NSW Law Reform Commission

REPORT 40 (1984) - COMMUNITY LAW REFORM PROGRAM: FIFTH REPORT - PASSING OF RISK BETWEEN VENDOR AND PURCHASER OF LAND

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Terms of Reference and Participants

New South Wales Law Reform Commission

The Honourable DP Landa, LLB, MLC,

Attorney General for New South Wales.

COMMUNITY LAW REFORM PROGRAM

Attached to this document is the report of this Commission pursuant to the reference dated 20 June 1983, a copy of which is fully set out on page 3 of the report.

Ronald Sackville, Chairman

Russell Scott, Deputy Chairman

Colin Phegan, Commissioner.

March 1984

Terms of Reference

“To inquire into and report on:

(i) The law and practice relating to insurance or compensation in respect of damage to or destruction of improvements and other property on land the subject of a contract for sale, and as part of such inquiry to consider the following:

(i) how the risk of such damage or destruction should be borne as between vendor and purchaser

(ii) whether the benefit of an insurance policy held by the vendor should ensure for the purchaser

(iii) the manner in which the proceeds of any insurance policy held by the vendor or the purchaser, or any compensation received by either party, should be applied.

(ii) Any incidental matter.”

DP Landa

Attorney General and Minister of Justice.

20 June 1983.

New South Wales Law Reform Commission

The Law Reform Commission is constituted by the Law Reform Commission Act 1967.

The Commissioners are:

Chairman

Professor Ronald Sackville

Deputy Chairman

Mr Russell Scott

Full-time Commissioners

Miss Deirdre O'Connor

Associate Professor Colin Phegan

Part-time Commissioners

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This is the Fifth Report of the commission under its Community Law Reform Program. Its short citation is LRC 40.

Participants

Commission Members

For the purpose of the reference the Chairman, in accordance with section 12A of the Law Reform Commission Act, 1967, created a Division comprising the following members of the Commission:

Professor Ronald Sackville (Chairman)

Mr Russell Scott (Deputy Chairman)

Associate Professor Colin Phegan (from 6 February 1984)

Mr JRT Wood, QC (until 31 January 1984)

Secretary

Ms Mariella Lizier

Consultant to the Commission

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REPORT 40 (1984) - COMMUNITY LAW REFORM PROGRAM: FIFTH REPORT - PASSING OF RISK BETWEEN VENDOR AND PURCHASER OF LAND

Summary of Recommendations

Under existing law, the effect of a contract for the sale of land, unless the parties expressly agree otherwise, is that the risk of physical damage passes immediately to the purchaser. Thus, where the premises are destroyed or damaged, for example by fire, between the date of the contract and settlement of the transaction the purchaser must bear the loss. The fact that the vendor may have insurance over the premises is not likely to assist the purchaser, since the latter is generally not entitled to take advantage of the vendor s insurance policy. Consequently, if the purchaser does not take out insurance, he or she may suffer severe financial loss. While the obvious practical remedy is for the purchaser of real property to take out insurance immediately upon entering the contract for sale, some legally unrepresented purchasers do not appreciate the need to do so and are therefore at risk of sustaining catastrophic financial loss.
In our view, reform of the current law is warranted in order to protect the uninsured purchaser. The most appropriate reform is to enact legislation providing that the risk of damage to, or destruction of, the premises should not pass from the vendor to the purchaser immediately upon entry into the contract for sale. Rather, the risk should pass when the transaction is completed or when the purchaser is entitled to possession or actually takes possession whichever first occurs.

We recommend that the legislation altering the time when the risk passes to the purchaser should apply to:

contracts for the sale of a single dwelling, notwithstanding any contrary agreement between the parties; and

contracts for the sale of other real property, subject to any contrary agreement between the parties.

The legal consequences of damage which occurs to the property between the time of entry into the contract and completion or earlier possession should be as follows:

Where the damage is substantial (by which we mean damage of a kind that renders the property materially different from that which the purchaser contracted to buy), the purchaser should be entitled to rescind the contract and recover the deposit and all moneys paid under the contract A purchaser electing to rescind the contract should be required to notify the vendor of the election within 28 days of becoming aware of the damage to the property, or within such longer period as may be agreed upon between the vendor and purchaser. Upon rescission the parties should be relieved of all liability under the contract except liability resulting from a breach of any express or implied condition in the contract which occurs before the date of rescission.

Where the damage is substantial a purchaser who elects not to rescind or who loses the right to rescind should be entitled to require the vendor to proceed to completion with an appropriate abatement of the purchase price to compensate for the damage to the property. However, the court should have a discretion to refuse to require the vendor to complete the sale where it would be inequitable or unjust to do so. In such a case the court should have power to order rescission of the contract and the power to make such other orders as the court considers appropriate in the circumstances.

Where the damage is substantial and the purchaser elects not to rescind or loses the right to rescind, the vendor should be entitled to require the purchaser to complete, subject to allowing an appropriate abatement of the purchase price.

Where the property is damaged, but not substantially, the purchaser should have no right to rescind. However, the purchaser should be entitled to require the vendor to complete with an

appropriate abatement of the purchase price. Similarly, the vendor should be entitled to require the purchaser to complete, subject to allowing an appropriate abatement of the purchase price.

A purchaser should not be entitled to rescind the contract or receive an abatement of the purchase price (in the latter case whether the property is substantially damaged or not) where the damage is caused by a wilful or negligent act or omission on the part of the purchaser.

REPORT 40 (1984) - COMMUNITY LAW REFORM PROGRAM: FIFTH REPORT - PASSING OF RISK BETWEEN VENDOR AND PURCHASER OF LAND

1. Community Law Reform Program and This Reference

INTRODUCTION

1.1 This is the fifth report in the Community Law Reform Program. The Program was established by the then Attorney General, the Hon F J Walker, QC, MP, by letter dated 24 May 1982 addressed to the Chairman of the Commission. The letter included the following statement:

> "This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the community at large. The purpose of preliminary consideration will be to bring to my attention matters that warrant my making a reference to the Commission under s.10 of the Law Reform Commission Act, 1967."

The background of the Community Law Reform Program. is described in greater detail in the Commissions Annual Reports for 1982 and 1983.

1.2 In early 1983 the Commission gave preliminary consideration to the subject matter of this report following the enactment of the Sale of Land (Amendment) Act 1982 (Vic.) which dealt with important issues in relation to conveyancing transactions that were also applicable to New South Wales. The Victorian legislation is discussed in Chapter 3. After due consideration the Commission sought a reference by letter of 5 May 1983. By letter of reply dated 20 June 1983 the Attorney General the Hon D P Landa, LLB, MLC, made the following reference to the Commission:

"To inquire into and report on:

(i) The law and practice relating to insurance or compensation in respect of damage to or destruction of improvements and other property on land the subject of a contract for sale, and as part of such inquiry to consider the following:

(i) how the risk of such damage or destruction should be borne as between vendor and purchaser;

(ii) whether the benefit of an insurance policy held by the vendor should ensure for the purchaser;

(iii) the manner in which the proceeds of any insurance policy held by the vendor or the purchaser, or any compensation received by either party, should be applied.

(ii) Any incidental matter."

LAW REGULATING PASSING OF RISK

1.3 The present law in New South Wales regulating the passing of risk between vendor and purchaser in conveyancing transactions is described in detail in Chapter 2. Under the present law, in the absence of any agreement to the contrary, a purchaser under a valid contract for the sale of land is obliged to pay the full contract price if buildings on the land are destroyed or damaged, for example by fire, without fault on the part of the vendor, where such damage occurs after the contract has been entered into but prior to completion of the sale. The purchaser is not entitled to a reduction in the purchase price for the damage sustained, nor is the purchaser entitled to rescind (terminate) the contract In other words, the "risk" that the property [1] might be damaged or destroyed is deemed to pass from the vendor to the purchaser from the time the contract is entered into. An example of an agreement to the contrary occurs in the case of sales of strata title property in New South Wales. The 1982 standard

form contract specifically provides that the risk shall not pass to the purchaser until completion of the sale. [2]

THE NEED FOR REFORM

1.4 Clearly the present law can operate to the detriment of the purchaser who must bear the loss for any damage to buildings on the property occurring prior to completion. Accordingly, purchasers need to take out insurance to protect against such damage and, in practice, solicitors in New South Wales advise their purchaser clients of the need to insure. One obvious shortcoming with the present law is that purchasers who enter into conveyancing transactions without legal advice may be unaware of the need to take out insurance to protect their interest in the absence of insurance cover, they will personally bear the cost of any damage to the property sustained prior to completion of the transaction.

1.5 A further problem under the existing law is double insurance. Regardless of whether the purchaser takes out insurance, the vendor has an “insurable interest” in the property until completion of the transaction - that is, the vendor is entitled to maintain his or her own insurance over the property. In practice the vendor will usually retain insurance cover for the full value of the property until completion Protection of this kind is necessary because the transaction may not proceed to completion for example because the contract permits the purchaser to rescind in certain circumstances, The result is that there are usually two insurance policies covering the same property for the period between entry into the contract and completion - the vendor s and the purchaser’s.

1.6 It might be thought that the difficulties experienced by an uninsured purchaser could be overcome, where the vendor has insurance, by the purchaser claiming under the vendors policy. In practice this solution is not available. Even if the vendor is willing to assign the benefit of the policy to the purchaser, the assignment is not effective without the insurer’s consent. Nor can the problem be resolved by the vendor claiming under the policy and then paying the proceeds to the purchaser. This is because an insurance policy is “a contract of indemnity”, under which the insured person is entitled to be paid only for the loss sustained. if the vendor claims under the insurance policy, after having received the full purchase price, the insurer is entitled to recover the claim The reason is that the vendor has suffered no financial loss by reason of the damage to the property. Where the vendor claims under the policy before the sale is completed and the claim is met, the insurer is entitled to recover the amount paid out of the proceeds of the sale once the transaction is completed. if the vendor, having received the insurance moneys, is reluctant to force the purchaser to complete the transaction the insurer can force the purchaser to complete.

1.7 These principles were demonstrated in *Ziel Nominees Pty Ltd. v. VACC Insurance Co. Ltd*. [3] In that case, the purchaser of property did not take out insurance, relying on the fact that the vendor already had insurance cover. During the period between contract and completion the property was substantially damaged by fire. The vendor signed an authority addressed to the insurance company, authorising it to pay any moneys due under the policy to the purchaser. The purchaser completed the purchase. However, the insurer refused to make any payment under the policy. The High Court accepted the insurers argument that it was not liable to the purchaser.

> “It is settled law that upon the signature of an enforceable contract of sale of land the purchaser is bound to complete, irrespective of the destruction of the improvements on the land in the meantime ... The purchaser... has an insurable interest which he can immediately protect by cover note or policy of insurance.
>
> On the other hand, the vendor having an enforceable contract of sale is entitled to the price, notwithstanding the destruction of the improvements on the land... Thus a vendor who receives the price which he has agreed to accept for the land suffers no loss by the destruction of the improvements on the land meanwhile. The absence of any loss by reason of that destruction is clearly demonstrated by the vendor s receipt of the agreed price.

> It follows in my opinion that at the time the [authority addressed to the insurer] became effective i.e. on settlement of the contract of sale, the vendor was not and could not at that time have become entitled to any moneys under the policy. and this for the simple and direct reason that he had not and could not suffer any loss by reason of the destruction or damage of the improvements on the land which he had sold in other words he had nothing to assign" [4]

1.8 The *Ziel Nominees* case highlights the precarious situation of an uninsured purchaser, when the property is damaged between the date of contract and completion The case is a dramatic illustration of the problems associated with the current law, because the difficulties were foreseen by the parties and yet their efforts to overcome them failed. However, a much more straightforward illustration is the case of an uninsured purchaser who sustains catastrophic loss simply because he or she is unaware that the risk of damage to the property has passed under the contract.

1.9 It follows that under the present law a uninsured purchaser is at risk of serious financial loss where the property is damaged between the date of contract and completion. That risk is not overcome by the fact that the vendor has insurance, since in practice the purchaser cannot take advantage of the vendors policy.

PROPOSALS FOR REFORM

1.10 In order to deal with the difficulties associated with the present law governing the passing of risk between vendor and purchaser, a variety of reforms have been adopted in other jurisdictions. These are examined in Chapter 3, but in summary include the following,

> A provision allowing the purchaser a right to claim on the vendors insurance when damage to the property occurs between the date of contract and completion. Such a provision must be drafted in a manner that avoids the problem identified in the *Ziel Nominees* case (paragraph 1.7).
>
> A provision granting the purchaser the right to rescind the contract in the event of substantial damage occurring to the property between the date of contract and completion.
>
> A provision that the risk of damage to the property shall not pass from the vendor to the purchaser until completion of the contract or the time when the purchaser acquires the right to possession.

SUBMISSIONS

1.11 Following the receipt of the reference from the Attorney General the Commission wrote to interested organisations stating the terms of the reference and inviting submissions on a background paper which discussed the above proposals for reform. The submissions received are noted in Appendix B. All submissions acknowledged that the present law is deficient. We discuss the views expressed in the submissions in Chapter 4.

CONSULTANT TO THE COMMISSION AND PARLIAMENTARY COUNSEL

1.12 We wish to express our appreciation to Mr .Peter Butt, Senior Lecturer in Law University of Sydney, for his valuable contribution to the preparation of this report in his capacity as consultant to the commission for this reference. We also wish to record our thanks to Mr D R Murphy, QC, Parliamentary Counsel and to Mr D Colagiuri, Assistant Parliamentary Counsel for the preparation of the draft legislation appended to this report and for their advice and assistance.

FOOTNOTES

1. In this report the term 11 property" is taken to mean "real property": see B.A. Helmore, *The Law of Real Property in New South Wales* (2nd ed., 1966), pp10-11: R.E. Megarry and H.W.R. Wade, *The Law of Real Property* (4th ed., 1975), pp.10-12.

2. Clause 14A (Strata Title) of the 1982 standard form contract states:

“(e) until completion:

(i) notwithstanding anything elsewhere contained in this agreement or any rule of law or equity to the contrary the risk of the property sold shall not pass to the Purchaser.”

3. (1975) 7 A.LR, 667.

4. *Id.*, at p.669.

2. The Present Law in New South Wales

2.1 Two aspects of the present law in New South Wales call for comment

First, as between vendor and purchaser, who bears the loss if the property is damaged or destroyed between the time of entry into the contract for sale and the time of completion of the sale?

Secondly, what are the rights and obligations in respect of insurance over the property, both as between vendor and purchaser and as between those parties and the insurer?

PASSING OF RISK

Absence of Agreement Between Vendor and Purchaser

2.2 The general principle, in the absence of express agreement between the vendor and purchaser, is that the vendor becomes a trustee of the property f or the purchaser once there is a valid and binding contract between the parties,[1] There is some dispute as to precisely when the vendor becomes a trustee[2] but it is clear that, before completion of the contract the purchaser is regarded, at least for certain purposes, as the beneficial owner of the property.[3] One consequence of this is that, in the absence of want of reasonable care by the vendor in the use and management of the property, the purchaser bears any damage to, or diminution in the value of the property occurring prior to completion. For example, if a building on the land is, without fault on the part of the vendor, destroyed or damaged by fire prior to completion the purchaser, and not the vendor, is the person who ultimately bears the loss.[4] In practical terms, the purchaser must pay the full contract price without any reduction to compensate for the damage.

2.3 Fire is the most commonly encountered example of damage which falls within this principle. But the reported cases provide many illustrations of other kinds of damage, with the consequential loss being held to fall upon the purchaser.[5]

Agreement Between Vendor and Purchaser

2.4 There appears to be nothing in principle preventing the vendor and purchaser from agreeing to abrogate or modify the rule concerning the passing of the risk to the purchaser.[6] The parties could, for example, agree that the risk should remain with the vendor until completion or the prior taking of possession by the purchaser. Such an agreement could be express or implied. An express agreement is easier to prove, but an implied agreement may be equally effective. For example, in a recent case the contract provided for the sale of land with a building to be constructed by the vendor. Since the contract imposed an obligation upon the vendor to restore any part of the building damaged during the course of construction it was held that there was a clear implication that the building was to remain at the vendors risk until completion.[7]

2.5 An example of an express agreement altering the present rule concerning the passing of the risk is to be found in condition 14A(e) (i) of the 1982 edition of the joint Law Society of New South Wales and Real Estate Institute of New South Wales standard form contract for sale of land. This condition provides that in the case of property held (or intended to be held) under strata title, such as a residential unit in a block of units, the risk shall not pass to the purchaser until completion “notwithstanding ... any rule of law or equity to the contrary”. The condition has been included in the contract in the knowledge that the body corporate is obliged by the Strata Titles Act 1973 to maintain adequate insurance over the building[8] and that the proceeds of any insurance claim in respect of damage to, or destruction of the building are to be applied in repairing or rebuilding the property.[9]

However, the contractual provision relates only to strata title properties. There is no provision in the same contract abrogating or modifying the general law principles concerning the passing of risk in respect of properties not under strata title.

