

# Standard Conditions of Sale | Business Sale

Third Edition

Incorporating the Standard Conditions of Sale - Business Sale (Third Edition) adopted by the Real Estate Institute of Queensland Limited for conveyances of leasehold businesses only.

## 1 INTERPRETATION

### 1.1 In this Contract:

"**Accounts**" has the meaning set out in Clause 37.1;

"**Agent**" includes Auctioneer;

"**Business**" means the Business listed in Item J and includes the Business Assets;

"**Business Assets**" mean the assets described in Clause 3.1 or in 3.2 (as the case requires);

"**Business Day**" means a day (other than a Saturday, Sunday or public holiday) on which banks are open for business in the city or town listed in Item P;

"**Business Name**" means the business name described in Item J(d);

"**Buyer**" means the party named in Item E;

"**Completion**" and "**Date of Completion**" means the date of Completion set out in Item P or as varied by agreement;

"**Deposit**" means the sum stated in Item L(b);

"**Deposit Holder**" means the person named in Item I;

"**Encumbrances**" includes:

- (a) unregistered encumbrances;
- (b) statutory encumbrances; and
- (c) Security Interests;

"**Excluded Assets**" means:

- (a) any notified debt in accordance with Clause 16.3;
- (b) any other receivable;
- (c) any cash of the business;
- (d) any employment contract of any person (including an employee);
- (e) any insurance policy or insurance claim;
- (f) any document or record which the Seller is obliged by law to retain.

"**Gross Income**" means income earned by the Seller in the carrying on of the Business (excluding deductions and expenses);

"**GST**" means the goods and services tax under the GST Act;

"**GST Act**" means *A new Tax System (Goods and Services Tax) Act 1999* (Cth) and includes other GST related legislation;

"**Item**" means an Item as defined in Clause 1.4;

"**Keys**" means implements or instruments necessary for the purposes of fastening or unfastening:

- (a) the lock on any gate, door, grille, shutter or lift which secures any means of entrance to or exit from the premises (whether or not such gate, door, grille, shutter or lift forms part of the premises);

- (b) any other lock attached to or included in the premises; and includes electronic devices and written records of all codes or combinations necessary for the purposes of fastening or unfastening any such lock;

"**Lease**" means the lease, agreement for lease, or tenancy relating to the premises, particulars of which are set out in Item S or T (as the case may be);

"**Local Authority**" means the relevant local authority in whose area the premises are situated;

"**Plant and Equipment**" means the plant and equipment referred to in Item N;

"**PPSR**" means the Personal Property Securities Register established under the *Personal Property Securities Act 2009* (Cth);

"**Premises**" means the premises from which the Business sold is being conducted;

"**Property Occupations Act**" means the *Property Occupations Act 2014* (Qld);

"**Purchase Price**" means the sum stated in Item L;

"**Secured Party**" has the meaning given in the *Personal Property Securities Act 2009* (Cth);

"**Security Interests**" means all security interests registered on the PPSR over the Business and Business Assets;

"**Seller**" means the party named in Item C;

"**Seller's Agent**" means the person named in Item B;

"**Solicitor**" means a solicitor whether acting as principal or agent;

"**Stock-in-Trade**" means:

- (a) all goods owned or agreed to be bought by the Seller which are to be sold to third parties (whether by wholesale or by retail) in the course of conducting the Business, or

- (b) any goods which are listed as stock-in-trade in any schedule, annexure, or appendix to this Contract;

"**Trade Mark**" means any trade mark described in Item J(f);

"**Transferring Employee**" means an employee who accepts the offer of employment made by the Buyer under Clause 18.3; and

"**Work-in-Progress**" means:

- (a) the benefit of any Contract or other arrangement under which the Seller has provided any services to third parties for which payment is to be made by or on behalf of a third party, whether in whole or in part, and which services have been provided in connection with the Business;

- (b) any goods (excepting stock-in-trade) owned or agreed to be bought by the Seller which are used in or subject to any process of manufacture, combination, treatment, production, application or other procedure which alone or in combination with any other goods or inputs adds value to the goods for the purpose of applying or using them in the course of conducting the Business or any activity which is a step in conducting the Business; or
  - (c) any transaction listed as work-in-progress in any schedule, annexure or appendix to this Contract.
- 1.2** Unless the contrary intention appears, the date of formation of this Contract is the date stated in Item A.
- 1.3** Any reference to any statute includes any amendment, replacement or re-enactment for the time being in force, and any by-laws, statutory instruments, rules, regulations, orders, notices, directions, consents, permits or approvals made under any of these things and any conditions attaching to these things.
- 1.4** In this Contract, where the term "Item" is used in conjunction with a particular letter of the alphabet, it is a reference to the Item set opposite the letter referred to in the Items Schedule.
- 1.5** In this Contract, a reference to any schedule, annexure or appendix is a reference to that schedule, annexure or appendix to this Contract.
- 1.6** This Contract is binding upon and enure to the benefit of the parties and their permitted successors and assigns.
- 1.7** References in this Contract to the parties includes their respective directors, employees and agents.
- 1.8** Any undertaking by any party not to do any act or thing is deemed to include an undertaking not to permit or suffer the doing of that act or thing.
- 1.9** The singular includes the plural and vice versa and any gender includes any other gender.
- 1.10** The Items Schedule to this Contract and any schedule, annexure or appendix to this Contract constitute an integral part of this Contract.
- 1.11** A reference to a matter being to the best of the Seller's knowledge and belief means:-
- (a) if the Seller is a natural person, that the matter is to the best of the actual knowledge and belief of that person after making reasonable enquiries in the circumstances; or
  - (b) if the Seller is a corporation, that the matter is to the best of the actual knowledge and belief of each director of the Seller after making reasonable enquiries in the circumstances.

## 2 HEADINGS AND NOTES

- 2.1** The headings of Clauses and notes to Clauses in this Contract are for descriptive purposes only and do not control or alter the meaning of this Contract as set out in the text, and do not in any way limit or amplify the terms of this Contract.

## 3 THE BUSINESS

- 3.1** The Business includes the goodwill, fixtures, fittings, furniture, chattels and the plant and equipment, industrial and intellectual property, work-in-progress (if any), and stock-in-trade, permits, licences, and other assets set out

in any schedules attached to this Contract (but excluding any Excluded Assets) and which assets are in this Contract referred to as the "Business Assets".

- 3.2** If the Business is sold on a "walk-in, walk-out" basis, then the Business includes the goodwill, fixtures, fittings, furniture, chattels and the plant and equipment, industrial and intellectual property, work-in-progress (if any), permits, licences, stock-in-trade and other assets set out in any schedule attached to this Contract (but excluding any Excluded Assets) and which assets are in this Contract referred to as the "Business Assets".
- 3.3 Sale of a Going Concern**  
If this Clause 3.3 applies:
- (a) the Buyer warrants that the Buyer is registered or required to be registered under the GST Act;
  - (b) the Buyer must provide to the Seller at least one (1) Business Day before Completion written proof that the Buyer is registered under the GST Act; and
  - (c) if GST is imposed on the supply of the Business, the amount the Buyer must pay at Completion is increased by the amount of the GST.
  - (d) The Seller must carry on the Business as a going concern until the Completion.
  - (e) The parties entered into this Contract on the basis that the supply is GST-free and the Purchase Price is exclusive of GST.
  - (f) If the Seller is or becomes liable for GST on the supply of the Business or any Business Assets under or in connection with this Contract, then Clause 3.5 will apply despite any other provision in this Contract.
- 3.4 Purchase Price Includes GST**  
If this clause 3.4 applies, the Purchase Price includes the Seller's liability for GST on the supply of the Business. The Buyer is not obliged to pay any additional amount to the Seller on account of GST on the supply of the Business or any Business Assets under or in connection with this Contract.
- 3.5 Purchase Price Does Not Include GST**
- (a) If this Clause 3.5 applies, the Purchase Price does not include the Seller's liability for GST on the supply of the Business or any Business Assets under or in connection with this Contract.
  - (b) In addition to the Purchase Price the Buyer must:-
    - (i) indemnify the Seller from that GST; and
    - (ii) pay to the Seller an amount equal to the GST within five (5) Business Days of a written request from the Seller for payment of the GST, but if the written request is not in the form of a tax invoice, the Buyer need not pay until five (5) Business Days after receiving such a tax invoice (or an adjustment note).
  - (c) The amount the Buyer must pay to the Seller for GST under paragraph (b) must be calculated by multiplying the GST exclusive consideration for the taxable supply by the applicable GST rate.
  - (d) The GST exclusive consideration is the Purchase Price, or so far as the consideration for the supply is not expressed as an amount of money, the GST exclusive market value of that consideration.

