

# The Guide

## REIQ Business Sale Contract





## Who should use this Guide?

This Guide is designed for use by buyers and sellers of businesses, business brokers and professional advisers when using the REIQ Business Sale Contract (“Contract”). The purpose of the Guide is to explain what particular parts of the Contract mean and to highlight (either in the content or the process) various risks of getting things wrong.

## How should the guide be used?

For a seller (vendor), the Guide provides an important checklist of things to consider when listing a business for sale. For a potential buyer, it provides a better understanding of what the proposed Contract actually means and what to expect during the process. In either case, it should be helpful in understanding how the law will work, what’s included and excluded from the business, timing, notices and so on.

## Helpful Features

In the guide, we use the following special types of annotations:

- Seller Beware - an important note for the seller.
- Buyer Beware - an important note for the buyer.
- General notes and examples.

Please pay particular attention to these notes as they relate to you, especially as these are where buyers or sellers often miss something or get it wrong.

## Warning

Whether you are the buyer or the seller, you should not use this Guide as a do-it-yourself tool. The risks in doing so are high. The AIBB and Kafrouni Lawyers make no warranties regarding the accuracy of the guide and exclude any liability resulting from the use of this guide. Every business sale transaction is different and requires the input of a professional adviser – typically your solicitor, accountant and business broker.

## Get Involved

Many business people become impatient with details and there is a temptation to just say to an adviser: “you sort out the paperwork”. Unfortunately, only the seller knows the fine details of the business and the outcomes it hopes to achieve. Similarly, the buyer has its outcomes that it hopes to achieve. There is no substitute for working through every single detail until you are satisfied that the Contract reflects exactly what you want to achieve.

## If In Doubt, Ask

When a draft Contract is submitted to you, it is important that you read the whole document and understand what every item means for you. There is a simple rule: if you don’t understand something, it will probably cause a problem later on. So if in doubt, ask your professional adviser.

# This Guide is brought to you by:



The Australian Institute of Business Brokers (AIBB), formed in 1989, is the peak industry body representing and supporting business brokers nationally in the facilitation of business sales and purchases.

The AIBB provides its own industry specific training programs for business brokers, delivered by industry leaders and allied professionals who are the experts in their respective fields. By the high accreditation standards set, the AIBB has been able to ‘raise the bar’ in the competency level of its members and the industry.

The AIBB is determined to ensure that its initiatives, relationships with government and other stakeholders in the industry, education procedures, best practice standards and Code of Conduct are maintained to preserve the ‘public trust’ in members of the business broking profession.

For contact details of an AIBB member near you please visit [www.aibb.org.au](http://www.aibb.org.au) or phone 1300 79 66 67 and for information on Businesses for Sale by AIBB members visit [www.aibbsales.com.au](http://www.aibbsales.com.au)

## KAFROUNI LAWYERS

Kafrouni Lawyers, founded in 1999, is a specialist business law firm in Brisbane. They help SME business owners achieve better business outcomes, whether that involves creating opportunities, managing risk or resolving disputes.

The authors of this guide, Joe Kafrouni and Rob Montes, have a special interest in the sale and purchase of SME businesses, particularly those where there is some complexity or seriousness.

For further information on buying or selling businesses and other legal issues involved in owning a business, please visit [www.klaw.com.au](http://www.klaw.com.au) or phone (07) 3354 8888.



# THE CONTRACT

## ITEMS SCHEDULE

### A. DATE OF CONTRACT

Usually, at law, the date of Contract is the date the last party to sign the Contract (usually the seller) actually signs the Contract and notifies the other party that they have signed it. However, pursuant to NOTE 1 (on page 13 of the Contract), the date to be inserted is the date of signing by the last party to sign and not when the other party is notified.

- Whilst there must be notification before a contract is created at law, once notification occurs, the Date of Contract (pursuant to the Contract) is when the last party signs. Given the Contract has condition time-limits that run from the Date of Contract, it is critical that the last party to sign notifies the other party immediately of signing. Also, it is wise for the first party to sign to follow up regularly with the business broker or seller as to whether the Contract has been signed by the other party. Another option, and probably the preferred one, is to vary the Contract by special condition to state that the Date of Contract is the date the last party to sign notifies the other party of this.

Example: The Approval Date for Finance is “30 days from Date of Contract”.

### B. SELLER'S AGENT

This is usually the business broker representing the seller.

- Provide complete and accurate contact details here and throughout the Items Schedule. This will make it easier for all parties and representatives involved in the transaction to contact each other. If incomplete, delays may occur in contacting a party when required, which may delay the transaction.

### C. SELLER/S

This is the person(s) or company that owns the Business and Business Assets. Again, provide complete and accurate details.

- If there is more than one person or company that owns parts of the Business and Business Assets, they must all be included in order to bind them to the Contract.

