

**THE LAW REFORM COMMISSION
OF HONG KONG**

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

CONSULTATION PAPER

**LOCAL COMPLETED RESIDENTIAL PROPERTIES:
SALES DESCRIPTIONS AND
PRE-CONTRACTUAL MATTERS**

This consultation paper can be found on the Internet at:
<<http://www.info.gov.hk/hkreform>>.

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was principally responsible for the writing of this consultation paper.***

January 2001

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

The sub-committee would be grateful for comments on this Consultation Paper by 31 March 2001. All correspondence should be addressed to:

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

Anyone who responds to this consultation paper will be acknowledged by name in the subsequent report. If an acknowledgement is not desired, please indicate so in your response.

THE LAW REFORM COMMISSION OF HONG KONG

Consultation paper on local completed residential properties: sales descriptions and pre-contractual matters

CONTENTS

	Page
Preface	1
Terms of reference	1
The Sub-committee	1
Sub-committee membership	2
Meetings	3
Consultative document	3
1. The case for the reference and the scope of deliberations	4
The case for the additional reference for local completed residential properties	4
Scope of deliberations	5
Views against regulating the second-hand market	5
Views in favour of regulating the second-hand market	6
Definition of "completed residential property"	6
Part I – Second-hand Market	
2. The general approach to the second-hand market	8
Completed residential units in the second-hand market	8
Lack of sales brochure	8
3. Brief review of the existing law governing the protection of purchasers of completed units in the second-hand market	9
Introduction	9

	Page
Misrepresentation	9
Breach of contract	10
Fraudulent behaviour	10
Obtaining property or pecuniary advantage by deception	11
Conspiracy to defraud	11
Substantive offence of fraud	12
Trade Descriptions Ordinance (Cap 362)	12
Existing disclosure requirements under the Estate Agents Ordinance (Cap 511)	13
Lack of vendor's duties of disclosure	13
4. Disclosure of information by vendors	15
Existing law provides insufficient protection for purchasers of second-hand units	15
The Vendor's Information Form	15
The advantages of a VIF	18
The disadvantages of a VIF	19
The seven property particulars under the Estate Agents Ordinance	19
Contents of VIF	20
Sundry items	24
Should the Vendor Information Form be voluntary or compulsory?	24
Centralised property information system	27
5. Standard clauses of preliminary agreements	28
Introduction	28
Standard clauses for protection of homebuyers	28
Cooling-off period	29
Contract subject to finance	31
Survey report	33
Right of inspection	35
How should a standard clause be inserted into the preliminary agreement?	35
6. Summary of recommendations on completed units sold in the second-hand market	37
 Part II – First-hand Market	
7. The general approach to the first-hand market and the provision of sales brochures	40
Meaning of completed properties in the first-hand market	40

	Page
The general approach to the first-hand market	41
Availability of sales brochures to be mandatory	41
Advertisements other than sales brochures	43
8. Methods of measurement of floor area to be used by developers	45
Introduction	45
Saleable area (出售面積)	45
Gross floor area (建築面積)	47
Quoting of lowest price	48
9. Disclosure requirements for completed units offered for sale by developers	49
Introduction	49
Floor Plan	49
Fittings and Finishes	51
Location and layout plans	54
Misleading artistic impressions	57
Management of clubhouse and communal facilities	57
Date of completion	58
Sub-sale by original purchaser to sub-purchaser	59
10. Disclosure requirements for completed units offered for sale by developers (continued)	61
Introduction	61
Financing arrangements	61
Interest chargeable for late payment of purchase price	62
Change in market condition and bank lending policy	62
Cooling-off period	63
Preliminary agreement for sale and purchase	63
Right of inspection prior to signing of preliminary agreement	64
Defect liability period	65
Deed of Mutual Covenant	67
Conditions of the Government lease	70
Prices and number of units for sale	73
Miscellaneous matters	73
Enforcement of the recommendations	75
11. Summary of recommendations on completed units offered for sale by developers	77
12. The importance of public education	86

	Page
Glossary of terms	87
Annex I Legal Advisory Conveyancing Office Circular Memorandum No 40	92
Annex II Legal Information Form under "TransAction 2000" (the Law Society of England and Wales)	103
Annex III Seller Property Information Statement (the Ontario Real Estate Association)	108

Preface

Terms of reference

1. 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?"

2. The reference refers to "pre-contractual" matters. It covers any sales matters before the time of contract, that is to say, the signing of the formal sale and purchase agreement.

The Sub-committee

Part I - Local uncompleted residential properties

3. The Law Reform Commission's Sub-committee on Descriptions of Flats on Sale ("the Sub-committee") was first appointed in November 1992 to consider the sales descriptions of uncompleted residential properties. In April 1994, the Sub-committee released a consultation paper to seek public comments on their interim recommendations. 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 properties entitled, *Report on Description of Flats on Sale*, ("the First Report"). The Government published the Sales Descriptions of Uncompleted Residential Properties Bill as a White Bill on 7 April 2000 to largely implement the proposals in the Commission report.

Part II - Overseas uncompleted residential properties

4. In April 1995, the Sub-committee commenced consideration of the second part of their study, namely, the sales descriptions of overseas uncompleted residential properties put up for sale or advertised in Hong Kong. They released a consultation paper in September 1996 to solicit public views on their interim recommendations. The Sub-committee's proposals were again largely adopted by the Commission and formed the basis of the Commission report published in September 1997 entitled, *Report on Sales Descriptions of Overseas Uncompleted Residential Properties* ("the Second Report").

Part III - Local completed residential properties

5. This is the third part of the study by the Sub-committee. It covers the sales descriptions and other pre-contractual matters of completed residential properties in Hong Kong.

Sub-committee membership

6. The membership of the Sub-committee (in respect of the third part of its reference) was:

Mr Kennedy WONG Ying-ho (Chairman)	Managing Partner Philip K H Wong, Kennedy Y H Wong & Co Solicitor
Mr Tom Berry, JP (Represented by Mr John Edge, JP, Acting Deputy Director (Legal) of Lands Department from 21 January 1999 to 26 August 1999)	Deputy Director (Legal) Lands Department
Ms Audrey EU, SC (up to 22 April 1998)	Senior Counsel
Mr Kenneth KWOK Wing-hon (from 16 July 1999)	Senior Development Manger Swire Properties Ltd
Mr Andrew LEE King-fun	Principal Partner Andrew LEE King-fun and Associates Architect
Mr LIU Sing-cheong	Managing Director Hang Cheong Surveyors Ltd Surveyor
Ms Rebecca PUN Ting-ting (from 28 July 1999 to 31 March 2000)	Principal Assistant Secretary Housing Bureau Government Secretariat
Mr Malcolm Merry (from 30 June 1998)	Counsel
Ms June Teng (from 5 October 1998 to 3 June 1999)	General Secretary Real Estate Developers Association of Hong Kong

Ms Eva TO Hau-yin (up to 28 July 1999)	Principal Assistant Secretary Housing Bureau Government Secretariat
Mr WAI Siu-yu (up to 31 July 1998)	General Secretary Real Estate Developers Association of Hong Kong
Ms Lorna WONG Lung-shi (from 31 March 2000)	Principal Assistant Secretary Housing Bureau Government Secretariat
Mr Martin WONG Kwai-poon	Chief Complaints & Advice Officer Consumer Council
Mr Marco WU Moon-hoi, JP	Deputy Director/Management Housing Department

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

Meetings

8. The Sub-committee commenced the study of the third part of its reference on 26 February 1998 and between then and 27 July 2000, held a total of 48 meetings.

Consultative document

9. This consultation paper sets out the Sub-committee's interim recommendations on ways to improve the sales descriptions and other pre-contractual matters of completed residential properties in Hong Kong.

10. The purpose of circulating this consultation paper is to invite the public and all interested parties to express their views on the matters raised and the interim recommendations made. The Sub-committee will present its final recommendations to the Law Reform Commission after taking into account the responses collected during consultation.

Chapter 1

The case for the reference and the scope of deliberations

The case for the additional reference for local completed residential properties

1.1 When the Sub-committee was appointed in November 1992, their terms of reference were confined to uncompleted residential properties. The Sub-committee was given an additional reference in 1996 to consider completed residential properties in Hong Kong. There are a number of reasons for making this additional reference relating to pre-contractual matters and sales descriptions.

Public responses

1.2 When the consultative document on local uncompleted residential properties was issued in April 1994, there was strong public demand in the responses for the introduction of controls over sales descriptions of completed residential properties.

Uniform standards for completed and uncompleted property

1.3 In its First Report published in April 1995, the Commission made a number of recommendations in respect of local uncompleted residential properties. The Government published the Sales Descriptions of Uncompleted Residential Properties Bill as a White Bill in the Government Gazette on 7 April 2000. The White Bill, on which the public's views were sought for a three-month consultation period ending on 6 July 2000, aims largely to implement the Commission's recommendation in the First Report. It will create anomalies if some of these recommendations apply only to uncompleted but not completed properties. For example, standard definitions for measuring floor area are recommended for uncompleted properties. It would create confusion if the measurement methods were not extended to completed properties offered for sale by developers.

Uncompleted flats become completed

1.4 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 that less protection should be given to purchasers of such completed properties than those of uncompleted properties.

Scope of deliberations

1.5 The present study relates to completed residential properties in Hong Kong. Unlike uncompleted flats (which are mostly sold by developers), completed residential properties are sold either by developers in the first-hand market or by private property owners in the second-hand market.

1.6 Many of the sales descriptions of completed flats are provided by developers in much the same way as those for uncompleted flats. There is thus an obvious reason to regulate the sales descriptions and other pre-contractual matters of local completed flats in the first-hand market. The question is whether or not that regulation should extend to the second-hand market.

Views against regulating the second-hand market

1.7 Reservations have been expressed in some quarters to extending the study to the second-hand market and to individual flat owners. The view taken is that a sale in the second-hand market is primarily a transaction between two individual owners. For transactions in the second-hand market, the Government has introduced a scheme to regulate estate agents. It is hoped that the scheme will improve the quality of sales information provided to purchasers. Moreover, it is doubtful whether or not individual owners will have the necessary time and resources to provide the required information. It may also be difficult for them to check the property details of some older flats.

1.8 Furthermore, unlike purchasers of uncompleted properties, purchasers of second-hand completed flats can view or check the properties. It is in the first-hand or primary market that purchasers need more protection. In the second-hand market, purchasers are on an equal footing with the vendors. Hence, there is little need for additional legislative measures to protect purchasers.

Views in favour of regulating the second-hand market

1.9 The Sub-committee take the view that their terms of reference are wide enough to cover the second-hand market. Purchasers of second-hand completed flats, just like those buying in the first-hand market, are in need of protection. The present law does not provide enough positive protection for purchasers. For example, the burden of proof of an actionable misrepresentation would be on the aggrieved party and it will be difficult and costly to discharge that heavy burden. The Sub-committee believes that there is a need to impose positive duties on private vendors to provide fuller information before the Agreement for Sale and Purchase ("ASP").

1.10 In the second-hand market, verbal representations are often made by vendors and estate agents. It is difficult and costly for purchasers to verify certain important property information, including the age and size of the property. The property is not always available to prospective purchasers for inspection. Investors may buy property subject to an existing tenancy without the chance of viewing the property.

1.11 It is noted that the Estate Agents Ordinance (Cap 511) requires estate agents to supply certain sales information to purchasers in the second-hand market. The duties of estate agents are confined to the provision of seven basic property particulars.¹ There are many other types of property information of interest to purchasers of completed second-hand flats, such as, the level of management fees. Vendors should therefore also have some responsibility for providing property information to ensure its accuracy.

1.12 We have therefore come to the view that the present study should cover 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.

Definition of "completed residential property"

1.13 In the First Report, the Commission recommended that "uncompleted residential property" should refer to:

"residential units for which the Occupation Permit has yet to be issued by the Building Authority under the Buildings Ordinance, or in the case of the Housing Authority's Home Ownership Scheme, the completion certificate has yet to be issued by the Director of Housing ...that this definition should be suitably

¹ These are: (1) particulars of current ownership and subsisting encumbrances; (2) total or entire area; (3) year of construction completion; (4) restriction on use; (5) unexpired term of Government lease and right of renewal; (6) term of a new lease to be granted; and (7) a statement by vendor on known structural additions or alterations and repairs or improvements. See section 36(2)(a) to (g) of Estate Agents Ordinance (Cap 511).

*modified in the case of exempted houses in the New Territories."*²

1.14 We are of the view that the definition of "completed residential property" should also take the Occupation Permit as the demarcation point.

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.

² The Law Reform Commission of Hong Kong, *Report on Description of Flats on Sale* (Topic 32, April 1995), ("The First Report") paragraph 22 of introductory chapter.

PART I – SECOND-HAND MARKET

Chapter 2

The general approach to the second-hand market

Completed residential units in the second-hand market

2.1 In this part, we consider the means to improve the existing protection to purchasers of completed units in the second-hand market. Here we refer to those residential units with an occupation permit sold by private vendors to purchasers. Private vendors are those who are not in business as a developer or subsidiaries or associates of a developer.

Lack of sales brochure

2.2 In the second-hand market, there rarely be a sales brochure as the vendors are mainly private individuals. Thus, we shall explore other means of imposing positive duties on private vendors to provide essential property information to prospective purchasers. In this respect, we shall look at the feasibility of introducing a vendor's information form. We shall also study the possibility of inserting certain standard clauses into the preliminary agreement.

Chapter 3

Brief review of the existing law governing the protection of purchasers of completed units in the second-hand market

Introduction

3.1 In this chapter, we shall take a brief look at the existing law governing the protection of purchasers in the second-hand market. We shall try to see if the existing law is adequate to protect purchasers.

Misrepresentation

3.2 At common law, an agreement for sale and purchase of a flat may be rescinded if it has been induced by a misrepresentation, that is to say an untrue statement of fact made by one party to the other. The statement may be deliberately untrue or made recklessly as to whether or not it is true or it may be made negligently or innocently. Most misrepresentations are of the latter type. Once a misrepresentation of the latter type has occurred the contract becomes voidable: the victim of the misrepresentation has the option of withdrawing from the contract but may choose to continue with it. Alternatively, by virtue of statute (the Misrepresentation Ordinance Cap 284) the court may award damages to the victim, in which event the sale stands but the party who is responsible for the misrepresentation must pay compensation to the other party. If the misrepresentation is fraudulent, the contract is automatically void and damages (on a more generous scale) are recoverable.

3.3 It may be difficult for the purchaser to whom misleading information has been given to rely upon the law of misrepresentation. First, if the false statement is not in writing, as is particularly likely to be the case in a sale between private individuals, there will be difficulties in establishing that it was made and precisely what was said or communicated. A representation may be oral, in which case there could well be a clash of evidence as to what was said, or it may be by act or implication. There are particular difficulties where the representation is by silence, ie the failure to correct a false impression gained by the purchaser. Second, even if the court is satisfied as to what was said, the purchaser may not be able to show that the statement induced him to enter into the purchase agreement: typically a variety of factors will have led to his decision to buy, including price, surroundings and convenience of location, and separating the influences of these from that of

the false statement is problematic. Third, in order to be actionable, the inaccurate statement must be a statement of fact and not of opinion or of law. It can be particularly difficult to discern whether an assertion is an expression of the speaker or writer's opinion or is a statement of fact (indeed an assertion may contain a mixture of fact and opinion). An example is a general description of the internal decorations of a flat where phrases such as "high quality", "well designed" and so forth may be used. Fourth, the statement must be one of existing fact, not a promise as to future fact.

3.4 A further complication is that, whatever may have occurred during negotiations prior to the signing of the provisional agreement, the formal sale and purchase agreement frequently contains a standard clause to the effect that the agreement contains the whole agreement between the parties and that no representations or warranties other than those in the contract have been made or can be relied upon. A variant of this limits the remedies available for misrepresentation to damages and lays down how any compensation is to be calculated. These are examples of exclusion clauses which, under the provisions of the Control of Exemption Clauses Ordinance (Cap 71), generally would be effective only to the extent that they are reasonable but that ordinance specifically does not apply to contracts for the transfer of an interest in land so such clauses in a sale and purchase agreement are effective.

Breach of contract

3.5 If information concerning a property is incorporated into the contract of sale and is supported by an undertaking in the contract that the information is true or accurate, the purchaser will have an action for breach of contract should the information transpire to be inaccurate. Such stipulations are more frequent where the terms of the contract are influenced by an outside agency. For instance, in sales under the consent scheme, the vendor is obliged to warrant to the purchaser that the flat will be as shown on the plan and will be of the stipulated saleable area and that the sales brochure is accurate and complies with the requirements concerning such brochures laid down by the Lands Department. This approach is, however, unusual in a private sale of second-hand property: it would require the purchaser to insist upon a special clause in the contract and, where as is usual there is a provisional agreement, he can so insist only if the clause has been written into the provisional agreement.

