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 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.

9. (b)(a) Hemay be the registered, the proprietor ofehaged as to that lr. T

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.

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

(a) application of the requirements of Part III of the

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 s

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