

Vendor terms Rhetoric & reality

A report by the Consumer Action Law Centre

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Executive summary

What are vendor terms contracts?

Vendor terms contracts - also called vendor finance or terms contracts - are a way of selling real property where the seller, in effect, finances the purchase. No bank or other third-party financier is involved in the transaction. No mortgage is granted over the property. In a vendor terms transaction, the purchaser pays the contract price in instalments to the vendor, together with interest. Entitlement to be registered as proprietor of the property will not pass from vendor to purchaser until all payments are completed.

The terms 'wrap' and 'wrapping' are also used to describe a common type of transaction where the property in question is sold on vendor terms, but subject to a mortgage granted by the vendor to a third party who has financed the original purchase of the house by that vendor.

In what circumstances are they entered into?

While not always the case historically (and not exclusively the case currently), vendor terms contracts are commonly entered into by low-income, first home buyers who are unable to obtain 'mainstream' finance for purchasing a home. The transactions often involve cheap homes in rural and regional areas. The First Home Owner Grant is often the sole source of the deposit provided by the purchaser.

This transactional model has been promoted by entrepreneurs to aspiring property investors as a high-yield, low-risk investment strategy which has the added bonus of facilitating entry into the home ownership market for those otherwise denied the opportunity.

What problems can arise with vendor terms contracts?

Vendor terms contracts can give rise to a wide range of problems, including:

- a) poor quality dwellings,

- b) over-pricing of dwellings,
- c) interest being charged above bank rates,
- d) purchasers having no registered interest in the property,
- e) property being encumbered by vendor's mortgage with their bank,
- f) financial over-commitment of purchasers,
- g) misrepresentations regarding the nature and content of the contract,
- h) while compared favourably with renting by some promoters:
 - i. no regulation under the *Residential Tenancies Act 1997*, and
 - ii. purchasers being liable for rates, repairs and maintenance

The factors above are not necessarily unlawful, but do create a transactional imbalance in power to the detriment of the purchaser's rights.

Conclusions and Recommendations

This report makes the following conclusions and recommendations.

Recommendation One: amend the eligibility criteria for First Home Owner Grants to restrict access by purchasers of real estate on vendor terms

Recommendation Two: prohibit 'wrapping', ie prohibit entry into vendor terms contracts in respect of properties which are already subject to a mortgage.

Recommendation Three: create awareness of potential problems with vendor terms amongst low-income potential first home buyers

Recommendation Four: ensure that vendor terms contracts are covered by Part 2B of the *Fair Trading Act 1999*

Recommendation Five: amend the *Consumer Credit Code* to confirm that a vendor terms contract is a 'credit contract' within the meaning of Part One of the Code

Recommendation Six: revise the vendor terms provisions of the *Sale of Land Act 1962*

Recommendation Seven: obtain statistical data on vendor terms transactions

Recommendation Eight: take further steps to ensure access to justice for disadvantaged consumers

Introduction

About vendor terms contracts

Buying a home is the cornerstone of Australian ideas about financial security and providing for one's family.

However, consumers on lower incomes – or without savings – are more than ever precluded from entering the home buyers' market. As the traditional manner of financing the purchase price of a home with a bank mortgage has become less affordable, so the dream of home ownership has become less attainable.

While governments have taken various steps to remedy this problem – the First Home Owner Grant being the most widely recognised – business initiatives particularly have responded quickly to the greenfields market targeting low-income aspiring home-owners. Lenders are offering 100% mortgages for those who have no deposit, higher priced loans to those who are considered a higher risk, and a host of other products.

Making promises that are sometimes genuine, sometimes illusory, yet always bold, the new breed of alternative home financier speaks to those the banks reject: low-income earners who fail major lenders' credit-scoring tests, but who still hold dreams of owning a house of their own.

A vendor terms contract is one such alternative path to home ownership offered to the financially disenfranchised.

Vendor terms contracts - also called vendor finance or terms contracts - are a way of selling real property where the seller, in effect, finances the purchase. No bank or other third-party financier is involved in the transaction. No mortgage is granted over the property. In a vendor terms transaction, the purchaser pays the contract price in instalments to the vendor, together with interest. Entitlement to be registered as proprietor of the property will not pass from vendor to purchaser until all payments are completed. Thus, a purchaser may wait in excess of twenty years before becoming a true 'home owner'. Alternatively, a purchaser may after some years accrue enough equity in the property to satisfy the credit-scoring criteria of a financial

institution and secure a loan to pay out the vendor terms contract, replacing their liability to the vendor with an obligation to repay a bank loan secured by a mortgage.

The terms ‘wrap’ and ‘wrapping’ are also used to describe a common type of transaction where the property in question is sold on vendor terms, but subject to a mortgage granted by the vendor to a third party who has financed the original purchase of the house by that vendor. The vendor ensures that the payments made by the purchaser exceed – and thus ‘wrap’ around – the payments owed by the vendor under their pre-existing mortgage.

Vendor terms contracts have for many decades provided a valuable and uncontroversial way to purchase land without the intercession of a third-party financier. But this newer role, as a means of facilitating home ownership for people denied bank loans, has accorded vendor terms contracts the status of a mechanism of last resort, by which the most vulnerable and disadvantaged consumers in our society seek to enter the increasingly exclusive home ownership club.

Vendor terms contracts are also – like ‘standard’ sale of real property contracts – complex legal documents. But unlike the traditional sale-contract-plus-bank-mortgage transaction, the community does not demonstrate a level of basic familiarity with the fundamental structure of vendor terms.

To consider an additional factor, buying a home is not only the largest dollar-value transaction a person will normally enter into in their life, it is also one of the most emotionally-laden financial transactions a person will undertake. The primal desire to own a home – a derivative of the territorial imperative - makes the home-buying transaction ripe for exploitation.

The personal circumstances of many low-income earners buying their first home on vendor terms magnifies this emotional charge. Finally, someone is promising to deliver on the Great Australian Dream: a dream which has for years been coveted only as an unattainable fantasy.

It is perhaps little wonder therefore that government regulators, consumer advocacy organisations and community welfare services have recognised an inordinately high proportion of allegations of consumer detriment arising in connection with vendor terms financing in this impecunious and under-serviced corner of the home buyers’ market.

About this report

This report is the culmination of work undertaken by the Consumer Action Law Centre and its predecessor the Consumer Law Centre of Victoria, and by the Gippsland Community Legal Service and the Legal Centre Warrnambool.

The report provides rigorous and up-to-date research about the operation of vendor terms contracts in Victoria, and their effect on Victorian consumers. Through this research, the way towards a more equitable home buyers market for both purchasers and vendors will hopefully become clearer.

Chapter One is an overview of the nature of vendor terms and the environment in which it operates as a mechanism for home ownership.

Chapter Two constitutes an analysis of Victorian regulation of vendor terms in comparison to regimes in other Australian jurisdictions.

Chapter Three reviews the extant and relevant literature regarding vendor terms contracts in Australia.

Chapter Four reviews the case law relating to vendor terms contracts in Australia.

Chapter Five makes recommendations concerning a range of consumer protection initiatives targeting the vendor terms market, including enhanced regulation, compliance and enforcement campaigns, and community education.

Chapter One – Issues

This chapter sets out information about the place vendor terms transactions hold in the residential property market, and about the types of people – both purchasers and vendors – who commonly enter into vendor terms transactions.

The market

Cheap houses

Of the twelve case studies collected for this report, all concerned properties (both house and land) sold for between \$20,000 and \$110,000, where such prices were often grossly inflated.

The nexus between cheap housing and vendor terms arises out of the targeting of low-income earners by vendor terms operators. The houses that are the subject of the contracts ultimately entered into are of necessity low-cost to ensure that the transaction appears affordable to purchasers.

It is important to recognise however that there is nothing inherent in the nature of vendor terms that associates it with the sale of cheap real property. Its use amongst farming communities (see below) illustrates its use in higher value property transactions.

Predominantly rural/regional

Vendor terms contracts are predominantly entered into in respect of rural and regional properties, and to some degree, outer metropolitan areas, where higher rental yields create a minimal difference between monthly payments under a vendor terms contract, and monthly payments in rent.¹ Prospective purchasers in such areas will be attracted to the idea of replacing their rent payments with only marginally higher payments which contribute towards equity in a property they can ultimately own. Of the twelve case studies collected for this report, all involved properties located in rural or regional areas.

¹ Interview with Steve McKnight and Lewis O'Brien, 17 May 2005.

First Home Owner Grant

The First Home Owner Grant (**FHOG**) scheme in Victoria is administered by the State Revenue Office, under powers granted to it by the *First Home Owner Grant Act 2000* (Vic). As demonstrated by the case studies collected for this report, the monies available to first home buyers under the grant scheme are commonly used by low-income earners entering into vendor terms contracts as the sole source of deposit monies payable upon execution of the agreement.

The re-enlivening of vendor terms contracts as a method of transacting property appeared to coincide with the introduction of the FHOG. It is arguable that the FHOG contributed to the rise in vendor terms transactions (at least across a particular sector of the market) in two ways. Firstly, by fuelling the housing and property boom and secondly, and more directly, by making deposit funds available to low-income earners.

Recent trends

Vendor terms contracts first came to the attention of consumer advocacy groups in the 1980s – at a time when property prices were increasing sharply. While we do not know the outcomes of all these deals, many rural purchasers found significant problems with the properties, including no road access or inability to build due to flooding. Those who bought in the metropolitan area often found that high payments and the need to maintain low-value, deteriorating properties forced them to leave the property.

Once more, in the mid 1990s, as property prices began to soar, vendor terms emerged as a way of marketing overpriced homes to predominantly low income consumers. The increased interest in property for investors, and for those concerned they may never be able to purchase a home, attracted investors and purchasers in vendor terms schemes. With the flattening out of property prices, the interest of investors and purchasers in vendor terms appears to be waning. Additionally it may be that the increase in property values have made it more difficult for investors to find properties that are suitable for sale to low-income earners.

The players

Purchasers

Young couples without savings, the self-employed, former bankrupts, those with poor credit records, low-income earners generally:² all such people may fall within the banner of those euphemistically titled 'non-conforming borrowers'. A non-conforming borrower does not conform to the credit assessment standards of a major lender, and must seek finance elsewhere. It is from the ranks of the non-conforming borrowers that prospective vendor terms purchasers may arise.

² Ibid. See also interviews with Rick Otton (24 May 2005), Malcolm Buchanan (23 May 2005).

Examples are often given of purchasers who would have no difficulty in making the payments, but are unable to obtain mainstream finance due to circumstances other than income, for example those who don't have a huge deposit or credit history.³ For example, when Rick Otton started promoting "wraps" in Australia, he provided an example of a plumber who couldn't get finance because he was self employed, and of a family who had saved a deposit, but had been forced to spend it on their daughter's leukemia treatment.⁴ Our experience suggests that wraps are promoted to many people who are simply on very low incomes. For example, the following exchange is from an online property investment forum:

13/2/04

Settled on a house mid Jan which I intend to wrap and I'm settling on another one end of Feb. Replies to my newspaper adds have been kinda slow and I will be doing a letter drop this week. I've got signs up on the places also to assist with the marketing process.

Have you guys out there found it also a bit slow or is there more that I can do to market the houses. My houses are in Geelong, Victoria. Any advice would be appreciated from you experienced wrappers out there.

Cheers

15/2/04 reply

Hi,

I know that Geelong was pounded with wrap ads a year or so ago to the point that the market was saturated.

Perhaps another approach other than classified ads is required... perhaps a letterbox drop, but maybe a JV with a service provider. I outline more about this in the revised Wrap Kit due for release in a couple of weeks.

Cheers,

Steve McKnight⁵

It is possible that the heavy promotion of wrapping as an investment strategy has led to more investors than interested consumers, resulting in agreements being entered into with consumers who are clearly unable to pay.

Additionally, purchasers may have chosen vendor terms despite being able to qualify for mainstream finance. This decision might be made if a personal or familial relationship exists between the vendor and purchaser. Research undertaken for this report indicates that such transactions generally appear to generate less complaints and problems than those involving non-conforming borrowers.

Vendors

In recent times, people choosing to sell property on vendor terms are more likely to be doing so as part of a property investment strategy or business. Of course, vendors may still be entering into vendor terms contracts simply as part of a

³ Today Tonight, 16 September 2002, Rick Otton

⁴ Ibid.

⁵ www.propertyinvesting.com

straightforward, one-off real property transaction. Such transactions generally appear to generate less complaints and problems than those involving vendors engaged in a larger property investment strategy or business.

Research undertaken for this report does not definitively reveal the demographics of vendor terms investors (as distinct from sellers engaging in one-off transactions). However, it is reasonable to suggest that such investors have either a reasonable level of experience in more standard forms of property investment, or have completed some course of education (or self-education) offered by a variety of promoters of vendor terms and ‘wrapping’.

Promoters

The Wrap Pack™ Is Unlike Any Other Course, Seminar Or Product You've Ever Seen Before ...⁶

Whatever the ultimate value of the product they offer, vendor terms promoters employ the lexicon of the get-rich-quick spruiker to gain the attention of those hungry for ‘a massive increase in positive cash flow.’⁷ While most promoters are careful to include statements stressing that wrapping and vendor terms investment is *not* a get-rich-quick scheme,⁸ the examples concurrently used to sell the concepts are illustrations of just that: investors getting rich quickly.⁹

As well as stressing the returns to investors, promoters argue that vendor terms also serves a social benefit by assisting low-income earners to enter the property market, who themselves make considerable profits while doing so: a win-win scenario.¹⁰

Promoter Steve McKnight gives examples of four transactions that confer capital gains upon the purchaser of up to \$21,000 in eighteen months. This report does not propose to challenge the veracity of the McKnight’s case studies, but it does question whether they are representative of the average gains that may be obtained by a consumer from vendor terms. Research undertaken by property consultants Charter Keck Kramer commissioned specially for this report concludes that such gains were most attributable to the property boom of 2000-2003 which delivered very strong price growth of 10-15% per annum. The research concludes that the McKnight examples ‘are not typical of the long-term movements in property prices but rather, are indicative of potential short-term gains available during the upswing and peak phases of the residential property market cycle.’¹¹

Further, it is possible that many of the promoters make more money from education products - seminars and information packs – than from property investment itself. Such products can cost many thousands of dollars.¹²

The promoters aim to establish vendor terms property transactions as the core of a property investment business, rather than as a mere tool used occasionally for

⁶ www.financiallyfree.com.au/wrap_pack.htm.

⁷ *Ibid.*

⁸ Eg: www.propertyinvesting.com/resources/5.html#4.

⁹ Eg: ‘\$220,000 Richer In Less Than A Year’: www.financiallyfree.com.au/wrap_pack.htm.

¹⁰ Interview with Steve McKnight and Lewis O’Brien, 17 May 2005; interview with Rick Otton, 24 May 2005; ‘You Feel Good ... You Help Someone ...And You Make Money At The Same Time’: www.financiallyfree.com.au/wrap_pack.htm.

¹¹ See Appendix Two to this report for the full text of the Charter Keck Kramer analysis.

¹² Rick Otton’s Wrap Pack retails at \$2,897.00: www.financiallyfree.com.au/wrap_pack.htm

transferring interests in real estate. The emphasis placed upon vendor terms contracts as a mechanism for investment is of concern to people on both sides of the transactions. The investors/vendors may not realize the comparatively high-risk nature of vendor terms as a variety of property investment, and the purchasers face a range of problems (discussed below) arising out of the peculiar vulnerabilities of their place in the transaction.

Some promoters interviewed for this project had concerns about an investment model that targets low-income earners, suggesting that problems are highly likely to arise when purchasers do not provide a deposit from their own pockets.¹³

In the submission of this report, the promotion of vendor terms as a stand-alone investment strategy has been one of the main engines driving the increase in problem transactions in this sector of the property market. It attracts operators with a focus on high-volume, high-turnover business aimed at generating swift increases in cash flow. This mindset can lead to cutting of costs, and of corners, in the search for the investment bonanza promised – all at the expense of the purchasers fueling the exercise.

Rural communities

In a report that has been initiated in response to widespread problems associated with vendor terms transactions, it is important not to overlook the many successful instances of transfers of property by way of vendor terms.

Research undertaken in preparation for this report showed that vendor terms was commonly used, and generally to the satisfaction of all parties, as a mechanism for transferring rural property and farmland.¹⁴ Such transfers might involve a retiring farmer selling land on vendor terms to aid quick sale, or parents selling a home to a child to assist entry into the home ownership market. In both cases, personal knowledge of the other parties to the transaction, and of the property in question, may be an incentive to finance through vendor terms rather than third parties. The absence of a third-party financier, and attendant brokers and intermediaries, will also reduce transaction costs. Additionally, payment of stamp duty is deferred until the contract is paid out, which can be of significant advantage to a purchaser.

Terms contracts in this market are normally not regulated under the *Consumer Credit Code* because farming enterprises make up the bulk of the subject properties.

This sector of the market displays a good example of vendor terms transactions operating free of the distorting intercessions of vendor terms promoters, who stress a get-rich-quick angle that persuades inexperienced people to set up as professional property investors and results in large volumes of transactions that aim to maximize cash flow.

Warrnambool solicitor J M Dwyer of Desmond Dunne & Dwyer states that vendor terms contracts have in his experience

provided a very useful vehicle for the sale of farms.... We have over the years had many family transactions where houses and business premises have been sold

¹³ Interview with Rick Otton, 24 May 2005. Otton refers to this model as being influenced by US investment guru John Burley: www.johnburley.com.

¹⁴ See correspondence of solicitors J M Dwyer, Desmond Dunne & Dwyer (1 Apr 05); G Skewes, Maddens Lawyers (13 Apr 05); D Jellie, Jellie Laidlaw McDonald Wilson (6 May 05);

between related parties and this has been of great benefit to the Purchasers who have been able to reduce expenses.¹⁵

The problems

Vendor terms contracts have given rise to a wide range of complaints by purchasers.

Poor quality dwellings

Many purchasers complained that the houses they bought were in poor condition and, in some cases, uninhabitable.¹⁶ The range of problems with properties extended from unpainted walls to rotten flooring and vermin infestation.

The fact that a house is in poor condition is not inherently related to the peculiarities of a vendor terms contract. Uninformed and vulnerable consumers, however, are more likely to fail to recognize the poor state of a property, or pay an inflated price for such a property, or even fail to inspect a property prior to purchase. The nexus between poor quality dwellings and vendor terms therefore stems from the fact that both phenomena inhabit the bottom end of the property market.

The location of properties, in the “cheaper” parts of regional areas, can often provide problems for the types of consumers attracted to vendor terms purchases, including lack of easy access to facilities and community services.

Over-pricing of dwellings

Inflating the price of a property is something that is central to the business plans of many vendor terms entrepreneurs. Justification for this price increase is usually based on the grounds that it compensates the vendor for the increase in the price of the property between the formation of the contract and the ultimate transfer of registered title,¹⁷ or that vendor terms transactions are easier and more convenient than ‘standard’ home purchase transactions.¹⁸

Critics say that the price increases are excessive, and are a result of vendors taking advantage of purchasers who have no alternative but to accept the price if they are to enter the home buyers’ market.

The property valuation analysis commissioned for this report¹⁹ found that the value of properties in the streets where properties were sold on vendor terms tended to be between 25-50% lower than the median values of the properties in the suburb, confirming that properties chosen for vendor terms sales tend to be not only in areas with low house values, but are the lower value homes within those areas. Our casework experience suggests that this can be due to the low quality of the home as well as the actual location of the home.

¹⁵ Correspondence from J M Dwyer to Neil Longmore, South West Community Legal Centre, 1 Apr 05.

¹⁶ See Case Studies One, Two, Three and Eight.

¹⁷ Interview with Steve McKnight, 17 May 2005.

¹⁸ Interview with Rick Otton, We Buy Houses, 24 May 2005.

¹⁹ See Appendix Two.

