

1 Definitions, Interpretation and Priority

Definitions

Commencement Date means the date that both parties agree to commence the Services.

Company means Total Dealership Marketing.

Confidential Information means all information of a confidential nature that a party first becomes aware of as a result of its involvement with the other party for the purposes of this Agreement but excluding information that:

- (a) the party creates independently;
- (b) is public knowledge (other than as a result of a breach of confidentiality by that party); or
- (c) is obtained without restriction from a third party through no breach of confidentiality by that third party.

Consequential Loss means loss of revenue, loss of profits, loss of anticipated savings, pure economic loss, loss of data, loss of value of equipment (other than the cost of repair or replacement) loss of opportunity or expectation loss and any other form of consequential, special, indirect, punitive or exemplary loss or damages.

Customer means the recipient of the Proposal.

Customer Data means data relating solely to the Customer provided by the Customer to the Company or data obtained directly by the Company from the Customer's system.

Insolvency Event means:

- (a) any step is taken to enter into any scheme of arrangement with creditors;
- (b) any step is taken to appoint a receiver or manager, a liquidator, an administrator or other like person;
- (c) the suspension of payment of debts generally; or
- (d) presumed insolvency for the purposes of any provision of the *Corporations Act 2001 (Cth)*.

Intellectual Property Rights means any intellectual or industrial property rights (including any registered or unregistered trademarks, patents, designs or copyright).

Price means the charge(s) for the Products and Services.

Products means any goods provided by the Company to the Customer under this Agreement.

Proposal means the attached quotation, proposal or other similar document.

Related Body Corporate has the meaning given in the *Corporations Act 2001 (Cth)*.

Services means any services provided by the Company to the Customer under this Agreement.

Tax means any value-added or goods and services tax, withholding tax, charge (and associated penalty or interest), rate, duty or impost imposed by any authority at any time, but does not include any tax on income or capital gains.

Term means the length of time the Services are to be provided by the Company to the Customer.

Territory means the territory identified in the Proposal (if any) and otherwise Australia.

Interpretation

- (a) The expressions 'Company' and 'Customer' will include respective successors and permitted assigns and novatees.
- (b) A reference to a person includes a reference to a person, firm, corporation or other legal entity.
- (c) A term which is defined in any part of the Agreement has the same meaning in every other part of the Agreement.
- (d) The singular includes the plural and vice versa.
- (e) Different grammatical forms of the same word have the corresponding meaning.
- (f) A reference to a clause is to a clause in this Agreement, unless otherwise stated.
- (g) Examples or words of inclusion are illustrative only and do not limit the generality of the relevant subject.

2 Provision

2.1 The Company will provide and the Customer will acquire the Products and Services set out in the Proposal.

2.2 The Customer must provide the Company with all reasonable information, access, storage, facilities and assistance that the Company requires in order to provide the Products and Services.

2.3 The Company may use any of its Related Bodies Corporate to assist it with the provision of the Products and Services under this Agreement.

3 Products

3.1 Unless specified otherwise in the Proposal, the Customer must, in addition to the Price, pay for all freight, handling and insurance charges payable in connection with the delivery of the Products to the Customer.

3.2 The Company will use all reasonable endeavours to ensure that delivery times set out in the Proposal are met but the Customer acknowledges that such times are estimates only.

3.3 The Company may make part-delivery of any Products and this Agreement will apply separately to each part-delivery.

3.4 Risk in the Products passes upon delivery.

3.5 Title to the Products passes upon payment in full.

3.6 Until title has passed under clause 3.5, the Customer holds the Products as bailee and must clearly identify such Products as the property of the Company.

3.7 If the Company is reselling any third party software as part of the Products, the relevant third party licence and warranty terms and conditions apply to the provision of that software.

3.8 If the Company is not the manufacturer of the Products, the company does not make any warranties with respect to the Products and the only warranties available to the Customer are the standard third party manufacturer warranties that the Company will use reasonable endeavours to transfer the benefit of, to the Customer.

4 Services

4.1 The Company reserves the right in its reasonable discretion to:

- (a) determine which personnel will perform the Services;
- (b) replace or reassign such personnel; and
- (c) sub-contract suitable third parties to perform the Services.

- 4.2 Any alterations to the Services in terms of contact information are required in writing 14 days prior to the commencement of the campaign.
- 4.3 If the Company is providing any software or system support as part of the Services, the Customer must install the latest version of relevant software as advised or provided by the Company.
- 4.4 Where the Company is reselling standard product maintenance services as part of the Services, the relevant third party maintenance terms and conditions of supply apply to the provision of those maintenance services.

5 Invoices and Payment

- 5.1 The Customer must pay each invoice by the due date shown on it and if there is no date, within 30 days of the date of invoice. Time is of the essence for payment of invoices.
- 5.2 If the Customer disputes any invoice it must:
 - (a) raise that dispute with the Company as soon as reasonably possible and in any event within 12 months of the date of invoice; and
 - (b) pay any undisputed amount included in the invoice in accordance with clause 5.1.
- 5.3 If the Customer raises a dispute under clause 5.2, the Company will conduct prompt investigations and advise the Customer of its findings.
- 5.4 If following an investigation by the Company under clause 5.3 the parties are unable to resolve the dispute, then either party may commence proceedings or take such other actions as they deem appropriate.
- 5.5 The Company may charge the Customer for all reasonable expenses it incurs in connection with late payments by the Customer and may also charge the Customer interest at the prime lending rate of the Company's principle banker calculated daily on the total overdue amount.
- 5.6 Unless stated otherwise, the Price and any other charge invoiced by the Company under this Agreement is exclusive of Tax and the Customer must pay an additional amount equal to the Tax.
- 5.7 In some cases the Company may specify a charge followed by another amount in parentheses or as 'without GST' and 'with GST'. In those cases, the specified charge or 'without GST' amount is exclusive of GST and the amount in parentheses or specified as 'with GST' is:
 - (a) the charge inclusive of GST at the rate in effect at the date of agreement; and
 - (b) included by way of information only, and its inclusion does not limit the Customer's obligation to pay the GST exclusive charge together with an additional amount equal to the GST determined at the applicable rate.