Example: ABC Pty Ltd owns a food supplies business. ABC's director, Bob, registered the trademark for “Bob's Fine Foods” in his name personally. Both ABC Pty Ltd and Bob must be noted as the sellers on the Contract, otherwise Bob will need to legally transfer the trademark to ABC Pty Ltd prior to the Date of Contract.

### D. SELLER'S SOLICITOR AND ACCOUNTANT

Insert details.

- Again, provide complete and accurate contact details.

### E. BUYER/S

- Insert complete and accurate details.

If the buyer is:

- an individual, insert the buyer's full name;
- a company, insert the A.C.N e.g. ABC Pty Ltd A.C.N. 123 123 123;
- a trust, insert the name of the trust as well as the name of the trustee e.g. ABC Pty Ltd A.C.N. 123 123 123 as trustee for The ABC Family Trust.

- Incomplete names, especially for the buyer, may not be easy to fix later on. The simple task of correcting a typographical error may cost precious time and additional legal fees.
- Sometimes, a buyer is not sure about whether to buy the business in their own name, company or trust and may seek to note the buyer as, for example, Bob “and/or nominee”. For the buyer's nominee to effectively buy the business (if required) and to avoid having to pay double stamp duty, the buyer must have specific legal “nomination” documents in place before the Contract and subsequently sign statutory declarations for the Office of State Revenue to that effect. You should seek legal advice on “and/or nominee” contracts prior to signing.

### F. BUYER'S SOLICITOR AND ACCOUNTANT.

Insert details.

- Again, provide complete and accurate contact details.

### G. GUARANTOR/S

Insert the name of any person or company required to guarantee the performance of the buyer under the Contract (see Standard Condition 35).

- If the buyer is a company, you should include the buyer's shareholders and directors as Guarantors. If the buyer breaches the Contract, you can pursue the directors and shareholders, as well as the Company, for any losses you suffer as a result of the buyer's breach. This is especially important when the buyer has little or no money or assets for you to recover. Director and shareholder details can be ascertained through a company search – your solicitor can do this for you.

### H. ADDRESS FOR NOTICES

Insert details of addresses to where important legal notices required under the Contract are to be sent. This must be completed accurately to ensure that each party receives important written communications pursuant to the Contract.

- For the seller, this is usually to the seller's Solicitors, i.e. insert “AS IN ITEM 'D(a)' ABOVE”. For the buyer, this is usually to the buyer's Solicitors, i.e. insert “AS IN ITEM 'F(a)' ABOVE”. An incorrect address could mean that you will not receive an important legal notice or document, which could jeopardise your rights or put you in breach of the Contract.

### I. DEPOSIT HOLDER

Insert details. This will be whoever is holding any deposit paid under the Contract, usually the seller's agent (i.e. the business broker).

### J. THE BUSINESS

The details should be completed in full.

- Type of Business: insert a general description of the business.
- Location: the address of the business premises.
- Known as: the trading name of the business.
- Registered Business Name: the name, if registered as a business name in Queensland.
  - If this is completed then you warrant or promise (Clause 26) that the Business Name is registered under the *Business Names Act 1962* (Qld).
- Registered Business No: the BN (business number) if registered in Qld.
  - This number can be found on the Certificate of the Registration of a Business Name (issued by the Office of Fair Trading), which must be displayed at the business premises.





- f) Trade Mark: the mark and number of any registered trademarks, otherwise insert "Nil".
- If this is completed then you warrant (Clause 26) that any Trade Mark is registered under the *Trade Marks Act 1955* (Cth).
- g) Telephone: insert number(s).
- The seller must, by Completion, give to the buyer any telephone or postal company servicing the business premises a notice cancelling the service from Completion and allowing the buyer to acquire the telephone or postal services, including any telephone or fax numbers.
  - Completion is the day the Business Sale settles, i.e. when the buyer pays the purchase price to the seller and takes control of the Business.
- h) Facsimile No: insert number.
- i) E-mail Address: insert addresses, otherwise insert "Nil".
- j) Website Address: insert addresses, otherwise insert "Nil".
- k) Domain Name: insert name(s), otherwise insert "Nil".
- The Business sold includes the items stated in Items J(a) to J(k) and everything else forming part of the Business such as goodwill, fixtures, fittings, furniture, chattels, plant & equipment, industrial and intellectual property, work-in-progress, stock-in-trade, permits, licences and any other assets set out in schedules attached to the contract (Standard Condition 3). The only items not included in the sale are the "Excluded Assets", defined as:
    1. any debts owed to the seller that are notified to the buyer;
    2. any other receivables;
    3. any cash of the business;
    4. any employment contract of any person;
    5. any insurance policy or insurance claim; and
    6. any document or record that the seller is obliged by law to retain.
  - Whilst all the assets of the Business are included in the sale, it is important to ensure that any asset of significance to you is specifically mentioned in the Contract (in the above items or in the special conditions or Schedules). This will reduce the chance of a dispute, should there be a misunderstanding with the seller as to what is included.
  - Under this Contract, you are selling all the assets of the Business whether mentioned in the contract or not. If there is something that you do not want to include in the sale, you must expressly exclude it in the special conditions. However, if you seek to exclude something that is necessary for the "continued operation" of the Business, you may affect the tax treatment of the sale for GST purposes so that the buyer may have to pay GST on the purchase price when otherwise they would not. This will increase the up-front cost in effect by 10%. You should obtain advice from your accountant if excluding assets.

