

**REPORT OF THE
WORKING GROUP ON THE
ESTATE AGENTS BILL**

**The Hong Kong Institute of Surveyors
March 1996**

"Estate Agents Bill"

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EXECUTIVE SUMMARY

Efficiency of the Property Market

- 1) The operation costs of estate agents will inevitably be increased in order to comply with all the requirements stipulated in the Bill. Such increase in cost will have bearing on the commission to be charged. (para 2.2)
- 2) In respect of aged properties, there will be difficulties in satisfactorily complying with the mandatory requirements. There will be reluctance in accepting instructions to deal with aged properties because of higher risk and operation costs. Efficiency of this sector of the market will be adversely affected. (para 2.3)
- 3) A central data back should be set up to assist estate agents to comply with the requirements in respect of information to be provided. Implementation of provisions of the Bill should be in different phases in line with the advancement of the supporting facilities. (para 2.4 and 2.5)
- 4) Property developments are usually carried out by subsidiaries or joint-ventures with marketing being handled by another subsidiary agency company. It is necessary to consider whether it is appropriate for the Bill to cover such agency arm of developers. (para 2.6)

Preliminary (Part I)

- 5) The definition of the terms "client", "Estate Agency Work" and "Estate Agent" should be amended to avoid the classical problem of circular reference and other technical problems. (para 3.1-3.5)
- 6) The proposed exemption for lawyers and accountants is too wide and more precise definitions are required. Public tender is common method of marketing for real estate properties and should be explicitly covered by the Bill. (para 3.6 and 3.7)

- 7) Members of the Hong Kong Institute of Surveyors - General Practice Division and Registered Professional Surveyors - General Practice Division should be exempted from the Bill. They are already regulated by the Institute which has been established under the Hong Kong Institute of Surveyors Ordinance or by the Surveyors Registration Ordinance. The punishment of expulsion is adequate for profession in most cases. Even exemption is granted, professional surveyors will still be subject to the existing criminal and civil liabilities under common law and other statutes. Actually, no complaints have ever been received against professional surveyors in Hong Kong in connection with their estate agency practice. (para 3.8 -3.12)

Estate Agents Authority (Part II)

- 8) Although substantial powers are required for the efficient operation of the Estate Agents Authority, a system to monitor the performance of the Authority is necessary. Such function will be performed by the Secretary of Housing and this arrangement is anticipated to be satisfactory. However, the composition of committees under the Authority should be defined more clearly. (para 4.1 - 4.2)

Registration and Licencing (Part III)

- 9) Indication on the duration of "relevant period" is necessary for forward planning. The Authority should play active role in education and promotion of standards and status of estate agents. (para 5.2 & 5.3)
- 10) Some flexibility should be allowed for the Authority to deal with the publicing of fresh applications and renewals. Licences should be renewed automatically subject to certain conditions. (para 5.1 - 5.7)
- 11) The terms "effective control" and "good character" should be defined clearly in the Bill. (para 5.8)

Investigations and Discipline (Part IV)

- 12) A panel comprising appropriate persons should be established and investigators will be chosen from the panel. Members of the proposed panel should not act as members of the Appeal panel and tribunals for natural justice. (para 6.1 - 6.3)

Estate Agents' Duties, Liability and Advertising (Part V)

- 13) The reasons for providing clear and accurate information on particulars of properties are understood. However there will be problems in implementing those requirements since not all the required information is available from the Land Registry. The establishment of a central data bank is essential for implementation of all these requirements. It will be better for most of the requirements on information to be deleted from the main Ordinance. The Estate Agents Authority can deal with these separately by means of regulations and the Authority is empowered to do so. Statutory defence should be added to the Bill as well. (para 7.1)
- 14) It is unfair to presume knowledge of information by estate agents and the burden of proof should be on the complainant. (para 7.10)
- 15) In respect of disclosure of interest, more clear definition is required. In some cases, it is immaterial whether estate agency agreement is in existence or not. (para 7.11)

Miscellaneous (Part VII)

- 16) We appreciate the intention to codify the existing criminal liabilities to give sufficient deterrence. However, it is considered not appropriate to create new criminal liabilities for estate agents, such as for merely late filing of accounts or notice. With positive licensing, revocation of licence or fines should be adequate and are comparable with other western countries. (para 8.1)

- 17) Self-discrimination should be a valid ground for refusal to answer questions as basic human right. (para 8.2)
- 18) The subsidiary regulations under the proposed legislation should be made by the Secretary for Housing instead of the Authority. (para 8.4)
- 19) In respect of the composition of the Estate Agents Authority, people whose business only partially related to estate agency work should be allowed to sit in the Authority under Category B. Professional bodies should have seats in the Authority. Two seats for the Hong Kong Institute of Surveyors are considered to be adequate.

