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Report of the Bills Committee on Stamp Duty (Amendment) Bill 2012

Purpose

This paper reports on the deliberations of the Bills Committee on Stamp Duty (Amendment) Bill 2012 ("the Bills Committee").

Background

2. The exuberant state of the local residential property market in recent years, fueled by the spiraling residential property prices and rental amidst increased global liquidity, exceptionally low interest rates and a tight residential properties supply, has been a cause for public concern. Since 2010, the Administration has implemented a number of long-, medium- and short-term measures in four areas, namely, increasing land supply; combating speculative activities; enhancing property transaction transparency, and preventing excessive mortgage lending expansion, to safeguard against the risk of a property bubble.

3. To curb short-term speculative activities and mitigate further exuberance in the local residential property market, the Stamp Duty (Amendment) Ordinance 2011 (No. 14 of 2011) was enacted in June 2011 to impose a special stamp duty ("SSD") on transactions of residential property acquired on or after 20 November 2010 and resold within 24 months after acquisition¹.

¹ The SSD is imposed at the following regressive rates for different holding periods –

- (a) 15% of the amount or value of the consideration if the property has been held for six months or less;
- (b) 10% of the amount or value of the consideration if the property has been held for more than six months but for 12 months or less; and
- (c) 5% of the amount or value of the consideration if the property has been held for more than 12 months but for 24 months or less.

4. While property speculation has shown signs of a tapering off since the introduction of SSD, abundant liquidity, persistent low interest rates, influx of foreign capital and an imbalance between the supply and demand of residential properties have continued to fuel the property boom. According to the Administration, overall property prices have risen by 20% during the first nine months of 2012, culminating at a hefty increase of 107% over the 2008 price level. By September 2012, overall property prices have surpassed the 1997 peak by 26%.

5. To further rein in market exuberance, the Financial Secretary ("FS") announced on 26 October 2012 two new demand-side management measures, i.e. the enhancements to the Special Stamp Duty ("the enhanced SSD") and the introduction of a 15% Buyer's Stamp Duty ("BSD") on residential properties acquired by any person other than a Hong Kong Permanent Resident ("HKPR").

The Bill

6. The Bill, introduced into Legislative Council ("LegCo") on 9 January 2013, seeks to amend the Stamp Duty Ordinance (Cap. 117) ("SDO") to:

- (a) adjust upward the duty rates and to extend the holding period in respect of SSD, as follows –
 - (i) 20% of the amount or value of the consideration if the residential property has been held for six months or less;
 - (ii) 15% of the amount or value of the consideration if the residential property has been held for more than six months but for 12 months or less; and
 - (iii) 10% of the amount or value of the consideration if the residential property has been held for more than 12 months but for 36 months or less;
- (b) introduce a BSD on residential properties acquired by any person (including companies) who is not a HKPR. BSD is to be charged at a flat rate of 15% on all residential properties, on top of the existing stamp duty and SSD, if applicable. There will be exemptions from BSD under certain circumstances. A refund mechanism will be provided to cater for acquisitions of residential properties for the purpose of redevelopment; and

- (c) introduce a mechanism whereby SSD and BSD rates can be revised by means of subsidiary legislation subject to the LegCo's negative vetting.

7. According to the Administration, the objectives of these measures are to further curb speculative activities, cool off the overheated residential property market, and accord priority to HKPR buyers in the midst of the tight supply situation. Given the price-sensitive nature of the property market, the proposed new measures shall take effect from the day immediately following the announcement on 26 October 2012, so that all residential properties acquired on or after 27 October 2012 will be subject to the new SSD regime and BSD upon the enactment of the new legislation. The Inland Revenue Department ("IRD") will record all the residential property transactions between 27 October 2012 and the date on which the Bill is enacted. Reminders for the SSD underpaid and the BSD, if applicable, will be issued to the solicitors handling the relevant transactions after the enactment of the Bill.

The Bills Committee

8. At the House Committee meeting held on 11 January 2013, Members decided that a Bills Committee be formed to study the Bill. Hon Starry LEE Wai-king and Hon James TO Kun-sun were elected Chairman and Deputy Chairman of the Bills Committee respectively. The membership list of the Bills Committee is in **Appendix I**.

9. The Bills Committee has held a total of 21 meetings with the Administration and received views on the Bill from relevant stakeholders and the public at its meeting held on 18 February 2013. A list of the organizations/individuals which/who have submitted views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

10. Members of the Bills Committee in general support the policy intent of the Bill to curb short-term speculative activities, to accord priority to the home ownership needs of HKPRs, and to rein in the exuberance of the residential property market so as to ensure its healthy and stable development, which is crucial to the sustainable development of Hong Kong as a whole. Views on some key provisions of the Bill and issues regarding the application and exemption arrangements of the demand-side management

measures, adjustment of the rates of the SSD and the BSD by way of subsidiary legislation subject to the LegCo's negative vetting, and the inclusion of a sunset clause in the Bill, etc., are diverse. Some members including members belonging to the Business and Professionals Alliance for Hong Kong ("BPA"), the Liberal Party and the Civic Party have expressed grave concerns about the demand-side management measures' adverse impact on the business environment, the normal market operation, and on the reputation of Hong Kong as one of the world's freest economies. These members have requested the Administration to fine-tune the measures, including expanding the scope and the extent of exemption. On the other hand, some members, including members belonging to the Democratic Alliance for the Betterment and Progress of Hong Kong ("DAB"), the Hong Kong Federation of Trade Unions ("FTU") and the Labour Party, consider the demand-side management measures essential to cool off the irrational market exuberance which is out of step with the economy, to stabilize property prices which has risen beyond the affordability of the general public, and to accord priority to the home ownership needs of the HKPRs amidst the current tight supply situation. These members are concerned that any further widening of the scope of exemption would send a wrong signal to the community, dilute the effectiveness of the measures, and lead to a renewed surge in residential property prices. Hon James TO and some members have great reservation over future adjustment of SSD and BSD rates by way of negative vetting. The deliberations of the Bill Committee and the Administration's views are set out in the report and arranged according to issues in the following order-

<u>Issues</u>	<u>Paragraphs</u>
(a) Effectiveness of the enhanced SSD and BSD	11 – 14
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<u>Issues</u>	<u>Paragraphs</u>
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(k) Adjustment of SSD and BSD rates	66 – 67
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Effectiveness of the enhanced SSD and BSD

11. As residential property prices have remained at high level despite the implementation of the SSD since November 2010 and the announcement of the enhanced SSD and BSD in October 2012, many members doubted the effectiveness of the demand-side management measures in cooling off the overheated residential property market. There are also concerns that the Mainland buyers could ride on the appreciation of Renminbi to offset BSD's impact on property acquisition cost. Some of these members are of the views that while the measures have notably reduced the volume of property transactions, the measures have not met the stated policy objectives of lowering property prices for first-time buyers and assisting HKPRs in acquiring residential properties. Neither could the measures tackle the problem of property supply shortage at source. Some members are concerned that the BSD would discourage property developers from building more private housing, thus reducing supply in the primary market, while the increased SSD would hold back property owners from selling, thereby reducing the supply in the secondary market. Both could go against the stated policy objective of bringing down property prices to a level affordable to genuine first time local home buyers. Hon Emily LAU and a majority of members consider that a fundamental solution is to increase land and property supply as soon as practicable to tackle the root cause of the property price spiral.

12. In view of the substantial rise in prices of non-residential properties and some property developers' recent sales tactics, such as offering discounts or offering to pay BSD for non-HKPR flat buyers, some members including Hon CHAN Yuen-han, Hon WONG Kwok-hing and Hon LEE Cheuk-yan urge the Government to formulate tougher measures to address the overheated property market, such as extending the scope of SSD to non-residential properties, introducing capital gains tax, restricting sale of residential properties to HKPRs for an extended period, and re-introducing rent control to curb the rent spiral.

