



2 June 2016

By email: consumerpropertylawreview@justice.vic.gov.au

Consumer Property Law Review
Policy and Legislation Branch
Consumer Affairs Victoria
GPO Box 123
Melbourne VIC 3001

Dear Sir/Madam,

Consumer property law review: Issue Paper 3: Sale of land and business

Consumer Action Law Centre (**Consumer Action**) is pleased to make this submission to Consumer Affairs Victoria's (**CAV**) review of Victoria's consumer property laws on *Issue Paper 3: Sale of land and business*.

This submission is focused on issues that Consumer Action has observed through our casework and research in vendor terms and rent-to-buy schemes involving disadvantaged consumers in the residential property market. The findings of this work will be published in coming months. Consumer Action has also made comments relevant to this review in our earlier submission to this review, as well as submissions to CAV's current review of residential tenancies laws. This submission reflects Consumer Action's current understanding of terms contracts and rent-to-buy schemes. Our client work and research in this area is ongoing.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

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Part A: Sale of land process

Section 1: Before signing a contract of sale

3 *What is your view on the approach or approaches required to deter misleading and deceptive conduct during the sale of land?*

The deterrents to misleading and deceptive conduct in the *Sale of Land Act 1962* (Vic) (**SLA**) and the *Estate Agents Act 1980* (Vic) (**Estate Agents Act**) should at a minimum be retained, and we would support an increase in the maximum penalties to better protect vulnerable buyers.

The protections in the Australian Consumer Law (**ACL**) are confined to misleading or deceptive conduct in trade or commerce. While this concept has been interpreted broadly, it may cover real estate agents but not extend to a vendor in one-off private sale of land (which can be the structure of vendor terms and rent-to-buy arrangements).

The protections in the SLA will cover the one-off sales to which the ACL may not extend. Therefore, there remains an important place for them.

4 *In light of the Australian Consumer Law offences, is there still a need to retain specific offences relating to misleading and deceptive conduct under the Estate Agents Act?*

The offences in the Estate Agents Act should be retained. Consumer protections must remain in place for as long as there is no comprehensive, robust protection framework for buyers and vendors in these deals. Consumer Action notes that the most significant recent CAV enforcement action against brokers has been under the Estate Agents Act,¹ and that this avenue for dealing with detrimental broker conduct should not be cut off.

Section 5: Deposit moneys

24 *Is there still a need to ensure that deposit moneys are preserved until settlement? Please give reasons for your answer.*

One of the critical risks to buyers in vendor terms (and rent-to-buy) deals is the loss of their money if the deal fails prior to settlement and legal title is never obtained. Some of the money paid prior to settlement in these deals may be protected by the SLA requirements in relation to deposits. This buyer protection is important to retain.

¹ See CAV, *Benjamin David Chislett - Court action*, 28 October 2015, <https://www.consumer.vic.gov.au/news-and-events/news-updates/benjamin-david-chislett-court-action> and *James Allan Monaghan - Enforceable undertaking*, 10 April 2015, <https://www.consumer.vic.gov.au/news-and-events/news-updates/james-allan-monaghan-enforceable-undertaking>

However, in the transactions seen by Consumer Action, the SLA deposit provision has done little to ensure that a buyer's money can be recovered when a deal fails. This is chiefly because large sums paid by a buyer will not be considered the 'deposit' under the SLA.

While under the SLA a 'deposit' in a terms contract includes 'any moneys received by the vendor or on behalf of the vendor before the buyer becomes entitled to possession'² and must be paid into special purpose account or held by a legal practitioner, conveyancer or estate agent,³ large sums paid by a buyer prior to settlement will not be considered a deposit. This is because a buyer often has possession of a property for several years prior to settlement, and nothing in the SLA appears to protect any of the buyer's instalments or First Home Owners Grant (in the case of vendor terms deals), or rent and/or option payments (in the case of rent-to-buy deals) in the same way. Consumer Action is aware of a number of cases where a broker has become insolvent and no money could be recovered by the buyer, even if a buyer has a cause of action or court order for recovery of the money.

The special purpose account requirement could leave a vulnerable party open to agreeing to release trust money without understanding the effect of this. A preferable option is extending the trust account requirement to all money paid before settlement, aside from occupation rent or fair market rent.

Consumer Action has also observed consistent non-compliance with the requirement to protect deposit money in vendor terms and rent-to-buy deals. Deposits have been routinely paid directly to brokers or vendors and not held in a trust account or special purpose account. This may be an area for enforcement focus.

25 *What remedies should be open to a buyer in circumstances where a seller does not meet his or her obligations to pay over the deposit? For example, should a buyer be able to end the contract?*

The lack of remedies for a buyer when a vendor does not pay over the deposit as required is a considerable risk for vendor terms and rent-to-buy buyers. The small penalty for vendors who breach the requirements is likely to be insignificant relative to the size of the deposit. It does little to address the temptation for a vendor, particularly one under financial stress, to immediately use the deposit rather than 'locking it up' in a trust account.

