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**PROBLEMS RELATING TO PASSING
OF RISK BETWEEN VENDOR AND
PURCHASER**

Preliminary Discussion Paper
MP 13

Queensland Law Reform Commission
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You are invited to make comments and submissions on the issues and on the preliminary proposals in this Paper.

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It would be helpful if comments and submissions addressed specific issues or preliminary recommendations in the Paper.

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QUEENSLAND LAW REFORM COMMISSION
PRELIMINARY DISCUSSION PAPER

ON

PROBLEMS RELATING TO PASSING OF RISK
BETWEEN VENDOR AND PURCHASER



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In March, 1984 the New South Wales Law Reform Commission published a report entitled "Passing of Risk Between Vendor and Purchaser of Land." The within paper is presented in two parts:-

1. An outline of the recommendations made in the New South Wales report.
2. Comments in the report relative to sections 63 and 64 of the Property Law Act 1974-1982.

The Queensland Law Reform Commission has considered the New South Wales report but has not yet reached any firm decision concerning what amendments of the law may be required.

It would be appreciated if any submission you are to make concerning problems experienced in this area could be forwarded to the Secretary, Law Reform Commission, Box 312 Post Office North Quay prior to 30th November, 1984.

1. The New South Wales Report

The law in relation to a purchaser's position is set out in Williams on Vendor and Purchaser (4th edition) at page 547:

" From the date of the contract the purchaser is in equity the owner of the property sold, though not absolutely, but subject to the condition that the contract is specifically enforceable. He therefore bears all losses and takes the advantage of all additions and improvements which casually happen or are made to the property after that date. Thus, if after signing the contract, but before its completion a house or any other building erected on the land sold is accidentally destroyed by fire, the purchaser remains nonetheless liable to perform the contract without any abatement of the price and this liability may be enforced at law or equity."

The New South Wales Commission has expressed its attitude to this statement in these words:

"We think there is a very strong case for protecting a purchaser against the consequences of a rule of law which does not accord with an assumption that lay people might make - i.e. that the property is at purchaser's risk only after the completion of the transaction or after the purchaser has taken possession of the property" (paragraph 4.3).

In seeking methods to circumvent the problem, the options considered were -

1. Vendor's Insurance.

This is granting the purchaser the right to claim on vendor's insurance policy where property was damaged after date of contract but before transaction was completed or purchaser entered into possession. (paragraph 4.7) The Commission concluded (paragraph 4.14) that this was not an entirely satisfactory way of overcoming the deficiency in the present law.

2. Right of Rescission.

That is granting a purchaser the right to rescind in event of substantial damage to or destruction of property after date of contract but before transaction was completed or purchaser entered into possession. (paragraph 4.7) This was described as the approach adopted in Queensland and Victoria where legislation altered the principle so that in cases where premises are so destroyed or damaged as to be unfit for occupation the purchaser may rescind the contract. (Section 64 Property Law Act). The New South Wales Commission considered that a right to rescind modelled on this legislation should not be introduced in that State unless it were not possible to provide more complete protection for the uninsured purchaser. (Paragraph 4.19).

3. Risk remaining with the Vendor.

This option would provide that the risk of damage to, or destruction of property should not pass to purchaser until the transaction was completed or the purchaser entered into possession (paragraph 4.7). The Commission considered that the simplest option for reform was to provide that in the case of a contract for 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 (paragraph 4.20).

The provision would protect the uninsured purchaser against loss and he or she would not require access to the vendor's insurance. A provision similar to Queensland's or Victoria's may not be necessary because postponing the risk may result, inter alia, in a right in purchaser to rescind in the event of substantial damage to property (paragraph 4.23).

The Commission concluded 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. 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 property at this time as he or she is no longer entitled to possession (paragraph 4.29).

In determining the scope of the proposed legislation the New South Wales Commission expressed the view that people should be free to enter into contracts on such terms as they wish and if parties to the transaction agreed that the property be at the purchaser's risk as soon as contracts were exchanged, the law should give effect to that agreement (paragraph 4.34).

Its conclusion was that the most appropriate means of protecting the uninsured purchaser was a provision postponing the passing of risk until the transaction was completed or the purchaser entered into or was entitled to enter into possession of the property and that any such legislation should be made applicable to contracts for sale of dwellings notwithstanding any contrary agreement between parties and to contracts for sale of other real property subject to any contrary agreement between the parties (paragraphs 4.35-6). The Commission's conclusions led it to draft the Bill contained in Appendix A. The effect of the proposed amendments is considered later in this memorandum.

2. Comments on sections 63 and 64 of the Property Law Act 1974-1982

Section 63(1) and (2) are:

63. Application of insurance money on completion of a sale or exchange. [Eng. s. 47; Vic. s. 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, 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.