## 4 STOCK-IN-TRADE AND WORK-IN-PROGRESS

- 4.1 (a) Where Clause 3.1 applies, in addition to the Purchase Price specified in Item L, the Buyer must at the date of Completion take over and purchase from the Seller all the goods and saleable stock-in-trade being in and on the premises at the landed invoice cost or as mutually agreed between the Seller and the Buyer.
- (b) Unless the Seller and the Buyer agree as to the value of the stock-in-trade for the purpose of Clause 4.1(a), a stocktake must be carried out by an independent stocktaker appointed by the Seller and the Buyer and in default of agreement in that regard appointed by the Seller's Agent. The value and saleability or otherwise of such stock-in-trade must be determined by the stocktaker. The stocktaker's fee in respect of the stocktake must be borne equally by the Seller and the Buyer.
- (c) The stocktake must be carried out after the close of trade on the nominated date of stocktake referred to in Item M(a).
- (d) The Buyer must pay for stock-in-trade to the maximum nominated figure contained in Item M(b) on the date of Completion. If the value of stock-in-trade exceeds that amount the Buyer may elect to reject such items selected solely at the option of the Buyer as may be necessary to reduce the total value of stock-in-trade to the maximum nominated figure.
- 4.2 For the purposes of Clause 3.1, the following applies:
- (a) The Seller and the Buyer may agree upon the value of work-in-progress if this is not stated in Item O.
- (b) If the Seller and the Buyer do not agree upon the value of work-in-progress by the date stated in Item M(a) or by any other agreed date (each the "Valuation Date") then the following applies:
- (i) the Seller and the Buyer must agree by the Valuation Date on an independent accountant to value the work-in-progress;
- (ii) where agreement is not reached by the Seller and the Buyer in terms of Clause 4.2(b)(i), the accountant shall be appointed by the Seller's Agent and the Seller and the Buyer must pay the fees and disbursements of that accountant in equal shares;
- (iii) the accountant must:
- (a) value the work-in-progress in accordance with generally accepted accounting principles; and
- (b) notify the Seller and the Buyer and the Seller's Agent of the value of the work-in-progress at least two (2) Business Days before the date of Completion; and
- (iv) the valuation determined in accordance with Clause 4.2(b)(iii) is binding upon the Seller and the Buyer for all purposes connected with this Contract.
- (c) The value of work-in-progress determined in accordance with Clauses 4.2(a) or (b) (as the case may be) must be paid by the Buyer to the Seller together with the balance of the Purchase Price set out in Item L(c) in accordance with Clause 6.1.

- (d) Any determination by an accountant under this Clause of a matter is final and binding on the parties in all respects and is made as an independent expert and not as an arbitrator.

## 5 DEPOSIT

- 5.1 The Buyer must pay the Deposit to the Deposit Holder upon the signing of this Contract. If the Buyer:
- (a) fails to pay the Deposit as provided in this Clause 5.1;
- (b) pays the Deposit by post-dated cheque; or
- (c) pays the Deposit by a cheque which is not honoured on presentation, it will be in substantial breach of this Contract and the Seller (in addition to any rights at law or in equity) may exercise its rights under Clause 29.

## 6 COMPLETION

- 6.1 The balance of the Purchase Price set out in Item L(c) together with the sum to be paid for stock-in-trade and work-in-progress determined according to Clauses 4.1 and 4.2 must be paid in cash or by Bank Cheque or such other means as agreed to by the parties on the date of Completion to the Seller's Solicitor named in Item D or as directed by the Seller in exchange for:
- (a) the relevant instrument of lease relating to the occupation of the premises;
- (b) a transfer of the Seller's interest in the lease properly signed and (if appropriate) capable after stamping of immediate registration with the competent authority;
- (c) any declarations or instruments required by the Office of State Revenue to be made by the Seller to stamp the documents and instruments of transfer and any other dutiable instruments;
- (d) releases of all Encumbrances (other than registered Security Interests) over the Business or the Business Assets;
- (da) in respect of each Security Interest over the Business or the Business Assets, a covenant by each relevant Secured Party to discharge such Security Interest;
- (e) transfers of all Business Assets not otherwise referred to duly executed (where required by law) together with such instruments of title and other supporting documentation as may be necessary to effect registration in any competent authority;
- (f) if the Business Name is registered, any information and each document (if any) needed to transfer registration of the Business Name to the Buyer, such as the consent to transfer number issued by the Australian Securities Investment Commission or a consent to the Buyer using the name;
- (g) the duly executed covenant referred to in Clause 12.2(b) (if applicable); and
- (h) any other documentation necessary to vest in the Buyer unencumbered title to the Business and the Business Assets (and the stock-in-trade, if applicable).
- (i) a valid tax invoice if the supply of the Business is subject to GST.
- (j) a notice of disposal of each registered motor vehicle included in the plant and equipment together with the certificate of registration for, and a roadworthiness certificate required by an applicable law for transfer from the Seller to the Buyer of the registration of, each such motor vehicle;

- (k) (at the places at which they are usually located in the normal course of operation of the Business), any original held by the Seller of any contract which relates to the Business;
- (l) (at the place of which they are usually located in the normal course of operations in the Business), any original held by the Seller of each authorisation of a government agency to carry on any aspect of the Business;
- (m) (at the places at which they are usually located in the normal course of operations of the Business), all documents and records (eg, financial records, business data, correspondence, customer lists, supplier details, pricing information, catalogues, promotional materials, marketing data and employment files) relating to the Business or needed for it to be carried on and in the possession of the Seller, which may be copies if the Seller wishes to retain the originals;
- (n) an effective transfer of each Trade Mark;
- (o) each document which must be signed by the Seller to transfer or apply for the reissue to the Buyer of each authorisation of a government agency to carry on any aspect of the Business.
- (p) All documents signed by the Seller as may be required to transfer or assign the email address for the Business prescribed in Item J(i).
- (q) All documents signed by the Seller as may be required to transfer or assign the website address mentioned in Item J(j) and domain name mentioned in Item J(k) to the Buyer.

The Buyer may deduct from the balance Purchase Price sufficient funds to cover any fees payable to an authority for registration of any documentation referred to in sub Clause (d) above.

**6.2** Despite any other provision of this Contract, a reference to a "Bank Cheque" in Clause 6.1:

- (a) includes a cheque drawn by a Building Society or Credit Union on itself;
- (b) does not include a cheque drawn by a Building Society or Credit Union on a Bank; and
- (c) the Seller is not obliged to accept a cheque referred to in Clause 6.2(b) on Completion.

## **7 POSSESSION**

**7.1** On the date of Completion (provided always that the Buyer has paid all monies which are payable on or prior to that date in terms of Clauses 5 and 6) the Seller must give and the Buyer must take possession of the Business and the Business Assets.