3.6 The law also implies terms into contracts but the circumstances in which this will be done are limited to where the implication is necessary or is prescribed by law.

Fraudulent behaviour

3.7 In Hong Kong, cases involving aspects of fraudulent behaviour are dealt with either as specific offences under the Theft Ordinance (Cap 210)

or, where a criminal agreement between two or more persons can be proven, by means of a charge of "conspiracy to defraud."¹

Obtaining property or pecuniary advantage by deception

3.8 Section 17(1) of the Theft Ordinance (Cap 210) provides:

"Any person who by any deception (whether or not such deception was the sole or main inducement) dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years."

3.9 Section 18(1) of the Theft Ordinance (Cap 210) provides:

"Any person who by any deception (whether or not such deception was the sole or main inducement) dishonestly obtains for himself or another any pecuniary advantage shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 10 years."

3.10 "Deception" is defined as "any deception (whether deliberate or reckless) by words or conduct as to fact or law ..."² Hence, mere silence in itself cannot be a deception within the meaning of the section.³ It is therefore difficult to base liability on the mere omission (albeit deliberate) on the part of the vendor to provide property information. At present, there is no positive legal duty on the vendor to provide property information except a vendor's statement as to known structural additions or alterations and repairs or improvements to his unit under the Estate Agents Ordinance (Cap 511).⁴ Even that vendor's statement on structural alterations and repairs is not supplied to the purchaser direct by the vendor himself. The vendor makes the statement and passes it to the estate agent who will in turn pass it on to the purchaser. As the statement relates to known structural alterations or repairs, a vendor need not make any disclosure so long as he is not aware of any such matters.

Conspiracy to defraud

3.11 In brief, the common law offence of conspiracy to defraud consists of an agreement by two or more persons to commit fraud. It does not apply to one person acting alone. In most cases, the vendor alone supplies the property information and it is difficult to prove the existence of

¹ The Law Reform Commission of Hong Kong, *Report on Creation of a Substantive Offence of Fraud*, (Topic 24, July 1996), paragraph 2.4.

² Theft Ordinance (Cap 210), sections 17(4) and 18(3).

³ *Archbold 1998*, at paragraph 21-181.

⁴ Estate Agents Ordinance (Cap 511), section 36(2)(g).

any agreement to defraud the purchaser. It is therefore difficult to find any liability in conspiracy to defraud in respect of the provision of property information.

Substantive offence of fraud

3.12 Acting upon the recommendations of the Law Reform Commission in its report entitled *Report on Creation of a Substantive Offence of Fraud*,⁵ a new section 16A was added to the Theft Ordinance on 16 July 1999.⁶ The new section 16A(1) provides:

"If any person by any deceit (whether or not such deceit is the sole or main inducement) and with the intent to defraud induces another person to commit an act or make an omission, which results either –

- (a) in benefit to any person other than the second-mentioned person; or*
- (b) in prejudice or substantial risk of prejudice to any person other than the first-mentioned person,*

the first-mentioned person commits the offence of fraud and is liable on conviction upon indictment to imprisonment for 14 years."

3.13 This new statutory offence of fraud applies to one person acting alone. However, it is hard to prove beyond reasonable doubt deceit and the intention to defraud in the case of vendors providing wrong property information. For instance, the owners of units in old buildings may not know whether there are illegal structures or alterations as the building plans may be missing or may not be readily accessible at reasonable cost. The owners may make an honest mistake in providing wrong or misleading information as to illegal structures or alterations. It would be difficult to find deceit and intention to defraud on the basis of such honest mistake.

Trade Descriptions Ordinance (Cap 362)

3.14 Section 7(1)(a)(i) of the Trade Descriptions Ordinance (Cap 362) provides that it is an offence to apply a false trade description to any goods in the course of any trade or business. Section 2(1) defines "goods" as including "vessel and aircraft, things attached to land and growing crops" which arguably includes the fittings and finishes of flats and even the building itself. However, a private individual selling his unit is usually not doing it "in the course of any trade or business". It is therefore difficult to establish

⁵ See paragraph 1 of the Explanatory Memorandum to the Theft (Amendment) Bill 1998.
⁶ Ordinance No 45 of 1999.

liability for false trade descriptions in respect of misleading or false property information supplied by a private vendor in the second-hand market.

3.15 Moreover, a "trade description" requires a direct or indirect indication under section 2(1). Mere silence on the part of the vendor is therefore not a trade description. The Trade Descriptions Ordinance cannot catch vendors who deliberately withhold material facts.

Existing disclosure requirements under the Estate Agents Ordinance (Cap 511)

3.16 Under the Estate Agents Ordinance, estate agents are required by law to provide seven basic property particulars to purchasers. These are:

- current ownership and encumbrances,
- total or entire area,
- year of construction completion,
- use restrictions,
- unexpired term of Government lease,
- term of new lease,
- vendor statement on known structural additions or alterations and repairs or improvements.⁷

The estate agent is responsible for collecting these property particulars, except for the vendor statement on structural alterations and repairs. Hence, the vendor's existing duty under the Estate Agents Ordinance is confined to the provision of the statement on structural alterations and repairs. But even that vendor statement covers only any information "within the vendor's knowledge". If the vendor is not aware of the structural alterations or repairs, he is not obliged to make any vendor statement.

3.17 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.⁸ 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

3.18 The above review of the existing law indicates that there are few positive duties, if at all, on a vendor of second-hand property to disclose particulars of the property for sale. In second-hand sales, there is no such

⁷ See section 36(2)(a) to (g) of Estate Agents Ordinance (Cap 511).

⁸ Under section 36(5)(b)(ii) of the Estate Agents Ordinance (Cap 511), there is a defence of due diligence available to an estate agent if he shows that (A) he relied on information obtained from a source prescribed for the purposes of this subparagraph in respect of such information; (B) it was reasonable for him to have relied on such information; and (C) he had taken all steps reasonably open to him to avoid the failure.

thing as a sales brochure compiled by the vendor. A vendor is, of course, obliged to provide basic information on the property in the preliminary agreement. It is of little assistance to the purchaser only to obtain the property information after the preliminary agreement is signed. Moreover, the contents of the preliminary agreement are not uniform. Most preliminary agreements contain only the address of the property, the purchase price, payment terms, and date of completion of sale and purchase.

Chapter 4

Disclosure of information by vendors

Existing law provides insufficient protection for purchasers of second-hand units

4.1 As we have seen in the preceding chapter, there is insufficient protection for private individuals buying residential units in the second-hand market. Moreover, the present law is deficient in that it provides for very few, if any, positive duties on the vendor to provide particulars of the property he offers to sell. Without such positive obligations, it is difficult to establish criminal or civil liability for false or misleading property descriptions.

4.2 We take the view that the vendor should have a positive duty to supply prospective purchasers with some basic property particulars well before a preliminary agreement is entered into. Property information provided at an early stage can assist prospective purchasers in making informed decisions. What is more, such positive disclosure requirements can assist the purchaser in any future claims against the vendor for misleading or false representations.

The Vendor's Information Form

4.3 The lack of positive disclosure requirements upon vendors has led us to the idea of a Vendor's Information Form (VIF). VIF is a form to be filled in by the vendor containing various particulars about the unit he offers for sale in the second-hand market. A vendor should make available the VIF when his unit is put on the market for sale, whether through an estate agent or not. In other words, a VIF is prepared long before a potential purchaser is identified, and in any event before signing of any preliminary agreement.

4.4 We are aware of the concern that the introduction of VIF may over-regulate the sale of completed units in the second-hand market. We do not take the view that VIF will over-regulate the second-hand market. The Estate Agents Ordinance (Cap 511) has already contained requirements for estate agents to provide seven basic property particulars. Whilst Cap 511 puts on the estate agent the primary responsibility for providing property particulars, the proposed VIF places that responsibility on the vendor. We consider that the vendor, rather than the estate agent, should have primary positive duty to disclose property particulars. As pointed out above, without such positive obligations on the vendor, it is difficult for the purchaser to establish liability for false or misleading property descriptions made by the

vendor. It should be borne in mind that the positive disclosure duty on the vendor does not in any way preclude him from completing VIF with the assistance of the estate agent. Moreover, the property particulars in the proposed VIF are not difficult to provide and they are helpful to purchasers in making informed decisions. VIF is not a new idea. VIF or its equivalent has either been proposed or is already in place in some overseas jurisdictions. The following are examples.

England and Wales

4.5 A working party of the Law Society of England and Wales (the Working Party) has recommended as part of its conveyancing reform called "TransAction 2000" the introduction of a Legal Information Form. The Legal Information Form is to be supplied by the seller's solicitor to the seller's agent setting out in plain English "the necessary information which an informed buyer would wish to have before making an offer for the property".¹

4.6 The Legal Information Form is to be prepared by the seller's solicitors and contains basic information about the property, including the type of ownership, lease terms, expenses, repairs, management, planning consent and other general matters relating to disputes and notices. Prospective buyers can view the Legal Information Form (as part of the seller's information pack) either at the selling agent's office or the office of the seller's solicitors.²

Idaho, USA

4.7 In Idaho, the Property Condition Disclosure Act (chapter 25)³ provides that for each transfer of residential real property, on or after 1 July 1994, the transferor must complete a "property condition disclosure form". The property disclosure form constitutes a statement of the condition of the property and of information concerning the property actually known by the transferor.⁴ It is not a warranty of any kind by the transferor or his agent.⁵ It is not a substitute for any inspections.⁶ The transferor must deliver a signed and dated copy of the completed disclosure form to each prospective transferee or his agent within 10 days of the transferor's acceptance of the transferee's offer.⁷ The Idaho property condition disclosure form covers such information as appliances and services systems included in the sale, problems with basement, foundation, roof condition, well, septic system, plumbing, drainage, electrical, heating, conditions that may affect clear title (such as encroachments, easements, zoning violations, lot line disputes), knowledge of any hazardous materials or pest infestations, and any substantial additions or alterations without a building permit.

¹ The Law Society of England and Wales, *Conveyancing Reform: TransAction 2000*, August 1998, paragraph 6.1.

² *Conveyancing Reform*, above, paragraphs 5.3 and 6.1.

³ Idaho Statutes, Property in General (Title 55) <<http://www3.state.id.us/cgi-bin/newidst?sctid>> (27.1.2000)

⁴ Idaho Statutes, above, paragraph 55-2507(1).

⁵ Idaho Statutes, above, paragraph 55-2507(3).

⁶ Idaho Statutes, above, paragraph 55-2507(4).

⁷ Idaho Statutes, above, paragraph 55-2509.

Virginia, USA

4.8 In Virginia, the Residential Property Disclosure Act (chapter 27)⁸, which came into effect from 1 July 1993, applies to sales of residential real property consisting of not less than one nor more than four dwelling units, whether or not with the assistance of a licensed real estate broker or salesperson. Under the Act, the owner is required to furnish to a purchaser either (1) a residential property disclaimer statement, stating that he makes no representations or warranties as to the condition of the property and the purchaser will be receiving the property "as is" or (2) a residential property disclosure statement.

4.9 The residential property disclosure statement contains representations by the owner and not those by the broker or salesperson. The disclosure and disclaimer forms make no representations with respect to any matters which may pertain to parcels adjacent to the subject parcel. The owner must deliver to the purchaser the disclosure or disclaimer form prior to the acceptance of a real estate purchase contract. The owner is not liable for any error in the information not within his actual knowledge or which was based on information provided by public agencies and where he was not grossly negligent in obtaining the information from a third party. At or before settlement, the owner must disclose any material change in the physical condition of the property or certify that the condition of the property is substantially the same as it was when the disclosure form was provided.

4.10 The Virginia residential property disclosure statement includes information on the basement, roof, fireplace/chimney, plumbing system, septic/sewer system, water supply, heating system, air-conditioning system, electric system, insulation, exterior drainage, wood-destroying organisms, etc.

Ontario, Canada

4.11 In Ontario, Rule 11.3 of the Code of Ethics of the Real Estate Council of Ontario provides:

*"A Member representing a Seller of Residential Property should consider requesting that the Seller complete and sign a Vendor Property Information Statement and should attach a copy to the Agreement or provide in the Agreement, or otherwise, in writing to the Parties, a statement that the Seller refused or was unable to complete the Statement."*⁹

4.12 The Seller Property Information Statement is not a statutory form,¹⁰ but is prescribed by the Ontario Real Estate Association for use by real estate brokers and salespersons. It covers matters such as interest in the

⁸ <www.austlii.edu.au/links/2431.htm> (25.10.2000): Virginia – Code (Virginia State Legislature) Title 55 - Property and Conveyances.

⁹ <www.reco.on.ca/ethics.htm> (14.8.2000).

¹⁰ The Ontario Real Estate Association has informed us that the name of the form has changed from "Vendor" to "Seller". The form which is in general use is still undergoing scrutiny and revisions.

property by other parties, plan of survey, connection to municipal sewer, water systems, problem in relation to quantity and quality of well water, septic system, zoning and rezoning, easements, restrictive covenants, local levies or unusual taxes being charged or contemplated, notice or claim affecting the property from any person or public body, public projects planned for the immediate area, approximate age of property.

The four approaches to imposing positive disclosure duties on vendors

4.13 The comparative study of overseas practices earlier in this chapter shows that there can be four approaches to imposing duties of positive disclosure on vendors. The first approach is a VIF on a purely voluntary basis. An example is the Legal Information Form proposed by the English Law Society. The second is a compulsory VIF backed up by statutes. This is the approach adopted by the state of Idaho in the USA.

4.14 The third approach is the one being used 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 made no representations or warranties as to the condition of the property and the purchaser would be receiving the property "as is". This is a statutory flexible approach.

4.15 The fourth approach is a code of practice for estate agents, as is 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.

The advantages of a VIF

Assistance to purchasers in making informed offers

4.16 A VIF will assist purchasers in making more informed decisions. The number of disputed sales will be reduced.

Added protection to home-buyers

4.17 The VIF contains the vendor's representations on particulars about the units. Its contents will be of assistance to purchasers in future litigation arising from misleading or false property descriptions. A vendor

might refuse to fill in some items in the VIF without some form of legal compulsion (an issue which we shall address later in this chapter). However, the fact that there are gaps in the VIF will put prospective purchasers on notice.

User-friendly summary

4.18 The VIF should be a user-friendly summary of the necessary information in plain language.¹¹ Property particulars taking the form of a summary in plain language will be of great assistance to prospective purchasers. At present, most property particulars are contained in complicated legal documents not readily intelligible to lay persons. Purchasers have to rely on their solicitors or the conveyancing clerk to explain to them their rights and obligations under the title documents. However, solicitors in Hong Kong are normally involved only when the purchaser has signed a preliminary agreement.

The disadvantages of a VIF

Additional costs and burden to vendors and possible slowing down of transactions

4.19 The preparation of a VIF may involve additional costs and an added burden to the vendor. It may also slow down transactions 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. 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. The possible delay to a transaction may in any case give the vendor and purchaser more time to think clearly about the transaction.

4.20 On balance, we consider that the advantages of the VIF outweigh its disadvantages. Having decided that a VIF is desirable, the next issue is what its contents should be.

The seven property particulars under the Estate Agents Ordinance

4.21 Our view is that a VIF should at least provide information on the seven property particulars to be supplied by estate agents under section 36(2)(a) to (g) of the Estate Agents Ordinance (EAO). These property particulars are the minimum information required by purchasers in reaching their decision to buy. **We consider that vendors of second-hand completed units should be responsible for supplying these seven**

¹¹ *Conveyancing Reform*, above, paragraphs 6.1 and 6.2.

property particulars in the VIF. We also consider that the proposed VIF should include details of the saleable area and any other statutory measurement methods that may eventually be enacted by the proposed Sales Descriptions of Uncompleted Residential Properties Bill.

Contents of VIF

Warning clauses

4.22 A VIF should contain warning clauses to the effect that, among other things:¹²

- It is only a summary of the main terms.
- It does not explain everything and purchasers should take legal advice.
- Circumstances may have changed since the date of the VIF.
- 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 the required borrowing will be readily available.

4.23 **In our view, the proposed VIF should contain at least these warning clauses.** All these warnings are useful in that they direct purchasers' attention to matters which they should bear in mind when referring to the particulars contained in the VIF. They also bring home to purchasers the important matters that they should consider before committing to a purchase. **We consider that there should also be a warning note to the vendor that the VIF is a legal document and that he will bear responsibility for its accuracy.**

*Type of ownership*¹³

4.24 The type of ownership (that is to say, whether leasehold or freehold) is not important as land in Hong Kong is always leasehold. Hence, we take the view that the type of ownership should be omitted from the proposed VIF.

