

THE LAW REFORM COMMISSION OF HONG KONG

Report

Local Completed Residential Properties: Sales Descriptions and Pre-contractual Matters

Executive Summary

(This Executive Summary is an outline of the Report. Copies of the Report can be obtained either from the Secretary, Law Reform Commission, 20/F, Harcourt House, 39 Gloucester Road, Hong Kong, or on the Internet at <<http://www.info.gov.hk/hkreform>>. References in this Executive Summary to paragraph numbers are to paragraphs in the Report.)

Preface

Background and terms of reference (paragraphs 1 - 3)

1. In June 1992, the then Attorney General and the then Acting Chief Justice referred to the Law Reform Commission for consideration the law governing the protection of prospective purchasers of uncompleted property in relation to inadequate or misleading sales information or particulars. A sub-committee was appointed in November 1992 and considered the sales descriptions first of local uncompleted residential properties, and thereafter of overseas uncompleted residential properties.

2. The Commission published its recommendations in April 1995 in respect of the sales descriptions of local uncompleted residential properties ("the First Report"), and followed this in September 1997 with its report dealing with overseas uncompleted residential properties ("the Second Report"). The Commission's original terms of reference in respect of this project were confined to uncompleted residential property. It became apparent in the course of the Commission's deliberations, however, that there were grounds for expanding the study to include pre-contractual matters and sales descriptions relating to *completed* residential properties in Hong Kong. The principal reasons for expanding the terms of reference were:

- *Public responses* When the sub-committee issued a consultation paper on local uncompleted residential properties in April 1994, there was strong public demand that similar controls should be introduced over the sales descriptions of completed residential properties.
- *Desirability of uniformity of standards for completed and uncompleted property* In its First Report, the Commission made a number of recommendations in respect of local

uncompleted residential properties. It would create anomalies if some of these recommendations were to apply to uncompleted but not to completed properties. For example, standard definitions for measuring floor area were recommended for uncompleted properties. It would create confusion if the measurement methods were not extended to completed properties offered for sale by developers.

- *Increase in first-hand completed flats* There are a growing number of first-hand completed residential units being offered for sale. Although these flats have been "completed", they are offered for sale in much the same way as if they were still uncompleted. Prospective buyers may not be given the opportunity to view the particular flats themselves, but instead are usually only able to view one or more show or mock-up flats. As in the case of uncompleted properties, prospective purchasers have to rely largely on the information in the sales literature. There thus seems little reason why less protection should be given to purchasers of such completed properties than those of uncompleted properties.

3. Accordingly, in March 1996, the then Attorney General and the then Chief Justice made the following reference to the Law Reform Commission:

"Should the present laws governing the protection of prospective purchasers and purchasers of completed residential property in Hong Kong in relation to any pre-contractual matters and sales descriptions be changed and, if so, in what way?"

Scope of deliberations (paragraph 4)

4. This third part of the Commission's study covers the sales descriptions and other pre-contractual matters relating to the sale of completed residential properties in Hong Kong. By "pre-contractual" matters is meant any sales matters before the time of contract, that is to say, the signing of the formal sale and purchase agreement. Unlike uncompleted flats (which are mostly sold by developers), completed residential properties are sold either by developers in the first-hand market or by property owners in the second-hand market (paragraph 4).

5. The present study covers completed residential properties offered for sale not only by developers in the first-hand market but also those offered for sale by private vendors in the second-hand market (paragraph 12).

The consultation paper (paragraphs 15-16)

6. On 8 January 2001, the sub-committee issued its interim report in the form of a consultation paper ("the consultation paper"). In it, the sub-committee set out its interim recommendations on ways to improve the sales descriptions and other pre-contractual matters relating to the sale of completed residential properties in Hong Kong. The consultation period ended on 31 March 2001. A list of those who commented is at Annex I of the Report. In the light of the comments received, a number of adjustments were made to the interim recommendations. The sub-

committee endeavoured so far as possible to balance the views of conflicting interests in arriving at its final recommendations and was guided by the overall objective of improving consumer protection. That is to say, the sub-committee considered that where there are conflicting views on particular issues these should be resolved in favour of the furthering of consumer interests. That approach is reflected in this report.

Definition of "completed residential property"

Recommendation 1

We recommend that "completed residential property" should refer to residential units in respect of which there is an Occupation Permit under the Buildings Ordinance or, in the case of the Housing Authority's Home Ownership Scheme, in respect of which the completion certificate has already been issued by the Director of Housing. This definition should be suitably modified in the case of exempted houses in the New Territories and Tenants Purchase Scheme flats offered for sale by the Housing Authority.

PART I – SECOND-HAND MARKET

Chapter 1

The general approach to the second-hand market

7. In the second-hand market, there will rarely, if ever, be a sales brochure as the vendors are mainly private individuals. Thus, we explore other means of imposing positive disclosure duties on private vendors. We look at the feasibility of introducing a Vendor's Information Form. We also consider the possibility of inserting certain standard clauses into the preliminary agreement. (Paragraph 1.2)

A brief review of the existing law governing the protection of purchasers in the second-hand market

8. This chapter takes a brief look at the existing law governing the protection of purchasers in the second-hand market. The purpose is to try to see if the existing law is adequate to protect purchasers. It covers misrepresentation, breach of contract, fraudulent behaviour (namely, obtaining property or pecuniary advantage by deception, conspiracy to defraud and the substantive offence of fraud) and the Trade Descriptions Ordinance (Cap 362) (paragraphs 1.1 – 1.17).

Existing disclosure requirements under the Estate Agents Ordinance (Cap 511) (paragraphs 1.18-1.20)

9. Under section 36(1) of the Estate Agents Ordinance, estate agents are required to provide purchasers with certain information about the property. The

nature of that information is prescribed by regulation. Regulation 3(1) and the Schedule to the Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation have accordingly prescribed that the following information must be provided by estate agents:

- particulars of current ownership and subsisting encumbrances registered in the Land Registry,
- floor area of the property (where available, the saleable area provided by the Rating and Valuation Department or the Land Registry),
- year of completion of the property,
- user restrictions,
- unexpired term of Government lease and any right of renewal,
- if a Government lease is to be granted, the term of the new lease,
- a vendor's statement on known structural additions or alterations and reinstatements, rectifications, repairs or improvements.

