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**EXCLUSIVE  
DISTRIBUTORSHIP AGREEMENT**

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DATED THE \_\_\_\_ DAY OF \_\_\_\_\_ 20 \_\_\_\_

BETWEEN

Company Pty Ltd ACN 111 222 333 ("the Supplier");

AND

Other Company Pty Ltd ACN 333 222 111 ("the Distributor")

# **DISTRIBUTORSHIP AGREEMENT**

## **(EXCLUSIVE)**

**THIS AGREEMENT MADE ON THE \_\_\_\_\_ DAY OF \_\_\_\_\_ 20\_\_\_\_.**

**BETWEEN      Company Pty Ltd ACN 111 222 333 1 Sydney Street Sydney 2000 in New South Wales (the “Supplier”);**

**AND:            Other Company Pty Ltd ACN 333 222 111 1 Brisbane Street Brisbane 7000 in New South Wales (the “Distributor”).**

### **RECITALS**

- A.** The Supplier is the manufacturer and seller of the Products which it markets and sells through various distributors.
- B.** The Supplier and the Distributor (the “Parties”) have agreed to enter into this agreement for the purpose of establishing an exclusive supply and distribution agreement between them for the Products in the territory (the “Territory”) described in Item - The Territory of Schedule A.

### **THE PARTIES AGREE AS FOLLOWS**

#### **1. DEFINITIONS**

1.1 In this Agreement the following words and phrases mean:

“**Agreement**” means this Distribution Agreement and includes all amendments or variations to this Agreement.

“**Additional Clauses**” means the clauses set out in Schedule D.

“**Approval**” means all permits, licences or approvals required from time to time to sell or distribute the Products in the Territory.

“**Confidential Information**” means all of the following: (a) the trade secrets of any Party; (b) the names of all past, present, and prospective Consumers, including all records regarding Products sold or supplied to them; (c) the names of all past, present, and prospective employees of such Party; (d) the Party's past, present, and prospective systems, methods and procedures used in the operation of such Party's business; (e) any other oral, written, electronic and/or recorded information of any Party's business, products, financial condition, operations, assets or liabilities; (f) any documentary information that is marked “Confidential”, “Private”, “Secret”, “In Confidence” or “Not to be disclosed”; (g) all notes,

analyses, summaries, compilations, studies projections, forecasts budgets, price list or records of any Party that is marked confidential or which by its nature is confidential.

Confidential Information *excludes* information (a) generally available in the industry other than as a result of a wrongful disclosure, (b) independently acquired or developed by a Party without breach of this Agreement, or (c) available to a Party on a non-confidential basis from a third person not bound by any confidentiality agreement or fiduciary obligation owed to the other Party.

**“Consumer”** means any person who purchases or may purchase any Products for use within the Territory.

**“Deliver/Delivery”** means delivery of the Products to the Distributor’s nominated warehouse in the Territory.

**“Dollars”** means Australian Dollars.

**“Distributorship”** means this distributorship relationship between the Parties.

**“GST”** means Goods and Services Tax as defined under the GST Act.

**“GST Act”** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**“Intellectual Property”** includes but is not limited to copyright, trade marks, designs, patents, processes and all other intellectual property that is capable of legal protection, regardless of whether such legal protection has been formally obtained.

**“Invoice”** means a tax invoice that complies with the GST laws.

**“Law”** means all applicable statutes, Acts, rules, regulations and by-laws current in the Territory together with all amendments and replacing laws.

**“Material Breach”** means any of the following:

- (a) any breach of a clause that is described as an essential term;
- (b) any breach of a clause that is capable of rectification and the Party in breach has failed to rectify within 14 days after being requested so to do by the other Party.

**“Merchantable”** means saleable in the Territory under its Product description at its market price or, if applicable, fit for its ordinary purpose.

**“New Products”** means all new products of whatever kind that the Supplier introduces as part of its overall range of Products available for sale in the Territory and also includes all enhancements, upgrades, new versions and/or replacements of any of the Products and/or newly developed products of the Supplier.

**“Notice”** means a notice in writing including those sent by facsimile, letter, email and telex and conveyed in accordance with this Agreement.

**“Order”** means an Order placed by the Distributor on the Supplier for any of the Products which Order must be in the form from time to time specified by the Supplier. The Order must include details of the Products’ description, the quantity ordered, the price per item in Dollars, the total price in Dollars, the requested time for Delivery and such other information as the Parties may reasonably require.

