



Contact Details  
T +61 2 4926 8200  
F +61 2 4926 8201  
E [bradken@bradken.com](mailto:bradken@bradken.com)  
W [bradken.com](http://bradken.com)

## ASX/Media Release

**Monday 3 October 2016**

### **Bradken's board unanimously recommends cash takeover offer from HCM**

- HCM to make a cash takeover offer for 100% of the ordinary shares of Bradken
- Priced at \$3.25 per share, which represents a premium of 34% to the last close, 40% to the 30 day VWAP and 90% to the 90 day VWAP<sup>1</sup>
- Represents an implied fully diluted market capitalisation of \$688.5 million and an enterprise value of \$976.1 million<sup>2</sup>
- Bradken board believes it is an attractive offer and recommends that shareholders accept it subject to the independent expert opinion that the offer is fair and reasonable, and in the absence of a superior proposal

Bradken Limited ("Bradken") today announced that it has entered into a bid implementation agreement ("BIA") with Tokyo Stock Exchange listed Hitachi Construction Machinery Co., Ltd. ("HCM") for it to make a cash takeover offer ("Offer") for 100% of the ordinary shares of Bradken at \$3.25 per share.

Bradken's board of directors unanimously recommends that shareholders accept the Offer once it is formally put to them by HCM, subject to the independent expert opinion (and continuing to opine) that the Offer is fair and reasonable, and in the absence of a superior proposal. Subject to those same two qualifications, each Bradken director intends to accept, or procure the acceptance of, the Offer in respect of each Bradken share they hold or have control over the disposal of.

Bradken understands that its head office will remain in Newcastle and on successful conclusion of the Offer it is to become a key part of HCM's global mining and industrial services business, which will continue the delivery of products and services to customers and provide for enhanced employment and career progression opportunities for Bradken's staff.

Bradken chairman Mr. Phil Arnall said: "I am pleased to announce this Offer by HCM, which provides shareholders with an attractive premium. On successful completion, it lets Bradken, which has a proud history in mining and industrial services, join with one of the world's largest machinery companies to form a premium global business."

<sup>1</sup> Last close as at 3 October 2016

<sup>2</sup> Based on fully diluted shares of 211.8 million and reported net debt of \$287.6 million as at 30 June 2016 (both adjusted to assume that the RPS are converted to 35 million ordinary shares)



Mr. Paul Zuckerman, Bradken's CEO, added: "Bradken's staff have worked very hard to reposition the business for success following the downturn in mining, and can be proud that their achievements have been recognised by HCM."

Mr. Yuichi Tsujimoto, President & CEO at HCM said: "We look forward to welcoming Bradken as a member of the HCM family. We have great respect for the Bradken team and believe its businesses are complementary with our mining equipment services business. Both companies leveraging each other's global network will enable us to strengthen our combined businesses and enhance our earnings."

### **Conditions of Offer**

The Offer is subject to various conditions including:

- Acquisition of a relevant interest in more than 50% of all Bradken shares on a fully diluted basis
- Satisfaction of regulatory approvals/expiry of regulatory notice periods, including ACCC, CCB, HSR and SACA<sup>3</sup> as well as FIRB, CFIUS and DDTC<sup>4</sup>
- No "material adverse change", "prescribed occurrence" or prohibited actions by Bradken

The full terms and conditions of the Offer are set out in the BIA attached as Annexure A. Those terms and conditions, together with further information about the Offer, will be set out in HCM's Bidder's Statement.

Bradken has appointed an independent expert to opine on whether the Offer is fair and reasonable to Bradken Shareholders. The independent expert's report will be published in Bradken's Target's Statement.

The BIA contains terms usual for a transaction of this nature, including customary exclusivity arrangements such as "no shop", "no talk", "no due diligence" and a right for HCM to be notified of and to match any competing proposals. A break fee of A\$6.885 million may be payable by Bradken to HCM in the circumstances set out in the BIA.

### **Debt refinancing arrangements**

Bradken has US private placement ("USPP") notes on issue. The terms governing the USPP contain a change of control provision that will be triggered in certain circumstances including if the Offer becomes unconditional and HCM acquires more than 50% of the shares in Bradken.

Bradken also has a Syndicated Facility Agreement ("SFA") in place with its bank lenders. A change of control is a review event under the SFA and will be triggered in certain circumstances including if the Offer becomes unconditional and HCM acquires more than 50% of the shares in Bradken.

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<sup>3</sup> Australian Competition and Consumer Commission, Canada's Competition Bureau, the Hart-Scott-Rodino Act and the South African Competition Act

<sup>4</sup> Foreign Investment Review Board, Committee on Foreign Investment in the United States, and the Directorate of Defense Trade Controls



To assist Bradken in repaying those facilities if required and to have working capital for its operations, HCM has agreed with Bradken to provide Bradken with an A\$450 million unsecured credit facility. This unsecured credit facility, together with Bradken's existing cash reserves, will enable Bradken to repay the above facilities should it be required to do so.

The unsecured credit facility has a 180 day term from first drawdown, an interest rate of 6% for advances denominated in Australian Dollars and 4% for advances denominated in US Dollars, and will only become available if Bradken is required to repay any existing financing due to the acquisition of shares by HCM under the Offer.

### **Timetable and next steps**

Bradken's shareholders are not required to take any action at this time. It is expected that HCM will dispatch its Bidder's Statement to shareholders in mid-late October, and that Bradken's Target's Statement will follow once the independent expert's report is available.

Bradken has retained Highbury Partnership Pty Limited as financial adviser and Allen & Overy as legal adviser.

### **Contact information**

- *Media contact:* Lauren Thompson (+61 2 9119 3078), Domestique
- *Investor contact:* Matthew Roberts (+61 2 8188 1150) and Alan Young (+61 2 8188 1152), Highbury Partnership

### **About Bradken**

Bradken is the leading supplier of differentiated consumable and capital products to the global resources, energy, and freight rail industries. The Company employs almost 3,500 people in 24 manufacturing facilities and more than 28 sales and service centres across Australia, New Zealand, USA, Canada, the United Kingdom, India, Indonesia, Malaysia, South Africa, South America and China. The Company which became a publicly listed company in August 2004 has been in business for over 90 years and operates four market-focused divisions and a separate business.

For further information about Bradken, visit [www.Bradken.com](http://www.Bradken.com)



## Annexure A: Bid implementation agreement

# **BID IMPLEMENTATION AGREEMENT**

**DATED 3 OCTOBER 2016**

**HITACHI CONSTRUCTION MACHINERY CO., LTD.**

**AND**

**BRADKEN LIMITED**

**ALLEN & OVERY**

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**THIS AGREEMENT** is made on 3 October 2016

**BETWEEN:**

- (1) **Hitachi Construction Machinery Co., Ltd.** of 16-1, 2-chome, Higashiueno, Taito-ku, Tokyo 110-0015, Japan (**Bidder**); and
- (2) **Bradken Limited** (ACN 108 693 009) of 20 McIntosh Drive Mayfield West NSW 2304, Australia (**Bradken**).

**BACKGROUND:**

- (A) Bidder proposes to acquire all Bradken Shares by means of a Takeover Bid.
- (B) The Bradken Board is proposing to recommend the Takeover Bid in the absence of a Superior Proposal and subject to the Independent Expert opining that the Takeover Bid is fair and reasonable to Bradken Shareholders.
- (C) This agreement is entered into to record and give effect to the terms and conditions on which Bidder proposes to make the Takeover Bid.
- (D) Bidder and Bradken have entered into the Bidder Facility Agreement to enable the funding of the repayment of the Bradken Facilities in certain circumstances.

**IT IS AGREED** as follows:

**1. INTERPRETATION**

**1.1 Definitions**

In this agreement:

**ACCC** means the Australian Competition and Consumer Commission;

**ACCC Informal Clearance** means a statement in writing from the ACCC that it does not object to, or does not intend to intervene with respect to, the Transaction contemplated by this agreement for the purposes of section 50 of the CCA;

**Acceptable Confidentiality Agreement** means a confidentiality agreement which contains obligations on the recipient of confidential information which are in Bradken's bona fide view materially no less onerous as a whole than the obligations of Bidder under the Confidentiality Agreement;

**Action of Divestiture** means (i) any license, sale or other disposition or holding separate (through establishment of a trust or otherwise) of any shares of capital stock or of any business, assets or properties of Bidder or the Bidder Group, or Bradken or the Bradken Group, (ii) the imposition of any limitation on the ability of Bidder or the Bidder Group, or Bradken or the Bradken Group, to conduct their respective businesses or own any capital stock or assets or to acquire, hold or exercise full rights of ownership of their respective businesses and, in the case of Bidder, the businesses of Bradken and each of its subsidiaries or (iii) the imposition of any impediment on Bidder or the Bidder Group, or Bradken or the Bradken Group, under any Antitrust Laws;

**Announcement Date** means the date that the Bid Announcements are made;

**Antitrust Laws** means:

- (a) the HSR Act, the Sherman Act of 1890, the Clayton Act of 1914, the Federal Trade Commission Act, and any other United States federal or state statutes, rules, regulations, orders, decrees, administrative or judicial doctrines or other laws that are designed to prohibit, restrict or regulate actions having the purpose or effect of monopolization or restraint of trade;
- (b) the Canadian Competition Act;
- (c) the CCA; and
- (d) the South African Competition Act;

**ASIC** means the Australian Securities and Investments Commission;

**Associate** has the meaning given in Division 2 of Part 1.2 of the Corporations Act as if section 12(1) of the Corporations Act included a reference to this agreement and Bradken were the designated body;

**ASX** means ASX Limited (ABN 98 008 624 691) or the financial market known as the Australian Securities Exchange operated by it, as the context requires or permits;

**ASX Listing Rules** means the official listing rules of the ASX;

**Bid Announcements** means the announcements to be released by Bidder and Bradken respectively on the Announcement Date in the form previously agreed;

**Bidder Facility Agreement** means the agreement entered into on or prior to the date of this agreement between the Bidder and Bradken pursuant to which the Bidder will make available to the Bradken Group an unsecured loan for a maximum of A\$450 million;

**Bidder Group** means Bidder and its Related Entities (other than members of the Bradken Group);

**Bidder Indemnified Persons** means each member of the Bidder Group and each of their respective Representatives;

**Bidder's Statement** means the bidder's statement to be issued by Bidder to Bradken Shareholders in relation to the Offer and acceptance form(s) under sections 636 and 637 of the Corporations Act, and which includes the Offer;

**Bid Terms** means the terms and conditions of the Offer set out in Schedule 1;

**Bradken Board** means the board of directors of Bradken;

**Bradken Facilities** means financial indebtedness and other financial commitments payable or potentially payable as a result of the change in control of Bradken under the Takeover Bid;

**Bradken Group** means Bradken and its Related Entities;

**Bradken Indemnified Persons** means each member of the Bradken Group and each of their respective Representatives;

**Bradken Share** means a fully paid ordinary share issued in the capital of Bradken;

**Bradken Shareholder** means a person who is registered in the Register as the holder of one or more Bradken Shares from time to time;

**Break Fee** means \$6.885 million (exclusive of any GST);

**Business Day** means a day that is not a Saturday, Sunday, bank holiday or public holiday in Sydney, Australia or Tokyo, Japan;

**Canadian Competition Act** means the Canadian Competition Act, R.S.C. 1985, c. C-34, as amended;

**CCA** means the *Australian Competition and Consumer Act 2010* (Cth);

**CCB** means the Canadian Competition Bureau;

**CCB Clearance** means any of:

- (a) the issuance of an advance ruling certificate pursuant to section 102 of the Canadian Competition Act;
- (b) Bidder and Bradken have each given the notice required under section 114 of the Canadian Competition Act with respect to the Transaction and the applicable waiting period under section 123 of the Canadian Competition Act has expired or been waived in accordance with that Act, and Bidder has been advised in writing by the Commissioner of Competition (or a Person authorized by the Commissioner of Competition) that the Commissioner of Competition does not, at that time, intend to make an application under section 92 of that Act in respect of the Transaction; and
- (c) the obligation to give the requisite notices has been waived pursuant to subsection 113(c) of the Canadian Competition Act and Bidder has been advised in writing by the Commissioner of Competition (or a Person authorized by the Commissioner of Competition) that the Commissioner of Competition does not, at that time, intend to make an application under section 92 of that Act in respect of the Transaction;