2.6 There appears to be no Australian or English authority as to the effect of an agreement altering the general rule concerning the passing of the risk between vendor and purchaser. No doubt this is because it is rare to find agreements altering the incidence of the present rule.[10] Traditionally, contracts for sale are prepared by vendors who are naturally reluctant to accept gratuitously the risk of damage to the property after the date of the contract By analogy with settled principles governing the right to compensation for errors and misdescriptions in the contract, the following would seem to be the position if the property is at the vendors risk and is damaged between contract and completion.

> Where the damage is so substantial that the property is materially different from that which the purchaser contracted to buy, or (amounting to the same thing) the damage is so substantial that it could not reasonably be assumed that the purchaser would have entered into the contract to purchase the property in its damaged condition the vendor cannot enforce the contract against the purchaser. In this case, the purchaser may rescind (terminate) the contract and recover all moneys paid under it,[11] or (at the purchaser s option and subject to considerations of hardship to the vendor) proceed with the contract subject to an appropriate abatement (reduction) of the purchase price for the damage.[12]
>
> Where the damage is not so substantial as to fall within the first category, the vendor can usually enforce the contract against the purchaser subject to an appropriate abatement of the purchase price to compensate for the damage. Similarly, the purchaser is usually entitled to insist upon the vendor completing the contract subject to an abatement of the purchase price for the damage.

In either case, where compensation is given or sought the court may determine the most appropriate means of measuring compensation according to the circumstances of the case.[13]

2.7 These conclusions accord generally with the position reached by courts in a number of American States where the law is that the risk does not pass until completion or earlier possession by the purchaser.[14] They are also similar to the statutory regime introduced into other American States by the Uniform Vendor and Purchaser Risk Act (paragraphs 3.41-3.42),and which applies subject to contrary agreement between the parties.

2.8 We inject a note of caution here. Given the absence of Anglo-Australian authority on the matter, it cannot be assumed that courts in this country necessarily would reach the same conclusions as in the United States. Nor can the analogy with principles governing compensation for error or misdescription be pushed too far. There is an important distinction between compensation for an error or misdescription, and compensation for damage to the property in the circumstances under consideration. When there is an error or misdescription in the contract compensation is awarded for a deficiency in the property which existed at the time the contract was entered into. Moreover, many of the cases turn on the specific wording of clauses in contracts for the sale of land. The problem with which we are concerned involves compensation for damage to the property occurring between contract and completion and for which the vendor is not responsible. To avoid doubt we later suggest that the introduction in New South Wales of a provision deferring the passing of risk until completion or earlier possession by the purchaser should be accompanied by a more detailed statement of the respective rights and obligations of both the vendor and purchaser in the event of damage to the property.

INSURANCE

Where the Risk has Passed to the Purchaser

The Purchaser

2.9 For reasons already given in the absence of agreement between the vendor and purchaser altering the normal incidence of the risk the prudent purchaser will take out insurance against damage to or destruction of the property as from the date of the contract. The purchaser has an insurable interest from the time of entry into the contract[15] and in practice, solicitors in New South Wales advise purchasers of the need to insure. Almost certainly, a solicitor who neglects adequately to explain the dangers in failing to insure is guilty of professional negligence and liable to the client for any loss sustained.[16]

2.10 A purchaser to whom the risk has passed may insure for the full value of the property and may recover the full amount of the damage to the property.[17] If the property is damaged, the purchaser s insurer is not entitled Lo delay payment until completion.[18] However, the insurer may delay payment until the purchaser has established that the vendor has a good title, or the purchaser has agreed to accept such title as the vendor has. If the insurer pays the purchaser in respect of the damage but the contract does not proceed and the purchaser recovers any deposit paid, the insurer would presumably be entitled to recover the payment from the purchaser.[19]

The Vendor

2.11 Notwithstandingthattheriskpassestothepurchaseruponexchangeofcontractsthe vendor also has an insurable interest in the property. This is because the vendor retains rights in the property (such as the right to the rents and profits pending completion) which he or she is entitled to protect.[20] The vendor also faces the possibility that the contract may not proceed for some reason (such as the purchaser s insolvency), with the result that he or she is left with a damaged property of reduced value.[21] The vendor may, and in practice does, retain the pre-existing insurance for the full value of the property.

2.12 If the property is damaged between contract and completion the vendor may recover from his or her insurer the full amount of the damage.[22] The insurer cannot delay payment to the vendor until it is known whether or not the purchaser will complete.[23] But a contract of insurance is a contract of indemnity.[24] This means that if the purchase price has been paid to the vendor at the time of the vendor's claim against the insurer (whether or not a formal conveyance or transfer has been executed), the insurer is not liable to pay under the Policy.[25] Similarly, the insurer is entitled to be subrogated to the vendor' s rights against the purchaser, to the extent of the amount paid by the insurer. Thus, if the purchase price has not been paid at the time of the vendors claim against the insurer, but is subsequently paid to the vendor, the insurer may recover from the vendor the amount paid under the policy (to the extent that this can be satisfied out of the amount paid by the purchaser to the vendor). If the vendor declines to enforce the contract against the purchaser the insurer may do so.[26]

"Double" Insurance

2.13 Since both the vendor and purchaser have insurable interests in the property even though the risk may have passed to the purchaser, each may insure for the full value of the property. This regularly occurs in practice, at least where the parties to the contract for sale are legally advised. Upon exchange of contracts, the purchaser takes out insurance for the full value of the improvements, and the vendor retains (and, if necessary, renews) the existing insurance until completion. The result is that two policies are current and two premiums are paid for the period between contract and completion.[27]

2.14 Technically speaking, there is no "double insurance" in this period of overlap, because the respective insurable interests of the vendor and purchaser are separate and distinct; each is insuring a different interest in the property.[28] But the fact is that two premiums are being paid in respect of the one property. More significantly, however, the vendor's insurer, although receiving a premium from the vendor, ultimately escapes liability under its policy when the purchaser completes the contract (as in practice he or she is obliged to do). As a result of the indemnity principle, it could be argued that the vendor's insurance reaps a legal windfall From the insurer's point of view it might be suggested that the "windfall" is actually reflected in reduced premiums, the benefit of which is passed on to insured persons.

Assignment of Policy

2.15 It might be asked why the vendor and purchaser cannot avoid the overlap of insurance simply by agreeing that the purchaser shall have the benefit of the vendor's policy between contract and completion (perhaps in return for the purchaser reimbursing the vendor for an appropriate proportion of the premium). The reason is that a contract of insurance is personal to the insurer and insured, and any ported assignment by the vendor to the purchaser will be ineffective without the insurer's consent.[29] In practice, purchasers do not seek consent to assignment of the vendor s insurance policy. The Law Society of New South Wales has made the following comments on the question of assignment of the vendors policy.[30]

The vendor and purchaser may not wish to insure with the same insurer or take out the same extent or range of cover.

> The purchaser runs the risk of the insurer having a right to avoid the policy because of a material non-disclosure or misrepresentation by the vendor.
>
> The purchaser would need to be satisfied that a full disclosure of the terms of the policy has been made by the vendor.
>
> The purchaser may not be acceptable to the insurer and a mortgagee would be reluctant to advance funds until an assignment of the policy has been endorsed.

Joint Policy

2.16 The law does offer a means of overcoming the problem of double insurance, namely, a single policy covering the interests of both parties to the contract for sale. A party to the contract who takes out or renews, a policy between contract and completion may cover the interest of the other party as well as his or her own[31] This procedure is not adopted in practice in New South Wales. The Law Society of New South Wales has pointed out to us some of the difficulties of joint policies [32]

> Where a joint policy is issued by the insurer on the basis of a proposal completed by both parties, each is dependent on the accuracy of information supplied by the other.
>
> The considerable number of attendances required by solicitors to effect such a policy would not justify the saving on double premiums. The Law Society estimates that for an average residential transaction where completion takes between five and seven weeks from the date of exchange of contracts, the additional insurance cost would usually not exceed $25.
>
> If the vendor directs that insurance be taken out with one particular company, after completion the purchaser may wish to change insurers. While there would be a refund of premiums on the cancelled policy, there would be no refund of stamp duty.
>
> The vendor and the purchaser may not necessarily wish to insure with the same insurer or take out the same extent or range of cover.

2.17 In England it appears that the insurance industry has voluntarily extended the vendors insurance cover to protect the purchaser in the interval between contract and completion. by the insertion into policies of a provision that an otherwise uninsured purchaser may upon completion claim against the vendor's policy.[33] The provision takes the following form:

> "If at the time of destruction or damage to any building hereby insured the Insured shall have contracted to sell his interest in such building and the purchase shall not have been but shall be thereafter completed, the purchaser on completion of the purchase, if and so far as the property is not otherwise insured by or on behalf of the purchaser against such destruction or damage, shall be entitled to the benefit of this Policy so far as it relates to such destruction or damage without

prejudice to the rights and liabilities of the Insured or the Company under this Policy up to the date of completion."[34]

A purchaser cannot be sure that he or she will be able to take advantage of the vendor's policy. For example, the italicised words would allow the insurer to avoid the policy if the vendor had given grounds for doing so. Nonetheless, the clause offers protection in many cases to uninsured purchasers. In New Zealand, some (but not all) insurers include a similar provision in their policies, although usually restricted to residential properties.[35] There is no legal impediment to insurers in New South Wales following this precedent, but to date they have not done so.[36]

Vendor not Trustee of Policy

2.18 As we have seen, the general principle is that between contract and completion the vendor is a trustee of the property for the purchaser. [37] But this trusteeship is a modified or "qualified" [38] one only. Although it obliges the vendor to take reasonable care of the property for the purchaser, in the event of damage to the property between contract and completion it does not oblige the vendor to hold the proceeds of any claim on the insurance policy in -trust for the purchaser. [39]

Where the Risk does not Pass to the Purchaser

2.19 Although there is almost no direct judicial authority upon the matter we consider briefly the insurance aspects of an agreement express or implied, between the vendor and purchaser that the risk shall not pass until completion.

The Purchaser

2.20 It would seem that even where the risk does not pass until complete if the purchaser has an insurable interest. This arises because of the possibility that the vendor may be able to require the purchaser to complete if the damage is minor, and purchase something which, because of the damage, is worth less than that which the purchaser had contracted to buy. [40] In addition, it is possible that the vendor will be unable to discharge mortgages or other encumbrances over the land with the reduced purchase price which will be available on completion. [41] In this situation the purchaser may be forced either to rescind the contract or to accept title subject to the encumbrances which the vendor cannot discharge. Whether purchasers would choose in practice to insure against Such possibilities is not clear, but there is little doubt that they hive an insurable interest.

The Vendor

2.21 Where the risk does not pass until completion, the vendor , of course retains an insurable interest until completion. The vendor, may, and doubtless would, insure for the full vale of the property until completion of the sale.

The Prospect of "Double" Insurance

2.22 It follows that where the risk does not pass until completion of the sale, both the vendor and purchaser have insurable interests in the property and both may insure for its full value (although the amount actually payable under the policy will vary according to the circumstances). It is clear that a properly advised vendor will continue his or her insurance beyond the date of the contract. If the purchaser also elects to take out insurance there will be two policies current for the period between contract and completion In other words, there would be the same "overlap" of premium as exists in practice where the risk passes on exchange of contracts.

SUMMARY

2.23 In this chapter we have examined two aspects of the present law governing conveyancing transactions in New South Wales relevant to the period between entry into a contract and completion.

These are, respectively, the passing of risk between vendor and purchaser and the rights and obligations concerning insurance over the property.

2.24 In the absence of a contrary agreement between the vendor and purchaser, the risk of damage to, or destruction of, the property passes to the purchaser at the date of the contract. This means that the purchaser must bear the cost of any damage to, or diminution in the value of, the property occurring after that date and before completion where the vendor has not been at fault. There is nothing in principle to prevent the vendor and purchaser specifically agreeing that the risk remain with the vendor until completion or earlier entitlement to possession. If the property is to remain at the vendor s risk pending completion and it is substantially damaged during that period, it would seem that the vendor is not entitled to enforce the contract against the purchaser. Where the damage is not substantial it would seem that the vendor can require the purchaser to complete the transaction subject to an appropriate abatement of the purchase price to compensate for the damage.

2.25 Both the vendor and the purchaser have an insurable interest in the property between contract and completion. In practice, the result is that there are usually two policies current and two premiums paid for this period, although the amounts involved are generally modest. Both the vendor and the purchaser would still have an insurable interest even where the risk remains with the vendor until completion. Whether there would be “double insurances” during this period would depend on the willingness of purchasers to accept a right to rescind the contract or to receive an abatement of the purchase price in the event of damage, as a substitute for a separate insurance policy.

FOOTNOTES

1. *Lysaght v. Edwards* (1876) 2 Ch.D. 499; *Shaw v. Foster* (1872) LR 5 HL 321.

2. *Lysaght v. Edwards* (1876) 2 Ch.1). 499, at p.507: *Chang v. Registrar of Titles* (1976) 137 C.L.R. 177, at p. 184, per Mason J.

3. See generally, *Davioyda Estates Pty. Ltd. v. National Insurance Co. of New Zealand Ltd.* (1965) 69 S.R (N.S.W.) 38 1: R. Stonhan Vendor and Purchaser (1964), pp.582-583.

4. *Paine v. Meller* (1801) 6 Ves.jun. 349; 31 E.R. 1088; Rayner v. Preston (1881) 18 Ch.D. 1; *Ziel Nominees Pty.Ltd. v. V.A.C.C. Insurance Co. Ltd*. (1975) 7 A.L.R 667.

5. *Robertson v. Skelton*(1849) 12 Beav. 260; 50 E.R. 1061 (part of property collapsing); *Smith v. Hayles*(1877) 3 V.LR (L) 237 (third party removing fixtures without vendors knowledge); *Fletcher v. Manton* (1940) 64 C.LR 31 (demolition order): *Davjoyda Estates Pty. Ltd. v. National Insurance Co*. of New Zealand Ltd. (1965) 69 S.R (NSW.) 381 (fire); *Stenner v. Sterling Homes Northside Pty. Ltd.* (1973) 3 D.C.R. (NSW) 72 (third party stealing fixtures); *Fagan v. The Canterbury Waste Lands Board* (1882) 1 NZLR (S.C.) 242(flood); *Cass v. Rudele* (1692) 2 Vern 280; 23 E.R.781 (earthquake); *Poole v. Adams*(1864) 33 L.J. Ch 639 (fire), *Re Sweeny’s Estate* (1890) 25 L.R. lr. 252 (acts of vandalism by persons unknown); *Meriton Apartments Pty. Ltd. v. McLaurin & Tait (Developments)Pty.Ltd*. (1976) 133 C.L.R. 671 (union green ban).On the vendor’s liability for deterioration caused by his tenant, see *Jensen v. Jeffery* [1957] NZLR 159.

6. This is implicit in many of the decisions on the passing of the risk: see eg. *Fletcher v. Manton*(1940) 64C. LR 37, at p.45, per *Starke v Davjoyda Estates Pty. Ltd. v. National Insurance Co. of New Zealand Ltd*. (1965) 69 S.R (NSW) 381, at pp.399-400, 407.

7. *Fox v. Everingham,* 30 November 1982, Supreme Court of the Northern Territory O’Leary J., citing Hudson’s Building and Engineering Contracts(10th ed., 1970), p.307. See also *Appleby v. Myers* (1867) L.R. 2 C.P. 651, at p.660. The Full Federal Court has reversed the judgment of O’Leary J. on other grounds: *Fox v. Everingham* (1983) 50 A.LR 337.