## K. LICENCES, PERMITS, PATENTS, CERTIFICATES AND CONSENTS

Insert details of those necessary to operate the Business.

- You warrant to the buyer that you believe all necessary licences, permits etc. necessary to run the Business are obtained or applied for and there is nothing adversely affecting any such licenses, permits etc. (Standard Condition 8.1(b)). If in doubt, you should check. Alternatively, you should only agree to transfer to the buyer what the Business has in place. This will require a variation to the Contract.
- The Contract gives you no guarantee that the seller has all the required licenses, permits, consents or approvals to run the Business. Also, if you need to apply for any non-transferable license, the Contract does not allow you to terminate if such licence is not obtained before Completion. If necessary, a variation to the Contract is required setting out what licenses you require prior to Completion and what should occur if you do not get them. You should obtain legal advice if this is important to you.

## L. PURCHASE PRICE

Insert details.

- You must pay the Deposit to the Deposit Holder when the Contract is signed, otherwise you will be in breach of the Contract and the seller may terminate the Contract and sue you (Standard Condition 5). Therefore, ensure you have the money or have a special condition inserted that you will pay part on signing and part on another date, e.g. on finance approval or 14 days from the Date of Contract.  
Walk-In, Walk-Out: if the Purchase Price at L(a) includes stock-in-trade and work-in-progress then insert "Yes" and complete Item M. Otherwise, insert "No".
- The balance purchase price (less deposit) is payable on Completion. However, the amount ultimately paid may vary depending on whether the seller must be reimbursed for expenses that the buyer will benefit from, e.g. rent, advertising, license fees and bonds paid for a period after Completion (Standard Condition 16.8).

## M. STOCK-IN-TRADE

Insert details or "Not Applicable" if the Business is Walk-In, Walk-Out.

Delete and initial Item M if there is no stock-in-trade or work-in-progress.

- a) Nominated Date: this date should be as close as practicable to Completion (usually the day before). The stocktake will occur after the close of trade on that day. Either the parties mutually agree on the value of the stock or they jointly pay for an independent stocktaker to value the stock (Standard Condition 4.1(b)).
- b) Maximum: if the total stock value exceeds the maximum amount inserted, the buyer may choose what stock to exclude to reduce it to that maximum amount (Standard Condition 4.1(d)).
- c) Work-in-Progress: either the parties mutually agree on the value of the work-in-progress or they jointly pay for an independent accountant to value the work-in-progress (Standard Condition 4.2).

## N. PLANT & EQUIPMENT

- a) Unencumbered: Insert list of plant and equipment in Schedule A. Unencumbered (means that the plant and equipment will be owned outright by the seller on Completion).
- You should attempt to list all assets being purchased in this Schedule (especially those of importance) to avoid any misunderstanding.
- You are selling all the business's plant and equipment pursuant to the Contract. If something is not included in the sale, you must specifically exclude it. This will require a variation to the Contract.



- b) Leased: insert list of leased plant and equipment in Schedule B.
  - You will have to take over these leases and the obligations under them (Standard Condition 15).
- c) Rental Agreements: insert list of rented plant and equipment in Schedule B.
  - You will have to take over these rentals and the obligations under them (Standard Condition 15).

#### O. APPORTIONMENT OF PURCHASE PRICE

Insert details if known or leave blank.

To apportion the Purchase Price, the parties need to agree on the split of the purchase price between assets, industrial & intellectual property and goodwill. If no apportionment is made or possible, the bottom section only (Purchase Price) should be completed.

- The manner in which this section is completed will have tax consequences on the parties. This is because Goodwill and other Assets (such as plant and equipment) are taxed differently when a business is sold (important to the seller) and during ownership (important to the buyer). It is important that the buyer and seller speak to their own accountants about this.

#### P. DATE AND PLACE OF COMPLETION

Insert details.

- The city in which the Business is located will usually be the place for Completion. The buyer takes over the Business on the date of Completion (Standard Condition 7).

