TEMPLATE SOFTWARE RESELLER AGREEMENT – USER NOTES

This is a simple "supplier friendly" B2B reseller agreement for low value/low risk software.

If the software is high risk or high value, and/or the arrangement will involve the Company (being the software supplier, not the Reseller) providing additional services to the Reseller, you should use an agreement that has been drafted for those purposes (e.g. more "belts and braces").

This template assumes:

- the product being resold is a software product that is installed and operated by an end customer (i.e. is not SaaS)
- the Company will have the contractual relationship with the end customers, and the Reseller won't deal with the software or the end customers after it is sold.

Competition issues can arise in relation to reseller arrangements, particularly for:

- exclusivity
- territorial restrictions
- restraints on competition
- pricing structures.

We suggest you consult a commercial lawyer when considering the above issues.

Where a reseller is operating outside New Zealand, we also suggest having a qualified lawyer in the relevant jurisdiction review the agreement for competition issues, unfair contract terms, and any other local "fishhooks".

The terms of the agreement are not a "one-size-fits-all" solution, and may require change to reflect the particular commercial arrangement that applies in this instance.

DISTRIBUTOR AGREEMENT

A distributor agreement for electronic products is also available on our website.

A key distinction between the distributor agreement and this one is that, in the distributor agreement, the distributor (not the product supplier) has the relationship with the end customer, and the distributor makes money via a margin on the products.

USING THIS TEMPLATE

The ***User Notes*** and the statements in the footer (all marked in red) are included to assist you to prepare this document. They are for reference only. You should delete all user notes and the statements in the footer from the final form of your document.

The use of [*square brackets*] around black text means that:

- the requested details need to be inserted
- there are different options for you to consider
- the whole clause is optional and you need to consider whether to include it, based on your circumstances and the user notes.

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Before finalising your document, check for all square brackets to ensure you have considered the relevant option and deleted the brackets.

If you delete any clause or schedule, remember to cross reference check the document.

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RESELLER AGREEMENT

DATE

PARTIES

[User note: The Agreement assumes that two companies are entering into the Agreement. Different party identifiers will be required for other entities.]

1 [***INSERT FULL LEGAL NAME***], company number [*insert company number*] (**Company**)

2 [***INSERT FULL LEGAL NAME***], company number [*insert company number*] (**Reseller**)

SECTION A: AGREEMENT AND KEY DETAILS

AGREEMENT

The Company agrees to engage, and the Reseller accepts engagement, to resell the Products on the terms of the Agreement. The Agreement comprises:

- Section A (Agreement and Key Details), including this cover page and the signature clauses; and
- Section B (General Terms).

KEY DETAILS

[User note: This section should include all of the "reseller specific" details relating to the Products to be resold. It should include sufficient detail to provide certainty to both parties about the scope of the Agreement, i.e. what is "in" and what is "out".]

ITEM	DETAIL
Start Date	[*On the date both parties sign the Agreement/[Insert date]*]. ***[User note: The Start Date is often the date of the Agreement. However, in some cases the parties may wish to have the Agreement take effect from a future date.]***
End Date	[*Insert length of the initial term of the Agreement, e.g. 12/24/36 months*] from the Start Date. ***[User note: If this is a new relationship, you should consider including a short to medium length initial term of the Agreement so that, if the relationship doesn't work, you are not "locked in" long term. Alternatively, you should include a "no fault"***

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ITEM	DETAIL
	termination right to enable you to easily exit the relationship for reasons other than breach (see clause 14.2).]
Territory	[*Insert the territory in which the Reseller may market, promote and resell the Product*]. ***[User note: Often resale arrangements are "territory specific", particularly if the Reseller has exclusive rights. This enables you to "carve up" the rights worldwide and to avoid overlap. Including a territory can also be useful in a non-exclusive arrangement, e.g. where the Reseller has knowledge of a particular local market only.]***
Brands	As at the Start Date, [*insert any Company brand, trade mark, logo and/or design that the Reseller may use to conduct the Business*].
Products	[*Insert the software products that may be resold by the Reseller, including a description of each product's core functionality*].
Currency	[*NZD/Insert the currency used in the Agreement*].
Fees	$[*List the fees payable to the Reseller by the Company for the resale of each Product*] for each Product purchased by a Customer under a Customer Agreement[*, including any renewal of that agreement*]. ***[User note: The Agreement assumes that the Company pays the Reseller a "one-off" fee per Product sold. However, depending on the type of Product and how the fee is calculated, this may require ongoing payments (e.g. if the Reseller obtains X% of the licence fee and fees for related services for a period of Y years). If you use a more complex pricing methodology, you will need to include drafting to give effect to this, including how and the extent to which these payments continue if the Agreement ends (but the Company's relationship with the Customer continues).]***
[Minimum Requirements]	[*Insert the minimum Product resale requirements of the Reseller (and the relevant period, e.g. Yearly) if the Agreement is exclusive. E.g. 100 new Customer Agreements must be entered by the Company each Year as a result of the Reseller reselling the Products or the Reseller must generate a stated amount of revenue for the Company each Year as a result of the resale activities*]. ***[User note: Include Minimum Requirements if the rights provided to the Reseller in the Agreement are exclusive. See our discussion on exclusivity in the user note to clause 2. Minimum Requirements for non-exclusive***

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ITEM	DETAIL
	Resellers may be useful in other circumstances too, e.g. where the Company incurs costs supporting an under-performing Reseller.]
Email addresses for notice	**Company** [*Insert email address*] **Reseller** [*Insert email address*]

SIGNED

[User note: Assumes two companies are entering into the Agreement. Different signature clauses may be required for other persons.]