13. The Administration has explained that the exuberant state of the residential property market is due to a combination of factors, including the overall demand and supply imbalance, the influx of capital, and the ultra-low interest rates environment, all of which have driven up property prices to a level much deviated from the economic fundamentals and increase the risk of a property bubble. The Administration has further explained that it is not possible that all the issues relating to the property market can be resolved with just one single silver bullet, and the various demand-side management measures introduced by the Government have their specific targets and policy objectives, which are interrelated and work collectively to achieve the objectives of ensuring the healthy and stable development of the property market. The Administration takes the view that the demand-side management measures have yielded the expected and notable results in stabilizing the residential property market and reversing the community's irrational expectation that property prices could only go up. According to the Administration, speculative activities and purchases of residential properties by non-local individuals and companies have reduced significantly since the introduction of the SSD in November 2010 and the BSD in October 2012. Stamp duty statistics from the IRD indicate that, after the enactment of the SSD enabling legislation, the numbers of confirmor and resale cases within 24 months have dropped significantly. The total number of such transactions in 2011 was down 42.5% compared with 2010, and a further plunge of 56% was recorded in 2012 compared with 2011. As to the BSD, by increasing the overall cost of property acquisitions for non-HKPR buyers, the BSD has also significantly curtailed demand from non-local buyers. Purchases of residential property by non-local individuals and companies (local and non-local) have plummeted to a monthly average of 294 cases, a mere 4.2% of total transactions, in the first two months of 2013, markedly below the respective monthly averages of 1 089 cases or 13.6% in January to October 2012 (i.e. the period before the announcement of the BSD). Moreover, the property market has been stabilized since the introduction of enhanced ad valorem stamp duty ("AVD") across the board in February 2013. Overall flat prices have even dropped by 0.3% month-on-month in September 2013 and remained stable thereafter, ending the upward trend in the preceding four consecutive months. Mindful that the demand-supply imbalance has to be addressed at source by a sustained increase in supply, the Government would continue to adopt the supply-led strategy to tackle the housing problem at source. The Chief Executive has announced in the 2013 Policy Address an overall blueprint and various measures for increasing land supply in the short-, medium- and long-term through a multi-pronged approach to re-balance demand and supply so as to meet the housing and other development needs of Hong Kong.

14. As regards members' concern about the shifting of overheating to the non-residential property market, the Administration has advised that to address the issue, the Government has announced on 22 February 2013 an increase in AVD for both residential and non-residential properties, and that the charging of the AVD on non-residential property transactions would be advanced from the date of conveyance on sale to the date of agreement for sale, to tally with the existing arrangement for residential properties. Subject to the enactment of the relevant legislative amendments, the above measures shall take effect on 23 February 2013. The Government will continue to closely monitor the land supply for commercial properties to ensure a stable and adequate supply of land for business and commercial uses to tie-in with the sustainable development of the Hong Kong economy and maintain the status of Hong Kong as a business hub and financial centre.

Justifications for the demand-side management measures

15. Given the Administration's claim that the SSD has effectively curbed short-term speculative activities, some members have questioned the justifications for the enhanced SSD to further increase the duty rates in respect of the different holding periods. In particular, some members including Hon Tony TSE, Hon Paul TSE, Hon Abraham SHEK, Hon James TIEN and Hon WU Chi-wai have queried the rationale for extending the coverage period of the enhanced SSD from 24 months to 36 months as this would further reduce the supply of residential properties in the secondary market. In their view, holding a property for 36 months is a relatively long period and should not be considered as "speculative". Members belonging to the BPA and the Liberal Party have also queried the justifications for exempting HKPRs from the BSD and questioned why the exemption is not extended to Hong Kong identity card holders who are not HKPRs.

16. The Administration is of the stance that while the supply-led strategy is the basis for tackling the housing situation at source, the demand-side management measures are extraordinary measures that are essential to help ensure the healthy and stable development of the private residential property market and the overall macroeconomic and financial stability of Hong Kong under the current exceptional market exuberance and supply shortage. The Government has explained that the SSD will reduce short-term speculative activities immediately. With most speculators driven out of the market, the end result will be a more healthier market of end-users. Although the SSD has been effective in combating short-term speculative activities, there are signs of a diminishing SSD effect beyond the first year after acquisition and as the holding period of a property increased. A strong disincentive for speculators and short-term investors is still needed by increasing the cost of speculation to make the residential property market healthier and

user-oriented. This would in turn help minimise the risk of a property bubble and preclude wide fluctuations in property prices that could affect the macroeconomic and financial stability of Hong Kong. The Administration holds the view that as most genuine homebuyers would not resell residential properties acquired within a short period, the enhanced SSD should not have a significant impact on the supply of flats held by these end-users.

17. On exempting HKPRs from the BSD, the Administration has explained that as land and property in Hong Kong are finite in supply, meeting the home ownership needs of HKPRs should come first in view of the current tight housing situation. The BSD aims to reduce the non-HKPR demand for residential properties (including demand from foreign investments) by increasing the transaction costs of all residential property acquisitions except those involving HKPRs and other specified situations that are exempted. It pursues the legitimate aim of according priority to meeting the home ownership needs of HKPRs who have a close connection with Hong Kong. It is no more than what is necessary to accomplish the policy objectives to address the irrational market exuberance in recent years. Further extending the scope of exemption would dilute the policy intent and undermine the effectiveness of the BSD.

Impact on business environment and Hong Kong's image

18. Members belonging to the BPA and the Liberal Party are gravely concerned that the BSD, by targeting non-HKPR buyers and corporate buyers, would indiscriminately affect genuine users and investors, such as HKPR buyers acquiring residential properties in the name of companies and corporate buyers purchasing residential properties in Hong Kong for use as staff quarters. This would dampen investment sentiment of local and multi-national enterprises, erode market confidence in Hong Kong, and undermine the business environment and the overall economy of Hong Kong.

19. Concerns are also raised that the stagnant market with a sharp decline in transaction volume has hard hit the business of the property-related sectors, including real estate agencies, the decoration and furniture business, the building repair and maintenance sectors, and the cleaning and related service sectors. According to the Property Agencies Association, an estimated 5-10% of real estate agencies are expected to close down due to lack of business, leading to unemployment. Sharing the concern of the affected trades as expressed by some deputations, including the Hong Kong Institute of Estate Agents and the Hong Kong Institute of Real Estate Administrators, these members urge the Administration to consider relaxing the measures.

20. The Administration has advised that the employment situation in the property-related sectors, including real estate sector, has generally improved over the past few years, with the unemployment rates showing a noticeable decline amid a generally tight labour market with full employment. While the demand-side management measures may have affected the estate agency trade, the impact has been cushioned by a vibrant domestic sector and the tight labour market so far. The Administration has highlighted that although the SSD and the BSD would inevitably cause pain to certain trades, these measures are necessary to curb the irrational market exuberance and help protect Hong Kong's macroeconomic and financial stability that would benefit the overall economy in the long run.

21. According to the Administration, the majority of the general public do not support withdrawal of the measures under the prevailing circumstances. A study by the Economist magazine has pointed out that Hong Kong is, among all economies in the world, having the highest risk of a property bubble. The Administration cautions that if the Government does not cool down the overheated property market in a timely manner, property prices will further deviate from economic fundamentals, and would lead to a greater impact on the market and more painful adjustment to society should there be any change in interest rates or other external factors. The Administration therefore has no intention to withdraw or relax the measures at this stage, lest it would dilute their effectiveness, leading to an increase in the risk of a property bubble. Members belonging to the DAB, FTU and the Labour Party share the Administration's concern that the withdrawal or any relaxation of the measures might undermine their effectiveness and send a wrong message to the community, calling into question the Government's determination to stabilize the property market. This might in turn trigger a return to the cycle of irrational exuberance and expose the property market to an even higher risk of an asset bubble, to the detriment of Hong Kong's economy and people's livelihood.

22. Echoing the views of the Hong Kong Institute of Real Estate Administrators and some trade associations including the Hong Kong General Chamber of Commerce and the Australian Chamber of Commerce in Hong Kong and Macau, on the demand side management measures' adverse impact on Hong Kong's competitiveness in the region, Hon Emily LAU and some members have expressed grave concern that over-regulation of the normal market operation would not only go against Hong Kong's long-held free market principles but would also undermine Hong Kong's hard-earned reputation as one of the world's freest economies and weaken its status as an international financial centre.