#### Q. FINANCE

This clause should be completed if the contract is conditional upon the buyer getting finance, otherwise it should be crossed out and initialed and the following special condition should be inserted: *“Clause 23 of the Standard Conditions does not apply as the Contract is not subject to finance.”*

- a) Lender: either name the lender (e.g. Westpac) or insert “Any bank or financial lending institution of the buyer’s choice.”
- b) Approval Date: the date by which the buyer must obtain finance (either specific e.g. “1 April 2011” or specified by a period e.g. “14 days from Contract Date”).
  - Prior to entering into the Contract you should discuss with your financier the period of time it is likely to take to obtain approval. This period should be inserted into the Contract.
- c) Amount of Loan: the maximum amount required by the buyer in order to satisfy its finance requirements. eg. “sufficient to complete contract”.
  - If the buyer cannot obtain the required finance amount by the Approval Date then the buyer can terminate the contract before the Approval Date. This clause requires the buyer to act reasonably and not use the Finance clause as an excuse to get out of the Contract for other reasons (Standard Condition 23).

#### R. LEASE REQUIREMENT OF BUYER

If the Business operates from leased premises, then either the existing lease will have to be transferred (assigned) to the buyer or the buyer will need to negotiate a new lease with the lessor. Either “Assignment of Lease” or “New Lease Required” should be inserted and initialed.

#### S. PARTICULARS OF EXISTING LEASE

If there is an existing lease that needs to be assigned to the buyer this Item should be completed and Item T crossed-out and initialed.

Item S(o) should be amended to either cross out “is” or “is not” to elect whether the lessor’s bank needs to approve the assignment of lease.

- It is important that the lessor’s bank approves the assignment of lease. If not, the lessor’s bank may be able to terminate the lease if the lessor defaults on its loan.

#### T. BUYER’S REQUIREMENT FOR NEW LEASE

If the buyer wants to make the Contract conditional upon a new lease being granted by the lessor then this Item should be completed and Item S crossed-out and initialed.

Item T(o) should be completed to elect who will pay for the lessor’s legal costs of the new lease.

- The buyer usually pays the costs of a new lease.
- Item T(p) should be amended to either cross out “is” or “is not” to elect whether the lessor’s bank needs to approve the assignment of lease.
- It is important that the lessor’s bank approves the new lease. If not, the lessor’s bank may be able to terminate the lease if the lessor defaults on its loan.

#### U. PERIOD OF SELLER’S TUITION/ASSISTANCE

Insert the number of days.

Tuition before Completion: during that time, the buyer may attend at the Business during business hours to observe the business and receive tuition in running of the Business (Standard Condition 19).

- This is at no cost to the buyer. Also, consider the impact this may have on you and your staff. Assistance after Completion: the seller must attend the Business after Completion to give tuition and to introduce the buyer to customers, clients, suppliers and use its best endeavors to retain the business’ goodwill for the buyer (Standard Condition 20).
- This is at no cost to the buyer.

#### V. BUYER’S TRIAL PERIOD

Insert the period and amount. If no trial is required delete Item V and initial.

- During this period, the buyer is allowed to trial the Business to verify the trading performance and the average gross income. This means that the buyer will usually attend at the Business for the period to observe the point of sale (normally where the cash registers are located) and view the till tapes at the end of the business day for verification of trading performance.  
Normally, any trial period will be for one or two weeks in some cases where there might be a variance from week to week. This will depend on the type of business.  
If the trading performance is less than the amount stated or not as otherwise represented to the buyer, the buyer may terminate the Contract.



## W. RESTRICTION OF SELLER'S COMPETITION

Insert the area and the period in which the seller must not commence a competing business of a similar nature.

- If the seller is a Company, the directors and shareholders of the company are also restrained on the same terms.
- Any attempt to restrict the seller from competing with the buyer after Completion will only be valid if it is reasonable, which will depend upon the type of business. The greater the area and the period of time, the more likely it will be that the restriction will be invalid. The restriction should only be what is absolutely necessary to protect the goodwill of the Business. Legal advice should be sought if this issue is important.

## X. REQUISITIONS

Insert an amount that would be the maximum cost that the seller would have to pay to deal with any requisitions, which are defined as unsatisfied lawful demands, requisitions, orders or notices by any authority that has jurisdiction over the use and occupation of the Business or the premises.

## Y. LIST OF EMPLOYEES

Unless there is only one employee, a schedule or annexure should be attached to the Contract setting out the details of each employee.

## Z. THE BUSINESS, ASSETS AND STOCK-IN-TRADE

Either the seller or the buyer should be nominated to bear the risk of the assets from the Contract Date to Completion.

- The seller usually bears the risk.
- If you are nominated then you should arrange insurance to protect you from the risk.

## GST

This section confirms the GST status of the sale.