8. Strata Titles Act 1973, Part IV, Division 5.

9. *Id*., s.87.

10. One exception is the 1982 general conditions for the sale of land of the Real Estate Institute of Western Australia and the Law Society of Western Australia, both of which provide that the property is at the risk of the vendor until completion or until the purchaser is entitled to or is given possession, whichever is the earliest These provisions are discussed in Chapter 3.

11. This is the rule in *Flight v. Booth* (1834) 1 Bing N.C. 370: 131 F.R. 1160.

12. *Drummoyne Municipal Council v. Beard* [1970] 1 N.S.W.R.432 *Rutherford v. Acton-Adams* [1915] A.C. 866, at p.870.

13. I.C.F Spry, *Equitable Remedies* (2nd ed., 180), pp, 291-292.

14. See M.R. *Friedman Contracts and Conveyances of Real Property* (3rd ed., 1975), pp. 376-386, O.L Browder, RA Cunningham and J.R. Julin, *Basic Property Law* (2nd ed., 1973), pp. 1068-1089. The American States which adopt the rule that the risk remains with the vendor include Connecticut Maine, Montana, New Hampshire, Massachusetts, Oregon, Rhode Island and Washington There are some differences of approach amongst these States in matters of detail.

15. *Ziel Nominees Pty. Ltd. v. V.ACC. Insurance Co. Ltd*. (1975) 7 A.LR. 667, at 1).669: *Davioyda Estates Pty. Ltd. v. National Insurance Co of New Zealand Ltd.* (1965) 69 S.R, (NSW.) 381.

16. *Carly v. Farrelly* 119751 1 N.Z.LR. 356.

17. *Reid v. Fitzgerald (1926)* 48 W.N. (NSW) 25, at 1).26.

18. Presumably the insurer can delay payment until the purchaser establishes that the contract is specifically enforceable, although this is by no means clear.

19. D.I. Cassidy, “The Insurance of Land and Buildings the Subject of a Contract of Sale” (1971) 45 *Australian Law Jsournal* 30, at p.31.

20. *Shaw v. Foster* (1872) LP 5 H.L 321, at p.338; *Lysaght v. Edwards* (1876) 2 Ch. D. 499, at p.506: *Buchanan v. Oliver Plumbing & Heating Ltd.* (1959) 18 D.L.R. (2d) 575, at p.581.

21. *Collingridge v. The Royal Exchange Assurance Corporation* (1877) 3 Q.B.D. 173.

22. *Ibid.*

23. *Ibid.*

24. See, eg, *British Traders’ Insurance Co. Ltd. v. Monson* (1964) 111 CLR- 86; *Castellain v. Preston* (1883) 11 Q.B.D. 380, at p.386; *Hirst v. The New Zealand Insurance Co. Ltd.* [1981] V.R. 571.

25. *Bank of New South Wales v. The North British and Mercantile Insurance Co*. (1881) 2 LR. (NSW.) 239.

26. *Castellain v. Preston* (1883) 11 Q.B.D. 380; *Kennedy v. Boolarra Butter Factory Pty. Ltd.* [1953] VLP, 548: Chief Justice’s Law Reform Committee (Victoria), *Report on Insurance of Real Property* (1979), Appendix B; Committee of Inquiry into Conveyancing (Victoria), *Further and Final Report* (1980), pp. 11- 12.

27. The Insurance Council of Australia Ltd. was unable to provide detailed information as to the average period for which premiums actually overlap. In response to an inquiry undertaken by the Insurance Council N.RM.A. Insurance Ltd. stated that “the average period of double insurance would be the length of the conveyancing transaction between exchange and settlement which is approximately 8 weeks” (letter from N.R.M.A. Insurance Ltd. addressed to Mr. C.D. Henri, Regional

Manager (NSW), Insurance Council of Australia Ltd., 10 January 1984). The same company stated that in fixing premiums generally no regard is had to an overlap of premiums as this is considered to be a rating factor. The company did note however that if there were no overlap of premiums the total premium pool would diminish and this might affect premium rates.

28. See, eg., *The Western Australian Bank v. The Royal Insurance Co*. (1908) 5 C.L.R. 5 *Davioyda Estates Pty. Ltd. v. National Insurance Co. of New Zealand Ltd*. (1965) 69 S.R. (NSW) 181, it pp.410, 417.

29. *Bank of New South Wales v. North British and Mercantile Insurance Co*. (1882) 3 L.R. (NSW) 60.

30. Letter from Mr. R.H. McGeoch, President, Law Society of New South Wales, 23 January 1984.

31. B*ritish Traders' Insurance Co. Ltd. v. Monson* (1964) 111 C.L.R. 86: *Davjoyda Estates Pty.Ltd. v. National Insurance Co. of New Zealand Ltd.* (1965) 69 S.R (NSW) 381, at 1).396: *Castellain v. Preston* (1888;) 11 Q.B.D. 389, at pp. 398-399.

32. Note 30 above. N.R.M.A. Insurance Ltd. has advised that while it will assign policies and does not consider this to be too complex a procedure, it is opposed to the issue of single policies covering the interests of both parties "as this would involve short-term policies and consequently high administrative costs in issuing the policies and keeping records" (note 27 above, p.2).

33. See E.J. Peverett "Shifting the Insurance Burden: Another View" (I 975) 125 *New Law journal* 217.

34. Id., at p.218.

35. See Report by the New Zealand Contracts and Commercial Law Reform Committee, *Aspects of Insurance Law* (2) (1983), pp.25-27.

36. N.RM.A. Insurance Ltd. has advised that it is not aware of the reasons why this precedent has not been followed in New South Wales. The company does state however the that it believes "most insurers are reluctant to insure persons who are unknown" (note 27 above, p.2).

37. See the authorities cited in note 1 above.

38. *Rayner v. Preston* (1881) 18 Ch.D. 1, at p.6, per Cotton LJ. See also *Re Hamilton-Snowball's Conveyance* [1959] Ch.D 308; *Re Lyne-Stephens and Scott-Miller's Contract* [1920] 1 Ch. 472.

39. *Rayner v Preston* (1881) 18 Ch.D. 1 *Royal Insurance Co. Ltd. v. Mylius* (1926) 38 C.L.R. 477, at p.490; *Knezovic v. Yagmich* [1979] 1 S.R. (WA) 75

40. *Voyda Estates Pty. Ltd. v. National Insurance Co. of New Zealand Ltd.* (1965) 69 S.R. (NSW) 381, at p.407.

41. Cassidy, note 19 above, at p.31.

3. Reforms Effected and Proposed Outside New South Wales

3.1 The inadequacies of the common law relating to the passing of risk and insurance in conveyancing transactions have led to reforms in a number of jurisdictions. An examination of those reforms is useful in determining whether the law in New South Wales should be changed and, if so, the directions the change should take.

ENGLAND

3.2 English legislation enacted in 1925 purports to modify the common law position regarding rights to the proceeds of the vendor's insurance policy in the event of damage to the property. Section 47 of the English Law of Property Act 1925 is in the following terms:

> "47. (1) Where after the date of any contract for sale or exchange of property, money becomes payable under any policy of insurance maintained by the vendor in respect of any damage to or destruction of property included in the contract the money shall on completion of the contract, be held or receivable by the vendor on behalf of the purchaser and paid by the vendor to the purchaser on completion of the sale or exchange, or so soon thereafter as the same shall be received by the vendor.
>
> (2) This section applies only to contracts made after the commencement of this Act, and has effect subject to -
>
> (a) any stipulation to the contrary contained in the contract
>
> (b) any requisite consents of the insurers,
>
> (c) the payment by the purchaser of the proportionate part of the premium from the date of the contract." [1]

Prior to the passing of the 1925 Act, it was common practice to arrange, with the insurers consent for the purchaser to have the benefit of the vendor s, existing insurance and this was usually stipulated in the contract for sale. [2] Section 47 removes the need to make the stipulation.

3.3 There are two major deficiencies in the protection offered to purchasers by this section The first is that it is subject to any requisite consent of the vendor s insurer (section 2(b)), and the section imposes no obligation upon the insurer to give that consent. While the requirement for consent may pose no practical problem in England - the English insurance industry's voluntary extension of the benefit of the vendor's policy to the purchaser, mentioned in Chapter 2, may be taken as consent - it may well do so under any similar provision in New South Wale. In addition the section is subject to any contrary agreement between the parties to the contract for sale.

3.4 The second deficiency is one which does not appear to have been tested in the English courts, but which follows from the decision of the High Court in *Ziel Nominees Pty. Ltd. v. V.A.C.C. Insurance Co. Ltd*. [3] It is this: the fact that the vendor has made, or is entitled to make, a claim upon his insurer in respect of damage to the property does not relieve the purchaser from the obligation to pay the full purchase price. Since a contract of insurance is a contract of indemnity only, a vendor who has received the full purchase price has suffered no loss from the damage to the property. Consequently, there is no money "payable" under the vendor s policy. This reasoning, if correct would substantially destroy the usefulness of the section and would restrict its operation to situations where the vendor was in fact paid by the insurer before completion of the sale. The counter- argument is that the

purpose of the provision is to ensure that the purchaser, compelled to pay the full price for a damaged property, is compensated by the proceeds of the vendor's policy, and that this purpose can be achieved only by interpreting the section as impliedly abrogating the indemnity principle. Under this construction money would remain "payable" under the vendor's policy even though the vendor had received the purchase price. No doubt some judges would be sympathetic to the counter-argument, but it would require a willingness to interpret the language of the section liberally.

3.5 These deficiencies make the section at least in its present form an unsatisfactory attempt to provide protection to an uninsured purchaser. However, if the general approach taken by section 47 were considered appropriate the section could be drafted to overcome the deficiencies.

3.6 In England the purchaser also has a right to compel the vendor's insurer to expend the proceeds of the insurance in rebuilding the property instead of paying the money to the vendor. This right stems from the Fires Prevention (Metropolis) Act 1774, an Imperial enactment which does not apply in New South Wales.[4] No other legislation exists in New South Wales to enable the purchaser to insist that the proceeds of the vendor's insurance be applied towards repair of damage occurring to the property between contract and completion.

NORTHERN TERRITORY

3.7 The Northern Territory by the Real Property (Insurance Money Application) Ordinance 1975, adopted a provision similar to section 47 of the English Law of Property Act 1925. The Northern Territory provision is as follows:

> "4. (1) Where after the date of a contract... for the sale or exchange of property money becomes payable under a policy of insurance maintained by the vendor in respect of damage to or destruction of property included in the contract, the money shall on completion of the contract, be held or receivable by the vendor on behalf of the purchaser and paid by the vendor to the purchaser on completion of the sale or exchange, or so soon thereafter as the money shall be received by the vendor.
>
> (2) Sub-section (1) has effect subject to the payment by the purchaser of the proportionate part of the premium from the date of the contract."

This provision differs from its English conterpart in that it is not subject to any requisite consent of the vendors insurer. But it suffers from the second deficiency of the English provision mentioned earlier, namely, that a vendor who has received the purchase price from the purchaser has suffered no loss, so that, in accordance with the indemnity principle, no money is " payable" under the vendor's policy.

QUEENSLAND

3.8 The Queensland legislature directed its attention to the matter of insurance in conveyancing transactions when enacting the Property Law Act 1974. This Act resulted from recommendations contained in a report of the Queensland Law Reform Commission.[5] The report recommended substantial reform of Queensland property law and, *inter alia*, examined section 47 of the English Law of Property Act 1925 as a possible precedent in relation to the application of insurance money in the event of destruction or damage to property between the date of contract and completion. The Commission proposed the adoption of section 47 in Queensland, subject to specifically providing that the insurer would still be liable even though the risk had passed to the purchaser, and further, that the consent of the vendor s insurer would not be required.[6] Two sections of the Property Law Act 1974 are relevant to the present discussion sections 63 and 64:

"**63. Application of insurance money on completion of a sale or exchange.**

(1) Where after the date of any contract for sale or exchange of property, money becomes payable under any policy of insurance maintained by the vendor in respect of any damage to or destruction of property included in the contract, the money shall on completion of the contract, be held or receivable by the vendor on behalf of, and, on completion of the sale or exchange or so soon thereafter as the same shall be received by the vendor, paid -

(a) to any person entitled thereto by virtue of an encumbrance over or in respect of the land; and

(b) as to any balance thereafter remaining, to the purchaser.

(2) For the purpose of this section cover provided by such a policy maintained by the vendor extends until the date of completion and money does not cease to become payable to the vendor merely because the risk has passed to the purchaser.

(3) This section ... shall have effect subject to -

(a) any stipulation to the contrary contained in the contract;

(b) the payment by the purchaser of the proportionate part of the premium from the date of the contract. [7]

64. Right to rescind on destruction of or damage to dwelling-house.

(1) In any contract for the sale of a dwelling-house where, before the date of completion or possession whichever earlier occurs, the dwelling-house is so destroyed or damaged as to be unfit for occupation as a dwelling-house, the purchaser may, at his option rescind the contract by notice in writing given to the vendor or his solicitor not later than the date of completion or possession whichever the earlier occurs.

(2) Upon rescission of a contract pursuant to this section any moneys paid by the purchaser shall be refunded to him and any documents of title or transfer returned to the vendor who alone shall be entitled to the benefit of any insurance policy relating to such destruction or damage subject to the rights of any person entitled thereto by virtue of an encumbrance over or in respect of the land.

(3) In this section the term “sale of a dwelling-house” means the sale of improved land the improvements whereon consist wholly or substantially of a dwelling-house or the sale of a unit within the meaning of the Building Units Titles Act 1965-1972.

(4) This section... shall have effect notwithstanding any stipulation to the contrary.”

3.9 As noted earlier, section 63 is similar in purpose to section 47 of the English Law of Property Act 1925 but there are some important differences in drafting.

The consent of the vendors insurer is not required.

Encumbraricees are entitled to be paid out in priority to the purchaser. It is not clear why this provision was considered necessary since the rights of the encumbrances would not appear to be prejudiced by the statutory application of the insurance moneys.[8]

Money does not cease to be payable to the vendor under the insurance policy “merely because the risk has passed to the purchase”. The Queensland Law Reform Commission was concerned that the insurer might escape liability under the policy by showing that the risk had passed to the purchaser.[9] However, the provision does not seem to be necessary since the mere passing of the risk to the purchaser is not a justification for the vendor's insurer refusing to pay a claim under the vendor's policy (paragraphs 2.11-2.12).

The vendor's insurance cover "extends until the date of completion". Although the wording is not entirely clear, presumably it is intended that, even though the vendors policy in fact lapses between contract and completion it is notionally' continued for the purposes of the section until completion actually takes place. In a typical transaction this provision would require the deemed continuance of the cover for a matter of weeks, or possibly months only, but it would seem also to prolong the cover where the contract is a term or instalment contract with a period of years between contract and completion. The extension may of course impose a substantial additional burden on insurers.

3.10 As with the English and Northern Territory provisions mentioned earlier, section 63 also is open to the interpretation that a vendor who has been paid the purchase price has suffered no loss, so that there is no money "payable" under the vendor s policy of insurance. It could be argued that the effect of section 63(2) is to overcome the problem of interpretation evident in the decision of the High Court in *Ziel Nominees* (paragraph 3.4). The difficulty here is that if the insurer is able to escape liability under the policy it may not be "merely because the risk has passed to the purchases". It may be, in addition, because the vendor has received or is entitled to receive the full purchase price pursuant to the contractor sale and has therefore suffered no loss against which he or she needs to be indemnified. If this reasoning is correct, section 63 may be interpreted in a manner which destroys much of its value.

3.11 Section 64, while not altering the common law rule regarding the passing of risk, gives the purchaser an important right of rescission not conferred by the common law. It is subject to a number of important qualifications, the desirability of which would need to be considered in any discussion of the suitability of a similar right in New South Wales.

It applies only to the sale of dwelling houses. In contracts for the sale of properties which do not fit the description of "dwelling-house" the general law principles, discussed in Chapter 2, would continue to apply. Further, the section does not define "dwelling-house" in detail although subsection (3) makes it clear that residential units are included.

The right to rescind arises only where the dwelling-house is so damaged or destroyed as to be unfit for occupation as a dwelling-house.

