



# EXPLANATORY MEMORANDUM

Sale of Land Amendment Bill 2016

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### Overview of this Bill

#### **Background**

It is common practice for a developer to sell a lot in a subdivision before they are the registered owner to fund their developments.

In 2014, however, the Supreme Court found in *Barker v Midstyle Nominees Pty Ltd* (“Barker Decision”) that a contract of sale of a proposed lot in a subdivision entered into before the land is owned by the vendor in breach of section 13 of the *Sale of Land Act 1970* (“SLA”) leaves both the purchaser and the vendor/developer in an uncertain position. The court found that the sale contract is unenforceable by the vendor, even after the vendor becomes the registered owner of the land, which also casts doubt on whether the purchaser’s deposit is recoverable. The effect of the Barker Decision is that purchasers and vendors/developers of lots in a proposed subdivision may not be prepared to enter into these types of contract.

Feedback from industry suggests that the Court’s decision has already impacted finance and funding arrangements for the land development industry in Western Australia, which will ultimately affect the development and release of new lots onto the market and their affordability. This uncertainty could have a strong negative effect on the sustainability of an important driver of economic activity in Western Australia.

#### **The Bill**

The primary purpose of the SLA is to protect purchasers of land. The *Sale of Land Amendment Bill 2016* (“the Bill”) will ensure that the SLA continues to deliver protection to consumers by providing certainty in relation to sales contracts where the land being sold is not yet owned by the land developer. The amendments will also provide certainty to land developers and purchasers, supporting the ongoing timely release of affordable new lots into the market.

The key amendments provide the following:

- Broader consumer protection: the restriction on the sale of lots will be applied to the sale of one or more lots in a subdivision, including strata subdivisions, rather than on sales of five lots or more or two lots or more in a strata subdivision.
- Greater certainty: a contract of sale of any lot in a subdivision where the vendor is not owner of the land (‘future lot contract’) will be conditional upon the vendor becoming the registered proprietor of the lot within 6 months, or such other date provided in the contract. In addition, a requirement will be included for ‘reasonable endeavours’ to cause the ‘vendor’s condition’ to be satisfied.

- Better information to purchasers: it is proposed that a pre-contractual statutory warning be included in the future lot contract. This warning will state that the vendor is not currently the registered owner of the lot and include an explanation of the purchaser's rights. If the warning is not contained in the contract then the contract will be illegal and void.
- Greater surety of outcomes: an obligation to inform the purchaser about progress towards the vendor's condition being satisfied must be included in the future lot contract. If it is not included within the contract then the contract will be illegal and void.
- Increased protection for purchasers: any deposit or other monies paid to the vendor/developer will be held by a licensed settlement agent, real estate agent or a solicitor in a trust account in Australia. The deposit monies will be recoverable in the event of the contract of sale being terminated if the vendor's condition is not satisfied within 6 months or such date as is provided in the future lot contract.
- Higher penalties will be introduced for failure to comply with the SLA. The penalty for breach of section 13 of SLA, which applies the restrictions to the sale of land, is currently set at \$750. This penalty is considered to be too low and inadequate in preventing the breach of section 13. The majority of stakeholders support increasing the penalty for failure to place deposit monies into a trust account and for entering into a void contract to \$100,000 to provide a greater deterrent. A higher penalty of \$100,000 will also be introduced in sections 16 to 18 to deter vendors from false advertising, misrepresentation concerning public amenity and door to door selling of land.

- Clause 1      Sets out the short title of the Act which is the *Sale of Land Amendment Act 2016*.
- Clause 2      Provides that sections 1 and 2 will come into operation on the day in which the Act receives the Royal Assent and that the rest of the Act will come into operation on a day fixed by proclamation and that different days may be fixed for different provisions.
- Clause 3      States that this Act amends the *Sale of Land Act 1970* ("SLA").
- Clause 4      Amends section 7 by deleting the existing penalty of \$750 and inserting a new penalty, being a fine of \$100,000.
- Clause 5      Amends section 8 by deleting the existing penalty of \$750 and inserting a new penalty, being a fine of \$100,000.
- Clause 6      This clause:
- Inserts definitions into section 11 of the SLA for the following new terms used in the Act:
    - ADI (authorised deposit-taking institution)
    - approved form
    - Australian legal practitioner
    - deposit holder
    - future lot contract
    - real estate agent
    - Registrar of Titles
    - settlement agent
    - vendor's condition
    - working day.

- Deletes and inserts a new definition for the following term used in the Act:
  - lot
- Corrects typographical mistakes by deleting parentheses from the definitions of proprietor and sell.