**CFIUS** means the Committee on Foreign Investment in the United States;

**CFIUS Approval Condition** means the Condition in item 5(d) of Schedule 1;

**Claim** means in relation to a person, a demand, claim, action or proceeding made or brought by or against the person, however arising and whether present, unascertained, immediate, future or contingent;

**Competing Proposal** means a proposed transaction or arrangement pursuant to which a Third Party, would, if the proposed transaction or arrangement is entered into or completed substantially in accordance with its terms:

- (a) directly or indirectly acquire or have a right to acquire:
  - (i) a Relevant Interest in 20% or more of Bradken Shares (or securities that may convert into or be exchanged for such a Relevant Interest) or otherwise acquire Control of Bradken; or
  - (ii) an economic interest in all or a material part of the business of the Bradken Group (including for the avoidance of doubt a proposed transaction involving the sale, divestment or similar transaction involving a material part of the business of the Bradken Group, whether or not such proposed transaction is subject to the approval of Bradken Shareholders);

- (b) enter into, buy, dispose of, terminate or otherwise deal with any cash settled equity swap or other synthetic, economic or derivative transaction connected with or relating to 20% or more of Bradken Shares; or
- (c) otherwise acquire or merge with Bradken whether by way of takeover offer, scheme of arrangement, shareholder approved acquisition, capital reduction, share buy-back, sale or purchase of assets, joint venture, reverse takeover, dual-listed company structure or other synthetic merger or any other transaction or arrangement with similar effect;

**Competition Approval Condition** means the Condition in item 5(f) of Schedule 1;

**Competition Approvals** means:

- (a) ACCC Informal Clearance;
- (b) CCB Clearance;
- (c) HSR Antitrust Approval; and
- (d) South African Competition Authorities Approval;

**Competition Authority** means the ACCC, the CCB, the DOJ, the FTC, the South African Competition Authorities or any other government agency under any Antitrust Law;

**Conditions** means the defeating conditions of the Takeover Bid set out in item 5 of Schedule 1;

**Confidentiality Agreement** means the confidentiality agreement between Bidder and Bradken dated 8 August 2016;

**Control** has the meaning given in section 50AA of the Corporations Act;

**Control Date** means the first Business Day on which the Offer is free of any defeating conditions and Bidder has a Relevant Interest in more than 50% of the Bradken Shares on a Fully Diluted Basis;

**Corporations Act** means the *Corporations Act 2001* (Cth);

**Court** means the Federal Court of Australia or any other court of competent jurisdiction under the Corporations Act as Bidder and Bradken agree in writing;

**Data Room** means the Project Hammerhead web based data room hosted by IntraLinks to which access was provided to Bidder on or around 12 August 2016 and ended at 9.00 am on 3 October 2016;

**Director** means a director of Bradken;

**Disclosed** means fairly disclosed;

**DDTC** means the United States Department of State, Directorate of Defense Trade Controls;

**DDTC Approval** means the filing by the seller with the DDTC of a 60-day Pre-Notification pursuant to section 122.4(b) of ITAR (**the 60-day Notification**) and the expiry (or waiver by the DDTC) of the corresponding notification period without the DDTC revoking the ITAR registration held by the Bradken Group or imposing any new conditions on that registration;

**DDTC Notification Condition** means the Condition in item 5(e) of Schedule 1;

**DOJ** means the US Department of Justice;

**Due Diligence Material** means:

- (a) the documents provided by Bradken to Bidder in the Data Room (including the written responses to any requests by Bidder for further information) before 9.00 am on 3 October 2016, the index of which documents is agreed and exchanged between the parties on the date of this agreement; and;
- (b) the written information provided by Bradken or its Representatives to Bidder or its Representatives during the management presentation, management calls and due diligence calls held prior to the date of this agreement;

**Duty** means any stamp, transaction or registration duty or similar charge imposed by any Government Agency and any penalty, fine, interest or additional charge payable in relation to any such duty or charge;

**EBIT** means earnings from normal underlying activities of the Bradken Group before interest and tax calculated in accordance with the accounting policies and practices applied by Bradken as at the date of this agreement;

**Encumbrance** means any mortgage, fixed or floating charge, pledge, lien, option, right to acquire, right of pre-emption, assignment by way of security, trust arrangement for the purpose of providing security, retention arrangement, hypothec, or other security interest of any kind, and any agreement to create any of the foregoing and includes a PPS Security Interest other than a Permitted Encumbrance;

**End Date** means the earlier of:

- (a) the date on which the Offer Period ends; and
- (b) the date falling 7 months from the date of this agreement or any later date as Bidder and Bradken agree in writing;

**Exclusivity Period** means the period starting on the date of this agreement and ending on the first to occur of:

- (a) the termination of this agreement; and
- (b) the End Date;

**FATA** means the Australian *Foreign Acquisitions and Takeovers Act 1975* (Cth);

**FIRB** means the Foreign Investment Review Board;

**FIRB Approval Condition** means the Condition in item 5(c) of Schedule 1;

**FTC** means the US Federal Trade Commission;

**Fully Diluted Basis** means all Bradken Shares to which the Offer relates including:

- (a) any new Bradken Shares issued during the Offer Period on exercise or vesting of Share Rights and/or conversion of RPS, on issue as at the Register Date; or

- (b) any new Bradken Shares that are able to be issued (whether subject to vesting or satisfaction of a condition or otherwise) during the Offer Period on exercise or vesting of Shares Rights or conversion of RPS (or both), on issue as at the Register Date,

**Government Agency** means any government, any department, office or minister of any government and any governmental, semi-governmental, administrative, fiscal, judicial or quasi-judicial agency, authority, board, commission, tribunal or entity and includes ASX, ASIC, CFIUS and TSE and any Competition Authority;

**HSR Act** means the United States Hart-Scott-Rodino Antitrust Improvements Act of 1976 as amended;

**HSR Antitrust Approval** means any approval, clearance or expiration or termination of a waiting period required in relation to the Transaction under the HSR Act;

**Independent Director** means a Director who is independent in accordance with the definition, and taking into account the factors set out in, the Corporate Governance Principles and Recommendations 3rd Edition released by the ASX Corporate Governance Council (as amended or replaced from time to time);

**Independent Expert** means Grant Thornton;

**Independent Expert's Report** means the report from the Independent Expert engaged by Bradken in connection with the Takeover Bid opining on whether the Takeover Bid is fair and reasonable to Bradken Shareholders;

**ITAR** means the International Traffic in Arms Regulations of the United States;

**Material Adverse Change** means one or more events, matters, changes or circumstances, including any litigation or dispute, which (individually or when aggregated) have or could reasonably be expected to have, a material adverse effect on the business, financial or trading position, assets or liabilities, profitability or prospects of the Bradken Group (taken as a whole), including any one or more events, matters, changes or circumstances which have had, or could reasonably be expected to have, the effect of:

- (a) diminishing the value of the consolidated net assets of the Bradken Group as set out in the balance sheet for the financial year ended 30 June 2016 by \$25 million or more; or
- (b) diminishing the EBIT of the Bradken Group by at least \$7.5 million per year against the EBIT for the financial year ended 30 June 2016,

other than:

- (c) any event, matter, change or circumstance Disclosed to Bidder before the date of this agreement (including the implementation of any future matters included in budgets, business plans or other future planning or strategy documents);
- (d) any event, matter, change or circumstance Disclosed in public filings by a member of the Bradken Group to ASX or ASIC before the date of this agreement;
- (e) any event, matter, change or circumstance resulting from the change of control of Bradken contemplated by the Takeover Bid;
- (f) any thing required or permitted to be done or not done under this agreement, the Takeover Bid or the transactions contemplated by them;

- (g) any event, matter, change or circumstance in or resulting from:
  - (i) economic, business, regulatory or political conditions in general;
  - (ii) credit, financial, securities or currency markets in general (including any reduction in market indices);
  - (iii) any change effecting the mining services industry generally (including fluctuations in commodity prices),
  - (iv) any change in law, taxation, accounting standards, interest rates or exchange rates, occurring after the date of this agreement; or
- (h) any event, matter, change or circumstance arising from actions taken by the Bradken Group with the prior written consent of Bidder, that consent not to be unreasonably withheld or delayed;

**Net Financial Indebtedness** means all external borrowings and financial indebtedness (including leases and bank guarantees but excluding the RPS) less cash or cash equivalents (both calculated consistently with the methods applied in Bradken's financial statements and notes thereto for the year ended 30 June 2016) with all underlying amounts being translated into Australian dollars using the same exchange rates applied in those financial statements;

**Offer** means the offer by Bidder to acquire each Bradken Share (including any Bradken Shares which may be issued on exercise of the RPS and the Share Rights) together with all Rights attaching to such Bradken Shares under the Takeover Bid on terms and conditions no less favourable to Bradken Shareholders than the Bid Terms;

**Offer Period** means the period during which the Offer is open for acceptance;

**Permitted Encumbrance** means any Encumbrance in relation to any property of a Bradken Group member that is:

- (a) registered against a Bradken Group member and recorded in the public records maintained by the Registrar (as defined in section 10 of the PPSA), 3 Business Days before the date of this agreement;
- (b) a lien arising by operation of law and in the ordinary course of trading;
- (c) a retention of title arrangement provided that such arrangement was entered into in the ordinary course of business;
- (d) a purchase money security interest (as defined in section 14 of the PPSA) which relates to the deferred purchase price of any asset or service provided in the ordinary course of trading;
- (e) a netting, set-off or similar arrangement or any combination of them entered into in the ordinary course for the purpose of netting debit and credit balances; or
- (f) an interest in personal property that would not be an Encumbrance but for section 12(3) of the PPSA;

**Prescribed Occurrence** means the occurrence of any of the following events:

- (a) Bradken converting all or any of the Bradken Shares into a larger or smaller number of shares under section 254H of the Corporations Act;

- (b) Bradken or a subsidiary of Bradken resolving to reduce its share capital in any way;
- (c) Bradken or a subsidiary of Bradken entering into a buyback agreement or resolving to approve the terms of a buyback agreement under subsection 257C(1) or 257D(1) of the Corporations Act;
- (d) Bradken or a subsidiary of Bradken making an issue of Bradken Shares (other than Bradken Shares issued as a result of the conversion of RPS that are in existence as at the Register Date or exercise or vesting of Share Rights that are in existence as at the Register Date) or granting an option over the Bradken Shares or agreeing to make such an issue or grant such an option;
- (e) Bradken or a subsidiary of Bradken issuing, or agreeing to issue, convertible notes;
- (f) Bradken or a subsidiary of Bradken disposing or agreeing to dispose, of the whole, or a substantial part, of its business or property;
- (g) Bradken or a subsidiary of Bradken charging, or agreeing to charge, the whole, or a substantial part, of its business or property as security for any new indebtedness;
- (h) Bradken or a subsidiary of Bradken resolving that it be wound up;
- (i) the appointment of a liquidator or provisional liquidator of Bradken or of a subsidiary of Bradken;
- (j) the making of an order by a court for the winding up of Bradken or of a subsidiary of Bradken;
- (k) an administrator of Bradken or of a subsidiary of Bradken being appointed under section 436A, 436B or 436C of the Corporations Act;
- (l) Bradken or a subsidiary of Bradken executing a deed of company arrangement; or
- (m) the appointment of a receiver or a receiver and manager in relation to the whole, or a substantial part, of the property of Bradken or of a subsidiary of Bradken;

**PPS Security Interest** means a security interest that is subject to the PPSA;

**PPSA** means the Personal Property Securities Act 2009 (Cth);

**Register Date** means the date set by Bidder under sections 633(2) to (4) inclusive of the Corporations Act in relation to the Takeover Bid.

