

# Drafting of Special Conditions and REIWA Sale of Business Agreements

Presented by:

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## Tom Meagher | Director



Tom has over 30 years' legal and business experience including:

- ✓ working for local and major national Law Firms;
- ✓ being the majority owner and executive director of his former mid-tier Law firm;
- ✓ being a National Operations Manager for a financial advisory IT platform provider
- ✓ being the WA Legal Technology Group Manager for a National Law Firm
- ✓ qualified as a Microsoft-certified Project Manager;
- ✓ owning and managing an IT Consultancy Business; and
- ✓ being a Director and In-House Counsel for a Public Company.

He is also a regular publisher of articles and is one of Australia's leading presenters of legal seminars to and for various professional bodies, associations & government authorities on a wide range of business law and professional development-training topics including:

**WA Department of Commerce • Chartered Accountants Australia and New Zealand • Law Society of WA • Innovation Centre of WA • LegalWise CLE • The Tax Institute • Institute of Public Accountants • Governance Institute of Australia • National Electrical & Communications Association (WA) • Australian Hotels Association (WA) • Small Business Development Corporation • Australian Institute of Conveyancers (WA) • CPA Australia • Mortgage & Finance Association of Australia • City Insolvency Discussion Group • Forum for Directors of Indigenous Organisations (FDIO) • Stirling Business Centre • Institute of Certified Bookkeepers • Western Suburbs Business Association • Business Foundations Inc. • WA Business Assist • WA Reckon Partners • Innovate Australia.**



# Disclaimer

*This seminar is not legal advice and must not be relied on as such.*

*The information presented in this seminar is intended only as a guide, as to the topic and the matters discussed.*

*If you have a matter which relates to this seminar or you require legal advice, careful review and analysis of your matter's particular facts, information, documents and the applicable laws are required before proper legal advice can be given or applied to that matter.*



# Overview

- A. Properly drafting Special Conditions.**
- B. Relevance & Importance of Special Conditions.**
- C. When Special Conditions may apply for a Sale of Business.**
- D. Special Conditions - Workshop Case-studies.**
- E. Q&A Session.**

## A. Introductory tips to properly drafting Special Conditions

- Firstly, how well do you know your REIWA :

- 1) **Agreement for the Sale of a Business and its General Conditions** (*2014* version!) ,
- 2) **Confidential Disclosure Deed; and**
- 3) **Supplementary Statement?**



- We'll now conduct a brief walk-through and re-familiarisation with these key contractual documents...



## A. Properly drafting Special Conditions cont'd

Some introductory tips to properly drafting Special Conditions:

- ✓ Know and *fully understand* the relevant base-Agreement you are relying upon ('the best tradesperson always keeps their tools sharp').
- ✓ Ensure that any 'reused terms' correctly align with the existing Definitions. e.g don't use "Settlement Date" if there is a predefined "Completion Date"

TIP: capital letters for existing, defined terms. Otherwise be sure to concisely, 'intra-define' any new terms.

- ✓ Understand how:
  - the Interpretation and General/'boilerplate' provisions from the Agreement interoperates; and
  - whether they need to be amended or qualified with the Special Conditions?



## A. Properly drafting Special Conditions cont'd

Some introductory tips to properly drafting Special Conditions cont'd:

- ✓ Noting that Special Conditions may be created at the 'heat of the moment', when the sale is trying to be 'crunched' with the Buyer, it's 'okay to phone a friend':
  - Namely, if you are unsure, unable or it is obviously beyond your ability to properly draft any such bespoke special conditions; whether I to the complexity the technicality or the specific then you should seek appropriate independent advice (e.g. from a tax advisor, lawyer, insurance broker, specialist consultant etc).
  - Also, **know your limits**: think of getting independent input and guidance as to small insurance-premium *investment*; rather than just a waste of time and some sort of arbitrary expense.



## B. What's the Relevance and Importance of Special Conditions?

### ❖ Insurance

- Possible negligence claims by seller clients resulting in a notification and even, actual professional indemnity insurance claims!
- Note: required payment of insurance excess as well as adverse effect on subsequent premiums too...

### ❖ Loss of commission

- If an Agreement falls-over due to defective or poorly-written special conditions, a Broker will not be entitled to their commission.
- Therefore, despite spending in an insignificant amount of time and professional effort, all that is for nil (in addition to the other potential headaches can arise from such!).



## B. Relevance/Importance of Special Conditions cont'd?

### ❖ **Damage to personal reputation Broker & your Business' Goodwill**

- Repeat and referral business is a Broker's cheapest and most easily acquired client.
- There can be a loss of reputation when clients spread the word of what happened to them which may be very difficult to address, let alone reverse.
  - Remember that: with the internet, Facebook, LinkedIn, Google Reviews etc and basically your hometown is, nowadays, 'a very small place'!

### ❖ **Time & Stress**

- What about the time spent trying to rectify and a problem and explaining or debating a poorly or incorrectly written condition? Poor or defective drafting of Special Conditions may also have also have latency risks i.e it may arise long after Settlement, and therefore further unbudgeted work and costs to (hopefully) satisfactorily redress same..