**“Party/Parties”** means the Parties to this Agreement and includes their lawful successors and assigns. Any reference to a party will include, where applicable, any subsidiary controlled by a Party or by the same persons who control that Party.

**“Person”** includes any body that is recognised at Law in the Territory whether it be a natural person, an entity or corporation.

**“Products”** includes all the products listed in Schedule B and all Spare Parts and components of the Products. Products include all New Products and Samples.

**“Quarterly”** means a period of 3 months.

**“Samples”** includes supplies of the Products (which includes New Products) for promotional purposes and all other promotion materials having regard to the then current and anticipated Consumer market in the Territory.

**“Spare Parts”** means all parts or components of the Products which are capable of being replaced in order to repair or maintain any of the Products.

**“Territory”** means the Territory described in Item - The Territory of Schedule A.

**“Term”** means the period commencing from the date hereof and set out in Item - The Term of Schedule A, unless this Agreement is terminated by either Party during that period, in which case the Term will expire on the date of such termination. The Term also includes all extensions of the Term and all such other periods as the Parties may in writing agree.

**“Year”** means each period of 12 months during the Term, the first Year commencing on the date hereof and expiring on the day before the anniversary of the date hereof.

## **2. INTERPRETATION AND ADDITIONAL CLAUSES**

- 2.1 Words importing any genders include all genders including the neuter gender.
- 2.2 Words importing the singular include the plural and vice versa.
- 2.3 The Parties agree that the Additional Clauses will each be expressed terms of this Agreement. To the extent there is any inconsistency between clauses in this Agreement and the Additional Clauses the Parties agree that to the extent only of that inconsistency the inconsistent clauses in this Agreement shall not apply.

### **3. APPOINTMENT AND TERM**

- 3.1 The Supplier appoints the Distributor, and the Distributor accepts its appointment, as the exclusive distributor of the Products for the Term in the Territory on and subject to the rights and obligations of the parties as set out in the clauses in this Agreement and where applicable in the Additional Clauses.
- 3.2 During the Term the Distributor will, for so long as it has the right to be the exclusive distributor in the Territory, have the sole and exclusive right to market, sell, distribute and promote the Products in the Territory.
- 3.3 During the Term, each Party promises to act reasonably and in good faith towards the other and provide to the other on request all reasonable assistance in promoting the sale of the Products in the Territory.
- 3.4 The Distributor may appoint sub-distributors, agents, licensees, franchisees and other representatives to market, sell and distribute the Products in the Territory or any part thereof. The Distributor is responsible for all acts and omissions of its sub-distributors, agents, licensees, franchisees and other representatives as if those acts or omissions were those of the Distributor with the intent that any such act or omission will be a breach of this Agreement by the Distributor.
- 3.5 The Supplier promises and undertakes to the Distributor that it will not, for so long as the Distributor is the exclusive distributor in the Territory, directly or indirectly (other than through the Distributor) market, sell or distribute the Products in the Territory.

### **4. NEW PRODUCTS**

- 4.1 The Supplier must promptly notify the Distributor of any New Products available to the Distributor.
- 4.2 Provided the Distributor has met all its Targets (if any specified in Schedule A), all New Products which the Supplier at its sole discretion decides to distribute, market or sell in the Territory, must first be offered to the Distributor to market and sell. If the Distributor does not agree to sell the New Products on the terms proposed by the Supplier then the Supplier may make such other arrangements as it thinks fit for the marketing and sale of the New Products in the Territory. The Distributor will be deemed not to have agreed to sell the New Products if it fails to accept the terms proposed by the Supplier within 30 days of those terms being offered to the Distributor.

### **5. INTELLECTUAL PROPERTY AND CONFIDENTIAL INFORMATION**

- 5.1 The Supplier is the exclusive owner of all of the Supplier's Intellectual Property in the Products. The Distributor may not challenge or dispute the Supplier's ownership of the

Supplier's Intellectual Property. The Distributor must not do anything or omit to do anything which could detrimentally effect the ownership of the Supplier's Intellectual Property.