10. The estate agent is responsible for collecting these property particulars, except for the vendor statement on structural alterations and repairs. The vendor himself is under no obligation to complete the vendor statement. He may choose not to do so, and even if he does complete the statement this covers only any information "within the vendor's knowledge". If the vendor is not aware that there have been structural alterations or repairs, he will obviously complete the vendor statement on the basis of such knowledge as he has.

11. If the property particulars supplied by an estate agent are wrong, the estate agent may be able to rely upon the defence of due diligence. The Estate Agents Ordinance increases the transparency of transactions and provides more sales information to purchasers but falls short of giving them ultimate satisfactory protection.

Lack of vendor's duties of disclosure (paragraph 1.21)

12. It is clear from the brief review of the existing law that there are few positive duties, if any, on a vendor of second-hand property to disclose particulars of the property for sale. In second-hand sales, there is no sales brochure compiled by the vendor. A vendor is, of course, obliged to provide basic information about the property in the preliminary agreement, but the contents of the preliminary agreement are not uniform. It is of little assistance to the purchaser if he obtains adequate property information only after the preliminary agreement has been signed.

Chapter 2

Disclosure of information by vendors

The Vendor's Information Form (paragraphs 2.3 – 2.12)

13. Because of the lack of positive disclosure requirements imposed upon vendors, the sub-committee put forward the idea of a Vendor's Information Form (VIF) in the consultation paper. The VIF would be completed by the vendor and would contain various particulars about the unit he offers for sale in the second-hand

market. A vendor would have to make the VIF available when the unit is put on the market for sale, whether through an estate agent or not.

14. The VIF is not a new idea. The VIF or its equivalent has either been proposed or is already in place in a number of overseas jurisdictions. Examples are found in England and Wales, Idaho (USA), Virginia (USA) and Ontario (Canada).

The four approaches to imposing positive disclosure duties on vendors
(paragraphs 2.13 – 2.15)

15. These examples of overseas practice suggest that there can be four approaches to imposing duties of positive disclosure on vendors:

- The VIF is purely voluntary (eg the Legal Information Form proposed by the English Law Society)
- The VIF is compulsory, backed by legislation (adopted, for instance, in the state of Idaho, USA)
- A flexible statutory approach (this is followed in the state of Virginia in the USA). Under the Virginia Residential Property Disclosure Act, the owner can furnish to a purchaser either a residential property disclaimer statement or a residential property disclosure statement. The residential property disclaimer statement states that the owner has made no representations or warranties as to the condition of the property and the purchaser would be receiving the property "as is".
- A code of practice for estate agents (used in Ontario). Under rule 11 of the Code of Ethics of the Real Estate Council of Ontario, a member (ie a real estate broker or salesperson) should consider requesting the seller to complete and sign a Seller Property Information Statement. If the seller refuses to, or is unable to complete the statement, that fact should be stated in the agreement. The statement is not a statutory form but is only part of a code of practice prescribed for real estate brokers and salespersons.

Public views on the introduction of a VIF (Paragraphs 2.16-2.17)

16. The responses to the consultation paper show a fairly divided view as to whether a VIF should be introduced for completed flats in the second-hand market. Those who were in favour of a VIF considered that such a proposal would generally enhance consumer rights by imposing upon vendors the positive responsibility to disclose useful sales information before the signing of the PSAP. The main argument advanced by those against the VIF proposals was that the proposals would increase transaction time and costs. Property owners might not necessarily possess sufficient knowledge to complete the VIF, or they might find it difficult to obtain the property particulars necessary for completion of the VIF. There was further concern that the introduction of a VIF might over-regulate the sale of completed units in the second-hand market.

17. It is, in our view, a misconception to perceive the VIF as being an expensive and time-consuming scheme. As it is necessary to prepare only one

original of the VIF, the costs of its preparation should be but a small percentage of the overall transaction costs. It should not be too time-consuming to find out the necessary information for the VIF, as most of the information required will be readily available at the various registration sources. Modern technology has made it easier than before to conduct searches for registered property information. The Rating and Valuation Department, for example, has introduced an Info-Hotline Service on Property Age and Floor Area. (Paragraph 2.23)

18. Some respondents also suggested that the VIF might slow down transactions. This may be the case where estate agents come knocking at a vendor's door to advise him of a ready potential buyer. In such cases, the negotiation cannot proceed before the VIF is prepared. We note this concern but consider that any possible delay to a transaction may in fact give the vendor and the purchaser more time to think clearly about the transaction. (Paragraph 2.24)

19. The Estate Agents Ordinance (Cap 511) already contains requirements for estate agents to provide certain basic information on the property. Whilst Cap 511 places on the estate agent the primary responsibility for providing particulars of the property, the proposed VIF transfers that responsibility to the vendor. We consider that the vendor, rather than the estate agent, should have the primary positive duty to disclose property particulars. (Paragraph 2.25)

Should the VIF be voluntary or compulsory? (Paragraphs 2.50-2.56)

20. The consultation paper proposed a moderate two-phase approach by which a period of time would be set aside for the market to voluntarily try out the VIF scheme. At the end of that period, the Administration would be left to decide if it was necessary to impose a mandatory scheme through legislation. There was public support in the responses to the consultation paper for a voluntary scheme. Some respondents, however, expressed scepticism over the likelihood of establishing a VIF as a market practice on a voluntary basis. They held the view that the VIF should be made compulsory from the outset by legislation.