## **8 STATEMENTS AND WARRANTIES**

**8.1** The Seller states and assures the Buyer that except as otherwise disclosed in this Contract:

- (a) the Seller is the owner of the Business and it will not be subject to any Encumbrances or liens at the date of Completion except as may be disclosed in this Contract;

- (b) to the best of the Seller's knowledge and belief the Seller has applied for or obtained all licences, permits, patents, certificates, consents or other approvals from any competent authority necessary for the proper carrying on of the Business and that there is not, and at the date of Completion there will not be, any subsisting contravention of any licence, permit, patent, certificate, consent or other approval obtained by the Seller in relation to the premises for the carrying on of the Business;
- (c) that all plant and equipment will at the date of Completion be in good working order and condition;
- (d) that on Completion:
  - (i) there will not be any subsisting breach of the lease by the Seller;
  - (ii) the Seller has received no notice from the Lessor under the lease which has not been complied with;
  - (iii) the lease will be valid and subsisting; and
  - (iv) the information in Item S is true and correct in every respect;
- (e) that the Seller will execute all such documents and give such other assistance as the Buyer may reasonably require to enable all right title and interest held by the Seller in the Business and the Business Assets mentioned in Items J, K, M and N(a) to vest in the Buyer on Completion, free from any Encumbrance or any restriction;
- (f) the Seller (if a company) is duly incorporated and validly existing under the laws of its jurisdiction of incorporation and has full corporate power and lawful authority to own the Business Assets and to carry on the Business as now conducted;
- (g) the Seller has not acquired or agreed to acquire any Business Assets or stock-in-trade on terms that property in them does not pass until full payment is made;
- (h) pending Completion the stock-in-trade of the Business shall not be offered for sale at prices less than the prevailing retail prices for such goods or otherwise than in the normal course of Business without the prior consent of the Buyer;
- (i) the trading figures and other financial data relating to the Business, particulars of which are set out in any schedule, annexure or appendix to this Contract, are true and correct in every particular.
- (j) if the Seller is a natural person, the Seller is not a bankrupt, nor has the Seller signed any authority under Section 188 of the *Bankruptcy Act 1966* (Cth); and
- (k) if the Seller is a corporation within the meaning of the *Corporations Act 2001* (Cth) or any similar legislation in the Seller's place of incorporation:
  - (i) the Seller is not in liquidation;
  - (ii) no action has been taken by or against the Seller which could lead to the winding up of the Seller;
  - (iii) the Seller is not under official management;
  - (iv) an administrator, controller or managing controller has not been appointed to the Seller or in respect of the whole or any part of the Business or Business Assets; and



- (v) a compromise or arrangement has not been proposed between the Seller and its members or creditors, nor agreed to by the members or creditors sanctioned by the Court.

**8.2** Where there is a breach of Clause 8.1:

- (a) the Buyer may terminate this Contract by notice in writing to the Seller and may sue the Seller for damages for the loss suffered arising from the breach; or
- (b) the Buyer may affirm this Contract and:
  - (i) may sue the Seller for damages for the loss suffered arising from the breach; and
  - (ii) may seek specific performance of this Contract or damages as an adjunct to or instead of specific performance of this Contract (or both); and
- (c) nothing in this Clause 8.2 limits the rights or remedies of the Buyer under other provisions of this Contract or at law or in equity.

**8.3 Buyer's Statements**

The Buyer states and assures the Seller that:

- (a) the Buyer has entered this Contract after satisfactory personal inspection and investigation of the premises, Business, stock-in-trade, licences and other Business Assets and the Buyer has perused such records of financial transactions relating to the Business as the Buyer has desired to inspect;
- (b) the Buyer (if a company) is duly incorporated and validly existing under the laws of its jurisdiction of incorporation and has full corporate power and lawful authority to execute and deliver this Contract and to consummate and perform or cause to be performed its obligations under this Contract;
- (c) this Contract constitutes a legal, valid and binding obligation of the Buyer enforceable in accordance with its terms by appropriate legal remedy; and
- (d) this Contract and its Completion do not conflict with or result in a breach or a default under any provision of its Constitution (if the Buyer is a company), or any material term or provision of any agreement or deed or any writ, order or injunction, judgement, law, rule or regulation to which it is a party or is subject or by which it is bound;
- (e) if the Buyer is a natural person, the Buyer is not a bankrupt, nor has the Buyer signed any authority under Section 188 of the *Bankruptcy Act 1966* (Cth); and
- (f) if the Buyer is a corporation within the meaning of the *Corporations Act 2001* (Cth) or any similar legislation in the Buyer's place of incorporation:
  - (i) the Buyer is not in liquidation;
  - (ii) no action has been taken by or against the Buyer which could lead to the winding up of the Buyer;
  - (iii) the Buyer is not under official management;
  - (iv) an administrator, controller or managing controller has not been appointed to the Buyer in respect of the whole or any part of its assets;
  - (v) a compromise or arrangement has not been proposed between the Buyer and its members or creditors nor agreed to by the members or creditors sanctioned by the Court.

**9 SELLER IN POSSESSION UNTIL COMPLETION**

- 9.1** Until the date of Completion, the Seller will:
- (a) remain in possession of the Business and the premises and will manage the Business as a going concern; and
  - (b) ensure that the Business is carried on in its usual way (having regard to the nature of the Business and past practice), including, without limitation, the maintenance of the trading hours of the Business that apply as at the Contract Date.
- 9.2** The Seller must sign and execute all documents and do all acts and things reasonably required for putting the Buyer in full possession and enjoyment of the Business and the premises from Completion and for otherwise performing this Contract.

**10 ERRORS AND MISDESCRIPTIONS**

- 10.1** If any mistake is made in the description of the Business or the Business Assets or the premises or any other error whatsoever appears in any schedule, annexure or appendix to this Contract such mistake or error does not annul the sale but compensation or equivalent must be given or taken as the case may require.

**11 BUYER'S TRIAL PERIOD**

- 11.1** If Item V is completed, upon the Buyer providing to the Seller written notice that:
- (a) its obligations under Clause 5 have been satisfied; and
  - (b) the provisions of Clauses 23, 24, 25 and 37 (if applicable) have either been satisfied or waived by the Buyer (as the case may require),
- the Seller must permit the Buyer, or the Buyer's representative, to trial the Business for the period set out in Item V(a) at no cost to the Seller for the purpose of verifying the trading performance of the Business at the date of this Contract and verifying to the Buyer that the gross income for the period set out in Item V(a) is not less than the amount set out in Item V(b).
- 11.2** Despite any other provision in this Contract, if the Buyer conducts such a trial, it is deemed to have acknowledged that the provisions of Clauses 23, 24, 25 and 37 (if applicable) have either been satisfied or waived by the Buyer.
- 11.3** If the Buyer is not satisfied with the trading performance of the Business under Clause 11.1 then the Buyer may by notice in writing to the Seller given not later than two (2) Business Days after the expiration of the period set out in Item V(a) terminate this Contract in which event all Deposit and other monies received by the Seller or Deposit Holder on account of the Purchase Price must be refunded to the Buyer by the Seller or the Deposit Holder as the case may be.
- 11.4** If the Buyer does not notify the Seller, in writing whether or not it is satisfied with the trading performance of the Business under Clause 11.1 within the period specified in Clause 11.3, the Buyer is deemed to be so satisfied for the purpose of this Clause 11.

## 12 RESTRICTION ON SELLER'S COMPETITION

- 12.1 The Seller must not in any manner whatsoever either directly or indirectly be concerned or interested either alone or in partnership with or as manager servant or agent for any other person, company or corporation in the Business described in Item J or any other business of a similar nature within the prescribed area as set out in Item W(a) for the prescribed period as set out in Item W(b). If either the period set out in Item W(b) or the area set out in Item W(a) be found to be excessive and unenforceable by any Court of competent jurisdiction then the Buyer may serve upon the Seller notice of variation of this Clause and Items W(a) and (b), specifying a reduced period and area and upon the service of such notice the period and area shall be so reduced and the parties agree to be bound by the provisions of this Clause as varied by the notice of variation. Nothing in this Clause 12.1 prevents any Court of competent jurisdiction from reading down the area or period of restraint if such Court is empowered to do so in order to validate these restraints.
- 12.2 The parties agree that:
- (a) this Clause 12 is for the benefit of the Buyer to protect the goodwill of the Business; and
  - (b) if the Seller is a company or a corporation then the Seller will on or before the date of Completion obtain a covenant in terms of Clause 12.1 from the directors and shareholders of the Seller in favour of the Buyer.
- 12.3 If this Clause 12 is annulled by any order of any Court of competent jurisdiction, then this Clause 12 is severable from this Contract.