**Register** means the register of Bradken Shares maintained by Link Market Services Limited on behalf of Bradken;

**Regulatory Approval** means each of the following:

- (a) FIRB Approval;
- (b) CFIUS Approval;
- (c) DDTC Approval; and
- (d) the Competition Approvals;

**Related Entity** means:

- (a) in respect of Bidder, an entity that:
  - (i) directly or indirectly Controls Bidder;
  - (ii) is Controlled directly or indirectly by Bidder; or
  - (iii) is under the Control of another entity that also Controls Bidder; and
- (b) in respect of Bradken, an entity that is under the Control of Bradken;

**Relevant Interest** has the meaning given in the Corporations Act as if sections 609(6) and 609(7) were omitted;

**Relevant Person** has the meaning given in clause 7.2.

**Representative** means:

- (a) in relation to Bradken, a member of the Bradken Group, any Director, officer or employee of any member of the Bradken Group, and any financier, financial adviser, accounting adviser, auditor, legal adviser or technical or other expert adviser or consultant to any member of the Bradken Group in relation to the Takeover Bid; and
- (b) in relation to Bidder, a member of the Bidder Group, any director, officer or employee of any member of the Bidder Group, and any financier, financial adviser, accounting adviser, auditor, legal adviser, or technical or other expert adviser or consultant to any member of the Bidder Group in relation to the Takeover Bid;

**Rights** means all accretions, rights or benefits of whatever kind attaching to or directly or indirectly attaching to or arising from the Bradken Shares arising on or after the date of this agreement including all rights to receive dividends, to receive or subscribe for shares, notes or other securities and all other distributions or entitlements declared, paid, made or issued by Bradken after that date, but excluding any franking credits attached to a distribution;

**RPS** means redeemable convertible preference securities issued by Bradken RPS Pty Limited in July 2015 to Sigdo Koppers and CHAMP Private Equity (which are convertible into ordinary Bradken shares in certain circumstances);

**Share Rights** means a share right granted pursuant to the Share Plan Rules;

**Share Plan Rules** means each of:

- (a) the 2014 Bradken Share Rights Plan (EPS);
- (b) the 2014 Bradken Restricted Share Rights Plan (TSR);
- (c) the 2015 Bradken Share Rights Plan (EPS);
- (d) the 2015 Bradken Restricted Share Rights Plan (TSR);
- (e) the 2016 Bradken Restricted Cash Rights Plan (EPS); and
- (f) the 2016 Bradken Restricted Cash Rights Plan (TSR);

**South African Competition Act** means the Competition Act, Act 89 of 1998 (as amended) (Republic of South Africa);

**South African Competition Approval** means, either:

- (a) the South African Competition Authorities have provided a notice in writing stating or to the effect that the South African Competition Authorities approve the Bidder acquiring Bradken Shares under the Offer; or
- (b) by reason of the elapse of time, the South African Competition Authorities are no longer empowered under the South African Competition Act to make an order prohibiting the acquisition of Bradken Shares by the Bidder under the Offer.

**South African Competition Authorities** means the competition authorities established under the South African Competition Act;

**Superior Proposal** means a bona fide Competing Proposal which in the determination of the Directors acting in good faith in order to satisfy what the Bradken Board considers to be its fiduciary or statutory duties (after having taken advice from their legal and financial advisers):

- (a) is reasonably capable of being completed, taking into account the nature of the Competing Proposal, the person or persons making it and any other factors they consider relevant; and
- (b) would, if completed substantially in accordance with its terms, be reasonably likely to result in a transaction more favourable to Bradken or Bradken Shareholders as a whole than the Offer;

**Takeover Bid** means the off-market takeover bid to be made by Bidder for all Bradken Shares under Chapter 6 of the Corporations Act which bid will incorporate the Offer, subject to the Conditions and otherwise in accordance with the terms of this agreement;

**Target's Statement** means the target's statement to be issued by Bradken to Bradken Shareholders in relation to the Offer in accordance with section 638 of the Corporations Act;

**Third Party** means a person other than the Bidder or its Related Entities;

**Timetable** means the indicative timetable set out in Schedule 2, or such other timetable as the parties agree in writing;

**Transaction** means the acquisition by Bidder of Bradken Shares through acceptances of the Offer;

**Treasurer** means the Treasurer of the Commonwealth of Australia or his delegate;

**TSE** means the Tokyo Stock Exchange; and

**Unacceptable Circumstances** has the meaning given in section 657A of the Corporations Act.

## 1.2 Bradken awareness

Where any warranty provided by Bradken is qualified by the expression **so far as Bradken is aware** or any similar expression, Bradken will be deemed to know or be aware of all matters or circumstances of which any Director, the Chief Executive Officer or the Chief Financial Officer of Bradken is actually aware as at the date the statement is made. For avoidance of doubt, none of the individuals named in this clause has any personal liability in respect of the Bradken warranties.

### **1.3 Reasonable endeavours**

Except as otherwise expressly provided in this agreement, any provision of this agreement which requires a party to use reasonable endeavours or all reasonable endeavours, or to take all steps reasonably necessary, to procure that something is performed or occurs, does not impose any obligation to:

- (a) commence any legal action or proceeding against any person;
- (b) procure absolutely that that thing is done or happen; or
- (c) pay any money or provide any financial compensation, valuable consideration or any other incentive to or for the benefit of any person or Government Agency (other than its Representatives for the provision of services) except for the payment of any applicable fee for the lodgement or filing of any relevant application with any Government Agency.

### **1.4 Things required to be done other than on a Business Day**

Unless otherwise indicated, if the day on which any act, matter or thing is to be is a day other than a Business Day, that act, matter or thing must be done on or by the next Business Day.

### **1.5 Other rules of interpretation**

In this agreement:

- (a) any reference, express or implied, to any legislation in any jurisdiction includes:
  - (i) that legislation as amended, extended or applied by or under any other legislation made before or after signature of this agreement;
  - (ii) any legislation which that legislation re-enacts with or without modification; and
  - (iii) any subordinate legislation made before or after signature of this agreement under that legislation, including (where applicable) that legislation as amended, extended or applied as described in clause 1.5(a)(i), or under any legislation which it re-enacts as described in clause 1.5(a)(ii);
- (b) references to persons or entities include natural persons, bodies corporate, partnerships, trusts and unincorporated associations of persons;
- (c) references to an individual or a natural person include his estate and personal representatives;
- (d) a reference to a clause, schedule or annex is a reference to a clause, schedule or annex of or to this agreement (and the schedules and annexes form part of this agreement);
- (e) subject to clause 15.2, references to a party to this agreement include the successors or assigns (immediate or otherwise) of that party;
- (f) a reference to any instrument or document includes any variation or replacement of it;
- (g) unless otherwise indicated, a reference to any time is, a reference to that time in Sydney, Australia;
- (h) a reference to \$, A\$ or dollars is to Australian currency;

- (i) singular words include the plural and vice versa;
- (j) a word of any gender includes the corresponding words of any other gender;
- (k) if a word or phrase is defined, other grammatical forms of that word have a corresponding meaning;
- (l) general words must not be given a restrictive meaning just because they are followed by particular examples intended to be embraced by the general words;
- (m) nothing is to be construed adversely to a party just because that party put forward this agreement or the relevant part of this agreement; and
- (n) the headings do not affect interpretation.

## **2. AGREEMENT TO PROPOSE AND IMPLEMENT TAKEOVER BID**

### **2.1 Agreement to make Offer**

Bidder agrees to:

- (a) make Offers pursuant to the Takeover Bid on terms and condition no less favourable to Bradken Shareholders than the Bid Terms; and
- (b) without limiting clause 2.1(a), publicly announce a proposal to make Offers under the Takeover Bid in accordance with clause 2.2.

### **2.2 Release of Bid Announcements**

Immediately after both parties have executed this agreement, the Bidder and Bradken will each issue their respective Bid Announcements to the ASX market announcements platform concerning the Takeover Bid.

### **2.3 Compliance with Timetable**

- (a) Each party agrees to use reasonable endeavours to implement the Takeover Bid in accordance with the Timetable.
- (b) Bradken agrees, and represents and warrants that all of the Directors have agreed, for the purposes of Item 6 of section 633(1) of the Corporations Act, that the Bidder's Statement may, if Bidder so determines, be dispatched to Bradken Shareholders on the date agreed between Bidder and Bradken that is earlier than the date for sending under Item 6 of section 633(1) of the Corporations Act.

### **2.4 Satisfaction of Conditions**

- (a) Without limiting clauses 2.4(b) to 2.4(e) inclusive:
  - (i) each of Bradken and Bidder must consult and co-operate fully with the other party in relation to the satisfaction of the Conditions, including in relation to all material communications with any Government Agency in relation to Regulatory Approvals;
  - (ii) to the extent that it is within its power to do so, each party must use reasonable endeavours to procure that nothing occurs that will, or is likely to, cause any Condition to be breached or will or is likely to prevent a Condition from being satisfied; and

- (iii) Bradken must, to the extent it is within its control, use reasonable endeavours to procure that the Conditions in items 5(b) (*No prescribed occurrences*) 5(g) (*No dividends*) 5(h) (*No material adverse change*) 5(i) (*No material acquisition disposals or other event*), and 5(j) (*Share Rights*) are not breached.
- (b) In relation to the FIRB Approval Condition:
  - (i) Bidder must use reasonable endeavours to satisfy the FIRB Approval Condition as soon as reasonably practicable after the date of this agreement;
  - (ii) Bradken agrees to cooperate and provide such assistance as Bidder reasonably requires to assist Bidder in relation to satisfying the FIRB Approval Condition, including providing information reasonably requested by Bidder; and
  - (iii) Bradken acknowledges and agrees that nothing in this clause will oblige Bidder to accept or agree to a conditional approval given by the Treasurer of Australia under the FATA unless Bidder (acting reasonably and in good faith) considers such condition(s) to be acceptable. For this purpose, Bidder acknowledges that standard tax compliance conditions imposed by FIRB consistent with those set out in a publication issued by FIRB dated 3 May 2016 entitled 'Taxation Conditions of Certain No Objection Decisions' (Version 3) will be acceptable.
- (c) In relation to the CFIUS Approval Condition:
  - (i) Bidder and Bradken must use their reasonable endeavours to satisfy the CFIUS Approval Condition as soon as reasonably practicable after the date of this agreement;
  - (ii) Bidder and Bradken will prepare and submit a joint voluntary notice with respect to the Takeover Bid to CFIUS pursuant to Section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007, as amended (**FINSA**) as promptly as reasonably practicable and shall take all reasonably necessary steps to finally and successfully satisfy the CFIUS Approval Condition; and
  - (iii) Bradken acknowledges and agrees that nothing in this clause will oblige Bidder to accept or agree to a conditional approval or other mitigating measures that may be considered by the Bidder (acting reasonably and in good faith) to be unacceptable. Bidder shall use its reasonable endeavours to complete any commitments or mitigation measures imposed by the United States Government with respect to the transactions contemplated by this agreement that may be considered by the Bidder (acting reasonably in good faith) to be reasonable.
- (d) In relation to the DDTC Notification Condition:
  - (i) Bidder and Bradken must use their respective reasonable endeavours to satisfy the DDTC Notification Condition as soon as reasonably practicable after the date of this agreement;
  - (ii) Bidder and Bradken will prepare and submit a joint notice with respect to the Takeover Bid to DDTC pursuant to 22 Code of Federal Regulations Section 122.4(b) as soon as reasonably practicable after signing this agreement and shall take all reasonable actions that are advisable, necessary or desirable to finally and successfully satisfy the DDTC Notification Condition; and

- (iii) Bradken acknowledges and agrees that nothing in this clause will oblige Bidder to accept or agree to a conditional approval or other mitigating measures that may be considered by the Bidder (acting reasonably in good faith) to be unacceptable. Bidder shall agree to and complete any commitments or mitigation measures imposed by the United States Government with respect to the transactions contemplated by this agreement that may be considered by the Bidder (acting reasonably and in good faith) to be reasonable.
- (e) In relation to the Competition Approvals Condition:
  - (i) as soon as reasonably practicable after the date of this agreement:
    - (A) Bidder must prepare and submit an application for informal clearance with the ACCC and thereafter, take all necessary and appropriate steps to obtain ACCC Informal Clearance;
    - (B) Bidder and Bradken must promptly execute and file, or join in the execution and filing of, any application, notification or other document that may be necessary in order to obtain HSR Antitrust Approval including, without limitation Bidder filing within five Business Days of the date of this agreement, a pre-merger notification in accordance with the HSR Act and Bradken filing a pre-merger notification in accordance with the HSR Act within 10 days of Bidder filing;
    - (C) Bidder and Bradken must promptly execute and file, or join in the execution and filing of, the notices required under section 114 of the Canadian Competition Act and an application for an Advance Ruling Certificate under that Act; and
    - (D) Bidder must prepare and submit an application for approval with the South African Competition Authorities and thereafter, take all necessary and appropriate steps to obtain the South African Competition Approval;
  - (ii) without limiting any other provision of this agreement, each party must:
    - (A) use reasonable endeavours to ensure that all Competition Approvals are obtained as soon as reasonably practicable after the date of this agreement and in any event prior to the end of the Offer Period;
    - (B) not take or agree to take any action which would reasonably be expected to materially increase the risk of any Competition Approval not being obtained, or which would reasonably be expected to materially delay the obtaining of any Competition Approval;
    - (C) comply at the earliest practicable and advisable date with any request for additional information, documents or other materials received by such party or any of its Related Entities from any Competition Authority; and
    - (D) not directly or indirectly unilaterally extend any waiting period under the HSR Act or any other Antitrust Laws.
  - (iii) nothing in this agreement requires Bidder or any member of the Bidder Group to:
    - (A) apply for formal clearance or merger authorisation under Division 3 to Part VII of the CCA in respect of the Transaction;