- 5.2 The Distributor is entitled during the Term to use the Supplier's Intellectual Property including all trade marks as it may reasonably require for the sole purpose of effectively selling, marketing and/or distributing the Products in the Territory. The Distributor must not use any of Supplier's Intellectual Property for any other purpose without the prior written consent of the Supplier.
- 5.3 Each Party undertakes not to use or disclose to any other Person or entity any of the other Party's Confidential Information and will only use such Confidential Information in good faith and for the proper purposes of this Agreement and subject to any restrictions imposed by the Party that is the provider of the Confidential Information.

## **6. SUPPLIER'S OBLIGATIONS**

- 6.1 For so long as the Distributor meets its Targets (if any specified in Schedule A) the Supplier will promptly refer to the Distributor all inquiries it receives in relation to the Products from the Territory.
- 6.2 The Supplier covenants with the Distributor that for so long as the Distributor is the exclusive distributor in the Territory it will not directly or indirectly supply the Products itself to any Person in the Territory. This is an essential term.
- 6.3 The Supplier will provide the Distributor with suitable promotional and marketing materials in relation to the Products throughout the Term. If the Distributor chooses to use these materials then by this subclause, it is licensed to do so and at no fee. The Distributor is entitled to modify, adapt and change such materials to suit its reasonable requirements for the marketing of the Products in the Territory. There is no obligation on the Supplier to modify or adapt any of the materials it provides to the Distributor.
- 6.4 The Supplier undertakes to promptly attend to the reasonable fulfilment of all Orders for the Products and their Delivery in accordance with the terms of this Agreement and subject to proper arrangements acceptable to the Supplier being made for payment. The Distributor acknowledges that the Supplier's ability to fulfil Orders is dependant on available stock of the Products Ordered.
- 6.5 The Supplier undertakes to the Distributor to endeavour to maintain sufficient quantities of the stock of the Products so as to reasonably be able to meet the Distributor's anticipated Orders having regard to forecasts provided to the Supplier by the Distributor. The Distributor acknowledges and agrees that the Supplier may at its

sole and absolute discretion delete any Products from the Product list in Schedule B and upon the Supplier notifying the Distributor in writing of such deletion those deleted Products will cease to form part of the Products and the Distributor will have no right or entitlement to distribute those deleted Products after such notification.

- 6.6 The Supplier must provide all specification (if any) required for use of the Products by Consumers.

## **7. PRODUCT DEFECTS & GENERAL LIABILITY**

- 7.1 The Supplier warrants to the Distributor that:-

- 7.1.1 The Products and their packaging at Delivery will be fit and Merchantable at that time and will meet and be in accordance with the Law of the Territory; and
- 7.1.2 If the Products and/or its packaging are defective and/or not Merchantable and provided the Distributor has stored the Products in accordance with the Supplier's recommendations (if any) provided no "use by date" has expired and the Distributor has not altered, tampered with or adulterated the Products and/or its packaging then:
- (a) The Supplier must either replace or repair or pay the cost of replacing the defective Products or at its own cost; or
  - (b) Where the defect is only in respect to the Product's packaging the Supplier may at its own cost either:
    - (i) require the defectively packaged Products to be freighted back to it or as it may direct at its cost and risk; or
    - (ii) provide replacement packaging and have the Products repackaged at its cost in the Territory.
- 7.1.3 The Supplier warrants to the Distributor that the Products are safe for use in the Territory if the Supplier's specifications (if any) and instructions for storage installation, set up, use and/or maintenance (if any) are all followed.
- 7.1.4 The Supplier represents to the Distributor that all information on the Products including brochures, advertising materials, samples and instructions for the installation, set up, use and/or maintenance of the Products will be provided in English, are up to date and will be updated as appropriate. Furthermore that such materials do not contain any representations that are incorrect, untrue, deceptive or misleading or likely to deceive or mislead the Distributor or any Consumer.
- 7.1.5 The Supplier undertakes to the Distributor to use all reasonable commercial endeavours to support the Distributor in the sale, marketing and supply of the

Products in the Territory and will supply all Orders from the Distributor in a timely manner.

- 7.1.6 The Distributor must follow all reasonable directions and carry out all reasonable requests of the Supplier in respect of the storage, packaging and presentation of the Products. If the Distributor requests any particular packaging or presentation, the costs thereof must be borne by the Distributor. The Supplier may at its discretion require prepayment by the Distributor of this cost as a pre-condition to such packaging and/or presentation being carried out.
- 7.2 Neither party will in the course of conducting its business engage in conduct which is misleading or deceptive or is likely to mislead or deceive and/or constitutes any breach of any Law of the Territory. This is an essential term.
- 7.3 If either Party wrongfully or improperly does anything or omits to do anything which has the effect or consequence of rendering the other Party liable to any third party or Consumer under any Law then the Party whose act or failure to act has caused such liability fully indemnifies the other against all liabilities, losses, damages and other claims that it might thereby incur.