## 13 DISPUTE RESOLUTION

- 13.1 Unless a party to this Contract has complied with Clauses 13.1 to 13.4, that party may not commence litigation or arbitration relating to any dispute arising from this Contract except where that party seeks urgent interlocutory relief, in which case that party need not comply with this Clause 13 before seeking such relief. Where a party to this Contract fails to comply with Clauses 13.1 to 13.4, any other party in dispute with the party so failing to comply, need not comply with this Clause 13 before referring the dispute to arbitration, or commencing litigation relating to that dispute.
- 13.2 Any party to this Contract, claiming that a dispute has arisen, shall give written notice to the other party, or parties in dispute, designating a representative with authority to settle the dispute on that party's behalf ("designation notice"). Each other party given a designation notice shall within three (3) Business Days of receipt of the designation notice give to the other parties in dispute, a designation notice appointing a representative with similar authority.
- 13.3 The persons designated under Clause 13.2 shall seek to resolve the dispute within five (5) Business Days of the service of the last designation required by Clause 13.2.
- 13.4 If the dispute is not resolved within the period referred to in Clause 13.3 (or within such further period as the representative may agree upon) the parties in dispute shall within a further period of ten (10) Business Days (or within such further period as the representatives may agree) seek to agree on a process for resolving the whole

- or part of the dispute through means other than litigation or arbitration, such as further negotiations, mediation, conciliation, independent expert determination or mini-trial (each a "dispute resolution process") and on:
- (a) the procedure and timetable for any exchange of documents and other information relating to the dispute;
  - (b) procedural rules and a timetable for resolving the dispute;
  - (c) the procedure for the selection and remuneration of any neutral person who may be employed by the parties in dispute; and
  - (d) whether the parties should seek the assistance of a person or an organisation possessing dispute resolution expertise.
- 13.5 The parties acknowledge that the purpose of any exchange of information or documents or the making of any offer of Settlement under this Clause 13 is to attempt to settle the dispute between the parties.
- 13.6 After the expiration of the time established by or agreed under Clause 13.4 for agreement on a dispute resolution process, any party which has complied with the provisions of Clauses 13.1 to 13.4 may by notice in writing terminate the dispute resolution process and may then refer the dispute to arbitration or commence litigation relating to the dispute.
- 13.7 Nothing in this Clause 13 is intended to oust the jurisdiction of any Court of competent jurisdiction.

## 14 TELEPHONE

- 14.1 On or before the date of Completion the Seller will deliver to the Buyer or deliver to any authorised telecommunications carrier and postal service cancellation forms in respect of the existing telecommunication and postal services to the premises to the intent that:
- (a) the cancellation of the Seller's subscription takes effect on the date of Completion; and
  - (b) the Buyer may acquire the telecommunication and postal services and the telephone number and facsimile number (if any) set out in Items J(g) and J(h) from the date of Completion.

## 15 CONTRACTS & HIRE AGREEMENTS

- 15.1 With the consent of the owner or service provider, as the case may be (but not otherwise), the Seller assigns to the Buyer and the Buyer accepts as at the date of Completion the benefit and burden of:
- (a) the agreements set out in Items N(b) and N(c); and
  - (b) any other agreement connected with the supply of services in respect of the conduct of the Business by the Seller at the date of this Contract.
- The agreements in this Clause 15 shall be known as the "Service Agreements".
- 15.2 Where Clause 15.1 does not apply:
- (a) with the consent of the owner or service provider the Seller may terminate any or all of the Service Agreements and in that event on notification in writing to the Buyer, the Buyer may enter into agreements with the owner or service provider in substitution for the Service Agreements; and

(b) where Clause 15.2(a) applies, the Seller agrees to surrender or deliver to the owner or service provider (or as it or they may direct) any goods to which the Service Agreement relates.

**15.3** If any Service Agreement is not terminated by the date of Completion and if Clause 15.1 does not apply, then:

- (a) the Buyer agrees to perform that Service Agreement on behalf of the Seller; and
- (b) the Buyer must indemnify the Seller against all liability arising from any such Service Agreement in respect of any act, matter or thing which occurs on or after the date of Completion.

**15.4** Where Clause 15.1 applies, the Seller must indemnify the Buyer against all liability arising from any Service Agreement in respect of any act, matter or thing which arises before the date of Completion.

**15.5** The Seller agrees not to enter into any Service Agreement in respect of the Business between the date of this Contract and the date of Completion of this Contract except with the prior consent of the Buyer and on such terms (if any) as the Buyer nominates.

**15.6** The Seller and the Buyer must execute all transfers or other instruments and do all other acts necessary to give effect to this Clause 15. The indemnities contained in this Clause 15 survive Completion.

**15.7** Any monies paid or payable in respect of the Service Agreements by the Seller for any period after the date of Completion shall be adjusted at the date of Completion.

## **16 DEBTORS AND CREDITORS**

**16.1** Subject to Clause 16.9 the Seller agrees to pay, satisfy and discharge in the proper time all debts and liabilities of the Business incurred before Completion and agrees to indemnify, and keep indemnified, the Buyer with respect to all claims arising from those debts and liabilities.

**16.2** The Buyer is solely responsible to all creditors of the Business for debts and liabilities incurred by the Buyer on and from the date of Completion and agrees to indemnify, and to keep indemnified, the Seller against all claims in relation to those debts and liabilities.

**16.3** On the date of Completion the Seller may give a notice to the Buyer concerning the debts owed to the Seller in respect of the Business at Completion ("debt notice") which, in respect of each debt specified ("notified debt") must set out:

- (a) the name and address of the debtor;
- (b) the amount payable; and
- (c) the date the notified debt becomes payable.

**16.4** In respect of each notified debt, that debt remains the property of the Seller. The Seller appoints the Buyer as its agent to collect the notified debt for a period of 30 Business Days (or such other period as may be agreed upon) after Completion and the Buyer must:

- (a) subject to Clause 16.5, use reasonable endeavours to collect each notified debt (including, if appropriate, by withholding supply);
- (b) pay all amounts received in respect of a notified debt into a separate bank account specified as an account for the purpose of holding moneys under this Clause for the benefit of the Seller;
- (c) not allow any money received for a notified debt to be mixed with money of the Buyer; and

(d) account for and pay the proceeds of the notified debts in the bank account to the Seller on a weekly or other agreed basis.

**16.5** Nothing in Clause 16.4 requires the Buyer to institute or continue any action or proceedings in any Court or tribunal in relation to any notified debt.

**16.6** Subject to Clause 16.7, the Buyer must not apply any amount received by the Buyer from the relevant debtor to pay an amount due from that debtor to the Buyer until the full amount of the notified debt has been paid to the Seller.

**16.7** Clause 16.6 does not apply to the extent that the relevant debtor disputes the notified debt or specifically allocated a payment in a different way, but only if the Buyer promptly gives the Seller details of the dispute or allocation.

**16.8** Where the Seller has on or before the date of Completion paid any amount of outgoings or expenses in connection with the Business which relates to a period after Completion and has given notice specifying those payments to the Buyer on or before the date of Completion, the Buyer agrees to pay to the Seller that amount at Completion to the extent that it relates to the period after Completion.

**16.9** Where the Buyer accepts liability in respect of an outgoing or expense in connection with the Business for a period before Completion and the Seller has not paid or reimbursed that outgoing or expense, the Seller must at the date of Completion either:

- (a) pay to the Buyer the amount of that liability; or
- (b) permit the deduction of that amount from the balance of the Purchase Price mentioned in Item L(c).

**16.10** For the purposes of Clauses 16.8 and 16.9 outgoings and expenses includes all rent, taxes, assessments, telephone accounts, gas and electricity accounts, rates and any other outgoings or expenses of whatsoever kind payable by the Seller for or in respect of the Business or the premises.

## **17 REQUISITIONS**

**17.1** The Seller warrants that at the date of this Contract to the best of the Seller's knowledge and belief there are no unsatisfied lawful demands, requisitions, notices, orders or other communication to which attaches any legal impediment (each a "Requisition") in respect of the Business or the premises by any local authority or other competent authority having jurisdiction in respect of the use and occupation of the Business or the premises. Any Requisitions issued prior to the date of Completion by a Court, local authority or competent authority having jurisdiction in respect of the use and occupation of the Business or the premises must be fully complied with by the Seller at the Seller's cost and expense prior to the date of Completion. Any work performed by or on behalf of the Seller to satisfy any such Requisitions must be carried out in a proper and workmanlike manner.

