

---

## **11 Off-Market Sale of Property**

---

### **11.1 Acknowledgements**

(PURCHASER) acknowledges that the Property has been sold by the Commonwealth under the Commonwealth's Off-market sale program with the understanding that the Property will be used by (PURCHASER) under the current zoning and for the Permitted Use.

### **11.2 Duration of obligations**

- (a) The obligations and restrictions in clauses 11.3 to 11.7 (inclusive) have effect until the earlier of:
  - (i) the date the Minister releases those obligations and restrictions by instrument in writing; and
  - (ii) the expiry (if ever) of the applicable period set out in clause 11.2(b).
- (b) For the purpose of clause 11.2(a)(ii), the applicable period is:
  - (i) from the date of Completion until the date that is 12 months after the date of Completion;
  - (ii) from the date of Completion until the date that is 2 years after the date of Completion;
  - (iii) from the date of Completion until the date that is 5 years after the date of Completion;
  - (iv) from the date of Completion until the date that is 10 years after the date of Completion;
  - (v) from the date of Completion until the date that is 30 years after the date of Completion;
  - (vi) from the date of Completion until the date that is 40 years after the date of Completion;
  - (vii) perpetuity.
- (c) If a court determines that a specified duration of restriction under clauses 11.2(a) and 11.2(b) in respect of any of clauses 11.3 to 11.7 is unlawful, the next lawful shorter specified duration will apply to the applicable clause.
- (d) Any rights that have accrued under clauses 11.3 to 11.7 (inclusive) continue to have effect despite the expiry of any applicable period set out in clause 11.2(b).

### **11.3 Minister's consent**

- (a) (PURCHASER) may not effect a Sale of the Property (or any part of it) without obtaining the prior written consent of the Minister.
- (b) (PURCHASER) may not effect a Dealing other than a Sale of the Property (or any part of it) without obtaining the prior written consent of the Minister.
- (c) (PURCHASER) may not Rezone the Property (or any part of it) or use it for any purpose other than the Permitted Use, or allow those things to occur, without obtaining the prior written consent of the Minister.
- (d) The Minister's consent does not release the obligations under clauses 11.4, 11.5, 11.6, 11.7, 11.8 or 11.9.

- (e) (PURCHASER) acknowledges and agrees:
  - (i) that the Commonwealth may (at its discretion and if permissible and supportable under legislation) lodge a caveat against the title of the Property after Completion in relation to its interest under this clause 11.3; and
  - (ii) upon request from the Commonwealth, to provide a further executed consent to the registration of the caveat in the form required by the Commonwealth.
- (f) This clause 11.3 does not merge on completion.

#### 11.4 Property Sale payment

- (a) This clause 11.4 applies if an application of the formula in clause 11.4(c) gives an amount greater than zero.
- (b) (PURCHASER) must, on or before settlement or completion of a Sale of the Property (or any part of it), pay to the Commonwealth an amount calculated in accordance with the formula in clause 11.4(c).
- (c) The amount payable under clause 11.4(b) is:

$$AP = NSP - \left[ Px \left( 1 + \frac{SCPI - CCPI}{CCPI} \right) + DC \right]$$

Where:

'AP' is the Amount Payable by (PURCHASER) to the Commonwealth.

'NSP' is the net sale price of the part of the Property Sold excluding GST, plus reasonable agents and legal costs.

'P' is the price paid by (PURCHASER) to the Commonwealth under this Deed, or where part only of the Property is sold, the proportion of the price paid by (PURCHASER) to the Commonwealth under this Deed that equates to the proportion of the area of the Property that is Sold that bears to the total area of the Property.

'DC' is the development costs, if any, attributable to the part of the Property Sold paid by (PURCHASER) (receipts for which must be capable of being produced to the Commonwealth) which are of a capital nature, including acquisition costs (but excluding the price paid by (PURCHASER) under this Deed), and legal fees and stamp duty. It is agreed that development costs do not include:

- (i) statutory and other outgoings with respect to the Property;
- (ii) maintenance costs;
- (iii) costs recoverable under an insurance policy that would have been maintained by a reasonable and prudent property owner (even if such an insurance policy was not in place);
- (iv) costs relating to fixtures and fittings replaced as a result of damage or wear and tear;
- (v) costs that were treated as a development cost in respect of a previous payment made under clause 11.4(b); and

- (vi) costs of items excluded from the Deed for the sale of the Property (e.g. if (PURCHASER) installed a new fixture on the Property but that fixture is excluded from the contract of sale for the Property).

'SCPI' is the Consumer Price Index (All Groups – All Cities) as at the settlement of the sale by (PURCHASER).

'CCPI' is the Consumer Price Index (All Groups – All Cities) as at the date of this Deed.

