

Landgate Consultation Paper Sale of Land Act: Proposals for Changes to Section 13 March 2015

By Email:

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Title: Sale of Land Act Consultation Response

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Date

28 April 2015

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1 Introduction

- 1.1 The Law Society of Western Australia is the peak professional association for lawyers in Western Australia. Established in 1927, the Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.
- 1.2 The Society acknowledges the work of Landgate in the preparation of the *Sale of Land Act: Proposals for Changes to Section 13* Consultation Paper (**Consultation Paper**) dated March 2015 and is pleased to be afforded the opportunity to comment.

2 Parts 2 to 5 of the Consultation Paper

Part 2	Background
Part 3	Impact of the Barker Decision
Part 4	Advantages and Disadvantages of Non-Owner Sale off the Plan
Part 5	Options

The Society makes the following comments in response to Parts 2 to 5 of the Consultation Paper.

- 2.1 S.13 of the *Sale of Land Act 1970* (“SLA”) is, as detailed below, one of numerous provisions in various Acts regulating the sale of land before subdivision is completed, and therefore should not be reviewed and reformed in isolation as proposed in the Consultation Paper.
- 2.2 Accordingly, any reform of s.13 of the SLA should be consistent and harmonious with other legislation regulating transactions which may result in a vendor being unable to complete a contract to sell a lot or lots in a proposed subdivision (“Future Lot Contract”).
- 2.3 Under the SLA, inability of a vendor to complete a Future Lot Contract because the vendor is not the owner of the land being subdivided is regulated by the strong prohibition in s.13 of the SLA, whether the proposed subdivision is of broadacres land or creation of a strata or survey-strata subdivision.

- 2.4 Although when the SLA was originally enacted, strata subdivision was excluded by s.12 of the SLA and s.13 of the SLA regulated only subdivision of broadacres land of five lots or more, that changed when s.12 of the SLA was repealed and strata subdivision was brought into s.13 of the SLA by the *Acts Amendment (Strata Titles) Act 1985*, which was enacted at the same time as the *Strata Titles Act 1985* (“STA”). Importantly, for strata subdivisions, the number of lots for a regulated strata subdivision was two lots, which meant every strata subdivision since 1985 has been regulated by s.13 of the SLA. It is therefore not accurate to describe the purpose of s.13 of the SLA since 1985 as only regulating large subdivisions, as suggested in the Consultation Paper.
- 2.5 In 1985, the regulation of “off the plan” strata sales became regulated by both Part III of the SLA and by Part V of the STA. The conclusion of the Court of Appeal in *Walker v Clough Property Claremont Pty Ltd* [2010] WASCA 232 that s.13 and s.14 of the SLA only oblige a vendor of a lot in a proposed strata subdivision to own the underlying land to be subdivided and not the subdivided lot to be sold is far from clear from the language of ss.13 and 14 of the SLA, but does clearly appear to be contemplated by Part V of the STA.
- 2.6 Protection of purchasers’ deposits for Future Lot Contracts involving strata/survey-strata subdivisions are currently dealt with in s.70 of the STA, and could be conveniently dealt with in the proposed reform of the SLA.
- 2.7 The protection of purchasers’ deposits in s.14(2)(b)(ii) of the SLA and in s.68(4) of the *Real Estate and Business Agents Act 1978* (“REBAA”) should also be considered in any reform.
- 2.8 The related issue of the protection of purchasers’ deposits under a Future Lot Contract where the vendor is proprietor of the underlying land at the date of the contract but has not completed the subdivision and is ultimately unable to complete a Future Lot Contract because the proposed subdivision is not approved or carried out, which is currently partially regulated by Part 10 of the *Planning and Development Act 2005* (“PDA”) could also be appropriately dealt with in the same manner as in the proposed reform of the SLA.

2.9 The discussion of the extent to which Future Lot Contracts should be permitted where vendors do not own the land to be subdivided at the date of the contract in the Consultation Paper appears to have conflated two separate finance issues, namely, the obtaining of finance by a vendor to complete the purchase of the underlying land to be subdivided and the obtaining of finance by a vendor to complete a development. The Society submits that reform would be appropriate only to the extent necessary to enable a vendor to achieve the first of these two finance requirements and, for that reason, submits that a permissible condition in a Future Lot Contract for the vendor to acquire the underlying land to be subdivided should require that the condition be satisfied in a period not exceeding 6 months from the date of the contract specified in the contract, with a definition of “date of the contract” in the same terms as in s.70(8) of the STA being included. In that way, a vendor will be able to test the market and achieve “off the plan” sales for up to 6 months, so as to enable the vendor to obtain finance to purchase the underlying land.

