

**The Administration's response to the issues raised at
the meeting of the Bills Committee on the Stamp Duty (Amendment)
Bill 2012 held on 18 February 2013**

Further to our responses to the major comments on the Stamp Duty (Amendment) Bill 2013 ("the Bill") expressed by the deputations and the written submissions received (LC Paper No. CB(1) 692/12-13(01), issued on 8 March 2013), our responses to the submissions from the Law Society of Hong Kong, the Hong Kong Conveyancing & Property Law Association Limited and the Hong Kong Association of Banks are summarised at **Annex** for the Bills Committee's reference.

**Transport and Housing Bureau
April 2013**

**The Administration's responses to the submissions from the Law Society of Hong Kong,
the Hong Kong Conveyancing & Property Law Association Limited and the Hong Kong Association of Banks**

Issues raised	The Administration's responses
<i>The Law Society of Hong Kong</i>	
<p>1. The Administration is requested to provide an analytical review of the goals to be achieved by the Buyer's Stamp Duty ("BSD"), and an analysis of the success or otherwise of the BSD / the Special Stamp Duty ("SSD") within a specified timeframe.</p>	<p><u>BSD</u></p> <ul style="list-style-type: none">♦ The objective of the BSD is to accord priority to Hong Kong permanent resident (HKPR) buyers over non-HKPR buyers under the current tight supply situation.♦ Following its announcement on 26 October 2012, the BSD has significantly curtailed demand from non-local buyers. Stamp duty statistics from the Inland Revenue Department (IRD) indicate that purchases of residential property by non-local individuals and companies (local and non-local) plunged to 318 cases or 4.5% of total transactions in Jan 2013, markedly below the respective monthly averages of 1 089 cases or 13.6% in Jan to Oct 2012 (the period before the announcement of the BSD). <p><u>SSD</u></p> <ul style="list-style-type: none">♦ The objectives of the SSD are to, through combating short-term speculative activities, prevent further exuberance in the housing market which may pose significant risks to our macro economic and financial sector stability, and to ensure the healthy and stable development of the residential property market which is crucial to the sustainable development of Hong Kong as a whole.♦ We have reviewed the SSD introduced in November 2010 in view of the continued

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	<p>exuberant state of the property market.</p> <ul style="list-style-type: none"> ♦ In the first nine months of 2012, i.e. before the announcement of the new demand-side management measures in October 2012, on average there were a total of 15 cases per month for resale within 12 months (including confirmor transactions) which were subject to the SSD. During the same period, the monthly average number of transactions for resale between 12 to 24 months subject to the SSD was higher, at 102 cases. Moreover, the number of such cases has been on the rise, from 83 in March 2012 to 218 in September 2012, as properties bought in the early months after the introduction of the SSD reach the end of the first year of the higher SSD rates. ♦ Given the current tight supply, we see a need to provide a stronger disincentive for speculators and short-term investors. In fact, the enhanced SSD helped cool down the residential property market towards the end of 2012. Transactions in November and December 2012 plunged sharply as speculative activities and non-local demand were significantly reduced. Specifically, short-term trading of residential property (comprising resale before assignment and resale within 24 months) went down to only 245 cases or 3.4% of total transactions in January 2013, markedly lower than the long-term average of 1 570 cases or 17.1% over 1997-2010. ♦ In fact, we note that other jurisdictions have also formulated measures on property market with reference to their specific circumstances. For instance, Singapore has enhanced its Seller's Stamp Duty (similar to the SSD in Hong Kong) to cover resale of residential properties within four years.
2. To clarify whether stamp duty	♦ Under the proposed sections 29CB(12) and 29DB(13) of the Stamp Duty

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<p>(including the BSD) will be exempted when there is:</p> <ul style="list-style-type: none">• a change of trustees with no change in the beneficial interest in the underlying residential property, regardless of whether the incoming trustee is a Hong Kong permanent resident (HKPR), non-HKPR or a corporation;• a change of trustees with no change in the beneficial interest in the underlying residential property, regardless of whether the beneficial owner is a HKPR; and• distribution from trustees to beneficiary for no consideration, regardless of the identity or residency of the beneficiary.	<p>(Amendment) Bill 2012 ("the Bill"), if an instrument is not chargeable with stamp duty under head 1(1A) and head 1(1) of the Stamp Duty Ordinance (Cap.117) ("SDO"), it is not chargeable with the BSD.</p> <ul style="list-style-type: none">♦ By virtue of section 27(5) of the SDO, any instrument made for the appointment of a new trustee, and/or under which no beneficial interest passes in property conveyed is not chargeable with stamp duty under head 1(1A) and head 1(1). Hence, such instrument will not be chargeable with the BSD.