- (B) offer to give (or give) any undertakings or agree to any conditions that are not reasonably acceptable to the Bidder (acting reasonably and in good faith), in order to satisfy the Competition Approvals Condition;
  - (C) agree to any Action of Divestiture that are not reasonably acceptable to the Bidder (acting reasonably and in good faith), in order to satisfy the Competition Approvals Condition; or
  - (D) issue or defend proceedings in any Court or tribunal in order to satisfy the Competition Approvals Condition; and
- (iv) Bradken must not, without the prior written consent of Bidder, take or agree to take any Action of Divestiture or enter into any agreement with a Competition Authority related to this agreement or the Transaction in relation to satisfaction of the Competition Approvals Condition.
- (f) Bidder agrees that if a Regulatory Approval is given subject to a condition, it will accept the condition if Bidder (acting reasonably) considers the condition reasonable, in which case Bidder will use its reasonable endeavours to complete any commitments or mitigation measures included in or forming part of the Regulatory Approval or the condition to which that Regulatory Approval is subject.
- (g) Nothing in this clause 2.4 or clause 2.5 prevents Bradken or the Bradken Board, from taking, or failing to take, action where to do otherwise would be likely to, in the opinion of the Bradken Board determined in good faith and acting reasonably, constitute a breach of the fiduciary or statutory duties of any member of the Bradken Board.

## **2.5 Communication in relation to satisfaction of Regulatory Approvals**

- (a) Subject to clause 2.5(b) each party must:
- (i) provide the other party with a copy of all applications for Regulatory Approvals and all material communications with any Government Agency in relation to Regulatory Approvals;
  - (ii) give the other party drafts of all material written communications intended to be sent by that party to any Government Agency, in relation to the Regulatory Approvals and:
    - (A) give the other party a reasonable opportunity to comment on such drafts in advance; and
    - (B) must consider in good faith reasonable comments provided by the other party;
  - (iii) use its reasonable endeavours so far as it is able, to allow the other and its Representatives the opportunity to be present and make submissions at any meetings or oral communication with any Government Agency in respect of the Regulatory Approvals;
  - (iv) use its reasonable endeavours to promptly provide an accurate summary of any meeting or oral communication between a party and a Government Agency at which the other party and the Representatives of the other party are for any reason, not present.

- (b) Notwithstanding clause 2.5(a) no party is required to disclose information that, as reasonably determined by the disclosing party, is:
  - (i) competitively sensitive, a business secret, or confidential;
  - (ii) unrelated to the transactions contemplated by this agreement; or
  - (iii) privileged; and

such information may be redacted or designated as 'external counsel only' so long as each party acts reasonably in identifying such material.

## **2.6 Communication and waiver**

- (a) If a party becomes aware that any Condition has been satisfied, it must promptly notify the other party in writing of that fact.
- (b) If Bradken or Bidder becomes aware that a Condition has been breached or is not able to be satisfied or becomes aware of the occurrence of any fact, matter or circumstance which will or is likely to cause any Condition to be breached, or which will or is likely to prevent any Condition from being satisfied or cause satisfaction of it to be unreasonably delayed, then it must promptly notify the other party of that fact, matter or circumstance, providing all material information that is within its actual knowledge relating to the event.
- (c) Bidder must, within 5 Business Days of becoming aware that a Condition has been breached or is not able to be satisfied, give written notice to Bradken and the ASX of its decision whether or not to waive or rely on that Condition.
- (d) If Bidder gives a notice that it will rely on the Condition, either party may terminate this agreement without any liability to the other party because of that termination, unless the failure of the Condition to be satisfied, arises out of a breach by the terminating party of clause 2.4.
- (e) In the event that Bidder does not give a notice to waive or rely on the Condition within 5 Business Days of becoming aware that the Condition has been breached or is not able to be satisfied, Bidder will be taken to have agreed to waive the Condition and must take all steps required under the Corporations Act to immediately declare the Offer to be free of such Condition.

## **2.7 Acknowledgments**

The parties acknowledge and agree that nothing in this agreement:

- (a) limits the rights of Bidder under Part 6.7 of the Corporations Act; or
- (b) will oblige Bidder or any subsidiary of Bidder to comply with clause 2.1 if, prior to making any Offer, Bidder is made aware that a Condition cannot be fulfilled.

## **2.8 RPS**

Bidder acknowledges that RPS may be converted in accordance with their terms, resulting in up to a maximum of 35 million additional Bradken Shares being issued during the Offer Period which Bradken Shares will upon issue be subject to the Takeover Bid.

## **2.9 Share Rights**

- (a) Bidder acknowledges that certain outstanding Share Rights may vest in accordance with the Share Plan Rules during the Offer Period, resulting in:
  - (i) up to a maximum of 2,971,989 additional Bradken Shares being issued during the Offer Period which Bradken Shares will upon issue be subject to the Takeover Bid; and
  - (ii) Bradken paying up to a maximum aggregate amount of 2,849,523 multiplied by the Offer Price to Bradken Group employees, officers or directors collectively.
- (b) Bradken warrants that, as soon as reasonably practicable after the Offer is unconditional and Bidder has obtained a Relevant Interest in more than 50% of Bradken Shares, the Bradken Board will:
  - (i) subject to receipt of the ASIC relief noted in clause 2.9(c) release all Bradken Shares issued and to be issued in respect of the exercise or vesting of any Share Rights from any restrictions or holding locks; and
  - (ii) in respect of any Share Rights issued under the 2016 Bradken Restricted Cash Rights Plan (TSR) or the 2016 Bradken Restricted Cash Rights Plan (EPS), not resolve to require the holders of exercised Share Rights under that plan to acquire Bradken Shares (either by on market purchases or by receiving a transfer from the trustee of the Bradken Share Rights Plans) to the value of the after tax cash payment received by those holders.
- (c) Bradken warrants that it will as soon as reasonably practicable after the Announcement Date cooperate and provide any assistance as Bidder reasonably requires to assist Bidder in relation to Bidder's application for ASIC relief to allow the Offer to extend to all Bradken Shares that are issued on or before the end of the Offer Period under or as a result of the exercise or vesting of Share Rights in existence as at the Register Date.

## **3. BIDDER'S STATEMENT AND OFFER**

### **3.1 Preparation of Bidder's Statement**

- (a) Bidder must within a reasonable time (and in any event not later than 3 Business Days) prior to lodgement of the Bidder's Statement with ASIC, provide an advanced and reasonably complete draft of the Bidder's Statement to Bradken and its Representatives for review and consider in good faith the comments of Bradken and its Representatives when finalising the Bidder's Statement.
- (b) Bradken must provide on a timely basis any assistance and information that is reasonably requested by Bidder or its Representatives to enable Bidder to prepare and finalise the Bidder's Statement.
- (c) Despite any comments or assistance provided by Bradken:
  - (i) the Bidder's Statement will be the sole responsibility of Bidder which will make the final determination as to the form and content of the Bidder's Statement; and
  - (ii) none of the Bradken Indemnified Parties assumes any responsibility for the accuracy or completeness of the Bidder's Statement.

### **3.2 Information regarding Bradken Shareholders**

- (a) Bradken agrees to promptly provide to Bidder all information about Bradken Shareholders as required by section 641(1) of the Corporations Act, as at the Register Date and in a form reasonably requested by the Bidder.
- (b) Bradken must give all necessary directions to the Bradken share registry to ensure that any information that the Bidder reasonably requests in relation to the Register, including any CHESSE sub-register and any issuer-sponsored sub-register, is promptly provided to the Bidder and, where requested by the Bidder, Bradken must procure that such information is made available in such electronic form as is reasonably requested by the Bidder other than information that the Bradken share registry is prohibited from providing by law or by the operating rules of any financial market or clearing and settlement facility.
- (c) Bradken agrees to comply promptly with any request of Bidder acting reasonably to give directions under Part 6C.2 of the Corporations Act and provide copies of any responses to Bidder on request, provided that Bidder reimburses reasonable out-of pocket expenses incurred by Bradken in doing so.

### **3.3 Bidder's rights to extend or vary Offer**

Bidder may exercise any rights under the Corporations Act in respect of any Offers or Bidder's Statement including to extend or vary any Offer or declare the Offer free of defeating conditions provided that:

- (a) it will not (without the prior written consent of Bradken):
  - (i) waive the Condition set out in item 5(a) of Schedule 1 (*minimum acceptance condition*) until Bidder has obtained a Relevant Interest in at least 40% of Bradken Shares; or
  - (ii) extend the Offer Period so that the Offer Period exceeds 6 months; and
- (b) the revised Offer terms and conditions are not less favourable to Bradken Shareholders than the Bid Terms and no additional defeating conditions are included.

## **4. TARGET'S STATEMENT AND RECOMMENDATION**

### **4.1 Target's Statement**

- (a) Bradken must within a reasonable time (and in any event not later than 3 Business Days) prior to lodgement of the Target's Statement with ASIC, provide an advanced and reasonably complete draft of the Target's Statement to Bidder and its Representatives for review and consider in good faith the comments of Bidder and its Representatives when finalising the Target's Statement.
- (b) Bidder must provide on a timely basis any assistance and information that is reasonably requested by Bradken or its Representatives to enable Bradken to prepare and finalise the Target's Statement.
- (c) Despite any comments or assistance provided by Bidder:
  - (i) the Target's Statement will be the sole responsibility of Bradken which will make the final determination as to the form and content of the Target's Statement; and

- (ii) none of the Bidder Indemnified Parties assumes any responsibility for the accuracy or completeness of the Target's Statement.

#### **4.2 Independent Expert's Report**

- (a) Bradken will within 5 Business Days after the date of this agreement appoint the Independent Expert to prepare the Independent Expert's Report for inclusion with the Target's Statement.
- (b) Bradken will provide all assistance and information reasonably requested by the Independent Expert in connection with the preparation of the Independent Expert's Report.
- (c) Bradken will provide Bidder with a reasonable opportunity to undertake a factual accuracy review of an advanced draft of the Independent Expert's Report at least 4 Business Days before the Target's Statement is lodged with ASIC and will provide to the Independent Expert any comments or suggested amendments to the draft Independent Expert's Report provided by the Bidder to correct matters of factual accuracy.

#### **4.3 Directors' recommendation**

Bradken represents and warrants to Bidder that each Director has informed it that that he:

- (a) will publicly recommend that Bradken Shareholders accept the Offer in respect of all their Bradken Shares; and
- (b) intends to accept, or procure the acceptance of, the Offer in respect of each Bradken Share that he holds or has control over the disposal of,

subject in each case to the Independent Expert opining that the Offer is fair and reasonable to Bradken Shareholders (other than the Bidder) and there being no Superior Proposal.

#### **4.4 Joint Promotion of Takeover Bid**

During the Offer Period Bradken will provide reasonable cooperation to the Bidder in promoting the Takeover Bid including procuring that senior executives participate in efforts reasonably requested by the Bidder to promote the merits of the Takeover Bid to Bradken Shareholders subject to:

- (a) the Independent Expert opining that the Offer is fair and reasonable to Bradken Shareholders (other than the Bidder) and not withdrawing that opinion; and
- (b) there being no Superior Proposal; and
- (c) the requested cooperation not unreasonably affecting such senior executives' day to day involvement in the management of the Bradken Group.