23. The Administration has reaffirmed its commitment to free market principles, highlighting that Hong Kong's long-standing free-market economy is built on multiple institutions, policies and practices that protect private property, market freedom and free flow of information and capital. According to the Administration, other jurisdictions have also formulated measures on property market with reference to their specific circumstances.² The Administration would closely monitor the private residential property market and consider withdrawing the measures after the demand-supply balance has been restored.

Constitutionality of SSD and BSD

24. Sharing the views of the Hong Kong Conveyancing & Property Law Association Ltd and some other deputations, Hon Abraham SHEK, Hon Andrew LEUNG, Hon Jeffrey LAM, Hon Paul TSE and Dr Hon LAM Tai-fai have questioned the constitutionality of the demand-side management measures. These members are concerned that apart from affecting the normal market operation, the measures might infringe the fundamental rights of individuals and legal persons to the acquisition, use, disposal and inheritance of property provided for under Article 105 of the Basic Law. As it is common in Hong Kong for people to acquire properties in the name of companies as a long-term investment, these members are of the view that HKPRs should have the right and freedom to choose how they own properties, and should not be deprived of the existing option to purchase and hold properties through companies. While some members support the introduction of BSD in light of the increasing share of residential property market transactions taken up by non-local buyers, Hon Paul TSE and members belonging to the BPA and the Liberal Party are concerned that the differential treatment under the BSD measure might be discriminatory against non-HKPRs (including Hong Kong residents, foreign buyers and corporate buyers), and is in breach of Basic Law Article 25 which provides that all Hong Kong residents shall be equal before the law. These members also query the rationale of the removal of the BSD exemption for HKPR minors who acquire residential properties through their trustees or guardians. In light of the Court of Final Appeal ("CFA")'s recent judgement against the seven-year residence requirement of the Comprehensive Social Security Assistance ("CSSA") Scheme, some members have raised concern about the implications of the judgement for the constitutionality of the BSD.

25. The Administration has assured members that it has no intention to intervene with the market operation. Legal advice has pointed out that the

² 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. The United Kingdom, Australia, Singapore and Macau have adopted measures in relation to the purchase of residential properties by non-locals.

demand-side management measures are constitutional and in conformity with the Basic Law, and that the SSD, the enhanced SSD and the BSD are legitimate taxations governed by Basic Law Article 108 instead of Article 105. According to the Administration, while Article 25 of the Basic Law provides that all Hong Kong residents should be equal before the law, this guarantee does not invariably require exact equality amongst all Hong Kong residents and in all cases, as far as the differences in legal treatment is justified for good reason, i.e. the difference in treatment pursues a legitimate aim, is rationally connected to the legitimate aim, and is no more than is necessary to accomplish that aim. In this connection, the Administration maintains that the measures do indeed pursue a legitimate aim, are rationally connected to, and are no more than necessary to accomplish the legitimate aim of combating short-term speculative activities to prevent further market exuberance which might pose significant risks to the macro economy and the stability of the financial sector, as well as the legitimate aim of according priority to meeting the home ownership needs of HKPRs who have a close connection with Hong Kong. Moreover, the BSD measure does not prohibit non-locals from acquiring residential property, but only increases the property transaction costs of non-HKPRs and corporate buyers so as to help manage the demand on local properties. As regards the CFA's judgement, the CFA has clearly stated that its judgement is specific to the CSSA Scheme and cannot be extrapolated for general application across the spectrum of all public services. In determining whether a difference in treatment between HKPRs and non-HKPRs is reasonable, rational and constitutional, one has to take into account the objectives, justifications and other key factors of the relevant government policies or services.

Application of BSD to guardians and trustees of HKPR minors and mentally incapacitated persons (Clause 9-section 29CB(8)(b) and (9)(b) and Clause 12-section 29DB(9)(b) and (10)(b))

26. In pursuance of the policy objective to accord priority to the home ownership needs of HKPRs under the current tight housing supply situation, the Bill proposes that BSD would be levied on agreements for sale and conveyances on sale of residential properties executed by any person (including companies) who is not a HKPR³. For a HKPR to be exempted from the BSD, the HKPR must be the purchaser/transferee acting on his or her own behalf in the acquisition of the residential property, unless the person is a HKPR minor or mentally incapacitated person, who due to the lack of capacity to enter into legally binding agreements, must in practice require

³ Under clause 5(1) of the Bill, a HKPR means a person (a) who holds a valid permanent identity card (PIC holder) issued under the Registration of Persons Ordinance (Cap. 177); or (b) who is eligible to but is exempted from applying for the issue of a PIC under regulation 25(e) of the Registration of Persons Regulation (Cap. 177A) (e.g. the aged, blind or infirm).

another person to act on his or her behalf. To cater for their needs, the Bill proposes that if a residential property is acquired on behalf of a HKPR minor or a mentally incapacitated person by his/her guardian or trustee, the minor or mentally incapacitated person will be treated as a purchaser in place of the trustee or guardian so that if other conditions are met, the instruments effecting the relevant transaction would be exempted from the BSD. The beneficial interest of the residential property so acquired rests with the HKPR minor/mentally incapacitated person concerned.

27. Hon Mrs Regina IP, Hon Ronny TONG, Hon Paul TSE, Hon Tony TSE, Dr Hon LAM Tai-fai, Hon YIU Si-wing, Hon Kenneth LEUNG and some members belonging to the DAB, Democratic Party and the FTU have expressed grave concern that the BSD exemption arrangement in respect of HKPR minors might be vulnerable to abuse, and would therefore undermine the effectiveness of the BSD. Since minors could not protect their own interest, the exemption arrangement concerned would provide incentives for non-HKPR trustees/guardians/parents to use the name of HKPR minors to acquire residential properties and hence evade the BSD. These members are particularly concerned about the possible abuse in the case of children born in Hong Kong to Mainland parents, both of whom are not HKPRs. Hon James TO has also expressed similar concern about the risk of BSD evasion in the case of mentally incapacitated persons. Moreover, some members consider that the complicated trust law might enable non-HKPRs to set up a trust to circumvent the BSD. Concerns are raised as to how the Administration could ascertain the exact nature and details of the trust, and whether the trust or guardianship is bona fide. To address the potential abuse of the BSD exemption, some members have suggested that the BSD exemption should be granted only if the parent/trustee/guardian acting on behalf of the minor is himself/herself a HKPR.

28. The Administration cautions that the suggestion to exempt only HKPR parent/trustee/guardian acting on behalf of a HKPR minor from the BSD would likely be discriminatory against certain HKPR minors based on the HKPR status of their parents/trustees/guardians. Legal advice sought by the Administration indicates that any proposal to impose arbitrary restrictions on the BSD exemption for those HKPR minors whose parents/guardians/trustees are not HKPRs is likely to be discriminatory and may infringe the right to equality of the relevant HKPRs, and such an approach would have human rights implications. In line with the policy intent to accord priority to the home ownership needs of HKPRs under the current tight housing supply situation, all HKPR minors, regardless of the HKPR status of their parents, guardians or trustees should be entitled to the same exemption. As regards members' concern about the possible loopholes relating to the trust and guardianship arrangement, the Administration has

advised that administrative measures would be drawn up to guard against potential abuse. Anyone who claims BSD exemption in the capacity as the guardian/trustee of a HKPR minor or mentally incapacitated person would be required to produce documentary evidence⁴ to the satisfaction of the IRD to substantiate the claim.

29. To safeguard the effectiveness of the BSD measure, Hon Kenneth LEUNG has proposed a Committee stage amendment ("CSA") introducing the "domicile" concept to the effect that only those HKPRs domiciled in Hong Kong will be exempted from the BSD. Hon Mrs Regina IP has proposed a CSA seeking to remove the BSD exemption for acquisitions of residential properties made on behalf of a minor who is a HKPR.

