

AU-CPcs103

Company purchase agreement: cash and shares, part deferred

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Agreement for the Sale and Purchase []

This agreement is dated: [date]

The Seller is: [ABC] Pty Limited, a company incorporated in the Commonwealth of Australia, ACN [number] []

The Seller is: [name] of [private address]

OR

The Sellers are: those persons whose names are set out in Part 1
1 .

The Buyer is: [DEF] Pty Limited, a company incorporated in the Commonwealth of Australia, ACN [number] [].

The First Guarantor is: [name] of [private address]

The Second Guarantor is: [name] of [private address]

It is now agreed as follows:

1. Definitions

So far as the context permits, the following words
:

- “Accounting Date” means the date of the Company have historically been prepared and to .
- “Accountants” means the firm of [name of Accountants] [].
- “Accounts” means the financial statements, annually audited profit and loss account and balance sheet of the .
- “Additional Price” means part of the total Purchase Price for the Shares, deferred until the outcome of trading of the [].

“Assets”	means and include collectively the fixed assets (fixtures and fittings, furniture, office equipment and motor vehicles of the Company), stock and good 2 2 ;
“Buyer New Shares”	means the ordinary shares of \$ [1] each in the [Enter Buyer(Corporation name)], to
“Company”	means [name of Company] Limited, the Shares in which
“Confidential Information”	means all information about the Company and parties to this agreement, including any information which may give a commercially competitive : information about staff, their performance and data or information relating to suppliers, product plans, marketing strategies, finance, performance, operations, customer ; information owned by a third party and in respect of which a party information, comment or implication published on information about the Intellectual Property and
“Disclosure Letter”	means the disclosure letter provided by the Seller to the Buyer including all such information to complete the Sale and enclosing all
“Domain Names”	means the Internet domain names used by the

Company in connection with its website or in

- “First Year Accounts” means the accounts to be drawn to the
- “Intellectual Property” means intellectual property owned by the Company, of every sort, whether or not registered or registerable in any country, including Intellectual Property of all kinds coming into existence after today; and including, among others,
- “Last Year End” means [date] (being the date to which the).
- “Net Profit” means the net profit (less losses) of the Company as shown by ().
- a) after deducting all expenses and depreciation;
 - b) after adding added back all payments, bonuses, options and pensions and any ;
 - c) after adding back sums for transactions not at
 - d) without taking account of capital profits or losses;
 - e) before deducting tax on that profit.
- “Property/Properties” means the land and buildings owned and / or used by the Company, brief details of 2 1 .
- “Purchase Price” means the total price, paid or to
- “Sale” means the sale of the Shares.
- “Shares” [number] ordinary shares of \$ [1] each held by

the Sellers, being the

- “Trustee” means [names, if few] / any Seller
- “Trustee Warranties” means the limited warranties given by any Trustee as set [12].
- “Warranty/Warranties” means the warranties and undertakings of the Sellers contained in paragraph [12] [3].

2. Interpretation

In this agreement unless the context otherwise requires:

- 2.1. a reference to a person includes a human individual, a corporate entity, a partnership, a governmental authority
- 2.2. the Sellers shall be jointly and severally liable for every
- 2.3. a reference to one gender shall include any or all genders and a reference to the singular may be interpreted
- 2.4. a reference to a person includes reference to that person’s successors, legal representatives, permitted assigns and any person to whom rights and obligations are transferred or pass as a
- 2.5. a reference to a paragraph or schedule is to a paragraph or schedule to this agreement unless the context
- 2.6. the headings to the paragraphs and schedules (if any) to this agreement are inserted
- 2.7. any agreement by any party not to do or omit to do something includes an obligation not to allow some

- 2.8. [except where stated otherwise], any obligation of any person arising from this ;
- 2.9. a reference to an act or regulation includes new law of substantially the same ;
- 2.10. all money sums mentioned in this agreement are calculated net of GST, which will be charged when due by law and payable when ,
- 2.11. this agreement is made only in the English language. If there is any conflict in meaning between the English language version of this agreement ,

