**THE LAW REFORM COMMISSION**
**OF WESTERN AUSTRALIA**

Project No 1 – Parts II & III

# Protection for Purchasers of Home Units and Sales of Land through Land Agents

**WORKING PAPER**

**JUNE 1972**

# INTRODUCTION

The Law Reform Committee has been asked to consider the matters set out in paragraph 1 on the following page.

The Committee having completed its first consideration of the matters now issues this working paper. The paper does not necessarily represent the final views of the Committee.

Comments and criticisms are invited. The Committee requests that they be submitted by 7 September 1972.

Copies of the paper are being sent to –

The Chief Justice and Judges of the Supreme Court
The Judges of the District Court
The Law Society
The Magistrates Institute
The Law School
The Solicitor General
The Under Secretary for Law
The Real Estate Institute of Western Australia
The Developers Institute of Australia
The Associated Banks of Western Australia
Other Law Reform Commissions and Committees with which this Committee is in correspondence.

The Committee may add to this list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the paper.

The research material on which the paper is based is at the offices of the Committee and will be made available on request.

# TERMS OF REFERENCE AND COMMENTS THEREON

1. The following are the Committee's terms of reference –

**PART A**

To consider whether the sale of home units should be subject to Part III of the *Sale of Land Act 1970*, or any other appropriate legislation.

**PART B**

To consider proposals that –

(i) licensed land agents should be entitled to hold in their trust accounts all money paid to them on account of a purchase of land until the availability of a title to the land is assured;

(ii) all sales of land (other than between private persons not engaged in the business of buying and selling land) must be made through a licensed land agent.

2. Part A and Part B were originally referred to the Committee as separate projects. Since they relate broadly to the same topic and raise similar issues the Committee has decided to consider them together.

3. Part A was referred to the Committee as a result of the recent Whatley Crescent case. A building comprising home units was erected by a company on land owned by it. There was a large mortgage over the land and building, which presumably was used to secure advances for the construction of the building. Members of the public agreed to subscribe for shares in the company which under the articles would entitle them to exclusive occupation of specified units. However, under the agreements the share subscribers were eventually to be issued with strata titles. Some subscribers paid to the land agent acting on behalf of the company the full amount owing under their agreements and others paid deposits. The land agent paid this money to the company at its request. The company subsequently defaulted in payment of the mortgage and the mortgagee pointed to its right to sell the land and building. In the event

concessions were made. The share subscribers were left in possession of their units and were eventually issued with the strata titles they had been promised.

4. Part B arose out of suggestions made to the Attorney General by the Real Estate Institute of Western Australia. Although the immediate reason for the Institute's concern was the occurrence of the Whatley Crescent case, representatives of the Institute have informed the Committee that there have been cases other than sales of home units where the Institute considered that purchasers had been insufficiently protected.

5. Although Part B is in accordance with the original suggestion of the Institute, its representatives in discussion with the Committee qualified proposal (i) of Part B as follows –

(a) it would apply only to "cash" sales - i.e. other than sales on terms over a period of time,

(b) money representing payment of a deposit of up to 10% would not be included,

(c) land agents would be required (not merely entitled) to hold the money pending assurance of title,

(d) after the contract had been entered into, a purchaser would be empowered to authorise payment to the vendor, even though the title was not then assured.

The Committee points out that it accepts Part B (i) of the terms of reference as excluding private sales.

## DISCUSSION OF PART A

### THE PRESENT LAW IN WESTERN AUSTRALIA

6. Part III of the *Sale of Land Act 1970* provides (s.13) that a person who would otherwise have the right to sell five or more lots (which term includes proposed lots) in a subdivision or proposed subdivision must not sell a lot unless he is, or is immediately entitled

to become, the proprietor of that lot. If such a lot is subject to a mortgage (see s.14) it must not be sold unless –

(a) the mortgage relates only to that lot and the lot is sold under a contract which provides for the purchaser to assume the burden of the mortgage and for the price to be reduced by an amount equal to the amount owing under the mortgage, or

(b) the lot is sold under a contract which provides that the mortgage affecting it is to be discharged as to that lot prior to the purchaser becoming entitled to possession or to the receipt of the rents and profits, and that so much of the deposit and other money paid by the purchaser as is required to discharge the mortgage is to be paid to a legal practitioner or land agent, to be applied for that purpose.