摘要

物業市場之效率

- 1) 爲了符合草案之各種要求，地產代理之經營成本將無可避免地增加，這些成本上漲將影響佣金之水平。(2.2段)
- 2) 對於較舊之物業，將有困難去符合建議中之法定要求。由於高成本及高風險，物業代理對接受較舊物業之委托將有所抗拒，物業市場的效率將受到不好影響。(2.3段)
- 3) 應該建立中央資料庫以便幫助地產代理提供法例要求的資料。有關法例的執行必須要與支援設施的建立進步配合。(2.4至2.5段)
- 4) 物業發展通常由地產發展商之附屬公司或合資公司進行，而銷售則交由另一附屬代理公司處理。因此有需要考慮是否應把該等附屬代理公司納入該草案之範圍。(2.6段)

導言 — 第I部

- 5) 有關"客戶"，"地產代理工作"，和"地產代理"的定義出現相互參照和其它技術問題，需要作出修改。(3.1-3.5段)
- 6) 對給與律師和專業會計師的豁免過於廣範，有需要作出明確的界定。公開投標是一種常見的出售物業方式，應明確包括在草案的管制範圍。(3.6—3.7段)
- 7) 香港測量師學會的產業組會員和註冊專業測量師—產業測量組應獲得豁免受該草案監管。因他們已受香港測量師學會—根據香港測量師學會條例成立，或測量師註冊局—根據測量師註冊條例成立，所監管。對專業人仕而言，驅逐出會已是很足夠之處分。算獲得豁免，專業測量師依然要承擔現時在不成文法和法例中的刑事和民事責任。事實上，專業測量師在過去從未有受到在從事物業代理業務方面的投訴。(3.8—3.12段)

地產代理監管局 — 第II部

- 8) 要建立有效的地產代理監管局，廣範的權力是必須的，但同時也需要有一套監督的機制。房屋司將在這方面扮演重要角色，估計這將是令人滿意的安排。不過對監管局下面的委員會的組成，應進一步明確規定。(4.1—4.2段)

登記及發牌-第III部

- 9) 對過渡期的長短應有指示，以便對未來作出計劃。監管局在教育和提高水平和地位方面應扮演積極角色。(5.2—5.3段)
- 10) 對有關公佈新申請和續期申請方面，應給與監管局一定的靈活性。地產代理牌照除在某些情況下，應自動獲得續期。(5.1—5.7段)
- 11) 有關"實際控制"和"品性不良"的定義在草案中需明確界定。(5.8段)

調查及紀律制裁 — 第IV部

- 12) 調查員應從一特定小組中挑選，該特定小組將由適當人選組成。為保證公平原則，特定小組成員不可出任上訴委員團及審裁小組成員。(6.1—6.3段)

地產代理的責任，法律責任及廣告宣傳 — 第V部

- 13) 對提供清楚及準確的物業資料的理由充分理解，但由於該等資料並非全部可從土地註冊處獲得，因此在執行上將有實際困難。成立一中央資料庫對推行該等要求將十分有需要。建議將該等有關物業資料的要求從草案中刪除，交由將來的地產代理監管局分開處理，以規例形式執行，監管局在草案中已獲得這方面的適當授權。在草案中也應加入法定的抗辯理由。(7.1段)

- 14) 地產代理被推定為曾知有關資料是不公平的，舉證的責任應在投訴一方。(7.10段)
- 15) 對利益之公開，要有更明確的界定。在某些情況下，是否已簽署地產代理協議並不重要。(7.11段)

雜項條文 — 第VI部

- 16) 我們欣賞對現時刑事責任給與明確說明的意圖，以收有效的阻嚇力。但不應增加新的刑事責任，如遞交會計或通知。在發牌制度下，撤銷牌照或罰款應已足夠，同時和其它西方國家的處理也一致。(8.1段)
- 17) 導致其本人入罪應該是容許拒絕回答問題的理由，以符合基本人權。(8.2段)
- 18) 有關規例的制定應由房屋司負責。(8.4段)
- 19) 對於地產代理監管局的組成，如果只是部份業務是關於地產代理的人仕，也應容許在B類下出任監管局成員。專業團體應在監局中有一定席位，香港測量師學會應可獲給與2席。

CHAPTER 1

INTRODUCTION

- 1.1 The Estate Agents Bill was published in the Government Gazette on 17th November 1995. The preamble of the Bill is as follows:

"Provide for the establishment of a body to be known in the English language as the Estate Agents Authority and in the Chinese language as "地產代理監管局" and to define its functions, for the licensing of estate agents and certain salespersons, the regulation of estate agency work and certain agency agreements, and for matters related or incidental to the foregoing.

- 1.2 The Bill will have tremendous impact on the work of estate agents and the functioning of the property market. An adhoc group under the Hong Kong Institute of Surveyors (the Institute) has been established to study and to comment on the Bill.