21. We have carefully reviewed the views expressed in response to the sub-committee's consultation paper and have concluded that, in respect of the sale of second-hand properties, the VIF should be introduced on a voluntary basis, at least initially. In reaching this conclusion, we have taken account of the fact that sales in the second-hand market generally involve private individuals. The vendor and the purchaser are therefore usually on an equal footing and there is less need to make provision to protect a weaker party from a stronger, as in the case where the vendor is a corporate developer. The resources available to an individual vendor in the second-hand market are likely to be considerably less than those of a developer selling in the first-hand market, and it may be that the individual vendor may prefer not to expend the necessary effort to complete a VIF. Unlike a compulsory scheme which requires a lengthy period to complete the legislative process, a voluntary scheme is flexible and can be implemented quickly. If the VIF is promoted, a prudent purchaser will naturally demand a VIF from the vendor. The vendor failing for whatever reason to supply a VIF will put the prudent purchaser on suspicion of the desirability of going ahead with the transaction. We believe that in this way market forces will establish the VIF as accepted market practice.

22. We do not rule out the possibility, however, of a compulsory scheme at a later stage if a market practice for the VIF cannot be established as envisaged. In our view, it is desirable for the market to voluntarily try out the scheme. Any experience obtained from the voluntary scheme will assist the Administration in making a rational decision as to whether or not a compulsory scheme should be introduced and, if so, in what way.

23. One respondent suggested during consultation that vendors of units in old buildings should be exempted from any compulsory VIF scheme. The respondent pointed out that such units are likely to be of relatively smaller value and their owners less well-off. Building plans of old buildings are not readily accessible and in some cases are missing. We agree with this view and wish to note that if, at a later stage, it is considered desirable to introduce a compulsory VIF scheme, the feasibility of the scheme in respect of older buildings should be further considered by the Administration.

Recommendation 2

We recommend the introduction of a Vendor's Information Form for the sale of completed residential properties in the second-hand market. Relevant bodies in Hong Kong should be encouraged to make the Vendor's Information Form a market practice in the near future. The Government should monitor the situation at some stage later. Unless a market practice can be established by then, the Government should introduce legislation making it compulsory to provide a Vendor's Information Form.

We recommend that a vendor should make available a Vendor's Information Form when his unit is put on the market (whether through an estate agent or not). The proposed Vendor's Information Form should contain at least the following warning clauses and property particulars:

Warning clauses

- **The Vendor's Information Form is only a summary of information relating to the property.**
- **The Vendor's Information Form does not explain everything and purchasers should take legal advice.**
- **Circumstances may have changed since the date of the Vendor's Information Form.**
- **The purchaser should inspect the property before making an offer to buy.**
- **The state of repair and physical condition is not given. The purchaser should inspect the property and consult his professional advisors.**
- **Before making an offer to buy, the purchaser should make**

sure that any necessary loans of funds will be readily available.

- The Vendor's Information Form is a legal document and the vendor will be responsible for its accuracy.

Property particulars

- The information described under section 36(2)(a) to (g) of the Estate Agents Ordinance.
- Details of the saleable area.
- The availability of services known to the vendor (such as water (fresh/sea), drainage, gas (what kind) and electricity).
- The management fees for the current month.
- The amount of Government rent, so far as it is possible to state this.
- Any notice received by the vendor from the Government, management office, or any relevant authority of expenditure requiring contribution from the owners.
- Whether there is an owners' corporation and, if so, its name, and the name of the management company.
- Any pending claims known to the vendor affecting the property.
- A statement to the effect that the vendor will vacate the property and hand over vacant possession upon completion of the sale and purchase and that the property will then be free from mortgages and subsisting tenancies. However, if there are subsisting tenancies, the terms of those tenancies should be spelt out.
- A reference to any septic tank if it is being used.
- Whether or not the vendor is operating under a Power of Attorney.

We recommend that the vendor should update the information in the Vendor's Information Form if he knows of changes subsequent to the date of its preparation.

We recommend that if the Government should decide to make Vendor's Information Form compulsory, the Government should embark on a review of the Estate Agents Ordinance with a view to reconciling the disclosure duties of the vendor and the estate agent.

Centralised property information system (paragraph 2.58-2.60)

24. At present, different kinds of property information are provided by various Government departments. We consider that there is a need for a single Government body to collate these various kinds of property information so that the public could have access at one location.

Recommendation 3

We recommend that the Administration should consider exploring the option of establishing a centralised property information system. In doing so, the Administration should consider ways in which the information necessary for later completion of the VIF could be input by developers into the centralised property information system at the first-hand property stage.

Chapter 3 **Standard clauses of preliminary agreements**

Standard clauses for protection of homebuyers (paragraphs 3.2 – 3.6)

25. In Hong Kong, lawyers are usually appointed only after the preliminary agreement has been signed. As a preliminary agreement is signed without the scrutiny and advice of a solicitor, its terms may not be in the best interests of the purchaser. In this chapter, consideration is given to whether certain standard clauses should be included in the preliminary agreement. Purchasers would obtain additional protection if standard clauses of potential benefit to them were included in the preliminary agreement.

Cooling-off period (paragraphs 3.7 – 3.16)

26. In Victoria, Australia, a purchaser is entitled to a three-day cooling-off period. In exercising the right to rescind the contract during the cooling-off period, the purchaser must forfeit \$100 or 0.2 percent of the purchase price (whichever is greater). The three-day cooling-off period does not apply in certain circumstances, such as where the property is worth more than A\$250,000.

27. There are a number of arguments which favour the introduction of a cooling-off period in the second-hand market. Firstly, there may be circumstances where a purchaser is persuaded to enter into a contract against his better judgment by an aggressive estate agent or vendor. The provision of a cooling-off period allows the purchaser to withdraw from the preliminary agreement if he subsequently considers it not to be in his best interests to complete the transaction. Secondly, it is common practice in Hong Kong for the preliminary agreement to be completed by the purchaser without the benefit of legal advice. The cooling-off period provides the purchaser with an opportunity to obtain professional advice before committing himself further. Thirdly, the cooling-off period gives the purchaser time to ensure

that any necessary financing arrangements are in place to enable the transaction to go forward.