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<p>3. According to the Bill, where the purchaser for the SDO purpose is a non-HKPR, BSD will apply regardless of the beneficial ownership. That is not correct as the stamp duty law consistently looks to the beneficial ownership for all other purposes. A HKPR should not be disadvantaged for using legitimate asset protection arrangement to hold his property, where the arrangement is made transparent to the Stamp Office. The proposed BSD treatment will only make the arrangements and exemptions become complicated, which is contrary to a stated government policy of wanting more trust work to Hong Kong.</p>	<ul style="list-style-type: none"> ♦ The objective of BSD is to accord priority in addressing the home ownership needs of HKPR buyers under the current tight supply situation in the residential property market. In pursuance of this policy objective, it is proposed that subject to the exemptions provided under the Bill, no acquisition of residential property can be exempted from the BSD unless the buyer is a HKPR acting on his / her own behalf. ♦ For a HKPR who is a minor or a mentally incapacitated person, due to the lack of capacity to enter into legally binding agreements, he or she must in practice require another person to act on his or her own behalf. The Bill proposes that the trustee or guardian of such a minor or mentally incapacitated person should be exempted from the BSD solely for the purpose of protecting the rights of a minor or mentally incapacitated person as a HKPR. ♦ For subsequent transfers upon change of trustees or transfers to beneficiaries, no BSD is payable as indicated in item (2) above.
<p>4. To clarify the following issues in relation to the customary Chinese trusts under “Tso” and</p>	<ul style="list-style-type: none"> ♦ “Tso” and “Tong” function similarly to a trust under the common law. In <i>Tang Yau Yi Tong & Anor v Tang Mou Shau Tso & Ors</i> [1996] 2 HKC 471 at 481G, the Court of Appeal held that “Tso” and “Tong” were not legal entities. Thus, the

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<p>“Tong”:</p> <ul style="list-style-type: none"> • Will the birth and death of a member of “Tso” or “Tong” constitute a transfer subject to BSD? • If a “Tso” or “Tong” (whose beneficiaries consist of both HKPR members and non-HKPR members) acquires residential property, will the acquisition be subject to the BSD? • Will a “Tso” or “Tong” be deemed to be a body corporate in nature and not eligible for any exemption for the BSD? 	<p>entities will not be regarded as bodies corporate.</p> <ul style="list-style-type: none"> ♦ Notwithstanding the above, given that a “Tso” or “Tong” operates as a trust, its acquisition of residential property is clearly for and on behalf of its members and accordingly will be subject to the BSD. ♦ Since no instrument will be executed in the event of the birth or death of a male descendant of a “Tso” or “Tong”, there is no question of stamp duty.
<p>5. The scope of the “close relative” exemption should be expanded to cover grandparents, grandchildren, sons-in-law and daughters-in-law.</p>	<ul style="list-style-type: none"> ♦ We have made reference to the existing exemption arrangements of the SSD in considering the exemption arrangement of the BSD. The proposed “close relative” exemption arrangement follows the same principle of the SSD regime, which exempts transactions involving persons who (a) are blood-related or half blood-related, or (b) have adoption or step relationship. The Administration considers that the proposed exemption arrangement strikes the right balance between addressing the genuine needs of the public and safeguarding the effectiveness of the BSD by avoiding loopholes for circumvention.

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<p>6. An exemption should be provided for deeds of family arrangement; which are commonly used for redistribution of estate.</p>	<ul style="list-style-type: none"> ♦ A transfer of residential property under an estate pursuant to a will or in accordance with the law of intestacy is not chargeable with stamp duty. ♦ However, the beneficiaries of the estate may deviate from the provisions of the will or the law of intestacy and agree among themselves to redistribute the property as per their own wishes. In some cases, the beneficiaries may even engage corporate vehicles to take up the distributed assets. Quite often such redistribution will lead to an excess distribution over some beneficiaries' entitlements under the will or the law of intestacy and in turn, a stamp duty liability on the amount of the excess. Such voluntary disposition should be subject to stamp duty.
<p>7. The imposition of the BSD without notice is unfair to the tenders which straddled the introduction of the BSD on or after 27 October 2012 as such extra stamp duty had not been factored into the tenders.</p>	<ul style="list-style-type: none"> ♦ It is necessary for the BSD to come into effect on the day following its announcement to ensure that no one could take advantage of the gap period between its announcement and its effective date. ♦ If a developer acquires a site from the Government by tender, there is no question of stamp duty. This is because in general, a developer acquires a bare site from the Government by means of a "conditions of sale" (in the case of public auction or tender) or a "conditions of exchange" (in the case of land exchange), and neither of them is a chargeable instrument under the stamp duty regime..
<p>8. In order to minimize any disruption to redevelopment activities, an exemption of BSD should be provided where</p>	<ul style="list-style-type: none"> ♦ A refund mechanism is proposed under the Bill so that acquisitions of residential properties for redevelopment purpose (whether the residential property acquired is for redevelopment into a residential or a non-residential property) will be exempted from the BSD, provided that the immovable properties being constructed