- 1.3 Members of the adhoc working group are as follows:

Mr Augustine Wong (Convener)
Mr Lau Chun Kong (Deputy Convener)
Mr Andrew Chan
Mr Edmond Cheng
Mr Raymond Foo
Mr Francis Lam
Mr Patrick Lo
Mr Vincent Sung
Mr Stephen Yip

- 1.4 The adhoc working group has had meetings amongst members of the Institute and with the Housing Branch of the Government to go through the provisions in the Bill. Two open forums for members of the Institute were held in December 1995 and January 1996 to seek the opinion of our members on the Bill and our recommendations. Mr C Y Leung, President of the HKIS, Mr Stephen Yip, Chairman of General Practice Division of the Institute and Mr Augustine Wong, Convener of the adhoc working group of the Institute have also made a presentation to the Legco Bills Committee on the Bill.
- 1.5 This report contains the findings and comments of the adhoc working group on the Bill. The main objective of this report is to ensure that the future legislation will be capable of practical implementation in Hong Kong for the people and companies involved in estate agency business. On the other hand, reasonable protections will be offered to consumers whether buying or selling or leasing real estate.

CHAPTER 2

EFFICIENCY OF THE PROPERTY MARKET

2.1 Cost of Sale

The commission usually charged by estate agents for the sale of properties in Hong Kong is normally not more than 1 percent of the consideration. Combining other transaction costs such as stamp duty and legal costs, the costs to a purchaser in Hong Kong for a local property would be around 4.5 per cent.

The rate of commission in Hong Kong is much lower than the commissions charged by estate agents in western countries such as the United States, Canada and Australia.

2.2 Operation of Estate Agents

In order to comply with all the requirements prescribed in the Bill and to avoid the severe punishment, the rate of commission charged will extremely likely be increased to cope with higher operating costs and risks involved in the operation of the estate agents. Moreover, it will be inevitable that different departments within a firm will be formed into separate subsidiary companies to reduce the risk. As an example, there will be ABC (Residential) Co Ltd, ABC (Office) Co Ltd, ABC (Retail) Co Ltd, ABC (Industrial) Co Ltd, ABC (Investment) Co Ltd and ABC (Project) Co Ltd under the ABC (Holdings) Co Ltd. The administration costs involved will be huge.

2.3 Aged Property

It will be inevitable that some of the information required to be provided may not be available in respect of properties completed in the 70's and earlier. Estate agents handling such properties will have more difficulties in complying with the mandatory requirements satisfactorily or confidently.

Therefore higher risk will be faced by those estate agents. As a result, the commission charged for the aged properties will be higher than for modern properties with adequate information. Alternatively, there will be less estate agents willing to deal with aged properties and this will reduce the available stock and liquidity in the market. The efficiency of the property market will be adversely affected.

2.4 Central Data Bank

One of the possible solutions is to establish a Central Data Bank within the Government where all the mandatory information will be available. Moreover, the reliance on information available from the Central Data Bank could be a statutory defence for estate agents to discharge their duties under the Bill. Should incorrect information have been obtained from the Central Data Bank, would compensation be payable for loss suffered by either the vendors or the purchasers? The implementation of most of the requirements for information to be provided by estate agents under the legislation must be linked with the development of the Central Data Bank.

2.5 Phased Implementation

The Bill no doubt sets very high standards for estate agents. However it will be inevitable that it will take long time to achieve this target. The establishment of the Central Data Bank will take some time as well. Moreover, it will be impossible for the Central Data Bank to cover all properties in Hong Kong initially. For example, agricultural land in the New Territories will be a very complicated sector. Therefore, the implementation of the provisions in the Bill should be phased depending on the advancement of the supporting facilities. In respect of information to be provided, it may cover initially residential properties completed on or after 1980.

2.6 Developers

Although the Bill exempts employees dealing with properties owned by their employers and owners handling the sale directly, it will still create problems for developers disposing their properties. In Hong Kong it is not uncommon to find properties owned and developed by Company S, (a shelf company for developing a particular property only), a wholly owned subsidiary of Company H (the developer). In case of sale to the public, another subsidiary company A (an estate agency company) of Company H will handle the disposal. It is doubtful whether the agency arm of Company H will be exempted because of different legal entities.

2.7 Moreover, joint-ventures in property development is very common in Hong Kong. Usually one of the joint-venture partners will be appointed as project manager and sales agent. In such case, the developer will also be covered by the Bill.

CHAPTER 3

PRELIMINARY (PART I)

3.1 The major problems found in Part I of the Bill are with the definitions of some of the terms and the general exemption for lawyers and accountants.

3.2 "Client"

"means any person who whether on his own behalf or on behalf of another person retains or otherwise uses the services of, or otherwise engages or employs, an estate agent".