#### **4.5 Change or withdrawal of recommendation**

- (a) Bradken undertakes to Bidder to use its reasonable endeavours to procure that no Director changes or withdraws the recommendation referred to in clause 4.3 once made and does not make any public statement which would suggest that the Offers made under the Takeover Bid are no longer recommended unless the Bradken Board determine that a Competing Proposal constitutes a Superior Proposal or the Independent Expert does not opine that the Offer is fair and reasonable to Bradken Shareholders (other than the Bidder) or changes its opinion to similar effect.

- (b) Before the Bradken Board withdraws or changes its recommendation under clause 4.5(a) due to a Superior Proposal Bradken must comply with its obligations under clause 7.5.

## **5. BRADKEN BOARD**

### **5.1 Board transition**

As soon as practicable following the Control Date, Bradken must use its reasonable endeavours:

- (a) to procure the appointment to the Bradken Board of such persons Bidder nominates before the Control Date, subject to those persons having provided a consent to act as directors of the relevant company or companies; and
- (b) unless otherwise agreed by Bidder in writing, that each member of the Bradken Board, other than those appointed in accordance with clause 5.1(a), resigns as a director of Bradken provided that Bidder agrees that a minimum of two existing Independent Directors will remain on the Bradken Board until at least the end of the Offer Period.

### **5.2 Related Party Transactions/Independent Board Committee**

On and from the Control Date until Bidder is entitled to and lodges a compulsory acquisition notice under section 661B of the Corporations Act to acquire the remaining Bradken Shares it does not already own:

- (a) Bidder will ensure that its nominees to the Bradken Board do not participate in any decisions or discussions regarding the Takeover Bid including not receiving board papers regarding such decisions;
- (b) the parties will ensure that there are a minimum of two Independent Directors on the Bradken Board; and
- (c) the parties will ensure (and Bidder will ensure that its nominees to the Bradken Board support) that Bradken has in place and complies with a related party and conflict of interests policy which among other things requires that any transactions between the Bradken Group and the Bidder Group (including any further acquisition of Bradken Shares or variation or waiver to this agreement) take place on arm's length terms and any evaluations of and decision to enter into them is made by an independent board committee of Bradken comprising of at least two Independent Directors who will have access to external advice at Bradken's cost.

### **5.3 Insurance**

- (a) Bidder acknowledges that, notwithstanding any other provision of this agreement, Bradken may, prior to the Control Date, enter into a run-off insurance policy in respect of any Bradken Indemnified Party for a 7 year period (or longer if the Bidder agrees, acting reasonably), and that any actions to facilitate that insurance or in connection therewith will not be a Prescribed Occurrence or breach any provision of this agreement.
- (b) Bidder will not take, and will procure that after the Control Date no member of the Bradken Group takes any action which would prejudice or adversely affect any directors' and officers' runoff insurance cover taken out prior to the Control Date.

### **5.4 Deeds of indemnity, access and insurance**

- (a) With effect from the Control Date, Bidder must:

- (i) procure that Bradken and each other member of the Bradken Group complies with all of its obligations under the terms of each deed of indemnity, access and insurance made by them in favour of their respective directors and officers from time to time (and Bradken undertakes not to vary, and must ensure there is no variation of, those arrangements after the date of this agreement, except that it may enter into such deeds with newly appointed directors and officers on terms materially consistent with existing deeds); and
  - (ii) to the extent permitted by law, for a period of 7 years from the Control Date, ensure that the constitutions of Bradken and each other member of the Bradken Group continue to contain such rules as are contained in those constitutions at the date of this agreement that provide for each company to indemnify its directors and officers against any liability incurred by that person in his or her capacity as a director or officer of the company (and Bradken undertakes not to vary, and must ensure there is no variation of, those constitutional arrangements after the date of this agreement).
- (b) The undertakings contained in clause 5.4(a) are subject to any Corporations Act restriction, or any restriction in the law of a jurisdiction in which the relevant Bradken Group member is incorporated, and will be read down accordingly.

## **6. CONDUCT PENDING COMPLETION**

### **6.1 Change of control rights**

As soon as practicable after the date of this agreement, Bidder and Bradken must seek to identify any change of control or similar provision in material contracts to which any entity within the Bradken Group is a party which may be triggered by the Takeover Bid. In respect of these material contracts, the parties agree as follows:

- (a) Bradken must, as soon as practicable, apply to the counterparties to these contracts for consent to the change of control of Bradken in relation to the Takeover Bid.
- (b) Bradken must use reasonable endeavours to obtain the consents referred to in clause 6.1(a) as expeditiously as possible.
- (c) Bidder must provide any assistance (including providing factual information regarding Bidder and attending relevant meetings) reasonably requested by Bradken for the purposes of Bradken complying with its obligations under this clause 6.1, including Bidder bearing all necessary costs incurred in connection with any application for or granting of consent from the counterparties to the material contracts provided Bidder has first consented to those costs being incurred (which consent cannot be unreasonably withheld or delayed).
- (d) Bradken must not, without the prior written consent of Bidder which must not be unreasonably withheld or delayed, incur any costs other than reasonable travel and legal expenses in connection with performing its obligations under this clause.

### **6.2 Conduct of business**

- (a) From the date on which this agreement is executed until the end of the Offer Period, Bradken will and will procure that each of its subsidiaries will:
  - (i) conduct the business and operations of the Bradken Group in the usual and ordinary course consistent with the manner in which the business and operations were conducted in the 12 months prior to the date of this agreement;

- (ii) not take any action that will or is likely to breach or prevent the satisfaction of any Condition;
  - (iii) not alter its capital structure including by issuing any securities or rights that are convertible into Bradken Shares (other than issuing Bradken Shares under the exercise or vesting of Share Rights or the conversion of the RPS);
  - (iv) not announce, determine as payable, declare or pay any other dividend, capital return or distribution until after the End Date; and
  - (v) make all reasonable efforts to preserve their relationships with any Government Agency, customers, suppliers, joint venture partners and others with whom they have business dealings.
- (b) Nothing in clause 6.2(a) restricts the ability of any member of the Bradken Group to act in a manner which:
- (i) the Directors consider in good faith and acting reasonably is required by their duties as directors (including in respect of a Superior Proposal);
  - (ii) is required or permitted by this agreement;
  - (iii) is required by law or by an order of a court or Government Agency;
  - (iv) has been Disclosed in the Due Diligence Materials as being actions that the Bradken Group may carry out between the Announcement Date and the close of the Offer Period;
  - (v) is reasonably required to respond to any emergency or disaster; or
  - (vi) has been consented in writing by Bidder (that consent not to be unreasonably withheld or delayed).

### **6.3 Access and integration**

- (a) From the date of this agreement to the Control Date, Bradken must use reasonable endeavours to respond to any reasonable requests for information from Bidder to assist it in complying with its obligations under this agreement or as otherwise agreed between the parties.
- (b) From the Control Date (or such earlier date as the parties agree in writing) until the end of the Exclusivity Period, Bradken must use reasonable endeavours to procure that, where requested, Bidder is provided with reasonable access to information, premises and senior executives of the Bradken Group.
- (c) Neither clause 6.3(a) nor 6.3(b) imposes any obligation on Bradken to the extent that the provision of such information or access:
  - (i) is prohibited by law or any confidentiality obligations owed to third parties;
  - (ii) would or may reasonably compromise legal professional privilege of a Bradken Group member over the information;
  - (iii) would in the opinion of Bradken acting reasonably cause undue disruption to the business of the Bradken Group; or

- (iv) relates or may relate to a Competing Proposal.

## 7. EXCLUSIVITY

### 7.1 Bradken warranty and undertakings

- (a) Bradken:
  - (i) warrants that as at the date of this agreement it has, and any member of the Bradken Group or any of their respective Representatives have, ceased any existing discussions or negotiations with any party which may reasonably be expected to lead to a Competing Proposal; and
  - (ii) agrees that promptly after the signing this agreement it will, and will procure any member of the Bradken Group or any of their respective Representatives, request the return or destruction of confidential information of Bradken in accordance with the terms of any relevant confidentiality agreement from all third parties conducting due diligence investigations on the Bradken Group prior to the date of this agreement.
- (b) During the Exclusivity Period, Bradken must:
  - (i) as soon as reasonably practicable, ensure that any electronic data room access granted to any third party prior to the date of this agreement in connection with a Competing Proposal is withdrawn; and
  - (ii) subject to clause 7.3, not grant any waivers or agree to any amendments under any confidentiality agreements entered into in connection with a Competing Proposal (before the date of this agreement).

### 7.2 No solicitation

During the Exclusivity Period, Bradken must not, and must ensure that each of its Representatives (each a **Relevant Person**) do not, except with the prior written consent of Bidder:

- (a) (**no shop**) directly or indirectly solicit, invite, encourage or initiate any Competing Proposal or any enquiries, negotiations, or discussions with any Third Party in relation to, or that could reasonably be expected to lead to a Competing Proposal or communicate any intention to do any of those things;
- (b) (**no talk**) subject to clause 7.3, continue, negotiate, accept or enter into, approve or recommend, participate in negotiations or discussions with, or enter into any agreement, arrangement or understanding with any Third Party in relation to, or that could reasonably be expected to lead to, a Competing Proposal, even if:
  - (i) the Competing Proposal was not directly or indirectly solicited, initiated, or encouraged by a Relevant Person; or
  - (ii) the Competing Proposal has been publicly announced; or
- (c) (**no due diligence**) subject to clause 7.3, make available to any Third Party or permit any Third Party to receive any non public information relating to any member of the Bradken Group, in connection with that Third Party submitting, formulating, developing, assessing or finalising a Competing Proposal.

### 7.3 Exceptions

Clauses 7.2(b) and 7.2(c) (**no talk** and **no due diligence**) and 7.1(b)(ii) do not apply to the extent they would require Bradken or a Relevant Person to do or refrain from doing any thing with respect to a Competing Proposal or an offer or expression of interest that could reasonably be expected to lead to a Competing Proposal (a **Potential Competing Proposal**) where:

- (a) the Bradken Board acting in good faith determines (after taking advice from its external financial advisers) that the Competing Proposal or Potential Competing Proposal is or may reasonably be expected to lead to a Superior Proposal; and
- (b) the Bradken Board acting in good faith determines (after taking advice from its external legal advisers) that failing to respond to that Competing Proposal or Potential Competing Proposal would be reasonably likely to constitute a breach of the fiduciary or statutory duties owed by the Bradken Board.

### 7.4 Notification to Bidder

- (a) Subject to clause 7.4(b), during the Exclusivity Period, Bradken must promptly notify Bidder if Bradken is approached directly or indirectly by any person to engage in any activity that would breach or otherwise be inconsistent with clause 7.2(b) or 7.2(c).
- (b) A notification given under clause 7.4(a) must be accompanied by a summary of all material terms and conditions of the actual, proposed or potential Competing Proposal (excluding the identity of the Third Party making the approach).
- (c) Despite anything in this clause 7.4, each obligation of Bradken under this clause 7.4 does not apply to the extent that the Bradken Board acting in good faith determines (after taking advice from its external legal advisers) that complying with the obligation would constitute or would be likely to constitute a breach of the fiduciary or statutory duties owed by the Bradken Board.

### 7.5 Opportunity to match

- (a) If Bradken receives a Competing Proposal and as a result the Bradken Board proposes to either:
  - (i) change its recommendation in favour of the Takeover Bid or publicly recommend a Competing Proposal or make any public statement, or take any other action, to the effect that the Offer is no longer recommended; or
  - (ii) approve or recommend entry into any agreement, commitment, arrangement or understanding to implement the Competing Proposal with the person who has made the applicable Competing Proposal (**Rival Acquirer**),

Bradken must ensure that the Bradken Board does not do so:

- (iii) unless the Bradken Board considers that the Competing Proposal is bona fide; and
- (iv) until each of the following has occurred:
  - (A) the Directors (or a majority of the Directors) have made the determination contemplated by clause 7.5(a)(ii) in respect of that Competing Proposal;

- (B) Bradken has given Bidder written notice (**Relevant Notice**) of the Directors' proposal to take the action referred to in clause 7.5(a)(i) or 7.5(a)(ii) (subject to Bidder's rights under clause 7.5(b)); and
  - (C) Bradken has given Bidder a summary of all material terms and conditions of the Competing Proposal, including details of the Third Party making the approach (except that Bradken may withhold the identity of the Rival Acquirer from disclosure if the Board, acting in good faith determines (after taking advice from its external legal advisers) that giving those details to the Bidder would constitute or would be likely to constitute a breach of the fiduciary or statutory duties owed by the Bradken Board).
- (b) If Bradken gives Bidder notice in writing under clause 7.5(a), Bidder will have the right but not the obligation at any time during the 5 Business Days following the receipt of the Relevant Notice to amend the terms and conditions of the Takeover Bid including increasing the amount of consideration offered under the Takeover Bid (**Counter Proposal**) and, if Bidder does so, the Bradken Board must review the Counter Proposal in good faith. If the Bradken Board (or a majority of the Directors) determine that the Counter Proposal would be equivalent to, or more favourable to Bradken Shareholders than the Competing Proposal (having regard to all aspects of the Counter Proposal and the Competing Proposal), Bradken and Bidder must use their respective best endeavours to:
- (i) agree any amendments to this agreement that are reasonably necessary to reflect the Counter Proposal, including a requirement that a majority of the Bradken Board recommend to Bradken Shareholders that they accept the Counter Proposal subject to the Independent Expert opining that the Offer or Counter Proposal is fair and reasonable to Bradken Shareholders and there being no Superior Proposal; and
  - (ii) enter into a deed of amendment for this agreement to give effect to any amendments agreed under clause 7.5(b)(i);

in each case as soon as reasonably practicable.

