



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 1 – Part I

**Protection to
Defaulting Purchasers**

REPORT

SEPTEMBER 1969

REPORT ON PROTECTION TO DEFAULTING PURCHASERS

To: THE HON. ARTHUR F. GRIFFITH, M.L.C.,
MINISTER FOR JUSTICE

TERMS OF REFERENCE

1. In its first programme project number 1 the Committee was asked -

"to consider the law applicable to a defaulting purchaser under a terms contract for the sale of land and to report whether there is need for reform and the extent of such reform".

2. In considering this project it became apparent that the statute law on the subject was in need of revision and on the 13th September, 1968 you approved the Committee's request to extend the terms of reference to include a consideration of the provision of the *Vendor and Purchaser Act, 1878* (as amended), the *Sale of Land (Vendors' Obligations) Act, 1940* and the *Purchasers' Protection Act, 1933-1948*, to see whether they can be modernised and consolidated into one statute.

THE PRESENT LAW IN WESTERN AUSTRALIA

3. In terms contracts the vendor retains title but becomes in equity a trustee of the land for the purchaser, though in a "qualified sense", and the beneficial ownership passes to the purchaser and remains with him so long as he continues to meet his obligations under the contract. The vendor has only a lien on the property as security for the payment of purchase money (Voumard: *Sale of Land* 2nd ed. 97). This relationship persists only while the contract remains on foot.

4. Even though a contract does not give the vendor an express right to rescind, he still has a common law right to rescind in the event of a breach of a material term in the contract by the purchaser.

5. Once the vendor exercises his right to rescind the purchaser loses his beneficial interest in the property and his rights and liabilities then depend either on the express terms contained in the contract or on the common law.

6. Where the contract contains no express default provisions, it is well established that on default at common law the deposit is forfeited to the vendor (*Howe v Smith* [1884] 27 Ch.D. 89) and any instalments paid (which are regarded as pre-payments of the consideration for the ultimate conveyance) belong at law to the purchaser on the basis that the consideration for the conveyance has failed and accordingly can be recovered at law by him subject to the vendor's right to counterclaim for damages. (*McDonald v Dennys Lascelles Ltd* [1933] 48 C.L.R. 457 and also *Cowan v Stanhill Properties* (1967) V.L.R. 461).

7. Equity will relieve the purchaser against forfeiture of an amount which though described as a deposit is in fact a penalty. In addition, where the contract provides expressly for the forfeiture of the deposit *and* instalments, equity may grant relief against forfeiture of the deposit if penal and will generally hold that forfeiture of instalments is penal and may give relief on equitable grounds. (*Coats v Sarich* [1964] W.A.R. 2 and *McDonald v. Dennys Lascelles Ltd*).

8. In the English case of *Stockloser v Johnson* [1954] Q B.476, it is suggested that the courts should make no distinction between cases in which the contract expressly provides for the forfeiture of instalments and those in which the contract is silent on this matter. However, in view of *McDonald v Dennys Lascelles Ltd.*, such a distinction should be made, with the purchaser being in the former case entitled to equitable relief, and in the latter having the right, at law, to repayment of the instalments subject to any set-off for damage suffered by the vendor.

9. It should be noted that in any claim by the vendor for damages he must credit the purchaser with any increase in the value of the property. This provides a defaulting purchaser with a set-off shield; it serves only to reduce a claim for damage made by a vendor but does

not give the purchaser an independent claim to the increased value of the property either at law or in equity.

MOVEMENT AND NEED FOR REFORM

10. The purchaser under a terms contract is in the vast majority of cases sufficiently protected by the present law but it has been contended that if in default he may and does sometimes suffer injustice because the vendor may deprive him of -

- (a) the benefit of the bargain , and
- (b) any increase in the value of the property resulting from a rising market or improvements effected to it by the purchaser (except to the extent to which the purchaser may set off such increase against a claim by the vendor for damages).

11. This contention may be posed in another way; what justification is there for a vendor obtaining more than he was entitled to by the original bargain? Should he not be satisfied if, on the purchaser's default, he recovers the amount contracted to be paid together with compensation for any damage suffered by him by virtue of the default? Why should he get the benefit of the improvements effected by the purchaser and why should he get the benefit of any increase in the value of the land?