¹² These warning clauses are modelled on those contained in the Legal Information Form described in the *Conveyancing Reform*, above.

¹³ Legal Information Form (LIF), paragraph 1.

Rights of way¹⁴

4.25 Most rights of way exist over common areas and so do not affect the exclusive occupation of the flats. Moreover, the average vendor is not in a position to tell by himself whether or not there are rights of way. Accordingly, we do not think rights of way should be included in the proposed VIF.

Services¹⁵

4.26 It should not be difficult for a vendor to state the availability of services such as water (fresh/sea), drainage, gas (what kind) and electricity. **We consider that the availability of services known to a vendor should be included in the proposed VIF.**

Management fees

4.27 **We consider that it will suffice to disclose the management fees for the current month in the proposed VIF.** The Legal Information Form (LIF), by contrast, requires the disclosure of the service charges (which are commonly called management fees in Hong Kong) for the last three years.¹⁶ Purchasers are interested in the monthly figure of management fees. As the amounts of management fees do not change drastically from year to year, purchasers will get a rough idea of the management fees by reference to the amount currently paid every month.

Furniture and fittings¹⁷

4.28 Furniture and fittings are not essential items for disclosure. The vendor and the purchaser can always negotiate what furniture and fittings should be included in the sale. It is already the current practice to include a list of furniture and fittings in the preliminary agreement.

4.29 We consider that furniture and fittings should be left out of the proposed VIF as they will be listed in the preliminary agreement in any event.

Government Rent¹⁸

4.30 The amount of Government rent in some cases is three percent of the rateable value of the property and can be a large sum. Vendors should have no difficulty in disclosing the amount of Government rent as its

¹⁴ LIF, paragraph 2.

¹⁵ LIF, paragraph 3.

¹⁶ LIF, paragraph 10.

¹⁷ LIF, paragraph 4.

¹⁸ LIF, paragraph 7.

amount can easily be ascertained from the demand note. **The proposed VIF should state the amount of Government rent as far as it is possible.**

Buyer's share of insurance premium

4.31 The LIF states that the purchaser must bear his proportion of the insurance premium covering the whole building.¹⁹ The last annual charge for insurance has to be stated.²⁰ In Hong Kong, the insurance premium for the whole block is usually covered by the management fees. However, in the Home Ownership Scheme, block insurance is taken out for the owners and the owners have to pay separately for the premium. Even so, the management fees are a more relevant item for disclosure than the buyer's share of expenses. **We therefore take the view that management fees but not other expenses such as insurance premiums should be included in the proposed VIF.**

Notice received by the owner²¹

4.32 This item refers to any plans for major future expenditure known to the vendor. It would seem that this item has already been covered by the vendor's statement under section 36(2)(g) of EAO. A vendor can, however, refuse to fill in the vendor's statement under section 36(2)(g). The estate agent will discharge his duty by certifying that he has duly advised the vendor to complete the statement but in vain.²²

4.33 We take the view that if a commitment has been made to pay certain expenditure, the vendor should be obliged to disclose that fact. If however the expenditure is merely a possibility, the vendor need not disclose it. **We consider that any notice received by the vendor from Government, management office, neighbouring properties, or any relevant authority of expenditure requiring contribution from the owners should be disclosed in the proposed VIF.**

Rights of entry for repair²³

4.34 The rights of entry for repair are normally covered by the Deed of Mutual Covenant. The existence of such rights is unlikely to have any significant effect on the price of the property. We consider that rights of entry for repair should be left out of the proposed VIF.

¹⁹ LIF, paragraph 8.

²⁰ LIF, paragraph 9.

²¹ LIF, paragraph 10.

²² See estate agent's declaration at the end of the Vendor's Statement (Part 2 of Form 1) under Estate Agents Practice (General Duties & Hong Kong Residential Properties) Regulation, Cap 511C Schedule 1 Forms.

²³ LIF, paragraph 13.

Existence of owners' corporation and name of management company

4.35 The LIF requires disclosure of details about the landlord/management company and of its operation.²⁴ Membership of the landlord/management company is not relevant in the Hong Kong context. Instead, the existence of any owners' corporation and the identity of the management company is of importance to residents. **We take the view that the proposed VIF should state whether there is an owners' corporation and, if so, its name, and the name of the management company.**

Planning consent

4.36 The LIF requires that any dispute relating to planning consent be referred to.²⁵ We consider that planning consent is not of great relevance in Hong Kong and should be omitted from the proposed VIF.

Pending litigation

4.37 A vendor is required to specify in the LIF that he knows of no disputes about his or any neighbouring property other than those stated.²⁶ We consider that the reference to "disputes" is too vague. **Instead, we are of the view that any pending litigation known to the vendor affecting the property should be disclosed in the proposed VIF.**

Vacant possession and free from mortgages

4.38 The LIF contains a statement to the effect that the vendor will vacate the flat and hand over vacant possession upon completion of the sale and purchase and that the flat will then be free from mortgages.²⁷ **We take the view that such a statement should be included in the proposed VIF but should be modified. It should read: "vacant possession and free from mortgages and subsisting tenancies." However, if there are subsisting tenancies, the terms of those tenancies should be spelt out.**

Septic system

4.39 The Ontario Vendor Property Information Statement requires the vendor to state any problems with the septic system. Purchasers are likely to show interest in any such problems known to the vendor. **We therefore consider that if a septic tank is used, this should be referred to in the proposed VIF.**

²⁴ LIF, paragraphs 15 and 16.

²⁵ LIF, paragraph 17.

²⁶ LIF, paragraph 19.

²⁷ LIF, paragraph 24.

Power of Attorney

4.40 The Ontario Vendor Property Information Statement requires the vendor to state whether he is acting under a Power of Attorney. As a Power of Attorney may affect the validity of the transaction, purchasers should be warned of the existence of such a power. **We take the view that the proposed VIF should contain a question to the vendor as to whether or not he is operating under a Power of Attorney.**

Sundry items²⁸

4.41 The LIF contains a number of other items such as deposit, other terms of the contract, stamp duty and list of documents held by seller's solicitors. We consider that it will be too onerous to require vendors to disclose these sundry items and take the view that they should be left out of the proposed VIF.

Should the Vendor Information Form be voluntary or compulsory?

4.42 Under TransAction 2000, the English Law Society urged solicitors in England to adopt the LIF as part of a conveyancing protocol.²⁹ The English Law Society however pointed out that it is unlikely that vendors would use the LIF "unless they are required to do so by legislation".³⁰ We consider that a similar approach should be adopted in Hong Kong and that the first step should be for the relevant bodies in Hong Kong (such as the Law Society and the Estate Agents Authority) to endeavour to have VIF adopted as market practice on a voluntary basis. Such a course should be welcomed by solicitors and estate agents as the VIF will enable them to advise their clients fully.

4.43 We are, however, conscious that a voluntary approach may not work and we therefore suggest that the Government should review the situation at some stage later. If a market practice cannot be established by then, the Government should introduce legislation requiring the completion of a Vendor's Information Form, **at least in relation to newer buildings**. There is a view that if Vendor's Information Form is to be made compulsory at a later stage, the legislation should include a provision enabling the parties to contract out of its various requirements. The merit of such a provision is that it provides a degree of flexibility to the parties who want to conclude a deal

²⁸ LIF, paragraphs 25 and 26.

²⁹ In 1990 the Law Society of England and Wales introduced 'TransAction' setting out the protocol in dealings between solicitors over the conveyancing process. It included standard forms for the contract and pre-contract information designed solely for dealing with sales of homes. A working party of the Law Society was later convened to revise the documents required under the TransAction protocol. The revised protocol was launched under the title 'TransAction 2000'. The principle part of TransAction 2000 was the introduction of a Legal Information Form. (See *Conveyancing Reform*, above, at paragraphs 2.1 and 4.1).

³⁰ *Conveyancing Reform*, above, paragraph 9.1.

quickly. On the other hand, such a provision for contracting out will undermine the effectiveness of Vendor's Information Form as a means of making the vendor liable for information provided to the purchaser. We, however, anticipate that once introduced, Vendor's Information Form will come to be more accepted over time with fewer parties wanting to contract out.

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 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 must 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

- **It is only a summary of the main terms.**
- **It 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 the required borrowing will be readily available.**

- It is a legal document and that the vendor will bear responsibility for its accuracy.

Property particulars

- The seven property particulars currently to be supplied by estate agents under section 36(2)(a) to (g) of the Estate Agents Ordinance.
- Details of the saleable area and any other statutory measurement methods that may eventually be enacted by the proposed Sales Descriptions of Uncompleted Residential Properties Bill.
- 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.
- State the amount of Government rent so far as it is possible.
- Any notice received by the vendor from the Government, management office, neighboring properties, or any relevant authority of expenditure requiring contribution from the owners.
- State whether there is an owners' corporation and, if so, its name, and the name of the management company.
- Any pending litigation 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.
- Make reference to any septic tank if it is being used.
- State whether or not the vendor is operating under a Power of Attorney.

We recommend that the vendor be required to 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

4.44 At present, different kinds of property information are provided by various Government departments such as Rating and Valuation Department, the Buildings Department and the Land Registry. 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. This role could be filled by the Land Registry or indeed any other appropriate Government agency. We understand that it will probably take some years to implement such a centralised search system but we consider that the Administration should explore the feasibility of such an option.

Recommendation 3

We recommend that the Administration should consider exploring the option of establishing a centralised property information system.

Chapter 5

Standard clauses of preliminary agreements

Introduction

5.1 There is at present no standard form of preliminary agreement for the buying and selling of residential properties between private individuals in the second-hand market. Most preliminary agreements contain basic terms such as a brief description of the property, the price, payment schedules, the date of formal agreement for sale and purchase ("ASP") and the date of completion of sale and purchase. Other terms are a matter for negotiation between the parties. Whether particular terms are included or not will depend very much on the parties' relative bargaining power and the market condition at the time. If an estate agent is involved, the parties will invariably adopt the pro-forma provided by the estate agent. Such pro-forma preliminary agreements are not uniform though their main terms are essentially the same.

Standard clauses for protection of homebuyers

5.2 In Hong Kong, lawyers are usually appointed after a preliminary agreement has been signed. The usual practice is for vendor and purchaser to sign the pro-forma preliminary agreement prepared by the estate agent. The estate agent will then pass a copy of the signed preliminary agreement to the solicitors acting for the parties. The solicitors will prepare the formal ASP on the basis of the preliminary agreement and any further instructions from the parties.

5.3 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. Even if the preliminary agreement has been drafted by a lawyer it may have been amended by the estate agent or by the parties themselves who are not legally trained. We take the view that certain standard clauses should be included in a preliminary agreement. Although homebuyers would be provided greater protection if there were certain standard clauses in the formal agreement, we are not in a position to conduct any study in that respect as our terms of reference are confined to pre-contractual matters. In any event, purchasers can obtain additional protection if standard clauses of potential benefit to them are included in the preliminary agreement.

5.4 The Sub-committee is indebted to the Property Law Group of the Australian Law Council for having supplied the Sub-committee with

sample standard form of residential property contracts used in various states of Australia. The Sub-committee has considered some of the contract clauses in these standard form residential property contracts and is impressed with the Australian approach which gives considerable protection to purchasers.¹ Whilst the Australian approach is conducive to consumer protection, some aspects may not be feasible for Hong Kong.² Though not all Australian practices are suitable for use in Hong Kong, it is desirable to adopt some of their standard clauses selectively.

5.5 We have chosen to look at the Australian model as it is the only jurisdiction of which we are aware which satisfies both criteria of having (i) a conveyancing system similar to ours in that there is an immediate binding agreement; and (ii) standard clauses relating to such matters as a cooling-off period and a contract subject to finance.

5.6 We shall discuss below the desirability and feasibility of inserting into the preliminary agreement standard clauses relating to a cooling-off period, contract subject to finance, survey report and inspection of property prior to completion.

Cooling-off period

5.7 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 give written notice of his intention to do so to the vendor or his agent. 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, for example, where the property is worth more than A\$250,000; where independent legal advice has been obtained before signing the contract; or the purchaser has previously signed a similar contract for the same property.³

5.8 The question is what benefits a similar cooling-off period could bring for second-hand properties. In our view, a cooling-off period can afford purchasers the time to arrange for finance. In any event, a reasonable cooling-off period can afford the purchaser a better opportunity to ascertain the financing position. This will in turn assist the purchaser in making an informed decision on whether he should withdraw from the transaction.

¹ In Australia, for example, there are standard clauses in the formal contract relating to such matters as cooling-off period, contract subject to finance, survey report, inspection of property prior to completion.

² For example, legislation in New South Wales requires that an estate agent must have a contract, containing all required attachments, available for inspection by prospective purchasers when a property is offered for sale (Conveyancing Act 1919 (New South Wales, Australia), section 52A.) The result is that the vendor's solicitors will generally prepare the contract before a buyer has been found. Such a practice is unlikely to be acceptable to vendors in Hong Kong for reasons of cost.

³ Law Institute of Victoria and the Real Estate Institute of Victoria Ltd, Contract Note (May 1993), see "Important Notice to Purchasers".

5.9 It may be argued that a cooling-off period is unnecessary in the second-hand market. In the first-hand market, developers can afford to launch large advertising campaigns to create enthusiasm and attract potential purchasers. Potential purchasers could be vulnerable to the effects of such advertising campaigns and make hasty purchase decisions. A cooling-off period is therefore necessary to give purchasers in the first-hand market a chance to rethink on the transactions. Private vendors in the second-hand market however cannot afford such an advertising campaign and so it is unnecessary to give a purchaser a chance to opt out on second thought. On the other hand, though a private vendor is not in a position to launch an advertising campaign on his property, a purchaser can still be subject to pressure or persuasion to buy made face-to-face by the vendor himself or an estate agent acting for him.

5.10 Another major argument against a cooling-off period is that it will fuel speculation. However, a provision for the forfeiture of a specified percentage of the purchase price can work as an effective deterrent to potential speculative activities.

5.11 If there is to be a cooling-off period, it should be applicable to the purchaser only. The vendor will obviously know more about the property than the purchaser. The purchaser will therefore need more time to consider and so the cooling-off period should be of use to him. However, in order to be fair to the vendor, the purchaser should not have the right to sub-sell during the cooling-off period. A prohibition on sub-sale during the cooling-off period will also prevent speculation.

5.12 Under the Lands Department (Legal Advisory & Conveyancing Office) Consent Scheme in Hong Kong, a purchaser who does not execute the formal ASP after signing a preliminary agreement is liable to forfeiture of five percent of the purchase price or the amount of the preliminary deposit, whichever is lower. The ASP must be signed by the purchaser within three working days of signing the preliminary agreement and by the developer within a further seven working days thereafter. We consider the level of forfeiture in the Consent Scheme is appropriate and should be adopted in respect of the proposed cooling-off period.

5.13 It is noted that in Victoria, the cooling-off period is not applicable to the sale of more expensive 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. **We would however like to hear the public's views as to whether any particular class of properties should be excluded from the cooling-off period.**

5.14 The next question is the length of the cooling-off period. We think the period 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. We prefer a cooling-off period of three working days in order to be consistent with the Consent Scheme. Three working days will be

sufficient for a purchaser to check for the availability of finance or to conduct a property search.

Recommendation 4

We recommend that the preliminary agreement for the purchase of second-hand completed flats should contain a standard clause giving 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 purchaser is 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 purchaser should not have the right to sub-sell during the cooling-off period.

Contract subject to finance

5.15 The standard form contracts of several jurisdictions in Australia contain a "subject-to-finance" clause. In Victoria, where a lender is nominated in the contract, the purchaser can end the contract if the loan is not approved by the "approval date". However, in order to exercise this right to end the contract the purchaser must, inter alia, have made immediate application for the loan and done "everything reasonably required" to obtain approval of the loan.⁴

5.16 In the Northern Territory of Australia, if a lender is named in the contract, the contract will be conditional upon the purchaser obtaining the named finance by an approval date. The purchaser must make immediate application to the lender for a loan on the "then prevailing conditions as to interest rate, term and rate of payment". The purchaser must "diligently pursue" that application, give such security, and "do all such acts and pay all such fees as the lender may reasonably require". If the purchaser fails to obtain the loan by the specified date of approval, he may rescind the contract by giving written notice within two days of that date.⁵

5.17 In Hong Kong sale subject to finance is already in place in some special form of contracts. For example, the standard ASP used in the Home Ownership Scheme (HOS) contains a "subject to finance" clause providing that the ASP is conditional upon the purchaser being able to obtain a loan by "using due diligence and completing the necessary formalities".⁶ If the vendor is satisfied that the purchaser cannot obtain such a loan, the ASP will

⁴ The Law Institute of Victoria and the Real Estate Institute of Victoria Ltd, "Contract of Sale of Real Estate", Estate Agents Act 1980 Form 2 (May 1993), see clause 3 of General Conditions.

