

YOUR LOGO
HERE

AGENCY AGREEMENT – EXCLUSIVE

BETWEEN

Company Pty Ltd ACN 111 222 333

AND

Other Company Pty Ltd ACN 333 222 111

AND

John Smith

AGENCY AGREEMENT

(Exclusive)

THIS AGREEMENT made the _____ day of _____ 20____ .

BETWEEN: **Company Pty Ltd** ACN 111 222 333 a company incorporated in Australia and having its registered office at 1 Sydney Street Sydney 2000, (the “Principal”);

AND: **Other Company Pty Ltd** ACN 333 222 111 a company incorporated in Australia and having its registered office at 1 Brisbane Street Brisbane 7000 , (the “Agent”) ;

AND: **John Smith** of 1 Perth Street Perth 5000 (the “Director”).

RECITALS:

- A. The Principal carries on the business described in Part A of the Schedule (the “Business”) and has decided to appoint the Agent to act as an exclusive agent for the purpose set out in Part B of the Schedule (the “Purpose”) during the period set out in Part C of the Schedule (the “Term”) and on the terms contained in this Agreement.
- B. The Agent has agreed to act as an exclusive agent of the Principal for the consideration set out in Part D of the Schedule (“the Agent’s Fee”) and on the terms set out in this Agreement.
- C. The Director is a director of the Agent and has entered into this Agreement for the purpose of guaranteeing to the Principal the due and punctual performance by the Agent of this Agreement and to provide his/her own undertakings and promises to the Principal.

THE PARTIES AGREE AS FOLLOWS:

1. APPOINTMENT OF AGENT AND RELATIONSHIP

- 1.1. The Principal hereby appoints the Agent as its exclusive agent for the Purpose during the Term to provide the services as set out in Part E of the Schedule (the “Services”) to the Principal with the express powers (the “Powers”) to so act as set out in Part G of the Schedule.

- 1.2. The Principal appoints the Agent on an exclusive basis contingent upon the minimum performance requirements set out in the key performance indicators (**the “KPIs”**) in Part F of the Schedule.
- 1.3. If at any time the Agent does not meet the KPIs, the Principal reserves the right in its absolute discretion and without providing any reason other than the Agent’s failure to meet the KPIs, to give notice to the Agent:
 - (a) terminating the exclusivity of the agency; or
 - (b) terminating the agency,notwithstanding that the Term has not expired.
- 1.4. The Agent hereby accepts its appointment as exclusive agent of the Principal for the Purpose and to provide the Services during the Term and acknowledges that its authority to act as Agent is limited to those Powers set out in Part G of the Schedule or as amended from time to time as provided for in Clause 3.5.
- 1.5. This appointment does not create any relationship between the Principal and the Agent other than the agency relationship as created by this Agreement. In particular there is no joint venture, partnership, or employment relationship between the Principal and the Agent.
- 1.6. Where the Services involve the promotion of, marketing of, introduction of or sale to potential customers or existing customers of the Principal of any of the Principal’s goods, products or services the Agent will in all those activities be acting as agent of the Principal and not as a principal in its own right. Any sale of any goods, products or services by the Agent to a customer or potential customer will be strictly as agent for the Principal.
- 1.7. The Agent acknowledges that it owes a duty to promote the interests of the Principal and to avoid conflicts between its own interests and the interest of the Principal. The Agent further acknowledges that out of the provision of the Services it will not without the express knowledge and consent of the Principal make any profit, receive any sum or commission from any other person out of or as a consequence of performing the Services.

2. REPRESENTATIONS BY THE AGENT AND DIRECTOR

- 2.1. The Agent represents to the Principal that:
- 2.1.1. it is competent, experienced and has suitably qualified staff including the Director who are able to properly, lawfully and efficiently provide all the Services as and when required during the Term;
 - 2.1.2. it is able to act as the Principal's exclusive Agent for the Purpose during the Term;
 - 2.1.3. the Powers are sufficient to enable the Agent to perform the Services and thereby achieve the Purpose; and
 - 2.1.4. it is not currently acting for or in any way involved contractually or otherwise with any competitor of the Principal.
- 2.2. The Director and the Agent jointly and separately undertake to the Principal that the Director does and will work full time for the Agent during the Term and will be, as an employee of the Agent, primarily responsible for and involved in the provision of the Services.