- (d) On the Sale of the whole of the Property the amount paid under clause 11.5(b) may be treated as development costs. On the sale of part of the Property, a reasonable amount attributable to the Sold Property that was paid under clause 11.5(b) may be treated as development costs. If the parties are unable to agree on the amount attributable to the Sold Property, it will (after notice by either party to the other) be determined by an Agreed Valuer, who will be appointed in accordance with clause 11.8.
- (e) (PURCHASER) acknowledges and agrees that:
- (i) the Commonwealth may (at its discretion and if permissible and supportable under legislation) lodge a caveat against the title of the Property after Completion in relation to its interest under this clause 11.4; and
  - (ii) upon request from the Commonwealth, to provide a further executed consent to the registration of the caveat in the form required by the Commonwealth.
- (f) This clause 11.4 does not merge on Completion.

## **11.5 Rezoning, change in use and other Dealing payment**

- (a) This clause 11.5 applies if an application of the formula in clause 11.5(c) gives an amount greater than zero.
- (b) If the Property (or any part of it) is:
- (i) Rezoned or is permitted to be used other than for the Permitted Use; or
  - (ii) subject to a Dealing other than Sale;
- (PURCHASER) must pay to the Commonwealth the amount calculated in accordance with the formula in clause 11.5(c).
- (c) The amount payable under clause 11.5(b) is:

$$AP = \text{Valuation} - \left[ Px \left( 1 + \frac{SCPI - CCPI}{CCPI} \right) + DC \right]$$

Where:

'AP' is the Amount Payable by (PURCHASER) to the Commonwealth.

'Valuation' is the value of the Property determined under clause 11.5(f)(ii).

'P' is the price paid by (PURCHASER) to the Commonwealth under this Deed.

'DC' is any payment made previously under clause 11.5(b) and the reasonable and verifiable costs and expenses incurred by (PURCHASER) in improving the Property and making the application for Rezoning (other than any costs and expenses allowed for in relation to a previous payment under clause 11.5(b)). It is agreed that DC does not include statutory and other outgoings with respect to the Property.

'SCPI' is the Consumer Price Index (All Groups – All Cities) as at the settlement of the sale by (PURCHASER).

'CCPI' is the Consumer Price Index (All Groups – All Cities) as at the date of this Deed.

- (d) The payment under clause 11.5(b) is payable within 14 days of demand by the Commonwealth.
- (e) (PURCHASER) must notify the Commonwealth in writing:
  - (i) within 3 Business Days if it lodges an application for Rezoning or the Property (or any part of it) is used other than for the Permitted Use; and
  - (ii) within 3 Business Days of any event described in clause 11.5(b) occurring.
- (f) (PURCHASER) must:
  - (i) notify the Commonwealth of its proposed Agreed Valuer within 3 Business Days of any event described in clause 11.5(b) occurring;
  - (ii) request the Agreed Valuer (agreed by the parties or appointed under clause 11.8) to determine the open market value of the whole Property within 20 Business Days after the date of its appointment on the following basis:
    - (A) taking into account values as at the date of the Agreed Valuer's appointment of any comparable land;
    - (B) assuming that the use of the Property is its highest and best use in accordance with the Rezoning;
    - (C) assuming that the Property is not contaminated or polluted;
    - (D) assuming the Dealing has not occurred;
    - (E) making the assessment on a GST-exclusive basis; and
    - (F) taking into account any other criteria that may, in the opinion of the Agreed Valuer, be relevant to the determination of the open market value (except for the criteria that are not consistent with the other criteria listed in this clause 11.5(f)(ii));
  - (iii) provide the Commonwealth with a copy of the instructions that (PURCHASER) has provided to the Agreed Valuer within 3 Business Days of providing those instructions to the Agreed Valuer; and
  - (iv) ensure that a copy of that valuation is provided to the Commonwealth within 3 Business Days of receipt from the Agreed Valuer.
- (g) The Commonwealth and (PURCHASER) agree that the valuation of the Agreed Valuer shall be final and binding on the parties (except for manifest error).
- (h) The criteria in clause 11.5(f)(ii) are in random order and no significance or priority is to be attached to that order.

- (i) (PURCHASER) acknowledges and agrees that:
  - (i) the Commonwealth may (at its discretion and if permissible and supportable under legislation) lodge a caveat against the title of the Property after Completion in relation to its interest under this clause 11.5; and
  - (ii) upon request from the Commonwealth, to provide a further executed consent to the registration of the caveat in the form required by the Commonwealth.
- (j) The Agreed Valuer's costs will be borne by (PURCHASER).
- (k) This clause 11.5 does not merge on Completion.