⁵ Northern Territory standard form of contract for a residential sale, clause 23 of "Conditions of Contract".

⁶ See clause 26 of standard HOS agreement for sale and purchase.

be rescinded and all money already paid by the purchaser will be returned without interest, costs or compensation. The vendor is entitled to charge an administrative fee, the amount of which is at the discretion of the vendor.

5.18 The idea of making the preliminary agreement subject to finance is controversial and the Sub-committee is divided in its views. Those in favour of a "subject to finance" clause would cite instances of banks pulling out of their original commitment to provide finance to purchasers during the onset of the recent recession. Purchasers were caught by surprise by the banks' sudden withdrawal of finance. The idea of contract subject to finance would be helpful to purchasers in such circumstances. If their loans were withdrawn by the bank, they could rescind the preliminary agreement and obtain from the vendor a refund of the deposit.

5.19 In contrast, banks are now keen to grant mortgage loans and compete intensely among themselves for mortgage customers.

5.20 Another argument in favour of a "subject to finance" clause is that HOS contracts are already subject to finance. HOS contracts are, however, of a special kind in that the Housing Authority will guarantee the purchasers' outstanding loan and interest. Hence, it is very unusual for banks to go back on their loan promises to HOS purchasers.

5.21 A "subject to finance" clause in the preliminary agreement will give a purchaser an additional opportunity to back out of the transaction. If the purchase turns out not to be to his advantage, a purchaser can convince the bank not to grant him a loan. Yet a carefully worded "subject to finance" clause may discourage this from happening.

5.22 We have mentioned above some of these formulae to prevent abuse by purchasers. For instance, the clause used in Victoria requires the purchaser to make immediate application for a loan and to do "everything reasonably required" to obtain approval of the loan. The clause in the Northern Territory requires the purchaser to "diligently pursue" the application for a loan, give such security, and "do all such acts and pay all such fees as the lender may reasonably require". The HOS clause requires the purchaser to try to obtain a loan by "using due diligence and completing the necessary formalities". It should however be borne in mind that the Australian approach which requires the name of the lender bank to be inserted in the agreement is unworkable in Hong Kong since banks seldom come into play at such an early stage of the transaction.

5.23 Another principal argument against a "subject to finance" clause is that banks are less likely to go back on their loan promises in the case of completed properties. According to the professional experience of some members of the Sub-committee, the majority of transactions are completed within one month of the preliminary agreement. It is unlikely that banks will change their loan promises within such a relatively short period of time. It could however happen in a turbulent economic downturn such as that experienced in late 1997.

5.24 A "subject-to-finance" clause may not be necessary if purchasers have the benefit of a cooling-off period of three working days as recommended above. The cooling-off period provides purchasers with an opportunity to arrange finance. If they cannot get a positive response concerning a loan from the bank, they can take advantage of the cooling-off period to rescind the agreement. The other side of the argument is, however, that the bank can still back out before the facility papers are signed.

5.25 **We wish to put forward the idea of a "subject-to-finance" clause in the preliminary agreement for public consultation.** It has been a subject of considerable debate among the members of the Sub-committee. It is the preliminary view of the Sub-committee that such a clause is not necessary though there is a stronger case for it where the period for completion of sale and purchase is long.

Survey report

5.26 The standard form contract in Queensland, Australia provides for the purchaser a right to obtain a building report on the property. The contract is subject to the purchaser's obtaining a building report on the property by the "Building Inspection Date". The purchaser must take all reasonable steps to obtain the report. The purchaser may terminate the contract by notice at any time before 5 pm on the Building Inspection Date if the report is "unsatisfactory to the buyer". However, if the purchaser does not terminate the contract by 5 pm on the Building Inspection Date, he will be treated as being satisfied with the building inspection report.⁷

5.27 It has been suggested in Hong Kong that a vendor of second-hand property should provide a survey report of any refitting that might affect the internal structure of the premises. This has arisen from the judicial attitude⁸ that the vendor's solicitors should check with the help of a surveyor to find out whether there is any illegal structure in the property. If there is any, the vendor can then qualify the title. This judicial attitude strengthens the argument for permitting a survey report at least in relation to illegal or unauthorised structures. Whilst we consider that a surveyor's report is useful in relation to the existence of illegal structures, the problem with such a suggestion is that a surveyor cannot tell whether there are illegal structures or have been structural alterations without the original building plans, and these may take some time to obtain.

⁷ The Real Estate Institute of Queensland, *Contract for Houses and Land* (1st Ed, 1996), see Clause 4 of terms of contract.

⁸ In *Spark Rich (China) Ltd v Valrose Ltd* (1999) CACV No 249/98 Godfrey JA said that a prudent vendor should always consider, before attempting to sell his property, whether his title to the property may be affected by some unauthorised building work. If so, the vendor should not enter into any contract for sale of the property unless the contract contains full disclosure of the problem and also the purchaser's agreement not to raise any requisition or take any objection to the title on the basis of the unauthorised work. The learned judge also pointed out that cases in which a purchaser may safely be advised that he can safely disregard unauthorised building work are likely to be rare.

5.28 It has been suggested that it may instead be possible to rely on the Assignment Plan to figure out the partition wall and the core wall with a view to ascertaining only unauthorised alterations. However, the Assignment Plan shows only the thickness of the walls. Moreover, no professional would be willing to rely upon the Assignment Plan alone to make an assessment of the building structure. They will always go to the Building Authority for the original building plans as the Assignment Plan is meant for the identification of the property only.

5.29 Furthermore, the vendor when asked by the surveyor may not know whether there are illegal structures in his premises. The surveyor can only determine this from the building plans but it takes a long time to obtain the building plans. Furthermore, the Building Authority does not necessarily have plans of buildings built before the 1950s. If the Building Authority suspects that there are defects in these buildings, they have to send independent consultants to investigate the structural safety. Also, some more recently-constructed properties such as village type houses in the New Territories do not have approved plans.

5.30 In addition to illegal structures, problems of dampness or water leakage in the unit may be another possible reason in favour of survey reports. Water leakage is a common problem in Hong Kong, even among newly built units. However, a common inspection report may not always reveal such leakage. In order to detect water leakage, a detailed survey report is necessary and it could be costly.

5.31 Another practical difficulty of having a standard clause in the preliminary agreement requiring a survey report is the question of deciding which party should bear the costs of the survey report. There will be much resistance if vendors are required to bear those costs. Likewise, not many purchasers in Hong Kong are willing to bear the additional costs of a survey report even though it is in their interests to do so. Some purchasers might waive those right to a survey report for reason of cost.

5.32 Furthermore, the requirement of a survey report will lengthen the time it takes for sale and purchase of properties. In Hong Kong, time is nearly always of the essence in property transactions. Such a requirement will also effect substantial change to the present system and is likely to be opposed by owners and estate agents.

5.33 We have considered that as an alternative to a survey report, a standard clause might be inserted into the preliminary agreement to the effect that the vendor warrants that there are no illegal structures. The problem with this is that the vendor will not know if there are illegal structures unless he has the building plans. Some alterations to the building itself could be legal.

5.34 **It is our preliminary view that survey reports are not feasible for Hong Kong due to cost and practical reasons.** However, we are aware of the fact that illegal or unauthorised structures as well as water

leakage are common phenomena in second-hand properties. Moreover, it is recent judicial attitude that illegal or unauthorised structures are likely to affect title. These factors weigh in favour of survey reports. **We would like to hear public views on the feasibility of having a standard clause in the preliminary agreement entitling the purchaser to a satisfactory survey report.**

Right of inspection

5.35 In the Australian Capital Territory, the standard contract for sale contains a clause providing that the buyer may on reasonable notice and at reasonable times inspect the property before completion of the sale and purchase.⁹ The way in which the clause is worded seems to imply that the purchaser is entitled to inspect the property more than once before completion.

5.36 In Hong Kong, a purchaser of a completed unit in the second-hand market is usually allowed to view the unit at least once before completion of the sale and purchase. This however may not be the case where the property is sold subject to an existing tenancy. Ideally, there should always be a right of inspection in order to give better protection for purchasers. Purchasers of units with vacant possession and those buying units subject to existing tenancies should be treated alike. However, the problem is that sometimes even the landlord himself does not have an opportunity to inspect the unit. The landlord's right of inspection depends on the terms of the tenancy and even if that right exists, a tenant may choose to make it difficult for the landlord to exercise. The tenancy invariably provides for the tenant's peaceful enjoyment of exclusive possession.

5.37 It could be argued that the right of inspection would be unnecessary if there were a cooling-off period of three working days. The purchaser, after signing the preliminary agreement, can take advantage of the cooling-off period to afford himself time for reflection and to view the property. However, even if there is a cooling-off period, it does not necessarily mean that there is always a chance to view the property within the cooling-off period.

5.38 **We have come to the view that there should not be a right of inspection in respect of second-hand sales due to its impracticality, especially in the case of property sold subject to an existing tenancy.**

⁹ The Law Society of the Australian Capital Territory, Contract for Sale (Crown Lease and Unit Title)(1998), see clause 10.

How should a standard clause be inserted into the preliminary agreement?

5.39 We concluded earlier in this chapter that a standard clause providing for a three-day cooling-off period should be incorporated into preliminary agreements for sale and purchase of second-hand completed residential properties. This could be achieved in one of three ways:

- (a) introducing a standard form of preliminary agreement;
- (b) awaiting the adoption of a uniform practice by solicitors and estate agents; or
- (c) introducing an appropriate implied term to the agreement by statutory provision.

We have concluded that the third option is the most appropriate.

Recommendation 5

We recommend that the standard clause allowing a three-day cooling-off period to purchasers should be implied by legislation into preliminary agreements for sale and purchase of second-hand completed residential properties.

Chapter 6

Summary of recommendations on completed units sold in the second-hand market

This chapter gives a summary of recommendations made for completed units sold in the second-hand market.

6.1 "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. (Recommendation 1)

6.2 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 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 Information Form. (Recommendation 2)

6.3 A vendor must 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

- It is only a summary of the main terms.
- It 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 the required borrowing will be readily available.
- It is a legal document and that the vendor will bear responsibility for its accuracy.

Property particulars

- The seven property particulars currently to be supplied by estate agents under section 36(2)(a) to (g) of the Estate Agents Ordinance.
- Details of the saleable area and any other statutory measurement methods that may eventually be enacted by the proposed Sales Descriptions of Uncompleted Residential Properties Bill.
- 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.
- State the amount of Government rent so far as it is possible.
- Any notice received by the vendor from the Government, management office, neighboring properties, or any relevant authority of expenditure requiring contribution from the owners.
- State whether there is an owners' corporation and, if so, its name, and the name of the management company.
- Any pending litigation 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.
- Make reference to any septic tank if it is being used.
- State whether or not the vendor is operating under a Power of Attorney. (Recommendation 2)

6.4 The vendor be required to update the information in the Vendor's Information Form if he knows of changes subsequent to the date of its preparation. (Recommendation 2)

6.5 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. (Recommendation 2)

6.6 The Administration should consider exploring the option of establishing a centralised property information system. (Recommendation 3)

6.7 The preliminary agreement for the purchase of second-hand completed flats should contain a standard clause giving 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 purchaser is liable to forfeit to the other party of an amount equal to five percent of the purchase price or the preliminary deposit whichever is the lower. The purchaser should not have the right to sub-sell during the cooling-off period. (Recommendation 4)

6.8 The standard clause allowing a three-day cooling-off period to purchasers should be implied by legislation into preliminary agreements for sale and purchase of second-hand completed residential properties. (Recommendation 5)

PART II – FIRST-HAND MARKET

Chapter 7

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

Meaning of completed properties in the first-hand market

7.1 As we have defined completed properties as those having an Occupation Permit (OP),¹ completed properties in the first-hand market refer to those properties with an OP being offered for sale by developers to the public. Although these properties have an OP, they may or may not have a Certificate of Compliance (CC) at the same time.

7.2 The issuance of a CC requires the developer to comply with all the conditions in the Government Lease. These conditions may include the provision of community facilities such as a swimming pool or footbridges. It may not always be possible to complete these facilities in time to comply with the lease conditions when the OP is issued. Where a large development is completed and offered for sale by phases units in the latter phases may not have been completed when units in the first or second phases are offered for sale. This being the case, units in the first or second phases will be offered for sale in the absence of a CC. There are in fact some developments where the owners have occupied their units for years without a CC or with only a Consent to Assign.

7.3 The Government will issue a Consent to Assign to those developers who wish to sell their units with an OP but not the CC. The Consent to Assign is sufficient authority to enable developers to sell their completed units to the public even in the absence of a CC.²

¹ However, in the case of the Housing Authority's Home Ownership Scheme, the completion certificate takes the place of an OC for the purpose of defining completed properties.

² However, if there is no CC, the purchaser may only be buying an equitable interest rather than the legal interest in the property. In these circumstances, the vendor may need to specify in the ASP that he is selling only the equitable interest in the property to avoid the purchaser subsequently claiming to rescind the ASP for failure to pass good title. See Court of Appeal, Civil Appeal No 194 of 1997; [1998] 2 HKLRD 751 at page 758A-C.

The general approach to the first-hand market

7.4 As mentioned, completed units in the first-hand market are those uncompleted units which have become "completed" with the issue of the OP. These units are offered for sale by developers in much the same ways as if they were still uncompleted. The Commission made a number of recommendations in the First Report 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. We shall take this general approach in dealing with completed properties in the first-hand market.

Availability of sales brochures to be mandatory

7.5 The sales brochure is the most common means by which developers provide sales information to prospective buyers in the first-hand market. Sales brochures can provide comprehensive information to prospective purchasers as, theoretically, they could be of any length to contain as much information as desired. We therefore take the view that the provision of sales brochures for local completed residential properties sold for the first time should be made mandatory.

When sales brochure should be available

7.6 The Commission made different recommendations for local and overseas uncompleted residential properties as to when sales brochures should be made available to prospective purchasers.

7.7 For local uncompleted residential properties, the Commission recommended that the sales brochures should be accurate at the time of the first sale of units in a development but did not specify when sales brochures should be made available.³

7.8 For overseas uncompleted residential properties, the Commission recommended that sales brochures must be available from the time the properties were first advertised for sale. Any invitation to buy could only be made if sales brochures were available to prospective purchasers at that stage.⁴ We prefer the latter approach in that it specifies when sales brochures should be made available. For local completed residential

³ See the First Report, at paragraph 14.13. The Commission however recommended that the price lists should be available at least three days before the day of registration of prospective purchasers for balloting (paragraph 12.6 of the First Report).

⁴ Law Reform Commission of Hong Kong, *Report on Sales Descriptions of Overseas Uncompleted Residential Properties* (September 1997) ("the Second Report") at paragraph 1.34.

properties, we take the view that sales brochures should be available when the completed properties are offered for sale.

Recommendation 6

We recommend that sales brochures must be available from the time the completed properties are offered for sale. All information in sales brochures must be accurate at the time the completed properties are offered for sale.

Material changes between date of printing and time of sale

7.9 As there could be a time lapse between the printing of the sales brochure and the time of sale of the units, the Commission recommended, for local uncompleted residential properties, that material changes taking place between the date of printing and the time of first sale should be disclosed in a note attached to the sales brochure.⁵

7.10 We take the view that a similar recommendation should be made for local completed residential properties.

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.

Exemption from requirement to produce sales brochures

7.11 In the First Report, the Commission recommended that the developer may apply to the relevant authorities in certain circumstances for exemption from the requirement to produce a sales brochure.⁶ We are of the view that a similar recommendation should be made for local completed residential properties. Such a recommendation provides a degree of flexibility in the case of, for instance, bulk purchases where there is no intention to resell to the public. However, it may be difficult to ascertain whether the bulk purchaser has the intention to re-sell or not. We consider it desirable to require that an application for exemption be accompanied by a written undertaking from the purchaser not to re-sell the units within a

⁵ The First Report, at paragraph 14.13.

⁶ The First Report, at paragraph 14.16.

specified period. We shall leave it to the Government to decide the duration of the undertaking.

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.