## **7.6 Equal access to information**

- (a) Subject to clause 7.6(b), during the Exclusivity Period Bradken must not provide any non-public information to a person in connection with or to directly or indirectly encourage a Competing Proposal unless:
  - (i) that person has entered into an Acceptable Confidentiality Agreement; and
  - (ii) any material non-public information provided to that person is also provided to Bidder (unless the information has already been provided to Bidder or its Representatives).
- (b) Despite anything in this clause 7.6, Bradken's obligation under this clause 7.6 does not apply to the extent that the Bradken Board, acting in good faith determines (after having taken advice from its external financial and legal advisers) that to comply with the obligation would constitute or would be reasonably likely to constitute a breach of the fiduciary or statutory duties owed by the Bradken Board.

## **7.7 Normal provision of information**

Nothing in this clause 7 prevents Bradken or any Relevant Person from:

- (a) providing information to a Relevant Person;
- (b) providing information required to be provided by law, a court or any Government Agency;
- (c) providing information to its auditors, customers, financiers (including the RPS holders), joint venturers and suppliers acting in that capacity in the ordinary course of business;
- (d) providing information required to be provided by law, including to satisfy its obligations of disclosure under the ASX Listing Rules or to any Government Agency; or
- (e) making presentations to brokers, portfolio investors, analysts and other third parties in the ordinary course of business.

## **7.8 Acknowledgement**

The parties acknowledge and agree that Bidder has required Bradken to agree to the undertakings set out in this clause in consideration of Bidder entering into this agreement and incurring significant costs in doing so. In the absence of obtaining these undertakings from Bradken, Bidder would not have entered into this agreement.

## **8. BREAK FEE**

### **8.1 Bradken undertaking to pay Break Fee**

- (a) Subject to clause 8.6, Bradken must pay Bidder the Break Fee without withholding or set off if:
  - (i) a Competing Proposal is publicly announced before the End Date and, within 12 months after the End Date the person making the Competing Proposal (whether alone or together with one or more Associates), completes in all material respects a transaction of the kind referred to in the definition of Competing Proposal;
  - (ii) at any time before the end of the Exclusivity Period, the Directors (or a majority of Directors) fail to make or make and then change or withdraw a recommendation to Bradken Shareholders to accept the Offer made under the Takeover Bid for all Bradken Shares, other than because:
    - (A) Bidder is in material breach of a Bidder warranty or any other material obligation under this agreement and the cure periods specified in clause 12.2(a) have expired or any member of the Bidder Group breaches or indicates it may breach in any material respect the Bidder Facility Agreement and the relevant cure periods in the Bidder Facility Agreement have expired;
    - (B) a Condition is breached or has become incapable of being satisfied, other than where the non-satisfaction of the Condition is solely or primarily due to an act (or failure to act) of Bradken or any member of the Bradken Group in breach of Bradken's obligations under clause 2.4;
    - (C) the Independent Expert has opined that the Offer is not fair and reasonable to Bradken Shareholders (other than the Bidder) or the Independent Expert, having opined that the Offer is fair and reasonable, withdraws that opinion, other than where the reason for that opinion or change of opinion is due wholly or partly to the existence, announcement or publication of a Competing Proposal;

- (iii) Bradken is in material breach of a Bradken warranty or any other material obligation under this agreement and the cure periods specified in clause 12.1(a) have expired; or
  - (iv) the happening of a Prescribed Occurrence which was not consented to by Bidder or has not been waived by Bidder.
- (b) For the purpose of clause 8.1(a)(ii), Bidder acknowledges and agrees that a statement by a Director or by the Bradken Board that Bradken Shareholders should take no action pending further advice from the Bradken Board (or words to similar effect) is not to be regarded as a failure to make, a change or a withdrawal of a recommendation.

## **8.2 Payment of Break Fee**

Bradken must pay the Break Fee to Bidder within the later of 15 Business Days of receipt of the demand in writing from Bidder and 5 Business Days after the end of the Exclusivity Period. The demand may only be made after the occurrence of the event referred to in clause 8.1.

## **8.3 Refund of Break Fee**

If, despite the occurrence of any of the events referred to in clause 8.1(a), Bidder becomes the holder of more than 50% of Bradken Shares on a Fully Diluted Basis before the End Date as a result of the Takeover Bid, Bidder must repay to Bradken any amount received by it under clause 8.1(a).

## **8.4 Basis of Break Fee**

- (a) The Break Fee has been calculated to reimburse Bidder for costs including the following:
- (i) advisory costs, legal costs, funding costs, costs of management and directors' time;
  - (ii) out of pocket expenses incurred in implementing the Takeover Bid;
  - (iii) reasonable opportunity costs incurred in pursuing the Takeover Bid or in not pursuing other alternative transactions or strategic initiatives; and
  - (iv) damage to reputation associated with a failed transaction and the implication of those damages,

in each case incurred as a result of it having entered into this agreement, making announcements required by this agreement or pursuing the Takeover Bid.

- (b) The Break Fee is a genuine pre estimate of the costs and losses which Bidder is expected to incur in connection with the Takeover Bid and it is not a pre condition to Bidder being paid the Break Fee that it has actually incurred those costs or losses or that it be able to prove that it has done so.
- (c) Bradken acknowledges and agrees that:
- (i) the Break Fee is reasonable in the context of the Takeover Bid;
  - (ii) benefits will flow to Bradken and its shareholders from Bidder making the Takeover Bid; and
  - (iii) entering into this agreement is necessary to induce Bidder to make the Takeover Bid.

## **8.5 Release by Bidder**

Despite any other provision of this agreement, where the Break Fee is paid to Bidder, Bidder (for itself and as agent of every member of the Bidder Group) releases all rights against and agrees with Bradken that Bidder will not make a Claim against any member of the Bradken Group under or in connection with this agreement other than any Claim arising from a wilful, reckless or deliberate breach by Bradken of its material obligations under clause 7.

## **8.6 Compliance with law**

If:

- (a) it is found by the Takeovers Panel or a court that all or any part of the payment required to be made under clause 8.1 is unlawful, involves a breach of directors' duties or constitutes Unacceptable Circumstances and the period for lodging an application for review or a notice of appeal (as applicable) has expired without that application or notice having been lodged; or
- (b) an application for review or a notice of appeal is lodged with the Takeovers Panel or a Court within the prescribed period, and it is found by the review panel or the appeal Court that all or any part of the payment required to be made under clause 8.1 is unlawful, involves a breach of directors' duties or constitutes Unacceptable Circumstances,

**(Disputed Amount)** then:

- (c) the undertaking in clause 8.1 does not apply to the extent of the Disputed Amount; and
- (d) Bidder must refund any Disputed Amount paid to it.

## **9. WARRANTIES**

### **9.1 Mutual warranties**

Each party warrants to the other party that each of the following statements is true and accurate as at the date of this agreement:

- (a) it is a corporation validly existing under the laws of its place of incorporation;
- (b) it has the power to execute, deliver and to perform its obligations under this agreement, and has taken all necessary corporate action to authorise such execution, delivery and the performance of such obligations;
- (c) its obligations under this agreement are legal, valid and binding obligations enforceable in accordance with their terms;
- (d) the execution and delivery by it of this agreement do not and will not conflict with or constitute a default under any provision of:
  - (i) its constitution; or
  - (ii) any law, order, judgment, award, injunction, decree, rule or regulation by which it is bound;
- (e) no resolutions have been passed and no other step has been taken or legal proceedings commenced or threatened against it for its winding up or dissolution or for the appointment of a liquidator, receiver, administrator or similar officer over any or all of its assets, and no

regulatory action of any nature has been taken, which would prevent, inhibit or otherwise have a material adverse effect on its ability to fulfil its obligations under this agreement; and

- (f) it is not aware of any act, omission, event or fact that would result in one or more of the Conditions being triggered, except as disclosed by a party to the other party in writing prior to the signing of this agreement.

## **9.2 Bradken warranties**

- (a) Bradken warrants to Bidder that as at the date of this agreement each of the following statements is true and accurate:
  - (i) so far as it is aware:
    - (A) all information which has been disclosed by Bradken under its continuous disclosure obligations under the Corporations Act and the ASX Listing Rules was true and correct at the time it was disclosed in all material respects;
    - (B) it not in breach in any material respect of its continuous disclosure obligations under the Corporations Act and the ASX Listing Rules;
  - (ii) there are:
    - (A) 171,027,249 Bradken Shares;
    - (B) 5,821,512 Share Rights; and
    - (C) 700,000 RPS,on issue and there are no other shares or other equity securities (including convertible securities) or share rights or other instruments which are convertible into securities in Bradken nor has it offered or agreed to issue any such shares, securities, options or share rights or other instruments to any third party;
  - (iii) so far as Bradken is aware no regulatory action has been taken which would prevent, inhibit or otherwise have a material adverse effect on its ability to fulfil its obligations under this agreement;
  - (iv) as at the date of this agreement and so far as it is aware, the Due Diligence Material as a whole is accurate in all material respects, and the information as a whole is not misleading in any material respect whether by inclusion of misleading information or the omission of material information or both;
  - (v) Bradken's financial statements for the full year ended 30 June 2016:
    - (A) were prepared in good faith and in accordance with applicable laws and generally accepted accounting principles in Australia; and
    - (B) give a true and fair view of the financial position and performance of the Bradken Group; and
  - (vi) Bradken is not aware as at the date of this agreement that any customer which accounted for more than \$10 million in revenue to the Bradken Group in the 12 months to 30 June 2016 has indicated that it intends to cease purchasing from the

Bradken Group or to terminate prior to its expiry any material contract with the Bradken Group.

- (b) The warranties provided under clauses 9.2(a)(iii), 9.2(a)(iv), 9.2(a)(v) and 9.2(a)(vi) are qualified by (and Bradken will not be taken to be in breach of them to the extent so qualified) matters:
  - (i) which were Disclosed prior to the date of this agreement in the Due Diligence Material or in public filings by Bradken or a member of the Bradken Group to ASX or ASIC in a manner such that a reasonable person in the position of Bidder may identify the nature of the matter or thing disclosed; or
  - (ii) which were within in the actual knowledge of Bidder prior to the date of this agreement.

### **9.3 Bidder warranties**

Bidder warrants to Bradken that each of the following statements is true and accurate:

- (a) as at the date of this agreement it has a reasonable basis to expect that it will have available to it sufficient cash amounts or legally binding commitments from one or more banks to enable it to perform its obligations to pay the total cash consideration payable to Bradken Shareholders under the Takeover Bid in accordance with its terms and conditions and within the timing requirements of the Corporations Act and to ensure that Bidder complies with its obligations under the Bidder Facility Agreement;
- (b) on each day on and from the lodgement of the Bidder's Statement with ASIC until the End Date, it will have available to it sufficient cash amounts or legally binding commitments from one or more banks to enable it to perform its obligations to pay the total cash consideration payable to Bradken Shareholders under the Takeover Bid in accordance with its terms and conditions and within the timing requirements of the Corporations Act and to ensure that Bidder complies with its obligations under the Bidder Facility Agreement;
- (c) as at the date of this agreement and on each day up to and including the end of the Offer Period other than as contemplated by the Bid Terms, no approvals or notifications are required to be obtained by Bidder under any applicable law or regulation where the failure to obtain such approval or make such notification will prevent Bidder from performing its obligations under this agreement and the Offer; and
- (d) as at the date of this agreement and on each day up to and including the end of the Offer Period it will comply during the Offer Period with its obligations under the Corporations Act in respect of the Takeover Bid in all material respects.