28. Some respondents to the consultation paper expressed doubt at the necessity for a cooling-off period on the ground that there is an existing mechanism for parties to a preliminary agreement for sale and purchase to withdraw from the transaction. In our view, even though the existing clause is widely adopted in preliminary agreements, there is much to be said for applying a common provision to all preliminary agreements. This would avoid confusion, and would assist in making all parties aware of their rights and obligations. In addition, it is possible for the parties to agree to delete the existing clause allowing withdrawal; it will not be possible to opt out of the proposed standard clause providing for a cooling-off period.

29. Another major argument against a cooling-off period is that it would fuel speculation. We consider that a provision for the forfeiture of a specified percentage of the purchase price would work as an effective deterrent to potential speculative activities. We note that a similar arrangement has worked well in the pre-sale of uncompleted residential units under the Consent Scheme.

30. Most respondents took the view that the proposed cooling-off period should be available equally to both the vendor and the purchaser. They argued that the spirit of a contract lies in fairness and impartiality, and so the interests of all parties should be subject to the same protection. We agree with this line of argument and have adjusted the original recommendation to make the proposed cooling-off period equally applicable to both parties to a transaction.

31. It is noted that in Victoria, the cooling-off period is not applicable to the sale of properties worth more than A\$250,000. We see no good reason to confine the benefit of a cooling-off period to purchasers of lower-end properties as in the case of the Australian model.

32. In respect of the length of the cooling-off period, we think that this should be short but realistic. We see the choice as one between the Australian model of three clear days and the Consent Scheme of three working days. On balance, we prefer a cooling-off period of three working days in order to be consistent with the Consent Scheme. Three working days should be sufficient for a purchaser to satisfy himself that he still wishes to go ahead with the transaction.

Recommendation 4

We recommend that the preliminary agreement for the purchase of second-hand completed flats should contain a standard clause giving the vendor and the purchaser a cooling-off period of three working days. In exercising the right to rescind the preliminary agreement during the cooling-off period, the part electing to rescind should be liable to forfeit to the other party an amount equal to five percent of the purchase price or the preliminary deposit, whichever is the lower. The parties should not have the right to sub-sell during the cooling-off period.

How should a standard clause be inserted into the preliminary agreement? (Paragraphs 3.40-3.41)

33. The majority of the Sub-committee considered that the cooling-off period should be made an implied term of the preliminary agreement by legislation, while a minority preferred a voluntary approach. We agree with the majority of the Sub-committee, and favour introducing an appropriate implied term to the preliminary agreement by legislation. It should not be possible to contract out of this implied term.

Recommendation 5

We recommend that the standard clause allowing a three-day cooling-off period should be implied by legislation into preliminary agreements for sale and purchase of second-hand completed residential properties. It should not be possible to contract out of this implied clause.

PART II – FIRST-HAND MARKET

Chapter 4

The general approach to the first-hand market and the provision of sales brochures

The general approach to the first-hand market (paragraph 4.4)

34. Completed units in the first-hand market are those units which have become "completed" with the issue of the Occupation Permit (OP). These units are offered for sale by developers in much the same way as if they were still uncompleted. Our First Report made a number of recommendations on ways to improve the quality of sales particulars and other matters relating to local uncompleted flats. The majority of those recommendations focus on the contents of the sales brochure. We are of the view that many of these recommendations can be extended to cover local completed flats in the first-hand market, subject to necessary modifications.

Availability of sales brochures for first-hand completed flats (paragraphs 4.5 – 4.16)

35. We propose that for the "left-over" units (meaning those flats which were first marketed when uncompleted but are left unsold after issue of the OP, thus becoming completed flats), developers should be required to make available the latest sales brochures and a VIF. That is to say, developers will be able to use the same sales brochures used when the flats were marketed as uncompleted flats. No updating of the sales brochures will be required. The VIF will provide the up-to-date sales particulars. However, up-to-date sales brochures should always be made available for completed flats marketed for the first time after the issue of the OP.

We consider that sales brochures are a prerequisite for flats marketed for the first time.

Recommendation 6

We recommend that for “left-over” flats (ie flats which were first marketed when uncompleted but are left unsold after issue of the occupation permit) the developer should make available the latest sales brochures and a Vendor’s Information Form. However, up-to-date sales brochures should always be made available for completed flats marketed for the first time after the issue of the occupation permit. The sales brochures (and the Vendor’s Information Form, where applicable) must be made available by developers from the time the completed properties are offered for sale. All the information in the sales brochure (and the Vendor’s Information Form, where applicable) must be accurate at the time the flats are first marketed.

Recommendation 7

We recommend that if there have been any material changes in the information in the sales brochure between the date of its printing and the time of sale, a note to that effect should be attached to the sales brochure or the price list.

Recommendation 8

We recommend that the developer may apply to the relevant authorities in certain circumstances for exemption from the requirement to produce a sales brochure. For instance, where a purchaser buys in bulk from the developer with no intention to re-sell any of those units to the public, there should not be any need for the developer to produce a sales brochure in respect of those units. The application for exemption should be accompanied by a written undertaking from the purchaser not to re-sell the units within a specified period to be determined by the Government.

Recommendation 9

We recommend that the obligation on a developer to provide sales brochures should apply equally to someone buying in bulk from the developer at the first sale of completed residential properties involving strata title.

Advertisements other than sales brochures (paragraphs 4.17 – 4.18)

36. Publicity for properties often takes the form of newspaper advertisements and radio or television commercials. It is obviously not feasible to apply all the disclosure requirements for sales brochures to other means of advertising. To make sure purchasers do not rely on the limited sales information in such advertisements, we recommend that purchasers should be advised to refer to the sales brochure which contains fuller property information (and the Vendor's Information Form, where applicable).