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<p>a developer has acquired up to 30% of the undivided shares in a residential lot which is of not less than 30 years old.</p>	<p>are completed within six years, with extension allowed in specific circumstances. For BSD purposes, our proposal is that the “six-year period” will start counting when the relevant developer has become the owner of the entire lot of the redevelopment concerned. The developer will be considered to have completed the construction if it has obtained, within six years thereafter, the Occupation Permit (OP) in respect of the redevelopment, or the first OP if there is more than one for the entire redevelopment.</p> <ul style="list-style-type: none"> ♦ We would like to emphasise that the proposed “six-year” period is not set on an arbitrary basis. In formulating the mechanism, we have made reference to the redevelopment timeframe set out under the Land (Compulsory Sale for Redevelopment) Ordinance, which stipulates that the redevelopment of the lot sold under an order granted under that Ordinance shall be completed and made fit for occupation within six years after the date on which the purchaser of the lot became the owner of the lot. We have also made reference to the building covenants stipulated in the land grants, which require the lot owners to complete the developments concerned within the specified periods, generally four to six years ♦ To facilitate redevelopment, once the development has acquired its first Occupation Permit within the “six-year period”, this will be regarded as satisfying the refund requirement and a full refund will be granted for all phases in the redevelopment. In short, we consider that the proposed mechanism will not block redevelopment. Indeed, it should be flexible enough to cater for the actual operation of redevelopment. ♦ It would be difficult to give any exemption from the BSD before the IRD can obtain solid proof that an acquisition is indeed for the purpose of redevelopment and that the developer can subsequently fulfill the various conditions for

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	<p>exemption. While the site or the property concerned may be acquired for redevelopment purposes, there is equal chance that it can be acquired for trading. Therefore, under the mechanism as proposed in our Bill, the person or company pursuing redevelopment has to pay the BSD upfront as and when individual units are acquired. However, once the development has acquired the first OP within the "six-year period", it will be regarded as satisfying the refund requirement. We consider that our proposed arrangement under the Bill could avoid any risk of abuse, has struck the right balance between maintaining the integrity of the BSD regime while not interfering with practical aspects of redevelopment projects.</p>
<p>9. To clarify whether a partition is liable to the BSD.</p>	<ul style="list-style-type: none"> ♦ A partition or an agreement to partition a residential property will, subject to sections 27 and 29F of the SDO, as the case may be, be charged with stamp duty including the BSD (if applicable) by reference to the equality money under section 25(7) or section 29C(10) of the SDO respectively.
<p>10. To clarify whether section 29CC(1) and (2) of the Bill covers an exchange of residential property ("the First Exchanged Property") for a non-residential property plus a residential property ("the Second Exchanged Property" collectively).</p>	<ul style="list-style-type: none"> ♦ The proposed section 29CC(1) and (2) of the Bill applies to an exchange of any immovable property for any other immovable property. In the given scenario, as both the First Exchanged Property and the Second Exchanged Property form the subject matter of the exchange, IRD will regard the transaction as an exchange of residential property for residential property for BSD purposes. Therefore, the deed of exchange will, subject to section 29F of the SDO, be charged with BSD by reference to the equality money pursuant to the proposed section 29CC(2).
<p>11. To clarify the legal basis for the distinction between the</p>	<ul style="list-style-type: none"> ♦ The proposed section 29CC(1) of the Bill is an anti-avoidance provision which seeks to tackle the arrangement whereby a non-HKPR buyer first acquires a

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<p>BSD treatment referred to in the proposed section 29CC(1) of the Bill (in respect of an exchange of a residential property for non-residential property), and that in the proposed section 29CC(2) of the Bill (in respect of an exchange of a residential property for any other residential property)</p>	<p>non-residential property (without the need to pay the BSD) and then undertakes an exchange of such property for another residential property with equivalent value. In such circumstances, if only the equality money is subject to the BSD, the non-HKPR buyer will be able to avoid or significantly reduce his or her BSD liability as the equality money is usually much smaller than the value of the residential property.</p>
<p>12. To clarify whether a “usual mortgage”, which confers no immediate or automatic right of sale of the property, will be chargeable with the BSD.</p>	<ul style="list-style-type: none"> ♦ All along we take the view that a “usual mortgage” in respect of residential property does not fall within the definition of “agreement for sale” under section 29A(1)(c) of the SDO as it confers no immediate or automatic right of sale of the property, and the mortgagee will exercise its rights only in case of the mortgagor's default. As such, a mortgage is not considered to be agreement for sale and is not chargeable with any stamp duty including the BSD. ♦ However, it should be noted that a disguised mortgage (e.g. one incorporating an irrevocable power of attorney) which does not merely provide security for money advanced but give, expressly or impliedly, an immediate or automatic right of disposal of a residential property will be regarded as an agreement for sale and be subject to stamp duty including BSD, if applicable.
<p>13. IRD should provide more</p>	<ul style="list-style-type: none"> ♦ While the BSD would be chargeable on transactions involving residential