There are also subsections (3) and (4) which are not relevant to this discussion.

At paragraph 3.10 the New South Wales Commission referred to Ziel Nominees Pty Ltd v VACC Insurance Co (1975) 7 A.L.R. 667 in which the High Court held -

- (i) Upon the signature of an enforceable contract of sale of land the purchaser is bound to complete, irrespective of the destruction of improvements on the land meantime.
- (ii) The purchaser has, upon that signature, an insurable interest which he can immediately protect by cover note or policy of insurance.
- (iii) The vendor, having an enforceable contract of sale, is entitled to the price notwithstanding the destruction of the improvements on the land.
- (iv) A vendor who receives the price which he has agreed to accept for land suffers no loss by the destruction of the improvements on the land.
- (v) At the time the document of 20 February became effective, i.e. on settlement of the contract of sale, the vendor was not and could not have become entitled to any moneys under the policy: that he had not and could not suffer any loss and therefore had nothing to assign.
- (vi) The fact that the vendor had been paid his agreed price would provide the insurance company with a complete defence.
- (vii) The result did not depend in any respect or to any extent upon questions relating to equitable assignments.

It was the Commission's opinion (expressed in the same paragraph) that section 63 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.

When the Queensland Commission compiled a report no. 16 which preceded the promulgation of the Property Law Act in 1974, it was expected that section 63(2) which was modelled on a like provision in the Northern Ireland report on Land Law, would preclude arguments based on the "passing of risk". The decision in the Ziel Nominees case (supra) leaves this aspect still open to debate. In paragraph 3.10 the New South Wales Commission contends that the vendor would be able to escape liability not because the risk has passed to the purchaser but because he is entitled or has received the purchase price and has therefore suffered no loss against which he or she needs to be indemnified. If this interpretation is correct much of the value of section 63 would be destroyed.

The provisions of section 64 are:

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 applies only to contracts made after the commencement of this Act and shall have effect notwithstanding any stipulation to the contrary.

The comments of the New South Wales Commission concerning this section which it says "gives the purchaser an important right of rescission not conferred by common law" contained in paragraph 3.11 are:

- (i) it applies only to sale of dwellings (but includes residential units);
- (ii) right to rescind arises only where dwelling is so damaged or destroyed as to be unfit for occupation as a dwelling house;
- (iii) damage or destruction might occur between contract and taking of possession or completion whichever is earlier.

The comments contained in paragraph 3.12 seem to suggest that the effect of the words "alone shall be entitled to the benefit of any insurance policy" in section 64(2) require clarification.

In paragraph 3.16 of the New South Wales report reference is also made to sections 34 and 35 of the Sale of Land (Amendment) Act 1982 (Vic). Appendix B contains a copy of these sections. It will be noted there are points of similarity between these two sections and sections 63 and 64 of the Property Law Act (Qld.). Mr P.F. Mitchell in (1983) 57 Law Institute Journal 73 at p.75 wrote:

"The intention of this provision is clearly to overcome the anomalies highlighted in the decisions of Ziel Nominees Pty Ltd v. V.A.C.C. Insurance Co. Ltd (supra) and Hirst v. The New Zealand Insurance Co. Ltd. [1981] V.R. 571, in cases where the vendor maintains insurance in respect of the particular property. It is, however, perhaps unfortunate that the drafting of this provision does not completely lay the spectre of these decisions. This is because it is by no means clear whether the words "the vendor has suffered no loss" are to be read independently of the remainder of the provision or whether these words, and the words "has suffered diminished loss", are each to be coupled with the words "by reason of the fact that the vendor is entitled to be paid the purchase price or the balance thereof by the purchaser"."

Comments in the New South Wales report on the Victorian legislation are contained in paragraphs 3.13 to 3.23 and the conclusion reached is that this legislation leaves open areas which require clarification before they could be considered acceptable for New South Wales.

In the United States, some States adopted a uniform Vendor and Purchaser Risk Act. (See Appendix C.) The report presented by the Contracts and Commercial Law Committee of New Zealand in May 1983 considered that the New York version could (with suitable replacements for inappropriate terminology) form the basis for reform (report page 29). Mr G. Walker in his article "Insurance and the Sale of Land" (1981) 9 Australian Business Review page 148 at page 162 quoted from an article by Fineberg in (1979) 14 Columbia Journal of Law and Social Problems 453 at pages 489-490

"The New York version of the Act provides the most comprehensive answer to the problem of burden of loss during the executory period. It minimizes the involvement of insurance companies in the separate relation between buyer and seller by providing for an abatement in the price, thereby making the imposition of a constructive trust unnecessary. At the same time, social utility is served because the burden is placed on the party in possession, who is best able to protect the property, and thus the likelihood of negligence is minimized. All solutions to this difficult situation must be problematic, but the New York statute answers most problems while preserving the integrity of contract law and avoiding the necessity of the intervention of equity."

