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BUY/SELL DEED SUMMARY AND INSTRUCTION SHEET

The Buy/Sell Deed is a business succession planning tool that deals with “ownership succession” of the business should specific insurance related events occur with respect to a key person in the business. These key persons are defined in the Buy/Sell Deed to be “Principals”.

If a nominated insurance related event (called a “Trigger Event” in the Buy/Sell Deed) occurs with respect to a Principal then the Buy/Sell Deed will operate so as to provide the parties with a legal framework by which equity interests in the business can be transferred from “Exiting Owners” to “Ongoing Owners” on agreed terms. Indeed, the fundamental purpose of the Buy/Sell Deed is to enable the transfer of these equity interests in the business to take place in these circumstances:

- with legal certainty
- in a timely manner
- for an agreed purchase price
- with the purchase price funded by an insurance policy.

The end result of a successful Buy/Sell Deed is the achievement of critical business succession planning outcomes namely:

- control of the business by the Ongoing Owners
- receipt of “fair value” by the Exiting Owner for their equity interests
- minimize the delay in achieving the intended outcomes
- minimize the legal costs in achieving the intended outcomes
- minimize the risk of dispute between the parties.

There are some key concepts used in the Buy/Sell Deed. Understanding these concepts is critical to understanding the operation of the Buy/Sell Deed. These are outlined below.

These documents can be set up for a single business structure or multiple business structures together.

1. Principal

A “Principal” is a person:

- who is a key person in the business;
- in respect of whom the business succession plan is centered;
- either owns equity interests in the business directly or through a related or associated entity; and
- in respect of whom an insurance policy is put in place for business succession purposes.

It is the occurrence of a Trigger Event in relation to a Principal that is the significant event for the business from a business succession planning perspective.

Should a Trigger Event occur with respect to a Principal, the Buy/Sell Deed will come into operation.

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2. Related Owner

A “Related Owner” is the person or entity that is connected with a Principal and owns equity interests in the business. For example, a Related Owner in respect of a Principal could be the Principal themselves (ie person X is the Principal and person X also owns equity interests in the business), the spouse of a Principal or the Principal’s family discretionary trust. It is important to identify all of the persons who are Related Owners in respect of a Principal so the equity interests of all of those Related Owners become subject to the Buy/Sell Deed should a Principal suffer a Trigger Event.

The Related Owners cannot deal with their Business Interests other than as contemplated buy the Buy/Sell Deed or with the consent of all other parties.

3. Related Insurance Owner

A “Related Insurance Owner” is the person or entity that owns the policy of life insurance on the life of the Principal. In some circumstances there may not be a Related Insurance Owner, for example, where a Principal is not insurable or where the Insurance Policy is held by a superannuation fund. There is a significant amount of planning that goes into the structuring of insurance policy ownership for the purposes of a Buy/Sell Deed. Commonly, the Related Insurance Owner in respect of a Principal will be the Principal themselves (a “self ownership” model), the spouse of the Principal or, in appropriate circumstances, the Principal’s superannuation fund.

4. Business Entity and Business Interests

The Buy/Sell Deed must identify and deal with all of the entities (called “Business Entities”) that are relevant to the conduct of the business. For example, all operating or trading entities should be included as well as entities that own important assets relevant to the business (eg business premises or intellectual property assets). Similarly it is critical that the Buy/Sell Deed identify and deal with all of equity interests (called “Business Interests”) in all of the Business Entities.

5. Trigger Events

The Buy/Sell Deed is very much a specific purpose business succession document dealing with the occurrence of an insurance related event in respect of a Principal. These events are referred to in the Buy/Sell Deed as “Trigger Events”. The two most common “Trigger Events” are the death or total and permanent disablement (“TPD”) of a Principal. A trauma or critical illness event is sometimes also included as a Trigger Event.

Clearly, the occurrence of one of these Trigger Events in respect of a Principal (a key person in the business) will have a significant impact on the business and is an event that needs to be planned for in the business succession context.

6. Insurance Policies

The Insurance Policies that are owned by the Related Insurance Owner are critical to the practical operation of the Buy/Sell Deed because of the proceeds from these Insurance Policies will provide the Ongoing Owner with funding to enable them to pay to the Exiting Owner the purchase price as consideration for the transfer to them of the Exiting Owners’ Business Interests. Under the terms of the Buy/Sell Deed the Related Owner will be required to provide this funding to the Ongoing Owners.