SIGNED for and on behalf of ***[INSERT NAME OF COMPANY]*** **LIMITED** by:)

Signature of authorised signatory

Print full name of authorised signatory

SIGNED for and on behalf of ***[INSERT NAME OF COMPANY]*** **LIMITED** by:)

Signature of authorised signatory

Print full name of authorised signatory

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SECTION B: TERMS OF THE AGREEMENT

1 INTERPRETATION

1.1 **Definitions:** In the Agreement, the following terms have the stated meaning:

TERM	MEANING
Agreement	Section A (Agreement and Key Details, including the cover page and signature clauses) and Section B (General Terms).
Brands	the brands, trade marks, logos and/or designs set out in the Key Details.
Business	the promotion, marketing and reselling of the Products in the Territory.
Confidential Information	the terms of the Agreement and any information that is not public knowledge and that is obtained from the other party in the course of, or in connection with, the Agreement. The Company's Confidential Information includes Intellectual Property owned by the Company (or its licensors), and the Customer (and prospective Customer) details described in clause 14.3aiii.
Customer	a person in the Territory who is party to a Customer Agreement.
Customer Agreement	a written agreement between the Company and the Customer for the supply of Products that results from the Reseller conducting the Business.
Documentation	a hard or electronic copy of the generally released documentation relating to the Products, as updated by the Company from time to time.
End Date	the end date set out in the Key Details.
Fees	the fees set out in the Key Details.
Force Majeure	an event that is beyond the reasonable control of a party, excluding: • an event to the extent that it could have been avoided by a party taking reasonable steps or reasonable care; or • a lack of funds for any reason.

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TERM	MEANING
Good Industry Practice	in relation to an undertaking, the exercise of that degree of skill and care which would reasonably be expected from an experienced operator engaging in the same or a similar undertaking.
Intellectual Property Rights	includes copyright and all rights existing anywhere in the world conferred under statute, common law or equity relating to inventions (including patents), registered and unregistered trade marks and designs, circuit layouts, data and databases, confidential information, know-how, and all other rights resulting from intellectual activity. **Intellectual Property** has a consistent meaning and includes any enhancement, modification, or derivative work of the Intellectual Property.
Key Details	the Agreement specific details set out in Section A of the Agreement.
[*Minimum Requirements*]	[*the minimum requirements set out in the Key Details.*] **[*User note: Include only if the Key Details include Minimum Requirements.*]**
Order	a written request by the Reseller to the Company to enter into a Customer Agreement for the supply of Products.
Products	the products set out in the Key Details.
Sales Tax	goods and services tax, value added tax, sales tax or equivalent tax payable under any applicable law.
Start Date	the start date set out in the Key Details.
Territory	the territory set out in the Key Details.
Year	a 12 month period from the Start Date or the anniversary of that date.

1.2 **Interpretation:** In the Agreement:

a clause and other headings are for ease of reference only and do not affect the interpretation of the Agreement;

b words in the singular include the plural and vice versa;

c a reference to:

i a **party** to the Agreement includes that party's permitted assigns;

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ii **personnel** includes officers, employees, contractors, and agents, but a reference to the Company's personnel does not include the Reseller;

iii a **person** includes an individual, a body corporate, an association of persons (whether corporate or not), a trust, a government department, or any other entity;

iv **including** and similar words do not imply any limit; and

v **$** and **dollars** is a reference to the currency listed in the Key Details; and

vi a statute includes references to regulations, orders or notices made under or in connection with the statute or regulations and all amendments, replacements or other changes to any of them;

d no term of the Agreement is to be read against a party because the term was first proposed or drafted by that party; and

e if there is any conflict between Section B and Section A of the Agreement, Section B prevails unless expressly stated otherwise in Section A.

2 APPOINTMENT

[User note: Clause 2.1 below sets out the nature of the rights granted to the Reseller under the Agreement, including whether those rights are exclusive within the Territory. Often a reseller will seek exclusivity to avoid or limit competition in the market. From the Reseller's perspective, exclusivity provides an incentive to invest in the development of the market for the Products, knowing its work will be for its (and not its competitor's) benefit. However, the Company should carefully consider the impact of granting exclusive rights. If the Agreement is exclusive, it means that neither the Company nor a third party may sell the Products in the relevant territory. If you agree to an exclusive arrangement, you should ensure that there are limits on the exclusivity, e.g. state a limited territory for resale, keep the duration of the Agreement short, ensure that the Reseller provides adequate assurances as to its level of performance (see the Minimum Requirements), etc.. These types of limits are discussed throughout the Agreement.]