7.12 Some bulk purchasers of a large number of units from developers will keep the units for some time before reselling them to the public. In our view, this category of bulk purchasers should be brought within the definition of a developer so as to make them responsible for the provision of sales brochures.

Recommendation 9

We recommend that the definition of a developer should include someone buying in bulk from the developer at the first sale of completed residential properties involving strata title.

Advertisements other than sales brochures

7.13 Publicity on 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. For instance, it is unrealistic to require a radio or television commercial, which lasts for a few minutes or even seconds, to disclose all the sales information contained in the sales brochure.

7.14 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.

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. Information given in the advertisement must be consistent with that given in the sales brochure.

Chapter 8

Methods of measurement of floor area to be used by developers

Introduction

8.1 Accurate and adequate descriptions of floor areas are of great importance to prospective purchasers of completed flats.¹ Where completed flats in new developments are offered for sale, prospective purchasers may not be allowed to inspect all the units which they are interested in buying. They may only visit show or mock-up flats put up by developers. Purchasers thus have to look to the sales brochures for information as to the floor area.

8.2 There are currently two principal types of measurements of floor area, viz, gross floor area and saleable area. Although purchasers need an accurate and adequate indication of the floor area, there is presently no legal requirement that the measurement adopted be disclosed in the sales literature. However, the Commission has made recommendations on the disclosure of measurements of floor area in their previous reports on the sales of uncompleted flats.

Saleable area (出售面積)

8.3 There is an accepted method of measuring saleable area. The Commission recommended that a standardised definition of saleable area be adopted for all local uncompleted residential properties.² The Commission also recommended that it should be mandatory for the standardised definition to be used and disclosed in the sales literature.³

8.4 We take the view these recommendations should also be extended to local completed residential properties in the first-hand market. Even in the case of completed properties, prospective purchasers may still

¹ The Government published the Sales Descriptions of Uncompleted Residential Properties Bill as a White Bill in the Government Gazette on 7 April 2000. The Bill intends to implement most of the recommendations in the First Report relating to the sales descriptions of local *uncompleted* residential properties. It contains various provisions on the measurement of floor areas.

² Under the recommended definition, saleable area essentially means the area contained within the enclosed walls of the unit measured up to the exterior face of an external wall or the centre line of a separating wall between adjoining units, as the case may be. Saleable area thus includes the thickness of external walls, internal columns and partitions. Ancillary areas such as bay window, carparking space, yard, terrace, garden which are for the exclusive use of the owner are to be listed separately (see the First Report, at paragraph 1.25.)

³ The First Report, at paragraph 1.25.

have to rely on the sales literature for information on the saleable area. We have come across a recent example of the developer including the "exempted areas" into the calculation of the saleable areas of the individual units. In calculating the plot ratio of a development, the exempted areas are not considered part of the overall gross floor area of the whole development. Likewise, therefore, we consider that the exempted areas should not be included in the calculation of saleable areas of the individual units.⁴

Recommendation 11

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 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 carparking space, the area of that carparking space measured from the interior of its demarcating lines or enclosing walls, as the case may be;**
- (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 their 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 incorporated item in the definition (such as a cockloft, bay window, carparking space, yards, terrace, garden, flat roof or roof), the saleable area of each of them should be specified and described separately in the sales literature.

⁴ The exempted areas refer to those areas being exempted under regulation 23(3)(b) of the Building (Planning) Regulations (Cap 123) from the calculation of the overall gross floor area of the development. Under regulation 23(3)(b), exempted areas are any floor space "constructed or intended to be used solely for parking motor vehicles, loading or unloading of motor vehicles or occupied solely by machinery or equipment for any lift, air-conditioning or heating system or any similar service."

Recommendation 12

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 (which shall include 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 such 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 13

We also recommend that:

- (1) the above mentioned definitions of saleable area should be recognised in legislation as the standard method to describe saleable area in all sales literature in respect of local completed residential properties;**
- (2) the inclusion of saleable areas in sales literature should be made mandatory by legislation;**
- (3) any areas exempted from the calculation of gross floor area should be excluded from the calculation of saleable areas of the individual units.**

Gross floor area (建築面積)

8.5 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. The confusion over gross floor area goes further in that even Government departments use different definitions of gross floor area.

8.6 The Commission recommended that the definition of gross floor area of local uncompleted properties should be standardised and should follow the definition of that term in regulation 23(3) of the Building (Planning) Regulations (Cap 123), subject to certain modifications.⁵

8.7 **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.**

Quoting of lowest price

8.8 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.

8.9 **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.** The fact that the definition of saleable area is one agreed by the Consumer Council and the relevant professional bodies should serve to remove much uncertainty. While we consider that where the lowest price is quoted this should always be calculated on the basis of saleable area, 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.

⁵ The First Report, at paragraphs 1.18 to 1.20.

Chapter 9

Disclosure requirements for completed units offered for sale by developers

Introduction

9.1 In this chapter, we shall look at the various minimum sales particulars that should be provided by developers in sales brochures. We shall review some of the recommendations made in the First Report and try to see if they can be adapted for use in respect of completed units offered by sale by developers in the first-hand market. In the process, we shall also put forward ideas additional to those made in the First Report. As the First Report was completed several years ago, some of the ideas useful at that time may have been rendered obsolete.

Floor Plan

9.2 Where prospective purchasers are not able to inspect the completed units, they may have to rely on the descriptions contained in the floor plan. This is the case even where mock-up or show flats are open to them. Where purchasers can inspect the actual completed units, they may still refer to the floor plans in the sales literature for a rough idea of the internal layout and measurements.

9.3 We consider that all of the previous recommendations of the Commission on floor plans of local uncompleted properties are equally applicable to sale of completed units by developers.¹ However, the requirement that a note be put in sales brochures to bring purchasers' attention to the usual term in the ASP 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. It seems unlikely that there will be any further change in the building plans as the properties have already been completed at the time they are offered for sale.

9.4 The Commission previously recommended that there should be a legal obligation on developers upon completion to inform purchasers of the saleable area as certified by an architect.² We consider that developers should be under a similar legal obligation in respect of completed properties, as the saleable area of a completed property is readily ascertainable. We

¹ See paragraph 2.19 of the First Report for the previous recommendations on floor plans.

² The First Report, at paragraph 2.20.

take the view that the saleable area quoted by developers upon completion should be that supplied by the Authorised Person.

Recommendation 14

We recommend that:

- (1) The sales brochure should contain floor plans which:**
 - (a) specify the external dimensions of individual units;**
 - (b) are presented according to conventionally accepted scales;**
 - (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 parking 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

Importance of fittings and finishes

9.5 The quality of fittings and finishes of the individual unit and of the common parts of a building is of considerable importance to purchasers of residential properties. For people buying flats for their own occupation, good quality fittings and finishes will mean a better living environment and less money to be spent on maintenance and renovation. For those buying residential properties for investment purposes, high quality fittings and finishes in general enhance the letting and resale value of the property.

Problems faced by purchasers

9.6 It is not always the case that purchasers of completed properties can see for themselves the quality of fittings and finishes. Prospective purchasers will therefore place great reliance on the descriptions of fittings and finishes contained in the sales brochures. However, sales brochures do not always contain uniform adequate descriptions of fittings and finishes. Most sales brochures give only a general description of the fittings and finishes of the individual units and of the common areas.

Previous recommendations

9.7 In its First Report, the Commission made some recommendations in respect of fittings and finishes for local uncompleted residential properties.³

9.8 These recommendations were largely modelled on the list of fittings and finishes contained in the Land Office Circular Memorandum No 101 (LOCM 101). On 28 May 1999, the Legal Advisory Conveyancing Office Circular Memorandum No 40 (LACO CM 40) replaced LOCM 101. LACO CM 40 contains essentially the same disclosure requirements as had been imposed by the superseded LOCM 101. LACO CM 40 is reproduced at annex I of this paper. LACO CM 40 contains a list of fittings and finishes. The items are external walls, windows, bay windows, planters, verandah/balcony, drying facilities for clothing, lobbies, internal walls and ceilings, floors, bathrooms, kitchens, doors, bedroom fittings, telephone and aerials, electricity fittings, gas/electricity supply, washing machine connection

³ The First Report, at paragraphs 3.14 to 3.17.

point, water supply and pipes, security facilities, lifts, letter boxes, refuse collection and water, electricity and gas meters.

Right of inspection

9.9 We take the view that if prospective purchasers are given the opportunity to inspect the completed units before entering into a purchase contract so that they can verify the make and quality of fittings and finishes on the premises, there is no need to change existing requirements as to the contents of the sales brochure with regard to fittings and finishes, save that those contents should not be misleading.

No right of inspection

9.10 We consider it appropriate to introduce the above recommendations in respect of local completed properties if there is no right of inspection before entering into a purchase contract. In addition, photographs of the fittings should be included in the sales brochure.

9.11 Clearly, the provision allowing developers to use substitute materials is not necessary for completed units since at the time of printing of the sales brochures, the intended materials should have already been used.

9.12 Though developers had reservations about stating brands and origins of fittings and finishes to be used for uncompleted properties because of possible changes in market provision, this should not be a problem in the case of completed properties.

9.13 We take the view that photographs of the fittings and finishes should be shown in the sales brochure. This will give prospective purchasers some impression of the fittings and finishes in the absence of a right to inspect the units offered for sale.

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

9.14 There is also the problem of occasional discrepancies between the descriptions of the fittings and finishes contained in the Chinese and English versions of the sales brochure. The Commission recommended for local uncompleted residential properties 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 of the language versions is applicable."*⁴

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

9.15 In order to avoid the inconvenience of letting a great number of prospective purchasers inspect the completed units, mock-up or sample flats are used to show the quality of fittings and finishes. 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. On this basis, the Commission made the following recommendations in respect of local uncompleted residential properties:⁵

"If mock-up or sample flats are provided, the mock-up should be accurately representative of the actual unit in all aspects including quality and dimensions and the Authorised Person of the development project should certify a schedule of the

⁴ The First Report, at paragraph 3.19.

⁵ The First Report, at paragraph 3.24.

specifications of the mock-up flats. The developer should have a duty to keep a record of the certified schedule."

Certification of the schedule of the specifications

9.16 There have been reservations expressed over the requirement for certification by the Authorised Person (AP) of the schedule of specifications. The view is that it is not the practice for the AP of the development project to certify a schedule of specifications of mock-up flats. The developer specifies the fittings and finishes and the AP must follow the specifications provided by the developer.

9.17 We take the view that even with disclosure in the sales brochure, certification by the AP is necessary. If the property is completed but prospective purchasers are still not allowed to inspect it, they should have the same protection as in the case of uncompleted properties. Once the units are completed it is only necessary to certify that the mock-up units are the same as the actual units.

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

9.18 Purchasers of residential properties usually attach considerable importance to the availability of communal facilities, such as a clubhouse and swimming pool and the present and future surroundings of the development. Location and layout plans in the sales brochure are the major sources of information on communal facilities and surroundings.

9.19 In the First Report, the Commission considered that LOCM 101 (now replaced by LACO CM 40 which imposes the same disclosure requirements) provided a good model for the provision of location and layout plans in sales brochures and recommended the disclosure requirements be

adopted for all uncompleted units.⁶ But unlike LOCM 101, the Commission did not think developers should be required to state the uses of land outside the boundaries of the development.

9.20 LOCM 101⁷ (or LACO CM 40) requires that the sales brochure of a Consent Scheme development should include:

- "(i) a location plan 'including up-dated information on prominent environmental features in the vicinity eg public park, swimming pool, refuse collection point etc, intended user of surrounding areas, if known'; and*
- (ii) a layout plan drawn to scale 'including communal facilities (and their completion dates if possible); undeveloped land and its intended use within the boundary of the development; the scale used.'"*

9.21 We consider that the Commission's previous recommendations should be extended to local completed flats. There have an query as to the need to disclose the intended uses of undeveloped land and its intended uses within the boundary of the development (as required by LACO CM 40). The argument is that it is difficult to show the intended uses since intention can change subsequently. We take the view that there is a case for stating the present intention even if it may change later. In our view, there is a need for developers to disclose the intended and permitted uses of land within the site of the development. At the end of the day, it is important to educate the public on the need to check the land uses carefully before making a decision to buy.

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.**

⁶ The First Report, at paragraphs 4.19 to 4.25.

⁷ See Appendix 1 of Land Office Circular Memorandum No 101, at paragraphs A 2 & 3. The same requirements are contained in paragraphs 2 and 3 of Appendix XII of Land Advisory Conveyancing Office Circular Memorandum No 40 which came into force on 28 May 1999.

- (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 printing of the sales literature.

Misleading artistic impressions

9.22 Sales literature and advertisements sometimes contain misleading artistic impressions. We have considered whether artistic impressions should be prohibited or whether they should be allowed but required to be accurate. It is our view that artistic impressions of the surroundings of the building are necessary for marketing purposes. Hence, we are of the view that artistic impressions in whatever form should be allowed but they should give accurate representation of the surroundings of the property development.

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

9.23 Nowadays, in order to enhance their image as luxury apartments, many developments, including those with only small and medium-sized flats, will include a clubhouse and other communal facilities such as swimming pools, tennis courts and children's playgrounds.

9.24 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. The result is that most purchasers will assume that the developer or its subsidiary will manage the clubhouse and other communal facilities a long time. However, there are cases in which the developer or its subsidiary assumes the management for the initial few years and then hands over the managerial role to the owners themselves. Unless the owners are well organised (such as by forming themselves into an owners' corporation), they may not be prepared to take up the management 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.**

Date of completion

The use of the occupation permit as the definition of building completion

9.25 A completed unit is one with an occupation permit and as such, is only structurally in place but may not be fully fitted out with all the fittings and finishes. An occupation permit can be issued upon the completion of construction of the units and on general compliance with the requirements relating to lifts, fire service installations and connection to water supply.⁸ **We would observe that the existing law in relation to the use of the occupation permit as the definition of buildings completion should be reviewed**, as buildings with an occupation permit (especially those in multi-block developments) may not be ready for immediate occupation.

The relevance of the date of completion to completed properties

9.26 The date of completion can refer to any one of the following dates:

- (1) the construction completion date as stated in the Agreement for Sale and Purchase ("ASP");
- (2) the date of completion of sale and purchase; and
- (3) the date of vacant possession.

9.27 The construction completion date as stated in the ASP obviously has no relevance here as we are dealing with properties for which the occupation permit has been issued. The completion of the construction of the units is a pre-condition for the issue of the occupation permit.

Date of completion of sale and purchase and date of vacant possession

9.28 The date of completion of sale and purchase and the date of vacant possession are of considerable importance to purchasers of completed properties. 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.

9.29 When dealing with completed properties, the date of completion of sale and purchase and the date of vacant possession are known with

⁸ See section 21(6) of Buildings Ordinance (Cap 123) which spells out the circumstances in which an application for an occupation permit will be refused by the Building Authority.

certainty. It is therefore not difficult for developers to put these dates in the sales brochure (or the price list). We understand that this is the existing practice. However, in order to allow some flexibility the dates need not be actual dates in the calendar. They can be a time frame, such as, a certain period of time from the signing of the ASP.

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

9.30 For first-hand completed properties, the date of legal completion is usually within five weeks of the preliminary agreement.

9.31 The industry-wide practice is that the developer and the purchaser would cancel their original agreement. The developer charges an administration fee for the cancellation equivalent to one percent of the consideration. The developer then signs a new agreement with a new purchaser. The original agreement is cancelled. All additional costs so incurred will be borne by the original purchaser or sub-purchaser. 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

9.32 We take the view that the public should be alerted to the inherent risk in a confirmor sale. 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 as "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.

9.33 There is a risk that the sub-purchaser at the end of the chain of sub-sales cannot get good title to the property because of defaults of confirmors further up the chain. We are of the view that in order to minimise the risk involved in sub-sale, all money should be stakeheld by the solicitors.

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

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

Chapter 10

Disclosure requirements for completed units offered for sale by developers (continued)

Introduction

10.1 In this chapter, we continue to look at the various sales particulars that should be provided by developers as well as the way to enforce the relevant recommendations.

Financing arrangements

10.2 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 interest that sales brochures give them sufficient information as to the terms of the mortgage loans that are offered by banks and other financial institutions.

10.3 We have considered the recommendations in the First Report and are of the view that they can be extended to local completed residential properties subject to some modifications.¹

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.**

¹ See the First Report, at paragraphs 7.6 to 7.8 for the previous recommendations.

- (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

10.4 There are invariably provisions in the ASP which give the developer the right to charge interest on any part of the purchase price not paid by the purchaser on its due date as set out in the agreement. The First Report recommended that the rate of interest chargeable in those circumstances should be included in the sale brochure.² We take the view that this recommendation should be extended to local completed residential properties.