The Insurance Policies that underpin the funding arrangement in the Buy/Sell Deed must be regularly reviewed to ensure that the policy proceeds are sufficient having regard to the value of the Exiting Owners Business Interests.

The Insurance Policies can be used only for the purposes of the Buy/Sell Deed. The Insurance Policies cannot, for example, be used as security for any private loans of the Principal or Related Insurance Owner unless all parties to the Buy/Sell Deed agree.

7. Market Value of Business Interests

A fundamental purpose of a Business Succession Deed is the obtaining of legal certainty that the equity ownership transfer will take place in the manner that the parties intended.

Critical to achieving this is the need to provide a mechanism in the Buy/Sell Deed for determining the agreed value of an Exiting Owner's Business Interests and, consequently, the purchase price to be paid by the Ongoing Owner to the Exiting Owner. An important part of the business succession planning is to avoid dispute between the parties as to what the value of the Business Interests are and what the purchase price should therefore be. This is achieved in the Buy/Sell Deed by the relevant clauses and Schedules that deal with and determine the market value of the Business Interests.

As the value of business change over time, the relevant clauses and Schedules in the Buy/Sell Deed that determine the market value and purchase price for the Exiting Owners Business Interests should be regularly reviewed (at least annually) and updated accordingly.

8. Mechanical Operation of the Buy/Sell Deed

Under the terms of the Buy/Sell Deed, each Owner of Business Interests in a Business Entity grants a Call Option and a Put Option to each other Owner subject to the following conditions occurring:

- a Principal suffers a Trigger Event; and
- the proceeds of the Insurance Policy on the life of that Principal are paid to the Related Insurance Owner.

Under the Buy/Sell Deed arrangement the Exiting Owner (who is the Principal's Related Owner) can exercise their Put Option, which then forces the Ongoing Owner (who are Related Owners of the other Principals) to buy their Business Interests for the "Purchase Price" (as agreed by the parties under the terms of the Buy/Sell Deed). Alternatively, the Ongoing Owners can exercise their Call Option which then forces the Exiting Owners to sell their Business Interests for the agreed Purchase Price.

The transfer of the Business Interests from the Exiting Owners to the Ongoing Owners will be done in the same proportion as the Ongoing Owners own their Business Interests.

Once the Put Option or Call Option is exercised, the Related Insurance Owner is required to provide to the Ongoing Owners an amount equal to the Purchase Price that is payable by the Ongoing Owners to purchase Business Interests from the Exiting Owner. This is called the "Funding Amount" and is the mechanism by which the Insurance Policy proceeds (or such nominated part of those proceeds) are used to fund the purchase of Business Interests by the Ongoing Owners. The Funding Amount must be paid within 7 days of the Put Option or Call Option being exercised.

The transfer of the Business Interests from the Exiting Owners to the Ongoing Owners must be completed within 30 days after the date that the Put Option or Call Option is exercised or by such other

date that the parties agree, whichever is the later. This date is called the “Completion Date” in the Buy/Sell Deed.

While it is common that the Ongoing Owner will purchase the Business Interests from the Exiting Owners, the Buy/Sell Deed is flexible enough to allow an Ongoing Owner to introduce a new Owner if they wish. The Ongoing Owner, and their related Principal, may wish to do this for a number of reasons including tax planning and asset protection planning. However, any person who is not already a party to the Buy/Sell Deed and who intends to acquire interests in any of the Business Entities cannot do so unless they agree to be bound by the terms of the Buy/Sell Deed.

Review of Buy/Sell Deed

As has been mentioned previously in this summary, it is critical that the business succession arrangement generally and the Buy/Sell Deed in particular be reviewed at least annually or when a significant event occurs which impacts on the business. In particular, having in place a regular process for reviewing the Buy/Sell Deed is important to deal with:

- the addition of new, or the ceasing involvement of existing, Principals;
- the additions of new, or the cessation of existing, Business Entities;
- alterations to the amount or types of Business Interests;
- changes to the value of the Business Entities;
- changes to the Insurance Policy details.