Consumer Action proposes the following options to strengthen buyer protections under these provisions:

- A vendor should be required to prove to a buyer that it has complied with this requirement within the required time. Failure to provide this proof should qualify as a breach of the legislation and entitle the buyer to give the vendor notice of rescission, with a certain time period for compliance and the ability to end the contract if the vendor does not comply.
- Penalties for breach of these requirements should be commensurate with penalties for other similar breaches of the SLA.

² SLA s 23.

³ SLA s 25.

- A buyer should be able to end the contract for breach of these provisions and require the immediate return of the deposit.

26 *What is your experience of the effectiveness, or otherwise, of the 'early release' provisions?*

There is potential for the early release provisions to be used by a broker or vendor to access deposit money in vendor terms contracts irrespective of whether there is a realistic chance of the sale being completed. Where a buyer is in a vulnerable position for what is often a long period of time, release of the deposit (as well as payment of other money directly to the vendor) increases the financial risk for the buyer, as money paid will not be protected and may not be recoverable if the buyer is later entitled to have some of the money repaid (for example, if a court order is made or if the vendor is in breach). The early release provisions could therefore pose a significant financial risk to a vulnerable buyer who does not have independent advice on the consequences of the release.

28 *Should the buyer's right to end the contract be absolute if the seller misleads them about the details of mortgages and caveats over the land? Can you envisage any circumstances where a seller may make an honest and reasonable mistake?*

The risks to a buyer in a vendor terms or rent-to-buy agreement in relation to a mortgaged property are excessive. The process of entering into a terms contract for a `mortgaged property is called 'wrapping' by the industry (that is, a mortgage is 'wrapped' in a terms contract).

The existence of mortgages and, depending on their grounds, caveats over land can often be indicative of a vendor in financial trouble. Mortgagees and caveators will often claim a proprietary interest in the property to secure a debt. A mortgage must be signed by the vendor (as the property owner), and a caveat can only be validly lodged where a proprietary interest supports it, which can only realistically arise from the owner's dealings with the property.

Short of a lack of due diligence on their own part or a failure to recall their own dealings with the property, it is difficult to envisage circumstances where a genuine honest and reasonable mistake could lead to non-disclosure of mortgages or caveats. It is true that caveats may be lodged without the owner's knowledge, but an owner will receive notice, and if the caveat does not have a proper basis, then an owner would be entitled to have it removed.

See further our detailed comments under 'Part C: Terms contracts and other specialised sale of land contracts' (pp 6-15).

Section 6: Damage to land or buildings before sale completed

30 *What risks do buyers face in relation to damage or destruction of the property they are buying in the period between the signing of the contract and settlement?*

Consumer Action has seen vendor terms arrangements where the buyer has been required under the contract to pay home insurance. This inappropriately shifts the cost of the premium and excess from the property title holder, who holds the insured risk, to the buyer during what is essentially a long settlement period.

The Financial Ombudsman Service (**FOS**) has dealt with a case in Queensland where a property was damaged by a cyclone while the buyer was in possession and the vendor held the insurance policy.⁴ In that case, there was no obligation on the vendor to apply the insurance proceeds under its policy to the repair of the property. Instead, the proceeds were applied to reduce the balance owed by the buyer under the terms contract. Ultimately, once informed that the repairs would not be paid for by insurance, the buyer undertook repairs himself. FOS determined that the only claim which the buyer could sustain was in relation to a delay by the vendor in informing the buyer that the repairs would not be undertaken, which caused the buyer stress and inconvenience. It was found that there was no financial loss suffered by the buyer. This case illustrates the limited recourse and control that a buyer under a vendor terms or rent-to-buy contract can have if they are relying on a vendor to ensure that repairs are completed.

31 *Are the current protections still relevant or are there other risks that should be mitigated?*

There are also risks to a buyer in a vendor terms or rent-to-buy arrangement where a vendor holds the home insurance policy. The right of a buyer under the SLA to rescind the contract and recover any money paid towards a property that is destroyed or not fit for occupation only applies before the buyer is entitled to possession.⁵ It therefore does not appear to apply to vendor terms or rent-to-buy arrangements, or any other contract of sale, after the buyer takes possession.

Consumer Action is aware of a situation where a house being purchased on vendor terms was destroyed in fires in 2015. The vendor, who held the home insurance policy, wanted to claim for total loss rather than rebuild the house. Depending on the contract in place, this type of situation could leave a buyer with no claim to any insurance pay out and relying on litigation to recover any money owed.