**17.2** If the cost of complying with all such Requisitions exceeds the amount nominated in Item X, then the Seller may by notice in writing to the Buyer terminate this Contract, unless the Buyer elects to pay the difference.

17.3 If the Buyer does not elect to pay the difference under Clause 17.2 the Buyer may terminate this Contract by notice in writing to the Seller. In that event all Deposit and other monies received by the Seller or the Deposit Holder on account of the Purchase Price must be refunded to the Buyer in full.

## 18 EMPLOYEES

18.1 The respective periods of service of each employee of the Seller at the date of this Contract are set out in Item Y.

18.2 The Buyer must notify the Seller in writing prior to the date of Completion of the names of the employees of the Seller who the Buyer proposes to employ.

18.3 The Buyer must offer each employee whose name is notified for the purposes of Clause 18.2 employment in the Business with the Buyer as follows:

- (a) the offer must be conditional on Completion. The offer must be subject to no other condition;
- (b) the employment offered must commence on the day of Completion;
- (c) the offer must require the employee to resign from employment with the Seller if the employee accepts employment with the Buyer and if Completion also occurs;
- (d) the employment offered must be on terms no less favourable overall than the terms of the employee's employment by the Seller as at Completion; and
- (e) the offer must provide for continuity for all purposes of employment and benefits (such as sick leave, rostered days off, annual leave, annual leave loading, long service leave, superannuation and redundancy) as if employment by the Buyer started on the date that the employee commenced employment with the Seller (or with any predecessor of the Seller in any part of the Business).

18.4 The Seller is responsible for each employee who does not accept the Buyer's offer of employment.

18.5 The Buyer is responsible for any redundancy payments that the Seller must make to any employee to whom the Buyer does not make an offer of employment as and when required by Clause 18.3 and whose services the Seller terminates on Completion or within 12 months after Completion. The Buyer must indemnify the Seller against and pay the Seller on demand the amount of, any loss or claim by or relating to the redundancy of such an employee.

18.6 At Completion, the Seller must give the Buyer in writing details of all entitlements as at Completion of each Transferring Employee for wages, holiday pay and holiday loadings, sick leave, superannuation and long service leave, together with any other lawful entitlements due to such employee (each a "lawful entitlement" in this Clause 18).

18.7 An entitlement to long service leave is taken to have been accruing from day-to-day on a proportionate basis from the commencement of the employment of each employee by the Seller (or by any predecessor of the Seller in any part of the Business) even though the employee may not be entitled to long service leave if his or her employment is terminated.

18.8 The Seller must allow to the Buyer at Completion an amount equal to 70% of the aggregate value of the following entitlements calculated as at Completion:

- (a) the accrued entitlement of the Transferring Employees to sick leave and annual leave;
- (b) the accrued entitlement to long service leave of those Transferring Employees with 5 years service with the Seller and any predecessor of the Seller in any part of the Business by Completion.

18.9 From Completion the Buyer must:

- (a) treat each Transferring Employee as if the Transferring Employee had been continuously employed by the Buyer from the time of commencement of the employment with the Seller (or any predecessor of the Seller in any part of the Business); and
- (b) deal with the lawful entitlements of each Transferring Employee as if each entitlement had been accrued by the Transferring Employee while in the employment of the Buyer.

18.10 The Buyer must indemnify the Seller against, and pay to the Seller on demand the amount of, each claim against the Seller in respect of a Transferring Employee:

- (a) relating to the period after Completion;
- (b) in respect of which the Seller has accurately paid or allowed an amount to the Buyer under Clause 18.8; and
- (c) arising out of the Transferring Employee's employment with the Buyer terminating for any reason including on redundancy;

18.11 The Seller must indemnify the Buyer against, and pay the Buyer on demand the amount of, each claim against the Buyer with respect to a Transferring Employee:

- (a) for remuneration (other than accrued sick leave, annual holiday or long service leave) relating to the period before Completion;
- (b) of any claim (including for redundancy payments calculated by reference to the period of service before Completion) arising out of the termination (including termination on acceptance of the offer of employment made by the Buyer pursuant to this Clause 18) of a Transferring Employee's employment with the Seller; and
- (c) if the claim is for an entitlement for sick leave, annual leave or long service leave which accrued before Completion then to the extent to which the Seller has not accurately paid or allowed an amount in respect of that entitlement to the Buyer under Clause 18.8.

## 19 SELLER'S TUITION

19.1 If Item U is completed, upon the Buyer providing to the Seller written notice that:

- (a) its obligations under Clause 5 have been satisfied;
- (b) the provisions of Clauses 23, 24, 25 and 37 (if applicable) have either been satisfied or waived by the Buyer (as the case may require),

the Seller must allow the Buyer or a nominee of the Buyer to be in attendance at the Business after the date of such notice and prior to the date of Completion for a total of not more than the number of Business Days set out in Item U(a) during normal business hours at no cost to the Seller



to observe the manner in which the Business is conducted and to receive tuition in relation to the conduct of the Business.

- 19.2 Despite any other provision in this Contract, if the Seller provides such tuition to the Buyer, the Buyer is deemed to have acknowledged that the provisions of Clauses 23, 24, 25 and 37 (if applicable) have either been satisfied or waived by the Buyer.

## 20 SELLER'S ASSISTANCE

- 20.1 The Seller or a nominee of the Seller familiar with the Business must attend at the Business on and from the date of Completion for the number of Business Days set out in Item U(b) during normal business hours or such other hours as may be agreed at no cost to the Buyer to give tuition to the Buyer in relation to the conduct of the Business and to introduce to the Buyer the customers and clients of the Business and suppliers of goods, services and stock-in-trade used in the Business and generally to use his, her or its best endeavours to retain for the Buyer the benefit of the goodwill of the Business.

## 21 RISK

- 21.1 The Business, Business Assets and stock-in-trade are at the risk of the party specified in Item Z from the date of this Contract until the date of Completion.

## 22 TIME OF THE ESSENCE

- 22.1 Time is of the essence of this Contract.

## 23 FINANCE CLAUSE

- 23.1 If Items Q(a), (b) and (c) are not deleted from this Contract, then the succeeding provisions of Clause 23 apply to this Contract.
- 23.2 This Contract is subject to the condition precedent that the Buyer obtains from the lender or class of lender nominated in Item Q(a):
- (a) by the approval date nominated in Item Q(b) ("approval date"); and
  - (b) on terms and conditions satisfactory to the Buyer; approval of a loan which is not less than the amount nominated in Item Q(c) ("loan approval").
- 23.3 If Clause 23.2 is not satisfied in accordance with its terms or if Clause 23.4(c) is not activated, then the Buyer may terminate this Contract by notice in writing to the Seller. This Contract is terminated once that notice is given to the Seller and:
- (a) the Seller shall refund or cause the Deposit Holder to refund to the Buyer the Deposit and any other moneys paid on account of the Purchase Price within three (3) Business Days of receipt of the notice of termination; and
  - (b) both the Seller and the Buyer shall do all those acts and things which are necessary to restore each other to their pre-contractual position.
- 23.4 The Buyer:
- (a) must take all measures which are reasonably necessary or incidental to obtain the loan approval by the approval date and the onus of establishing this is on the Buyer;

- (b) must give notice in writing of the loan approval to the Seller promptly once the loan approval is notified to the Buyer or to another person on behalf of the Buyer and in any event not later than two (2) Business Days after the approval date;

- (c) may waive the benefit of the condition precedent contained in Clause 23.2 by notice in writing to the Seller not later than two (2) Business Days after the approval date nominated in Item Q(b); and

- 23.5 If the Buyer does not obtain the loan approval by the approval date in terms of Clause 23.2 or if the Buyer does not waive the benefit of the condition precedent contained in Clause 23.2 or if the Buyer fails to notify the Seller of the loan approval in terms of Clause 23.4(b), then the Seller:
- (a) may without prejudice to its other rights and remedies under this Contract or at law or equity, by notice in writing to the Buyer expressed to be under this Clause 23.5 terminate this Contract, which is terminated once that notice is given to the Buyer; and
  - (b) must, where Clause 23.5(a) applies:
    - (i) refund or cause the Deposit Holder to refund to the Buyer the Deposit and any other monies paid on account of the Purchase Price;
    - (ii) and the Buyer must do all those acts and things which are necessary to restore each other to their pre-contractual position.