9. Other Important Aspects of Business Succession Planning

The Buy/Sell Deed is an important but very specific business succession planning tool. If they have not already done so, the Principals in particular should give due consideration to the following issues which, depending on the specific circumstances in question, can also be of importance for business succession planning purposes:

- business owners agreements (ie shareholders agreements, unitholders agreements, partnership agreement)
- key-person capital purpose insurance cover
- key-person revenue purpose insurance cover
- management succession planning
- personal Wills and estate planning
- review of the business ownership structures and business relationships between business entities
- employment agreements for key personnel.

10. Amendment to Will

As you are aware, insurance policies have been entered into for the specific purpose of funding a transfer under the Buy/Sell Deed should a Trigger Event occur. So as to ensure consistency and avoid estate issues where the Principal is the policy owner (or will otherwise be the recipient of the insurance proceeds indirectly, such as from an insurance policy held by a superannuation fund for the purposes of the Buy/Sell Deed) then a clause to the following effect should be contained in the Principal’s Will: “The part of my estate representing the proceeds from the payment from an insurance policy <INSURANCE POLICY NUMBER>, have been specifically nominated to be used for the purposes of <BUSINESS NAME> Buy/Sell Deed. As such, my Executor is directed to ensure such funds remain available to meet my estate obligations as contracted by me under the Buy/Sell Deed.”

11. Information Required to Proceed

Where we have been involved in the establishment of your business structures or where we have the information, we will no doubt have this information, so you do not need to provide us with this. We will confirm these details with you.

INFORMATION SCHEDULE

1. **Name of Buy/Sell Deed**
2. **List all of the Business Entities that will be dealt with in the Buy/Sell Deed (eg company, unit trust, partnership) and provide the following details:**

Name	ACN/ABN	Registered Office	Agreed Business Value

3. **Please draw a diagram of business and ownership structure:**

4. **For each of the Business Entities listed in question 2 identify the Principals and Related Owners**

Name of Business Entity	Principal	Related Owner (ie the Owner related to the Principal)	% Ownership of Business Entity

5. For each Principal identify the person or entity that owns the Insurance Policy on their lives (“the Related Insurance Owner”) and the Insurance Policy Details:

Principal	Related Insurance Owner	Insurance Policy No.	Insurer	Sum Insured

6. List the Trigger Events that are covered by the Insurance Policies and which will be covered in the Buy/Sell Deed.

Death

TPD

Critical Illness / Trauma

If you ticked the box for Critical Illness / Trauma please answer the following additional questions.

- (a) For how long should the Principal be unable to carry out “the Principals nominated business activities” before the other business owners (the Ongoing Owners) can exercise their call option under the Buy/Sell Deed?

6 months

12 months

Other (please specify)

- (b) What constitutes “the Principals nominated business activities?”

All usual business activities to the Principal prior to the occurrence of the Critical Illness / Trauma event

Other (please specify)

7. Is the sum insured under the Insurance Policy on the life of any of the Principals less than the Agreed Value of the Business Interests of that Principal’s Related Owner?

Yes

No

If yes, there is a funding shortfall ie not all of the purchase price payable by the Ongoing Owner will be funded by the Insurance Policy on the life of the Principal.

On what terms is the shortfall in the purchase price to be paid by the Ongoing Owners to the Exiting Owings (eg vendor financing over a period of time, interest payable or not, security granted or not).

- (a) Term/ Period – is this time related or outflow related (e.g., payments per month to be no more than x or no less than y with balloon)
- (b) Interest rate
- (c) Security

Payment Options

(a) Please charge my credit card (if you choose this option please complete and fax or email this page to 02 9247 2222 or office@samaraslawyers.com.au)	
Card Type Type (surcharge fee applies)	<input type="checkbox"/> Visa <input type="checkbox"/> Mastercard <input type="checkbox"/> American Express
Card No:	
Expiry Date:	____ / ____
Credit Card CCV No. (the last digits on front or reverse of card)	
Name on Card	
Amount	\$
Cardholders Signature	
(b) Paying an invoice by direct deposit (please provide a reference):	Bank: National Australia Bank Name: Samaras Lawyers Branch Number: 082 057 Account Number: 1964 08066
(c) Paying an amount into our trust account by direct deposit (please provide a reference):	Bank: National Australia Bank Name: Samaras Lawyers Law Practice Trust Account Branch Number: 082 057 Account Number: 1964 49247
(d) Post a cheque or money order to:	Samaras Lawyers PO Box 2717 Taren Point NSW 2229