The apparent lack of buyer protection under the SLA where a property is destroyed during a vendor terms or rent-to-buy deal is significant and puts already vulnerable people at greater risk of losing their investment in what they hope will be their home.

⁴ Financial Ombudsman Service Determination 302744 (31 July 2014)

⁵ SLA s 34.

Part B: Buying property ‘off-the-plan’

Section 7: How off-the-plan sales are regulated

Consumer Action has recently seen extremely harmful broker behaviour and significant financial loss to buyers in relation to off-the-plan arrangements on vendor terms or similar contracts.

It is noted that the SLA requires deposits received in connection with off-the-plan sales to be held in trust until the plan of subdivision is registered. This provides a degree of protection of the deposit, such that it will be preserved and can be returned where there are delays in the registration of the plan, or it is refused, and the contract permits the contract to be ended in those circumstances.

Off-the-plan sales involve what can be lengthy periods before the subdivision registration condition is satisfied. When coupled with a terms contract or a rent-to-buy arrangement this can further extend an already lengthy contractual relationship which can increase the likelihood of one or the other party succumbing to financial stresses and the agreements falling over.

Given this, Consumer Action recommends stronger buyer protection in respect of such sales, or even a prohibition of off-the-sales purchases where they are coupled with a terms contract or a rent-to-buy arrangement.

Part C: Terms contracts and other specialised sale of land contracts

Section 12: Terms contracts

54 *What is your experience with buying or selling property under a terms contract? Do you agree that there is a continuing place for such contracts in today’s market?*

Vendor terms (and rent-to-buy) schemes sell the dream of owning your own home—without a bank loan. These schemes target people who are excluded from the mainstream mortgage market (due to their income, savings or credit history), and appear to be driven by the lack of affordable housing across large parts of Australia. Consumer Action’s casework and research⁶ has shown that:

- vulnerable buyers (and some vendors) are convinced to enter into unsuitable and highly risky deals,
- these schemes can cause significant financial and personal harm to those buyers and vendors if they or an intermediary broker are unable or unwilling to stick to the agreement, and

⁶ See Consumer Action Law Centre, *Vendor Terms: Rhetoric and Reality*, February 2007, <http://consumeraction.org.au/policy-report-vendor-terms/> and Consumer Action’s forthcoming policy report on this issue.

- intermediary brokers who take advantage of desperate buyers and vendors are often the only ones who 'win' in the arrangement.

In vendor terms contracts (and rent-to-buy schemes) buyers often pay large amounts of money towards purchasing or securing their property before any legal title passes to them. These funds are not held on trust or otherwise secured. This is a critical risk for buyers, and the money paid will often not be recoverable if the deal fails. Through our casework and research we have seen hopeful buyers lose huge sums, for example by being unable to make the high repayments required and being evicted, being unable to refinance, or even by the property being sold under the buyer's feet when a property owner or mortgagee takes possession.

Consumer Action is aware of other types of vendor terms arrangements in Victoria, for example, to manage liability for taxes and duties or to allow for a gradual transition of ownership, particularly in farm, family or commercial transactions. Where these transactions are successful, it is likely to be because family relationships involve trust and do not involve the same profit motives. In the case of commercial transactions, the relative bargaining positions of the parties is likely to be in stark contrast to the home purchase deals seen by Consumer Action.

It is Consumer Action's view that:

- there is significant ongoing harm to disadvantaged buyers and some vendors who enter into these types of arrangements;
- the restrictions on terms contracts under the SLA are narrow and largely do not operate to prevent harmful contracts;
- disadvantaged buyers would be highly unlikely to proactively use the buyer protections under the SLA, including the "transfer with mortgage back" requirement;
- there is merit in the approach taken in South Australia to render terms contracts void; and
- the risks associated with these types of arrangements are significant and far outweigh the possible advantages, particularly for vulnerable people who pay significant amounts towards the promise of owning their own home.

Buyer protections

Despite a number of buyer protections being built into the SLA, Consumer Action continues to see disadvantaged people targeted by these schemes and left with uncertain legal rights and prospects.

Disclosure requirements

The SLA disclosure requirements for vendor terms contracts aim to ensure that a buyer has sufficient information about the deal, particularly the cost. These requirements currently require the vendor to tell the buyer:

- information about certain financial matters related to the property, including rates, taxes and other outgoings, plus in the case of a terms contract the details of the vendor finance agreement,⁷ and
- whether the property is mortgaged and, if it is sold subject to a mortgage, certain details of about the mortgage balance, current interest rate and instalments.⁸

Despite a breach of these requirements by a vendor being an offence and entitling the buyer to end the contract prior to settlement,⁹ Consumer Action continues to see vulnerable buyers enter deals that are unaffordable and high risk. Of the buyers Consumer Action has assisted, none obtained independent legal or financial advice prior to entering the contract. This leaves people faced with documents that they do not fully understand, even if they meet the SLA disclosure requirements. The conduct and representations of intermediary brokers are critical here and have led to numerous buyers enter deals that, on the face of it, are destined to fail. In Consumer Action's experience, the SLA disclosure requirements, while important to retain, have not *per se* deterred vulnerable buyers from high risk vendor terms deals.