2.1 **Right to conduct the Business:**

a The Company grants to the Reseller the [*exclusive/non-exclusive*], non-transferable right to conduct the Business in accordance with the Agreement for the duration of the Agreement.

b The Reseller must use best efforts to conduct the Business.

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2.2 **Territory:** The Reseller must not market, promote, resell or distribute the Products outside the Territory. The Reseller will promptly pass to the Company details of any enquiry or order received by it from a prospective customer or reseller outside the Territory.

2.3 **Status:** The Reseller is an independent contractor of the Company. No other relationship (e.g. employment, joint venture, agency, trust or partnership) exists under the Agreement. The Agreement does not transfer or license any Company Intellectual Property to the Reseller, except as expressly set out in the Agreement.

2.4 [***Non-exclusive arrangement:*** *To avoid doubt, the rights granted to the Reseller under the Agreement are non-exclusive. Nothing in the Agreement applies to limit or restrict the Company's right to conduct the Business (and to authorise third parties to conduct the Business).*] ***[User note: Delete clause 2.4 if the arrangement is exclusive. As a general comment, practical issues in relation to the "claiming" of customers, etc., can arise with non-exclusive arrangements, particularly where the Company is directly marketing and selling its own Products in the Territory, alongside the Reseller. If you think this may be a problem, you should consider including a clause that clarifies what happens if both the Reseller and the Company (or an authorised third party) approach the same customers. This is usually determined based on who was the first person to establish a relationship with the customer.]***

3 ORDERS

[User note: Clause *Error! Reference source not found.* ***below assumes that the Reseller will procure orders for the Products from time to time within the Territory but the Company will enter into the Customer Agreement. This is often the case for resale agreements for software as it makes it easier for the Company to provide "vital" associated services, e.g. support and maintenance – this can get a bit confused if contracting through a Reseller as a "middleman". If your preferred approach is that the Reseller has the direct relationship with the Customer (which is also common), then the Agreement will need to be updated to reflect that.]***

3.1 **Placing Orders:** The Reseller must place an Order by providing the Company with the details of the prospective Customer (including full legal name and contact details), the Products required by the prospective Customer, and any other information reasonably required by the Company.

3.2 **Accepting Orders:** The Company has the right to accept or reject each Order on reasonable grounds. If the Company rejects an Order, it must provide the Reseller with its reasons for doing so.

3.3 **Customer Agreements:** An Order is not binding on the Company until the Company has entered into a Customer Agreement with the prospective Customer. The Company will use

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reasonable efforts to enter into a Customer Agreement as soon as practicable after accepting an Order.

3.4 **Advice:** The Company must advise the Reseller of the entry into a Customer Agreement.

4 [DEMONSTRATION AND TRAINING LICENCE

[User note: If the Reseller will need to demonstrate a Product and use it for training, then clause 4 should be included. Often, there is no need for demonstration and training (e.g. if the Company has good online resources that may be reviewed by a prospective Customer to assess the Products). In this case, this clause 4 should be deleted. Clauses in the Agreement are auto-numbered so deleting this clause should not affect the numbering. However, if you have manually changed a clause or are using an old version of Word or another program, you should check the numbering to ensure it is correct.]

4.1 ***Grant of licence:*** *The Company grants the Reseller a non-exclusive, non-transferable licence for the term of the Agreement to use [a single copy] of each Product in the Territory for the purposes of:*

a *evaluating and testing the Products internally;*

b *showing prospective Customers how the Products work by demonstrating the Products at the Reseller's place of business or such other location approved in advance by the Company; and*

c *training the Reseller's personnel in the conduct of the Business.*

4.2 ***Limits on use:*** *The Reseller must:*

a *not, except to the extent necessary to operate its copy of each Product in the ordinary course under clause 4.1, copy or distribute the Products or the Documentation in whole or in part in any visual or machine-readable form;*

b *not reproduce, translate, modify, vary, adapt, decompile, or reverse-engineer the Products (or cause or permit any person to do so), or otherwise attempt to derive the Products' source code from object code, except to the extent expressly permitted by any law or treaty that is in force in the Territory where that law or treaty cannot be excluded, restricted or modified by the Agreement;* ***[User note: The Agreement assumes that the Company, rather than the Reseller, will distribute copies of the Product directly to the Customer.]***

c *not sell, transfer, license, sublicense, display, lease, assign or otherwise deal with or grant a security interest in the Products; and*

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d *not merge all or any part of the Products with any other product, software or source code.*]

5 MARKETING AND PROMOTION

5.1 **General:** The Reseller must, at its own expense:

a work diligently to promote and protect the Company's interests, enhance and maintain the reputation of the Products and the Company, and act loyally and faithfully towards the Company, including:

i without limiting clause 9.5, representing the Products and Brands to Customers and prospective Customers in the most favourable manner at every reasonable opportunity; and

ii maintaining good relationships with all of the Customers and prospective Customers in the Territory; and

b use best efforts to maximise sales of the Products in the Territory.