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.

Change in market condition and bank lending policy

10.5 For completed properties, completion may not take place immediately after signing of the preliminary agreement. There may still be a time gap between the signing of the preliminary agreement and completion. In a fluctuating market, banks may change their lending policies and refuse to grant mortgage loans to the full extent they originally promised to the developer. Purchasers will as a result fail to obtain the necessary amount of mortgage loan to complete the transaction and their deposits will be forfeited. There is a view that if a developer makes representations in the sales brochure or during the promotion exercise as to the availability of mortgage facilities, the developer should be liable if purchasers cannot subsequently obtain the facilities. We do not share that view, as the developer has no control over any subsequent change in bank lending policies.

² The First Report, at paragraph 7.10.

Cooling-off period

10.6 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 there should be 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 percent of the purchase price or the amount of the preliminary deposit, whichever is the lower.

Preliminary agreement for sale and purchase

10.7 In Hong Kong, the usual procedure for the purchase of a completed unit commences with the developer and the purchaser entering into a preliminary agreement for sale and purchase (or a "Memorandum for Sale" as they are more frequently called) at the site office or the developer's office. The purchaser pays a deposit or reservation fee upon signing the preliminary agreement. A formal ASP will later replace the preliminary agreement if the purchaser decides to go ahead with the deal.

10.8 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 spell out whether or not the preliminary agreement is intended to be binding.

10.9 If the preliminary agreement is not intended to be binding, purchasers can walk out of the deal simply by not signing the formal agreement within the stipulated period (usually within three working days of the preliminary agreement). But there will, invariably, be legal consequences following the purchaser's breach. It is desirable that sales brochures should spell out these legal consequences, such as the amount of preliminary deposits that would be forfeited. The procedures for rescinding the preliminary agreement should also be stated in sales brochures. If the preliminary agreement is to be rescinded by a formal cancellation agreement, there will be legal costs such as the relevant solicitors' charges and Land

Registry registration fees. Purchasers should be informed of these costs in sales brochures.

10.10 We consider that the recommendations in the First Report on this subject can be extended to local completed flats.³ A specimen copy of the preliminary agreement should be displayed at the sales office.

Recommendation 26

We recommend that sales brochures should state that the preliminary agreement or Memorandum for Sale 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

10.11 Purchasers of first-hand completed flats from developers may not be able to inspect the property until completion of the transaction. The question is whether it should be mandatory for developers to allow prospective purchasers to view the completed units before signing the preliminary agreement. In our view, this question can be tied to the cooling-off period. Where a purchaser has a right of inspection before signing the preliminary agreement and he elects to cancel the transaction during the cooling-off period, the preliminary deposits should be liable to forfeiture as mentioned above. If, however, a purchaser does not have the right to inspect the unit before signing the preliminary agreement, the preliminary deposits should not be liable to forfeiture in the event of cancellation of the transaction during the cooling-off period. Such arrangements have the advantage of encouraging developers to allow purchasers to view the units before purchasers commit themselves to a binding preliminary agreement. For the avoidance of doubt, a purchaser who elects not to view the unit when offered the opportunity to do so by the developer should be treated as if he has viewed the unit.

³ The First Report, at paragraphs 8.5, 8.6 and 8.13.

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

10.12 There are two Defect Liability Periods, namely, (i) that between the developer and the purchaser, and (ii) that between the developer and his contractor. Our concern is with the first of these periods. 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.

10.13 The current Defect Liability Period between the developer and purchaser is in most cases six to 12 months from the date of completion of the sale and purchase.⁴ Developers usually require the purchaser to report, within 12 months of handing over possession, any defects not ascertainable when the units are handed over. Any such requirement, if stated in the ASP, can only limit the developer's contractual duty to remedy defects but does not affect the developer's separate liability in negligence to make good the defects. **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 starts to run from the date of the Assignment.**

10.14 As the duration of the Defect Liability Period is of great importance to purchasers, we consider that sales brochures of local completed residential properties should state the Defect Liability Period.

Recommendation 28

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

⁴ In the Housing Authority's Private Sector Participation Scheme, the Defect Liability Period is 12 months from the date of the Assignment. Starting from Phase 17A in 1995, the Defect Liability Period of Home Ownership Scheme units has changed to 12 months from the date of the completion certificate.

10.15 There is a view that in order to provide better protection for purchasers, the current Defect Liability Period of 12 months should be lengthened to, say, 24 months as in the case of the Home Ownership Scheme. We see no compelling reason to lengthen the current Defect Liability Period of 12 months. Most defects in the property will be detectable during the early months of occupation. A common defect is blockage of pipes caused by decorators dumping rubbish into the pipes. Such blockage is readily detectable. Another common defect is water leakage, but this will normally be detectable during the first complete annual cycle of seasons.

Warranties made to the developer by the contractor

10.16 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. To address this problem, we consider that recommendations should be made along the lines of some observations made in the First Report.⁵

Recommendation 29

We recommend that if the developer is wound up, the benefits of any warranties made to the developer by 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.

10.17 We have considered the likelihood of requiring developers to provide bank bonds to cover defects. The bank bond might be, say, one percent of the construction costs. The disadvantage of a bank bond is that it would discourage small developers. Large developers are more willing to provide some sort of bond in any event. On the other hand, a bond is fair and works well for projects in the Housing Authority's Private Sector Participation Scheme. **We consider that the subject of bank bonds is worth exploring further and would like to hear public comments on this issue.**

⁵ The First Report, at paragraphs 17.5 and 17.7.

Deed of Mutual Covenant

Purposes of a DMC

10.18 To prospective purchasers of local completed residential properties, the Deed of Mutual Covenant (DMC) is an important document. A DMC serves three main purposes. First, it has a technical purpose: the allocation of shares in land. In Hong Kong, when a person buys a unit he buys the notional shares, (called undivided shares) of the land. The DMC allocates units to the undivided shares. The method of allocation can usually be found at the end of the DMC. Whilst a purchaser buys the undivided shares allocated to his unit, he also buys the exclusive use of his unit together with an equal share of the use of the common parts.

10.19 The second purpose of a DMC is the definition and regulation of rights between owners. The local laws and rules of the development are achieved mainly through covenants binding all owners among themselves and their successors. The covenants in relation to the common areas and facilities are of particular importance.

10.20 The third purpose of a DMC is the provision for management of the development. Usually, the management rules are in the DMC, rather than a separate management agreement.

Parties to a DMC

10.21 The parties to a DMC are normally the developer/vendor, the first purchaser of a unit and the management company. As there is typically no separate legal representation for the first purchaser, there is no negotiation on the terms of the DMC.

Contents of the DMC

10.22 The primary responsibility for settling the contents of the DMC is with the developer's solicitors. DMCs are similar in terms because of Government's input and control. The Government, as grantor of land, imposes certain conditions to protect purchasers of units. The LACO, for example, lays down certain terms for DMCs relating to properties under the Consent Scheme. Also, the Building Management Ordinance (Cap 344) contains in two of its schedules certain implied terms for DMCs. Most of these implied terms concern management budgets, appointment and removal of the manager and meetings of owners.

DMC guidelines

10.23 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 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

10.24 The term "salient provisions" means what an owner needs to know about the DMC. The First Report recommended that certain specified provisions in the DMC should be disclosed in the sales brochures of local uncompleted flats.⁶ These were regarded as the salient provisions.

10.25 What provisions of the DMC are salient is, however, a movable idea. For example, modern technology has brought split-type air-conditioners which are installed on the external wall. That may be in breach of the DMC, but was never anticipated when the original DMC was drafted. Also, there is such a variety of developments that it is difficult to cover all aspects of different types of DMC.

10.26 We take the view that certain categories of provisions should be included in the list. In the first place, clauses in the DMC imposing financial obligations are generally of importance, as are those clauses touching upon everyday usage of the property, such as use of common areas, recreational facilities, illegal alterations and structures, prohibition on keeping of pets and carparking.

10.27 Whilst we agree that the salient provisions should be disclosed in the sales brochures, we do not want to define what the salient provisions are. We prefer to leave it to the Administration to draw up the a detailed list of the salient provisions of the DMC **but believe that the salient provisions in the Consent Scheme should be used as a reference point.**

⁶ (1) The definition of common parts; (2) the number of undivided shares allocated to each unit and the method of apportionment of management charges; (3) the fact that the number of undivided shares is subject to change; (4) the sum payable by the owners as deposit for the first year budgeted management expenses (to be expressed in terms of a specific number of months of management fee if the exact amount has not yet been worked out); (5) any restrictions imposed on owners in the use of the common parts; (6) interest and charges on owners who default in paying sums due under the DMC; and (7) the name of the first manager (if already decided) and the minimum period of its management. See paragraph 10.13 of First Report.

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

10.28 The First Report recommended that sales brochures should state that English and Chinese versions of the DMC are available at the sales office or solicitor's office for inspection.⁷ That recommendation would oblige the developer to arrange for Chinese translation of the DMC. We take the view that it is desirable to have a Chinese version of the DMC.

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.

Private slope maintenance

10.29 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. The DMC often sets out the individual owners' liability for potential expenses of slope maintenance. The consent letter issued by the LACO will build such a provision into the DMC (called a Slope Maintenance clause) to ensure that money can be collected in future from owners to undertake the repairs or maintenance.

10.30 The cost of maintaining and repairing private slopes can be great and the burden on individual owners heavy. As heavy rains are common every summer, private slopes are liable to erosion and damage. It is important that purchasers know of that potential liability for private slope maintenance.

⁷ The First Report, at paragraph 10.15.

Recommendation 32

We recommend that if there is actual or potential responsibility for maintaining private slopes, 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 private slopes at the date of its printing. Moreover, if there is responsibility in the Government Lease for maintaining private slopes, that responsibility should be spelt out in the sales brochure.

Duty to maintain terms of DMC unchanged

10.31 We take the view that if an uncompleted development has a DMC, developers should have an obligation to keep its terms unchanged when it later becomes completed with the issue of the occupation permit. The contents of the DMC should not change because it defines the rights and obligations of the owners in the same development. Whether or not there is an occupation permit should not have any bearing on those rights and obligations.

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

10.32 There are three main areas of concern in relation to the conditions of the Government lease, namely, (i) user restrictions; (ii) duration, and (iii) special lease conditions. User restrictions are the most important conditions of the Government lease.

User restrictions

10.33 Government leases and Conditions of Grant contain provisions which restrict the land to certain uses, the common ones being "commercial/residential", "non-industrial" and "industrial/godown". Compliance with the user restrictions is important as the Government may re-enter and take back possession of the land if a condition governing the

land use is breached. Moreover, if the land is put to more valuable use than that specified, a premium has to be paid to the Government. If, for example, an industrial use is converted to residential, a premium equal to the difference between the market value of the two uses will be payable.

Duration of the Government lease

10.34 The duration of the Government lease and the unexpired term of the lease are of interest to purchasers because renewal of a Government lease requires a substantial increase in the annual rent payable to the Government. The amount of Government rent in some cases could be three per cent of the rateable value of the property⁸ and that can be a substantial sum. It is the responsibility of the individual owners to pay their share of Government rent of the lot where the building is situated.

10.35 Apart from the potential liability for Government rent, the duration of the Government lease and its unexpired term are of interest to purchasers because it may affect banks' mortgage policies for the development.

Special lease conditions

10.36 There are various special lease conditions which impose on a flat-buyer continuing financial obligations, including:

- (1) The construction and maintenance of pedestrian subways and footbridges;
- (2) The construction and maintenance of escalators, stairways and lifts for the disabled;
- (3) The maintenance of slopes, toe-walls and retaining walls;
- (4) The maintenance of private open spaces and toilets; and
- (5) The maintenance of internal roads.

⁸ Non-renewable Government Leases which expire before 30 June 1997 are automatically extended up to 30 June 2046 without payment of additional premium but a new Government rent is payable (see Annex III of the Sino-British Joint Declaration on the Future of Hong Kong). All Government Leases whether in Hong Kong Island, Kowloon or the New Territories which have been granted since 27 May 1985 are also subject to this new Government rent from 1 July 1997 (see paragraph 1 of explanatory notes to Preliminary Advices on Government Rent issued by the Rating and Valuation Department to individual owners in April 1997.) The result is that many new developments are subject to the new Government rent, as they are built on lots of land granted after 27 May 1985. The new Government rent is at three percent of the rateable value of the property and so can be a substantial sum. This being the case, the Rating and Valuation Department has since 1 July 1997 issued demands for Government rent to the individual owners who are so liable.

10.37 The First Report made certain recommendations in relation to the conditions of the Government Lease.⁹ 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.

Translation of extracts of Government lease into Chinese

10.38 Whilst we consider it desirable that the Government lease should be translated into Chinese, we are aware that there are few available resources for the translation work and problems can arise as to who should be responsible for the costs of translation. Bearing in mind these practical difficulties, **we consider that it is 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

10.39 Some property owners have complained that some solicitors when acting for a purchaser do not check whether Government rent is paid up to date before completing a sale and purchase.¹⁰ As the new Government

⁹ The First Report, at paragraphs 11.12 to 11.13.

¹⁰ See Legal Advisory and Conveyancing Office Circular Memorandum No 22 dated 30 September 1996.

rent may involve greater sums of money, it is important that property owners are not exposed to additional charges which should have been the responsibility of previous owners. There is the possibility of re-entry by Government in the event of non-payment of Government rent, even if the amount is small. **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

10.40 The First Report made several recommendations to ensure prospective purchasers of uncompleted properties get an accurate impression of the prices of the units offered for sale and their number.¹¹ Those recommendations were made on the basis that prospective purchasers had to go through the process of balloting in all public sales. Nowadays, balloting is seldom used in the sale of completed units in view of prevalent market conditions. Depending upon market conditions, discounts from the prices quoted in the price lists are sometimes offered. When estate agents are employed by the developer to negotiate with prospective purchasers, price lists sometimes are not released to the public. In such situations, purchasers are not aware of the true prices being offered by the developer.

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

10.41 The First Report made a number of miscellaneous recommendations relating to local uncompleted flats.¹² These include the names of the contractors and Authorised Persons, responsibility for transaction fees, the date of printing of the sales brochure, supplementary charges payable by purchasers on taking possession, licence fee to Government, charges for right of way, car park spaces. We consider similar recommendations should be made in respect of local completed units. In addition, we take the view that the name of the firm of the Authorised Person should be stated. Prospective purchasers may show more interest in the name of the firm than the identity of the individual Authorised Person.

¹¹ First Report, at paragraphs 12.6, 12.15 and 12.16.

¹² First Report, at paragraphs 13.7, 13.13, 13.14, 13.18, 13.22, 13.24, 13.29.

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 right 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/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, for 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

10.42 The First Report recommended that the proposals on local uncompleted flats should be enforced by new legislation.¹³ We consider that this approach should also be used for local completed flats sold in the first-hand market.

Recommendation 39

We recommend that our recommendations on local completed residential properties sold in the first-hand market should be enforced by legislation.

We recommend that the proposed legislation should have the following features:

- (1) Fines should be sufficiently high to be an adequate deterrent;**
- (2) Civil remedies should be available to enable purchasers to claim damages 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 but not to potential purchasers.**

¹³ First Report, at paragraph 15.27.

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 11

Summary of recommendations on completed units offered for sale by developers

This chapter gives a summary of recommendations made for completed units sold in the first-hand market.

