



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

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 RMB250,000¹ to GBP930,000². 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.

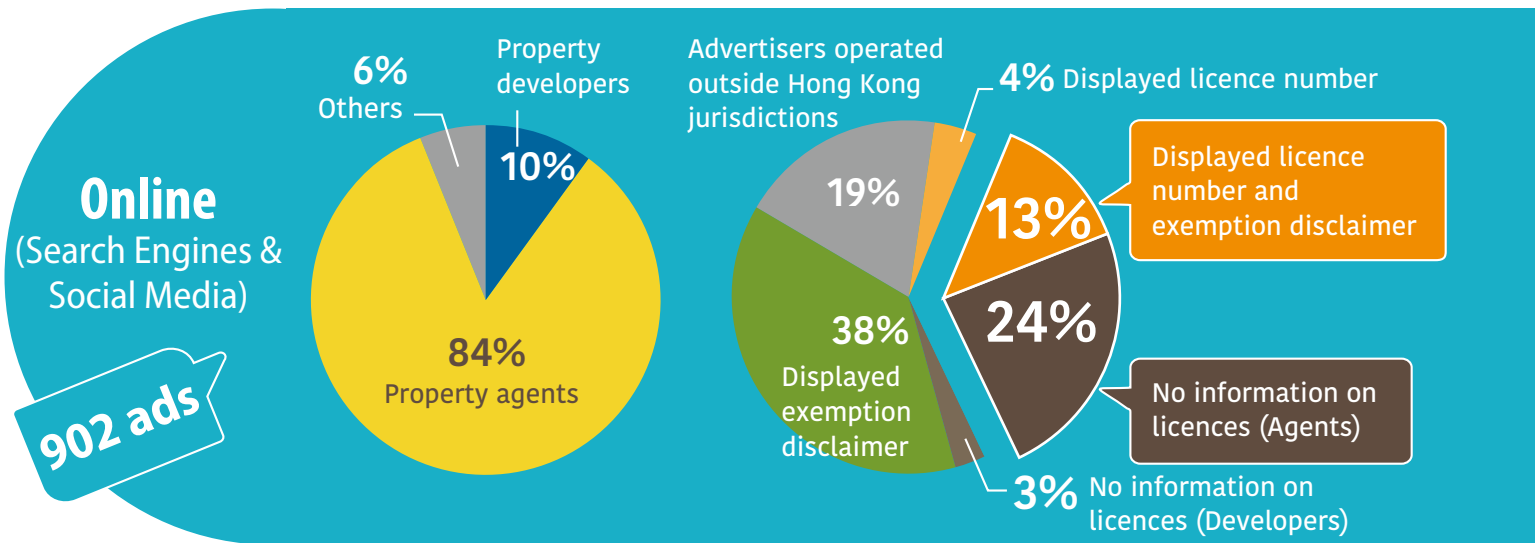
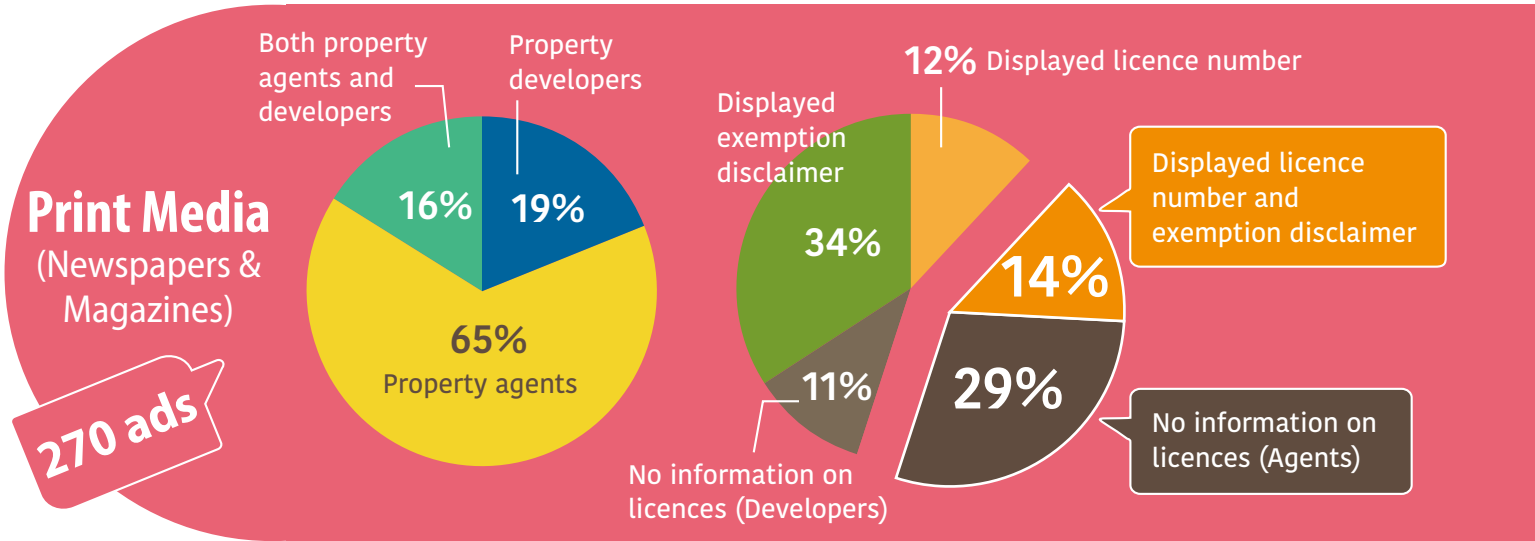
The findings from the mystery visits showed that the licensing status of agents and their salespersons could be confusing. In respect of the 15 unlicensed agents visited, only 1 of them provided the relevant disclaimer under the Exemption Order in the pamphlets, leaflets and name card distributed. For 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*