Problems are expected in cases where an estate agent being retained by an owner on an exclusive basis to handle the disposal of property. There is a clear principal and agent relationship between the owner and the estate agent in such case. In marketing the property, potential purchasers will make enquiries to the estate agent and certain information will be given to them. Since the estate agent is retained by the owner with fees payable only by the owner, a contractual duty is owed to the owner only and not the potential purchasers. However, a potential purchaser merely obtaining information and making enquiries may be interpreted as using the services of an estate agent and may fall within the meaning of "client" under the Bill.

3.3 Such definition is therefore considered to be too wide and potential purchasers in the above example should not be classified as client. We suggest the deletion of the phrase "or otherwise uses the services of" from the definition of "client".

"Client", "Estate Agency Work" and "Estate Agent".

3.4 In the definitions of the above three terms, there is a classical problem of circular reference. Each of the terms are used in the definition of the other two terms. The definitions under the UK Estate Agents Act 1979 will be of great reference for clearer meaning of such terms.

3.5 Estate Agent

"subject to subsection (3), means a person who in the course of a business (whether or not he carries on that or any other business) does estate agency work."

Following the decisions of the courts in the UK in the case of *Blakemore v. Bellamy* <1982> 147 JP89 Divisional Court and *Davies v. Sumner* <1984> 3 All ER 831, House of Lords, if someone carries on something for the purpose of the other business, e.g. for hobby or merely service of members, such situation is not in the course of a business and will not be within the definition of "estate agent" in the Bill. Thus no licence is required. Bearing in mind the intention of the administration as indicated in S15 of the Bill, any person who intends to carry out the functions of an estate agent, whether or not for payment or other remuneration (whether monetary or otherwise), will be required to hold a licence. We support the spirit of the Bill that to protect tenant, purchasers and owners, anyone who carries out the estate agency work must have a valid licence. Suitable amendments are thus required.

3.6 Exemption under the Bill

Under subsection (2)(b) of section 2 of the Bill, the proposed legislation will not apply to anything done in the course of practising his profession by a solicitor, notary public or a professional accountant or by any person employed by him. Thus the proposed legislation will not encompass any estate agency activities done by these professionals. Such exemption is similar to the exemption under the Estate Agents Act 1979 in UK. However, the system in UK is negative licensing while the proposed system in Hong Kong is positive licensing. The exemption proposed is too wide to

the extent that lawyers and accountants will be completely exempted from all provisions of the Bill.

- 3.7 Public tender is also a common method of marketing for real estate. It is quite common to find solicitors handling public tender on behalf of their clients. Solicitors or accountants undertaking such work should not be exempted from the Bill.
- 3.8 Since time immemorial, professional surveyors have actively involved in the development, marketing, sales and acquisition of properties in Hong Kong. It is surprising to note that exemptions are not afforded to professional surveyors. It is well known that there has never been any complaint at all against professional surveyors in Hong Kong in connection with their estate agency practice. Members of The Hong Kong Institute of Surveyors practising estate agency are qualified through extensive and vigorous education, examinations and test of professional competence and they should be distinguished from others.
- 3.9 The Institute exercises high practice standards and offers to clients of members' services complete and totally open channels for complaints and enquiries. The Institute is vested with disciplinary powers including the strong deterrence of removals from the professional register. The Institute is now looking into the need for initiating inquiries into members practice in some cases in the absence of complaints by clients or members of the public.
- 3.10 Furthermore, the Surveyors Registration Ordinance was passed in 1991 to regulate the work of Registered Professional Surveyors, through largely the Surveyors Registration Board adding to the regulations imposed already by the Hong Kong Institute of Surveyors. Unless members of the Hong Kong Institute of Surveyors and Registered Professional Surveyors are exempted from the provisions of the Bill, they would be subject to three sets of statutory controls and penalties. The objectives of the Surveyors Registration Ordinance would also be undermined.

3.11 Although there is no provision for punishment of imprisonment in the Hong Kong Institute of Surveyors Ordinance or Surveyors Registration Ordinance, the strong punishment of expulsion is generally considered as adequate for professionals in most cases. If surveyors are exempted from the proposed legislation, they would still be subject to the existing criminal and civil liabilities under common law and other statutes.

3.12 Therefore, we believe that members of the Hong Kong Institute of Surveyors in the General Practice Division and Registered Professional Surveyors - General Practice Division should be exempted from the provisions of the Estate Agents Bill. The exemption for surveyors can be achieved by amending section 2(2) of the Bill.

CHAPTER 4

ESTATE AGENTS AUTHORITY (PART II)

4.1 Estate Agents Authority

We expect the Estate Agents Authority when established will be responsible for the education, regulation and promotion of integrity and competence of estate agents and salespersons. With this in mind, it is necessary to give wide and substantial powers to the Estate Agents Authority. However, it is necessary to establish a system to monitor the performance of the Estate Agents Authority. Under the proposed legislation, such monitoring function will be performed by the Secretary for Housing and in most cases, such arrangement is anticipated to be satisfactory.