11.1 Sales brochures must be available from the time the completed properties are offered for sale. All information in sales brochures must be accurate at the time the completed properties are offered for sale. (Recommendation 6)

11.2 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 7)

11.3 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 8)

11.4 The definition of a developer should include someone buying in bulk from the developer at the first sale of completed residential properties involving strata title. (Recommendation 9)

11.5 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. Information given in the advertisement must be consistent with that given in the sales brochure. (Recommendation 10)

11.6 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 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 carparking space, the area of that carparking space measured from the interior of its demarcating lines or enclosing walls, as the case may be;
- (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 their boundary lines. Where the boundary consists of a wall, it shall be measured from the interior of that wall. (Recommendation 11)

11.7 Where the property includes any incorporated item in the definition (such as a cockloft, bay window, carparking space, yards, terrace, garden, flat roof or roof), the saleable area of each of them should be specified and described separately in the sales literature. (Recommendation 11)

11.8 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 (which shall include 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 such 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)

- 11.9 (1) The above mentioned definitions of saleable area should be recognised in legislation as the standard method to describe saleable area in all sales literature in respect of local completed residential properties;
- (2) the inclusion of saleable areas in sales literature should be made mandatory by legislation;
 - (3) any areas exempted from the calculation of gross floor area should be excluded from the calculation of saleable areas of the individual units. (Recommendation 13)

- 11.10 (1) The sales brochure should contain floor plans which:
- (a) specify the external dimensions of individual units;
 - (b) are presented according to conventionally accepted scales;
 - (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 parking 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). (Recommendation 14)

11.11 *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. (Recommendation 15)

11.12 The sales brochure should also state the brands and countries of origin of the fittings and finishes to be used. (Recommendation 15)

11.13 In addition, photographs of the fittings and finishes should be shown on the sales brochure. (Recommendation 15)

11.14 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. (Recommendation 16)

11.15 *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. (Recommendation 17)

Location plan

11.16 (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. (Recommendation 18)

Layout plans

11.17 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. (Recommendation 18)

Uses of land

11.18 (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 printing of the sales literature. (Recommendation 18)

11.19 Artistic impressions in whatever form should give accurate representations of the surroundings of the property development. (Recommendation 19)

11.20 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. (Recommendation 20)

11.21 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. (Recommendation 21)

11.22 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. (Recommendation 21)

11.23 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. (Recommendation 22)

- 11.24 (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. (Recommendation 23)

11.25 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. (Recommendation 24)

11.26 There should be 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 percent of the purchase price or the amount of the preliminary deposit, whichever is the lower. (Recommendation 25)

11.27 Sales brochures should state that the preliminary agreement or Memorandum for Sale 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. (Recommendation 26)

11.28 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. (Recommendation 27)

11.29 Sales literature should state the duration of the Defect Liability Period and when it will start to run. (Recommendation 28)

11.30 If the developer is wound up, the benefits of any warranties made to the developer by contractors should be passed on to the Owners' Corporation or the Manager of the development. (Recommendation 29)

11.31 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. (Recommendation 29)

11.32 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. (Recommendation 30)

11.33 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. (Recommendation 31)

11.34 If there is actual or potential responsibility for maintaining private slopes, 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 private slopes at the date of its printing. Moreover, if there is responsibility in the Government Lease for maintaining private slopes, that responsibility should be spelt out in the sales brochure. (Recommendation 32)

11.35 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. (Recommendation 33)

11.36 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. (Recommendation 34)

11.37 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. (Recommendation 34)

11.38 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. (Recommendation 35)

Name of main contractors, Authorised Person and his firm

11.39 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 36)

Responsibility for transaction fee

11.40 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. (Recommendation 37)

Scales of legal costs and stamp duties

11.41 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. (Recommendation 37)

Date of printing of sales brochure

11.42 The sales brochure should carry its date of printing. (Recommendation 37)

Supplementary charges upon taking possession

11.43 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. (Recommendation 37)

Licence fee to Government and charges for right of way

11.44 Where applicable, the sales brochure should state any way leave charges, licence fees or waiver fees payable to Government for water supply/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 37)

Car park spaces

11.45 The sales brochure should contain a description of the car park spaces within the development, including their respective numbers for sale, for 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. (Recommendation 38)

11.46 Our recommendations on local completed residential properties sold in the first-hand market should be enforced by legislation. (Recommendation 39)

11.47 The proposed legislation should have the following features:

- (1) Fines should be sufficiently high to be an adequate deterrent;
- (2) Civil remedies should be available to enable purchasers to claim damages 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 but not to potential purchasers.
(Recommendation 39)

11.48 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. (Recommendation 39)

Chapter 12

The importance of public education

12.1 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 40

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.**

Glossary of terms

Assignment

The legal document by which the vendor of a flat passes ownership of the flat to the purchaser. By taking the assignment, the purchaser will become the new owner of the flat.

Agreement for sale and purchase (ASP)

The legal document by which the vendor of a flat agrees to sell the flat to the purchaser for a stated price. It also spells out in detail the rights and obligations of the parties up to the date of its completion when it will be replaced by the Assignment. It is usually preceded by a preliminary agreement which sets out the salient points of the ASP. The ASP is sometimes called a "formal" agreement when compared with the preliminary agreement.

Authorised Person

The architect, engineer, surveyor or other professional person in charge of a development project. The Building Authority keeps a register of all persons who are qualified to be Authorised Persons pursuant to section 3 of the Buildings Ordinance (Cap 123).

Certificate of compliance

A certificate to the effect that certain conditions in the Government Lease or Conditions of Grant have been complied with.

Completion

It can mean both "Legal Completion" and "Construction Completion". See below for the meanings of these two terms.

Completion Certificate

A Completion Certificate is issued in place of an Occupation Permit for flats in the Housing Authority's Home Ownership Scheme.

Consent Scheme

The Consent Scheme applies to the development of lots where the Government Leases stipulate that the prior consent of the Director of Lands must be obtained before the sale or other disposal of uncompleted units to a

purchaser can be made. It also covers situations where an Exclusion Order made under the Landlord and Tenant (Consolidation) Ordinance (Cap 7) contains clauses prohibiting the owners from entering into agreements for the sale of uncompleted units without the Director of Lands' prior consent.

The Consent Scheme previously administered by the Registrar General (Land Officer) is now the responsibility of the Legal Advisory and Conveyancing Office of the Lands Department following the dissolution of the Registrar General's Department and the transfer of its various functions to other Government officers. The rules for granting consent are set out in Legal Advisory and Conveyancing Office Circular Memoranda issued from time to time by the Director of Lands (or Land Office Circular Memoranda previously issued by the Registrar General). The conditions for granting consent can therefore be varied to meet changing needs to protect purchasers of uncompleted units.

Consent to Assign

The Government will issue a Consent to Assign to a developer who wishes to sell units with an Occupation Permit but not a Certificate of Compliance.

Construction Completion

The completion of the construction of the flats in a development.

Confirmor

If an uncompleted flat is re-sold to sub-purchasers before the legal completion of the original sale, all sub-vendors will sign in the capacity as "confirmors" in the Assignment. The legal interests in the flat will pass from the developer direct to the sub-purchaser at the end of the chain.

Developer

An individual or company engaged in property development. For the purposes of this consultation document, a developer includes someone buying from the developer at the first sale of completed residential properties involving strata title.

Deed of Mutual Covenant

The legal document which contains the agreement among the individual flat-owners relating to the use, maintenance, repair, insurance, payment of outgoings, management etc of a building divided into flats.

Defect Liability Period

The period during which developers will make good any patent defects in the property and its installation. In the Consent Scheme, it usually lasts 6 months from the completion of sale and purchase, namely execution of the Assignment.

Exempted Houses

Houses which are exempted under the Buildings Ordinance (Application to the New Territories) Ordinance (Cap 121). Under section 5 of Cap 121, exemption from the application of the Buildings Ordinance is granted in respect of building works in the New Territories for the erection of a building for non-industrial purposes, community use, or agricultural purposes, or for the replacement of a temporary structure.

Flats

See "Units".

Government Lease

Also known as "Land Lease" or "Crown Lease". This is the legal document by which the Government grants the use of land to others for a stated period in return for payment of a premium and/or land rent.

Legal Completion

The final stage of the conveyancing process at which the Assignment is executed by the parties, all the purchase moneys are paid, and the purchaser obtains the legal ownership and usually vacant possession of the property.

Memorandum for Sale

See "Preliminary Agreement".

Mortgage

To borrow money (usually from a bank) on the security of landed property. It takes the form of an "equitable mortgage" if the security is an uncompleted unit. Where the security is a completed unit, it will take the form of a "legal charge".

Non-Consent Scheme

The Non-Consent Scheme refers to property developments where there are no lease conditions stipulating that prior consent of the Director of Lands is required for the sale of uncompleted units. In these cases, if the same solicitor acts for both the vendor and purchasers, the solicitor is required to comply with Rule 5C of the Solicitors (Practice) Rules and other Practice Directions issued by the Law Society of Hong Kong and to use a standard form of Agreement for Sale and Purchase ("ASP") which closely follows that used in the Consent Scheme.

Occupation Permit

The permit issued by the Building Authority under section 21 of the Buildings Ordinance (Cap 123) allowing the occupation of a newly-erected building.

Preliminary Agreement

This is also called "Provisional Agreement" or "Memorandum for Sale". It is usually the first agreement entered into between parties to a property transaction. Its main purpose is to spell out the salient points of the transaction in a preliminary way. It will be replaced by a formal Agreement for Sale and Purchase to be executed subsequently.

Provisional Agreement

See "Preliminary Agreement".

Purchaser

In this consultation paper, "purchaser" means any buyer of a completed unit.

Rescind

To cancel a contract.

Rescission

The act of cancelling a contract.

Sales Brochure

Any publicity material issued by developers giving sales information about flats to be put up for sale. It usually takes the form of sales brochures and price lists.

Units

This is used interchangeably with "flats" in this consultation paper. In a multi-storey building, the building is divided into a number of units, each of which under the Deed of Mutual Covenant, owns a specified number of the "undivided" shares of the land on which the development stands.

Uncompleted Units

Units for which the Occupation Permit has yet to be issued by the Building Authority.

LACO/HQ/127 III

28 May 1999

Legal Advisory Conveyancing Office
Circular Memorandum No. 40

**Lands Department Consent Scheme for
Sale of Units in Uncompleted Private Residential Developments
(Excluding Private Sector Participation Scheme,
Sandwich Class Housing Scheme and Flat for Sale Scheme)**

The Lands Department Consent Scheme was introduced by the Government in 1961. The current purposes of the Consent Scheme are:

- (i) to allow for the entry into agreements for sale and purchase of flats in uncompleted developments, ensuring that arrangements are in place for the completion of the construction of those flats;
- (ii) to provide for fair practice in the sale and purchase of uncompleted units in developments; and
- (iii) to give effect to Government policy in promoting a healthy property market.

2. Under the Scheme, if the Government Grant so requires, the developer must apply to the Director of Lands ("the Director") for his consent if he wants to sell the units in an uncompleted development before a Certificate of Compliance is issued. In order to obtain the Director's consent, the developer, through a solicitor who submits the application on his behalf, must satisfy all the requirements imposed by the Director (previously the Registrar General (Land Officer)). These requirements have been set out in a number of Land Office Circular Memoranda and Legal Advisory and Conveyancing Office Circular Memoranda.

3. As the social and economic environment has changed over time, and in response to changes in Government policies and recommendations made by community organizations (such as the Law Society, Real Estate Developers' Association and the Consumer Council), such requirements have from time to time been revised. Circular Memoranda were revised or cancelled and new ones were issued. Solicitors for the developers have to refer to different Circular Memoranda for the up-to-date instructions and may find it confusing as to which instructions still prevail today. This has occasionally led to them experiencing difficulties resulting in delay in their complying with the procedures in order to obtain the Director's consent. To improve efficiency, it has been decided to issue a single Circular Memorandum to cover all the current instructions still in force so that the legal profession and their developer clients will have a handy reference for the current rules of the Scheme.

4 The purpose of this Circular Memorandum is to consolidate all the prevailing rules and instructions currently governing the Lands Department Consent Scheme in relation to the sale of units in uncompleted private residential developments (excluding the Private Sector Participation Scheme (“PSPS”), Sandwich Class Housing Scheme and Flat for Sale Scheme). Where appropriate, the wording of Circular Memoranda replaced by this Circular Memorandum has been amended to assist in an easier understanding of the current prevailing rules and instructions. The current rules and instructions are contained in the Annex to this Memorandum. Separate consolidated Circular Memoranda will be issued in due course for sales of units in subsidized housing and commercial developments and for approval of Deeds of Mutual Covenant.

5 Inevitably, the rules and instructions cannot be exhaustive. I wish to emphasize that the Director may in individual cases impose such other or varied conditions as he may deem appropriate depending on the exact nature and circumstances of the many and, sometimes, complex developments involved, while at the same time bearing in mind the objectives of the Scheme. However, this Circular forms the essential framework on which consents will be issued.

6 The rules contained in this Circular Memorandum will, as has been done in the past, be reviewed from time to time. Consolidating Circular Memoranda will then be issued and the relevant files on Lands Department website www.info.gov.hk/landsd/ will be updated. Every effort will be made, as with this Memorandum, to issue these Memoranda in a user-friendly format.

7 The Land Office Circular Memoranda and Legal Advisory and Conveyancing Office Circular Memoranda for the Lands Department Consent Scheme specified below in so far as they relate to sale of units in uncompleted private residential developments (excluding PSPS, Sandwich Class Housing Scheme and Flat for Sale Scheme) are hereby replaced by this Memorandum :-

LOCM 7	LACO CM 1	LACO CM 20
LOCM 16	LACO CM 1B	LACO CM 24
LOCM 17	LACO CM 2	LACO CM 25
LOCM 19	LACO CM 3	LACO CM 26
LOCM 21	LACO CM 7	LACO CM 26A
LOCM 23	LACO CM 7A	LACO CM 27
LOCM 26	LACO CM 7B	LACO CM 29
LOCM 35	LACO CM 7C	LACO CM 30
LOCM 45	LACO CM 8	LACO CM 30A
LOCM 48	LACO CM 10	LACO CM 30B
LOCM 55	LACO CM 14	LACO CM 31
LOCM 57	LACO CM 15	LACO CM 35
LOCM 63	LACO CM 16	LACO CM 36
LOCM 66	LACO CM 17	LACO CM 38
LOCM 79	LACO CM 19	LACO CM 39
LOCM 83		
LOCM 84		
LOCM 88		
LOCM 97		
LOCM 100		
LOCM 101		

8. Copies of this Circular Memorandum with its Annex and Appendices may be downloaded from the Lands Department website as quoted in paragraph 6 above.

(A. L. Robertson)
Deputy Director (Legal)
for Director of Lands

To: All Solicitors

Appendix XII

Information To Be Incorporated In A Sales Brochure

1. **Introduction**

General description of development; the identity of the intended manager, if known.

2. **Location Plan**

Including up-dated information on prominent environmental features in the vicinity, e.g. public park, swimming pool, refuse collection point etc.; intended user of surrounding areas, if known.

3. **Layout Plan Drawn to Scale**

Including communal facilities (and their completion dates if possible); undeveloped land and its intended use within the boundary of the development; the scale used.

4. **Salient Points of Government Lease**

Including lot number; lease term; user restrictions on the lot; onerous lease conditions (if any) which would restrict purchasers' usual legal rights.

5. **Detailed Plan of a Typical Floor**

Showing all principal external dimensions of the unit; external dimensions of individual compartments in each unit; the scale used, a note informing prospective purchasers (i) the internal areas of units on upper floors will generally be slightly larger than lower floors due to the reducing thickness of structural walls on upper floors (ii) if there are special fittings/features affecting the enjoyment of the owner of a unit (e.g. exposed pipes) (the location of such special fittings/features should be specified).

In case there is any non-typical floor, a separate floor plan should be shown.

6. **Schedule of Flat Size**

Indicating size of each unit in standard saleable area (Appendix A), areas of bay windows, roofs, flat roofs and open yards (if any) should be specified separately.

7. **Fittings and Finishes**

Refer to Appendix B.

8. **Anticipated Completion Date of the Building**

9. Salient Points of DMC

Including definition of common areas; terms of appointment of Manager; principle/basis of fixing management fee; management fee deposit; a note informing prospective purchasers that a full script of the DMC is available upon request.

10. Carpark

Specify the location, number and the minimum dimensions of the carparks.

11. Miscellaneous Payments upon Delivery of Unit

Including debris removal deposit, reimbursement to vendor for water/electricity/gas deposit (inform purchasers of the obligation to pay such fees even though the exact amount is unknown)

12. Date of Printing of Sales Brochure

13. Names of Contractors and other Authorized Persons

14. Maintenance of Slopes

If the Government Grant requires the owners to maintain at their expense any slopes within and/or outside the lot, a note informing prospective purchasers of such requirement and that under the Deed of Mutual Covenant the Manager is to be given full authority by all the owners to carry out the necessary slope maintenance works in accordance with all guidelines issued from time to time by the appropriate government department and each owner will be obliged to make contributions towards the costs of such works. A plan showing the slopes and any retaining walls or other related structures already constructed or to be constructed within and/or outside the lot should be included in the sales brochure.

15. Cashier Order

The sales brochure should contain a prominent statement that the cashier orders tendered by applicants at the time of registration will be encashed and the proceeds thereof held or refunded by the stakeholders without interest.

16. Cancellation Agreement

The sales brochure should contain a prominent statement that in the event of the vendor, at the request of the purchaser, agreeing (at his own discretion) to cancel the sale and purchase or the obligations of the purchaser thereunder, the vendor will retain the sum of 5% of the total purchase price of the unit (and any parking space) in addition to payment by the purchaser of all legal costs, charges or disbursements (including stamp duty, if any) incurred by the vendor in connection with the cancellation of the sale and purchase.