- Most businesses are a "sale of a going concern" and GST1 is noted as "Yes".  
However, there are instances where this will not be the case and it must accordingly be noted whether the purchase price is inclusive or exclusive of GST.  
Both parties should seek advice from their accountant on this issue.

## SPECIAL CONDITIONS

Special conditions are used to:

1. vary a Standard Condition to suit the buyer or the seller;
2. address issues that are relevant to the buyer or the seller, but not covered in the Standard Conditions.

It is recommended that a buyer or seller obtain legal advice to draft a special condition. It is critical that any special condition inserted is not vague or confusing, otherwise it may be void.

The Special Conditions of the Contract will prevail in the event of any inconsistency with the Standard Conditions.

If there is not enough space on page 6 to insert any special conditions, it may simply refer to an "Attached Schedule" or "Attached Annexure", with the effect that such a schedule or annexure containing the special conditions being attached to the Contract will form part of the Contract.

## EXECUTION

Execution is the process of signing the Contract.

The parties should sign where indicated in the presence of an adult witness. It is not essential for the witness to be a JP or Solicitor. However, avoid having another party to the Contract or family member witness your signature where possible. The witness should write their full name under their signature.

If there is more than one buyer, seller or Guarantor, they all need to sign next to or above/below each other on their designated line. If they are signing at different times using different witnesses, the witnesses will also need to share the designated line and should note below their signature the name of the person they witnessed.

It is preferable that the parties sign at least two originals of the contract, with one signed copy eventually kept by the seller and the other signed copy given to the buyer. (Whilst not preferable, a contract signed by facsimile only is still evidence of a contract.)

Whilst it is not strictly necessary, it is preferable to get the parties to initial each page of the Contract and the Standard Conditions (usually the bottom right-side corner) and any hand-written amendments to indicate they were made by consent. This will reduce the risk of fraud or disputes regarding the contents of the Contract and/or Standard Conditions and make it difficult for a party to argue later on that a page or amendment was inserted after the contract was signed.

The Deposit Holder should sign with their personal signature. If the Deposit Holder is a company then it should be signed in accordance with the *Corporations Act 2001* (Cth).





# STANDARD CONDITIONS

## 1. DEFINITIONS AND INTERPRETATIONS

This clause defines commonly used words in the Standard Conditions.

Defined words in the Standard Conditions start with a capital letter, even when they do not start a sentence e.g. Business Assets.

When you come across a defined word, you should refer to clause 1.

## 2. HEADINGS & NOTES

This is a contract interpretation issue only and is of no significance.

## 3. THE BUSINESS

This clause defines what's included in the "Business".

It also sets out on what basis the Business is sold for GST purposes, normally a "going concern". However, there are circumstances where GST is payable and the GST item in the Items Schedule must indicate whether the purchase price is GST inclusive or exclusive. The parties must speak to their accountant to ensure this sale is a "sale of a going concern" and that they comply with any requirements for this to occur.

- Whilst the Business includes all assets of the Business, any asset of importance to you should be specifically mentioned in the Contract (either in the Items Schedule, a special condition or the Schedules).
- You are selling all the assets of the Business including the list in this clause. If you are not selling a particular asset in the sale, it should be specifically excluded. This is usually done in a special condition.
- If the purchase price does not include GST, the buyer is not obligated to pay the GST until five (5) business days after receiving a tax invoice. As it is important to receive the full purchase price (including GST) at Completion, you must issue the buyer with a tax invoice at least five (5) business days before Completion, otherwise you might find yourself chasing a debt.

**Items J and L(d)** deal with clauses 3.1 and 3.2.

**GST** deals with clauses 3.3 to 3.5.

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

This clause describes how the stock-in-trade and work-in progress is to be calculated, when it is to be calculated and by whom. It also explains who should bear the cost of determining the value of each.

If "work in progress" is included in the sale, the parties will benefit from including in the Contract a variation on how the work-in-progress will be determined. This may help to avoid a disagreement. Otherwise, it is important that the parties agree on a Valuation Date at least 10 days prior to the date of Completion to provide sufficient time for an independent accountant to be nominated if a disagreement occurs and for them to complete the valuation.

**Item M** deals with clause 4.1.

## 5. DEPOSIT

See **Item L(b)**.

## 6. COMPLETION

On the Completion Date, the buyer and the seller (usually through solicitors) meet to exchange payment of the balance purchase price (by cash or bank cheque) for documents held by the seller that are necessary to transfer the business and its assets to the buyer and the other items listed in this clause (Settlement).