Recommendation 10

We recommend that if developers, by themselves or through estate agents, advertise the sale of local completed residential properties otherwise than by means of a sales brochure, the advertisement should advise purchasers to refer to the sales brochure (and the Vendor's Information Form, where applicable). Information given in the advertisement must be consistent with that given in the sales brochure (and the Vendor's Information Form, where applicable).

Chapter 5 Methods of measurement of floor area to be used by developers

Introduction (paragraphs 5.1 – 5.2)

37. There are currently two principal types of measurement of floor area: gross floor area and saleable area. There is at present no legal requirement that the measurement adopted to be disclosed in the sales literature. However, the Commission's First and Second Reports have made recommendations on the disclosure of measurements of floor area on the sale of uncompleted flats.

Saleable area (出售面積) (paragraphs 5.3 – 5.5)

38. There is an accepted method of measuring saleable area. The First Report recommended that a standardised definition of saleable area be adopted for all local uncompleted residential properties. The Commission also recommended that it should be mandatory for the standardised definition to be used and disclosed in the sales literature. We consider that these recommendations should also be extended to local completed residential properties in the first-hand market.

Recommendation 11

We recommend that, in respect of local completed residential properties offered for sale in the first-hand market, "saleable area" in relation to a unit enclosed by walls should mean the floor area of that unit (including the floor area of any balconies and verandahs) measured from the exterior of its enclosing walls (except where those 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 a unit, but shall exclude the common parts outside its enclosing walls. 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.

Recommendation 12

We recommend that in respect of local completed residential properties offered for sale in the first-hand market, "saleable area" should mean:

- (1) in relation to any cockloft, the floor area of that cockloft measured from the interior of its enclosing walls;**
- (2) in relation to any bay window which does not extend to the floor level of a unit, the area of that bay window measured from the exterior of its enclosing walls or glass windows and from the point where the bay window meets the wall dropping to the floor level of a unit, but excluding the thickness of that wall;**
- (3) in relation to any car-park space, the area of that car-park space measured from the interior of its demarcating lines or enclosing walls, as the case may be; and**
- (4) in relation to any yard, terrace, garden, flat roof or roof, the area of that yard, terrace, garden, flat roof or roof measured from the interior of its boundary lines. Where the boundary consists of a wall, it shall be measured from the interior of that wall.**

We also recommend that where the property includes any item incorporated in the definition (such as a cockloft, bay window, car-park space, yard, terrace, garden or flat roof), the saleable area of each of them should be specified and described separately in the sales literature.

Recommendation 13

We also recommend that:

- (1) the definition of saleable area should be recognised as the standard method to describe saleable area in all sales literature in respect of local completed residential properties;
- (2) the saleable areas should be included in sales literature; and
- (3) any areas exempted from the calculation of gross floor area should be excluded from the calculation of saleable areas of the individual units.

However, if any areas exempted from the calculation of gross floor area are situated within the enclosing walls of a unit and for the exclusive use of its occupiers, such areas may be taken into account when calculating the saleable area of the unit.

Gross floor area (建築面積) (paragraphs 5.6 – 5.8)

39. Although developers invariably state in the sales brochure the gross floor area of the units, there is no standardised definition of gross floor area. Gross floor area essentially means the saleable area plus a share of the common areas and facilities. At present, different developers adopt different proportions of the common areas, thus leading to much confusion.

40. **Whilst we consider that the definition of gross floor area should be standardised, we take the view that the general use of saleable area should be the ultimate objective.**

Quotation of lowest price (paragraphs 5.9 – 5.10)

41. It is usual practice for developers to quote in advertisements and sales brochures the lowest price of the units being offered for sale. It is not uncommon to find such statements as "from X dollars per square foot" or "at Y dollars per square metre". Gross floor area is invariably the method of floor measurement being used in arriving at these prices because that area will give a lower price than saleable area, giving the impression that the properties represent good value. **We are of the view that the long-term objective should be that the lowest price stated is calculated on the basis of saleable area only.** That should not preclude a developer *in addition* quoting the lowest price calculated on the basis of gross floor area should he wish to do so. In our view, the more information which is provided to purchasers, the better.

Chapter 6

Disclosure requirements for completed units offered for sale by developers

Floor Plan (paragraphs 6.2 – 6.5)

42. We consider that all of the First Report's recommendations on floor plans of local uncompleted properties are equally applicable to the sale of completed units by developers. However, the requirement that a note be put in sales brochures to bring purchasers' attention to the usual term in the formal Agreement for Sale and Purchase concerning the adjustment in purchase price in proportion to variations in saleable area (arising from amendment to the building plans) is not applicable in the context of completed units.

Recommendation 14

We recommend that:

- (1) The sales brochure should contain floor plans which:**
 - (a) specify the external dimensions of individual units;**
 - (b) are drawn to scale and are reasonably legible;**
 - (c) show separately non-typical floors, the entrance floors, and the roof;**
 - (d) show the location, the number and the minimum dimensions of the car-park spaces;**
 - (e) show the orientation of the building and the location of ingress and egress points;**
 - (f) show the structural walls; and**
 - (g) show any known features within the unit that would materially affect a reasonable purchaser's enjoyment of the property, such as exposed pipes.**
- (2) The sales brochure should also contain:**
 - (a) schedules listing the saleable area of the unit and of any bay window areas, roof areas, flat roof areas, open yard areas, air-conditioning plant within the building, etc; and**
 - (b) a note that the internal area of units on the upper floors may be slightly greater than that of the lower floors, if that is the case.**

- (3) Certified copies of the latest approved building plans should be made available for free inspection at the sales office during normal office hours.
- (4) There should be a legal obligation on the developer upon completion to inform purchasers of the saleable area (as provided by the Authorised Person).

Fittings and Finishes

Recommendation 15

We recommend that *where there is no right of inspection before entering a preliminary sale and purchase agreement*, the sales brochure should contain:

- (i) at least details of the fittings and finishes as stated in Appendix XII B of Legal Advisory Conveyancing Office Circular Memorandum No 40 (LACO CM 40);
- (ii) a description of air-conditioners where supplied and descriptions, such as locations, of air-conditioning plants;
- (iii) information on the flush water/sewage treatment plants where they are supplied, including information on the maintenance of the treatment plants;

The sales brochure should also state the brands and countries of origin of the fittings and finishes to be used.