The damage or destruction must occur between contract and the taking of possession or completion, whichever is the earlier. There are many instances where purchasers are let into possession prior to completion. Under the legislation a purchaser has no right of rescission if the damage or destruction occurs between the date of taking possession and completion. Further, where the damage occurs before the date of possession, the notice of rescission must be given not later than the date of possession.

3.12 The provision in subsection (2) that the vendor " alone shall be entitled to the benefit of any insurance policy" relating to the damage or, destruction is somewhat puzzling. If interpreted literally, it would permit a vendor who had no insurance over the property to claim on any insurance which the purchaser may have taken out over the property. It seems unlikely that this result was intended, and that the provision was meant merely to confirm by way of more abundant caution that the purchaser, having rescinded, cannot take advantage of section 63. It might also be intended to confirm that a purchaser, in these circumstances, can have no claim against his or her insurer.

VICTORIA

3.13 The most substantial legislative reforms in this field have been enacted in Victoria in the Sale of Land (Amendment) Act 1982. This Act was introduced following two major reports dealing with the passing of risk and insurance in Conveyancing transactions, namely, the Chief Justice's Law Reform Committee's Report on Insurance of Real Property (1979) and the Dawson Committee of Inquiry into Conveyancing, Further and Final Report (1980). These reports differed in some respects as to the most appropriate path for reform to take. The Chief Justice's Law Reform Committee recommended

the adoption of a provision similar to section 63 of the Queensland Act, but with important amendments designed to protect the vendors insurer against high risk purchasers. That Committee did not recommend legislation granting purchasers a right to rescind along the lines of section 64 of the Queensland Act.

3.14 The Dawson Committee recommended that legislation similar to both sections 63 and 64 should be introduced. The Dawson Committee considered that a provision which merely gives the purchaser the benefit of the vendor s insurance policy is not sufficient where the vendor s insurance is inadequate or non-existent; and that, the purchase of a dwelling-house being more than a mere commercial transaction a purchaser should not be compelled to complete if the house were to be destroyed or damaged to the point where it was no longer habitable. [10] The Committee also took the view that it was appropriate to restrict the power of rescission to sales of dwelling-houses, as the purchase of other kinds of properties ordinarily takes place in a commercial setting where the purchaser can be expected to safeguard his or her own interests. [11] The new Victorian legislation adopts the approach of the Dawson Committee's Report although with some variations.

3.15 Before the introduction of the 1982 Victorian Act the law in that State was similar to that in England. Section 47 of the Victorian Property Law Act 1958 was almost identical to section 47 of the English Law of Property Act 1925, and section 67 of the Supreme Court Act 1958 (Vic.) was similar to section 83 of the Imperial Fires Prevention (Metropolis) Act 1774. Both provisions have now been repealed by the 1982 legislation.

3.16 The Act inserts into the Sale of Land Act 1962, the following sections relevant to the present discussion:

"**Right to Rescind**

34. (1) Where a contract for the sale of land upon which there is a dwelling-house has been entered into, and where the dwelling-house is so destroyed or damaged as to be unfit for occupation as a dwelling-house, before the purchaser becomes entitled to possession or to the receipt of rents and profits he may, at his option rescind the contract by notice in writing given to the vendor or his solicitor within fourteen days after the purchaser becomes aware of the destruction of or damage to the dwelling-house.

(2) Upon rescission of a contract for the sale of land pursuant to this section -

(a) any moneys paid by the purchaser shall be refunded to him;

(b) any documents of title or transfer shall be returned to the vendor; and

(c) the provisions of section 35 shall not apply and the vendor and any other person entitled to benefit from any insurance policy shall be entitled to do so to the same extent as they would have been if the land had not been subject to the contract.

(3) Any provision in any contract for the sale of land or other document whereby any provision of this section is excluded, modified or rescinded shall be void and of no effect.

Benefit of Vendor's Insurance

35. (1) During the period between the making of a contract for the sale of land and the purchaser becoming entitled to possession or to the receipt of rents and profits pursuant to the terms of the contract, any policy of insurance maintained by the vendor in respect of any damage to or destruction of any part of the land agreed to be sold pursuant to the contract shall in respect of the said land, to the extent that the purchaser is not entitled to be indemnified under any other policy of insurance, ensure for the benefit of the purchaser as well as for the vendor and the purchaser shall be entitled to be indemnified by the insurer under any such insurance policy in the same

manner and to the same extent as the vendor would have been if the land had not been subject to the contract.

(2) It shall not be a defence or answer to any claim by the purchaser against the insurer made under sub-section (1) hereof that the vendor otherwise would not be entitled to be indemnified by the insurer because the vendor has suffered no loss or has suffered diminished loss by reason of the fact that the vendor is entitled to be paid the purchase price or the balance thereof by the purchaser.

(3) A policy of insurance shall not enure for the benefit of a purchaser under sub-section (1) hereof if the insurer establishes that a prudent insurer would not have insured the purchaser against the risk covered by the policy.

(4) At any time prior to the happening of the risk insured against an insurer made liable to a purchaser under sub-section (1) may terminate that liability by giving notice of such termination to the purchaser in not less than three clear business days.

(5) ...

(6) The contract of insurance shall terminate at the expiration of the period specified in the notice.

(7) The service of a notice under sub-section (4) shall not affect the liability of the insurer to the vendor under the policy of insurance.

(8) Where money becomes payable under a policy of insurance in respect of any damage to or destruction of part of the land agreed to be sold the money shall on completion of the contract be held or receivable by the vendor on behalf of the purchaser and paid by the vendor to the purchaser on completion of the sale or as soon as the money is received by the vendor (whichever is the later).

(9) Notwithstanding sub- section (1) an insurer shall not be entitled to deny liability to the purchaser because of a fault on the part of the vendor by reason of which the vendor would not be entitled to make a claim under the policy.

(10) This section-

(a)...

(b) shall have effect notwithstanding any stipulation or term to the contrary contained in the contract of sale or any policy of insurance as referred to in sub-section (1).

Option of Restoring Premises

36. Where land has been destroyed or damaged, the vendor may restore that damage and where the vendor does so before the purchaser becomes entitled to possession or to the receipt of rents and profits, the purchaser shall not be entitled to rely on the provisions of section 34 or 35.”

Comments Upon the Victorian Legislation

Section 34: Right to Rescind

3.17 The purchasers statutory right to rescind is strictly limited. It may be exercised only where:

the contract is for the sale of a dwelling-house; and

the dwelling-house is so destroyed or damaged as to be unfit for occupation as a dwelling-house; and

the purchaser rescinds within 14 days of becoming aware of the destruction or damage and before becoming entitled to possession or to the rents and profits.

Further, if the right to rescind is exercised, the provisions of section 35 allowing a purchaser to take advantage of the vendor s insurance, do not come into operation The rights conferred by section 34 cannot be excluded or modified.

Section 35: Benefit of Vendor's Insurance

3.18 This section, like its Queensland counterpart is designed to give the purchaser the benefit of the vendor's insurance policy However, the section has significant differences, some of which are intended to protect the interests of the vendor's insurer.

The vendors policy continues for the benefit of the purchaser for the period between the making of the contract and the date when the purchaser becomes entitled to possession or to the receipt of rents and profits. Accordingly, where the purchaser goes into possession prior to completion he or she loses the benefit of the vendors policy. The vendor s insurer is thus protected against any potential increased "risk" which might be thought to flow from the taking of possession by a purchaser whose character is unknown to the insurer.

The insurer may avoid liability to the purchaser by establishing that a prudent insurer would not have insured the purchaser against the risk covered by the policy.

The insurer has a discretion, at any time before the happening of the risk insured against, to avoid liability to a purchaser by giving three days notice of termination of liability to that purchaser. Although the rationale behind this provision is clear enough it is not altogether clear how effective the insurer's right will be, since the insurer is unlikely to know that the property is subject to a contract for sale. Insurers could insert conditions in their policies requiring vendors to notify them when a contract is entered into, but such conditions might not be observed.

3.19 Four other aspects of section 35 call for comment.

First, notwithstanding the reference in subsection (8) to money becoming "payable" under the policy, the provisions of subsection (2), together with the concluding words of subsection (1), appear effectively to overcome the problem posed by the decision in *Ziel Nominees.* It seems clear that the vendor's insurer could not argue that payment to the vendor of the purchase price discharges the insurer from liability to pay under the Policy. [12] The only qualification to this result will be where the purchaser has taken out a policy. In such a case, under subsection (1), the vendor's insurer is not liable to the extent of the purchases s entitlement under his or her own policy.

Secondly, subsection (9) precludes the vendor's insurer from denying liability to the purchaser because of fault on the part of the vendor which would preclude the vendor from making a claim under the policy.

Thirdly, contracting out of the section is not permitted.

Fourthly (as with its Queensland counterpart), section 35 is not restricted in its operation to dwelling-houses.

3.20 The protection accorded by section 35 is dependent on the nature and extent of the insurance coverage taken out by the vendor (although even if the vendor is fully covered the purchaser will not necessarily be completely protected). Consequently, it may be important for the purchaser to as certain whether the vendor is insured for the full value of the improvements to the property. Section 32(2) (g) accordingly states that where the contract does not provide for the land to remain at the risk of the vendor pending completion the vendor shall give to the purchaser, before contracts are exchanged, a statement which includes particulars of any insurance policy maintained by the vendor in respect of damage to, or destruction of the property.

Section 36: Option of Restoring Premises

3.21 This section gives the vendor the option of restoring the damage before the purchaser becomes entitled to possession or to the receipt of rents and profits. There may be practical difficulties in the vendor taking advantage of the option conferred by the section, unless the purchaser agrees to this course of action. If the damage is anything other than minor, it is unlikely that the restoration could be completed before the purchaser becomes entitled to possession under the contract for sale. Should the restoration not be completed before this date, the purchaser will be entitled to exercise the right of rescission conferred by section 34, or the right to take the benefit of the vendor s insurance under section 35 provided of course that the requirements of each section have been met. If, however, the restoration is completed before the relevant date, the purchaser loses the right to rely on section 34 or 35.

3.22 Section 36 does not specify whether, if the vendor lays out the proceeds of insurance in repairing the damage, he or she can be called upon to refund the money to the insurer when the purchase price is paid. To avoid doubt it would be preferable for this matter to be covered expressly.

General

3.23 The Victorian legislation leaves open one point which should be clarified if similar legislation were thought advisable for New South Wales. Sections 34 and 35 appear to assume that the risk has passed to the purchaser upon exchange of contracts and that the purchaser needs protection against the consequences of the passing of the risk. If the risk remains with the vendor, it is likely that the purchaser is entitled, in the event of damage to the property, either to rescind or to insist that the purchase price be reduced. In such a case there would seem to be no valid reason for giving the purchaser a right to claim under the vendor's policy and it would not be essential to create a statutory right to rescind. It is presumably open to the vendor and purchaser to agree that the risk shall not pass on exchange of contracts, and indeed this is contemplated by the language of section 32(2)(g), referred to in paragraph 3.20. Consequently, sections 34 and 35 should be expressly confined to the situation where the risk has passed to the purchaser upon entry into the contract.

AUSTRALIAN LAW REFORM COMMISSION

3.24 The Australian Law Reform Commission has recently considered the question of passing of risk and insurance in its Report on Insurance Contracts. [13] This is a matter on which the Commonwealth has constitutional power, since the Parliament may make laws with respect to "insurance other than State insurance....." [14] The Commission's terms of reference were limited to considering the law governing contracts of insurance. Accordingly, it did not consider whether the difficulties associated with the current law governing passing of the risk between vendor and purchaser could be overcome by some means other than allowing the uninsured purchaser access to the vendor's insurance policy.

3.25 After considering actual or proposed reforms elsewhere, the Commission recommended legislation which would allow the purchaser to receive the benefit of the vendor's insurance in respect of any loss occurring before completion or entry into occupation by the purchaser. In the Commission's view the "only objection" which might be made to the proposal is that "it is contrary to principle to force an insurer to insure a risk which it is unable to assess". However, the Commission considered that concerns of this kind would be minimised if the purchaser could have the benefit of the vendor's insurance from exchange of contracts until completion or entry into possession whichever is earlier. During this period the Commission thought it unlikely that the purchaser would benefit from arson or add to the risk by careless maintenance. [15]

3.26 The Commission's report included a draft Bill giving effect to the recommendation in the text. The relevant clause is as follows:

> "**Sale of insured property**

50. (1) Where -

(a) a person (in this section called “the purchaser”) agrees to purchase, or to take an assignment of, property and in consequence the purchaser has, or will have, a right to occupy or use a building;

(b) the building is the subject-matter of a contract of general insurance to which the vendor or assignor under the agreement is a party; and

(c) the risk in respect of loss of or damage to the building has passed to the purchaser;

the purchaser shall be deemed to be an insured under the contract of insurance, so far as the contract provides insurance cover in respect of loss of or damage to the building and such of the contents of the building as are being sold or assigned to the purchaser at the same time, during the period commencing on the date on which the risk so passed and ending at whichever of the following times is the earliest:

(d) the time when the sale or assignment is completed;

(e) the time when the purchaser enters into possession of the building;

(f) the time when insurance cover under a contract of insurance effected by the purchaser in respect of the building commences;

(g) the time when the sale or assignment is terminated.

(2) A reference in this section to a building includes a reference to a part of a building and also includes a reference to a structure.”

In 1983 the Insurance Contracts Bill which gives effect to the recommendations of the Australian Law Reform Commission, was introduced into the Commonwealth Parliament Clause 50 of that Bill is in identical terms to clause 50 of the draft Bill appended to the Commission’s report.

3.27 The following points should be made about clause 50.

The legislation seems to avoid the problems presented by the decision in *Ziel Nominees,* by deeming the purchaser to be an insured under the contract of insurance.

As occurs in Victoria, the purchaser s right to claim under the vendor s insurance continues only until the purchaser enters into possession or completes the sale. The Commonwealth Bill also specifically provides that the purchaser's rights under the vendor's policy cease when the purchasers own insurance commences.[16]

The insurer has no statutory right to give notice to the purchaser terminating the insurance contract Nor can the insurer avoid liability on the ground (available in Victoria) that a prudent insurer would not have insured the purchaser against the risk covered by the policy.

It is not clear whether the insurer can avoid liability to the purchaser on the ground that the policy could be avoided against the vendor, for example, because of misrepresentation or non-disclosure. This issue is not addressed specifically in the legislation or the Commission’s report.[17] The better view would seem to be that as the purchaser is deemed to be an insured under “the contract of insurance”, the insurer retains whatever defences might otherwise be available under that contract.

It is also not clear, where the vendor s policy expires after exchange of contracts but before completion, whether the policy is deemed to continue in favour of the purchaser. The language of

clause 50 is capable of being interpreted as requiring the policy to continue, even though the insurer receives no premiums in respect of the period of extension. [18]

The provisions of clause 50 apply only when "the risk in respect of loss of or damage to the building has passed to the purchases".

The rights of the purchaser under the clause cannot be modified or excluded by any provision in the contract of insurance. [19]

WESTERN AUSTRALIA

3.28 The general conditions for the sale of land of both the Real Estate Institute of Western Australia and the Law Society of Western Australia are significantly different from the conditions contained in the standard form contract in use in New South Wales. The Western Australian provisions state that the property remains at the risk of the vendor until completion or earlier possession. Despite this important alteration to the general rule concerning the passing of risk, the provisions have not, to our knowledge, been the subject of any litigation.

3.29 The Law Society of Western Australia first adopted the provision that the property is at the risk of the vendor until completion or until the purchaser is entitled to or is given possession (whichever is the earliest) in its 1974 general conditions for the sale of land. We have been informed that the precedent for this was a similar provision in the New South Wales 1972 standard form contract for the sale of property under the Strata Titles Act, 1973. [20] The 1974 general conditions were revised in late 1979 by the Conveyancing Committee of the Law Society of Western Australia and the 1980 edition of the standard form contract used by the Law Society for residential torrens or strata title property reverted to the common law position with the risk passing to the purchaser upon exchange of contracts. [21]

3.30 However, following a further revision the 1982 Law Society general conditions for the sale of land contain a provision that the risk does not pass to the purchaser until completion or earlier possession. The condition is in the following terms:

"11. Risk

(1) Notwithstanding any rule of law or equity to the contrary the Property shall be at the risk of the Vendor until the whole of the Purchase Price is paid or the Purchaser is entitled to or is given Possession whichever is the earliest and thereupon the risk shall pass to the Purchaser.