## 24 ASSIGNMENT OF EXISTING LEASE

- 24.1 If Item S is completed and despite Clause 15, this Contract is conditional upon the lease of the premises being in terms and conditions satisfactory to the Buyer. The Seller must deliver to the Buyer or the Buyer's Solicitor a true copy of the lease within five (5) Business Days of the date of this Contract. The Buyer must notify the Seller or the Seller's Solicitors in writing within five (5) Business Days from the date the Buyer or the Buyer's Solicitor receives the lease, of its acceptability or otherwise of the terms of the lease. If the Buyer does not notify the Seller, in writing whether or not it is satisfied with the lease within such period, the Buyer is deemed to have accepted the lease. If the lease is not in terms and conditions satisfactory to the Buyer then the Buyer may by notice in writing to the Seller terminate this Contract. If so, all Deposit and other monies received by the Seller or Deposit Holder on account of the Purchase Price must be refunded to the Buyer by the Seller or the Deposit Holder as the case may be.
- 24.2 The Seller must on or before the date of Completion assign or cause to be assigned to the Buyer the lease of the premises and obtain the consent of the lessor and any mortgagee (if applicable) to such assignment, which is to be at the cost and expense of the Seller. If as a condition of consent the lessor requires a deed of covenant from the Buyer then the costs of that deed of covenant must be paid by the Seller.
- 24.3 This Contract is conditional upon the lessor and any mortgagee of the premises consenting to the assignment of the lease of the premises from the Seller to the Buyer. If those consents are not given by the date of Completion, the Buyer may by notice in writing to the Seller terminate this Contract. If so, all Deposit and other monies received by the Seller or the Deposit Holder on account of the

Purchase Price shall be refunded to the Buyer by the Seller or the Deposit Holder as the case may be.

- 24.4** The Seller will apply for any consent referred to in Clause 24.2 and the Buyer will supply such references and do all such things reasonably required by the Seller or the lessor in considering any such application, and both parties must use their best endeavours to obtain such consents as expeditiously as possible, but in any event not later than the date of Completion.

## **25 NEW LEASE**

- 25.1** If Item T is completed, this Contract is conditional upon:
- (a) the lessor of the premises granting to the Buyer or executing an agreement (which may be in the form of a letter of intent) to grant to the Buyer at the expense of the party nominated in Item T(o) a new lease of the premises containing such reasonable covenants and conditions as the lessor shall require, and including the matters set out in Item T on or before the date of Completion.
  - (b) (If the Buyer requires the lease to be registered in circumstances where the lease is not otherwise required to be registered by law) the lessor of the premises providing to the Buyer an undertaking in writing to register the lease in the competent authority at the cost and expense of the Buyer as soon as practicable after the date of Completion.
- 25.2** The Seller will apply for the lease referred to in Clause 25.1(a) and the undertaking referred to in Clause 25.1(b) (if applicable), and the Buyer will supply such references and do all things reasonably required by the Seller or the lessor in considering any such application and both parties shall use their best endeavours to obtain any such lease (which may be in the form of a letter of intent) and undertaking as expeditiously as possible, but in any event not later than the date of Completion.
- 25.3** If a new lease is not granted to the Buyer or the lessor does not sign an agreement for lease (which may be in the form of a letter of intent) or the lessor does not give the undertaking set out in Clause 25.1(b) to the Buyer (if it is required) by the date of Completion then the Buyer may by notice in writing to the Seller terminate this Contract. If so, all Deposit and other monies received by the Seller or Deposit Holder on account of the Purchase Price shall be refunded to the Buyer by the Seller or the Deposit Holder as the case may be.

## **26 BUSINESS NAME AND TRADE MARK**

- 26.1** If Item J(d) is completed, the Seller warrants that the Business Name is at the date of this Contract and will be at the date of Completion registered under the provisions of the *Business Names Registration Act 2011* (Cth).
- 26.2** If Item J(f) is completed, the Seller warrants that each Trade Mark is at the date of this Contract and will be at the date of Completion registered under the provisions of the *Trade Marks Act 1955* (Cth).

## **27 KEYS**

- 27.1** On the date of Completion the Seller must deliver to the Buyer or to the Buyer's Solicitor all keys under the possession or control of the Seller together with particulars of any codes used by the Seller for the fastening or unfastening of any locks on the premises.

## **28 INTEREST ON LATE PAYMENTS**

- 28.1** Without limiting the strict effect of Clauses 5.1 and 29, the Buyer will pay interest to the Seller at the rate of 5% per annum above the rate then ruling for 180 day bank accepted bills by the Seller's bank (or if there is more than 1 bank, the Seller's principal bank) in respect of any payments not paid by the Buyer on the due date.
- 28.2** Interest will:
- (a) accrue from day-to-day;
  - (b) be capitalised on the last day of each month;
  - (c) be payable with the balance outstanding when paid; and
  - (d) be computed from the due date for payment until payment.
- 28.3** Judgement for any sum referred to in Clause 28.1 will also bear interest from the date of judgement until the payment.

## **29 BUYER'S DEFAULT**

- 29.1** If the Buyer:
- (a) fails to pay the balance of the Purchase Price as provided in Clause 6;
  - (b) fails to comply with the terms or conditions of this Contract, then the Seller may:
  - (c) affirm this Contract; or
  - (d) terminate this Contract.
- 29.2** The Seller's rights under Clause 29.1 are in addition to the rights which the Seller may have at law or in equity.
- 29.3** If the Seller affirms this Contract under Clause 29.1, the Seller may:
- (a) sue the Buyer for either:
    - (i) damages for breach; or
    - (ii) specific performance and damages in addition to or instead of specific performance;
  - (b) recover any unpaid part of the Deposit as a liquidated debt; and will pay to the Deposit Holder any part of the Deposit received.
- 29.4** If the Seller terminates this Contract under Clause 29.1:
- (a) the Seller may elect to:
    - (i) forfeit the Deposit (or so much of it as has been paid);
    - (ii) recover any unpaid part of the Deposit as a liquidated debt;
    - (iii) either:
      - (I) sue the Buyer for damages for breach; or
      - (II) resell the Business, Business Assets and stock-in-trade and any deficiency or expense arising from the resale may be recovered from the Buyer as liquidated damages;

- (b) any liability for taxation upon any capital gain which accrues to the Seller under the *Income Tax Assessment Act 1997* (Cth) upon the forfeiture of the Deposit or which is in excess of the liability for taxation upon a capital gain which would have accrued in relation to the disposal of the Business, Business Assets and stock-in-trade had the Buyer completed this Contract is to be included in determining the amount of damages for breach recoverable by the Seller under this Clause 29.4.

## 30 MERGER

30.1 No provision of this Contract merges on Completion.

## 31 COSTS

- 31.1 Subject to Clause 31.2, each party must pay its own expenses incurred in negotiating, preparing, executing, completing and carrying into effect this Contract;
- 31.2 The Buyer is solely responsible for, and must indemnify the Seller against, any duty that is payable on or in relation to:
- (a) this Contract;
  - (b) the sale purchase assignment or transfer of any property under this Contract; and
  - (c) any instrument or transaction that this Contract contemplates.

## 32 NO WARRANTY ON PRESENT USE

32.1 The Seller does not give any warranty that the type of business stated in Item J(a) is a permissible use under any town planning scheme and no compensation is payable if the particulars in Item J(a) are not correct.

## 33 FOREIGN INTERESTS

- 33.1 The Buyer warrants that at the date of this Contract and at the date of Completion:
- (a) the Buyer is not a "foreign person" within the meaning of Section 21A of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) as the meaning of that expression is extended by the operation of Section 4(6) of that Act; and
  - (b) the Buyer is not a "person to whom this section applies" within the meaning of that expression in Section 26A of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) as that Section is affected by Section 5A of that Act.