Interest charged above bank rates

One of the central elements of the vendor terms investment strategy as it relates to 'wrapping' is that periodical payments made by the purchaser under the terms contract will be in excess of those payable by the vendor to the financial institution which has advanced funds pursuant to an underlying mortgage. In order to ensure this, vendors will charge purchasers annual percentage rates in excess of those charged by their financial institution. Vendor terms contracts will often express the annual percentage rate as something along the lines of 'the rate paid by the vendor, plus 2%.'

Consumer advocates raise the point that, where vendor terms operators target prospective purchasers who do not satisfy lenders' credit checks, signing such purchasers up to loans with interest rates in excess of those facilities for which they have already been rejected will lead to inordinately high levels of delinquency.

Purchaser has no registered interest in the property

The conferral upon a purchaser of a possessory right, without a right to be registered as proprietor, is a structurally definitive aspect of vendor terms contracts and confers upon a purchaser a vulnerability peculiar to such transactions.

To some degree the position of a purchaser is analogous to that of a tenant, but without the benefit of protection under the *Residential Tenancies Act 1997* and with the disadvantage of being liable for rates and maintenance of the property. A caveat ought to be, but is not always, registered by the purchaser to protect their interest.

In the event of a dispute about the amount of the purchaser's equity in the property, the purchaser would be at a disadvantage because of their lack of registered interest.

Property is encumbered by vendor's mortgage with their bank

In a 'wrap' arrangement, a vendor's default on their loan could result in the vendor's financial institution taking possession of the property as mortgagee. While the purchaser would retain actual possession,²⁰ the mortgagee may not be bound by the obligations of the original vendor under the terms contract, and the purchaser may be deprived of the right to ultimately transfer the property into his or her name.

This vulnerability mirrors that of purchasers prior to the introduction of the terms contract provisions of the *Sale of Land Act 1962*.

Financial over-commitment of purchasers

The reason most people are rejected by major lenders is because they are deemed an unacceptable credit risk.

Those vendor terms operators who target people who have been unable to obtain finance from major lenders will naturally run a higher risk of entering into contracts with people who are unable to afford repayments under those contracts.

²⁰ Land held by a registered proprietor shall be held subject to the interest (but excluding any option to purchase) of a tenant in possession of the land: s 42(2)(e), *Transfer of Land Act 1958*.

Vendor terms operators that also allow purchasers to sign up using only their First Home Owner Grant as a deposit are compounding the risk of default.

If purchasers default on payments they will often be subject to punitive termination clauses, or may be denied any payment representing equity they may have gained in the property.

Misrepresentations regarding nature of contract

There have been frequent complaints regarding alleged misrepresentations on the part of vendor terms operators, mostly regarding the nature of the agreement and the condition of the subject property.

The comparatively uncommon nature of vendor terms contracts makes them more susceptible to misunderstanding – either intentional or accidental – at the point of sale. The fact that most vendor terms purchasers have not had prior experience in signing a contract for the sale of land makes them more vulnerable to such misrepresentations.

Promise of early refinancing

According to some vendor terms promoters, one of the benefits for purchasers is that after making payments for one or two years they will have equity in the property, allowing them to refinance with mainstream lenders. For example, one promoter claimed:

We are a stepping stone that allows people to buy their own home and after a year or so refinance into the standard banking system.²¹

We were provided with four examples of this by a promoter. In each of the examples, the property values had increased significantly over a few years, and the promised positive outcomes for the purchasers depended on these large increases in value over a short period of time. We therefore sought further information to ascertain whether the outcomes similar to those in the examples might be achieved outside a period of strongly rising values.

The analysis of property values demonstrated that ‘the examples of vendor terms contracts (provided to CCLS) are not typical of the long-term movements in property prices but rather, are indicative of potential short-term gains available during the upswing and peak phases of the residential property market cycle.’ In fact the increases in the relevant areas was accentuated due to price growth in these areas being more ‘severely hit during the 1990s recession.’²²

The analysis shows that in the relevant suburbs, median house prices had, during the past two decades, remained steady – or even fallen.

Unlike other was of purchasing a family home, there is an emphasis placed on the value of the property increasing thereby allowing refinancing in a short period of time. In some cases this is a necessity – particularly where, as is evident from some of the case studies in this report, the vendor finance agreement requires payment of the

²¹ Rick Otton quoted in transcript from Today Tonight, 16/9/02, taken from www.rickotton.com

²² See Appendix Two.

balance within a short period (for example where the total balance owing must be repaid at the end of 5 years).

Of course, few people know when the market is likely to peak, particularly those purchasing on vendor terms. For those who purchased at the start, or during the upswing in property values, eventual purchase of the house was possible if they weren't overcommitted (as many appear to have been) by the payments, and other costs. However, for those who purchased towards the end of the "boom", they may have negative equity in the property for many years.

No regulation under Residential Tenancies Act 1997

As discussed above, while the position of a purchaser-in-possession under a vendor terms contract is akin in many ways to that of a tenant, the purchaser does not gain any of the protection offered by the *Residential Tenancies Act 1997*.

Purchaser liable for rates, repairs and maintenance

As discussed above, a purchaser under a vendor terms contract will often be held liable for rates, repairs and maintenance to the property, despite not being registered as proprietor. Given the often poor condition of properties, the amount of money required to be spent to keep the property in a habitable condition can be considerable, and can be difficult for low income earners to afford.

Other home ownership schemes

While this report focuses only on vendor terms transactions, it is worth noting the existence of other home ownership schemes that also target non-conforming borrowers and give rise to similar problems. Some of those particular schemes are outlined briefly below.

Rent-to-buy

A rent-to-buy arrangement involves a prospective purchaser of real property entering into a long term rental agreement (usually in excess of five years in duration) for the house to be purchased. At the same time, the purchaser executes a second contract by which the vendor grants to the purchaser, for a fee, an option to purchase the property after a specified period of time, for a specified value. Like vendor terms contracts, title to the property does not pass with possession and many rent-to-buy arrangements require the prospective purchaser to pay rates and maintenance costs for the property. Rent-to-buy contracts are also promoted to non-conforming borrowers, and many of the problems which arise with vendor terms also arise with rent to buy arrangements.

The Key Result Pty Ltd

The Key Result Pty Ltd promoted a form of home ownership scheme that was based on a rent-to-buy arrangement, but included a personal savings plan and budgeting service. As well as facilitating the entry of a prospective purchaser into a rent-to-buy arrangement with a third party investor, The Key Result Pty Ltd provided staff who would not only oversee the day-to-day spending of a prospective purchaser, but would in fact exclusively control his or her bank account.

Many and varied problems arose with this scheme, which through its enforced budgeting plans placed many prospective purchasers in extreme financial hardship as they were being forced to reduce spending sufficiently to be able to afford the rental and purchase option payments on properties which they could ill afford. The company is now under administration and has ceased trading.

Chapter Two – Legislation review

This chapter reviews Australian state and federal legislation that regulates vendor terms contracts.

The Uniform Consumer Credit Code

The *Uniform Consumer Credit Code* (**the Code**) applies in each Australian jurisdiction, by virtue of legislation in each state and territory importing the provisions of the Code set out in the appendix to the *Consumer Credit (Queensland) Act 1994* (Qld).

There has not been a definitive decision on whether the Code applies to vendor terms contracts. The matter turns on the technical definition of 'credit' in section 4 of the Code, which defines credit to be the deferral of payment of a debt owed by one person (the debtor) to another (the creditor). This definition presupposes that there must be some earlier point in time at which the debtor would have been obliged to make payment and that the payment has been deferred.

Thus, it has been argued that vendor terms contracts are not credit contracts, as no debt arises in any given instance until the instalment becomes due, and at that time there is no deferral of the obligation to pay. Recent decisions, while establishing that instalment contracts for the purchase of land are not per se excluded from the operation of the Code, confirm that such contracts might be so excluded, depending on their terms (see *Ormes v Lewis* [2006] NSWSC 16; *Director of Consumer Affairs Victoria v Geeveekay Pty Ltd* [2005] VCAT 555).

Vendors are commonly drafting their contracts on the basis that the Code does apply and the more common legal view is that the Code is applicable. As a result, vendor terms contracts should be considered from the perspective of the requirements of the Code.

In particular, section 15 of the Code sets out a number of matters that must be included in a credit contract. That information includes:

- the annual percentage rate applicable to the contract;

- the method of calculating interest, for example, interest is calculated daily on the outstanding balance;
- the amount of repayments or method of calculating the amount;
- the number of repayments and the total amount of repayments;
- details of all credit fees and charges; and
- the frequency with which statements of account are to be provided (unless the annual percentage rate is fixed for the term of the contract).

Other important provisions in the Code are contained in Part 4, which regulates changes to obligations under credit contracts, and makes provision for the reopening of unjust transactions. Part 5 regulates the ending and enforcing of credit contracts.

There are proposed amendments to the Code to make it clear that the Code applies to terms contracts. In October 2005, a draft *Consumer Credit (Queensland) Amendment Bill* which would amend the Code was released for comment by the Uniform Consumer Credit Code Management Committee.

The amended Code would provide that, in determining whether a 'land terms sale contract', under which the purchase price of land was greater than the 'cash price' of the land, was a credit contract for the purposes of the Code, a debt is to be regarded as having been incurred, and credit to be regarded as having been provided. A 'land terms sale contract' is defined broadly in the draft legislation, as a contract under which the purchaser is bound to make a payment or payments (other than a deposit) without becoming entitled to receive a conveyance in respect of the land.

Victoria

Sale Of Land Act 1962 (Vic)

The *Sale of Land Act 1962 (Vic)* (**the Act**) provides a comprehensive scheme of regulation for 'terms contracts'. By comparison with other Australian jurisdictions, it offers the most detailed regulatory framework.

The definition of a 'terms contract' in the Act is broad, encompassing an executory contract for the sale or purchase of land where the purchaser is obliged to make two or more repayments to the vendor after execution of the contract: section 2(1)(a). Alternatively, a 'terms contract' is also defined to be an executory contract for the sale or purchase of land where the purchaser is entitled to possession or occupation of the land before he/she becomes entitled to a transfer of legal title: section 2(1)(b).

Section 3 prohibits a person from selling land under a terms contract if, at the date of making the contract, that person is not the registered proprietor of the land: section 3(1)(b)(i). Specifically, section 3(1) provides:

A person shall not sell any land under a terms contract-

...

- b) if the land is under the operation of the Transfer of Land Act 1958 (other than land in an identified folio under that Act) unless at the date of the making of the contract-
 - (i) he is the registered proprietor of the land;

(ii) he is presently entitled to become the registered proprietor of the land;

Section 3(5) further provides:

A failure to comply with sub-section (1) of this section in respect of any land agreed to be sold under a terms contract because of a mistake or mis-statement in the contract in or with respect to the description measurement or area of the land agreed to be sold shall be disregarded for the purposes of this Act unless the mistake or mis-statement is a material mistake or mis-statement which would entitle the purchaser to be discharged from the contract irrespective of the provisions of this Act.

Section 4 of the Act grants a purchaser under a terms contract the right to demand from a vendor a conveyance of free title to the subject land, in return for which a mortgage must be granted by the purchaser to the vendor, which mortgage enshrines the entitlements of the vendor under the original terms contract. Such a conveyance would convert a terms contract into a more traditional transaction comprising transfer of title, consideration for which is financed by a loan secured by a mortgage. Although, as in a terms contract, the absence of a third-party financier would remain a defining hallmark of the arrangement.

This right can only be exercised where the purchaser is not in default under the terms contract.

Section 6 of the Act places restrictions on the sale of land under a terms contract where the land is subject to a mortgage.²³ Specifically, land which is subject to a mortgage cannot be sold under a terms contract unless

- the mortgage relates only to the land being sold - section 6(1);
- the contract of sale provides that the consideration for the sale of land shall be satisfied by the purchaser assuming from the date of the contract, the mortgagor's obligations under the mortgage (those obligations being to the extent of any money owing under the mortgage at the date upon which the purchaser is entitled to possession or receipt of the rents and profits of the land sold); and
- the contract expressly states the land is subject to a mortgage and gives particulars of such mortgage - section 6(2).

Section 6(3) provides that any terms contract entered into in contravention of section 6 will be voidable by the purchaser, at any time before completion. Contravention of any of these sections also entails an offence against the Act and liability to a civil penalty, as specified.

Section 6(4) further provides that sections 6(1) to 6(3) shall not apply to the sale of land under a terms contract where the contract provides that

- any mortgage affecting the land is to be discharged prior to the purchaser taking or becoming entitled to possession; and
- the deposit and all other moneys payable under the contract are to be paid to a qualified legal practitioner/licensed estate agent to be used to discharge the mortgage.

²³ 'Mortgage' includes traditional mortgages, liens or any charges which secure money (s 2).

However, where the mortgage is not discharged within ninety days of the purchaser taking possession and the purchaser is not in default under the contract, the contract is voidable at the option of the purchaser at any time before the mortgage is discharged: section 6(4). If the purchaser exercises that option, they will be entitled to recover all money paid under the contract: section 6(4).

Section 7(1) of the Act provides that once land has been sold under a terms contract, it is not to be mortgaged. However, section 7(2) provides that a vendor may, by written notice, require the purchaser to take a transfer or conveyance of land subject to a terms contract and (at the vendor's expense) execute such mortgage in favour of the vendor and others as the vendor may require, provided the obligations of the purchaser under the mortgage are not more onerous than under the terms contract.

If a vendor requires a purchaser to take a transfer or conveyance of land pursuant to section 7(2), the vendor must pay the purchaser the amount equal to the duty payable under the *Stamps Act 1958* (Vic) on the transfer or conveyance: section 7(3). Purchasers who fail to comply with a notice served by the vendor requiring a transfer of title in exchange for a mortgage in favour of the vendor pursuant to section 7(2) will be guilty of an offence and liable to pay civil damages: section 7(5).

Section 7(4) makes it an offence to contravene any of the provisions of section 7 and furnishes the purchaser with a right to void the contract any time before completion where a violation does occur. Section 7(4)(c) further specifies that where the land subject to a terms contract is mortgaged in contravention of section 7 and the mortgagee had actual or constructive notice of the purchaser's interest under the terms contract, the mortgagee loses power to exercise his remedies under the mortgage, must act to have the mortgage discharged and may recover from the vendor any amount paid to him/her in exchange for the mortgage: section 7(4)(c)(iii).

Section 7(7) states that constructive notice is established if the mortgagee would have discovered the purchaser's interest through one of the following:

- proper inspection of the land – section 7(7)(a);
- making reasonable inquiries of the mortgagor – section 7(7)(b);
- making inquiries of the local council – section 7(7)(c); or
- making inquiries/conducting searches at the Titles Office (7(7)(d).

A bona fide purchaser for value without notice remains secure in their proprietary interests over the land: section 7(4)(d)(i).

Moreover, where a mortgagee who had actual or constructive notice exercises the power of sale over a property under a terms contract, the purchaser may claim damages against the mortgagee: section 7(4)(d)(ii).

Section 7(6) refers to arbitration any disputes as to the sufficiency of amount arising in relation to any transfer, conveyance or mortgage executed under the section.

Section 14 of the Act provides that any terms contract entered into in contravention of the Act is voidable at the option of the purchaser at any time before completion of the contract. Upon voiding the contract, monies paid under the contract are recoverable.

Part 2 of the Fair Trading Act 1999 (Vic)

There are a number of provisions in Part 2 of the *Fair Trading Act (the FTA)*, relating to unfair practices, which might be relevant to the validity and enforceability of vendor terms contracts. Section 7 of the FTA prohibits, in trade and commerce, conduct which is unconscionable, 'within the meaning of the unwritten law'. A parallel provision at section 51AA of the *Trade Practices Act 1974 (Cth) (the TPA)* prohibits such conduct on the part of corporations. In each case, it is the common law standard of unconscionable conduct which is imported – conduct is unconscionable where one party has a special disadvantage, of which a second party is aware and unconscientiously takes advantage (see, for example, *Blomley v Ryan* (1956) 99 CLR 362; *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447).

There is case law to the effect that a private sale of a piece of land is not 'in trade or commerce', meaning that FTA and TPA provisions prohibiting only acts done in those circumstances might not apply (see *O'Brien v Smolonogov* (1983) 53 ALR 107). Though this would not exclude bulk of vendor terms contract sales of land, it might exclude private sales conducted on a vendor terms basis, with 'wrap finance' provided to and by the vendors.

Other provisions in Part 2 of the FTA which might well be relevant in the context of vendor terms contracts are the prohibition of statutory unconscionable conduct at section 8, and the prohibition of misleading and deceptive conduct at section 9. These are paralleled at sections 51AB and 52 of the TPA respectively.

In the sections in the FTA and the TPA prohibiting statutory unconscionable conduct, a range of statutory criteria are set out for determining whether such unconscionable conduct has taken place. The sections are limited to circumstances in which the impugned conduct occurs 'in trade or commerce', and is engaged in 'in connection with the supply or possible supply of goods or services'.

In respect of the latter issue, the supply of a house is plainly not the supply of goods. However, the supply of services has been held to include advertising house and land packages with finance (see *Henderson v Pioneer Homes Pty Ltd (No 3)* (1980) 29 ALR 597), so the advertising of properties for sale under vendor terms contracts would also, presumably, be the supply of services. Whether conduct relating to vendor terms contracts is prohibited as unconscionable under section 8 of the FTA or 51AB of the TPA will depend, therefore, on whether the conduct is relevantly 'in connection with' the advertising of properties. Conduct is 'in connection with' the supply of services where there is a substantial relationship, in a practical business sense – though not necessarily an immediate causal relationship – between the conduct and the supply of services (see *ACCC v Woolworths* [2003] FCA 530).

Provisions prohibiting misleading and deceptive conduct are also potentially applicable to vendor terms contracts for the sale of land. Again, these provisions (at section 9 of the FTA and 52 of the TPA) relate to conduct which takes place 'in trade or commerce'.

Part 2B of the Fair Trading Act 1999 (Vic)

Additionally, the provisions of Part 2B of the FTA, relating to unfair contracts, should be taken into account. Part 2B does not apply to provisions in contracts governed by the Code, unless the contract in question is of a prescribed class: section 32V. At the time of the passage of the legislation which amended the FTA so as to allow for

the prescription of such classes of contracts, there was bipartisan support for the notion that vendor terms contracts should be one such class. It does not appear, however, that any subordinate legislation so designating vendor terms contracts has yet been promulgated. Thus, the FTA does not, at this time, apply to vendor terms contracts for the sale of land.

Duties Act 2000 (Vic)

Section 7 of the *Duties Act 2000 (Vic)* imposes duty on the transfer of dutiable property – including (by operation of section 10) estates in fee simple which are the usual subject matter of vendor terms contracts. Sections 18 and 28 of this Act impose duty at rates which vary according to the dutiable value of the property. Under section 20, the dutiable value of the property is the greater of the consideration paid for the transfer and the unencumbered value of the property.

In the case of vendor terms contracts, the whole of the monies payable by the purchaser to the vendor prior to the release of the executed instrument of transfer is consideration for the transfer of the property. That sum includes any interest payments made by the purchaser up until the completion of the transaction. Therefore, as a matter of law, duty is payable not only on the purchase price of the property paid in instalments, but on the interest paid over the course of payment. However, the practice of the Commissioner of State Revenue is to levy duty only on the purchase price of the property, save where the taxpayer has entered into a scheme to avoid duty (for example, by reducing the purported purchase price and increasing the interest rate).²⁴

New South Wales

Part 3 of the *Land Sales Act 1964 (NSW)* (***the LSA***) regulates the sale of land by instalment contracts. An instalment contract is defined in section 2, more narrowly than a 'terms contract' under Victorian legislation, as

[a] contract, entered into after the commencement of this Part, for the sale of a lot in a subdivision comprising five or more lots where such contract provides for the purchase money to be paid by four or more part payments.