(2) If the Property includes a building or other improvement any part of which is destroyed or damaged prior to the risk passing to the Purchaser the following shall apply:-

(a) If the building is a dwelling and it is made substantially uninhabitable, or in any other case, the building or other improvement is made substantially unusable for the use current at the date of the contract, then at the option of the Purchaser, the Contract may be rescinded by notice in writing to the Vendor given not later than 14 days after the date upon which the Vendor has given written notice to the Purchaser of such destruction or damage, and thereupon the Vendor shall repay to the Purchaser the deposit and all other moneys (if any) paid by the Purchaser to the Vendor under the Contract without deduction; and

(b) If the Contract is not rescinded pursuant to paragraph (2) (a) of this Condition, the Purchase Price shall be reduced by an amount equal to the reduction in value of the Property caused by the destruction or damage. Such amount shall be settled in cases of difference by an arbitrator appointed in the manner specified in Condition 10(2)."

3.31 It can be seen that not only does condition 11 provide for an important alteration to the general rule concerning the passing of risk, but the purchaser is given a right of rescission if a dwelling-house

on the property is made substantially uninhabitable or any building or other improvement is made substantially unusable prior to the risk passing to the purchaser. Consequently, the right to rescind is not limited to damage occurring to dwelling-houses and in this respect is significantly different from section 64 of the Property Law Act 1974 (Qld) and section 34 of the Sale of Land Act 1962 (Vic). If the contract is not rescinded, there is an abatement of the purchase price equal to the reduction in the value of the property caused by the destruction or damage. There is provision for arbitration should there be any dispute as to the amount of the abatement.

3.32 The Real Estate Institute of Western Australia has a separate set of general conditions for the sale of land (1982 revision). We have been informed that at least 90 per cent of conveyancing transactions in Western Australia are completed using the Real Estate Institute general conditions. [22] Clause 9 of these conditions is in the following terms:

"9. Risk

> Notwithstanding any rule of law or equity to the contrary the buildings and erections on the property shall be at the risk of the Vendor until the Purchaser is entitled to or is given possession of the property (whichever is the earlier) and thereafter the property shall be at the risk of the Purchaser and until completion the Purchaser shall at his own expense insure and keep insured against loss or damage by fire, storm, tempest and earthquake and such other risks as the Vendor may reasonably require in the joint names of the Vendor and Purchaser with an insurance company approved by the Vendor to their full insurable value all buildings and erections of an insurable nature upon the property and all moneys received in respect of such insurance shall at the option of the Purchaser be applied in repairing or reinstating the buildings or erections insured or shall be applied by the Purchaser in or towards payment or part-payment (as the case may be) of the unpaid balance of the purchase price and any interest thereon. If the Purchaser neglects or refuses to pay the annual premium or any part thereof necessary to obtain or renew such policy the Vendor may pay the amount of such premium and thereafter demand and recover by process of law from the Purchaser the amount so paid."

This provision differs in several ways from the general conditions for the sale of land used by the Law Society of Western Australia.

> Clause 9 provides that the risk passes to the purchaser upon actual possession or entitlement to possession whichever is the earlier. There is no reference to the risk passing upon completion although generally speaking, the purchaser is entitled to possession from the day following completion of the sale unless the contract provides otherwise. [23]
>
> Clause 9 states that from the time the risk passes to the purchaser, the property is to be insured at the expense of the purchaser. The policy is to be in the joint names of the vendor and purchaser with an insurance company approved by the vendor. Clearly, the purchaser would only be required, pursuant to clause 9, to obtain insurance prior to completion when he or she has been given possession or is entitled to possession. However, we have been informed that there is a substantial amount of double insurance in Western Australia with purchasers taking out their own insurance upon exchange of contracts, principally because building societies insist that purchasers obtain insurance before a loan is granted. [24]

3.33 Finally it is to be noted that although both the general conditions of the Law Society of Western Australia and the Real Estate Institute can be altered by agreement between the parties, for example, to provide that the risk passes to the purchaser upon exchange of contracts, it appears that it is rare for the provisions concerning the passing of risk to be altered. [25]

NEW ZEALAND

3.34 In May 1983 the New Zealand Contracts and Commercial Law Reform Committee published a Report, *Aspects of Insurance Law (2)* in which the questions of passing of risk and insurance were considered. The Committee expressed the view that the present law in New Zealand, which is similar to that in New South Wales (with the exception that section 83 of the Imperial Fires Prevention (Metropolis) Act 1774 applies in New Zealand), was unsatisfactory and in need of reform The Committee considered that there were two main options for reform.

The first was the adoption of legislation along the lines of the United States Uniform Vendor and Purchaser Risk Act (paragraphs 3.41-3.42) which alters the common law rule concerning the passing of risk between vendor and purchaser. Although the Committee thought that such a reform possessed the advantage of simplicity, it was rejected as constituting too radical a change to the existing principle regarding the passing of risk. The Committee also felt that the Act was productive of possible uncertainty, in that it might be difficult to determine whether damage was “material” for the purposes of the Act, the answer to which determines whether the contract can be enforced by the vendor and, further, disputes could arise concerning the amount of abatement of the purchase price appropriate in the circumstances. [26]

3.35 The second possible option for reform was the statutory extension of the vendor s insurance cover to the purchaser. This path had been opposed by the New Zealand Insurance Council in its submission to the Committee as constituting too great an interference with insurer’s discretion to choose and measure risk. Notwithstanding this opposition the Committee was of the view that this was the appropriate reform to adopt. [27]

3.36 The Committee had before it the Victorian Chief Justice’s Law Reform Committee’s Report (paragraph 3.13), but apparently not the provisions of the 1982 Victorian Act The Committee agreed with the main thrust of the Victorian Committee’s proposals, subject to some qualification concerning aspects of that committee’s draft legislation which subsequently found their way into section 35 of the Victorian Act. In particular, the New Zealand Committee rejected the need for any provisions in the nature of subsections (3), (4) and (5) of section 3 5, on the ground that the insurer is reasonably protected by the provision that the policy continues for the purchasers benefit only until possession is given. [28]

3.37 The New Zealand Committee also addressed the problem that can arise at the same time that the purchaser is given the benefit of the vendor s policy, the purchaser also takes out his or her own insurance policy which includes a term avoiding liability if the purchaser is otherwise entitled to indemnity. In such cases, the enactment of a provision making the vendor’s policy enure for the benefit of the purchaser “could have the paradoxical effect of vitiating the insurance specifically arranged by the purchaser”. [29] Accordingly, the Committee recommended a section stating that it should not be a defence to any claim by the purchaser against his or her insurer:

> “that the purchasers entitlement under the policy to which the claim relates is affected or defeated by the existence or terms of any policy held by or on behalf of the vendor.” [30]

3.38 The draft provisions recommended by the New Zealand Committee are as follows:

> **“11. Purchaser of land entitled to benefits of insurance between dates of sale and possession**
>
> (1) During the period between -
>
> (a) The making of a contract for the sale of land and all or any fixtures thereon;
>
> (b) The purchaser taking possession of the land and fixtures pursuant to the contract or final settlement, whichever is the sooner -
>
> any policy of insurance maintained by the vendor in respect of any damage to or destruction of any part of the land or fixtures shall in respect of the land and fixtures agreed to be sold and

to the extent that the purchaser is not entitled to be indemnified under any other policy of insurance, enure for the benefit of the purchaser as well as for the vendor, and the purchaser shall be entitled to be indemnified by the insurer under the policy in the same manner and to the same extent as the vendor would have been if there had been no contract of sale:

Provided that nothing in this subsection shall oblige an insurer to pay more in total under a policy of insurance than it would have had to pay if there had been no contract of sale.

(2) It shall not be a defence or answer to -

(a) Any claim by a purchaser against an insurer under this section that the vendor otherwise would not be entitled to be indemnified by the insurer because the vendor has suffered no loss or has suffered diminished loss by reason of the fact that the vendor is or was entitled to be paid the purchase price, or the balance thereof, by the purchaser; or

(b) Any claim under this section by a purchaser against the vendor's insurer in relation to the land or fixtures sold that the purchasers entitlement under the policy to which the claim relates is affected or defeated by the existence or terms of another policy; or

(c) Any claim by a purchaser against an insurer (other than the vendor's insurer) that the purchasers entitlement under the policy to which the claim relates is affected or defeated by a claim under this section.

(3) In this section the word "vendor" includes a mortgagee of the vendor and any person claiming through the vendor.

(4) Where, in respect of a contract for the sale of land and all or any fixtures thereon, -

(a) There is damage to or destruction of any part of the land or fixtures during the period specified in subsection (1) of this section; and

(b) The whole or part of the amount payable in respect of the damage or destruction under the policy of insurance maintained by the vendor is payable to a mortgagee of, or any person claiming through, the vendor -

the purchase price payable under the contract of sale shall be reduced by the amount so payable to the mortgagee or person claiming through the vendor.

(5) This section shall not apply to the extent that the purchaser and vendor under a contract of sale expressly agree at any time.

(6) This section -

(a)...

(b) Subject to subsection (5) of this section, shall have effect notwithstanding any provision to the contrary in any enactment, rule of law, policy of insurance, deed, or contract.

(c)...

12. Double insurance relating to contracts for sale of land

Where there is a contract for the sale of land and all or any fixtures thereon, it shall not be a defence or answer to any claim by the purchaser against an insurer (other than the vendor s insurer) that the purchasers entitlement under the policy to which the claim relates is affected or defeated by the existence or terms of any policy held by or on behalf of the vendor."

In December 1983 the Insurance Law Reform Bill was introduced into the New Zealand Parliament and was referred to a Select Committee. The Bill gives effect to the recommendations of the report of the Contracts and Commercial Law Reform Committee. Clauses 11 and 12 of the Insurance Law Reform Bill are in almost identical terms to the clauses in the draft Bill appended to the Committee's report.

3.39 It will be noted that these provisions, while departing from aspects of the Victorian section 35, introduce some significant new matters. The following are noteworthy:

> the proviso to clause 11 (1), making it clear that the insurer is not obliged to pay more than would have been payable had there been no contract of sale;
>
> clauses 11 (2) (b), (c) and 12, removing the argument that the purchases s claim might be defeated if the purchaser has arranged his or her own insurance and the policy contains a clause avoiding liability if the purchaser is otherwise covered;
>
> clause 11 (3), extending the clause to a mortgagee of the vendor and any person claiming through the vendor;
>
> clause 11 (4), permitting an abatement of purchase price where the proceeds of the policy are payable to the vendor s mortgagee or a person claiming through the vendor;
>
> clause 11(5), permitting the vendor and purchaser to contract out of the operation of the legislation.

UNITED STATES OF AMERICA

3.40 Brief mention should be made of the position in the United States. [31] The courts in the majority of States have adopted the rule that the risk passes to the purchaser upon entry into a binding contract (although as mentioned in paragraph 2.7, in some States the risk remains with the vendor until completion or earlier possession by the purchaser [32]). However, the purchaser usually is able to claim the benefit of the vendor's insurance.

3.41 A number of States have adopted the Uniform Vendor and Purchaser Risk Act As adopted in New York (the provisions in brackets being New York additions to the original Uniform Act), the Act provides:

> "1. Any contract hereafter made for the purchase and sale or exchange of realty shall be interpreted, unless the contract expressly provides otherwise, as including an agreement that the parties shall have the following rights and duties:
>
> (a) When neither the legal title nor the possession of the subject matter of the contract has been transferred to the purchaser.
>
> (1) If all or a material part thereof is destroyed without fault of the purchaser or is taken by eminent domain, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid, but nothing herein contained shall be deemed to deprive the vendor of any right to recover damages against the purchaser prior to the destruction or taking.
>
> [(2) If an immaterial part thereof is destroyed without fault of the purchaser or is taken by eminent domain neither the vendor nor the purchaser is thereby deprived of the right to enforce the contract, but there shall be, to the extent of the destruction or taking, an abatement of the purchase price.]

(b) When either the legal title or the possession of the subject of the contract has been transferred to the purchaser, if all or any part thereof is destroyed without fault of the vendor or is taken by eminent domain, the purchaser is not thereby relieved from a duty to pay the price, nor is he thereby entitled to recover any portion thereof that he has paid; [but nothing herein contained shall be deemed to deprive the purchaser of any right to recover damages against the vendor for any breach of contract by the vendor prior to the destruction or taking.]"

3.42 It will be observed that under this Act liability for loss is governed by the passing of title or possession. So long as legal title and possession remain with the vendor, the vendor cannot enforce the contract if all or a material part of the property is destroyed or resumed; if only an immaterial part is destroyed or resumed, an appropriate abatement of purchase price is made. Once legal title or possession has been transferred to the purchaser, the purchaser must pay the full price, regardless of the extent of damage (provided that the damage has not been caused by any fault on the part of the vendor). In practical terms, the Act reverses the common law rule about the passing of the risk, although the presumption may be reversed by express agreement between the parties. The Act does not purport to interfere with or regulate the liability of insurers.

FOOTNOTES

1. Section 47(3) further provides that s.47 applies to the sale of property resulting from a court order.

2. RE Megarry and HWR Wade, *The Law of Real Property* (4th ed., 1975), p.577.

3. (1975) 7 ALR 667.

4. *Reid v. Fitzgerald* (1926) 48 WN (NSW) 25, at p.26, approved in *Hazelwood* v. *Webber* (1934) 52 CLR 268; Imperial Acts Application Act, 1969, s.8.

5. Queensland Law Reform Commission, *Report on a Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes,* QLRC 16 (1973).

6. *Id.,* p.51.

7. As with the English legislation, s.63(4) provides that s.63 applies to the sale of property resulting from a court order.

8. The section raises the question of whether the insurer is subrogated to the rights of the encumbrances against the vendor. cf. Strata Titles Act, 197 3, s.86.

9. Note 5 above, p.5 1.

10. Committee of Inquiry into Conveyancing, *Further and Final Report* (1980), p.16.

11. *Ibid.*

12. Cf. PF Mitchell, "Closing the Insurance Gap Between Vendor and Purchaser" (1983) 57 *Law Institute Journal* 73, at p.75, where it is argued that the Act is not as clear as it might have been an over coming the effect of the decision in *Ziel Nominees.*

13. Australian Law Reform Commission, *Insurance Contracts,* Report No.20 (1982), paras.130-132.

14. Constitution, s.51(xiv).

15. Note 13 above, para.132. A consultant to the Australian Law Reform Commission, Mr GR Masel, observed that a purchaser may benefit from arson before settlement if he or she wishes not to proceed with the contract or if the purchaser wishes to finance the purchase by insurance proceeds.

16. Cf. Sale of Land Act 1962 (Vic), s.35(1).

17. Cf. id, s.35(9).

18. Cf. Property Law Act 1974 (Qld), s.63(2).

19. Insurance Contracts Bill 1983 (Cth), cl.52.

20. Personal communication with Mr RD Warren, Chairman of the Conveyancing Committee of the Law Society of Western Australia, 13 January 1984. The provision in the 1972 contract for the sale of land was cl8(f) which stated that in the case of property which is part of a Strata Scheme under the Strata Titles Act 1973 then:

"Notwithstanding any rule of law or equity to the contrary the risk of the property sold shall not pass to the Purchaser until completion."

As noted elsewhere in this report (para.2.5) this provision has been included in condition 14A(e) (i) of the 1982 edition of the New South Wales standard form contract.

21. Clause 13 of the 1980 edition of the contract for sale of property stated that:

"The property is at the risk of the Purchaser after (but not including) the date upon which this Agreement or a duplicate or counterpart thereof executed by the Vendor is delivered to the Purchaser or the Purchaser's solicitors."

22. Personal communication with Mr N Roberts, Executive Director, Law Society of Western Australia, 13 January 1984.

23. Real Estate Institute of Western Australia, General Conditions for the Sale of Land (1982 Revision), cl.5.1.

24. Letter from Mr. CD Henri, Regional Manager (NSW), Insurance Council of Australia Ltd, 2 December 1983.

25. *Ibid*. This was confirmed by Mr RD Warren, Chairman of the Conveyancing Committee of the Law Society of Western Australia, note 20 above.