## 34 NOTICES

- 34.1 A notice, consent or other communication under this Contract is only effective if it is:
- (a) in writing, signed by or on behalf of the person giving it;
  - (b) addressed to the person to whom it is given; and
  - (c) given as follows:
    - (i) delivered or sent by prepaid mail (by airmail if the addressee is overseas) to that person's address;

- (ii) sent by fax to that person's fax number and the machine from which it is sent produces a report that states that it was sent in full; or
- (iii) sent in electronic form by email to that person's email address.

34.2 A notice, consent or other communication that complies with this Clause is regarded as given and received:

- (a) if it is delivered or sent by fax;
- (b) by 5:00pm (local time in the place of receipt) on a Business Day:
  - (i) on that day; or
  - (ii) after 5:00pm (local time in the place of receipt) on a Business Day, or on a day that is not a Business Day - on the next Business Day
- (c) if sent by mail:
  - (i) within Australia 2 Business Days after posting; or
  - (ii) to or from a place outside Australia - 7 Business Days after posting; and
- (d) if sent in an electronic form by email, at the earlier of the day on which it is read by the addressee, or (if the giver of the notice promptly confirms the notice by delivery, mail or fax) the first day on which it could have been read by the addressee, but if the notice is read or could first have been read after 5:00pm (local time in the place of receipt) on a Business Day, or on a day that is not a Business Day, the notice is taken to have been received on the next Business Day.

34.3 Any notice given or received by a Solicitor for a party to this Contract shall be deemed to be given or received with the actual or ostensible authority of that Solicitor.

34.4 Any notice relating to the payment of monies under this Contract given by or on behalf of the Seller may direct that payment shall be made in whole or in part to the Seller or a third person (or both). The Buyer must comply with any such notice.

## 35 GUARANTEE AND INDEMNITY

35.1 Where Item G is completed with the name or names of any person or persons ("Guarantor"), the succeeding provisions of this Clause 35 have effect.

35.2 In this Clause 35:

"Contract" means this Contract;

"Guarantor" means the person or persons named in Item G;

"Guarantor's Obligations" means the obligations of the Guarantor set out in Clause 35.3 or in any other provision of this Contract to which Clause 35.3 relates;

"Buyer's Obligations" means the due and punctual observance and performance by the Buyer of all liabilities, obligations and agreements (whether contingent, prospective or actual) to the Seller under or in connection with this Contract;

"Insolvency" includes administration, bankruptcy, compromise, arrangement, amalgamation, receivership, reconstruction, winding up, liquidation, dissolution and assignment for or compromise with creditors, and "Insolvent" is construed accordingly; and "security" means any mortgage, pledge, lien, charge or other security, whether consensual or arising by operation of law, and any guarantee, suretyship or other obligation whereby a responsibility is assumed for any obligation or indebtedness or the insolvency or financial condition of any other person.

- 35.3** In consideration of the Seller at the request of the Guarantor entering into this Contract, the Guarantor unconditionally (and jointly and severally where there is more than one Guarantor):
- (a) guarantees the Buyer's Obligations; and
  - (b) indemnifies the Seller against any loss or liability the Seller incurs arising from or connected with the Buyer's Obligations.
- 35.4** Each of the Guarantor's Obligations:
- (a) is a principal obligation and will not be treated as ancillary or collateral to any other right or obligation however created or arising;
  - (b) may be enforced against the Guarantor without the Seller first being required to exhaust any remedy it may have against the Buyer or to enforce any security it may hold with respect to the Buyer's Obligations;
  - (c) is a continuing guarantee and indemnity for the whole of the Buyer's Obligations and is irrevocable and remains in full force and effect until discharged; and
  - (d) will not be considered as wholly or partially discharged by the performance at any time of any of the Buyer's Obligations or by any settlement of account or by any other matter or thing whatever and will apply to the present and future scope of the Buyer's Obligations.
- 35.5** The liability of the Guarantor is absolute and will not be affected by any act, omission, matter or thing which but for this provision might operate to release or otherwise exonerate the Guarantor from the Guarantor's Obligations in whole or in part including:
- (a) the grant to the Buyer or any other person of any time, waiver or other indulgence or concession, or the discharge or release of any other security held by the Seller in respect of the Buyer's Obligations;
  - (b) any transaction or arrangement that may take place between the Seller and the Buyer, the Guarantor or any other person;
  - (c) the insolvency of the Buyer;
  - (d) the Seller exercising or refraining from exercising any other security or any of the rights, powers or remedies conferred on it by law or by this Contract or any other agreement with any person, or taking or failing to take any other security;
  - (e) the variation (including a variation which increases the Buyer's Obligations), extinguishment, unenforceability, failure, loss, release, discharge, abandonment or transfer either in whole or in part of this Contract, or any security now or in the future held by the Seller from the Buyer, the Guarantor or any other person;
  - (f) the Buyer's Obligations or any part of them being or becoming wholly or partially illegal, void, voidable, or unenforceable;
  - (g) the failure by the Seller to give notice to the Guarantor of any default by the Buyer under this Contract;
  - (h) any legal limitation, disability, incapacity or other circumstances related to the Buyer; or
  - (i) the failure of any Guarantor to execute this Guarantee or the granting of this Guarantee by any Guarantor being or becoming void or voidable.
- 35.6** This Guarantee extends to cover this Contract as amended, varied or replaced, either with or without the consent of the Guarantor.

- 35.7** If the Buyer becomes insolvent, the Guarantor authorises the Seller to prove for all monies which the Buyer or any other person will have paid under this Contract and to retain and to carry into a suspense account and to appropriate at the discretion of the Seller any dividends received in the insolvency of the Buyer and all other monies received in respect of the Buyer's Obligations until the Seller has been paid in full in respect of the Buyer's Obligations.

## 36 CONFIDENTIALITY

- 36.1** Subject to Clause 36.2, this Contract and all matters and things connected with and related to this Contract and its performance are confidential and no party shall disclose them to any other person except his, her or its legal and financial advisers and bankers (and then only if the recipient agrees prior to receipt to keep the information disclosed confidential) unless the prior written consent or waiver of the other parties (any Guarantor excepted) is first had and obtained.
- 36.2** Buyer Confidentiality
- (a) In this Clause 36.2:
 

**"Buyer's Agent"** means the Buyer's Solicitor, accountant, banker or financial adviser.

**"Confidential Information"** means information of a technical, business or financial nature regarding the Business provided by the Seller to the Buyer or the Buyer's Agent, but does not include information which the Buyer can establish:

    - (i) was in the public domain before disclosure to the Buyer or the Buyer's Agent;
    - (ii) becomes, after being given to the Buyer or the Buyer's Agent, part of the public domain, except through disclosure contrary to this Contract;
    - (iii) was in the Buyer or the Buyer's Agent's possession when it was given to the Buyer or the Buyer's Agents and had not been acquired in some other way (directly or indirectly) from the Seller; or
    - (iv) was lawfully received from another person who had the unrestricted legal right to disclose that information free from any obligation to keep it confidential.
  - (b) If the Buyer does not complete the purchase of the Business, the Buyer will return to the Seller all confidential information (including original or copy documents), within five (5) Business Days after the date that this Contract has been terminated, or within five (5) Business Days after receipt of written notice from the Seller, whichever occurs earlier.
  - (c) Unless and until the Buyer purchases the Business, the Buyer:
    - (i) agrees not to make use of any confidential information obtained from the Seller in the Buyer's present or future business ventures; and
    - (ii) must not disclose the confidential information to anyone else and must take all reasonable steps to ensure that its employees and the Buyer's Agents do not disclose the confidential information to anyone else (except with the prior consent of the Seller or if required by law).



