

Distribution Agreement

User's Guide

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Introduction to the User's Guide

Congratulations! You have purchased the *Distribution Agreement* from RP Emery & Associates.

This guide will assist you in completing your Distribution Agreement and adapting it to suit your own purposes.

A Distribution Agreement can be used in a variety of circumstances, such as when a manufacturer, supplier or head distributor, wishes to appoint another entity to distribute its products within a certain area (or an open area).

Essentially, the agreement sets out the terms which will govern the relationship between the supplier and distributor. It also addresses some of the unexpected issues which may occur in order to minimise uncertainty and prevent any disputes or misunderstands that may otherwise arise.

This User's Guide will assist you in completing your document by answering some commonly asked questions and setting out some of the issues you may wish to consider in preparing your agreement.

How to use this user's guide

We've structured this manual so it follows the same form as the Distribution Agreement.

Each section of the Distribution Agreement is covered here. We tell you what each section does, why it's in the Agreement and how you might adapt it to suit your particular circumstances more fittingly.

All you need to do is fill in the proper names, dates and details and the Agreement will be ready to use. However, if you decide to add some more and aren't sure how to do it, this manual can help.

Some areas are largely self-explanatory, while others may require more in-depth discussion.

What is a distributor?

A distributor buys or 'takes title' of goods, then on-sells them to local end users – either retailers or consumers. They may also sell to other wholesalers who in turn sell to local retailers or end users. Unlike an agent, a distributor has no right to act on your behalf and cannot bind you to their dealings with purchasers.

Distribution agreements in Australia

Distribution arrangements in Australia are based on contract law and are supplemented by equity and legislation. Unlike many EU countries and other civil law jurisdictions, in Australia suppliers and

distributors are generally free to determine the terms of their distribution arrangements, including termination terms.

What should you include in your Distribution Agreement? Here are just some of the things you should consider.

Why enter into a distributorship agreement?

A Distributor's Agreement allows you to set out the terms and conditions between the supplier and distributor up front. It provides clear boundaries about what the parties can and can't do under the arrangement and this gives the parties protection and certainty.

Some common issues addressed in a Distribution Agreement include;

- payment terms;
- costs and expenses;
- whether the distribution rights are exclusive;
- what geographical territory the distributor can operate in;
- details of the products to be distributed;
- the term of the arrangement, warranties;
- after sales services;
- whether minimum sales targets apply;
- what happens if a party breaches the agreement;
- dispute resolution procedures;
- allocation of risk;
- when title to the products passes to the distributor;
- delivery of products;
- non-payment and penalty interest and
- confidentiality provisions.

By entering into a written distribution agreement, you're setting clear boundaries for your arrangement. It also helps establish a level playing field, where both parties recognise what the other brings to the table. As with any legal arrangement, you should seek legal advice if you're unsure of your options or how best to proceed.

Before you print!

Before printing your agreement, make sure that you have taken out all of the grey fields, and replaced them with the pertinent information.

Delete the highlighted yellow notes that appear throughout your agreement. These are for your assistance only and should not appear on your printed Agreement.

Getting started – the Schedule

The first pages of your Distribution Agreement are made up of a Schedule which contains specific particulars that are referred to throughout the remainder of your agreement. Make sure that you are very precise when filling in the specific names and information required.

Items 1 and 2: Names of the parties

You will need to insert the full names of the parties here. The information you insert here will be referred to throughout the agreement and must be accurate.

Who are the parties? Are they individuals, companies or trusts?

Each party should be clearly identified, along with their contact details. Insert the full name, address and other details of the supplier and the distributor. If a company is involved, then the company name (and not the names of its directors) should be put in and its' ACN.

Item 3: Address

Clause 7 of the agreement envisages that, on receiving a purchase order, the supplier will arrange for the ordered goods to be delivered to the distributor. The costs of the freight/delivery will be incurred by the distributor (clause 7).

At Item 3 of the Schedule, insert the address the goods are to be delivered. There is provision here for the distributor to change the address by notifying the supplier in writing.

Refer to clause 7 below for more information relating to order and delivery of the product.

Item 4: Area

Define the area in which the supplier manufactures, sells or distributes the products.

The principal may have a limited area to which it has the rights to manufacture, distribute or sell the product. For example, the principal may be part of a contractual arrangement with a 'head' supplier or manufacturer, under which it is granted a defined area to conduct its business with respect to the product. If that is the case, define the area here.

