



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 38**

**The Sale of Undivided Shares in Land**

**REPORT**

**MAY 1973**

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

Mr. B Rowland, *Chairman*

Professor E. J. Edwards

Mr. E. G. Freeman

The Executive Officer of the Commission is Mr. C. W. Ogilvie, and the Commission's offices are on the 11th floor, R. & I. Bank Building, 593 Hay Street, Perth, Western Australia, 6000 (Tel: 25 9198 and 25 7835).

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

### TERMS OF REFERENCE

1. You asked the Commission to investigate schemes which invite the public to purchase undivided shares in land.

### WORKING PAPER

2. On 6 March 1973 the Commission issued a working paper in which it outlined the schemes and matters of concern, discussed a number of possible solutions, and in paragraph 17 stated that, whilst not unanimously of the view that legislation was necessary, it tended to favour the inclusion of a provision in the *Sale of Land Act* in the terms set out in that paragraph. A copy of the paper is appended and should be read as part of this report.

3. Copies of the paper were sent to -

the Chief Justice and Judges of the Supreme Court

the Judges of the District Court

the Law Society of Western Australia

the Magistrates' Institute

the Law School

the Solicitor General

the Under Secretary for Law

the Registrar of Companies

the Commissioner of Titles

the Local Government Department

the Town Planning Department

the Associated Banks in W.A.

the Developers Institute of Australia

the Estate Agents Association of Australia

the Housing Industry Association

the Local Government Association of W.A.

the Real Estate Institute of W.A.

other Law Reform Commissions and Committees.

A notice was placed in *The West Australian* offering copies of the paper to anyone interested and inviting comments.

4. Comments were received from -

the Law Society of Western Australia

the Registrar of Companies

the Town Planning Department, which gave an interim reply only

the Associated Banks in W.A.

the Local Government Association of W.A.

the Real Estate Institute of W.A.

the Managing Director of D. Chadwick & Associates Pty. Ltd.

Mr. D. E. B. Prosser.

5. The Council of the Law Society agreed with the proposal set out in paragraph 17 of the working paper, although it had reservations about the powers proposed to be given the Minister to exempt schemes on conditions. The Council also regarded it as essential that a purchaser should be entitled to avoid a contract of sale entered into in breach of the legislation, as was suggested in paragraph 19 of the working paper.

6. The Registrar of Companies -

(a) in relation to paragraph 8 of the working paper said -

“most of the schemes relating to the sale of undivided shares in land which have been investigated by this registry have been found not to be in breach of the provisions of Division 5 of Part IV of the *Companies Act*; either because they [had no profit motive for the purchasers] , in which case they do not fall within paragraphs (a) to (c) of the definition of "interest" in section 76 of the Act, or because they fell within the exemption from the definition of "interest" relating to partnerships, in paragraph (f) of the definition”;

- (b) made comments on several other paragraphs of the working paper, which have been taken into account;
- (c) is of the opinion that "the most unsavoury aspect of the present position is the total lack of control over misleading advertising" and that "it would be possible to prevent this if Division 5 of Part IV of the *Companies Act* were applicable, as section 82 requires the lodgement of a prospectus in this registry, and by virtue of section 42(2) (d) of the Act, I am prohibited from registering a prospectus if it appears to me to contain any statement or matter that is misleading in the form or context in which it is included".

7. The comments of the Associated Banks in W.A. are stated in a letter from the chairman of that body, who expressed their views on the proposal outlined in paragraph 17 of the working paper as follows -

“Whilst we recognise that legislative protection is necessary to protect some sections of the community from becoming involved in land dealings, the nature of which they do not understand, the question arises as to the extent that legislative protection is really desirable. At some point or other such legislation becomes a restriction of normal commercial enterprise and certain portions of paragraph 17 would seem to be far too all embracing. We consider provisions of this paragraph would rigidly limit sales of this nature other than by public companies under the provision of the *Companies Act*”.

8. The following is the opinion of the Local Government Association, quoted in a letter from the secretary of the Association -

"Any legislation should ensure that legitimate transfer for family or other reasons, e.g. division of land on death, where it was desired to transfer to family members in undivided shares, should be protected, with perhaps a limitation of the number permissible to ten. Now that Strata Titles were possible, undivided shares in flats seemed unnecessary. Possibly the simplest way was, as previously suggested, to provide that if the area covered by the shares, divided by the number of shares, is less than say five acres, the transaction must be approved by the Town Planning Board, in the same way as a subdivision or amalgamation, including consulting the Council.

