

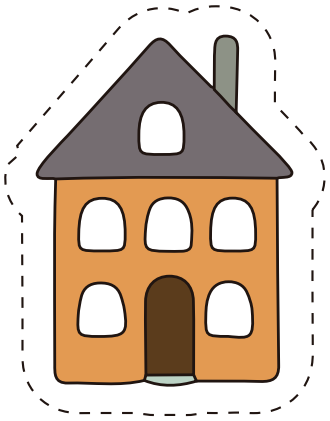
Purchase of Properties Outside Hong Kong

A Study on Enhancing Consumer Protection

「境外置業添保障」研究報告



消費者委員會
CONSUMER COUNCIL



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Abbreviations

1981 Act	Valuers, Appraisers, Estate Agents and Property Managers Act 1981
1919 Act	Conveyancing Act 1919 (NSW)
ACL	Australian Consumer Law (contained in Schedule 2 to the Competition and Consumer Act 2010)
Act	Housing Development (Control and Licensing) Act 1966
ALPRC	Advertising Law of the People's Republic of China (中華人民共和國廣告法)
AMREB	Administrative Measures for Real Estate Brokerage (房地產經紀管理辦法)
Approval in Principle	The approval in principle to construct from the appropriate government authority
ASAS	Advertising Standards Authority of Singapore
BC	Canada (British Columbia)
BCAP Code	The UK Code of Broadcast Advertising
Board	The Board of Valuers, Appraisers, Estate Agents and Property Managers of Malaysia
C&ED	Hong Kong Customs and Excise Department
CAP Code	The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing
CCR	Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013
CEA	Council of Estate Agencies of Singapore
Centaline	Centaline Group
Circular	Circular 8/2002
CIS	Collective investment scheme
Code	Civil Code of the People's Republic of China (中華人民共和國民法典)

Council	The Consumer Council of Hong Kong
CPR	Consumer Protection from Unfair Trading Regulations 2008
DD	Due diligence
Directions	Directions of Real Estate Broking Agency Engaged in Foreign Real Estate Broking or Sales (不動產經紀業從事國外不動產仲介或代銷業務規範)
EAA	Estate Agents Authority
EAO	Estate Agents Ordinance (Cap 511)
Enhanced Guidelines	ASAS's enhanced guidelines to regulate advertisements on investments including investments in overseas properties under Appendix J of the Singapore Code of Advertising Practice
Exemption Order	Estate Agents (Exemption from Licensing) Order (Cap 511B)
First Hand Sales Ordinance	Residential Properties (First-Hand Sales) Ordinance (Cap 621)
GBA	Guangdong-Hong Kong-Macao Greater Bay Area (Greater Bay Area)
FTA	Fair Trading Act 1987 (NSW)
LegCo	Legislative Council of the Hong Kong Special Administrative Region
Licensing Regulation	Estate Agents (Licensing) Regulation (Cap 511A)
LRC	The Law Reform Commission of Hong Kong
LRC Report	A report on "Sales Descriptions of Overseas Uncompleted Residential Properties" published by the LRC (售樓説明－境外未建成住宅物業)
Mainland	The Mainland China
Midland Global	Midland Realty (Global) Limited
NHBC	National House Building Council
NSW	Australia (New South Wales)
NSW Fair Trading	A division within the Department of Customer Service of the NSW State Government
NTSEAT	National Trading Standards Estate Agency Team of Powrys County Council of the UK

OSRE	The Office of the Superintendent of Real Estate
OTP	Option to Purchase
PGFP	CEA's Practice Guidelines for Estate Agents and Salespersons Marketing Foreign Properties
PGOTP	Practice Guidelines on Option to Purchase and Sale & Purchase Agreements
POH	Properties situated outside Hong Kong
Practice Circular	Practice Circular No. 17-03 (CR) issued by the EAA
Practice Regulation	Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation (Cap 511C)
Prominent Statement	A prominent statement that the purchase of UPOH is complicated and risky, advising the purchasers to review all relevant information and documents and seek independent professional advice before making a purchase decision as required under the Practice Circular
PSAA	Property and Stock Agents Act 2002
REC	Real Estate Council
REBMA	Real Estate Broking Management Act (不動產經紀業管理條例)
REDMA	Real Estate Development Marketing Act
2015 Regulations	Housing Development (Control and Licensing) Regulations 2015
RESA	Real Estate Services Act
Reservation fees	Booking fees or reservation fees (留位費)
SCAP	Singapore Code of Advertising Practice
SFC	Securities and Futures Commission of Hong Kong
SFO	Securities and Futures Ordinance (Cap 571)
Singapore EAA	Estate Agents Act
TDO	Trade Descriptions Ordinance (Cap 362)
THB	The Transport and Housing Bureau of Hong Kong

TV	Television
TV Code	General Code of Practice on Television Advertising Standards issued by the Hong Kong Communications Authority
UK	The United Kingdom
UK EAA	Estate Agents Act 1979
UREAL	Urban Real Estate Administration Law of the People's Republic of China (中華人民共和國城市房地產管理法)
UPOH	Uncompleted properties situated outside Hong Kong
Working Group	Working Group on Regulation of Estate Agents set up by the Planning, Environment and Lands Division of Hong Kong

Online Content

All websites and electronically available materials referenced in this report were last accessed on 8 October 2021.

This report can be downloaded from https://www.consumer.org.hk.

In case of any update, the latest version shall prevail.

Executive Summary

Introduction

Following a thriving local property market since the 1980s, Hong Kong consumers began to diversify their purchase and began to buy properties situated outside Hong Kong ("**POH**") for different purposes such as investment, retirement, holiday homes or homes for children studying overseas. In recent decades, with a free flow of money, low interest rates worldwide and a penchant for travel both to the Mainland China ("**Mainland**") as well as all over the world, the receptiveness of local consumers to buying POH has intensified. This phenomenon is evidenced by the increase in number of advertisements marketing POH across different traditional and online media such as in the newspapers, social media and on TV.

Back in the late 1990s, when the POH market began to flourish, the Law Reform Commission ("**LRC**") had the foresight to publish a report titled "Sales Descriptions of Overseas Uncompleted Residential Properties"(售樓說明－境外未建成住宅物業)("**LRC Report**") in September 1997 which proposed legislation to curb misleading advertisements for non-local uncompleted residential properties advertised or offered for sale in Hong Kong. One of the key recommendations of the LRC was that all sales of non-local uncompleted residential properties should be handled by licensed estate agents in Hong Kong, with the exception of the sale of a single dwelling by a private individual. At around the same time, in May 1997, the Estate Agents Ordinance, Cap 511 ("**EAO**") had been enacted in order to improve the standard of services provided by estate agents and to protect consumers in property transactions. It provides for the establishment of the Estate Agents Authority ("**EAA**") to regulate the trade through the implementation of a licensing system. Understandably, regulation of estate agents carrying out estate agency work in relation to local properties was accorded a higher priority. As a result, although the EAO was drafted with a view to covering local as well as POH, the Estate Agents (Exemption from Licensing) Order, Cap 511B ("**Exemption Order**") was enacted in 1998 under the EAO to exempt estate agents and salespersons dealing exclusively with POH from obtaining a licence.

In recent years, with the economic and infrastructure development of the Guangdong-Hong Kong-Macao Greater Bay Area ("**GBA**"), and further facilitated by the Central Government's 24 Policy measures promulgated in 2019, it is anticipated that very soon, more Hong Kong people will opt to live and work in the GBA "one-hour living circle". Thus, the desire to buy POH will increase further as the POH will become their home instead of just being a holiday or retirement property.

The purchase of a property is a significant consumption which warrants much stronger protection to safeguard consumer rights. Therefore, this study aims to assess whether the existing regulatory regime offers sufficient protection to consumers and if not, make proposals to enhance consumer interest in the purchase of POH.

The Current Regulatory Framework

In respect of the current regulatory framework, the sale of POH in Hong Kong is mainly governed by the EAO and the Exemption Order. In Hong Kong, while it is mandatory to obtain a licence from the EAA before carrying out estate agency work in relation to local properties, this is not necessarily the case for POH sales. The Exemption Order exempts any estate agent or salesperson from the requirement of obtaining an estate agent's or salesperson's licence so long as he does estate agency work exclusively in relation to POH and states in all relevant documentation including advertisements that he is not licensed to deal with any property situated in Hong Kong. However, if a person does estate agency work in relation to properties

both in and outside of Hong Kong, he is still required to hold a licence issued by the EAA. The effect of the Exemption Order is that both licensed and unlicensed estate agents can offer POH services to consumers. Furthermore, licenced agents can also employ unlicensed salespersons to solely carry out the sales of POH.

In 2017, the EAA issued a Practice Circular No. 17-03 (CR) ("**Practice Circular**") giving mandatory guidelines to licensed estate agents and salespersons on the sale of uncompleted properties situated outside Hong Kong ("**UPOH**"). Specifically, the Practice Circular requires licensees to obtain due diligence ("**DD**") report(s) on the vendor and the UPOH project, as well as a written legal opinion on material information. It also provides for regulation of the advertisements and promotional materials together with the provision of warnings to be included in the sales documents to purchasers. Licensees who fail to comply with the guidelines are subject to disciplinary sanctions. However, the Practice Circular only applies to UPOH and is not applicable to unlicensed agents or vendors, and they are therefore not regulated by the EAA.

Further, if the sale of POH constitutes a sale of interests in a collective investment scheme ("**CIS**") as defined under Schedule 1 to the Securities and Futures Ordinance (Cap 571) ("**SFO**"), this requires prior authorisation from the Securities and Futures Commission of Hong Kong ("**SFC**"). It is an offence to issue an invitation which includes any marketing materials containing an offer to the public to acquire an interest or participate in a CIS, unless it has been authorised by the SFC or an exemption under the SFO applies (e.g. the offer is made only to professional investors). The promotion of a CIS may also constitute conducting a business in a regulated activity which requires a licence from the SFC. Determination of whether a property marketed falls within the definition of a CIS can be complex and much turns upon the facts surrounding each transaction.

The Trade Descriptions Ordinance (Cap 362) ("**TDO**"), which prohibits unfair trade practices such as false trade descriptions and false, misleading or incomplete information, has limited application to POH sales. To start with, the TDO does not apply to immovable property as it is not a "goods" as defined under the TDO. However, a service supplied in relation to immovable property may be a "product" which could be regulated under the TDO. The TDO also does not apply to commercial practices engaged by an exempt person acting in the capacity of a professional which includes a licensed estate agent or salesperson. Therefore, licensed estate agents are not caught under the TDO but unlicensed estate agents providing estate agency services are.

As seen above, the current state of regulations on the sale of POH is quite fragmented and regulation of the unlicensed estate agents is extremely limited.

Methodology

When compiling this report, the Consumer Council ("**Council**") carried out the following work:

- Researched into the current laws and regulations in Hong Kong to gain insight into the state of regulation of the POH market, especially from a consumer protection perspective.

- Reviewed and analysed the related complaint statistics collected from relevant sources. This included the Council's own complaint cases; statistics from other enforcement and regulatory bodies, namely, the Police, the Customs and Excise Department ("**C&ED**"), the EAA and the SFC. This enabled problems and pitfalls faced by the consumers in this respect to be identified.

- Benchmarked the legislations and regulations of Hong Kong against 7 other jurisdictions/regions popular with the Hong Kong consumers, covering Australia (New South Wales) ("**NSW**"), Canada (British Columbia) ("**BC**"), the Mainland, Malaysia, Singapore, Taiwan and the United Kingdom ("**UK**") (England & Wales).

- Commissioned a consultant to conduct a survey of the advertisements relating to the marketing of POH in order to find out what marketing and advertising practices were being used by both licensed and unlicensed agents. The survey period was between November and December 2020, covering advertisements placed by developers, agents or salespersons in 3 different channels and mediums, namely, print media, online platform as well as TV.

- Conducted mystery visits to 20 traders involving 36 projects between June and July 2021. This exercise enabled the Council to identify the latest trade practices of agents and obtain direct consumer experience in the purchase of POH. 15 of these traders were found to be unlicensed agents, 4 were licensed agents and 1 was a developer. The marketed projects spanned across 8 jurisdictions (i.e. Australia, Canada, Mainland China (GBA), Malaysia, Japan, Singapore, Thailand and the UK). The visits were limited to the initial stage of the transaction involving contacts and enquiries with the traders, stopping short of any payment of reservation fees and/or deposits. The results corroborated the complainants' experience and validated the Council's concerns regarding the sufficiency of consumer protection in the POH market.

- Engaged with key stakeholders and trade participants to gauge their views and input. Key stakeholders included the Transport and Housing Bureau ("**THB**"), the EAA and the SFC. Major industry representatives contacted were the Centaline Group ("**Centaline**") and Midland Realty (Global) Limited ("**Midland Global**"). Their views on the sufficiency of the current state of regulation in relation to the sale of POH and their concerns were obtained.

- Undertook a desktop review of local and international journals to ascertain the trend of purchase of POH by local and international buyers in different jurisdictions.

Five Major Areas of Concern

Having analysed the complaint statistics, reviewed the findings of both the advertisements survey and the mystery visits, it is clear that the promoted properties were situated in many different cities or countries and the more popular ones include Australia, BC, GBA cities in the Mainland, Thailand, Malaysia and different cities in the UK. The projects comprised of completed and uncompleted developments and in addition to the commonly seen residential projects (including flats in a multi-storey building as well as individual houses), mixed commercial and residential properties and Airbnb were also on offer for sale. As for property prices, there was a wide range on offer, from as low as RMB250,000[1] to GBP930,000[2]. The variety of different properties advertised for sale, the vast range of entry prices and the number of countries/regions involved clearly point to Hong Kong being a very open and attractive market to international vendors looking to sell their properties, leading to Hong Kong consumers from all walks of life participating in the purchase of POH.

In addition, after benchmarking the Hong Kong rules and regulations against 7 jurisdictions, it was observed that all jurisdictions have in place stringent legislations, rules and guidelines regulating the

[1] Equivalent to HK$298,225.
[2] Equivalent to HK$10,044,000.

marketing or advertising of POH. In 4 of the 7 jurisdictions, licensing requirements have been imposed on estate agents selling POH and licensed estate agents have the obligation to carry out DD on POH before marketing the properties for sale. By comparison, the current Hong Kong legislation and regulations only regulate licensed estate agents and salespersons in the sale of UPOH only, leading to regulatory gaps in governing questionable practices by unlicensed agents and salespersons. As compared with the level of protection offered by other benchmarked jurisdictions, consumer interests in Hong Kong is obviously being undermined. Based on the findings, the Council has identified the following five major problems.

Lack of licensing requirements for certain estate agents and vendors

Estate agents. From the available information and statistics, the majority of complaints received by the Police and C&ED involved estate agents. A review of Council's complaint cases also revealed that 90% of cases involved complaints against estate agents and unlicensed agents accounted for over 60% of these complaints. The following are the major types of complaints:

(a) The provision of inaccurate or misleading information to purchasers and absence or omission of material information by estate agents (including insufficient warning of risks);
(b) Difficulties in obtaining a refund of the reservation fee or deposits paid by purchasers; and
(c) Project delay or failure.

The stakes involved in any purchase of POH are high as these transactions involve properties. The Council's complaint statistics from 2017 – 2021 (August) indicates that the average loss suffered was HK$368,000 whereas the average value of the property affected was close to HK$1.8 million. Furthermore, statistics from the Police and C&ED also show that the complainants suffered significant loss, with the average loss ranging from HK$240,000 to HK$875,000.

It can also be observed from the Council's complaint figures that local estate agents played an active role in information provision as the purchasers were unfamiliar with the purchase of POH, and so they relied heavily on what was provided by the agents. 75% of the complainants learnt about the POH developments through local newspaper advertisements while nearly 70% of them attended the sales exhibition or talks organised by agents. In fact, 93% of the transactions took place in Hong Kong. From the advertisements survey, 98% of the print and 60% of online advertisements included local contact details such as a Hong Kong address at commercial venues or hotels for exhibitions or local agents' telephone numbers for follow-up enquiries. Notwithstanding that, the advertisements survey and the mystery visits revealed that POH vendors would quite often still partner up with local estate agents and salespersons by providing a local mobile number or running exhibitions to facilitate the actual sale of the POH. Therefore, even though these advertisements might have been placed online, from outside of Hong Kong, for most of them, there existed a strong Hong Kong element.

The findings from the mystery visits showed that the licensing status of agents and their salespersons could be confusing. In respect of the 15 unlicensed agents visited, only 1 of them provided the relevant disclaimer under the Exemption Order in the pamphlets, leaflets and name card distributed. For the remaining 14 unlicensed agents, only one of them provided the exemption disclaimer on the name card and another on the leaflets. The rest of them (12) did not provide any such disclaimers on any of the said items.

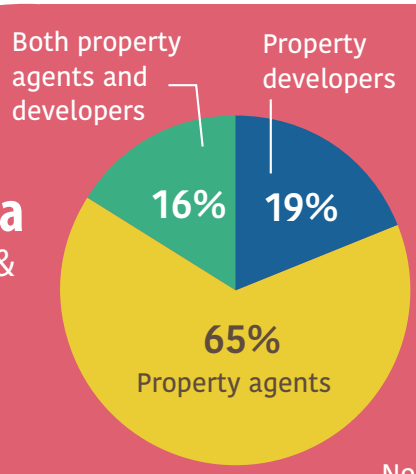
As for the 4 licensed agents, all of them stated the company's licence number in the advertisements and name cards of the salespersons. 2 of them stated the exemption disclaimer on their name cards to inform the consumer that they were unlicensed to deal with Hong Kong properties. This indicates that in practice, while the licensed agents may be regulated by the EAA, their front-line salespersons playing an active role

Key Issues of Advertisements for POH*

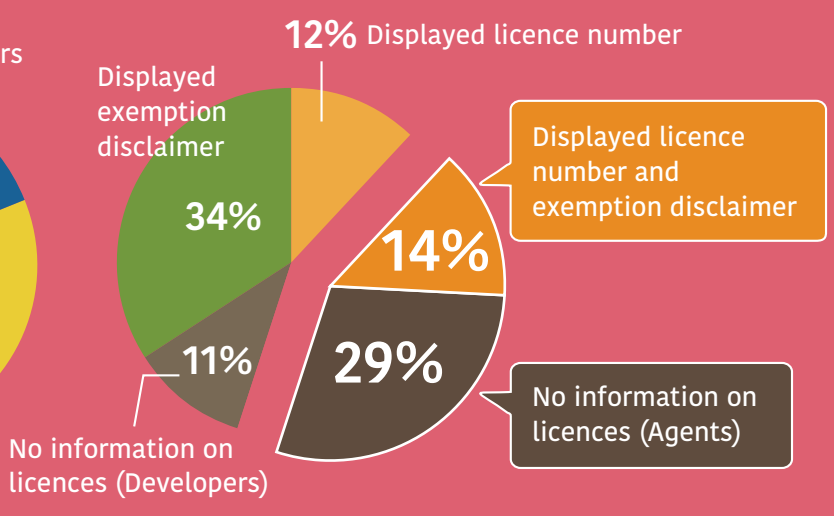
Print Media
(Newspapers & Magazines)

270 ads

Nature of Advertisers



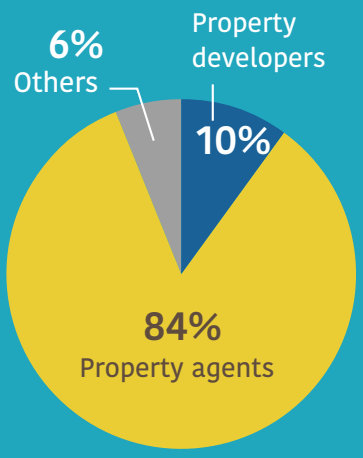
Licence and Disclaimer Disclosure



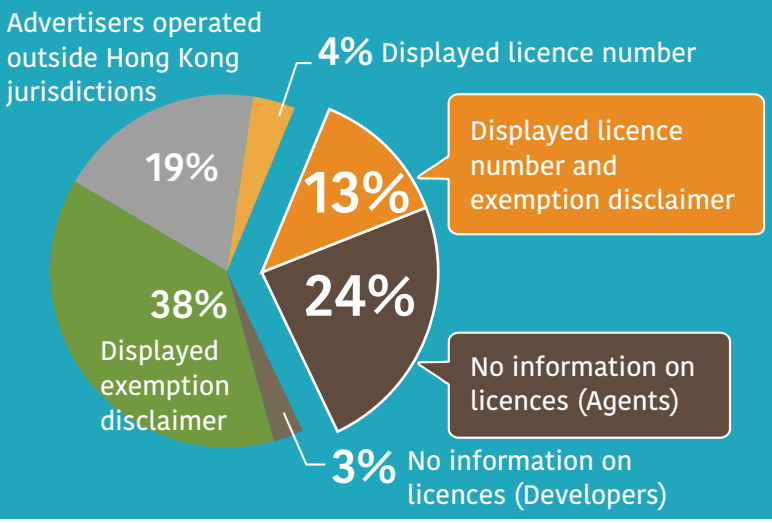
Online
(Search Engines & Social Media)

902 ads

Nature of Advertisers

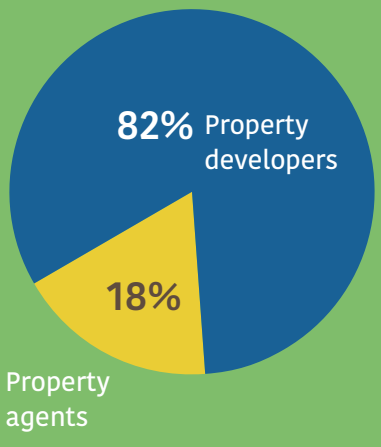


Licence and Disclaimer Disclosure



TV
(Free & Paid Channels)

142 ads



No major malpractices or unscrupulous marketing tactics were found

* Survey period November - December 2020

Common Issues

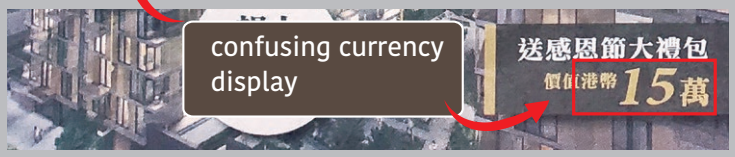
1 Questionable Claims as Bait



2 Confusing Information



confusing currency display



in the same advertisment

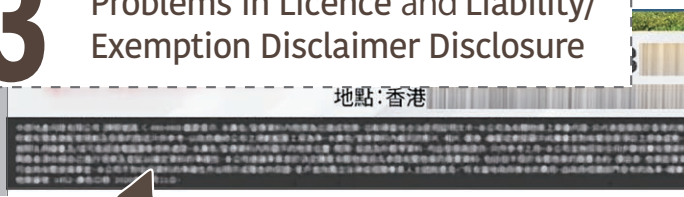


No clear statement whether the property is completed or uncompleted



only an approximate location as property description

3 Problems in Licence and Liability/ Exemption Disclaimer Disclosure



- licence information missing
- exemption disclaimer missing
- disclaimer font size too small or too blurred
- online advertisement disclaimer set out at bottom of web page, need to scroll down multiple pages to read, easy to miss

in promoting the POH project and interacting with the consumers could still be unlicensed and unregulated.

All the above highlight the presence of a loophole in the current regulatory regime whereby unlicensed estate agents and salespersons could easily take advantage of the Exemption Order. On occasions, these unlicensed estate agents engage in undesirable trade practices and undermine consumer protection. From a consumer protection perspective, there is no reason why estate agents who deal exclusively with POH should be exempted from licensing, especially as it has been shown that they did not always abide by the regulations.

Vendors. It was observed that advertising of POH was not limited to estate agents, licensed or otherwise. Developers from different jurisdictions could also market their projects direct without using any intermediaries in Hong Kong. As the development of properties or selling them does not fall under the definition of "carrying out estate agency work", neither the EAO nor the Practice Circular bind the activities of the developers / vendors. That being the case, any proposed extension of licensing to all estate agents, by itself, cannot help to regulate any potential misconduct of unscrupulous developers.

Benchmarking against the 7 jurisdictions/regions showed that 4 of them require estate agents conducting the sale of overseas or non-local properties to be licensed (i.e. Singapore, BC, Malaysia and Taiwan), regardless of the nature of such overseas or non-local properties and whether they are completed or not.

In Asia, there are specific rules and guidelines on the sale of overseas or non-local properties by local licensed or registered estate agents in Singapore, Malaysia and Taiwan. Malaysia's requirements are more stringent in that it requires that any offer for sale or invitation of offers to purchase any foreign properties in Malaysia be made by or through an estate agent practising and residing in Malaysia. In other words, foreign estate agents or vendors must engage the services of a local registered estate agent to joint market or sell overseas properties in Malaysia. Singapore has implemented enhanced guidelines to regulate advertisements on overseas properties.

No cooling-off period for deposits, reservation fees or deposit protection mechanisms in place

The complaint statistics and the mystery visits both show that it is common for purchasers in Hong Kong to pay a reservation fee to the agent to reserve the subject property prior to entering into the sales and purchase agreement. Such reservation fees typically range between HK$10,000 and HK$50,000. As there is no regulation and cooling-off period provided for such reservation fees, these fees will usually be forfeited when the purchaser decides not to proceed with the sale and purchase. The Council's complaint cases showed instances of complaints where the agent did not explain the terms and conditions concerning the reservation fee, resulting in dissatisfaction when the consumer found that such a fee was non-refundable after they decided not to proceed with the purchase.

However, in some instances, it was observed that some agents or vendors would refund or set this off against payment of deposit. The lack of uniformity in the treatment of reservation fees and the variety of terms adopted by different agents could bring confusion to consumers.

Benchmark research shows that out of all the different jurisdictions, only the BC regime in Canada mandates a cooling-off requirement for deposits. It also requires that deposit monies be put in a stake-holding trust account which means that these monies cannot be used for the construction of the

development. Despite no other researched jurisdictions requiring this level of stringency for deposits, a more standardised approach or mechanism to handle reservation fees should be welcomed by consumers.

Insufficient regulation of advertisements

Findings of the advertisements survey showed that 81% of the 270 print advertisements surveyed was placed by property agents (218). The involvement of property agents on the online platform was even higher, at 84% of the online advertisements (756 out of 902). Not surprisingly, given the cost, 82% of the TV commercials were taken out by developers (117 advertisements).

Print Advertisements. Over 40% of the total print advertisements did not give any licence information (109), and after deducting the advertisements placed by developers (30), it is clear that agents accounted for over 70% of these advertisements (79). The exemption disclaimer was found in nearly 35% of the print advertisements (93), meaning that at least this percentage of advertisements was placed by unlicensed estate agents. Furthermore, only around 25% of the advertisements provided the licence number (68). Interestingly, 54% of these advertisements (37) also inserted an exemption disclaimer, indicating that these licensed agents employed unlicensed salespersons.

Online advertisements. For online advertisements, only around 17% (151) of the advertisers stated that they had a licence under the EAO. 78% of the advertisers (118) also displayed the exemption disclaimer indicating that they employed unlicensed salespersons. In addition, 26.9% of the advertisements (243) did not give any licence number. Furthermore, it was observed that the exemption or liability disclaimers were not placed in a conspicuous place but instead placed at the end of the advertisements. Readers could only read them after scrolling down many pages or these disclaimers could easily be missed.

Practice Circular only regulates licensed estate agents selling UPOH. The Practice Circular of the EAA regulates the placement of advertisements and the content of these advertisements. However, this is only applicable to licensed agents selling UPOH. Completed POH remain outside of its scope and unlicensed agents selling POH remain unregulated.

No sufficient regulation of the font size of the disclaimers in the print advertisements. For the print advertisements which included exemption disclaimers, it was observed that the font was so small in around 22% of the advertisements that a person with normal eyesight could not easily read the content and a tool such as a magnifying glass or using a mobile phone to take an enlarged photograph was required to help improve readability. In 10% of these advertisements, the content was so blurred that the details were not legible even using an appropriate tool. Obviously there was a lack of font size regulation on disclaimers in the print advertisement.

Lack of uniformity of the wording used for the exemption disclaimer. The Exemption Order does not specify a standard statement in prescribed wordings to be inserted in the documents and advertisements. As a consequence of this lack of regulation, numerous different forms of descriptions were used with a view to satisfying the Exemption Order e.g. stating that they exclusively sold POH and were not subject to the control of the EAO; they did not have any Hong Kong licence; they were exempted under the EAO or the Exemption Order etc. An average consumer would find the different ways of expressing the Exemption Order confusing and hard to understand.

Misleading advertisements. Agents use many tactics to lure and confuse consumers. Claims of immigration shortcuts, unrealistically high rental returns, advantages, free gifts, interest-free installments have all been used as bait. Indeed, all the 7 researched jurisdictions have some way to regulate and govern

the marketing or advertisements of such properties in that jurisdiction (i.e. the Mainland, Singapore, The UK (England & Wales), BC, Malaysia, Taiwan and NSW).

Insufficient regulation of other trade practices

Lack of warning in relation to the risks of purchasing POH. From the mystery visits, it was found that most traders gave basic information and provided sales documents for the properties they recommended, such as provision of brochures, pamphlets or leaflets, giving information on the identity of the developer/vendor, price and mortgage facilities as well as offering assistance in taking possession of the property. However, although nearly 90% of the agents inserted liability disclaimers in relation to the accuracy of the contents of such documents, none of them drew the mystery visitors' attention to the existence of these disclaimers. It seems that the inclusion of liability disclaimers on the accuracy of the content provided was made solely for the purpose of protecting the agents from liability should things go wrong. However, failure to draw this to the consumer's attention in fact could undermine their right to be informed.

Notwithstanding the requirement under the Practice Circular, often times, it was found that the salesperson did not give any warning to the mystery visitors that the purchase of POH carried risks and liabilities.

Unsubstantiated/misleading claims of rental guarantee. From the Council's complaint cases and the advertisements survey, it was found that many traders used rental guarantees or high rental returns for a number of years as a bait to lure consumers. These claims were yet to be substantiated and it is questionable if there existed a rental market and the stated rental return. Complaint cases also indicated that vendors might not be able to honour such rental guarantees under the agreement. Some of these projects could possibly be a CIS and the sale of these products without authorization, if found to be true, could be in breach of the SFO.

Lack of sufficient or accurate information contained in the sales materials. As there is currently no mandatory requirement on unlicensed agents to conduct DD before taking up a project, consumers could not tell from the marketing materials or from the meeting with the salesperson as to whether such DD had been conducted.

During the mystery visits, the visitors discovered that unlicensed agents provided outdated brochures in any least 2 instances. On one occasion, the brochure of the developer of an uncompleted development in Manchester stated that it was printed in July 2018. At the time of the visit in June 2021, the sales staff did not provide any updated information on the construction status apart from repeating that the project would be completed in the 3rd quarter of 2021. However, the sales staff informed the mystery visitor that additional approval was being sought from the relevant UK authority to build 2 more floors without providing information on the impact of such a change on the completion date. In another instance, the unlicensed agent selling 2 uncompleted developments in Thailand appeared to have misstated material facts in a project, namely, the state of completion, location and the transport facilities nearby.

Some of the marketing materials were found not to have been translated into English or Chinese, making it impossible for consumers to understand what information was contained therein. In two of the visits made to 2 agents by the mystery visitors, the sales staff provided brochures and leaflets written in Japanese. The sales staff on both occasions told the mystery visitors that although they did not speak the language at all, they could guess the meaning of these words in Japanese due to their professed experience

in the sale of Japanese properties. Furthermore, there was also a lack of adequate or voluntary disclosure regarding commission payment or the relationship between the estate agent and the vendor.

Partial commencement of the EAO

The EAO was originally drafted to regulate all properties both in and outside of Hong Kong, imposing statutory duties on licensed agents to carry out certain obligations towards purchasers. Some of these obligations include giving certain material information to purchasers in relation to the properties, informing client of the extent of services they provide, to include the party for which they act so that purchasers may be warned of any potential conflicts of interest, prescription of what is or what is not allowed to be inserted into advertisements, etc.

Owing to legislative and regulatory priorities, when the relevant provisions came into operation in 1999, their application was only limited to Hong Kong residential properties and certain prescribed forms of estate agency agreements. This means that the statutory duties mentioned above does not apply to the sale of POH and the Practice Circular only regulates licensed agents selling UPOH. From the findings of the study, many consumers often are unaware as to which party the agents act for or the extent of the services to be provided by the agent. The right to be informed is an important consumer right and has to be safeguarded. Transparency of information is important and consumers should be made aware of any potential conflicts of interest of the estate agents so that an informed decision can be made taking into account all relevant information.

Recommendations

Considering the need to strike a proper balance between the objectives of strengthening consumer protection, maintaining business sustainability and allowing consumers to have reasonable access to information regarding the sale of POH in Hong Kong, the Council had thoroughly considered the recommendations made in the LRC report, the findings of this study and the stakeholders' views gathered before formulating the Council's recommendations. It should be noted that it is not the intention of the Council to make purchase of POH risk-free which is impossible in practice, but to facilitate consumers to make a well-informed choice with sufficient warnings given in advance.

Having consulted with the relevant authorities and major industry players, the Council agrees with all stakeholders that public education for potential buyers is indispensable and of crucial importance as it helps to strengthen public awareness of the potential risks and complications involved in the purchase of POH. Nonetheless, instead of relying solely on public education to mitigate the potential risks that a purchaser faces, the Council strongly believes, with support of some stakeholders i.e. the SFC, Centaline and Midland Global, that the consumers could be better protected through taking the following steps:

(a) Step up regulation of estate agents and salespersons, bearing in mind that most of them may be acting on behalf of the vendors, and
(b) Impose more stringent requirements on information provision and regulation of advertisements.

In summary, these 3 stakeholders expressed positive views in relation to licensing agents who carry out sales of POH. Furthermore, the industry players are also of the view that more stringent regulation should be put in place for advertisements, especially those which mention rental guarantees and returns; the imposition of more stringent information disclosure obligations; and a mandatory cooling-off period should be imposed for the payment of reservation fees subject to a deduction of a reasonable amount of administrative fee if the consumer decides not to proceed with the purchase.

However, it is also worth noting the concerns raised by the THB and the EAA that relating to policy considerations, the major ones being:

(a) Attempts to restrict the sales of POH in Hong Kong through licensed estate agents only may act contrary to the principle of free trade.
(b) Any proposed measures targeting the estate agents (e.g. requiring licensing of POH estate agents) cannot resolve issues which concern the vendors/developers or the projects themselves. To do so would be to shift the responsibility of the vendors/developers in relation to POH to estate agents, and this is not reasonable.
(c) As Hong Kong has no control over what regulatory regimes other jurisdictions have, simply regulating estate agents engaging in sale of POH situated in these jurisdictions cannot effectively minimise the risks that the buyer or potential buyer faces.
(d) The laws and regimes governing landed properties differ from one jurisdiction to another so the application of one set of Hong Kong's requirements on the sale of POH is inappropriate, nor is it practicable to tailor make requirements for different jurisdictions.
(e) Estate agents cannot be expected to possess the expertise to fully understand the relevant regulations and requirements in different jurisdictions concerning the sale of properties so it is not reasonable for them to be able to conduct any DD.
(f) Vendors and regulatory authorities in other jurisdictions are unwilling to co-operate or assist and this may amount to the EAA not being able to fully understand the regulations of the various jurisdictions and gather sufficient information to handle the relevant complaints satisfactorily.

This report has taken into consideration all the above feedback and concerns and they have informed the recommendations.

The Council also acknowledges that in the present context, there are material differences between the sale and purchase of first-hand residential POH, and (a) second-hand residential POH as well as (b) non-residential/commercial POH. It was observed that most of the identified issues related to first-hand residential POH, which, by its nature, would involve a relatively larger number of consumers facing the same potential risks, thereby involving a much higher consumer interest. For second-hand residential POH, in most cases, the vendors are not the developer and the condition of the POH in question would be unique and the potential risks involved would be case-specific. As for non-residential/commercial POH, it usually involves investors and very often include offices, hotels and shopping malls which need to be managed on behalf of investors and may include the offering of rental returns or guarantees. These cases would more likely fall within the ambit of a CIS and hence can be subject to the regulation of the SFC. Therefore, the Council's recommendations intend to focus on first-hand residential POH. The Council leaves it open to the market and the relevant authorities to consider if further regulations should be introduced for other types of POH at another time.

To conclude, the Council puts forward the following 5 recommendations of which the first three are interrelated and the fourth and the fifth are free-standing. In particular to recommendation 5, it should only be activated if the other measures prove insufficient for the protection of consumer rights.

1) To require all estate agents who engage in the sale of first-hand residential POH to be licensed under the EAO.
2) To impose the existing statutory duties under the EAO concerning the provision of information to purchasers and advertising on estate agents who engage in the sale of first-hand residential POH.
3) Prescribe the types of information to be provided to purchasers and regulate the content of advertisements for the sale of first-hand residential POH.

4) Introduction of a mandatory cooling-off period for reservation fees.
5) To make it mandatory that all sales of first-hand residential POH be conducted through licensed estate agents/salespersons.

To require all estate agents who engage in the sale of first-hand residential POH to be licensed under the EAO

Section 2(a) of the Exemption Order exempts a person who does anything referred to in section 15 or 16 of the EAO from the requirement of obtaining an estate agent's licence or a salesperson's licence if he "does so exclusively in relation to properties outside Hong Kong". The Council recommends that this sub-section be amended to read as follows:

"does so exclusively in relation to properties outside Hong Kong save and except first-hand residential properties."

The effect of the proposed amendment is that an estate agent (or a salesperson) dealing with first-hand residential POH will be required to obtain a licence under the EAO irrespective of whether he does so exclusively or not.

It can be argued that such change would impose an unfair or unduly heavy burden on the estate agents or salespersons. However, the Council believes that, on the contrary, the introduction of such change will bring a much more transparent and fairer marketplace for the estate agents to compete and to enhance the quality of services to consumers.

At present, even though any such estate agent or salesperson who deals with first-hand residential POH exclusively is not required to obtain a licence under the EAO, he still owes various legal duties to the prospective buyer under the common law, for example, the duty in tort not to make fraudulent or negligent misrepresentations. However, the common law does not define clearly the scope of such duty; and whether there is a breach will depend on the facts of each case. It is, in fact the interests of the estate agents or salespersons, that their scope of duty can be more clearly defined by statute (or guidelines to be issued by the regulatory authority) so that their business risks could also be better protected.

Despite the estate agents or salespersons who decide to engage in the sale of first-hand residential POH will need to assume greater legal liabilities in meeting the change, under a free market the related costs will likely be negotiated in the commission rate offered by the vendors in order to generate a favorable return to the estate agents or salespersons.

As to the conditions which need to be fulfilled by an applicant for a licence to deal with first-hand residential POH including whether they should be the same as those under the existing law, the Council keeps an open mind and takes the view that may be determined by the licensing body.

To impose the existing statutory duties concerning the provision of information to purchasers and the regulation of advertisements under the EAO on estate agents who engage in the sale of first-hand residential POH

Currently, under the EAO**,** sections 36 and 44 set out regulations and guidelines on information disclosure and regulation of the content of advertisements respectively. Although these provisions were originally intended to cover POH, they were only partially commenced in 1999 for the purposes of their application to and in relation to any property in Hong Kong use wholly or primarily for human habitation. This means

that as these provisions currently stand, they do not apply to POH sales. Therefore, these provisions will have to be extended to apply to first-hand residential POH.

By binding EAA guidelines, prescribe the information to be provided to purchasers, and regulate the content of advertisements for first-hand residential POH

In order that the second recommendation is given full effect, the Council opines that serious consideration be given to amend and modify the Practice Circular by imposing more requirements in the content of the 4 main documents for potential purchasers: (a) a DD report; (b) a legal opinion; (c) a written warning statement; (d) a sales information sheet. How the prescribed content of each of them should be improved is summarised as below.

DD Report – the name, the authority (such as whether it is a government department or a professional) and the professional qualifications (if applicable) of its issuer should be included. Furthermore, the DD report should also state the date thereof, and the date up to which the information contained therein are confirmed to ensure the report will be reasonably up to date. The estate agents should also be requested to summarise those adverse, or potentially adverse, findings in a separate document so that the attention of the potential purchasers could be fully drawn.

Legal Opinion – it should be extended to state whether there is any mechanism to safeguard the deposits or part payments made by the purchasers pending completion of the purchase of the POH in accordance with the local laws and regulations. Furthermore, if there is restriction on non-locals to obtain finance locally, the particulars should be clearly stated.

Warning Statement – additional warnings in the aspects of sufficiency in financial resources of the purchasers in completing the transaction and the loan facilities in general, risks in exchange rate fluctuations, inability of the vendor to honour any guarantees or rental yields, delay in property delivery and restrictions for non-locals to purchase at the place where the development is situated etc. should be added. Furthermore, the potential purchasers must be reminded that some information received during the sales stage may not be legally binding and the possible legal or other actions in case the sale and purchase of the property has fallen through.

Sales Information Sheet – the following items should be added:

(a) a map or plan drawn to scale showing the location of the POH;
(b) a standard definition used to measure the area of the POH; the date of completion, and the definition of "completion" in the place where the development is situated (if the construction of the POH have already been completed);
(c) the condition of the property upon handover, such as particulars of the fixtures and fittings that will be installed (if any), utilities that will be made available (if any), the grant of local permission for occupation;
(d) for uncompleted POH projects, the grounds on when the final handover deadline may be extended and the maximum length of such extension (if any);
(e) the particulars of the right of way to the POH and the restriction of its use (if any);
(f) whether there is any mechanism to safeguard the deposits made by the purchasers according to the laws and regulation of the place where the POH is situated, and if so the particulars of such mechanism; and
(g) provide a web link to the relevant legislation/regulatory authority governing the POH.

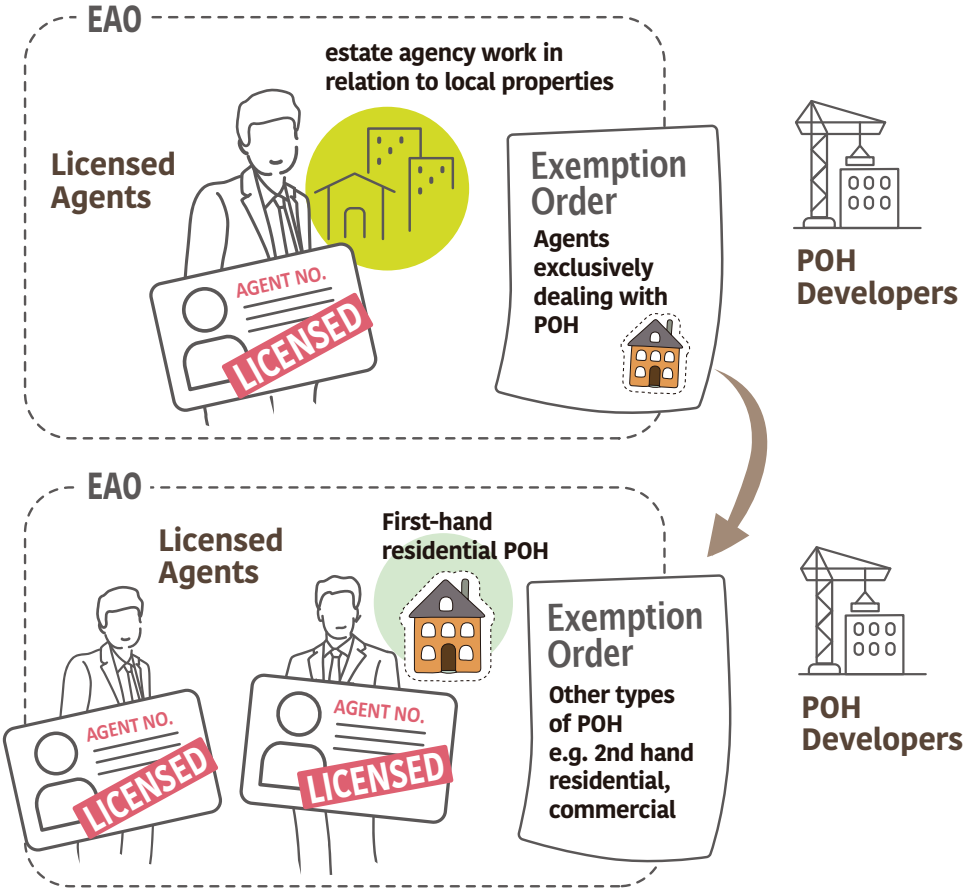
Recommendations and the Way Forward - POH

Focus on First-Hand Residential POH

Legislation

1

To require all estate agents who engage in the sale of first-hand residential POH to be licensed under the EAO by amending the Exemption Order



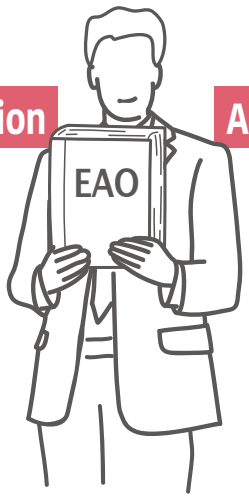
2

To impose the existing statutory duties concerning the provision of information to purchasers and the regulation of advertisements under sections 36 and 44 of the EAO on estate agents and salespersons who engage in the sale of first-hand residential POH

EAO s36

Sales Information

- ☑ due diligence
- ☑ prescribed information
- ☑ accurate information

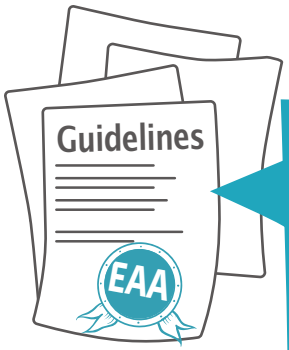


EAO s44

Advertisements

- ☒ misleading information
- ☒ exaggeration
- ☒ omission
- ☑ prescribed information

Practice Circular



3

By binding EAA guidelines, prescribe the specific information to be provided to the purchasers, and regulate the content of advertisements for first-hand residential POH

- **DD Report** to include issuer's name, authority and professional qualifications.
- **Legal Opinion** to state if any deposit protection mechanism in the place where POH is situated.
- **Warning Statements** to include risks of exchange rate fluctuations, rental guarantee may not be honoured, delay etc.
- **Sales and Marketing Materials** to include prescribed information.