In addition, photographs of the fittings and finishes should be shown on the sales brochure.

Discrepancies between languages (paragraph 6.15)

Recommendation 16

We recommend that if there are discrepancies between the Chinese and English versions of the specifications of fittings and finishes in the sales brochure, purchasers can choose which language version they rely on.

Mock-up flats (paragraphs 6.16 – 6.18)

43. In the First Report, the Commission took the view that it was unreasonable to oblige developers to build mock-up flats. If developers chose to set up mock-up flats, however, they had to accurately reflect the materials to be used.

Recommendation 17

We recommend that *where there is no right of inspection* before entering into a preliminary sale and purchase agreement and mock-up or sample flats are provided, the mock-up of at least one flat should be accurately representative of the actual unit in all aspects, including quality and dimensions. The Authorised Person of the development project should certify a schedule of specifications of such mock-up flats. The developer should have a duty to keep a record of the certified schedule.

Location and layout plans (paragraphs 6.19 – 6.22)

44. Location and layout plans in the sales brochure are the major sources of information on communal facilities and surroundings.

Recommendation 18

We recommend that :

Location plan

- (a) A location plan should be provided in all sales brochures. The location plan should include up-dated information on prominent environmental features in the vicinity (eg public park, swimming pool, refuse collection point, etc).
- (b) The date and the reference number of the latest outline zoning plans at the date of printing of the sales brochure should be stated in all sales brochures. There should also be a note stating that outline zoning plans are subject to change and that the latest outline zoning plans at the date of printing of the sales brochure are available for free inspection during normal office hours at the sales office.

Layout plans

All sales brochures should provide a layout plan drawn to scale, showing communal facilities (and their completion dates if possible) undeveloped land and its *intended and permitted use* within the boundary of the development, and the scale used. The layout plans provided in sales brochures should be the latest approved plans at the date of printing of the sales brochure. The expected completion dates of communal recreational facilities should be included in the layout plans.

Uses of land

- (a) If there are specific covenants in the Government Lease requiring the developer to put land inside or outside the boundaries of the development to particular uses, the developer should state accurately those particular uses in the sales literature.
- (b) The developer should be required to state accurately in the sales brochure the intended uses of the land within the boundaries of the development which are known to the developer at the date of printing of the sales brochure.
- (c) Except for specific uses required of developers by the terms of the Government Lease, developers should not be required to disclose the intended uses of land outside the boundaries of the development.
- (d) If the developer chooses to disclose in the sales literature any information about the use of land outside the boundaries of the development, the information so disclosed must be accurate at the date of putting the property up for sale.

Misleading artistic impressions (paragraphs 6.23-6.26)

Recommendation 19

We recommend that artistic impressions in whatever form should give accurate representations of the surroundings of the property development.

Management of clubhouse and communal facilities (paragraphs 6.27 – 6.28)

45. Whilst sales brochures usually contain a general description of the clubhouse and the communal facilities, they seldom mention with whom lies the responsibility for managing the day-to-day affairs of these facilities.

Recommendation 20

We recommend that the sales brochures should give the following details about the clubhouse and other facilities in the development:

- (i) whether they are communal facilities;
- (ii) who has ownership;
- (iii) who has responsibility for their management; and
- (iv) the duration of the management agreement.

Date of completion

Date of completion of sale and purchase and date of vacant possession (paragraphs 6.32 – 6.33)

46. The importance of these two dates is that they give purchasers an idea as to when they are required to pay the balance of the purchase price and when they can take possession of the property. Purchasers can then make their accommodation and financial plans by reference to these two dates

Recommendation 21

We recommend that all sales brochures should state the date of completion of sale and purchase and the date of vacant possession. The dates need not be expressed in terms of actual dates in the calendar. Instead, they can be expressed by reference to a time frame, such as a certain period of time from the signing of the ASP.

We recommend that if any of the payment terms is dependent on the occurrence of a contingent event (such as execution of the assignment), the sales brochure or the price list should state the date of the happening of that event.

Sub-sale by original purchaser to sub-purchaser (paragraphs 6.34 – 6.35)

47. The required procedures and administration fees charged by the developer for the cancellation of the agreement are not always indicated clearly in sales brochures.

Recommendation 22

We recommend that where developers impose any fees or charges on transfer of title from the original purchaser to a sub-purchaser, or on the cancellation of the purchase agreement, the amount of such fees or charges and the procedures for transfer should be specified clearly in the sales brochure.

Risk in confirmor sale (paragraphs 6.36 – 6.39)

48. If a completed unit is re-sold to sub-purchasers before the legal completion of the original sale, all sub-purchasers will sign in the capacity of “confirmors” in the assignment. The legal interests in the unit will pass from the developer direct to the sub-purchaser at the end of the chain. There is a risk that the sub-purchaser at the end of a chain of sub-sales cannot get good title to the property because of defaults by confirmors further up the chain.

49. We believe that, in order to protect sub-purchasers, the Law Society should consider the stakeholding of purchase monies in sub-sales and issue practice directions requiring solicitors to warn purchasers of the risk inherent in confirmor sales.

50. We also consider that the Estate Agents Authority should require estate agents to remind purchasers of the risk involved in confirmor sales.

Financing arrangements (paragraphs 6.40 – 6.41)

51. In the case of local completed residential properties, developers usually require the transaction to be completed within five weeks of signing the preliminary agreement. Purchasers are therefore under some pressure to arrange mortgage facilities. It is thus in purchasers' best interests that sales brochures give them sufficient information as to the terms of the mortgage loans that are offered by banks and other financial institutions.