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<p>guidelines on the treatment for car parks. For example, where it is a condition in the land grant that the car parks in a development shall only be purchased by the buyers of flats in the same development, will the car parks purchased in such circumstances be treated as part of the flats and subject to BSD?</p>	<p>properties, whether a car park will be regarded as a part of the residential property concerned depends on the circumstances of each case.</p> <ul style="list-style-type: none"> ♦ In general, if a residential property and the car park are purchased as one single unit and cannot be purchased separately, the instrument for acquisition of the residential property and car park concerned will be chargeable with the BSD by reference to the total value of the whole transaction. However, if the car park is a separate and independent property from the residential unit and its occupation permit does not allow it to be used for residential purposes, the instrument for purchase of the car park will not be chargeable with the BSD.
<p>14. To clarify whether the sale and purchase of a property which is restricted for use as a hotel under the government grant/lease, occupation permit, deed of mutual covenant or other relevant instruments will not be treated as residential property for purposes of stamp duty (including BSD).</p>	<ul style="list-style-type: none"> ♦ Residential property is defined under section 29A(1) of the SDO as “any immovable property other than “non-residential property”. On the other hand, “non-residential property” is defined as “immovable property which, under the existing conditions of – <ul style="list-style-type: none"> (a) a Government lease or an agreement for a Government lease; (b) a deed of mutual covenant, within the meaning of section 2 of the Building Management Ordinance (Cap.344); (c) an occupation permit issued under section 21 of the Buildings Ordinance (Cap.123); or (d) any other instrument which the Collector is satisfied effectively restricts the permitted user of the property, may not be used, at any time during the term of the Government lease in respect of the property or during the term of the Government lease that has been agreed

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	<p>for in respect of the property (as is appropriate), wholly or partly for residential purposes.</p> <ul style="list-style-type: none"> ♦ The classification of premises in terms of “residential property” and “non-residential property” is by reference to the permitted use rather than actual use. A property is regarded as a non-residential property if under any of the above-mentioned document, the property may not be used, wholly or partly, for residential purpose.
<p>15. It is a common practice in Hong Kong for investment purchasers to own properties through a corporate entity in order to maximize tax advantages. The Administration should consider an exemption for corporate entities which invest in property where all the shareholders are HKPRs acting on his/her behalf and maintain only one class of shares.</p>	<ul style="list-style-type: none"> ♦ Applying BSD to all companies is in line with and is essential to achieve the policy objectives of cooling down the property market and to accord priority to HKPRs in addressing their home ownership needs. As such, all companies, regardless of whether the shareholder(s) or director(s) is / are HKPR(s), should be subject to the BSD. We do not consider it appropriate to exempt company buyers from the BSD on grounds that it is a “common practice for investment purchasers to own properties through a corporate entity to maximise tax advantages” as suggested. In law, a company is an entity independent of its shareholder(s). Under the legal framework of Hong Kong, we have all along distinguished companies by whether they are established locally or overseas, instead of making reference to the HKPR status of shareholders. ♦ Besides, even if a self-declaration mechanism is put in place as proposed by some, this would still fail to tackle the problem that the HKPR shareholders can circumvent the BSD through transferring property entitlement to non-HKPR shareholders by ways of nomination, declaration of trust or authorisation, allotment of new shares, or issue of new class of shares, etc. Upon the completion of entitlement transfer, the original shareholders may appear to remain

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	<p>as shareholders of the company. In reality, however, the control of the company has been transferred to someone else.</p> <ul style="list-style-type: none"> ♦ We are also concerned about the impact of exempting companies from the BSD on the effectiveness of the various demand-side management measures which the Administration has introduced. The enhanced SSD, the introduction of the BSD and the increase in the ad valorem stamp duty rates (AVD) target at different demands of different buyers. These measures are interrelated and work collectively to achieve the objectives of combating speculations and managing demand. Under the AVD regime, in determining whether a HKPR has possessed more than one residential property and hence subject to AVD, the residential property held by that HKPR in the name of a company would not be taken into account. If companies of which all shareholders are HKPRs were to be exempted from the BSD, those who wish to possess more than one residential property might simply purchase a residential property in the name of a company without the need to pay the BSD, and at the same time can also circumvent the AVD as they are exempted from the new AVD when they purchase a residential property in their own names. If so, this would seriously undermine the effectiveness of the AVD regime. These persons would be able to avoid the BSD and AVD, which would be inconsistent with the policies behind the series of demand-side management measures and seriously undermine the effectiveness of these measures in achieving their objectives. ♦ In view of the above, we consider it inappropriate to exempt companies from the BSD simply on the basis that their shareholders are HKPRs.
16. Under the proposed section	<ul style="list-style-type: none"> ♦ We note the observation and will carefully consider the suggestion.

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<p>29CB(4) to (6) of the Bill, exemptions will be provided to a non- HKPR buyer of a residential property where the property is acquired to replace his/her another residential property which, among others, has been sold or resumed pursuant to certain ordinances. However, the list of such ordinances appears not to be exhaustive. The Administration is invited to clarify the exemptions by providing an exhaustive list to include the Mass Transit Railway (Land Resumption and Related Provisions) Ordinance (Cap.276), the Roads (Works, Use and Compensation) Ordinance (Cap.370), the Railway Ordinance (Cap. 519) and the Partition Ordinance (Cap.352).</p>	
<p>17. The proposal of 1.5 times (i.e.</p>	<p>♦ The Collector of Stamp Revenue (the Collector) may impose a penalty for late</p>