Mr Walker found both the New York and Victorian legislation assumed the existence of insurance. The New York statute assumed the party in possession would be insured and thus able to alleviate his loss by the proceeds of insurance while the Victorian section depended upon the existence of insurance maintained by the vendor. (See (1981) 9 Australian Business Review 148 at page 165).

In regard to these provisions the New South Wales report in paragraph 3.42 stated that the liability for loss is governed by the passing of title or possession and as long as legal title and possession remained 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.

Sections 63 and 64 of the Property Law Act 1974-1982 were considered by Mr Justice Andrews S.P.J. in Ex parte S.G.I.O. (Queensland) Q.L.R. 29/9/84. In this case Mr and Mrs Hamill were vendors of certain land and improvements consisting of residential flats to a company Marson Pty. Ltd. The vendors had insurance with the S.G.I.O. and the purchasers took out a policy with Royal Insurance Limited. Before the contract was completed one flat was destroyed by fire and Marson's claim on its insurer was paid. In this case the S.G.I.O. and Mr and Mrs Hamill were applicants for declarations:

- "(a) That on the true construction of section 63 of the Property Law Act 1974-1982 and in the circumstances set out in the affidavit filed herein no money has become payable pursuant to a fire policy of insurance issued on the 28th June, 1983 to Colin Ivan Hamill and Vera Esther Lucia Hamill covering residential flats at 2831 Gold Coast Highway, Surfers Paradise;
- (b) That on the true construction of the said fire policy, and of a policy of householders' insurance issued by Royal Insurance Australia Limited on 21st June, 1983 to Marson Pty. Ltd. in respect of the same property, the applicant State Government Insurance Office (Queensland) is not obliged pursuant to the said fire policy to pay any money to Marson Pty. Ltd. or to Colin Ivan Hamill and Vera Esther Lucia Hamill."

During the course of his judgment in which he granted the declarations, His Honour said:-

"In my view s.63 in the circumstances here does not create a right in the purchasers to receive money under the S.G.I.O. policy in respect of the damage to the property sold. The intention of the section where money is received by a vendor in such circumstances prior to settlement is to extend protection to the purchaser but not under the policy.

It has been argued here for the applicants that the policy is one of indemnity and that the vendors suffered no loss having received payment in full under the contract and that the section can only apply where the vendor's insurer pays before completion with the vendor holding as trustee for the purchaser."

Later in his judgment he said:-

"I am unable to see how the words of s.63 can avail the purchaser here in that money has not become payable under the policy of insurance maintained by the vendors."

Having received the purchase money nothing could "become payable under the policy of insurance". [see Zeil Nominees Pty. Ltd. v. VACC Insurance Co. (supra)].

Another interpretation of the way s.63 is seen to operate is alluded to in Duncan and Vann Property Law and Practice in Queensland at para 63.5:

"If s.63 is applied in favour of the purchaser, the vendor would stand possessed of the insurance monies on behalf of the purchaser and settlement would simply be an exchange of cheques, the vendor would notionally give the purchaser the insurance proceeds in exchange for the sale price, either one duly adjusted. In practice a cheque for the difference in favour of the vendor usually would be paid by the purchaser."

From the foregoing it can be seen that there are difficulties with these provisions and the New South Wales proposals for overcoming these difficulties will now be examined.

NEW SOUTH WALES PROPOSALS

Cl 66J Interpretation

(1) Definitions.

"damage" Section 64 of the Property Law Act 1974-1982 refers to a dwelling house being so destroyed or damaged as to be unfit for occupation as a dwelling house. The New South Wales Commission considered this provision was inadequate and drew a definition in subclause 1 and a separate subclause 2 to overcome the inadequacy.

Under its definition "land" includes buildings and other fixtures. The word is already defined in s.4 of the Property Law Act 1974-1982 but this definition differs from the one in s.36 of the Acts Interpretation Act 1954-1977 by reason of the omission of the word "messuage" which thus leaves it open to an interpretation that buildings, etc. are not included. In s.64(3) the expression "sale of a dwelling-house" receives a somewhat wider definition. It seems some amended definition is required to clarify the application of these provisions.

The proposed definition is for "sale" to include exchange. Section 63(1) already specifies "sale or exchange".

(3) Use of Commission reports as extrinsic aids in interpreting statutes has long been a vexed question and the New South Wales Commission has endeavoured by this provision to put the issue beyond doubt. However, the support for the use of such reports given recently by members of the High Court in Barker v The Queen (1983) 57 A.L.J.R. 426 suggests that such an excess of caution is not really required. This is now permissible under s.15AB(2)(b) of the Commonwealth Acts Interpretation Act as amended in 1984.