30. The Administration holds the view that the domicile concept proposed by Hon Kenneth LEUNG may not be effective in achieving its intended purpose of safeguarding the effectiveness of the BSD measure, and will have implications for the BSD policy. According to the Administration, Hon Kenneth LEUNG's proposed CSA would subject those HKPRs not domiciled in Hong Kong (who would otherwise be exempted) to BSD, which is contrary to the policy intention that all HKPRs who satisfy the relevant requirements as set out in the Bill and acting on their own behalf in acquiring residential properties should be entitled to the same BSD exemption. The Administration also has grave concern that the proposed CSA would result in significant complications and uncertainties to the actual application of the relevant provisions of the Bill. Under the Domicile Ordinance (Cap. 596), one has to be physically present in a place and intend to make a home there for an indefinite period in order to be domiciled in that place. While the general principles of the domicile concept have been set out in the Domicile Ordinance, the determination of one's domicile usually involves detailed examination of factual evidence and ascertaining of one's state of mind. These are contentious issues and often have to be dealt with by the court. Due to the complicated issues involved in determining one's domicile, as well as the substantial amount of residential property transactions handled by the IRD on a daily basis, it would not be feasible for the IRD to verify the domicile of each HKPR buyer.

31. The Administration, on the other hand, considers as acceptable from both the policy and legal perspectives Hon Mrs Regina IP's proposed outright withdrawal of the BSD exemption for acquisitions made on behalf of HKPR minors. The Administration is of the view that the proposal would safeguard the effectiveness of the BSD in according priority to the home

⁴ Such as the birth certificate to certify the parental relationship, an instrument to appoint a guardian pursuant to the Guardianship of Minors Ordinance (Cap. 13), a valid and legally binding trust instrument, a court order or guardianship order pursuant to the Mental Health Ordinance (Cap. 136) etc.

ownership needs of HKPRs but would not result in any difference in treatment between minors with HKPR trustees or guardians and those with non-HKPR trustees or guardians. Having considered the fact that the CSA would result in tightening up of the BSD regime, thus enhancing its effectiveness in according priority to the home ownership needs of HKPRs, and bearing in mind some members' views that minors are generally expected to be taken care of by, and stay with, their parents or guardians and accordingly their housing needs would not be prejudiced *per se*, the Administration agrees to take over Hon Mrs Regina IP's proposed amendment to the Bill.

32. Some members however have expressed reservation. Hon Abraham SHEK and Hon Paul TSE do not subscribe to the Administration's rationale for removing BSD exemption for minors across the board, which would affect not only children born to Mainland parents (both of whom are not HKPRs) but also children born to HKPR parents. Hon James TO has questioned the rationale and legal justifications for withdrawing BSD exemption for minors while retaining the exemption for mentally incapacitated persons in light of the Administration's earlier view that all HKPRs who can satisfy the relevant requirements as set out in the Bill, regardless of whether they are minors or mentally incapacitated persons, should be entitled to the same exemption from the BSD. Hon Paul TSE and Hon James TO warn about the danger of a judicial review of the BSD exemption for the mentally incapacitated persons and the removal of the BSD exemption for HKPR minors. Hon James TO considers that removing the BSD exemption for acquisition of residential properties made on behalf of mentally incapacitated persons may avoid the danger of judicial review. He suggests tightening up the proposed BSD exemption arrangement for mentally incapacitated persons so that the BSD exemption would only be granted for acquisitions of residential properties made by mentally incapacitated persons who are HKPRs through trustees or guardians who are appointed under the MHO or otherwise by the court.

33. The Administration emphasizes that the decision to take over the Hon Mrs Regina IP's CSA is to address the grave concerns expressed by some members that the exemption from BSD for acquisitions of residential properties made by minors who are HKPRs through their trustees or guardians might be vulnerable to abuse and would undermine the effectiveness of the BSD. The Administration maintains that mentally incapacitated persons should have a greater need to acquire residential properties than minors. Unlike minors who are under the supervision of, and are more likely to live with, their parents or guardians, mentally incapacitated persons who are adults have a right to choose their place of residence and where and with whom they live. Compared to minors,

mentally incapacitated persons are less likely to live with their family members and have greater home ownership needs. Besides, the Mental Health Ordinance ("MHO") (Cap. 136) sets out a relatively stringent definition of a guardian of a mentally incapacitated person. Any person claiming to act on behalf on a HKPR mentally incapacitated person in the acquisition of a residential property has to provide documentary evidence, such as a valid and legally binding trust instrument, a court order, or guardianship order pursuant to the MHO and any other documents as required by the IRD to prove his/her capacity as a guardian/trustee in the transaction.

Issues relating to resulting and constructive trust

34. Some members and the Law Society of Hong Kong have raised concern about the practical difficulties in ascertaining whether a HKPR was acting on his or her own behalf when acquiring a residential property involving provision of funds by persons other than the buyer who took the legal title in his name, which may give rise to resulting and constructive trusts. The HKPR purchaser concerned might inadvertently breach the law by having wrongly declared that he/she is acting on his/her own behalf.

35. The Administration has explained that in an acquisition involving funds provided by persons other than the buyer, such contribution may either be provided by way of a gift, a loan or an entrustment. The buyer (who is in full cognizance of the facts and circumstances surrounding the contribution) is in the best position to determine the nature of such contribution and to state whether he or she acts on his/her own behalf in the acquisition. The requirement to make a declaration could prompt the purchaser to make a conscious decision on the true nature of the contribution before the declaration is made. Where the purpose of the contribution is not clearly communicated by the contributor to the purchaser; or where the purchaser, for whatever reason, is not sure about the true nature of such contribution, it will not be difficult for him/her to ascertain the true nature of such contribution from the contributor before the making of the declaration.

Application of BSD to companies

36. The Bills Committee takes note of 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. While supporting the policy intention of the measures to combat short-term speculative activities, cool off market exuberance, and stabilize the residential property prices, Hon James TO, Hon Tony TSE, Hon Paul TSE, Dr Hon LAM Tai-fai and some members belonging to the BPA, the Liberal Party and the Civic Party are gravely

concerned that the measures would affect the normal operation of the residential property market and deprive HKPRs of the option to purchase residential properties through companies. These members hold the view that enterprises have genuine need to acquire residential properties for self-use and long-term investment. Acquiring residential properties in the name of a company is common in Hong Kong, especially for small and medium enterprises which would very often mortgage the properties to finance their businesses. Subjecting company buyers to BSD would unfairly increase their cost of acquiring residential properties and harm the business environment, dampen investment sentiments and discourage business expansion. These members are of the view that the BSD should not be applied across the board to all companies indiscriminately. One suggestion is that companies of which all shareholders or directors are HKPRs ("HKPR companies") should be exempted from the BSD or be refunded the BSD paid on certain specified conditions safeguarded by a statutory declaration mechanism and heavier penalties. Hon Abraham SHEK has proposed CSAs to the effect that the BSD paid by a HKPR company in acquiring a residential property be refunded three years after the acquisition at the earliest, subject to meeting certain conditions. Hon Tommy CHEUNG has proposed CSAs seeking to allow total BSD exemption for HKPR companies meeting certain conditions.

37. The Administration holds the view that exempting HKPR companies from BSD, be it an upfront exemption or deferred refund, is contrary to the policy objective of according priority to the home ownership needs of HKPRs, and will compromise the policy intent of stabilizing the property market. The Administration is concerned that such an exemption will create loopholes for abuse, incentivize non-HKPRs to ride on companies owned by HKPRs for BSD avoidance, and cause enforcement difficulties for the IRD, thereby undermining the effectiveness of the BSD in achieving its policy objective through managing demand.

38. The Administration considers it inappropriate to exempt companies from BSD simply on the basis that their shareholders are HKPRs. The Administration has explained that in law, a company is an entity independent of its shareholder(s). To exempt a company from BSD on account of the HKPR status of its shareholders is contrary to the fundamental legal principle currently governing companies that "a company is an entity independent of its shareholders." Moreover, exemption based on the conditions proposed by Hon Abraham SHEK (private company of no more than 5 members holding shares and no more than 3 directors each of whom is a HKPR) and Hon Tommy CHEUNG (private companies limited by shares and each of the member and director of the company is a HKPR) would raise questions as to whether the proposed change is discriminatory against other types of

companies and whether the long-existing principle of level playing field among companies in Hong Kong can be maintained.