The sale of land under an instalment contract is prohibited unless the subdivision complies with the provisions in the LSA. Section 4 sets out the requirements for that compliance. Importantly, it sets out at section 4(c) that a trustee must hold office under a trust deed that relates to the subdivision, which complies with the LSA and which is endorsed with the approval of the Minister, both in respect of the trustee appointed and in respect of the terms of the deed itself.

A trust deed complies with the provisions of this Part if it meets the requirements in section 7 of the LSA, including that:

- it makes provision for the appointment by the vendor of a trustee for purchases of lots in the subdivision proposed to be sold;
- it annexes copies of the form/s of instalment contract to be used in connection with the sale of land, which specify that deposit monies of at least 15% of the purchase price are to be paid by the purchaser to the trustee; and

²⁴ Duties Act Bulletin August 2005 – D5/05

- it sets out that all monies received by the trustee from a purchaser under an instalment contract are to be retained by the trustee. The trustee may release the monies when authorised by the vendor to refund them, or when an instalment contract is signed by both the vendor and purchaser (or their properly constituted attorneys) and presented to the trustee for inspection, along with the written authority of the purchaser to account to the vendor.

Under section 12 of the LSA, the purchaser of a property under an instalment contract must be provided, before an initial payment is made for the property, with documents prescribed in the Fourth and Fifth Schedules to the LSA. The first is a document setting out the lot and subdivision number of the property, along with its vendor, legal owner and information as to any equitable interests in, or securities held over, the property. The second is a document providing advice to purchasers as to their rights under an instalment contract.

Section 13 of the LSA provides a right to a purchaser under an instalment contract to require the transfer of the property, subject to a mortgage back to the vendor. This right may be exercised where the purchaser has paid not less than 15% of the purchase money, or has received a notice under section 14 of the vendor's intention to charge the property in question with a security.

South Australia

The *Land and Business (Sale and Conveyancing) Act 1994* (SA) prohibits the use of vendor terms contracts other than a contract for the sale of land by the South Australian Housing Trust and a contract for the sale of land by a body specified by regulation: sub-sections 6(1) and 6(3). Specifically, section 6(1) provides, 'a contract for the sale of land or a business that provides for the payment of part of the purchase price of the land or business (except a deposit) before the date of settlement is void.'

A South Australian government report issued in 1999 pointed out that this prohibition was 'intended to protect purchasers', some of whom who had previously suffered because of the operation of vendor terms contracts. In instances where they failed to lodge a caveat over the land, some purchasers lost both their payments under the contract, and the land that was being paid for, after the vendor mortgaged the land to a third party and failed to keep up repayments.²⁵ The same report noted that increased competition in the mortgage market might call into question whether vendor terms contracts were necessary at all, given the mortgage options available.²⁶

Northern Territory

The *Law of Property Act 2000* (NT), Division 4, governs terms contracts in the Northern Territory.

Section 73 defines a 'terms contract' in a materially similar way to the first limb of the definition in the Victorian legislation.

²⁵ Office of Consumer and Business Affairs, Government of South Australia, National Competition Policy Review of the *Land and Business (Sale and Conveyancing) Act 1994* – Final Report, December 1999, p.12

²⁶ *ibid*, p.13

Section 74 covers restrictions on vendor's rights of rescission in the event of a default by the purchaser under a terms contract. Specifically, section 74(1) provides that 'terms contracts' are not avoidable because of a default on the part of the purchaser until the expiration of 30 days notice of default issued by the vendor. Within those 30 days the purchaser can make payment to the vendor and the default will be deemed to have been remedied: section 74(2). The right of the vendor to rescind the contract will also cease: section 74(3).

Section 75(1) prohibits the sale and/or mortgage of land subject to a terms contract without the consent of the purchaser. Section 75(2) then provides that if section 75(1) is contravened, the purchaser has a right to avoid the contract at any time before its completion. The section does not prevent land already subject to mortgage being sold under terms contract.

Section 76(1) gives purchasers a right to lodge a caveat over the land they are buying under terms contract, the effect of which is to prevent registration of any instruments affecting the land. The caveat will lapse on the completion of the contract: section 76(3).

Section 77 covers the right of the purchaser (s 77(1)) and the vendor (s 77(2)) to serve notice on the other party requiring a transfer of title to be made in favour of the purchaser, in exchange for the purchaser executing a mortgage in favour of the vendor or vendor's nominee to secure all money payable under the terms contract. The mortgage must contain any terms, powers and covenants on the part of the mortgagor agreed between the vendor and purchaser, and is to accord with and provide for observance of all obligations of the purchaser under the instalment contract: s 77(4)(a). Section 77 also contains other administrative matters relating to the allocation of costs in respect of the execution of a mortgage and transfer.

Section 78(1) provides that a purchaser, who is not in default, to at any time before completion of the contract, require the vendor to deposit with the Public Trustee or other person prescribed by the Minister, the title documents relating to the land under terms contract together with a duly executed conveyance of the land in favour of the purchaser. A failure to comply with a purchaser's direction under section 78(1) amounts to a breach of contract and the purchaser will be entitled to pursue civil remedies: section 78(3).

Western Australia

The *Sale of Land Act 1970 (WA)*, Part 2, governs the sale of land under a 'terms contract'. A 'terms contract' is defined in section 5 as an executory contract for the sale and purchase of land where either:

- the purchaser is obliged to make two or more payments to the vendor (not including a deposit) prior to becoming entitled to a conveyance or transfer of the land; or
- where the purchaser is entitled to possession or occupation of the land before being entitled to a conveyance or transfer of the land.

A 'deposit' is defined in section 5 to include any part of the purchase price which is specified by the contract to be a deposit and is to be paid within 28 days of execution of the contract.

Before entering into a terms contract, the vendor must give the purchaser notice of any mortgage, encumbrance, lien or charge on the land and of any writ of fieri facias²⁷ or warrant of execution entered in the Register²⁸ or that is otherwise registered against the land: section 7(1).

In order to terminate a terms contract for a purchaser's failure to pay money under the contract, a vendor must serve a notice on the purchaser specifying the breach and requiring the purchaser to remedy the breach in not less than 28 days. If there is any other breach a notice must be served specifying the breach and requiring the purchaser to remedy it within a reasonable time from the date of service: sub-sections 6(1) and (2).

A vendor of land under a terms contract must obtain the purchaser's written consent 28 days before encumbering the land or the vendor is given leave by the court to encumber the land. There is a penalty of \$750 for not doing so: section 8. The court can make the order conditional to protect the interests of the purchaser: section 9.

If section 7 or 8 are contravened by the vendor, the purchaser can within one year of becoming aware of the contravention but, prior to the transfer or registration of the land, bring an action to rescind the contract. In such an action, a court can exercise the discretion it is entitled to exercise had the contract been induced by fraudulent misrepresentation: section 10.

Queensland

The *Property Law Act 1974* (Qld) defines an instalment contract as an executory contract where the purchaser is bound to make a payment or payments (other than a deposit) without becoming entitled to receive a conveyance in exchange for the payment or payments: section 71.

This Act provides that the vendor may only terminate the contract on the basis of a default by the purchaser in payment of an instalment (other than a deposit or part thereof) if the vendor has given written notice (30 days) to the purchaser in the approved form: section 72(1). The notice must inform the purchaser of his or her default and of the effect of not remedying the default within the time specified in the notice: section 72(4).

The purchaser can rectify the default anytime within 30 days: section 72(2). Once the purchaser has rectified the default, any right or power of the vendor to determine the contract specified in the notice will be extinguished and the purchaser is deemed not to be in default.

According to section 73, if the vendor wishes to sell or mortgage the land in question, the vendor must obtain the purchaser's consent: section 73(1). If consent is not obtained, the purchaser can elect to rescind the contract and the vendor will be guilty of an offence attracting a civil penalty. The rights of a bona fide purchaser for value without notice under the *Land Title Act 1994* (Qld) are not affected by this section.

²⁷ A writ to enforce a judgement debt.

²⁸ This is stated to be within the meaning of the *Transfer of Land Act 1893*.

Provided that the instalment contract is registered under the *Land Title Act*, the purchaser has the right to lodge a caveat under section 74(1) of the *Property Law Act*. Caveats lodged under this section can be removed if it can be proved that the purchaser has consented to removal, the contract is at an end or there is any other ground which justifies removal of the caveat: section 74(2).

Provided the purchaser is not in default, once an amount equal to one third of the purchase price is paid, the purchaser can serve notice on the vendor requiring the vendor to convey the land on the condition that at the same time of the conveyance the purchaser will execute a mortgage in favour of the vendor to secure payment of all outstanding money owed: section 75(1). The vendor has the reciprocal right to require the purchaser to accept a conveyance conditional on the purchaser entering into a mortgage: section 75(2). If the vendor chooses to exercise this right, she or he must add an amount to the principal amount secured by the mortgage for an amount equal to the stamp duty imposed on the conveyance and for the purchaser's legal costs for preparation, execution and registration of the conveyance: section 75(3).

Subject to any costs arising from a dispute as to the terms of the mortgage which will be shared by the purchaser and the vendor, the costs of preparation and registration of any mortgage will be borne by the party who serves a notice to compel the conveyance: sub-sections 75(4), (6) and (7).

If upon request by the other party, the vendor or purchaser unlawfully refuses the request, they will be in breach of a condition of the contract. The innocent party will be entitled to rescind the contract and sue for damages for the breach and the other party will be guilty of an offence attracting a civil penalty: section 75(9).

A purchaser who is not in default can, at any time after the contract is entered into, direct the vendor to deposit the title deed and an executed conveyance or transfer in favour of the purchaser with a prescribed authority: section 76(1) (see section 76(4) for list of prescribed authorities). If the vendor does not comply with the request she or he will be deemed to be in breach of a condition of the contract, entitling the purchaser to terminate the contract and sue for damages: section 76(2). The authority must hold the documents until ordered to release them by a court or until the contract is discharged.

ACT & Tasmania

ACT and Tasmania have not enacted legislation dealing specifically with vendor terms contracts.

Comparative analysis

Protections under general consumer protection legislation

The simplest protective regime relating to 'vendor terms' or 'instalment' contracts is the South Australian legislation which prohibits such contracts altogether. Outside of South Australia, and apart from legislation specifically dealing with 'vendor terms' or 'instalment' contracts for the sale of land, however defined, there are statutory provisions which affect the rights of purchasers entering into such contracts.

A minimum level of protection is provided, or will be provided, under the Code. Additionally, the TPA provides some protection, in the case of unconscionable conduct,²⁹ or misleading and deceptive conduct,³⁰ on the part of persons entering into vendor terms contracts in trade or commerce. State legislation in all jurisdictions provides similar protections against any person engaging in such conduct.³¹

Defining 'vendor terms' and 'instalment' contracts

Beyond these general protections, legislation addressing the question of the protection of purchasers of land varies in the generality with which it defines 'vendor terms' or 'instalment' contracts. The definition in the South Australian legislation applies the legislative prohibition to contracts under which the purchaser is required to make a payment, other than a deposit, prior to the settlement date for the sale of the property. The Northern Territory and Queensland have definitions which are close to, but slightly narrower than, the South Australian definition. They provide that a contract is caught by the applicable legislation where it

- is an executory contract for the sale of land;
- requires the purchaser to make two or more payments before the purchaser becomes entitled to the transfer of the property.

The definitions in the *Sale of Land Act 1962 (Vic)* and the *Sale of Land Act 1970 (WA)* extend further, bringing within the scope of the legislative protections contracts for the sale of land under which a person is entitled to possession or occupation of land before becoming entitled to the transfer of the land into their name.

In comparison, the New South Wales legislation has a particularly narrow focus. It relates only to sales of parcels of land which are contained in subdivisions of five or more lots. Further, such sales are subject to the protections in the legislation only where they require four more payments on the part of the purchaser.

Restrictions on vendor terms contracts relating to security of possession

Putting aside some cases which might arise under the extended definitions in Victorian and Western Australian legislation, purchasers under vendor terms transactions for the sale of land make payments prior to receiving an interest in the land. Because of this, a primary focus of legislation relating to vendor terms contracts is the protection of the interests of purchasers, and the prevention of dealings with property which leave purchasers without any interest in the property for which they have made payments.

Various pre-contractual protections are put in place by vendor terms legislation. Victorian legislation makes it an offence for persons to sell property under a vendor terms contract unless they are registered proprietors of the land, or are presently entitled to be so.

Restrictions on the sale on vendor terms of land subject to a mortgage vary between jurisdictions. Apart from legislation which sets out general disclosure requirements

²⁹ s51AA

³⁰ s52

³¹ FTA 1992 (ACT), FTA 1987 (NSW), Consumer Affairs and Fair Trading Act (NT), FTA 1989 (Qld), FTA 1987 (SA), FTA 1990 (Tas), FTA 1987 (WA)

on the sale of land,³² and prohibitions on misleading and deceptive conduct, specific restrictions applicable to vendor terms contracts range from none whatsoever (in New South Wales, the Northern Territory and Queensland, for example), through to the Victorian provisions. These which restrict the sale of mortgaged land under vendor terms contracts to limited circumstances, and impose disclosure requirements. In Western Australia, a vendor in such circumstances is required to disclose any of a range of specified interests in, or restrictions on, the land in question.

Various post-contractual protections affect the interests of purchasers of land under vendor terms contracts. Under New South Wales legislation for example, a purchaser's deposit money is held on trust until after the purchaser is provided with information as to any security interests applicable to the property, and in relation to their rights in respect of the transaction.

Several pieces of legislation provide for limitations on the right of a vendor to terminate a vendor terms contract. A right to peremptorily terminate a vendor terms contract can unfairly deprive a purchaser of an interest in land towards which they have made substantial payments. Therefore, legislation in the Northern Territory, Western Australia and Queensland provides that a defaulting purchaser under a vendor terms contract has 30 (or, in the case of Western Australia, 28) days in which to remedy the default before the vendor is entitled to avoid the contract. There does not seem to be any equivalent provision in New South Wales or Victoria, the only other Australian jurisdictions which provide a regulatory framework for vendor terms contracts.

Another set of post-contractual protections is a group of restrictions on the mortgaging or sale of land which is subject to a vendor terms contract. In Victoria, the mortgaging of land subject to a vendor terms contract is prohibited, though a vendor may require that the property be transferred to the purchaser on terms no less favourable than under the vendor terms arrangement, with a mortgage back to the vendor. Consent is required where a vendor wishes to encumber land subject to a vendor terms contract under Western Australian law, or wishes to sell or mortgage land subject to a vendor terms contract under Queensland or Northern Territory law.

Related to these provisions which restrict the sale or mortgaging of land sold on vendor terms are provisions which seek to protect bona fide purchasers for value from losses as a result of improper dealings with the property by the vendor. The Victorian legislation confers protection on a bona fide purchaser for value from a mortgagee, and preserves the operation of the *Transfer of Land Act 1958*, which provides for indefeasibility of title in some circumstances. The Northern Territory legislation similarly preserves the operation of legislation conferring indefeasibility of title, as does the Queensland Act.

Rights conferred on purchasers relating to security of possession

Legislation regulating vendor terms contracts confers various rights on purchasers of properties under such arrangements. A common protective provision is one which allows a purchaser under a vendor terms contract insist on a transfer of the property into their name, with a mortgage back to the vendor, such as is the case under s 4 of

³² See, for example, s32 Sale of Land Act 1962 (Vic), s12 Land Sales Act 1964 (NSW), s64 Law of Property Act 2000 (NT), s61 Property Law Act 1974 (Qld), s7 Land and Business (Sale and Conveyancing) Act 1994 (SA), s7 Sale of Land Act 1970 (WA)

the *Sale of Land Act 1962* (Vic). Legislation in New South Wales allows for this where a purchaser has paid at least 15% of the purchase price of the property, or has received notice of the vendor's intention to charge the property with a security. In the Northern Territory and Victoria, a purchaser of land under a vendor terms contract may, where not in default, insist that the land be conveyed with a mortgage back to the vendor. In Queensland, the right to insist on such a conveyance crystallises when a purchaser has paid one third of the purchase price, and is not in default.

Apart from provisions in all jurisdictions which allow for the lodgement of a caveat by a person claiming an interest in a particular piece of land,³³ legislation in the Northern Territory and Queensland confers a separate right on purchasers under vendor terms contracts to lodge caveats to protect their interests. In both jurisdictions, caveats lodged under those provisions will generally last until the completion or termination of the vendor terms contract.

A further right conferred on purchasers of land under vendor terms contracts, in the Northern Territory and Queensland, is the right to require the lodgement of title documents with an independent third party for safekeeping.

³³ See s89 Transfer of Land Act 1958 (Vic), s74I Real Property Act 1900 (NSW), s138 Land Title Act 2000 (NT), s137 Transfer of Land Act 1893 (WA), s104 Land Title Act 1994 (Qld)

Chapter Three – Literature review

This chapter canvasses the literature examining the operation of vendor terms contracts in Victoria and across Australia.

The historical context of the *Sale of Land Act 1962 (Vic)*

A number of commentators have reported on the historical passage of the *Sale of Land Act 1962 (Vic)* (***the Act***), which regulates vendor terms contracts in Victoria.³⁴ For example, Russell Cocks, a Victorian academic, sets the scene that led to the passing of the Act in 1962.³⁵

Following the Second World War, large numbers of migrants arrived in Melbourne seeking affordable housing. Many of those migrants were attracted to what was then relatively cheap inner city housing but most were unable to access mainstream finance. As a result, vendor terms contracts, under which the vendor effectively financed the purchase of the property, were used as a common method of sale.

Under the typical terms contract, the purchaser was required to pay an initial deposit followed by weekly payments to the vendor, until the purchase price was paid in full. However, the purchaser would not obtain title to the property until such time as the contract was completed, which would usually be many years. Instead, during the period of the contract, the purchaser would only have a possessory right to the property.

Some purchasers under vendor terms contracts would subsequently sell the property under a further terms contract, prior to the contract's completion. This would result in several terms contracts operating in respect of the same property. In some instances, properties were reportedly sold as many as five times over.³⁶

³⁴ See for example, Cocks, Russell, 'A study in consumer protection: A historical analysis of *The Sale of Land Act (Vic) 1962*' (2004) 11 *APLJ* 44. The paper was prepared on the basis of a paper by the same author on behalf of the Land Titles Office Victoria.

³⁵ Russell Cocks is a Lecturer in Property Law at Deakin University, Melbourne.

³⁶ Cocks, above, n 1 at 45.

Where a chain of vendor terms contracts existed in respect of the same property, registered title would remain with the original seller. As a result, every purchaser along the chain had to rely on those before them meeting their contractual obligations. Otherwise, they stood to lose their interest in the property in addition to all repayments made.

On the precarious nature of successive terms contracts Stewart notes:

This 'house of cards' could topple at any time if one of the early purchasers in the chain defaulted, giving rise to a right in the original vendor to rescind and reclaim the land.³⁷

The incidence of successive terms contracts, explains Cocks, essentially undermined the Torrens system of registered title:

The fundamental principle of the Torrens system is certainty of ownership evidenced by the Certificate of Title. The practice of selling on successive terms contracts undermines that system as it delays the registration of the transfer, which is the document that leads to a change in registered ownership. Successive terms purchasers do not have registered interests and are unable to rely on the protection of the Torrens system.³⁸

Even where only one contract existed in respect of the property, the purchaser under a terms contract remained at risk during the contractual period. In an address to the North Eastern Law Association in the early 1960s, prior to the passage of the Act, Justice Adam described the risks of a purchaser under a vendor terms contract as follows:

The purchaser on a terms contract is exposed to serious risks in the interval between his taking possession and final completion – a period during which he may well, in addition to paying off instalments, have expended substantial moneys in improvements on the property.