## **10. RELEASES**

### **10.1 Release of Bradken Indemnified Persons**

- (a) Bidder waives and releases, and must procure that each member of the Bidder Group waives and releases, all rights and Claims which it may have against any Bradken Indemnified Person (other than Bradken) as at the date of this agreement and from time to time in connection with:
  - (i) any breach of any warranties of Bradken or any member of the Bradken Group in this agreement; or

- (ii) any disclosure containing any statement which is false or misleading whether in content or by omission,

whether current or future, known or unknown, arising at common law, in equity, under statute or otherwise, except where such Bradken Indemnified Party has engaged in fraud or wilful misconduct.

- (b) This clause is subject to any restriction or limitation in the Corporations Act and will be read down accordingly.
- (c) Bradken receives and holds the benefit of this clause to the extent it relates to each Bradken Indemnified Person as trustee for each of them.

## **10.2 Release of Bidder Indemnified Persons**

- (a) Bradken waives and releases, and must procure that each member of the Bradken Group waives and releases, all rights and Claims which it may have against any Bidder Indemnified Person (other than Bidder) as at the date of this agreement and from time to time in connection with:

- (i) any breach of any warranties of Bidder or any member of the Bidder Group in this agreement; or
- (ii) any disclosure containing any statement which is false or misleading whether in content or by omission,

whether current or future, known or unknown, arising at common law, in equity, under statute or otherwise, except where such Bidder Indemnified Party has engaged in fraud or wilful misconduct.

- (b) This clause is subject to any restriction or limitation in the Corporations Act and will be read down accordingly.
- (c) Bidder receives and holds the benefit of this clause to the extent it relates to each Bidder Indemnified Person as trustee for each of them.

## **10.3 Liability cap**

The maximum aggregate amount that the Bidder and any Bidder Group members can recover from Bradken arising out of or in connection with all Claims for breach of this agreement or otherwise in respect of the subject matter of this agreement is the Break Fee other than in respect of any Claim arising from a wilful, reckless or deliberate breach by Bradken of its material obligations under clause 7.

## **11. ANNOUNCEMENTS AND CONFIDENTIALITY**

### **11.1 Public announcements**

- (a) Subject to 11.1(b), each party must use reasonable endeavours to consult with the other party prior to making any public announcements (other than the Bid Announcements and the initial Bidder's Statement and Target's Statement) in connection with the Offer (including any supplementary or replacement Bidder's Statement or Target's Statement) and take into account in good faith comments provided by the other party in finalising the public announcement.

- (b) The parties will not be required to comply with clause 11.1(a):
  - (i) during any period when a majority of the Directors are publically recommending a Superior Proposal; or
  - (ii) to the extent that compliance would, in the reasonable opinion of the party, be likely to result in that party breaching the ASX Listing Rules or any applicable law.

## **11.2 Confidentiality**

- (a) Bradken releases Bidder from its obligation of confidentiality owed to Bradken under the Confidentiality Agreement to the extent necessary for the Bidder to make the Takeover Bid including providing the Bidder's Statement.
- (b) Bradken permits Bidder to approach shareholders of Bidder despite clause 5.1 of the Confidentiality Agreement during the term of this agreement solely to promote the Takeover Bid.
- (c) Bidder releases Bradken from its obligation of confidentiality owed to Bidder under the Confidentiality Agreement to the extent necessary for the Bradken to respond to the Takeover Bid including providing the Target's Statement.
- (d) Each party acknowledges and agrees that, except as otherwise provided in this clause 11.2 it continues to be bound by the Confidentiality Agreement.

## **12. TERMINATION**

### **12.1 Termination by Bidder**

Bidder may terminate this agreement by giving notice in writing to Bradken before the Control Date if:

- (a) Bradken is in material breach of a Bradken warranty or any other material obligation under this agreement provided that Bidder has given written notice to Bradken setting out the relevant circumstances and stating an intention to terminate the agreement, the relevant breach continues to exist 5 Business Days after the date on which this notice is given and the relevant breach is material in the context of the Takeover Bid taken as a whole;
- (b) in the circumstance set out in clause 2.6(d); or
- (c) any Director fails to make the recommendation referred to in clause 4.3(a) or to give the undertaking referred to in clause 4.3(b) or changes, qualifies or withdraws that recommendation or undertaking once made.

### **12.2 Termination by Bradken**

Bradken may terminate this agreement by giving notice in writing to Bidder before the Control Date if:

- (a) Bidder is in material breach of a Bidder warranty or any other material obligation under this agreement provided that Bradken has given written notice to Bidder setting out the relevant circumstances and stating an intention to terminate the agreement, the relevant breach continues to exist 5 Business Days after the date on which this notice is given and the relevant breach is material in the context of the Takeover Bid taken as a whole;
- (b) in the circumstance set out in clause 2.6(d);

- (c) a Superior Proposal is publicly announced, provided that Bradken had not breached its obligations under clause 7 before that public announcement; or
- (d) the Independent Expert opines that the Offer is not both fair and reasonable to Bradken Shareholders (other than the Bidder) or having opined that the Offer is fair and reasonable withdraws that opinion.

### **12.3 Mutual agreement and reciprocal termination rights**

- (a) This agreement may be terminated by written agreement between the Bidder and Bradken.
- (b) This agreement may also be terminated by either the Bidder or Bradken by written notice to the other if:
  - (i) a Court issues a final and non appealable order or ruling to takes an action which permanently restrains or prohibits the Offer;
  - (ii) Bidder withdraws the Offer (with the consent of ASIC) or informs Bradken in writing that it will not proceed with the Offer for any reason including non satisfaction of a Condition;
  - (iii) the Offer Period ends without the Conditions being satisfied or waived; or
  - (iv) the Offer has not become unconditional by the End Date.

### **12.4 Effect of termination**

If this agreement is terminated under clause 12.1, 12.2 or 12.3:

- (a) each party will be released from its obligations under this agreement, except that this clause 12.4, and clauses 8, 10, 11.2(d), 15.4, 15.5 and 16, which will survive termination and remain in force;
- (b) each party will retain the rights it has or may have against the other party in respect of any past breach of this agreement: and
- (c) in all other respects, all future obligations of the parties under this agreement will immediately terminate and be of no further force and effect including any further obligations in respect of the takeover Bid.

### **12.5 No other termination**

Not party may terminate or rescind this agreement except as permitted under clause 12.1, 12.2 or 12.3.

## **13. NOTICES**

### **13.1 Manner of giving notice**

Any notice or other communication to be given under this agreement must be in writing (which includes fax and email) and may be delivered or sent by post, fax or email to the party to be served as follows:

- (a) to Bradken at:

Address: 20 McIntosh Drive, Mayfield West NSW 2304, Australia

Fax number: +61 2 4926 8201  
Email: sperry@bradken.com.au  
For the attention of: Steven Perry

(b) to the Bidder at:

Address: 16-1, 2-chome, Higashiueno, Taito-ku, Tokyo 110-0015, Japan  
Fax number: +81-3-5826-8209  
Email: m.narao.dq@hitachi-kenki.com  
For the attention of: Motohiro Narao

or at any such other address, fax number or email address notified for this purpose to the other parties under this clause. Any notice or other communication sent by post must be sent by prepaid ordinary post (if the country of destination is the same as the country of origin) or by airmail (if the country of destination is not the same as the country of origin).

### **13.2 When notice given**

Any notice or other communication is deemed to have been given:

- (a) if delivered, on the date of delivery; or
- (b) if sent by post, on the third day after it was put into the post (for post within the same country) or on the fifth day after it was put into the post (for post sent from one country to another);
- (c) if sent by fax, at the time shown in the transmission report as being the time at which the whole fax was sent; or
- (d) if sent by e-mail, upon the generation of a receipt notice by the recipient's server or, if such notice is not so generated, upon delivery to the recipient's server,

but if the notice or other communication would otherwise be taken to be received after 5.00 pm or on a Saturday, Sunday or public holiday in the place of receipt then the notice or communication is taken to be received at 9.00 am on the next day that is not a Saturday, Sunday or public holiday in the place of receipt.

### **13.3 Proof of service**

In proving service of a notice or other communication, it is sufficient to prove that delivery was made or that the envelope containing the communication was properly addressed and posted either by prepaid post or by prepaid airmail, that the fax was properly addressed and transmitted or that the e-mail was properly addressed and transmitted by the sender's server into the network and there was no apparent error in the operation of the sender's e-mail system, as the case may be.

### **13.4 Documents relating to legal proceedings**

This clause 13.1 does not apply in relation to the service of any claim form, notice, order, judgment or other document relating to or in connection with any proceedings, suit or action arising out of or in connection with this agreement.

## **14. GST**

- (a) In this clause 14, a word or expression defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) has the meaning given to it in that legislation.

- (b) If a party makes a supply under or in connection with this deed in respect of which GST is payable, the consideration for the supply but for the application of this clause 14(b) (**GST exclusive consideration**) is increased by an amount (**Additional GST amount**) equal to the GST exclusive consideration multiplied by the rate of GST prevailing at the time the supply is made.
- (c) (If a party must reimburse or indemnify another party for a loss, cost or expense, the amount to be reimbursed or indemnified is first reduced by the amount equal to any input tax credit the other party, or the representative member of the GST group of which the other party is a member, is entitled to with respect to the loss, cost or expense, and then increased in accordance with clause 14(b) if such amount is consideration for a taxable supply made under or in connection with this deed.
- (d) A party need not make a payment of the Additional GST amount until it receives a tax invoice or adjustment note (as appropriate) for the supply to which the payment relates.

## **15. GENERAL**

### **15.1 Amendments**

This agreement may only be amended in writing and where such amendment is signed by all the parties.

### **15.2 Assignments**

None of the rights or obligations of a party under this agreement may be assigned or transferred without the prior written consent of the other party.

### **15.3 Consents and approvals**

Except as otherwise expressly provided in this agreement a party may give or withhold its consent to or approval of any matter referred to in this agreement in its absolute discretion. A party that gives its consent to or approval of any matter referred to in this agreement is not taken to have made any warranty or representation as to any matter or circumstance connected with the subject matter of that consent or approval.

### **15.4 Costs**

Except as otherwise expressly provided in this agreement, each party must pay the costs and expenses incurred by it in connection with entering into and performing its obligations under this agreement.

### **15.5 Duty**

Bidder is liable for and must pay all Duty on or relating to this agreement, the Takeover Bid and any transfer of the Bradken Shares.

### **15.6 Entire agreement**

This agreement contains the entire agreement between the parties relating to the Transaction and supersedes all previous agreements, whether oral or in writing, between the parties relating to the Transactions except for the Confidentiality Agreement.

## **15.7 Execution in counterparts**

This agreement may be executed in counterparts, which taken together must constitute one and the same agreement, and any party (including any duly authorised representative of a party) may enter into this agreement by executing a counterpart. Faxed signatures are taken to be valid and binding to the same extent as original signatures.

## **15.8 Exercise and waiver of rights**

The rights of each party under this agreement:

- (a) may be exercised as often as necessary;
- (b) except as otherwise expressly provided by this agreement, are cumulative and not exclusive of rights and remedies provided by law; and
- (c) may be waived only in writing and specifically,

and delay in exercising or non-exercise of any such right is not a waiver of that right.

## **15.9 Further assurance**

Each party undertakes, at the request, cost and expense of the other party, to sign all documents and to do all other acts, which may be necessary to give full effect to this agreement.

## **15.10 No reliance**

Each party acknowledges that in agreeing to enter into this agreement it has not relied on any express or implied representation, warranty, collateral contract or other assurance made by or on behalf of the other party before the entering into of this agreement. To the maximum extent permitted by law, each party waives all rights and remedies which, but for this clause No reliance might otherwise be available to it in respect of any such representation, warranty, collateral contract or other assurance including all rights and remedies under Part 7.10 of the Corporations Act, Part 2 Division 2 of the Australian Securities and Investments Act 2001(Cth), section 18, Schedule 2 (Australian Consumer Law) of the Competition and Consumer Act 2010 (Cth) or any corresponding or equivalent provision of any legislation having effect in any relevant jurisdiction.