3 Part 6 of the Consultation Paper - Proposals

Proposals 1 to 6

The Society makes the following comments in response to Part 6 of the Consultation Paper.

Part 6.1 Contract Conditional

3.1 Proposal 1

The prohibition against a Non-Owner Sale off the Plan of a lot in a Large Subdivision not apply if the sale contract is conditional on the vendor becoming the registered proprietor, or becoming entitled to become the proprietor, of the lot within 6 months, or such other date provided in the contract (which could be varied by agreement).

The Society agrees with proposal 1, subject to:

- (a) the prohibition should cover all sales of proposed lots to be created by subdivision before settlement (para 2.4 above); and
- (b) the permissible period should be a period not exceeding 6 months from the date of the contract as specified in the contract (para 2.9 above).

3.2 **Proposal 2**

A contract not conditional on the vendor becoming the registered proprietor within 6 months, or within another time provided in the contract, would be void. Any deposit paid would be returned.

The Society agrees with proposal 2, subject to the contract not being automatically void but terminable as referred to in the response to proposal 4 below.

3.3 **Proposal 3**

The Act set out the consequence of the condition in Proposal 1 not being met within time, including requiring the return to the purchaser of any deposit paid.

The Society agrees with proposal 3, but the provision should require the deposit to be repaid if the ownership condition fails and, if the condition is satisfied, to be applied as required by law, including if applicable s.68(4) of REBAA; and provision should also be included in the new SLA provision in the same form as s.70(3) of the STA (paras 2.6 and 2.7 above).

3.4 **Proposal 4**

The consequence for the condition in Proposal 1 not being met within time could be, in addition to the return of any deposit paid, that:

4.1 The sale contract automatically terminates with no need for notice by either party.

OR

4.2 The vendor can terminate by giving notice within a set time.

OR

4.3 The purchaser can terminate by giving notice within a set time.

OR

4.4 Either the purchaser or the vendor can terminate by giving notice within a set time.

OR

4.5 Either the purchaser or the vendor can terminate by giving notice within a set time, up until the time the condition is satisfied.

Landgate invites your comments on the proposals. Where a proposal includes alternatives ('OR'), Landgate invites your comment on which alternative is preferable and why.

The Society submits that proposal 4.5 should be adopted, subject to modification such that the vendor is not entitled to terminate the Contract unless it has used reasonable endeavours to satisfy the condition during the condition period (ie not exceeding 6 months), with the vendor bearing the onus of proof that it has used reasonable endeavours. Without that modification, a vendor in the situation of a rising market would simply allow the condition to fail by not using reasonable endeavours to have its satisfied, so as to be able to re-sell at a higher price after the contract is terminated.

Part 6.2 Pre-contractual Statutory Warning

3.5 Proposal 5

If any of Proposals 4.2 – 4.5 above are implemented, that the Act require a pre-contractual statutory warning to be included in a Non-Owner Sale off the Plan contract for a lot in a Large Subdivision. A pre-contractual statutory warning would not be required if Proposal 4.1 was implemented.

The Society agrees with proposal 5 and the Society submits that the warning should be included in the contract and not in a separate document.

3.6 Proposal 6

That the statutory warning include, as a minimum, a statement:

6.1 *That the vendor is not currently the registered owner of the lot.*

OR

6.2 *An explanation of the purchaser's rights if the vendor does not become the registered owner of the land.*

OR

6.3 *A combination of 6.1 and 6.2 above: a warning that the vendor is not currently the registered owner of the lot and an explanation of the purchaser's rights if the vendor does not become the registered owner of the land.*

The Society agrees with proposal 6.3 and submits that proposal 6.3 should be adopted.

4 Additional proposals by the Society based on the above discussion

4.1 If conditional non-owner sales of subdivisional land are permitted, s.14 of the SLA should be repealed entirely at the same time or, alternatively, amended to apply to all Future Lot Contracts and s.14(2)(b)(ii) made consistent with the new SLA provision.

4.2 S.70(2) of the STA should be amended to require compliance with the amended SLA provisions where those provisions are applicable.

4.3 S.141 of the PDA should be amended to require deposits paid under contracts to purchase land where the land is not a lot at the date of the contract to be paid and held in accordance with the amended SLA provisions, and should also require that those deposits be applied under those provisions when a deposit becomes repayable pursuant to s.141 of the PDA.

5 Conclusion

It is the Society's submission that if all of the above proposals are implemented, the SLA will appropriately provide the regulatory framework for payment, holding and application of all deposits under all Future Lot Contracts.



Matthew Keogh
President

28 April 2015