



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 1 – Part III

**Protection for Purchasers
of Home Units**

REPORT

MARCH 1973

TO: THE HON. T. D. EVANS, M.L.A.
ATTORNEY GENERAL

TERMS OF REFERENCE

1. The Law Reform Committee was asked 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. The Commission, which is continuing the work of the Committee, now submits this report.

2. The project was referred to the Committee as a result of the Whatley Crescent case. The facts in the case were as follows. A proprietary company, had a building comprising home units erected on land owned by it. The land was mortgaged presumably to secure advances for the construction of the building. The company's advertising brochures invited people to purchase home units in the building. The typical offer and acceptance form used was somewhat confused in its terms. In effect the purchaser offered to purchase a specified home unit for a stated sum and at the same time applied for a group of shares in the company and agreed to be bound by its memorandum and articles of association. On the form it was also stated that "it [was] understood that the units [would] be converted to strata title on completion", and, in the part of the form relating to the acceptance of the offer, the company undertook "to give a strata title relating to the said unit within 60 days of possession". 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. Concessions were however made, and the share subscribers were left in possession of their units and were eventually issued with the strata titles they had been promised.

3. The Committee issued a working paper on 23 June 1972. The paper was divided into two parts. Part A dealt with this project. Part B contained a discussion on the topics of retention by land agents of purchase money and sales of land through land agents and will be the subject of a separate report.

4. Comments on Part A were received from -

- A.V. Jennings Industries (Australia) Limited
- the Associated Banks in Western Australia
- the Developers Institute of Australia (Western Australian Division)
- the Law Society of Western Australia
- the Master Builders' Association of Western Australia
- the Real Estate Agents' Association of Victoria.

DISCUSSION

General

5. 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.
6. There are three main legal arrangements in use in this State under which a person may "own" 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.
7. 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 1,700 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.
8. The substance of Part III of the *Sale of Land Act* is as follows -

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 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 (see s.14(1)) ;
or
- (b) the lot is sold under a contract which provides that –
 - (i) the mortgage affecting it is to be discharged as to that lot prior to or upon the purchaser becoming entitled to possession or to receipt of the rents and profits, and
 - (ii) that so much of the deposit and other money paid by the purchaser as is required to so discharge the mortgage is to be paid to a legal practitioner or land agent, to be applied for that purpose (see s.14(2)(b)).

If the mortgage is not so discharged the purchaser may rescind the contract and recover the money he has paid (ibid.).

9. Part III of the *Sale of Land Act* does not apply to the sale of strata title lots (s.12).

Lots under the Strata Titles Act

10. The Committee in its working paper pointed out that the purchaser of a lot or proposed lot under the *Strata Titles Act* is as vulnerable to the risks inherent in contracting to buy property itself subject to a mortgage and in contracting with a vendor who is not the registered proprietor of the lot or proposed lot, as is a purchaser of any other sort of subdivisional land. The Committee suggested that there seemed 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* and that there would be no special difficulties involved.

11. All the commentators agreed with the Committee's view. Some went further (see paragraph 17 below).

12. 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.

13. But it is not unusual for a promoter to enter into contracts for the sale of units before the building is completed. In such cases if the property is mortgaged, although the promoter could hardly comply with the first subsection of s.14 of the *Sale of Land Act* as the strata lots would not be in existence, he could fairly be expected to comply with the second (see paragraph 8(b) above) as the transaction would involve an agreement for the issue of a strata title for each unit sold.

14. The Commission has not attempted to draft the amendments which would be necessary to extend the provisions of Part III of the *Sale of Land Act* to strata title lots but does not expect that the amendments will give rise to difficult drafting problems. Section 12 of the Act would need to be repealed and the definition of "lot" in s.11 may need amendment to ensure that a strata title lot is included.