For a variety of reasons he may, during this critical interval of time, and perhaps through no fault of his own, be deprived of any opportunity of acquiring the title for which he has been paying, and may find himself ejected from the property.³⁹

In particular, where the vendor had a mortgage on the property at the time of the sale or entered a mortgage following the sale on terms, the purchaser bore the risk that the vendor might default on their own mortgage and consequently lose the property when the lender foreclosed.⁴⁰

In the course of his address, His Honour went on to describe the even more precarious nature of successive terms contracts,

The terms purchaser who buys, not from a registered proprietor, but from one who is himself a purchaser on terms is exposed to more and graver risk, and the more numerous the terms contracts in the chain which separates him from the registered proprietor the more the risks. The fate of his contract depends on the fate of all others.⁴¹

³⁷ Stewart, Richard, 'Terms contracts – a minefield for conveyancers?' (1991) 65 *LJ* 1042 at 1043.

³⁸ Cocks, above, n 1 at 44.

³⁹ Address by The Honourable Justice Adam to the North Eastern Law Association Convention at Corryong, 10 March 1962, printed as 'Terms Contracts of Sale of Land' (1962) 36 *LJ* 159 at 160.

⁴⁰ As above.

⁴¹ As above.

Advocating for legislative change to address these issues, His Honour noted that many purchasers under terms contracts were migrants with limited English skills who were vulnerable to ‘persuasive land salesmen’.⁴² Cocks also notes:

Stories of salesman meeting the boats at Station Pier and properties being sold as many as five times on successive terms contracts meant that the process inevitably resulted in innocent parties coming to harm.⁴³

In most instances, the purchaser was a person of limited financial means.⁴⁴ However, despite the fact that they were entering one of the most important legal transactions in their lifetime, purchasers rarely sought legal advice prior to contracting and were often unaware of the risks inherent in the contract, until such time as a problem arose.⁴⁵

In 1961, with the problematic nature of vendor terms contracts increasingly apparent, the Victorian Government requested an inquiry by the Statute Law Revision Committee into their use.⁴⁶ In addition, the Committee looked into the practice of subdivision, which was considered to be problematic when developers sold properties ‘off-the-plan’, that is, before the subdivisional process was complete.⁴⁷ In these circumstances, a purchaser merely had ‘lines on maps’ to evidence his or her ownership of the property.⁴⁸ During the 1950s and early 1960s, many developers operated through limited liability companies. Following what Cocks terms ‘the Credit Squeeze’ - a tightening of monetary supply across the economy - many of those companies failed, with dramatic consequences for purchasers under uncompleted subdivisions and terms contracts.⁴⁹ As a result of the inquiry, the Committee made a number of recommendations for legislative change. Those recommendations formed the basis of the Act, passed in 1962.

The operation of the Act

Generally speaking, the Act incorporated a consumer protection focus, seeking to protect purchasers under these arrangements.⁵⁰ As far as vendor terms contracts were concerned, the Act prohibited the sale on terms by anyone other than a registered proprietor. This prohibition sought to address the problems relating to successive terms contracts by effectively permitting only a single contract in respect of the same property.

The Act also provided that any mortgage on the property, including the terms of that mortgage, had to be disclosed to a purchaser on terms. Through disclosure, the purchaser would be informed of the extent of the vendor’s liability pursuant to the

⁴² Adam, above, n 6 at 161.

⁴³ Cocks, above, n 1 at 45.

⁴⁴ Adam, above, n 6 at 161.

⁴⁵ Adam, above, n 6 at 161.

⁴⁶ Cocks, above, n 1 at 44.

⁴⁷ Cocks, above, n 1 at 45.

⁴⁸ As above.

⁴⁹ As above.

⁵⁰ The regulatory focus of the current Act is now much broader than it was when originally enacted. In particular, the Act was substantially amended in the 1980s to introduce a cooling-off period for residential sales below \$250,000 (this monetary limit was removed from 1 February 2004); increased pre-contractual disclosure and provisions relating to insurance if the property was damaged during the contract period. See Cocks, above n 1.

mortgage and could make an assessment about the risks of purchase.⁵¹ In addition, any mortgage could only relate to the property that was the subject of the sale, to ensure that the purchaser did not become entwined in the vendor's other obligations.⁵²

The Act also prohibited the sale of any land before the final stage of the subdivision process – that is, registration of the plan.⁵³ It also created the office of an arbitrator to resolve what Parliament had predicted could otherwise become complex (and costly) legal disputes.⁵⁴

On the implementation of the Act, Cocks concludes:

The introduction of the Act was the cause of much angst in the legal profession and real estate world. It challenged existing work practices and prohibited a method of selling that was entrenched in practice. ... but basically the objectives of the Act were absorbed into conveyancing practice and the problems created by successive terms contracts overcome.⁵⁵

Judicial interpretation of the Act

In the course of the literature review undertaken for this report, we also looked at literature and case law on the operation of the Act, as well as similar legislation in other jurisdictions of Australia.

Susan MacCallum, a Victorian academic, discusses the judicial interpretation of the words 'terms contracts'.⁵⁶ According to MacCallum, the wide judicial interpretation of this term has created the potential for many unsuspecting consumers and their advisers who fail to realise that what seems to be a simple contract for the sale of land is, actually, a vendor terms contract.⁵⁷

The Act defines a 'terms contract' in section 2(1) as:

an executory contract for the sale or purchase of land where the purchaser is

- (a) obliged to make two or more repayments to the vendor after execution of the contract and before he is entitled to a conveyance or transfer of the land; or
- (b) entitled to possession or occupation of the land before he becomes entitled to a conveyance or transfer of the land.

The definition in section 2(1) was specifically considered by Justice Hedigan of the Supreme Court of Victoria in *Australian Horizons (Vic) Pty Ltd v Ryan Land Co Pty Ltd*.⁵⁸ In the particular case, Hedigan J found that three successive agreements between the vendor and purchaser in relation to the sale of a single property constituted a 'terms contract'. Critically, on the basis that he construed the

⁵¹ Cocks, above, n 1 at 45.

⁵² As above.

⁵³ Cocks explains that this prohibition on sale until the subdivision process was complete 'was probably an over-reaction and was revisited and ameliorated in subsequent years.' See Cocks, above, n 1 at 46.

⁵⁴ Cocks, above, n 1 at 46. Note that there are only a few recorded decisions of this arbitrator during the 1960s and little evidence that the forum was frequently used.

⁵⁵ Cocks, above, n 1 at 46.

⁵⁶ MacCallum, Susan, 'Terms Contracts' (1994) 2 *APLJ* 139.

⁵⁷ As above, at 143.

⁵⁸ (1993) V ConvR 54-470.

agreements to be intended to be read together and under the various agreements provided for the purchaser to make two or more repayments to the vendor before title was transferred, His Honour found that they operated as a ‘terms contract.’

In the course of his judgment, Justice Hedigan referred to two High Court decisions which gave a ‘wide, even benign, construction’ to a similar definition in the Queensland legislation.⁵⁹ In *Wacal Developments Pty Ltd v Realty Developments Pty Ltd*, the High Court found that ‘payments’ includes payments of interest at regular intervals, between the deposit and final payment.⁶⁰ In *Braidotti v Queensland City Properties Ltd*, the High Court went further to find that other payments, which are not immediately referable to the price, could also be ‘payments’.⁶¹ In this case, a weekly amount paid by the purchaser to maintain the farming capabilities of the property in case the sale did not go ahead was held to be such a payment.⁶²

Stewart also notes that the wide definition of ‘terms contract’ can lead to what would otherwise be a simple sale contract being construed so as to be covered by the Act. For example, Stewart refers to a contract providing for the initial deposit to be paid in multiple instalments.⁶³ Where this is the case, says Stewart, the Act imposes the ‘strict requirements’ applicable to terms contracts on the vendor, including pre-contractual obligations to disclose any existing mortgages and restrictions on the right to mortgage the property following the sale. A failure to comply with these requirements ‘can result in the contract becoming voidable at the purchaser’s option at any time prior to the settlement, even on the day of the settlement.’⁶⁴

Stewart also discusses the operation of section 14 of the Act, which he describes as ‘a general ‘catch all’ section to thwart any attempt to contract out of its provisions.’⁶⁵

As Stewart notes, section 14(1) provides that if a terms contract is entered into in contravention of any of the provisions of the Act, it is voidable at the option of the purchaser. Section 14(2) further renders void any provision in a terms contract which attempts to exclude, modify or restrict any right conferred by the Act. Finally, section 14(3) provides:

any agreement whereby a person purports to waive any right which he may have under this Act to avoid a contract shall be void and of no effect.

As such, it is clear that the purchaser has quite significant rights of rescission under a vendor terms contract where the Act is not complied with.

Of course, the rights of a vendor to rescind a terms contract following a default on the part of a purchaser are also significant. This was noted by a Law Institute of Victoria committee considering suggestions by solicitors for amendments to the Act in the early 1980s as follows:

In the course of its review of the Act, the Committee noted that the legal consequences of rescission of a terms contract by the vendor due to default by the

⁵⁹ As above.

⁶⁰ (1978) 140 CLR 503.

⁶¹ (1990) 172 CLR 293.

⁶² See generally MacCallum, above, n 23.

⁶³ Stewart, above, n 4 at 1043.

⁶⁴ As above.

⁶⁵ Stewart, above n 4 at 1045.

purchaser differ fundamentally from the legal consequences of the exercise by a mortgagee of his rights under the mortgage following default by the mortgagor.

If, having rescinded the contract, the vendor resells the property, he is entitled, after payment of expenses incurred in the resale, to any increase in the value of the land and may, therefore, receive more than the original contract price.

In the case of a sale by a mortgagee, the mortgagee receives only the principal and interest secured by the mortgage, and any surplus funds, including any appreciation in value of the property.⁶⁶

The committee suggested that the rights of a vendor in terms contracts should be

the same as if he were a mortgagee exercising his rights under a mortgage, i.e. he would be entitled to receive only the amount due under the contract with any excess being returned to the purchaser.⁶⁷

Recent use of vendor terms contracts

The recent increase in the use of vendor terms contracts in the Australian residential housing market has been well documented. Such contracts are now also known as 'vendor financing', 'wrap financing' or 'wrapping'⁶⁸ and in the last five or so years have been increasingly used as a method of buying and selling a home.

In 2003, Bina Brown, writing in *The Australian*, noted the increase in vendor or wrap financing:

In just three years, about 300 "wrappers" have emerged, some with up to 60 homes, providing finance to potential home buyers at 1 or 2 per cent above the standard variable rate.⁶⁹

The increase in the incidence of vendor or wrap financing for residential housing has received particular attention from State governments.⁷⁰ There has also been concern amongst consumer advocates arising from the increasing use of vendor terms contracts by low-income and vulnerable consumers and examples of unfair contract terms used in such contracts.⁷¹

A number of commentators have discussed the divergence of views on whether consumers can stand to gain from vendor or wrap financing. Derkley notes:

According to promoters of the practice, everyone is a winner with wrapping. Buyers who would otherwise not be able to gain entry into the property market are given the chance to own their own homes. In many cases, the only deposit they may have to pay is their first-home-buyers grant. They are exempted from establishment and other loan fees. In two, or three years, they will have a payment history, and, they hope, equity in their property, which will mean they can refinance it more advantageously.⁷²

⁶⁶ 'Rescission of Terms Contracts of Sale' (1982) 56 LJ 358.

⁶⁷ As above.

⁶⁸ 'Wrap financing' or 'wrapping' are terms used in America.

⁶⁹ Brown, Bina, 'Vendor Finance – Housing Under Wraps', *The Australian*, 23 April 2003.

⁷⁰ See for example, *Credit contract consumers protected from unfair terms*, Media release from the Minister for Consumer Affairs (Victoria), 16 May 2004.

⁷¹ See for example, Consumer Credit Legal Service (Vic) Inc, *Submission to the Standing Committee of Consumer Affairs Working Party on Unfair Contract Terms* (11 March 2004) at 9-10.

⁷² Derkley, Karin, 'Under wraps' 2004 (July) *Personal Investor* 46 at 46.

For the wrapper, says Derkley, the primary benefit is a 'positive cashflow'. In most cases, the vendor will have their own mortgage on the property but will charge the purchaser between 0.5% and 5% more than the rate on the vendor's own mortgage.

Under most contracts, wrappers will also charge a premium on top of the price that he or she originally paid for the house.⁷³ This premium is generally not hidden – the buyer is usually told they are paying more than its market value. According to the wrappers, it aims to compensate 'for the fact that buyers are getting a fixed price in a property that may well have increased in value by the time they come to refinance.'⁷⁴ However, Derkley reports that one vendor terms promoter explained that by adding a premium to the amount the investor originally paid for the house, the vendor can ensure their own mortgage is repaid in a very short period of time.⁷⁵

In addition, Derkley states that, as most purchasers are first time buyers, vendors or wrappers can request a deposit in the form of the First Home Owner Grant (which, varying from jurisdiction to jurisdiction, can be as much as \$12,000).⁷⁶ Where many residential properties being sold by wrappers are in low cost housing areas, such as rural and regional areas and the outer suburbs of major cities, the First Home Owner Grant can go a long way to assist the vendor to purchase the property outright.

Several state governments consider that the alleged benefits of wrapping are not so straightforward. The ACT Commissioner for Fair Trading says:

Are you a first home buyer who will do anything to get into the rising housing market? If you are then don't let the dream of owning your own home make you sign a contract you might regret. For people desperately trying to get into the housing market the offer of signing a contract with a seller, without a mortgage, to make regular payments to the seller seems like an offer too good to be true – and this is often the case.⁷⁷

The New South Wales Office of Fair Trading has said that vendor financing arrangements 'have the potential to deprive vulnerable people of their hard earned savings'.⁷⁸ In a similar vein, the Victorian Attorney General has said that many of the contracts are exploitative.⁷⁹

The 2005 *Report of the Consumer Credit Review*⁸⁰ by James Merlino MP, commissioned by the Victorian Minister for Consumer Affairs, identified the following problem areas faced by purchasers of homes on vendor terms:

- Purchase prices can be significantly above the market value.
- Title to the property does not pass to the consumer until the last payment has been made.

⁷³ As above.

⁷⁴ As above.

⁷⁵ As above.

⁷⁶ In Victoria, eligible first home buyers who qualify for the Victorian Government \$7000 First Home Owner Grant may also be eligible for an additional First Home Bonus payment. A \$5000 bonus payment applies to contracts entered into between 1 May 2004 and 31 December 2005 and a \$3000 bonus payment applies to contracts entered into between 1 January 2006 and 30 June 2007. To be eligible to receive the Bonus payment, the property purchased must not exceed \$500,000. See generally www.sro.vic.gov.au

⁷⁷ Kelly, Elizabeth, 'Home buyers told to beware', *Canberra Times*, 7 September 2003.

⁷⁸ Derkley, above, n 39 at 47.

⁷⁹ As above.

⁸⁰ Merlino MP, James, *The Report of the Consumer Credit Review*, State of Victoria, 2006.

- There is a lack of clear information about the interest, fees and charges payable under the contract.
- In wrap arrangements, the consumer relies on the vendor to forward the instalment payments to the vendor's credit provider.
- The consumer faces major penalties for instalment payment defaults.
- There are restrictions on how the consumer can use the property.
- The consumer forfeits the First Home Owner Grant if they default and lose the house.
- The consumer risks losing all or most of the equity accrued from instalments paid to date if they are unable to continue the payments.
- The consumer has no right to benefit from any capital gain if the contract is terminated.⁸¹

The Merlino Report recommends that the *Sale of Land Act 1962 (Vic)* should be simplified to make the vendor finance protections it offers more accessible, and that the unfair contract terms provisions of Part 2B of the *Fair Trading Act 1999 (Vic)* should be extended to vendor finance.⁸² The *Government Response to the Report of the Consumer Credit Review* subsequently released by Minister Thompson supported both these recommendations.⁸³

Tim O'Dwyer, a Queensland solicitor and real estate advocate argues that consumers would be better off renting and saving the difference.⁸⁴ Under a vendor terms contract, says O'Dwyer, the obligation to maintain the property and to pay council rates, insurance and other outgoings vests with the purchaser.⁸⁵ By contrast, under a rental agreement, these responsibilities remain with the landlord.

Further, says O'Dwyer, many vendor-financing arrangements, especially those in jurisdictions that restrict their use, are provided under rent-to-buy contracts, which operate to deprive buyers from coverage of consumer protection legislation in each jurisdiction.⁸⁶ In many cases they contain terms and conditions that are onerous and oppressive.⁸⁷

Several newspapers have reported on the unfair outcomes of vendor terms mortgages for consumers. For example, one family in New South Wales was threatened with eviction after they missed just one weekly payment.⁸⁸ This was despite the fact the family had paid \$60,000 plus interest in repayments (on a

⁸¹ As above, at 157-8.

⁸² As above, at 160.

⁸³ Consumer Affairs Victoria, *Government Response to the Report of the Consumer Credit Review*, State of Victoria, 2006, at 25-6.

⁸⁴ Derkley, above, n39 at 47.

⁸⁵ As above.

⁸⁶ As above. O'Dwyer may be referring to the Uniform Consumer Credit Code (*the Code*). There is some lack of clarity around whether the Code applies to vendor terms contracts but it is clear that it does not apply to rent-to-buy contracts, as the latter would not be defined as 'credit' under the Code. In addition, some rent-to-buy contracts may be excluded from the consumer protection legislation covering residential tenancies.

⁸⁷ As above.

⁸⁸ Garnaut, John, 'In a bind as wrap finance hits home', *The Sydney Morning Herald*, 24 December 2004.

\$93,000 house), repainted the house inside and out, replaced much of the roof and guttering, and planted a vegetable garden.⁸⁹

Another family - a husband, wife and six children - fell behind in their payments after the wife was diagnosed with breast cancer and the husband lost his job.⁹⁰ While trying to manage the arrears and ongoing payments, but still \$2,000 behind, the vendor offered the family a 'special deal': to forego the arrears if the family vacated plus \$1,000 for moving costs.⁹¹ However, in that case the family had made more than three years worth of payments towards the house, spent substantial sums on house repairs and maintenance and had achieved equity of around \$50,000.⁹²

Generally, promoters of vendor or wrap financing say that the principal benefit of wrapping for the consumer is that within just two or three years, they can move into the mainstream mortgage market.⁹³ In that time, say promoters, the consumer should obtain enough equity in the property to ensure that they become eligible for mainstream finance in circumstances where they would not otherwise be ever likely to qualify.

Nevertheless, argues O'Dwyer, this outcome is only likely in a market of increasing housing values and not in one currently showing signs of flattening out.⁹⁴ O'Dwyer explains:

that means that people are going to have to stay in this very high-interest arrangement for a lot longer than they thought.⁹⁵

Real estate consumer advocate Neil Jenman, a vocal critic of wrapping, also says that a purchaser will only achieve equity after a 'freak boom or years of battling to make payments.'⁹⁶ Jenman is scathing of wrappers and says:

Indeed, the home-buyers who are rejected by the banks (because the banks feel they cannot afford bank interest rates) are the same buyers who are then preyed upon by scavenging wrappers. The wrappers borrow money from the banks and re-lend it to the buyers at a higher interest rate.⁹⁷

Overall he considers that wrap loans are exploitative:

Let's compare any of the major banks with wrappers.

First, a bank. If a home is worth \$300,000 and the loan is \$200,000, the borrowers have \$100,000 in equity. If they default ... the bank will sell the home and the equity is given to the borrowers.

Now, let's look at a wrap loan. If the Borrowers default, the wrap sharks snatch the equity and give the borrowers nothing. In the above example, it's the wrappers who receive the \$100,000 in equity. That's the exact opposite to a bank.

⁸⁹ As above.

⁹⁰ Brown, above, n 36.

⁹¹ As above.

⁹² As above.

⁹³ Derkley, above, n 39 at 47.

⁹⁴ As above at 49.

⁹⁵ As above at 49.

⁹⁶ Jenman, Neil, 'Wrappers are snatchers not bankers – How the property loan sharks cheat buyers and banks'. Article available at www.jenman.com.au/NewsArticles1.php?id=128.

⁹⁷ As above.