3. Entire agreement

- 3.1. Each party acknowledges that this agreement and the Disclosure Letter , ,
- 3.2. Each party acknowledges and warrants that he [].
- 3.3. Each Seller warrants and undertakes that he is not

4. Calculation of the Purchase Price

- 4.1. The Purchase Price is the total of:
- 4.1.1 the sum of \$ [] (“ ”) ;

4.1.2 the sum of \$ [amount], payable by the []
[] [] ;
-],

4.2. The Additional Price shall be calculated [6]

4.3. The Sellers shall share

5. Buyer New Shares: Buyer's obligations

The Buyer undertakes as follows:

5.1. to issue or procure []

5.2. that the Buyer New Shares shall rank

5.3. that each Buyer New Share shall \$ []

5.4. to procure that the Buyer New Shares shall be

6. The Additional Price: calculation and payment

For the purpose of this paragraph "Warranted Net Profit"

6.1. After completion of this agreement the Accountants shall be instructed jointly by the Sellers and the

6.2. The cost of the audit and certification shall be paid as

OR

6.3. The cost of the

6.4. The parties shall promptly provide to the

6.5. The Warranted \$ [147 , 000].

6.6. The Buyer agrees that he will not take

6.7. If the Net Profit shown by the First Year Accounts is

[3]

6.8. The Additional Price shall be paid by the Buyer in cash to

21

6.9. If the Net Profit shown by the First Year Accounts is less than the Warranted

\$ []].

OR

6.10. If the Net Profit shown by the First Year

6.11. The procedure described above, in this paragraph shall be

[]

7. Buyer's acknowledgment of inspection

The Buyer admits that:

- 7.1. all of the
;
- 7.2. it has made full investigation into the title,
;
- 7.3. it enters into this agreement on the basis of that

8. Agreement for Sale and subscription for Buyer New Shares

- 8.1. The Sellers agree to sell the Shares with full
- 8.2. The Sellers acknowledge receipt []
- 8.3. Each of the Sellers hereby waives any pre-
- 8.4. Each Seller now hands to the Buyer a letter of
()
- 8.5. So far as the Sellers have any powers or control of any aspect of
- 8.6. The Sale is :
- 8.6.1 the Sellers entering into a shareholders' agreement []
- 8.6.2 [Beatrice Blackbird and Robin Finch] each []

9. Completion and delivery of documents

9.1. Completion of this Sale shall take

9.1.1 a payment receipt [bank]

9.1.2 letters of allotment of the Buyer New Shares;

9.2. At completion,

9.2.1 the title deeds relating to

9.2.2 title deeds,

9.2.3 signed share transfer forms

9.2.4 [if the Company]

9.2.5 letters of resignation of certain directors, namely [names] [and the secretary of the Company], with

9.2.6 [the resignation of];

9.2.7 a list of all user names and

9.2.8 the certificate of incorporation of the Company;

9.2.9 written confirmation by

9.2.10 [employment contracts / service agreements], signed

9.2.11 all records relating to the employment of any person

6] ;

9.2.12 the minutes of meetings

9.2.12.1 [Buyer nominee name] [;

9.2.12.2 transfer forms ;

9.2.12.3 the resignations of [name] []
[]

9.3. Following completion of this Sale, the Buyer shall obtain

9.4. The Sellers undertake that they will:

9.4.1 immediately repay to the Company any ;

9.4.2 use his best endeavours to do

10. Warranties applicability and limitation

10.1. None of the

10.2. Each of the Sellers confirms that when any Warranty refers to

10.3. Each of the

10.4. Nothing done or not done by

10.5. The Buyer may make any agreement with one or more

10.6. The Buyer undertakes to use its best endeavours to conduct the businesses

10.7. If and only if any Warranty cannot be specifically referable to

10.8. Each Seller waives any claim he might have against

11. Warranties by Sellers

11.1. The Sellers (except the Trustees) jointly and severally warrant to the []:

11.1.1 the Sellers are entitled to transfer the Shares to

;