39. The Administration is also concerned about how BSD exemption for companies could impact the effectiveness of the various inter-related demand-side management measures targeting demands from different buyers. The Administration has pointed out that in determining whether a HKPR is in possession of more than one residential property and hence subject to the AVD rates under the new AVD regime (the doubling of the AVD rates) announced in February 2013, the residential property held by that HKPR in the name of a company would not be taken into account. As such, if HKPR companies are to be exempted from the BSD, any HKPR who wishes 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, or when such a HKPR has already held a residential property in the name of a company, he or she can circumvent the new AVD by acquiring another residential property in his/her own name. This would seriously undermine the effectiveness of the measures in achieving their objectives of combating speculation and managing demand.

40. Some members share the Administration's concern that the proposed exemption for HKPR companies is vulnerable to abuse and would create loopholes through which non-HKPRs could avoid the BSD by acquiring ownership of property-holding companies, which are practically difficult to plug. According to the Administration, there are numerous means⁵ to transfer company shares, company ownership, and company-controlled assets (including residential properties). In some cases (e.g. the allotment of new shares or the issue of a new class of shares), there is no legal obligation on the parties concerned to notify the IRD of the transfer. Moreover, under the current regime, the validity of the transfer of company ownership would not be affected even if such transfers are not registered with the Companies Registry and the instruments involved (which may need to be stamped) are not presented to the IRD for stamping. If HKPR companies were exempted from the BSD, non-HKPRs could easily make use of various means which would be hard to uncover or trace, to acquire the beneficial interest of the shares of the company and gain control of the company in a concealed way⁶. This would in effect allow non-HKPRs to assume the effective ownership of the residential property held by the company, and at the same time evade the BSD.

⁵ Such as the execution of a nomination, declaration of trust or power of attorney, allotment of new shares, issue of a new class of shares and variation of the right of existing shares.

⁶ For example, through a company with only one HKPR as its shareholder and director who is asked to sign a blank instrument of transfer and surrender all seals of the company to the person from outside Hong Kong.

41. The Administration maintains that even if a statutory declaration mechanism with heavier penalties as proposed by some members is in place, the loopholes could not be effectively plugged. As a result, the penalty, however heavy, could hardly be of any deterrent value, thus rendering the mechanism ineffective and vulnerable to abuse. Fundamental changes to the existing well-established taxation and company regulatory regimes would be required⁷ to plug all the possible loopholes. Given that the BSD is an extraordinary measure introduced under exceptional circumstances, it would be against the principle of proportionality if various changes to the existing company and taxation regimes were to be adopted to plug the loopholes. According to the Administration, even if the present taxation and company regimes were changed, there is still no guarantee that the IRD could uncover non-compliance cases. The efforts required therefore would be disproportionate.

42. The Administration has further highlighted that Hon Abraham SHEK's proposal to refund the BSD after a period of three years would provide an even greater incentive for tax evasion, encouraging more HKPRs to purchase residential properties in the name of a company and sell the shares of the property holding company to any person upon the expiry of the three year freezing period. People from outside Hong Kong could also make use of the aforementioned arrangements to legitimately acquire, upon the lapse of the freezing period, all the shares of the HKPR company concerned and in turn, acquire indirectly the ownership of the residential property held by the company concerned. Moreover, the proposed three-year freezing period would lapse together with the expiry of holding period in respect of the SSD. The two combined would stimulate an immediate demand for residential properties and render the demand-side management measures ineffective.

43. Having considered the concerns raised by the Administration and mindful of the risks of abuse and the undesirable impact of the BSD exemption for companies, some members belonging to the DAB, FTU and Labour Party have expressed reservation on exempting companies and HKPR companies from the BSD. These members consider it inappropriate to widen the scope of exemption lest it would send a wrong message to the community, calling into question the Administration's determination to stabilize the property market, and diluting the effectiveness of the measures, leading to a renewed surge in residential property prices, thereby rendering the Government's efforts futile.

⁷ For instance, making changes to the Companies Ordinance (Cap. 32) and the SDO by requiring notification to the IRD and the Companies Registry of any activities involving changes in a company's controlling stakes.

44. Some members including Hon James TO, Hon Paul TSE, Dr Hon LAM Tai-fai and Hon Abraham SHEK have questioned why the Administration, while accepting the statutory declaration made by a HKPR buyer, would not likewise accept a declaration made by a HKPR company shareholder/director. These members consider that the risk of abuse of the declaration mechanism for an individual buyer would be higher than that for shareholders/directors of a HKPR company as it is more difficult to control a number of different shareholders than an individual HKPR buyer. These members are of the view that the Government should not assume that companies will abuse the statutory declaration mechanism. As most enterprises are law-abiding, heavy penalty and criminal liability should be sufficient to deter abuse of the BSD exemption.

45. Whilst highlighting that it is not assuming that all companies will abuse the statutory declaration mechanism to circumvent the BSD, the Administration has cautioned against underestimating the risk of BSD evasion in view of the substantial stakes involved (i.e. 15% of the consideration of the relevant residential property transaction), coupled with the fact that there are situations where the transfer of shares and ownership may be concealed.

46. According to the Administration, while the IRD can subsequently ascertain whether the registered owner of the residential property concerned is the HKPR making the statutory declaration by checking the property registration records of the Land Registry, there is no way for the IRD to ascertain if each HKPR shareholder of a company has ever transferred his/her company shares. As such, a non-HKPR can easily evade BSD by acquiring shares of a HKPR company and indirectly the ownership and control of a residential property held by the company in a concealed way with very low risk. On the other hand, the incentive for an individual buyer to make use of the identity of a HKPR to acquire a residential property for the purpose of evading BSD is relatively less. The Administration has pointed out that the transaction instruments which have not been stamped by the IRD, including secret agreements, are not registrable with the Land Registry. If a person outside Hong Kong enters into a secret agreement with a HKPR and makes use of the identity of the HKPR concerned to acquire a residential property for the purpose of evading BSD, such person has to bear a high risk of losing his/her beneficial interest in the residential property as it is difficult for him/her to prevent the HKPR concerned, who is the registered owner in the Land Registry, from executing an assignment selling the residential property.

Application of BSD to charitable institutions exempt from tax under section 88 of the Inland Revenue Ordinance (Cap. 112)

47. Some members including Hon James TO and Hon Alan LEONG consider that charitable institutions which are exempted from tax under section 88 of the Inland Revenue Ordinance (Cap. 112) ("IRO") should either be exempted from BSD or be refunded on certain conditions, such as after a certain specified period, in respect of a residential property acquired solely for charitable purposes or for use as staff quarters. These members are of the view that charitable institutions have the genuine need to purchase residential properties as staff quarters or for the purposes of carrying out their charitable functions. Furthermore, a body has to satisfy IRD's stringent requirements to be qualified as charitable institutions, and a charity exempted from profits tax under section 88 of IRO is required to include in its governing instrument certain clauses prohibiting distribution of its incomes and properties amongst its members and specifying how the assets should be dealt with upon its dissolution (which should normally be donated to other charities). As there are currently only about 7 600 such institutions in Hong Kong, exempting them from the BSD payment is unlikely to create much demand on residential properties nor would it enhance the risk of a property bubble. In the absence of any statistics on charitable institutions' involvement in short-term speculative property transactions, exemption from or refund of BSD should be granted to these institutions so as not to undermine their charitable activities, which are in the interest of the community as a whole. Hon James TO has proposed draft CSA seeking to exempt acquisitions of residential properties made by charitable institutions or trusts that are exempted from tax under section 88 of IRO from BSD.

48. The Administration maintains that an exemption or refund to charitable institutions or trusts of a public character is inconsistent with the existing taxation and stamp duty regimes, and will undermine the effectiveness of the BSD in cooling down the overheated property market, and thwart the policy intention of according priority to the home ownership needs of HKPRs. Whilst the Government recognizes that charitable institutions might have the need to purchase residential properties, the Government has to be careful in determining the priorities of different sectors' demands for residential properties under the current market condition. Even with the conditions that the residential properties acquired by the charitable institutions should only be used for dormitory or other purposes consistent with the concerned organisations' expressed charitable objects as suggested by some members, such an exemption would still increase the overall demand for residential properties, thereby reducing the residential properties available to HKPRs.