Recommendation 23

We recommend that:

- (a) Where the developer quotes in any sales literature or advertisement a list of banks providing initial finance, the sales literature should contain a general description of the finance schemes available from the banks so quoted. Where the interest is specified, it should be the rate per annum.
- (b) Where the developer arranges finance, whether solely or to top up other loans, details of those facilities and the interest rates per annum should be disclosed in the sales literature.
- (c) Where the developer provides initial finance but later arranges for replacement finance, purchasers should be informed in the sales literature of the possibility of the costs of replacement finance which may be passed to them.

Interest chargeable for late payment of purchase price (paragraph 6.42)

Recommendation 24

We recommend that the rate of interest per annum chargeable under the ASP for late payment of any part of the purchase price should be stated in the sales literature.

Cooling-off period (paragraphs 6.44 – 6.45)

52. Under the existing LACO rule, a purchaser of a Consent Scheme flat is required to sign the formal agreement for sale and purchase within three working days of signing the preliminary agreement. He can withdraw from the preliminary agreement, subject to the forfeiture of five percent of the purchase price or the amount of the preliminary deposit, whichever is the lower. We understand that this LACO rule functions well and believe it can be applied to completed flats in the first-hand market.

Recommendation 25

We recommend that if the preliminary agreement is binding as a sale, the purchaser should be entitled to a cooling-off period of three working days after signing the preliminary agreement for local completed residential properties in the first-hand market. A purchaser can elect to cancel the preliminary agreement within the cooling-off period subject to forfeiture of five per cent of the purchase price or the amount of the preliminary deposit, whichever is the lower.

Preliminary agreement for sale and purchase (paragraphs 6.46 – 6.49)

53. It is often difficult to construe the terms in a preliminary agreement to determine whether it is intended to be binding. It is therefore in consumers' interests that the sales literature spells out whether or not the preliminary agreement is intended to be binding.

Recommendation 26

We recommend that sales brochures should state that the preliminary agreement for sale and purchase is subject to a cooling-off period of three working days after signing the preliminary agreement. Sales brochures should also state that a purchaser can elect to cancel the preliminary agreement within the cooling-off period subject to forfeiture of five percent of the purchase price or the amount of the preliminary deposit, whichever is the lower.

Right of inspection prior to signing of preliminary agreement (paragraph 6.50)

Recommendation 27

We recommend that if there is no right of inspection prior to signing of the preliminary agreement, the purchaser of a completed residential unit in the first-hand market should not be liable to forfeiture of his preliminary deposits where he takes advantage of the cooling-off period to cancel the preliminary agreement.

Defect liability period (paragraphs 6.51 – 6.53)

54. **We consider that the Defect Liability Period of completed units should run from the date of the Assignment. By executing the Assignment, the purchaser becomes the legal owner of the unit he has bought. It is therefore fair that the Defect Liability Period should run from the date of the Assignment.**

Recommendation 28

We recommend that sales brochure should state the duration of the Defect Liability Period and when it will start to run.

Warranties made to the developer by the contractor (paragraphs 6.55 – 6.58)

55. Most grantees of Government leases tend to be subsidiary shell companies of developers. Some developers may evade their liability to make good defects in the property by winding up the subsidiary shell company after completion of the development.

Recommendation 29

We recommend that if the developer is wound up, the benefits of any warranties made to the developer by his contractors should be passed on to the Owners' Corporation or the Manager of the development.

We recommend that, notwithstanding any term in the building contract between the developer and the contractor prohibiting the assignment of the developer's rights against the contractor, the purchasers should have the right to take direct legal action against the contractor for any defects in the units.

56. The consultation paper considered the option of requiring developers to provide bank bonds to cover defects. **As the provision of bank bonds by**

developers is a complex subject and there are divided views on its feasibility, we have decided to leave this issue to the government for further exploration.

Deed of Mutual Covenant

DMC guidelines (paragraph 6.64)

57. At present, detailed provisions on the management of multi-storey buildings are contained in the two schedules to the Building Management Ordinance (Cap 344). Cap 344, however, does not contain provisions setting guidelines for the DMC. Instead, Government enforces DMC guidelines by administrative means through the Consent Scheme. We are of the view that the DMC guidelines require statutory backing because they are currently applicable to Consent Scheme properties only. **We consider that the Government should set up a Building Management Working Group with a view to giving a statutory basis to the DMC guidelines.**

Salient provisions of the DMC (paragraphs 6.65 – 6.68)

Recommendation 30

We recommend that sales brochures should state the salient provisions of the Deed of Mutual Covenant (DMC). The list should include those clauses in the DMC imposing financial obligations and those touching upon everyday usage of the property.

Availability of bilingual copies of DMC (paragraph 6.69)

Recommendation 31

We recommend that the developer should deposit copies of the English and Chinese versions of the DMC at the sales office or the solicitors' office for free inspection during normal office hours. The sales brochure should contain a statement to the effect that the English and Chinese versions of the DMC are so available for inspection.

Slope maintenance (paragraphs 6.70 – 6.71)

58. The slope adjacent to a building is often owned by individual owners of the building under the terms of the Government Lease. The maintenance of these private slopes is the responsibility of the individual owners.

Recommendation 32

We recommend that if there is actual or potential responsibility for maintaining slopes or other areas, there should be clear notification to purchasers in the sales brochure of that responsibility. The sales brochure should also disclose any existing notice from the authorities to repair and maintain slopes or other areas at the date of its printing. Moreover, if there is responsibility in the Government Lease for maintaining slopes or other areas, that responsibility should be spelt out in the sales brochure.

Duty to maintain terms of DMC unchanged (paragraph 6.72)

Recommendation 33

We recommend that if an uncompleted development has a DMC, developers should have an obligation to keep its terms unchanged when the development later becomes completed with the issue of the occupation permit.

Conditions of the Government lease (paragraphs 6.73 – 6.78)

59. The First Report made certain recommendations in relation to the conditions of the Government Lease. We consider that those recommendations can be extended to local completed residential properties.