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<p>15% x 10 times) the property value as a penalty for failing to pay the BSD is very harsh and disproportionate. While the Administration noted that the Collector had discretion of remitting the penalty depending on the facts of each case, it made no commitment to provide any guidelines to the Collector on the exercise of such discretion. The system simply lacks transparency.</p>	<p>stamping up to ten times of the stamp duty payable pursuant to section 9(1) of the SDO if a chargeable instrument is not submitted for stamping within the specified period. Such a penalty is not unique for property instruments subject to the BSD, but applies to all kinds of chargeable instruments.</p> <ul style="list-style-type: none"> ♦ Under section 9(2) of the SDO, the Collector may remit the whole or part of the penalty for late stamping. While the remission of penalty is discretionary and should be considered on the basis of the circumstances of each case, the Collector has promulgated general guidelines on the Government's website that in a voluntary disclosure case where the delay is not deliberate, he will normally impose the penalty at a reduced rate (14%) with reference to the period of delay, subject to a minimum amount (\$500). For a second or subsequent delay uncovered, the penalty imposed will be severer.
<p>18. The definition of HKPR in the Bill fails to address the practical problem that a non-Chinese may lose his or her HKPR status by virtue of section 7 of Schedule 1 of the Immigration Ordinance (Cap. 115), say because of a continuous absence from Hong Kong for not less than 36 months. This area of law is complicated, and it is unfair to</p>	<ul style="list-style-type: none"> ♦ Under the proposed stamping arrangement for the BSD, all purchasers of residential properties, save for those who (a) are non-HKPRs and / or (b) acquire the properties on behalf of others, will be required to - <ul style="list-style-type: none"> – make statutory declarations stating that they are HKPRs who acquire the properties in their own capacity; and – provide evidence in support of their HKPR status where necessary. ♦ As to a purchaser's residency status and capacity in the purchase are to a certain extent matters within his / her personal knowledge, the Administration proposes to require all HKPR buyers who act in the transactions on their own behalf, or all trustees and guardians acting for minors or mentally incapacitated persons, to declare the same by way of statutory declarations. This proposal strikes the right

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<p>expect the solicitors to verify whether a buyer is a HKPR or is entitled to HKPR status. The Administration is invited to consider introducing a scheme to provide verification of HKPR status and alert the public to the relevance of section 7 of Schedule 1 of the Immigration Ordinance for BSD purposes.</p>	<p>balance between the efficiency of the stamping system and the proposed statutory requirement that the Collector has to be satisfied with the purchaser's residency status and capacity before accepting that the property transaction is not subject to the BSD.</p> <ul style="list-style-type: none"> ♦ With the above declaration mechanism, the Administration does not consider that there will be an undue burden on the solicitors or the banks to verify the purchaser's residency status and his / her capacity in the transaction.
<p>19. By virtue of section 15 of the SDO, if a buyer fails to pay the BSD in respect of a chargeable agreement, the seller will have to bear the BSD if he wants to produce the relevant agreement in court. Failing which the relevant agreement cannot be admitted as evidence and this may lead to a blot on the title of the property. To accommodate the innocent sellers who need to present documentation in court</p>	<ul style="list-style-type: none"> ♦ Inadmissibility in evidence and civil liability for the unpaid duty (which is jointly and severally held by the person(s) executing the instrument and those using the instruments) are the major practical sanctions for failure to stamp or under-stamp a chargeable instrument provided under the SDO. The Administration takes note of the deputations' concerns and will consider the relevant suggestions.

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proceedings, the application of section 15 should be excluded for BSD purposes.	
<i>The Hong Kong Conveyancing & Property Law Association Limited</i>	
20. Believes that to a certain extent the SSD has been effective in containing the exuberant state in the residential market and it has in some way contributed to control speculation and to ensure the healthy and stable development of residential property market; and supports the enhancement to the SSD to make it more effective.	<ul style="list-style-type: none"> ♦ Noted.
21. Concerns that the BSD may be an infringement of the provisions of the Basic Law, in particular, Articles 105 and 106 ¹ .	<ul style="list-style-type: none"> ♦ We consider that the BSD is constitutional and, being a legitimate taxation, is governed by Article 108² instead of by Article 105 / 106 / 115¹ of the Basic Law. ♦ In the midst of a continuously exuberant state in the residential property market, arising from a tight supply of flats, extremely low interest rates and the influx of capital from overseas, it is apparent that the residential property market is out of

¹ The Hong Kong Conveyancing & Property Law Association Limited mentioned in the submission that BSD might infringe Article 106 of the Basic Law as it concerned the policy of free trade. We note that Article 106 in fact concerns issues such as the independent finances of the HKSAR, whereas Article 115 specifies that HKSAR shall pursue the policy of free trade and safeguard the free movement of goods, intangible assets and capital.

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	<p>step with the real economy. Property prices are rising beyond the affordability of the general public and the risk of a property bubble has increased substantially.</p> <ul style="list-style-type: none"> ♦ In view of the above, the Financial Secretary announced on 26 October 2012 the new demand-side management measures, including the introduction of the BSD. The objectives of the BSD are to accord priority to HKPR buyers over non-HKPR buyers under the current tight supply situation; prevent even further exuberance in the housing market which may pose significant risks to our macro economic and financial sector stability; and to ensure the healthy and stable development of the residential property market which is crucial to the sustainable development of Hong Kong as a whole. The proposed exemption for HKPR buyers pursues the legitimate aim of meeting the housing needs of HKPRs who have a close connection with Hong Kong. Exempting buyers who are HK residents but are not HKPRs would undermine the effectiveness of the measures. The exemption is rationally connected to the legitimate aim and is no more than is necessary to accomplish that aim. ♦ We would like to emphasise that the demand-side management measures, including the BSD, are extraordinary measures introduced in response to the present exceptional circumstances. We will continue to closely monitor the private residential property market and consider withdrawing these measures after the demand-supply situation of the property market has regained its balance.

