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**By email: [cav.consultations@justice.vic.gov.au](mailto:cav.consultations@justice.vic.gov.au)**

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Dear Ms Davie

### **The definition of 'terms contract' under the Sale of Land Act 1962**

Thank you for the opportunity to comment on Consumer Affairs Victoria's discussion paper on the definition of 'terms contract' under the *Sale of Land Act 1962* (**the Act**).

Briefly, we have argued that:

- the 2008 amendment to the definition of 'terms contract' has made one arm of the definition (at 29A(1)(a)) redundant, and the definition should be amended;
- however 'terms contract' is defined, Consumer Affairs needs to continue to review the law and include anti-evasion provisions if it is not capturing the conduct it is designed to regulate;
- there are a number of circumstances where the consumer protections provided by the National Credit Code might be avoided by vendors or promoters of terms contracts. It would be unwise to rely on the Code rather than including sufficient consumer protections in the Sale of Land Act;
- people who arrange terms contracts will be able to avoid the law regardless of how 'terms contract' is defined, and action needs to be taken to address the broader problems caused by this business model. In particular, the Government should take steps to ensure that people arranging terms contracts for profit should be licensed either as real estate agents or credit providers.

Our comments are detailed more fully below.

### **About Consumer Action**

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

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## The pre-2008 and post-2008 definition of 'terms contract'

The consultation paper asks

whether there are material examples of multiple payments terms contracts in Victoria that would have been "terms contracts" under the [pre-2008] wording of the Act but are now unprotected by the Act, accompanied by descriptions of any such transactions.

We do not have any examples to hand of multiple payment terms contracts which would have been covered by the pre-2008 definition but not by the post-2008 definition in the Act. However, it appears clear that the first arm of the definition (at paragraph 29A(1)(a)) has been made redundant by the 2008 amendments and should be changed.

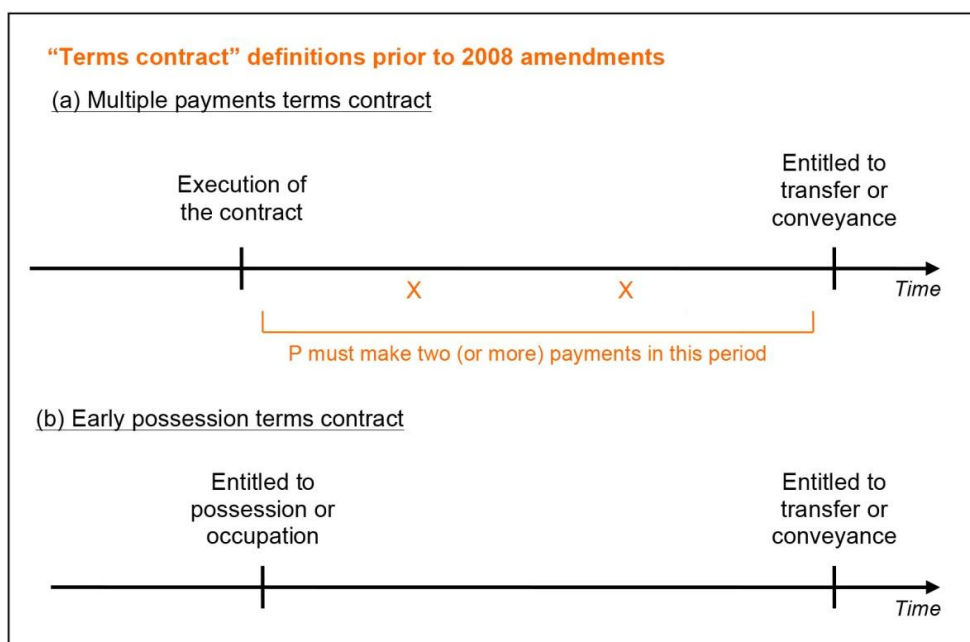
As the discussion paper explains, the pre-2008 definition of 'terms contract' caught two different types of arrangement:

- a) one where the purchaser must make at least two payments after the execution of the contract and before conveyance; and
- b) one where the purchaser has a right to possess or occupy the property at some point before conveyance.