12. It has been suggested that terms contracts usually do contain severe purchaser default clauses because the contracts have been drawn by solicitors acting for vendors; that though the parties may be said to have agreed to the terms, the clauses in fact are frequently included as a matter of course from earlier precedents, are seldom read and, if read, probably not understood; and that in such dealings it often happens that the parties are not really in an equal bargaining position, the purchaser usually being at a disadvantage. In particular it would seem to be the almost invariable rule to include in such contracts a clause making time of the essence.

13. We have been informed that during the depression many defaulting purchasers were the victims of harsh dealing.

14. We have not been told of any recent cases (i.e. within the last twenty years or so) of hardship or injustice arising out of the purchaser's sheer inability to keep up the instalments. We assume that in these days of increasing land prices the purchaser is generally able to protect his position (e.g. by raising finance on the land or even arranging to sell).

15. However, the Committee has knowledge of two recent cases where hardship has been caused to a purchaser because through an oversight he did not pay an instalment on the due date and the vendor immediately rescinded the contract, relying on the provision in the contract making time of the essence. This hardship could not arise if the purchaser was given reasonable time to make arrangements.

THE SCOPE AND METHOD OF INQUIRY

16. In considering this project the Committee has studied legislation providing for the protection of purchasers of land in the following States – Victoria; *Sale of Land Act 1962* (as amended); New South Wales; *Land Vendor's Act 1964*; Queensland; *Contracts of Sale of Land Act 1963*; New Zealand; *The Property Law Act 1952*.

The Committee has received informative comments from the New Zealand Law Society and C.P. Hutchinson Q. C., Chairman of the Property Law and Equity Reform Committee (New Zealand), and from the Law Societies of New South Wales and Victoria. Representatives of the Western Australian Law Society attended a meeting with the Committee to discuss the matter. The Committee also considered earlier comments and recommendations raised by the Law Society in recent years in correspondence to you.

The Committee published a working paper on 18 October, 1968, and sent copies to the then Chief Justice and the Judges of the Supreme Court of Western Australia, the Law Society, the Law School, the Magistrate's Institute, the Real Estate Institute and several practitioners known to be interested in the subject and to other law reform committees and commissions.

17. The Committee received comments on its working paper from the then Chief Justice, Mr. Justice Hale, the Law Society of Western Australia, the Law Society of New South Wales, F.T.P. Burt, Q.C., J.L. Toohey, Q.C., W.E. Pidgeon and R.D. Keall.

RECOMMENDATIONS

18. The Committee in its working paper suggested that the problem that appeared to call for early legislative action in this State was that referred to in paragraph 15 above namely the hardship imposed on a purchaser, who through an oversight fails to pay an instalment under a contract in which there is a time of the essence clause, and also has the default provisions invoked against him immediately without giving him a chance to make good.

19. The Committee stated in paragraph 29 of its working paper that a purchaser under a terms contract, in the conditions at present prevailing in this State, would be sufficiently protected if in addition to his rights under the existing law he was given a statutory right to reasonable notice before the vendor could act against him on his default.

20. All local commentators on the working paper agreed that a case existed for reform and they also agreed generally with the suggested proposals put forward by the Committee.

21. The Committee gave attention to what would be a reasonable notice. It was felt that a figure of 7, 14 or 28 days might in some circumstances be fair, but in others not. On the other hand, it was suggested that the length of notice should be stated to be simply a reasonable notice in the circumstances, and in the event of dispute this could be left to the Court to decide.

22. In the end the Committee decided that it would fix an arbitrary time limit for 28 days to remedy a breach of covenant to pay money, and that for any other breach the legislation should lay down only that the purchaser should be allowed a reasonable time to remedy the default, thus leaving it to the Court to determine in any particular case what period was reasonable.

23. Before leaving this aspect the Committee would like to draw your attention to some of the legislation that has been passed in Victoria and New South Wales. This was dealt with in some detail in the Committee's working paper issued in October of 1968 and the Committee indicated that the problems and circumstances that gave rise to the legislation in those States were not within the Committee's terms of reference, nor had the Committee been shown that those problems and circumstances existed in this State.