This is the reason why loan sharks are drawn to wrapping. They sink their teeth into the buyers in three ways – a loaded price for the home, a loaded interest rate for the repayments – and then, if the borrowers miss payments (even one payment) at any time during the life of the loan agreement, the wrappers can kick the borrowers out and snatch the equity.⁹⁸

The Victorian Government considers that in many instances, consumers are expected to fail:

Vendor terms contracts are often the only way individuals with a poor credit rating or on a low income can purchase real estate... Many of these contracts were set up to fail with unrealistic repayments and interest rates well above the average.⁹⁹

According to Jenman, consumers are likely to fail for the simple fact that they are unlikely to be able to afford the arrangement in the first place:

There is a reason these people can't get mortgages from banks. They can't afford it. Why suddenly would they be able to afford a loan at 2 per cent higher than bank rates?¹⁰⁰

The Reserve Bank has also been reported as saying that high-interest vendor finance is offered to people who cannot get loans from traditional finance providers.¹⁰¹ According to the Reserve Bank, in such arrangements, people stand to lose their houses, their First Home Owner Grant and any payments under the contract.¹⁰²

Anthony Cordato, a Sydney solicitor who reportedly advises many investors in relation to vendor terms contracts, says wrappers are servicing three types of homebuyers: small business owners with no financial track record and who do not qualify for a low document loan; those without a deposit; and, the credit impaired (usually former bankrupts and people with defaults listed on their credit records).¹⁰³ He acknowledges that there will always be criticisms, 'because wrapping involves the fringe areas of the market.'¹⁰⁴ However, Cordato also says that market forces will take care of those charging exorbitant interest rates:

Charging more is just going to send the purchaser broke. And evicting a defaulting purchaser is more difficult and expensive than it is worth. What you're aiming for is to have them pay you out as soon as possible.¹⁰⁵

Generally, Cordato considers that the *Uniform Consumer Credit Code (the Code)* offers broad protection to consumers through its disclosure requirements. He admits, nevertheless, that wrapping is high risk and consumers can lose when, for example, partners separate or the primary income earner loses their job.¹⁰⁶ In most cases, says Cordato, the major issue is a lack of independent advice about the viability of the arrangement and the legal obligations under the contract:

⁹⁸ As above.

⁹⁹ 'Credit contract consumers protected from unfair terms', Media release from the Minister for Consumer Affairs (Victoria), 16 May 2004.

¹⁰⁰ Royall, Ian, 'Government wise to dodgy property deals', *Herald Sun*, 17 May 2004.

¹⁰¹ Daly, Martin, 'Putting the real back in estate', *The Age*, 29 November 2003.

¹⁰² As above.

¹⁰³ Dunlevy, Maurice, 'Not rapt in taking rap for wraparounds' *The Australian* 28 June 2003.

¹⁰⁴ As above.

¹⁰⁵ Derkley, above, n 39 at 49.

¹⁰⁶ Brown, above, n 36.

The main problem arises when people want to take shortcuts and sign purchases on the kitchen table, when they should always tell them they need independent advice.¹⁰⁷

And elsewhere he has noted:

There is a possibility, for instance, that a purchaser may not realise that they need to have a caveat written into the contract that prevents the vendor reselling the home without their permission. Purchasers have to make sure that they get their own independent legal advice before entering into any arrangement of that kind.¹⁰⁸

Indeed, the Victorian Consumer Credit Legal Service (**CCLS**) has said that increasingly in the case of vendor terms contracts and rent-to-buy property contracts, purchasers are 'not receiving the independent legal advice that normally accompanies entry into [sale of land] contracts.'¹⁰⁹ In a submission advocating for the extension of the unfair contracts provisions in the *Fair Trading Act 1999* (Vic) to cover particular credit contracts, the CCLS argues:

Alternative methods of funding real property purchases are increasing, and such methods often fall outside the protection offered to consumers in respect of real estate purchasing. ... licensed real estate agents may not be involved, the purchaser may not have the benefit of independent legal advice, or legal advice at all, and the purchaser may not be sourcing a loan from a traditional lender. Vendor terms and rent to buy contracts have produced some of the most problematic instances of unconscionable dealings in recent times.¹¹⁰

While there is general agreement that the Code applies to vendor terms contracts, a number of commentators have noted the potential for non-compliance with consumer protection legislation. Indeed, wrappers themselves acknowledge that there are operators out there who willingly break the law:

Unfortunately, not all investors are out to create win-win deals.

Sadly, there are a few mavericks that blatantly break the law and need to be brought to justice.¹¹¹

As far as the Victorian legislative regime is concerned, the Solicitors Liability Committee has noted that solicitors sometimes fail to recognise a terms contract where one exists or are simply unaware of the operation of the provisions of the Act.¹¹²

While the negatives involved in wrapping for the consumer are broadly noted, beneficial outcomes for the wrapper are also not necessarily guaranteed. Steve McKnight of PropertyInvesting.com has been reported as saying:¹¹³

¹⁰⁷ As above.

¹⁰⁸ Derkley, above, n 39 at 49.

¹⁰⁹ Consumer Credit Legal Service (Vic) Inc, 'Submission to the Standing Committee of Consumer Affairs Working Party on Unfair Contract Terms', 11 March 2004 at 9.

¹¹⁰ Consumer Credit Legal Service (Vic) Inc, above, n 38 at 9.

¹¹¹ Brown, above, n 36.

¹¹² Milne, Miranda, 'Recognising terms contracts' (1995) 69 *LJ* 439; Milne, Miranda, 'Terms Contracts and s 6 Requirements' (1996) 70 *LJ* 67.

¹¹³ See www.propertyinvesting.com/resources/5.html. PropertyInvesting.com markets 'The Wrap Kit' described on its website as 'Australia's most comprehensive vendor finance resource available and a product considered to be #1 by discerning investors looking for quality information at a budget conscious price.'

Vendor finance is to property investment what options trading is to the stock market – higher returns can be achieved but there's also arguably more risk.¹¹⁴

Indeed, the promotional material of PropertyInvesting.com warns potential investors:

IMPORTANT! Let me be very clear ...wrapping is not a fast buck, no-effort, magic pill solution for getting rich quick. It's a complex investment strategy demanding skill and expertise with substantial emotional and financial risks¹¹⁵

A case in point - Kellie Brown

In 2004, a Victorian Magistrate awarded a single mother of three children, Kellie Brown, a substantial amount in damages in what has been heralded a 'test case' for vendor terms contracts.¹¹⁶ The damages order was on the basis that Ms Brown had entered the contract as a result of misleading and deceptive and unconscionable conduct.¹¹⁷

In June 2001, Ms Brown bought a house for \$55,000 under a terms contract from a vendor company, which operated through a group of related companies. At the time of the sale, Ms Brown had told the vendor that she was a pension recipient and could not afford to pay more than \$130 per week.¹¹⁸

Ultimately, Ms Brown agreed to the contract for the particular house on the basis of representations made to her by one of the vendor's directors and an officer of the vendor. Those representations included that the house had just come on the market, would be in demand and having regard to its condition, was being offered for a very reasonable price.¹¹⁹ She was also offered a \$2,000 discount for early settlement.¹²⁰

In fact, the house had been on the market for years, with an asking price of \$12,000.¹²¹ It required substantial repairs.¹²² Some period into the contract, Ms Brown became aware that the vendor had paid not even half the price she had bought the home for. Following a complaint to Consumer Affairs Victoria, an action was brought against the vendor and its directors in the Magistrates' Court in Horsham.

The Court found that the vendor had engaged in misleading and deceptive conduct and unconscionable conduct in breach of the *Fair Trading Act 1999* (Vic). The Court found that the sales pressures exerted on Ms Brown, prevented her from looking around for another property, including examining and comparing other prices being offered by real estate agents, seeking independent advice and seeking information to ascertain that she was paying too much.¹²³ In a Media Release, the Victorian Government said of the Kellie Brown case:

¹¹⁴ Brown, above, n 36.

¹¹⁵ See www.propertyinvesting.com/resources/5.html

¹¹⁶ Daly, above, n 64. Then Minister for Consumer Affairs, John Lenders, is reported as referring to the case as a 'test case that could lead to further prosecutions'.

¹¹⁷ Media release, above n 62.

¹¹⁸ Daly, above, n 64.

¹¹⁹ As above.

¹²⁰ As above.

¹²¹ As above.

¹²² As above.

¹²³ Media release, above, n 62.

Ms Brown was also prevented from making a considered decision by their insistence that she had to pay a deposit immediately to secure the house it was said was in demand. In fact, the house had been on the market for at least seven years.¹²⁴

Further, at the time of contracting, the vendor was not the registered proprietor.¹²⁵ The Court also ordered the vendor to cease representations that they were the owners of registered properties when they were not.¹²⁶

On the outcome of the Court's decision, then Minister for Consumer Affairs, The Honourable John Lenders said:

This is a significant result that sends a message to property companies dealing with vulnerable consumers.¹²⁷

And further:

The Bracks Government will have no hesitation in supporting further court action, if required, to prevent unacceptable conduct relating to vendor terms contracts.¹²⁸

The decision was upheld on appeal to the Supreme Court of Victoria.¹²⁹

¹²⁴ As above.

¹²⁵ Daly, above, n 64.

¹²⁶ Media release, above, n 62.

¹²⁷ As above.

¹²⁸ As above.

¹²⁹ *Astvilla v Director of Consumer Affairs* [2006] VSC 289

Chapter Four – Case law

McKenzie & Anor v Smith & Anor; Lenehan v Smith & Anor [1998] ASC 155-025

This decision of the Commercial Tribunal of New South Wales involved two matters heard currently, involving two separate vendor terms contracts, both entered into with the Respondent Smith as vendor. In both cases, the properties in question were subject to an underlying mortgage entered into by the Respondent with a third party financier.

The Respondent defaulted under these mortgages and the Applicants, who had failed to make payments under their respective terms contracts, vacated their respective dwellings.

Each Applicant subsequently sought orders from the Tribunal that the Respondent pay civil penalties arising out of breaches of the *Consumer Credit (New South Wales) Code*, and that the contracts be found unjust and reopened under s 71 of the Code.

The Tribunal was first called upon to consider whether the contracts were regulated credit contracts under the Code. The Tribunal found that the contracts were instalment contracts under which an obligation to pay is immediately incurred but that enforcement of that obligation was postponed. Such an arrangement did not involve contingent or future debts, which do not fall within s 4 of the Code, but rather, existing debts payable at a future date: nothing more after entry into the contracts is required to create the requisite legal obligation or duty to pay.

Accordingly, the contracts did involve the provision of credit to which the Code applied and the contracts were credit contracts regulated by the Code.

The Tribunal went on to consider whether or not the contracts were unjust within the meaning of s 70 of the Code. The Tribunal found that the following factors, amongst others, contributed towards a finding of unjustness:

- a) the contracts provided for the vendor to encumber the subject premises with competing interests without the consent or knowledge of the purchasers;

- b) interest charged under the contracts constituted prohibited monetary liabilities under ss 21(1)(c) and 26(1)(a) of the Code;
- c) the form of the contracts were derived from the standard forms of contract for land sales of the Law Society of New South Wales, which gave the transactions an appearance of legality when in fact the transactions were entered into in contravention of the Code;
- d) the vendor made no enquiries of the purchasers as to their ability to pay.

Exercising its powers under s 71, the Tribunal set aside the contracts ab initio, requiring the Respondent to repay amounts paid by the Applicants, less a fair rental charge for the periods of occupation of the subject premises.

Astvilla v Director of Consumer Affairs [2006] VSC 289

In 2004, a Victorian Magistrate awarded a single mother of three children, Kellie Brown, a substantial amount in damages in what has been heralded a 'test case' for vendor terms contracts.¹³⁰ The damages order was on the basis that Ms Brown had entered the contract as a result of misleading and deceptive and unconscionable conduct.¹³¹

In June 2001, Ms Brown bought a house for \$55,000 under a terms contract from a vendor company, which operated through a group of related companies. At the time of the sale, Ms Brown had told the vendor that she was a pension recipient and could not afford to pay more than \$130 per week.¹³²

Ultimately, Ms Brown agreed to the contract for the particular house on the basis of representations made to her by one of the vendor's directors and an officer of the vendor. Those representations included that the house had just come on the market, would be in demand and having regard to its condition, was being offered for a very reasonable price.¹³³ She was also offered a \$2,000 discount for early settlement.¹³⁴

In fact, the house had been on the market for years, with an asking price of \$12,000.¹³⁵ It required substantial repairs.¹³⁶ Some period into the contract, Ms Brown became aware that the vendor had paid not even half the price she had bought the home for. Following a complaint to Consumer Affairs Victoria, an action was brought against the vendor and its directors in the Magistrates' Court in Horsham.

The Court found that the vendor had engaged in misleading and deceptive conduct and unconscionable conduct in breach of the *Fair Trading Act 1999* (Vic). The Court found that the sales pressures exerted on Ms Brown, prevented her from looking around for another property, including examining and comparing other prices being offered by real estate agents, seeking independent advice and seeking information to

¹³⁰ Daly, above, n 64. Then Minister for Consumer Affairs, John Lenders, is reported as referring to the case as a 'test case that could lead to further prosecutions'.

¹³¹ Media release, above n 62.

¹³² Daly, above, n 64.

¹³³ As above.

¹³⁴ As above.

¹³⁵ As above.

¹³⁶ As above.

ascertain that she was paying too much.¹³⁷ In a Media Release, the Victorian Government said of the Kellie Brown case:

Ms Brown was also prevented from making a considered decision by their insistence that she had to pay a deposit immediately to secure the house it was said was in demand. In fact, the house had been on the market for at least seven years.¹³⁸

Further, at the time of contracting, the vendor was not the registered proprietor.¹³⁹ The Court also ordered the vendor to cease representations that they were the owners of registered properties when they were not.¹⁴⁰

On the outcome of the Court's decision, then Minister for Consumer Affairs, The Honourable John Lenders said:

This is a significant result that sends a message to property companies dealing with vulnerable consumers.¹⁴¹

And further:

The Bracks Government will have no hesitation in supporting further court action, if required, to prevent unacceptable conduct relating to vendor terms contracts.¹⁴²

The decision was upheld on appeal to the Supreme Court of Victoria.¹⁴³

Lewis v Ormes (Commercial) [2005] NSWCTTT 481 (18 July 2005)

David and Corinda Lewis were both unemployed and together they had four children. David had three other children from a previous relationship. He also had a diagnosed mental illness, received the disability support pension and had a poor work history. Corinda had only been employed for a few years, having spent the majority of her adult life caring for her four children.

David and Corinda had always rented accommodation. They had attempted to secure finance from traditional lending sources but were unable to obtain a loan due to their poor savings and work history.

In July 2002 however, they saw a newspaper advertisement offering people the opportunity to own their own home without a deposit. Following discussions with the advertised company, David and Corinda entered into a vendor terms contract with one Darren Ormes for the purchase of 15 Wybalena Ave, Dapto in New South Wales.

The amount of credit was \$188,000.00, being a purchase price of \$200,000.00, less \$12,000.00 deposit paid by the applicants. This amount was to be repaid by way of 300 monthly instalments (initially set at \$1,755.00 at a variable rate of 9.2 % p.a.), payable over 25 years. The contract also contained the following clause:

¹³⁷ Media release, above, n 62.

¹³⁸ As above.

¹³⁹ Daly, above, n 64.

¹⁴⁰ Media release, above, n 62.

¹⁴¹ As above.

¹⁴² As above.

¹⁴³ *Astvilla v Director of Consumer Affairs* [2006] VSC 289

- 9.5 The following shall apply upon the termination:
- (i) the Purchaser shall forfeit to the Vendor and the Vendor shall keep the deposit and all Instalments paid under this Contract, as liquidated damages for non-performance of the Contract without necessity for the Vendor to give notice or to do any other thing; and
 - (ii) the Purchaser shall have no claim against the Vendor for the cost or value of any improvements made by the Purchaser to the property; and
 - (iii) the termination shall not extinguish or affect the Vendor's entitlement to recover all moneys done up to the termination or the reasonable enforcement charges.

Mr Ormes did not, prior to entering into the contract, make proper enquiries about the Lewises' savings history, living costs, rental history, employment history or credit history.

In general, Mr Ormes did not make enquiries designed to ascertain the ability of the Lewises to afford and maintain payments under the contract. If such investigation had been undertaken he would have been aware that David and Corrinda had never at any time in their lives saved any significant amounts of money, had never successfully borrowed and repaid any credit, had never been employed on a consistent basis, had never been able to maintain stable rental accommodation, had never paid more than \$260.00 per month as accommodation expenses, and did not present as people who had good prospects of making monthly payments of \$1,755.00 over an extended term

The Lewises entered into possession of the premises during August 2002.

From June 2004 onwards David and Corrinda experienced financial difficulties as a result of unemployment and fell behind in instalment payments. They received a termination notice in September 2004 and sought legal assistance. They lodged an application with the NSW Consumer Trader and Tenancy Tribunal seeking orders reopening the contract under s 71 of the *Consumer Credit Code* (**the Code**) on the basis that it was unjust. David and Corrinda left the premises on 8 April 2005.

The Tribunal found that the vendor terms contract was a credit contract within the meaning of the *Consumer Credit Code*.

The Tribunal also found that:

- David and Corrinda were relatively unsophisticated in matters of finance and real property as compared to Mr Ormes;
- they approached Mr Ormes as they were desperate to acquire a residential property to reside in and even more desperate as none of the mainstream lenders would afford them the finance requested to acquire such a property;
- any inequality in bargaining power was tipped largely in Mr Ormes' favour; and
- the probability of David and Corrinda being able to negotiate the provisions of the contract or indeed negotiate and/or reject any of its provisions was negligible.

The Tribunal did find however that the Lewises received independent legal advice prior to entry into the contract, and that the advice warned that they would not own the property until the final payment had been made.

In respect of the transaction itself, the Tribunal found that the terms of clause 9.5 disclosed above were not justified in respect of the risks undertaken by Mr Ormes.

The Tribunal concluded that, on the basis of the failure to make the necessary enquiries in respect of Lewises' ability to pay instalments of at least \$1,600.00 per month for 25 years, the inevitability of the only result this failure to enquire would cause and the draconian provisions of Clause 9.5, the contract was unjust and ought to be re-opened.

The Tribunal ordered that Mr Ormes pay to David and Corrinnda compensation of \$28,630.00, being the difference between the amount paid under the contract, and notional rent payable for the property for the period of occupancy.

An appeal by Mr Ormes to the Supreme Court of New South Wales was dismissed.

Director of Consumer Affairs Victoria v Geeveekay Pty Ltd (Credit) [2005] VCAT 555; [2006] VCAT 793

A number of decisions have arisen out of litigation initiated by the Director of Consumer Affairs Victoria against Latrobe Valley-based vendor terms operator Geeveekay Pty Ltd, and its directors Geoff and Veronica Keogh. As part of its business, Geeveekay (or in some cases, the directors in their personal capacities) entered into 46 contracts for the sale of land on vendor terms with a number of different purchasers.

In November 2004, the Director of Consumer Affairs applied to the Credit List of the Victorian Civil and Administrative Tribunal for declarations that Geeveekay breached certain key requirements of the *Consumer Credit (Victoria) Code* and for orders that Geeveekay must pay civil penalties in connection with those breaches.

In the decision of *Director of Consumer Affairs Victoria v Geeveekay Pty Ltd (Credit)* [2005] VCAT 555, the Tribunal considered Geeveekay's application to strike out the Director's claim on the basis that the contracts were not regulated by the Code because they were not contracts for the provision of credit within the meaning of s 4 of the Code, which reads:

- (1) For the purposes of this Code, "credit" is provided if under a contract--
 - (a) payment of a debt owed by one person (the debtor) to another (the credit provider) is deferred; or
 - (b) one person (the debtor) incurs a deferred debt to another (the credit provider).