Vendor mortgage restrictions

The mortgage restrictions in the SLA may reduce the risk of a buyer losing their home because of mortgage default.¹⁰ However, typically a vulnerable vendor facing the loss of their property to a mortgagee could still comply with these requirements (and disclosure requirements) while creating a high-risk situation for a buyer who enters the deal without independent legal and financial advice.

Where a terms contract provides that an existing mortgage must be discharged before the buyer can take possession of the property, the specific mortgage disclosure obligations do not apply.¹¹ While a requirement to discharge a mortgage prior to possession could significantly mitigate the financial risk to a buyer, Consumer Action is not aware of any terms contracts which have included a clause to this effect. It is unlikely that our client group, who lack any legal advice or bargaining power, would attempt to use this provision to promote their own legal interests.

Transfer with mortgage back

The SLA seeks to address the critical risk of a buyer under a terms contract not having legal title of the property until final settlement, by enabling the buyer to require the vendor to transfer the legal ownership of the property at any time during the agreement, with the buyer then having a 'mortgage back' to the vendor (with or without a discharge of the mortgage). A vendor who breaches a buyer's request to transfer the property faces civil penalties.¹²

⁷ SLA s 32A and Sch 2.

⁸ SLA s 29M and Sch 1.

⁹ SLA s 29N.

¹⁰ SLA ss 29M, 29N and 29P.

¹¹ SLA s 29O.

¹² SLA s 29H.

The 'transfer and mortgage back' requirement has the potential to secure a buyer's stake in the property, and may do so effectively where a buyer is an equal party to a property transaction and receives independent legal advice. However, as with the mortgage restrictions, Consumer Action is not aware of any cases where a disadvantaged or vulnerable buyer has used this provision to protect their interests.

With the requirement to discharge the mortgage only applying where the terms and conditions of the mortgage are more onerous than those of the terms contract, the deals that Consumer Action has seen would not require a discharge of the mortgage before transfer. This is because it would most likely be unprofitable for a vendor to enter into a terms contract with less onerous terms than the vendor's mortgage.

There are significant hurdles for our client group using a 'transfer with mortgage back', including that:

- a buyer must proactively require the vendor to transfer the property—this would require relatively complex legal advice, which disadvantaged buyers typically do not seek and probably could not afford,
- the process would be unaffordable for a buyer on a low income, who would have to cover the cost of preparing the mortgage back¹³ plus legal and any other costs, on top of ongoing instalment payments and outgoings, and
- there may be complexities involving the vendor's mortgagee, for example:
 - a vendor, particularly a vulnerable vendor in financial stress, may not be able to discharge the mortgage if required, and would therefore only have the option of attempting to transfer the property subject to the existing mortgage,
 - the terms of a vendor's mortgage may restrict the vendor's ability to transfer the subject property without the lender's consent, and
 - a lender's consent will likely be required, responsible lending obligations under the National Credit Code (**NCC**) will come into play, and other conditions may operate to hinder the vendor's ability to transfer the land subject to the mortgage.

These factors involving a vendor's lender will make the transaction complex and may mean that a vulnerable vendor, who has entered into an agreement to sell their property on vendor terms because they are facing financial difficulty, could be at high risk of breaching the transfer with mortgage back provisions.

Putting to one side the NCC requirements, a transfer of mortgaged property will not affect the mortgagee's rights over the property, and the obligations of the vendor will remain enforceable by the lender against the vendor. There are implied obligations on the buyer in these arrangements to honour the outstanding mortgage obligations and to indemnify the vendor in relation to the mortgage obligations¹⁴—effectively the buyer assumes responsibility for the vendor's mortgage repayments. Where the property is transferred subject to the lender's mortgage, the ongoing obligations owed by the buyer to the vendor under the terms contract

¹³ SLA Pt 1 Div 4 Subdiv 3.

¹⁴ *Transfer of Land Act 1958* (Vic) s 46(2).

(taking into account the liabilities assumed by the buyer in connection with the mortgage) will be secured by a second mortgage.¹⁵

Under the NCC, a mortgagee's consent must be obtained to a sale of the property, which consent must not be unreasonably withheld.¹⁶ The mortgagee can require as a condition of its consent that the buyer agree to be bound directly by the mortgage terms. This adds another potential obstacle for vendors to be able to comply with either of the available alternatives if a buyer gives notice requesting a transfer of the property.