24. Paragraphs 23, 24, 25 and 26 of the Committee's working paper are set out hereunder -

"23. Victoria's *Sale of Land Act 1962* deals with the sale of land on terms, mortgages of land and the sale of land in subdivision. It was enacted mainly to meet the problem which had been created (during the land boom and credit squeeze) by intermediate vendors, who were themselves purchasers under terms contracts, defaulting and leaving purchasers at the end of the line without title. The Act provides that no person may sell land unless he is registered or immediately entitled to be registered as the proprietor. However, it also provides that either a purchaser or a vendor under a terms sale may insist on the property being transferred to the purchaser subject to his giving a mortgage back to the vendor on terms equivalent to those contained in the original contract (and see Appendix A, page 1). We have been informed that this has had the effect of overcoming the immediate problem in Victoria and has tended to replace terms contracts by transfers with mortgage back.

24. There does not seem to be a similar problem in Western Australia at present.

25. The New South Wales *Land Vendors Act 1964* was introduced to stop malpractices connected with the sale of sub-divisional land. The Act applies only to the sale on terms (four or more payments) of a lot in a subdivision comprising five or more lots. It requires the appointment of a trustee in every such sale and gives him extensive powers to safeguard the interests of the purchaser. It gives the purchaser right to call for a transfer of the legal estate when 15% of the purchase price has been paid conditional on his giving a registrable mortgage back to the vendor. We are told that in practice trustees are not appointed, vendors finding it much more convenient to proceed by way of transfer and mortgage back to avoid the rather onerous conditions imposed by the Act.

26. As between the New South Wales and Victorian schemes, the latter appears to us to be preferable though if adopted it should be made subject to the proviso that if the vendor is to be forced into the position of a mortgagee he be given all the rights of a mortgagee including particularly the right to the payment of a reasonable amount of the purchase price (say 30%) before being obliged to effect a transfer: We emphasise however (see paragraph 24 above) that in this State there does not appear to be a problem calling for such interference with freedom to contract".

25. There is still no indication at this stage that there are any similar problems in Western Australia to those outlined above. Nevertheless we have knowledge of one large sub-divisional project, where land is being developed and sold in lots, but where the vendor to the purchasers of the subdivided lots is not the registered proprietor of the land, and is in fact the last but one purchaser in a chain of dependent terms contracts from the registered proprietor. There may well be other sub-divisional projects of this type, but we have not made a survey. In these circumstances the final purchaser gets little protection in the event of default by any of the intermediates, on whom he must rely for his ultimate title.

26. The Committee has not been referred to any cases where default of the type mentioned in the paragraph above has occurred, but simply wishes to draw your attention to the fact that in this type of transaction it only needs one of the persons in the chain leading to title to default, and all the purchasers further down the line are likely to suffer. The precarious position of the purchaser in this situation has been drawn to the Committee's attention by the then Chief Justice and by J.L. Toohey, Q.C., in their comments on the Committee's working paper. Mr. Toohey also referred to the problem in an article in the *University of Western Australia Law Review 1964*, pp. 424-427. The Victorian legislation appears to give the purchaser the most protection.

27. There is another aspect of the Victorian *Sale of Land Act 1962* which we consider should be mentioned. There are cases where the vendor is selling land on a terms contract subject to an already existing mortgage. Section 46 of our *Sale of Land (Vendors' Obligations) Act 1940* requires the vendor to notify the intending purchaser of the existence of any such encumbrance. The purchaser will suffer hardship if the vendor fails to repay the mortgage and the mortgagee enforces his rights against the land. The Victorian legislation protects the purchaser by providing firstly that any mortgage over the purchaser's land must relate only to that land and secondly for the purchaser to assume direct responsibility for repayment of the mortgage, and the amount so repayable to be deducted from the purchase price.

28. The matters mentioned in paragraphs 23 to 27 hereof do not strictly fall within the Committee's terms of reference, and our final recommendations do not attempt to solve any problems that could arise in that field. Also we do not attempt to answer directly the problem referred to in paragraphs 10 and 11 above. We consider that by giving the purchaser time to remedy any default, any such possible injustice will not in fact arise.