## **15.11 Severability**

The provisions contained in each clause of this agreement are enforceable independently of each other clause of this agreement and the validity and enforceability of any clause of this agreement will not be affected by the invalidity or unenforceability of any other clause.

## **16. GOVERNING LAW AND JURISDICTION**

### **16.1 Governing law**

This agreement and any non-contractual obligations arising out of or in connection with it is governed by the law applying in New South Wales, Australia.

### **16.2 Jurisdiction**

The courts having jurisdiction in New South Wales, Australia have non-exclusive jurisdiction to settle any dispute arising out of or in connection with this agreement (including a dispute relating to any non-contractual obligations arising out of or in connection with this agreement) and each party

irrevocably submits to the non-exclusive jurisdiction of the courts having jurisdiction in New South Wales, Australia.

### **16.3 Service of process**

Bidder irrevocably appoints Earl & Associates of Level 7, 410 Collins Street, Melbourne, Victoria 3000 with effect until 3 months after the end of the Exclusivity Period as its agent in Australia for service of process in connection with this agreement and agrees that any service document in connection with this agreement may be effectively served on it by service on Earl & Associates of Level 7, 410 Collins Street, Melbourne, Victoria 3000 or such other person resident in Australia as Bidder may from time to time notify Bradken in writing

**THIS AGREEMENT** has been executed by the parties on the date stated at the beginning of this agreement.

## SCHEDULE 1

### BID TERMS

|    |                       |   |
|----|-----------------------|---|
| 1. | <b>Offer</b>          | <p>Bidder will offer to acquire all Bradken Shares.</p> <p>Subject to section 653B(1)(b) of the Corporations Act, Bradken Shareholders may only elect to accept the Offer in respect of all of their Bradken Shares.</p>  |
| 2. | <b>Bradken Shares</b> | <p>The Offer will extend to all Bradken Shares on issue before the end of the Offer Period including all new Bradken Shares that are issued on or before the end of the Offer Period under or as a result of the exercise or vesting of Share Rights in existence as at the Register Date (subject to ASIC granting any necessary relief from the Corporations Act) and the conversion of any RPS in existence as at the Register Date.</p>   |
| 3. | <b>Offer Price</b>    | <p>\$3.25 per Bradken Share less the amount or value of any Rights attaching to or arising from Bradken Shares which are declared or paid by Bradken after the Announcement Date.</p>   |
| 4. | <b>Offer Period</b>   | <p>The initial offer period in respect of the Offer will be not greater than seven weeks, but may, subject to clause 3.3, be extended.</p>  |
| 5. | <b>Conditions</b>     | <p>(a) <b>(Minimum acceptance)</b> During or before the end of the Offer Period, the Bidder has a Relevant Interest in more than 50% of all Bradken Shares on a Fully Diluted Basis.</p> <p>(b) <b>(No Prescribed Occurrences)</b> Between the Announcement Date and the end of the Offer Period (each inclusive), no Prescribed Occurrence occurs.</p> <p>(c) <b>(FIRB approval)</b> Before the end of the Offer Period, either:</p> <p>(i) the Treasurer (or his delegate) has provided a notice in writing (without any terms or conditions or with standard tax compliance conditions imposed by FIRB consistent with those set out in a publication issued by FIRB dated 3 May 2016 entitled 'Taxation Conditions of Certain No Objection Decisions' (Version 3)) stating or to the effect that the Australian Government does not object to the Bidder acquiring Bradken Shares under the Offer; or</p> <p>(ii) by reason of the elapse of time, the Treasurer (and each of his delegates) is no longer empowered under the FATA to make an order prohibiting the acquisition of Bradken Shares by the Bidder under the Offer.</p> <p>(d) <b>(CFIUS Approval)</b> Before the end of the Offer Period,</p> |

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|  |  | <p>either:</p> <ul style="list-style-type: none"> <li>(i) Bradken and Bidder receive a written notification issued by CFIUS that it has determined that: <ul style="list-style-type: none"> <li>(A) the Takeover Bid is not a “covered transaction”; or</li> <li>(B) CFIUS has concluded its review and has determined not to conduct a full investigation; or</li> </ul> </li> <li>(ii) if a full investigation is deemed to be required, Bradken and the Bidder receive notification issued by CFIUS that the United States government will not take action to prevent the consummation of the Takeover Bid or to impose any requirements or conditions to mitigate any national security concerns related to the Takeover Bid;</li> </ul> <p>(e) <b>(DDTC Notification)</b> Before the end of the Offer Period, DDTC Approval occurs;</p> <p>(f) <b>(Competition Approval)</b> Before the end of the Offer Period:</p> <ul style="list-style-type: none"> <li>(i) ACCC Informal Clearance has been obtained;</li> <li>(ii) CCB Clearance has been obtained;</li> <li>(iii) HSR Antitrust Approval has been obtained; and</li> <li>(iv) South African Competition Approval has been obtained,</li> </ul> <p>in each case unconditionally.</p> <p>(g) <b>(No dividends)</b> Between the Announcement Date and the end of the Offer Period (each inclusive), Bradken does not declare, determine as payable or pay a distribution (whether by way of dividend, capital reduction or otherwise and whether in cash or in specie).</p> <p>(h) <b>(No material adverse change)</b> Between the Announcement Date and the end of the Offer Period (each inclusive), no Material Adverse Change occurs.</p> <p>(i) <b>(No material acquisitions, disposals, new commitments or other events)</b> Between the Announcement Date and the end of the Offer Period (each inclusive), (other than as disclosed to Bidder (including the implementation of any future matters included in budgets, business plans or other future planning or strategy documents) before the Announcement Date or as disclosed in a public filing with ASX before the Announcement Date) no member of the</p> |
|--|--|--|

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|--|--|---|
|  |  | <p>Bradken Group:</p> <ul style="list-style-type: none"> <li>(i) <b>(no material acquisitions)</b> acquires, offers to acquire, agrees to acquire or announces an intention to acquire, one or more shares, companies, businesses, properties or assets (or an interest in one or more shares, companies, businesses, properties or assets), other than in the ordinary course of business, the total consideration for which, or the value of which, either individually exceeds \$1.0 million or in aggregate exceeds \$1.0 million;</li> <li>(ii) <b>(no material disposals)</b> disposes of, offers to dispose of, agrees to dispose of or announces an intention to dispose of, one or more shares, companies, businesses, properties or assets (or an interest in one or more shares, companies, businesses, properties or assets), other than in the ordinary course of business, for an amount, or for which the book value (as recorded in Bradken's statement of financial position as at 30 June 2016) is, either individually greater than \$10 million or in aggregate, greater than \$10 million;</li> <li>(iii) <b>(no material commitments)</b> enters into, offers to enter into, or announces an intention to enter into, any agreement, lease, joint venture, partnership, management agreement, arrangement or commitment which would require expenditure other than in the ordinary course of business, or the foregoing of revenue, by any member(s) of the Bradken Group of an amount or value which, in aggregate, exceeds either \$10 million (for each separate agreement, lease, joint venture, partnership, management agreement, arrangement or commitment) or \$10 million in aggregate;</li> <li>(iv) <b>(no constitutional changes)</b> makes any change to its constitution or convenes a meeting to consider a resolution to change a constitution of any member of the Bradken Group or passes any special resolution;</li> <li>(v) <b>(no entry into new contract of service)</b> enters, or agrees to enter, into any contract of service for the appointment of a director or senior manager on a base salary of more than \$200,000 per annum (or the approximate local currency equivalent);</li> <li>(vi) <b>(no change in existing contract of service)</b> varies, or agrees to vary in any material way any existing contract of service with any director or senior manager on a base salary of more than \$200,000 per annum (or the approximate local currency equivalent);</li> </ul> |
|--|--|---|

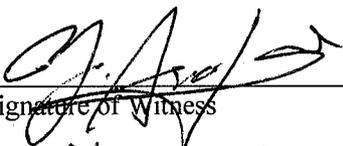
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|  |  | <p>equivalent), including making or agreeing to make any substantial change in the basis or amount of remuneration of any director or senior manager except:</p> <ul style="list-style-type: none"> <li>(A) as required by law;</li> <li>(B) in accordance with any contractual entitlement existing as at the date of this agreement;</li> <li>(C) for salary increases in the normal course provided that such increase is no more than \$20,000 per annum in respect of any employee;</li> <li>(D) vesting of Share Rights in accordance with clause 2.9; and</li> <li>(E) payments not exceeding \$500,000 in aggregate under the Bradken Group's short term incentive plans;</li> </ul> <p>(vii) <b>(no scheme of arrangement)</b> implements or agrees to implement any scheme of arrangement or compromise (including one for a reconstruction or amalgamation of any members of the Bradken Group), or any analogous procedure, scheme or arrangement in any jurisdiction;</p> <p>(viii) <b>(no new Encumbrances)</b> other than in the ordinary course of ordinary business, grants or agrees to grant, any Encumbrances over a material part of its assets as security for new indebtedness; or</p> <p>(ix) <b>(no new indebtedness)</b> incurs other than in the ordinary course of ordinary business any new indebtedness such that the Bradken Group's Net Financial Indebtedness exceeds \$ 450 million;</p> <p>(j) <b>(Share Rights)</b> Between the Announcement Date and the end of the Offer Period (each inclusive), no Share Rights are granted or issued.</p> |
|--|--|--|

**SCHEDULE 2**  
**INDICATIVE TIMETABLE**

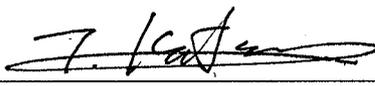
| <b>Event</b>  | <b>Date</b>      |
|---|------------------|
| Bidder and Bradken issue their respective Bid Announcements   | 3 October 2016   |
| Bidder's Statement lodged with ASIC, Bradken and ASX  | 17 October 2016  |
| Notice to Bradken and ASIC that Bidder's Statement ((incorporating the Offer) has been sent to Bradken Shareholders | 24 October 2016  |
| Offer period commences  | 24 October 2016  |
| Target's Statement lodged with ASIC, Bidder and ASX   | 24 October 2016  |
| Target's Statement dispatched to Bradken shareholders   | 31 October 2016  |
| Offer Period closes (subject to right to extend in accordance with clause 3.3(a)(ii))                               | 12 December 2016 |
| End Date  | 3 May 2017       |

**EXECUTION PAGE**

**Executed** for and on behalf of **Hitachi Construction Machinery Co., Ltd** by its Attorney under a power of attorney dated 3 October 2016 and the Attorney declares that he has not received any notice of the revocation of such Power of Attorney, in the presence of:

  
\_\_\_\_\_  
Signature of Witness

Name: Yusuke ARAKI  
Title: General Manager, Legal Dept.

  
\_\_\_\_\_  
Signature of Attorney

Name: Tetsuo Katsurayama  
Title: Vice President, Executive Officer and Director, General Manager, Finance Div., Chief Financial Officer

**Executed by Bradken Limited** in accordance with section 127 of the Corporations Act 2001 (Cth):

\_\_\_\_\_  
Signature of director

Name: Phillip Arnall  
Title: Chairman

\_\_\_\_\_  
Signature of company secretary

Name: Steven Perry  
Title: Chief Financial Officer

**EXECUTION PAGE**

Executed for and on behalf of **Hitachi Construction Machinery Co., Ltd** by its Attorney under a power of attorney dated 3 October 2016 and the Attorney declares that he has not received any notice of the revocation of such Power of Attorney, in the presence of:

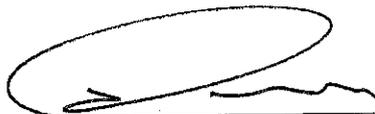
\_\_\_\_\_  
Signature of Witness

Name:  
Title:

\_\_\_\_\_  
Signature of Attorney

Name: Tetsuo Katsurayama  
Title: Vice President, Executive Officer and Director, General Manager, Finance Div., Chief Financial Officer

Executed by **Bradken Limited** in accordance with section 127 of the Corporations Act 2001 (Cth):



\_\_\_\_\_  
Signature of director

Name: Phillip Arnall  
Title: Chairman



\_\_\_\_\_  
Signature of company secretary

Name: Steven Perry  
Title: Chief Financial Officer