The regime which permits a buyer to require a transfer of title appears to Consumer Action to have the potential to force vulnerable or financially stressed vendors into breach of contract. A vendor may be unable to procure a transfer of the underlying property subject to the mortgage due to the conditions of the mortgage or loan agreement itself, or conditions reasonably imposed by the lender. It would appear that the only circumstances which are free of these risks are where there is no mortgage, or where the parties' respective financial positions are such that a cash contract could have been utilised and the buyer could have accessed more mainstream finance. These are not circumstances that Consumer Action has commonly seen in our casework.

Other jurisdictions

At the Commonwealth level, the NCC expressly covers certain sales of land by instalments.¹⁷ The definition of these instalment sales is different but not inconsistent with the SLA definition of terms contract. However, because a credit provider must also be in the business of providing credit,¹⁸ the fact that a vendor may not meet this requirement (particularly a distressed property owner drawn into the deal by a broker) means that a terms contract may be valid under the SLA but not be covered by the NCC. This is a significant—and we believe possibly unintended—gap in buyer protection related to these schemes.

In other states, terms contracts are dealt with differently, with the various regimes offering different levels of protection for buyers in these deals. However, it is Consumer Action's view that overall most other state regimes do not provide significantly better protections for vulnerable buyers than the Victorian SLA does.

South Australia has the strongest buyer protections under its sale of land legislation, with vendor terms agreements having been void since 1973.¹⁹ Any money paid by a buyer under a vendor terms contract can be recovered by the buyer.²⁰

¹⁵ SLA s 29H(6)

¹⁶ *National Consumer Credit Protection Act 2009* (Cth) Schedule 1 s 51

¹⁷ NCC s 10.

¹⁸ NCC s 5.

¹⁹ *Land and Business Agents Act 1973* (SA) s 89. Instalment contracts are now void under s 6 of the *Land and Business (Sale and Conveyancing) Act 1994* (SA). An instalment contract in SA is a contract that provides for payment of part of the purchase price (except the deposit) before settlement. The deposit is an amount paid in not more than three instalments before the date of settlement: *Land and Business (Sale and Conveyancing Act) 1994* (SA) s 6.

²⁰ *Land and Business (Sale and Conveyancing Act) 1994* (SA) s 6(2).

While not banning 'instalment contracts', NSW legislation defines them narrowly and prohibits instalment contracts that fall outside the definition.²¹ An 'instalment contract' is a contract for the sale of a lot in a subdivision of five or more lots which provides for the purchase money to be paid by four or more part payments.²² It also includes an option to purchase. The NSW definition appears to be confined to residential lots, given the requirement that the property is a lot in a moderately-sized subdivision.

By vendor terms contracts being tightly restricted in NSW and banned in SA, the scope for deals that present a serious risk to buyers yet are still legal under sale of land legislation is more limited than is currently the case in Victoria.

55 *Should the current restrictions on sellers under terms contracts be expanded to encompass debt that is not linked to the property but which may impact on the seller's capacity to pass title to the buyer? If yes, what sources of debt should be included?*

It is consistent with the existing provisions under the SLA that any debts incurred by a vendor which may prevent title passing could also be considered. This would include debts incurred or arising before or after entering into a terms contract, and whether secured against the property or not. Such debts would include tax debts, personal loans and credit cards, all of which could ultimately be enforced against the vendor's property if the creditors were to pursue enforcement action.

Even where a creditor cannot look to the property directly to satisfy the debt, the fact that a vendor may have an additional debt burden can have a flow on effect, negatively impacting the vendor's ability to service the mortgage on the property.

However, there may be a question as to how much control state legislation could have over the vendor's debt when it is not secured by the property.

It makes sense to Consumer Action that, to the extent that it may impact on the buyers rights under the terms contract, the overall debt position of the vendor should be taken into account. However, given that there may be limited potential for the SLA to extend the restrictions on vendor debt, and on the basis that a mortgage would often represent the most significant of a vendor's debts, a prohibition on mortgaged properties being sold on vendor terms is the only further restriction that would address one of the most significant risks to buyers in vendor terms deals.

²¹ Under the *Land Sales Act 1964* (NSW)

²² *Land Sales Act 1964* (NSW) s 2.

56 *Should there be greater levels of scrutiny applied to terms contracts ‘brokered’ by intermediaries? If yes, what would you favour:*

- *offences and remedies directed at intermediaries?*
- *requirements on intermediaries to have contracts of sale independently audited for financial soundness before proceeding?*
- *other approaches? Please provide your ideas.*

Intermediary brokers have the least to lose and most to gain from vendor terms and rent-to-buy deals. In our experience, brokers will often have minimal if any exposure to the risks inherent in the transactions, and may derive a level of profit which is disproportionate to the risk they assume or the time and effort invested into the arrangement.