- You must be in a position to provide the buyer with all the documents and material stated in this clause. Read it carefully. If there is anything that you cannot provide, you must address it prior to entering into the contract and vary clause 6 if necessary by special condition. In particular, you should check that:
  - a) your lease is either registered with the Department of Natural Resources or capable of registration; and
  - b) if the seller is a company, whether there are any charges registered against the company assets (charges are like a mortgage over a house but on a company's assets instead, they usually occur when the company has borrowed money) or if the seller is not a company any security taken over the assets. You must find out as soon as possible what is required to have these removed.

## 7. POSSESSION

On the date of Completion, the buyer will take over the Business once the purchase price is paid in exchange for the documents and material referred to in clause 6 (Settlement).

- Because Settlement normally occurs in the afternoon, the seller normally attends at the Business with the buyer from when the business opens on that day. Upon settlement occurring, the buyer becomes the owner. The profit of the day is normally that of the buyer who must reimburse the seller for any cash float. The seller will also need to reimburse the buyer for any Eftpos transactions into the seller's bank account. If settlement, for any reason, does not occur on the date of Completion then the profit of that day is the seller's. If this arrangement is not what the buyer or seller expect, a special condition must be inserted to set out the parties' wishes.

**Item P** states the date and place for Completion.

## 8. STATEMENTS AND WARRANTIES

This clause contains important statements made by the seller to the buyer about the Business and the seller.

If any are wrong, the buyer can terminate the contract or sue for damages (or both).

It also contains important statements (promises) made by the buyer to the seller about the buyer. The buyer and the seller must read these warranties carefully. If they are wrong, even slightly, the relevant party must either be in a position to comply by the relevant date or vary the Contract to accommodate their position. If a party has any concern about any statement or warranty, they should obtain legal advice.

- You should check the following as they are easy to overlook:
  - a) all plant and equipment is in good working order and condition; and
  - b) you have not acquired stock on terms where the ownership in them does not pass until full payment is made (what's known as a Retention of Title or Romalpa Clause). If you are not sure, you will need to check each of your supply contracts to make sure.
- Whilst there are clauses in this Contract that deal with it to some extent (Standard Conditions 8.1(b), 3.1 or 3.2, 6.1(e) & 9.2), there is no guarantee that you will have all the licenses, permits, consents and approvals (Licenses) from any authority to run the business by the date of Completion. It is important that you satisfy yourself as to what Licenses you require to run the business and insert a special condition dealing with this requirement and the consequences of not receiving them by Completion.
- Standard condition 8.1(i) provides a warranty from the seller that "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. Often, these financial documents will not be attached to the Contract. In order for this warranty to be effective, they must be attached.
- If you are providing trading figures or financial data as part of the Contract (see standard condition 8.1(i)), you must ensure they are true and correct in every particular. If not, the buyer can terminate the contract, no matter how insignificant the mistaken particular.



## 9. SELLER IN POSSESSION UNTIL COMPLETION

The seller must continue to operate the Business in its usual manner up to the Completion Date.

## 10. ERRORS AND MISDESCRIPTIONS

Any mistake in describing the Business or its assets will only entitle the buyer to compensation, but no right to terminate the Contract.

## 11. BUYER'S TRIAL PERIOD

See **Item V**.

- If you commence the trial period without having obtained satisfactory finance, a satisfactory lease or having satisfactorily verified the financials of the Business, you are deemed to be satisfied with respect to these three (3) very important issues.

## 12. RESTRICTION ON SELLER'S COMPETITION

See **Item W**.

- This is only a geographical and time restraint. If you want to restrain the seller from doing anything else, e.g. not to poach customers or employees of the Business or deal with suppliers, then a variation to the Contract by special condition is required.

## 13. DISPUTE RESOLUTION

This clause explains the process that must be undertaken in order to resolve any disputes that may arise from the Contract before a party can take the matter to court. Unless a party needs urgent relief from a Court, they should follow the procedure set out in this clause in the event of a dispute.

## 14. TELEPHONE

See **Item J**.

This clause explains the seller's obligations to cancel or transfer telephone and postal services.

- This clause places no obligation on the seller to transfer mobile phone numbers or PO boxes to you. If these are important, a variation to the Contract by special condition is required.

## 15. CONTRACTS AND HIRE AGREEMENTS

See **Item N**.

This clause sets out:

1. the process required to transfer Leased and Hired plant & equipment and what is referred to as "Service Agreements" to the buyer; and
  2. the responsibilities of the buyer and seller if the Service Agreements are not transferred by the date of Completion.
- In addition to the Leased and Hired equipment, you are also required to take over any other agreement related to the supply of services to the Business. The seller is not obligated to disclose those to you at the time of entering into the Contract. Therefore, you must find out what these are and whether they are acceptable to you. Further, if it is essential to you that a particular Service Agreement is transferred to you on or before Completion, the Contract will need to be varied to reflect this.