29. In its working paper the Committee also detailed to some extent the provisions of the *Vendor and Purchaser Act*, the *Sale of Land (Vendors' Obligations) Act* and the *Purchasers Protection Act* and stated that in its view these Acts should be consolidated and any obsolete or unnecessary parts repealed. We suggested that the statutory provisions mentioned in paragraphs 19 and 22 above should be included in the consolidated statute.

All who commented on this aspect of the working paper agreed with this suggestion.

30. The Committee has drafted a Bill incorporating the recommendations made in this report and a consolidation of the three Acts mentioned in paragraph 29 above, with the amendments it thought necessary. The Committee has dealt with those Acts as follows -

VENDOR AND PURCHASER ACT

31. This Act has been modernised, pruned of the provisions which are of no further effect and brought into line with recent legislation in the United Kingdom and other Australian States. Thirty years is substituted for forty years as the commencement of title which may be insisted on for old system land.

SALE OF LAND (VENDORS' OBLIGATIONS) ACT

32. The basic idea behind this legislation has been kept, but the provisions have been re-drafted and penalties increased. In addition the Act has been given teeth by enabling the purchaser to avoid the contract and obtain his money back where the vendor acts contrary to its provision.

PURCHASERS PROTECTION ACT

33. This Act has caused the Committee most concern because it is an Act passed for a specific purpose, and the circumstances giving rise to it have now almost completely disappeared. Many of its provisions are either too limited in scope or are covered in other legislation.

34. The Act provided that in the sale of subdivisional land by private treaty certain representations made are deemed to be representations of fact made for the purpose of inducing a purchaser to buy. The Committee felt that it might be worthwhile keeping this type of provision, whilst enlarging its scope and making the consequences for breach of the provision penal rather than contractual.

35. The Act also prohibited house to house selling of subdivisional land. The Committee believes that this type of activity should be discouraged, and has dealt with the matter in the

present Bill, but in wider terms than in the original Act, by making house to house selling of any vacant land illegal.

NOTICE OF ZONING

36. On the 20th June, 1969, the Committee received a request from the Town Planning Commissioner to consider an amendment to the law requiring details of the current zoning of land to be given when that land is advertised for sale.

It seemed to the Committee from the submissions made that any malpractice in this regard would most often arise in the case of the sale of vacant land.

37. The Committee, with the concurrence of the Town Planning Commissioner, sought the views of the Law Society on this matter and as a result has incorporated a clause in the Bill to cover this aspect.

SUMMARY OF RECOMMENDATIONS

The Committee recommends as follows -

- (a) that legislation be enacted to ensure that in a terms contract the purchaser is given a right to notice before the vendor can act against him on his default;
- (b) that the *Vendor and Purchaser Act 1878* (as amended), the *Sale of Land (Vendor's Obligations) Act 1940* and the *Purchasers Protection Act 1933-1948* be repealed and that new legislation be enacted, incorporating such provisions of these three Acts as they are still necessary, and containing provisions to give effect to recommendation (a).

B. W. Rowland
Chairman

C. le B. Langoulant
Member

I.W.P. McCall
Member

5th September 1969.

LEGISLATIVE COUNCIL

Read 1° 1969
(Introduced by)

A BILL

for

AN ACT to consolidate and amend the
Law relating to the Sale of Land.

Be it enacted. ..(etc.).

PART I – PRELIMINARY

- | | |
|-----------------------------|---|
| Short title
Commencement | 1. This Act may be cited as the <i>Sale of Land Act Commence 1969</i> . |
| Repeals | 2. On the coming into operation of this Act, the Acts specified in the Schedule to this Act are repealed. |
| Arrangement | 3. This Act is divided into Parts as follows -

PART I - Preliminary (ss. 1-4)

PART II - Sale of Land under Terms Contract (ss.5-9)

PART III - Offences in relation to Sale of Land (ss.10-13)

PART IV - Application to the Court by Vendor or Purchaser (s.14)

PART V - Rules relating to title of General Law Land (ss.15-17). |
| Interpretation | 4. In this Act, subject to the context -