To make the same point another way, before 2008 a contract could be a terms contract:

- a) regardless of whether the purchaser had a right to possess or occupy the property before conveyance (as long as at least two payments are made between execution and conveyance); and
- b) regardless of whether the purchaser must make payments between possession and conveyance (as long as the purchaser has a right to possess or occupy before conveyance).

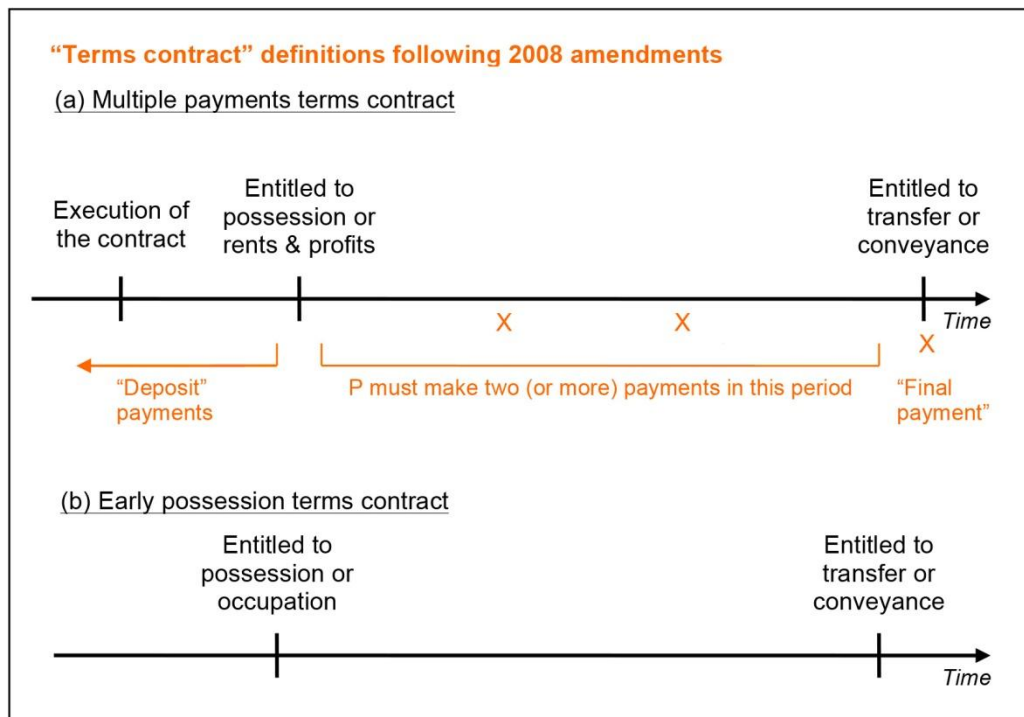
Figure one in CAV's discussion paper (pasted below) helpfully explained the two types in the pre-2008 Act.



The 2008 amendments effectively repealed arm a) of the definition (we presume it did so unintentionally). The result is that a contract can no longer be considered a terms contract unless it is a contract of type b), that is, it allows possession at some point before conveyance. This is because:

- the new definition of arm a) states that a 'deposit' is not considered one of the two payments; and
- a 'deposit' is any payment that occurs before the purchaser accrues a right to possession or ownership; so
- a contract requiring two or more payments to be made between execution and conveyance *must* specify a point before conveyance where the purchaser accrues possession or occupation rights, otherwise the two or more payments could never be made—they would be deemed a deposit.

Figure two in CAV's discussion paper (which explains the two arms of the definition of terms contract post-2008, pasted below) illustrates this point. Figure two makes it clear that contract type a) is now effectively a subset of contract type b) and so has become redundant.



Regardless of whether CAV has evidence that traders have exploited this loophole, we have no doubt that some will in future. If it is the government's view that Sale of Land Act protections should apply to contracts of type a) under the pre-2008 legislation—that is, those contracts in which a purchaser has no right to possess or occupy a property before conveyance—then the definition in section 29A must be amended.

More broadly, we would make the point that businesses will seek to construct their contracts and business models to avoid regulation however the definition is framed. We would encourage Consumer Affairs to continue to review the law to ensure it is capturing the conduct it is designed to regulate. Consumer Affairs should also be willing to include anti evasion provisions if it is clear

that businesses are using contrived trading models to evade the spirit of the law and are causing consumer detriment.