11.1.2 after completion of this ,

;

11.1.3 except as disclosed in the Disclosure Letter, all of the

3

11.1.4 the contents

;

11.1.5 unless otherwise specified,

;

11.1.6 [Each corporate

];

11.1.7 the Shares constitute the whole

[

]

;

11.1.8 there is

11.2. The Warranties in this agreement are not

OR

11.3. The Warranties in this agreement are not limited in monetary value, but no claim

[]

12. Trustee Warranties

Each of the Trustees warrants:

12.1. that he has legal title

;

12.2. that he has

;

12.3. that he has no knowledge of any circumstance unknown

13. Restrictive agreement

13.1. So that the Buyer has the full benefit

,

:

13.1.1 for [3] years after completion of the Sale, either alone or jointly with or

13.1.2 at any time after completion of the Sale, disclose to any

13.1.3 for [3] years after completion of the Sale, either on his own account or for any

[3]

13.2. Each of the Sellers now agrees that

13.3. Following completion of

13.3.1 hold himself

13.3.2 register nor purchase nor use any name similar to any

14. Sellers' protection

14.1. Any claim against any Seller, in relation to the

14.2. No single Seller can be liable for any Warranty claim unless his

\$ [5 , 000].

14.3. In any event, the maximum
\$ [100 , 000].

14.4. The Buyer may not claim more

15. The Guarantee

15.1. [Each of]

:

15.1.1 that every statement,

;

15.1.2 that he will procure

;

15.1.3 that he will indemnify the Buyer against all

,

;

15.2. [Each of] The Guarantor accepts that compliance by the

,

15.3. [Each of] The Guarantor accepts that the Buyer is

15.4. This guarantee is limited to:

15.4.1 the sum of [sum] in total;

15.4.2 claims notified to the []

16. Publicity / Announcements

16.1. No public or press announcement shall be made

OR

16.2. No party shall:

16.2.1 make any public a announcement; or

16.2.2 disclose any information; or

16.2.3 allow expressly or by default any other person

16.3. Except, that no party shall be prohibited from making

16.4. The parties agree to the issue of a

1 3 ,

16.5. [Each/every] party

17. Miscellaneous matters

17.1. No amendment or variation to this agreement

17.2. The parties acknowledge and agree that this

17.3. Unless otherwise stated in this agreement, all expenses in connection

17.4. So far as any time,

17.5. If any term or provision of this agreement is at any time held by any jurisdiction to be void, invalid or unenforceable, then it shall be treated

17.6. Any obligation in this agreement

17.7. If any of the Shares shall at any time be sold or transferred, the benefit

OR

17.8. This agreement shall be binding upon each party's successors, assigns
and ()

17.9. No failure or delay by any party to exercise any right,

17.10. The parties agree that

17.11. Any communication to be served on either of the parties

It shall be deemed to have been delivered:

if delivered : ;
if sent by post : 72
;

If sent by e-mail to the address from which the receiving party has
last sent e-mail: 24

17.12. In the event of a dispute between the parties to this agreement,

17.13. This agreement does

17.14. In the event of any conflict between any term of this agreement and the

17.15. This agreement may be executed in multiple counterparts each

17.16. The validity, construction and performance

[].

Signed by [personal name] on behalf of [named] / [

Signed by [personal name] on behalf of [named] / [

Signed by [personal name] on behalf of [named] / [

OR

Signed by [Seller name in full]

AND

Signed by [/]

Schedule 1- Part 1 Shareholdings

[Here list all sellers, names, addresses

].