- Clear/legible essential information
- No exaggeration/misleading representations
- Font size regulation of print advertisements and regulation of period of exposure for digital advertisements



4

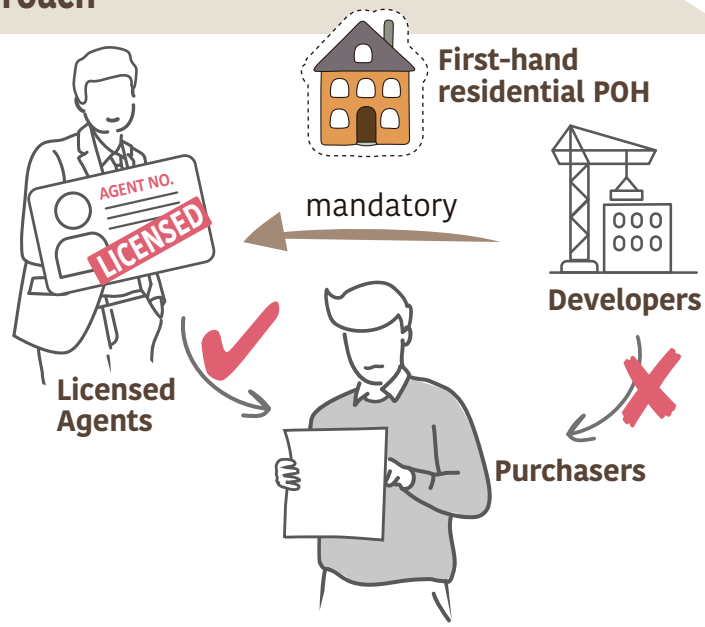
Introduction of a mandatory cooling-off period for reservation fees

- ⩾7 days
- allow an administration charge to be deducted - reasonable and not excessive

5

Incremental Approach

Should recommendations 1-4 be implemented and further consumer protection is required:
mandatorily require that all sales of first-hand residential POH must be conducted through licensed estate agents/salespersons



Advertisement requirements – in addition to what is currently required, the following should be mandated:

(a) Advertisements should clearly and legibly state certain essential information (e.g. a statement that purchasers should refer to the sales information sheet for further details, qualification of speaker at any exhibitions etc.)
(b) Advertisements must not exaggerate or make false or misleading representations in material particulars including the financial position of the developer or the legal rights pertaining to the units, actual location and price etc.
(c) There should be font size regulation of print advertisements and regulation of the period of exposure for digital advertisements.

Introduction of a mandatory cooling-off period for reservation fees

The reservation fee is different from a deposit or part payment after the execution of a sale and purchase agreement. The reservation fee charged is to allow the purchaser to enjoy exclusive opportunity to buy the favoured property. Given the amount of information which requires review and analysis and possibly to seek independent advice, the Council is of the view that a reasonable cooling-off period of no less than 7 days should be given to prospective purchasers to consider whether or not to enter into a legally binding agreement.

If the prospective purchaser does not proceed within the cooling-off period, he should be able to recover the reservation fee wholly or partly. However, as the estate agent may have incurred costs and expenses which would be wasted due to the sale not proceeding and the fact that the prospective purchaser has enjoyed an exclusive opportunity to buy the particular property, he should be allowed to forfeit a reasonable but not excessive amount from the reservation fee to reflect this.

To make it mandatory that all sales of first-hand residential POH must be conducted through licensed estate agents/salespersons

Currently, the advertisement survey and the mystery visits reveal that most of the sale of POH are conducted through local estate agents. This is to say that there is a local element involved. In addition, it has always been the case that vendors have the freedom to carry out POH sales directly in Hong Kong, notwithstanding the possible difficulties of enforcement concerning overseas/non-local vendors. This is in line with the philosophy of free market, with no legal requirement for local sales of properties to be conducted through estate agents only.

The Council hopes that should recommendations 1-4 be implemented, and public education be put in place to i) encourage consumers to purchase first-hand residential POH through estate agents; ii) warn them of the risks of not doing so, there may not be a need to implement this last recommendation, which is to introduce a requirement for vendors selling first-hand residential POH in Hong Kong to either obtain a local estate agent licence or partner with local estate agents. Once the implementation of the 4 above-mentioned recommendations has been carried out, there should be a review after a reasonable period of time, to see if this last recommendation is necessary.

Way Forward

Hong Kong is an affluent international city, with good infrastructure and a mature local property market which has been attracting international buyers for many years. A similar level of protection should be given to the Hong Kong purchasers of POH. With the continued development of this market, especially bearing in mind the growth of the GBA, this warrants a comprehensive review of the POH regulations.

The Council recognises that the issues involved are complicated and hopes that the release of this report will stimulate and generate constructive discussions and consideration by all interested parties including the relevant policy bureau and the governing authority, other stakeholders and the general public. In making these recommendations, the Council is seeking to discharge its statutory function to protect and promote the interests of purchasers of immovable property.

In the meantime, consumer education remains important as the Council understands that it will take time to consider and implement the recommendations. Moreover, even if they are implemented, consumer education is still indispensable in order to empower the consumers to safeguard their own interests. The Council shall collaborate with all other interested parties to enhance public education in this respect.

摘要

簡介

隨着 1980 年代香港房地產市場蓬勃發展，消費者購買的物業變得多樣化並開始購買境外物業，以作投資、退休、度假或供子女在境外留學時的住宿等不同用途。在過去數十年間，資金的自由流動、全球的低利率以及對於前往中國內地（“**內地**”）和世界各地旅行的熱愛，都加深本地消費者購買境外物業的興趣，這趨勢亦可從境外物業廣告每天在各種傳統和網上媒體（例如報紙、社交媒體和電視）上不斷增加的數量反映出來。

早在 1990 年代後期，境外物業市場起飛，法律改革委員會（“**法改會**”）當時已洞悉這趨勢，並於 1997 年 9 月發表題為「境外未建成住宅物業：售樓說明」的報告（“**法改會報告**”），建議立法約束有關在港推廣或銷售的境外未建成住宅物業的誤導性廣告。法改會的主要建議之一，是所有境外未建成住宅物業的銷售，除卻個人出售單一住宅的情況，均應由香港的持牌地產代理處理。近乎同期，於 1997 年 5 月，當局制定了第 511 章《地產代理條例》，務求提高地產代理的服務水平及在物業買賣交易中消費者的保障，並在《地產代理條例》下，成立地產代理監管局（“**地監局**”），通過實施發牌制度來規管行業。因應當時規管地產代理進行本地物業的銷售工作有較高的優次，因此，雖然《地產代理條例》草擬時實有同時涵蓋本地及境外物業，但於 1998 年根據《地產代理條例》制定的第 511B 章《地產代理（豁免領牌）令》（“**豁免令**”）卻豁免純粹處理香港以外地方物業的地產代理及營業員（“**非持牌地產代理/營業員**”）無須取得牌照。

近年，粵港澳大灣區（“**大灣區**”）的經濟發展和基礎建設一日千里，中央政府於 2019 年亦頒布了 24 項政策措施進一步促進大灣區發展，推動更多港人選擇在大灣區「一小時生活圈」內生活和工作，有見及此，他們購買境外物業的興趣將會大大提升，並以其作為日常居所，而並非僅作度假或退休之用。

購買房產是一項重大的消費，應有更强大的保障來維護消費者權益。因此，本研究報告旨在檢視現行規管制度是否能為消費者提供足夠的保障，若保障不足，則提出建議加强消費者購買境外物業的保障。

當前的監管架構

就目前的監管架構而言，在香港出售境外物業主要受《地產代理條例》（第 511 章）及豁免令所規管。在香港，雖然任何人就香港本地物業進行相關的地產代理工作前必須取得由地監局發出的牌照，但對於境外物業買賣則並非一定須要領牌。根據豁免令，如某人純粹處理境外物業的地產代理工作及在其所有相關文件中，包括廣告，述明其本人並無處理位於香港的任何物業的牌照，則可獲得豁免而不須向地監局領取地產代理牌照或營業員牌照。然而，如某人在香港同時從事處理與本地及境外物業

相關的地產代理工作，他仍須取得由地監局發出的牌照。豁免令致使持牌及非持牌的地產代理均可向消費者提供銷售境外物業的服務，此外，持牌代理亦可以聘請非持牌的營業員銷售境外物業。

於 2017 年，地監局發出執業通告編號 17-03(CR)（"**執業通告**"），就銷售香港境外的未建成物業（"**境外未建成物業**"）向所有持牌地產代理及營業員訂立強制性指引。執業通告除了明確要求持牌人取得關於發展商和境外未建成物業項目的盡職審查報告及重要資料的書面法律意見外，還作出對廣告及宣傳物品的規定及在銷售文件上加上警告字句的要求，違反指引的持牌人將遭受地監局的紀律處分。執業通告僅適用於境外未建成物業，而且不適用於不受地監局監管的非持牌代理及發展商。

此外，如果境外物業的出售構成《證券及期貨條例》（第 571 章）附表 1 所定義為集體投資計劃權益的出售，則須取得證券及期貨事務監察委員會（"**證監會**"）的事先認可。在未有獲得事先認可或《證券及期貨條例》豁免（例如當對象為專業投資者）的情況下，發出邀請包括派發宣傳物品含有向公眾要約取得集體投資計劃的權益或參與集體投資計劃安排即屬違法。為推廣集體投資計劃亦可能構成從事須向證監會領取牌照的受規管活動中的業務。至於銷售個別物業是否符合集體投資計劃的定義比較複雜，某程度取決於每宗交易的實際情況。

《商品說明條例》（第 362 章）旨在禁止不良營商手法，例如提供虛假商品說明、虛假、具誤導性或不完整的資料，惟該《條例》只能有限地應用於境外物業銷售。首先，《商品說明條例》訂明不動產不屬「貨品」，因此，條例不適用於不動產；然而，就不動產而提供的服務，可以是產品，因而受到條例監管。《商品說明條例》亦不適用於以專業人士身份行事的獲豁免人士（包括持牌地產代理或營業員）所從事的營業行為。因此，持牌地產代理並未受《商品說明條例》所約束，但提供地產代理服務的非持牌地產代理則受《條例》規管。

如上所述，目前關於境外物業銷售的法規相當零散，針對非持牌地產代理的監管亦十分薄弱。

研究方法

在撰寫本報告時，消費者委員會（"**消委會**"）進行了以下工作：

- 研究香港現行的法律法規，特別是從消費者保障的角度，深入了解境外物業市場的監管狀況。

- 檢視和分析從相關來源收集得來的投訴統計數據，包括消委會的投訴個案及從其他執法和監管機構，即警方、海關、地監局和證監會的統計數據，以辨識消費者所面對的問題和隱患。

- 以香港的法例及規則為基準，與七個較熱門的司法管轄區/地區作比較，包括澳洲（新南威爾士州）、加拿大（卑詩省）（"**卑詩省**"）、內地、馬來西亞、新加坡、中國台灣和英國。

- 委託顧問就銷售境外物業相關的廣告進行調查，以檢視出持牌與非持牌代理所使用的銷售和推銷手法。調查於 2020 年 11 月和 12 月期間進行，範圍涵蓋發展商、代理或營業員於三種不同渠道和媒體上所刊登的廣告，即印刷媒體、線上平台和電視。

- 在 2021 年 6 月至 7 月期間，以神秘顧客身份訪問了二十個商戶並涉及三十六個樓盤。神秘顧客的訪問讓消委會辨識到代理的最新營商手法，並以第一身體會獲得消費者在購買境外物業時的處境。當中十五個商戶是非持牌代理，四個是持牌代理，一個是發展商。項目橫跨八個司法管轄區（即澳洲、加拿大、內地（大灣區）、馬來西亞、日本、新加坡、泰國和英國）。訪問僅限於交易的初始階段，包括聯絡商戶和作出查詢，但不涵蓋支付任何留位費及/或訂金。訪問的結果引證了投訴人所說及的經歷，並進一步確認消委會就境外物業市場對消費者是否有足夠保障的擔憂。

- 與主要持份者和行業代表接觸以搜集他們的觀點和意見。接觸的主要持份者包括運輸及房屋局（"**運房局**"）、地監局及證監會，而主要行業代表則為中原集團（"**中原**"）和美聯物業（環球）有限公司（"**美聯環球**"）。各主要持份者及行業代表向本會表達了就現時境外物業銷售的監管狀況是否足夠和他們的主要關注。

- 對本地和國際期刊進行網上資料搜集和分析，以了解不同司法管轄地方的本地及海外買家在購買境外物業的趨勢。

香港現行規管架構五大值得關注的事項

投訴統計資料的分析、廣告調查及神秘顧客訪問的結果清楚顯示，被推廣的境外物業位於許多不同的城市或國家，而最熱門的包括澳洲、加拿大卑詩省、大灣區內地城市、泰國、馬來西亞和英國不同城市。這些項目包括已建成和未建成的發展項目，除了常見的住宅項目（包括多層建築的單位和獨立屋）外，還有出售商業住宅混合物業以及民宿物業。樓價範圍廣泛，由低至人民幣 250,000 萬元[3] 至 930,000 萬英鎊[4] 不等。從廣告出售的不同物業種類繁多、入場價格懸殊以及涉及的國家/地區廣泛中均清楚顯示，香港對希望出售其物業的境外賣家而言，是一個非常開放和具有吸引力的市場，而不同階層的消費者亦能參與其中。

此外，在參考 7 個司法管轄區的相關法規後，觀察到所有司法管轄區都制定了嚴格的法例、規則和指導方針，規範境外物業的營銷或廣告。在 7 個司法管轄區中，有 4 個司法管轄區規定銷售境外物業的地產代理須領取牌照，以及持牌地產代理有義務在進行銷售和宣傳境外物業之前對物業進行盡職審查。相比之下，香港現行的法規僅監管對銷售境外未建成物業的持牌地產代理和營業員，導致在監管非持

[3] 相等於 298,225 港元。
[4] 相等於 10,044,000 港元。

牌地產代理/營業員的可疑營商手法方面存在漏洞。與其他司法管轄區提供的保障水平相比，香港的消費者權益明顯不足。根據調查結果，消委會確定了以下五大關注。

某類地產代理及賣方均無須領牌

地產代理 – 根據現有的資料和統計數字，警方和海關接獲的投訴大多涉及地產代理。 從消委會接獲的投訴個案亦顯示，近九成的個案涉及地產代理，而非持牌地產代理/營業員的投訴則佔這些投訴六成以上。以下是主要的投訴類型：

(1) 地產代理向買家提供不準確或具誤導性的資料，以及沒有提供或遺漏重要資料（包括風險警告不足）；
(2) 買家難以取回所支付的留位費或訂金；和
(3) 項目延誤或爛尾。

由於交易屬購買境外物業，當爭議出現時所牽涉的金額自然不菲。消委會以 2017 年至 2021 年（8 月）的投訴數字估算，買家的平均損失為 368,000 港元，而受影響物業的平均價值則接近 180 萬港元。此外，警方及海關的統計數字亦顯示，投訴人所蒙受的損失重大，平均損失由 240,000 萬港元至 875,000 萬港元不等。

從消委會所處理的投訴亦清楚顯示，由於買家對購買境外物業並不熟悉，所以他們非常依賴代理提供的資料，本港地產代理在提供的資料對買家發揮了積極作用。75% 的投訴人通過香港報章廣告獲悉境外物業項目，而近 70% 的投訴人參加了展銷會或代理籌辦的講座。投訴數字顯示，93% 的交易發生在香港。在廣告調查中，98% 的印刷廣告和 60% 的線上廣告均包含本地的聯絡方式，例如位於香港的商業場所或酒店的地址以作展銷用途或本地代理的電話號碼以進行後續查詢。再者，廣告調查和神秘顧客的體驗均證實境外物業的賣方仍會經常與香港本地的地產代理和營業員合作，通過提供香港本地手機號碼或舉辦展覽來促銷境外物業。因此，儘管有些廣告可能是在網上發放和來自香港以外的地區，但對大多數廣告而言，都存在濃厚的香港元素。

神秘顧客訪問的另一結果是，有關代理及其銷售人員的持牌狀態容易引起混亂。就 15 名被訪問非持牌代理人中，只有 1 名在派發的小冊子、單張和名片中提供了豁免令下的相關聲明（ “**無牌聲明**” ）。其餘 14 名非持牌地產代理/營業員中，只有一名在名片上提供無牌聲明，另外一名在傳單上提供。其餘的非持牌代理（12 間）均沒有在上述任何文件提供任何無牌聲明。

至於 4 名持牌代理，他們均在廣告及營業員的名片上註明公司的牌照號碼。其中 2 人在名片上註明豁免聲明，以表示他們沒有處理位於香港的物業的牌照。這表明，在實際操作上，雖然持牌代理受到地監局監管，但在積極參與推廣境外物業項目並與消費者互動的前線銷售人員仍然可能是屬非領有牌照和不受監管。

以上種種突顯出現行規管制度存在漏洞，非持牌地產代理/營業員可輕易利用豁免令繞過監管。這些非持牌地產代理可趁機從事不良營商手法並對消費者的保障構成損害。從保護消費者的角度而言，實在沒有合理理由容許純粹處理境外物業的地產代理可豁免不用領牌，尤其是他們不遵守豁免令規定的情況時有發生。

賣方 – 據觀察所得，境外物業的廣告並不限於持牌及非持牌地產代理。來自不同司法管轄區的發展商也可以直接在香港推銷它們的項目，而無需使用任何中介。由於發展或出售物業不屬於“進行地產代理工作”，因此《地產代理條例》或執業通告均沒有約束發展商/賣方的活動。所以，就算建議將牌照要求擴大至所有地產代理，仍未能規管發展商有可能發生的不良銷售行為。

比較 7 個司法管轄區/地區，其中 4 個司法管轄區（即新加坡、卑詩省、馬來西亞和中國台灣）均要求地產代理銷售海外或非本地物業必須領牌，不論該等海外或非本地物業的性質以及它們是否已建成。

在亞洲，新加坡、馬來西亞和中國台灣均有特定的規則和指引規管銷售海外或非本地物業的本地持牌或註冊地產代理。馬來西亞的要求更為嚴格，要求任何在馬來西亞出售或邀請購買任何外國物業的要約必須由或透過在馬來西亞執業和居住的地產代理提出。換而言之，外國地產代理或賣方必須聯同當地註冊地產代理在馬來西亞進行推廣或銷售海外物業。新加坡亦實施了強化指引，以規範海外物業的廣告。

就訂金和留位費缺乏冷靜期或訂金保障機制

消委會收到的投訴內容及神秘顧客訪問均顯示，香港買家普遍會在簽訂買賣合約前，向代理支付留位費以預留物業。該等留位費用一般介乎 10,000 港元至 50,000 港元之間。由於目前就留位費沒有任何法例和冷靜期的規管，當買家決定不購買時，該等費用通常會被沒收。消委會的投訴個案中，曾有投訴指代理沒有解釋有關留位費的條款及細則，導致消費者在決定不購買物業後才得悉該費用不可退還而深感不滿。

然而，據觀察所得，在某些情況下一些代理或賣方會退還留位費或將該費用跟買家所應付的訂金作對沖。留位費的處理缺乏統一性以及不同代理採用的條款各有不同，可能會混淆消費者的理解。

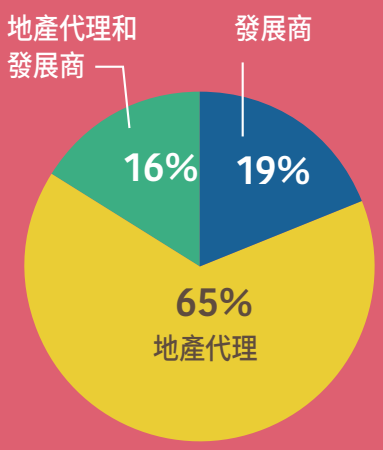
研究亦顯示，在所有不同的司法管轄區中，只有加拿大的卑詩省強制要求為訂金設立冷靜期。它還要求將訂金存入在該省的受託管信託賬戶，這意味著這些資金不能用於建設所發展的項目。就研究中儘管沒有其他司法管轄區對訂金有相類似的嚴格要求，消費者理應歡迎有更標準化的方法或機制來處理留位費。

涉及境外物業銷售廣告的主要問題*

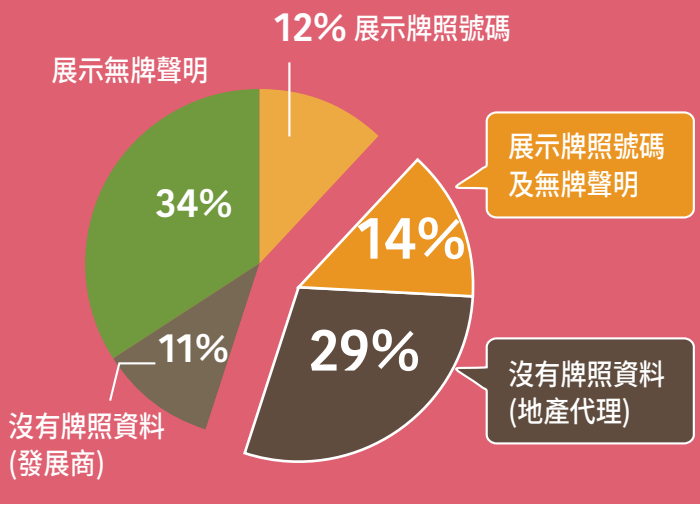
印刷媒體
(報章及雜誌)

270則

廣告商身份

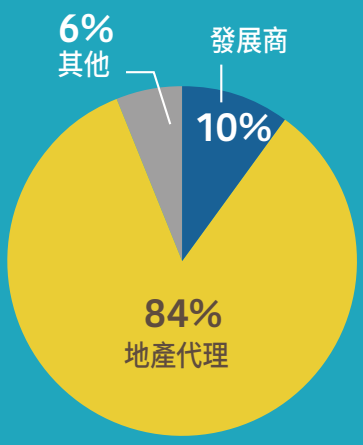


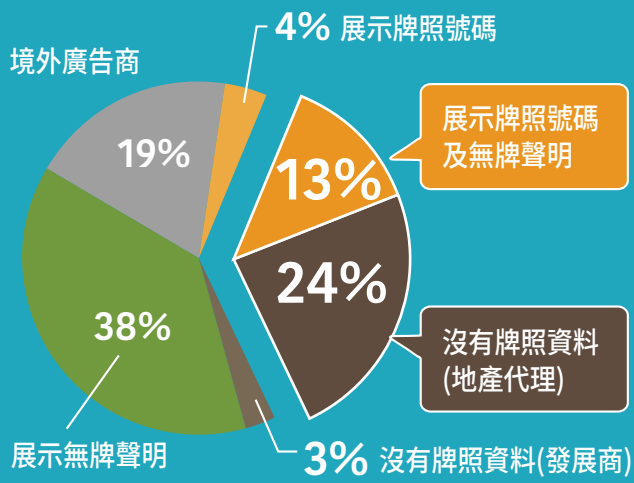
提供牌照資料及無牌聲明



線上媒體
(搜尋引擎及社交媒體)

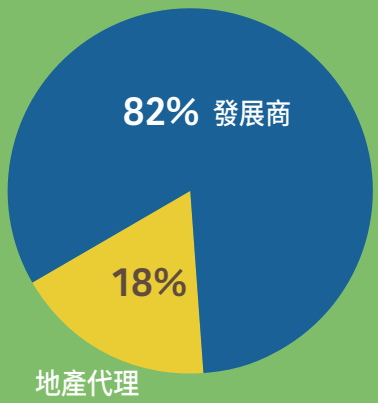
902則





電視
(免費及收費頻道)

142則



並無發現明顯的不良銷售手法

*調查時間：2020年11月至12月

共通問題

1 以存疑的聲稱作餌誘



2 資訊混亂



標示不同貨幣
令人混淆



同一廣告

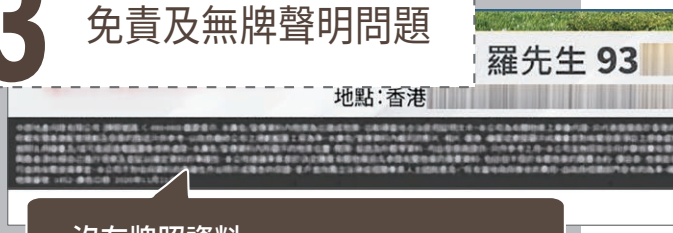


沒有清楚陳述物業是否
已建成



物業說明只提供
概略位置

3 免責及無牌聲明問題



- 沒有牌照資料
- 沒有無牌聲明
- 無牌聲明字體太小或太模糊
- 線上媒體上的無牌聲明置於網頁最底，需捲動多頁才能閱讀，容易被人忽略

廣告監管不足

廣告調查發現，270 個印刷廣告中，有 81% 是由地產代理投放（218 則）。其參與度在線上平台的更高，佔線上廣告的 84%（902 則中的 756 則）。另外，鑑於成本，82% 的電視廣告由發展商投放（117 則）。

印刷廣告 – 超過 40% 的印刷廣告沒有提供牌照資料（109 則），扣除發展商投放的廣告（30 則）後，很明顯地產代理佔這些廣告（79 則）的 70% 以上。接近 35% 的印刷廣告（93 則）列明關於豁免的無牌聲明，這意味著至少有這個百分比的廣告是屬非持牌地產代理投放。此外，只有大約 25% 的廣告提供了牌照號碼（68 則）。有趣的是，這些廣告中有 54%（37 則）亦有作出無牌聲明，表示這些持牌地產代理所僱用的是非持牌營業員。

線上廣告 – 對於線上廣告，只有約 17% 的廣告表示他們持有地產代理條例下的牌照（151 則）。78% 的廣告（118 則）還展示了無牌聲明，意味著他們僱用了非持牌營業員。此外，26.9% 的廣告（243 則）沒有列明牌照號碼。此外，據觀察，無牌或免責聲明沒有在廣告的當眼地方出現，反之是放置在廣告的末端。讀者只能在向下滾動許多頁面後才能閱讀無牌或免責聲明，容易被人忽略。

執業通告僅限於監管銷售境外未建成物業的持牌地產代理 – 地監局的執業通告有條文規管廣告的投放和內容。但是，執業通告僅限於監管銷售境外未建成物業的持牌地產代理。已建成的境外物業仍然不在其範圍內，而非持牌地產代理銷售境外物業仍然不受監管。

印刷廣告中的無牌/免責聲明的字體大小欠缺規定 – 對於包含關於豁免的無牌和免責聲明的印刷廣告中，觀察所得大約 22% 的廣告中的字體小至連視力正常的人都無法輕鬆閱讀其內容，需要使用放大鏡或以手機拍攝後放大的照片以幫助提高可讀性。在這些廣告中，有 10% 的無牌/免責聲明印刷模糊，以至即使使用適當的工具也無法清晰地閱讀其內容。顯然，印刷廣告中的無牌/免責聲明缺乏字體大小的規定。

無牌聲明缺乏統一的表述方式 – 豁免令沒有規定文件和廣告中有關字句的統一表述方式。由於缺乏規定，許多不同形式的表述均被採用以符合豁免令，例如聲稱專門銷售境外物業及不受地產代理條例的監管；沒有持有任何香港牌照； 獲得地產代理條例或豁免令豁免等。代理就豁免令所須的要求作出不同的表述方式容易令一般消費者困惑和難以理解。

誤導性廣告 – 代理使用不同手法來吸引消費者和作招徠。聲稱移民捷徑、不切實際的高租金回報、不同的禮遇、免費禮物、免息分期都被用作餌誘。事實上，所有被研究的七個司法管轄區（即內地、新加坡、英國、卑詩省、馬來西亞、中國台灣和新南威爾士州）都有某種監管該司法管轄區內此類物業的營銷或廣告的法規。

就其他營商手法管制不足

購買境外物業的風險警告 – 從神秘顧客調查中發現，大部分商戶都提供了所推薦物業的基本資料和銷售文件，例如提供售樓書、小冊子或傳單，有關發展商/賣方的身份、價格和按揭貸款的資料，並協助收樓。然而，儘管接近九成的代理就此類文件內容的準確性加入了免責聲明，但沒有一個代理提醒神秘顧客注意這些免責聲明。似乎加入關於所提供內容準確性的免責聲明僅僅是為了保護商戶在出現問題時免於承擔責任。然而，不提醒消費者注意這些免責聲明會有損他們的知情權。

儘管執業通告有所規定，神秘顧客的調查中亦有發現銷售人員沒有就購買境外物業存在的風險和責任向他們發出任何警告。

未經證實或具誤導性的租金保證 – 從消委會的投訴個案及廣告調查中發現，為吸引顧客不少商戶以一定年期的租金保證或高額租金回報為餌誘，惟這些聲稱未經證實，是否存在租務市場和所述租金回報亦存疑。投訴亦顯示賣方未必能按協議提供所述回報。其中一些項目可能屬集體投資計劃，如經查證後未經授權，銷售這些產品會違反《證券及期貨條例》。

銷售資料的充分性和準確性有待加強 – 由於現時並無強制規定非持牌地產代理在接手項目前必須進行盡職審查，消費者無法從營銷資料或與銷售人員的會面中得知是否已進行盡職審查。

在神秘顧客調查期間，神秘顧客發現非持牌地產代理至少有 2 次提供過時的售樓書。其中一次，曼徹斯特一個未建成物業項目的售樓書於 2018 年 7 月印刷。在 2021 年 6 月調查期間，銷售人員只重複聲稱該項目將於 2021 年第三季度完成，但沒有提供任何關於施工狀態的最新資料。然而，銷售人員告知神秘顧客正在尋求英國相關當局的額外批准，以再加建造多兩樓層，但並未提供對完工日期的影響的資料。在另一個案中，出售兩個未建成的泰國物業的非持牌地產代理似乎誤報了重要事實，即完工狀態、位置和附近的交通設施。

部分銷售資料沒有被翻譯成英文或中文，使消費者無法理解其中包含的信息。在神秘顧客對兩位代理的兩次訪問中，銷售人員提供了用日語編寫的售樓書和傳單。該些銷售人員聲稱根據他們銷售日本房產的經驗，告訴神秘顧客儘管他們不諳日語，已能猜出這些字詞在日語中的意思。此外，在佣金支付或地產代理與賣方之間的關係方面也缺乏充分或自願的披露。

部分生效的《地產代理條例》

草擬《地產代理條例》時是涵蓋監管香港境內及境外所有物業的地產代理工作，對持牌代理施加法定要求，以履行對買家的責任。其中一些職責包括向買家提供與有關物業的重要信息、讓客戶得知其提供的服務範圍，包括他們是誰的代表，以提醒買家任何潛在的利益衝突及廣告內容的限制等。

基於立法和監管的優次考慮，相關條文於 1999 年實施時，只適用於香港住宅物業和某些訂明形式的地產代理協議。這意味著上述法定責任並不適用於銷售境外物業，而執業通告僅限於對銷售境外未建成的物業的持牌代理進行監管。知情權是一項重要的消費者權利，必須得到保障。但研究結果反映消費者往往未能得悉代理是以誰的利益為依歸或代理所提供的服務範圍。信息的透明度至為重要，消費者應了解地產代理的任何潛在利益衝突，以便在考慮所有相關信息的情況下作出明智的決定。

建議

考慮到有必要在加強消費者保障、維持業界可持續發展及滿足消費者合理獲取有關在港銷售境外物業的資訊這三個宗旨之間取之平衡，本會在制定建議之前，已詳細參考法改會報告中提出的建議、並就是次研究的結果及持分者的意見作充份的考慮。大前提是，本會的倡議目的並非要理論化地要令購買境外物業零風險，此舉並不務實，而是期望消費者在事前有足夠警告及充分知情的情況下作出明智的選擇。

在與有關當局和主要業界參與者的交流中，本會完全同意進行公眾教育是不可或缺，亦是至關重要，以加強公眾對購買境外物業涉及的潛在風險及複雜性的認識。然而，消委會深信並非單純依賴公眾教育就能減低買家面臨的潛在風險，而是在一些持份者的支持下（即證監會、中原及美聯環球），透過以下方法加強消費者的保障：

(1) 加強對地產代理和營業員（當中大部分可能都是代表賣方）的規管；及
(2) 對資料提供及廣告引入較嚴格的要求。

總括而言，以上 3 個持份者均對進行境外物業銷售的代理須要領牌持有正面意見。而且，業界參與者亦認為應就廣告引入較嚴格的規則，尤其是涉及租金回報和保證的廣告，同時亦應對資訊披露方面加強要求，以及需要就留位費方面提供強制性冷靜期保障，若交易不成亦可從留位費中扣除合理金額的行政費。

另外要加以考慮的是，運房局和地監局就政策考慮方面也提出關注，主要是：

(1) 任何試圖限制只能透過持牌地產代理在香港銷售境外物業可能會違反自由貿易的原則。
(2) 任何針對地產代理所提議的措施（例如要求從事境外物業的地產代理須領牌）並不能解決與賣方/發展商或項目本身有關的問題。這樣做是不合理地將賣方/發展商就境外物業的責任轉嫁給地產代理。
(3) 由於香港無法控制其他司法管轄區所存在的監管制度，僅僅監管銷售位於這些司法管轄區的房地產的地產代理並不能有效地將買家或潛在買家承受的風險降至最低。
(4) 有關土地財產的法律和制度因司法管轄區而異。因此，適用一套香港就銷售境外物業的規則並不適當。為不同的司法管轄區度身訂造要求也不切實際。

(5) 地產代理不會擁有完全了解不同司法管轄區有關物業銷售的相關法規和要求的專業知識，因此他們能夠進行任何盡職審查是不合理的。
(6) 若賣方和其他司法管轄區的監管機構不願意合作或協助，會令地監局難以充分了解各個司法管轄區規例，和收集足夠的資料來令人滿意地處理有關投訴。

本報告考慮了上述所有這些反饋和關注，讓本會作出知情的建議。

本會知悉，在目前的情況下，境外一手住宅物業的買賣與 1) 境外二手住宅物業 以及 2) 境外非住宅/商業物業之間存在著重大差異。按觀察所得，大多數出現的問題均與境外一手住宅物業有關，而就其性質而言，會有相對較多的消費者面對相同的潛在風險，因而涉及較大的消費者利益。至於境外二手住宅物業，在大多數情況下業主都不是發展商，所涉及物業的狀況各有不同，而潛在的風險也會因個案而異。對於境外非住宅/商業物業，通常買家涉及投資者及很多時候需要代為管理服務包括辦公室、酒店和購物中心，並可能有一定租金回報或保證的承諾。此類情況較有可能屬於由證監會所監管的集體投資計劃。因此，本會的建議將集中於境外一手住宅物業上，是否應為其他類型的境外物業引入進一步規管，本會持開放的態度和讓市場和有關當局再作研究。

總括而言，消委會提出下列五項建議，當中第一至三項建議是相關的；而第四及第五項則為獨立建議。若首四項建議於實施後對於消費者保障仍有不足之處，第五項建議應予以考慮引入。

1) 規定所有從事銷售香港境外一手住宅物業的地產代理及營業員須根據《地產代理條例》取得牌照
2) 就給予買方的資料及廣告宣傳，根據《地產代理條例》向所有從事銷售境外一手住宅物業的地產代理和營業員加入現行的法定責任
3) 規定給予買方的資料及規管銷售境外一手住宅物業的廣告內容
4) 就留位費引入強制性冷靜期
5) 強制要求所有境外一手住宅物業的銷售須由持牌地產代理/營業員進行

規定所有從事銷售香港境外一手住宅物業的地產代理須根據《地產代理條例》取得牌照

豁免令第 2(a)條訂明如任何人「純粹就香港以外地方的物業」作出《地產代理條例》第 15 或 16 條所提述的任何事情，則獲豁免而不受領取地產代理牌照或營業員牌照的規定規限。消委會建議該條文修改為「純粹就香港以外地方的物業（除一手住宅物業外）」。

條文修改後，所有從事香港境外一手住宅物業的地產代理（或營業員），不論他是否純粹處理此等物業，均須按照《地產代理條例》取得牌照。

這項修改可能會被指對地產代理或營業員造成不公或過重的負擔。然而，消委會相信，引入這項修改將帶來更透明及公平的市場，在地產代理的競爭下，從而提升向消費者提供服務的質素。

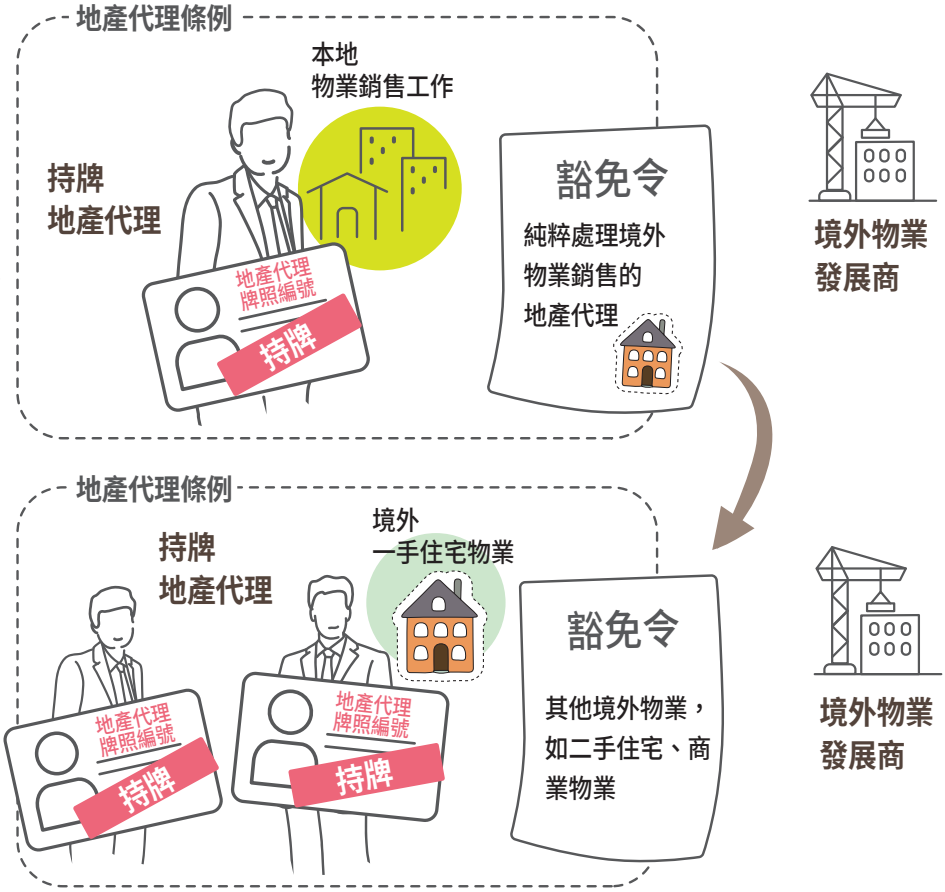
建議及前瞻 - 境外一手住宅物業

聚焦境外一手住宅物業

立法

1

透過修訂《地產代理條例》豁免令，規定所有從事境外一手住宅物業銷售的地產代理均須按《地產代理條例》取得牌照



2

就給予買方的資料及廣告宣傳，根據《地產代理條例》的第36及44條的規定和指引，向從事銷售境外一手住宅物業的地產代理加入現行的法定責任



執業通告



3

透過具約束力的地監局指引，規定向買方提供指定資訊，並規管境外一手住宅物業廣告的內容

- 重要基本資訊須清晰易讀
- 不得誇大、虛假或誤導
- 對指定警告句語在印刷廣告的字體大小和於電子媒體廣告出現時間應有所規定

- **盡職審查報告**
  包括發行人的名稱、所屬機構及專業資格
- **法律意見**
  如涉及的境外一手住宅物業銷售有訂金保障機制，須清楚列明
- **警告聲明**
  包括匯率浮動風險、可能無法兌現的租金收益保證、及延遲交樓等
- **銷售及推廣資料**
  包括提供指定的資訊



4

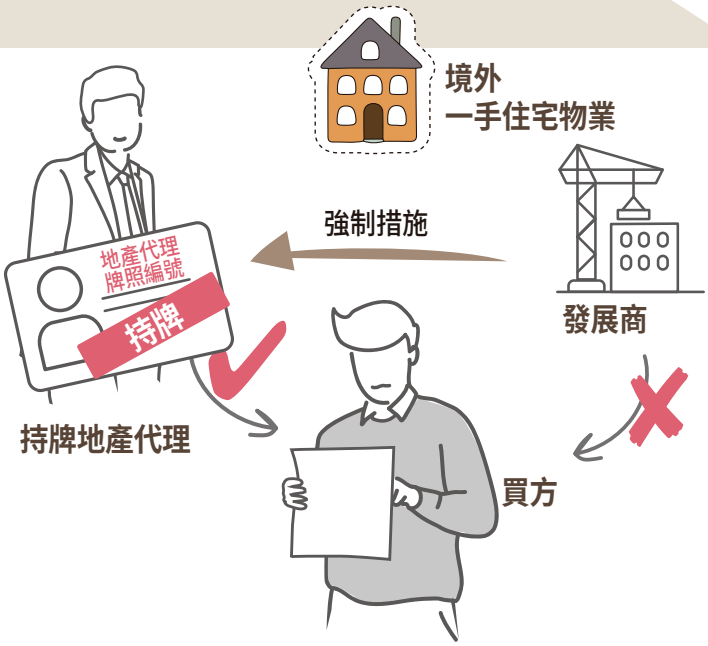
就留位費引入強制性冷靜期

- ⩾7天
- 容許收取行政費 – 扣取合理而不過多的金額

5

漸進模式

如執行1-4項建議後，仍需進一步加強消費者保障：採取漸進模式，強制所有銷售境外一手住宅物業須由持牌地產代理/營業員進行



雖然目前純粹從事境外一手住宅物業銷售的地產代理或營業員無需根據《地產代理條例》取得牌照，但他們在普通法下仍須對準買家或買家負上各種法律責任，例如包括民事侵權責任，或不能作出欺詐性或疏忽的失實陳述，然而，普通法並沒有明確界定這類責任的範圍；而是否違法將取決於每個個別案件的事實。事實上，從地產代理或營業員的利益而言，如法例（或監管當局發布的指引）能夠更清晰界定他們的職責範圍，他們的經營風險亦會因而受到保障。

儘管決定從事境外一手住宅物業銷售的地產代理或營業員日後需要承擔更大的法律責任，在自由市場下，該些地產代理或營業員可對發展商所提供的佣金比率進行協商，以帶來可觀的回報。

至於申請辦理從事境外一手住宅物業地產代理工作的牌照須符合哪些條件及是否應與現行法例相同，消委會持開放態度及認為發牌機構可自行決定。

就給予買方的資料及廣告宣傳，根據《地產代理條例》向從事銷售境外一手住宅物業的地產代理加入現行的法定責任

目前，《地產代理條例》的第 36 及 44 條分別列明與資料披露和廣告內容監管的規定和指引，這些條文原適用於境外物業，惟條文自 1999 年開始生效時只有部分生效，僅適用於香港住宅物業，即代表這些條文現時不適用於境外物業銷售。因此，這些條文應進一步生效至適用於境外一手住宅物業。

透過具約束力的地監局指引，規定給予買方的資料及規管境外一手住宅物業的廣告內容

為使第 2 項建議有效實行，本會認為有確切需要考慮修訂和更改執業通告，對提供給潛在買家最主要的四份文件的內容提出更多規定：(一) 盡職審查報告；(二) 法律意見；(三) 書面警告聲明；(四) 銷售資料單張。主要建議的規定如下。

盡職審查報告 – 報告發行人的名稱、所屬機構（例如是否政府部門或專業人士）及專業資格（如適用）應包括在內。此外，亦應列明報告日期，以及確認資料正確的最後日期，以確保報告有適時更新。地產代理亦須在另一份文件中總結負面或潛在負面的發現，以令準買家充分知悉該等負面發現。

法律意見 – 應擴展至說明是否有任何根據當地法律法規，可以保障買家在完成購買境外物業前所支付之訂金或部分付款的機制。另外，若當地有對非本地人取得當地貸款的限制，則應加以說明。

警告聲明 – 應加入不同方面的警告，包括有關買方在完成交易時是否有足夠的財務資源及一般貸款事項、匯率浮動風險、賣方可能無法兌現任何承諾或租金收益、延遲交樓及對非本地居民在當地購買物業的限制等。此外，亦需提醒準買家在銷售階段中獲取的資料可能不受法律約束，以及在買賣未能完成的情況下可採取的法律途徑或其他行動。

銷售資料單張 – 應加入以下事項：

(1) 按比例繪畫的地圖/圖則以展示境外物業的位置；
(2) 用於測量境外物業面積的標準定義，完成交易日期及根據項目在當地標準對「完成」的定義（如建築工程已竣工）；
(3) 收樓時的物業狀況，例如裝置及配件的詳情（如有）、將提供的設施（如有）及當地批出的佔用許可；
(4) 對於尚未竣工的工程，延長最終交樓日期的理由及最長的延長期限（如有）；
(5) 有關通往境外物業的通行權的詳情及其使用限制（如有）；
(6) 境外物業所在地的法律法規是否有保障買方訂金的機制，如有，該機制的詳情；及
(7) 提供監管境外物業所在地的相關法例/監管機構的網上鏈接。

廣告要求 – 除現時的規定外應加入：

(1) 廣告應清晰易讀地說明某些重要基本資訊（例如建議買方參考銷售資料單張上的詳情、提供展銷會上演講者的資格等）
(2) 廣告不得誇大或在要項上提供屬虛假或誤導的資訊，包括有關發展商財務狀況或相關單位的法律權利、實際位置和價格等資訊。
(3) 對指定警告句語在印刷廣告的字體大小和對電子媒體廣告出現時間應有所規定。

就留位費引入強制性冷靜期

留位費有別於買賣合約下的訂金或部分付款，繳付留位費是為了讓買方優先享有獨家購買心儀物業的機會。基於準買家需要檢視和分析的資料數量龐大及有可能需要尋求獨立意見，本會認為給予準買家不少於 7 天的冷靜期實屬合理，容讓他們考慮是否訂立具有法律約束力的合約。

如準買家在冷靜期內決定不繼續交易，他理應可以收回全部或部分的留位費。考慮到地產代理的成本支出和所蒙受的經濟損失，而且事實上準買家已獲取獨家購買該物業的機會，因此地產代理應可以從留位費中扣除合理而不過多的金額為行政費用。

強制要求所有境外一手住宅物業的銷售須由持牌地產代理/營業員進行

廣告及神秘顧客的調查顯示，現時大部分境外物業都存在本地因素和透過本地的地產代理進行銷售。此外，儘管對海外/非本地賣方的執法存有一定困難，但按照自由市場的理念，賣方依然可直接在香港自由銷售境外物業，並沒有法律規定在本地銷售境外物業必須由地產代理進行。

消委會希望第一至四項建議得到落實，並配合公眾教育，以 (一) 鼓勵消費者通過地產代理購買境外一手住宅物業；(二) 警告他們不依從的風險，如行之有效便沒有實施最後一項建議的必要（即要求在港銷售境外一手住宅物業的賣方必須取得本地地產代理牌照或與本地持牌地產代理合作）。在上述四項建議實施了一段合理時間後，便應檢視是否有必要實施最後一項建議。

邁向未來

香港是一個富裕的國際城市，擁有良好的基礎設施及成熟的本地物業市場，多年來亦一直吸引著國際買家。香港買家購買境外物業時亦同時應享有相同程度的保障。隨著境外物業市場持續蓬勃，特別是考慮到大灣區的發展，對境外物業相關的法律進行全面檢視實在刻不容緩。

本會明白當中涉及的事情複雜，但希望本報告的發表，能引發各方（包括相關政策當局、監管機構、持份者及公眾）作出建設性的討論和考慮。在作出上述的建議，是建基於本會希望能克盡己任，以保障及推廣不動產買家的利益。

考慮和實施上述建議固然需時，所以期間加強消費者教育尤為重要；若建議得以接納和實行，消費者教育更須持續以助消費者維護自己的權益。本會會繼續與相關各方緊密合作教育公眾。

1. Introduction

1.1. Background

Throughout the years, Hong Kong consumers are no strangers to purchasing properties situated outside Hong Kong ("**POH**"). The reasons behind such purchases are multifarious and diverse, and tend to reflect the socio-economic trends of the time. Some people look to the purchase of POH as a way of diversifying their investment portfolios; some people purchase a property in the jurisdiction to which they plan either to send their offspring to complete their education or retire; some consumers purchase POH as part of their migration plan. Further, Hong Kong is a city with free flow of money and this, coupled with the low interest rates worldwide and an appetite for frequent travel to the Mainland China ("**Mainland**") as well as overseas, all contribute to a heightened interest in buying POH and this is manifested in a flourishing POH market to which agents both local and from abroad flock, in order to target and market to receptive local buyers.