#### **11.6 Covenant on Sale of Property**

- (a) If (PURCHASER) or its successors in title Sells the Property (or any part of it) (PURCHASER) must first obtain from its or their purchaser, transferee or disponee (as the case may be) a covenant in favour of the Commonwealth from (PURCHASER), the purchaser, transferee or disponee that it will observe, perform and fulfil the obligations of (PURCHASER) under clauses 11.3, 11.4, 11.5, 11.6, 11.8 or 11.9 in respect of the Sold Property.
- (b) Despite any covenant entered into as described in clause 11.6(a) (PURCHASER) is not released from its obligation to pay money to the Commonwealth in accordance with clauses 11.4 or 11.5. (PURCHASER) will be released from its payment obligations when and to the extent an amount is paid by a successor in title of (PURCHASER) in respect of the equivalent obligation.
- (c) (PURCHASER) acknowledges and agrees that:
  - (i) the Commonwealth may (at its discretion and if permissible and supportable under legislation) lodge a caveat against the title of the Property after Completion in relation to its interest under this clause 11.6; and
  - (ii) upon request from the Commonwealth, to provide a further executed consent to the registration of the caveat in the form required by the Commonwealth.
- (d) The covenant under clause 11.6(a) must be entered into before any settlement of the Sale.
- (e) This clause 11.6 does not merge on Completion.

#### **11.7 Restrictive Covenant**

- (a) As soon as reasonably practicable following the registration of the plan of subdivision referred to in clause [REDACTED] (PURCHASER) must execute the Restrictive Covenant:
  - (i) in the terms and (if any) form annexed or in such form as the Commonwealth may require; and
  - (ii) in accordance with s120 of the *Lands Acquisition Act 1989* (Cth).
- (b) In acknowledgement that restrictive covenants are not registrable unless they create an interest in land but that section 120 of the *Lands Acquisition Act 1989* (Cth) entitles the Minister to impose the Restrictive Covenant:
  - (i) (PURCHASER) must apply for registration of the Restrictive Covenant at Land and Property Information within 3 Business Days of the

registration of the plan of subdivision referred to in clause [REDACTED]  
[REDACTED]; and

- (ii) (PURCHASER) must endeavour to have the Restrictive Covenant registered as soon as possible.
- (c) Following the registration of the plan of subdivision referred to in clause [REDACTED] the Commonwealth will:
  - (i) use its reasonable endeavours to assist (PURCHASER) to a(PURCHASER)er any requisition in connection with registration of the Restrictive Covenant raised by Land and Property Information to enable registration of the Restrictive Covenant; and
  - (ii) arrange for the duplicate certificate of title (if any) for any land benefited as identified in the Restrictive Covenant to be produced to Land and Property Information immediately following the registration of the plan of subdivision referred to in clause [REDACTED] to enable registration of the Restrictive Covenant.
- (d) (PURCHASER) acknowledges and agrees that:
  - (i) the Commonwealth may (at its discretion and if permissible and supportable under legislation) lodge a caveat against the title of the Property after Completion in relation to the Restrictive Covenant; and
  - (ii) upon request from the Commonwealth, (PURCHASER) must provide a further executed consent to the registration of the caveat in the form required by the Commonwealth.
- (e) (PURCHASER) cannot raise any objection or requisition, rescind or terminate this Deed or delay Completion in relation to any matters arising out of this clause 11.7.
- (f) Until the Restrictive Covenant is registered or if the Restrictive Covenant cannot be registered for whatever reason (PURCHASER) must comply with this clause 11.7.
- (g) This clause 11.7 does not merge on Completion.

#### **11.8 Agreed Valuer**

- (a) The Agreed Valuer shall be a valuer identified in accordance with this clause 11.8.
- (b) After notice is given under clause 11.4(d) or 11.5(f)(i) the Commonwealth and (PURCHASER) will endeavour to agree on the Agreed Valuer.
- (c) If the Commonwealth and (PURCHASER) fail to agree on the Agreed Valuer within 14 days of notice being given under clause 11.4(d) or 11.5(f)(i) (as applicable), the Agreed Valuer will be the person who is appointed by the President of the relevant division of the Australian Property Institute located in the State or Territory where the Property is situated or his or her nominee upon the application of either party.

#### **11.9 Interest on late payments**

If payment of an amount due under clauses 11.4 or 11.5 is made late, interest shall be payable on the daily amount outstanding by (PURCHASER) to the Commonwealth at 3% above the Australian Tax Office sourced General Interest Charge rate current at the due date for payment, compounding monthly.

**11.10 Grant on Charge**

- (a) (PURCHASER) charges the Property in favour of the Minister to secure the performance by (PURCHASER) of (PURCHASER)'s obligations in this Deed.
- (b) If requested by the Commonwealth (PURCHASER) will execute such further instrument as the Commonwealth requires to give proper effect to this charge.
- (c) (PURCHASER) acknowledges and agrees that:
  - (i) the Commonwealth may lodge a caveat against the title of the Property after Completion in relation to its interest under this clause 11.10; and
  - (ii) upon request from the Commonwealth, to provide a further executed consent to the registration of the caveat in the form required by the Commonwealth.