26. New Zealand Contracts and Commercial Law Reform Committee, *Aspects of Insurance Law (2)* (198 3), para.9.9.

27. *Id*., para.9.11.

28. *Id*., para.9.14.

29. *Id*., para.9.15.

30. *Ibid*., and Appendix A, cl.12.

31. See the helpful article by G. Walker, "Insurance and the Sale of Land" (1981) 9 *Australian Business Law Review* 148.

32. *Ibid.,* pp. 151, 156-157, 158.

4. Reform Proposals

SHOULD THE LAW BE REFORMED?

4.1 The first question is whether the current law governing the passing of risk between vendor and purchaser of land in New South Wales should be changed. As has been seem the general principle, in the absence of express agreement between the parties to a contract for sale, is that the purchaser bears the risk of damage to, or destruction of, the property occurring after the date of the contract but before completion of the transaction. Consequently, if the property is damaged or destroyed during that period the purchaser must bear the loss and, generally speaking, cannot rely on the damage or destruction as a ground for rescinding the contract If the purchaser is fully insured against such loss from the date of the contract. he or she will be protected against the financial consequences of the damage or destruction. However, if the purchaser is uninsured, or inadequately insured, the financial loss which he or she will have to bear could prove catastrophic. The purchaser cannot avoid the loss by looking to the vendor's insurer (if any) for indemnity, unless special arrangements have been made and the insurer's consent obtained.

4.2 It follows that the person most likely to suffer under the existing law is the unrepresented purchaser of land. A purchaser represented by a solicitor will (or should) invariably be advised of the need to take out insurance from the time of entry into the contract. As mentioned in paragraph 2.9, a solicitor who neglects to advise his or her client of the need to insure upon entry into the contract is almost certainly professionally negligent and liable to compensate the client for any financial loss sustained thereby. A purchaser who is not legally represented may not appreciate the need to insure the property before the transaction is completed and possession taken Should the property be damaged or destroyed between contract and completion such a purchaser not only is without insurance, but has no right to claim damages against any other party for failing to provide proper advice.

4.3 The specific deficiency in the current law is that an unrepresented purchaser may well assume, incorrectly, that there is no need to take out insurance over the property until the purchase is completed. A purchaser making such an assumption is at risk of catastrophic loss should the property be damaged or destroyed after the date of the contract but before completion. There is no empirical evidence available in New South Wales as to the precise proportion of purchasers who are not represented in conveyancing transactions. While there is little doubt that a substantial majority of purchasers, including purchasers of houses and home units, are represented by solicitors, it is clear many are not Purchasers are not obliged to engage solicitors to act for them and encouragement has been given in recent years to have purchasers reduce expenses by acting for themselves. Clearly, an unrepresented purchaser should not necessarily be protected against every mistake he or she might make; the function of the law is not to guard against every conceivable act of folly. But we think there is a very strong case for protecting a purchaser against the consequences of a rule of law that does not accord with an assumption that lay people might reasonably make - that is, that the property is at the purchasers risk only after completion of the transaction or after the purchaser has taken possession of the property.

4.4 This conclusion accords with the approach taken in other Australian States, the United Kingdom and many jurisdictions in North America although, as has been explained in Chapter 3, the form of remedial legislation varies considerably. For example, the United Kingdom has legislation which allows the purchaser to take advantage of the vendor s insurance policy where the property is damaged or destroyed between the date of the contract and completion. Queensland, Victoria and the Northern Territory have comparable legislation while both the Australian Law Reform Commission and the New Zealand Contracts and Commercial Law Reform Committee have recently recommended that a similar approach should be taken. In addition, Queensland and Victoria grant the purchaser of a dwelling-house the right to rescind the contract if the premises are so destroyed or damaged as to be unfit for occupation. The right to rescind cannot be excluded or modified by agreement between the parties.

The Uniform Vendor and Purchaser Risk Act in the United States applies a similar rule to all contracts for the sale of real property, but the provision may be excluded by agreement between the parties.

4.5 The submissions received by the Commission on this reference support the need for reform. The Real Estate Institute of New South Wales, which represents 1,765 member agency firms, stated that it:

> "supports the concept that substantial alteration is required by way of legislative enactment to bring about change in the common law pertaining to the passing of risk in conveyancing transactions and the concomitant onus to insure." [1]

The Institute submitted that legislation should be enacted to ensure that the risk attached to property which is the subject of a contract for sale should not pass between the vendor and purchaser until completion or earlier possession by the purchaser. The Institute further submitted that legislation should set out the circumstances in which a purchaser can rescind the contract for damage to the property occurring prior to completion. The Institute suggested rescission should be available if the damage is sufficient "to render the property untenantable". Contracting out of these provisions would be prohibited. The Institute contended as follows:

> "The proposed changes are in accord with common sense and moral principles as to who should bear or suffer any severe loss occurring prior to settlement especially as the Purchaser is hardly ever let into possession prior to settlement.
>
> It is more equitable that risk should pass on the taking of possession by the Purchaser and there is no reason why a Purchaser should have the burden of risk thrust upon him under current law when he is not in possession of the property." [2]

4.6 The law Society of New South Wales reported the view of the Conveyancing Review Committee that the present:

> "situation could only be effectively and satisfactorily altered by legislation [A] change in the law would provide some protection to those purchasers who, through oversight or ignorance, fail to take out insurance at the time of exchange of contracts." [3]

The New South Wales Bar Association observed that the current law:

> "maybe a source of surprise to laymen and hardship may have been caused where such persons are uninsured through their own ignorance, their legal advisees failure to warn them, or their lack of any legal advises". [4]

The Insurance Council of Australia Ltd expressed support for legislative action in the form of a statutory provision that in a contract for the sale of land, the risk should not pass until completion of the transaction and the purchaser should be able to rescind the contract in the event of destruction or damage to the property. [5]

4.7 Accordingly, we conclude that the current law is in need of reform. This, of course, leaves open the question of what changes should be proposed. We now turn to the options for reform, noting that they are not necessarily mutually exclusive. The major options are as follows:

> granting the purchaser a right to claim upon the vendor's insurance policy where the property is damaged or destroyed after the date of the contract but before the transaction is completed or the purchaser enters into possession;
>
> granting the purchaser the right to rescind the contract for sale in the event of substantial damage to, or destruction of, the property after the date of the contract but before the transaction is completed or the purchaser enters into possession; and

providing that the risk of damage to, or destruction of, the property shall not pass to the purchaser until the transaction is completed or the purchaser enters into possession.

THE VENDOR'S INSURANCE

4.8 The first option is to permit the purchaser, at least in certain circumstances, to take advantage of the vendor's insurance over the property where the property is damaged or destroyed after exchange of contracts but before completion or entry into possession by the purchaser. It may be that there is little point considering this option in depth since the Insurance Contracts Bill 1983 (Cth.), if it is enacted, will introduce this principle into federal law. Despite the proposed federal legislation, the terms of which have been discussed earlier (paragraphs 3.24- 3.27), we think it useful to consider, as a matter of principle, whether this is the most appropriate solution to the defect we have identified in the current law.

4.9 There is also a practical reason for considering this option. Clause 50(1) of the Insurance Contracts Bill 1983 (Cth) applies only where "the risk in respect of loss of or damage to the building has passed to the purchases". It for example, we were to recommend that the risk of damage to property should not pass to the purchaser until completion or earlier possession, the effect would be to exclude the operation of the Commonwealth provision. Thus, our recommendations could have important practical consequences as far as Commonwealth law is concerned.

4.10 Provisions entitling an uninsured purchaser to gain access to the vendor's insurance have been adopted in three Australian jurisdictions, apart from the Commonwealth. While the legislation has respectable antecedents, deriving from English legislation of 1925, in many respects it constitutes a far- reaching reform. The legislation interferes with the insures s usual right to assess the risk before extending cover, and compels the insurer to provide cover in circumstances where it might otherwise decline to do so. [6] Nonetheless, the objective is quite clear to give an uninsured purchaser the protection of the vendors insurance cover on the property, even though there has been no contractual relationship between the insurer and the purchaser.

4.11 There are two principal difficulties with provisions of this kind as a solution to the problems facing uninsured purchasers. The first is that a right to gain access to the vendors insurance can only be as effective as that insurance. Vendors can hardly be compelled to insure and if they do, they cannot be compelled to insure for the full value of the property. If the vendor is uninsured, or has inadequate coverage, the purchaser will either be unprotected or insufficiently protected, despite having a statutory right to claim under the vendor s insurance. Moreover, if the vendor s insurer is entitled to avoid liability as against the vendor, for example, because of a material misrepresentation or a failure to abide by a term of the policy, the purchaser may be deprived of protection under the legislation. The Victorian legislation specifically prevents the insurer raising certain defences against the vendor. However, in other jurisdictions, the purchaser cannot claim under the policy if the insurer has a defence against the vendor and there is no completely reliable method of ascertaining that the insurer has no such defence. [7]

4.12 The second difficulty is that legislation of this kind imposes liability on an insurer for a risk which the insurer may not have been prepared to accept voluntarily. This creates a dilemma: if the insurer is deprived of defences which ordinarily would be available, the legislation might be regarded as excessively harsh on insurers. On the other hand, if the defences are preserved, the legislation falls short of providing maximum protection to uninsured purchasers. Australian legislators have resolved the dilemma in different ways. Neither the Queensland Act nor the Commonwealth Bill, for example, allow the insurer to escape liability on the ground that the purchaser could reasonably have been regarded as an unacceptable risk In addition, the Queensland Act, and possibly the Commonwealth Bill deem the insurance policy to continue beyond the date on which it would ordinarily lapse, even though the insurer has received no premiums in respect of the extension. In Victoria, by contrast the insurer has a defence to a claim by the purchaser if it establishes that "a prudent insurer would not have

insured the purchaser against the risk covered by the policy". [8] Moreover, the legislation does not extend the term of an insurance policy which has expired.

4.13 Submissions to the Commission did not favour granting the purchaser a right to gain access to the vendor s insurance. The Law Society of New South Wales emphasised the inadequate protection afforded to a purchaser:

> "because of the difficulties attached to ascertaining what if any, insurance the vendor has, and the adequacy of this insurance." [9]

The Law Society also pointed out that this approach would not avoid double insurance, because the prudent purchaser would still take out his or her own insurance while "the imprudent purchaser might place undue reliance on an unknown policy." [10] The Insurance Council of Australia Ltd said that the Queensland and Victorian legislation presented problems because of "the assessment of the moral hazard of the purchases", [11] although the submission failed to take account of the important differences in the drafting of the two Acts. The Real Estate Institute of New South Wales supported a provision which prevented the risk of damage to the property passing until completion of the transaction or earlier possession by the purchaser, but gave no reasons for rejecting the insurance approach to reform. [12]

4.14 We have concluded that to allow the purchaser of land access to the vendor's insurance is not an entirely satisfactory means of overcoming the deficiency in the existing law, namely the inadequate protection accorded to the uninsured purchaser against damage to, or destruction of, property after the date of the contract but before completion of the transaction. Our principal reason is that such a reform even if the insurer is denied defences that would be available against the vendor, does not guarantee that the purchaser is protected against loss. In Particular, if the vendor is uninsured or under-insured, the uninsured purchaser will sustain the whole or part of the loss caused by damage to, or destruction of, the property. It is, in our opinion, no answer to say that the purchaser should inquire as to the nature and extent of the vendors insurance. Even assuming that the purchaser could rely on the reply as accurate, the suggestion requires the purchaser to be sufficiently well-informed to make the inquiry in the first place. A well-informed purchaser is presumably able to arrange his or her own insurance and thus avoid the problems associated with the current law without the need for special statutory protection. Accordingly, we think it would be better to look to another solution to provide more complete protection to the uninsured purchaser.

4.15 We have noted the further argument that legislation granting the uninsured purchaser access to the vendor's insurance policy is unfair to insurers, since they are required to provide coverage to purchasers who might otherwise be considered to constitute unacceptable risks. We do not think, however, that this argument would be sufficient in itself to reject such legislation. The reason is that once insurers are aware that they are required to bear the additional burden of providing coverage to a purchaser when property is sold, at least for a limited period, it is fair to assume that premiums generally will rise to reflect the increased risk in other words, the additional burden will not simply fall on individual insurers, but will be incorporated into the premium structure and ultimately met by policy holders as a class. The real question is whether the increased insurance costs can be justified in terms of the additional protection provided to uninsured purchasers. For reasons we have explained, we do not think the additional protection is adequate.

4.16 There are two other factors which although not decisive, tend to support our conclusion. First a provision granting the purchaser access to the vendor's insurance would be unlikely to decrease the incidence of double insurance. As the Law Society's submission pointed out, a prudent purchaser would be bound to take out insurance as from the date of the contract, even though there would be a statutory right to claim under the vendor's insurance. We doubt that any solution will eliminate double insurance, but other approaches are more likely to reduce its incidence. Secondly, as the Queensland, Victorian and Commonwealth legislative models show, provisions allowing the purchaser access to the vendor's insurance almost inevitably produce problems of interpretation that are difficult to justify if the legislative solution is, in any event, imperfect.

RIGHT OF RESCISSION

4.17 A second approach to reform is to confer on the purchaser a statutory right to rescind the contract for sale if the property is substantially damaged or destroyed after the date of the contract but before the transaction is completed (or before the purchaser takes possession). As we have seer this approach has been adopted in both Queensland and Victoria, but in combination with provisions allowing the purchaser access to the vendors insurance (paragraphs 3.8 and 3.16). In each State the purchaser's right to rescind is confined to a contract for the sale of a dwelling-house, presumably on the ground that purchasers of such premises need special protection. The right to rescind arises where the house is so "destroyed or damaged as to be unfit for occupation as a dwelling-house". A purchaser exercising the right of rescission is entitled to a refund of moneys paid under the contract but not to compensation for other expenses incurred such as conveyancing costs. Any documents of title are to be returned to the vendor. The statutory right of rescission cannot be excluded by agreement between the parties.

4.18 Leaving aside the fact that the Queensland and Victorian legislation is confined to contracts for the sale of dwelling-houses, it falls short of providing complete protection to an uninsured purchaser. The principle that the risk passes to the purchaser as from the date of the contract remains the starting point for analysis. The legislation in effect, alters that principle only where the premises are rendered unfit for occupation as a dwelling-house. Clearly, it is possible for premises to be quite severely damaged without necessarily being rendered unfit for occupation. For example, part of a dwelling-house may be damaged by fire or even destroyed, yet the remainder of the house may be untouched and the premises as a whole capable of being occupied in such a case even though the cost of restoration maybe many thousands of dollars, the legislation provides the purchaser with no remedy. In particular, the purchaser is not entitled to claim a reduction in the purchase price equivalent to the reduction in the value of the premises or the cost of restoring the premises. In other words, unless the premises are so badly damaged as to allow the purchaser to rescind the contract, he or she is obliged to proceed to completion and pay the full purchase price.

4.19 It follows that if the objective of the law is to protect the uninsured purchaser a right to rescind only where the property is rendered unfit for occupation does not completely achieve that objective. This remains true even if the right to rescind is coupled with a provision permitting the purchaser to claim upon the vendor s insurance since, as we have seer the vendor may be uninsured or under-insured. Thus, while the combination of remedies is more effective from the purchaser s point of view than a single remedy, the combination is still not an entirely satisfactory solution to the defect we have identified in the current law. Accordingly, we do not consider that a right to rescind, modeled on the Queensland and Victorian provisions, should be introduced in New South Wales unless it is not feasible to provide more complete protection for the uninsured purchaser. However, as we shall see, a right to rescind would be a component of a broader approach to reform.

RISK REMAINING WITH THE VENDOR

4.20 The simplest option for reform although it has not yet found favour with legislatures in Australia, is to provide that, in the case of a contract for the sale of land, the risk of damage to, or destruction of the property does not pass to the purchaser until completion or until the purchaser enters into, or is entitled to enter into, possession of the property. A statutory provision postponing the passing of risk would bring the law broadly into line with the practice in New South Wales relating to the sale of properties under the Strata Titles Act, 1973. As discussed earlier, the standard contract in use in New South Wales for such sales provides that the risk does not pass to the purchaser until completion notwithstanding any rule of law or equity to the contrary (paragraph 2.5). We also observed in Chapter 3 that the general conditions for the sale of land of both the Law Society of Western Australia and the Real Estate Institute of Western Australia contain a provision that the property is at the risk of the vendor until completion or earlier possession by the purchaser (paragraphs 3.28-3.33).