4.2 Committees

Committees can be established to exercise powers delegated by the Authority. Members of the committees may or may not be members of the Authority. It is necessary to state clearly who will be eligible to be members of the committees. Alternatively, such appointment shall be subject to the approval of the Secretary for Housing. Bearing in mind the extensive powers of the Authority, it is necessary to have such system of control.

CHAPTER 5

REGISTRATION AND LICENSING (PART III)

5.1 Section 15

We agree that in order to cover adequately all those who carry out estate agency work, it is necessary to require licensing. Moreover, in order to close certain loop-holes and to offer protection to all users of estate agents services, it is necessary to cover all cases whether or not payment or other remuneration (whether monetary or otherwise) are offered. To reflect such case properly in the legislation, the term "business" should be clearly defined.

5.2 Section 18 - Relevant Period

Within the relevant period, the requirements for licensing will be minimal so that almost all the persons or companies doing estate agency work right now will be able to obtain the licence. This arrangement is appropriate in order not to cause problems for people doing estate agency work now. The future Estate Agents Authority should state the duration of such relevant period and what measures the Authority will take to ensure training courses will be offered to assist the persons doing estate agency work now to obtain the qualifications set down by the Authority for licensing.

5.3 Education will be a major area to be dealt with by the Authority in order to promote the standards and status of the estate agents. This can be done by close liaison with educational institutions and professional bodies involved in real estate related activities. The Hong Kong Institute of Surveyors is willing to offer assistance to the Authority in this area.

5.4 Effective Control

The term "effective control" is used in section 20 (1)(b) in granting licence to a company. This term should be defined more clearly under section 40 to avoid ambiguity.

5.5 Section 22

It is proposed that any application for the grant of a licence shall be published in (a) the Government Gazette, (b) at least 1 Chinese newspaper, and (c) at least 1 English newspaper. Since the number of applications will be quite numerous, it will be costly to comply with such requirement. Merely publishing in the Government Gazette should be adequate or some flexibility should be given to the Authority.

5.6 Section 23 - Renewal

It is proposed that all applications for renewal of the licences will be treated in the same manner as fresh application. Such proposal is found to be not necessary. Bearing in mind the time, costs and volume of work involved in the renewal of licences, all estate agents' licences should be renewed automatically upon application. If there have been valid complaints against the estate agents or there are other good reasons, the application for renewal can be rejected. Such revised system will not affect the Authority's power to terminate the licences of those estate agents who are considered to be incompetent. If the Authority is not satisfied with the performance of an estate agent, the Authority has already got the power to carry out investigations and to take appropriate action at any time before the expiry of the licence.

5.7 On the same reasons as stated in 5.6, the requirements for publishing the applications for renewal is not necessary. Any customers or persons, who believe an estate agent should not be granted the licence, have the chance and right to lodge their objections or complaints with the Authority at any time. Such objections or complaints can be dealt with by the Authority immediately or upon the renewal of the licence.

5.8 Section 27 - Objections

One of the grounds for objection to the grant or renewal of a licence is that an individual is not of good character (S27(2)(ii)) or that a director or officer of the company who is in effective control of its business as an estate agent is not of good character. Unlike "fit and proper", the term of "good character" is not defined in the Bill. In order to avoid dispute, it may be necessary to define the term "good character" in the Bill.

CHAPTER 6

INVESTIGATIONS AND DISCIPLINE (PART IV)

6.1 The Bill gives very extensive powers to the Estate Agents Authority to investigate matters concerning licensees. Although it is necessary to give sufficient powers to the Authority, it is essential to establish a system to make sure that there will not be any abuse of such power.

6.2 Section 29(1) - "Investigator"

The Authority may appoint in writing 1 or more of its employees, or 1 or more other persons to act as the investigator. The investigator has extensive powers under the Bill and it is inappropriate that anyone can be appointed as the investigator. A panel comprising appropriate persons who either have the relevant professional knowledge or are of reputable standing should be established. The members of the panel should be appointed by the Secretary for Housing. Investigators should then be chosen from such panel. This will enhance the standing of the investigator and avoid abuse of powers.

6.3 Appeal Panel and Tribunals

To ensure the compliance of natural justice, members of panel under 6.2 should not act as members of the Appeal panel and tribunals. The establishment of investigators panel, Appeal panel and Tribunals is not a new creation. Such system can be found in the framework of Town Planning Ordinance.