6 Intellectual Property

- 6.1 Intellectual Property Rights in:
 - (a) the Customer Data will be owned by the Customer;
 - (b) in the Products (including any third party licensed software provided) will be owned by the manufacturer; and
 - (c) all other materials, information, know-how, systems, processes and technology of any nature that is created or used in connection with this Agreement (**Material**) that is not covered by clauses 6.1(a) or (b) will, as between the parties, be owned by the Company.
- 6.2 The Company grants the Customer a royalty free, non-exclusive, non-transferable licence to use the Intellectual Property Rights in the Material for its own internal purposes in the Territory.
- 6.3 The Customer grants the Company a non-exclusive licence to use the Customer Data for the purposes of providing the Products and Services.
- 6.4 Any third party software provided by the Company to the Customer under this Proposal will be licensed to the Customer on the relevant Vendor's terms and conditions.

7 Liability

- 7.1 To the extent permitted by law, the Company excludes all implied conditions and warranties and limits its liability for non-excludable conditions and warranties to, at the Company's complete discretion, repairing or replacing the relevant Products, resupplying the relevant or equivalent Services or, in either case, paying the Customer the cost of doing so.
- 7.2 Each party accepts liability for loss suffered by the other party (excluding Consequential Loss) arising from personal injury, breach of a confidentiality obligation owed or a third party intellectual property infringement, to the extent that such loss is caused or contributed to by a negligent act or omission of that party in connection with this Agreement.
- 7.3 Each Party excludes all liability for Consequential Loss suffered by the other party that arises in connection with this Agreement.
- 7.4 Subject to clauses 7.1-7.3, each party's liability for loss suffered or incurred by the other party in connection with this Agreement whether based in contract, tort (including negligence), statute or otherwise, is limited in aggregate to the lesser of:
 - (a) the aggregate of all invoices paid by the Customer in respect of Products and Services during the preceding 12 months prior to the occurrence of the event causing the loss; and
 - (b) AU \$5,000,000.

8 Confidentiality

- 8.1 Each party agrees to keep the other party's Confidential Information confidential and to only disclose such Confidential Information to those of its employees, agents, contractors or advisers who have a need to know.
- 8.2 The obligations of confidentiality in clause 9.1 do not apply to the extent that disclosure is required by law or the listing rules of a stock exchange or pursuant to a direction of a government body.

9 Term and Termination

- 9.1 This Agreement commences on the Commencement Date and continues for a Term of 12 months unless a different Term is specified by the parties at the time of purchase.
- 9.2 At the end of the Initial Term, this Agreement will automatically extend for successive Terms as specified in the proposal or where no Term has been specified, a Term of 12 months unless either party provides written notice to the other no less than 60 days prior to the expiry a term that the Agreement will expire at the end of the term.
- 9.3 The Customer shall remain obligated for all fees through to the date of termination

- 9.3 Either party may terminate Agreement with immediate effect by giving written notice to the other party if the other party:
- (a) breaches a material term of this Agreement and that breach is not capable of remedy or if capable of remedy is not remedied within 20 Business Days after notice is given; or
 - (b) suffers an Insolvency Event.
- 9.4 On termination of this Agreement for any reason:
- (a) the Customer must pay all outstanding invoices within 30 days of the date of termination (including any relevant Cancellation Fee);
 - (b) each party must, if requested by the other party, return all Confidential Information of the other party or if not requested then destroy such Confidential Information;
 - (c) the Customer must grant the Company access to any relevant Customer premises to retrieve any Products in respect of which title has not passed to the Customer; and
 - (d) the accrued rights and obligations of each party are unaffected.

10 General

- 10.1 Any notice given under this Agreement must be in writing delivered to the recipient's registered office or principal place of business.
- 10.2 A waiver of any right under this Agreement must be in writing.
- 10.3 If a provision of this Agreement is void, voidable or unenforceable, it will be severed and the remainder of the Agreement will not be affected.
- 10.4 The Company may, in connection with this Agreement, pay commission to any of its employees or any third party.
- 10.5 Nothing in the Agreement constitutes a relationship of employer and employee, principal and agent, partnership or joint venture between the Customer and the Company and neither party has any right to bind the other in contract or otherwise.
- 10.6 Each party will be relieved of its obligations to the extent that it is unable to fulfil them as a result of circumstances beyond its reasonable control. If such an event occurs, the affected party must notify the other party as soon as reasonably possible.
- 10.7 The Agreement is governed by the laws applicable in the state of New South Wales and the parties submit to the non-exclusive jurisdiction of the courts of that state.
- 10.8 This Agreement may only be varied in writing signed by both parties.