49. The Administration has explained that under the present taxation regime, charitable institutions do not enjoy general tax exemption across the board. Only profits that are generated from activities that fulfil the organization's charitable objects would be exempted from tax. As section 88 of the IRO does not prohibit charitable institutions from engaging in investment or trading activities not in the course of carrying out their expressed charitable objects, these charitable institutions are, as with any other companies, at liberty to engage in trading activities in the property market, and may acquire residential properties for investment purpose to support their operation. Moreover, the nature of charitable institutions varies, and they exist in different legal forms, such as a company incorporated under the Companies Ordinance (Cap 32), a trust, a society established under the Societies Ordinance (Cap. 151) etc. As a point of reference, over 70% of the section 88 charitable institutions are in the form of companies.

50. The Administration has further pointed out that charitable institutions have always been required to pay AVD under the SDO upon acquisition of any residential property (except receiving as gifts). The Administration is concerned that BSD exemption for charitable institutions as proposed by Hon James TO or BSD refund in accordance with the use of the residential property acquired (i.e. for charitable purpose) may create a serious risk of abuse, and result in fundamental and far-reaching implications for the present regimes. The substantial amount of the BSD payable might provide an incentive for BSD evasion by acquiring residential properties through charitable institutions for various purposes, including investment, which in turn would undermine the effectiveness of the BSD. Also, there is at present no statutory definition of what constitutes a charity or a charitable purpose in Hong Kong. The IRD has all along made reference to the common law in determining charitable bodies and charitable purposes under section 88 of the IRO. As charitable purposes are diverse and subject to dispute, and that IRD is responsible only for the tax exemption aspect of charitable institutions, the IRD will have difficulties determining the actual use of the residential property and verifying whether the residential property concerned has indeed been used for charitable purpose. In order to plug the loophole, a comprehensive review of the monitoring mechanism for charitable organizations has to be conducted, which will lead to a more complicated regime. This would be against the principle of proportionality given that the measures are extraordinary measures under the current exceptional circumstances.

51. According to the Administration, under Hon James TO's CSA, it appears that a charitable institution may still be exempted from the BSD even if it is not acting on its own behalf in acquiring a residential property, and that joint acquisition of a residential property by a charitable institution and non-HKPRs would also be exempted from the BSD. These arrangements may provide a channel for non-HKPRs to circumvent the BSD, and hence undermine the effectiveness of the BSD.

52. Taking into account the above considerations, the Administration maintains its stance that the Bill has struck a right balance in preserving the policy objective of the BSD and addressing the needs of charitable organizations. The Administration has further advised that drawing reference from the present stamp duty and SSD regimes, it has been proposed under the Bill that gifts of residential property to tax-exempt charitable institutions should be exempted from the BSD.

BSD refund mechanism for redevelopment (Clause 12 - proposed section 29DD)

53. The Administration has proposed in the Bill a refund mechanism to cater for acquisition of residential properties for the purpose of redevelopment. A person or a company who has paid BSD in respect of an instrument effecting the acquisition of a residential property for redevelopment purpose (whether the residential property acquired is for redevelopment into a residential or non-residential property) may apply for a refund of the BSD payment, provided that the construction of the redevelopment project is completed within six years, or within the time extension as permitted under the Bill. The "six-year period" will start to run after the entire lot to be redeveloped has been acquired⁸.

54. Some members including Hon Abraham SHEK, Hon James TIEN, Hon CHAN Kam-lam, Hon Tony TSE, Dr Hon LAM Tai-fai and Hon YIU Si-wing have expressed concern that the BSD would hinder redevelopment and that the six-year requirement under the BSD refund mechanism for redevelopment proposed by the Administration is not flexible enough to cater for the practical steps and actual operation involved in redevelopment. These members are of the view that requiring private developers to pay the BSD as and when individual units on the lot are acquired would add to the cost of redevelopment, thereby dampening private developers' interest in redevelopment. Apart from slowing down the overall rate of

⁸ If the redevelopment project involves more than one lots, the period will not start until the last lot has been acquired. Once the development has been granted the first Occupation Permit within the "six-year period", the whole development will be regarded as satisfying the refund requirement.

redevelopment, it may also have the effect of letting the Urban Renewal Authority ("URA") dominate redevelopment projects. Pointing out that redevelopment is conducive to increasing the supply of residential properties, which is in line with the policy objective behind the introduction of BSD, some members have requested the Administration to consider exempting private developers from paying the BSD upfront as and when individual units are acquired on the condition that the private developers undertake (with bank guarantee or other collateral) that the BSD chargeable would be payable with interest if the relevant redevelopment is not completed within the "six-year period". Hon Abraham SHEK, Hon Tony TSE and some deputations such as The Real Estate Developers Association of Hong Kong, The Hong Kong Institute of Surveyors, The Law Society of Hong Kong and the Hong Kong Conveyancing & Property Law Association Limited have urged the Administration to consider enhancing the refund mechanism, such as to advance the refund of the BSD paid for redevelopments when an investor or developer has obtained a certain percentage, say 80%, of ownership of the lot to be redeveloped, or when the property has been demolished and the building plan of the redevelopment has been approved by the Building Authority ("BA").

55. The Administration does not subscribe to the suggestion that a developer should get BSD refund upon securing a certain percentage of ownership of the lot to be redeveloped. The Administration has further explained that while the policy intent is that the BSD should not block redevelopment, it would be difficult to give any BSD exemption before the IRD could ascertain the ownership of the entire lot and obtain solid proof that an acquisition is indeed for the purpose of redevelopment and that the developer can subsequently fulfil the various conditions for exemption. Notwithstanding that the site or the property concerned may be acquired for redevelopment purposes, there is equal chance that it can be acquired for trading. Hence, the person or the company pursuing redevelopment has to pay the BSD as and when individual units are acquired.

56. Having regard to members' and deputations' views on redevelopment and in pursuance of the policy intent to facilitate redevelopment, the Administration has proposed to enhance the refund mechanism premised on two major principles i.e. (a) the developer concerned has obtained ownership of the entire lot to be redeveloped; and (b) there is proof that the developer concerned will use the site for redevelopment purpose. Under the proposed enhanced mechanism, a developer may apply for a refund of the BSD paid after the developer concerned has acquired the entire lot to be redeveloped, AND that the developer has either obtained BA's consent to commence any foundation work for the lot; OR has demolished all the original structure(s) on the lot (other than a building the demolition of which is prohibited under

any Ordinance) and obtained BA's approval of the building plan for the redevelopment. As such, the original requirement of "six-year period" within which the developer has to produce the first OP would no longer apply.

57. According to the Administration, the timing of refund could be advanced by up to four to five years under the revised refund mechanism as compared with the original mechanism where a developer may apply for refund of the BSD upon issue of the first OP within six years after it has become the owner of the lot. The two alternative conditions under the enhanced mechanism also cater for different redevelopment scenarios and give developers greater flexibility in applying for refund of the BSD paid with reference to the actual situation of their redevelopment project.

58. The Administration holds that the proposed arrangement for the enhanced refund mechanism could avoid any risk of abuse and has struck the right balance between maintaining the integrity of the BSD regime while not frustrating redevelopment. The Secretary for Transport and Housing will move CSAs to enhance the refund mechanism. The Bills Committee has no objection to the proposed revised refund mechanism.

59. Regarding Hon Tony TSE's suggestion to extend the BSD refund mechanism to cover refurbishment project, the Administration's stance is that while the Government attaches importance to building safety and welcomes private sector initiatives to rehabilitate old buildings, it is not apparent how the acquisition and wholesale renovation of properties by investors will support the policy objective of the demand-side management measures. Over the last few years, the Administration has introduced a host of measures, in collaboration with the URA and the Hong Kong Housing Society, such as the Operation Building Bright initiative and the Integrated Building Maintenance Assistance Scheme, to provide professional advice and financial support to eligible owners to help them rehabilitate and improve their buildings.