The respondents relied upon the decision of Dixon J in *MacDonald v Denys Lascells Ltd* (1933) 48 C.L.R 457 at pp.475-6 in establishing that instalment contracts for the sale of land do not create debts or deferred debts:

As a general rule, on the failure or refusal of a purchaser to complete an executory contract for the purchase of land, the vendor is not entitled to sue for the purchase money for the debt. He is entitled merely to sue for specific performance or for

damages for loss of his bargain. It is only when the contract has been completed by the execution and acceptance of a conveyance that unpaid purchase money may become a debt and can be recovered accordingly...The general rule, however, that in an executory contract for the sale of land, the vendor cannot sue for the price is excluded when a contrary intention is shown by the express terms of the contract. And it seems established by authority that a contrary intention is sufficient shown in all cases in which, by the express terms of the contract, purchase money or any part thereof is made payable on a fixed day, not being the agreed day for the completion of the contract by conveyance. In all cases, the purchase money or such part thereof becomes on the day so fixed for its payment, a debt immediately recoverable by the vendor irrespective of the question of whether a conveyance has been executed, and notwithstanding the fact that the purchaser may have repudiated the contract.

The respondents argued that the obligations to pay the instalments due under their terms contracts arise only upon the date of each payment, and that such an arrangement involved the creation of future debts, rather than deferred debts.

The Tribunal, at [40], did not accept *MacDonald's* case as authority for the proposition that all instalment contracts for the sale of land only create future debts with the debt constituted by each instalment when it becomes due. In the context of a strike out application however, the Tribunal was not required to ultimately determine this point of law.

The Tribunal merely found therefore that the respondents had failed to establish that the Director's case was manifestly hopeless, and the matter was set down for further hearing.

The subsequent decision of *Director of Consumer Affairs Victoria v Geeveekay Pty Ltd (Credit)* [2006] VCAT 793 conclusively determined that the transactions constituted the provision of credit to which the Code applied. At [38]-[43] of that decision, McKenzie DP considered an exemplar contract and held that this was so for two major reasons:

First, on its proper construction, I am satisfied that the contract of sale makes the balance of the purchase money (that is, less the \$2000 deposit) immediately owing on the date of execution of the contract. This is indicated by the use of the word "owing" in respect of that balance in various parts of the contract, and by the fact that the contract obliges the purchaser to pay interest on the part of the balance which is unpaid. The instalments pay the interest and go towards the reduction of the balance. On its proper construction, the immediate payment of the whole of the balance is deferred so that it is payable by 360 instalments.

I do not consider that it is correct to characterise this arrangement as the transformation of an immediately due debt into a series of smaller debts, each being the amount of an instalment...

...

Second, the contract of sale has the effect that as between the purchaser and vendor, the mortgage and the loan contract between the Keoghs (as borrower and mortgagor) and the Bank of Melbourne (as lender and mortgagee) has effect as if the Keoghs were the lender and mortgagee and Ms Rand was the mortgagor or borrower. It does not have that effect as between the Keoghs and the Bank of Melbourne. Bank of Melbourne is not a party to the contract of sale. Indeed the particulars of the mortgage recite that Bank of Melbourne has not consented to the purchaser under the contract of sale assuming the vendor's obligations under the mortgage. But as between the Keoghs and Rand, this is the effect of the contract of sale.

...

These arrangements clearly involve credit...

McKenzie DP also observed at [44] that the contract documents conformed to the disclosure requirements of the Code and that, while this was not determinative, it indicated that both parties believed the transaction to be regulated by the Code.

In dealing with the application to the Geeveekay transactions of the *MacDonald* principle articulated above, the Tribunal stated:

The issue here is not whether each instalment constitutes a debt incurred when the contract was entered into and which is then deferred, or whether it arises at some later date. These transactions made the balance of purchase money a debt on the entry into the contract. That debt arose when the contract was entered into. The payment of that debt was then deferred so that the debt was payable by instalments due on fixed dates.

The Tribunal found therefore that the Code applied to the transactions in question. The matter in its entirety, including the respondents' liability to pay civil penalties, is yet to be ultimately determined.

Impact of case law on industry practices

While not vast, the available case law shows that there are legal remedies available that can address some of the major concerns identified in vendor terms contracts. The decisions outlined above should send a clear message to vendors that they could face financial loss if they:

- do not comply with the UCCC;
- do not assess the purchaser's capacity to pay;
- include an unfair term in the contract;
- mislead the purchaser in relation to the value of the property.

However, it is our experience that many consumers, particularly lower income, disadvantaged consumers, are either unable, or unwilling to assert their rights in a legal forum. While lack of legal advice and representation is often a major factor, we have found that many consumers are reluctant to issue legal proceedings even where they are offered free legal representation.

This is a key problem in using the law to address a range of practises that impact on disadvantaged consumers, and requires broader consideration of options to ensure that the law is effective in providing remedies for all consumers.

Chapter Five – Conclusions and recommendations

In theory, there is some attraction in the concept of using vendor terms contracts to assist consumers who are unable to finance a home, and to make money for investors at the same time.

However, the sale of overpriced, low value regional properties to disadvantaged, low-income consumers, combined with many of the legal problems that arise with these agreements raises a range of problems for the purchasers.

There has recently been a decrease in these types of contracts, and they appear to be losing favour with investors – and possibly consumers – due to the slow-down in the property market and perhaps due to publicity about a number of legal cases. However, the popularity of this type of agreement has risen and fallen in the past, and we have little doubt that this type of agreement will emerge again. It is therefore important that government and regulators learn from our recent experience and are prepared for another wave of wrapping.

Recommendation One: amend the eligibility criteria for First Home Owner Grants to restrict access by purchasers of real estate on vendor terms.

Of the twelve case studies canvassed in this report, all involved purchasers who used their First Home Owner Grant (**FHOG**) as a deposit under their vendor terms contract.

One of the most common indicia of injustice arising out of these case studies is that the purchasers were unable to afford the scheduled repayments under the vendor terms contracts they entered into.

It appears that the FHOG acts as a financial incentive for vendors to sign up purchasers who do not have cash reserves for a deposit and, most importantly, are unable to afford repayments under the vendor terms contract.

Victoria – eligibility for FHOG

In Victoria, eligibility for the FHOG determined in accordance with the criteria set out in the *First Home Owner Grant Act 2000* (Vic) (**the FHOG Act**). The FHOG Act restricts the availability of the FHOG by requiring the fulfilment of criteria in respect of the applicant, and in respect of the transaction.

To focus upon the later set of criteria, a vendor terms contract is an 'eligible transaction' within the meaning of s 13 of the FHOG Act in that it is a contract made for the purchase of a home in Victoria. Sub-section 13(2) clarifies that a 'contract for the purchase of a home' is a contract for the acquisition of a relevant interest in land on which a home is built. Paragraph 5(2)(f) of the Act confirms that a 'relevant interest' is an interest as purchaser of an estate in fee simple under a terms contract.

Under s 7(1)(b)(ii) of the Act, the FHOG is payable to a successful applicant upon completion of an eligible transaction.

Most relevantly for the present inquiry, s 13(5)(a)(i) of the Act states that an eligible transaction is completed when the purchaser (or a nominee of the purchaser) becomes entitled to possession of the home under the contract.

Accordingly, the situation of a purchaser under a vendor terms contract is to all intents and purposes identical to that of a purchaser pursuant to a 'standard' contract for the sale of real property: the FHOG is payable at the time possession is granted.

Queensland – eligibility for FHOG

In Queensland, the situation is somewhat different. In that state, eligibility for the FHOG is determined by the Commissioner for State Revenue in accordance with Practice Direction (First Home Owner Grant) 2.2, the full text of which can be read at Appendix Three.

The intention of the Practice Direction, issued on 18 October 2004, was in fact to make the FHOG available to vendor terms purchasers, who are denied eligibility under the *First Home Owner Grant 2000* (Qld).

However, the Practice Direction creates eligibility criteria for vendor terms purchasers that are over and above those that must be satisfied in respect of contracts for sale of real property where a right to possession and an entitlement to be registered as proprietor passes simultaneously.

Under the Practice Direction, the Commissioner will exercise a discretion to pay the grant to purchasers under instalment contracts prior to completion of the contract if all of the following circumstances exist:

- (a) The contract has been in existence for at least one (1) year.
- (b) The purchaser is not in default under the contract so that the vendor has no right to cancel the contract.
- (c) The purchaser has occupied the home as their principal place of residence under the contract.
- (d) The purchaser has paid to the vendor an amount of not less than \$7,000 or
an amount which is equal to at least ten per cent (10%) of the purchase

price, whichever is the greater. In calculating the amount paid to the vendor, any of the following can be taken into account:

- (i) any deposit paid by the purchaser to the vendor;
- (ii) any interest paid by the purchaser to the vendor; and
- (iii) any other amounts which have been paid and deducted from the balance of the purchase price.

Accordingly, under the Queensland regime, payment of the FHOG is deferred for one year, and is not granted to any applicant who has failed to make certain minimum financial contributions towards the subject property. These rules ensure that the FHOG is unable to be used as a deposit under a vendor terms contract.

By denying immediate access to funds available under the FHOG, these more stringent criteria effectively remove the financial incentive which drives certain vendor terms operators to enter into contracts with purchasers who are unable to afford their repayments.

Additionally, restricting access to the FHOG in the manner shown above would reduce the incidence of purchasers applying the FHOG to transactions that have a high likelihood of termination prior to completion and exhausting their eligibility for the FHOG in the process.

This report recommends that the eligibility criteria for FHOGs in respect of vendor terms contracts be amended to conform with the criteria currently in place in Queensland.

In Victoria, the availability of the FHOG has provided immediate profit – and therefore added incentive – for those investing in “wrapping”. In particular, it reduces the need for the vendor to ensure the purchaser has the ability to pay, and encourages unrealistic “wrapping” agreements.

Recommendation Two: prohibit ‘wrapping’, ie prohibit entry into vendor terms contracts in respect of properties which are already subject to a mortgage

Historically, specific regulation of vendor terms contracts arose as a consequence of government concern over the vulnerability of purchasers at the lower end of a string of vendor terms contracts. Such purchasers could find themselves ejected from their homes without any act of default on their part, solely because a vendor up the chain failed to make timely payments. In order to remedy this situation, vendor terms contracts were not allowed to be entered into in respect of properties that were already subject to another, prior, vendor terms contract.

The vulnerability of such purchasers is being mirrored today by the position of purchasers under vendor terms contracts for properties which are the subject of a mortgage entered into by the vendor.

Common to both situations is the possibility that, if the vendor defaults on his or her mortgage, the purchaser may be evicted without any event of default on their part under the separate vendor terms contract.

This risk flows from a feature inherent in all vendor terms contracts, and unarguably prejudicial to all purchasers: the fact that registered title to the property does not pass with possession. The particular vulnerability articulated above is unique to the subset of vendor terms contracts known as ‘wrapping’, which feature a vendor’s mortgage underlying the subsequent vendor terms sale.

Compounding this vulnerability is the fact that vendor terms contracts are an unusual and oft-misunderstood mechanism for conveyance of real property rights, and many vendor terms purchasers are entirely ignorant of the fact that they will not receive a transfer of title at the time they take possession of the subject property.

The *Sale of Land Act 1962* has a number of provisions which aim to protect purchasers under a vendor terms contract subject to an underlying mortgage. Most notably, s 4 confers upon a purchaser under a vendor terms contract a right to compel a vendor to transfer title to the subject property in exchange for the granting of a mortgage securing the funds owed to the vendor. A more detailed discussion of regulation of vendor terms contracts under that Act is contained in Chapter Two of this report.

However, evidence in this report shows that these safeguards are ineffective in remedying injustices perpetuated on vulnerable and disadvantaged consumers. This failure is present primarily because vulnerable and disadvantaged are unlikely to be aware of these safeguards in order to benefit from their protection and further, even where purchasers are aware of these safeguards, exercising the rights thereby conferred requires positive action on the part of the purchaser, and possibly recourse to professional legal advice and representation. Further, where a third party mortgagee is involved (as is the case with wraps), the mortgagee may be unaware of the wrap agreement and may challenge the purchaser’s rights. Moreover, with particular regard to s 4 of the *Sale of Land Act 1962*, low-income purchasers would not all be able to afford to pay the stamp duty costs associated with a transfer of title.

By definition, vulnerable and disadvantaged consumers are the least likely to pursue such self-help remedies.

Accordingly, it is the recommendation of this report that the *Sale of Land Act 1962* be amended to prohibit entry into vendor terms contracts in respect of real property already subject to a mortgage. Such an amendment would merely operate as a blanket enforcement of a right already given to purchasers under s 4 of that Act but would, by lifting the onus from purchasers to positively exercise that right, confer protection upon the most vulnerable and disadvantaged purchasers in the market.

Even if a wrap sale is otherwise appropriate (for example, regarding the purchaser’s understanding of the agreement and ability to maintain financial obligations), the fact that a lender holds a mortgage relating to the vendor’s loan places the purchaser in a vulnerable position. If the vendor fails to make payments, or otherwise breaches terms of the mortgage, the mortgagee’s rights take priority over the rights of the purchaser.

Recommendation Three: create awareness of potential problems with vendor terms amongst low-income potential first home buyers

As discussed above, many of the problems discussed in this report are caused or exacerbated by the fact that vendor terms contracts are comparatively unusual mechanisms for purchasing real property. It is submitted that most potential home owners understand the essentials of how a contract for sale of real property in conjunction with a mortgage to a third party financier.

The same level of familiarity cannot be assumed in respect of vendor terms contracts. Many vendor terms purchasers do not understand the fundamental elements of their contracts which distinguish them from 'standard' land sale contracts.

Most importantly, the features that are peculiar to vendor terms contracts are those which can disadvantage a purchaser most critically: for example, the fact that title does not pass with possession, and that the property can be subject to an underlying mortgage.

In sum, widespread community unfamiliarity combines with contractual mechanisms unique to vendor terms contracts and prejudicial to the rights of purchasers, to make vendor terms contracts a magnet for consumer disadvantage.

A campaign to increase awareness of the nature of vendor terms contracts and the particular problems which can arise would assist in minimising – but admittedly not altogether alleviating – consumer complaints in respect of vendor terms.

Such a campaign would operate most effectively by targeting people who are more likely to enter into a vendor terms contract: low-income earners who are considering purchasing a home and who are unlikely to qualify for mainstream finance. Such a demographic could be targeted by examining the manner in which vendor terms finance is promoted in the Victorian market place and using the same forums used by the promoters themselves: for example, classified advertisements in major and suburban newspapers.

Note that this is not a recommendation that awareness be raised by the mechanism of contractual disclosure. The amount of paperwork involved in a real property transaction is already formidable. Further documentation may be ignored or misunderstood by vulnerable and disadvantaged consumers, who are less likely to read and properly comprehend complex legal documents.

However, delivery of key messages in a format and style that is accessible may do much to instil a basic awareness of the vagaries of vendor terms contracts. The language of advertising, rather than of law and contract, appears to be very effective in disseminating basic concepts which can fulfil the critical role of flagging the existence of potential problems in the minds of consumers who may be considering purchasing on vendor terms.

The targeted provision of information to vulnerable groups should be part of the response to problems arising from vendor terms agreements.

Recommendation Four: ensure that vendor terms contracts are covered by Part 2B of the *Fair Trading Act 1999*

The Merlino Report as well as the government's response to that report has identified the potential benefits of ensuring that vendor terms contracts fall within the purview of Part 2B of the *Fair Trading Act 1999* (Vic).

This report welcomes the government's commitment to this important step in tackling the problem of vendor terms contracts including provisions that are highly prejudicial to the rights of purchasers.

The following are examples of vendor terms contractual provisions which may be considered unfair under Part 2B:

- a) a term which appoints the vendor the attorney of the purchaser, 'with specific power... to execute all such loan, mortgage, and other documents as may be reasonably necessary for the purposes of creating an enforceable loan and second mortgage in terms as above referred to in favour of the Vendor, and to enable registration of the same.'¹⁴⁴
- b) a term which requires removal of any caveat lodged by the purchaser over the subject property in the event of default of payment by the purchaser, and which in the event of a failure to so remove the caveat within seven days of the vendor's request, appoints the vendor as irrevocable agent of the purchaser, with power to do any act or sign any document reasonably necessary to remove such caveat.¹⁴⁵
- c) a term which allows the vendor to pay equity accrued in the property by the purchaser at time of termination to the purchaser in instalments of \$50 a week without payment of any interest.¹⁴⁶
- d) a term which requires the purchaser to 'do anything reasonably required by the Vendor from time to time (including signing additional documents) to make this contract more effective or to ensure that the Vendor receives the intended payments under this Contract.'¹⁴⁷
- e) a term which imposes upon a purchaser in default an obligation to pay, not only a higher default rate of interest, but also a 'Late Payment Fee' of 5% of the outstanding instalments, payable in respect of each 20 day period the arrears continue.¹⁴⁸

However, Part 2B appears unlikely to deal with instances of excessive pricing as an indicia of unfairness, which will prevent those provisions being used to tackle this very serious problem in the vendor terms marketplace.

Note further that the capturing of vendor terms under Part 2B may not have a significant impact upon such unfair practices directed towards vulnerable and disadvantaged consumers without resources being set aside for a compliance and enforcement campaign to underscore the impact of Part 2B upon this section of the market.

¹⁴⁴ Special Condition Seven, Contract of Sale of Real Estate: Case Study Six.

¹⁴⁵ Special Condition Six, Contract of Sale of Real Estate: Case Studies Nine, Ten.

¹⁴⁶ Special Condition 14.5, Contract of Sale of Real Estate: Case Studies Nine, Ten.

¹⁴⁷ Special Condition 17.1, Contract of Sale of Real Estate: Case Studies Nine, Ten; Special Condition 15.1, Contract of Sale of Real Estate: Case Study Eleven.

¹⁴⁸ Special Condition 5.6, in conjunction with 5.5, Contract of Sale of Real Estate: Case Study Eleven.

Wrap agreements generally contain a number of unfair contract terms. Consumer Affairs Victoria should have the power to determine that particular terms in these contracts are unfair, and prohibit their use.

Recommendation Five: amend the *Consumer Credit Code* to confirm that a vendor terms contract is a ‘credit contract’ within the meaning of Part One of the Code

Whilst a number of recent decisions around the country have found that vendor terms contracts are regulated by the *Uniform Consumer Credit Code* (***the Code***)¹⁴⁹, there is still uncertainty as to whether a vendor terms contract extends credit and is thus a ‘credit contract’ within the meaning of Part One of the Code.

Concerns regarding this lack of certainty have been raised as far as back as the publication of the Final Report of the Post Implementation Review of the Code in August 1999.

More recently, in 2005 the Standing Committee of Officials of Consumer Affairs undertook to make such an amendment and has overseen the drafting of the *Consumer Credit (Queensland) Amendment Bill 2005*, Clause 5 of which proposes to insert a new section 9A into the Code to provide the requisite coverage.¹⁵⁰

As reflected in the case studies, many vendors, and lawyers acting for vendors, are presuming regulation under the Code for vendor terms, subject of course to satisfaction of the requirements of s 6 of the Code. However, ostensible compliance with the documentary requirements of Part Two of the Code will not be determinative of the issue, and vendors who ensure such compliance may still subsequently deny regulation under the Code.¹⁵¹

While many wrap contracts refer to the Code, and some recent decisions have found that these contracts are regulated by the Code, uncertainty can add to the difficulties faced by consumers who wish to have a dispute heard, as well as for regulators in their enforcement role. The position should be clarified.

This report supports the proposed amendment to the Code.

Recommendation Six: revise the vendor terms provisions of the *Sale of Land Act 1962*

The Merlino Report as well as the government’s response to that report has recommended that the vendor terms provisions of the *Sale of Land Act 1962* be re-written in accordance with prevailing standards of plain English expression.