² Article 108 of the Basic Law states that “the Hong Kong Special Administrative Region shall practise an independent taxation system. The Hong Kong Special Administrative Region shall, taking the low tax policy previously pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation.”

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<p>22. Except for non-HKPRs and HKPRs who have purchased properties on behalf of non-HKPRs, the Collector will require the purchasers to make statutory declarations as to whether they are HKPRs and whether they have purchased on behalf of non-HKPRs. The procedure will incur unnecessary wastage of time and costs.</p>	<ul style="list-style-type: none"> ♦ The purchaser's residency status (i.e. whether he / she is a HKPR) and his / her capacity in a residential property transaction (i.e. whether he / she acts on his / her own behalf or as trustee for other(s)) are key determinant of whether the transaction is subject to the BSD. ♦ The residency status and capacity of a person are to a certain extent matters within his personal knowledge, the Administration proposes to require all HKPR buyers who act in the transactions on their own behalf, or all trustees and guardians acting for minors or mentally incapacitated persons, to declare the same by way of statutory declarations. This proposal strikes the right balance between the efficiency of the stamping system and the proposed statutory requirement that the Collector has to be satisfied with the purchaser's residency status and acting capacity before accepting the property transaction as not subject to the BSD.
<p>23. The exemptions provided to non-HKPRs under the proposed sections 29CB and 29DB are extremely unfair to HKPRs and create unnecessary tension between the two. They should be scrapped so long as the Government is not able to provide similar exemption to limited companies genuinely held by HKPRs.</p>	<ul style="list-style-type: none"> ♦ It is the policy intent that all companies, regardless of whether the shareholder(s) or director(s) is / are HKPR(s), should be subject to the BSD. We do not consider it appropriate to exempt company buyers from the BSD. In law, a company is an entity independent of its shareholder(s). Under the legal framework of Hong Kong, we have all along distinguished companies by whether they are established locally or overseas, instead of making reference to the HKPR status of shareholders. ♦ Besides, even if a self-declaration mechanism is in place as some have proposed, this approach would fail to tackle the problem that the HKPR shareholders can circumvent the BSD through transferring property entitlement to non-HKPR shareholders by ways of nomination, declaration of trust or authorisation, allotment of new shares, or issue of new class of shares, etc. Upon the

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	<p>completion of entitlement transfer, the original shareholders may appear to remain as shareholders of the company. In reality, however, the control of the company has been transferred to someone else.</p> <ul style="list-style-type: none"> ♦ We are also concerned about the impact of exempting companies from the BSD on the effectiveness of the various demand-side management measures which the Administration has introduced. The enhanced SSD, the introduction of the BSD and the increase in the ad valorem stamp duty rates (AVD) target at different demands of different buyers. These measures are interrelated and work collectively to achieve the objectives of combating speculations and managing demand. Under the AVD regime, in determining whether a HKPR has possessed more than one residential property and hence subject to AVD, the residential property(ies) held by that HKPR in the name of a company would not be taken into account. If companies of which all shareholders are HKPRs were to be exempted from the BSD, those who wish to possess more than one residential property might simply purchase a residential property in the name of a company without the need to pay the BSD, and at the same time can also circumvent the AVD as they are exempted from the new AVD when they purchase a residential property in their own names. If so, this would seriously undermine the effectiveness of the AVD regime. These persons would be able to avoid the BSD and AVD, which would be inconsistent with the policies behind the series of demand-side management measures and seriously undermine the effectiveness of these measures in achieving their objectives. ♦ In view of the above, our current view is that it is inappropriate to exempt companies from the BSD simply on the basis that their shareholders are HKPRs. ♦ As regards other exemptions, we have made reference to the existing exemption

Issues raised	The Administration's responses
	<p>arrangements of the SSD in considering the exemption arrangement of the BSD. We consider that the proposed exemption arrangement for the BSD meets the genuine needs of the public.</p>
<p>24. According to the definition under the proposed section 29A(1), HKPR is a person who is a holder of a valid HK permanent identity card. A lawyer has no way to ascertain whether an identity card is valid or not unless he writes to the Commissioner of Registration for verification. That is cumbersome, time-consuming and incurring more costs. Furthermore, solicitors will find it difficult to give proper legal advice in some cases whether his client is purchasing the property on his own or on behalf of another person.</p>	<ul style="list-style-type: none"> ♦ Under the proposed stamping arrangement for the BSD, all purchasers of residential properties, save for those who are (a) non-HKPRs and / or (b) acquire the properties on behalf of others, will be required to: <ul style="list-style-type: none"> – make statutory declarations stating that they are HKPRs who acquire the properties in their own capacity; and – provide evidence in support of their HKPR status where necessary. ♦ As to a purchaser's residency status and capacity in the purchase are to a certain extent matters within his / her personal knowledge, the Administration proposes to require all HKPR buyers who act in the transactions on their own behalf, or all trustees and guardians acting for minors or mentally incapacitated persons, to declare the same by way of statutory declarations. This proposal strikes the right balance between the efficiency of the stamping system and the proposed statutory requirement that the Collector has to be satisfied with the purchaser's residency status and capacity before accepting that the property transaction is not subject to the BSD. ♦ With the above declaration mechanism, the Administration does not consider that there will be an undue burden on the solicitors or the banks to verify the purchaser's residency status and his / her capacity in the transaction.
<p>25. The provisions relating to the BSD should be drafted in a</p>	<ul style="list-style-type: none"> ♦ The objective of BSD is to accord priority in addressing the home ownership needs of HKPR buyers under the current tight supply situation in the residential property