15. If Part III of the *Sale of Land Act* had applied to strata title lots the Whatley Crescent problem would not have arisen, because not only the company, but the agent who received the purchase moneys and handed them over to the company, would have committed an offence (see s.14 of the *Sale of Land Act*; and see also ss.371 and 373 of the *Criminal Code*).

Company and tenancy in common types of home ownership

16. In its working paper the Committee expressed the view that "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".

17. The Law Society disagreed with the Committee. The Council of the Society adopted the comments of one of the members of the Society as representing the Society's views. The following is an extract from these comments –

“If we accept the premises that purchasers of home units need some form of protection such as is presently afforded by the *Sale of Land Act* to purchasers of ordinary lots of land, then I cannot see any logical reason why that protection should only apply to purchasers of units the subject of strata titles as against the purchasers of the now less common “company type” or “tenancy in common type” of unit. The reasons given in the paper for not extending the Act to these two types of home unit types are –

- (a) That this type of project is often financed by a mortgage over the land and building as a whole with the units being acquired subject to the mortgage, to be discharged after the unit owners have entered into possession, under an arrangement between themselves. It is said that the restrictions in section 14 of the *Sale of Land Act* would appear to make such an arrangement impossible “even supposing any legal difficulty in effectively discharging the mortgage in respect of particular units could be overcome”. My comment on this is that this type of situation is just the dangerous kind of situation which arose in the Whatley Crescent case and the fact that legislation imposing some protection by way of restriction on such an arrangement, might make the arrangement difficult or even impossible does not seem to me to be a valid argument, if we grant the fact that the purchaser does need protection.
- (b) It also appears to be suggested that the sales of these two types of units are now so infrequent as not to warrant any legislation. This does not seem to be a very strong argument, particularly since there is the possibility, if strata titles **are** brought under the *Sale of Land Act*, that developers might in the future turn back to the other two types (home unit companies and tenancies in common) to avoid the restrictions imposed by the *Sale of Land Act*.

To sum up, whilst I fully agree that it would be desirable for Part III of the *Sale of Land Act* to apply to strata titles, I think that some legislation should be introduced simultaneously to deal with the mischief which actually prompted the paper that is to protect purchasers of other types of home units, whether they be shares in companies or purple titles, where they may find that the whole block of units is subject to a mortgage. I do not necessarily think that Part III of the *Sale of Land Act* would be the appropriate protection or the best protection, but as a matter of principle, it should be suggested to the Committee that it consider some of the legislation to be introduced for this purpose”.

18. The Commission having reconsidered the matter is not persuaded that legislation should be enacted either to prohibit company and tenancy in common type home unit arrangements, or to impose on such arrangements requirements relating to the discharge of mortgages along the lines of s.14 of the *Sale of Land Act*.

19. Until now there have been comparatively few arrangements of the company or tenancy in common type (see paragraph 7 above) and no cause for concern has been expressed about anyone of them in particular. The Commission however accepts that with the new restriction on strata title home units there may be an increase in these other types of arrangement and that the incautious purchaser may be misled but, in the Commission's view, there is at this stage insufficient justification for interfering with the rights of individuals to combine either as a company or as tenants in common to acquire home units and collectively accept the responsibility for any encumbrance on the property.

20. Moreover, under the company or the tenancy in common type of arrangement, the purchaser should be aware that he is participating in a joint venture, even though he will be acquiring exclusive rights to occupy part of the property. Consequently he should be more on his guard concerning the whole venture. In addition, with the company type arrangement, some measure of protection would be afforded shareholders by such provisions in the *Companies Act* as those relating to prospectuses and protection of minorities.

RECOMMENDATIONS

21. The Commission recommends that legislation be enacted extending the provisions of Part III of the *Sale of Land Act* to strata title lots.

22. The Commission does not recommend that legislation be enacted to prohibit or restrict company and tenancy in common type home unit arrangements at this stage.

CHAIRMAN: B W Rowland

MEMBER: E J Edwards

MEMBER: E G Freeman

16th March 1973