"advertisement" includes notice, circular or other document, and also includes any advertisement published or disseminated by broadcasting, television, cinematograph or any other means whatsoever;

"Court" means the Supreme Court;

"land" includes land of any tenure and buildings or parts of buildings; |

"public amenity" includes roads, bridges , churches, shops, petrol stations, shopping centres, hotels, water supply, sewerage, light, power, gas, drainage, schools, hospitals, parks, reserves, swimming pools, railways and other means of transport;

"terms contract" means an executory contract for the sale and purchase of land under which the purchaser is -

- (a) obliged to make two or more payments to the vendor (over and above any deposit paid on or in connection with the execution of the contract) before he is entitled to a conveyance or transfer of the land; or
- (b) entitled to possession or occupation of the land before he becomes entitled to a conveyance or transfer of the land.

PART II – SALE OF LAND UNDER TERMS CONTRACT

Restriction on rescission

5.(1) A terms contract shall not be determined or rescinded on account of a breach by the purchaser of any condition or stipulation therein unless and until the vendor has served on the purchaser a notice specifying the breach complained of and requiring the purchaser to remedy the breach within the time hereinafter mentioned and the purchaser has failed to do so.

(2) The time referred to in subsection (1) of this section within which the purchaser is required to remedy a breach shall be -

- (a) where the breach consists of a failure to pay a sum of money - a date stipulated by the vendor being a date not less than twenty-eight days from the date of service of the notice ;
- (b) in any other case, a reasonable time from the date of service of the notice.

(3) This section has effect notwithstanding any stipulation to the contrary.

Notification of condition of title to be given No. 46 of 1940 s.3

6.(1) Every vendor of land, when such land is being or is about to be sold by means of a terms contract, shall notify the purchaser in writing before the purchaser executes the terms contract of any mortgage or encumbrance, lien, or charge on the land, and of any writ or fieri facias or warrant of execution entered in the register book or registered against such land. Any notification as aforesaid will be deemed sufficient if clearly contained in the terms contract.

PENALTY: Seven hundred and fifty dollars.

(2) In this section the word "charge" does not include rates or taxes charged on the land.

Except under certain conditions vendor not to encumber land after entering into terms contract No.46 of 1940 s.4

7. So long as the land remains the subject of a terms contract, the vendor shall not mortgage or otherwise encumber the land unless

- (a) the purchaser has consented thereto in writing not more than twenty-eight days of prior to the execution of the mortgage or encumbrance; or
- (b) the Court has on the application of the vendor pursuant to s.8 hereof given leave to mortgage or otherwise encumber the land.

PENALTY: Seven hundred and fifty dollars.

Power of Court on application for leave to mortgage

8. A vendor of land under a terms contract may make application to the Court by summons at chambers for leave to mortgage or otherwise encumber the land and mortgage on such application the Court may make an order accordingly, subject to such conditions as are necessary to protect the interest of a purchaser under the contract.

Remedy of purchaser on contravention

9. Where a vendor of land sold under a terms contracts acts in contravention of sections 6 or 7 hereof, the purchaser is entitled by notice served on the vendor at any time prior to conveyance or the registration of a transfer to rescind the contract and recover from the vendor all moneys and interest paid by the purchaser pursuant to the contract.

PART III - OFFENCES IN RELATION TO SALE OF LAND

Advertisements

10. Any advertisement relating to the sale of vacant land shall contain a description of the current zoning of such land under the *Town Planning and Development Act 1928-1969* and the *Local Government Act, 1960-1969*.

PENALTY: Two hundred dollars

Misrepresentation concerning public amenity an offence

11.(1) Where on or in connection with the sale of any land the vendor or his agent makes any statement, whether oral or written, as to the position or operation whether actual, proposed, or projected, of any public amenity, he shall be guilty of an offence unless at the time of the making of the statement the construction and operation of that public amenity in that place has been authorised in manner required by law by all persons or bodies whose authority is required therefore.

PENALTY: Two hundred dollars.

(2) Any marking or indication concerning the position or operation of a public amenity in any brochure, pamphlet or advertisement issued, or in any sign publicly exhibited, before the sale shall be deemed to be a statement as to the position or operation of that public amenity for the purposes of subsection (1) of this section.