60. The Bills Committee takes note that under the Bill (clause 15), the current relief in stamp duty liability in case of conveyance between associated bodies corporate⁹ under section 45 of the SDO will be extended to BSD. Having considered the market practice in carrying out redevelopment, and in order to facilitate redevelopment activities carried out by developers and their subsidiaries, eligible developer will be allowed to apply for BSD

⁹ For the purpose of such relief, "associated bodies corporate" are defined as, for two bodies corporate, one is a beneficial owner of not less than 90% of the issued share capital of the other or a third such body is a beneficial owner of not less than 90% of the issued share capital of each of the two bodies.

refund solely or jointly with an associated body corporate within the meaning of section 45 of the SDO. Where a transferor and transferee of the relevant residential property cease to be associated within two years after the transaction, the relief from stamp duty will be cancelled and the companies will become liable to stamp duty payment including BSD.

61. In response to members' enquiry, the Administration clarified that acquisitions of bare sites on the private market that are permitted for residential development are subject to BSD payment. The refund history of the residential properties concerned is irrelevant to the determination of whether or not the developer is eligible for the BSD refund. The buyers concerned may apply for BSD refund if the relevant conditions under the BSD refund mechanism are satisfied. The BSD refund mechanism for redevelopment also does not apply to refurbishment project and rebuilding of New Territories Exempted Houses which meet the requirements set out under the BO (Application to New Territories) Ordinance (Cap. 121) and have been issued with a Certificate of Exemption by virtue of the Ordinance.

BSD exemption for acquisition of a replacement property by non-HKPRs under specified situations (Clause 12- Proposed section 29DB(6))

62. To address the needs of and to forestall hardship created for a non-HKPR owner who has been made to sell his/her residential property not at his/her volition, the Administration has proposed in the Bill to apply BSD exemption to the replacement purchase made by a non-HKPR property owner or company affected by the URA's acquisitions, resumption by the Government under the Lands Resumption Ordinance (Cap. 124), or compulsory sale pursuant to an order for sale made under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545). In response to members' concern and views from The Law Society of Hong Kong, the Administration has agreed to introduce CSAs to extend the exemption to cover five additional scenarios. They include resumption order made under section 4(1) of the Mass Transit Railway (Land Resumption and Related Provisions) Ordinance (Cap. 276); an order made under section 13(1) of the Roads (Works, Use and Compensation) Ordinance (Cap. 370), an order made under section 16 or section 28(1) of the Railways Ordinance (Cap. 519); an acquisition order made section 3(1) or (2) of the Land Acquisition (Possession Title) Ordinance (Cap. 130) or an order made under section 37(2) of the Land Drainage Ordinance (Cap. 446).

63. The Bills Committee takes note that there is no restriction on the size and value of the replacement property or the timeframe for the replacement purchase. If the property to be replaced is jointly owned by two or more persons, each of the affected non-HKPRs may make one replacement

purchase, whether alone or jointly with any other person or persons. Hon James TO is concerned about possible abuse of the exemption, and suggest tightening up the exemption by imposing reasonable restrictions, such as on the size and value of the replacement property as well as the time within which such purchase is to be made. The Administration has advised that the exemption is provided in pursuance of the policy intention to provide flexibility for the replacement purchases made by the affected non-HKPR property owners and to facilitate the smooth implementation of the acquisitions under the specified scenarios which serve public purposes. Moreover, given the lack of an objective basis to determine the suggested restrictions with regard to the size, value or timeframe of the replacement purchase, the restrictions thus imposed would be arbitrary and may be subject to challenge.

BSD exemption for joint acquisitions made by a non-HKPR with a closely related HKPR (Clause 9 - Proposed section 29CB(13))

64. Under the Bill, a joint acquisition made by a non-HKPR with a HKPR who is a closely related person¹⁰ of the non-HKPR will be exempted from the BSD. For the purpose of the exemption arrangement, the proposed section 29CB(13)(b) of the Bill provides that, where the purchasers consist of more than two persons, they are considered to be closely related if each of them is a parent, spouse, child, brother or sister of each of the other persons. Some members including Hon James TO suggest that the scope of exemption be expanded to include in-laws such that a joint purchase by a couple together with their non-HKPR parent(s) should also be exempted.

65. The Administration explains that the exemption arrangement in respect of joint acquisitions made by a HKPR with closely related persons is an exceptional arrangement to exempt certain non-HKPRs from the BSD, with a view to facilitating the needs of HKPRs in acquiring residential properties. The Administration maintains that the proposed exemption arrangement, same as that adopted for the existing SSD regime, has struck the right balance in ensuring the effectiveness of the BSD on the one hand, and adequately facilitating HKPRs in acquiring residential properties on the other. To further expand the exemption arrangement as suggested by members would result in BSD exemption being granted even if the purchasers consist of non-HKPRs who are not closely related to all other HKPR purchasers or transferees in a purchase of residential property.

¹⁰ Two persons are closely related if one person is the parent, spouse, child, brother or sister of the other person, including persons who are blood-related, half blood-related, or have adoption or step relationship.

Adjustment of SSD and BSD rates (Clause 16 - proposed section 63A)

66. The Bills Committee takes note that the Bill seeks to add a section empowering the FS to, by notice published in the Gazette, adjust the SSD and BSD rates by subsidiary legislation subject to negative vetting by LegCo within the specified period under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1). Some members including Hon James TO, Hon Alan LEONG, Hon Abraham SHEK and Hon Tommy CHEUNG consider such an arrangement highly undesirable as it may seriously undermine the scrutiny power of LegCo and its gate-keeping role in monitoring the Government. Hon James TO has indicated that the Democratic Party objects to the negative vetting procedures proposed under Clause 16, and strongly urges that adjustments to the rates of SSD and BSD by FS should be subject to "positive vetting" of LegCo, or by resolution of the LegCo. Hon CHAN Kam-lam and some members, however, are of the view that negative vetting of adjustments to the SSD and BSD rates is no cause for concern as such an arrangement is common in effecting tax and revenue related measures.

67. The Administration has explained that the demand-side management measures are extraordinary measures introduced under the current exceptional circumstances. It is important that such measures can be reversed as and when it is appropriate. The mechanism to adjust the SSD and BSD rates by way of subsidiary legislation is therefore proposed to provide the necessary flexibility to adjust the applicable rates (to zero if necessary) in a timely manner with reference to the latest property market situation and change in the external economic environment. The Administration has highlighted that while the SSD and BSD rates as amended by the FS may not have been specifically approved by the LegCo in advance, the subsidiary legislation made by the FS will be subject to the LegCo's scrutiny under the negative vetting procedure. In response to the suggestion of the Legal Adviser to the Bills Committee to enhance textual clarity of the provision, the Administration has proposed CSA to the proposed section 63A providing for the FS to amend the relevant head of charge in the First Schedule to SDO to effect a change to the rate of stamp duty.

Sunset clause for the demand-side management measures

68. Members note that the Administration has time and again indicated that the demand-side management measures would be withdrawn when the property market returns to a normal state and after the demand-supply balance has been restored. As Hong Kong is an externally oriented economy, vulnerable to fluctuations in the external economic environment, there are concerns that the Administration will not be able to revoke the

demand-side management measures in time once the property market trend reverses should there be a change in the interest rates or other external factors such as the United States Federal Reserve adjusting the size of the quantitative easing measures and reducing asset purchase. Dr Hon LAM Tai-fai and members belonging to the BPA, Liberal Party and Democratic Party are of the view that the Administration should draw up an exit plan and set objective and quantifiable target indicators to which the Administration would make reference in determining the timing for withdrawing the measures. This would enhance transparency of the Government's decision on the withdrawal of the measures and provide more information to enable business investors and home buyers to make an overall risk assessment and informed acquisition decisions. These members urge the Administration to consider introducing a sunset clause for the measures to give policy certainty to the business community and the general public, which is crucial to sustaining business confidence and the stable development of the property market.

69. The Administration disagrees that a sunset clause should be introduced and does not consider it possible to predict future market changes and various external factors to pre-determine a date on which the measures would be deemed no longer necessary. Given the complexity of the property market, no single indicator could fully reflect the underlying situation of the property market, and these indicators should be taken into consideration in totality. The Administration assures the Bills Committee that it would continue to monitor the development of the property market closely, review the SSD and the BSD and make adjustments to the measures in a timely manner as and when necessary upon careful assessment of the market by reference to a basket of indicators, including property prices, the housing affordability for the general public, the volume of property transactions, the supply of residential properties, mortgage payments, rent-to-income ratio, etc. The Administration also undertakes to review and report to the LegCo one year after the Bill is enacted. Some members belonging to the DAB and FTU share the Administration's concern and have expressed reservation that any prescribed sunset clause may only send a wrong signal to the market and fuel demand, thus undermining the effectiveness of the measures.