## **8. DISTRIBUTOR'S OBLIGATIONS AND COVENANT NOT TO COMPETE**

- 8.1 The Distributor will use its best efforts to promote, market, distribute and sell the Products within the Territory so as to maximise the sale of the Products within the Territory during the Term. The Distributor must not make or publish any disparaging remarks or comments about the Products or Supplier. This is an essential term.
- 8.2 The Distributor must not distribute the Products outside of the Territory or sell or supply the Products to any other Person to sell or distribute outside the Territory without Supplier's prior written consent. This is an essential term.
- 8.3 The Distributor is entitled to market the Products as it thinks fit in the Territory and may enter into such lawful agreements as it deems desirable to market and/or promote the Products in the Territory.
- 8.4 The Distributor will maintain a database of all complaints, comments or claims made to it in respect to the Products from Consumers and will provide the Supplier with these details within 21 days of being requested to do so by the Supplier. This is an essential term.
- 8.5 The Distributor will be responsible for its own storage of the Products and must comply with the Supplier's recommendations for storage.

- 8.6 The Distributor may use the Supplier's Intellectual Property including its trade marks for the sole purpose of advertising and marketing of the Products and in its promotional material for the Products but for no other purposes. This is an essential term.
- 8.7 The Distributor will not intentionally deface, obscure or remove from any of the Products the Supplier's trade marks or reservations of Intellectual Property. This is an essential term.
- 8.8 The Distributor is solely responsible for and must at its expense obtain all any necessary approvals, licences, permits, authorisations and certifications for the Products to enable it market and sell the Products in the Territory including, if applicable, any Australian Standards ("AS") certification and/or Australia/New Zealand Standards ("AS/NZS") certification or any other regulatory body's requirements for the sale, distribution, marketing or use of the Products in the Territory. The Supplier will provide reasonable assistance, co-operation in respect to such approvals.
- 8.9 The Distributor will apply for and do all things commercially reasonable to obtain any required registration of the Products in the Territory. The cost of such registration shall be borne by the Distributor. On termination of this Agreement the Distributor must execute all documents to enable all such registrations to be transferred to the Supplier or as it directs.
- 8.10 The Distributor has no authority to make any representation on behalf of the Supplier. This is an essential term.
- 8.11 During the Term the Distributor may sell, market or distribute products that are similar to or competitive with the Products.
- 8.12 The Distributor acknowledges and agrees that at the end of the Term the Distributor will hold the goodwill of its business of selling the Products exclusively on trust for the Supplier and for any new distributor nominated by the Supplier to distribute the Products in the Territory.
- 8.13 At the expiry of the Term the Distributor undertakes and promises to the Supplier that the Distributor will not sell, distribute or market, whether directly or indirectly, any products in the Territory that are the same as, similar to, or competitive with the Products for a period of six (6) month(s) from the date of expiry of the Term. The Distributor acknowledges that this restraint is reasonable both as to time and area in order to protect the interest of the Supplier in the goodwill of the business of distributing, marketing and selling of the Products in the Territory. Furthermore, the Distributor acknowledges that damages are not a sufficient remedy for the Supplier

should there be a breach of this clause and that the Supplier is entitled to apply for an injunction to restrain any breach or threatened breach of the clause.

## **9. SUB DISTRIBUTORS**

- 9.1 The Distributor may appoint sub distributors, licensees and franchisees for the marketing, sale, distribution and/or maintenance of the Products in the Territory. The Distributor must ensure that any Person it appoints as a sub distributor, licensee or franchisee is a Person of good repute and character with suitable experience and training capabilities to act as a sub distributor, licensee or franchisee of the Products within the Territory.
- 9.2 The Distributor is exclusively responsible for all of the acts or omissions of its sub distributor(s), franchisee(s) and sub licensee(s) in respect of the Products and indemnifies and keeps indemnified the Supplier against all liabilities and/or losses sustained as a consequence of any negligent, improper or unlawful conduct and/or omission by any sub distributor(s), licensee(s) or franchisee(s).
- 9.3 No agreement between the Distributor and any sub distributor, licensee or franchisee may be for any period exceeding the Term.
- 9.4 No agreement between the Distributor and any sub-distributor, licensee or franchisee will be binding on the Supplier or directly or indirectly impose any obligation on the Supplier.
- 9.5 The Distributor must promptly on request provide the Supplier with a copy of every sub distributor, licence or franchise agreement it enters into. None of the terms of such agreements may be inconsistent with this Agreement.