Name	Address	Number of Shares	Signature

Schedule 1 - Part 2 Details of the Company

1. The Company

Company number: [] : []

Share capital: [] \$ []

[A company using] 2001

Registered office: [address]

Directors: [list all names in full]

Secretary: [name in full]

Schedule 1- Part 3 Press release

Schedule 2: Part 1 Properties

[Please

]

- Freehold Properties
- Leasehold Properties
- Any other particulars

Schedule 2: Part 2 Assets

[,]

Schedule 3 - The Warranties

General

1.

2.

3.

4.

5.

6.

7.

8.

9.

10.

No damaging effect of this agreement

11.

12. No term of this agreement conflicts with:

12.1.

12.2. the constitution of the Company.

13.

Company structure and operation

14.

15.

16.

17.

17.1. all documents of title relating to its Assets;

17.2.

17.3.

18.

19.

20.

21.

22.

Accounts

23.

[]

24.

[]

25.

26. The Accounts:

26.1.

26.2.

2001 ,

;

26.3.

26.4.

27.

its purchase price;

its production cost;

its net realisable value.

28.

29. Since the Last Year End:

29.1.

29.2.

29.3.

30.

Cash flow

31.

31.1.

31.2.

31.3.

32.

33.

[]

Taxation

34.

35.

36.

37.

38.

39.

[]

40.

41.

Guarantees and borrowing

42. The Disclosure Letter discloses:

42.1. ;

42.2. the terms of every loan;

42.3. ;

42.4.

43.

44.

45.

Assets

46.

:

46.1. are in its possession and control.

46.2.

46.3.

46.4.

46.5.

Trading and contracts

47.

- - , / ,

48.

49. Since the Last Year End:

49.1.

49.2. the Company has paid its creditors promptly.

49.3.

49.4.

[]

50.

50.1.

50.2. no payment due to the Company is overdue.

50.3. all contracts comply with the relevant law.

50.4.

51. [/]

52. No existing contract is for work which:

52.1. is beyond the normal course of business.

52.2.

[] .

52.3. is likely to result in a loss.

52.4.

52.5. [10] %

53. [

,] .

54.

55. [],

56. [25]

[25]

57. ,

58.

Properties - all

59. ,

60.

61.

62.

63.

2

1

64.

65.

65.1.

65.2.

65.3. There are no rent reviews in progress.

66.

67.

68.

69.

70.

71.

72.

:

72.1. water;

72.2. drainage;

72.3. electricity;

72.4. gas;

72.5. telecommunications.

73.

Properties let by the Company

74.

2 1 .

75.

76.

:

76.1. the name and address of the tenant.

76.2. the name and address of any guarantor.

76.3. the address of the Property.

76.4.

76.5. the rent.

76.6.

76.7.

76.8.

76.9.

76.10. any unusual provisions.

77.

Employment

78.

79.

80.

81.

82.

\$()

83.

Pensions

84.

84.1. copies of the trust deeds;

84.2. the latest actuarial report;

84.3.

85.

Insurance

86.

87. No policy contains any special term or restriction.

88.

89.

90.

Intellectual Property

91.

92.

93.

94.

95.

96.

97.

) (

98.

Information technology (“IT”)

99.

:

106.1 the name;

106.2 name and contact information of registrant;

106.3 date to which the name is registered.

100.

101.

102.

103.

[]

104.

105.

:

105.1.

;

105.2. technical, customer and client support services;

105.3.

;

105.4. an email service provider.

106.

107.

108.

108.1.

108.2. what password he uses;

108.3.

108.4.