Issues raised	The Administration's responses
<p>way that the BSD applies to certain transactions rather than to all with certain exemptions. Indeed, there are many more buyers who are HKPRs than those who are not. It is unfair to put the burden on them to prove that they are not subject to the BSD.</p>	<p>market. In pursuance of this policy objective, it is proposed that subject to the exemptions provided under the Bill, no acquisition of residential property can be exempted from the BSD unless the buyer is a HKPR acting on his / her own behalf. It would therefore be necessary to require a HKPR buyer to –</p> <ul style="list-style-type: none"> – make statutory declarations stating that they are HKPRs who acquire the properties in their own capacity; and – provide evidence in support of their HKPR status where necessary.
<p>26. Without prejudice to the recommendation to scrap exemptions for non-HKPRs, the exemptions for replacement of properties should also cover the agreements for sale where the applications under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545) have been made but without court orders (e.g. the agreements reached during mediation). Likewise, the same should also apply to other exemptions concerning acquisition or transfer of</p>	<ul style="list-style-type: none"> ♦ The exemption for purchasing replacement property is to forestall hardship created for a non-HKPR property owner who has been made to sell or part with his or her residential property not on his or her own volition. We do not consider that extending such an exemption to agreements reached before a court order is granted is in line with our intention.

Issues raised	The Administration's responses
properties pursuant to court orders.	
27. The owners of pre-war buildings may be forced to sell their properties due to the lack of resources for redevelopment pursuant to the noticed issued under section 4 of the Demolished Buildings (Re-development of Sites) Ordinance (Cap. 337). They should be entitled to exemption for the purchase of replacement properties.	<ul style="list-style-type: none"> ♦ We note the observation and will carefully consider the suggestion.
28. To clarify whether the section 29CC(1) and (2) of the Bill covers an exchange of residential property ("the First Exchanged Property") for a non-residential property plus a residential property ("the Second Exchanged Property" collectively).	<ul style="list-style-type: none"> ♦ The proposed section 29CC(1) and (2) of the Bill applies to an exchange of any immovable property for any other immovable property. In the given scenario, as both the First Exchanged Property and the Second Exchanged Property form the subject matter of the exchange, the IRD will regard the transaction as an exchange of residential property for residential property for BSD purposes. Therefore, the deed of exchange will, subject to section 29F of the SDO, be charged with BSD by reference to the equality money pursuant to the proposed section 29CC(2).
29. The proposed section 29DD	<ul style="list-style-type: none"> ♦ A refund mechanism has been proposed under the Bill so that acquisitions of

Issues raised	The Administration's responses
<p>should be amended so that (a) the purchaser of a vacant site should be entitled to refund of BSD, and (b) the developers of properties under the Demolished Buildings (Re-development of Sites) Ordinance (Cap. 337) should also be entitled to refund of BSD in case of redevelopment.</p>	<p>residential properties for redevelopment purpose (whether the residential property acquired is for redevelopment into a residential or a non-residential property) will be exempted from the BSD, provided that the immovable properties being constructed are completed within six years, with extension allowed in specific circumstances. For BSD purposes, our proposal is that the “six-year period” will start counting when the relevant developer has become the owner of the entire lot of the redevelopment concerned. The developer will be considered to have completed the construction if it has obtained, within six years thereafter, the Occupation Permit (OP) in respect of the redevelopment, or the first OP if there is more than one for the entire redevelopment.</p> <ul style="list-style-type: none"> ♦ Under the proposed amendment, a purchase of a vacant site where the BSD is chargeable would be entitled to a refund provided that the “six-year” requirement is fulfilled. ♦ Under the Demolished Buildings (Re-development of Sites) Ordinance (Cap.337), the Director of Buildings may serve an order on the owner of a site in respect of which a re-development notice has been served to require the re-development of the site. If the redevelopment is carried out by the owner and no sale and purchase of residential property is involved, no BSD is payable. If a sale and purchase of residential property is involved, the refund mechanism mentioned above may be applicable depending on the actual circumstances.
<p>30. Supports that the Financial Secretary may by notice amend the SSD and BSD rates.</p>	<ul style="list-style-type: none"> ♦ This mechanism provides the necessary flexibility to adjust the applicable rates (to zero if necessary) in a timely manner with reference to the market situation.