## **10. PRICES, ORDERING AND PAYMENT**

- 10.1 The current Prices for the Products are set out in Schedule B.
- 10.2 The Supplier shall not increase its Prices for any items of the Products until the expiry of the first Year of this Agreement. Thereafter, the Supplier may change its Prices at any time upon sixty (60) days prior written notice to the Distributor.
- 10.3 The Supplier will not increase its Prices for any items of the Products until the expiry of the first Year of this Agreement. Thereafter the Supplier may change its Prices at any time upon 60 days' prior written notice to the Distributor.
- 10.4 All Orders for the Products must be made by the Distributor using the Supplier's Order forms. The Supplier may from time to time amend or alter its Order form and must notify the Distributor of such changes.

- 10.5 The Supplier will issue an Invoice to the Distributor for the Products ordered 21 days prior to the nominated Delivery date of the Products.
- 10.6 The Distributor must pay the Supplier for all Products ordered:
  - 10.6.1 within seven (7) days of receipt of the relevant Invoice from the Supplier; or
  - 10.6.2 within seven (7) days of Delivery  
whichever is the last to occur. This is an essential term.
- 10.7 The Distributor must pay for all items of the Products ordered in such manner as the Supplier may reasonably require including without limitation the provision of any letter of credit or bank transfer of funds in accordance with any direction given by the Supplier. This is an essential term.
- 10.8 Unless otherwise specified by the Supplier items of the Products ordered may be paid for by: Cash, Cheque, Bank Cheque, Electronic Transfer, and any other payment method agreed by the Supplier. Where the value of the Order exceeds \$10,000.00 the Supplier may require the Distributor to secure the Order by providing the Supplier with a ninety (90) day revolving irrevocable letter of credit in favour of the Supplier and issued by an Australian Bank reasonably acceptable to the Supplier. In such circumstances the Supplier is only obliged to fulfil that Order if the said letter of credit is provided.

## **11. DELIVERY OF PRODUCTS**

- 11.1 The Supplier must Deliver the Products so Ordered by the Distributor to the Distributor.
- 11.2 Subject to sub clause 12.4, the Distributor covenants that it will bear all the costs and charges arising out of the transportation of the Products.
- 11.3 Where the Products may be hazardous, flammable or fragile, the Supplier must ensure they are packaged and labelled in accordance with all regulations relating to hazardous air/sea/overland transportation Laws for the shipment and/or transportation of such Products from the Supplier's to the place of delivery.
- 11.4 Upon Delivery of the Products the Distributor must promptly visually inspect the Products and within 14 days of such receipt give the Supplier Notice of any Products that are apparent from such inspection to be not of Merchantable Quality and the Distributor will arrange for such Products to be returned to the Supplier at the Supplier's expense. If no Notice is given in that time the Products will be deemed to be Merchantable and fit for purpose except in respect to any latent defects not reasonably apparent on inspection.

11.5 The Supplier will do all things commercially reasonable to replace any defective Products as soon as possible. Where a visual inspection of the Products does not disclose any relevant defect then the Distributor must promptly notify the Supplier of such defect when it becomes aware of its existence.

## **12. TERMINATION**

12.1 This Agreement may be terminated by either Party if the other Party commits a Material Breach. The procedure for termination is set out in this Clause.

12.2 On termination the Supplier must either:

12.2.1 Deliver sufficient quantities of Products Ordered by the Distributor so as to allow the Distributor to satisfy all of its outstanding contractual obligations to its Consumers, or

12.2.2 at its sole discretion take over responsibility for meeting all those outstanding orders, in which event the Supplier indemnifies the Distributor against any liability to those Consumers in respect to those outstanding Orders.