## B. Relevance/Importance of Special Conditions cont'd?

### ❖ Non-Compliance

- Regulatory-compliance audits of Brokers may identify inadequately written Special Conditions in Sale Agreements which in turn can lead to confusion, complaints and even possible litigation between the buyer and the seller parties as well as compliance breaches.
- There may be implications for Brokers if poor wording of a Special Condition they have written contributes to a problem between a buyer and a seller.
- Poorly written conditions may also be breach in the [Code of Conduct for Agents and Sales Representatives](#) (“the Code”).
- This could potentially lead to a fine, suspension, loss of license or registration. The following sections of the Code are particularly relevant when writing Special Conditions:
  - *Section 4: General duty to principal.*
  - *Section 7: Duty to behave fairly.*
  - *Section 9: Standard of service.*

## B. Relevance/Importance of Special Conditions cont'd?

### ❖ Legal

There may be a number of legal and other ramifications as a result of poorly-written special conditions including , but not limited to:

- the clause being unenforceable or having unintended consequences
- breaches of legislation - e.g. the *Australian Consumer Law (ACL)*, with respect to one sided terms or conduct likely to mislead or deceive;
- risk of litigation by the seller or buyer seeking to recover damages; and
- negative repercussions in relation to employment:



## C. When Special Conditions may apply.

### ❖ Sample clauses for certain situations

- ✚ *Electronic Transmission of Contract*
- ✚ *Conditions precedent/Due Diligence by Buyer*  
(with contractually-permitted Adjustment of Purchase Price)
- ✚ *Warranties reinforced with Retention Sums and/or Earn-outs*  
(‘floor’ and ‘blue sky’/ ‘cap & collar’ provisions )
- ✚ *Better, Alternate Offer clause.*



## C. When Special Conditions may apply cont'd.

### ❖ Sample clauses for certain situations

✚ *Vendor Finance and related security.*

✚ *'Later of:...' Completion Date.*

✚ *Voluntary Execution and Independent Advice clause.*





## D. When Special Conditions may apply cont'd.

### ❖ Other situations when Special Conditions may be appropriate

- Phased' Deposits.
- Consignment and bailments.
- Seller/ Key Persons Employment offers – beyond mere seller assistance/ handover period.
- Employee Entitlements amortisation/offsets in lieu of Seller paying-out entitlements prior to Completion.
- Not taking certain Employees – HR records (note: LinkedIn profile and personal mobile phone numbers of sales/BD persons!).
- Buying any of the Seller's Debtors (factoring).
- Privacy Act considerations.



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## **Session 2.2:**

# **Drafting of Special Conditions – *Interactive Workshop plus Q&A***



## Scenario A – Selling of 1 of 2 Businesses Owned by a Vendor client..

Bob, through his vendor entity ABC Pty Ltd owns two successful, proprietary-technology, manufacturing businesses situated at different locations, North and South called “Bob’s Spiffy Products”.

You have introduced Mary as the proposed purchaser. Mary is a successful, long-time manager of competitor’s business, and it appears she’s interested to buy ABC’s North business.

Bob likes Mary, even though she can only raise 75% of the funds for his sought-purchase price of \$1m; being \$600k for goodwill and the rest being towards the P&E (you have previously advised him that it’s probably only worth \$800K).

However, for Bob, he considers she is ideally-suited to take-over the North business and his team there.

*(cont’d)*



## Scenario A – Selling of 1 of 2 Businesses Owned by a Vendor client..

Bob is therefore prepared to offer her a portion of vendor finance and provide her with all \$200K of sale Stock on consignment.

Bob really wants to make this deal work.

Mary has said she won't likely engage the services of buyer representative and asked you provide her with a copy of the proposed Sale of Business Agreement, so she can go to her bank to get finance approval.

What are the various issues with possible amendments to the standard REIWA Agreement, in particular its Conditions?

Also, what Special Conditions could be considered for achieving a successful deal between the parties?

[Issues & Answers](#)



## Scenario B – Selling of a Professional Services’ business.

Sara is a successful financial advisor, trading through her corporate authorised representative entity UVW Pty Ltd trading as “SarAdvisory”. UVW is an AFSL licensee of OMG Limited.

(To keep things relatively simple) Sarah would like to sell her business to another licence financial advisor, John whom you have found and introduced to Sarah. John also utilises a corporate authorised representative XYZ Pty Ltd trading as “LitteJohn’s” and licensed by OMG.

Sarah as a well-regarded veteran in her industry, and she has been wanting to retire lately. The Haynes Royal Commission report has accelerated that desire...

John is a keen, younger financial advisor and is looking to grow his firm’s client-base and reputation.

*(cont’d)*



## Scenario B – Selling of a Professional Services’ business cont’d.

In fact John recognises the SarAdvisory brand; including its website and also its office’s location (situated in a prominent location in Peppermint Grove), means he is prepared to entirely take-over UVW’s business on a ‘going concern’ basis.

Notably because Sara has been a financial advisor for so long, due to legacy reasons, it is unsure whether Sara or UVW owns some of the valuable client book she acquired 20 years ago.

John recognises a key part of ensuring/optimising the goodwill, and seamless transition of SarAdvisory clients, is to have Sara continue to work in the business for at least 2 years post-settlement. She is prepared to do this.

John also understands that, no matter how enthusiastic & committed to making this work, he and the combined XYZ/ SarAdvisory business teams are mindful there may be some ‘client attrition’ too.

*(cont’d)*



## Scenario B – Sale of a Professional Services’ business cont’d.

So,

- whilst John’s prepared to pay Sara’s asking price of \$2 million (being \$1.9 million for goodwill and the rest depreciated office P&E), and
- having done the calculations on the ‘funds under management’ and the annualised ‘fees per client’ (with a (grossly) simplified expected annual net profit \$1m),
  - in lieu of having issues regarding possible clawbacks or arguable warranty claims for loss of goodwill for various reasons...
    - It’s been agreed between the vendor and purchaser party is that there will be a retention sum of \$500,000 withheld for 2 years post-Settlement; and
    - will be released to UVW after that period; subject to confirmation in each year of at least \$1 million net profit by XYZ.

What are the various issues with possible amendments to the standard REIWA Agreement, in particular its Conditions?

Also, what Special Conditions could be considered for specifying this deal between the parties? [Issues & Answers](#)



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# “Q&A”

“Q&A”

*fire away!* 😊



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