## 37 VERIFICATION OF BOOKS AND RECORDS

- 37.1** This Contract is conditional on the Buyer verifying within ten (10) Business Days of the date of this Contract ("Verification Date") that the Buyer is satisfied that the financial accounts of the Business ("Accounts") as provided to the Buyer by the Seller in accordance with this Clause 37.1 are substantially true and correct. The Seller must produce to the Buyer (or the Buyer's accountant if so directed in writing by the Buyer) all books and records comprising the Accounts of the Business within three (3) Business Days after execution of this Contract.
- 37.2** The Buyer must notify the Seller in writing whether it is satisfied or not satisfied that the Accounts are substantially true and correct by the Verification Date.
- 37.3** If the Buyer does not notify the Seller, in writing whether or not it is satisfied that the Accounts are substantially true and correct by the Verification Date, the Buyer is deemed to be so satisfied for the purpose of this Clause 37.
- 37.4** If the Buyer gives notice in writing that it is not satisfied that the Accounts are substantially true and correct by the Verification Date, then the Contract is terminated and:
- (a) the Seller shall refund or cause the Deposit Holder to refund to the Buyer the Deposit and any other monies paid on account of the Purchase Price within three (3) Business Days of receipt of the notice of termination; and
  - (b) both the Seller and the Buyer shall do all those acts and things which are necessary to restore each other to their pre-contractual position.

## 38 SELLER'S DEFAULT

- 38.1** If, the Seller fails:
- (a) to produce to the Buyer (or the Buyer's accountant if so directed in writing by the Buyer) the accounts in accordance with Clause 37.1; or
  - (b) to comply with the terms or conditions of this Contract, then the Buyer may;
  - (c) affirm this Contract; or
  - (d) terminate this Contract.
- 38.2** The Buyer's rights under Clause 38.1 are in addition to the rights which the Buyer may have at law or in equity.
- 38.3** If the Buyer affirms this Contract under clause 38.1, the Buyer may:
- (a) sue the Seller for either:
    - (i) damages for breach; or
    - (ii) specific performance and damages in addition to or instead of specific performance.
- 38.4** If the Buyer terminates this Contract under Clause 38.1:
- (a) all Deposit and other monies received by the Seller or Deposit Holder on account of the Purchase Price must be promptly refunded to the Buyer by the Seller or the Deposit Holder as the case may be; and
  - (b) the Buyer may sue the Seller for damages for breach.

## 39 ENTIRE AGREEMENT

- 39.1** This Contract contains the entire agreement between the parties with respect to its subject matter and supersedes all prior negotiations, understandings and agreements, whether oral or written.
- 39.2** This Contract shall not be modified, amended or supplemented except by an instrument in writing duly executed by the parties (any Guarantor excepted).

## APPENDIX A - IMPORTANT NOTICE TO USERS OF THIS CONTRACT

**NB.** where any specific items are not required delete and initial

**NOTE 1** Insert, in Item A, the date of signing by the last party to sign.

**NOTE 2** If the Seller or Buyer or Guarantor requires documents or written communication to be given to them at a different address than that in Items D, F and G, then complete this Item and delete "AS IN ITEM D(a) ABOVE" in the Seller's Address Section in Item H(a); "AS IN ITEM F(a) ABOVE" in the Buyer's Address Section in Item H(b) and "AS IN ITEM G ABOVE" in the Guarantor's Address Section in Item H(c) and initial.

**NOTE 3** Complete Item J in full. Item L(d) is an alternative to be completed if and only if the sale is on a "walk-in, walk-out" basis. If Item L(d) is not completed, then this Contract is not a "walk-in, walk-out" sale and Clauses 3.1 and 4 will apply.

**NOTE 4** Separate schedules to form part of the Contract IF and WHEN required and referred to in the Special Conditions.

**NOTE 5** If no Stock-in-Trade or Work-in-Progress delete and initial. See also Note 3.

**NOTE 6** Complete in full.

**NOTE 7** Where no apportionment is given or possible, the Total Purchase Price Section should be completed.

**NOTE 8** If the Contract is to be subject to finance then Items Q(a), (b) and (c) should be completed in every respect.

If the Contract is not subject to finance then Items Q(a), (b) and (c) should be deleted and initialled and the following Special Condition should be inserted in the Contract:

"The Contract is not subject to finance and Clause 23 of the Standard Conditions does not apply."

**NOTE 9** If known, state name of lender in Item Q(a). If not known, state class (eg. bank, building society, insurance company, credit union, or other class of lending institution). Do not insert the words "finance company" but insert the specific name (or names) of a finance company.

**NOTE 10** The date in Item Q(b) should be at least fourteen (14) days prior to the date of Completion.

**NOTE 11** Cross out that which does not apply and initial.

**NOTE 12** Nominate Seller or Buyer.

**NOTE 13** Cross out that which does not apply and initial.

**NOTE 14** Cross out that which does not apply and initial.

**NOTE 15** If no trial is required delete and initial.

**NOTE 16** Nominate Seller or Buyer.

**NOTE 17** The Deposit Holder should sign with his or her personal signature.

If the Deposit Holder is a partnership, a member of the partnership should sign in the partnership name.

If the Deposit Holder is a company, the acknowledgment should be signed in accordance with Section 127 of the *Corporations Act 2001* (Cth).

**NOTE 18** WARNING: These Standard Conditions have been adopted and approved by the REIQ for conveyances of leasehold businesses only. These Standard Conditions may need to be added to or varied (by inserting specifically prepared Special Conditions in the Contract) if they are to be used for any other purpose.

- 1 This Contract has been adopted by the REIQ. This Contract constitutes information only and not advice.
- 2 None of the REIQ, its officers, employees, agents or its advisers (collectively "the REIQ") accept any legal or equitable responsibility arising from or connected with the use of this Contract by any person or that person's advisers (whether or not that person is a member of the REIQ).
- 3 Without limiting paragraph 2 above, the REIQ does not accept any liability in contract, tort, equity or restitution for any direct or consequential loss (or both) arising from or connected with the use of this Contract by any person or that person's advisers.
- 4 Any person uses this Contract at his, her or its own risk. The REIQ does not assume any risk arising from or connected with the use of this Contract. Any user of this Contract must be satisfied that this Contract is appropriate to his or her or its requirements.
- 5 If the REIQ incurs any liability at law or in equity or is said to assume any risk (despite paragraph 4 above) arising from or connected with the use by any person or that person's advisers of this Contract, then that person:
  - (a) agrees to indemnify and keep indemnified the REIQ on demand on a full indemnity basis against all actions, liabilities, proceedings, claims, costs and expenses incurred by the REIQ to or against any person, including any user of this Contract, for any reason.
  - (b) the indemnity contained in paragraph 5(a) extends to any act or omission which causes wholly or partially direct or consequential loss or damage (or both) to the user of this Contract or to any other person (or both).
- 6 The Commissioner's tax ruling GSTR 2002/5 details the circumstances in which the Commissioner considers that there has been a "supply of a going concern" for GST purposes. If the Seller is not confident that the supply is of all things that are necessary for the continued operation of an enterprise, the Seller should pay GST and pass it on to the Buyer. For this purpose use paragraph (b) of Clause 3.5 which is an indemnity of the Seller.

If the Buyer is a new company, the Seller will need assurance that the Buyer is either registered under the GST Act before Completion, or is required to be registered. The Seller may be satisfied that the Buyer is required to be registered, especially if

the acquisition and conduct of the Business will give rise to that requirement. If not, the Seller may insist on a Completion requirement that the Buyer be registered (and an entity with an Australian Business Number is not necessarily registered for GST).

You can check ABN and GST registrations at:  
[www.abn.business.gov.au](http://www.abn.business.gov.au)

- 7 Since the Buyer will get a tax deduction when the employee entitlements are paid (see Section 26-10 of ITAA 97), the Seller would limit this allowance to the Buyer to 70% of the employee entitlements, assuming the Buyer is a company. The corporate tax rate has been 30% since 1 July 2001.

As the decision in *TNT Skypack Aust Pty Ltd -v- FCT* (1988) 88 ATC 4279 (approved by IT 2557) illustrates, if employee entitlements are allowed as a reduction of the cash to be paid at Completion, no adverse tax consequences will follow. If on the other hand, the Seller pays to the Buyer, to compensate the Buyer for assumption of these entitlements, receipt of that payment by the Buyer may be assessable income of the Buyer (see Section 15-5 of ITAA 97).