Nature of Advertisers

Licence and Disclaimer Disclosure



* Survey period November - December 2020

Common Issues

Interest-free instalment loans
特享20個月免息分期

包2年12%租金回報

Rental guarantee

Free "gifts"

送三年定期高息戶口

港幣20萬輕鬆入場

Low entry price point without details

Immigration advantages

黃金簽證簡介
購買價值超過35萬或50萬歐元的房產，就有資格申請黃金居留許可簽證

- 只要持有黃金居留許可簽證滿五年，就可以申請永久居留身份；滿六年，即可申請成為葡萄牙公民及入籍歐盟
- 不用坐移民監，每年只要住滿7天便可。一人申請，配偶和子女，即全家，也可以一齊移民

1 Questionable Claims as Bait

3 Problems in Licence and Liability/ Exemption Disclaimer Disclosure

地點：香港

- 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

英國自住投資全攻略

£20萬以下由南部揀到北部

最大化現金流

英鎊低水

送感恩節大禮包
價值港幣**15萬**

in the same advertisement

2 Confusing Information

墨爾本東面高端華人區

別墅連地皮大型屋苑

坐落DEAKIN大學區 | 呎價港幣\$2,200起

限量322套

No clear statement whether the property is completed or uncompleted

日本物業投資

根據日本国土交通省最新公布，二世古(ニセコ/NISEKO)連續3年成為全日本地價升得最犀利地方，足足有58%升幅。東臨有羊蹄山，北望安努普里山脈，更有不少世界知名的滑雪場，以及眾多富含各種礦物質的溫泉，吸引了世界各地而來的觀光客前來，近日更有消息指豪華酒店品牌及集團亦將拓展版圖至北海道二世古，開發度假村項目，可見該區之投資潛力。

現全新二世古度假村正式登場，鄰近二世古 Grand Hirafu 滑雪場，及李氏集團 The Park Hyatt Niseko，位置優越！鄰近超市、餐廳、酒吧及大型溫泉。

only an approximate location as property description

Green Star

最新一期
低密度公寓
在港首賣極搶手!

結合全球首個14萬呎
六星環保商場

免費投資講座
主題：墨爾本各大華人區全面大比拼 自住投資揀邊區
BURWOOD EAST | BOX HILL | DONCASTER | GLEN WAVERLEY
長假商場次星期六下午1點 | 星期日 下午4點 | 尖沙咀場次星期六下午4點 | 星期日 下午1點

親體會費用全免 歡迎致電查詢及預約
與你的專業顧問

Stephen 9973 Eric 6931 Jason 6057

墨爾本Burwood 11月28至29日 (星期六日) 星期六上午11時至下午1時

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 stakeholding 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 subsection 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