7. Part III of the *Sale of Land Act* (see s.12) does not apply to the sale of a lot as defined in s.3 of the *Strata Titles Act*.

**TYPES OF HOME UNIT**

8. Although the term "home unit" typically refers to an apartment or flat in a multi-storied building, it is also used for some types of duplex houses and town houses.

9. There are three main legal arrangements in use in this State under which a person "owns" a home unit.

(a) He may be the registered proprietor of a lot under the *Strata Titles Act 1966*.

(b) He may be the holder of a parcel of shares in a company which owns the land and building and, as such holder, entitled to exclusive occupation of a particular unit.

(c) He may be an owner as tenant-in-common in undivided shares in the land and building, and entitled under an agreement with his co-tenants to exclusive occupation of a particular unit.

10. Although precise figures are unavailable it appears that the strata title arrangement is the most common. Since the *Strata Titles Act* came into force in November 1967, about 1,100 strata plans have been deposited under that Act. By contrast the Companies Office cannot recall a venture purely of the company type started during the same period. Moreover a number of company type ventures have now converted to the strata title system. The tenancy-in-common type arrangement continues to be used, but no figures are available.

11. An advantage of the company and tenancy-in-common type arrangements is that they enable the unit owners as a group to regulate transfers of occupancy of the units, and thereby control who may be their neighbours. This is not possible under the strata title system. Section 15(3) of the *Strata Titles Act* expressly provides that no by-law made by the corporate body comprising the owners of the lots is capable of operating so as to restrict the transfer of, or other dealing with, a lot. On the other hand an advantage of the strata title system is the greater ease with which intending purchasers can finance the purchase by mortgaging the unit.

## THE COMMITTEE'S PROVISIONAL VIEWS ON PART A

12. A purchaser of a lot under a strata title is as vulnerable to the risks inherent in contracting to buy property subject to a mortgage, and in contracting with a vendor who is not the registered proprietor of the lot, as is a purchaser of any other sort of subdivisional land. Thus there would seem to be a strong case for applying Part III of the *Sale of Land Act* to the sale of lots under the *Strata Titles Act*.

13. There would seem to be no special legal or practical difficulty in applying Part III of the *Sale of Land Act* to the sale of strata title lots in a building already erected, where separate strata titles have been or can immediately be issued.

14. It is not unusual for a promoter to enter into contracts for the sale of prospective strata title lots before the building is completed. There would appear to be no difficulty in the promoter complying with s.13 of the *Sale of Land Act*, that is, to be the proprietor of the land and building, as a whole before offering any proposed lot for sale. If the land is subject to a mortgage, it would seem impossible for him at that stage to comply with s.14(1) of the Act, since the mortgage would necessarily relate to more than one prospective lot. However, since the normal arrangement is for each purchaser eventually to become the proprietor of his lot

free of the original mortgage, the promoter could avail himself of the alternative provided in s.14(2) of that Act (see paragraph 6(b) above).

15. It should be observed that in Victoria (s.7 of the *Strata Titles Act 1967*) and in Queensland (s.67 of the *Auctioneers and Agents Act 1971*, and see paragraph 27 below) all money paid by a purchaser in the sort of case outlined in the previous paragraph must be held by a solicitor or land agent in trust until the strata plan is approved. In Victoria, if the plan is not approved within six months of the contract of sale the purchaser may recover the money, subject to occupation rent. This requirement would apply whether or not the unit was subject to a mortgage and thus goes further than s.14 of the *Sale of Land Act* of this State. Enactment of legislation along the lines of the proposals in Part B of the terms of reference would achieve broadly the same end as the Victorian and Queensland legislation, but if Part B is not considered desirable some thought could be given to enacting legislation on the Victorian or Queensland model.

16. Sales of company and tenancy-in-common types of home units do not fall within Part III of the *Sale of Land Act* and it seems inappropriate to widen it to include them. Projects of these types are often financed by a mortgage over the land and building as a whole, the arrangement being that the units are acquired subject to the mortgage, which would be discharged after the unit owners have entered into possession under an arrangement between themselves. The restrictions in s.14 of the *Sale of Land Act* would seem to make such an arrangement impossible even supposing any legal difficulty in effectively discharging the mortgage in respect of particular units could be overcome.