Brokers enter into contracts with vendors to formalise the financial agreement, profit split and responsibilities. Brokers come in many forms and operate using different methods and structures. One of the more problematic and common types of agreements between brokers and vendors is a joint venture agreement. Under these, typically a broker is given a power of attorney over the property and may have complete control over it. We are aware of cases where a vendor did not know the terms of the vendor terms contract that the broker entered into with a buyer.

The risks for buyers in brokered transactions could be significantly reduced by prohibiting brokered transactions that are not covered by the NCC. Consumer Action has seen numerous failed deals where the vendor has argued that the NCC does not apply because the vendor was not in the business of providing credit. A vendor, as the provider of the credit, may try to argue this irrespective of whether the broker holds an Australian Credit Licence.

To address any additional risks posed by vendor terms and rent-to-buy deals where there is an intermediary broker, some appropriate means of scrutiny may include enforcement of:

- Australian Consumer Law requirements in relation to advertising of properties offered on vendor terms or rent-to-buy. Online advertisements seen by Consumer Action frequently do not disclose the full cost of the deal (including one or more of the deposit, weekly payments, interest, option fees, total purchase price and any default interest and fees),
- estate agents regime compliance and cooperation with ASIC in relation to credit licensing regimes, and
- third-party certification of deals, for example, an independent solicitor’s certification that the buyer understands the contract.

Section 13: ‘Rent-to-buy’ contracts

57 *What are your experiences of rent-to-buy contracts? Can you provide any examples where a buyer has successfully purchased a property using the rent-to-buy method?*

Consumer Action has seen a number of rent-to-buy transactions in recent years that have caused severe financial and personal distress for buyers, as well as some vendors. We are not aware of any situation where a buyer has successfully purchased a property in a rent-to-buy deal in Victoria. Rent-to-buy schemes also do not appear to have the long history of vendor

terms contracts. We are not aware of any uses of these transactions aside from the highly risky schemes seen in Consumer Action's casework.

While rent-to-buy arrangements are partly regulated under residential tenancies legislation, at least to the extent of the lease agreement, they present similar risks for buyers as terms contracts. The regulation of rent-to-buy arrangements should be clearer, given that at present there appears to be uncertainty around how the option element of the arrangement is regulated.

Buyers in rent-to-buy schemes have had increased protection under the *Residential Tenancies Act 1997* (Vic) (**RTA**) since 2008.²³ The RTA will regulate the residential tenancy agreement component of the arrangement, so the extent to which a buyer can rely on the RTA for protection will be determined by how much of an overall rent-to-buy arrangement that definition extends to.

The giving of an option to purchase land is considered a 'sale' of land under the SLA²⁴ and therefore the option agreements seen in rent-to-buy deals are likely to fall under the SLA. This will provide the buyer with some remedies in the event of a vendor's breach of the agreement or the law. However, to pursue those remedies, a buyer will need to be proactive and have the resources to sustain legal action, which a vulnerable buyer often will not have. The SLA does not provide the same lower cost, less formal avenues for buyers in disputes that the RTA does for tenants.

Option agreements set out among other things what will happen in the case of default (non-payment of option fees) by the tenant. Critically for tenants, under the option agreements that Consumer Action has seen, option fees paid by a tenant are typically not refundable if the purchase is not completed.

The RTA appears to be silent on whether option agreements could be additional terms of a lease and therefore potentially invalid if their terms exclude, restrict or modify the application of the RTA or the exercise of a right under the RTA.²⁵

It is possible that in Victoria the option agreement and the residential tenancy agreement will constitute one agreement and that payments required under the option agreement may be prohibited under the RTA. The structure of a particular deal as a whole and the degree of connection between the option agreement and the residential tenancy agreement will determine if this is the case. Although the issue does not appear to have been considered by Victorian courts or the Victorian Civil and Administrative Tribunal (**VCAT**), an unreported decision of the Consumer, Trader and Tenancy Tribunal in NSW²⁶ held that where entry into an option agreement was a precondition to the grant of a residential tenancy agreement, there was effectively one agreement, and the money paid under the option agreement was void.²⁷

²³ Section 6 of the RTA as amended by the *Consumer Credit (Victoria) and Other Acts Amendment Act 2008* (Vic).

²⁴ SLA s 2.

²⁵ Under s 27 of the RTA.

²⁶ *Ardle & Milsom v Hooi Kiang Kho*, NSW CTTT, 18 April 2013 (unreported).

²⁷ Under the *Residential Tenancies Act 2010* (NSW) s 21.

Given the similarities between the relevant provisions of the NSW and Victorian legislation, there is the potential that a similar outcome would occur in Victoria.²⁸

The potential application of both the SLA and RTA to the option agreement component of rent-to-buy agreements is symptomatic of the uncertain state of the law as it relates to these arrangements.

