



ARE YOU PREPARING A TERMS CONTRACT?

When drafting a contract of sale of land, be careful not to inadvertently create a terms contract.

LPLC receives claims where practitioners acting in conveyancing transactions inadvertently prepare a contract of sale of land which falls within the definition of a “terms contract” under Part I Division 4 (ss29A to 29W) of the *Sale of Land Act 1962* (SLA).

A common scenario is when the vendor and purchaser negotiate a longer settlement for the sale of land, for example two or three years, with the purchase price to be paid in a series of instalments. The vendor’s legal practitioner is instructed to prepare the s32 statement and contract of sale of land, which they draft without recognising that the multiple payments have rendered the contract a terms contract under the SLA.

As a result, the contract of sale of land and s32 statement do not comply with the special rules governing terms contracts under the SLA, and the vendor is not aware of their rights and obligations. This can have significant unwanted repercussions for the parties, which may include the contract being voidable.

What is a terms contract?

A terms contract (also colloquially referred to as a vendor finance contract or instalment contract) is defined under s29A of the SLA as a contract for the sale of land where the purchaser is:

- obliged to make two or more payments to the vendor other than a deposit or final payment on completion, or
- entitled to possession of the land or to the receipt of rents and profits before the purchaser becomes entitled to a conveyance or transfer of the land.

When preparing a contract of sale of land, practitioners should always pay careful attention to the type and number of payments the purchaser will be required to make under the contract. Multiple payments can render a contract of sale of land a terms contract under the SLA, notwithstanding that the transacting parties only intend to enter into a standard contract.

To this end, the following types of payments do not count in determining whether a contract of sale of land is a terms contract under the SLA:

- deposit instalments that are specified to be payable within 60 days of the date of execution of the contract
- a final payment made by the purchaser at settlement where they become entitled to a transfer of the land
- payments made prior to signing the contract
- voluntary payments which the purchaser is not obliged to make under the contract.

As such, if the contract of sale of land requires the purchaser to make two or more payments after 60 days has passed since executing the contract and before the final payment at settlement, even if they form part of the deposit, the contract will be a terms contract under the Act.

Example

Consider the following example where a purchaser agrees with the vendor to buy a parcel of land for \$5 million, with the contract of sale of land requiring the purchase price to be paid in four instalments over a three-year period. In scenario 1, the two payments made more than 60 days after the day of sale and before the final balance is paid at settlement will render the contract of sale a terms contract. In scenario 2, there is only one payment made after the 60 days and before settlement and so the contract will not fall within the definition of a terms contract.

Scenario 1 A Terms contract	Scenario 2 Not a terms contract
1. \$500,000 deposit payable upon execution of contract	1. \$250,000 part deposit payable upon execution of contract
2. \$500,000 instalment payable 12 months after execution	2. \$250,000 part deposit payable 30 days after execution
3. \$500,000 instalment payable 24 months after execution	3. \$1 million instalment payable 18 months after execution
4. \$3.5 million payable at settlement	4. \$3.5 million payable at settlement

Risk management tips

All conveyancing practitioners should be across the terms contract provisions in ss29A through 29W and s32A(d) of the SLA to properly understand what constitutes a terms contract and the obligations and rights of the parties when a terms contract is created.

When drafting a contract of sale of land, practitioners must consider and check the type and number of payments to be made by the purchaser to avoid creating a terms contract inadvertently. Vendors should be advised that if the contract requires the purchaser to make two or more payments after 60 days have passed since the contract is signed and before the final payment at settlement, the contract will be deemed a terms contract under the SLA. In these circumstances, a “standard” contract of sale of land will not meet the parties’ needs and a bespoke document must be prepared to comply with special rules governing terms contracts under the SLA.

Further, the s32 statement will need to include information as to instalment payments required by Schedule 2 of the SLA. Failure to comply with the SLA can result in the terms contract being voidable.

Practitioners should also advise vendors and purchaser clients in writing of the risks and consequences of entering into a terms contract and what they must do to comply with the SLA.

The rules governing terms contracts are complex and it is easy to make mistakes if you are not experienced in this area. Practitioners without experience should avoid dabbling in drafting and advising on terms contracts and we recommend instead referring clients for specialist advice. ■

This column is provided by the **Legal Practitioners’ Liability Committee**. For further information ph 9672 3800 or visit www.lplc.com.au.