Hong Kong consumers' interest in POH span many different jurisdictions, from Australia, Japan, the Mainland, Singapore and Malaysia to name a few in the Asia Pacific region, to Canada, Portugal and the United Kingdom ("**UK**") in the rest of the world. The types of properties targeted by local buyers are also diverse, covering residential properties, commercial units, mixed commercial and residential offerings and even some Airbnbs. As for the prices of these POH, there is a vast range to suit every budget, ranging from RMB250,000[1] to GBP930,000[2] according to the advertisements surveyed. Given this broad range of POH available in the market with different price points and in different jurisdictions, this shows that the purchase of POH is not an activity restricted to the wealthy, but it is something that Hong Kong consumers from all walks of life participate in.

In the past decade, Consumer Council ("**Council**") has seen increased consumer interest in purchasing POH. The rising trend of buying POH is likely to continue as manifested in the widespread advertisements of these properties. In fact, Hong Kong, as part of the Guangdong-Hong Kong-Macao Greater Bay Area ("**GBA**"), has been the beneficiary of the various policy measures promulgated by the Central Government since August 2017 which has resulted in transportation and communication links between Hong Kong and the Mainland cities of the GBA being strengthened, directly facilitating Hong Kong people to develop, work and reside in the GBA cities. The Guangzhou-Shenzhen-Hong Kong High Speed Rail Hong Kong Section commenced operation in September 2018, cutting down the travel time between these places, and bringing cities in these areas much closer. Further, in March and November 2019, the Central Government announced a total of 24 policy measures, one of which is that Hong Kong residents are treated as local residents in purchasing properties in the GBA cities[3]. This was followed by the "GBA Youth Employment Scheme"[4] announced by the Chief Executive in the 2020 Policy Address. With the rapid development of the GBA, bringing with it many opportunities economically and financially and the relatively attractive housing prices, it is anticipated that in the not too distant future, more people in Hong Kong will live and work in the GBA. The purchased POH will become more or less a new

[1] Equivalent to HK$298,225.

[2] Equivalent to HK$10,044,000.

[3] Most of these policies have been implemented including the facilitation of Hong Kong people purchasing properties in mainland GBA cities.

[4] The scheme encourages enterprises with operation in both Hong Kong and the GBA to recruit and deploy local university/tertiary institution graduates to work in the Mainland cities of the GBA.

home for many people as opposed to purchasing such properties for holiday or retirement purposes as had been the trend in the past.

Although the government does not keep official statistics on the number of people migrating to other countries/regions, reference can be taken from statistics from other sources which give some indication on the immigration figures. For example, the Security Bureau estimated that there were 7,000 people migrating to other countries/regions in 2019 based on the Government's recorded number of people applying for a record of no criminal conviction. The number of people withdrawing MPF on the ground of permanently leaving Hong Kong also, to some extent, supports this phenomenon. The results from a recent telephone survey titled "Views about Emigration from Hong Kong" conducted by The Hong Kong Institute of Asia-Pacific Studies at the Chinese University of Hong Kong in September 2020 also supports this proposition, with 43.9% of those interviewed indicating that they would emigrate if they had the chance.

In tandem, there has also been a high upsurge in the number of complaints received by Estate Agents Authority ("**EAA**") (the regulatory body overseeing the activities of estate agents and salespersons) last year as compared to 2019. In late January 2021, the EAA stated that it recorded a sharp increase of complaints relating to POH from 6 in 2019 to 66 in 2020 with cases involving false or misleading representation of rental returns increase from 1 case in 2019 to 36 in 2020.

Despite statistics showing that complaints relating to the sale of POH having decreased since the late 1990s and the early 2000s, news reports of complaints relating to uncompleted POH developments (爛尾樓) continue to be regularly featured. Between 2017 and 2019, the Council received an average of around 33 cases of complaints involving POH, rising to 56 in 2020. In the first 8 months of 2021, the figure has risen again, to 106[5]. The complaints included failure to complete the development; agents suspected of misleading buyers by non-disclosure of the risks of under-valuation of the property which could affect the outcome of mortgage applications; and the sale and purchase contracts being at variance with the agents' descriptions. To alert consumers to these malpractices and to educate them of the various pitfalls involved, the Council issued an article in CHOICE magazine and a Press Release on 14 February 2018 highlighting the significant risks involved in purchasing POH.

In recent years, especially after the social incidents in 2019, the Council observed that advertisements promoting properties in the Mainland, Malaysia, Australia, the UK etc. have increased and that a number of these advertisements appear not to comply with the laws and regulations such as the Estate Agents (Exemption from Licensing) Order, Cap 511B ("**Exemption Order**") under the Estate Agents Ordinance, Cap 511 ("**EAO**"), therefore compromising consumer rights. The Council believes that it is a priority to visit this issue to assess whether the existing regulatory regime offers sufficient protection to consumers and if not, make proposals as to what could be done to enhance consumer interest in this area.

To quote the advice set out in the foreword of the information leaflet published by the EAA titled "Purchasing Non-local Properties Be SMART", "*purchasing properties situated outside Hong Kong, especially uncompleted ones, is very complicated…Consumers may have to bear extra risk for purchasing uncompleted properties situated outside Hong Kong ("**UPOH**"), as estate agents cannot*

[5] Comprised of residential and non-residential properties.

guarantee whether the developer is able to complete the construction on schedule. Consumers may need to negotiate with the developer themselves if the property fails to be completed on time" [6].

1.2. Terms of Reference and Rationale/Focus

The current regulatory regime governing the sale of POH by estate agents is the EAO and the Exemption Order. Under the EAO enacted in May 1997, which came into effect on 8 August 1997, any individual or company practicing estate agency work in the course of business in Hong Kong must hold a valid estate agent's licence. Anyone acting as a salesperson of an estate agent must also hold a valid salesperson's licence. However, the Exemption Order permits persons who do estate agency work exclusively in relation to POH and states in all documents (including pamphlets and brochures) and advertisements that they do not have a licence to deal with any property situated in Hong Kong, to sell POH without a licence. In other words, the exclusive sale of POH is not regulated by the EAA and this is where consumer interest is possibly compromised. This gives rise to the need to review the adequacy of the current regulations in terms of consumer protection.

The current regulatory framework in Hong Kong is set out in detail in Chapter 2 of this report.

1.3. Methodology and Structure

Methodology

In compiling this report, the Council carried out the following work:

- Laws and regulations regarding the sale of POH in Hong Kong were reviewed. In addition, references were made to certain sections of the Residential Properties (First-Hand Sales) Ordinance (Cap 621) ("**First Hand Sales Ordinance**") as regards the requirements and enforcement aspects of the advertisements and the need to have a standard estate agency agreement to set out their terms and conditions.

- By conducting desktop research, these laws and regulations relating to POH were then benchmarked against 7 different jurisdictions popular with Hong Kong consumers, namely, Australia (New South Wales) ("**NSW**"), Canada (British Columbia) ("**BC**"), the Mainland, Malaysia, Singapore; Taiwan and the UK.

- A desktop review of local and international journals was undertaken to ascertain the trend of purchase of POH of local and international buyers in different jurisdictions.

- An analysis was carried out into the Council's complaint cases to ascertain the major problems and malpractices involved. The complaint statistics and trends on POH related cases received from the Police, the Customs and Excise Department ("**C&ED**"), the EAA and the Securities and Futures Commission of Hong Kong ("**SFC**") were also captured and analysed.

- An external consultant was engaged to conduct a review of advertisements in Hong Kong promoting the sale of POH between November and December 2020. The results were then

[6] http://www.eaa.org.hk/Portals/0/Sections/CC/PurchasingNon-localPropertiesbeSmart_en.pdf

analysed to gauge the intensity of the advertisements and determine whether there were any malpractices or marketing tactics employed to the detriment of consumer interest.

- Engagements with stakeholders and key trade participants were carried out to gather inputs and views on the issues involved. The Council reached out to the EAA to gain more information in relation to the increased complaints received by the EAA in 2020 and to obtain its views on whether more stringent regulations should be imposed on the sale of POH. The SFC was contacted to seek their input in relation to issues arising from the sale of real estate investments which fall within the definition of a collective investment scheme ("**CIS**") and their views on the best way to regulate such sales involving POH. The Council also had meetings with representatives from the estate agent industry, e.g. the Centaline Group ("**Centaline**") and Midland Realty (Global) Limited ("**Midland Global**") to collect their views on the current state of regulation and their concerns, in particular as to whether they think the current regulations relating to the sale of POH are adequate to control and prohibit trade malpractices. Finally, the Council also engaged with the Transport and Housing Bureau ("**THB**") and the EAA to ascertain their views on the Council's findings and recommendations.

- Mystery visits were conducted to provide insight into trade practices of the vendors' agents (including licensed and unlicensed estate agents).

Structure

This report is divided into 8 chapters and is structured as follows:

Chapter 2 analyses the current situation as regards the purchase of POH in Hong Kong. The chapter also sets out the current regulatory framework governing the sale of these properties including the EAO. In addition, there is a review of the report titled "Sales Descriptions of Overseas Uncompleted Residential Properties" (售樓説明－境外未建成住宅物業) ("**LRC Report**") published by the Law Reform Commission ("**LRC**") and its recommendations.

Chapter 3 examines complaint cases of various enforcement and regulatory bodies. Case examples will be shared to illustrate some of the trade tactics employed and the impact they have on consumers.

Chapter 4 presents the survey findings of the tactics and undesirable trade practices found in the marketing and advertising of POH.

Chapter 5 presents the trade practices of agents selling POH in Hong Kong as obtained through mystery visits. The first-hand experience obtained from this exercise corroborated the complainants' experience set out in Chapter 3.

Chapter 6 reviews the regulatory regimes governing the sale of POH in the above-mentioned 7 jurisdictions, highlighting aspects to which this report has drawn references.

Chapter 7 identifies the areas of concern in respect of the existing regulatory regime and justifications for introducing further regulatory controls. It also contains the views of the various stakeholders which include the related regulators and major traders in the industry.

Chapter 8 provides recommendations to enhance protection for consumers in purchasing POH.

Throughout the report, words and expressions importing the masculine gender include the feminine and neuter genders. Words and expressions in the singular include the plural and words and expressions in the plural include the singular.

Unless otherwise specified, the percentage figures in the tables in this chapter are rounded to the nearest 0.1 and hence the total percentage may exceed 100.

2. A Review of the Situation in Hong Kong and the Current Regulatory Framework

2.1. Historical Background and Overview

As mentioned in the previous chapter, in recent years, it has been increasingly common for Hong Kong people to purchase POH. Rising property prices in Hong Kong has made the option of purchasing POH, which are relatively lower in price, more attractive than before. The chronology below sets out the key development of events over the years. Details are stated in subsequent paragraphs.

Date	Event
1990s	Major complaints involved project failures in the Mainland
1991-92	Council advocated for the regulation of estate agents through a licensing scheme
1993-94	Planning, Environment and Lands Division set up a Working Group on Regulation of Estate Agents ("**Working Group**") to look into the subject
1994-95	The Working group published a report recommending the licensing of estate agents, leading to the publication of the Estate Agents' Bill
May 1997	The EAO enacted
September 1997	LRC Report published
November 1997	The EAA established
November 1998	2 subsidiary legislations enacted:- the Estate Agents (Licensing) Regulation, Cap 511A ("**Licensing Regulation**") and the Exemption Order
2005	POH complaints abated
2013	THB maintained the Exemption Order but scaled up public education to raise awareness of risks of purchasing POH
2017	The EAA issued a Practice Circular No. 17-03 (CR) ("**Practice Circular**") to provide mandatory guidelines on how to conduct sales and promotional activities of UPOH

In the 1990s, one of the main complaints involving sale of POH was the failure by developers, especially in the Mainland, to complete construction of residential projects, causing many Hong Kong consumers to suffer substantial loss. In an attempt to address this, in September 1997, the LRC published the LRC Report which proposed legislation to curb misleading advertisements for non-local uncompleted residential properties advertised or offered for sale in Hong Kong. One of the key recommendations of the LRC was that all sales of non-local uncompleted residential properties should be handled by licensed estate agents in Hong Kong, with the exception of the sale of a single dwelling by a private individual.

At the same time, in May 1997, the EAO was enacted in order to improve the standard of services provided by estate agents and to protect consumers in property transactions. It provides for the establishment of the EAA to regulate the trade through the implementation of a licensing system. Under the EAO, the EAA's principal functions are to regulate and control the practice of estate agents and salespersons; to promote integrity and competence of estate agents and salespersons; and facilitate the provision of training for estate agency practitioners. The EAA was eventually established in November 1997 and it regularly organises qualifying examinations, issues licences to

individuals and companies, handles complaints against licensees, conducts compliance inspections and issues disciplinary sanctions to practitioners who have breached the EAO. The EAA also arranges activities for the professional development of the trade and for consumer education.

As mentioned above, shortly after the enactment of the EAO, the LRC Report was published proposing legislation to curb misleading advertisements for non-local uncompleted residential properties advertised or offered for sale in Hong Kong to address the issue. One of the key recommendations of the LRC was that all sales of non-local uncompleted residential properties had to be handled by licensed estate agents.

Upon studying the EAO and its legislative history, it is apparent that it was drafted with a view to regulate the sale of properties both inside and outside of Hong Kong and the various provisions regulating different types of properties would be implemented in stages[7]. It was expected that following the establishment of the EAA, the parties concerned would start working on formulating a large number of regulations and codes of practice so as to implement the whole regulatory system.

In 1998, 2 pieces of subsidiary legislations were made under the EAO, namely, (a) the Licensing Regulation and (b) the Exemption Order. The Licensing Regulation sets out the licensing requirements and other miscellaneous matters on licensing procedures, forms and licensing fees, whereas section 2 of the Exemption Order exempts estate agents dealing exclusively with POH from obtaining a licence. Details of the exemption in respect of those estate agents exclusively dealing with POH are set out below.

As was explained by the then Principal Assistant Secretary for Housing at a subcommittee meeting held on 2 November 1998, having regard to the different nature, scope and complexity of work relating to POH, the EAA would need to consider separate regulations for estate agents handling these properties[8]. The Exemption Order along with the Licensing Regulation came into operation on 19 November 1998.

Thereafter, as the number of complaints dropped, the need for legislation became less imminent[9]. In all fairness, according to the reply made by the then Deputy Director of Housing (Strategy) in 2005 at a Legislative Council ("**LegCo**") meeting, education had indeed reduced the number of complaints, especially as the EAA had by then issued a related pamphlet outlining matters which consumers should be aware of when buying such properties[10].

In March 2013, the THB stated that the proposed regulatory regime of the LRC would not be effective, as it would apply to estate agents only, not the vendors of non-local residential properties. Therefore, instead of implementing the LRC's recommendations, the THB adopted a public education approach to raise consumer awareness on the risks of purchasing uncompleted residential POH. By then, the advancement of technology also made it easier for overseas vendors or property developers not otherwise licensed under the EAO to directly market their sales and promotional activities through the internet casting doubt on whether mandating the sale of all POH through local licensed estate agents would be as effective as originally anticipated. Coupled with the difficulties of law enforcement against an overseas vendor or developer, this further reinforced

[7] The Official Record of Proceedings of the LegCo on 21 May 1997.
[8] Minutes of Meeting of Subcommittee on Subsidiary Legislation made under the EAO, LegCo paper no. CB(1) 841/98-99.
[9] Minutes of Meeting of the Panel on Housing held on 12 April 2005, LegCo paper No. CB(1) 1427/04-05.
[10] Ibid.

the Government's decision to pursue the line of consumer education instead of implementing the recommendations of the LRC Report.

In 2017, in order to further regulate the activities of the estate agents and enhance consumer protection, the EAA issued a Practice Circular[11] to provide mandatory guidelines on the conduct of the sales and promotional activities relating to the sale of UPOH. The Practice Circular requires licensees to obtain a due diligence ("**DD**") report on the vendor and the UPOH project, a legal opinion issued by a lawyer practicing in the place where the properties are situated, as well as requirements on the issuance of advertisements and sales documents for purchasers including warning statements and sales information sheets. This Practice Circular came into effect in April 2018. However, as these guidelines only apply to licensed estate agents and salespersons and it has no regulatory effect on unlicensed agents or vendors or developers.

In April 2021, the THB reiterated its position in a written reply to a LegCo member's enquiry.

2.2. The LRC Report

In September 1997, the LRC published the LRC Report with recommendations and proposals to curb misleading advertisements for overseas uncompleted residential properties advertised or offered for sale in Hong Kong[12]. The terms of reference of the LRC Report were limited to the sales descriptions of UPOH. The problems of inadequate and misleading sales information in the sale of overseas uncompleted units were manifold. For instance, at that time, most sales brochures and advertisements did not give a definite date of the property being ready for occupation. Purchasers did not have the chance to see the completed property prior to the purchase. Few purchasers could afford the time and expense to monitor the progress of construction. Failure to complete construction on time was, therefore, one of the most serious problems. In view of the great number of such properties being put up for sale in Hong Kong and the substantial monetary value involved in the transactions, the LRC considered that purchasers should be given better protection by being provided with adequate and accurate sales information, even though this could possibly be at the expense of added costs and work for the developers and estate agents[13].

The main recommendations of the LRC Report are as follows:

All sales of overseas uncompleted residential properties must be handled by licensed estate agents in Hong Kong

- Any vendor of overseas uncompleted residential property, whether based in Hong Kong or overseas, should engage a licensed estate agent in Hong Kong to handle such sale. However, this requirement should not apply to the sale of a single dwelling by a private individual. According to the LRC, this proposal had the advantage of giving purchasers the redress channels for damage suffered as a result of inaccurate or misleading sales descriptions as purchasers could turn to the licensed agents regulated by the EAO for remedies. It would also overcome many of the enforcement problems involved in regulating the sales of POH.

[11] The Practice Circular, http://www.eaa.org.hk/Portals/0/Sections/LGA/Circular/17-03_CRE.pdf.
[12] https://www.hkreform.gov.hk/en/docs/roversea-e.pdf.
[13] For the background and terms of reference of the LRC Report, see the chapter titled "Introduction and Overview", at paragraphs 1-10 and 28.

Regulation of advertisements and the availability of sales brochures

- The recommendation included the requirement of a reference to a licensed estate agent in an advertisement, the accuracy of the information contained therein, which party is responsible for providing up-to-date brochures and the language of these brochures. Again, these requirements did not apply to the sale of a single dwelling by a private individual, nor to advertisements of overseas property not put up for sale in Hong Kong.

- The estate agent referred to in the advertisement should be liable for all false or misleading information in the advertisement and sales brochures.

- It is the licensed estate agent's responsibility to make available up-to-date sales brochures to prospective purchasers. If sales brochures are not compiled by developers, it would be the licensed estate agent's responsibility to prepare the sales brochure. All information in the sales brochure should be accurate at the time the property was first advertised for sale.

Other key regulations:

Regulation of financing arrangements and introduction of cooling-off

- Mortgage facilities stated as available in any advertisements or sales brochures, must be accompanied by a general warning that (i) the prospective purchasers should find out for themselves from banks or other financial institutions the exact details; and that (ii) approval of mortgage facilities would depend on the individual's credit and other background. Any costs of arranging mortgage facilities should not be charged against the purchasers unless there had been previous disclosure of such charge and amount in the advertisements or sales brochure.

- LRC recommended that it would be desirable to have a cooling-off period of 3 working days after signing of the preliminary agreement (which includes the reservation agreement (留位協議) etc. If the purchasers did not purchase the property after signing the preliminary agreement, they might have to pay such administrative fees as might be fixed by the appropriate authority. Licensed estate agents would be entitled to administration fees[14].

Regulation of gifts and benefits in connection with the purchase of overseas properties

- This refers to representations in the advertisements and sales brochures on nationality schemes which must be accurate and not misleading.

Regulation of other aspects

- Further regulations were proposed to require information or descriptions in the content of the sales brochures such as fittings and finishes, information relating to utilities such as whether water, sewage and drainage would be connected and location of the property. In addition, the Hong Kong definition of saleable area should be adopted and disclosed in all sales brochures and advertisements of overseas uncompleted residential property.

[14] Paragraph 8.8 of the LRC Report, Chapter 8.

Enforcement

- The LRC Report proposed that penalties should include imprisonment, fines, civil remedies for purchasers/sub-purchasers and suspension, revocation or restriction of an estate agent's licence for acts or omission in breach of the proposed legislation[15].

2.3. The Current Regulatory Framework Governing the Sale of POH in Hong Kong

Consumer protection in the sale of POH in Hong Kong is mainly covered by the following legislations/regulations:

(i) The EAO and the Exemption Order;
(ii) The Practice Circular of the EAA;
(iii) The Securities and Futures Ordinance (Cap 571) ("**SFO**") insofar as this involves CIS; and
(iv) The Trade Descriptions Ordinance (Cap 362) ("**TDO**").

Regulation of Estate Agents under the EAO

In Hong Kong, the estate agency industry is governed by the EAO and its subsidiary legislation. As mentioned above, the EAO was enacted to set up the EAA, the industry regulator, which is responsible for the licensing and regulation of estate agents.

Generally speaking, any individual or company practising estate agency work in Hong Kong must hold a valid estate agent's licence[16]. Estate agency work (地產代理工作) is defined under section 2(1) of the EAO as *"subject to subsection (3), means any work done in the course of business for a client – (a) being work done in relation to the introduction to the client of a third person who wishes to acquire or dispose of a property, or to the negotiation for the acquisition or disposition of a property by the client; or (b) being work done, after the introduction in the course of that business to the client of a third person who wishes to acquire or dispose of a property or the negotiation in the course of that business for the acquisition or disposition of property by the client, in relation to the acquisition or disposition, as the case may be, of the property by the client."*

Anyone acting as a salesperson of an estate agent must also hold a valid licence[17]. Failure to do so without reasonable excuse is an offence with a maximum penalty of 2 years of imprisonment and a fine of HK$500,000 for unlicensed estate agent and 1 year of imprisonment and a fine of HK$200,000 for unlicensed salesperson respectively[18]. Upon conviction, the Court could also order the disqualification of the convicted person for a period of up to 5 years[19]. However, developers who sell POH direct to the consumers, whether at exhibitions or otherwise, are not regarded as carrying out estate agency work to which the EAO applies. Therefore, developers do not require

[15] Paragraphs 11.21-11.26 of the LRC Report, Chapter 11.
[16] Section 15(1) and (2) of the EAO.
[17] Section 16(1) of the EAO.
[18] Section 55(3)(a)(i) and (b)(i) of the EAO.
[19] Section 55(6)(a) of the EAO.

any such licences and are not regulated by the EAA unless they are licensees[20]. Accordingly, employees of developers are also not required to obtain such licences to carry out this work[21].

The Exemption Order

However, as mentioned above, carrying out estate agency work exclusively in relation to POH is expressly exempted from the above requirements by the Exemption Order. Section 2 of the Exemption Order provides that if a person:

(a) does estate agency work exclusively in relation to POH; and
(b) states in all his letters, accounts, receipts, pamphlets, brochures and other documents and in any advertisement[22] that he is not licensed to deal with any property situated in Hong Kong,

he shall be exempted from the requirement for obtaining an estate agent's licence or a salesperson's licence from the EAA.

In other words, carrying out estate agency work exclusively in relation to POH is exempted from the requirement of obtaining a licence and not regulated by the EAA as long as the other requirement as stated in section 2 of the Exemption Order is satisfied. However, if a person does estate agency work in relation to properties both in and outside Hong Kong, he is still required to hold a licence issued by the EAA.

If a licensed estate agent employs an unlicensed person as a salesperson to engage in the sale of POH, and the unlicensed person does not state in all his documents and in any advertisement that he is not licensed to deal with any properties situated in Hong Kong, he will not be exempted from being licensed and may be in breach of section 16(1) of the EAO for practicing estate agency work without a licence. The licensed estate agent who employs such unlicensed person as a salesperson may also be in breach of section 39(1) of the EAO for employing or continuing to employ a person who for the time being is not the holder of an estate agent's licence or salesperson's licence as a salesperson[23]. As practising estate agency work without a licence or employing unlicensed person to practice estate agency work is a criminal offence, the EAA would refer such cases to the Police for follow-up.

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[20] Section 2(2)(e) of the EAO.
[21] Section 2(2)(f) of the EAO.
[22] Under section 2(1) of the EAO, advertisement (廣告) includes every form of advertisement, whether to the public or not, and whether—
(a) in a newspaper or other publication;
(b) by TV or radio;
(c) by the display of posters, notices, signs, labels, showcards or goods;
(d) by the distribution of circulars, brochures, catalogues, price lists or any other material;
(e) by the exhibition of pictures, models or films; or
(f) in any other way,
and any reference to the issue or publication of advertisements shall be construed accordingly.
[23] The maximum penalty is imprisonment for 6 months and fine at level 6 (HK$100,000) under section 55(4)(b)(i) of the EAO.

Partial implementation of the EAO

As mentioned above, it is apparent from the provision of the EAO that the original intention was to include the regulation of POH. This can be seen in the definition of the word "***land***" in section 2 where the provision expressly stipulates that it applies to "***property outside Hong Kong***". Further support for this proposition comes in the form of sections 36(1)(a)(ii), (iii), (iv), (vi) and (vii) of the EAO which expressly provides that every licensed agent shall, as regards every property (***whether situated in Hong Kong or elsewhere***) in relation to which he has entered into an estate agency agreement, be reasonably satisfied as to the accuracy of the information prescribed[24], supply such information to persons so prescribed, disclose to a client any pecuniary or beneficial interest which the agent has in the property and any benefit such as any commission which will accrue to the agent should the property be disposed of and inform both of the vendor and the purchaser that he acts for both. Notwithstanding this, when this section came into operation, it only applied to any property in Hong Kong used wholly or primarily for human habitation (i.e. Hong Kong residential properties). Hence, there was only partial commencement of section 36.

Other provisions which were also partially commenced only for residential properties in Hong Kong included sections 44 and 46 of the EAO concern advertising and the form and content of the estate agency agreements respectively. Both sections empower the EAA to regulate advertising by licensed estate agents and to prescribe particulars to be included in estate agency agreements.

Pursuant to section 44, regulations made thereunder may prohibit the inclusion of false or misleading statements or particulars in advertisements; prohibit advertisements unless the vendor has agreed to such issue; and require or prohibit prescribed statements or particulars in the advertisements.

Pursuant to section 46, regulations made thereunder may specify that the agreement with the consumer contain such provisions to ensure that the rights and obligations of the parties are clearly set out; the amount or the rate of any commission or other fee payable under the agreement is clearly stated; disclosure of other pertinent matters made so that such matters are brought to the attention of the consumers without insufficient or excessive prominence.

While the Practice Circular issued by the EAA to licensees has dealt with some of the above matters (see Practice Circular below) there is currently no mandatory requirement for estate agents handling POH (even those licensed under the EAO) to enter into any estate agency agreement or any standard form agreement with the purchaser of POH. Therefore, there is no document which sets out clearly the rights and obligations of the parties including the role of the agent in the transaction and any pecuniary or beneficial interest of the agent involved in the sale of POH.

Practice Circular of the EAA

In 2017, the EAA issued a Practice Circular with the relevant Q&A to licensees to provide guidelines on the sale of UPOH. Licensees who fail to comply with the guidelines could be disciplined by the EAA. Examples and statistics of enforcement are set out in Chapter 3.

[24] Under section 2(1) of the EAO, "prescribed (訂明)" means prescribed by regulation under the EAO and made with the Secretary's approval.

As stated in the Practice Circular, there has been a rising trend of people in Hong Kong buying POH. Further, the regulatory regime and taxation system concerning purchase of properties may differ from one jurisdiction to another, and therefore purchasing POH often involves complicated issues. In particular, the purchase of UPOH often carries additional risks. Unlike properties in completed developments where property inspection may be feasible, purchasers of UPOH do not have the opportunity to inspect these properties before they enter into an agreement for sale and purchase with the vendor or in certain cases, sometimes not even upon the payment of the balance of purchase price. As some UPOH are handled by licensees and their conduct in the sale of these properties might raise concerns to the public, the EAA issued the Practice Circular to enhance the professionalism of the estate agency trade.

In some of the UPOH cases, the completion of the development is dependent on the developer being able to raise sufficient funds to complete the project and if such development is in an area where the land price is much lower than the development costs, (as compared to Hong Kong where the land price is much higher than the development costs) the risk of the project failing to complete could be higher.

Apart from providing general guidelines to the licensees which includes reminding them that they are required to observe and comply with the relevant provisions in the EAO and its subsidiary legislations, to include the Code of Ethics and all applicable guidelines issued by the EAA[25], and not to mislead purchasers when they participate in the sale of POH, the Practice Circular also provides specific guidelines on the sale of UPOH in relation to the following:

DD on the vendor and UPOH

The licensees must:

- obtain a report(s) issued by a professional person, financial institution and/or government authority confirming:

  (a) that the vendor is in existence and legally entitled to develop and sell the UPOH;
  (b) the vendor's source of funds/financial arrangement with regard to the completion of the UPOH; and
  (c) the key information of the development of which the UPOH forms a part.

Legal opinion on material information

- A written legal opinion issued by a lawyer practicing in the place where the UPOH is situated must be obtained by the licensee to advise on whether there is any form of restriction(s) for foreign purchasers to purchase, resell, lease or mortgage according to the laws of the place where the UPOH are situated, and if so, the nature of such restriction(s).

Advertisements and promotional materials

- All reasonable steps should be taken by the licensee to verify the accuracy of the information contained in advertisements or promotional materials, obtain the vendor's

[25] These guidelines include the practice circulars on property advertisements which apply to all types of properties including POH (no. 18-02(CR)) and online advertising which state that online advertisements by estate agency practitioners must comply with the relevant requirements in the EAO and its subsidiary legislation (No. 09-05 (CR)).

express endorsement in writing of the accuracy and completeness of the information contained therein.

- The following information should be inserted and stated clearly:- (a) a prominent statement that the purchase of UPOH is complicated and risky, advising the purchasers to review all relevant information and documents and seek independent professional advice before making a purchase decision ("**Prominent Statement**"), (b) development permit or approval number and the name of the relevant approving authority and (c) whether or not purchasers are acquiring an interest in the land etc.

- The advertisements or materials must not include anything which might give the impression that the purchase is safe, low risk or able to obtain fast or high yields or return with little risk.

Capacity to act

- The purchaser should be informed at the first opportunity in writing of (a) which party(ies) the estate agent acts for; and (b) whether the estate agent and the licensee concerned are also licensed to carry out estate agency work in the place where the UPOH is situated.

Sales documents for purchasers

- The following documents should be provided to purchasers before they enter into any agreement or make any payment in relation to the purchase of the UPOH (whichever is the earlier):

  (a) a copy of the DD report(s) regarding the vendor and the UPOH;
  (b) a copy of the legal opinion on the material information;
  (c) a written warning statement; and
  (d) a sales information sheet prepared or approved by the vendor containing inter alia information relating to cooling-off period of the development.

- The above-mentioned written warning statement should set out that the potential purchaser should:

  (a) conduct DD on the vendor and the UPOH themselves;
  (b) review all relevant sales documents including the DD report, legal opinion and sales information sheet;
  (c) pay attention to the risks involved;
  (d) consider seeking independent legal advice at all stages of the purchase including before placing the booking/reservation fees ("**reservation fees**") (留位費); and
  (e) consider seeking independent professional advice on taxation.

- Obtain a written acknowledgement from the purchasers before they enter into any agreement or make any payment that they fully understand the contents of the warning statement, DD report, the legal opinion and the sales information sheet.

- If the DD report and/or the legal opinion is/are issued by a person(s) acting for the vendor in the sale, purchasers' attention must be drawn to such fact and be advised to consider seeking independent advice.

Taxation

- Purchasers should be advised to seek independent professional advice on the types and amounts of taxes or levies that they may be liable to pay.

Payment and financing arrangements

- The information on payment arrangements based solely on the information provided by the vendor should be provided.

- No assurance on mortgage terms should be made.

Deposit protection mechanism, cooling-off period, reservation fees

As stipulated in the Practice Circular, when selling POH, licensed estate agents must provide a sales information sheet to potential purchasers setting out various information. Such information should include whether the relevant jurisdiction in which the POH is situated has any cooling off periods or whether there is any stakeholder arrangement for the payments and if so, the details thereof. This should enable potential purchasers to have all the relevant information to make an informed decision before signing any agreements and paying the deposit. However, vendors who are not licensed estate agents or are developers are not required to do this.

There are other general guidelines and regulations in relation to advertisements issued by licensees handling the sale of POH which are discussed in Chapter 4.

The present licensing conditions of estate agents

At present, licensing conditions for individual estate agents and salespersons require an applicant to (1) have attained the age of 18 years at the date of application; (2) have completed an educational level of Form 5 of secondary education or its equivalent; (3) have passed the relevant qualifying examination in the 12 months immediately prior to the application; and (4) be considered a fit and proper person to hold a licence. Certain former licensees may be exempted from the education and qualifying examination requirements[26].

Regulation of CIS under the SFO

The term "CIS" is defined in Schedule 1 to the SFO and includes investment products of a collective nature such as mutual funds, unit trusts, mandatory provident fund schemes and real estate investment trusts.

[26] http://www.eaa.org.hk/en-us/Licensing/Licensing-requirements and http://www.eaa.org.hk/en-us/Examination/Exam. In summary, there are 8 parts in the exam syllabus for the estate agent's qualifying examination: (1) Introduction to the real estate agency trade in Hong Kong; (2) EAO and estate agency practice; (3) Laws governing estate agency practice and conveyancing procedures; (4) Introduction to land registration, land search and property-related information systems; (5) Introduction to building-related knowledge, property classification and property management; (6) Principles and practice of property valuation; (7) Leasing and tenancy matters and (8) Effective agency management and supervision of salespersons to ensure compliance (Parts 6 and 8 are excluded in the salesperson's qualifying examination).

To qualify as a CIS, an investment generally needs to have the following four elements:

(a) it must involve an arrangement in respect of property;
(b) participants do not have day-to-day control over the management of the property even if they have the right to be consulted or to give directions about the management of the property;
(c) the property is managed as a whole by or on behalf of the person operating the arrangements and/or the contributions of the investors and the profits or income from which payments are made to them are pooled; and
(d) the purpose of the arrangement is for investors to participate in or receive profits, income or other returns from the acquisition or management of the property.

"Property" under the SFO is defined broadly to include any land or estate or interest in land, whether in Hong Kong or elsewhere[27]. Therefore, if the sale of property is regarded as a sale of interest in a CIS under Schedule 1 to the SFO, this is subject to the regulation of the SFC.

Under the SFO, it is an offence to issue an invitation which includes any marketing material containing an offer to the Hong Kong public to acquire an interest or participate in a CIS, unless it has been authorised by the SFC or an exemption applies under section 103 of the SFO, e.g. the offer is made only to "professional investors"[28]. This restriction applies irrespective of the media used to solicit or advertise this sale, including, for example, an electronic medium.

In addition, the promotion of a CIS may constitute conducting a business in a regulated activity which requires a licence from the SFC. Failure to comply with this requirement may lead to an offence under the section 114 of the SFO. On 17 June 2016, the SFC reminded licencees of the EAA that selling a CIS which is not authorised by the SFC may constitute a criminal offence.

In general, a CIS must be sold by an intermediary licensed or registered with the SFC. It may be hard to determine whether the property marketed to them falls within the definition of a CIS. Such a determination can be complex and much depends on the facts surrounding each transaction.

Real estate projects involving interests in hotels/holiday resorts, serviced apartments, student accommodation and shopping malls are more likely to be CIS because they are more likely to be managed on behalf of investors. It is also more likely that real estate projects with "buy-to-let" or "buy and leaseback" features could be CIS as they often involve a centralised letting and management service[29]. Moreover, although the fact that a property offers a rental guarantee may suggest that the sale falls within the definition of a CIS, the rental guarantee and the entire arrangement have to be examined carefully to see if it is CIS.

As regulation of CIS is already set out in the SFO, this study will mainly focus on the regulation of non-CIS POH whether it is uncompleted or otherwise. Examples and statistics of enforcement are listed in Chapter 3.

[27] According to schedule 1 to the SFO, property includes (a) money, goods, choses in action and land, whether in Hong Kong or elsewhere; and (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in (a).
[28] SFC's Questions and Answers on "Collective investment schemes involving interests in real property" last updated on 17 June 2016, at Q&A 3.
[29] Q&A 4 of the above Questions and Answers.

On 30 August 2021, the SFC launched a new alert list to warn the public of unauthorized investment arrangements suspected to be CIS including two POH projects involving the sale of properties in Japan and the UK. The Suspected Unauthorised CIS Alert List, though not exhaustive, will be updated by the SFC from time to time as new information becomes available.

TDO Regulations

Pursuant to section 2 of the TDO, immovable property is itself not a goods and therefore the TDO does not apply to it. However, a service supplied in relation to immovable property including rental or property management services may be a product which could be regulated under the TDO. As far as the provision of services is concerned, the TDO does not apply to commercial practices engaged by an exempt person acting in the capacity of a professional which includes a licensed estate agent or salesperson[30] . Therefore, licensed estate agents are not caught under the TDO whereas the provision of services by unlicensed estate agents, vendors or developers could be.

The TDO prohibits unfair trade practices such as "false trade descriptions" which includes a false trade description made by whatever means and in whatever form, e.g. paper, verbal and advertisement, and "misleading omissions" which includes omitting or hiding material information, or providing material information in a manner that is unclear, unintelligible, ambiguous or untimely.

[30] Schedule 3 to the TDO. Under section 2(1) of the TDO, an exempt person is not a "trader" for the purpose of the TDO.

3. Consumer Complaints and Issues

This chapter focuses on the consumer complaints in connection with the purchase of POH in order to identify the common problems and pitfalls faced by the consumers. In addition to the Council's complaint figures, statistics from other enforcement and regulatory bodies, namely, the Police, C&ED, the EAA and SFC were also obtained for analysis.

While complaint figures do not appear to be alarmingly high, it must be borne in mind that these transactions involve the purchase of properties and therefore by the nature of the purchases, the stakes involved when compared to other types of consumer spending are much higher. The complaints show that the loss suffered was significant and the impact on consumers was substantial. This is further exacerbated by the challenges of trying to resolve any disputes with the vendors/developers with the concern that these parties are located outside Hong Kong. The end result for the affected consumers in such situations, should the project fail or should they encounter problems for any reasons and enforcement or follow-up prove difficult, would result in considerable consumer detriment.

That said, analysis of the complaint cases of the Council revealed that estate agents were often the POH purchasers' point of contact. This meant that they became an important source of information upon which/whom trust and reliance was placed. The majority of the complaints involved estate agents and the major types of complaints are (a) provision of inaccurate or misleading information to purchasers and absence or omission of material information by estate agents (including insufficient warning of risks), (b) difficulties in obtaining a refund of the reservation fee or deposits paid by purchasers; and (c) project delay or failure.

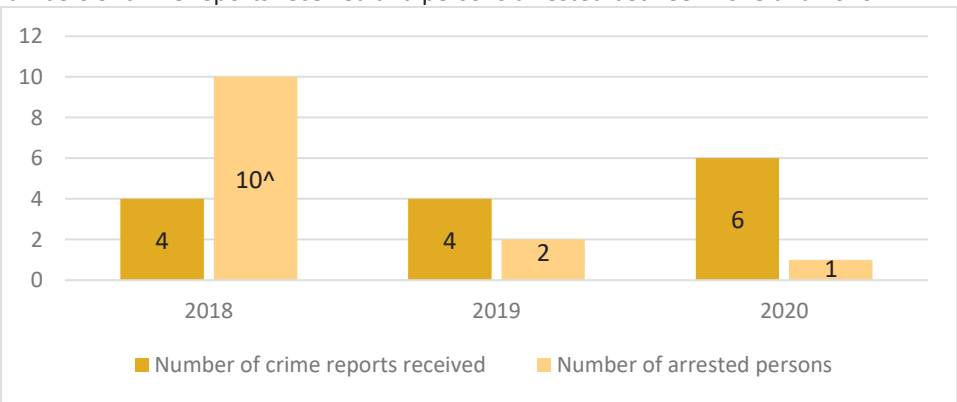
3.1. Complaint Statistics

In recent years, there has been regular reports of complaints to the various enforcement agencies and the relevant regulatory authorities in relation to the purchase of POH. The statistics tend to show the amount of loss suffered by the consumers was substantial.

Complaints Handled by the Police

The Police started to gather figures relating to complaints concerning POH since 2018. Relevant statistics collected between 2018 and 2020 are listed below:

Figure 1: Numbers of crime reports received and persons arrested between 2018 and 2020



^ 6 of which were EAA licensees.

The countries/regions where the POH involved, the number of cases related to completed and uncompleted properties and the total loss amount involved are set out below:

Table 1: Countries/regions where the POH were situated, the number of cases related to completed and uncompleted properties and the loss amount out of the crime reports received between 2018 and 2020

Year	Country/Region	Completed properties	Uncompleted properties	Loss amount involved (HK$ million)
2018	Japan, Myanmar, UK, US	2	2	179.13*
2019	Australia, Mainland, Malaysia	2	2	3.39
2020	Mainland, Myanmar, Palau, UK	1	5	27.45

* The average loss for the UK project was much higher than the POH in other jurisdictions.