House to house selling prohibited No.44 of 1933-48 s.16

12. A person shall not go, or employ or procure another person to go from house to house offering for sale or seeking offers for the purchase of vacant land, or for the purpose of persuading or inducing persons to go to view any vacant land with a view to purchase.

PENALTY: Two hundred dollars.

Remedy of purchaser on contravention No.44 of 1933 s.17

13. Where a contract is made as a result of a contravention of section 12 of this Act, the purchaser is entitled by notice served on the vendor at any time within fourteen days of the date of the making of the contract -

(a) to rescind the contract; and .

(b) to recover from the vendor all purchase moneys paid by the purchaser pursuant to the contract

PART IV - APPLICATION TO THE COURT BY VENDOR OR PURCHASER

Application to Court No.10 of 1878 s.9

14.(1) A vendor or purchaser of any interest in land or their personal representatives respectively may apply in a summary way to the Court in respect of any requisitions, or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract) and the Court may make such order upon the application as to the Court may appear just, and may order how and by whom all or any of the costs of and incidental to the application are to be borne and paid.

(2) Applications under subsection (1) of this section are to be made by summons in chambers.

PART V - RULES RELATING TO TITLE OF GENERAL LAW LAND

Application of this

15. This Part does not apply to land or any estate or interest in

Part land which is registered under the *Transfer of Land Act 1893*.

Thirty years title substituted for forty years 42 Vict. No .10 s.1

16. In the completion of any contract of sale of land made after the commencement of this Act and subject to any stipulation to the contrary in the contract, thirty years is substituted as the period of commencement of title which a purchaser may require in the place of forty years, but earlier title than thirty years may be required in cases similar to those in which earlier title than forty years might be required immediately prior to the commencement of this Act.

Rights of vendor and purchaser as to title 42 Vict. No.10 s .2

17. In the completion of a contract such as mentioned in section 16 of this Act and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser are to be regulated by the following rules, that is to say -

- (a) under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assignee is not entitled to call for the title to the freehold.
- (b) Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract, unless and except so far as they are proved to be inaccurate, are to be taken to be sufficient evidence of the truth of such facts, matters and descriptions.
- (c) The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title is not an objection to title where the purchaser will on the completion of the contract have an equitable right to the production of such documents.
- (d) Such covenants for production as the purchaser can and does require, are to be furnished at his expense, but the vendor is to bear the expense of perusal and execution on behalf of, or by himself, and on behalf of or by necessary parties other than the purchaser.
- (e) Where the vendor retains any part of an estate, to which any documents or title relate, he is to be entitled to retain such documents.

SCHEDULE

Repeals

Short Title	Extent of Repeal
<i>Vendor and Purchaser Act 1878</i>	The Whole
<i>Purchaser Protection Act 1933 – 1948</i>	The Whole
<i>Sale of Land (Vendors' Obligations) Act 1940</i>	The Whole



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 1

**Relief for Purchasers
Under Land Sales**

SUPPLEMENTARY REPORT

FEBRUARY 1970

SUPPLEMENTARY REPORT ON RELIEF FOR PURCHASERS UNDER LAND SALES

TO: The Hon Arthur F Griffith, MLC
MINISTER FOR JUSTICE

1. In your letter dated 9th November, 1969 you requested the Committee to consider what legislation is necessary to afford protection to purchasers acquiring land under the conditions referred to in paragraphs 23 to 25 of the Committee's report dated 5th. September 1969.

2. The Committee is of the opinion that in general freedom to contract should not be restricted otherwise than as recommended in its report, but that a special problem could arise in relation to subdivisional land which should be separately dealt with.

3. For example, suppose A, a registered proprietor, sells land under a terms contract to B who in turn sells under a terms contract to C, who subdivides and sells subdivided lots to numerous purchasers. If then C breaks a condition of his contract with B, B can rescind the contract and defeat any claims by the ultimate purchasers to the land, leaving them with only personal claims against C which may be worthless. Likewise, if B breaks a condition of his contract with A, A can claim back the land and so defeat C and his many ultimate purchasers. The ultimate purchasers may have claims against C but if C is caught up in B's default and becomes insolvent, these may be worthless.