4.21 We referred earlier to the absence of authority on the precise effect of a provision of this kind, whether in a contract or in legislation We suggested that the likely (but not certain) result in brief, is that where the property is substantially damaged the purchaser has the option of rescinding the contract or of proceeding to completion subject to an appropriate abatement of the purchase price. Where the damage is not substantial the principle would seem to be that the purchaser must complete the transaction subject to an appropriate abatement of the purchase price.

4.22 If this accurately describes the consequences in the event of damage to property of a provision postponing the passing of risk, it confers on a purchaser virtually complete protection against loss caused by damage to, or destruction of, the property after the date of the contract for sale but before completion In effect the purchaser is entitled either to rescind the contract and recover the deposit paid, or complete the transaction subject to an abatement of the purchase price. There may be circumstances in which an uninsured purchaser is not totally restored to the position he or she would have enjoyed had the transaction proceeded and the property not been damaged. For example, where the damaged buildings did not add materially to the value of the land, a court might abate the purchase price only by the difference between the value of the land before and after the damage. Nonetheless, a provision postponing the passing of the risk of physical damage to the property would avoid significant losses being sustained by uninsured purchasers.

4.23 It follows that, to the extent that the major deficiency in the current law is its failure to protect uninsured purchasers, a provision postponing the passing of risk of physical damage would largely overcome that deficiency. Moreover, such a provision would remove the need for the complex and inadequate reforms of the kind discussed earlier in this chapter. Since the provision would protect the uninsured purchaser against loss, he or she would not require access to the vendor s insurance. Similarly, a statutory right of rescission such as that in force in Queensland and Victoria, may not be necessary (except for additional certainty) because a provision postponing the passing of risk may create, among other things, a right in a purchaser to rescind in the event of substantial damage to the property. [13]

4.24 The effect of a provision postponing the passing of risk is to impose on the uninsured vendor, rather than the uninsured purchaser, the burden of bearing loss caused by damage which occurs after the date of the contract but before completion or earlier possession by the purchaser. It could be argued that this is unfair, since the vendor in these circumstances may suffer very considerable hardship. If the purchaser rescinds the contract f or sale, not only does the vendor suffer the reduction in value of the property, but he or she may sustain consequential losses. For example, a vendor who is relying on the proceeds of the sale to finance the purchase of another property faces the prospect of not being able to proceed with that purchase and perhaps thereby breaching that contract.

4.25 In the absence of insurance no solution can protect all parties: someone must bear the loss resulting from physical damage to the property. In our view, an uninsured vendor, unlike an uninsured purchaser, will rarely be prejudiced by entering into a contract for the sale of property. By that we mean that entering the contract for sale would rarely, if ever, render the vendor more vulnerable to the risk of serious loss than was the case before the contract. If at the time of the contract the vendor is already insured against loss caused by damage to the property, the contract will not reduce the protection afforded by the policy. If at the time the vendor is not insured the contract will not increase his or her vulnerability to loss. In other words, where property is damaged after the date of the contract for sale but before completion the vendor’s difficulties stem from the pre- existing failure to take out insurance, and not from the contract itself. We have not heard it suggested that an insured vendor is likely to cancel insurance in the mistaken belief that insurance is no longer required after a contract for sale has been entered into. On the other hand, as submissions to us have confirmed, it is clear that some unrepresented purchasers do not appreciate the need under the existing law, to take out insurance as from the date of the contract for sale. They assume, incorrectly, that insurance is necessary only when they complete the purchase or enter into possession. Accordingly, if one of the parties must bear the loss, we think there are sounder reasons for protecting an uninsured purchaser, than for protecting an uninsured vendor. Whether this approach should be pursued in all circumstances is a matter to which we return shortly (paragraphs 4.32-4.41).

4.26 We referred earlier to double insurance (paragraphs 2.22 and 2.25). A provision postponing the passing of risk is unlikely to eliminate completely the practice of both the vendor and purchaser having insurance over the property pending completion of the transaction. Some purchasers may prefer the security of their own insurance, even though the insurance is not necessary in the light of the statutory provision. However, if it is clear that the risk of the property being damaged or destroyed remains with the vendor, many purchasers may decide that the right to rescind the contract or to claim compensation from the purchaser affords substantially complete protection against financial loss and that insurance is unnecessary. On the other hand, merely allowing the purchaser access to the vendor s insurance, or permitting rescission in the event of substantial damage, would not justify a purchaser foregoing his or her own insurance. Thus, while double insurance is not perhaps a major problem we note that a provision postponing the passing of risk is more likely than other approaches to decrease the incidence of double insurance.

4.27 A proposal that the risk of damage to the property should not pass to the purchaser until completion was considered, but rejected by the New Zealand Contracts and Commercial Law Reform Committee in 1983. As we have noted (paragraph 3.34), the Committee took the view that such a reform would constitute too radical a change to the principles currently governing the passing of risk. The obvious answer to this criticism is that the other options for reform which we have already discussed, would also constitute a radical departure from the existing law in New South Wales. Indeed, the other proposals concern not only the rights and duties of the vendor and purchaser, but also the relationship between those parties and their respective insurers. Furthermore, subject to what we say in paragraphs 4.42 and 4.43, the proposal that the risk not pass to the purchaser upon exchange of contracts would bring the general law broadly into line with the practice already adopted in contracts for the sale of properties under the Strata Titles Act, 1973. Thus, the proposal has already been adopted in an important area of conveyancing practice in New South Wales.

4.28 The New Zealand Committee also criticised the suggestion that the passing of the risk of damage should be postponed until completion on the ground that it would lead to uncertainty, for example, in determining whether property is sufficiently damaged to permit rescission by the purchaser or in assessing the extent to which the purchase price should be abated to take account of damage to the property. However, as we have explained, any proposal for reform in this area necessarily introduces an element of uncertainty. For example, legislation providing for the purchaser to claim upon the vendor's insurance is often complex and difficult to interpret. Moreover, at least since the land mark case of *Flight v. Booth* in 1834, [14] the courts have dealt with questions relating to the abatement of purchase price in the analogous area of compensation for errors or misdescriptions without undue difficulty. We accept that any legislative reforms should minimise the scope for uncertainty, for this reason we recommend that the legislation should go beyond a simple declaration concerning the passing of risk and specify in more detail the legal consequences of such a declaration. Nonetheless, we recognise that uncertainty cannot be avoided completely. This, however, is the necessary price for preventing the hardship and injustice that would otherwise occur.

4.29 For these reasons, we conclude that the most satisfactory approach to reform is to enact legislation which specifically postpones the passing of risk of damage to, or destruction of the property until the transaction has been completed or the purchaser has entered into possession or is entitled to enter into possession, whichever is the earliest. In most cases, entitlement to possession will coincide with completion of the transaction but there may be cases where, by agreement between the parties, the purchaser is given the benefit of possession prior to completion. Entitlement to possession or actual possession of the property by the purchaser is the appropriate time when the risk should pass to the purchaser as he or she is then in a position to maintain the property and can fairly be expected to appreciate the need for insurance. The vendor should be relieved of the risk of damage to the property at this time as he or she is no longer entitled to possession. The Real Estate Institute of New South Wales stated in its submission that this proposal is "in accord with common sense and moral principles as to who should bear or suffer any severe loss occurring prior to settlement". [15]

4.30 It maybe that in exceptional circumstances the contract will provide for the purchaser to be entitled to possession immediately upon exchange of contracts so that the risk thereupon passes to the purchaser. This may occur in connection with the sale of vacant land where there are no improvements

and hence the question of the passing of risk and the need to insure is of less significance. In other circumstances, there would be little advantage for the vendor to specify in the contract that the purchaser is entitled to possession upon exchange of contracts solely to ensure that the risk of damage to the property is upon the purchaser because the vendor would consequently lose possession of the property.

4.31 Before formulating precise recommendations it is necessary to consider two further issues.

> The first concerns the scope of the legislation Should it apply subject to, or notwithstanding, any contrary agreement between the parties? A related question is whether the provision should apply to all contracts for the sale of land, or only those for a limited class of premises such as dwellings.
>
> The second issue relates to the form of the legislation. In particular, should the legislation simply state that the risk of physical damage not pass to the purchaser until completion or earlier possession or should it specify the consequences of damage to, or destruction of the property in more detail? If the latter, what consequences should be specified?

SCOPE OF THE LEGISLATION

4.32 We have pointed out that the major defect in the current law is that an uninsured purchaser is liable to sustain serious loss where property is damaged or destroyed after entry into the contract, but before completion. It is the legally unrepresented purchaser who is most likely to suffer a purchaser entering into a contract with the benefit of legal advice will be, or ought to be, advised of the need to insure.

4.33 While there is no reliable empirical evidence on the extent to which purchasers enter into conveyancing transactions without legal advice, there is little doubt that this occurs most frequently where the purchase relates to a dwelling. Moreover, it is fair to assume that an unrepresented purchaser of a dwelling is likely to be less knowledgeable about the need for insurance than an unrepresented purchaser of other kinds of property. This suggests that reform is most urgently required in relation to contracts for the sale of a dwelling, and less urgent where the property is, for example, commercial or industrial in character. On the other hand, at least some purchasers of commercial or industrial property will not have legal advice when entering the contract and may be ignorant of the need under the current law to take out insurance. For such persons, the consequences of damage to the property after the date of the contract may be as disastrous as for the purchaser of a dwelling. Again, some purchasers of dwellings are investors who presumably need no more protection than purchasers of other kinds of investment properties.

4.34 A further factor to consider is the principle generally, but by no means universally, applied, that people should be free to enter contracts on such terms as they wish. On this principle, if the parties to a transaction agree that property should be at the purchases s risk as soon as contracts are exchanged, the law should give effect to the agreement But again there are countervailing arguments. The use of standard form contracts, particularly where one party is unrepresented, often renders illusory the assumption that terms have been freely negotiated. Moreover, Parliament has often interfered with the principle of freedom of contract. There are now many examples of legislation imposing restrictions on the parties to a contract or conferring rights on one party, notwithstanding any contrary agreement. [16]

4.35 We have suggested that the most appropriate means of protecting the uninsured purchaser is a provision postponing the passing of risk until the transaction is completed or the purchaser enters into, or is entitled to enter into, possession of the property. In determining the scope of this legislation at least four major options should be considered. The legislation could apply.

> to all contracts for the sale of land subject to any contrary agreement between the parties;
>
> to all contracts for the sale of land notwithstanding any contrary agreement between the parties;

to all contracts for the sale of land notwithstanding any contrary agreement between the parties, except where the purchaser is legally represented in which case a contrary agreement would be effective; or

to contracts for the sale of dwellings notwithstanding any contrary agreement between the parties, and to contracts for the sale of other real property subject to any contrary agreement between the parties.

4.36 The choice among these options is by no means clear cut but on balance we prefer the last. In general the parties to a contract should not be deprived of the freedom to agree upon their own terms unless there are good reasons for doing so. We are persuaded that those reasons exist in the case of a contract for the sale of a dwelling, and consequently, that the parties should not be free to agree that the risk of damage should pass to the purchaser immediately contracts are exchanged unless the purchaser is entitled to enter into possession of the dwelling upon exchange of contracts (paragraph 4.30). As we have explained, purchasers of dwellings are more likely than other classes of purchasers to be unrepresented by a solicitor and uninsured. They are particularly Vulnerable to the risk of catastrophic loss created by the existing law, and statutory protection can be afforded without serious prejudice to the vendor (paragraph 4.25). Unless protection is provided to the purchaser notwithstanding any contrary agreement the danger is that standard form agreements will be used to ensure that the risk does pass to the purchaser on exchange of contracts. Other Australian States have accepted, in a slightly different form the need to provide special protection to the purchaser of a dwelling and to make that protection incapable of variation by agreement (paragraphs 3.8 and 3.16). It is true that protection of this kind may be over-inclusive, in the sense that some unrepresented purchasers of dwellings do not require any special protection. However, we do not think that this is a substantial price to pay to extend protection to home buyers who otherwise might experience great hardship.

4.37 We think that the justification for protecting uninsured purchasers by an *unalterable* statutory provision relating to the passing of risk, is less compelling where the contract concerns property other than a dwelling. For example, there is more reason to emphasise the freedom of the parties to negotiate their own contractual terms where the sale involves retail commercial or industrial property, as opposed to a dwelling. Similarly, the purchasers of such property are generally (although not invariably) better equipped than home buyers to protect their own interests and thus less likely to accept unquestioningly the terms of standard form agreements. A further factor is that, if the risk of damage is to pass to a purchaser from the date of the contract, the agreement will need to contain an express provision to this effect. Such a provision may increase the likelihood that an unrepresented purchaser will be alerted to the need to take out insurance. Again, assuming the Insurance Contracts Bill 1983 (Cth) is enacted (paragraphs 3.24-3.27), the uninsured purchaser to whom the risk of damage has passed may be able to take advantage of the vendor s insurance and claim under the policy for any loss sustained.

4.38 The third option identified in paragraph 4.35 (permitting the statutory provision relating to the passing of risk to be displaced only where the purchaser is legally represented) has some attractions, but also has drawbacks. If, like the Land Sales Act, 1964, the legislation requires the purchases s solicitor to certify that he or she has explained the effect of the contractual term governing the passing of risk, inconvenience and expense would be added to many conveyancing transactions. In addition, an unrepresented purchaser of say, commercial property may be experienced in business affairs and require no protection on the question of passing of risk. Yet such a person would be unable, without securing the services of a solicitor, to enter into an agreement providing that the risk of damage should pass as from the date of the contract. This might be regarded as an unnecessary intrusion by the legislation into commercial transactions.

4.39 We therefore conclude that legislation postponing the passing of risk to the purchaser until completion of the transaction or until the purchaser enters into, or is entitled to enter into, possession (whichever is the earliest) should apply to:

contracts for the sale of a single dwelling notwithstanding any contrary agreement between the parties; and

contracts for the sale of other real property subject to any contrary agreement between the parties.

4.40 This conclusion makes it necessary to define the term “dwelling” in any legislation. In our view, the term should mean premises used, or designed for use, principally as a place of residence. Premises used principally for retail commercial or industrial purposes should be excluded. [17] This would mean that if a single dwelling-house has a study or other room used for professional purposes, provided that the dwelling is still used principally as a place of residence, the parties would not be free to contract out of the provision that postpones the passing of the risk to the purchaser until completion or until the purchaser enters into, or is entitled to enter into, possession.

4.41 For the purpose of our recommendations, the definition of dwelling should include residential home units, including those under the Strata Titles Act, 1973, and also any outbuildings and other appurtenances to a dwelling. This would include, for example, a garage or storage space sold with a residential strata unit We use the expression “used or designed for use” to include dwellings that have, for example, been recently constructed but have not at the date of the contract been “used” for any purpose. We also recommend that “ dwelling” should be defined to include a dwelling that is in the course of construction. In our view, the unrepresented purchaser of a partly constructed dwelling is in a similar position to the unrepresented purchaser of a completed dwelling and may not appreciate the need to insure from the time of entry into the contract. In these circumstances, we conclude that in the case of the sale of a single dwelling which is in the course of construction the risk should not pass to the purchaser until completion or until the purchaser enters into, or is entitled to enter into possession whichever first occurs.

4.42 We mentioned earlier that the proposal that the risk not pass to the purchaser upon exchange of contracts would bring the general law broadly into line with the practice in New South Wales concerning the sale of properties under the Strata Titles Act 1973 (paragraph 4.27). There is one difference however. In contracts for the sale of property under the Strata Titles Act, 1973, clause 14A(e) (i) of the standard form contract provides that the risk does not pass to the purchaser until completion of the transaction. Our recommendation is that the risk should not pass to the purchaser until completion or until the purchaser has entered into possession or is entitled to enter into possession whichever is the earliest.