Explanatory notes

Company purchase agreement: cash and shares, part deferred

General notes

1. The parties

This agreement has been drawn assuming either a company seller or two or more shareholders selling a company to one

2. Complete when agreement dated or later?

This agreement has been drawn for completion immediately “as signed”. Signing completes the deal. The parties must then immediately do whatever else they have promised in order to complete the process. It is perfectly possible to complete at a later date than the agreement is signed. However, problems then arise with control of the company in the meantime and the possibility that anything may change between contract and completion. The Net Lawman recommended route is therefore

Paragraph specific notes

1. Definitions

The definitions have been considered very carefully. At Net Lawman we try to avoid a large raft of definitions, but in this agreement there is no alternative. There is no reason why you should not change any if you need to do so, but do

First Year Accounts: the sale of a company rarely falls at the perfect time to tie in with prompt preparation of annual accounts. A buyer must either insist on new accounts soon after completion, or chase for completion very soon after the last annual accounts, or simply take pot luck. But there is no reason in principle why accounts should not be prepared

“Net Profit” must be considered very carefully, as it is the base line for calculation of the retention and shortfall. The important point is to make the calculation the same for pre

If the same accountants conduct the audits, that should present no problem. If the buyer is likely to appoint new accountants, he would be wise to obtain a written statement from the sellers’ accountants setting out the method of calculation, so that he can instruct new accountants to use the same methodology. It may also be necessary further to

“ ”,

2. Interpretation

A number of provisions, each of which has application at one of more points later in the document. We suggest you do not

3. Entire agreement

This paragraph prevents a party from later saying he was relying on some other document or information or what was said. If other documents are to be relied on (if any), let them be listed

4. Calculation of the Purchase Price

The sellers are to receive a mixture of cash now, cash if future forecasts are met, and shares in the buyer company. You should take advice from your accountant as to how to treat these items for

The words “if it becomes due” should be left in place to assist the sellers discussions with taxation office as to

5. Buyer New Shares: Buyer’s obligations

These include the terms related to new shares in the buyer company. Here you just mention the basic terms. Of course you need a detailed shareholder agreement to protect ongoing interest. Without one, the buyer can

6. Additional Price: calculation and payment

The agreement provides for an addition sum to be paid to the sellers if profits exceed a pre-determined sum. We have also included terms to cater

If you are the seller then may delete this alternative. This provision is not in your favour. Seller will never want to be deprived of additional payment. However,

Either way, to use this provision, you should take accountant's advice as to how to determine and deal with outcome in a way which will prevent the buyer from finding

Edit as you require.

7. Buyer's acknowledgment of inspection

In practice the buyer will have inspected whatever he needs to inspect. This paragraph is usually required to protect the seller. If you

8. Agreement for Sale and subscription for Buyer New Shares

If you have a straight cash deal, delete all mention of subscription for new shares. If required,

9. Completion and delivery of documents

We have included here only the documents whose form and content are well known in advance. By far the largest set of documents will be

- Share certificates are documents of title, but if not available (lost or never issued), a simple declaration to that effect
- The buyer will wish to avoid any claim for compensation by a former director. But the directors are not (necessarily) sellers, so it is important that they are bound by the proposition that they have no claim. If they receive no "consideration" as directors, they will not be bound by a simple statement
- This provides for any key people to remain as employees. Their new contracts would be dated the same date as the agreement and would take
- Of course, the sellers will already have satisfied themselves that the beneficiary of a guarantee (like a bank)

10. Warranties applicability and limitation

Do not edit without very good reason and full understanding

11. Warranties by Sellers

"Joint and several liability" means that all the sellers are jointly liable. No one of them can avoid liability to the buyer by saying he was personally not to be blamed. This means that the buyer can (and would) claim against the wealthier sellers if

To avoid this situation, the sellers should prepare a simple shareholders agreement setting out exactly which of them is responsible for what areas and who pays what to whom in the event of a claim. Such an agreement cannot prejudice the buyer, who still may sue whom he wishes. It serves only to sort the position between the shareholders themselves. One of the

A company may sign up to a deal, by the hand of its directors, but if its constitution prevent such a contract being made (for one of any number of reasons), then it can wash its hands of