5.2 **Marketing review:** The parties must meet every [*insert period between marketing reviews, e.g. 6*] months to:

a review the sales made by the Reseller;

b discuss opportunities and risks, the Reseller's marketing plans and forecast sales of Products; and

c discuss what assistance may be required from the Company to support those marketing plans.

6 RESELLER OBLIGATIONS

[User note: his clause includes some general obligations on the Reseller. You should review each obligation to ensure its relevance and delete subclauses as required. Where your arrangement is "industry specific" or higher risk/value, you should consider including more comprehensive obligations.]

6.1 **General:** In addition to complying with its other obligations in the Agreement, the Reseller must:

a conduct the Business in accordance with Good Industry Practice;

b comply with:

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i all applicable laws, regulations, rules and professional codes of conduct or practice when conducting the Business and performing its other obligations in the Agreement; and

ii reasonable guidance from the Company on the conduct of the Business, as updated by the Company from time to time;

c procure all licences, authorisations and consents necessary for the Reseller to conduct the Business; and

d promptly notify the Company of:

i any breach of the Reseller's obligations under the Agreement or any matter which may impact on the Reseller's ability to perform its obligations under the Agreement; and

ii any complaint relating to the Products that is received by the Reseller, together with all available information relating to the complaint.

6.2 **Requirements and restraints:** The Reseller must:

a [*meet or exceed the Minimum Requirements*]; **[*User note: Delete if no Minimum Requirements apply (e.g. if this is a non-exclusive arrangement).*]**

b avoid entering into any arrangement which would result in a conflict of interest with its obligations under the Agreement, including reselling any software, service or other product that competes with a Product; and

c without limiting clause 6.2b, during the term of the Agreement and for a period of 6 months after its termination or expiry, not directly or indirectly operate or otherwise be involved in a business that competes with the Company's business or the Products, whether as a principal, employee, partner, agent, shareholder or however else. **[*User note: If the Reseller is a company and there is a risk of the Reseller's directors and/or key personnel taking advantage of this arrangement to compete with the Company, consider seeking an undertaking from those individuals in which they personally agree to the restraint and confidentiality provisions in the Agreement. This is particularly important for "one man band" companies. Otherwise, an individual could claim that he or she is not bound by the restraint and confidentiality provisions (i.e. only the contracting company is bound). To bind the individual, confirmation in the form of a deed (or similar) should be signed before or at the same time as the Agreement. See an example of this in the Kindrik Partners template "Independent Contractor Agreement".*]**

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6.3 **Reseller records:** The Reseller must maintain complete and accurate written records of all information relating to its conduct of the Business and which may be required to enable the Company or its authorised representative to verify the Reseller's compliance with the Agreement and any payment made by or to the Reseller under or in connection with the Agreement. On request, the Reseller must make available those records to the Company, including allowing the Company to copy those records.

6.4 **Reporting:** The Reseller must provide a written report to the Company on a monthly basis from the Start Date, to be provided within 2 days of month end. The report must include:

a [*details of the Reseller's actual performance, as measured against the Minimum Requirements;*] **[*User note: Delete if no Minimum Requirements apply.*]**

b details (including names and contact details) of current sales leads, prospects and planned promotional activity, including a rolling forecast of Orders for the next [*6*] calendar months; and

c any other information reasonably requested by the Company.

7 COMPANY OBLIGATIONS

In addition to complying with its other obligations in the Agreement, the Company must:

a use reasonable efforts to support and assist the Reseller's conduct of the Business;

b at the Reseller's [*cost and*] reasonable request, provide the Reseller with: **[*User note: Delete the square-bracketed words if the Company will provide this assistance at its own cost.*]**

i any existing marketing material to enable the Reseller to conduct the Business; and

ii reasonable technical training and guidance about the Products at dates and times agreed by the parties; and

c use reasonable efforts to keep the Reseller informed about any new version of the Products and other products that the Company may be making available to the Reseller.

8 FEES

8.1 **General:**

a Subject to the remainder of this clause 8, the Company must pay the Reseller the Fees plus Sales Tax (if any) in accordance with this clause 8. The payment of Sales Tax is subject to the Reseller supplying the Company with a valid tax invoice.

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b To avoid doubt, the Reseller is not entitled to any Fee relating to a Product unless and until the Customer has paid for the Product in full.