12.3 It is a breach of an essential term by the Distributor and the Supplier will be entitled to terminate this Distributorship by giving 14 days' prior Notice to that affect to the Distributor if :

12.3.1 The Distributor fails to pay any amount owing to the Supplier within 14 days of the date of a written request by the Supplier to make payment;

12.3.2 The Distributor becomes insolvent;

12.3.3 The Distributor commits any breach of this Agreement and fails to remedy that breach within 14 days of the date of a written request from the Supplier to do so;

12.3.4 The Distributor ceases to carry on business in the Territory;

12.3.5 The Distributor ceases to use commercially reasonable efforts to market, distribute and sell the Products in the Territory;

12.3.6 The Distributor fails to follow any reasonable and lawful direction given by the Supplier for the purposes of safe guarding the Supplier's Intellectual Property or Confidential Information;

12.3.7 The Distributor fails to meet the Target (if any specified in Schedule A) for any Year;

12.3.8 The Distributor breaches any term of this Agreement that is expressed to be an essential term.

- 12.4 It is a breach of an essential term by the Supplier and the Distributor will be entitled to terminate this Distributorship by giving 14 days' prior Notice to that affect to the Supplier if:
- 12.4.1 The Supplier fails to Deliver any of the Products to the Distributor within 30 days of the time specified in the Order for Delivery and the Distributor has requested in writing such Delivery and that Delivery has not been made within that 30 days or within 14 days of such request, whichever is the longer;
  - 12.4.2 The Supplier fails to make any payment due by it to the Distributor within 14 days of being requested by the Distributor in writing to make such payment;
  - 12.4.3 The Supplier becomes insolvent;
  - 12.4.4 The Supplier commits any breach of this Agreement and fails to remedy that breach within 14 days of being requested by the Distributor to remedy that breach;
  - 12.4.5 The Supplier ceases to carry on business;
  - 12.4.6 The Supplier ceases to supply any of the Products or fails to maintain the quality of any of the Products;
  - 12.4.7 The Supplier fails to follow any reasonable and lawful direction given by the Distributor for the purposes of protecting the Distributor's Confidential Information or the Distributor's Intellectual Property;
  - 12.4.8 There is a substantial product recall of any of the Products in the Territory;
  - 12.4.9 It becomes unlawful to sell the Products or any of them in the Territory;
  - 12.4.10 The Supplier breaches any term of this Agreement that is expressed to be an essential term.
- 12.5 Notwithstanding anything elsewhere contained in this Agreement and without giving any Notice under this clause either Party may terminate this Distributorship immediately by giving Notice to the other Party if the recipient Party of such Notice has breached any Law then applying to this Agreement or does any act or omits to do any act that could cause the terminating Party to be in breach of any Law applicable to this Agreement or wrongfully and knowingly uses or discloses the terminating Party's Confidential Information to any third party.
- 12.6 Upon termination each of the Parties must promptly return to each other all Confidential Information and Intellectual Property belonging to the other Party. Where such Confidential Information is incapable of being returned in tangible form then each Party warrants to the other that it will destroy all electronic records of such Confidential

Information. In addition, the Distributor must return to the Supplier or, if required by the Supplier, destroy any point of sale displays and other marketing materials provided to the Distributor by the Supplier.

12.7 Notwithstanding termination of the Distributorship, this Agreement will continue to be binding on the Parties and fully enforceable in respect to the rights and obligations of each Party relating to:

- 12.7.1 the payment of any sum;
- 12.7.2 any continuing obligations to any Consumers;
- 12.7.3 Product warranty to Consumers;
- 12.7.4 Confidential Information;
- 12.7.5 return of property and transfer of Trade Marks and Intellectual Property;
- 12.7.6 Obligations in this Clause and otherwise in this Agreement that are expressly intended to apply after termination;

12.8 On termination of the Agreement:

- 12.8.1 The Distributor must promptly notify the Supplier of all stock of the Products which it has and which are not required by it to fulfil outstanding contractual obligations to Consumers.
- 12.8.2 The Supplier may (but is not obliged) within 14 days buy back all stock of the Products held by the Distributor which the Distributor is not contractually obliged to sell to its Consumers. The price the Supplier will pay for the buy back of stock will be the price paid by the Distributor for the stock plus 10% less all set offs (if any) of amounts owing by the Distributor to the Supplier. Nothing in this paragraph obliges the Supplier to buy back stock that is unfit for sale or that has been damaged. Damage includes damage to packaging.
- 12.8.3 The Distributor must, subject to this Agreement, meet all its outstanding contractual obligations in any respect to its Consumers.
- 12.8.4 If within 14 days of termination the Supplier has not purchased all the stock of the Products held by the Distributor then notwithstanding anything elsewhere contained, the Distributor will be entitled to sell all its remaining stock of the Products in the Territory.
- 12.8.5 In the event of the Supplier buying back the stock of the Products the Supplier will pay (less any set offs) the Distributor for all such stock bought back and take delivery thereof at the date and time of payment. Delivery will be at the place where the stock is stored by the Distributor.