A Recommended List Of
Fittings And Finishes In A Development

EXTERIOR

External Walls

The type of external finishes

Windows

The material of the frames and glass

Bay Windows

The material and windowsill finishes of the bay windows

Planter

The type of finishes of the planters

Verandah/Balcony

The type of finishes and whether the verandah/balcony is covered or not

Drying Facilities for Clothing

The type and material of the drying facilities for clothing

INTERIOR FINISHES

Lobbies

The type of wall, floor and ceiling finishes in the lobbies

Internal Walls and Ceilings

The type of bedroom and living/dining room wall and ceiling finishes

Floors

The material of the floor and skirting of the bedrooms and the living/dining rooms

Bathroom

The type of wall, floor, and ceiling finishes and whether the wall finishes run up to the ceiling

Kitchen

The type of wall, floor, ceiling, and cooking bench finishes and whether the wall finishes run up to the ceiling

INTERIOR FITTINGS

Doors

The material, finishes and accessories of the doors (especially the entrance door to each individual unit)

Bathroom

The type and material of the fittings and equipment in the bathroom; the water supply system; bathing facilities i.e. shower or bath tub and size of bath tub if applicable

Kitchen

The material of the sink unit; the water supply system; the material and finishes of the kitchen cabinets; the type of all other fittings and equipment in the kitchen

Bedroom

The type and material of all the fittings (such as wardrobes) in the bedroom

Telephone and Aerials

The locations and number of such utilities

Electricity

Details of the fittings including safety devices, concealed or exposed conduits, the location and number of power points, sockets, air-conditioner points etc.

Gas/Electricity Supply

The type, system and location of the gas/electricity supply

Washing Machine Connection Point

The location and design of the washing machine connection point

Water Supply & Pipes

The material of the water pipes, whether they are concealed or exposed and whether hot water is available etc.

SECURITY FACILITIES

A description of security services including details of all built-in provisions and their locations

MISCELLANEOUS

Lifts

The country of origin/brand name of the lifts and whether the lifts serve all floors

Letter Box

The letter box material

Refuse Collection

The means of refuse collection, location of refuse room etc.

Water/Electricity/Gas Meters

The location of the meters and whether there are separate or communal meters of individual apartments

N.B.

- (1) If the country of origin/brand name is mentioned, the developer should undertake that materials of comparable quality will be used if the intended source becomes unavailable.
- (2) Mock-up units of accurate size and structural layout should be set up wherever possible.

Appendix XIII

Information To Be Incorporated In A Price List

1. Price of individual units
2. Purchase procedure
3. Payment terms
4. Responsibility for legal fees
5. Administration charges for execution of any documents
6. Instalment payment methods and interest rates in case of restricted choice of mortgage
7. Number of units available for sale

Appendix XIV

Information To Be Disclosed Upon Request

1. Charges for conveyancing and mortgage, stamp duties
2. A complete set of up-dated layout plans (if any) and building plans as approved by the Building Authority under the Buildings Ordinance
3. Full script of the form of DMC as approved by LACO

LEGAL INFORMATION FORM

relating to: ... *[property]*

Using this form:

- 1 This form is part of the TransAction 2000 protocol published by the Law society of England and Wales. It may be reproduced by any means by a solicitor or a licensed conveyancer.
- 2 The form should be completed in plain, non-technical language.
- 3 The information given on the form should wherever possible be complete, and should not refer to any other document.
- 4 If not selling a flat, use the TransAction 2000 form for houses, not this form.

These are the details of the terms on which you may make an offer to buy the flat identified above.

The seller's solicitors, who prepared this form, are:
... *[contact details]*

Please note:

- this is only a summary of the main terms. A brief document cannot explain everything which is relevant: you should take legal advice.
- unless expressly mentioned, the information does *not* extend to any neighbouring property.
- much of the information comes from details supplied by the seller, statutory authorities and utility companies. They are responsible for the accuracy of it. Circumstances may have changed since the information was supplied.
- you should not sign a contract which commits you to buy without consulting your solicitor or licensed conveyancer.
- the seller's lawyer cannot normally also act on your behalf.
- you should inspect the property before making an offer to buy it.
- these details do not give you information about the state of repair and physical condition of the property; for that, you should inspect the property and consult a surveyor.
- before offering to buy the flat, you should make sure that any borrowing you will need will be readily available, subject to satisfactory valuation.

THE PROPERTY

Type of ownership

1 The flat is sold leasehold.

Rights of way

2 *No/the following* arrangements apply concerning rights of way
...

Services

3 *No/the following* arrangements apply concerning water, drainage, *gas* and electricity services ...

For both rights of way and services, give details of (a) rights enjoyed and rights to which the flat is subject and (b) financial responsibilities

Furniture and fittings

4 The sale includes the furniture and fittings listed on the attached list. The seller may agree to include other items or to sell them separately.

Attach list of fixtures, fittings and contents

LEASE TERMS

Details of lease

5 The lease contains a detailed code of obligations for the ownership of the flat. The main details are given here, but there are other detailed requirements on which you should seek legal advice.

Length of lease

6 The lease runs until

EXPENSES

Rent

7 A rent of £ ... a year is payable to the landlord, by quarterly instalments. *The amount of rent increases to £ ... a year in*

Other payments

8 In addition, you must pay:

- first, your proportion of the insurance premium covering the whole building,
- secondly, a service charge which is a proportion of the cost of management, cleaning, decorating and repairing costs, which relate to the common parts used by the occupiers of more than one flat and the structure of the building.

Insurance

9 The last annual charge for insurance was £

Service charge

10 For the last three years, the service charges were £ ..., £ ... and £ The seller does not know of any plans for major future expenditure *other than The landlord/management company holds a reserve fund for major expenses, for which there is a contribution.*

REPAIRS ETC

Outside repairs and decorations, and cost

11

Give details of internal and external repairing and decorating obligations

Inside repairs and decorations

12

Rights of entry for repair

13 You have a right to enter other parts of the building for the purpose of repairing the flat, and you must allow others to enter the flat to repair other parts of the building.

Restrictions on use

14 *No/the following* existing restrictions apply *The seller requires the following new restrictions* ...

Relevant lease terms and restrictive covenants affecting the reversion

MANAGEMENT

Company membership

15 The *landlord/management* company comprises the leaseholders of all the flats. You will become a member when you become owner of the flat, and must relinquish membership when you part with the flat. The company has limited liability, which means that you are not liable to contribute *anything/more than a nominal sum* towards its debts, although you may also have liabilities under the lease.

Running the company

16 Like any other company, it is run by a board of directors elected by the members. It must prepare accounts and hold meetings as appropriate. The regulations for running the company are its 'memorandum and articles'. The seller's solicitors hold a copy.

PLANNING

Planning consent

17 The documents do not show any dispute relating to planning consent. Approved plans are normally only available at the local planning office.

Amend if necessary to explain planning queries

Authorised use

18 The authorised use of the property is as *a single private dwelling*, without special restrictions.

Amend as appropriate to explain conditions, eg occupation by the elderly

GENERAL

Disputes

19 The seller knows of no disputes about this or neighbouring property *other than* ...

Notices

20 The seller has neither sent nor received any letters or notices affecting the property or neighbouring property *other than* ...

Expenses

21 Nothing has to be paid by the owner of the flat other than taxes, amounts for electricity, gas and water and payments under the lease.

Amend if there are
additional
Payments

PROCEDURE

Formal contract

22 The formal contract will be based on a draft document already prepared by the seller's solicitors. You and the seller will each sign an identical copy. When they are exchanged, the contract will be binding on both of you.

Purchase price

23 The purchase price must be agreed between you and the seller. This must be done before contracts can be exchanged.

Property to be vacant and free from mortgages

24 The seller will agree to vacate the flat and hand it over to you empty when the purchase is completed. Any mortgage which the seller now has on the flat will by then be repaid and cancelled.

Deposit

25 On exchange of contracts, you must pay a deposit. This is normally 10 per cent of the agreed purchase price, but the seller may agree to a smaller amount. If you fail to complete the purchase, you may lose the deposit, and you may also be liable to compensate the seller for losses incurred.

Other terms

25 The contract is a technical document and will contain detailed provisions regulating the conveyancing process and dealing with possible contingencies.

STAMP DUTY

26 You will be liable to pay stamp duty, which is a form of tax collected by the Inland Revenue. There is a sliding scale, and the amount due depends on the price of the property and the rent payable under the lease. Your solicitor will be able to tell you how much you will have to pay.

Documents held by the seller's solicitor

- copy lease
- receipt for last payment of rent due
- receipts for all service charge payments during the last three years
- memorandum and articles of the landlord/management company
- seller's share or membership certificate
- company's accounts for the last three years
- copy insurance policy covering the building and copy receipt for payment of the last premium due
- copy of all regulations made by the landlord or management company and still in force
- draft contract
- office copies of the register dated: .
- epitome(s) or abstract(s) of title, showing all covenants and easements
- seller's property information form
- local search(es) and accompanying enquiries dated: .
- the following specialised searches:
 - dated: .
 - dated: .
 - dated: .
- copies of planning consents
- NHBC, Foundation 15 or Newbuild guarantee
- guarantee, and specification, for work (specify)
- other documents (specify)

ANSWERS MUST BE COMPLETE AND ACCURATE This statement is designed in part to protect sellers by establishing that correct information concerning the property is being provided to buyers. All of the information contained herein is provided by the Seller to the Broker/Sales Representative. Any person who is in receipt of and utilizes this Statement acknowledges and agrees that the information is being provided for information purposes only and is not a warranty as to the matters recited hereinafter. The Broker/Sales Representative shall not be held responsible for the accuracy of any information contained herein.

BUYERS MUST STILL MAKE THEIR OWN ENQUIRIES The buyers must still make their own enquiries notwithstanding the information contained on this statement. Each question and answer must be considered and where necessary, keeping in mind that the seller's knowledge of the property may be incomplete, additional information can be requested from the sellers or from an independent source such as the Municipality. Buyers can hire an independent inspector to examine the property to determine whether defects exist and to provide an estimate of the cost of repairing problems that have been identified.

PROPERTY:					
SELLERS:					
GENERAL:		YES	NO	UNK	N/A
1.	(a) I have owned the property for _____ years.				
	(b) I have occupied the property from _____ to _____				
	(c) Does any other party have an ownership, spousal, or other interest in the property?				
	(d) If the Seller owns adjoining land, has a consent to sever been obtained within the last 2 years?				
2.	(a) Is there a plan of survey for the property? Date of survey _____				
	(b) Does the survey show the current location of all buildings, improvements, easements, encroachments and rights-of-way?				
	(c) Are there any encroachments, registered easements, or rights-of-way on the property?				
3.	Is the title or property subject to first right of refusal, option, lease, rental agreement or other listing?				
4.	What is the zoning on the subject property? _____				
5.	Does the subject property comply with the zoning? If not, is it legal non-conforming? _____				
6.	Are there any applications for rezoning in your area?				
7.	Are there any restrictive covenants that run with the land?				
8.	Are there any drainage restrictions?				
9.	Are there any local levies or unusual taxes being charged at the present time or contemplated? If so, at what cost? _____ Expiry date _____				
10.	Have you received any notice or claim affecting the property from any person or any public body?				
11.	Are there any public projects planned for the immediate area? Eg: road widenings, new highways, expropriations etc.				
12.	(a) Are there any current or pending Heritage designations for the property?				
	(b) Is the property in an area designated as Heritage?				
13.	Are there any conditional sales contracts, leases, or service contracts? eg: furnace, alarm system, etc. Are they assignable or will they be discharged? _____				
14.	Are there any defects in any appliances or equipment included with this property?				
15.	Do you know the approximate age of the building(s)? Age _____ Any additions: Age _____				
16.	Are there any past or pending claims under the Ontario New Home Warranty Program? ONHWP Registration Number _____				
17.	Are you operating under a Power of Attorney?				
18.	Will the sale of this property be subject to Goods and Services Tax?				
WATER SUPPLY AND WASTE DISPOSAL:		YES	NO	UNK	N/A
1.	(a) What is your water source? <input type="checkbox"/> Municipal <input type="checkbox"/> Drilled <input type="checkbox"/> Bored <input type="checkbox"/> Dug <input type="checkbox"/> Lake <input type="checkbox"/> Community <input type="checkbox"/> Other				
	(b) Are you aware of any problem re: quantity of water?				
	(c) Are you aware of any problems re: quality of water?				
	(d) Do you have any water treatment devices?				
2.	(a) What kind of sewage disposal system services the property? _____				
	(b) Are you aware of any problems with the septic system?				
	(c) Is there a sketch and/or use permit for septic system attached? When was the system last pumped? Date _____				
ENVIRONMENTAL:		YES	NO	UNK	N/A
1.	Are you aware of possible environmental problems or soil contamination of any kind on your property or in the immediate area? Eg: toxic waste, underground gasoline or fuel tanks etc.				
2.	Are there any existing or proposed waste dumps, disposal sites or land fills in the immediate area?				
3.	Are there any pending real estate developments or projects in the neighbourhood?				
4.	Is the lot subject to flooding?				
5.	Is the property under the jurisdiction of any Conservation Authority or Commission?				

ADDITIONAL COMMENTS:

STRUCTURAL:

	YES	NO	UNK	N/A
1. Are you aware of any structural problems?				
2. (a) Have you made any renovations, additions or improvements to the property?				
(b) Was a building permit obtained?				
(c) Has the final building inspection been approved or has a final occupancy permit been obtained?				
3. To the best of your knowledge have the building(s) ever contained ureaformaldehyde insulation?				
4. (a) Are you aware of any deficiencies or non-compliance with the Ontario Fire Code?				
(b) Is your property equipped with operational smoke detectors?				
(c) Is the property equipped with operational carbon monoxide detectors?				
5. Is the woodstove(s)/chimney(s)/fireplace(s) in working order?				
6. Are you aware of any problems with the central air conditioning or heating system?				
7. Are you aware of any moisture and/or water problems in the basement or crawl space?				
8. Are you aware of any damage due to wind, fire, water, insects, termites, rodents, pets or wood rot?				
9. Are you aware of any roof leakage or unrepaired damage? Age of roof covering if known.....				
10. Are you aware of any problems with the electrical system? Type of wiring: <input type="checkbox"/> copper <input type="checkbox"/> aluminium <input type="checkbox"/> other.....				
11. Are you aware of any problems with the plumbing system?				
12. Is there any lead or galvanized metal plumbing on the property?				
13. What is under the carpeting?				
14. Are you aware of any problems with the swimming pool, hot tub or whirlpool bathtub?				
15. Is the outdoor lawn sprinkler system in working order?				
16. Is there a home inspection report available? Date of Report				

CONDOMINIUMS:

	YES	NO	UNK	N/A
1. Are there any special assessments approved or proposed?				
2. Are there any pending rule or bylaw amendments which may alter the uses of the property?				
3. Is the condominium registered?				
4. Are there any restrictions?				
5. Parking: Number of Spaces..... <input type="checkbox"/> Owned <input type="checkbox"/> Exclusive Use <input type="checkbox"/> Leased or Licensed				

RENTAL INFORMATION: APPLICABLE NOT APPLICABLE

	YES	NO	UNK	N/A
1. To the best of your knowledge are the current rents legal? If no, explain				

RENTAL SCHEDULE	APARTMENT	APARTMENT
TENANTS NAME		
CURRENT RENT		
ARE ANY RENTS IN DEFAULT?		
DATE OF LAST INCREASE		
AMOUNT OF DEPOSIT HELD		
EXPIRY OF LEASE (IF ANY)		
RENTAL INCLUSIONS		

(ATTACH SEPARATE RENTAL SCHEDULE IF MORE THAN 2 UNITS)

ADDITIONAL COMMENTS:

.....

For the purposes of this Seller Property Information Statement, a "Seller" includes a Vendor, a landlord, or a prospective vendor or landlord and a "Buyer" includes a purchaser, a tenant, or a prospective purchaser or tenant.

THE SELLERS STATE THAT THE ABOVE INFORMATION IS TRUE, BASED ON THEIR CURRENT ACTUAL KNOWLEDGE AS OF THE DATE BELOW. ANY IMPORTANT CHANGES TO THIS INFORMATION KNOWN TO THE SELLERS WILL BE DISCLOSED BY THE SELLERS PRIOR TO CLOSING. THE SELLERS AGREE THAT A COPY OF THIS STATEMENT MAY BE GIVEN BY THE AGENT TO THE PROSPECTIVE BUYERS.

(Seller) DATE

(Seller) DATE