8.2 **Invoicing and payment:**

a Within 14 days of the end of each calendar month, the Company must provide the Reseller with a monthly statement of the Fees earned by the Reseller in the previous month, including all information reasonably required to verify those Fees.

b The Reseller must notify the Company in writing of any error in the calculation of the Fees within 7 days of receiving the statement or the Reseller is deemed to have accepted the statement. Clause 15 applies to any dispute relating to a calculation error.

c The Reseller must supply the Company with a valid tax invoice for the amount of the Fees. To avoid doubt, the amount stated in the invoice must be the amount in the statement provided under clause 8.2a or as determined/agreed under clause 15.

d The Company must pay the Fees within 30 days of the later of receipt from the Customer of the payment for the Products to which the Fees relate or a valid tax invoice that complies with this clause 8.2.

8.3 **Sales Tax and deductions:**

a Other than Sales Tax, the Reseller is responsible for paying all taxes, duties, fees or other government charges relating to the Fees.

b The Company may deduct any withholding tax required to be withheld by law from the Fee payments made under this clause 8. If withholding occurs, the Company will advise the Reseller of the amount withheld at the time each payment is made.

8.4 **[*Refunds and credit:*** *If the Company repays or credits any money to a Customer relating to a Product, the Reseller must, on demand by the Company, promptly repay any Fee paid to the Reseller relating to those Products. The Company may set off against any future Fee payment any amount that becomes repayable by the Reseller under this clause but which has not been received by the Company.*] ***[User note: Depending on the circumstances, this clause may unfairly impact on the Reseller, e.g. if a contract is cancelled for reasons other than***

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Reseller default. We suggest you think carefully about how refunds and credits should work.]

9 INTELLECTUAL PROPERTY

9.1 **Products:** The Company (and its licensors) owns all Intellectual Property Rights in the Products and the Documentation. The Reseller must not contest or dispute that ownership, or the validity of those Intellectual Property Rights.

9.2 **New Intellectual Property:** As between the parties, from the date it is created, the Company solely owns[:]

a all new Intellectual Property created by the Company in the course of providing the Products or otherwise in connection with the Agreement[.][*; and*

b *all new Intellectual Property in any documentation or other materials created by the Reseller, to the extent the documentation or materials relate to the Products.*] ***[User note: Delete if the Reseller is to own the Intellectual Property in materials relating to the Products that the Reseller creates (e.g. marketing materials in other languages).]***

9.3 **Feedback:** If the Reseller or any Customer provides the Company with ideas, comments or suggestions relating to the Products or the Documentation (together **feedback**):

a all Intellectual Property Rights in that feedback, and anything created as a result of that feedback (including new material, enhancements, modifications or derivative works), are owned solely by the Company; and

b the Company may use or disclose the feedback for any purpose.

9.4 **Restrictions:** The Reseller must not:

a use the Company's Intellectual Property other than to carry out its obligations under the Agreement; [*or*]

b alter, remove or otherwise interfere with any copyright or proprietary marking on the Products, their packaging, or the Documentation[.][*; or*

c *except to the extent permitted by law, reverse-engineer, decompile, disassemble or modify the Products.*] ***[User note: Delete if the Reseller does not have direct access to the Products, e.g. where clause 4 has been removed.]***

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9.5 **Brands:**

a The Company grants to the Reseller a non-exclusive, non-transferable licence for the duration of the Agreement to use the Brands in the Territory in order to conduct the Business in accordance with the Agreement.

b The Products must be marketed and sold by the Reseller using the Brands. The Company may add or remove a Brand from the scope of the Agreement at any time by notice to the Reseller. On receipt of that notice, the definition of Brands in the Agreement is deemed to be amended in accordance with the notice.

c The Reseller must use the Brands only in accordance with any usage and marketing guidelines provided by the Company from time to time.

d All goodwill generated through the Reseller's use of the Brands accrues to the benefit of the Company.

9.6 **Notifying of issues:**

a The Reseller must promptly notify the Company:

i where the Reseller becomes aware, or reasonably suspects, that the Company's Intellectual Property Rights are being infringed, or are likely to be infringed, including any circumstance that suggests a person may have unauthorised knowledge, possession or use of the Products; and

ii of any proceeding or known intention to bring proceedings against the Reseller and/or the Company, including for infringement of Intellectual Property Rights.

b The Company has the sole right to take, defend or settle any proceeding for any alleged infringement of any Intellectual Property Right of any third party relating to the Intellectual Property of the Company.

c The Reseller must provide the Company with all assistance reasonably requested by the Company, at the Company's reasonable cost, relating to any action taken by the Company on a matter notified by the Reseller under clause 9.6a.

10 CONFIDENTIALITY

10.1 **Security:** Each party must, unless it has the prior written consent of the other party:

a keep confidential at all times the Confidential Information of the other party;

b effect and maintain adequate security measures to safeguard the other party's Confidential Information from unauthorised access or use; and

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c disclose Confidential Information to its personnel or professional advisors on a "need to know" basis only and, in that case, ensure that the personnel or professional advisor is aware of, and complies with, clauses 10.1a and 10.1b.