This would allow for all "legitimate" transactions to be considered, with a right to appeal, and the purpose of the division into undivided shares could be examined. The *Local Government Act* would still need to be amended to clarify, and allow the Council to rate each undivided share separately, to recover from each owner separately, and to impose a minimum rate on each share".

9. The Real Estate Institute of W.A. expressed its concern "at some of the promotional schemes arising from the sale of unsubdivided land, particularly in country areas". It suggested that all offers to purchase and contracts of sale of land should include a clause clearly stating the zoning at the time of purchase. If the sale related to an undivided share it should only be sold if a subdivision had been approved at the time the offer to purchase is made or the contract of sale entered into, and the offer or contract should include the conditions governing the subdivision and the date of its approval by the Town Planning Board. A failure to include any of these clauses should make the contract void. In addition the Institute proposed that "the sale of unsubdivided land should only be negotiated through licensed real estate agents". The Institute agreed with paragraphs 13, 14 and 16(c) and (e) of the working paper.

10. The Managing Director of D. Chadwick & Associates Pty. Ltd., real estate agents, expressed the hope that, if legislation was to be introduced it should not prohibit all schemes in the process of controlling undesirable ones. He stated that some schemes were popular with sections of the public, and the alternatives to these schemes would appear to be membership in public companies, which was not always desirable because the "costly administration expenses and company taxation would take a large percentage of the profit and the return to the investor would be substantially reduced". He also urged that suitable transitional provisions be included in any legislation to give protection to promoters of partly completed schemes and members of the public involved in them.

11. Mr. Prosser's comments described the events surrounding the purchase by his wife and son of an undivided share in land and emphasised the unsatisfactory nature of the transaction. He suggested that these schemes should be subject to the approval of a Government authority.

12. The Town Planning Department wrote, making two suggestions and asking for comments on them. The first was that, in order to facilitate dealing in land held by a number

of co-owners, a trustee should be empowered (perhaps by regulation) to negotiate the sale of the land, subject possibly to reference to a representative body of co-owners. The second was that "purple titles" should either not be issuable to co-owners as this caused misunderstanding, or be so worded as to make it clear that no part of the land belonged exclusively to the holders of such titles.

13. The Commission replied by letter and in answer to the first suggestion stated that, in view of the many different forms such schemes could take, it was probably undesirable to require that in every case a trustee be empowered to negotiate a sale, and that it would be preferable at this stage to rely on the powers of the Registrar under Division 5 of Part IV of the *Companies Act* to refuse approval to a deed which did not contain covenants which were adequate. If his powers were shown, by experience, to be deficient, an amendment to the Regulations could then be considered.

In answer to the second suggestion, the Commission stated that it might be best in this case also to rely on the Registrar's discretion under Division 5 of Part IV of the *Companies Act*. A scheme which provided for the issue of "purple titles" could be quite reasonable in certain circumstances, and the true extent of the rights of a co-owner would have to be clearly set out in the prospectus under s.80 of the *Companies Act*. In the view of the Commission it was doubtful whether the issuing of a "purple title" of itself raised in people's minds the thought of exclusive ownership of a portion. The Commission also pointed out that the Commissioner of Titles did not think it was desirable to include, in the certificate of title of a co-owner, a statement that no part of the land belonged exclusively to the holder.

14. The Commission in its letter suggested that the Department might wish to comment further and accordingly held back final consideration of the matter. It now understands that the Department will not be making further comments.

## **DISCUSSION OF COMMENTS**

15. Since the working paper was issued, a bill to amend the *Trade Descriptions and False Advertisements Act* has been introduced into Parliament extending s.8 of that Act so as to make it an offence to publish not only false advertisements in connection with the sale of land (and goods) but misleading or deceptive ones as well. The enactment of this bill should help

in the control of the first of the two main areas of concern referred to in paragraph 7 of the working paper, but would not affect the other area of concern which is that of the administrative difficulties associated with large numbers of co-owners where there are no adequate machinery provisions in a trust deed.

16. If the Government wishes to deal with the second area of concern relating to administrative difficulties, the Commission is of the opinion that it would be undesirable to do so by prohibiting the sale of undivided shares in land altogether or subjecting all such schemes to the approval of a Government authority, as the Local Government Association and Mr. Prosser suggested.