Other jurisdictions

Unlike vendor terms contracts, the NCC does not expressly apply to rent-to-buy contracts, although the structure of a transaction may characterise it as one to which the NCC applies.

In South Australia, since 2008 a buyer has been able to choose to end a rent-to-buy agreement and recover all money paid aside from fair market rent.²⁹ Prior to 2008, a South Australian court had found that a lease-option agreement constituted a vendor terms agreement and was void.³⁰ While the SA model has provided significant buyer protections, Consumer Action is nonetheless aware of a number of failed rent-to-buy deals involving vulnerable people in SA who were unaware of their legal rights from the outset.

Residential tenancies laws in other parts of Australia appear to capture the residential tenancy agreements in rent-to-buy deals. Consumer Action has not identified anything in the legislation outside of SA which would exclude these arrangements from tenant protections. However, the situation in other states is not as clear as in Victoria, where rent-to-buy agreements have been purposely brought into the residential tenancies regime.

The legislation in each jurisdiction (as in Victoria) prohibits the payment of certain charges. These include charges for making, continuing and renewing leases which are bonuses, commissions or similar types of payment. Often, a landlord can only require rent and a security bond, and the amount of rent which can be charged in advance is also controlled.³¹ Certain payments are also specifically banned.³²

Conclusions and recommendations

Rent-to-buy deals present the same risks as vendor terms contracts, with the added uncertainty as to applicable laws. They also do not appear to have established uses in other parts of the residential property market. There is an extremely strong argument for prohibiting rent-to-buy deals in Victoria, considering their unclear legal status and lack of express NCC coverage. If they continue, the restrictions that we have identified for vendor terms contract should apply.

²⁸ However it is noted that the NSW decision will not bind the Victorian tribunals or courts.

²⁹ *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 6.

³⁰ *Johnstone v Poralka Investments Pty Ltd* [2008] SADC 87.

³¹ See for example *Residential Tenancies Act 1995* (SA) s 54; *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 87

³² See for example *Residential Tenancies Act 1997* (Vic) s 51; *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 163

Section 14: Land banking

58 *Should there be additional protections provided to buyers who purchase property under land banking schemes? If yes, where do you think the risks lie and how can they be mitigated?*

Consumer Action has not represented or advised clients on land banking matters. However, similar issues can arise with these schemes as with vendor terms and rent-to-buy schemes, in particular where there is misleading and deceptive conduct by spruikers in their dealings with hopeful investors, or by brokers in their dealings with property owners or hopeful buyers.

Consumer Action supports the recent recommendations of the Senate Economics References Committee that policy makers consider property investment advice be regulated at a Commonwealth level, and that stronger consumer protections be put in place for buyers in these schemes.³³

Section 15: Private sales online

59 *What are your experiences with selling and buying property privately online?*

Consumer Action has seen some rent-to-buy/vendor terms deals where the property owner made the deal directly with the buyer. It appears that some of these properties were advertised online, including on Gumtree, Facebook and specialist websites such as realestate.com.au. However, from a review of recent advertising, it appears that the current trend may be towards deals being made by intermediary brokers, who it is presumed are required to be licensed estate agents in Victoria.³⁴

Part D: Sale of land and business protections within the Estate Agents Act

Section 17: Statement concerning finance

61 *Do estate agents and auctioneers commonly assist buyers in obtaining finance or has this practice declined over the years as bank finance became more readily available?*

Consumer Action has seen number of buyers in rent-to-buy and vendor terms deals who were led, by an intermediary 'broker' of the deal (not a mortgage broker), to believe that they would be able to obtain a home loan after several years.

³³ Senate Economic References Committee, *Scrutiny of Financial Advice: Part I – Land banking: a ticking time bomb*, February 2016, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Scrutiny_of_Financial_Advice/Report.

³⁴ See Consumer Action's first submission to this review: *Submission to consumer property law review: Issue Paper 1 – Conduct and institutional arrangements for estate agents, conveyancers and owners corporation managers*, 11 March 2016, <https://www.consumer.vic.gov.au/resources-and-education/legislation/public-consultations-and-reviews/consumer-property-law-review/issues-paper-1-conduct-and-institutional-arrangements>.

One of Consumer Action's clients had debt agreements, which are an act of bankruptcy, and only entered a rent-to-buy agreement because the intermediary broker told him that he would easily get a home loan at the end of the three-year contract, and that the broker would help him to do so. This was not the case and he has been unable to get a loan to buy the (overpriced) property.

Part E: Modernisation of the Sale of Land Act

Section 20: Definitions

65 How can the current definitions be improved? Where have you experienced areas of inconsistency or confusion?

Consumer Action has identified two definitions in the SLA that could be reviewed with a view to improving the regulation of vendor terms and rent-to-buy arrangements, and protections for vulnerable parties in these deals.

