



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 38**

**The Sale of Undivided Shares in Land**

**WORKING PAPER**

## **TERMS OF REFERENCE**

1. “To investigate schemes which invite the public to purchase undivided shares in land”.

## **CLASSIFICATION OF SCHEMES**

2. These schemes take a number of forms.
3. There are schemes in which the purchaser is to be given the right to the exclusive occupation or use of a specified building or part of a building (for example a block of home units or offices). These schemes have already been considered by the Law Reform Committee in its working paper on Project No. I, Parts II & III (*Protection of Purchasers of Home Units and Sales of Land through Land Agents*, 23 June 1972).
4. There are others where a specific commercial enterprise or development is intended to be carried on by or on behalf of the co-owners. These schemes, which usually take the form of an investment in an income earning property (for example, the purchase of a block of flats for letting) although sometimes they involve the development of a property with a view to profit (for example, the development of a pine plantation), are controlled by Division 5 of Part IV of the *Companies Act 1961-1972* except where they take the form of a sale of partnership interests, in which case they are exempt from the application of that Division. However a bill to amend the *Companies Act* was introduced into the last session of State Parliament, which is intended to limit the exemption to interests in partnerships that are prescribed interests.
5. With some schemes, however, no precise or specific commercial enterprise or development is expressly proposed. They involve the sale of undivided shares in broad acres, in some cases the sale taking place outside of Western Australia. Occasionally they offer exclusive use of portion of the land to each co-owner (for example, a portion of the land which can be used as a hobby farm by a co-owner). More commonly no such exclusive use is offered, although this may be vaguely suggested in the connected advertising.
6. There has been a considerable increase over the last year in the number of the schemes referred to in the preceding paragraph. Some concern has been expressed about them and a number of warnings have been issued through the press by the present Minister for Town Planning and his predecessor.

## **MATTERS OF CONCERN**

7. There are two main areas of concern -
  - (a) The advertising and invitations associated with the sale of such shares in land can be misleading. The purchasers may be given the impression that they are buying specific portions of the land rather than shares in the whole, or they may be misled about the likelihood of re-zoning or the probable conditions and expense of future development, and as a result sales may occur at inflated prices. In addition, the vendor may not be the registered proprietor of the land.
  - (b) The existence of an excessive number of co-owners, many of whom may be difficult to locate, can give rise to considerable problems if there is no mechanism for administering these schemes. It may be difficult to arrive at decisions on matters of land usage and the land could fall into disuse. Other problems could arise both for the co-owners and the Government or local authority for example in negotiations relating to resumption or in the collection of rates.

## **DISCUSSION**

8. Notwithstanding that no precise or specific commercial enterprise or development is expressly proposed, some of the schemes referred to in paragraph 5 above possibly offend against the provisions of Division 5 of Part IV of the *Companies Act*.

9. Section 81 of that Act provides that no person, except a public company, “shall issue or offer to the public for subscription or purchase or shall invite the public to subscribe for or purchase any interest”. The penalty is twelve months imprisonment or \$1,000 fine (see s.86(1)).

Before any such company can issue or offer any "interest" to the public, it must, amongst other requirements, issue a prospectus (s.82), appoint an approved public company as trustee and lodge an approved trust deed (ss. 77, 78 & 79) containing covenants as to accounts, audit, meetings and other matters of administration (s.80).

10. “Interest” is defined in s.76 as follows -

“... any right to participate or interest whether enforceable or not and whether actual prospective or contingent -

- (a) in any profits assets or realisation of any financial or business undertaking or scheme, whether in the State or elsewhere;
- (b) in any common enterprise whether in the State or elsewhere in which the holder of the right or interest is led to expect profits rent or interest from the efforts of the promoter of the enterprise or a third party; or
- (c) in any investment contract;

whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset, but does not include -

- (d) any share in or debenture of a corporation;
- (e) any interest in or arising out of a policy of life insurance; or
- (f) any interest in a partnership agreement”.

An “investment contract” is defined in the same section as -

“... any contract scheme or arrangement which in substance and irrespective of the form thereof involves the investment of money in or under such circumstances that the investor acquires or may acquire an interest in or right in respect of property that under or in accordance with the terms of investment will or may at the option of the investor be used or employed in common with any other interest in or right in respect of property acquired in or under like circumstances”.