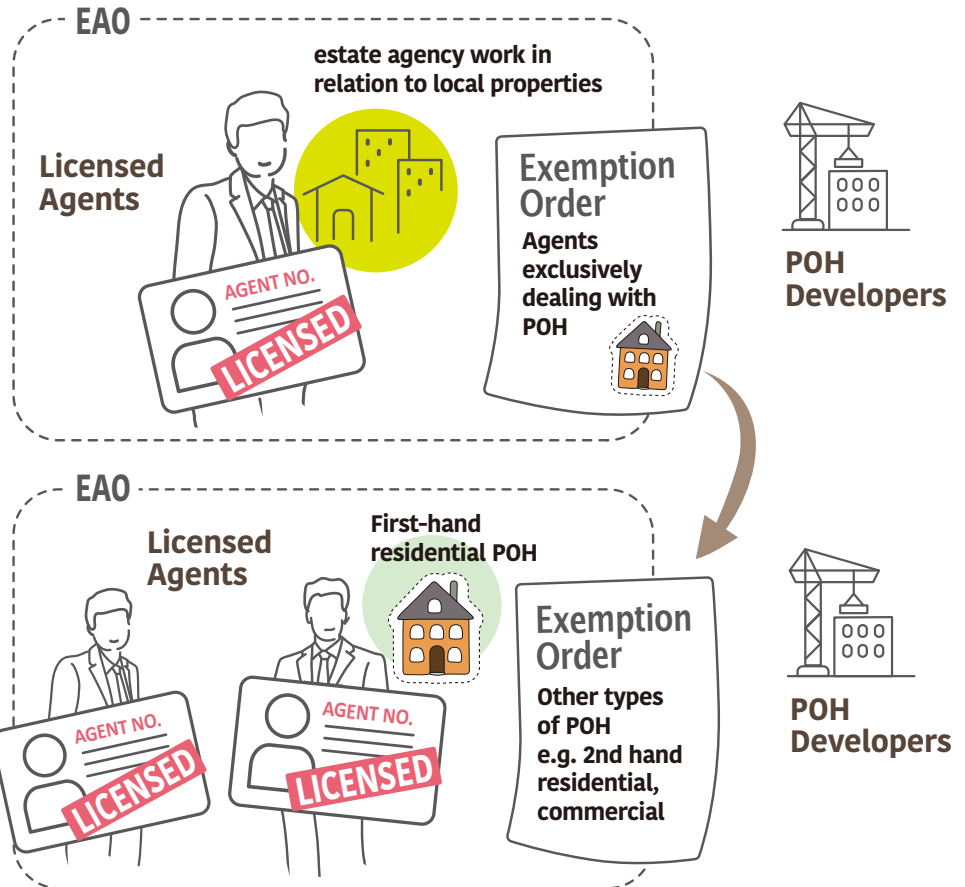
Recommendations and the Way Forward - POH

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

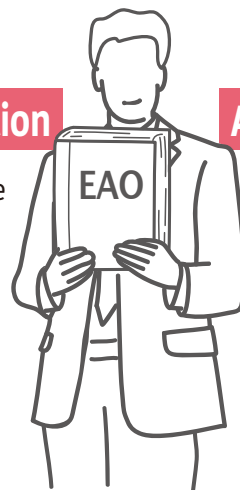


2

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

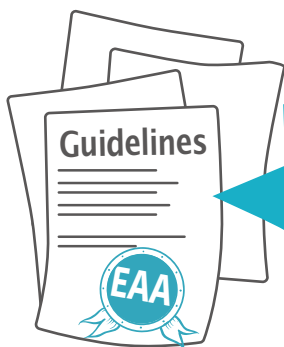


EAO s44 Advertisements

- 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

COOLING-OFF

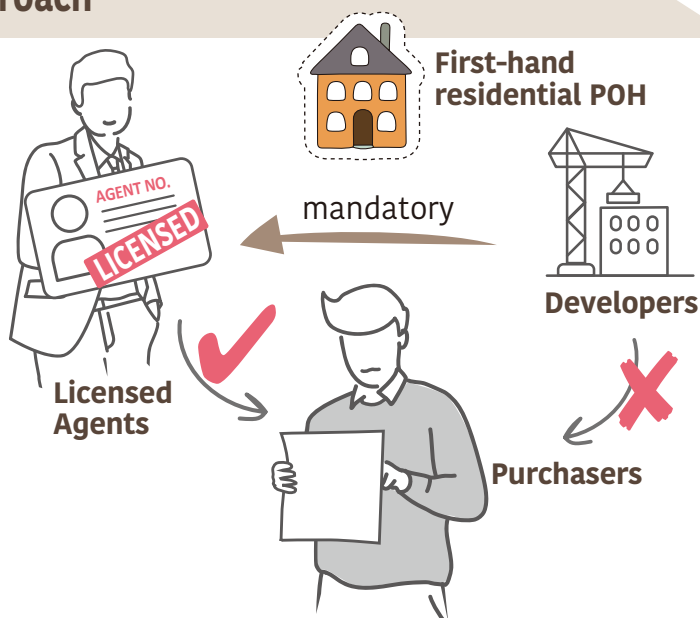
Introduction of a mandatory cooling-off period for reservation fees

- ≥ 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



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.

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.



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