CHAPTER 7

ESTATE AGENTS' DUTIES, LIABILITY AND ADVERTISING (PART V)

- 7.1 We are very concerned by the detrimental impact on the efficiency of all the sectors of the property market for the following reasons :
- (a) Relative to the growing demand for investment, for housing and other purposes, the supply of real estate in Hong Kong has been scarce. At any one time, the amount of space available for occupation through lettings or sales in the market is very limited. Over the years, Hong Kong has developed a very efficient market whereby the transaction cost is low, the transaction time very short and the whole procedure of sourcing or disposing of real estate very efficient. This efficiency has been clearly demonstrated by the low vacancy rates, even when there are strong speculative activities, in Hong Kong's buildings relative to other markets, such as Singapore and Taiwan. This efficiency also helps alleviate the supply/demand imbalance. The rather rigid procedure laid down in the Bill, to be applied indiscriminately to all sectors of the market and to all who practise agency in the market, will inordinately lengthen the sourcing, negotiation and transaction process, and diminish the liquidity of all real estate, increase carrying costs and increase vacancy rates. Both private and social costs are very considerable.
 - (b) Estate agents will be required to put a lot of efforts to comply with the procedures and requirements laid down by the Bill on the companies. It will be inevitable that different departments will be set up under separate subsidiary companies in order to reduce the risks.
 - (c) The cost to comply with the Bill will be expensive to every estate agent, regardless of their scale of operation. An estate agent will be required to research, maintain and update various data about a property throughout the whole marketing period. Obviously, some of the

requirements will be beyond the ability of most small scale estate agents. Even for the bigger estate agencies, these will have a financial implication, which, in a free market economy, will be paid by the consumer in the end.

- (d) As we are all aware, the information specified in the Bill to be provided by an estate agent are not all readily available from Government Departments including the Land Registry, the Buildings Department or the Rating & Valuation Department. In particular, very few properties have their floor areas, whether saleable areas or gross floor areas clearly stated in the Instruments registered in the Land Registry. As another example, an estate agent is required to provide the user clause under the Crown Lease but we believe that the interpretation of the user clause is more appropriately the scope of work of the lawyer handling the conveyancing rather than that of an estate agent.
- (e) Instead of requiring an estate agent to provide all the data specified in the Bill, we consider that the purchasers' interests could be protected equally if not better by amending the Bill to include certain statutory defences and exclusions whereby the reliance of data shown in the reports prepared by lawyers, architects or surveyors will be deemed to comply with such requirements.
- (f) Although we agree that sufficient protection should be given to purchasers, we note that in the Bill, the important Common Law rule of "Caveat Emptor" will be abandoned as far as real estate buying and selling is concerned. We believe that any presumption of knowledge of information on the part of an estate agent is dangerous, bearing in mind the severity of the punishment! We also believe that such a presumption is not fair after considering the interests and the basic rights of the general public, the purchasers and the estate agents.

7.2 Offer - Section 37(1)(a)(v)

An estate agent will be required to inform a client who is a vendor of each offer received as regards the property concerned at any time prior to that at which the client becomes bound by contract to dispose of the property or, in case the client withdraws his instructions, prior to such withdrawal. We support the spirit of this requirement but would suggest clear definition of "offer" in this case. For example, any indication of price or counter offer by potential purchasers would constitute an offer only if it contains the following information :

- (a) The Price;
- (b) Payment Terms; and
- (c) Completion Date.

Casual or even frank indication prices must be distinguished from genuine offers.

7.3 Section 37(2)(a)

Ownership and Encumbrances

Information is supplied to potential purchasers regularly and almost daily. It will be difficult to comply with such requirement. However, we agree that the estate agent should have knowledge of ownership and encumbrances in order to protect the purchasers. As a compromise, we would suggest that the estate agent should carry out search in the Land Registry upon receiving the instruction in order to ascertain whether the person who instructs the agent to dispose of his property is in fact the owner. Thereafter, the owner will be required to inform the agent on any change and the agent will not be liable for subsequent updating.

7.4 The Land Registry should ensure that it will be possible for small estate agents to obtain information efficiently and without undue delay.

7.5 Floor Area - S37(2)(b)

Areas, whether gross, saleable or internal floor areas, are not readily available from the Land Registry. It is difficult for estate agents to comply with this requirement. For example office buildings sold after a period of owner or tenanted occupation, the completion of construction, the floor area is very rarely stated in the floor plans registered in the Land Registry. No. 9 Ice House Street is a good example of this.

7.6 Unless there is a central data bank where floor areas are available, the imposition of such a duty on estate agent would be an impossible order. The Estate Agents Authority or a Government department should set up such central data bank before the implementation of such requirements. Moreover, the reliance of information obtained from these sources or reports prepared by professional such as architect or surveyors should be deemed to be compliance with the requirement.

7.7 Age of Property - S37(2)(c)

Similar to floor areas, occupation permit or certificate of compliance may not be available from the Land Registry. Although copies of occupation permit can be obtained from the Buildings Department, the process is very time consuming. Although we support the spirit of this sub-section, the implementation should be subsequent to the establishment of the central data bank.