10.2 **Permitted disclosure:** The obligation of confidentiality in clause 10.1 does not apply to any disclosure or use of Confidential Information:

a for the purpose of performing the Agreement or exercising a party's rights under the Agreement;

b required by law (including under the rules of any stock exchange);

c which is publicly available through no fault of the recipient of the Confidential Information or its personnel;

d which was rightfully received from a third party without restriction and without breach of any obligation of confidentiality; or

e by the Company if required as part of a "bona fide" sale of its business (assets or shares, whether in whole or in part) to a third party, provided that the Company enters into a confidentiality agreement with the third party on terms no less restrictive than this clause 10.

11 WARRANTIES

11.1 **Mutual warranties:** Each party warrants that it has full power and authority to enter into and perform its obligations under the Agreement which, when signed, will constitute binding obligations on the warranting party.

11.2 **Products:** The Company does not give any warranty to either the Reseller or any Customer relating to the Products, other than the warranties:

a that the Company makes directly to Customers in a Customer Agreement or the Documentation; or

b for which the Company cannot exclude its liability.

11.3 **Prohibition:** The Reseller must not give any warranty or make any representation relating to the Products, including that the Products will be exclusively licensed or made available to the Customer or prospective Customer.

11.4 **No implied warranties:** To the maximum extent permitted by law:

a the Company's warranties are limited to those set out in the Documentation and the Agreement, and all other conditions, guarantees or warranties whether expressed or implied by statute or otherwise (including any warranty under Part 3 of the New Zealand

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Contract and Commercial Law Act 2017) are expressly excluded and, to the extent that they cannot be excluded, liability for them is limited to an amount equal to the Fees paid or payable by the Company to the Reseller in relation to the relevant Product; and

b the Company makes no representation concerning the quality of the Products, and does not promise that the Products will operate without error or interruption.

11.5 **Consumer Guarantees Act:** The Reseller agrees and represents that it is acquiring the right to conduct the Business, and entering the Agreement, for the purposes of trade. The parties agree that:

a to the maximum extent permissible by law, the New Zealand Consumer Guarantees Act 1993 does not apply to the supply of that right or the Agreement; and

b it is fair and reasonable that the parties are bound by this clause 11.5.

12 INDEMNITY

12.1 **IP indemnity:** ***[User note: The scope of the indemnity and any other indemnity provided by the Company will depend on the negotiating power of the parties, e.g. in some circumstances the Reseller may require an indemnity to cover use of the Products by the Customers in accordance with the Agreement and the Customer Agreements. Where you are supplying the Products overseas, particularly in a crowded market, you should consider seeking local advice on the scope of this indemnity.]***

a The Company indemnifies the Reseller from and against any claim or proceeding brought against the Reseller in the Territory to the extent that claim or proceeding alleges that the resale of the Products [*or the use of the Brands*] by the Reseller in accordance with the Agreement constitutes an infringement of a third party's Intellectual Property Rights in the Territory (**IP Claim**). The indemnity in this clause is subject to the Reseller:

i promptly notifying the Company of the IP Claim;

ii making no admission of liability and not otherwise prejudicing or settling the IP Claim, without the Company's prior written consent; and

iii giving the Company complete authority and information required for the Company to conduct and/or settle the negotiations and litigation relating to the IP Claim. The costs incurred or recovered are for the Company's account.

b The indemnity in clause 12.1a does not apply to the extent that the IP Claim arises from or in connection with the conduct of the Business in breach of the Agreement, including:

i the resale of the Products [*or use of the Brands*] outside the Territory; or

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ii any warranty given or representation made by the Reseller to a Customer or prospective Customer in breach of clause 11.3.

c Without limiting the indemnity in clause 12.1a, if at any time an IP Claim is made, or in the Company's opinion is likely to be made, then in defence or settlement of the IP Claim, the Company may modify or replace the items the subject of the IP Claim so they become non-infringing.

12.2 **Reseller indemnity:** The Reseller indemnifies the Company from and against any claim, proceeding, damage, loss, liability, cost and expense (including legal costs on a solicitor and own client basis) suffered or incurred by the Company resulting from:

a infringement of the Company's Intellectual Property Rights by the Reseller, including any misuse of the Brands; and

b any warranty given or representation made by the Reseller to a Customer or prospective Customer in breach of clause 11.3.

13 LIABILITY

13.1 **Maximum liability:** The maximum aggregate liability of the Company to the Reseller under or in connection with the Agreement, whether in contract, tort (including negligence), breach of statutory duty or otherwise:

a relating to any Product, must not exceed an amount equal to the Fee paid or payable by the Company to the Reseller for that Product; and

b must not in any Year exceed [*insert cap e.g. an amount equal to the Fees paid to the Reseller under the Agreement in the previous Year (which in the first Year is deemed to be the total Fees paid to the Reseller from the Start Date to the date of the first event giving rise to liability)*].