### **13. RELATIONSHIP**

- 13.1 The Parties acknowledge that they are not in partnership, there is no joint venture between them or franchise arrangement and that the only relationship between them is that of seller (in the case of the Supplier) and as buyer (in the case of the Distributor) in respect of the Products on the terms in this Distribution Agreement. Neither Party may claim or hold itself out as having any other relationship, authority, right or entitlement to represent or act as agent of the other or to have any interest or shareholding in the other.
- 13.2 The Distributor sells all the Products to Consumers as principal not as agent for the Supplier.
- 13.3 It is expressly agreed that nothing in this Agreement will give rise to any fiduciary relationship between the Supplier and the Distributor and neither Party owes any fiduciary duty to the other in respect of its conduct.
- 13.4 It is expressly acknowledged that nothing in this Agreement confers upon the Supplier the right to direct the Distributor to conduct its business in any particular way. The Distributor acknowledges that it has not paid any premium or other sum as consideration for entering into this Agreement nor has it been required as a precondition to entering into this Agreement to purchase any Products or pay for any training or other services.

### **14. DISPUTE RESOLUTION AND JURISDICTION**

- 14.1 It is agreed by the Parties that this Agreement is to be construed in accordance with the Law of Australia and each Party covenants that it submits to the jurisdiction of the Courts of the State or Territory in which the Territory is located for the resolution of any dispute under the Agreement. If the Territory is the whole of Australia then the Parties submit to the jurisdiction of all State and Territory Courts and Federal Courts.
- 14.2 The Parties will comply with the following dispute resolution procedure:
  - 14.2.1 where a dispute arises between the Parties, the complainant Party will set out in writing and in English what it regards the dispute to be, telling the respondent Party:
    - (a) the nature of the dispute; and
    - (b) what outcome the complainant wants;
    - (c) what action the complainant Party requires in order to settle the dispute;
  - 14.2.2 Both Parties will make every effort to resolve the dispute through negotiation and will in so doing act in good faith;

14.2.3 For mediation under this Agreement:

- (a) if the Parties cannot agree under sub clause (b) within 7 days, either Party may refer the matter to a mediator; and
- (b) if the Parties cannot agree about who should be the mediator, either party may ask the Chief Executive Officer (at that time) of the Australian Commercial Disputes Centre to appoint a retired Judge or court officer or practising barrister of at least 10 years admission to the Bar to act as the mediator and that mediator will act as mediator of the dispute;

14.2.4 The mediator may decide the time and place for mediation;

14.2.5 The Parties or their legal representative(s) must attend the mediation and try in good faith to resolve the dispute through mediation;

14.2.6 The Parties are equally liable for the costs of mediation and the costs of the mediator under this part unless they agree otherwise. The Parties must pay their own costs for attending at or being represented at the mediation;

14.2.7 Nothing in this clause affects the right of a Party to take legal proceedings under this Agreement, if mediation fails to resolve the dispute;

14.2.8 Nothing contained in the dispute resolution procedures above will deny or delay any Party seeking immediate injunctive relief from an appropriate Court where in the reasonable opinion of the Party the failure to obtain such relief would cause irreparable damage to the Party concerned;

14.2.9 These dispute resolution procedures will not apply to events giving rise to a right of termination of this Agreement where there is no legitimate dispute as to the occurrence of that event.

## **15. VARIATION AND WAIVER**

15.1 This Agreement may only be varied in writing signed by both the Parties.

15.2 The waiver by any Party of any right or entitlement or to claim in respect of any breach of this Agreement must be in writing signed by the Party so waiving. No purported waiver that is not in writing and signed by the waiving Party will have any effect whatsoever.

15.3 A waiver will not preclude that waiving Party from relying upon any such right or entitlement arising in the future or to claim in respect of any subsequent breach of this Agreement even if that future right, entitlement or subsequent is the same as that previously waived.