### **Application of national credit law to terms contracts**

there are a number of circumstances where the consumer protections provided by the National Credit Code (**the Code**) might be avoided by vendors or promoters of terms contracts. That being so, we think it would be unwise to rely on the Code rather than including sufficient consumer protections in the Sale of Land Act.

Section 10 of the Code provides that a terms contract can be a provision of credit regulated by the Code. However, such a transaction will still only be regulated by the Code if it also meets the requirements of section 3 (that defines 'credit') and section 5 (that determines the provisions of credit to which the Code applies). The Code could be avoided in at least two ways, discussed below.

#### The contract does not 'defer' a debt and so does not meet the section 3 definition

Section 3 of the Code provides that a debt must be 'deferred' before an arrangement can be considered 'credit'. The Code will not apply to a transaction which does not defer a debt. This could arguably be avoided by a trader framing their contract as a lease with an option to buy. This transaction would arguably not defer any debt because under the terms of the contract, the prospective purchaser would be leasing rather than paying off a sale by instalments. The inclusion of the option to buy allows the vendor and purchaser a vehicle for transferring ownership at the end of the lease term without actually giving the purchaser a right to own the property. Similar mechanisms are successfully used by consumer lease providers to offer rent-to-own deals for cars and household goods which are regulated as consumer leases despite being for all practical purposes a sale by instalments.

We understand that similar arrangements have been challenged in courts, which on at least one occasion have determined that the arrangement is in effect a purchase by instalments (which would be a provision of credit regulated by the Code.)<sup>1</sup> Realistically, however, few contracts would be challenged and even fewer disputes would reach the point of being adjudicated in a court.

#### The vendor (or intermediary) is not providing credit 'in the course of a business'

Paragraph 5(1)(d) of the Code requires that a transaction can only be considered a 'provision of credit' if:

...the credit provider provides the credit in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.

A private vendor selling their home through a terms contract would not meet this definition (nor do we argue that they should). However, we note that some promoters of vendor terms

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<sup>1</sup> See for example *Johnstone v Poralka Investments Pty Ltd*, [2008] SADC 87. In that case, Clayton J in the South Australian District Court found that the 'Rent to Buy Agreement' comprising a lease and option to buy '...was a contract for the sale of land... In reality there was only one transaction... There would have been no lease without the option to purchase'. At 90-91.

contracting suggest that if a private vendor enters into 'only a few' contracts per year, then they would not be in the business of providing credit. We do not agree with this position, but note that without enforcement it may mean some vendors are able to avoid or not comply with the Code.

## **Other matters**

The discussion paper invites submissions on other matters relevant to the definition of 'terms contract'. From recent complaints to our centre (and web research), we are aware of a broader problem of intermediaries arranging terms contracts between buyers and sellers for their own profit, without regulatory oversight. We discuss this in more detail in the attachment. We are concerned that some of the purchasers and sellers may be in financial difficulty, which is exacerbated by the contract, but while the intermediary may be in the business of arranging the transactions, neither the seller, nor the intermediary, are required to be licensed or comply with the Code because the seller is an individual who is involved in one sale, and not in business. In fact we believe that some sellers are encouraged to sell in this way by the intermediary to resolve the seller's financial difficulties.

It is our view that any intermediary who is arranging a transaction which would be credit if the provider was in the business of providing credit for the purposes of section 5 of the Code should be required to hold a credit licence and be subject to the other licensing requirements of the national credit law, including obligations relating to internal and external dispute resolution. Alternatively (or in addition) intermediaries should be required to be licensed as a real estate agent if they are in practical terms performing the functions of an estate agent as defined by the Estate Agents Act 1980.

This is neither regulatory overreach or a case of unnecessary red tape, but a matter of simply ensuring that people that profit by acting as either a real estate agent or credit provider should be subject to the standards the law requires of those professions. The Victorian Government should take steps, in partnership with the Commonwealth, to ensure that these business models are appropriately licensed, regulated and enforced.

Please contact David Leermakers on 03 9670 5088 or at [david@consumeraction.org.au](mailto:david@consumeraction.org.au) if you have any questions about this submission.

Yours sincerely

**CONSUMER ACTION LAW CENTRE**



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