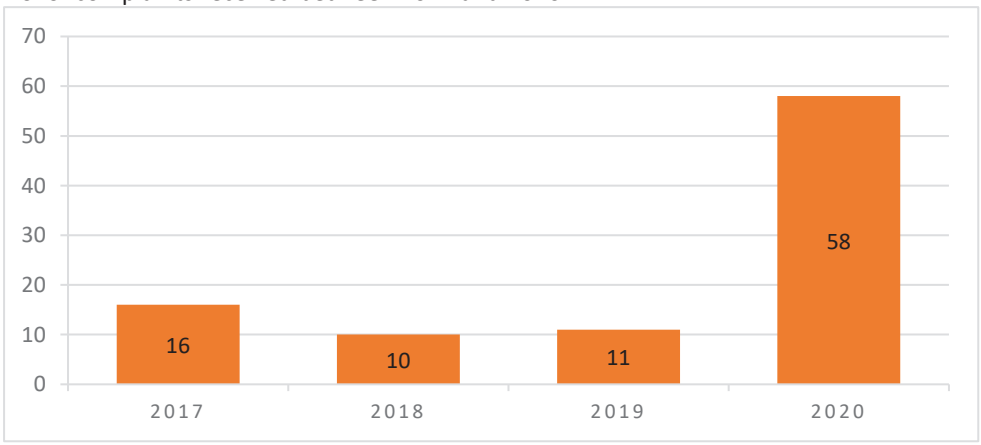
As the Police only started to collate crime report statistics in relation to POH specific complaints between 2017 and 2018, the first set of figures date from 2018. The crime report statistics show that there is a steady number of reports in 2018 and 2019, both at 4 per year, but showed a surge of complaints in 2020, increasing from 4 to 6 cases. These complaints relate mainly to off-plan purchase, i.e. uncompleted POHs where the property project never existed; and inferior second-hand properties which were falsely represented to be in good condition. As a result, 13 people were arrested between 2018 and 2020, with 6 of them (46%) being licensed under the EAO. They included property agents, directors of property intermediaries and agents of property intermediaries.

According to the available information and statistics, the average loss suffered ranged from around HK$240,000 for a Japanese project, around HK$680,000 for a US project to HK$875,000 for a UK project.

Complaints Handled by the C&ED

Between 2017 and 2020, a total of 95 complaints were received by C&ED regarding the sale of POH, the breakdown is as follows:

Figure 2: No. of complaints received between 2017 and 2020



Among the 95 complaints received, 51 complaints (54%) related to estate agents/salespersons licensed under the EAO (i.e. licensed agents), whereas 44 complaints concerned unlicensed estate agents/salespersons. C&ED does not maintain statistics on developers.

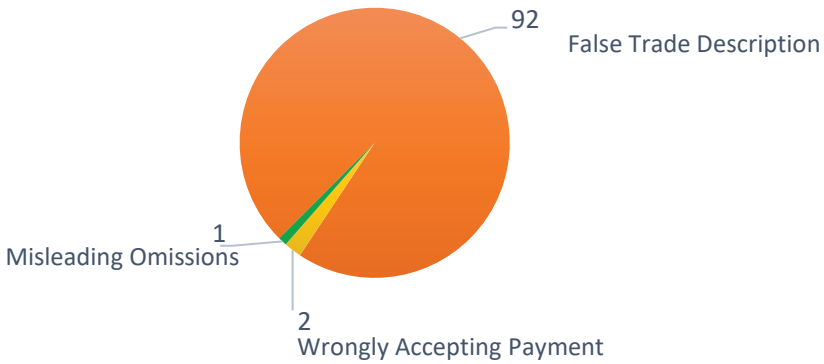
Of the complaints received, over half of them involved properties situated in Thailand, followed by 15 cases in the UK and 12 cases in the Mainland. The breakdown of figures is as follows:

Table 2: Countries/regions where the POH were situated and the number of cases related to completed and uncompleted properties (2017-2020)

Country/Region	Completed Properties	Uncompleted Properties	Without information provided	Total
Albania	0	1	0	**1**
Australia	1	1	6	**8**
Canada	0	0	1	**1**
Japan	0	0	1	**1**
Mainland	1	0	11	**12**
Malaysia	1	0	1	**2**
Taiwan	0	0	1	**1**
Thailand	1	23	29	**53**
UK	1	3	11	**15**
USA	0	0	1	**1**
Total	**5**	**28**	**62**	**95**

Of the complaints received, nearly 97% allegedly related to False Trade Description.

Figure 3: No. of complaints related to TDO



Despite a slight drop in the complaint cases from 16 in 2017 to 10 in 2018, the complaint figures remained steady for 2019, but surged four folds to 58 cases in 2020. This is mostly due to a project in Thailand failing to complete involving many Hong Kong consumers.

Out of the 95 complaints, only 23 complainants (24%) provided sufficient information for C&ED to ascertain the loss suffered which amounted to HKD16.8 million in total. Only 12 complainants (13%) provided information on the value of the properties concerned and they amounted to an approximate sum of HK$30.5 million.

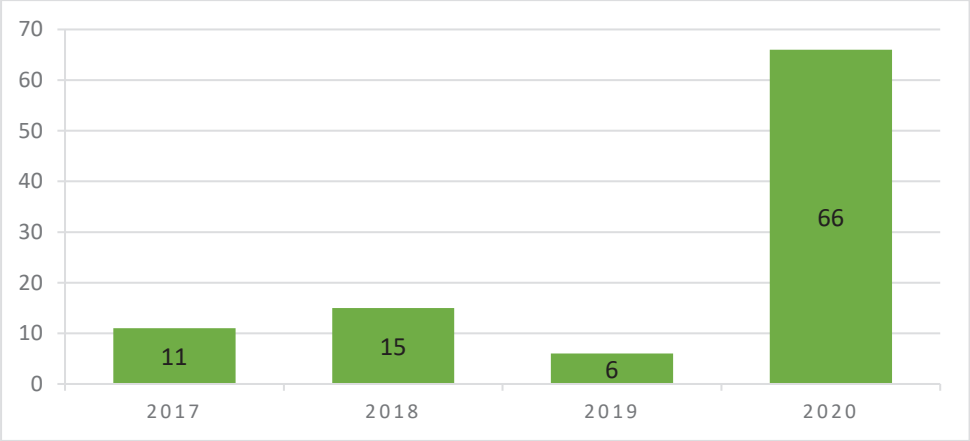
From the above statistics, it could be calculated that the average loss per complaint was in the region of HK$730,000 and the average value of the properties involved was in the region of HK$2,540,000. If these average figures were to be extrapolated to 95 complaints, the total loss suffered between 2017 and 2020 would have been estimated at HK$69 million and the total value of properties involved between 2017 and 2020 would have been HK$241 million.

As of March 2021, among the 95 aforesaid complaints, 83 of the cases were concluded with no further action, 7 complaints were referred to the EAA / The Law Society of Hong Kong for follow-up and 5 complaints remained under assessment.

Complaints Handled by the EAA

Between 2017 and 2020, the EAA received 98 complaints related to the sale and purchase of POH. Out of these cases, 25 estate agents/salespersons licensed under the EAO (i.e. 17 licensed companies and 8 individual licensees) and 19 non-licensees (i.e. 11 unlicensed companies and 8 unlicensed individuals) were involved. Some of them were involved in more than 1 complaint case. As stated in chapter 2, while the EAA has no jurisdiction to handle complaints against non-licensees, when complainants lodged complaints involving non-licensees and there was supporting evidence, they would refer the complaints to the Police for investigation regarding unlicensed estate agency work as this constitutes an offence under the EAO. Between 2017 and 2020, the EAA referred 5 cases to the Police for investigation. Of these referrals, 1 was unsubstantiated and others were still under investigation by the Police. Insofar as vendors are concerned, the EAA has no jurisdiction to deal with complaints against them and therefore did not have such records.

Figure 4: Complaint Statistics of the EAA regarding sales of POH between 2017 and 2020



The complaints involve properties situated in Australia, Canada, Japan, the Mainland, Malaysia, Thailand and the UK. 3 cases related to completed properties and 89 cases related to uncompleted properties. As regards the remaining 6 cases, as the complaints related to advertisements and therefore no such information was given by the complainants or was available.

Table 3: Countries/regions where the POH were situated and the number of cases related to completed and uncompleted properties out of the complaints (2017 – 2020)

Country/Region	Completed Properties	Uncompleted Properties	Without information provided	Total
Australia	1	2	1	**4**
Canada	0	1	1	**2**
Mainland	1	40~	1	**42**
Malaysia	0	1	1	**2**
Thailand	1	30#	1	**32**
UK	0	15	1	**16**
Total	**3**	**89**	**6**	**98**

~ 36 of which related to one Zhuhai development.
# 26 of which related to one Thailand development.

The major types of complaints involved in these 98 complaints are:

(1) The agent provided false or misleading information on rental return (of this nature, most of the cases, i.e. 36 of them, related to one Zhuhai development);
(2) The agent provided misleading information on the location of the property, i.e. whether the development was situated within Bangkok area or at a city adjacent to but outside Bangkok (all of the 26 cases of this nature related to one Thailand development); and
(3) The agent misrepresented on the identity of the vendor/developer, i.e. misrepresenting that the vendor/developer was a "subsidiary" of a listed company in Singapore (all of the 26 cases of this nature related to the same Thailand development mentioned in (2) above).

It is not the EAA's practice to maintain statistical record in respect of the total amount of money claimed or the total value of the properties concerned as some complaints related to advertisements which did not involve the value of properties and some suffered loss of the reservation fees, deposits or part payments as opposed to the value of the properties.

Out of the 98 cases received between 2017 and 2020, 5 cases were substantiated. The respective estate agents or salespersons were reprimanded and fined, and where appropriate, the EAA issued a reminder of good practice to the concerned estate agent. The amount of fine ranged between HK$3,000 and HK$56,000. The remaining 93 cases included (a) 32 cases that were unsubstantiated, withdrawn, non-pursuable due to insufficient information or referred to the Police for investigation (including a case regarding an unlicensed estate agent failing to state in the advertisements that it was not licensed, thus was suspected of engaging in estate agency work without valid licence) and (b) 61 cases were still under investigation as of March 2021.

Table 4: Recent penalties on breaches of the Practice Circular, the practice circular no. 18-02 (CR) and the Licensing Regulation

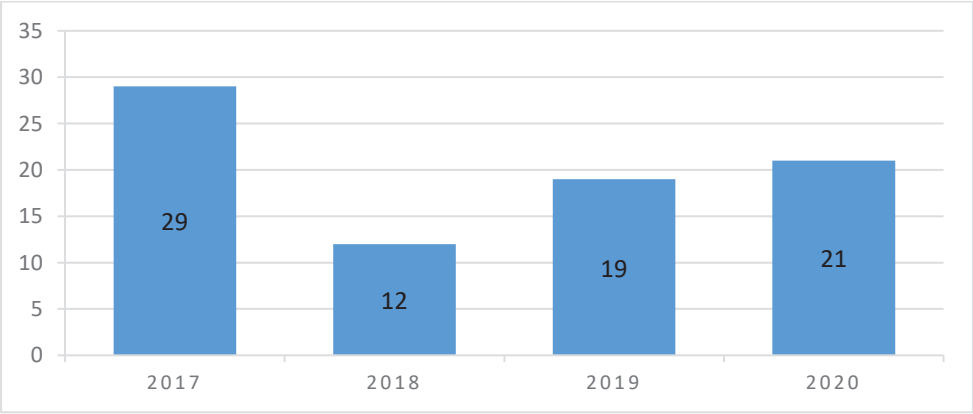
October 2020 – 4 company licensees were each reprimanded and fined by the EAA	
Issuance of online advertisements without having performed DD on the vendor or the UPOH.	Reprimand and fine HK$50,000
Failing to state clearly certain matters in the advertisements including the development permit or approval numbers and the name of the relevant authority which issued such permit or approval, whether or not purchasers	Reprimand and fine HK$4,500

are acquiring an interest in land, prominent statement reminding purchasers that purchasing UPOH is complicated and contains risk.	
October 2020 – 2 company licensees were each reprimanded and fined by the EAA	
Failing to state clearly and legibly in the property advertisement the property number.	Reprimand and fine HK$1,500
October 2020 – 1 company licensee was reprimanded by the EAA	
Failing to state clearly and conspicuously in the advertisement the estate agent's licence number or the relevant statement of particulars of business and the business name.	Reprimand
December 2020 – a company licensee was reprimanded and fined by the EAA concerning its breaches	
Failing to: (a) State clearly the development permit or approval numbers and the name of the relevant authority which issued such permit or approval, whether or not purchasers are acquiring an interest in land, prominent statement reminding purchasers that purchasing UPOH is complicated and contains risk, when issuing advertisements prepared by it in respect of an UPOH; (b) Obtain the requisite legal opinion issued by a lawyer practicing in the place where UPOH is situated before participating in the sale or promotional activities for UPOH; and (c) Failing to state clearly and legibly the property number and the date on which it was issued or updated in an advertisement for the property.	Reprimand and fine HK$28,500

Complaints Handled by the SFC

Between 2017 and 2020, the SFC received a total of 81 complaints which involved CIS concerning POH. However, the SFC neither compiled statistics on the amount of money involved in these complaints nor on the amount of assets involved. The SFC is also constrained by law and not in a position to share other information such as investigation status. The year-by-year breakdown for these complaints are shown as follows:

Figure 5: Complaint Statistics of the SFC which involved CIS concerning POH between 2017 and 2020



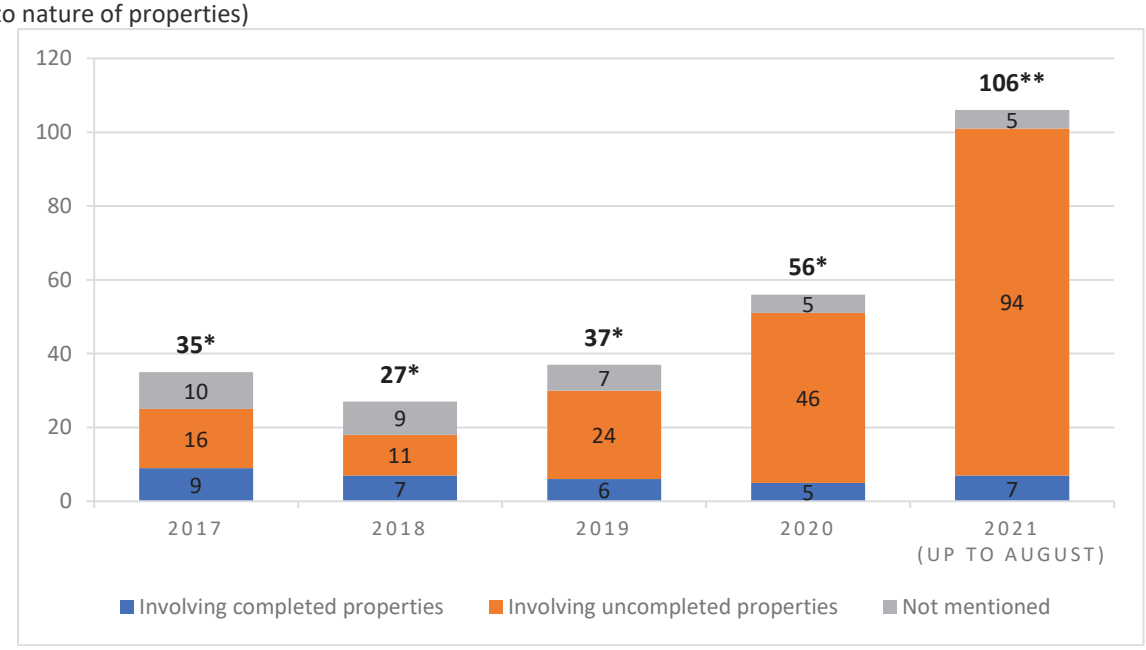
The statistics show fluctuations in the number of complaints received between 2017-2019, with a 59% reduction in 2018 as compared to 2017, and then a subsequent rise in 2019. The number of complaints recorded a similar level in 2020 as compared with 2019.

In 2006, the SFC successfully prosecuted an estate agent (company), a mainland company and a senior officer of the estate agent for issuing advertisements in Hong Kong relating to a CIS which concerned the sale of shop units in the mainland, without authorisation from the SFC. The parties were ordered to pay a fine for the breach[31].

Complaints Received by the Council

Between 2017 and August 2021, the Council received a total of 261 cases of complaints involving purchase of POH and the claim amounts exceeded HK$239 million. The value of the properties amounted to approximately HK$505 million. The number of cases in each year is as follows:

Figure 6: Complaint statistics of the Council regarding sales of POH between 2017 and August 2021 (according to nature of properties)



* Residential properties only

** Comprised of residential and non-residential properties

Out of the total 261 cases covering 75 traders, nearly 70% of them concerned residential properties (179 cases). Looking at these 179 cases relating to residential properties, nearly 90% (159 cases) involved complaints of estate agents and unlicensed agents account for 63% (112 cases). Among the 71 traders involved during the period for the residential cases, only 8 of them were licensed under the EAO. 62% of the 179 cases (111 cases) involved uncompleted properties and most of the transactions took place in Hong Kong, accounting for 93% (166 cases).

As seen above, the complaint cases remained steady for 3 years between 2017 and 2019 with a 23% drop in 2018. In 2020, there was a rise to 56 cases, representing an increase of 51% arising from a residential project in Thailand which failed to complete, affecting many Hong Kong consumers. In

[31] SFC Enforcement Reporter (January 2007).

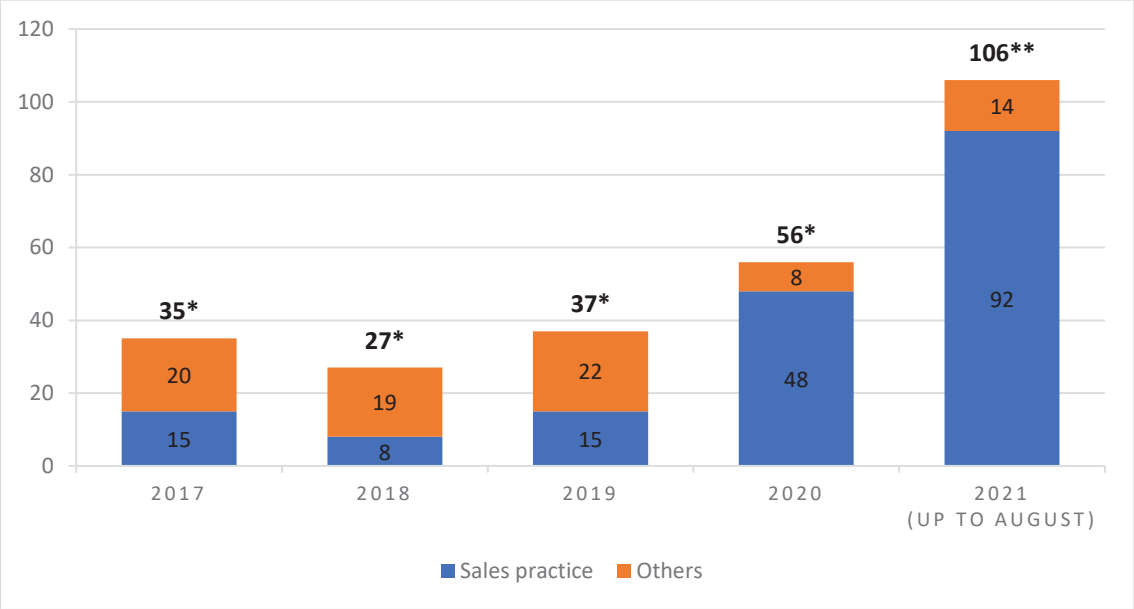
the first 8 months of 2021, there was an increase of almost 90% of complaint cases to 106 cases. Of these 106 cases, 82 were non-residential properties comprising mostly of a failed commercial project located in Zhuhai of the Mainland. The remaining 24 cases related to residential properties.

Insofar as residential properties are concerned, according to the available information and statistics between 2017 and August 2021, the loss averaged over HK$368,000 and the total value of the property involved in the complaints averaged close to HK$1,800,000.

The major types of complaints are set out as follows:

(a) Provision of inaccurate or misleading information to purchasers and absence or omission of material information by estate agents;
(b) Difficulties in obtaining a refund of the reservation fee or deposits paid by purchasers; and
(c) Project delay or failure.

Figure 7: Reasons of complaints to the Council regarding sales of POH (2017 - August 2021)



* Residential properties only
** Comprised of residential and non-residential properties

It is noted that complaints of undesirable sales practice (including inaccurate or misleading information provided or omission of material information) accounted for around 55% (98 cases) of the total complaint cases regarding residential POH, which was much higher than the overall percentage of complaints involving unscrupulous sales practices of different industries received by the Council for the same period (around 15%)[32]. Project delay or failure accounted for 31% of the complaint cases relating to residential POH (56 cases). Examples of the complaint cases received by the Council are stated in table 6.

The majority of the total complaints involved properties situated in the following jurisdictions: Thailand (55 cases), the Mainland (127 cases), the UK (33 cases) and Australia (21 cases).

[32] Overall average (2017 -August 2021).

Table 5: Share of complaints regarding properties situated in various jurisdictions

Location	No. of cases
Thailand	55
Mainland	127
UK	33
Australia	21
Others	25

The Council observed that estate agents played an active role in the sales and marketing of POH. 75% of the complainants (196 cases) found out about the subject POH through local newspaper advertisements. Nearly 70% of the complainants attended the sales exhibition or talks organised by agents, accounting for 69% of the total complaints received. It is also not uncommon that purchasers paid a reservation fee to the agent before entering into the sales and purchase agreement, typically ranging between HK$10,000 and HK$50,000. 175 cases involved payment of reservation fees (67%), of which 169 were paid to the agent, with the remaining 6 to the developer.

Detailed Analysis of Consumer Complaints

Review and analysis of the Council's complaint cases revealed that, typically, a consumer would be drawn into a sale of POH through advertisements published locally, followed by attending the relevant sales exhibition or sales talk. Such analysis of consumers' experience is set out below.

Over 80% of consumers are firstly attracted by certain aspects of advertisements marketing the sale of a POH. These advertisements could be in print (80%), online (5%) or on TV (1%). The points of attraction were varied and could include appealing entry price points, apparent promise of a high investment return which would usually be expressed as an attractive guaranteed annual rental return; lure of the promise of immigration, tax or other financial benefits etc. Keen to find out more, these consumers would be invited to register and attend a sales exhibition to speak with the sales representatives to learn more about the development. These sales exhibitions are usually run by local agents, some of them were estate agents licensed with the EAA while others would be unlicensed entities. The fact as to whether the agents were licensed or not would not necessarily be shared with the consumers at the exhibition but in compliance with the EAO rules and regulations, such information should be contained in the advertisement in the first place.

At the exhibition, a sales talk would be given to the potential buyers to introduce the developer and the development, and employees of these sales agents would follow up by answering questions posed to them. These questions would typically centre around practical details relating to the properties such as completion dates, quality of finishes; facilities in the neighbourhood; proximity to public transport; information relating to financing the purchase, for example, ease and availability of obtaining financing; and depending on the particular attraction of the advertisements, questions on rental return and management costs, immigration or taxation benefits etc. It was the natural assumption of consumers that the information passed on to them would be accurate and not misleading. As these were POH situated in jurisdictions with which they were unfamiliar, unsurprisingly, the consumers would rely on the sales agents to carry out DD to verify the information supplied by the developer or vendor before selling the POH to them. Some less sophisticated consumers would even assume that the sales agents represented them in purchase and therefore would place trust and confidence in them.

With the sales agents eager to secure a deal at the exhibition, inducements such as on-the-spot discounts, free legal services; or misrepresentations allegedly made recklessly or negligently would entice the consumers not to walk away without payment of a reservation fee and signing a reservation agreement. From the review of the Council's complaint cases, these reservation fees ranged between HK$3,000 to HK$50,000 depending on key factors such as the price of the property and the jurisdiction where they were situated. Usually, as stipulated in the reservation agreement, these reservation fees were non-refundable if the purchaser did not proceed with the purchase. But in some instances, vendors had agreed to allow the consumers to set off this sum against the payment of deposit. Preparations for deposits and arrangements for a mortgage would follow the signing of the reservation agreement. As there is usually no opportunity for the consumers to obtain any independent legal, financial or other relevant expert advice at the exhibition and there are no cooling off provisions in the reservation agreements, were the consumers to sign any agreement at the exhibition and subsequent legal or financial advice is contrary to the representations made by the salespersons, they would be contractually committed to this large transaction or risk forfeiting the reservation fees paid.

Table 6 highlights the common issues and challenges facing the consumers when purchasing POH and the difficulties in seeking redress.

Table 6: Examples of complaint cases received by the Council

(a)	**Misrepresentation with Mistake as Explanation**
•	**Case 1 – Mistake/misrepresentation as to address** The complainant was a frequent traveler to Japan and was interested in Japan's residential property for self-use. He was attracted by an advertisement of residential property in Osaka and approached the estate agent. After discussions with and upon recommendation by the licensed estate agent, he entered into a sale and purchase agreement in June 2019. The price of the property was JPN40,000,000[33] and he paid a deposit of JPN12,000,000[34]. However, the transaction failed to complete by October 2019 as promised, therefore the complainant paid a visit to Osaka. To his surprise, he found that the address number stated in the contract, 2-6-17, had already been occupied. After further enquiry, he discovered that the correct address of the property should be 2-6-16 instead. Further, upon inspection of the property, he discovered that it had not been refurbished to the standard as promised. Losing confidence in the licensed agent, the complainant decided not to proceed with the transaction and requested a full refund of the deposit paid. Luckily for the complainant, with the Council's assistance in facilitating conciliation, he received a full refund of JPN12,000,000[35]. The estate agent involved with the sale of this POH was licensed.
(b)	**Misrepresentation of material information**
•	**Case 2 - Commercial instead of residential property** The complainant and his wife, in their 50s, intended to purchase a residential apartment in the GBA for their own use after retirement. Attracted by a newspaper advertisement posted by a licensed estate agent, the couple attended a sales exhibition in Mongkok and the

[33] Equivalent to HK$2,831,229.
[34] Equivalent to HK$849,322.
[35] Equivalent to HK$849,322.

complainant explicitly mentioned to the agent that he wanted to buy a residential apartment. Based on their requirements, a property in Huizhou was thus identified and recommended to him. The agent later accompanied the couple to visit the property showroom in Huizhou and chose a unit which was identified as suitable for their needs. The complainant signed a provisional sales and purchase agreement and paid a deposit in the sum of around RMB51,000[36] to the developer.

After payment, a legal representative of the developer explained the details of the purchase to the complainant and it was the first time the couple learned that the unit was a commercial apartment, not a residential apartment, and its land lease would only last for 40 years which was not what they intended to purchase. Given that this material fact had not been explained to the complainant before he signed the purchase agreement, the complainant immediately refused to sign the formal sales and purchase agreement and requested a cancellation of the transaction and full refund of the deposit paid. With the assistance of the Council and the Huizhou Consumer Council, the developer agreed to a full refund.

- **Case 3 - Car motel in the surroundings turned out to be psychiatric health care home**

  The complainant and her husband, in their 50s, planned to migrate to Australia and noticed an advertisement posted by an estate agent. They attended a sales exhibition organised by the licensed estate agent in late November 2019 and were recommended a residential property in Melbourne. During the sales process, the couple were told that there were an elderly home and a car motel nearby the property. Based on these representations, the couple paid a reservation fee of HK$40,000 by credit card and signed the reservation agreement. When they returned home, they researched the relevant information of the property and found that the motel which the agent mentioned was in fact a psychiatric health care home.

  In early December 2019, the complainant and her husband visited the office of the estate agent and asked for a refund due to the misrepresentation of the facilities surrounding the property. When discussing the refund, the complainant had an argument with the estate agent, resulting in furniture being broken. Although the estate agent finally agreed to refund the reservation fee less HK$1,000 for the bank charges and HK$3,500 for the damage to the estate agent's property allegedly inflicted by the complainant's husband, the complainant refused to accept the deductions and no refund was made in the end.

- **Case 4 – Misrepresentation of property area in the sales brochure contributed to the failure to obtain necessary mortgage**

  In December 2014, the complainant attended an Australia (Melbourne) property sales exhibition, which was organised by the Hong Kong office of an Asia international property investment company which was not a licensed estate agent. The complainant decided to purchase an uncompleted apartment through the salesperson there and paid deposit of AUD46,700[37]. As stipulated in the sales brochure, the apartment he purchased comprised of 46m^2 interior area and 5m^2 exterior area. In November 2016, the complainant applied

[36] Equivalent to HK$61,365.
[37] Equivalent to HK$268,263.

for a mortgage loan with a bank but was informed that according to its inspection, the interior area of the apartment was 41m^2 only. In addition, the valuation report showed that the valuation price of his apartment was 20% lower than the purchase price. As a result, the bank refused to proceed with his mortgage loan application.

The complainant asked the estate agent for an explanation but did not receive any positive response apart from being reminded that there was a condition stated in the contract that a purchaser should not dispute with the seller over the size/area of the unit concerned. Unfortunately, conciliation failed.

- **Case 5 - Discrepancies/misrepresentation in relation to the identity of the developer in the sales brochure, the reservation form and the agreement for sale and purchase**

The complainant, in his late 50s, intended to migrate to the UK. He learned from an online advertisement that a consultancy firm, which was not a licensed estate agent, was promoting a UK uncompleted property project in Manchester. After reading the project information, he found both the location and price level acceptable and agreed to buy a property for around GBP200,000[38] at the sales exhibition organised by the agent. A reservation fee of GBP3,000[39] was paid. About 2 weeks later, the complainant received a formal sale and purchase agreement but was shocked to find that the name of the vendor on the contract was wholly different from that on the reservation form and sales brochure. He tried to research online but he claimed he could not establish any legal relationships between these 2 companies.

The complainant then asked the agent to clarify why the names were different and to amend the contract as appropriate but the company declined saying that the developer would not accept such a request. After all, this was a standard contract for all purchasers and the setting up by developers of a single-purpose-vehicle for the development of a particular project was common/standard practice in the industry. The agent did not explain why the actual entity of the vendor was not stated in the sales brochure and the reservation form. Having listened to the explanation, the complainant decided not to sign the contract after evaluating the risks.

Notwithstanding that it was his own decision not to proceed, he asked for a refund of the reservation fee but was declined on the basis that the complainant had signed a reservation form which had clearly stated that the reservation fee was non-refundable. The agent stressed that it accepted the reservation fee on behalf of the UK developer and any decision relating to refund was theirs to make. Although the agent relayed the complainant's request to the developer, no refund was forthcoming.

(c) Over-inflated purchase price leading to inability to obtain necessary mortgage

- **Case 6**

The complainant planned to migrate to Australia after retirement. Drawn by a newspaper advertisement of Australian residential properties in Melbourne, he and his wife attended a seminar organised by a consultancy firm in August 2018. The consultancy firm was not a

[38] Equivalent to HK$2,164,868.
[39] Equivalent to HK$32,472.

licensed estate agent in Hong Kong. The consultant (also unlicensed) recommended a completed property in Melbourne to the complainant.

The consultant introduced a staff member at a bank specialising in mortgage arrangements, who assured the complainant that their mortgage application would be approved. Given the said verbal assurance and 6% rental return guarantee in the first 5 years by the developer, the complainant agreed to purchase the premises at AUD558,000[40] and signed a nomination form in October 2018. However, the consultant failed to explain the terms and conditions of the nomination form and the risks he would have to bear if the valuation of the property was substantially lower than the purchase price.

In late October 2018, the complainant paid a 10% deposit and on 11 November 2018, he signed the nomination deed. A few days later, the complainant asked the mortgage consultant about the progress of the mortgage arrangement and was shocked to learn that the valuation of the premises was in fact AUD445,000[41], which was 20% lower than the purchase price.

As a result, only a mortgage of 65% of the purchase price was secured. Unable to come up with this unexpected resultant shortfall of around HK$470,000 for the down payment, the complainant could not proceed with the transaction. The complainant requested the consultancy firm to assist with the cancelling of the agreement and for a refund of the AUD55,800[42] deposit paid. This request was met with no response notwithstanding the Council's attempt for the parties to conciliate.

(d) Missed explanation on the condition of refund of reservation fee

- **Case 7 - Misleading omission on the importance of signing reservation agreement and suspected malpractice**

  The complainant and his cousin, both elderly, attended a sales exhibition for residential properties in the UK organised by an unlicensed estate agent in Hong Kong. They were looking for properties for self-use.

  During the negotiation on the property price, a director of the agent asked for their credit cards purportedly to check their credit limits. However, a staff proceeded to charge HK$50,000 as reservation fee without their prior consent and asked them to sign on the credit card payment slips. After some discussion, the complainant and his cousin each agreed to sign a document and each of them paid HK$50,000 to reserve a flat in London on the promise of a 7% discount on the property price and GBP1,000[43] legal cost offered by the director and the understanding that the reservation fee could be refunded.

  During the whole process, the director did not explain the terms and conditions of the signed document and they were not able to read the documents without their reading glasses which they did not have with them at the time. When they returned home, they found that the reservation fee paid to the agent was refundable within 120 days only if they proceeded

[40] Equivalent to HK$3,205,171.
[41] Equivalent to HK$2,555,658.
[42] Equivalent to HK$320,534.
[43] Equivalent to HK$10,824.

with the transaction by paying deposit and signing the sales and purchase agreement as stipulated in the reservation agreement. They considered the consultant untrustworthy and without explanation, deprived them of the chance of changing their mind and getting back the money paid. Therefore, they decided not to proceed with the transaction and sought a refund of the HK$50,000 paid. The trader refused to refund to the complainants but they managed to get the refund via chargeback from their credit card company.

(e) Rental guarantee - Attractive rental guarantee used as bait to solicit interest for property developments. Rental guarantee is accounted for by over-inflated asking price of property.

- **Case 8 - Attractive rental guarantee used as a bait to solicit interest for property developments including uncompleted developments. Whether such guarantee would be honoured depends on whether the development could be completed.**

  This case is based on the facts of case 6 and case 9. In both cases, the complainants were attracted by the high rental guarantee for the first few years and entered into the agreements. Yet, for case 6, it could be said that the purchase price of the property was over inflated to take into account the said rental guarantee resulting in the failure to obtain sufficient mortgage loan. As for case 9, the project failed to complete at all. In both cases, the complainants suffered considerable loss.

- **Case 9 - Attractive rental guarantee induced consumers to purchase units under development. Although there was payment of rent for a couple of years, the project subsequently failed and the developer stopped paying the rent as guaranteed.**

  This case involved a group of purchasers of which 80 of them made complaints to the Council. The case involved a commercial development in the Mainland which was marketed by a licensed estate agent in Hong Kong in 2013. The developer was marketed as a Mainland company listed in Hong Kong. Subsequently it transpired that the vendor of the development was only a joint venture partner of the developer and therefore was a separate entity.

  The purchasers were induced by the favourable rental guarantee of 49% return on the total purchase price payable over 8 years. For various reasons, the development failed to complete. The complainants paid the full purchase prices exceeding some RMB3,500,000[44] in 2013 and started receiving the guaranteed rates of rent from 2015 which continued until 2017. However, the vendor failed to complete the development by the original completion date of December 2014 as agreed, notwithstanding that rent continued to be paid for 3 or so years. Rental payment stopped in 2017. The Complainants neither received the unit they purchase nor the remaining rental guaranteed under the contract.

(f) Failure to complete

- **Case 10 – Developer went into liquidation after payment of deposits**

  A condominium development located in Thailand was being marketed through a licensed agent in Hong Kong. The agent sold over 200 units to Hong Kong purchasers. The development was originally due to complete in March 2020 as set out in the agreement but due to various reasons, it failed to do so and the developer subsequently went into

[44] Equivalent to HK$4,210,877.

receivership in May 2021, resulting in the complainants losing all of their deposits. 28 complainants approached the Council seeking assistance.

During the sales process, the project was marketed by the sales staff of the licensed agent as being developed by a top-tier developer listed on the Singapore Exchange and awarded with numerous prizes. When some complainants questioned why the vendor in the reservation form was another entity, instead of the listed company as represented in the exhibition and advertisements, the staff reassured the purchasers that the vendor was the subsidiary of the listed company set up as required under the Thai law, and the listed company was the ultimate parent company which would be responsible for the development. Although there was mention of seeking professional consultations in the reservation forms, the purchasers' attention was not drawn to the risks of such purchases of UPOH and also there was no reminder for them to seek independent legal advice before signing the reservation form.

In addition, the complainants each paid a deposit of between 20%-30% of the purchase price, averaging between TBH545,600 -THB1,201,800[45]. Upon the collapse of the developer, these monies were not returned to the complainants. While there was payment of reservation fees of HK$20,000 each to the licensed estate agent, these monies were subsequently paid back to every purchaser.

Upon conciliation by the Council, the licensed agent reached settlement with certain complainants.

3.2 Summary

In summary, the statistics of all the different enforcement and regulatory bodies as well as the Council complaint figures show that there has been a surge of complaint figures relating to the sale of POH in 2020 indicating that the problem is on the rise. While the Council's 2021 complaint figures show an increase of almost 90% of complaint cases in the first 8 months of 2021, 82 of the 106 cases were non-residential properties comprising mostly of a failed commercial project. This leaves 24 cases, which when extrapolated to the end of 2021, would amount to 36 cases.

As these transactions involved properties, the losses suffered ranged from HK$3,000 (reservation fees) to HK$875,000 (failed project). The average value of property involved was close to HK$1.8 million, depending on the jurisdiction involved.

The analysis of the complaint cases indicated that the location of the countries/regions where the POH were situated was very diverse and that the consumers would often place total trust in and reliance on the estate agents in providing accurate information to them. Further review of the Council's complaints pointed to the fact that many of these complaints related to undesirable sales practices (including inaccurate or misleading information provided or omission of material facts or just pure mistake), involving a Hong Kong element, such as attending exhibitions or talks organized by local agents. Indeed, most of these transactions took place in Hong Kong.

Unlicensed estate agents make up a fair share of the complaint targets. However, the current state of regulations in the sale of POH is fragmented with insufficient legislation and regulations

[45] Equivalent to HK$127,528 – HK$280,908.

regulating these unlicensed agents. This results in an anomaly whereby licensed agents are regulated whereas the unlicensed ones are not. In Chapters 4 and 5, problems associated with the Exemption Order in its operation are discussed. Moreover, due to the limited application of TDO to the sale of POH as stated in Chapter 2, there could be little repercussions for agents making deliberate or negligent misrepresentations. This is amplified by the difficulty and costs of pursuing complaints and proving the case in civil litigation in Hong Kong against the agent or salesperson in question, let alone in a different jurisdiction if the claim is made against the vendor. This state of affairs means that ordinary consumers are practically left without any recourse.

4. Trade Practices on Marketing and Advertisements

One of the fundamental consumer rights is to be treated fairly in the marketplace. Consumers should be able to expect to be provided with clear and accurate information and be kept appropriately informed before, during and after the point of sale. As consumers initial exposure to POH is often via advertisements, the Council commissioned a survey of the advertisements relating to the marketing of POH in order to see what marketing and advertising tactics are being employed by the sales agents.

To this end, the Council engaged an external consultant to conduct a survey of such advertisements published and broadcasted on various media and communications channels disseminated by developers, agents or salespersons in Hong Kong between November and December 2020. The results were then analysed to determine whether there were any undesirable or questionable advertising or marketing practices and/or marketing tactics employed to the detriment of consumer interest.

Further, the Council conducted mystery visits to gain direct experience of the business practices and sales tactics engaged by property agents and developers in the sale of POH and collect more information on how their services are provided (Chapter 5). Analysis of the survey results in respect of advertisements and exploratory field visits to the exhibitions, seminars and sales offices of agents and developers reveal that there are undesirable or questionable practices which are detrimental to consumer interest and should be addressed to strengthen consumer protection.

4.1. Scope of the Study

Advertisements related to the sales of POH placed by developers, agents or salespersons were collected over 3-4 consecutive weeks from the 3 main advertising platforms, covering the following different channels and mediums namely,

(a) print media covering newspapers and weekly magazines;
(b) online platform covering search engines and social media; and
(c) television ("**TV**") covering free TV and paid TV channels.

4.2. Methodology and Findings

Print Media

Printed commercial listings containing POH advertisements were collected for 30 consecutive days in the period between 9 November 2020 to 8 December 2020 from six paid newspapers (Apple Daily, HK01, Hong Kong Economic Times, Ming Pao, Oriental Daily News and Sing Tao Daily News), two free tabloids (Headline Daily and AM730) and two weekly magazines (Eastweek and Ming Pao Weekly). Advertorials which were bundled with print advertisements (such as containing a full banner, Run of Print) were also included in the data collection and data analysis exercise. A total of 270 pieces of POH advertisements were recorded during this period.

Online Advertisements

Two cycles of online POH advertisements which were listed or recommended on the first result page of the keyword search from two popular search engines (google.com and hk.yahoo.com) and two social media (youtube.com and discuss.com.hk) were reviewed and analysed. The first cycle of the 12-keyword[46] searches was completed within the first week (17 November to 22 November 2020) whereas the second cycle was completed in the following second and third week (23 November to 6 December 2020) of the observation period. Out of a total of 1,454 online advertisements, 902 were POH advertisements (62.0%). The majority (819) of these POH advertisements (90.8%) were collected from the search engines and the rest – 83 of them (9.2%) were collected from the sampled social media.

TV Commercials

An estimate of 5,543 TV commercial slots[47] were reviewed and analysed across four consecutive weeks during the period from 14 November 2020 to 12 December 2020. The review was carried out each day between 6 pm to 1 am of the subsequent day from three free TV channels (TVB Jade, channel 81; Open TV, channel 77; and Viu TV, channel 99) and two paid TV channels (Cable TV, News channel and Now TV, News channel). Among the 5,543 TV commercial slots, 2.6% of them (143) had broadcasted 144 TV commercials which involved POH.

4.3. Observed Trend

From the advertisements reviewed, it could be seen that the advertisements covered many properties in different markets, both in Asia Pacific and around the world. These markets spanned across Australia, Cambodia, the Mainland, Japan, Singapore in Asia Pacific and Canada, Portugal and the UK. As for the property prices, the POH advertisements covered a diverse range. One could see properties advertised from as low as RMB250,000[48] in the Mainland, properties in Portugal advertised for EUR350,000[49], to a residential property in the UK selling for GBP930,000[50]. Turning to the types of properties on sale, again there was a huge diversity detected. In addition to the usual residential units in the form of a flat in a multi-storey building (the Mainland, Canada, Singapore and the UK), individual houses (Australia, Canada) were advertised for sale, as well as mixed commercial and residential properties (the Mainland and Canada) and properties for Airbnb (Japan).

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[46] 12 keywords were identified for the purpose, comprising (i) overseas property investment; (ii) overseas property financing; (iii) overseas property consultant; (iv) overseas property management; (v) overseas property exhibition; (vi) international estate agent HK; (vii) 大灣區物業; (viii) 買海外樓/ 買內地樓/ 買區域樓; (ix)海外/國內物業投資; (x) 物業展銷會; (xi) 銷售海外物業 and (xii) 睇樓團.

[47] As there were days when the service provider could not submit valid recording of TV programme content, projection on the number of TV commercial slots for a few TV channels was made. Among these invalid recordings, 2.3% (127) of the TV commercial slots did not have video content, 3.4% (186) TV commercial slots encountered loading difficulties. In other words, a total projected invalid rate of 5.6% was reported. The invalid statistics facilitated the estimation of an accurate base (i.e. total TV commercial slots during the observation period) for a proper calculation of the proportion of POH-related TV commercials. As all subsequent analyses used the total POH-related TVC as base, the invalid statistics had no impact on these analyses.

[48] Equivalent to HK$298,225.

[49] Equivalent to HK$3,430,000.

[50] Equivalent to HK$10,044,000.

From the different varieties of properties advertised for sale, the vast range of entry price points, and the number of markets involved, it is clear that unlike 20 or so years ago, the purchase of POH is now not limited to a small group of high net worth and affluent consumers. In fact, the price range, markets in which the POH are situated and the variety of properties available from the advertisements show that there is interest in POH from many different quarters to fit the demand and affordability of Hong Kong consumers that are interested in purchasing POH.

4.4. Regulatory Requirements for POH Advertisements

Print and Online Advertisements

In Hong Kong, there is no specific code regulating the publication of print or online advertisements relating to the sale of POH unless it falls under a CIS, in which case, the regulations contained in the SFO applies. Any regulation in this respect can be found in the EAO and its subsidiary legislation applicable to POH, for example, the Exemption Order, which requires that a person who handles exclusively the sale of POH has to state in all his letters, accounts, receipts, pamphlets, brochures and other documents and in any advertisement that he is not licensed to deal with any property situated in Hong Kong in order to be exempted from the licensing requirement. Under section 2(1) of the EAO, "advertisement" includes every form of advertisement, whether to the public or not[51].

Insofar as licensed estate agents and salespersons are concerned, the Practice Circular stipulates that:

(1) licensees must take all reasonable steps to verify the accuracy of the information or materials contained in these advertisements and obtain the vendor's written endorsement of the same;
(2) insert a Prominent Statement; and
(3) state clearly the development permit or approval numbers and the name of the approving authority as well as whether or not purchasers are acquiring an interest in the land[52].

Further, a licensed estate agent must state clearly and conspicuously on any letter, account, receipt, pamphlet, brochure and other documents, and in all advertisements his licence number or Statement of Particulars of Business and the business name[53]. Similarly, under section 5 of the Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation (Cap 511C) ("**Practice Regulation**"), a practitioner shall inform his clients of his licence number. In this connection, the EAA stated in a practice circular that it is advisable for practitioners to print their licence numbers on their business cards[54].

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[51] Under section 2(1) of the EAO, advertisement (廣告) "includes every form of advertisement, whether to the public or not, and whether—
(a) in a newspaper or other publication;
(b) by TV or radio;
(c) by the display of posters, notices, signs, labels, showcards or goods;
(d) by the distribution of circulars, brochures, catalogues, price lists or any other material;
(e) by the exhibition of pictures, models or films; or
(f) in any other way,
and any reference to the issue or publication of advertisements shall be construed accordingly."

