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

APPENDIX

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.