This report supports the proposed revision, but observes that benefits conferred upon purchasers by the *Sale of Land Act* provisions will not flow, irrespective of their

¹⁴⁹ *Rafiqi and Thomas v Wacal Investments Pty Ltd* (1998) ASC 155-024 (District Ct (Qld)); *McKenzie v Smith*; *Lenehan v Smith* (1998) ASC 155-025; *Lewis v Ormes (Commercial)* [2005] NSWCTTT 481 (18 July 2005) (upheld on appeal to Supreme Court of NSW);

¹⁵⁰ The draft Bill is available at http://www.creditcode.gov.au/content/downloads/explanatory_pack.pdf.

¹⁵¹ *Director of Consumer Affairs Victoria v Geeveekay Pty Ltd (Credit)* [2006] VCAT 793

wording, unless the consumer protection mechanisms enshrined within that statute are redrafted in recognition of the needs and characteristics of vulnerable and disadvantaged consumers.

Clearer wording is certainly beneficial to all stakeholders, but those consumers with the greatest need for protection will not gain that protection while consumer protection policy and regulation continues to presume that consumers will take proactive steps to enforce their rights.

Consider the power of a vendor terms purchaser under section 4 of the *Sale of Land Act* to compel a vendor to transfer title to the subject property in return for a mortgage granted back to the vendor securing monies owed under the contract. It is reasonable to presume that a vulnerable and disadvantaged consumer would not be likely to exercise such a right due to:

- a) the complexity of the resultant transaction,
- b) the expense involved in retaining a solicitor to prepare and file the necessary documents,
- c) stamp duty associated with the transfer of title and mortgage, and
- d) most critically, ignorance of the existence of the right to do so.

Whether this observation founds an argument for a different type of regulation, or whether it simply militates towards increased enforcement of existing regulation, is a matter for debate.

The vendor terms provisions of the *Sale of Land Act 1962* should be re-written in accordance with prevailing standards of plain English expression, to ensure better understanding and access to the law by consumers.

Recommendation Seven: obtain statistical data on vendor terms transactions

We are aware that information collected by the State Revenue Office of Victoria in respect of property transactions generally may provide statistical information about the incidence of vendor terms transactions in Victoria. Particularly, this data may help ascertain:

- a) the number of vendor terms transactions entered into in Victoria annually;
- b) the number of vendor terms transactions in respect of which an application for the First Home Owner Grant was successfully made; and
- c) the number of vendor terms transactions which result in the purchaser ultimately becoming registered proprietor of the subject property.

This information will help policy makers determine the degree to which vendor terms fulfils its promise of assisting low income earners and non-conforming borrowers to become home owners.

The only data available on vendor terms, or wraps transactions, is from individual consumers and from those promoting investment in wraps. We are unable to identify the number of wraps agreements entered into, or any other data about those

agreements. The publication of further data held by the State Revenue Office or any other Government body, would help to inform policy in relation to this issue.

This report recommends that quantitative data regarding vendor terms transactions in Victoria be collected from the State Revenue Office and any other relevant sources, and analysed in light of the findings and recommendations of this report.

Recommendation Eight: take further steps to ensure access to justice for disadvantaged consumers

The survey of case law contained within Chapter Four shows that when consumers have legal representation, or where a regulator uses its enforcement powers, the law can be effective in obtaining outcomes that benefit individual consumers concerned, and can also have a wider impact.

Where a particular industry practice has a detrimental impact almost entirely upon low-income or otherwise disadvantaged consumers, there is often no legal challenge. We have seen this in the area of mortgages over household goods, where many consumers are affected, but are reluctant to take legal action.

While not necessarily a matter for law reform, this issue does evidence a need to acknowledge the difficulties faced by low-income and disadvantaged consumers in obtaining redress in any number of legal disputes – not merely those involving vendor terms - and to consider how regulators, consumer advice agencies and dispute resolution forums might work together to improve the likelihood of disadvantaged consumers seeking and obtaining legal remedies for wrongs suffered.

Appendix One – Case studies

The case studies contained in the following pages are the stories of individuals who have sought assistance from the Consumer Law Centre Victoria, South-West Community Legal Centre and Gippsland Community Legal Centre.

The names of individuals and companies or businesses have been changed to protect privacy.

Case Studies One, Two and Three all involve the same vendor who used a contract based on the Law Institute of Victoria standard contract with minimal variation in each case study.

Case Study One

Brett is a single man aged about 35 years. Brett has an extensive history of mental illness and homelessness.

In mid 2002, Brett was living in Melbourne when he saw an advertisement for cheap rural properties in a metropolitan newspaper. He rang the telephone number provided and was given information about prices and payment methods. Brett was told he would be able to buy a house for about \$30,000 in a small country town in the western border region of Victoria.

Brett made no immediate commitment to purchase. Over the course of the next week, however, Brett was contacted a number of times by an employee of the vendor, who kept urging him to purchase. Brett was attracted to the purchase terms offered to him, primarily because he would not need to obtain a deposit but could apply for the First Home Owner Grant (**FHOG**) and then make further payments from his Disability Support Pension.

Brett wanted to live somewhere where he could achieve the 'Australian dream' of becoming a property owner. Brett's life from childhood had involved moving from one sub-standard location to another, in the Melbourne area. Brett's transient lifestyle had fostered a litany of unpaid debts that never really caught up with him as he moved from one place to another. In addition, paying rent was becoming difficult due to the increasing costs of the private rental market.

Due to his illness, Brett has high support needs and few of the skills required to manage financial commitments of any significance.

Following several conversations with the vendor, Brett travelled in his unregistered car to western Victoria to inspect the property being offered to him. He was initially euphoric on seeing the green grass of the western district in the springtime and the small, dilapidated cottage in a back street of the town. The dilapidated condition of the property did not concern him because the weather was warm and Brett thought he could improve the building himself. Mostly, he was ecstatic at the prospect of having his own property from which he could not be evicted, as had been his experience for many years. Brett was used to dwelling in substandard accommodation that was never secure so it was appealing for him to be told that he could secure his own home out of the rat race simply by applying for the FHOG and making deductions from his Disability Support Pension.

Brett was aware that the average prices of even dilapidated buildings in Melbourne were then around \$300,000 and he would never be able to purchase secure accommodation in Melbourne. At the time, Brett was not aware that the vendor had purchased the cottage less than a year before for about \$8,000 (which later became apparent according to information received from the local water authority).

Under the terms set out in the contract, Brett was asked to pay the \$7,000 of the FHOG plus another \$1,000 as a deposit and lump sum. Over the course of the contract, he would be expected to pay almost \$50,000 extra in principal and interest repayments of \$95 per week (almost two thirds of his weekly income derived solely from his pension), with an effective interest rate of 16%. In summary, he was to pay almost \$60,000 for an uninhabitable dwelling which one year before had changed hands for the amount Brett paid as a deposit. The increase in value could not be explained by a property boom because this particular town is out of the way of any industry or tourism flows and still faces a generally depressed economic outlook with long-term population declines.

Brett received no independent financial or legal advice on the purchase. The vendor handled all documentation including applying for the FHOG, contracts and attending on Brett with persistent telephone calls urging him to sign up. Within a week or two, Brett signed the contract at the vendor's office. He then packed up his unregistered car with the few goods he owned. He had a subscription to pay television, a new wide-screen television and little else. On arrival and through the following summer, Brett camped out in the two-room cottage. Considering himself something of a handyman, he attempted some repairs to the front verandah and various other minor alterations.

It was only after autumn had passed and winter had set in that the unsuitability of the house for occupation in that climate became evident. The dwelling was full of holes and mice, it had no heating facilities including water heating facilities, there was no kitchen sink, storm water ran off the roof and down and through the walls and accumulated under the floor, there was no back door which allowed the prevailing westerlies to howl through, a back porch that formerly sheltered the back door fell down in the wind, there were no trees or other vegetation around the house to break the weather and large amounts of dangerous metallic debris and rubble were strewn about. It was clear that Brett had not been able to make sufficient improvements to the dwelling over summer and autumn to make the property habitable.

Brett became extremely ill. He was put in hospital after contacting a social worker in a larger regional town about one hour's drive away. From this point on Brett came to rely almost completely on the social welfare services in the area for emergency accommodation, free legal assistance, psychiatric counselling and tenancy support. None of these services were available in the town where Brett had settled.

The building inspector of the local shire condemned the property soon after.

When discharged from hospital, Brett experienced considerable difficulty with the Office of Housing in receiving extended emergency housing as he appeared to be a home owner who would not qualify for emergency housing. He needed to pay rent for emergency accommodation as well as repayments under his contract. This was clearly impossible on the limited amount of his pension.

It was at this stage that Brett was put into contact with a local community legal centre. Brett still wanted to achieve home ownership and as a result, cancellation of his contract and transfer of equity to another property in northern Victoria at Minyip was tentatively negotiated with the vendor. Transfer was delayed because the previous purchaser who was similarly financially placed to Brett had defaulted, but was still in possession of the property.

Towards the end of 2003, Brett moved into the house at Minyip, without having come to any agreement as to whether he was renting or purchasing the property. The vendor made various proposals in writing, giving him the option of renting or purchasing. The rent was set at \$120 per week, with a bond of \$6,000 (the equity from the previous property). This was exorbitant for the location. The purchase price of \$45,000 was substantially more than Brett's previous dwelling and the interest rate was still set at 16% per annum over a term of 8 years.

One of the vendor's agents befriended Brett at this time and began to take him fishing and on various jobs to the properties owned by the vendor in the region. Brett was advised that he should not trust lawyers; lawyers would only want money. Brett was being assisted by the local community legal centre without charge. Brett was told that the vendor would always look after him as long as he cancelled the previous contract.

Brett could not afford to pay the weekly rent of \$120. In addition, he believed that he could no longer trust the vendor or its agents. With the assistance of the local community legal centre, the vendor was prevailed upon to sign a mutual release of the previous contract with Brett receiving \$10,000 in settlement.

Brett was last sighted eating a hamburger outside McDonald's in Horsham in the company of the vendor's agent. He had just purchased a caravan and was heading off on a grand tour of Victoria, leaving all his dreams of home ownership behind.

Location of property:	Western Border Region
Purchase price:	\$32,500
Amount of credit from vendor:	\$24,400
FHOG:	Yes
Approximate market value:	Approximately \$8,000
Manner property sold:	Vendor Terms Contract
Interest rate:	16% per annum (Default rate – Not stated)
Method interest calculated:	'...on the balance outstanding from quarter to quarter with quarterly adjustments at the rate of

Particular terms of contract:	4.0% per quarter which is equivalent to 16% per annum calculated from the date of possession to the date of final settlement'. Purchaser signed section agreeing to vendor finance and to vendor's 'full legal right to rescission in default of payments on time which could lead to repossession of the property'.
Maintenance of property:	Purchaser
Insurance:	None
Default:	Not stated
Special Condition(s):	Vendor agreed to replace front window, re-hang front door, install second-hand electric stove, install kitchen sink and taps, put back up fence which had fallen over. (Only the first two items were completed).
Pre-contractual advice:	None

Case Study Two

Colin was an elderly disability pensioner of extremely limited financial means, living in Melbourne.

During mid 2002, Colin came across a rural property for sale in the town of Polwarth from the same vendor as the purchaser in Case Study 1. Colin came across the property in a similar way, namely through an advertisement in the local newspaper.

Colin had a physical impairment that restricted his mobility and he had no access to private transport. Without viewing the property and without independent legal advice, he signed a vendor terms contract to purchase the property.

Polwarth is a virtually abandoned rural settlement with a large number of derelict houses and no public services remaining. Subsequent research reveals that the property had been offered for sale for around \$7,000 within the previous 12 months by a different vendor. Colin obtained the FHOG at the vendor's insistence and entered into a contract with a purchase price of over \$20,000 and an interest rate of 16%.

On arrival in Polwarth, Colin was surprised and disappointed to discover that the brick dwelling he had purchased was in fact an almost uninhabitable, derelict timber dwelling. He eventually contacted the community legal service in the region who brought the issue of possible contractual misrepresentation to the attention of the vendor. The vendor offered Colin an alternative dwelling at Patchewollock, an even more remote township on the edge of the Mallee, in northern Victoria. In this manner, the vendor adopted a pattern of moving troublesome cases to other dwellings at more remote locations away from easy access to free legal services.

It is not known whether Colin was able to continue repayments on his disability pension or whether he was able to maintain a moderate quality of life in such a place, with none of the support services essential to meet someone of his needs.

Location of property:	POLWARTH, VICTORIA (original contract)
Purchase price:	Approximately \$20,000
Amount of credit from vendor:	Not known
FHOG:	Yes
Approximate market value:	Approximately \$7,000 (Based on previous advertised price)
Manner property sold:	Vendor Terms Contract
Interest rate:	16% per annum (Default rate –Not stated)
Method interest calculated:	Quarterly
Maintenance of property:	Purchaser
Default:	Not stated
Pre-contractual advice:	None

Case Study Three

This case study follows on from Case Study Two as it concerns the subsequent sale of the same property in Polwarth that Colin originally purchased by the same vendor.

A young Melbourne man, David, came into contact with the vendor through its advertising. David had previously purchased a property so the vendor encouraged him to enlist his father (who had never previously purchased) as a first home owner and nominal purchaser, so as to qualify for receipt of the FHOG.

The vendor prepared the necessary documentation for the FHOG which was duly received and passed on to the vendor as a deposit. It appears that the vendor deliberately induced the purchaser into taking actions that avoided the requirements of the FHOG so that the vendor could obtain it as an immediate and sizeable deposit.

David entered into a vendor terms contract to buy the property for \$32,000 described in the accompanying section 32 statement by a bare computer printout Certificate of Title, with no Plan of Subdivision attached. David did not receive any independent legal advice or perform his own title search and accepted the representations made by the vendor. The contract simply specified a particular Crown Allotment which, he assumed, was the subject of the contract. He assumed that the land he was purchasing contained the house he was offered in the advertisement, although the contract did not describe any improvements to the land.

David kept up his repayments of \$100 per week under the mortgage for over a year, when he unexpectedly received a new contract in the mail with the vendor's signature. The new contract was dated with the same date as the original contract.

Subsequently, David contacted his local community legal centre. The new contract contained a different description of the land being purchased with a Plan of Subdivision that post-dated the date of the contract. The Crown Allotment now specified was in a completely different location from the original contract. A title search of the Certificate of Title described in the new contract revealed that the new Certificate of Title had been cancelled - it was therefore still unclear what property was being purchased. No valid contract could be formed where the Volume and Folio numbers did not relate to an existing parcel of land.

The community legal centre contacted the vendor in relation to its concerns. The vendor subsequently produced another Certificate of Title, together with a new Plan of Subdivision. The vendor had this time created a title on which two Crown Allotments existed. A caveat applied to both allotments (including David's allotment) even though the caveat had been lodged by David's neighbour to protect their purchase of the adjoining property. At time of writing, negotiations were proceeding with the vendor.

Location of property:	POLWARTH, VICTORIA
Purchase price:	\$32,000
Amount of credit from vendor:	\$40,000
FHOG:	Yes
Approximate market value:	Approximately \$7,000 (Based on previous advertised price)
Manner property sold:	Vendor Terms Contract
Interest rate:	16% per annum (Default rate – Not stated)

Method interest calculated:	Quarterly
Maintenance of property:	Purchaser
Insurance:	Purchaser
Default:	Not stated
Pre-contractual advice:	None

Case Study Four

In July 2001, Leah, a single mother living in Morwell decided that she would like to purchase a home. As Leah relies on government benefits as her sole source of income, she was unable to obtain finance from any of the traditional mortgage providers that she approached. Subsequently, Leah was referred by a local real estate agent to Mr Adam Bradley, Director, Picturesque Homes.

In October 2001, Leah entered into a vendor terms contract with Picturesque Homes to purchase a property in Morwell for \$64,000. Leah was required to pay a \$1,000 deposit, as well as a further \$102.72 payment in advance. As this was the first property that Leah had bought, she was eligible for the FHOG, which was also paid to Picturesque Homes.

At the date of contracting, the balance owing was \$55,893.84. Interest under the contract was set at 8.75% per annum, with a default rate of 10.75%.

Leah made regular payments to Picturesque Homes from the commencement of the contract and she was provided with regular statements of account. The statements detailed the payments made by Leah, interest and charges applied to the account and the balance owing on the property.

In early 2004, Leah became concerned when Picturesque Homes reissued earlier statements of account, which showed that Leah owed more than in the original statements. As a result, Leah approached the Consumer Law Centre Victoria (CLCV).

The CLCV considered that the statements of account that Leah had received from Picturesque Homes were probably accurate. The CLCV advised Leah to investigate refinancing with a traditional mortgage provider.

In mid-2004, Leah called for the transfer of the property as she was entitled to do under the contract and now is registered as the owner of the property, with a mortgage granted in favour of the new finance provider.

However, the CLCV had concerns about the unfair nature of Leah's contract with Picturesque Homes, particularly its belief that the vendor had inflated the purchase price of the property. On the basis of Leah's instructions, the CLCV has sought advice from counsel as to whether Leah has a claim against Picturesque Homes for damages. In particular, counsel has been asked to advise whether Picturesque Homes engaged in unconscionable conduct under section 8 of the *Fair Trading Act 1999* (Vic) and under section 51AB of the *Trade Practices Act 1974* (Cth), by inflating the purchase price of the property. In this regard, the CLCV is considering its position in light of the decision of the Supreme Court of Victoria in *Astvilla v Director of Consumer Affairs* [2006] VSC 289, which has a significant bearing on any claim Leah might have against Picturesque Homes.

Location of property:	MORWELL, VICTORIA
Purchase price:	\$64,000
Amount of credit from vendor:	\$55,893.84 (Balance under contract)
FHOG:	Yes
Approximate market value:	Unknown
Manner property sold:	Vendor's Terms

Interest rate:	8.75% p.a. (Default Rate - 10.75% p.a.)
Method interest calculated:	Calculated and compounded daily on the outstanding balance at the close of each day.
Special Condition(s):	<u>Special Condition 12</u> – ‘In the event of the purchaser failing to make a payment or any breach of contract, the vendor shall be entitled to serve a Notice of Default, specifying the necessary remedial action and allowing 30 days for the purchaser to act. Failure by the purchaser to remedy the default shall entitle the vendor to terminate the contract.’
Maintenance of property:	Purchaser
Insurance:	Purchaser
Pre-contractual advice:	None

Case Study Five

Sarah is a single parent with four children. Her sole source of income is a Disability Support Pension.

In late 2001, Sarah and her partner Wayne were residing in Queensland but were looking to buy a property in Victoria. On the basis of a recommendation by a family member, they entered into telephone negotiations with Aurora Pty Ltd for the purchase of a property in Beulah, Victoria. Ultimately, Sarah and Wayne agreed to purchase the property for \$52,000 under a vendor terms contract. Because they had not previously owned a home, they were eligible for the FHOG.

In March 2002, Sarah and Wayne arrived at the property expecting to meet an employee of Aurora. Instead, they found a key to the property and a contract of sale signed by Aurora. The total contract price was \$52,000, divided into a \$7,000 Lump Sum Payment (representing the FHOG), a Deposit of \$2,800 and a balance of \$42,200. Under the Additional Vendor's Statement pursuant to section 32 of the *Sale of Land Act 1962* (Vic), the total interest payable is expressed to be \$39,114.36; no interest rate is specified in the contract, however, interest on the balance is specified in the Particulars of Sale to be subject to quarterly adjustments 'at the rate of 4% per quarter calculated from the date of possession to the date of final settlement'.

Sarah and Wayne began making payments to Aurora shortly after moving into the property. Each payment was deposited at the local supermarket, which also operated as the local bank branch, into a bank account number for Aurora. The bank account details for payment were set out in a payment book which Aurora had provided to Sarah and Wayne.

In May 2002, two months after moving into the property, Sarah and Wayne's relationship broke down and Wayne moved out of the property. Sarah contacted Aurora to explain the change in her circumstances and subsequently was sent by post a form to have Wayne's name removed from the contract which both Sarah and Wayne signed.