'Sale'

By the definition of 'sale' including the 'giving of an option to purchase',³⁵ the option agreement in a lease-option arrangement is expressly within the scope of the SLA. However, the lease agreement is governed by the *Residential Tenancies Act 1997* (Vic) (**RTA**). It is unclear how the protections and responsibilities under the SLA and RTA regimes interact in rent-to-buy arrangements. Under the RTA, an option agreement may be considered part of a lease agreement and potentially contain 'invalid terms'³⁶ despite being valid under the SLA.

The current definition of sale is in this regard unclear. If rent-to-buy deals are to continue in Victoria, the relevant legislation should clarify the legal status of option agreements while preserving tenant protections provided under the RTA.

'Occupation rent'

Where a buyer is able to avoid a prohibited terms contract and recover money paid under the contract, the amount recoverable is offset by an 'occupation rent' being payable for the time they were in possession of the property.³⁷ Consideration of the rent that would be payable can arise when a buyer uses other causes of action to recover money paid under a vendor terms or rent-to-buy agreement.

While 'occupation rent' is not defined in the SLA, it is an important consideration for a buyer pursuing money from a failed rent-to-buy or vendor terms deal. It is presumed that similar

³⁵ SLA s 2.

³⁶ Under s 27 of the RTA. See further Consumer Action Law Centre, Submission to Residential Tenancies Act review: Issues Paper 3 – Rights and responsibilities of landlords and tenants, 3 May 2016, <http://consumeraction.org.au/residential-tenancies-act-review-issues-paper-3-rights-responsibilities-landlords-tenants/>.

³⁷ SLA s 29F. In South Australia, 'fair market rent' is payable by a buyer who rescinds a rent-to-buy contract: *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 6(2c).

considerations will be taken into account as those used when a tenant applies to the CAV Director and subsequently VCAT for a review of excessive rent.³⁸

Clarification of how 'occupation rent' will be determined could significantly assist buyers and their legal representatives to assess the amount that they can pursue when disputes arise.

It may also be the case that 'fair market rent' (as under the SA legislation) is the more appropriate term.

Section 23: Conciliation and mediation of disputes

70 *Should there be opportunities for mediation and/or conciliation of disputes arising under the Sale of Land and Estate Agents Acts? If yes, what typical areas of dispute would benefit?*

71 *Should there be mandatory conciliation before a dispute can escalate to VCAT or a court? Are there areas where conciliation should not apply – for example, if a person is electing to exercise their rights to end a contract?*

Consumer Action is broadly supportive of ombudsman schemes as a means to improve access to justice while providing an effective alternative dispute resolution process. We are wary, however, of mandatory conciliation being imposed where this is not part of an effective ombudsman service or dispute resolution scheme that complies with the benchmarks for industry-based dispute resolution schemes.³⁹

Our position is based on our experience that mediation and conciliation can work against the interests of a consumer where their dispute is against a trader or a more powerful party. The power imbalance inherent in such transactions means that conciliation or mediation can be used to inhibit just outcomes. Further, we are concerned if such processes included fees or charges, or were otherwise inaccessible to low-income earners.

If an ombudsman service is established to deal with real estate disputes, including vendor terms and rent-to-buy contracts, Consumer Action sees no reason to limit its jurisdiction. To be effective, it should cover the vast array of disputes in the sector, including those that relate to ending a contract and contractual provisions.

Consumer Action notes that there is a Property Ombudsman in the UK, which has jurisdiction for the resolution of disputes between consumers and certain property agents.⁴⁰

³⁸ RTA ss 45 to 48, in particular factors that VCAT must have regard to in s 47(3).

³⁹ Treasury, *Benchmarks for Industry-based customer dispute resolution*, available at: http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2015/benchmarks_ind_cust_dispute_reso/Documents/PDF/benchmarks_ind_cust_dispute_reso.ashx

⁴⁰ See, <https://www.tpos.co.uk/>.

Section 24: Offences and remedies

72 *Are the current remedies under the Sale of Land Act meaningful for buyers and sellers? Are there opportunities for reform?*

See our comments above regarding the utility of the current remedies under the SLA for Consumer Action's client group.

73 *Should sellers have the opportunity to argue honest and reasonable mistake? Are there any circumstances where a seller should not be able to put this case? Please give reasons for your view.*

See our comments above on this issue.

76 *What are your views on the current offences and penalties applying under the Sale of Land Act?*

See above for our views on offences and penalties.

Please contact Susan Quinn on 03 9670 5088 or at susan@consumeraction.org.au if you have any questions about this submission.

Yours sincerely,

CONSUMER ACTION LAW CENTRE



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