Clause 7      This clause:

- Amends section 13 by deleting the reference to five in relation to subdivisional lots and two in relation to strata subdivisional lots and replacing both references with one. This enables section 13 to apply to one or more lots in a subdivision, including strata subdivisions. This means that purchasers who are buying land arising out of a subdivision of five lots or less will get the benefit of the consumer protection provisions relating to the warning statement, clearer contractual remedies and deposit holding provisions.
- Deletes the existing penalty of \$750 and inserts a new penalty being a fine of \$100,000.
- Deletes reference to the Western Australian Land Information Authority established by the *Land Information Authority Act 2006* section 5 and inserts the Registrar of Titles as the relevant officer that receives and deals with the land title documents.

Clause 8      This clause inserts new sections 13A to 13I.

- Section 13A provides that despite the restrictions in section 13, a person may sell one or more lots under a future lot contract as long as sections 13B to 13D are complied with.
- Section 13B requires that the future lot contract must include the condition (vendor's condition) that before a period of six months or any other period specified in the contract, the vendor will become the proprietor of the lot/s to which the contract relates. The section sets out the consequences of the vendor's condition not being inserted into a contract (the contract is illegal and void), the ability for the purchaser to recover their deposit and the penalty for future lot contracts that do not include the vendor's condition. The section deals with and explains that a vendor is entitled to become the proprietor of the land if entitled to become registered as proprietor by virtue of one or more registrable instruments lodged with the Registrar of Titles.
- Section 13C requires that a future lot contract must contain a warning that the vendor is not the proprietor of the lot/s to which the contract relates and provides that if the warning is not included then the contract is illegal and void. In that case the purchaser may recover any deposit monies and the penalty for non-compliance by the vendor is a fine of \$100,000.

- Section 13D requires that a future lot contract must provide that a deposit payable by the purchaser must be paid to a deposit holder. It outlines conditions relating to the payment including the consequences of not including the required provision (the contract is illegal and void) and how the purchaser may recover monies paid under the contract.
- Section 13E sets out the rights relating to the deposit or other amount payable under a future lot contract, including:
  - the vendor must pay any deposit to the deposit holder within two days of receipt
  - the deposit holder must operate a trust account that may be audited
  - the need for the deposit to be repaid if the obligation arises under any of the relevant provisions
  - a deposit holder may deduct from any repayment an amount due to the vendor under the future lot contract in certain circumstances
  - a penalty of \$100,000 for non-compliance will be applied if deposit is not paid or repaid or the deposit is not placed in trust account.
- Section 13F empowers the Registrar of Titles to require an audit of a deposit holder's trust accounts by a suitably qualified person. The section enables the Registrar of Titles to engage a person to conduct the audit if the deposit holder fails to make arrangements to do so. The section also sets out that a court order may be obtained by the Registrar to obtain access to the deposit holder's trust accounts and records if access is refused. The section provides that associated costs may be recovered by the Registrar of Titles.
- Section 13G imposes an obligation on the vendor and purchaser to make "all reasonable endeavours" to ensure that the vendor's condition in a future lot contract is satisfied before the end of the period specified in the contract. The section requires the vendor to provide certain information about steps taken to cause the satisfaction of the vendor's condition.
- Section 13H sets out the consequences if the vendor's condition in a future lot contract is satisfied and that the required notification by the vendor to the purchaser must occur within 10 working days of the vendor's condition being satisfied.
- Section 13I sets out the consequences if the vendor's condition in a future lot contract is not satisfied or taken not to be satisfied. The section sets out the circumstances in which and by whom the contract may be terminated as well as the ability for the purchaser to recover any deposit monies.

## Clause 9

This clause:

- Amends section 14 by deleting the reference to five in relation to subdivisional lots and two in relation to strata subdivisional lots and replacing both references with one. This enables section 14 relating to the restriction on sale of mortgaged subdivisional land to apply to one or more lots in a subdivision, including strata subdivisions.

- Deletes the existing penalty of \$750 and inserts a new penalty being a fine of \$100,000.
- Deletes reference to definition of Australian Legal Practitioner in the *Legal Practitioner's Act 2008* section 3 as the definition is now included in section 11 of this Act.

- Clause 10 Amends section 16 by deleting the existing penalty of \$200 and inserting a new penalty of \$100,000.
- Clause 11 Amends section 17 by deleting the existing penalty of \$200 and inserting a new penalty of \$100,000.
- Clause 12 Amends section 18 by deleting the existing penalty of \$200 and inserting a new penalty of \$100,000.
- Clause 13 Amends section 19B by deleting the existing penalty of imprisonment for 12 months or \$1000 and inserting a new penalty, being a fine of \$100,000.
- Clause 14 Inserts Part 7 which contains the transitional provisions for this Act. In essence, the transitional provisions apply the new provisions of the Act to future lot contracts that are created after the coming into effect of the amendments so that there is no retrospective effect on contracts that were created prior to the coming into effect of these amendments.

## **Landgate Contact**

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