13.2 **Unrecoverable loss:**

a Neither party is liable to the other under or in connection with the Agreement for any:

i loss of profit, revenue, savings, business, data and/or goodwill; or

ii consequential, indirect, incidental or special damage or loss of any kind.

b To avoid doubt, the Reseller's liability to a Customer or any other person is a type of loss excluded under clause 13.2a.

13.3 **Unlimited liability:**

a Clauses 13.1 and 13.2 do not apply to limit the Company's liability:

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i to pay the Fees;

ii under the indemnity in clause 12.1a; or

iii under or in connection with the Agreement for:

- personal injury or death;
- fraud or wilful misconduct; or
- breach of clause 10.

b Clause 13.2 does not apply to limit the Reseller's liability:

i for breach of clause 2, [4] [***User note: Delete the reference to clause 4 if that clause is not included***], 6.1bi, 6.1c, 6.2c, 9.4 or 9.5;

ii under the indemnity in clause 12.2; or

iii for those matters stated in clauses 13.3aiii.

13.4 **No liability for other's failure:** Neither party will be responsible, liable, or held to be in breach of the Agreement for any failure to perform its obligations under the Agreement or otherwise, to the extent the failure is directly caused by the other party failing to comply with its obligations under the Agreement, or by the negligence or misconduct of the other party or its personnel.

13.5 **Mitigation:** Each party must take reasonable steps to mitigate any loss or damage, cost or expense it may suffer or incur arising out of anything done or not done by the other party under or in connection with the Agreement.

13.6 **Insurance:** At its own expense, the Reseller must maintain in effect at all times during the term of the Agreement the insurance policies, with a reputable third party insurance company, that a prudent entity conducting the Business would maintain, taking into account the Reseller's risks and potential liabilities under the Agreement.

14 TERM AND TERMINATION

14.1 **Duration:** Unless terminated under this clause 14, the Agreement:

a starts on the Start Date and ends on the End Date; but

b where there is no End Date, continues for successive terms of [*insert period, e.g. 12 months*] from the Start Date unless a party gives at least [*insert period, e.g. 30 days'*] notice that the Agreement will terminate on the expiry of the then-current term.

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14.2 **[*No fault termination:* *The Company may terminate the Agreement on at least [insert period e.g. 3 months'] prior notice to the Reseller.*] [*User note: Include clause 14.2 where it would be useful for the Company to be able to terminate the agreement "at will". If clause 14.2 is retained, clause* Error! Reference source not found. *should be titled "Other termination rights".*]**

14.3 **[*Other t*][*T*]ermination rights:**

a Either party may, by notice to the other party, immediately terminate the Agreement if the other party:

i breaches any material provision of the Agreement and the breach is not:

- remedied within 10 days of the receipt of the notice from the first party requiring it to remedy the breach; or
- capable of being remedied;

ii becomes insolvent, liquidated or bankrupt, has an administrator, receiver, liquidator, statutory manager, mortgagee's or chargee's agent appointed, becomes subject to any form of insolvency action or external administration, or ceases to continue business for any reason; or

iii is unable to perform a material obligation under the Agreement for 30 days or more due to Force Majeure.

b The Company may, by notice to the Reseller, immediately terminate the Agreement if the exercise of the remedy in clause 12.1c does not remedy or settle the IP Claim.

14.4 **[*Company termination:* *The Company may terminate the Agreement by giving at least 30 days' notice if the Reseller fails to meet or exceed the Minimum Requirements.*] [*User note: Delete if no Minimum Requirements apply.*]**

14.5 **[*Loss of exclusivity:* *Where the Company has the right to terminate the Agreement under clause 14.3[or 14.4], it may, instead of exercising that right, by notice convert the rights granted under clause 2 into non-exclusive rights. The effect of this will be that the Company (and authorised third parties) has the right to conduct the Business.*] [*User note: Include this clause only if the rights provided to the Reseller under the Agreement are exclusive. Delete the reference to clause 14.4 if that clause is not included.*]**

14.6 **Consequences of termination or expiry: [*User note: What is included in this clause will depend on your preferred approach to termination and the extent to which the Company seeks an ongoing relationship with the Reseller. There are many different options available and the approach set out in this clause may not be suitable for all*

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arrangements. In all circumstances, the Company should take care to ensure that it is not bound to deal with the Reseller in perpetuity after the Agreement has ended.]

a Termination or expiry of the Agreement does not affect either party's rights and obligations accrued before that termination or expiry.

b On termination or expiry of the Agreement, the Reseller must:

i immediately cease to:

- conduct the Business; and
- use the Products, the Documentation, the Brands and all other Company Confidential Information;

ii promptly return, destroy or erase (at the Company's option) all copies of Company Intellectual Property in the Reseller's possession (including the Products, the Documentation, and all signs, stationery, sales brochures and promotional and support materials supplied to or used by the Reseller in relation to the conduct of the Business), and (if requested by the Company) certify in writing its compliance with this clause 14.6bii; and

iii if requested by the Company, promptly deliver to the Company a complete list of names, addresses, phone numbers and other available contact details for all Customers and prospective Customers which, to avoid doubt, the Company may use to conduct the Business.

c Where the Agreement is terminated by the Company under clause 14.3ai, no further Fees are payable by the Company from the termination date. In all other cases, the Company must continue to pay the applicable Fees for Products supplied under a Customer Agreement entered into by the Company prior to the termination or expiry date. Clause 8 will continue to apply to the payment of those Fees.

d No compensation is payable by the Company to the Reseller as a result of termination of the Agreement for whatever reason.