The 'Area' is only mentioned once in the terms of the agreement, which is at recital 1.

Item 5: Start date

The commencement date is the date the terms and conditions contained in the agreement come into effect.

The default commencement date at Item 5 is stated as ‘the date of this Agreement’. This is the date the agreement is signed by all parties, as stated on the signing page.

Alternatively, if both parties have agreed that the agreement will start on another ‘set’ date, insert that date here.

Item 6: Term

Insert the length of time the agreement will run for.

For example, *‘three years, beginning on 1 September, 2015 and ending on 31 August 2018’* or *‘three years commencing from the date of this Agreement’*.

Item 7: Territory

Insert the territory which the supplier is granting the distributor the rights to deal with the products in under the Agreement here at Item 7.

You may appoint separate distributors for each state and this Distributor may be limited to the state of New South Wales. Alternatively, you might not want to specify a distinct territory, leaving the Distributor free to sell the Products wherever he or she chooses. If that is the case, make sure this arrangement does not conflict with any rights you may have granted other distributors, in particular, if you have granted exclusive rights to others to operate within a certain territory with respect to the goods.

You may also want to consider online sales and whether you, as the supplier, will also be restricted to operating within a defined area.

Item 8: Distribution rights

Insert here whether the Distributor’s rights are exclusive or non-exclusive – that is, whether only the distributor can sell within the territory specified in Item 7 or whether others might be given the rights to sell and market the product within the same Territory.

If the distributor is being granted exclusive rights to sell the Product within the Territory, clause 3 of the Agreement will apply. Under this clause, the Principal agrees that it will not appoint any other person to sell the products within the same Territory (among other things).

You should also note that under Australian law, it's illegal to enter into an exclusive dealing arrangement that has an anti-competitive effect. So you'll need to ensure the terms of your arrangement aren't overly restrictive.

Item 9: Minimum advertising

If the supplier requires the distributor to spend a certain amount on advertising, insert that amount here.

Clause 16 is the corresponding clause that deals specifically with advertising and promotional requirements and it refers back to this Item 9. Under clause 16.5, you will see that the Distributor is obligated to spend not less than the minimum advertising amount stipulated here at Item 9 of the Schedule, to advertise the products in the territory every year.

If there is no minimum advertising amount, insert '*nil*'.

Item 10: Minimum purchase

Is the Distributor required to purchase a minimum amount of product each year? If so, insert that amount here. Otherwise, insert '*not applicable*'.

This item corresponds directly to clause 14, which sets out in detail minimum order obligations placed on the distributor. It requires the distributor to purchase the minimum quantity specified here at Item 10 in the first year of the agreement and this will be increased by 5% each subsequent year.

If this clause does not reflect your arrangements, you can edit it to suit your needs or you can delete the clause in its entirety – just leave in the main heading so as not to throw out the numbering in the rest of the document and underneath the heading insert the words, '*not applicable*'.

Item 11: Products

Use an attachment to set out a description of the products available to the distributor and mark it as Annexure 'A'.

You can use the page titled 'Annexure A' we have provided for you at the end of the document, to type out a description of the products or you can attach your own list to the agreement after you print it and mark it as 'Annexure A'.

Item 12: Price List

Item 12 refers to a price list attached as Annexure 'B'. You will notice a page titled 'Annexure 'B' Price List' at the end of your Agreement. You can type your price list here or attach a print-out of your relevant price list and attach it here, marked with the words 'Annexure 'B' – Price List'.

For the provisions about pricing, refer to clause 8 which is discussed in greater detail below.

Item 13: Confidential information

Confidential information is defined here. The definition covers information in relation to the products which is of a confidential nature, including advertising materials and price lists. This definition is a 'catch-all' but if there is any other *specific* confidential information you know of that the distributor will be privy to in the course of the distribution relationship, you can add it here.

Note that confidential information does not include information which is already public knowledge or in the 'public domain'.

Confidential information is dealt with specifically at clause 20, which refers back to this definition. Under this clause, the Distributor agrees not to disclose any confidential information, except to the extent necessary to enable it to comply with the agreement.

Item 14: Supplier's warranty

The supplier's warranty is described as '*any warranty prescribed by the Supplier from time to time*'. You may want to attach current warranty specifics. If so, refer to that attachment here as Annexure 'C'. This definition of supplier's warranty is referred to in clauses 21.2 and 21.3.