## 16. DEBTORS AND CREDITORS

This clause outlines:

1. who is responsible for the debts of the business incurred before and after Completion;
2. the process for dealing with debts owed to the seller but received by the buyer after Completion (e.g. for goods or services sold on credit); and
3. how accounts for business expenses and outgoings that cover a period overlapping the date of Completion are to be dealt with. Example: if the date of Completion is 15 March and the rent for all of March was paid by the seller, the buyer would have to reimburse the seller for the rent paid from 15 March to 31 March.

The parties should review these clauses carefully. Should the process or obligations not be sufficient, a variation to the Contract will be required.

## 17. REQUISITIONS

See **Item X**.

The seller warrants that there are no unsatisfied "issues" concerning any government body (e.g. the local Council or a relevant department or agency of the Queensland Government). These are called "Requisitions" and this clause outlines the process for dealing with them prior to the date of Completion.

## 18. EMPLOYEES

See **Item Y**.

This clause sets out the process for the termination of employees from the seller and the re-employment of employees by the buyer.

This is a complex clause and is very important if the Business has employees. Both the seller and the buyer should obtain legal advice prior to entering into the Contract if they do not understand the implications of this clause.

Any employee of the Business re-employed by the buyer is considered to be a "Transferring Employee" and the buyer will be responsible for all accrued entitlements from the date the Employee commenced employment with the seller (or any previous owner of the Business).

Consequently, the seller must reimburse the buyer at Completion for 70% of such accrued entitlements. The Contract explains in Appendix A that it is only 70% "since the buyer will get a tax deduction when the employee entitlements are paid". Whilst, the net effect of any tax deduction will vary from buyer to buyer, the 70% apportionment is generally fair. However, if your circumstances warrant a variation, you should obtain legal advice.

- If you notify the Seller that you will employ an employee but don't offer them employment in accordance with standard condition 18.3, you will be responsible for any redundancy payments due to that employee arising from the Seller's termination of their employment on or within 12 months after Completion. If an offer is properly made but rejected by the employee, or if you did not notify a desire for that employee, the Seller is responsible for their redundancy payments.
- The accrual and obligation to pay long service leave is the most complex of all leave entitlements. If you have many employees with 5 years' service or more, your obligation to reimburse the buyer under this clause may be significant, even though the Employees may never reach the threshold to receive this entitlement. Depending on the number of employees you have in this category, you may wish to vary the contract to suit your circumstances and should therefore seek legal advice.





## 19. SELLER'S TUITION

See **Item U**.

This clause sets out the seller's obligations during the Tuition period.

- If you commence Tuition without having obtained satisfactory finance, a satisfactory lease or having satisfactorily verified the financials of the Business, you are deemed to be satisfied with respect to these three (3) very important issues.
- The buyer may nominate a "nominee" to attend in their place. This could be anyone, even someone you may not feel comfortable with. Also, unless the nominee is a party to the Contract (e.g. Guarantor), they are not bound by any confidentiality agreement. You should ensure that they sign a suitable confidentiality agreement.

## 20. SELLER'S ASSISTANCE

See **Item U**.

This clause sets out the seller's obligations during the Assistance period.

## 21. RISK

See **Item Z**.

## 22. TIME OF THE ESSENCE

This means that any time limits or deadlines specified in the Contract are strict.

The parties should ensure that they strictly meet any deadline specified in the Contract, e.g. the Finance Approval Date or the date of Completion. If they don't, the consequences are serious and may entitle the other party to terminate the Contract and sue for damages.

If a party believes it cannot meet a deadline, they should contact the other party immediately to negotiate an extension of the deadline.

## 23. FINANCE CLAUSE

See **Item Q**.

This clause sets out the basis upon which the buyer or seller may terminate the Contract if the buyer does not obtain satisfactory finance.

## 24. ASSIGNMENT OF EXISTING LEASE

See **Item S**.

This clause sets out the process and conditions for the assignment of the lease from the seller to the buyer. This process is what allows the buyer to take the place of the seller in relation to the lease.

- You are required to have the lessor obtain their bank's consent prior to the date of Completion. This means that if the lessor has borrowed money from a bank and the bank has a mortgage on the property containing the Premises, the bank must consent to the assignment of lease to the buyer. This process is often forgotten and could cause the buyer to terminate the contract on the date of Completion if not obtained. You should contact the lessor to arrange this.
- You are obligated to supply such references and do all things necessary to facilitate this process. The lessor will normally request at least the following documents from a buyer:
  1. two (2) business references of the buyer;
  2. a summary of the business experience (CV) of the buyer; and
  3. a statement of assets and liabilities of the buyer.

To avoid delay, you should immediately arrange for these to be available to the lessor.

## 25. NEW LEASE

See **Item T**.

This clause sets out the process and conditions for the new lease of the Premises to the buyer.