[52] Paragraphs (13)-(15) of the Practice Circular.

[53] Section 14(1)(b) and (c) of the Licensing Regulation.

[54] Circular No. 99-17 (CR).

As for the Prominent Statement required under the Practice Circular, it is noted that there is no prescription of minimum font size to be used therein. The question to ask is whether the statement in the advertisement or promotional materials is easily readable by a person with normal eyesight[55].

The EAA's Practice Circular No. 18-02 (CR) which applies to all types of properties including POH, uncompleted or otherwise[56], mandates amongst other things that the issue of advertisements must have prior written consent of the vendor; that all information contained in the advertisement is accurate and valid at the advertisement date and must not be false or misleading in a material particular; and must not advertise a property at a price or on terms different from that instructed by the client; state the unique property number assigned to each property in the advertisement; and not to engage in or allow employees to engage in misleading advertising tactics.

As TV advertisements are already subject to stringent regulations such as the General Code of Practice on Television Advertising Standards[57] ("**TV Code**") issued by the Communications Authority to provide guidance for its TV broadcasting licensees under the Broadcasting Ordinance (Cap 562), the focus of this study report will concentrate on the practices related to print and online advertisements.

TV Advertisements

By way of background, the original TV code which applying to TV advertisements involving real estate properties, which was more stringent. This was relaxed following a public consultation in mid-2020 with a view to placing reliance on the existing regulatory requirements imposed by the EAA. Part of the rationale was to avoid duplication of regulatory effort[58]. In respect of advertisements of POH placed by licensed estate agents under the EAO, the previous substantiation requirements which obliged developers or vendors to produce a confirmation of various issues have been amended following the public consultation.

Accordingly, under the prevailing TV Code published in September 2020[59], so long as the advertisement is placed by a licensed estate agent, there is no mandatory requirement to provide the requisite information and documents. However, should the advertisements be placed by a developer or other unlicensed estate agents, then the previous substantiation requirements as amended still stand. In gist, the substantiation requirements as amended under the prevailing TV Code are that no advertisement for POH should be accepted unless the advertiser is a licensed estate agent under the EAO or the developer or vendor is able to produce (a) a letter from a law firm registered and recognized in the country/region where the POH is situated confirming that all requirements imposed by the local government relating to the project and the sale of property have been complied with and the developer or vendor has obtained the requisite consent from the local

[55] Practice Circular, Questions and Answers (Q&As), Q7.
[56] Q&A of the Practice Circular No. 18-02(CR).
[57] Generic Code of Practice on Television Advertising Standards, released by the Communications Authority dated 25 September 2020.
[58] Paragraph 6 of the Public Consultation on Relaxation of Television and Radio Codes of Practice, issued by the Communications Authority dated 23 June 2020.
[59] Paragraph 37 of Chapter 6 of the TV Code.

government for the sale of the property to non-residents; and (b) a letter from a law firm qualified to practice in Hong Kong confirming that the local firm of solicitors providing the aforesaid confirmation is registered in the place where the POH is situated for provision of the advice within that jurisdiction.

In addition to the above substantiation requirements, real property advertisements should carry an intelligible visual and/or aural advisory message reminding the viewers to review carefully the information relating to the POH before making any purchase decisions and to seek professional advice. No advertisements should be accepted if it contains an invitation to the public to enter into or offer to enter into a regulated investment agreement in respect of real property or to acquire an interest in or participate in, or offer to acquire an interest in or participate in, a CIS unless the requisite authorisation has been obtained from the SFC or an exemption applies under the SFO. Finally, the advertisements are also subject to the requirements of truthful presentation as set out in the TV Code. The licensed broadcaster must ascertain that any claims of a specific nature in the TV advertisement are adequately substantiated by the advertiser.

4.5. Review of the POH Advertisements

As shown in Table 7 below, property agents were responsible for placing the majority of print advertisements, accounting for 80.8% of the advertisements surveyed. The involvement of property agents in the online platform is even higher, at 83.8%. In contrast, TV commercials are mostly placed by developers (82.4%). This is probably due to the higher costs involved in placing such advertisements on TV. Most of the TV commercials were related to the promotion of POH, adopting a soft sell approach to invite TV audience to visit exhibition halls for further information.

Table 7: Nature of advertisers placing advertisements of POH

Nature of Advertisers of POH	Print		Online Platform		TV	
	Total	%	Total	%	Total	%
Property Agents	176	65.2	756	83.8	25	17.6
Property Developers	51	18.9	88	9.8	117	82.4
Both Property Agents and Developers	42	15.6	-	-	-	-
Investment consultancies	-	-	51	5.7	-	-
Business consultancies	-	-	7	0.8	-	-
Not Specified	1	0.4	-	-	-	-
Total	**270**	**100**	**902**	**100**	**142**	**100**

Table 8: The countries/regions where the POH were situated

Country/region	Total	%	Print	Online Platform	TV
UK	290	22.1%	63	215	12
Mainland	211	16.1%	110	30	71
Japan	168	12.8%	7	149	12
Canada	149	11.3%	52	97	-
Thailand	109	8.3%	3	106	-
Australia	105	8.0%	16	89	-
Malaysia	49	3.7%	1	27	21
Vietnam	42	3.2%	5	37	-
Cambodia	38	2.9%	1	37	-
Singapore	27	2.1%	5	22	-
Taiwan, China	6	0.5%	-	6	-
Portugal	4	0.3%	3	1	-
Indonesia	4	0.3%	-	4	-
Miscellaneous	124	9.4%	4	82	38
Total	**1314**	**100%**	**270**	**902**	**142**

- The top 5 countries/regions where the advertised POH were situated were UK (22.1%), Mainland (16.1%), Japan (12.8%), Canada (11.3%) and Thailand (8.3%).

Print Advertisements

Details of the survey on POH advertisements in newspapers, tabloids and magazines, are as follows:

Table 9: Review of print advertisements

Survey period	9 November 2020 to 8 December 2020 [30 consecutive days]
Total no. of advertisements recorded	270
Newspapers (Paid)	▪ Apple Daily ▪ Ming Pao ▪ Oriental Daily News ▪ Sing Tao Daily News ▪ HK01 (Available on Mon only) ▪ Hong Kong Economic Times (Available from Mon to Sat only)
Tabloids (Free)	▪ Headline Daily (Available from Mon to Sat only) ▪ AM730 (Available from Mon to Fri only)
Weekly magazines	▪ Eastweek ▪ Ming Pao Weekly

Key findings

- **Most of the print advertisements involved property agents.** As seen in Table 7 above, 80.8% of the surveyed print advertisements involved property agents and property developers accounted for 34.5% of the advertisements.

- **Unlicensed agents accounted for the majority of the advertisements.** As seen in Table 10, 34.4% (or 93 advertisements) of the print advertisements of POH contained the relevant disclaimers indicating that they were placed by estate agents under the Exemption Order, i.e. were unlicensed estate agents. Of these, various descriptions of disclaimers, such as stating that they exclusively sold POH and were not subject to the control of the EAO; they did not have any Hong Kong licence; or they were exempted under the EAO or Exemption Order. Only one-quarter of advertisements (25.2%) stated the EAO licence numbers which indicated they were licensed estate agents, but over half of them (54.4%) also inserted the disclaimer under the Exemption Order indicating that they might have involved staff which were unlicensed agents[60].

- Over 40% of the advertisements (109 advertisements) did not give any licence information, and after deducting 30 advertisements placed by developers, it could be said that agents account for over 70% of these advertisements. Hence, taking into account the number of advertisements with the relevant disclaimers as well as those without any licence information at all, unlicensed agents accounted for the majority of the 270 advertisements surveyed (around 77%). In addition, it can be seen from the different methods of description of the disclaimer as required under the Exemption Order that there was no one single way of informing the consumers that they were not licensed estate agents, thereby possibly causing confusion.

- The advertisements also did not always show as to whether the POH are completed or uncompleted (Figures 16 and 17). Only 21.1% advertisements (57) provided the building or development permit number which indicated that the project under sale was uncompleted. This could cause confusion to the consumers, inducing them to attend the sales exhibitions.

Table 10: Summary statistics for print advertisements

	Total	%
(a) Fulfilled the requirement under the Exemption Order	93	34.4
(b) Mentioned the licence number under the EAO	68	25.2
- Also fulfilled the requirement under the Exemption Order	*37*	*13.7*
(c) Did not give any information on licences	109	40.4
- Developers	*30*	*11.1*
(d) Advertisers operated under overseas jurisdiction	-	-
Total	**270**	**100**

[60] As stated in Chapter 2, where a licensed estate agent employs an unlicensed person as salesperson to engage in the sale of POH, the unlicensed person shall state in all his documents and in any advertisement that he is not licensed to deal with any properties situated in Hong Kong as required under the Exemption Order.

Figure 8: Requirement under the Exemption Order fulfilled (with clear exemption statement in the disclaimer)



Disclaimer with clear exemption statement

Figure 9: Requirement under the Exemption Order fulfilled (with licence information and clear disclaimer)



Disclaimer with licence number

Figure 10: Requirement under the Exemption Order fulfilled (with licence information and clear disclaimer). The Estate Agent Company Licence C-XXXXXX and the statement *"... Some of our salespersons are not licensed to deal with any property situated in Hong Kong..."* in the disclaimer.



Figure 11: Licence information or dislcaimer missing/ Juxtaposed presentation of initial payment and total property price for different properties in the same advertisement may cause confusion



Figure 12: Licence information missing / Example of advertorial with overhead banner indicating the price and mortgage information



Figure 13: Licence information missing



Figure 14: Licence information missing / A useable area of 210% is stated



Figure 15: Licence information missing *(NB. No clear evidence whether this belongs to estate agent or developer's advertisement.)* / A high yearly return of over 30% with a seminar to be given on the investment and living as well as indications of experts to teach on the "sure-win" method on renting out the property



- Some traders used sales and marketing tactics such as high return and rental guarantee (Figures 15, 17 and 18), immigration advantages (Figure 19), tax incentives (Figure 17) and stamp duty holiday (Figure 18), availability of mortgage or mortgage holidays (Figures 12, 17, 18 and 19), low entry price point without clarifying as to whether the price indicated related to the deposit or the purchase price of the whole property (Figure 18) as bait to attract consumers to make enquiries. Others used free talks and seminars in relation to investment and living outside Hong Kong to attract unsuspecting consumers to advertised POHs in different markets. Some traders also referred to the unusually high rental return and useable area of the property to attract consumers (Figures 14 and 15).

- There are currently no legislations mandating the use of one single currency as reference to enable consumers to compare prices. As shown by the survey findings, this can cause confusion to consumers especially if the advertisements of properties in different markets are listed side by side (Figure 18). These advertisements did not have a Hong Kong dollar equivalent and consumers could easily be confused as to the real value of the property they were looking at.

Figure 16: Development permit number missing *(NB. No clear evidence as to whether this advertisement refers to completed or uncompleted property.)*



Figure 17: Advertisement contains rental guarantee and a claim that a 30% mortgage would be available



Figure 18: Advertisements containing undesirable trade practices in marketing. Advertisements contain rental guarantee, representation as to level of mortgage obtainable, free "gifts", low entry price point without reference to whether it is first instalment payment or total property price.



主辦單位只專售賣香港以外的地產項目，故不受《香港地產管理條例》限制。

Figure 19: Disclaimer with small font size / Blurred disclaimer / Sales tactics in marketing involving representation on interest-free instalment loans and immigration advantages in relation to the purchase of a completed property



- **Disclaimer with small font size (around 4.5 point) / blurred disclaimer**
- **Licence number is barely legible**

- **Clarity of the disclaimers.** For advertisers who had included the disclaimers in the print advertisements (180 advertisements), the font was so small in 22.2% of the advertisements that a person with normal eyesight could not easily read the content and a tool such as a magnifying glass was required to help improve the readability. In 10% of these advertisements, the content was so blurred that the details of the disclaimers were not legible to the audience even using an appropriate tool.

Table 11: Clarity of disclaimers of print advertisements

Clarity of Disclaimers	Total	%
▪ Clear (include Ad with QR code)	122	67.8
▪ Can read with tool that helped improve readability	40	22.2
▪ Blurred contents that were not readable even with tool	18	10
Total	**180**	**100**

Figure 20: Disclaimer with small font size / Blurred disclaimer



Disclaimer with small font size/ blurred disclaimer, barely legible

Figure 21: Disclaimer with small font size / Blurred disclaimer / Famous developer in the UK with guaranteed quality



質素保證
英國著名發展商
重點發展項目 以往項目全數售罄!

Disclaimer with small font size/ blurred disclaimer, barely legible

Figure 22: Disclaimer with small font size / Blurred disclaimer



- **Failure to state any development permit or approval number.** Of a total of 270 print advertisements, over 40% of the advertisements did not list the development permit or approval number or the name of the authority which issued the permit or approval as required in the Practice Circular.

Figure 23: Development permit number missing *(NB. This advertisement refers to a completed property.)*

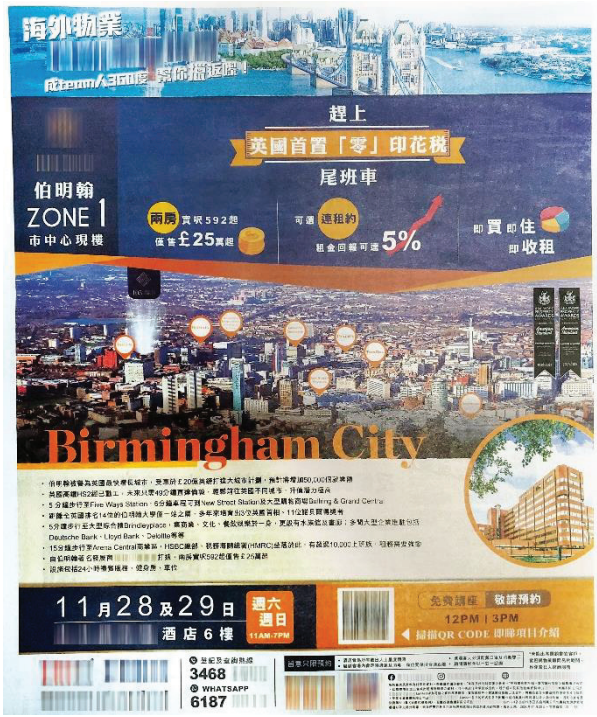


Figure 24: Development permit number missing *(NB. No clear statement as to whether this advertisement refers to completed or uncompleted property.)*



Most of the advertisers have included a Hong Kong contact. 98.1% of the print advertisements reviewed included a Hong Kong contact. Half of the print advertisements encouraged the consumers to conduct follow-up meetings at commercial venues (50.0%) while over one-third of the print advertisements were at hotel function rooms (36.7%). Less than 10% relied on sales contacts such as telephone numbers or WhatsApp for sales enquiry follow-up. This indicates that although the vendor or developers might have been situated outside Hong Kong, nevertheless, the sales activities were highly localised with local partners or agents involved to facilitate the sale of these properties.

Online Advertisements

The Council reviewed and analysed the advertisements listed or recommended on the first result page of keyword search on online platforms including search engines and social media. Search details are as follows:

Table 12: Review of online advertisements

Survey period	17 November 2020 to 6 December 2020 ▪ First cycle: 17 November 2020 to 22 November 2020 ▪ Second cycle: 23 November 2020 to 6 December 2020
Total no. of advertisements recorded	1,454 (902 of them were POH advertisements, i.e. 62%) ▪ Among the 902 POH advertisements recorded, 819 (90.8%) of them were collected from the two selected search engines and 83 (9.2%) of them were collected from the two social media samples.
Search engines	▪ Google (google.com.hk) ▪ Yahoo (hk.yahoo.com)
Social media[61]	▪ Youtube (youtube.com) ▪ Discuss HK Forum (discuss.com.hk) ▪ Property-related sub-channels of Discuss HK Forum: • 各行各業 • 金融財經

Key findings

- **Over 80% of the online advertisements involved property agents.** Most of the online advertisers of POH were property agents (83.8%), followed distantly by property developers (9.8%).

- **59.5% online advertising of POH with pop-up/banner had shown a Hong Kong address or telephone numbers for contact on the online advertisements**. As with the print advertisements, this indicates that although the vendor or developers might have been situated outside Hong Kong, nevertheless, there were local partners or agents involved to facilitate the sale of these properties.

- 14 traders advertised in both print and online advertisements.

[61] **Hong Kong Golden Forum** (forum.hkgolden.com) and **Price.com** (price.com.hk) were excluded given the chance of POH advertisements was low. **Facebook** and **Instagram** were excluded as advertisements were custom-made through artificial intelligence to the interest of readers.

Figure 25: Online advertisement with pop-up or banner that stated a Hong Kong address



- **Only around 17% of the online advertisers stated that they had an EAO licence.** As seen in Table 13 below, 37.5% of the online advertisements (338 advertisements) of POH contained the relevant disclaimers indicating that they were placed by estate agents under the Exemption Order, i.e. were unlicensed estate agents. Less than one-quarter of advertisements (16.7%) stated the EAO licence numbers which indicated they were licensed estate agents but a majority of them (78.1%) also inserted the disclaimer under the Exemption Order indicating that they might have involved staff which were unlicensed agents.

- It is also noted that around 26.9% of the advertisements (243) did not give any licence information, out of which advertisements placed by developers only accounted for a small portion (11.9% or 29 advertisements), representing around 88% of these advertisements were dominantly advertised by unlicensed agents or a party with unknown identity.

- Similar to the print advertisements, although there was a disclaimer as required under the Exemption Order, the multitudinous methods of presentation of this information could possibly cause confusion.

Table 13: Summary statistics for online advertisements

	Total	%
(a) Fulfilled the requirement under the Exemption Order	338	37.5
(b) Mentioned the licence number under the EAO	151	16.7
- Also fulfilled the requirement under the Exemption Order	*118*	*13.1*
(c) Did not give any information on licences	243	26.9
- Developers	*29*	*3.2*
(d) Advertisers operated under overseas jurisdiction	170	18.8
Total	**902**	**100**

- **Most of the online advertisers of POH showed certain details of the properties or developments in the advertisements (73.9%).** The type of details included the developer, the total number of units, the number of floors, range of floor space available for sale, price of property, facilities such as sport facilities, international schools that were located near the property, transportation network, car park arrangements, types of furniture or fixture that would be bundled with the purchase. However, only one-fifth of the advertisements (20.7%) provided the exact address of the property on sale.

Figure 26: Online advertisement containing details of the development

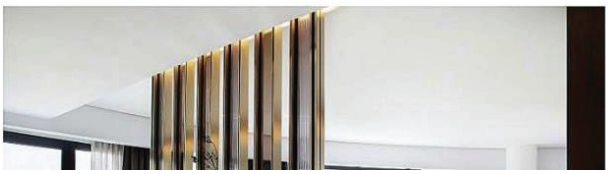


904 - 2,982 平方呎 / 港幣$3M 起

被譽為馬來西亞第三大上市公司[redacted]銀行旗下發展商[redacted]集團另一口碑之作—星級公寓DC [redacted]，位於被喻為「吉隆坡比華利山」的傳統豪宅地段—[redacted] Heights[redacted]高尚住宅區。DC [redacted]是此區唯一大型綜合項目，毗鄰TPC 高爾夫球會及8間國際學校，距離地鐵站僅數步之遙

物業資訊

- 單位**首期港幣30萬起**，享永**久業權**。
- 位於**傳統豪宅地段**—白沙羅嶺高尚住宅區。**有「吉隆坡比華利山」之稱**。
- **附送車位及全屋傢俬**。
- 附送裝修、傢俬及[redacted]、[redacted]、[redacted]品牌電器。
- 屋苑設有50米無邊際鹽水泳池、健身室，以及私人電影院等等。
- **距離地鐵站僅數步之遙**。毗鄰[redacted]高爾夫球會及8間國際學校
- 馬來西亞第[redacted]大上市公司[redacted]銀行旗下[redacted]集團發展



業權	永久業權
佔地	8.5 英畝
單位數量	370 個
A及B座	每座28層

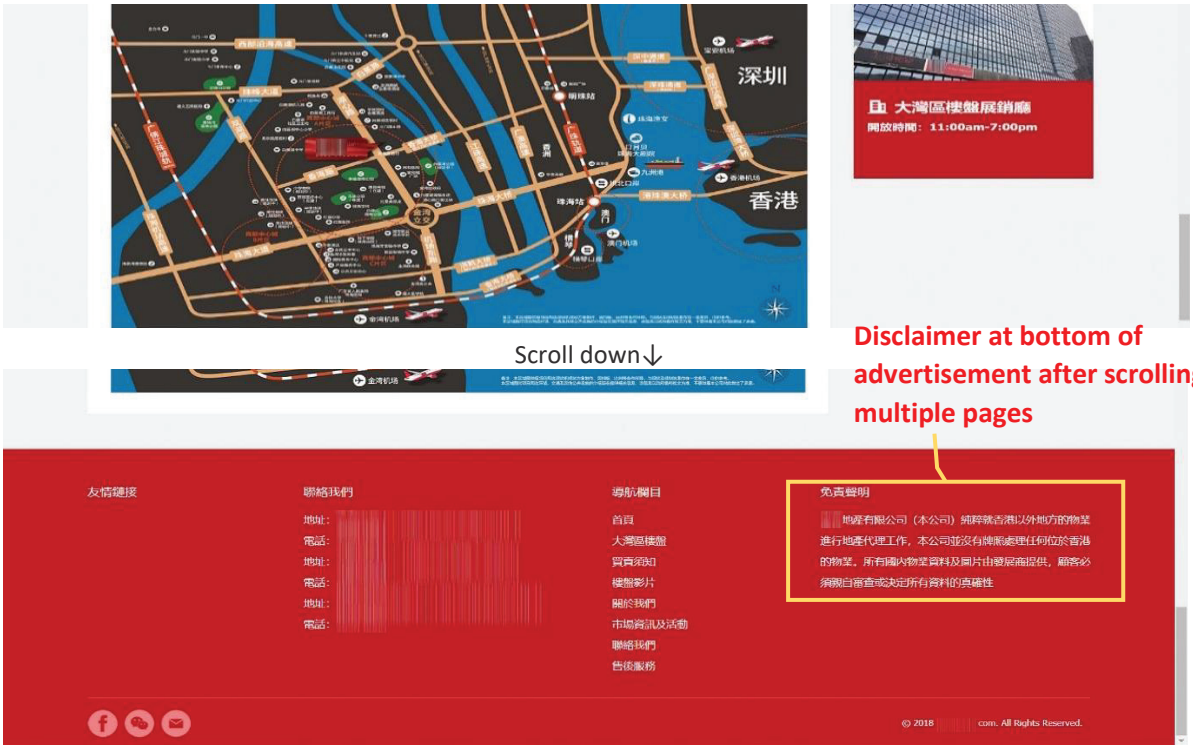
Figure 27: Online advertisement with only an approximate location as property description



- **The disclaimers (exemption and liability) were not placed in a conspicuous place so readers would only see them after scrolling down many pages. In fact, many of the disclaimers were placed at the end of the advertisements.**

Figure 28: Online advertisement with disclaimer set out at the bottom of the page with small font size





TV Advertisements

Details of the survey on TV advertisements are as follows:

Table 14: Review of TV advertisements

Survey period	14 November 2020 to 12 December 2020 [4 consecutive weeks]
Estimated no. of TV commercial slots reviewed	5543 (projection on the number of TV commercial slots had to be carried out for a few TV channels for days with no valid recordings of TV programmes) ▪ Estimated invalid rate 5.6% ▪ Among these TV commercial slots, 143 (2.6%) of them had presented 144 TV commercials that were related to POH.
TV Channels (Free)	▪ TVB Jade (Channel 81) ▪ Open TV (Channel 77) ▪ Viu TV (Channel 99)
TV Channels (Paid)	▪ Cable TV (New Channel) ▪ Now TV (New Channel)

Key findings

- In comparing print and online advertisements (dominated by estate agents as advertisers), over 82.4% of the TV advertisers were property developers and the rest of them were property agents (17.6%).

- Almost 72.5% of the TV advertising of POH were general TV commercials; whereas 27.5% advertised in the form of title sponsorship, which is relatively short[62].

- 64.8% of TV commercials were related to product/service promotion, using a soft selling approach to invite TV audience to visit the exhibition hall for more information while the rest of them were related to overall brand building exercise with title sponsorship as the main approach.

- The survey did not reveal any glaring malpractices or unscrupulous marketing tactics, most possibly due to the more stringent regulation of these advertisements by the TV Code.

Figure 29: Soft-selling approach



Figure 30: Disclaimer shown in the last shot of the TV commercial



[62] An example of the voiceover of a title sponsorship is as follows: XXX 集團為你提供《今日恆生指數》收市係二萬六千五百零五點。《今日恆生指數》收市點，係由 XXX 集團贊助播出。

4.6. Summary

From the analysis of the advertisements for POH during the subject period, it can be seen that there was a diverse portfolio of properties in the market, comprising of completed or uncompleted projects and in different price range for sale in Hong Kong. From this, it can be inferred that Hong Kong is a very open and attractive market to international vendors looking to sell their properties.

The survey also shows that estate agents play an active role in the sale of POH on behalf of their principals. Among the advertisements surveyed, unlicensed estate agents and developers/vendors were responsible for listing the majority of the advertisements, whether they were printed, online or via the TV medium. Due to the pricing of TV advertisements, most of these were taken out by developers.

With the more stringent regulations for TV advertisements, no glaring malpractices or concerns were observed. For the online and printed advertisements, the survey uncovered undesirable trade practices which raised serious concerns from a consumer protection perspective.

The insufficiency of regulation for the sale of POH means that unlicensed estate agents can simply use a disclaimer to escape liability under the EAO. The means that the extent of the DD, if any, carried out by the unlicensed agents before taking up the project for sale to the Hong Kong public cannot be scrutinised as they are not regulated by the EAA.

It is also observed that these unlicensed agents used all sorts of sales and marketing tricks and tactics to attract and induce consumers into buying POH. These tactics or undesirable sale practices include the use of small fonts, blurred disclaimers, lure of rental guarantee or availability of loans. Further, the lack of a specified or uniform way of describing the unit area or the price of the POH, or the description of the disclaimer, all contributed to consumer rights being eroded.

The survey also shows that while licensed estate agents tended to be relatively more self-disciplined in adhering to the requirements of the EAO and the Practice Circular, the situation is far from perfect and grey areas have been exposed, causing concern.

The crux of the matter is that the advertisements placed by estate agents constitute the first consumer interface. With the consumers unable to tell from these advertisements as to whether they are dealing with licensed or unlicensed agents, they cannot be expected to understand their rights and choices properly and the need, where appropriate, to do their own research or seek independent advice.

5. Trade Practices of Agents Selling POH in Hong Kong

With the Covid-19 pandemic more under control, mystery visits were carried out by the Council from June to July 2021 to validate both the experience of the consumers during their initial contact with the Hong Kong agents when purchasing POH and the advertisement survey results of the external consultant as set out in Chapter 4. This chapter focuses on the findings from the exercise and areas of concern flowing from these trade practices will be discussed in Chapter 7.

5.1 Mystery Visits

This mystery visit exercise enabled the Council to obtain first-hand experience of the trade practices and sales tactics engaged by the sales agents, facilitating corroboration of the complainants' experience. It also allowed the mystery visitors to find out what information would typically be given to consumers so that an assessment could be made as to the sufficiency of information provided and warnings given.

It should be noted that there were limitations to the mystery visits undertaken by the Council as the exercise stopped short of the stage whereby the mystery visitors were asked to commit by signing reservation agreements or placing a deposit. The user experience with agents was therefore confined to the making of initial enquiries and visiting exhibitions or attending one-on-one meetings with salespersons but not beyond. Although the Council only managed to obtain a few agreements relating to the payment of reservation fees and deposits during the mystery visits, these documents serve as useful reference to enable observations to be drawn, upon which the recommendations are based.

Research Design and Methodology

Based on the Council's complaint statistics, it was clear that the sales of POH in some jurisdictions were more problematic than others. By reference to the popularity of POH situated in certain jurisdictions among Hong Kong people, 8 jurisdictions were identified for the mystery visitors, namely Australia, Canada, the Mainland (GBA), Malaysia, Japan, Singapore, Thailand and the UK. The advertisements of a mix of completed and uncompleted projects were then chosen via desktop research to support the mystery visits. In order to ensure that there was a Hong Kong element involved in the sale of these POH, advertisements placed by Hong Kong based agents were targeted.

As the Hong Kong laws and regulations currently stand, unlicensed estate agents are allowed to carry out the sale of POH unregulated if the requirements of the Exemption Order are satisfied. As previously mentioned, the results of the external consultant's survey showed that the advertisements of unlicensed estate agents appeared to be more problematic, thus, more advertisements placed by unlicensed agents were selected as samples for the visits.

In total, 9 mystery visitors visited 20 traders, of which 19 were agents and 1 was a developer. Out of the 19 agents, 4 were licensed estate agents as listed on the licence list of the EAA and the

remaining 15 were unlicensed. As 3 agents were visited for POH situated in multiple jurisdictions and some agents promoted more than 1 project during the visits, this accounted for the higher number of projects promoted (36) than the total number of agents visited as listed in the table below.

For all the visits, the mystery visitors were asked to role-play a consumer who had no previous experience purchasing any POH. Furthermore, different scenarios were designed for the mystery visits so that this could reflect the different needs of consumers wishing to purchase POH, such as:

i. Self-use / migration
ii. Investment/rental/preparation for future education of children
iii. Retirement
iv. Vacation home

The mystery visitors initiated the contact with the agents by online registration, WhatsApp contact or telephone calls as stated in the advertisements. Depending on the response of the contact person of the agent and/or what was being advertised, an appointment would be made for a physical meeting or to register for the attendance at an exhibition (with or without presentations). On 2 occasions, the mystery visitor did a walk-in at the agent's office to ask for information and indicated interest in purchasing POH.

A table summarising the jurisdictions identified for the exercise and the numbers of agents and developers contacted are set out below.

Table 15: Jurisdictions identified for the mystery visits, numbers of projects involved and the numbers of agents and developers contacted

Jurisdictions	No. of project(s) promoted by agents	No. of project(s) promoted by developer
Australia	7	
Canada	2	
Mainland (GBA)	5	1
Malaysia	4	
Japan	3	
Singapore	1	
Thailand	7	
UK	6	
Total number of projects promoted by agents/developer	***35***	***1***
Total number of agents/developer	***19***	***1***
Of which – Licensed agents	***4***	
– Unlicensed agents	***15***	

Findings and Observations

1. *Initial experience/enquiries over the phone*

At the initial stage, most of the mystery visitors did not report any bad experiences, with the sales staff being prepared to give out name cards, brochures and other relevant information with physical meetings arranged for the mystery visitors subsequently.

However, on 3 occasions, the mystery visitors reported negative experiences in their initial contact with those agents. Examples of such negative experiences included no appointment being made following the initial call; the agent representing a Mainland developer did not show up at the sales office; and the mystery visitor being left unattended for the duration of his visit. In one instance, the mystery visitor was even directed to contact a Malaysian agent who represented the developer and the Hong Kong salesperson did not offer any substantive information for the development/unit in question.

2. *Variation in operational scale, practices and quality of service of traders*

Supported with more resources and operational experience, the larger and more reputable traders were found to be more organised in their sales practices and could provide sufficient information and materials on the projects they were selling. In addition, these representatives also proffered detailed explanation of the sales process (for completed or uncompleted projects) and there was voluntary explanation and/or highlighting of the overseas/non-local requirements governing the sale of POH which would impact the purchaser.

At the other end of the spectrum, some traders operated on a much smaller scale and were far less attentive in their services and information provision. These traders tended not to offer much, if any, information on the project and merely referred the mystery visitor to online information posted on the website or directed them to contact the overseas agent representing the developer direct. Also, as mentioned previously, one of the mystery visitors was left unattended for the whole duration of the visit which demonstrated a clear lack of professionalism of the trader.

It was also observed that no matter what the size of the operation of the trader was, there tended to be a failure to warn the consumers of or highlight any risks in relation to the legal or regulatory implications of purchasing POH in the relevant jurisdiction or the need to seek independent advice. This will be covered in detail in paragraph 9.

3. *Confusion over the licensing/unlicensing status of agents and their sales representatives*

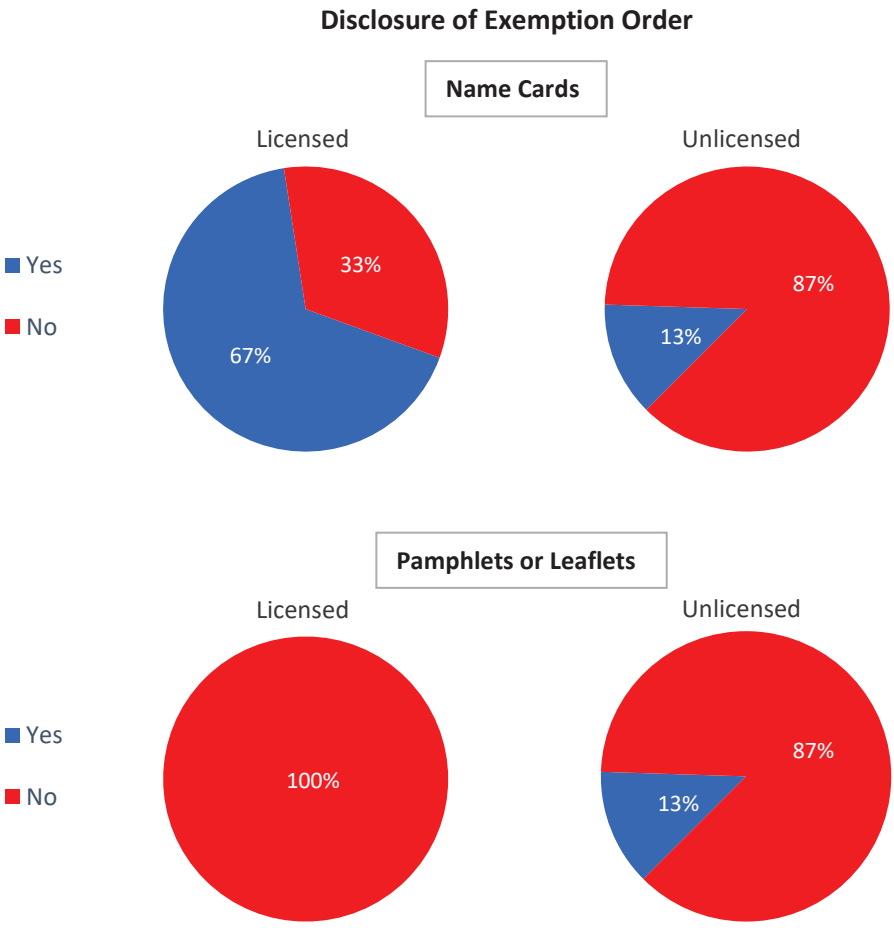
As stated in Chapter 4, a licensed estate agent is required to state clearly and conspicuously in all advertisements its licence number, if it is licensed, and if not, the relevant disclaimer under section 2 of the Exemption Order that it is not licensed to deal with any property situated in Hong Kong. The same applies to name cards of estate agents and salespersons as stipulated in the Practice Circular[63].

[63] As stated in the Practice Circular (Q&A), if the licensed estate agent is desirous of employing unlicensed staff to deal exclusively with the sale of POH, the non-licensed staff must still comply with the Exemption Order in that the business card and other documents of the unlicensed staff must state that they are not licensed to deal with any property situated in Hong Kong.

All 4 licensed agents were found to have complied with the requirement to state the company's licence number in both the advertisements and name cards of the sales staff. However, it was observed that the sales staff attending to the mystery visitors from 3 licensed agents were unlicensed under the EAA's licence list and only 2 of them stated the relevant disclaimer on their name cards to inform the consumer that they were unlicensed to deal with Hong Kong properties pursuant to the Exemption Order. This shows that while licensed agents are regulated by the EAA, their sales staff who would be the front-line salespersons playing an active role in promoting the subject POH concerned, could still be unlicensed and unregulated if they show or display the requisite disclaimer under section 2 of the Exemption Order.

In respect of the 15 unlicensed agents, 14 of them did not provide the relevant disclaimer under the Exemption Order in the pamphlets, leaflets and/or name cards distributed. Of the 14 unlicensed agents, only one of them provided the exemption disclaimer on the name card and another on the leaflets. The rest failed to provide any disclaimers on any of the above items. Without such disclaimers, potential purchasers of POH would not be made aware of the licensing status of the agents and their staff members and the potential purchasers would not be reminded in a timely manner that they would need to be more careful and/or seek appropriate professional advice before proceeding with the purchases further.

Figure 31: Disclosure of Exemption Order



It was also found that one of the unlicensed agents adopted the listed company stock code on the name card of the sales staff instead of the disclaimer under the Exemption Order,

presumably to add credibility to the company. Such trade practices could cause confusion to the consumers who might believe that purchasing POH through the agent would afford them more protection by virtue of its listed company status.

As the Exemption Order allows both licensed and unlicensed agents operating in the market and also enables the use of unlicensed staff by licensed agents for the sale of POH, this causes much confusion to consumers and greatly undermines any protection the EAO could offer to consumers. This status of protection for a purchaser of POH served by such unlicensed staff is unclear.

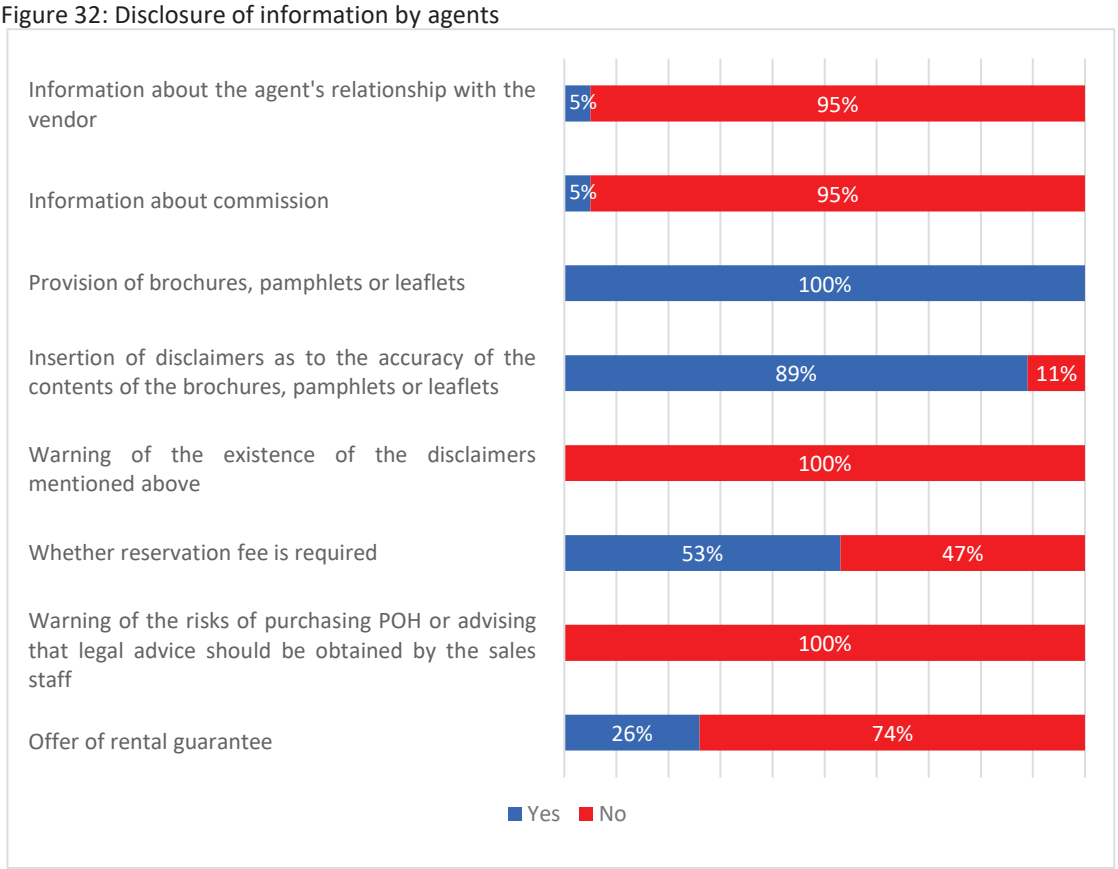
4. *Provision of information during the visits*

In the course of the mystery visits, where appropriate, mystery visitors were directed to make enquiries of certain key information which might affect a typical purchaser's ability or decision to buy the property, such as

(i) the identity of the developer/vendor;
(ii) price information and mortgage facilities;
(iii) help with taking possession of the property upon completion; and
(iv) for mystery visitors who looked for POH as an investment, rental return.

The majority of the mystery visitors found that the agents could give basic information in relation to the properties they recommended, the sales procedures and other services. However, upon more detailed examination, there were instances where the agents did not sufficiently disclose relevant information which deserved particular attention for the purpose of consumer protection. On occasions, mystery visitors were provided false or inaccurate information as outlined below.

Figure 32: Disclosure of information by agents



5. Inadequate disclosure of the agents' relationship with the vendors and commission payments

Out of 19 agents, the sales staff of 1 agent voluntarily disclosed at the beginning of the meeting that they acted for the developer and there was no need for the purchaser to pay commission. The remaining 18 agents did not specify which party they acted for or only disclosed this information upon enquiry by the mystery visitor. However, when specifically asked, the sales staff did disclose to the mystery visitors commission payment information relating to the purchase. As mentioned above, one agent did not provide any substantive information and immediately referred the mystery visitor to contact the overseas Malaysian agent on behalf of the developer. Although it could be said that sales staff might not have thought it would be necessary to mention commission issues if the consumers were not required to pay any, it is observed that, without voluntary disclosure of this type of pertinent information, ordinary consumers might not be alerted to ask about the relationship between the agent, the developer/vendor and the purchaser which could signify potential conflicts of interest.

6. Accuracy of the information provided in doubt due to lack of DD or effluxion of time, or lack of provision of English or Chinese translated versions

All agents provided brochures, pamphlets or leaflets relating to the project under sale. However, as the current laws and regulations do not require the unlicensed agents or their staff members to perform DD, there is no guarantee that there is any degree of DD conducted before taking on the sale of POH. During this exercise, the mystery visitors discovered that the brochures provided by the unlicensed agents were outdated in at least 2 instances. On one occasion, the brochure of the developer of an uncompleted development in Manchester stated that it was printed in July 2018. At the time of the visit in June 2021, the sales staff did not provide any updated information on the construction status apart from repeating that the project would be completed in the 3rd quarter of 2021. In conflict with this piece of information, the sales staff added that additional approval was being sought from the relevant authority in the UK to build two more floors to the development. No further advice was given on the possible implication of that change on the completion date should approval be granted. When the mystery visitor showed confusion, the sales staff then added that the approval was unlikely to be granted, causing even greater confusion. This was unsatisfactory.

In another instance, the sales staff/agent deliberately or negligently failed to point out some discrepancy of information contained in the brochure to the mystery visitor. The information stated in a brochure clearly showed that the completion date of the property was the first quarter of 2021 (which preceded the visit to the agent by the mystery visitor) but the sales staff told the mystery visitor that the completion date was expected to be around August 2021. This highlighted the fact that given the time lapse between the printing date of the brochure and the sale in Hong Kong, the information provided in the brochure could be superseded by events and therefore wrong but this discrepancy was not pointed out. This led the mystery visitor to wonder how accurate the other information contained in brochure really was.

While most of the agents appeared helpful in giving information relating to the POH, the purchase decision was somehow based on trust of what the agents said or disclosed as it might not be easy for ordinary consumers to verify all the information provided, given the jurisdictional element. This situation was particularly unsatisfactory for unlicensed agents selling POH situated in jurisdictions where neither Chinese nor English was the official language

and they were not regulated or bound by the Practice Circular. The mystery visitors were given comfort and reassurance that there would be translators on site to orally explain contracts written in foreign languages, such as Japanese, at the time of signing the contract.

In 2 of the visits attended by the mystery visitors, the agents provided brochures and leaflets written in the Japanese language. What was shocking was that the sales staff on both occasions told the mystery visitors that although they did not speak the language at all, they could guess the meaning of these words in Japanese due to their professed experience in the sale of Japanese properties. One of them went so far as to claim that he could understand what was written in Japanese notwithstanding his lack of proficiency in the language as being Chinese, he was familiar with Hanji.

Further in one of the above instances, the sales staff looked up second-hand properties on a real-estate platform on a Japanese website, showed the Japanese Google map to the mystery visitor as to the surroundings of the property and gave explanations. The reliability of the information given by the sales staff was in doubt given the self-professed language barrier. The mystery visitor, being unfamiliar with POH in Japan and lack of Japanese language proficiency, had no choice but to rely on the information given and trust the salesperson.

7. Mistake, misrepresentation, negligent or otherwise

The unlicensed agent selling 2 uncompleted developments in Thailand appeared to have misstated material facts in one of the projects, namely the state of completion, location and the transport facilities nearby. Some of the misstatement could be based on a genuine mistake and demonstrated unprofessionalism of the salesperson and some misstatements were negligent misrepresentations at best, blatant misrepresentation at worse, made to induce consumers into purchasing the properties.