17. In the view of the Commission (which is shared by the Law Society) it would be preferable to enact legislation which would include the proposals contained in paragraphs 17 and 19 of the working paper and incorporated in the Commission's recommendations in paragraph 22 below. The Commission considers that the schemes which are the subject of concern are similar to the type of schemes already controlled by Division 5 of Part IV of the *Companies Act*, and that the same principles of control should apply to them. The Commission's proposals are based on the assumption that the proposed amendment to Division 5 of Part IV of the *Companies Act* will be enacted.

18. The enactment of legislation along the lines suggested by the Commission would require all but exempted schemes to comply with Division 5 of Part IV of the *Companies Act*. This would have the following effect -

- (a) It would prevent false or misleading advertising (see ss. 42 and 82 of the *Companies Act*), irrespective of whether the *Trade Descriptions and False Advertisements Act* is amended (see paragraph 15 above).

The Commission believes that this would do much to ensure that no intending purchaser is misled into thinking that ownership of an undivided share in a piece of land carries the right to exclusive occupation of any portion. It would also prevent misleading advertising as to zoning, a matter which is of concern to the Real Estate Institute.

- (b) It would help to ensure that the trust deed governing the scheme contained appropriate covenants (including covenants relating to rates, taxes and other matters of administration) to enable the scheme to operate satisfactorily (see s.78 of the *Companies Act* and paragraph 12 of the *Companies Regulations 1962*).
- (c) It would ensure that a trustee approved by the Minister was appointed to safeguard the rights and interests of the co-owners (see ss.77 and 80 of the *Companies Act*).

The Commission believes that this requirement would of itself do much to ensure that the scheme was well managed.

19. The Law Society expressed doubts about the desirability of empowering the Minister to exempt schemes from the legislation. However the Commission considers that the circumstances in which exemptions would be justifiable are so many and varied that it would be desirable to provide for a power of exemption.

20. The Managing Director of D. Chadwick & Associates Pty. Ltd. urged the enactment of transitional provisions (see paragraph 10 above). The Commission has considered the question but does not think that such provisions are required. The proposed legislation would, in any case, apply only to offers accepted or made after the coming into force of the Act. Further, it excludes specifically offers or invitations relating to the total undivided shareholding of the offeror, and therefore a co-owner in a partly completed scheme would not be stopped from offering his interests for sale publicly. In addition a promoter could apply to the Minister (see paragraph 22 below, recommendation (1) (d)) to exempt a partly completed scheme from the legislation if it appeared that undue hardship would otherwise result.

21. In paragraph 20 of the working paper the Commission drew attention to the special case of sales of undivided shares occurring overseas and to the fact that the suggested legislation might not provide sufficient protection where such sales are concerned. The Commission is still of the view that it would be difficult to devise legislation that would completely protect incautious purchasers who are not within the jurisdiction.

## RECOMMENDATIONS

22. The Commission therefore recommends -

- (1) The inclusion of a provision in the *Sale of Land Act 1970* along the following lines -

No person shall offer to the public for purchase, or shall invite the public to purchase, any undivided share in land unless -

- (a) the promoter complies with Division 5 of Part IV of the *Companies Act*;
  - (b) the offer or invitation relates to a specified building and the purchaser has the right to exclusive occupation or use of that building or part of that building;
  - (c) the offer or invitation relates to the total undivided shareholding of the offer or in the land and the sale is to be effected in the one transaction;  
or
  - (d) the Minister has, by notice in the *Government Gazette*, exempted the offer or invitation from compliance with the proposed provision on such conditions as he thinks fit.
- (2) That the exemption referred to in paragraph (d) above should also operate to exempt the offeror from compliance with Division 5 of Part IV of the *Companies Act*.
  - (3) That criminal penalties should be provided for breach of the provision and that, if a contract of sale is entered into in breach of the legislation, the purchaser

should have the right, within a prescribed period, to avoid the contract and recover the money he has paid.

- (4) That the legislation should apply to -
  - (a) offers made after the coming into force of the Act, and
  - (b) offers accepted after the coming into force of the Act even though the offer was made before that date.

CHAIRMAN: B. W. Rowland

MEMBER: E. J. Edwards

MEMBER : E. G. Freeman

22nd May 1973.