7.8 User Clause - S37(2)(d)

The interpretation of the user clauses in Government leases is more appropriately within the scope of professionals such as lawyers and surveyors. It will be too demanding to expect an estate agent to be able to read through a government lease and state clearly the user contained therein. Moreover, quite a lot of government leases are in old-fashioned form and the user is not stated directly and clearly. For example, some of the government leases may contain only prohibitions against offensive

trades. In some extreme cases, the lease terms and user clauses are not traceable. At times the Land Registry may not be able to offer any assistance (*Niceboard Development Ltd v. China Light & Power Co Ltd* 1994HKLT).

7.9 Even if some simple descriptions are available from the Land Registry, it may be very misleading for the general public. For example, non-industrial use may mean that service apartment is allowed. However, it may not be the case after considering the town planning zoning, the deed of mutual covenants, master layout plans etc. The problem is much more serious in the New Territories. Therefore, although we appreciate the benefits of stating the user under government lease in the particulars, it is difficult and too demanding to do so. We would suggest the deletion of S37(2)(d) and leave the Authority to review in due course under S37(1)(a)(iii).

7.10 Presumption of knowledge S37(7)(a)(ii)

It is unfair to presume knowledge of information by estate agents as found under S37. The burden of proof should be on the complainant. The reference to subsection (1)(c) in this subsection is incorrect and should be made to subsection (1)(a).

7.11 Disclosure of interest

Problems will occur for large estate agents companies and in connection with listed companies. It is unclear whether shareholder of a listed company should be regarded as member of the company for the purpose of this Bill. Moreover, disclosure of interest is only required after execution of an estate agency agreement. In some cases, it is immaterial whether estate agency agreement has been executed or not. For example, if the estate agent is actually the beneficial owner of the property, this must be disclosed even if the potential purchaser is not his client.

7.12 Accountant's reports - S38

Accountant's report is required to be submitted to the Authority within 3 months from the expiry of the accounting period. Such period is considered to be too short. At least one more month i.e. upto 4 months, should be allowed.

7.13 Vicarious liability of estate agents - S45

- It should be stated clearly that, subject to S44, employers are not liable for the criminal liabilities of their employees.

7.14 Advertising - S 47(1)(a)

It is not necessary to control the advertisement of an estate agent about his business only and not particulars of properties. The use of the word "inaccurate" may be confusing. "Inaccurate" should be defined as to mean inaccurate to a material degree.

CHAPTER 8

MISCELLANEOUS (PART VII)

8.1 Punishment for non-compliance of the provisions of the Bill

We appreciate the intention behind codifying criminal liabilities of estate agents in order to give sufficient deterrence. However, we are surprised to note that the Bill carries the maximum penalty of imprisonment, for non-compliance of some mere procedure, such as the late filing of accounts.

We have studied similar estate agency legislation in other countries and our findings are that punishments are mainly limited to fines and/or suspension/revocation of licence. We note that punishment by imprisonment is only used in the State of Victoria, Australia. The provisions in these countries are summed up below :

In the U.K., it is an offence to make false or misleading statements in the course of the business of an estate agent. The penalty for being convicted is a fine (not imprisonment!) which is currently not exceeding 5,000 pound Sterling in Magistrates Court and unlimited if the conviction is in the High Court. Both the offence and statutory defence are clearly defined in the Estate Agents Act 1979 and the Property Misdescription Act 1991.

In Singapore, it is an offence for a person to carry on a trade or business as a house agent without licence. Such offence is liable on conviction to a fine (not imprisonment) not exceeding S\$2,000.

In the New York State, U.S.A., the law allows the Department of State to punish the estate agent / sales person on certain non-compliance of the law. The punishments include :-

- 1) revocation/suspension of the licence
- 2) A fine not exceed US\$1,000 and
- 3) a reprimand.

Summing up, we believe that for breaches under the Bill, revocation of the license and/ or fines should be adequate because anyone who has suffered damages due to mis-conducts of estate agents still has the right to sue for damages. In respect of the criminal liabilities, we have no objection to codify, the existing criminal liabilities in the Bill.

8.2 Incrimination S55(2)(d)

A person shall not be deprived of his basic right to refuse to answer questions put to him in any investigation or enquiry on the ground of self-incrimination.

8.3 Offences - S56

Punishment by imprisonment may be necessary if negative licensing is adopted. In the present proposal of positive licencing, expulsion is adequate. The most important subject is for the Estate Agents Authority to maintain high standards in respect of education and conduct.

8.4 Regulations - S57

The Estate Agents Authority has the power to make regulations subject to the approval of the Secretary for Housing. Such power is considered to be too wide and the regulations should be made by the Secretary for Housing on advice or recommendations from the Authority.