In the first development, the sales staff of the agent informed the mystery visitor that the project was a completed development. She only realised her misstatement much later on in the sales process and corrected herself. She also represented that the location of the property to be within Bangkok in the region of Rangsit. A simple Google search by the mystery visitor afterwards revealed that Rangsit was 40km from Bangkok and located within the province of Pathum Thani, not Bangkok. Pathum Thani is a central province of Thailand and is north of Bangkok. While technically, Pathum Thani is a part of the Bangkok metropolitan area, to describe the development to be within Bangkok was highly inaccurate and misleading, giving the impression that the development would be in Bangkok city. Finally, the representation that the nearby train station which was being built to service the development would be on the BTS (Bangkok Mass Transit System) railway line. Research by the mystery visitor showed that the actual station servicing the development should be on the SRT railway (State Railway of Thailand) instead of BTS railway.

In another development, the sales staff showed the mystery visitor photographs of flats and represented that these were the actual flats to be sold as they had been completed. However, the mystery visitor discovered that the website of the developer showed an expected project completion date of August 2021 so the photographs could not have been completed units. This was then raised with the sales staff who then had to retract what she had said earlier and subsequently clarified that the photographs were taken at the show flats.

8. Use of disclaimers to escape liability regarding the accuracy of the content in the sales documents

The majority of the promotional leaflets and brochures provided by the agents contained disclaimers. These disclaimers usually state that the documents are provided by the developer/vendor and the content may be subject to change and does not constitute part of the contract. However, in all of the cases, the sales staff did not refer to such disclaimers in the promotion of the POH nor provide warning of the existence of these disclaimers.

9. Disclosure of information relating to the payment of reservation fees and their refund

Out of the 19 agents, 10 of them required the payment of a reservation fee to secure and reserve the properties concerned. Such reservation fees ranged from HK$5,000 to HK$75,000. These reservation fees were non-refundable if the purchaser did not enter into the sale and purchase agreement and some could be set off against the deposit paid by the purchaser toward the purchase. The majority of the salespersons did not discuss the finer details of the reservation fees but this could be due to the initial stage of the contact.

Only 1 agent indicated that a cooling off period could be provided upon request but no further details were provided.

1 of the mystery visitors managed to obtain a copy of the reservation agreement for the sale of a property in Thailand. The draft agreement clearly stated that the agreement would be governed by the laws of Thailand. This piece of information was not conveyed to the mystery visitor although the non-refundable nature of the fees was touched upon.

10. No warning given of the risks of purchasing POH/lack of advice to consumers that independent legal advice should be obtained

For the sale of UPOH, agents would make reference to the photographs taken recently of the development to showcase the construction progress of the project and try to convince the purchaser that there was no or little risk of failure so as to promote the sale. However, as stated in Chapter 3, notwithstanding these photographs evidencing progress of construction, developments still failed to complete.

Further, the agents also provided information relating to the types of taxes to be paid in relation to the purchase of POH such as stamp duty without any warning given to the purchasers to seek independent advice. In one instance, the sales staff of an unlicensed agent explained to the mystery visitor the different tax rates applicable to the purchase depending on whether the property was acquired for the purpose of self-occupation or investment. The sales staff said that if the purchaser declared to the relevant Council of Manchester in the UK that the property was acquired for self-occupation, then it could not be rented out. However, he added that even if one rented out the property, the Council would not necessarily check, therefore indirectly hinting to the prospective purchaser that he could evade tax and pay less. If the purchaser were to do so upon listening to the advice of the salesperson, he could be at risk of making a false declaration, which in the UK, would be a criminal offence. Tax issues are complicated and agents and salespersons should be more responsible when giving such information. No advice was given to the mystery visitor to obtain proper tax or legal advice. There was also no indication at all as to why the sales staff considered himself qualified to give such complicated and detailed advice.

11. Promise of guaranteed rental returns

Out of 19 agents, at least 5 of them offered the mystery visitors rental guarantee as part of the sales promotion. These offers were provided for properties located in Australia, Japan, Malaysia, Thailand and the UK, and typically ranged from 5-7% of the purchase price of the property. In one instance, the agent offered 7% of rental guarantee for 9 years from the construction period of a hotel-style project in Malaysia. The developer further offered that it would buy back the property after 9 years at the rate of 130% of the original purchase price.

It was noted that printed in extremely fine print at the bottom of the cover of the brochure, the rental guarantee scheme/guaranteed return only applied to professional investors and the term "professional investor" was stipulated as that defined in schedule 1 of the SFO and the Securities and Futures (Professional Investor) Rules. There was no mention of such purported disclaimer at all during the sale by any of the salespersons. The sales staff were selling this project to ordinary people who would not be regarded as professional investors as contemplated under the SFO. The remit of the mystery visits obviously did not go as far to test whether such representations would be honoured at the end of the day but there could be deliberate or at least negligent misstatement or omission of details of the rental return situation which for a purchaser who wanted an investment, would be an important factor to consider.

In another instance, the unlicensed agent promoted a property which was in the nature of an Airbnb with a rental guarantee of 6% per annum for 2 years. The Airbnb licence would be held by the designated rental service company.

With reference to the incidents mentioned above, such offers of rental guarantee may amount to a sale of interests in a CIS under Schedule 1 to SFO, depending on the real nature of the project. As discussed in Chapter 2, the term "CIS" is defined broadly in Schedule 1 to the SFO. Without looking in depth at each and every case where the salespersons promised rental guarantees in the mystery visits, stakeholder discussions with the SFC revealed that real estate projects involving interests in hotels/holiday resorts, serviced apartments, student accommodation and shopping malls would likely be considered as a CIS because it was more likely that they would need to be managed on behalf of investors. Therefore, real estate projects like some of those involved in the mystery visits with "buy-to-let" or "buy and leaseback" features could well be considered a CIS as they would often involve a centralised letting and management service[64]. If these developments were found to be CIS, then the developer and the agent could be found to be in breach of the SFO – 'Without obtaining the necessary and requisite approvals from the SFC', the sale of these units could be forced by the Courts to unwind the transaction. This could cause loss and damages to the consumer.

An interesting observation

12. Meeting of consumer's preference/pitching for side business

Some mystery visitors who indicated that they were looking for a retirement home or a flat for self-occupation ended up receiving sales pitch on management and rental services. Without

[64] Q&A 4 .

the disclosure of the fees involved, the salesperson was selling other services offered by the agent's parent office in the home jurisdiction to optimise their chances of gaining more business. However, it might not be the intention of the prospective buyers to look for such services.

In addition to management and rental services, other services mentioned in the visits were the referral of mortgage services, currency exchange services, immigration assistance and assistance in taking possession of the property on behalf of the purchaser upon completion of the sale. One salesperson offered to refer the consumer to obtain a personal loan to be provided by a bank in Hong Kong without disclosure of whether he would obtain any commission or other personal interest.

On one occasion, the mystery visitor was offered a commission if she managed to refer successful buyers to purchase some of the units promoted.

5.2 Summary

From a sample size of 36 mystery visits, a number of issues were clearly revealed which, if left unchecked, could greatly undermine consumer protection. This confirms that the purchase of POH involves a lot of complexities which may lead to high risks.

In gist, there was confusion over the licensing status of agents and their sales representatives with the majority of the unlicensed agents not providing the relevant disclaimer under the Exemption Order in the pamphlets, leaflets and name cards distributed. Although most traders could give basic information for the properties they recommended, some traders failed to disclose sufficient information in relation to certain areas, with some providing false or inaccurate information.

Furthermore, a lack of adequate or voluntary disclosure regarding commission payment or their relationship with the vendors also caused concern as was the lack of warning by the sales staff to potential purchasers of the risks of purchasing POH or advice that legal and or professional advice should be obtained.

All the above findings confirm that consumers may not be able to protect themselves solely through education and more regulatory efforts should be imposed to offer better protection to consumers buying POH.

6. Regulatory Regimes in Other Jurisdictions

6.1 Introduction

The Council conducted research to see if there are other jurisdictions or regions which impose legislations or regulations on estate agents to govern the sale of overseas or non-local properties. For ease of reference, a summary of the Council's findings is set out at the end of this chapter as well as in **Annex 1**. The jurisdictions selected for research are NSW, BC, the Mainland, Malaysia, Singapore, Taiwan and the UK (England & Wales). These jurisdictions are chosen either for their geographical proximity or their similarities to Hong Kong in terms of their state of economic development, business environment, or legal system and also because they are considered popular destinations for Hong Kong consumers in terms of purchasing POHs. This chapter gives an overview of the regulatory framework and focuses on key areas such as regulatory body, licensing, DD and disclosure requirements, marketing and advertising restrictions, deposit handling, cooling off provisions, supervision and enforcement. The cooling off period and the deposit protection mechanism (if any) for purchasing local properties within that jurisdiction are also set out for reference.

It is hoped that the discussion below could provide some useful references for identifying any concerns of the local regulatory regime and could serve as a foundation for exploring the recommendations listed in Chapter 8 of this Report. The Council's research findings are stated in the summary table below:

Table 16: Summary of the Council's research findings

Jurisdictions	Australia (NSW)	Canada (BC)	Mainland	Malaysia	Singapore	Taiwan, China	UK (England & Wales)
Licensing	✗	✓	✗	✓	✓	✓	✗
DD	✗	✓	✗	✓	✓	✓	✗
Advertising	✓	✓	✓	✓	✓	✓	✓
Cooling-off	✗	✓	✗	✗	✗	✗	✗
Deposit protection	✗	✓	✗	✗	✗	✓	✗

6.2 Australia (New South Wales)

Overview and Regulatory Body

The primary legislation governing the conduct of real estate agents and property industry professionals in NSW is the Property and Stock Agents Act 2002 ("**PSAA**"). New South Wales Fair Trading, a division within the Department of Customer Service of the NSW State Government ("**NSW Fair Trading"**) is the industry regulator.

Licensing

Under PSAA, real estate agents are required to obtain a licence before they could exercise real estate agent functions which include acting as agent for the introduction, or arranging for the introduction, of a prospective purchaser to another licensed agent or to the owner, or the agent of

the owner of land[65]. Assistant agents (salespersons) in the employment of a licensee (or a person required to be licensed) are required to hold the relevant certificate of registration. Further, real estate agents cannot act for both the buyer and the seller of land at the same time[66]. Although the PSAA does not expressly provide whether it applies to land situated outside NSW or Australia, enquiry to the NSW Fair Trading confirmed that estate agents' activities are regulated with respect to land and property in NSW only due to there being no express words specifying that the law applies to land outside NSW. Therefore, it is likely that a real estate agent dealing with property overseas is not required to hold an NSW real estate agent's licence. Rather, the agent will need to comply with the laws of the state in which the property is located.

Disclosure and Advertising Requirements

The PSAA and the regulations made under it provide for requirements of disclosure and advertising requirements of real estate agents[67]. An agent must not induce a person to enter into any contract or arrangement by: (a) any statement, representation or promise that is false, misleading or deceptive (whether to the knowledge of the agent or not), or (b) any failure to disclose a material fact of a kind prescribed by the regulations (whether intended or not) that the agent knows or ought reasonably to know. Real estate agents are required to disclose to the person for whom he is acting and any prospective buyer of the land (if he is acting for the seller) certain matters including the amount or value of any consideration received or to be received by the agent from a person to whom the agent has referred the client or a prospective buyer. A real estate agent who provides financial or investment advice to a person in connection with the sale and purchase of land should also provide a specified warning as well as information that discloses the existence and nature of any conflict of interest that the agent may have (e.g. entitlement to commission or referral fees). Furthermore, the advertisement relating to the agent's business and the sale of property should include the agent's name and any relevant interest of the agent as the owner of the property.

The Australian Consumer Law (contained in Schedule 2 to the Competition and Consumer Act 2010) ("**ACL**") is a national law which applies as the principal consumer protection law in Australia. While "land" under PSAA does not expressly include land situated outside NSW or Australia, the ACL prohibits a person, in trade or commerce (which means: (a) trade or commerce within Australia; or (b) trade or commerce between Australia and places outside Australia), from engaging in misleading or deceptive conduct[68]. In relation to the sale of an interest in land (or promotion of the sale of an interest in land)[69], section 30 of the ACL specifically provides that a person must not, in trade or commerce, make a false or misleading representation about:

- the nature of the interest in the land;
- the price payable for the land;
- the location of the land;

[65] Sections 3, 3A, 8 and 9 of the PSAA. "Land" is defined under section 3 to include "(a) a lot within the meaning of the Strata Schemes Development Act 2015, and (b) shares that, under a company title scheme, entitle their holder to the possession of premises".
[66] Sections 10, 11 and 48 of the PSAA.
[67] Sections 46, 47, 50 and 52 of the PSAA and clause 6 of the Property and Stock Agents Regulation 2014.
[68] Section 18 of the ACL.
[69] Interest, in relation to land, means: (a) a legal or equitable estate or interest in the land; or (b) a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in an incorporated company that owns the land or building; or (c) a right, power or privilege over, or in connection with, the land (section 2 of the ACL).

- the characteristics of the land;
- the use to which the land is capable of being put or may lawfully be put;
- the existence or availability of facilities associated with the land; or
- the sponsorship, approval or affiliation of the person making the statement.

The ACL is implemented in the NSW through the Fair Trading Act 1987 (NSW) ("**FTA**"). According to section 32 of the FTA, the ACL applies to and in relation to (a) persons carrying on business within NSW, (b) bodies corporate incorporated or registered in NSW, (c) persons ordinarily resident in NSW or (d) persons otherwise connected with NSW, and subject to aforesaid, the ACL extends to conduct and other acts, matters and things occurring or existing outside or partly outside NSW (whether within or outside Australia).

Furthermore, section 5(1)(c) of the Competition and Consumer Act 2010 sets out that the ACL consumer protections, such as false and misleading representations (including for the sale of land), apply to any conduct that occurs in the course of trade or commerce by any bodies corporate incorporated or carrying on business within Australia or Australian citizens or persons ordinarily resident within Australia.

Therefore, based on a strict reading of the legislation[70], for international consumers, as long as the supplier (e.g. a Realtor) is in the course of carrying on a business in trade or commerce; and the supplier is a corporation incorporated or carrying on business in Australia or an Australian citizen or a person ordinarily resident in Australia, the application of the ACL should apply.

Cooling-Off Period and Deposit Handling

The sale and purchase of properties situated in NSW is regulated by the Conveyancing Act 1919 (NSW) ("**1919 Act**") and the Conveyancing (Sale of Land) Regulations 2017.

For purchase of domestic properties in NSW, the PSAA provides for a cooling-off period of 1 business day for every estate agency agreement in respect of the sale of residential property or rural land as defined in that Act[71]. The client can rescind the agreement by serving a notice of rescission on the agent within the cooling-off period upon which neither the agent nor the client is liable to pay any sum for commission, damages, costs or expenses for or in connection with the agency agreement or its rescission. The agent must also refund to the client any money paid to the agent under a rescinded agreement. There is also a statutory cooling-off period of 10 business days for buyers of uncompleted residential properties in NSW subject to a forfeiture of 0.25% of purchase price pursuant to the 1919 Act. For completed residential properties, the cooling-off period is 5 business days.

For purchase of domestic properties in NSW

A prescribed form of cooling-off period must be included in the contract of sale and purchase of residential properties[72], failing which the purchaser may rescind the contract by serving a notice of rescission before completion under section 66U of the Act. Similarly, a warning statement alerting

[70] Based on confirmation from the NSW Fair Trading in February 2021
[71] Sections 3, 59 to 61 of the PSAA.
[72] Section 66X of the 1919 Act.

purchasers to the cooling-off period must be included in the contract, failing which the purchaser may rescind the contract before completion[73].

The cooling-off period can be extended if expressly provided for in the contract or by the vendor's writing. It may be waived or shortened if the purchaser provides the vendor with a certificate complying with section 66W of the Act.

Deposit handling

A deposit or any other instalment paid by the purchaser under an off-the-plan contract must be held in the trust account of a solicitor, conveyancer, or real estate agent during the contract period[74].

The deposit and instalment monies cannot be released to the vendor until completion, thus, protecting the purchaser's monies in the event of the developer's insolvency. Notwithstanding restrictions on how deposits/instalments are held, such monies may be paid by way of deposit bond, bank guarantee or other similar arrangement in lieu of a cash deposit.

Disclosure Statement in the Off-the-Plan Contract

Vendors must attach a Disclosure Statement outlining key information to the off-the-plan contract before it is signed by the purchaser. Draft documents such as a plan, proposed schedule of finishes, and draft by-laws must also be provided[75]. Failure to do so allows the purchaser to rescind the contract within 14 days after making the contract[76].

A vendor is also required to serve notice of changes in relation to a 'material particular' which have resulted in the disclosure statement being inaccurate[77]. The purchaser may, after receiving a notice of changes, rescind the contract if a change notified in the notice of changes is such that the purchaser (a) would not have entered into the contract had the purchaser been aware of the change, and (b) would be materially prejudiced by the change[78].

A 'material particular' is defined to include certain changes that adversely affect the use and enjoyment of the subject lot, such as changes to the draft plan, by-laws, schedule of finishes or easements[79].

Enforcement

As mentioned, the PSAA is mainly enforced by NSW Fair Trading. Breach of the PSAA in relation to licensing, disclosure and advertising requirements may attract penalties and disciplinary actions. A

[73] Section 66X of the 1919 Act.

[74] Section 66ZT of the 1919 Act. It is provided under section 66ZT(1) of the 1919 Act that "*Any money paid by the purchaser by way of deposit or instalment under an off the plan contract must be held—*
(a) as trust money by a real estate agent in accordance with the Property, Stock and Business Agents Act 2002, or (b) as trust money by a licensed conveyancer in accordance with the Conveyancers Licensing Act 2003, or (c) as trust money or controlled money by a law practice in accordance with the Legal Profession Uniform Law (NSW)."

[75] Section 66ZM of the 1919 Act and section 4A of the Regulation.

[76] Section 18 of the Regulation.

[77] Section 66ZN of the 1919 Act.

[78] Section 66ZO of the 1919 Act.

[79] Section 66ZL of the 1919 Act.

maximum penalty of AUD22,000 will apply for unlicensed trading by a corporation and AUD11,000 for an individual.

The PSAA also provides for the availability of a civil remedy for recovery against the real estate agents in respect of any misrepresentation or concealment in the sale or purchase of a property, whether or not they have already entered into an agency agreement[80].

The role of enforcing the ACL is placed on the Australian Competition and Consumer Commission and each State and Territory's consumer protection or fair trading agencies (which is NSW Fair Trading for NSW). Breach of the ACL may result in criminal sanctions and disciplinary actions. In addition, there is also express provision for civil remedies for the recovery of loss and damage against the contravening party[81]. In particular, breach of section 30 of the ACL concerning making false or misleading representations with respect to sale of land amounts to a criminal offence with monetary penalties. Penalties against corporations for certain breaches including section 30 can be the greater of the following (a) AUD10 million, (b) three times the value of the benefit received, or (c) 10 per cent of the annual turnover in the preceding 12 months if the court cannot determine benefit obtained from the offence. Maximum penalties for individuals can be up to AUD500,000.

6.3 Canada (British Columbia)

Overview and Regulatory Body

In BC, purchasers of development units are protected under the Real Estate Development Marketing Act ("**REDMA**")[82] and every person who provides real estate services for a remuneration is subject to the Real Estate Services Act ("**RESA**")[83]. The Office of the Superintendent of Real Estate ("**OSRE**") co-regulates the real estate industry with the Real Estate Council ("**REC**") of BC.

Licensing Requirement

Under RESA, providers of real estate services, including finding buyers for real property in BC, must be licensed with the REC unless otherwise exempted[84]. Real estate, as defined in RESA, with reference to REDMA, includes foreign property and pre-sale condominium projects[85].

Advertising and Marketing Requirements

REDMA applies to the marketing of development properties regardless of whether the development unit is located in BC or not[86]. According to the BC government, local and foreign developments must meet similar requirements in order to be marketable in the province[87] .

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[80] Section 53 of the PSAA.
[81] Sections 152, 224, 236 and 237 of the ACL.
[82] Article "Real Estate Development Purchaser Rights" issued by the BC Government
[83] Section 2 of RESA.
[84] Section 3 of RESA.
[85] Section 1 of RESA, definition of "real estate", "real estate services" and "trading services"; sections 1 and 2(2)(a) of REDMA.
[86] Section 2(2)(a) of REDMA.
[87] Article "Real Estate Development Marketing" issued by the BC Government, the section on "Properties Located Outside of B.C."; Information Bulletin (REDMA 07-01) on "Development properties located outside British Columbia" dated 30 April 2007.

These requirements include[88]:

(1) Meeting preliminary approval requirements (e.g. building permits);
(2) Adequately assuring title, utilities and services;
(3) Filing and providing a disclosure statement of material facts of the development property; and
(4) Appropriately handling deposits, if any

Early marketing before the issuing of building permits

Under REDMA, a developer cannot market a real property located outside BC unless the relevant building permit is issued[89]. However, a developer may conduct early marketing of development units if both the approval in principle to construct from the appropriate government authority ("**Approval in Principle**") and the OSRE's permission to begin marketing are obtained[90]. What constitutes satisfactory evidence that a developer has obtained the Approval in Principle is contained in Policy Statement 5 issued by OSRE. The OSRE will permit a developer to begin marketing if, inter alia, the relevant building permit is estimated to be obtained within 9 months[91].

Early marketing before the assurance of title, payment of utilities and services

To enable a developer to carry out early marketing of a development; it has to show OSRE it has made adequate arrangements to ensure that:

(1) a purchaser of the development unit will have assurance of title for which the purchaser has contracted[92];
(2) payment of the cost of utilities and other services associated with the development unit[93]; and
(3) satisfactory financing commitment that is sufficient to finance the construction and completion of the development property[94].

Assurance of title

Adequate arrangements in respect of the assurance of title[95] includes:

(1) title to be held in trust for the purchaser by specified persons (e.g. a lawyer) until it is assured;
(2) the developer provides a surety bond;
(3) the developer must be able to give good title without encumbrances; or
(4) if the purchase agreement is completed with undertakings given between the developer's solicitor and the purchaser's solicitor, that there would be complete discharge of all charges within a reasonable time after completion.

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[88] Section 3 of REDMA; Article "Requirements for Marketing Real Estate Developments" issued by the BC Government.
[89] Section 9 of REDMA.
[90] Section 10(1) of REDMA; Real Estate Development Marketing Act Amended Policy Statement 5.
[91] Section 6 of Policy Statement 5.
[92] Section 11 of REDMA.
[93] Section 12 of REDMA.
[94] Amended Policy Statement 6.
[95] Sections 11(2) and (3) of REDMA and section 4 of Policy Statement 4.

Utilities and services including financing commitment to complete

Adequate arrangements in respect of payment of the cost of utilities and services can be shown to have been made either at the time of seeking permission or within 12 months thereof[96]. Such arrangements include[97]:

(1) title to be held in trust for the purchaser by specified persons (e.g. a lawyer) until all costs of utilities and services have been paid;
(2) the developer providing a surety bond; or
(3) satisfactory financing commitment, a commitment that is sufficient to finance the construction and completion of the development property such as a lender's funds that is non-conditional on the developer entering into a certain number of purchase agreements with purchasers.

Disclosure statements and on-going obligation to ensure accuracy

To ensure that local purchasers in BC, who may not be familiar with the property regime in a different jurisdiction, have all the pertinent details of which they are required to make a sound purchase decision, stringent disclosure requirements of the development such as approvals, land title, land use restrictions etc. need to be in place. The disclosure statement has to be backed by a Solicitor's Certificate issued by an insured British Columbian lawyer, who may rely on a foreign legal opinion or title. This allows local purchasers to more easily obtain a remedy in BC for any improperly certified information[98].

A developer is also obliged to file a new/amended disclosure statement[99] if it becomes aware that a disclosure statement does not comply with the relevant legislation or regulations, or contains misrepresentations of a material fact[100], such as the identity of the developer.

Right of rescission

A purchaser may cancel his/her purchase agreement under the following three situations[101]:

(1) Cooling-off period: The purchaser may cancel the contract within 7 days from the date of the purchase agreement or the purchaser's statement acknowledging disclosure statement has been reviewed, whichever is later.
(2) Inadequate disclosure: If the purchaser is entitled to a disclosure statement (or an amendment thereto) and does not receive one; or if a disclosure statement contains a misrepresentation.
(3) Failure to meet conditions for early marketing.

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[96] Section 5(a) of Amended Policy Statement 6.
[97] Section 12(2) of REDMA.
[98] Information Bulletin No. REDMA 07-01, "Development Properties Located Outside British Columbia" issued by Financial Institutions Commission in BC in https://www2.gov.bc.ca/assets/gov/housing-and-tenancy/buying-and-selling/consumer-protection/historical/redma-07-01.pdf.
[99] Section 16 of REDMA.
[100] Section 1 of REDMA, definition of "material fact"
[101] Sections 21(2) (3) and (3.2) and section 16(2) of REDMA; Policy Statements 5 and 6.

Deposit handling

In BC, purchasers' deposits are protected under REDMA[102] and the Insurance Act.

All deposits received from purchasers must be placed with a prescribed person such as a lawyer or notary public who holds as trustee in a trust account in a savings institution in BC[103]. To ensure protection for purchasers, the deposit should not be used to construct and market the development units unless authorised deposit insurance has been arranged to ensure that a purchaser will be indemnified for any losses[104] in the event that: (i) the developer fails to obtain the approval required for the lawful occupation of the development unit within the time stipulated in the purchase agreement; and (ii) fails to return the deposit to the purchaser[105].

The amount of deposit paid by a purchaser must not be more than 10% of the purchase price if an issued building permit/satisfactory financing commitment is yet to be obtained and no amendment to the disclosure statement to this effect is received[106].

The trustee must promptly return the deposit to the purchaser upon rescission[107].

Enforcement

Under RESA, it is an offence to provide real estate services for a remuneration without appropriate licences or exemptions[108]. Penalties for unlicensed individuals and companies can be up to CAD1.25 million on a first conviction, and imprisonment for up to 2 years[109].

Under REDMA, developers who provide inadequate disclosure statements, mishandle deposits or market developments without meeting legislative requirements commit an offence[110]. Failure to obtain OSRE's permission to begin marketing is also an offence[111] and penalties may include fines of up to CAD1.25 million on a first conviction for individuals and companies[112], and imprisonment[113].

The OSRE has disciplinary powers including:

(1) Making a cease marketing order,
(2) Making penalties of up to CAD250,000 and CAD500,000 respectively for individuals and companies[114]; and
(3) Ordering payment of enforcement expenses[115].

[102] Division 5 of REDMA.
[103] Section 18(1) of REDMA.
[104] Section 19(1) and (2) of REDMA; sections 142(1) and 143(1) of the Insurance Act.
[105] Section 143(1) of the Insurance Act.
[106] Section 6(c)(iii) of Policy Statement 5; section 5(c)(ii) of Policy Statement 6.
[107] Section 21(6) of REDMA.
[108] Section 118(1) of RESA.
[109] Section 119 of RESA.
[110] Section 39 of REDMA.
[111] Sections 39 and 10(4)(b) of REDMA; section 3(b) of Policy Statement 5.
[112] Section 40 of REDMA.
[113] Section 40 of REDMA.
[114] Section 49(2)(d) of RESA and section 30 of REDMA.
[115] Section 31 of REDMA.

6.4 Mainland China

Overview and Regulatory Body

In the Mainland, real estate brokerage activities are regulated by the Administrative Measures for Real Estate Brokerage (房地產經紀管理辦法) ("**AMREB**"), which was promulgated in 2011 for the purposes of regulating real estate brokerage activities, protecting the legitimate rights and interests of the parties engaged in real estate transactions and brokerage activities, and promoting the development of the real estate market. However, the AMREB, being formulated in accordance with the Urban Real Estate Administration Law of the People's Republic of China (中華人民共和國城市房地產管理法) ("**UREAL**"), does not cover overseas properties[116].

Nonetheless, advertisements of overseas properties in the Mainland are regulated by the Advertising Law of the People's Republic of China (中華人民共和國廣告法) ("**ALPRC**")[117]. The State Council shall take charge of advertising supervision and administration nationwide, and the relevant departments of the State Council shall be responsible for work related to advertising administration within their respective functions. Local market regulatory departments at and above the county level shall take charge of advertising supervision and administration within their respective administrative regions, and the relevant departments of local people's governments at and above the county level shall be responsible for work related to advertising administration within their respective functions.[118]

Advertising Regulations

ALPRC is applicable to commercial advertising activities within the territory of the Mainland[119].

Pursuant to Article 26, an advertisement on real estate shall contain true information on the source of the real estate, with the area thereof clarified as the gross floor area or the gross internal floor area, and shall not contain:

(1) any commitment on appreciation or investment return;
(2) any indication of the location of the project by the time needed from the project to a specific object of reference;
(3) any violation of the provisions of the state on price management; or
(4) any misleading publicity on transport, commerce, cultural and educational, and other municipal facilities in planning or under construction.

[116] According to Article 2 of UREAL, UREAL is applicable to "State-owned land within the designated urban area of the People's Republic of China".
[117] Unofficial English translation of the ALPRC by the Peking University Center for Legal Information is adopted hereinafter.
[118] Article 6 of ALPRC.
[119] Article 2 of ALPRC.

Cooling-Off

Technically, every Chinese citizen is subject to an annual foreign exchange quota of USD 50,000.[120] In addition, exchanging foreign currency for the purpose of purchasing overseas properties is prohibited by the State Administration of Foreign Exchange.[121] Given this special social context, it appears that the issue of cooling-off period for the sale of overseas properties does not apply to the Mainland.

For the sale of domestic properties only, a few cities have implemented a cooling-off period. This does not apply to the purchase of properties outside of the Mainland. In 2019, Dongguan city of the Guangdong Province (東莞市) implemented a voluntary cooling-off period of 2 days for the sale and purchase of commercial housing properties (商品房). The purchaser may cancel the purchase document by written notice within 2 days from the signing of the purchase document and the developer shall return the deposit paid. After 2 days of the signing of the purchase document, the purchaser cannot cancel the purchase document on the ground that he does not understand the content of the Agreement for Sale and Purchase.[122]

Deposit Handling

For domestic purchases, the general rules on deposits apply pursuant to the Civil Code of the People's Republic of China (中華人民共和國民法典) ("**Code**"). If the sum is payable as a security deposit (定金) as opposed to pre-payment (訂金/預付金), the sum of the deposit shall not exceed 20% of the contract price under the Code.[123] The deposit is forfeitable by the vendor upon the default of the purchaser whereas the vendor shall pay twice the deposit to the purchaser if it is the defaulting party[124]. Where the payment is in the nature of a prepayment, the vendor may not be able to forfeit the pre-payment and should return it to the purchaser. All turns on whether the payment made was a security deposit or a pre-payment which would be clearly specified in the sale and purchase agreement[125].

Enforcement

Pursuant to Article 58(8) of ALPRC, if an advertisement relating to real estate is published in violation of Article 26, the market regulatory department has power to order a cessation of publishing of the advertisement, order the advertiser to eliminate adverse effects within the corresponding extent, and impose a fine of not less than double nor more than three times the advertising expenses or if the advertising expenses are incalculable or evidently low, a fine of not less than RMB100,000 nor more than RMB200,000. Should such violation be committed under serious circumstances, a fine of not less than three times nor more than five times the advertising expenses would be imposed

[120]《個人外匯管理辦法實施細則》第 2 條：對個人結匯和境內個人購匯實行年度總額管理。年度總額分別為每人每年等值 5 萬美元。

[121] See http://www.xinhuanet.com/house/2017-01-03/c_1120232236.htm.

[122] See https://new.qq.com/cmsn/20190112/20190112002527.html?pc.

[123]《中華人民共和國民法典》第 586 條：當事人可以約定一方向對方給付定金作為債權的擔保。定金合同自實際交付定金時成立。定金的數額由當事人約定；但是，不得超過主合同標的額的百分之二十，超過部分不產生定金的效力。實際交付的定金數額多於或者少於約定數額的，視為變更約定的定金數額。

[124]《中華人民共和國民法典》第 587 條：債務人履行債務的，定金應當抵作價款或者收回。給付定金的一方不履行債務或者履行債務不符合約定，致使不能實現合同目的的，無權請求返還定金；收受定金的一方不履行債務或者履行債務不符合約定，致使不能實現合同目的的，應當雙倍返還定金。

[125] https://www.66law.cn/laws/119224.aspx

or if the advertising expenses are incalculable or evidently low, a fine of not less than RMB200,000 nor more than RMB1,000,000. In such cases, the administrative department for industry and commerce may also revoke the business licence of the advertiser, and the advertisement censoring authority has power to revoke the advertisement censorship approval document issued and decline to accept its advertisement censorship application for one year.

6.5 Malaysia

Overview and Regulatory Body

In Malaysia, the relevant laws and regulations governing the marketing of foreign properties are found in the Valuers, Appraisers, Estate Agents and Property Managers Act 1981 ("**1981 Act**") and Circular 8/2002 ("**Circular**"). The Board of Valuers, Appraisers, Estate Agents and Property Managers ("**Board**") is the industry regulator.

Licensing Requirement

Pursuant to section 22C(1)(ba) of the 1981 Act, any offer or invitation of foreign properties marketed in Malaysia must be made by or through an estate agent practising and residing in Malaysia on behalf of a principal or an estate agent practising or residing outside. Accordingly, foreign estate agents or principals are not required to be licensed but they must engage the services of a local registered estate agent to jointly market or sell foreign properties[126].

Marketing and Advertising Requirements

Before proceeding with the marketing of foreign properties, the engaged locally registered estate agent, acting on behalf of a foreign estate agent or principal, must submit all applications to the Board one month before hosting an exhibition; obtain the Board's written permission; and play a pivotal role in the marketing of the property[127].

Where applicable, the application must be accompanied by[128]:

1) the approval letter of development and building plans;
2) details of selling prices and annual maintenance cost for the properties intended to be sold;
3) financing arrangements;
4) details regarding sale and purchase agreement;
5) the appointment letter, the artwork of the advertisement and all other relevant documents to substantiate any claim made in the advertisement;
6) requisite fee of MYR50 for processing and MYR1,000 for approval.

Any application failing to adhere to the aforesaid requirements is deemed incomplete and will be rejected by the Board[129].

[126] Paragraph 2 of the Circular.
[127] Paragraphs 2(1) to 2(3) of the Circular.
[128] Paragraph 3 of the Circular.
[129] Paragraph 4 of the Circular.

In all advertisements relating to the sale of foreign properties, due prominence should be given to the identity of the engaged local registered estate agent with the approval number given by the Board prominently displayed[130].

DD by the Estate Agent

The engaged local registered estate agent must acquaint himself with the real estate laws of the particular country's properties he is promoting[131].

Enforcement

The police is vested with powers to investigate any offences under the 1981 Act[132]. Any person who contravenes section 22C of the 1981 Act[133] commits an offence and is liable on conviction to a fine not exceeding MYR300,000 and/or imprisonment for a term not exceeding 3 years. A further penalty of MYR1,000 for each day during the continuance of such offence[134] is also payable.

The Board has powers to take disciplinary actions against the estate agents who have contravened any provisions of the 1981 Act[135] including the cancellation or suspension of registration or imposing a fine not exceeding MYR 25,000[136].

Cooling-off and Deposit Handling

Cooling-off

The National House Buyers Association states there is usually no mandatory cooling-off period for the sale and purchase of domestic properties unless the parties expressly agreed otherwise.[137]

Deposit handling

In relation to the sale and purchase of residential properties under construction in Malaysia, housing developers in Malaysia are governed mainly by the Housing Development (Control and Licensing) Act 1966[138] ("**Act**") and its regulations including Housing Development (Control and Licensing) Regulations 2015 ("**2015 Regulations**").

[130] Paragraphs 2(5) and 2(6) of the Circular.
[131] Paragraph 2(4) of the Circular.
[132] Section 30A of the 1981 Act
[133] Section 30(1)(i) of the 1981 Act.
[134] Sections 30(1) and 30(2) of the 1981 Act.
[135] Section 24(1)(d) of the 1981 Act.
[136] Sections 24(1) to 24(viii) of the 1981 Act.
[137] See https://www.hba.org.my/faq/list.htm.
[138] It is expressly stated under section 1(3) of the Act that the Act shall only apply in the Peninsula of Malaysia. It is also provided that the Act is to provide for the control and licensing of the business of housing development in Peninsular of Malaysia, the protection of the interest of purchasers and for matters connected therewith.

Under the Act, all housing developers are required to obtain a licence before they can engage in housing development[139]. Further, the purchase moneys received from the purchasers shall be deposited into a housing development account opened for each housing development and shall not be withdrawn except as authorised under the regulations[140].

Additionally, a purchaser may terminate the sales and purchase agreement entered with any developer upon certification by the Housing Controller or the Malaysian Housing Ministry. Requirements include that the developer has abandoned the project (continuously for 6 months or more) and upon written consent from any financial institutions financing the said housing purchase for which the consent shall not be unreasonably withheld. Upon notification of such termination, any monies paid by the purchaser must be refunded to the purchaser free from any interest within the period stated in the Minister's approval[141].

Collection of a booking fee before signing a standard sale and purchase agreement is also prohibited under regulation 11(2) of the 2015 Regulations. According to the prescribed forms of sale and purchase agreements under the 2015 Regulations, the purchaser shall pay 10% of the purchase price upon signing the sale and purchase agreement.

6.6 Singapore

Overview and Regulatory Body

In respect of the sale of foreign properties in Singapore, the main areas that are being regulated by relevant authorities are, namely, the licensing of estate agents under the Estate Agents Act ("**Singapore EAA**") and marketing requirements under the practice guidelines issued by the Council of Estate Agencies ("**CEA**") and the Advertising Standards Authority of Singapore ("**ASAS**").

Licensing Requirement

The Singapore EAA applies to all estate agency work for local and foreign properties, whether residential, commercial or industrial, so long as they are marketed, sold or leased in Singapore[142]. Under the Singapore EAA, estate agency work can only be undertaken by estate agents licensed or salespersons registered [143] by the CEA. Foreign estate agents who wish to market or sell overseas properties in Singapore need to obtain a licence from the CEA or partner up with a local licensed estate agent before they can engage in estate agency work or hold exhibitions in Singapore[144].

[139] Section 5(1) of the Act. "Housing development" means to develop or construct or cause to be constructed in any manner whatsoever more than four units of housing accommodation and includes the collection of moneys or the carrying on of any building operations for the purpose of erecting housing accommodation in, on, over or under any land; or the sale of more than four lots of land or building lots with the view of constructing more than four units of housing accommodation (see section 3).
[140] Section 7A of the Act.
[141] Section 8A of the Act.
[142] Section 2 of the Singapore EAA; Article "Consumer Tips for Buying Foreign Properties" issued by CEA, p.1.
[143] Sections 28(1) and (3), 29(1) and (4) of the Singapore EAA.
[144] Article "Consumer Tips for Buying Foreign Properties" issued by CEA, p.1

However, the Singapore EAA does not apply to activities conducted by overseas developers using their own staff[145].

DD on Vendors and Foreign Properties

Under CEA's Practice Guidelines for Estate Agents and Salespersons Marketing Foreign Properties[146] ("**PGFP**"), in the pre-marketing phase, estate agents are required to perform DD and reasonable verification of facts to ensure information provided in relation to vendors and foreign properties are not misrepresented to consumers[147]. DD include [148]:

1) vendor's good financial standing, legal owner of the property, payment arrangements stipulated by the vendor;
2) vendor's claims e.g. guaranteed rate of return stated in advertisements should be included in the contractual documents; date and time of the presented data;
3) property title, tenure, location, size, features, amenities and its surroundings of foreign properties;
4) other possible adverse interest such as claims made in relation to the foreign property assessing any possible adverse interest and requiring purchaser's written acknowledgement in relation to any adverse findings when they are revealed during the pre-marketing or marketing phase[149];
5) verifying qualification of foreign estate agents or local representatives[150] to perform DD checks.

Advertising Requirements

Requirements of estate agents and salespersons

Estate agents and salespersons have to comply with the marketing requirements as stipulated in the following:

1) CEA's Code of Ethics and Professional Client Care and the Practice Guideline on Ethical Advertising;
2) CEA's PGFP[151];
3) ASAS's enhanced guidelines ("**Enhanced Guidelines**") to regulate advertisements on investments including investments in overseas properties under Appendix J of the Singapore Code of Advertising Practice ("**SCAP**") (see below).

Under the PGFP, the following practices have to be observed in the marketing phase[152]:

1) Estate agents and salespersons must inform consumers their acting capacity.
2) Written advisory messages on risks in the prescribed form must be provided before the purchase.
3) Payment and financing arrangements must be explained clearly and put in writing.

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[145] Article "Buying an Overseas Property" issued by the CEA; Article "Consumer Tips for Buying Foreign Properties" issued by CEA, p.1; Sections 4(1)(f)(g) of the Singapore EAA.
[146] Practice Guidelines for Estate Agents and Salespersons Marketing Foreign Properties (PG01/2018) dated 30th August 2018 issued by CEA.
[147] Paragraph 5 of PGFP.
[148] Paragraphs 5, 6 and 8 of PGFP.
[149] Paragraph 8 of PGFP.
[150] Paragraph 6 of PGFP.
[151] Practice Guidelines for Estate Agents and Salespersons Marketing Foreign Properties (PG01/2018) dated 30th August 2018 issued by CEA.
[152] Paragraphs 13-18 of PGFP.

4) The arrangements for the signing of transaction documents must be explained and consumers must be advised to seek independent legal advice. Estate agents must obtain English translation for non-English transaction documents from reasonably qualified translator.
5) The dispute resolution mechanism, the applicable jurisdiction and the governing law must be explained to consumers.

Estate agents are required to have professional indemnity insurance for conducting foreign properties marketing work[153] while selected salespersons must undergo project-specific training including knowledge of PGFP[154]. Further, estate agents must keep a record[155] of evidence of compliance with the PGFP, such as, material transaction records, training materials for marketing foreign properties with list of salespersons trained and marketing materials used.

Requirements of advertisers

As referred above, the Enhanced Guidelines set out the requirements for information to be provided by advertisers, irrespective of whether they are estate agents or foreign developers. They aim to minimise the scope for advertisers of investments and investment services to make claims that are speculative, misleading or which cannot be substantiated[156].

The Enhanced Guidelines contain, inter alia, the following requirements specific to property-related advertisements:

1) Advertisements for real property located abroad, whether for sale, investment or owner-occupation, should not mislead or exaggerate on certain matters, such as[157], the actual site location, the legal title, the legal or equitable ownership of the land and the developer's financial position.
2) Advertisements should not make inaccurate, misleading or exaggerated claims about the qualifications of the speaker/trainer[158].
3) For investment seminar advertisements, advertisers must indicate whether there is any sale-related activity and the nature of interest to be acquired[159].

The Enhanced Guidelines also contain, inter alia, general requirements which the advertisers for overseas properties have to comply with:

1) Advertisements should not contain claims that give the impression that an investment is "safe", "low-risk" or "risk-free", or able to generate "quick", "easy" or "high" profits with little or no risk[160].
2) Advertisers should clearly state whether they are regulated by other agencies in Singapore or they have any tie-ups with entities regulated by such agencies[161].

[153] Paragraph 9 of PGFP.
[154] Paragraphs 10-11 of PGFP.
[155] Paragraphs 19 to 22 of PGFP.
[156] Paragraph 1.1 of the Enhanced Guidelines.
[157] Paragraph 7.2 of the Enhanced Guidelines.
[158] Paragraph 8.3 of the Enhanced Guidelines.
[159] Paragraph 8.4 of the Enhanced Guidelines.
[160] Paragraph 6.1 of the Enhanced Guidelines.
[161] Paragraph 3.1 of the Enhanced Guidelines.

3) A warning statement must be included in any advertisement across all media platforms for overseas investments[162] as follows:
"This is an overseas investment. As overseas investments carry additional financial, regulatory and legal risks, investors are advised to do the necessary checks and research on the investment beforehand."
4) All claims made must be substantiated with documentary evidence ready for verification upon request[163].

Deposit Handling

PGFP issued by CEA provides information on payment and financial arrangements[164]. PGFP requires the estate agents and salespersons to explain clearly to consumers regarding the payment and financial arrangements, payment milestones, amounts involved, any restrictions to the type of loans provided by financial institutions (Singapore or elsewhere), foreign currency exchange requirements and impacts of exchange rate fluctuations on their financial commitment and reasons why payments are not made to the vendor directly (e.g. trust account) etc. Estate agents and salespersons must highlight the relevant payments and financing arrangements to consumers in writing[165].

PGFP states that estate agents must keep all material transaction records, e.g. Sale & Purchase Agreements, Options to Purchase ("**OTP**"), commission records etc. for each foreign property marketed[166].

CEA may take disciplinary action against errant local property agencies and agents. However, CEA does not have any jurisdiction over foreign developers and overseas properties. Consumers will have to seek legal recourse to recover any monetary losses[167].

As for the sale and purchase of properties situated in Singapore, the estate agent or salesperson must comply with the Practice Guidelines on Option to Purchase and Sale & Purchase Agreements ("**PGOTP**") if he makes available an OTP or Sales & Purchase Agreement to his client for use during estate agency work. Part II of the PGOTP refers to payment of stakeholder money to be held pending completion of sale. Lawyers shall not receive and hold conveyancing money in their normal client accounts but rather a conveyancing account should be set up. The money can also be held by the Singapore Academy of Law or under escrow agreements as agreed by lawyers on both sides[168].