70. Despite the Administration's explanation and undertaking, Hon Andrew LEUNG has proposed CSAs to introduce a sunset clause to the effect that the SSD and BSD will expire by midnight on 26 October 2015. Hon Tommy CHEUNG has proposed CSAs that the SSD and BSD will lapse by the midnight of 31 December 2014. The Administration is of the view that amendments proposed by Hon Andrew LEUNG and Hon Tommy CHEUNG, if enacted, will cause the entire SSD regime (i.e. both the existing SSD

regime currently in place by virtue of the SDO and the enhanced SSD as proposed in the Bill) to expire by the same specified date. As the purpose of the Bill is limited to enhancing the SSD regime and imposing higher SSD rates for residential properties acquired on or after 27 October 2012 according to the length of period for which they had been held, the proposed amendments are beyond the scope of the Bill.

Admissibility of instruments not duly stamped with the BSD

71. Section 15 of the SDO provides that instruments not duly stamped are not admissible in certain proceedings. To address the concern expressed by some deputations, including The Law Society of Hong Kong and The Hong Kong Association of Banks, that a buyer's failure to pay the BSD should not affect the innocent sellers' right to produce the relevant documentation in court proceedings, the Administration has agreed to introduce CSAs to the effect of allowing an instrument to be received in evidence in civil proceedings before a court, even if it is not duly stamped with the BSD, on condition that the instrument has to be produced by a person other than the purchaser. Members note that the amendment is in line with the policy intention that any failure to pay the BSD by the buyer should not affect an innocent party's right to produce the relevant documentation in court proceedings.

Committee stage amendments to be moved by the Administration

72. Apart from the CSAs as elaborated in paragraphs 56, 57, 62 and 71 above, the Administration has proposed to move some technical CSAs to improve the clarity of the provisions, including amendment consequential to the Inland Revenue and Stamp Duty Legislation (Alternative Bond Schemes) (Amendment) Ordinance 2013 enacted on 19 July 2013 such that BSD relief would be provided for the relevant instruments exempted from stamp duty and SSD. The Administration will take over Hon Mrs Regina IP's proposed CSA to remove the BSD exemption for acquisitions of residential properties made on behalf of HKPR minors as detailed in paragraphs 31 and 33.

Committee stage amendments to be moved by the Bills Committee

73. At the meeting on 20 December 2013, the Bills Committee agreed to accept and move the draft CSAs to the Bill respectively proposed by Hon Tommy CHEUNG, Hon Abraham SHEK, Hon Andrew LEUNG and Hon Kenneth LEUNG. The CSAs to be moved by the Chairman on behalf of the Bills Committee are elaborated in paragraphs 29, 36 and 70 above.

74. The Bills Committee agreed that notices of amendment to the Bill in respect of BSD exemption for companies owned by HKPRs be served in the following order:

- (i) draft CSAs proposed by Hon Tommy CHEUNG; and
- (ii) draft CSAs proposed by Hon Abraham SHEK.

75. The Bills Committee agreed that notices of amendments to the Bill relating to the sunset clause for the SSD and BSD be served in the following order:

- (i) draft CSAs proposed by Hon Tommy CHEUNG; and
- (ii) draft CSAs proposed by Hon Andrew LEUNG.

Committee stage amendment to be moved by members

76. The Bills Committee takes note that Hon James TO will move CSAs proposing to exempt from BSD acquisitions of residential properties made by charitable institutions or trusts that are exempted from tax under section 88 of IRO; to require that adjustments to the rates of the SSD and BSD could only be made by the FS by way of a subsidiary legislation subject to LegCo's "positive vetting", or by resolution of the LegCo; and to tighten up the proposed BSD exemption arrangement for mentally incapacitated persons so that the BSD exemption would only be granted for acquisitions of residential properties made by mentally incapacitated persons who are HKPRs through trustees or guardians who are appointed under the MHO or otherwise by the court. Hon Dennis KWOK (Non-Bills Committee Member) will move CSAs to the effect that the Government's CSA to withdraw the BSD exemption for property acquisitions made by HKPR minors through their trustees or guardians should not apply to transactions made before the passage of the Bill.

Resumption of Second Reading debate on the Bill

77. The Bills Committee raises no objection to the resumption of the Second Reading debate on the Bill at the Council meeting on 19 February 2014.

Consultation with the House Committee

78. The Bills Committee reported its deliberations to the House Committee on 7 February 2014.

Council Business Division 1
Legislative Council Secretariat
14 February 2014

Bills Committee on Stamp Duty (Amendment) Bill 2012

Membership List

Chairman	Hon Starry LEE Wai-king, JP
Deputy Chairman	Hon James TO Kun-sun
Members	Hon LEE Cheuk-yan
	Hon CHAN Kam-lam, SBS, JP
	Hon Emily LAU Wai-hing, JP
	Hon Abraham SHEK Lai-him, GBS, JP
	Hon Tommy CHEUNG Yu-yan, SBS, JP (since 25 January 2013)
	Hon WONG Kwok-hing, BBS, MH
	Hon Jeffrey LAM Kin-fung, GBS, JP
	Hon Andrew LEUNG Kwan-yuen, GBS, JP
	Hon WONG Ting-kwong, SBS, JP
	Hon Ronny TONG Ka-wah, SC
	Hon Cyd HO Sau-lan (up to 21 May 2013)
	Dr Hon LAM Tai-fai, SBS, JP
	Hon WONG Kwok-kin, BBS
	Hon Mrs Regina IP LAU Suk-yea, GBS, JP
	Hon Paul TSE Wai-chun, JP
	Hon Alan LEONG Kah-kit, SC
	Hon James TIEN Pei-chun, GBS, JP
	Hon WU Chi-wai, MH
	Hon YIU Si-wing
	Hon Charles Peter MOK
	Hon CHAN Yuen-han, SBS, JP
	Hon LEUNG Che-cheung, BBS, MH, JP
	Hon Kenneth LEUNG
	Hon POON Siu-ping, BBS, MH
	Hon TANG Ka-piu
	Dr Hon CHIANG Lai-wan, JP
	Hon Tony TSE Wai-chuen

(Total : 28 members)

Clerk Ms Annette LAM

Legal Adviser Mr KAU Kin-wah

Bills Committee on Stamp Duty (Amendment) Bill 2012

**List of organizations/individuals which/who have
submitted views to the Bills Committee**

1. The Real Estate Developers Association of Hong Kong
2. Hong Kong General Chamber of Commerce
3. Hong Kong Chamber of Professional Property Consultants Ltd
4. Property Agencies Association
5. Hong Kong Economic Development Strategy Studies Centre
6. Dr YIP Kwok-chung
7. The Hong Kong Institute of Surveyors
8. Hong Kong Real Estate Agencies General Association
9. Hong Kong Christian Council
10. The Swiss Chamber of Commerce in Hong Kong
11. Mr Clayton IP
12. Liberal Party
13. The Hong Kong Conveyancing and Property Law Association Ltd
14. The Law Society of Hong Kong
15. Hong Kong Institute of Real Estate Administrators
16. Webb-site.com
17. Green Sense
- * 18. Mr LEUNG Fan-hung
- * 19. KPMG Tax Limited
- * 20. Hong Kong Institute of Estate Agents
- * 21. The French Chamber of Commerce and Industry in Hong Kong
- * 22. Hong Kong Bar Association
- * 23. Estate Agents Management Association
- * 24. The Australian Chamber of Commerce in Hong Kong and Macau
- * 25. The Hong Kong Association of Banks
- * 26. Society of Hong Kong Real Estate Agents Ltd
- * 27. Federation of Hong Kong Industries
- * 28. Mr CHENG Chun-ting, Registered Professional Surveyor
- * 29. BSD Concern Group
- * 30. WONG, HUI & CO., Solicitors
- * 31. 36 members of the public

* submitted written views only