Around the time of the breakdown of the relationship, Sarah discovered that she was unable to locate the payment book, without which she was unable to continue making payments.

Throughout 2002, Sarah made repeated requests by telephone for a new payment book. On several occasions, Sarah received verbal assurances from Aurora that a new payment book either would be or had been mailed to her. Sarah's Salvation Army worker also contacted Aurora to explain Sarah's inability to make payments under the contract without a payment book, on at least three separate occasions in late 2002 and early 2003.

Sarah never received a new payment book from the vendor and the last payment made under the contract was in, or around, May or June 2002. However, Sarah continued to live at the property with her four children throughout 2002 and 2003.

In late January 2004, Sarah fell very ill and together with her four children, went to stay with her sister. Sarah remained at her sister's house for approximately four months, during which time she returned to the property regularly, mainly on weekends. On all occasions, Sarah left the property locked with her belongings and personal effects inside.

In April 2004, Sarah received notification from Aurora that it intended to take possession of the property. Sarah responded by contacting Aurora and reiterating that she was unable to make payments in the absence of a payment book.

In May 2004, Sarah returned to the property to find a 'For Sale' sign at the front, padlocks on all of the doors and all of her belongings and personal effects removed. Neighbours in the area told Sarah that a man called 'Victor' had entered the property before the property had been sold and cleared away her belongings.

Subsequently, Sarah contacted Aurora and spoke with one of its two directors. The director informed her that a new sale had been arranged but that he would prevent the settlement of the sale if she commenced making payments. Sarah agreed to the proposal and requested a new payment book. No payment book was ever received.

In June 2004, Sarah contacted the CLCV. In the course of discussions with Aurora, Aurora informed the CLCV that it could stop the settlement of the new sale if Sarah resumed making payments. The director also stated that Aurora had thought the belongings were just 'rubbish' and offered Sarah between \$1000 and \$1,500 for any inconvenience caused. Sarah instructed the CLCV that she was not prepared to accept this offer.

It became apparent that some of Sarah's belongings were disposed of while others were taken to St Vincent de Paul. Sarah has managed to recover some of the items, however, the majority have been permanently disposed of.

The CLCV has agreed to assist Sarah to apply for counsel's advice on a *pro bono* basis as to whether she may have a claim against Aurora for the value of her belongings and personal effects removed from the property. If her application is successful, counsel's advice will also be sought as to whether Sarah has a claim for damages representing the value of the payments she made to the vendor pursuant to the contract, including the value of the FHOG.

Location of Property:	BEULAH, VICTORIA
Purchase price:	\$52,000
Amount of credit from vendor:	\$39,114.36
FHOG:	Yes
Approximate market value:	Unknown
Manner property sold:	Vendor Terms Contract
Interest rate:	Total interest payable is expressed to be \$39,114.36; no interest rate is specified.
Method interest calculated:	Interest is specified in the Particulars of Sale to be subject to quarterly adjustments 'at the rate of 4% per quarter calculated from the date of possession to the date of final settlement'.
Special Condition(s):	<u>Special Condition 11</u> : If the purchaser 'falls into arrears at any time during the term of the contract, then this gives the Vendor the right to rescind the contract immediately, and all monies paid will be forfeited.'
Maintenance of property:	Purchaser
Insurance:	Purchaser
Pre-contractual advice:	None

Case Study Six

Wendy is a 36 year old single parent with two children, in receipt of the pension. She had recently left a violent relationship and had been through the process of obtaining Family Court Orders granting her residence with her children. Wendy was keen to establish stable accommodation and was attracted by advertising material about 'Rent Buy' schemes. After speaking to the vendor, Wendy was of the view that if she paid \$109 per week in rent she would own her home. Wendy was told that the vendor would arrange for a garage to be built at the house at the vendor's expense.

On 28 November 2000, although illiterate, Wendy entered a vendor terms contract for the property in Churchill and a loan agreement. Previously, on 10 November 2000, Wendy also entered into a licensing agreement with the vendor, to rent the premises until settlement on 30 January 2001. Documents indicate that Wendy had a solicitor acting for her, but Wendy has not heard of that solicitor and states she did not have a solicitor acting for her.

Wendy applied for the FHOG which was to be paid direct to a finance company; fees were estimated to be approximately \$6,500. The vendor informed Wendy that her outstanding debt to East Coast Housing (\$1,200) would be paid from the FHOG and this would become a \$1,200 loan to the vendor, because the FHOG 'belongs' to the vendor.

Wendy was told her finance had been approved and she moved into the home on 9 December 2000, paying \$360 for 3 weeks rent. Wendy's children changed schools in order to move into the new home.

After the initial payment, Wendy did not make further payments because the garage had not been built, as promised. On 23 January 2001 Wendy was informed that her finance had been refused and the vendor filed and served a Notice to Vacate in the Victorian Civil and Administrative Tribunal on the basis of outstanding rental arrears in the sum of \$654. The vacation date was stated to be 7 February 2001.

Wendy was concerned that moving from the home would provide the Father of her children with an argument that she was not fit for the children to reside with. Wendy could not find alternate accommodation because she could not raise the funds for a bond and had the outstanding debt to East Coast Housing. Wendy was under extreme pressure from a number of people attending the house and saying they were moving in. A person who the vendor had since 'on-sold' the property to attended the home with 2 other men and told Wendy that if she did not vacate the premises by 23 February, they would move in and 'throw' Wendy's belongings out. Without having arranged accommodation, Wendy moved her belongings out of the home on 24 February.

Wendy sought assistance from her local community legal centre, however, she did not provide a forwarding address and has since lost contact.

Location of property:	CHURCHILL, VICTORIA
Purchase price:	\$53,000
Amount of credit from vendor:	\$13,000
FHOG:	Yes
Other credit:	\$42,000 (not approved)
Approximate market value:	Not known
Manner property sold:	Vendor Terms Contract/Licence Agreement

Interest rate (Vendor Finance):	10% per annum (Default rate - 16% per annum)
Method interest calculated:	'Adjusted weekly'
Interest rate (Liberty Finance):	11.3% per annum (variable)
Maintenance of Property:	Purchaser
Insurance:	Not stated
Default:	Higher interest rate & \$10 late fee
Special Condition(s):	Purchaser appointed Vendor as attorney with specific power to execute documents for creating an enforceable loan and second mortgage.
Pre-contractual advice:	Not clear

Case Study Seven

Jenny is a 26 year old single parent with two young children, in receipt of the pension. Jenny received advertising material about a Rent Buy scheme, was attracted by the idea that she could buy her own home, and thought it would be cheaper than renting. On 8 November 2000, Jenny signed a contract of sale and loan agreement with a vendor under a vendor terms contract. On 9 November 2000, she also entered into a licensing agreement with the vendor to rent the premises until settlement on 29 January 2001.

The home was in a very poor state of repair and the contract of sale stipulated a number of special conditions requiring the vendor to paint the house, fix a heater, install doors, repair holes, windows and a light, amongst other things. The vendor verbally agreed to lend Jenny \$3,727 to re-stump the home.

Jenny applied for the FHOG which was paid direct to a finance company; fees were approximately \$5,000. Jenny received some legal advice from a solicitor who she was referred to by the vendor.

The vendor reneged on the agreement to lend \$3,727 to Jenny and did not perform a number of special conditions to make the house habitable. Jenny applied to the Victorian Civil and Administrative Tribunal to be reimbursed for her costs in performing some of the repairs and was successful. Jenny was forced to obtain further finance from a bank at an interest rate of 15%, to arrange for the house to be re-stumped.

Jenny was diligent about making her contractual payments. However, the pressure of maintaining the loans and the home (which was in a poor condition) caused constant stress to Jenny. At the same time, Jenny was diagnosed with, and began treatment for, cancer. Jenny was extremely stressed by the whole ordeal and eventually sold the home with the assistance of CAV in 2003. Jenny's matter was investigated by CAV (prosecution may be pending).

Location of property:	MORWELL, VICTORIA
Purchase price:	\$49,500
Amount of credit from vendor:	\$14,844
FHOG:	Yes
Other credit:	\$38,851.20 (Finance company)
Approximate market value:	Not known
Manner property sold:	Vendor Terms Contract
Interest rate (Vendor Finance):	10% per annum (Default Rate - 16% per annum)
Method interest calculated:	Balance of principal at start of each week
Interest rate (Liberty Finance):	9.55% p.a. (Default Rate – 11.55% p.a.)
Maintenance of property:	Not stated
Insurance:	Not stated
Default:	Higher interest rate & \$10 late fee
Special Condition(s):	- Vendor to undertake many stipulated tasks to make the house habitable. - Purchaser agrees that funds provided by the Lender at settlement will be less than the full purchase price, and that a residue will be owed to the Vendor. Vendor agrees to accept repayments of the residue over 25 years.

Pre-contractual advice:

- If finance not approved, Vendor agrees to rent property to purchaser and keep price of house firm for 6 months.

Referred to solicitor by vendor

Case Study Eight

Jill is a 65 year old woman in receipt of the Aged Pension and her husband, Jack, is in receipt of the Disability Support Pension. Jill suffers from chronic arthritis and is losing her eyesight. Jack suffers from cerebral palsy. Jill had been in rental homes all her life and when she saw the advertisement for the Rent Buy Scheme in a solicitor's office she thought it offered the opportunity to buy a house and pay the same as she paid in rent.

Jill and Jack inspected their home and believed they could afford it because it was extremely run down. Amongst other things, the roof of the house leaked and the spouting required replacing. On 15 May 2001, Jill and Jack signed a vendor terms contract for the house in Morwell, as well as a loan agreement with the vendor. The property settled on 13 July 2001. Jill and Jack applied for the FHOG, which was paid toward the contract.

Documents indicate that Jill and Jack had a solicitor acting for them who was arranged by the vendor. However, according to Jill and Jack, they did not realise that the solicitor was their representative.

Within 3 months of moving into the home, the electric fuse box caught fire and all electricians on the property stopped working. An electrician reported that the wiring was old and it had to be completely replaced, at a total cost of \$1,600. Jill and Jack were never in arrears on the contract but Jill's health suffered demonstrably from the stress of maintaining the payments.

On 20 May 2003, Jill sold the house back to the vendor at a price of \$35,325 with a condition that the vendor waive the debt of \$13,062.77 still owing. The property was independently valued at \$65,000 to \$70,000. A further condition of the sale was that the vendor would pay Jill and Jack \$3,000, however he only paid \$2,000. Jill and Jack agreed to sell the home at the price because they were scared that if they did not, the sale would not occur, and they were no longer able to maintain the house or the payments.

This matter is being investigated by CAV.

Location of property:	MORWELL, VICTORIA
Purchase price:	\$49,900
Amount of credit from vendor:	\$13,400
FHOG:	Yes
Other credit:	\$33,600 (Finance company)
Approximate market value:	Not known
Manner property sold:	Vendor Terms Contract
Interest rate (Vendor Finance):	12.5% per annum (Default Rate - 16% per annum)
Method interest calculated:	Balance of principal at start of each week
Interest rate (Liberty Finance):	9.25% p.a. (Variable) (Default Rate - 11.25% p.a.)
Maintenance of Property:	Not stated
Insurance:	Purchaser
Default:	Higher interest rate & \$10 late fee
Special Condition(s):	Purchaser appointed Vendor as attorney with specific power to execute documents for

Pre-contractual advice:

creating an enforceable loan and second mortgage.
Referred to solicitor by vendor

Case Study Nine

Susan is a 35 year old single parent, in receipt of the pension.

Susan saw advertising material for vendor contracts and believed there was an opportunity for her to buy a home. On 15 April 2002, Susan signed a vendor terms contract to purchase a house in Morwell for \$107,100. Documents indicate that Susan's 'representative' is the legal firm acting for the vendor.

Susan applied for the FHOG which was paid to the vendor as an 'early possession fee'.

In February 2003, Susan considered refinancing with a bank and the vendor offered to sell the property to her for \$120,000, 'allowing' \$25,000 for improvements. Susan had completed a lot of work at the home, increasing the value substantially. Under this arrangement, the payout to the vendor would be \$95,000. The house was valued at \$120,000. Susan is still in the home and maintaining payments.

Location of Property:	MORWELL, VICTORIA
Amount of Purchase:	\$107,100
Amount of Credit from Vendor:	\$100,100
FHOG:	Yes
Vendor's own mortgage:	\$68,000 at 7.29% interest
Approximate Market Value:	Not known
Manner Property Sold:	Vendor Terms Contract
Interest Rate:	7.29% per annum (Default Rate - 10% per annum)
Method interest calculated:	Balance of principal at start of each week
Maintenance of Property:	Purchaser
Insurance:	Purchaser
Default:	Higher interest rate & \$10 late fee per week
Special Condition(s):	- If Purchaser's FHOG application is not successful then the contract and Purchaser's right to occupy shall automatically terminate, save for Purchaser's obligation to pay a reasonable occupation fee. - Payments require that the 'final payment' (\$100,100) is paid on 24 May 2007.
Pre-contractual advice:	Vendor's solicitor

Case Study Ten

Rhonda is a 20 year old, in receipt of the Newstart allowance.

On 17 December 2002, Rhonda and her de facto partner signed a vendor terms contract to buy a house in Morwell. The vendor advised Rhonda that she did not require a solicitor and as a consequence, Rhonda did not seek legal advice.

Rhonda applied for the FHOG which she paid to the vendor as an 'early possession fee'. Within 2 or 3 months of possession, the vendor informed Rhonda that he had been required to pay the property rates, thus the purchaser's weekly payments would be increased by \$25 per week. Rhonda was subsequently unable to maintain payments and left the property in July 2003.

The property was valued at \$65,000 to \$75,000.

Rhonda sought assistance from her local community legal centre, however, she did not provide a forwarding address and has since lost contact.

Location of property:	MORWELL, VICTORIA
Purchase price:	\$57,000
Amount of credit from vendor:	\$50,000
FHOG:	Yes
Vendor's own mortgage:	\$34,400 at 7.5% interest
Approximate market value:	\$55,000 - \$60,000
Manner property sold:	Vendor Terms Contract
Interest rate:	7.5% per annum (Default Rate - 10% per annum)
Method interest calculated:	Balance of principal at start of each week
Maintenance of Property:	Purchaser
Insurance:	Purchaser
Default:	Higher interest rate
Special Condition(s):	- If Purchaser's FHOG application is not successful then the contract and Purchaser's right to occupy shall automatically terminate, save for Purchaser's obligation to pay a reasonable occupation fee. - Payments require that the 'final payment' (\$50,000.00) is paid on 3 January 2008.
Pre-contractual advice:	None (on basis of vendor's advice that a solicitor's advice was not necessary)

Case Study Eleven

Harriet, a 50 year old woman and her partner Ivan, rely solely on government support payments as their source of income.

On 6 July 2001, Ivan and Harriet signed a vendor terms contract for a house Morwell for \$65,000. Settlement occurred on 9 July 2001. The vendor specifically advised Ivan and Harriet not to seek legal advice regarding the contract.

Pursuant to the contract, the vendor provided finance of \$58,000 at an interest rate of 8.4% (which was 2% above the standard variable interest rate on the vendor's own mortgage). Further, the contract specified that interest is 'compounded daily based on the outstanding balance at close of each day'. The contract also specified that the default interest rate is '2% above then current interest rate'. Under the terms of the contract, maintenance of the property and insurance were specified to be the purchaser's responsibility.

Ivan and Harriet applied for the FHOG which was paid toward the purchase price.

Ivan and Harriet were not able to maintain payments under the contract and vacated the property in November 2001. The vendor returned approximately \$5,400 of the FHOG to the Victorian State Revenue Office, having deducted amounts allegedly owed for rent and cleaning.

Location of Property:	MORWELL, VICTORIA
Amount of Purchase:	\$65,000
Amount of Credit from Vendor:	\$58,000
FHOG:	Yes
Vendor's own mortgage:	\$32,800 at 8.05% interest
Approximate Market Value:	Unknown
Manner Property Sold:	Vendor Terms Contract
Interest Rate:	8.4% per annum (Default Rate - 10.4% per annum)
Method interest calculated:	Compounded daily on balance outstanding at close of each day
Maintenance of Property:	Purchaser
Insurance:	Purchaser
Default:	Default interest rate and late payment fee
Pre-contractual advice:	None (on basis of vendor's advice not to see a solicitor)

Case Study Twelve

In 2002, Kirsten entered into a rent-to-buy agreement with a company, Upton Pty Ltd, for a property in Morwell. Kirsten contacted Upton Pty Ltd after seeing an advertisement in the local newspaper for their services which carried the slogan, 'Why pay rent?' Under the agreement, Kirsten paid a \$1000 deposit.

Shortly after moving into the property, Kirsten discovered that the property was infested with mice. Shortly thereafter the heater broke down. Despite repeated complaints neither problem was attended to by Upton Pty Ltd.

Subsequently, Upton Pty Ltd made an offer to Kirsten of another property in Morwell, this time under a vendor terms contract. According to Kirsten, Upton Pty Ltd offered her the property for \$70,000.

In October 2002, Kirsten signed the vendor terms contract. At the time of signing, she was told that the price of the property was \$92,000 despite being quoted a much cheaper price earlier. Kirsten did not obtain any independent advice and nor did the vendor suggest that she seek advice before signing the contract.

Kirsten enquired with Upton Pty Ltd about the return of her deposit under the rent-to-buy agreement. Upton Pty Ltd responded that something would be worked out.

From the inception of the vendor terms contract, Kirsten's weekly payments of \$153, due under the contract, were deducted by Upton Pty Ltd direct from her bank account. In September 2003, Kirsten became concerned when her monthly statement showed that she was in arrears. However, Kirsten believed the arrears must be an administrative error on the part of Upton Pty Ltd as her weekly payments had been continuously deducted from the inception of the contract.

By April 2004, Kirsten was \$3062.96 in arrears. Consequently, Kirsten contacted her local community financial counselling agency.

It soon became apparent that Kirsten had fallen into arrears as a result of rates and charges levied in respect of the property. Upton Pty Ltd had paid the rates and then charged Kirsten for them. Such amounts were not covered by the regular \$153 weekly payment. When Kirsten subsequently fell into arrears, Upton Pty Ltd charged her default interest in accordance with the terms of the contract. On this basis, Kirsten's debt to Upton Pty Ltd had increased to \$3062.96 in just seven months.

Special Condition 9 of the contract rendered Kirsten liable for all rates and outgoings or gave the vendor a sole discretion to pay the rates and then recover them from the purchaser. At the time of contracting, however, Upton Pty Ltd had informed Kirsten that they would take care of all rates.

Kirsten's financial counselling agency has referred the matter to CAV for investigation.

Location of property:	MORWELL, VICTORIA
Purchase price:	\$92,000
Amount of credit from vendor:	\$85,000 (Balance of purchase price)
FHOG:	Yes
Approximate market value:	Unknown
Manner property sold:	Vendor Terms Contract

Interest rate:	7.09% per annum (Default Rate - 10% per annum)
Method interest calculated:	Interest is calculated on the basis of the balance at the start of each week.
Maintenance of Property:	Purchaser
Insurance:	Purchaser
Default:	Default interest
Special Condition(s):	<ul style="list-style-type: none">- <u>Special Condition 11</u> - The Vendor has the right, but no obligation, to carry out repairs to and maintain the property ... 'so as to protect the Vendors investment'. The cost of such repairs and maintenance shall be added to the Actual Balance at no less than \$50 per week.- <u>Special Condition 12</u> - Assignment of rights under the contract.- <u>Special Condition 14</u> - In event of proper termination, the purchaser must immediately remove all property. If the purchaser fails to do so, the vendor can dispose of the goods as the agent of the purchaser.- <u>Special Condition 16</u> – The purchaser acknowledges that the vendor has recommended that he or she has received independent legal advice prior to signing the contract.
Pre-contractual advice:	None

Appendix Two Property valuation report

Appendix Three
Qld OSR Practice Direction FHOG 2.2

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