11. It is arguable that the schemes about which concern has been expressed would be caught within this very wide definition (and see Wallace & Young, *Australian Company Law and Practice*, p.302-4) and that promoters of such schemes should be prosecuted if they do not comply with Division 5 of Part IV of the *Companies Act*. The term "interest", however, does not appear to have been judicially considered in the context of such schemes. Moreover, there may well be difficulties of proof and hence a reluctance to prosecute.

12. To overcome any difficulties of proof, the *Companies Act* could be amended to cast the burden on the defendant-promoter to prove that the offer or invitation did not offend against the provisions of the Division. There may, however, be objections to this in principle.

13. As an alternative, new legislation could be enacted specifically dealing with the sale to the public of undivided shares in land, and incorporating only those provisions of Division 5 of Part IV of the *Companies Act* which would be appropriate to control schemes having no precise or specific commercial enterprise or development in view. In addition it might be desirable to ensure that some person (such as a trustee, promoter or manager) was responsible for the payment of rates and other incidents of land ownership.

14. If any such new legislation is to be enacted, it would seem appropriate that it be by way of an amendment to the *Sale of Land Act 1970*, although the administration of the legislation could nevertheless be vested in the Companies Office which has the necessary skills and organisation to regulate schemes financed by public investment.

15. The difficulty with this proposal would be in determining which schemes should be required to comply with Division 5 of Part IV of the *Companies Act* and which with the new legislation. To give to the Registrar a discretion to determine with which statutory provision a promoter should comply would seem undesirable. In effect he would have to determine whether a proposed scheme involved the sale of an "interest" as defined in s.76 of the *Companies Act*.

16. A number of other suggestions have been advanced as possible solutions. These include -

- (a) That all schemes for the sale of undivided shares in land be subject to the prior approval of some Government or statutory authority, which would have the power to grant or refuse applications in accordance with certain prescribed principles.
- (b) That the number of co-owners of a given piece of land be limited by law to, say, 5 or 10 persons. The suggestion would of course need to be subject to certain exemptions such as family property arrangements and rights of succession to land on death.
- (c) That the purchasers be given a statutory right to apply to the court for relief in terms similar to s.10 of the *Sale of Land Act 1970*.
- (d) That the purchasers be given a statutory right to terminate the contract of sale within a specified period (a “cooling off” period) similar to that provided in s.4 of the *Door to Door (Sales) Act 1964*.
- (e) That all administrative difficulties be remedied by amendments to the specific Acts concerned (for example, problems of rating could be overcome by amendments to the *Local Government Act 1960-1972*).

The Commission has considered each of these suggestions but is of the view that none of them offers a satisfactory answer to all the matters of concern.

17. The Commission at this stage is not unanimously of the view that further legislation is necessary, but if legislation is to be enacted, the Commission tends to favour the inclusion of a provision in the *Sale of Land Act 1970* in the following terms -

No person shall offer to the public for purchase, or shall invite the public to purchase, any undivided share in land (whether or not it is an “interest” as defined in s.76 of the *Companies Act*) 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 (see paragraph 3 above);
- (c) the offer or invitation relates to the total undivided shareholding of the offeror in the land; and the sale is to be effected in the one transaction;
- (d) the Minister has, by notice in the *Government Gazette*, exempted the offer or invitation from compliance on such conditions as he thinks fit (it may be necessary to ensure that this exemption also exempts the promoter from compliance with Division 5 of Part IV of the *Companies Act*).

18. The effect of such a provision would be that, except in strictly limited circumstances, the sale to the public of undivided shares in land would be prohibited, other than sales by public companies with all the safeguards provided in Division 5 of Part IV of the *Companies Act*.

19. Criminal penalties would be provided for any breach of this statutory provision. If any contract of sale is entered into in breach of the legislation, the purchaser would have access to his common law remedies. It may be desirable in addition to give him an express right to avoid the contract and recover money paid (compare s.19 of the *Sale of Land Act 1970*).

20. The legislation suggested may not provide sufficient protection where the sale occurs overseas but it would seem difficult to devise legislation which completely protects incautious purchasers who are not within the jurisdiction.