## **16. NOTICES**

- 16.1 All Notices or requests given by either Party to the other are deemed to have been properly given if posted by mail or faxed to the addresses or fax numbers set out in Item Five of Schedule A.
- 16.2 Any Notice or request sent by fax will be deemed served on the day after faxing. A facsimile transmission record will be conclusive evidence of the date of faxing. Any Notice or request sent by mail will be deemed served 7 days after the date of posting, not including the date of posting.
- 16.3 Any Notice or request sent by a Party to the other must be signed by a director or officer of the sending Party or appear on its face (where a fax) to be so signed.
- 16.4 All Notices must be given in English.
- 16.5 Either Party may change its details for service of a Notice by serving a Notice on the other party setting out its new address for service and/or facsimile number.

## **17. ENTIRE AGREEMENT**

- 17.1 This Agreement represents the entire agreement between the Parties relating to the subject matter of the Agreement and supersedes all prior agreements, understandings, representations and warranties relating to the subject matter of this Agreement. No Party has relied on or been induced by any representations or promises made to it prior to entering into this agreement in reaching its decision to enter into this Agreement on these terms.

## **18. FORCE MAJEURE**

- 18.1 Except for obligations to make payment, non-performance by any Party will be excused to the extent that performance is rendered impossible or impractical by acts of God, lighting strike, earthquakes, floods, storms, explosions, fires and any natural disaster, acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage and revolution or governmental acts or orders or restrictions.

## **19. SEVERABILITY**

- 19.1 If any clause of this Agreement is invalid under any applicable such Law, the clause will be limited, narrowed, construed or altered as necessary to render it valid, but only to the extent necessary to achieve such validity. If necessary the invalid clause will be deleted from the Agreement and the remaining clauses will remain in full force and effect.

**20. COUNTERPARTS**

- 20.1 This Agreement may be executed in counterparts, each of which will be deemed to be an original and all of which together will constitute one instrument and Agreement.

**21. NO THIRD PARTY BENEFICIARIES**

- 21.1 This Agreement is entered into for the benefit of the Parties and may not be deemed to grant any rights or interests to any third party.

**22. LEGAL ADVICE**

- 22.1 Each Party acknowledges and represents to each other that it has had the opportunity to seek and obtain separate and independent legal advice before entering into this Agreement. If either Party has entered this Agreement without first taking legal advice it has done so at its sole and absolute discretion and it will not be entitled to rely upon the absence of legal advice as a defence to any breach of any of the clauses of this Agreement.

**SAMPLE ONLY**  
YOUR DOCUMENT WILL VARY DEPENDING ON THE ANSWERS YOU  
PROVIDE THROUGH THE BUILDING PROCESS

**EXECUTED AS AN AGREEMENT** on the day first mentioned.

**SIGNED BY**)  
**Company Pty Ltd**)  
**ACN 111 222 333** pursuant to )  
Section 127 of the *Corporations Act 2001* )  
in the presence of:

\_\_\_\_\_  
Director

Print Name:

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

\_\_\_\_\_  
Director/Secretary

Print Name:

\_\_\_\_\_  
Print Name:

**SIGNED BY**)  
**Other Company Pty Ltd**)  
**ACN 333 222 111** pursuant to )  
Section 127 of the *Corporations Act 2001* )  
in the presence of:

\_\_\_\_\_  
Director

Print Name:

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

\_\_\_\_\_  
Director/Secretary

Print Name:

\_\_\_\_\_  
Print Name:

**SAMPLE ONLY**  
YOUR DOCUMENT WILL VARY DEPENDING ON THE ANSWERS YOU  
PROVIDE THROUGH THE BUILDING PROCESS

## **SCHEDULE A**

**Item - The Territory**

Perth

**Item - The Term**

2 years

**SAMPLE ONLY**  
YOUR DOCUMENT WILL VARY DEPENDING ON THE ANSWERS YOU  
PROVIDE THROUGH THE BUILDING PROCESS

*Initial:* \_\_\_\_\_

## **SCHEDULE B**

### **The Current Products**

Product	Wholesale Price
Rodaderas	\$125 includes GST

**SAMPLE ONLY**  
YOUR DOCUMENT WILL VARY DEPENDING ON THE ANSWERS YOU  
PROVIDE THROUGH THE BUILDING PROCESS

*Initial:* \_\_\_\_\_