8.5 Composition of the Authority

The composition of the Authority as proposed in the Bill are as follows :

- (a) Not more than 18 ordinary members plus the Chairman and the Vice-chairman
- (b) Category A - Estate agents (now or previously)
Category B - Professionals and managerial people
Category C - Other suitable people

8.6 Persons whose business only partially relates to estate agency work should be allowed to sit in the Authority under Category B.

8.7 Professional bodies such as the Hong Kong Institute of Surveyors, the Law Society, the Consumer Council etc should have representatives in the Authority in order to provide advice. Such representatives should be nominated by the relevant professional bodies. Two seats for members of the Hong Kong Institute of Surveyors in the Authority under Category B would be considered adequate representation.

摘要

物業市場之效率

- 1) 爲了符合草案之各種要求，地產代理之經營成本將無可避免地增加，這些成本上漲將影響佣金之水平。(2.2段)
- 2) 對於較舊之物業，將有困難去符合建議中之法定要求。由於高成本及高風險，物業代理對接受較舊物業之委托將有所抗拒，物業市場的效率將受到不好影響。(2.3段)
- 3) 應該建立中央資料庫以便幫助地產代理提供法例要求的資料。有關法例的執行必須要與支援設施的建立進步配合。(2.4至2.5段)
- 4) 物業發展通常由地產發展商之附屬公司或合資公司進行，而銷售則交由另一附屬代理公司處理。因此有需要考慮是否應把該等附屬代理公司納入該草案之範圍。(2.6段)

導言 — 第I部

- 5) 有關"客戶"，"地產代理工作"，和"地產代理"的定義出現相互參照和其它技術問題，需要作出修改。(3.1-3.5段)
- 6) 對給與律師和專業會計師的豁免過於廣範，有需要作出明確的界定。公開投標是一種常見的出售物業方式，應明確包括在草案的管制範圍。(3.6-3.7段)
- 7) 香港測量師學會的產業組會員和註冊專業測量師一產業測量組應獲得豁免受該草案監管。因他們已受香港測量師學會 — 根據香港測量師學會條例成立，或測量師註冊局 — 根據測量師註冊條例成立，所監管。對專業人仕而言，驅逐出會已是很足夠之處分。算獲得豁免，專業測量師依然要承擔現時在不成文法和法例中的刑事和民事責任。事實上，專業測量師在過去從未有受到在從事物業代理業務方面的投訴。(3.8-3.12段)

地產代理監管局 — 第II部

- 8) 要建立有效的地產代理監管局，廣範的權力是必須的，但同時也需要有一套監督的機制。房屋司將在這方面扮演重要角色，估計這將是令人滿意的安排。不過對監管局下面的委員會的組成，應進一步明確規定。(4.1—4.2段)

登記及發牌-第III部

- 9) 對過渡期的長短應有指示，以便對未來作出計劃。監管局在教育和提高水平和地位方面應扮演積極角色。(5.2—5.3段)
- 10) 對有關公佈新申請和續期申請方面，應給與監管局一定的靈活性。地產代理牌照除在某些情況下，應自動獲得續期。(5.1—5.7段)
- 11) 有關"實際控制"和"品性不良"的定義在草案中需明確界定。(5.8段)

調查及紀律制裁 — 第IV部

- 12) 調查員應從一特定小組中挑選，該特定小組將由適當人選組成。為保證公平原則，特定小組成員不可出任上訴委員團及審裁小組成員。(6.1—6.3段)

地產代理的責任，法律責任及廣告宣傳 — 第V部

- 13) 對提供清楚及準確的物業資料的理由充分理解，但由於該等資料並非全部可從土地註冊處獲得，因此在執行上將有實際困難。成立一中央資料庫對推行該等要求將十分有需要。建議將該等有關物業資料的要求從草案中刪除，交由將來的地產代理監管局分開處理，以規例形式執行，監管局在草案中已獲得這方面的適當授權。在草案中也應加入法定的抗辯理由。(7.1段)

- 14) 地產代理被推定為曾知有關資料是不公平的，舉證的責任應在投訴一方。(7.10段)
- 15) 對利益之公開，要有更明確的界定。在某些情況下，是否已簽署地產代理協議並不重要。(7.11段)

雜項條文 — 第VII部

- 16) 我們欣賞對現時刑事責任給與明確說明的意圖，以收有效的阻嚇力。但不應增加新的刑事責任，如遲交會計或通知。在發牌制度下，撤銷牌照或罰款應已足夠，同時和其它西方國家的處理也一致。(8.1段)
- 17) 導致其本人入罪應該是容許拒絕回答問題的理由，以符合基本人權。(8.2段)
- 18) 有關規例的制定應由房屋司負責。(8.4段)
- 19) 對於地產代理監管局的組成，如果只是部份業務是關於地產代理的人任，也應容許在B類下出任監管局成員。專業團體應在監局中有一定席位，香港測量師學會應可獲給與2席。