Issues raised	The Administration's responses
<i>The Hong Kong Association of Banks</i>	
31. The liability to pay the SSD should rest with the vendor solely or if this is not accepted, any additional SSD due to any inadequacy of the stated consideration should be payable by the vendor solely.	<ul style="list-style-type: none"> Stamp duty is a levy on instruments. Under the present SDO, all the parties executing a chargeable instrument are jointly and severally liable to pay the stamp duty. This applies to the purchase and sale of properties and the leasing of properties.
32. Appropriate provisions should be included in the Bill to clarify that the liability to pay any additional SSD should not create any encumbrance on the residential property or affect the title to the residential property, or alternatively, to provide for protection to bona fide purchasers (including mortgagees) for valuable consideration dealing with the residential property.	<ul style="list-style-type: none"> Inadmissibility in evidence and civil liability for the unpaid duty (which is jointly and severally held by the person(s) executing the instrument and those using the instruments) are the major practical sanctions for failure to stamp or under-stamp a chargeable instrument provided under the SDO. The Administration takes note of the deputations' concerns and will consider the relevant suggestions.
33. The wording of the proposed section 29DB(8)(c) of the Bill	<ul style="list-style-type: none"> Question 9 of the FAQ on IRD's website means that acquisition of a mortgaged residential property under a conveyance by a mortgagee, or transfer of a

Issues raised	The Administration's responses
<p>is inconsistent with item (vi) in Question 9 of the FAQ on IRD's website. The former should be amended to clarify that a conveyance <i>by or to</i> mortgagee that is a financial institution within the meaning of section 2 of the Inland Revenue Ordinance (Cap.112) ("IRO") or a receiver appointed by such a mortgage should be exempted from BSD.</p>	<p>mortgaged residential property under a conveyance to a mortgagee will not be subject to the BSD if the mortgagee is a financial institution within the meaning of section 2 of the Inland Revenue Ordinance. It is consistent with section 29DB(8)(c) of the Bill.</p>
<p>34. There is no express requirement under the proposed section 29DB(8)(c) of the Bill that the mortgagee referred to in that section must be the same mortgagee of the mortgaged property.</p>	<ul style="list-style-type: none"> ♦ We note the observation and will carefully consider the suggestion.
<p>35. The Government should provide examples which come within the scope of the exemption provided under the proposed section 29DB(8)(c)</p>	<ul style="list-style-type: none"> ♦ The proposed section 29DB(8)(c) is intended to apply to the situation where a mortgagor of a residential property is unable to repay the mortgage loan and transfers the mortgaged property to the mortgagee which is a financial institution within the meaning of section 2 of the IRO, or a receiver appointed by such a mortgagee.

Issues raised	The Administration's responses
of the Bill.	
<p>36. To align with the proposed section 29DB(8) of the Bill, an equivalent provision should be added to the proposed section 29CB of the Bill to exempt an agreement for sale from the BSD if under that agreement the mortgaged property is sold to a mortgagee (that is a financial institution within the meaning of section 2 of the IRO) or a receiver appointed by such a mortgagee.</p>	<ul style="list-style-type: none"> ♦ We understand that a mortgaged property can only be acquired by or transferred to the mortgagee by way of conveyance. Hence, the proposed provision should not be necessary.
<p>37. The Government should confirm that neither the Bill nor any administrative measures will seek to impose additional legal duty or obligation on the banks to verify the HKPR status of the purchasers / mortgagors.</p>	<ul style="list-style-type: none"> ♦ Under the proposed stamping arrangement for the BSD, all purchasers of residential properties, save for those who are (a) non-HKPRs and / or (b) acquire the properties on behalf of others, will be required to: <ul style="list-style-type: none"> – make statutory declarations stating that they are HKPRs who acquire the properties in their own capacity; and – provide evidence in support of their HKPR status where necessary. ♦ As to a purchaser's residency status and capacity in the purchase are to a certain extent matters within his / her personal knowledge, the Administration proposes to require all HKPR buyers who act in the transactions on their own behalf, or all

Issues raised	The Administration's responses
	<p>trustees and guardians acting for minors or mentally incapacitated persons, to declare the same by way of statutory declarations. This proposal strikes the right balance between the efficiency of the stamping system and the proposed statutory requirement that the Collector has to be satisfied with the purchaser's residency status and capacity before accepting that the property transaction is not subject to the BSD.</p> <ul style="list-style-type: none"> ♦ With the above declaration mechanism, the Administration does not consider that there will be an undue burden on the solicitors or the banks to verify the purchaser's residency status and his / her capacity in the transaction.
<p>38. To protect the interests of the mortgagee banks and other subsequent bona fide purchasers for valuable consideration, the Bill should clarify that the failure to pay the BSD due to the fraud perpetrated by purchasers / mortgagors should not create an encumbrance on the residential property or affect the title to that property.</p>	<ul style="list-style-type: none"> ♦ Inadmissibility in evidence and civil liability for the unpaid duty (which is jointly and severally held by the person(s) executing the instrument and those using the instruments) are the major practical sanctions for failure to stamp or under-stamp a chargeable instrument provided under the SDO. The Administration takes note of the deputations' concerns and will consider the relevant suggestion.