Cooling-Off

Although there is a 5-day cooling-off period under the Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations[169] in Singapore, the acquisition of an estate or interest in any immovable property is among the exclusions[170]. Therefore, there seems to be no statutory cooling-

[162] Paragraph 3.5 of the Enhanced Guidelines.
[163] Paragraphs 6.10 and 6.11 of the Enhanced Guidelines.
[164] Paragraph 15 of the PGOTP 1/2015 issued by CEA.
[165] Paragraph 15 of PGFP.
[166] Paragraph 20 of the Practice Guideline for Estate Agents and Salespersons Marketing Foreign Properties (PG01/2018) issued by CEA.
[167] CEAnergy, Issue 1/2017, answer to question 3.
[145] It is also noted that under regulation 7(1)(a) of the Estate Agents (Estate Agency Work) Regulations 2010, it is an offence for estate agent or salesperson to hold or handle any monies for any party in relation to the sale and purchase of any property situated in Singapore.
[169] Regulation 4 of the Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations.
[170] First Schedule to the Consumer Protection (Fair Trading) Act.

off protection for purchasers of immovable properties be it local or overseas. However, it is common for purchasers of Singapore properties to enter into an OTP prior to entering into the sale and purchase agreement which provides some sort of cooling-off protection as stated below.

Option to Purchase

Under an OTP, the seller grants the buyer an option to purchase the property based on the terms, in return for a sum of money from the buyer called the "Option Fee". Typically, the "Option Fee" is 1% of the sale price and the "Option Period" is usually 14 days. During the Option Period, the seller is prohibited from selling the designated property to other buyers while the buyer is considering whether to go ahead with the purchase. If the buyer decides not to go ahead with the transaction after signing the OTP, the Option Fee is forfeited to the seller. Alternatively, if the seller backs out, the seller must refund the Option Fee to the buyer[171]. It is noted the OTP terms are negotiable between parties.

The CEA issued the PGOTP on 24th February 2021.

PGOTP seeks to provide that OTP are suitable for their purposes. It shall contain appropriate provisions to facilitate compliance with measures to safeguard conveyancing. PGOTP does not dictate any specifications as to the amount of option fee or the option period to be put into the OTP.

Enforcement

Breach of Singapore EAA

It is an offence under Singapore EAA to act as estate agents or salesperson without licence and/or registration. Breach of the Singapore EAA in relation to licensing and/or registration is an offence with a financial penalty (not exceeding SGD75,000) and/or imprisonment (not exceeding 3 years)[172].

A failure to observe codes of practice, ethics and conduct issued by the CEA may render the estate agent and/or salesperson liable to disciplinary action[173]. The Disciplinary Committee may impose a financial penalty (not exceeding SGD200,000[174]), suspend or revoke the licence or registration, or admonish or reprimand the licensee or registered salesperson[175]. CEA does not have any jurisdiction over foreign developers[176].

[171] Article, "Option to Purchase: 6 things to know before Exercising It" dated 18th January 2019 in https://singaporelegaladvice.com/law-articles/option-to-purchase-before-exercising/
[172] Sections 28(2), 29(3), 39(2), 40(3) and 41(3) of the Singapore EAA.
[173] Section 42 of the Singapore EAA.
[174] The Estate Agents (Amendment) Bill was passed by the Parliament of Singapore on 5 May 2020 and the maximum financial penalty under section 52(3) of the Singapore EAA was amended to SGD200,000 for licensed estate agent and SGD100,000 for registered salesperson under the new section 52(12) of the Singapore EAA. The amendment has come into force on 30 July 2021 after the Bill has been assented by the President of the Republic of Singapore and gazetted.
[175] Section 52 of the Singapore EAA.
[176] CEAnergy, Issue 1/2017, answer to question 3.

Breach of Enhanced Guidelines

Advertisers who do not comply with the Enhanced Guidelines risk the withholding of advertising space or time by media owners, as well as the withdrawal of trading privileges from advertising agents[177]. In extreme cases, there is additional sanction of adverse publicity through the publication of details of the outcome of the ASAS's investigation and naming those who have offended the Enhanced Guidelines[178].

6.7 Taiwan, China

Overview and Regulatory Body

In Taiwan, the relevant legislations governing the dealing of non-local properties are primarily, the Real Estate Broking Management Act (不動產經紀業管理條例) ("**REBMA**") and the Directions of Real Estate Broking Agency Engaged in Foreign Real Estate Broking or Sales (不動產經紀業從事國外不動產仲介或代銷業務規範) ("**Directions**").

Licensing Requirement

Under REBMA, a real estate broking agent is required to obtain a permit and register if it carries on the real estate broking business. In particular, the broking agent dealing with the broking business and sale of non-local properties is required to be registered as a company[179]. One of the application requirements is to put up a surety bond (營業保證金) upon registration[180].

DD by Broking Agent and Disclosure Requirements

Broking agents dealing with non-local properties have an obligation to disclose and explain to consumers in property exhibitions the relevant legislations governing the subject non-local property and environment, the nature of the property interests, tax liabilities, transaction restrictions, loan arrangements, foreign exchange rate conditions, relevant transactions in the last three months and the same should be provided in the sale brochures[181].

Further, sale brochures must fulfill specific disclosure requirements which include details of the land, property rights, construction status, payment method and tax liabilities etc. In addition, sale brochures must be in Chinese, signed by both the broking agent and its principal (委託人) and must form part of the sale and purchase agreement. If these requirements cannot be fulfilled, explanation for such failure will have to be set out in the section under "Other important matters" in the sale brochures[182].

[177] Clause 6.1 of SCAP.
[178] Clause 6.2 of SCAP; Media Release issued by the ASAS dated 3 August 2015.
[179] Article 5 of REBMA.
[180] Article 7 of REBMA.
[181] Section 3(1) of the Directions.
[182] Directions, sections 3(2)(1) to 3(2)(4).

Advertising Requirements

Under REBMA and the Directions, the broking agent has to first enter into a commission contract (委託契約書) with its client (委託人) before being allowed to advertise and deal with sales[183]. Other advertising stipulations relating to overseas properties include: (1) the content of the advertisement should be true and accurate and the broking agent's name should be shown in the advertisement[184]; (2) a warning statement should be included in the advertisements to remind investors in overseas properties of the risk involved and the need to review all relevant documents carefully before making the decision[185].

Cooling-Off

When dealing with the sale of a non-local property, the broking agent must return the property viewing reservation fee (保留看屋/地權利費用) to the consumer in the event that: (1) no transaction is made after the overseas viewing tour; or (2) the consumer did not attend the overseas viewing tour[186].

In relation to the purchase of local properties, there is no statutory requirement for a cooling-off period.

However, consumers shall be given a reasonable period[187] (契約審閱期) to review all contract clauses, before entering a standard contract[188]. If such period has not been provided by the broker, the purchaser has a right to rescind the contract wholly or partially. Insofar as the agreements for sale and purchase of uncompleted/completed properties (預售屋/成屋) are concerned, the relevant period for contract review is at least 5 days.

Deposit Handling

Brokers are required to inform buyers of any inconsistencies between non-local laws governing the property and local laws on the effect and arrangement of making deposits[189]. Brokers, who are authorised to receive deposits, are required to sign and issue a receipt[190]. Further, if the transaction cannot be completed due to: (1) broking agent's fault, the agent has to return the double amount of the deposit to the buyer; (2) buyers' fault, the buyer cannot request the return of the deposit; (3) no fault of either parties, the broker has to return the deposit to the buyer[191].

Payment of negotiation prepayment to show sincerity (斡旋金) or signing an offering document of purchase (承購要約書) for purchase of local properties in Taiwan

For the sale and purchase of local properties situated in Taiwan, if the buyer is interested in purchasing a property and would like to negotiate for the price with the seller through a broker (i.e.,

[183] REBMA, Article 21; Directions, section 2(1)(1).
[184] REBMA, Article 21.
[185] Directions, section 2(2)(3).
[186] Directions, section 4(2)(5).
[187] At least 3-5 days in case of sale of properties.
[188] Pursuant to Article 11-1 of *Consumer Protection Act (消費者保護法)*.
[189] Directions, section 4(4).
[190] Directions, section 4(3).
[191] Section 4(4) of the Directions; Article 249 of the Civil Code.

estate agent), s/he may either pay a "negotiation prepayment" or adopt the use of an "offering document of purchase".

Negotiation prepayment (斡旋金)

The industry practice of broking agents in Taiwan is to request a negotiation prepayment (normally 1-5% of the intended purchase price) from the buyer to "show sincerity" to the seller and facilitate negotiation of the purchase price. The negotiation prepayment will be kept by the designated broker during the negotiation period to be specified by the buyer (say 3-7 days). In general, an accompanying agreement (斡旋金合約/斡旋金契約/不動產買賣意願書, etc., with various names) setting out all the negotiation details will be signed between the buyer and the broker upon prepayment. However, disputes or risks often arise (e.g., brokers abscond with the prepaid sum).

If the buyer withdraws an offer within the specified period by the specified manner prior to any delivery of acceptance of the seller, the broker shall return the negotiation prepayment to the buyer[192].

If the buyer's offer is accepted by the seller by signing and delivering the said agreement within the specified period, the negotiation prepayment will automatically convert as earnest money (i.e., deposit) and parties are legally bound to enter into a formal agreement (買賣契約). If the buyer revokes the agreement, the earnest money will be forfeited; while the seller's revocation results in the return of double amount of earnest money[193].

Offering document of purchase (承購要約書)

To better improve consumer protection and prevent disputes frequently encountered in negotiation payments, buyers may choose to sign an offering document of purchase without making any prepayments. Brokers, in preparation of the offering document, should follow the template and sign on the same[194]. The template also sets out the minimal time of 3 days for the buyer to review the offering document of purchase before signing.

If the buyer's offer is accepted by the seller within the specified period, parties are legally bound to enter into a formal agreement[195]. Revocation by any parties results in monetary compensation.

Although brokers are inclined to request for negotiation prepayment which encourages transaction, they are legally required to inform buyers of the alternative choice of signing an offering document of purchase as stated in paragraph 9 of《公平交易委員會對於不動產經紀業之規範說明》.

Enforcement

The relevant administrative office has the power to investigate breaches of the Directions[196].

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[192] Ibid; See also "斡旋金契約之實務問題研究" (a legal analysis of a unilateral promise with a sum of money between a buyer and his real estate broker – Taiwanese Case Studies, by Jseng, Pin-chieh, published in "公平交易季刊", volume 12, issue 1.

[193] Pursuant to Articles 248 & 249 of the *Civil Code (民法).*

[194] Pursuant to Article 22 of REBMA.

[195] Clause 3 of the sample offering document.

[196] Section 9(2) of the Directions; Article 3 of REBMA.

Penalties under REBMA:

1) Fine of NTD60,000 to NTD300,000 can be imposed for breach of the advertising provisions[197].
2) Suspension of broking agent's business[198] for breach of the surety bond provisions.
3) Reprimand, suspension or revocation of licences[199] for brokers who fail to explain the contents of the sales brochures to consumers.

REBMA allows consumers who have obtained a favourable decision against a broking agent or a broking agent to seek enforcement of compensation against the surety bond. After payment of compensation out of the surety bond, the bond has to be topped up within a specified time or business will be suspended[200]. The Court can assist with the enforcement of financial penalties should fines not be paid in a timely manner[201].

6.8 The United Kingdom (England & Wales)

Overview

In the UK, estate agents in the UK are principally regulated by the Estate Agents Act 1979 ("**UK EAA**") and the Consumer Protection from Unfair Trading Regulations 2008 ("**CPR**").

Licensing

In the UK, estate agents are not required by law to be licensed or qualified. The UK EAA is often described as imposing a negative licensing regime in which an estate agent shown to have breached certain provisions of the UK EAA setting out standards of behaviour of estate agents (such as duties owed to clients including handling of clients' money and disclosure of conflict of interest) may be banned from engaging in estate agency work[202]. According to the National Trading Standards Estate Agency Team of Powrys County Council ("**NTSEAT**"), the UK's lead enforcement authority for the UK EAA, overseas property transactions are not controlled by the UK EAA. Estate agents in the UK may join trade bodies such as the Association of International Property Professionals as members on a voluntary basis, which require members to adhere to the UK EAA and set guidelines in relation to the sale of overseas properties.

Given the current lack of clarity, the Regulation of Property Agents Working Group chaired by Lord Best made several recommendations in 2019 that, inter alia, a new regulator should be established; property agencies and agents should be licensed; and all who carrying out property agency work including international property agents will have to be regulated[203]. As of August 2021, the UK government was considering the recommendations stated in Lord Best's Report.

[197] Article 29(3) of REBMA.
[198] Articles 7 and 29(7) of REBMA.
[199] Article 31 of REBMA.
[200] Article 26 of REBMA.
[201] Article 35 of REBMA.
[202] Briefing Paper on the Regulation of Estate Agents, 18 April 2019, House of Commons Library ("House of Commons' Briefing Paper"), p.10.
[203] Lord Best's Report dated July 2019, Executive Summary, pp 3 to 6

Advertising Requirements

Insofar as the marketing of overseas properties is concerned, the NTSEAT's position is that CPR applies when the marketing of overseas properties by local or overseas estate agents reaches, or is capable of reaching consumers in the UK[204]. CPR protects consumers from unfair trade practices, misleading omissions and aggressive sales tactics, breach of which may result in criminal and/or civil sanctions. The CPR contains, inter alia, broad rules outlining unfair commercial practices as follows:-

(1) Giving misleading information to consumers, for example, through false or deceptive advertisements or statements.
(2) Failing to give necessary information to consumers, for example, leaving out or hiding important information.
(3) Acting aggressively, for example, through sales techniques that use harassment, coercion or undue influence.
(4) Failing to act in accordance with reasonable expectations of acceptable trading practice (failing to be professionally diligent).

Cooling-off

The cooling-off protection under Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ("**CCR**") does not apply to contracts in connection with rights of immovable properties [205]. However, consumers can still cancel any service agreements in connection with properties (e.g. estate agents service contracts and other associated services such as marketing, vetting, inventory listing etc. by estate agents[206]) within the stipulated cooling off period, i.e., 14 calendar days[207] under the CCR.

CCR applies to the selling of goods, services, or digital content to a consumer. CCR set out[208]:
a. the information which a trader must give to a consumer before and after making a sale
b. how that information should be given
c. the right for consumers to change their minds when buying at a distance (including online sales) or off-premises (e.g. in a client's home)[209]
d. Delivery times and passing of risk
e. a prohibition on any additional payments which appear as a default option
f. a prohibition on consumers having to pay more than the basic rate for post-contract customer helplines.

Although CCR exempts contracts which create rights in immovable property (i.e., land), estate agents still need to comply with CCR. This is because the exemption relates to the contract between the vendor or landlord/lessor and the buyer or tenant/lessee, and not to associated services such as marketing, vetting, inventory listing etc. by estate agents[210]. Marketing and inventory listing are

[204] Guidance on Property Sales, published by NTSEAT in September 2015 and reviewed in April 2019 (NTSEAT's Guidance on Property Sales), at paragraph 1.2.
[205] Regulation 6 of the CCR.
[206] Briefing Paper "Regulation of estate agents" issued by House of Commons Library, p.12, paragraph 4.3.
[207] Regulation 30 of the CCR.
[208] Briefing Paper "Regulation of estate agents" issued by House of Commons Library, p.12, paragraph 4.3.
[209] The Property Ombudsman's June 2014 Newsletter.
[210] Briefing Paper "Regulation of estate agents" issued by House of Commons Library, p.12, paragraph 4.3.

associated services for the developers/vendors whereas vetting of property is an associated service for consumers/ purchasers.

The exemption does not apply to service contracts and consumers do not need to provide reasons to cancel the contract during this 14-day cooling off period[211]. In other words, the cooling-off period applies to estate agents service contracts for their work in connection with the sale or letting of properties but does not apply to contracts between vendor and purchaser of properties.

On this basis, the services provided by estate agents on vetting the property etc. would be covered by CCR and the 14-day cooling off period applies. It is noted that if the service is completed within the cancellation period, the consumer's right to cancel is lost.

Deposit Handling

With respect of deposit handling, the section on "Client's money and accounts" under the UK EAA is referred to. Under the UK EAA, "client money" means any money received by the estate agent in the course of his work, which could be a contract or pre-contract deposit, in respect of the acquisition of an interest in land in the UK[212].

Client Money Protection Scheme

Under the Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc.) Regulations 2019, a property agent who holds client money must be a member of an approved client money protection scheme in which compensation being available is no less than the maximum amount of client money that the agent hold[213]. However, it only applies to client money received by property agents during English letting agency work and English property management work in respect of housing in England[214].

Handling clients' money for an interest in land in the UK

The UK EAA has specific requirements for estate agents on how to handle clients' money and accounts in respect of acquiring an interest in land in the UK[215].

There are two types of deposit. "Pre-contract deposit" is a deposit paid before the exchange of contracts to show a serious intention to buy. "Contract deposit" is a deposit paid at the exchange of contracts[216].

An estate agent who receives client's money is held by him on trust for his client[217]. He must put the client's money in a special "client account" which is set up for this purpose at a bank or other financial institution.

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[211] The Property Ombudsman's June 2014 Newsletter.
[212] Section 12(1)(a) of the UK EAA.
[213] Section 3 of the Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme) Regulations 2019.
[214] Section 55 of the Housing and Planning Act 2016.
[215] Sections 12(1) to 17 of the UK EAA.
[216] "Advice for Estate Agents" issued by Powys County Council, p.12; Sections 12(2) and (3) of the UK EAA.
[217] Section 13 of the UK EAA.

An estate agent may not accept clients' money unless there is insurance cover for clients' money[218].

When contracts are exchanged, the contract deposit to be paid is usually 10% of the purchase price[219]. The deposit will normally be paid to the vendor's solicitors who hold the deposit as stakeholder[220] in their client account, save where the seller is purchasing another property in England and Wales for his residence, in which the seller may use all or part of the deposit as the deposit on that purchase[221]. If the deposit is held by the vendor's solicitors as 'agent' for the seller under the terms of the contract, the vendor's solicitors may hand the deposit over to the vendor before completion. This is most common when buying the property from a home builder. Most home builders are members of a guarantee company such as the National House Building Council ("**NHBC**"). NHBC provides insurance protection to the buyers from the exchange of contract if the buyer loses the deposit due to the registered builder's insolvency or fraud. The insurance cover is 10% of the original purchase price or GBD100,000, whichever is the lower[222].

A purchaser who has paid a deposit for an 'off-plan' apartment may assert a purchaser's lien over the proceeds of the sale of the site where the apartment is never built. In *Eason v Wong*[223], the court held that the purchasers were entitled to purchasers' liens and a pro-rata distribution of the proceeds of sale of the site to the extent of their security[224].

Approved Redress Scheme

The Consumers, Estate Agents and Redress Act 2007 made it a legal requirement on estate agents who engage in residential work to belong to an approved redress scheme[225]. If a consumer who has a legitimate complaint is dissatisfied with the relevant estate agent's response, he may contact the relevant redress scheme to try and resolve the matter[226].

Enforcement

The NTSEAT has power to investigate complaints breaches of UK EAA involving estate agents and can require anyone, including clients and potential buyers, to give information or produce documents. It also has enforcement powers to issue warning or prohibition notices against those persons it considers to be unfit to continue to carry on estate agency work[227].

The local authority Trading Standards Service, the Office of Fair Trading or other consumer enforcement bodies are the enforcement bodies for breaches of CPR.

In respect of advertisements breaches, both online and in the print media, estate agents could be subject to published adjudications of the Advertising Standards Authority which takes factors

[218] Section 16 of the UK EAA.
[219] Clause 2.2.1 of the Standard Conditions of Sale (Fifth Edition) issued by the Law Society of UK.
[220] Clause 2.2.6 of the Standard Conditions of Sale (Fifth Edition) issued by the Law Society of UK.
[221] Clause 2.2.5 of the Standard Conditions of Sale (Fifth Edition) issued by the Law Society of UK.
[222] http://www.nhbc.co.uk/Homeowners/WhatdoesBuildmarkcover/
[223] [2017] EWHC 209 (Ch)
[224] Off-plan apartments and the purchaser's lien when the developer becomes insolvent, Cristan Toman, (2020) 2 CRI 44.
[225] Paragraph 4.4 of the House of Commons' Briefing Paper.
[226] Article "Who regulates estate agents?" issued by House of Commons Library dated 27th June 2019, section about "How to complain?".
[227] Paragraph 6.8 of the NTSEAT's Guidance on Property Sales.

identified in the CPR into account when it considers whether advertisements breach The UK Code of Broadcast Advertising ("**BCAP Code**") and The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing ("**CAP Code**")[228].

6.9 Summary

In a nutshell, most of these jurisdictions require the sale of overseas or non-local properties to be conducted through a licensed estate agent (i.e. Singapore, BC, Malaysia and Taiwan) or have some sort of regulations governing the marketing or advertisements of such properties in that jurisdiction (i.e. the Mainland, Singapore, the UK (England & Wales), BC, Malaysia, Taiwan and NSW).

In Singapore, Malaysia and Taiwan, there are specific rules and guidelines on the sale of overseas properties by local licensed or registered estate agents and restrictions on marketing of overseas properties by estate agents without a local licence. These rules and guidelines apply whether the property concerned is completed or uncompleted. Malaysia's requirements are more stringent in that it requires that any offer for sale or invitation of offers to purchase any non-local properties in Malaysia be made by or through an estate agent practising and residing in Malaysia. Singapore has implemented enhanced guidelines to regulate advertisements on overseas properties.

In BC, local and foreign developments alike must meet preliminary approval requirements before the real estate developer can market a development unit in BC. All deposits received from purchasers must be held in trust inside BC. Purchasers may rescind (cancel) their purchase with a developer within 7 days after the later of the date that the purchase agreement was made and the date that the purchaser gave written acknowledgment of having an opportunity to read the disclosure statement or a new disclosure statement, as the case may be.

As regards cooling-off protection and deposit handling for the sale and purchase of overseas and local properties, as can be seen from the summary of the research findings, out of the 7 jurisdictions researched, only BC has in place regulation for a cooling-off period and a requirement for deposits paid by the purchasers to be held in a trust account within BC.

To avoid any speculation or hasty purchases, even if a mandatory cooling-off period for overseas properties were to be advocated, research shows that there are provisions in certain jurisdictions providing that an appropriate percentage of the purchase price should be forfeited in the event that the purchaser decides to back out. For reference, in Hong Kong, there is a similar provision pursuant to sections 52 and 53 of the First Hand Sales Ordinance where 5% of the purchase price under the preliminary agreement is liable to be forfeited in the event that the purchaser fails to enter into a formal agreement within 5 working days after entering into the preliminary agreement.

[228] The BCAP code Appendix 3; The CAP Code, Appendix 1.

7. Areas of Concern and Justification for Introducing Further Regulatory Control, Views of Stakeholders

This chapter reviews the areas of concern of the existing regulatory framework for the sale of POH in Hong Kong. In carrying out this review, the Council has considered the complaints raised by local consumers, the trade practices of the marketing and advertisements of POH, through surveys and mystery visits, and the relevant practices in the researched jurisdictions in Chapter 6. All in all, it is observed that there are loopholes in the current regulatory framework and unscrupulous practices of traders involved for which more stringent regulatory control should be introduced. Further, there is a rising trend of purchasing POH which is expected to intensify in the coming years, following the rapid development of the GBA and the growing appetite of Hong Kong people to invest in POH. It is therefore high time to review the current regulatory framework and to take steps to enhance consumer protection in this area as soon as possible.

The Council has engaged with 3 relevant authorities, namely the THB, the EAA and the SFC, for their views on various issues relating to the sale of POH. Engagement was also made with 2 major industry players, Midland Global and Centaline.

7.1 Areas of Concern

7.1.1 Lack of Licensing Requirements for Certain Estate Agents and Vendors

Estate Agents

As noted above, carrying out estate agency work exclusively in relation to POH is not regulated by the EAA. There is a loophole in the current regulatory regime enabling unlicensed agents to take advantage of the Exemption Order and engage in possibly unscrupulous practices in their promotion of POH in Hong Kong. As the POH business develops in Hong Kong, from a consumer protection perspective, there seems to be no logical reason why agents exclusively dealing with POH are not required to be licensed under the Exemption Order. This point was indeed raised at the subcommittee meeting of LegCo in 1998. Business entities choosing to carry out any business in Hong Kong including promoting sales of POH properties should rightly expect to be subject to local laws and regulations.

The Council's statistics set out in Chapter 3 show that the majority of complaints involved unlicensed agents. This is consistent with the survey on advertisements showing that the majority of print and online advertisements were placed by unlicensed agents. Further, first-hand residential properties constitute a major type of properties sold by agents, indicating that the degree of exposure of Hong Kong consumers to the unregulated sales agents is high. It is anticipated that the demand for POH, especially properties in the GBA, would intensify in the coming years. All these factors further point to the need to make sure that all agents dealing with POH (or at least first-hand residential POH) should be licensed and regulated. Should there

be a mandatory requirement stipulating that estate agents handling the sale of first-hand residential POH must be licensed, this would serve to provide more consumer protection as the conduct of these agents would be regulated. In addition, the extension of licensing requirement would bring Hong Kong in line with the majority of the jurisdictions researched (Chapter 6), namely, BC, Malaysia, Singapore and Taiwan which require estate agents handling the sale of overseas or non-local properties to be licensed.

As estate agents exclusively handling POH are exempted under the Exemption Order from obtaining a licence under the EAO, there are more risks associated with or arising from the Exemption Order in its operation including the use of small print disclaimers by unlicensed agents or no disclaimer was provided in the brochure, pamphlets or name cards distributed; and the non-applicability of the code of ethics and practice circulars to unlicensed agents as more particularly set out in 7.1.3 and 7.1.4 below.

One of the findings from the mystery visits is that the Exemption Order allowed licensed agencies to employ and use unlicensed sales staff to market the sale of POH. This caused much confusion to the mystery visitors and diluted the protection offered.

Vendors

However, whether the proposed extension of licensing requirements for estate agents selling POH in Hong Kong alone is sufficient in terms of consumer protection is a point to be discussed further. As the advertisement survey reveals, supported by findings from the mystery visit exercise, advertising and sales of POH were not limited exclusively to estate agents, licensed or otherwise. Some developers marketed their projects direct without using an intermediate estate agent in Hong Kong.

Under the EAO, development of housing projects or selling them is not regarded as carrying out estate agency work. As a result, developers carrying out the above types of work are not subject to the regulation of the EAO nor would they be bound by the practice circulars of the EAA.

Should regulation be considered to be extended to developers, this would echo Malaysia's regime and is consistent with the LRC's recommendation. Of all the researched jurisdictions, Malaysia goes one step further by mandating developers to engage the services of a local registered estate agent to jointly market or sell foreign properties in Malaysia and prior approval is required before such sales or marketing takes place[229]. Indeed, as stated by the LRC, purchasers could turn to licensed estate agents for redress as a result of inaccurate or misleading sales information given as they are regulated by the EAA and this could also address the enforcement problems against overseas/non-local vendors. It also took a pragmatic view that positive vetting of advertisements by the EAA was not feasible as there are large numbers of these projects sold or advertised in Hong Kong.

Online marketing

A further concern is the increasing use of technology in the marketing of POH. Survey results as shown in Chapter 4 indicate that a small number of online advertisements were placed by

[229] See section 22C(1) (ba) of the 1981 Act, which provides that "*any offer or invitation of foreign properties marketed in Malaysia must be made by or through an estate agent practising and residing in Malaysia on behalf of a principal or an estate agent practising or residing outside.*".

developers, without using an intermediate estate agent. With the advancement of technology, the online medium is used often in marketing activities such as pop ups or banners on Facebook, unsolicited WhatsApp messages via mobile phones or unsolicited marketing emails. In the post pandemic world, it is anticipated that online marketing activities of POH may be even more prevalent and popular.

However, while there is a general trend for increased use of online advertisements, the current situation remains that a high degree of Hong Kong element is involved in these marketing activities, for example, through the provision of local telephone numbers, addresses and exhibition venues in the advertisements showing that local partners or agents in Hong Kong (as opposed to foreign agents or vendors/developers) are involved to facilitate the sale to people in Hong Kong (see Chapters 3, 4 and 5). As stated in a journal article published by the London School of Economics and Political Science, about a third of the sales of new residential units in London between April 2014 and April 2016 were made to overseas buyers, and this proportion rose to over 50% in central London. Their research showed that some agents and developers would set up permanent offices in major overseas markets (notably Hong Kong SAR and the Mainland) to enable them to run exhibitions and sales events overseas[230]. This corroborates the findings from mystery visits and the survey of advertisements that quite a number of POH developers/vendors would involve a Hong Kong element when selling POH here. Therefore, the extension to regulate these entities and individuals is not only feasible but essential to safeguard the purchasers in Hong Kong.

As POH involves complex extra territorial aspects, legislation in Hong Kong alone would not be able to address all possible malpractices unless it is backed by reciprocal international measures which, if to be introduced, would inevitably take time to be put in place. Given the current lack of sufficient legislation governing or regulating POH advertisements, Hong Kong consumers need to be extra vigilant of the pitfalls associated with the purchase of POH so they are not lured into purchasing the same by unregulated advertisements which may exaggerate or oversell, negligently or deliberately, the benefits without highlighting the risks. In the meantime, continued and increased education could be a practical interim solution.

7.1.2 No Cooling-off Period for Deposits, Reservation Fees or Deposit Protection Mechanisms in Place

Currently, there are no cooling-off provisions for the payment of deposits or reservation fees which means that consumer protection in this respect is compromised. The LRC Report recommended that the Government undertake a study on the different types of financial measures which could be introduced to protect the deposits and instalments paid by purchasers such as stake-holding, insurance, bond etc.[231] and further recommended a cooling-off period of 3 working days with administrative fee to be paid to the licensed estate agent in the event that the purchaser decides to withdraw from the transaction.

This recommendation echoes the regulatory regime in BC, whereby there is a cooling-off period of 7 days in general for development properties whether it is situated in BC or not. It

[230] The role of overseas investors in the London new-build residential market: Final report for Homes for London, Kath Scanlon, Christine Whitehead and Fanny Blanc with Ulises Moreno-Tabarez, LSE London, May 2017.
[231] Paragraphs 2.8-2.13 of the LRC Report, at Chapter 2.

also requires that the deposit be put in a trust account within BC and should not be used to construct or market development units unless a deposit insurance is obtained.

However, as noted in the LRC Report, stake-holding of deposits and instalments would not be a viable solution in the case of UPOH as these deposits or instalments are often required to be released to developers in accordance with the actual progress of construction (subject to any applicable laws and regulations in that jurisdiction). In any event, even if the deposit monies are not required for development purposes, it is onerous and difficult for local solicitors to monitor the progress/status of overseas projects[232].

As for reservation fees, the purpose of their payment is different and in addition, the payment is usually made to the estate agents (sometimes for onward forwarding to the vendors) as an indication of interest and as consideration for the vendor to take the particular unit off the market before signing of the contract or payment of deposit. From the complaints received by the Council, it can be seen that these reservation fees did not involve a large sum of money when compared to the purchase price, with sums typically ranging from HK$10,000-HK$50,000. The findings from the mystery visits (i.e. HK$5,000-HK$75,000) are similar.

Currently, depending on the individual practices of different estate agents, the reservation fee is usually non-refundable if the consumer decides subsequently not to sign the sale and purchase agreement. However, in some instances, agents or vendors would refund or set off the reservation fees if the consumer proceeds to sign the agreement and complete the sale. What is observed is the lack of uniformity in the treatment of refund of reservation fees and the variety of the terms adopted by different agents could bring confusion to the consumers.

Discussions with major industry players as stated in 7.2 below indicated that they would be supportive of the introduction of a mandatory cooling-off period insofar as it relates to the payment of the reservation fees, with some of them indicating that it might be more fair to allow the amount to be refunded to factor in a deduction of a reasonable amount as administrative charge to represent work carried out by the estate agent if the purchaser later decides not to proceed. This is also supported by the LRC's recommendations[233].

7.1.3 Insufficient Regulation of Advertisements

Practice Circular Only Regulates Licensed Estate Agents Selling UPOH

Although the Practice Circular puts in place requirements for marketing practices and the placement of advertisements of UPOH, only licensed estate agents are regulated. Non-licensed estate agents and developers are not subject to any specific control other than the general law such as the TDO. If the advertisements placed by these unlicensed agents/vendors and their marketing practices and tactics remain unregulated over time, this could seriously harm consumer interest.

Further, the Practice Circular only applies to UPOH and POH which are completed properties remain outside of its scope. As set out in Chapter 3, complaints relating to the purchase of POH were not limited to UPOH but also completed properties. The Practice Circular sets out requirements on DD, legal opinion to be obtained as well as various information to be inserted

[232] Paragraph 2.9 of the LRC Report, at Chapter 2.
[233] Paragraph 8.8 of the LRC Report, at Chapter 8.

in advertisements and other sales documents. The same standard should be adopted across all first-hand sales of residential POH, completed or not, if not all types of POH, with necessary modifications so as to offer comprehensive protection to consumers. It is anticipated that the extension of the coverage of the Practice Circular should raise the standard of the services offered.

No Sufficient Regulation of Font Size of the Disclaimers in Print Advertisements

As seen from the examples listed in Chapter 4, print advertisements which were mandated to carry a disclaimer did so but the font size was so small that any consumer with normal eyesight could not be expected to read it without assistance. This makes a mockery of the mandatory requirement under the Exemption Order and it is anticipated that many consumers in Hong Kong could overlook the statement and therefore not know that the estate agents who placed the advertisements were not licensed nor regulated in Hong Kong.

Insofar as licensed estate agents are concerned, there is also currently no requirement in the Practice Circular regarding font sizes of the warning statement, only that it be "prominent". However, in answer to one of the Questions and Answers to the Practice Circular[234], there is explanation that the statement in the advertisement or promotional material has to be easily readable by a person with normal eyesight. Without specifying the font size, this could still give rise to ambiguity and uncertainty. Further, the same concern as above prevails - the Practice Circular only applies to licensed estate agents dealing with UPOH and does not apply to completed projects of POH. As most of the advertisements observed with illegible disclaimers were placed by unlicensed estate agents, these guidelines as they currently stand, would not apply in any event.

Lack of Uniformity of the Wording Used for the Exemption Disclaimer

A review of the advertisements, both print and online, shows that there were many different methods of presenting the mandated disclaimer in purported satisfaction of the Exemption Order as the Exemption Order does not prescribe the statement to be used. Lack of uniformity of the disclaimer causes confusion and diminishes the consumer protection effect it was originally intended to provide.

Disclaimers in Online Advertisements Could Be Easily Missed by Consumer

For online advertisements containing disclaimers, these were usually found at the bottom of the page after scrolling 5-10 pages. As the information contained in the disclaimers is considered important, the disclaimers should not be hidden at the bottom of the advertisements where consumers may not usually scroll to or may be easily missed.

Misleading Advertisements

The review of advertisements by the external consultants shows that many tactics had been used to induce consumers into buying POH. It is not unusual to see 2 advertisements side by side containing identical figures but in different denominations, sometimes one showing the deposit amount and one showing the asking price of the property. Consumers could be misled or be confused as to what was being offered. In addition, irresponsible, unsubstantiated or erroneous representations of rental guarantee; ability to obtain immigration shortcuts; and advantages,

[234] Q.7 and Answer of the EAA Questions and Answers to the Practice Circular of UPOH.

free gifts and potential mortgage holidays had all been used as bait to attract consumers to make enquiries. Other advertisements used the guise of free talks and seminars to attract unsuspecting consumers to attend these events which inevitably, would turn out to be marketing opportunities for the estate agents with a trapped audience. The Council also notes from the advertisements reviewed in the survey and the Council's complaint cases that consumers were often attracted by the rental return as stated in the advertisements or sales promotion of the POH and entered into the sales contract. Some of these claims were made as a result of a mark-up on the purchase price and on occasions these so called guarantees could not be honored in the end, e.g. where there was failure of the project due to insolvency of the developer. More stringent rules should be put in place in regulating the accuracy of the information provided in sales materials in order to discourage any use of unscrupulous tactics which undermines consumer protection in the first place.

7.1.4 Insufficient Regulation of Other Trade Practices

Lack of Warning in Relation to the Risks of Purchasing POH

Although the Practice Circular requires the publication of a warning statement, DD checks and disclosure of requisite information in the advertisements and sales information sheet to purchasers to facilitate the making of an informed choice, there is no warning by the salesperson to the consumer of the potential risks and liabilities of purchasing POH. As outlined in previous chapters, in view of the complexities and risks involved in the purchase of POH, in line with the researched jurisdictions and taking into account the First Hand Sales Ordinance, further relevant sales information could be provided to purchasers before they make the purchase decisions on areas including deposit protection mechanism, rental returns and font size requirements of any warning statements contained in all sales and marketing materials.

Unsubstantiated/Misleading Claims of Rental Guarantee

As can be seen from the complaint cases of the Council and the findings of the mystery visits, some agents offered guaranteed rental returns spanning over a number of years to induce consumers to purchase. Some of these rental guarantees could, depending on the scheme of arrangement, be a CIS in disguise and therefore, the sale of these products without authorisation could possibly be in breach of the SFO. In reality, many of these claims cannot be easily substantiated and they may not be honoured over time.

Lack of Sufficient or Accurate Information Contained in the Sales Materials

Findings from the mystery visits highlight that lack of English or Chinese translated marketing documents or regular update of brochures led to outdated or erroneous information being given to the consumer. Most of the unlicensed agencies also did not provide any disclaimers under the Exemption Order in the pamphlets, leaflets and name cards distributed.

7.1.5 Partial Commencement of the EAO

As mentioned in Chapter 2, it is apparent that the EAO was drafted with a view to regulating properties both in and outside of Hong Kong and the provisions on such different types of properties would be implemented by stages. The definition of the word "***land***" in section 2 specifically makes mention of its application to "***property outside Hong Kong***". Further, section

36 mandates that every licensed agent shall declare conflict of interest to his client, including any benefit such as any commission which will accrue to the agent should the property be disposed of, in relation to every property "***whether situated in Hong Kong or elsewhere"***.

When the above section 36 came into operation on 1 November 1999, somehow its application was limited to Hong Kong residential properties and certain prescribed forms of estate agency agreements in relation to these properties were made under the Practice Regulation. As a result of this partial commencement of the EAO, licensed estate agents dealing with POH are not required to disclose the commission received by them. In addition, notwithstanding the Practice Circular requiring the licensee to disclose to the purchaser inter alia the party for whom the agent acts, this requirement only applies to the sale of UPOH. As indicated by some of the Council's complainants and acknowledged by some industry players, many consumers often are unaware as to which party an agent acts for or the extent of the services to be provided by the agent. The right to be informed is an important consumer right and has to be safeguarded. Transparency of information is important and consumers should be made aware of any potential conflicts of interest of the estate agents so that an informed decision can be made taking into account all relevant information.

Other provisions which are also partially commenced only for residential properties in Hong Kong include sections 44 and 46 of the EAO which concern advertising and the form and content of the estate agency agreements respectively. Both sections empower the EAA to regulate advertising by licensed estate agents and to prescribe particulars to be included in estate agency agreements.

Under paragraph (16)(a) of the Practice Circular, estate agents and salespersons must inform the purchaser in writing of the party(ies) for which they act. However, the complaint cases and findings from the mystery visits revealed that agents often did not draw the purchasers' attention to this issue nor to the issue of whether any commission would be payable. It is also noted from industry stakeholders that some agents may receive lucrative commission from vendors in respect of the sales of certain projects, depending on many different circumstances and business considerations. This gives rise to the concern as to whether the level of disclosure is sufficient to enable the consumers to know precisely the relationship between the agent, the vendor and the purchaser which could then lead them to realise that there may be a conflict of interest involved.

While from the perspective of consumers, it is true that disclosure of any commission payable by the vendors of POH to the agents could assist them in further assessing the risks involved, it is noted that the partially commenced section 36(1)(a)(vi) of the EAO has already imposed statutory duties on a licensed estate agent to disclose to a "client" full particulars of any pecuniary or other beneficial interest, including any commission which will accrue to such agent if the property is disposed of. The effect of this does not mandate disclosure of commission receivable by the agent where the estate agent is only the sales agent acting on behalf the vendor and the purchaser may not be his client. Similarly, there is no requirement for agents engaging in the sale of local first hand residential properties in Hong Kong to disclose to the purchasers the commission payable by the developers to the agents. That being the case, the Council takes the view that, should there be further commencement of the provisions of the EAO, especially sections 36 and 44, the present requirement for disclosure of conflict of interest under the EAO and the Practice Circular is sufficient.

7.2 Views of Stakeholders and Major Industry Players on Various Issues

Based on the various concerns highlighted above, the Council carried out stakeholders' engagement meetings with the EAA, the SFC, Midland Global and Centaline in order to ascertain their views on these key issues.

Views of the THB and the EAA

The THB and the EAA thanked the Council for engaging them in the study. It provided a good opportunity to learn about the broad direction and thinking of the Council. While they did not have sight of the full study report including the final recommendations beforehand, the THB and the EAA would like to offer preliminary views based on some key principles. The THB and the EAA would appreciate it if the Council could take into account their views in drawing up its final recommendations.

The THB and the EAA fully support consumer protection, and consider that any measures to achieve this goal should be reasonable, effective and targeted at the right party(ies).

First and foremost, any attempt to restrict the sales of POH in Hong Kong through licensed estate agents only will act contrary to the principle of free trade. Apart from the impact on vendors/developers, consumers in Hong Kong will also be deprived of their very basic right to purchase POH direct from the vendors/developers. One should also bear in mind that vendors/developers of POH can easily conduct sales and promotional activities online, by post sent from abroad or through other means nowadays and given the question of legal jurisdiction, any attempted regulation is unlikely to be effective.

In considering measures to enhance the protection of buyers or potential buyers of POH, it is vital to understand the roots and nature of the problems encountered by buyers of POH. According to the complaints received by the EAA in recent years (120 cases from 2016 to 2020, of which 107 related to uncompleted POH), most issues in relation to POH originated from the vendors/developers. Examples include vendors/developers failing to complete the POH (76% of the uncompleted cases[235]), failing to pay the guaranteed rental return to purchasers as promised (34% of the uncompleted cases), and not providing accurate information to estate agents in the first place (7% of the uncompleted cases) (such as incorrect information about floor area, balcony size and vicinity of the property which were provided by the vendors). **Any proposed measures targeting the estate agents** (e.g. requiring estate agents engaging in POH sale to be licensed) **cannot resolve issues that are concerned with the vendors/developers or the projects themselves, not to mention that it is unreasonable to shift the responsibility of the vendors/developers in relation to POH to estate agents** (for instance, since whether reservation fee can be refunded or is subject to a cooling-off period is a matter for the developer/vendor, any attempt to put the responsibility onto estate agents is not appropriate) . Worse still, any attempt to target the estate agents instead of the vendors for POH may create false expectation that comprehensive protection would then be provided for the consumers which is not the case.

Regulating estate agents is but only one of the ways to protect consumers in a property purchase. Also necessary is a local regime that effectively regulates how the owner/developer constructs, completes and disposes of the flats. In the Hong Kong context, if a developer wishes to sell flats

[235] Some cases involved multiple allegations.

before their completion, the Government's Pre-sale Consent Scheme requires the developer to, amongst others, demonstrate that it has adequate financial ability to complete the development, and puts in place a mechanism to ensure that the purchase monies can only be used to meet construction costs and some specified expenses. The project progress is also closely monitored. Also, the First Hand Sales Ordinance regulates the sale of first-hand residential properties, which imposes stringent requirements including for instance how the area of flats should be measured and described. **Similar effective regulatory regimes may not be present in other jurisdictions and this is entirely out of Hong Kong's control. Simply regulating estate agents engaging in sale of POH in these jurisdictions cannot effectively minimise the risks that the buyer or potential buyer faces.** Consumer education on the risks of purchasing POH remains important. The Government, together with the EAA and the Council, have all along been stepping up public education efforts on this front.

On provision of information to purchasers, in the Hong Kong context, estate agents engaging in local property sale are required to possess and provide accurate specified information regarding the property in question, and estate agents can easily carry out land searches to obtain the information required. On the other hand, the laws and regimes governing landed properties differ from one jurisdiction to another. Not only are the nature and amount of information available, adopted, required, and presented differ (e.g. "area" of a flat can be measured and presented differently for POH in different jurisdictions; "subsisting encumbrances" that can have legal implications on the ownership of POH; and the method for determining the age of a POH may also differ between jurisdictions), the availability and accessibility of channels for obtaining such information also differ from one jurisdiction to another. It is not appropriate to straitjacket Hong Kong's requirements on the sale of POH, nor is it practicable to tailor make requirements for different jurisdictions. It is also unrealistic to expect the estate agents to possess the expertise to fully understand the relevant regulations and requirements in different jurisdictions concerning the sale of properties. While estate agents conducting POH sale in Hong Kong should perform DD and supply accurate and necessary information as obtained from the vendors/developers to the potential purchasers, it is inevitable that consumers should exercise caution and seek independent professional advice as appropriate before making a decision to purchase POH, given the very different market operation and conduct regulation in other jurisdictions.

Consumer education concerning purchase of POH remains important. The THB and the EAA are pleased to note that the result of enhancing public education by the Government, the EAA and the Council throughout the years has been very positive. Complaints about the sales of uncompleted residential POH have drastically reduced as compared to the situation in the 1990s. Nonetheless, the Government will continue to keep a close watch over the situation, and consider suitable measures to enhance consumer protection where appropriate.

Additional Views of the EAA from an Operational Perspective

The sale of POH involves laws and regulations of different jurisdictions, and the complexity of the issues would place an exacting demand in terms of expertise for regulating estate agents in conducting related activities. For instance, the terminologies used for describing the types of landed properties, the categorisation of their usage (such as residential, non-residential or hybrid type of use), the interests to be acquired in the POH (interest in land or right to use the property only), and the respective requirements on their sales vary extensively between different jurisdictions. Also, the meaning of "property" and what constitutes a "completed" or "uncompleted" property can be different according to the laws of other jurisdictions. These issues will have to be properly addressed for the EAA to regulate effectively.