- You are obligated to supply such references and do all things necessary to facilitate this process. The lessor will normally request at least the following documents from a buyer:
  1. two (2) business references of the buyer;
  2. a summary of the business experience (CV) of the buyer; and
  3. a statement of assets and liabilities of the buyer.

To avoid delay, you should immediately arrange for these to be available to the lessor.

## 26. BUSINESS NAME AND TRADE MARK

Only applicable if **Items J(d)** or **J(f)** have been completed, in which case the seller warrants that the business name and/or trademarks are properly registered under the applicable law.

## 27. KEYS

Any keys or codes required for the Business must be given to the buyer on Completion Date.

## 28. INTEREST ON LATE PAYMENTS

The buyer has to pay default interest on any payments not made by the due date in accordance with this clause.

## 29. BUYER'S DEFAULT

If the buyer fails to comply with the Contract then the seller can either proceed with the Contract or terminate the Contract and, in either case, claim for any loss suffered as a result of the breach. If the Contract is terminated by the seller then the seller can take the deposit, as well as claiming against the buyer for its losses or reselling the Business (in which case it is only entitled to any deficiency in the sale price).

## 30. MERGER

Just because the Business is transferred and the Contract is completed, it does not mean that all the terms of the Contract are at an end; some can be enforced even after Completion.

## 31. COSTS

Except for any stamp duty on the Contract, which is payable by the buyer, each party is responsible for their own costs in completing the transfer of the Business.

However, the seller is responsible pursuant to clause 24 to pay the lessor's costs for an assignment of lease (if applicable).

## 32. NO WARRANTY ON PRESENT USE

The seller does not warrant that the type of Business stated at Item J(a) is legally allowed to operate at the Premises.

- You should ensure that the relevant town planning scheme allows the type of business to operate from those premises and should seek advice from a town planner if you are not sure.



### 33. FOREIGN INTERESTS

This clause contains a promise by the buyer that they are not a “foreign person”, which includes a person not ordinarily resident in Australia or a corporation (whether foreign or not) that has a shareholder (either a foreign company or a person not ordinarily residing in Australia) with a substantial or controlling interest.

- If you are a “foreign person” within the meaning of section 21A of the *Foreign Acquisitions and Takeovers Act 1975* (Cth), then a special condition should be inserted to delete this standard condition and also provide a mechanism for the Contract to be conditional upon you obtaining the necessary approval to proceed with the purchase; otherwise you will breach the legislation and liable for a penalty.

### 34. NOTICES

The parties should pay attention to what is required to give proper notice pursuant to this contract, otherwise it will not be an effective notice or may be late causing a party to be in breach of Contract.

If a notice is important, consider sending it by facsimile (rather than by other means); so that a successful facsimile transmission report can evidence that it was sent to the other party.

### 35. GUARANTEE AND INDEMNITY

See **Item G**.

- If the seller is a company, you may also wish to have the directors and shareholders guarantee the obligations of the seller. Not only will this strengthen your position if the seller breaches the contract, but it will ensure that the directors and shareholders of the seller will have a vested interest in ensuring that the seller complies with its obligations after completion, e.g. complying with restriction on seller’s competition (Clause 12), employee’s indemnities (Clause 18), seller’s assistance (Clause 20), unfinished lease issues (Clauses 24 & 25) and confidentiality (Clause 36).

### 36. CONFIDENTIALITY

This clause sets out the buyer’s obligation to keep the seller’s business information confidential.

- This clause may not adequately cover your business’s confidential information. Also, it does not bind parties receiving your confidential information who are not a party to the Contract. A separate confidentiality agreement may be required to protect your interests. You should obtain legal advice on how best to protect your confidential information.

### 37. VERIFICATION OF BOOKS AND RECORDS

This standard condition makes the Contract conditional upon the buyer satisfying itself within ten (10) business days of the Contract Date of the accuracy of the Business’s financial accounts.

The seller must provide to the buyer all books and records comprising the Business’s financial accounts within three (3) business days of the Contract Date. If the seller fails to provide the accounts in that time or if the buyer is not satisfied with the accounts received, then the buyer can terminate the Contract.

### 38. SELLER’S DEFAULT

This clause sets out the buyer’s rights should the seller fail to comply with a term of the Contract.

### 39. ENTIRE AGREEMENT

This clause is very important, especially if the parties have discussed things about the Business before the Contract, which have not been addressed in the Contract.

Basically, unless it’s in the Contract then either party cannot rely on it and say it was part of the deal.

Any changes to the Contract must be in writing, agreed to by all parties to the Contract.

## CHECKLIST: CRITICAL DATES

For the assistance of both parties, below is a checklist of the potential dates that might arise in relation to the Standard Conditions (SC) only. Any further dates arising out of Special Conditions should also be diarised to ensure that no crucial dates are missed.