17. Protection could possibly be afforded to purchasers of home units of these two types by requiring all purchase money to be paid to a trustee to be applied towards discharging the mortgage over the land and building. However this may be unduly restrictive if the arrangement was for the mortgage not to be discharged for a lengthy period, since it would involve the purchasers' money being put aside for that period.

18. It would of course be possible to prohibit company or tenancy-in-common type ventures altogether. This could confine promoters to the sale of lots under the *Strata Titles Act*. The Committee feels that there is not enough in the present situation to warrant such an extreme course.

19. In summing up, the Committee is provisionally of the opinion that –

(a) application of the requirements of Part III of the *Sale of Land Act* to sales of strata title lots is desirable and would present no special difficulty;

(b) it would be inappropriate to apply Part III of the *Sale of Land Act* to sales of home units of the company or tenancy-in-common type, and at this stage there seems insufficient justification for enacting other legislation controlling such sales.

## DISCUSSION OF PART B

### THE PRESENT LAW IN WESTERN AUSTRALIA

20. Under the common law a land agent, like any other agent, is accountable to his principal for money received unless he is in the special position of stake holder. If the agent fails to account to his principal on demand, the principal has a right of action against the agent. The action for recovery of money paid to an agent who is not acting as stakeholder lies against the principal, not the agent.

21. If an agent receives money as stake holder his obligation is to pay it to the person entitled to it on the happening of a specified event. If the parties have not entered into a contract, then, *prima facie*, the agent holds any money paid by the intending purchaser as stake holder. If the parties have entered into a contract then, generally, the agent holds money paid by the purchaser as agent of the vendor. Usually the contract will expressly indicate in which of these capacities the agent holds the money.

22. The *Land Agents Act 1921* obliges a person whose business it is to act as an agent for a consideration in respect of a land transaction to be licensed as a land agent (s.3), and provides protection in various ways for those who deal with land agents. For example, a land agent must pay into a trust account purchase money received by him pending payment to the person lawfully entitled thereto (s.8); his trust accounts must be audited periodically (s.14G); he must contribute to a fund (s.22) which is available to reimburse those who suffer loss by reason of any "stealing" (as defined in s.371 of the *Criminal Code*) by him of money or other

property entrusted to him (s.26); and he must employ only registered land salesmen (s.15A). The Act does not affect the general principles of agency outlined in paragraphs 20 and 21 above.

23. There is no statutory requirement in this State that a vendor of land who sells as owner must be a licensed land agent, or that an employee engaged in selling his employer's land must be a registered land salesman.

**THE LAW ELSEWHERE IN AUSTRALIA**

24. All other jurisdictions in Australia have legislation obliging land agents to be licensed. Some States, however, go further.

25. In South Australia the *Land Agents Act 1955* includes within the definition of land agent a person whose business is the selling of land as owner. Unless such a person sells his land through a licensed land agent, he must be licensed and comply with the provisions of the Act.

Under s.60 of the South Australian *Land Agents Act* a land agent must not withdraw money paid by him into a trust account except for the purpose of completing the transaction in the course of which the money was received. This section was considered in *Bottroff v. Hillson* [1966] S.A.S.R. 159 (affirmed on appeal [1967] S.A.S.R. 115), where it was held that a land agent must not pay a deposit to a vendor prior to the settlement date for the balance of the purchase price, notwithstanding a provision in the contract to the contrary. On appeal, Chamberlain J., with whose judgment the other Judges concurred, said -

> "Land agents most frequently obtain their instructions from vendors, but they also must frequently end up by acting for both parties, and the policy of making them, in effect, stake holders of moneys coming into their hands is an understandable and, in my view, a reasonable one."

26. In Victoria under the *Estate Agents Act 1958* a land salesman employed by a person for the purpose of negotiating the sale, purchase, or lease of the employer's property is required to be a licensed estate agent, unless the employer himself holds an estate agent's license in which case the land salesman must hold a sub-agent's license (see s.3, definition of "estate agent" and "sub-agent", and ss. 9 and 10).