Following the above, there is also practical difficulty mandating estate agents in Hong Kong to provide certain specific information of POH (e.g. "saleable area", "subsisting encumbrances" and "age" of the POH concerned according to the definition or requirements in Hong Kong) or introducing a standardised estate agency agreement for POH in all jurisdictions. Some jurisdictions may have restrictions on dual agency and other matters and the requirement for provision of prescribed property information would also be different.

In investigating complaints with respect to the sale of POH, collection of evidence has been an obstacle for the EAA in view of the extra-territorial communications and language barrier involved. From past experience, vendors and regulatory authorities in other jurisdictions are often unwilling to co-operate or assist. Without such co-operation and assistance, the EAA may not fully understand the laws and requirements of various jurisdictions and gather sufficient information to handle the relevant complaints satisfactorily. If the sales and promotional activities are conducted outside Hong Kong, it would be outside the EAA's purview to regulate them.

Views of the SFC

The SFC has noted the increasing popularity of investments in overseas properties in recent years. However, some of these investments are not simply buying and selling real estate. Instead, they may be CIS. The sale of CIS to the Hong Kong public is subject to restrictions under the SFO. Investments in hotels, service apartments, student dormitories and shopping complexes are more likely to be CIS as they need to be managed on behalf of investors.

In general, CIS must be sold by an intermediary licensed or registered with the SFC. CIS that are not authorised by the SFC may generally be sold to professional investors only.

If a property investment is a CIS, it will be managed by an operator. Investors will not have day-to-day control. As unauthorised investment arrangements and their offering documents are not authorised by the SFC, they may not be suitable for the Hong Kong public. Their disclosures may not be clear and complete and investors may not be properly protected.

Further, investors should note that the powers of Hong Kong regulatory authorities may not cover overseas transactions or investments. For example, currently the EAO only regulates property transactions handled by real estate agents within Hong Kong and the sale and purchase of overseas properties may not be subject to its regulation. In addition, the SFC will only have a regulatory handle if the property investment concerned is a CIS. However, even where an investment is a CIS, the SFC may be subject to considerable legal and other limitations where the CIS involves overseas scheme operators and overseas properties. Investors should therefore be extra vigilant when investing in property overseas.

For the protection of investors' interests, the SFC has recently launched a new Suspected Unauthorised CIS Alert List to warn the public about unauthorised investment arrangements involving overseas properties and other investments which are suspected to be CIS and may not be offered to the Hong Kong public. In principle, the SFC supports the introduction of enhanced regulations governing the sale of overseas properties in Hong Kong.

The SFC has worked with the Investor and Financial Education Council to strengthen investor education efforts to raise public awareness of property investment arrangements which are unauthorised CIS and related risks and will continue its engagement with the Council and the EAA on efforts to inform the public.

Views of Centaline

Centaline Property Agency Limited, part of the Centaline group of companies, is one of the largest property agencies in Hong Kong. It is licensed under the EAO. As one of the major players in the industry, Centaline is supportive of the introduction of licensing requirement for all estate agents and their salespersons where it involves the sale of POH.

According to Centaline, when it handles any POH sales, it follows the requirements of the EAA's Practice Circular and obtains the requisite legal opinion and the DD report from the vendor's solicitors. It would then carry out its own research and investigation to check if the developer is listed on any stock exchange and double check its property development track record. In addition, it would also check if any banks would be willing to accept mortgage applications for the project and whether any lawyers would be available and ready to take up legal work for the project. Centaline believes that in order to raise the standards of estate agents and salespersons, the Practice Circular requirements, which are mandatory, must be stringently enforced.

On the matter of reservation fees and who receives it, Centaline is of the view that this is not a straightforward issue. Usually, when the purchaser pays the reservation fee to the Hong Kong agents, whether this is passed on to the developer or whether this is retained by the agent depends on the different projects and the contractual terms between the developer and the estate agent. Such reservation fees are usually paid by credit card as opposed to the payment of a deposit which is usually done by way of a cheque or by telegraphic transfer. Not all purchases of POH involves a requirement to pay a reservation fee. It is common practice for reservation fee to be charged for the sale of POH in Australia, Canada and the UK, given the time difference. The amount to be charged varies and is usually proportionate to the purchase price and is typically around 1-3% thereof.

As to whether there should be an imposition of a cooling-off requirement for reservation fees, Centaline is of the view that should the purchase not proceed, the fee paid could be refunded but subject to an administrative charge or handling fee representing the work already carried out for the purchaser. In terms of the current practice, it is not unusual for there to be a clause in the reservation form to state that the reservation fees once paid, is non-refundable. Notwithstanding this, under special circumstances, Centaline would refund the reservation fee to the purchaser if the purchaser does not commit to the purchase or for other reasons, the purchase could not be completed.

Centaline's observation is that it is not uncommon for consumers not to be aware that the estate agent acts for the vendor only. This relationship should be clearly spelt out so as not to cause confusion to the consumers.

On the question of sufficiency of the existing sanctions, Centaline's view is that much depends on the nature and intention of the misrepresentation. If the information was supplied by the developers to the estate agent and the agent failed to verify the information properly before passing on, that would be negligence and should not attract criminal liabilities. However, if there was deliberate provision of false or misleading information, and fraud was involved, then such action should attract criminal sanctions.

Views of Midland Global

Midland Holdings Limited is one of the largest real estate brokerage companies in Hong Kong. Its wholly-owned subsidiary, Midland Realty, is another sizeable real estate agent in Hong Kong

providing broker services for residential properties. Midland Realty is licensed under the EAA. To deal with the sale of POH, Midland set up another subsidiary, Midland Global, which is not licensed under the EAO.

Although Midland Global is unlicensed, the company imposes its own set of governance which it believes to be more stringent than that under the EAA's Practice Circular, and in most cases, it is applied to the POH no matter it is a completed development or an uncompleted development. This includes a checklist which the salespersons must go through and complete, and includes the provision of a legal opinion, proof of title, a Business Registration search or similar search of the developer and DD on relevant marketing materials. For example, to verify the actual location of the development, they would check via google map; any claims of rental return would be verified through research into the jurisdiction in which the POH is situated.

On the issue of booking or reservation fees, Midland Global's policy is to fully refund any reservation/booking fees paid should the sale not proceed for whatever reason. In fact, they provide a 7-day cooling–off period. While it is of the view that any work done or administrative charges incurred for the unsuccessful transaction is part of the cost of business, they are not opposed to a reasonable administrative fee being charged for aborted purchases.

When asked about the present situation of POH market and whether the current regulatory framework could be improved, Midland Global suggested that there are still loop-holes which could be addressed. It would like the Government to focus on stricter regulation of the various sales practices and tighten up on the information disclosure aspect. For example, there should be more stringent requirement on estate agents and salesperson to carry out proper DD into the information provided by the developers. No exaggeration should be allowed and the information provided to potential purchasers must be factual and correct.

While it understands the need for the introduction of licensing requirement for all estate agents and salespersons if they are involved in the sale of POH, it has concerns that the bar for licensing, as currently set, may not be high enough as salespersons are required to have a certain level of English proficiency and the ability to carry out DD into the information provided by the developers. If licensing requirement is to be introduced to all agents and salespersons working on the sale of POH, in tandem, there should be a review of the threshold requirements for licensing for such a group, reviewing requirements in terms of education level, relevant language skills and work experience to ensure that licensed persons engaged in such work would be able to meet these standards.

On the subject of inflated rental return, it is of the view that there should be an outright prohibition of mention of rental return in advertisements.

While failure to complete is one of the major complaints for the EAA, no amount of DD into any developer's track record for developing property projects could prevent such an occurrence.

Finally, it is of the view that in addition to increased and improved regulation, education of both the licensees and the public would be vital.

On the question of sufficiency of the existing enforcement mechanism, Midland Global is of the view that the current sanctions (both in the EAO and the Practice Circular) are sufficient and there is no need to criminalise any breaches.

Summary

In summary, having consulted with major industry players and the relevant authorities, unsurprisingly, there is a mix of positive support and legitimate concerns. All stakeholders agree that education of the public is important to raise further awareness of the risks of purchasing POH. The SFC, Centaline and Midland Global are supportive of enhanced regulation of estate agents. In particular, Centaline and Midland Global are of the view that licensing of all agents who carry out sales of POH is necessary. They also wish for the introduction of more stringent regulations to be put in place for advertisements and information disclosure, and a mandatory cooling-off period to be imposed for the reservation fees subject to a deduction of a reasonable amount of administrative fee. The main concerns expressed by the THB and the EAA are noted and all views and feedback have informed the recommendations which this report puts forward in the following chapter.

8. Recommendations and the Way Forward

There has always been the purchase of POH by Hong Kong people. Since 1980s, with the rapid development of the Hong Kong economy, both the Hong Kong property market and the POH market began to flourish. In the late 1990s, the LRC had the foresight to publish its report and recommendations, proposing regulations for the sale of POH. With this objective in mind and following on from the enactment of the EAO, the EAA was set up with a view to regulating both the local market and the POH sales.

Subsequently, due to legislative and regulatory priorities, the regulation of local estate agencies selling local properties, which until then was unchecked, was understandably accorded priority. Since then, the Hong Kong economy has further evolved and developed, leading to the maturity of the Hong Kong property market. With the recent integration of Hong Kong into the GBA, the demand for POH has intensified.

With the results gathered from the complaint statistics, the survey on POH advertisements, the mystery visits and the various stakeholders' views, it is clear that the current regulatory regime is not comprehensive enough to provide the proper level of consumer protection.

From a consumer perspective, any POH transactions are significant in terms of the value of the property involved. When they encounter problems leading to loss being suffered, they feel extremely stressed and face immense financial and other pressure. This further demands the need for further regulation.

That being the case, in order to enhance consumer protection, the Council sets out a list of recommendations for consideration by the Government to strengthen the laws and regulations relating to the sale of POH in Hong Kong. It should be emphasized that consumer education should continue to play a role as purchase of POH involves complicated jurisdictional and financial issues which may not be familiar to ordinary Hong Kong people.

Considering the need to strike a proper balance between enhancing consumer protection, maintaining business sustainability and allowing consumers to have reasonable access to information regarding the sale of POH in Hong Kong, the Council therefore puts forward the following 5 practicable and proportionate recommendations for reasons to be elaborated below.

These recommendations concern and focus on first-hand residential POH only. The Council acknowledges that, in the present context, there are material differences between the sale and purchase of first-hand residential POH, and (a) subsequent sale and purchase of residential POH (otherwise known as second-hand residential POH) as well as (b) non-residential/commercial POH. Most of the identified issues related to first-hand residential POH which, by its nature, would involve a relatively larger number of consumers facing the same potential risks. The consumer interest would therefore be much higher. In respect of the sale and purchase of second-hand residential POH, the vendors are in most cases not the developer; the condition of the POH in question would be unique and the potential risks involved would be case-specific. On the other hand, it appears that purchasers of non-residential/commercial POH are usually investors. When compared to ordinary purchasers of residential properties, they are likely to be more experienced and sophisticated. Non-residential/commercial POH very often include offices, hotels and shopping malls which need to be managed on behalf of investors and may include offering of rental returns

or guarantees. These cases would more likely fall within the ambit of CIS and hence can be subject to the regulation of SFC. The Council's recommendations intend to focus on first-hand residential POH. The Council leaves it open to the market and the relevant authorities to consider if further regulations should be introduced in relation to the purchase of other types of POH.

The Council proposes that the definition of first-hand residential property and sales should adopt that which is used respectively in sections 6 and 10 of the First Hand Sales Ordinance. That is to say, a first-hand residential property includes any real property in the development or the phase constituting a separate unit used, or intended to be used, solely or principally for human habitation; and excludes any premises used, or intended to be used, solely or principally as a hotel or guesthouse within the meaning of section 2A of the Hotel and Guesthouse Accommodation Ordinance (Cap 349). As for what constitutes a first-hand sale, this is a sale where a property in a development has neither a preliminary agreement for sale and purchase nor has ever entered into an agreement for sale and purchase and no assignment has ever been made.

For the avoidance of doubt, this would include both completed and uncompleted POH. In other words, it would cover any such property irrespective of whether the construction thereof has been completed or begun, or the stage of construction it has reached.

The ultimate and overriding objectives of these recommendations are to enable a prospective purchaser of first-hand residential POH to make an informed choice as to whether to enter into a legally binding sale and purchase agreement or not by:

(a) ensuring that, insofar as reasonably practicable, he will:

    (i) receive accurate and essential information concerning both the vendor and the property, and;
    (ii) be sufficiently warned of any material potential risks and complications by the imposition of the corresponding duties to provide such information and give such warnings on Hong Kong estate agents (who will be subject to the jurisdiction of the Hong Kong authorities) acting on behalf of the vendor; and

(b) be given a reasonable time to consider the information provided and warnings given, so that he could make all necessary enquiries as he sees fit before committing himself whilst reserving the chance of buying a particular property in the meantime at a reasonable cost.

The recommendations are not aimed at rendering the purchase of first-hand residential POH completely risk-free. This would be wrong in principle and impossible in practice. Furthermore, the first three recommendations are interrelated whereas the fourth and fifth are free-standing.

The Council appreciates that its recommendations to tighten the control over the sale and purchase of first-hand residential POH might give rise to competition concerns among the estate agents. In particular, there might be concerns that larger and more resourceful estate agencies may dominate the market. However, the primary purpose of the Council's recommendations is to bring better protection to consumers as opposed to inhibiting competition. The Council believes that it should be reasonably practicable for an estate agency, irrespective of its size or past experience in dealing with POH, to comply with the regulations proposed under its recommendations. The Council is of the view that a set of clear and comprehensive regulations could bring benefits to the POH market and foster healthy competition as any agents interested in the first-hand residential POH market in Hong Kong would then be required to comply with the same regulations and be treated equally by

the responsible authorities. Even if this may entail higher costs of compliance for those engaged in the sale of first-hand residential POH, such costs are justifiable because the quality of estate agents should be uplifted and, most importantly, consumers could enjoy better and more reliable services. Besides, in law, statutory bodies such as the EAA are generally exempted from certain provisions of the Competition Ordinance (Cap 619) including the conduct rules[236].

8.1 First Recommendation: To require all estate agents who engage in sale of first-hand residential POH to be licensed under the EAO

Section 2(a) of the Exemption Order exempts a person who does anything referred to in section 15 or 16 of the EAO from the requirement of obtaining an estate agent's licence or a salesperson's licence if he "*does so exclusively in relation to properties outside Hong Kong*". The Council recommends that this sub-section be amended to read as follows:

"*does so exclusively in relation to properties outside Hong Kong save and except first-hand residential properties*."

The effect of the proposed amendment is that an estate agent (or a salesperson) dealing with first-hand residential POH will be required to obtain a licence under the EAO irrespective of whether he does so exclusively or not.

It should be borne in mind that section 2 of the EAO deliberately extends the definition of "land" to "property outside Hong Kong". It was clearly the legislative intention that, in principle, the EAO may and should apply to POH. The Exemption Order was made pursuant to section 3(1) of the EAO which provides that the EAA may, with the approval of the Secretary for Transport and Housing, exempt any class or description of persons specified from all of the provisions of the EAO or any of the provisions therein. An exemption is an exception. An exception is a departure from the norm; and hence, must be justified. The Council understands that the enactment of the Exemption Order was largely due to historical reasons. Whether the exemption should be continued must be reviewed from time to time. Otherwise, it will continue indefinitely and become permanent. If it is seen fit to make the exemption permanent, the proper way is to amend the EAO through the normal legislative process by deleting the reference of POH entirely.

As the Council understands, the Exemption Order was enacted because, the Government opined at the material time that, the EAA would need to consider separate regulations for estate agents handling these properties having regard to the different nature, scope and complexity of work relating to POH. There has been a long lapse of time since the enactment of the Exemption Order on 19 November 1998. Further, the EAA promulgated the Practice Circular in 2017. It therefore seems that the main, if not the only, reason to maintain the Exemption Order is the belief that public education would be sufficient. The Council disagrees:

(a) Undoubtedly, public education for potential buyers is indispensable and of crucial importance. However, it cannot and should not replace the regulation of estate agents or salespersons acting on behalf of the vendors. They serve different purposes. The purpose of public education is mainly to strengthen the public's awareness of the potential risks and complications involved in the purchase of POH. On the other hand, the purpose of regulating estate agents or salespersons (most of whom may be acting on behalf of the vendors) is mainly

[236] Section 3 of the CO.

to reduce the potential risks and complications that the buyers may be exposed to and to ensure that the buyers will be given accurate and sufficient information on those risks and complications. They are complementary and must not be treated as alternatives or mutually exclusive.

(b) Whether public education is already sufficient is impossible to verify as, to begin with, one cannot define the meaning of "sufficient" in this context objectively. But what cannot be disputed is that the consumers will be better protected if all estate agents and salespersons involved in the sale of first-hand residential POH are subject to regulations.

(c) Furthermore, consumer protection is forward-looking. One must have the foresight to be prepared for challenges ahead. It is reasonable to infer from current developments in Hong Kong that more and more people will be interested in buying POH, in particular, first-hand residential POH. Some of these developments are related to key national policies, namely, the Greater Bay Area Development Plan, which forms an integral part of the 14th Five Year Plan. To enhance consumers' protection and increase their confidence in buying POH are not only necessary to meet the needs of society but also conducive to the implementation of these national policies.

From the findings of this study, the Council takes that view that no distinction can or should be drawn between those estate agents or salespersons who deal with first-hand residential POH exclusively, and those who do so non-exclusively:

(a) The potential risks and complications faced by the buyers, and the corresponding duties that should be imposed on the estate agents or salespersons, do not depend on whether the latter deal with first-hand residential POH exclusively or not. There is no logical reason why estate agents or salespersons who deal with such properties exclusively shall not be subject to any control whatsoever under the statutory regime of the EAO at all.

(b) Estate agents or salespersons should not be able to avoid being regulated at their whim by opting to deal with such properties exclusively.

(c) Vendors of POH are most probably, if not certainly, foreign entities which have no presence in Hong Kong; and, hence, are not subject to the jurisdiction of the Hong Kong authorities (including the courts of Hong Kong). In contrast, estate agents in Hong Kong acting for and on their behalf will be subject to the jurisdiction of the Hong Kong authorities. To impose legal duties on these estate agents is, for all practical purposes, the most, if not the only, effective means to regulate the sale of POH. This important objective does not depend on whether the estate agents deal exclusively with POH or not.

The Council believes that this recommendation would not impose an unfair, or unduly heavy, burden on the estate agents or salespersons:

(a) The Council is unaware of any suggestion or evidence that those estate agents or salespersons, who deal with POH non-exclusively under the existing legal framework, have found the duties imposed on them in this respect to be unreasonably impracticable to comply with.

(b) At present, even though any such estate agent or salesperson who deals with first-hand residential POH exclusively is not required to obtain a licence under the EAO, he still owes various legal duties to the prospective buyer under the common law: for example, the duty in tort not to make fraudulent or negligent misrepresentations. However, the common law does

not define clearly the scope of such duty; and whether there is a breach of such common law duty will depend on the facts of each case. It would be in the interests of not only the buyers, but also the estate agents or salespersons, that their scope of duty in this respect can be more clearly defined by statute (or guidelines to be issued by the regulatory body).

(c) There is no intention and, in any event, it will be impractical to turn the estate agent or salesperson into the insurer or guarantor of the vendor's proper performance of the sale and purchase agreement. To ensure that this will not be the case, the solution is to define the scope of his duty in a reasonable and practicable manner rather than to exempt him from being regulated.

(d) It is correct that estate agents or salespersons will need to assume greater legal responsibilities. However, in the world of business, they have the freedom to choose whether to participate in the sale of first-hand residential POH and be selective in the projects to be engaged in. If they choose to do so, they will for sure not be acting gratuitously, and will receive commissions or other forms of remuneration from, and to be agreed with, the vendors. They are at liberty to negotiate with the vendors and decide on what costs they are required to be paid in return for assuming the greater legal responsibilities.

As to the conditions which need to be fulfilled by an applicant for a licence to deal with first-hand residential POH including whether they should be the same as those under the existing law, the Council keeps an open mind and takes the view that this may be determined by the licensing body, namely, the EAA in consultation with the interested parties.

To require an estate agent or a salesperson who deals with first-hand residential POH to obtain a licence under the EAO will open the gateway to impose appropriate regulations on him. But this, by itself, will not be sufficient. This leads to the next recommendation.

8.2 Second Recommendation: To impose the existing statutory duties concerning the provision of information to purchasers and the regulation of advertisements under the EAO on estate agents who engage in the sale of first-hand residential POH

There are two important provisions in Part V "Estate Agent's Duties, Liability and Advertising" of the EAO. They are sections 36 and 44.

First, section 36 (which concerns information disclosure) provides in sub-section (1) that:

(a) every licenced estate agent shall, as regards every property (whether situated in Hong Kong or elsewhere) in relation to which he has entered into an estate agency agreement, be reasonably satisfied as regards the accuracy of information prescribed for the present purpose and supply such information to the potential purchasers accordingly;

(b) he shall also disclose to a client full particulars of any pecuniary or other beneficial interest which such agent has in the property including any commission which will accrue to him should the property be disposed of.

The importance of section 36(1) is as follows:

(a) It creates a positive duty to require the estate agent to provide specific information to the purchaser.

(b) It provides a mechanism whereby the types of information which need to be provided to the purchaser may be prescribed.

(c) It defines the standard of duty to be imposed on the estate agent. In particular, it provides that he needs only to be "reasonably satisfied" with the accuracy of the information provided by the vendor to him. This is not an absolute duty, but merely a duty to exercise reasonable care and diligence.

(d) It also requires the estate agent to inform the purchaser of the existence, and the degree, of self-interest that he may have in the transaction. It is important to put the purchaser on alert that the estate agent is acting in the interest, and for and on behalf, of the vendor.

(e) Breach of such statutory duties would constitute a separate and distinct cause of action in law which the purchaser may invoke to enforce against the estate agent if he suffers any loss and damage as a result of such breach[237].

Second, section 44 of the EAO (which confers power on the EAA to regulate advertising) provides that:

(a) The EAA may, with the approval of the Secretary for Transport and Housing, regulate advertising by licenced estate agents to whom the regulations apply in such manner as appears to the EAA to be appropriate.

(b) Such regulations may prohibit the inclusion of (i) any statements or particulars which are false or misleading in a material particular, or (ii) any prescribed statements or particulars.

The significance of section 44 is to provide a means whereby the EAA may impose both positive and negative obligations on the estate agents in relation to the content of the advertisements to be published by them:

(a) In terms of positive obligations, the estate agents may be required to provide certain essential information in the advertisements, for example, their licence numbers, and to give warnings on certain matters.

(b) In terms of negative obligations, they may be prohibited from providing false or misleading information, as well as any other types of information which may be deemed undesirable even if it may be true.

Both sections 36 and 44 of the EAO were drafted in a way that they should, in principle, be applicable to POH. In particular, section 36(1)(a) refers specifically to "every property (whether situated in Hong Kong or elsewhere)". However, these sections partially commenced when they came into operation on 1 November 1999 only for the purposes of their application to and in relation to any property in Hong Kong used wholly or primarily for human habitation. This means that currently, they do not apply to any POH.

[237] Section 36(4) of the EAO.

If estate agents dealing with first-hand residential POH are required to be licensed pursuant to the Council's First Recommendation, it must logically follow that they should be subject to the statutory duties under sections 36 and 44 of the EAO. Otherwise, the purpose of requiring them to be licensed will be frustrated. As mentioned, these statutory duties concern two important inter-related areas for the purpose of safeguarding the potential purchasers' interests: provision of accurate essential information about the vendors and the properties; and their advertisements in presenting the information.

Hence, to ensure that these statutory duties would apply to estate agents who engage in the sale of first-hand residential POH, the Council recommends that the operation of sections 36 and 44 of the EAO should be extended to, and commenced for, first-hand residential POH.

That said, the implementation of the Second Recommendation will not, by itself, be sufficient to achieve the intended purpose. This is because:

(a) Section 36 of the EAO does not prescribe specifically what information the estate agents must supply to potential purchasers in general. There is only a sub-section 36(2) which sets out in detail the information that may be provided in respect of property situated in Hong Kong, such as particulars of current ownership and subsisting encumbrances, the total or entire area, the year of completion, etc.

(b) Section 44 of the EAO also does not prescribe what information has to be included or prohibited in any advertisement.

It is, therefore, necessary for us to supplement with the third recommendation.

8.3 Third Recommendation: By binding EAA guidelines, prescribe the information to be provided to purchasers, and regulate the content of advertisements for first-hand residential POH

To ensure that the imposition of the statutory duties on the estate agents as proposed under the Second Recommendation will serve its intended purpose, it is important to, first, prescribe the information which the estate agents should provide to the potential purchasers; and second, prescribe the information which should be included or prohibited in the advertisements.

The Council takes the view that the requisite information that (a) should be provided to the prospective purchasers, and (b) should or should not be included in the advertisements, may be prescribed by setting them out in a set of guidelines to be made by the EAA modelled on the existing Practice Circular. Section 44(1) of the EAO has already conferred the necessary authority on the EAA to regulate advertising. A comparable provision should be added to section 36 of the EAO to confer similar authority on the EAA to prescribe the information that should be provided to the potential buyers. The advantages of this mechanism are as follows:

(a) It would require minimal amendment to the primary legislation for reasons just explained.

(b) The content of the guidelines may be determined by the EAA upon consultation with all interested parties; and more importantly, may be changed easily and flexibly as the EAA sees fit.

(c) The Practice Circular has been in place for more than 3 years. They apply to sale of uncompleted properties suited outside Hong Kong regardless of the intended use of the properties. Most, if not all, of them may be extended to completed residential POH. It will not be necessary to draft an entirely new set of guidelines from scratch. All that will be needed is to review them and see whether they should be amended or modified.

(d) The EAA may commence disciplinary proceedings against an estate agent who has allegedly breached the Guidelines. It has the power to impose penalties, including to suspend or even revoke the licence of the estate agent, if the alleged breach is proved.

The Council takes the view that serious considerations should be given to amend and modify the Practice Circular as follows so that they can provide sufficient protection to potential buyers of first-hand residential POH. Under the Guidelines, the estate agents are obliged to provide the following 4 documents to the potential purchasers: (a) a DD report; (b) a legal opinion; (c) a written warning statement; (d) a sales information sheet. These 4 documents are the means by which essential information and important warnings are provided to the purchasers. How the prescribed content of each of them should be improved will be considered one by one below.

First, the estate agents are obliged to provide a copy of a DD report regarding the vendor and the POH to be issued by a professional person, financial institution and/or government authority in the place where the development is situated or the vendor operates or is incorporated[238]. The Council is of the view that:

(a) The DD report should state the name, the authority (such as whether it is a government department or a professional) and the professional qualifications (if applicable) of its issuer. These are essential information to enable the potential purchaser to judge the reliability of the report.

(b) The DD report should also state the date thereof, and more importantly, the date up to which the information contained therein are confirmed. To ensure that the report will be reasonably up to date, it should not be older than a certain period before it is provided to the purchasers.

(c) Among the matters which the DD report is required to confirm, there may be matters which are potentially adverse to the interest of the potential purchasers, for example, the source of funds/financial arrangement of the vendor, subsisting encumbrances, and restrictions on alienation. The potential purchasers may either overlook these adverse findings or fail to appreciate their significance as they will be overwhelmed by the excess information whether in the report or other documents provided. To ensure that the potential purchasers' attention will be sufficiently drawn to these adverse, or potentially adverse, findings, wherever there are such findings, the estate agents shall summarise them in a separate document.

(d) The matters to be covered by the DD report should correspond to the matters which are required to be set out in the sales information sheet (to be considered below). This will assist the estate agent to be reasonably satisfied that the content of the sales information sheet to be prepared or approved by the vendor is true and accurate.

Second, the estate agents are obliged to provide a legal opinion issued by a lawyer practising in the place where the POH is situated on whether there is any form of restriction(s) for foreign purchasers

[238] Paragraph (10) of the Practice Circular.

to purchase, resell, lease or mortgage such properties; and if so the nature of such restriction(s)[239]. The Council takes the view that the legal opinion shall be extended to state:

(a) whether there is any mechanism to safeguard the deposits or part payments made by the purchasers pending completion of the purchase of the POH according to the laws and regulations of the place where the POH is situated (which do not depend on the terms of the individual sale and purchase agreement in question); and, if so, the particulars of such mechanism; and

(b) whether there is any restriction on non-locals to obtain finance from local financial institutions to support the purchase of the POH according to the laws and regulations of the place where the POH is situated; and, if so, the particulars of such restriction(s).

Third, as to the warning statement[240], the Council takes the view that even though the following warnings may not be exhaustive, they should be added, namely the purchasers should:

(a) consider whether they have sufficient financial resources to complete the purchase bearing in mind that loan facilities offered by the vendors may not in fact be available;

(b) note that the exchange rate of Hong Kong dollar to the foreign currency at which the price of the property is set may fluctuate substantially;

(c) be aware that, insofar the vendors provide any guarantee on rental yields or the like, they may not be able to honour the guarantee;

(d) in respect of uncompleted POH, be warned that the construction of the POH may not be completed for various reasons;

(e) ascertain whether there are restrictions for non-locals to purchase at the place where the development is situated;

(f) note that some information provided in various documents or promotional materials may be subject to change e.g. management fees, and more importantly, they may not constitute any legally binding representations made by or on behalf of the vendors (or the estate agents) and will be subject to the terms and conditions of any legal agreement to be entered into with the vendors or the estate agents; and

(g) in case the sale and purchase of the property has fallen through, appreciate that they may need to take legal or other actions in the place where the development is situated to recover any monies already paid or to seek other remedies, and that no effective remedies may be available within Hong Kong.

Fourth, as to the sales information sheet related to the POH prepared or approved by the vendor (see Annex to the Practice Circular), the Council proposes that it is important for the following additional information to be provided:

(a) a map or plan drawn to scale showing the location of the POH;

[239] Paragraph (12) of the Practice Circular.
[240] Paragraph (20) of the Practice Circular.

(b) a standard definition used to measure the area of the POH;

(c) the date of completion, and the definition of "completion" in the place where the development is situated (if the construction of the POH have already been completed);

(d) the condition of the property upon handover, such as particulars of the fixtures and fittings that will be installed (if any), utilities that will be made available (if any), the grant of local permission for occupation;

(e) for POH uncompleted projects, the grounds on when the final handover deadline may be extended and the maximum length of such extension (if any);

(f) the particulars of the right of way to the POH and the restriction of its use (if any);

(g) whether there is any mechanism to safeguard the deposits made by the purchasers according to the laws and regulation of the place where the POH is situated, and if so the particulars of such mechanism; and

(h) provide a link to the relevant legislation/regulatory authority governing the POH.

As to advertisements and promotional materials prepared or distributed by the estate agents:

(a) It will be for the vendors (and the estate agents acting for them) to decide how the sale of their properties is to be promoted. The focus is to ensure that, if they choose to disseminate any information to promote the sale of the properties, such information must not be false or misleading. In line with section 44 of the EAO, there should be a clear provision that the estate agents must not make false or misleading representations in material particulars, as well as a clear definition on what would constitute "material particulars". Material information required to be disclosed in the sales information sheet (to be considered below) and should include, in particular:

    (i) the current ownership of the land where the development is situated;
    (ii) the background and financial position of the vendor;
    (iii) the location of the site where the development is situated;
    (iv) any public amenities or healthcare facilities and infrastructures in the vicinity of the site where the development is situated, whether they are already in existence or the estimated time when they will come into existence;
    (v) the accessibility to the property, including but not limited to the estimated travelling time and distance from any particular place(s) to the property;
    (vi) the price of the property (including the currency at which it is set);
    (vii) the terms of payment of the price of the property;
    (viii) the availability of loan facilities to finance the purchase of the property, and if so, the particulars (including but not limited to eligibility requirements) thereof;
    (ix) the nature of the legal interest to be acquired by the purchaser; and
    (x) a statement that purchasers should refer to the sales information sheet for further details.

(b) If the advertisements or promotional materials contain any information concerning the availability of loan facilities, it must be accompanied by a statement to the effect that there is no guarantee that such facilities will indeed be available, that it would depend on the particular circumstances of each case and subject to approval by the relevant financial institutions.

(c) The Practice Circular requires the inclusion of a prominent statement to the following effect: "Purchasing UPOH is complicated and contains risk. You should review all relevant information and documents carefully before making a purchase decision. If in doubt, please seek independent professional advice before making a purchase decision". First, the word "uncompleted" should be deleted. Further, what would constitute such a "prominent" statement ought to be defined:

(i) For written materials, the statement should be printed in characters not smaller than a certain font size.
(ii) For advertisements broadcasted on TV, the statement should be shown and/or read out for not less than a certain period of time.

(d) If the advertisements or promotional materials refer to any invitation to talks or seminars, the identity and qualification of the speaker(s) should be stated including, for example, whether he is a licensed agent/salesperson under the EAO or in the place where the POH is situated, whether he has any professional qualification, and his relationship with the vendor.

Under paragraph (18) of the Practice Circular, the four above-mentioned documents must be provided to the purchasers before they enter into any agreement in connection with the purchase (e.g. booking form, reservation form, agreement for sale and purchase) or make any payment in relation to the purchase of (whichever is the earlier). The same requirement should be imposed in relation to the purchase of first-hand residential POH. The rationale behind this requirement is to ensure that the purchaser will be provided with essential information and sufficient warnings before he incurs any financial and legal liability.

In view of the amount of information provided, and the potential complexity and complication of the issues involved, it will take some time for the purchaser to understand the information, make further enquiries or seek independent advice, consider the matter thoroughly before he can decide whether to buy the property under consideration. In the meantime, it is not uncommon that the purchaser will be asked, and will be willing, to pay a reservation fee to reserve the right to buy a particular property. In case he pays such reservation fee but then decides not to proceed with the purchase, he will run the risk of losing the reservation fee. This leads to the Council's next recommendation.

8.4 Fourth Recommendation: To introduce a cooling-off period for reservation fees received by the estate agents on behalf of the vendors

As discussed, it is a common practice that, before a prospective purchaser decides whether to enter into a legally binding sale and purchase agreement, he will be asked to pay a reservation fee. The purpose of the reservation fee is to give the prospective purchaser an exclusive opportunity to buy the favoured property in mind. If the prospective purchaser decides to proceed with the purchase, the reservation fee will be commonly used to set off the deposit or part payment payable under the sale and purchase agreement. Such reservation fee payable before the execution of any legally binding sale and purchase agreement must, however, be distinguished from a deposit or part payment payable upon or after the execution thereof as they are of different legal nature and serve different purposes. The amount of the reservation fee is likely to be substantial in the region of several tens of thousands.

In view of the amount of information which requires review and analysis, the Council is of the opinion that the prospective purchaser should be given a reasonable time to consider whether to enter into a legally binding sale and purchase agreement, or to seek necessary independent advice. In the event that the prospective purchaser is hesitant to proceed after conducting a more thorough risk assessment, the right to recover the reservation fee paid will definitely strengthen consumer confidence and rights when purchasing POH. Hence, the Council recommends that a cooling-off period should be provided to the effect that, before the expiry of such a period, the prospective purchaser may elect not to proceed and recover wholly or partly the reservation fee paid.

As to the length of the cooling-off period, on the one hand, it should be sufficiently long to enable the prospective purchaser to make an informed decision whether to enter into a legally binding sale and purchase agreement. On the other hand, it should not be unduly long because the vendor will in the meantime be deprived of the opportunity of offering the particular property which the prospective purchaser has reserved to other interested potential purchasers. The Council is inclined to the view that a period of not less than 7 days would be fair and reasonable.

If the prospective purchaser decides not to proceed during the cooling-off period, he should be entitled to recover the reservation fee wholly or partly. However, the Council agrees that it may be reasonable for the estate agent and/or the vendor to forfeit a part of the reservation fee as administrative fee for the following reasons:

(a) The estate agent and/or the vendor may have to recover certain sunk costs and expenses in case the prospective purchaser decides not to proceed.

(b) The prospective purchaser has in fact enjoyed an exclusive opportunity to buy the particular property during the period from the payment of reservation fee to the time of withdrawal. Such an exclusive opportunity is a matter of value and the cost involved should be stated clearly at the time or before the reservation is made.

The Council is inclined towards the view that the amount to be forfeited in any event shall be determined by the estate agent and/or the vendor with the agreement of the prospective purchaser. However, the estate agent and/or the vendor shall not be entitled to forfeit the whole of the reservation fee, or a substantial part thereof so that the amount to be returned is *de minimis* or negligible as this would render the cooling-off period nugatory.

In any event, the prospective purchaser must be informed clearly of the existence and length of the cooling-off period, how the right to withdraw from the intended purchase may be exercised, and the amount that will be forfeited in any event well before the reservation fee is paid. All these details should be set out in a written agreement to be signed by the prospective purchaser.

To implement this recommendation effectively, the Council proposes that a provision be added to the guidelines to be published in relation to first-hand residential POH under the Third Recommendation that, if a reservation fee is charged, there must be a reservation fee agreement containing the said essential terms about cooling-off period.

8.5 Fifth Recommendation: To make it mandatory that all sales of first-hand residential POH must be conducted through licensed estate agents

It should be apparent that the four above-mentioned recommendations would be useful only if the sale and purchase of the first-hand residential POH is conducted through an estate agent in Hong Kong. There is, however, no existing law prohibiting a vendor from offering to sell, or selling, POH directly to prospective purchasers in Hong Kong. Further, as mentioned, if the vendor is not present in Hong Kong (for example, if it is a foreign corporation with no place of business in Hong Kong), or if it carries out its sales activities entirely out of the territory or online only, the relevant Hong Kong authorities will not be able to exercise any jurisdiction at all or effectively against the vendor, or over the activities that it carries out. In the circumstances, it is pertinent to consider whether it should be rendered mandatory to engage estate agents in Hong Kong to offer to sell, or sell, first-hand residential POH. If there is such a requirement, the vendor will have to directly engage a Hong Kong estate agent; a foreign estate agent acting for the vendor will need to partner with a Hong Kong estate agent; or the vendor may set up its own estate agent in Hong Kong.

The Council notes that there is no legal requirement that the sale and purchase of properties in Hong Kong must be done through an estate agent. This is in line with the general freedom that the vendor of a property enjoys, disposing of the property in whatever manner as he sees fit. To introduce a mandatory requirement to engage an estate agent would also increase the cost of the transaction which the purchaser may need to shoulder. One may therefore legitimately ask why the vendors of first-hand residential POH should be treated differently, and more stringently.

The answer is that, even without the involvement of estate agents, the purchasers of first-hand residential properties in Hong Kong are protected in various ways by, for example, the Consent Scheme, the Non-consent Scheme, and the First Hand Sales Ordinance. Furthermore, it must be borne in mind that for local properties, in case any problem arises, it would generally be much easier for the purchasers of properties situated in Hong Kong to take action and seek legal remedies against the vendors. In contrast, purchasers of first-hand residential POH do not enjoy any of these, or any similar, protections.

For these reasons, the Council takes the view that there are substantial merits in making it mandatory to engage Hong Kong estate agents to conduct sales of first-hand residential POH. Having said that, the Council notes that, in practice, a significant proportion of sale and purchase of POH was in fact done through Hong Kong estate agents even though it was not mandatory. This is understandable as Hong Kong estate agents are familiar with local circumstances; they are in a much better position than foreign vendors or estate agents to arrange and carry out sales activities within the territory; and they would be able to communicate with prospective purchasers directly (in particular, face-to-face) in the same language.

In the circumstances, the Council is inclined to the view that, assuming that the four above-mentioned recommendations can be implemented, and that there will be sufficient public education to, first, encourage people to buy first-hand residential POH through Hong Kong estate agents, and, second, warn them of the risks of not doing so, there may not be an imminent need to implement this recommendation forthwith. The Council will support an incremental approach in that the need to implement this recommendation may be reviewed in due course at a reasonable time after the implementation of the four above-mentioned recommendations.

8.6 Way Forward

Hong Kong is an affluent international city, with good infrastructure and a mature local property market which has been attracting international buyers for many years. A similar level of protection should be given to the Hong Kong purchasers of POH. This enhanced level of consumer protection would, in the long run, benefit the economy of Hong Kong, leading to an uplifting of the quality of services offered and the quality of choice available. With the continued development of this market, especially bearing in mind the growth of the GBA, this warrants a comprehensive review of the POH regulations.

The Council recognises that the issues involved are complicated; and there must be in-depth discussions and consideration by all interested parties, stakeholders and the general public. The Council also appreciates that some of these issues would fall within the jurisdiction of the relevant policy bureau of the Government and statutory body, namely, the THB and the EAA; and hence, those issues must ultimately be studied and concluded by them. In making these recommendations, the Council is seeking to discharge its statutory function to protect and promote the interests of purchasers of immovable property by, among other things, taking such action as it thinks justified by information in its possession including tendering advice to the Government or to any public officer pursuant to section 4(1) of the Consumer Council Ordinance (Cap 216).

While the Council's statutory duty is to protect and promote the interests of consumers, it has not lost sight of the importance of adopting a balanced approach with proper regard to the interests of other interested parties, who, in the present context, would include the vendors and the Hong Kong estate agents. A balanced approach is required to ensure that the recommendations will be feasible and workable, and will have the greatest chance of gaining the support of society as a whole. The Council believes that the implementation of the above-mentioned recommendations will, on the one hand, provide protections to purchasers of first-hand residential POH, which they rightly and fairly deserve. On the other hand, they will not impose any unreasonable or impracticable burdens on the vendors or the Hong Kong estate agents. On the contrary, it will be in their interests that their legal duties are more clearly defined, and that they will be running their businesses in this respect under the same sets of rules in Hong Kong. Further, if members of the public, knowing that their rights will be better protected, become more confident in buying first-hand residential properties, it is likely that they will be more ready and willing to do so. This will be in the common interests of the consumers, the vendors, the estate agents, and indeed the Hong Kong society as a whole.

The Council hopes that the above recommendations will stimulate and generate informed and constructive discussions with all interested parties and stakeholders and most importantly, that the Government will support the advocacy of, and take the lead to further study these recommendations.

In the meantime, consumer education remains important as the Council understands that it will take time to consider and implement the recommendations. Moreover, even if they are implemented, consumer education is still indispensable in order to empower the consumers to safeguard their own interests. The Council shall collaborate with all other interested parties to enhance public education in this respect.

Annex 1: Overview of Regulatory Framework for Sale of Overseas or Non-Local Properties in Other Jurisdictions/Regions

Jurisdictions	Australia (NSW)	Canada (BC)	Mainland	Malaysia	Singapore	Taiwan, China	The UK (England & Wales)
Legislation	• Property and Stock Agents Act 2002 • Australian Consumer Law	• Real Estate Development Marketing Act • Real Estate Services Act • Insurance Act	• Advertising Law of the People's Republic of China (中華人民共和國廣告法) • Civil Code of the People's Republic of China (中華人民共和國民法典)	Valuers, Appraisers, Estate Agents and Property Managers Act 1981	Estate Agents Act	• Real Estate Broking Management Act (不動產經紀業管理條例) • Civil Code (民法)	Estate Agents Act 1979
Rules / Guidance	Property and Stock Agents Regulation 2014	The Office of the Superintendent of Real Estate's Policy Statements 4, 5, 6 and 17	✗	Circular 8/2002 issued by the Board of Valuers, Appraisers, Estate Agents and Property Managers	• The Council of Estate Agencies' Practice Guidelines for Estate Agents and Salespersons Marketing Foreign Properties (PG 01/2018) • Appendix J of the Singapore Code of Advertising Practice issued by Advertising Standards Authority of Singapore	Directions of Real Estate Broking Agency Engaged in Foreign Real Estate Broking or Sales (不動產經紀業從事國外不動產仲介或代銷業務規範)	The Consumer Protection from Unfair Trading Regulations 2008
Licensing	✗	✓	✗	✓	✓	✓	✗
Due Diligence	✗	✓	✗	✓	✓	✓	✗
Advertising	✓	✓	✓	✓	✓	✓	✓
Cooling-off	✗ Cooling off period only applicable to local properties: 10 and 5 business days for uncompleted and completed properties respectively with 0.25% of the purchase price forfeited (if the right to cool off exercised). Additionally, a cooling-off period of 1 business day for every estate agency agreement in respect of the sale of residential property or rural land.	✓ For local or non-local uncompleted properties: 7 days.	✗ Voluntary cooling off within 2 days for properties in Dongguan city in Guangzhou Province only.	✗	✗	✓ The cooling-off period only applicable to viewing tours conducted outside Taiwan whereby the reservation fee is refundable.	✗ However, consumers can still cancel any service agreements in connection with properties under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.
Deposit protection	✗ For local properties, monies paid under an off-the-plan contract must be held in the trust account of a solicitor, conveyancer or real estate agent and cannot be released to the vendor until completion.	✓	✗ For local properties, the vendor may not be able to forfeit the deposit when it is in the nature of a pre-payment as opposed to security deposit.	✗ For local properties, deposits paid into housing development account and cannot be withdrawn except as authorised under the regulations. Purchaser may terminate agreement under certain circumstances and deposits must be refunded.	✗ For local properties, the Practice Guidelines on Option to Purchase and Sale & Purchase Agreements must be complied with (i.e., Options to Purchase, Sale & Purchase Agreements, payment of stakeholder money to be held pending completion of sale).	✓	✗ For local properties, deposit paid to the vendor's solicitors. The National House Building Council provides insurance protection if the buyer loses the deposit under certain circumstances.



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