Recommendation 34

We recommend that sales brochures should state the following:

- (1) the permitted uses of the individual units as stated in the approved building plans, together with any restrictions on use contained in the Government lease or Conditions of Grant of the land;**
- (2) the original term of the Government lease and its date of expiry;**
- (3) the rent provisions in the Government lease; and**
- (4) that the renewed Government rent may be an apportioned amount of three percent of the rateable value of the building.**

Sales brochures should also contain a general notification to the effect that the Government lease will impose various financial obligations on purchasers and that they are advised to consult their professional advisers accordingly.

These financial obligations include:

- (a) the construction and maintenance of pedestrian subways and footbridges;**
- (b) the construction and maintenance of escalators, stairways and lifts for the disabled;**
- (c) the maintenance of slopes, toe-walls and retaining walls;**
- (d) the maintenance of private open spaces and toilets; and**
- (e) the maintenance of internal roads.**

Translation of extracts of Government lease into Chinese (paragraph 6.79)

60. We consider that it would be desirable for the Government to prepare a summary of extracts of the Government lease in plain language, in both English and Chinese.

Apportionment of Government rent (paragraph 6.80)

61. There have been complaints that some solicitors acting for a purchaser do not check whether Government rent is paid up to date before completing a sale and purchase. **We consider that the Law Society should encourage solicitors to properly apportion the respective liabilities of vendor and purchaser to pay Government rent at the time of conveyancing.**

Prices and number of units for sale (paragraph 6.81)

Recommendation 35

We recommend that the price lists of all units offered for sale should be made available to prospective purchasers by developers or their estate agent prior to the payment of any reservation fee or the signing of any preliminary agreement. We recommend that if developers advertise that a certain number of units will be offered for sale, that number of units should be available for sale to the public.

Miscellaneous matters (paragraph 6.82)

62. The First Report made a number of miscellaneous recommendations as to information which should be included in sales brochures for local uncompleted flats. We consider similar recommendations should be made in respect of local completed units.

Recommendation 36

Name of main contractors, Authorised Person and his firm

We recommend that the names of the main contractors and the Authorised Person and his firm should be disclosed in the sales brochure. For the present purpose, the Authorised Person means the person occupying that position at the time of printing of the sales brochures.

Recommendation 37

Responsibility for transaction fee

We recommend that whenever the sales literature contains information about the prices of the units, it should also state with whom the responsibility for legal costs and stamp duties lies.

Scales of legal costs and stamp duties

We recommend that information on the scales of legal costs (if any) and stamp duties should be provided by developers to purchasers upon request and a note to this effect should appear in the price list or other sales literature containing information about the prices of the units.

Date of printing of sales brochure

We recommend that the sales brochure should carry its date of printing.

Supplementary charges upon taking possession

We recommend that the sales brochure should provide an itemised list of supplementary charges payable by purchasers upon taking possession of their units. If the exact amounts of such charges are unknown, the obligation to pay them should be disclosed in the sales brochure.

Licence fee to Government and charges for rights of way

We recommend that where applicable, the sales brochure should state any way leave charges, licence fees or waiver fees payable to Government for water supply or drainage system going through Government land and/or pump room situated on Government land and any fees or charges payable to adjoining lot owners for right of way or easements. The amount of such charges or fees should also be stated, if known.

Recommendation 38

Car park spaces

We recommend that the sales brochure should contain a description of the car park spaces within the development, including their respective numbers for sale or rent, and those for visitors. If the developer has not yet decided at the date of the printing of the sales brochure any of these matters, the sales brochure should clearly state this fact. Moreover, any descriptions of car park spaces in the sales brochure should be binding on the developer.

Enforcement of the recommendations (paragraph 6.83 – 6.94)

63. The Sub-committee identified three alternative ways of applying their recommendations to local completed flats offered for sale by developers in the first-hand market. These were:

- (1) voluntary compliance by developers;
- (2) Government encouraging good market practices, while actively continuing to look into the need for legislation; and
- (3) legislation.

64. The Sub-committee was unable to reach an agreed view as to which of these alternatives should be pursued and left this question for the Commission to decide. We have unanimously concluded that the recommendations in this report in respect of the first-hand market should be implemented by legislation. The arguments for and against each of the three options are set out in paragraphs 6.84 to 6.91.

Recommendation 39

We recommend that our recommendations in respect of the first-hand market should be implemented by legislation.

Recommendation 40

There should be both criminal and civil sanctions against those who fail to comply with the proposed legislation. We consider that the determination of the appropriate level of criminal penalty is a matter for the Administration to decide, but the maximum fine should be substantial enough to act as an effective deterrent.

We recommend that a breach of the proposed legislation should constitute a statutory tort. Purchasers should be able to claim damages for loss suffered as a result of a breach of the proposed legislation, but rescission should not be an available remedy. There should be clear provision in the new legislation that nothing in that legislation will detract from the rights of the purchaser under the formal ASP, and that no clauses in the ASP will detract from the statutory remedies in the legislation.

Chapter 7

The importance of public education

65. We take the view that the best way to protect purchasers is for the purchasers themselves to exercise due care before entering into a transaction. In this respect, public education is very important.

Recommendation 41

We recommend that the Government should launch publicity programmes to educate the public on the need to exercise due care in buying properties. The publicity programmes should alert the public to the need to:

- **Be aware that the purchaser may not be able to obtain the financing advertised.**
- **Note and report defects in the property as soon as possible and in any event within the Defect Liability Period.**
- **Check carefully the Deed of Mutual Covenant as it is an important document.**
- **Check the land uses carefully.**
- **Consider the inherent risks if it is a confirmor sale.**
- **Take note of the charge of Government rent in certain developments.**
- **Include any specific requirements of the parties in the preliminary agreement, or consult their solicitors before signing the preliminary agreement, because it is a binding agreement which cannot be changed later without the consent of the other party.**

Chapter 8

66. This chapter gives a summary of recommendations made in the Report.