3. AGENT'S FEES AND EXPENSES

- 3.1. Subject to 3.2, the Principal undertakes to the Agent and agrees to pay to the Agent the Agent's Fee as set out in Part D of the Schedule at the times and in amounts as set out in Part D of the Schedule. Where in addition to a bare retainer fee the Agent's Fee also includes an entitlement on the part of the Agent to receive a commission or success fee in respect of the provision of the Services or as a result of a sale or event occurring, then the Principal undertakes to the Agent to also pay such commissions or success fees as and when they become due and payable.
- 3.2. Notwithstanding anything in 3.1, the Principal will not be liable to pay any Agent's Fee including commissions or success fees (if any) unless it has received a tax invoice that complies with the goods and services tax ("GST") legislation in Australia from the Agent. Provided there is no dispute as to the amount set out in the tax invoice, the Principal must pay to the Agent the amount set out therein within 28 days of its receipt by the Principal.
- 3.3. The Agent must bear and be responsible for all usual and normal operating expenses involved in providing the Services. Without limiting the generality of what are usual and normal operating expenses, the Agent acknowledges that these include:

- 3.3.1. the administration and management costs of operating the Agent's business including the provision of the Services and all wages, salaries and bonuses, superannuation and other expenses of its employees and staff including the Director;
 - 3.3.2. all computer equipment, motor vehicles, travel expenses and accommodation expenses alike;
 - 3.3.3. all costs, premiums and other payments in any way related to any insurances that are in any way associated with the Agent's business;
 - 3.3.4. all entertainment costs associated with the Agent's business in providing the Services;
 - 3.3.5. all taxes State or Federal in any way relating to the revenue earned by the Agent, the Director and the Agent's staff including all income taxes, payroll taxes and fringe benefit taxes; and
 - 3.3.6. all training costs and expenses associated with the provision of the Services by the Agent.
- 3.4. Where the Principal requests the Agent to incur any expense and such expense is of an unusual nature and is not a normal expense of conducting the Agent's business or in providing the Services, the Agent may require the Principal to reimburse or pay in advance any such cost or expense as a precondition to incurring it. Without limiting this Clause, unusual or abnormal expenses include any overseas air travel, overseas accommodation or providing any facility or service at the Principal's request not reasonably contemplated as being part of the Services.
- 3.5. The Principal may at any time in writing extend the Powers as set out in Part G of the Schedule at the Principal's absolute discretion. Unless the Agent's activities or conduct are expressly authorised as part of the Powers or the Principal has in writing expressly authorised such conduct, the Agent must not exceed the Powers set out in Part G in any of its dealings in acting as Agent for the Principal. Both the Director and the Agent hereby jointly and separately undertake to indemnify and keep indemnified the Principal against any loss, liability, cost or expense which the Principal might suffer or incur as a direct or indirect consequence of any breach of this subclause by the Agent. A breach of this subclause constitutes a breach by the Agent of an essential term of this Agreement and entitles the Principal to terminate this Agreement.

- 3.6. The Principal may at any time ratify in writing any action, conduct or activity by the Agent which if not ratified would constitute a breach for the purposes of subclause 3.5.

4. COMPLIANCE WITH LAWS

- 4.1. The Agent and the Director jointly and severally represent to the Principal that the provision of the Services will not at any time during the Term constitute 80% or more of the Agent's gross revenue in its business for any financial year of providing the Services. The Principal in entering into this Agreement is relying on the complete truth and accuracy of this representation. If at any time during the Term the Agent or the Director become aware of any circumstance that might have caused the gross revenue earned by the Agent under this Agreement to be 80% or more of the gross revenue of the Agent's business for any financial year, then the Agent or the Director must immediately notify the Principal in writing to that effect.

This is an essential term of this Agreement. If the Agent's gross revenue is 80% or more derived from the Agent's Fee in any financial year then the Principal may at its discretion terminate this Agreement by giving written notice to the Agent to that effect.

- 4.2. Within three (3) months of the end of each financial year during the Term the Agent must provide a written statement from its accountant to the effect that its gross revenue for the immediate preceding financial year earned as the Agent's Fee from this Agreement did or did not constitute 80% or more of the Agent's gross revenue for that financial year.

- 4.3. The Agent must ensure that throughout the Term it complies with all employment laws, occupational health and safety laws, pays all its taxes and duties as and when the same fall due, maintains full worker's compensation insurance cover as required by law and all other insurances that it is by statute required to maintain, makes pays and contributes all statutory superannuation payments which by law it is obliged to pay and otherwise meets all its legal obligations. The Principal may at any time require the evidence of such compliance and the Agent must promptly provide such evidence. A receipt of payment or a provision of a copy of a Certificate of Currency in respect of an insurance policy will be sufficient evidence of such compliance.