27. In *Queensland*, s.67 of the *Auctioneers and Agents Act 1971* provides that an estate agent or auctioneer who sells land which is not the whole of the land under an existing certificate of title, or who sells a unit in a building units plan (the equivalent of a strata title plan in this State) must retain the purchase money in his trust account until a separate certificate of title is available or, in the case of a unit, until an architect or building inspector certifies that the building has been completed. A person other than an estate agent or auctioneer who receives money in respect of the sale of such land or unit must pay the money into a trust account with a bank on similar conditions. Presumably this would include a person selling as owner. The purchaser may avoid the contract and recover his money if a separate certificate of title is not ready for delivery or a certificate of completion for the unit has not been given by the time he becomes liable to complete the purchase.

28. In *New South Wales*, Part IV of the *Auctioneers and Agents Act 1941* requires a "real estate dealer" - that is a person whose principal business is the selling as owner of allotments of land - to comply with certain advertising rules, to have a registered office, to keep proper records and employ only registered land salesmen. An allotment of land is defined as land on which there is no building suitable for human occupation, offered for sale for residential or retail commercial trade purposes, and includes a strata title lot and shares in a home unit company.

**THE COMMITTEE'S COMMENTS ON PART B**

29. A repetition of the Whatley Crescent type of situation (see paragraph 3 above), which in large measure prompted the Real Estate Institute to put forward its proposals, probably could be prevented by extending Part III of the *Sale of Land Act* to cover the sale of strata title lots. However the Committee has been informed of instances of sales of houses and building lots to which Part III would not apply, where purchasers have suffered loss or appear to be in danger of doing so. Some sales took place through land agents and legislation obliging land agents to hold money in their trust accounts pending assurance of title would possibly prevent losses in such cases. As a last resort the Land Agents Fidelity Guarantee Fund would be available to compensate purchasers.

30. On the other hand, the proposals do appear to raise difficulties.

**Retention of trust money**

31. Not the least difficulty in the case of the proposal as to retention by land agents of purchase money, is that of definition. Representatives of the Institute acknowledged that it would go too far to require retention until assurance of title in the case of sales of land on terms over a substantial period (though it might be practical to enact a requirement that the purchase money was to be held pending possession). The problem of distinguishing between "cash" and "term" sales would arise and any definition would be arbitrary and may not achieve the precise purpose intended.

32. Inclusion of money representing a deposit within the requirement could also cause undue inconvenience. Often the vendor needs the deposit to enable him to enter into a contract to purchase a property in his turn. Representatives of the Institute suggested that deposits of up to 10% of the purchase price should be outside the restriction, but according to information supplied to the Committee, some purchasers have suffered loss because deposits were paid to the vendor before the completion of the contract. It is to be noted that the legislation in South Australia (see paragraph 25 above) does not exclude deposits.

33. One further difficulty in relation to retention of purchase money should also be mentioned. As the Institute has suggested (see paragraph 5 (d) above) there would seem to be a case for qualifying the proposal to enable a purchaser to approve payment to the vendor before the title is assured. It would then be necessary to ensure that approval is not given as a mere formality. One way of doing this would be to provide that such approval was of no effect unless (a) the purchaser had already paid the money to the land agent, and (b) the purchaser's approval was given in the presence of a solicitor employed independently of the vendor and the solicitor has certified that the purchaser understood the consequences of his act. Section 19(1) of the *Hire Purchase Act 1959* (relating to contracts of guarantee) has a somewhat similar provision.

**Sales through land agents only**

34. Requiring all sales of land (other than between private persons not engaged in the business of buying and selling land) to be made through a licensed land agent, would make more effective the proposal as to the retention by land agents of purchase money. It would

bring into the scheme sales by those land developers who do not at present sell their land through land agents.

35. Such a requirement is, in substance, already the law in South Australia (see paragraph 25 above). Victoria in effect imposes a similar obligation upon land developers who employ salesmen (see paragraph 26 above).

36. The Institute's representatives suggested that those engaged in the business of buying and selling land could either obtain land agent licenses themselves or do their business through a land agent. The Institute expects that the rules of fair dealing laid down by the Land Agents Supervisory Committee would apply to transactions by such persons, thus restraining sharp practices.

37. This proposal, if adopted, would probably reduce abuses. It would however involve a substantial interference with the right of persons to deal in the way of business with their own property, although South Australia and Victoria have thought such a step necessary. Legislation along these lines could have broader consequences than the aspects considered in this paper, and the Committee would particularly welcome comments on this point.