The warranties are so fundamental to the transaction

12. Trustee Warranties

Provision has been made for the proposition that one or more people may hold shares as trustees. The buyer should make certain that any such person is a disinterested trustee. It could be that a major shareholder has placed some of shares in a family trust and he remains a trustee, or that some other person is

()

The trustees warrant only that they are selling fairly and know of no reason why

13. Restrictive agreement

These provisions are required to protect the buyer and are reasonable. Note that they do not prevent a former director from setting up in

“ ”

This paragraph may not be enforceable against a shareholder who has hitherto had

14. Sellers' protection

This paragraph is most important to the sellers as it caps their liability. How this is done is a matter for negotiation. This proposal is fair, subject of course to

15. The Guarantee

This paragraph protects the buyer against a seller who spends the sale proceeds and refuses to assist as this agreement requires. That will arise only when the

In that case, your guarantors will be the directors of the holding company seller.

A judge will usually treat a guarantee as a matter only of money. We have worded this one clearly so that there is

16. Publicity / announcements

This may not be important to

17. Miscellaneous matters

A number of special points. We have identified each of these as important to protect you. Some are relevant to particular paragraphs in the document, some apply more

The Schedules

We have no comment.

Notes on Warranties

Before we give you other drafting notes, we want to explain about warranties.

Warranties are the essence of the deal. They are listed in a schedule. Do make sure that the paragraph of

These warranties have been drawn to provide as large a "menu" as

For maximum protection,

1. Delete any warranties that cannot apply to your
2. Do not delete warranties relating to matters about which full information has already been provided. If you
3. Take the document to your accountant to
4. For sellers, the strength of a warranty may be greatly reduced simply by changing

Explanation of warranties

Unlike any sale agreement, a company sale agreement is different. The main proposition is

The agreement is usually drawn by the buyer. That is fair because the buyer knows nothing about the company and the seller knows everything (we hope)! So the agreement first covers

These are just assurances or guarantees from the seller as to the condition and state of the company and in particular, any existing liabilities, at the time of sale. No matter how thorough

How to use warranties?

If you are seller

The warranties are not so much the sting in the tail as half the dog. Many solicitors and entrepreneurs will deliberately insist on a seller giving

As a seller, you have a number of

- when you produce the draft agreement, remove the most “difficult” warranties before you send it to the buyer.
- provide clear and open disclosure to
- after considering the breadth of each warranty, you could edit those that
- Even where you “answer” the warranty in some way, there is still a strong case for qualifying absolute warranties,

Being the seller it is essentially important to provide full and

If you are the buyer

The weight of advantage is very firmly with the

As a buyer you need warranties:

- to provide yourself
- The general rule of "buyer
- In deciding to purchase share capital of the company, you have made a number of assumptions but

- To get the right to claim

Either you are the

Warranties: drafting notes continued

It is good practice to delete irrelevant warranties, but by all

General

These are very basic and general requirements. They are also broad, covering

No damaging effect of this agreement

The buyer needs to

Company structure and operation

With reference to licences and consents: in any business which has been operating for more than a few years,

Accounts, Cash flow and Taxation

The buyer should take advice

The basis of valuation of the company is likely to have been the last audited annual accounts,

Guarantees and borrowing

A list of creditors should be readily

Assets

Even if all accounts information is absolutely correct,

The most important answers sought here are as

Trading and contracts

This section covers every contract - from customers and suppliers to the office cleaner and the car leases. Particular care should be taken with

The buyer's requirement for details of customers and suppliers will be
1 , 000

The most common reason for litigation about contracts arises because someone

Properties - all

Real property is

Most of these items cover the facts that would be

Properties let by the Company

If none, delete.

Employment

We have no comment. Set the warranties

“ ”

Pensions

We have no comment.

Insurance

We have no comment.

Intellectual Property

All companies acquire some intellectual property. Even a quite small

A buyer should consider what IP this company might need

Information technology (“IT”)

These are of course an item of intellectual property. We have placed them under a separate heading to

“ ”

End of notes