



Leaker Partners
Corporate and Commercial Lawyers

THE CFO ACCESS

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POINTS TO COVER



- (a) Conditions Precedent
- (b) Financing Support
- (c) Warranties
- (d) Limits on Warranties
- (e) Restraints on Sellers
- (f) FIRB Conditions
- (g) Listed Parties v Unlisted Parties





CONDITIONS PRECEDENT

Real or Imagined Hurdles?

➤ ASSET SALES

- (a) No Material Adverse Conditions (after unique industry risks identified)
- (b) Third Party Consents/Release of Security Interests (see later comments on PPSR)
- (c) Board Approval (often claimed by the Buyer)
- (d) Key Employees retained
- (e) Key licences/approvals retained or new ones to be obtained
- (f) Continuing security of tenure of premises (e.g. lease)

TREND: Less CP's and CP's more tailored to specific transaction



CONDITIONS PRECEDENT (cont)

➤ SHARE PURCHASE

- (a) Maintenance of Key Ratios e.g. (i) working capital
 - (ii) debtors
 - (iii) sales
 - (iv) nett assets
- (b) Continuing Finance Facilities
- (c) Operational/Key Indicator Reviews

NOTE: More Due Diligence required at the beginning (adds to timing to completion)



CONDITIONS PRECEDENT (cont)

- CARVE OUTS (to consider)
 - (a) General economic downturn
 - (b) Changes in the law
 - (c) Industry conditions (e.g. drought, major correction in the industry e.g. technology)
 - (d) Change in Key Market e.g. China

General Comment on CP Trends

- (a) Less “Boilerplate”
- (b) More Specific



CONDITIONS PRECEDENT (cont)

➤ BREAK FEES

- (a) Break Fees payable to Seller if Buyer CP not achieved e.g. Board Approval
- (b) Break Fees payable to Buyer if Seller CP not achieved e.g. FIRB

Comment: Break Fees not considered often enough



FINANCING SUPPORT

More Focus on “Real” or “Likely” Loss

- i.e. Financing support provided by a Party to cover potential loss to the other Party
 - (a) Escrow (may be “slow release”)
 - (b) Holdback/Retention
 - (c) Seller/Buyer Guarantee (most common)
 - (d) Director Guarantees
 - (e) Warranty and Indemnity Insurance (only use if in excess of \$10 million) (note: insurers will have “knowledge carveout”)
 - (f) Bank Guarantees (less frequent but can be useful in a property transaction)

Unusual for agreements not to have any financial support of some variety.





WARRANTIES AND LIMITATIONS ON WARRANTIES

- TIP: IDENTIFY WHAT IS KEY TO MAKE MONEY IN THIS BUSINESS
 - (a) Data room disclosures
 - (b) Compliance with legal and accounting matters
 - (c) All relevant information is disclosed (specific requirements identified)
 - (d) Quality of assets and stock (stock levels)
 - (e) Intellectual Property rights (continuing validity and exclusive rights)
 - (f) Information technology (adequate security)
 - (g) Customer/supplier warranties
 - (h) Industrial relations/employment contracts (superannuation up to date)
 - (i) Environmental matters (especially businesses in agriculture and manufacturing) (often the discussion of “carveouts”)
 - (j) Security interests (PPSR – and timing of release) (identify security interests over assets not being transferred)



WARRANTY CLAIMS – CARVE OUTS AND LIMITATIONS

➤ RANGES OF LIMITS

- (a) UNLIMITED (less likely)
- (b) Limited to value of Purchase Price (possibly)
- (c) Limited to % of Purchase Price (most likely 50-60% of Purchase Price)
- (d) No warranty (unlikely)

Note: Minimum claim amounts often set, e.g. \$50,000

Observation: More “science” being applied to determine useful limitation





WARRANTY CLAIMS – CARVE OUTS AND LIMITATIONS (cont)

- TERM OF WARRANTIES
 - (a) Unlimited (unlikely)
 - (b) 2 years (most likely)
 - (c) 1 year

- TAX WARRANTIES
 - (a) Likely to be unlimited in value
 - (b) Term of 7 years





RESTRAINTS ON SELLERS

- RESTRAINTS IN COMPETING
- RESTRAINTS ON SOLICITATION OF EMPLOYEES/CUSTOMERS

Term: 2-3 years most likely

Beyond 3 years not likely

Less than 2 years unusual (but may depend on seller's ability to earn income, e.g. sale of smaller businesses)

Geographical Area: Depends very much on the business
For e-commerce business – normally irrelevant to impose geographical restraint

- EXITING SELLERS

May need to “carveout” an exemption to pursue a new or existing venture





FOREIGN INVESTMENT REVIEW BOARD APPROVALS

➤ Fees now payable – Residential Property

Minimum fee	\$5,600 (residential house less than \$1 million)
\$10 million residential property	\$102,300
Exemption certificates (for new dwellings)	\$26,100

➤ Fees now payable - Business

Agricultural land (\$2 million or less)	\$2,000
Agricultural land (\$10 million or more)	\$103,400

Trend: Despite timeframe for approval (statutory timeframe of 30 days does not run until fee is paid), FIRB may be the CP left till last or at least until greater certainty of completion





LISTED PARTY v UNLISTED PARTY

- GENERAL OBSERVATIONS
- LISTED PARTIES
 - (a) More likely to follow “their method” (Heads of Agreement recommended)
 - (b) Post-contract to rely strictly on the “black letter” of the agreement
 - (c) Certainty of price more likely
 - (d) “Locked Box” approach more likely
- UNLISTED PARTIES
 - (a) More malleable in their approach
 - (b) More likely to view the “deal” first then the written agreement
 - (c) Purchase Price more likely to be adjusted by a formula
- UNEQUAL BARGAINING POWER?
 - (a) Avoid negotiating commercial terms through the lawyers (if possible)
 - (b) Deal counterpart to counterpart



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THANK YOU