4. The Committee considered several possible ways of dealing with this problem, including schemes adopted in several other States (see paragraph 24 of the Committee's report). The Committee interviewed Mr B W A Lindsey, a commissioner of the Rural and Industries Bank, and Mr H S Lodge, a solicitor who has had considerable experience in subdivision work. As a result of these and other inquiries, the Committee is of the opinion that protective legislation could inhibit subdivisional land development in this State.

Nevertheless, the Committee considers that the ultimate purchaser of sub divisional land should be given some protection.

5. The Committee therefore recommends that legislation be enacted requiring the vendor of subdivisional land comprising five or more portions (whether Lots or parts proposed to be made into Lots) to be the registered proprietor of that land before he sells or offers for sale any portion or enters into any contract to sell any portion. This recommendation is prompted by certain provisions in the New South Wales and Victorian legislation. If adopted the problems created by the practice of selling land subject to a chain of dependant terms contracts would not arise.

6. The Committee considers that its recommendation will help protect the ultimate purchaser by removing from the field the more irresponsible speculators who cannot normally finance the purchase and transfer of land into their own names. Draft provisions to give effect to the recommendations are attached and could be included as a further Part in the draft Bill forwarded with the main report. It is stressed that the draft, as with other draft Bills emanating from this Committee, should be regarded as no more than a statement which may be adopted as instructions to the Parliamentary Draftsman.

7. Because the Committee does not think that subdivisional development should be inhibited more than is absolutely necessary, the Committee is not prepared to recommend any further restriction. However, a requirement that the vendor of subdivisional land must be the registered proprietor of the land may not be sufficient to protect the ultimate purchaser in all situations. The vendor may have heavily mortgaged the land before sale, and the purchaser could be placed in an unfortunate position if the vendor failed to live up to his mortgage commitments.

8. If the Government wishes to take the further step of protecting the ultimate purchaser from the claims of a registered vendor's mortgagee, the Committee suggests the enactment of a provision along the lines of section 6(1), (3) and (4) of the *Victorian Sale of Land Act, 1962*. This section provides that if land is sold subject to mortgage, either the mortgage must relate only to that land and the purchaser should be able at a certain stage to by-pass the vendor and payoff the mortgage himself, or the purchase money must be paid to a third person to be held in trust by him to be applied towards the discharge of the mortgage. The Committee suggests

that, in line with its recommendation above, any such restriction should apply only to land subdivided into five or more lots.

C Le B Langouant

Chairman

E J Edwards

Member

BW Rowland

Member

13 February 1970

PART IIA

Interpretation 9A In this Part, subject to the context -

"lot" means a lot as defined in section 2 of the *Town Planning and Development Act, 1928-1969*;

"proprietor" means a proprietor within the meaning of the *Transfer of Land Act, 1893-1969*;

"sell" includes offer to sell, hold oneself out as being willing to sell, advertise for sale, and agree to sell, and "sale" has a corresponding meaning.

Sale of
subdivisional
land

9B(1) No person shall sell a lot in an area of land which he has subdivided into five or more lots unless he is the proprietor of that lot.

(2) No person who has acquired, whether from the subdivider or from any person claiming through the subdivider, five or more lots in a subdivision referred to in subsection (1) of this section shall sell any such lot unless he is the proprietor of that lot.

(3) No person shall sell a portion of land which he represents to the purchaser thereof will constitute a lot in an area of five or more lots unless he is the proprietor of that area of land.

(4) This section shall not apply to a sale of a lot within the meaning of the *Strata Titles Act, 1966-1969*.

[This subsection may not be necessary in view of the definition of 'lot' in the *Strata Titles Act*.]

(5) This section has effect notwithstanding any stipulation to the contrary.

PENALTY: Seven Hundred and Fifty Dollars.

Exemptions

9C(1) The Minister for Justice may, on such conditions as he thinks fit, exempt from the provisions of this Part any vendor or class of vendors, or any contract or class of contracts.

(2) The Minister may at any time vary or revoke any such exemptions.