(4) If subclause 3 is not required, neither is subclause 4.

Cl. 66K Postponement of Passing of Risk.

Reference has been made earlier in this memorandum to paragraph 3.10 of the Commission's report where the shortcomings of section 63 of the Property Law Act are discussed. The New South Wales Commission recommended postponing the passing of risk of damage or destruction of property until the transaction has been completed or the purchaser has entered into possession.

Reference is also made to report number 20 of the Australian Law Reform Commission on Insurance Contracts at paragraph. 132. The recommendations discussed in that paragraph were enacted in the Commonwealth Insurance Act 1984 (no. 80) assented to on 25th June, 1984.

Perhaps consideration could be given to adoption of this provision to replace section 63(1) and section 63(2). Section 63(3) could be retained but section 63(4) would also require amendment. The report points out that in some circumstances the purchaser may wish to insure (see pages 74 and 75 of Appendix A).

Cl. 66L Power to Rescind.

Section 64 of the Property Law Act which gives the purchaser a right to rescind was considered deficient for three reasons:-

1. It applies only to dwelling houses;
2. Right arises only where dwelling is rendered unfit for occupation as a dwelling house; and
3. Damage or destruction must occur between contract and taking of possession or completion whichever is earlier (see paragraph 3.11).

If the proposed clause finds acceptance with members it could be used as a basis for amendment of section 64. Section 257 of the Property Law Act sets out extensively how notices are to be served and therefore subclauses 2 and 3 are not required. Subclauses 4 and 5 might be preferred to subsection 2. Subsections 3 and 4 could be retained.

Cl. 66M Abatement of Purchase Price where Land Damaged.

The New South Wales Commission considered there would be cases where purchaser does not have the right to rescind or where the purchaser preferred to proceed with the contract rather than rescind and has made provision for a reduction in the purchase price. The principles to be considered in such cases are analogous to those in actions for compensation - for error or misdescription (see paragraphs 2.6 to 2.8). The authorities quoted were Beard v. Drummoyne Municipal Council (1969) 71 S.R. NSW 250 and Rutherford v. Acton-Adams [1915] A.C. 865. R.M. Stonham in Vendor and Purchaser (1975) referred to Ferguson v Tadman (1827) 57 E.R. 676 and stated:

"The purchaser is entitled, in equity, to compensation for such deterioration, by way of abatement of purchase money, and will be entitled to deduct such compensation on completion, in the same manner as he would be allowed in a suit for specific performance".

Reference was also made therein to King v Poggioli (1923) 32 C.L.R. 222. Portion of the head-note to that case reads:

"an abatement of purchase-money is permitted in cases where there is some diminution or deterioration in the value of the property contracted to be sold so that the purchaser will not get the whole of what he contracted to buy."

Other issues were involved in that case which would tend to make the decision less supportive of the author's proposition.

Cl. 66N Refusal to Enforce Specific Performance Against the Vendor.

It was considered the Court should have discretion to refuse to require the vendor to complete where it would be unjust or inequitable to do so (see paragraph 4.45 and Spry, Equitable Remedies - (2nd edition) pages 287-289). It is quite likely a Court would approach an action for specific performance in this way but there seems to be no harm in giving it this recognition.

Cl. 66O.

In subclause 1, "dwelling house" is defined and subclause 2 sets out when the Division of the Act of which the new provisions form part will apply. This clause could be included if considered necessary.

SUMMARY

The New South Wales Report contains proposals which should be considered and there is merit in the submission concerning the shortcomings of sections 63 and 64 which could be amended by having regard to the clauses contained in the report.

(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 or 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.

74

Contracting out.

66O. (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.

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(1) 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 or 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 vendor's 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 66O

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 contract for sale and provisions of any other document or verbal agreement that relates to that sale.

DIVISION 3—INSURANCE

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.

Power of purchaser to rescind contract where house destroyed.
S. 34 inserted by No. 9858 s. 3.

(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.

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, 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 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.

Insurance held by vendor to enure for benefit of purchaser.
S. 35 inserted by No. 9858 s. 3.

(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) A notice under sub-section (4) shall be in writing and shall be served upon the purchaser personally or in the case of a company by leaving it at the company's registered office.

(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) shall apply to a contract for the sale of land made after the commencement of section 3 of the *Sale of Land (Amendment) Act 1982*; and

(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).

(11) This section shall apply *mutatis mutandis* to a sale or exchange by order of a court.

s. 36 inserted by
No. 9858 s. 3.

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.

APPENDIX C

U. S. A.

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.]”

APPENDIX D
COMMONWEALTH

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 day 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.