4.43 The implementation of our recommendations would mean that the risk would pass to the purchaser of a single residential unit under the Strata Titles Act, 1973, when he or she enters into, or is entitled to enter into, possession. The risk would pass to the purchaser notwithstanding any contrary agreement between the parties, including clause 14A(e) (i) of the standard form contract in its present form. However, this does not mean that the purchaser of a residential strata title unit who enters into possession prior to completion of the transaction is offered less protection under our recommendations. Clause 14A(e)(i) was inserted in the standard form contract in the knowledge that the body corporate is required to maintain adequate insurance over the building and apply any insurance moneys received in respect of damage to, or destruction of, the building to rebuilding or repair of the building. [18] Under our recommendations, these provisions of the Strata Titles Act, 1973 would still apply even where the risk has passed to the purchaser prior to completion. It would therefore not be necessary for the purchaser to take out his or her own insurance to protect against damage to, or destruction of the building. Moreover, implementation of our recommendations would have the advantage of introducing complete uniformity between the sale of residential units under the Strata Titles Act, 1973 and the sale of other dwellings in respect of the passing of risk.

SPECIFYING THE CONSEQUENCES OF DAMAGE TO THE PROPERTY

4.44 We have explained that there is no Anglo-Australian authority precisely in point as to the effect of a provision simply stating that the risk of damage or destruction should not pass to the purchaser until completion or earlier entitlement to, or actual entry into, possession by the purchaser. In the absence of such authority, the courts could be expected to reason by analogy with other areas of law and we have stated the conclusions we think they would be likely to reach (paragraph 2.6). It would be possible to

leave the courts free to work out the effect of a simple legislative provision stating that the risk shall not pass to the purchaser until completion or earlier possession. On balance, however, we think it better to reduce the scope for uncertainty and disputation by supplementing such a provision with a more detailed statement of the legal consequences that flow from it.

4.45 In our view, the principles embodied in legislation should include the following.

> Where the damage to the property between contract and completion (or earlier entitlement to, or actual entry into, possession by the purchaser) is substantial the purchaser should be entitled to rescind the contract and recover the deposit and all moneys paid under the contract. [19] By "substantial" damage, we mean damage of a kind that renders the property materially different from that which the purchaser contracted to buy. A purchaser electing to rescind on this ground should be required to notify the vendor of the election within 28 days of becoming aware of the damage to the property or within such longer period as may be agreed upon between the parties. If the purchaser fails to notify the vendor of the election to rescind within the specified period, he or she should lose that right. Where the purchaser does rescind the contract, the parties should be relieved of all liability under the contract except liability resulting from a breach of any express or implied condition in the contract which occurs before the date of rescission.
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> Where the property is substantially damaged, a purchaser who elects not to rescind should be entitled to require the vendor to proceed to completion and to allow an appropriate abatement of the purchase price to compensate for the damage to the property. However, the court should have a discretion to refuse to require the vendor to complete where it would be unjust or inequitable to do so. [20] In such a case, the court should have power to order rescission of the contract, with the consequences already specified. The court should also have the power to make such other orders as it considers appropriate in the circumstances.
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> Where the property is substantially damaged and the purchaser elects not to rescind or loses the right to rescind the vendor should be entitled to require the purchaser to complete, subject to allowing an appropriate abatement of the purchase price. We have considered whether the court should have a discretion to refuse to require the purchaser to complete where the purchaser loses the right to rescind (perhaps because he or she is ignorant of the need to rescind within the specified period) but would suffer hardship if forced to complete the sale. Our conclusion is that the court should not have such a discretion. Even if the right to rescind is lost, the purchaser is still entitled to an abatement of the purchase price. More importantly, to allow rescission of the contract beyond the specified period may greatly disadvantage the vendor who should be entitled to certainty in his or her dealings with the purchaser. The vendor may have entered into another contract in good faith to purchase a property with the proceeds of the sale on the basis that the specified period for rescission has expired.
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> Where the property is damaged, but not substantially, the purchaser should have no right to rescind. However, in these circumstances the purchaser should be entitled to require the vendor to complete and to allow an appropriate abatement of the purchase price. Similarly, the vendor should be entitled to require the purchaser to complete, subject to allowing an appropriate abatement of the purchase price.
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> A purchaser should not be entitled to rescind the contract or receive an abatement of the purchase price (in the latter case whether the property is substantially damaged or not) where the damage is caused by a wilful or negligent act or omission on the part of the purchaser.

4.46 We do not think it is desirable or appropriate to attempt to specify in legislation a formula for assessing the abatement of the purchase price. The courts are familiar with this problem in relation to compensation for errors and misdescriptions. [21] As one commentator has observed, the "method of assessment which is appropriate ... varies with the particular circumstances". [22] In some cases, the abatement will reflect the difference between the market value of the property at the date of the contract and the market value after the property has been damaged. In others the appropriate figure may be the cost of reinstatement of the property or indeed some other measure. [23] If the vendor and

purchaser cannot agree on the appropriate abatement the choice as to the method of assessment should be left to the courts.

FOOTNOTES

1. Submission of the Real Estate Institute of New South Wales, 30 August 1983, p.1.

2. *Id*., p.3.

3. Submission of the Law Society of New South Wales, 27 September 1983, p.l.

4. Submission of the New South Wales Bar Association, 18 October 1983, p.l.

5. Submission of the Insurance Council of Australia Ltd., 11 October 1983.

6. Depending on the form of the legislation the insurer may have the option of giving the purchaser notice cancelling the policy: cf. Sale of Land Act 1962 (Vic.), s.35(4).

7. As noted earlier, the Commonwealth Bill is open to the interpretation that the vendor's insurer can rely, as against the purchaser, on any defences open against the vendor: see para.3.27.

8. Sale of Land Act 1962 (Vic.), s.35(3).

9. Note 3 above, p.2.

10. *Ibid.*

11. Note 5 above, p.2. We note that the Australian Law Reform Commission reports the Insurance Council of Australia Ltd. as accepting what is now cl.50 of the insurance Contracts Bill 1983 (Cth): Australian Law Reform Commission, *Insurance Contracts,* Report No.20 (1982), para.132.

12. Note 1 above.

13. A provision postponing the passing of risk would not result in a windfall to an insured purchaser, where the property is damaged after the date of the contract insurance is a contract of indemnity and the insurer's liability would be limited to the loss actually sustained by the purchaser.

14. (1834) 1 Bing NC 370; 131 ER 1160.

15. Note 1 above, p.3.

16 See eg. Land Sales Act 1964, s.1 C, Part III: cf. Contracts Review Act, 1980, s.17.

17. Cf. Landlord and Tenant (Amendment) Act, 1948, s.8(l B).

18. Strata Titles Act 1973, Part IV, Division 5: see para.2.5.

19. In the normal course of events the purchaser should not be entitled to recover his or her conveyancing costs or expenses in the event of rescission of the contract. However, it may be that the damage to the property is caused by some wilful or negligent act on the part of the vendor and that therefore any conveyancing costs incurred by the purchaser should be recoverable from the vendor. It is clear that under our recommendations the vendor would have a duty to care for the property until the risk has passed to the purchaser. In these circumstances it may be possible for the purchaser to institute legal proceedings for negligence or breach of contract on the part of the vendor. Damages may include the conveyancing costs and expenses incurred by the purchaser in the transaction.

20. It may be inequitable, for example, where a requirement to complete would inflict hardship on the vendor. cf. ICF Spry, *Equitable Remedies* (2nd ed., 1980), pp.287-289.

21. *Id*, pp.291-292; P. Butt, “Compensation for Errors or Misdescriptions in Contracts for the Sale of Land: A New Approach in New South Wales” (1983) 57 *Australian Law Journal* 93, at pp.102-103.

22. ICF Spry, note 20 above, p.291.

23. One special case may be where the premises are being purchased for demolition An abatement of the purchase price equal to the difference between the market value of the premises at the date of the contract and the market value after the premises have been damaged may result in a windfall for the purchaser.

Appendix A - Conveyancing (Further Amendment) Bill, 1984

A BILL FOR
An Act to amend the Conveyancing Act 1919, with respect to the passing of risk between vendor and purchaser under a contract for the sale of land, and in other respects.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:-

Short title.

1. This Act may be cited as the "Conveyancing (Further Amendment) Act, 1984".

Commencement.

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect there of and as may be notified by proclamation published in the Gazette.

Amendment of Act No.6, 1919.

3. The Conveyancing Act, 1919, is amended in the manner set forth in Schedule 1.

Savings provision.

4. The amendments made by this Act to the Conveyancing Act, 1919, do not apply to or in respect of a contract for the sale of land which was made before the day appointed and notified under section 2(2).

SCHEDULE 1.

AMENDMENTS TO THE CONVEYANCING ACT, 1919

(1) Section 2 -

After the matter relating to Division 6 of Part IV, insert:-

DIVISION 7. - *Passing of risk between vendor and purchaser* - ss.66J-66O.

(2) Section 52(2) -

At the end of section 52, insert-

(2) Division 7 shall apply to land under the provisions of the Real Property Act, 1900.

(3) Part IV, Division 7 -

After Division 6, insert-

DIVISION 7. - *Passing of risk between vendor and purchaser.*

Interpretation.

66J. (1) In this Division -

"damage" includes destruction;

"land" includes buildings and other fixtures;

"sale" includes exchange.

(2) For the purposes of this Division land damaged after the making of a contract for the sale of the land is substantially damaged if the damage renders the land materially different from that which the purchaser contracted to buy.

(3) It is the intention of Parliament that this Division is to give effect to the recommendations made in the report of the Law Reform Commission on the passing of risk between vendor and purchaser and laid before each House of Parliament and accordingly, in the interpretation of this Division regard may be had to that report, including the draft legislation set out in that report.

(4) Subsection (3) does not prevent regard being had, in the interpretation of this Division, to any matter to which regard might have been had if that subsection had not been enacted

Postponement of passing of risk to purchaser.

66K. (1) The risk in respect of damage to land shall not pass to the purchaser under a contract for the sale of the land until -

(a) the completion of the sale; or

(b) the purchaser enters into, or is entitled to enter into, possession of the land, whichever first occurs.

(2) The reference in subsection (1) to possession in relation to land includes a

reference to -

(a) the occupation of the land (whether pursuant to a licence or otherwise) pending completion of the sale of the land; and

(b) the receipt of income from the land.

Power to rescind contract where land substantially damaged.

66L. (1) Where land is substantially damaged after the making of a contract for the sale of the land and before the risk in respect of the damage passes to the purchaser, the purchaser may rescind the contract by notice in writing served on the vendor -

(a) within 28 days after the purchaser first became aware of the damage; or

(b) within such longer period as may be agreed upon between the vendor and purchaser.

(2) A notice under subsection (1) which is served -

(a) by a solicitor or an agent acting for the purchaser; or

(b) on a solicitor on an agent acting for the vendor,

shall be deemed to have been served by the purchaser or on the vendor, as the case may be.

(3) A notice under subsection (1) may be served -

(a) in any manner prescribed by section 170; or

(b) in any manner prescribed by the contract to which it relates for the service of notices under that contract.

(4) Where the purchaser rescinds a contract for the sale of land pursuant to the right conferred by subsection (1) -

(a) all money paid by the purchaser under the contract shall be refunded to the purchaser;

(b) all documents of title or transfer shall be returned to the vendor; and

(c) the vendor and purchaser shall be relieved from all liability under the contract, except a liability arising out of a breach of any term or condition contained or implied in the contract occurring before the date of rescission.

(5) A purchaser is not entitled to exercise the right conferred by subsection (1) if the damage was caused by a wilful or negligent act or omission on the part of the purchaser.

Abatement of purchase price where land damaged.

66M. (1) Where land is damaged after the making of a contract for the sale of the land and before the risk in respect of the damage passes to the purchaser, the purchase price shall be reduced on completion of the sale by such amount as is just and equitable in the circumstances.

(2) Subsection (1) applies whether or not the land concerned is substantially damaged.

(3) Subsection (1) does not apply where the damage was caused by a wilful or negligent act or omission on the part of the purchaser.

Refusal to enforce specific performance against vendor.

66N. The Court may, if it thinks that it would be unjust or inequitable to require the vendor to complete the sale of land that is substantially damaged after the making of the contract for the sale of the land and before the risk in respect of the damage passes to the purchaser -

(a) refuse to enforce against the vendor specific performance of the contract;

(b) order the repayment of any money paid by the purchaser under the contract; and

(c) make such other orders as the Court considers appropriate in the circumstances.

Contracting out.

660. (1) In this section, "dwelling-house" means premises (including a lot under the Strata Titles Act 1973) used, or designed for use, principally as a place of residence, and includes -

(a) outbuildings and other appurtenances to a dwelling-house; and

(b) a dwelling-house which is in the course of construction.

(2) This Division has effect -

(a) in the case of the sale of a single dwelling-house - notwithstanding any stipulation to the contrary, or

(b) in any other case - subject to any stipulation to the contrary.

NOTES ON THE CONVEYANCING (FURTHER AMENDMENT) BILL, 1984

Proposed Section 66J

1. *"land".*

This expression has been defined to make it clear that the provisions of the Bill apply to damage to buildings and other fixtures. Since the definition is not exclusive, damage to crops and other things that are an integral part of land would also be included.

2. *"Sale".*

In the Principal Act "sale" means "only a sale properly so called' (see definition of "Sale" in section 7(l) of the Principal Act). Generally this means an exchange of property for money in which the vendor disposes of the whole of his interest in the property. This definition has been extended to ensure that the provisions of the Bill apply to a sale by way of exchange of land. Since "land" is defined in section 7(1) of the Principal Act to include any estate or interest in land, the provisions of the Bill would apply to an assignment of a lease or any other complete disposition of an interest in land that is less than a freehold interest.

Proposed Section 66K

Purchaser wishing to insure prior to *passing of risk.*

If a vendor has not insured the premises of has not taken out sufficient insurance, a purchaser may wish to insure prior to completion or entitlement to possession. As mentioned earlier in this report (paragraph 2.20), the purchaser would still have an insurable interest if a purchaser takes out insurance at any time after exchange of contracts and before completion or entitlement to possession, the risk remains with the vendor and the purchaser would not lose the statutory right of rescission or abatement of the purchase price conferred by the Bill.

Proposed Section 66L

1. *Notice within 28 days etc.*

The purchaser loses the right of rescission if it is not exercised within the specified period. However, the purchaser is still entitled to an abatement of the purchase price under proposed section 66M.

2. *Damages.*

The use of the expression "all money paid by the purchaser under *the contract*" in subclause (4) (a) excludes the purchaser s conveyancing costs and expenses from the money to be refunded to the purchaser, As foreshadowed in paragraph 4.45 of the report, provision has been made to preserve the right to recover damages where the contract is rescinded but there has been a breach of an express or implied term of the contract (for example, where the premises were damaged as a result of a default in the vendors duty to take care of the property while in the vendor s possession).

3. *Restoration.*

Where the vendor restores damaged premises before the purchaser enters into possession the purchaser does not lose the right to rescind. In some instances restoration is not satisfactory to the purchaser (for example, rebuilding of a destroyed historic house). If damage is restored but the purchaser does not rescind, there may be no or little abatement of the purchase price.

Proposed Section 66M

The provisions of this section would apply where a purchaser does not have a right of rescission because 'the land is not substantially damaged or where the land is substantially damaged but the purchaser does not exercise the right of rescission.

Proposed Section 66N

1. The provisions of this section would apply where the purchaser does not exercise the right to rescind but seeks completion of the sale with an abatement of the purchase price.

2. "Court",

This expression refers to the Supreme Court (See definition of "Court" in section 7(1) of the Principal Act).

Proposed Section 660

1. *"Dwelling-house".*

Where a residence is combined with some commercial industrial primary production or business use the premises are not a dwelling-house for the purposes of the section unless the premises are principally used as a place of residence.

2. "*Stipulation to the contrary*".

This expression is the common expression used in the Principal Act. The expression includes provisions included in the contact for sale and provisions of any other document or verbal agreement that relates to that sale.

Appendix B - Submissions Received

1. Mr W Duncan, Member of the Conveyancing Committee of the Queensland Law Society.
2. Insurance Council of Australia Limited.

3. Law Institute of Victoria.

4. Law Society of New South Wales.

5. New South Wales Bar Association.

6. Real Estate Institute of New South Wales.

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