Item 15: Licence

Trademarks are used to identify goods or brands. They can be registered or unregistered, and include words (QANTAS), logos (the flying kangaroo logo) and phrases (such as 'Flying Kangaroo').

Will you be giving the Distributor a licence to use trademarks associated with your company or products? If so, state whether the licence will be exclusive (ie. *only* the Distributor will be able to use the trademarks) or non-exclusive (other parties may be able to use the trademarks).

The licence to use the trademarks is discussed in depth at clause 18 of the Agreement. Under this clause, the supplier grants the distributor a licence of the scope defined here at Item 13 (ie. either exclusive or non-exclusive) to use the Trademarks in the Territory but only to the extent necessary to enable the distributor to exercise its' rights under the agreement.

Item 16: Trademarks

At this item, you will list the trademarks that the Distributor will be licensed to use under this agreement. This might include company or product logos or words. Refer to clause 18 for the default provisions relating to the distributors' use of the trademarks. This clause may be edited to more appropriately fit your particular arrangements.

Item 17: Penalty interest rate

Insert a percentage interest rate to be applied to late payments. Refer to clause 8.5 which relates to penalty interest. You can amend this default clause as necessary if required.

Item 18: Address for service of notices

Each party should nominate an address to which notices and communications are to be delivered. This may be an email address or a physical address.

Clause 23 of the agreement deals with how notices and communications between the parties are to be delivered.

An example of a notice under the agreement is a '*Termination Notice*' given under clause 22.

Item 19: Governing law

Nominate here which state laws will preside over this agreement, for example, 'New South Wales'. This is particularly important if the parties are located in separate states.

Item 20: Guarantors

If you require a guarantee, insert the guarantor's information here or type '*not applicable*'.

If the Distributor is a company or a trust, it is common practice for a personal guarantee to be given by its directors of the company or those who stand behind the trust. Make sure you name the individuals who will act as the guarantors here, as these are the people who agree to be responsible for the debts of the distributor should the distributor default or breach the agreement. If there is no guarantor/s, you can simply insert '*not applicable*'.

The terms of the guarantee are located at clause 34.

The recitals

The default recitals, numbered 1, 2 and 3, provide a broad outline of the background to the agreement and why the parties are entering into the arrangement.

1. Interpretation

This clause contains a number of standard provisions relating to the interpretation of the agreement.

2. Appointment

Under this clause, the supplier appoints and grants certain rights to the distributor to sell and distribute the product, use any trade secrets provided by the supplier relating to the product and to engage and appoint others to sell the product within the allocated territory.

3. Exclusivity

This clause 3 will apply if you have indicated at Item 8 that the distributor's rights within the stated territory are exclusive.

In the event the distributors' rights to deal with the product in the territory are exclusive, the supplier agrees that it won't give another distributor rights in the same territory and will use its best endeavours to make sure that the products are not sold by others in the territory.

4. Acceptance of appointment and term of appointment

Under clause 4, the distributor accepts the appointment as distributor.

5. Terms of sale of the products to the distributor

Clause 5 of the agreement concerns the terms of sale to the distributor.

Under this clause:-

- all orders are subject to acceptance by the supplier; and
- the parties agree that the distribution agreement will control all aspects of their dealings and particularly, no other terms that may be stipulated by the distributor when placing an order will apply unless agreed to in writing by the parties.

6. Order of product

This is a standard default clause dealing with the ordering process. Read it carefully to make sure it reflects your organisation's practices and amend it if required.

7. Delivery

This clause deals with the delivery of the products ordered by the distributor. It envisages the products being transported from the suppliers' warehouse to the distributor, at the distributor's expense.

The clause also addresses faulty or damaged goods received on delivery.

This is a default clause that may not be suitable for all situations. If you have made other arrangements, insert those arrangements here.

8. Price

This clause sets out the price of the products sold as per the Price List attached and marked as Annexure 'B'. The provisions allow the supplier to pass on any increases in costs, for example, during periods of inflation or production cost rises. The supplier may change its pricing at any time, by giving 60 days' prior written notice.

The distributor is responsible for freight, insurance, taxes, excises, duties, tariffs, GST and other charges. If any amount payable by the distributor becomes overdue, penalty interest will apply and the distributors account suspended.

This clause is a standard default clause and you may alter it to better reflect your organisation's terms if need be.



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