14.7 **Obligations continuing:** Clauses which, by their nature, are intended to survive termination or expiry of the Agreement, including clauses 6.2c, 6.3, 9.1 to 9.3, 10, 12.2, 13, 14.6, 14.7 and 15 continue in force.

15 DISPUTES

[User note: Where a Reseller is operating outside New Zealand and there may be a need to enforce a legal judgment issued in New Zealand against the Reseller outside New Zealand (e.g. because that is where its assets are), it can (depending on the country

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involved) be better for disputes to be resolved using arbitration instead of the New Zealand courts. We suggest obtaining advice from a qualified lawyer in the relevant jurisdiction on this issue. The position you reach on this clause may also affect the choice of law and jurisdiction provision also (see clause 16.9).]

15.1 **Good faith negotiations:** Before taking any court action, a party must use best efforts to resolve any dispute under, or in connection with, the Agreement through good faith negotiations.

15.2 **Obligations continue:** Each party must, to the extent practicable, continue to perform its obligations under the Agreement even if there is a dispute.

15.3 **Right to seek relief:** This clause 15 does not affect either party's right to seek urgent interlocutory and/or injunctive relief.

16 GENERAL

16.1 **Force Majeure:** Neither party is liable to the other for any failure to perform its obligations under the Agreement to the extent caused by Force Majeure, provided that the affected party:

a promptly notifies the other party and provides full information about the Force Majeure;

b uses best efforts to overcome the Force Majeure; and

c continues to perform its obligations to the extent practicable.

16.2 **Rights of third parties:** No person other than the Company and the Reseller has any right to a benefit under, or to enforce, the Agreement.

16.3 **Waiver:** To waive a right under the Agreement, that waiver must be in writing and signed by the waiving party.

16.4 **Notices:** A notice given by a party under the Agreement must be delivered to the other party via email using the email address set out in the Key Details or otherwise notified by the other party for this purpose. If the notice is given under clause 14, a copy of that email must be immediately delivered (by hand or courier) to the Chief Executive or equivalent officer of the other party at the other party's last known physical address.

16.5 **Severability:**

a If any provision of the Agreement is, or becomes, illegal, unenforceable or invalid, the relevant provision is deemed to be modified to the extent required to remedy the illegality, unenforceability or invalidity.

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b If modification under clause 16.5a is not possible, the provision must be treated for all purposes as severed from the Agreement without affecting the legality, enforceability or validity of the remaining provisions of the Agreement.

16.6 **Variation:** Subject to clause[*s*] 9.5b[*and 14.5*], any variation to the Agreement must be in writing and signed by both parties. **[*User note: Delete the reference to clause 14.5 if that clause is not included.*]**

16.7 **Entire Agreement:** The Agreement sets out everything agreed by the parties relating to the Products, the relationship between the parties, and the conduct of the Business, and supersedes and cancels anything discussed, exchanged or agreed prior to the Start Date. The parties have not relied on any representation, warranty or agreement relating to the subject matter of the Agreement that is not expressly set out in the Agreement, and no such representation, warranty or agreement has any effect from the Start Date. Without limiting the previous sentence, the parties agree to contract out of sections 9, 12A, and 13 of the New Zealand Fair Trading Act 1986, and that it is fair and reasonable that the parties are bound by this clause 16.7.

16.8 **No assignment:**

a The Reseller may not assign, novate, subcontract or transfer any right or obligation under the Agreement, without the prior written consent of the Company. The Reseller remains liable for the performance of its obligations under the Agreement despite any approved assignment, subcontracting, or transfer. Any assignment, novation, subcontracting or transfer must be in writing.

b Any change of control of the Reseller is deemed to be an assignment for which the Company's prior written consent is required under clause 16.8a. In this clause, **change of control** means any transfer of shares or other arrangement affecting the Reseller or any member of its group which results in a change in the effective control of the Reseller.

16.9 **Law:** The Agreement is governed by, and must be interpreted in accordance with, the laws of New Zealand. Each party submits to the non-exclusive jurisdiction of the Courts of New Zealand in relation to any dispute connected with the Agreement.

16.10 **Counterparts:** The Agreement may be signed in counterparts, each of which constitutes an original and all of which constitute the same agreement. A party may enter the Agreement by signing and emailing a counterpart copy to the other party.

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