- 4.4. The Agent must not in any of its dealings or activities with potential customers or customers or any other person in providing the Services engage in conduct that is

misleading or deceptive or likely to mislead or deceive any person in any way including, but without limitation, as to the nature, quality, origin, specification, use, maintenance or standards of any of the products or services of the Principal or otherwise as to the Business. If the Agent breaches this subclause, the Agent and the Director jointly and each separately indemnify the Principal against any loss, liability or damage, costs or expense which the Principal might suffer or incur as a direct or indirect consequence of such breach. A breach of this subclause is a breach of an essential term of this Agreement.

5. PRINCIPAL’S DIRECTIONS AND AGENT’S BUSINESS

- 5.1. The Agent must follow all reasonable and lawful directions given by the Principal relating to the Services. Nothing in this subclause may be construed as entitling the Principal to give the Agent instructions or directions as to how it is to conduct its business.
- 5.2. Subject to this clause, the Principal acknowledges that the Agent is free to carry on any and all businesses and activities as it thinks fit.
- 5.3. The Agent and Director jointly acknowledge that they stand in a fiduciary relationship with the Principal and will not conduct their business in such a way as to breach any of their fiduciary duties owed to the Principal. In particular, the Agent and the Director jointly and severally undertake not to act as Agent or consultant for or have any direct or indirect interest or involvement in any business that is competitive with the Business during the Term and for a period of 5 years within a radius of 500 kilometres of the Principal’s place of Business as set out in Part H of the Schedule. The parties agree and acknowledge that this restraint is reasonable in order to protect the goodwill of the Business.
- 5.4. The Agent must not at any time disparage or bring into disrepute the Principal, the Business or the products or services of the Principal.

6. CONFIDENTIALITY

- 6.1. Each party undertakes to the other to keep strictly confidential all information which either party discloses to the other about the other’s business, its strategies, services and /or products and which is expressed to be confidential or is by its nature confidential. Each party further undertakes and promises to the other that it will only use such information in good faith and for the proper and lawful performance of its obligations under this Agreement.

- 6.2. Neither party may permit or give access to any confidential information to any third party without the express prior written consent of the party disclosing such confidential information.
- 6.3. Each party acknowledges that damages alone would not be a sufficient remedy for a breach of this clause or a threatened breach of this clause, and that any breach or threatened breach entitles the party whose confidential information is disclosed or threatened to be disclosed in breach of this clause to seek injunctions, damages and such other orders as maybe necessary to protect its confidential information.
- 6.4. A breach of this clause is a breach of an essential term entitling the party not in breach to terminate this Agreement.

7. INTELLECTUAL PROPERTY

- 7.1. Nothing in this Agreement gives either party any interest or right in the intellectual property of the other party.
- 7.2. During the Term the Agent may use under licence hereby granted the logos, designs, brochures and marketing materials that the Principal provides to it. Subject to any limitations imposed by the Principal in respect of such intellectual property, the Agent may reproduce the same provided that such use or reproduction is strictly and exclusively for the purpose of providing the Services during the Term and is done in good faith and for the dominant purpose of the benefit to the Principal.
- 7.3. The Principal may give such directions, impose such limitations as it thinks fit and require such undertakings as it deems necessary or reasonable in order to protect its intellectual property and the Agent must strictly comply with all those directions, limitations and give such undertakings in respect of such use of the Principal's intellectual property. This is an essential term and if breached the Principal may immediately terminate this Agreement by giving the Agent notice in writing to that effect.
- 7.4. If there is a breach of this clause, the party in breach must indemnify and keep indemnified the other against all losses liabilities, costs and expenses which the party not in breach thereby directly or indirectly sustains as a consequence of that breach. In the case of any breach by the Agent, such breach will be regarded for all purposes as a breach by the Director.

8. GOOD FAITH AND CO-OPERATION

- 8.1. Each of the parties undertakes to the other that in all their activities and in the performance of their obligations and exercise of their rights under this Agreement they will at all times act in good faith towards the other party and have regard to the reasonable benefits and entitlements which the other party is entitled to expect from this Agreement.
- 8.2. Notwithstanding subclause 8.1, should a party breach any of the terms of this Agreement then the parties not in breach will not be constrained or prevented from taking any action which it deems prudent or reasonable to protect their rights and in those circumstances subclause 8.1 does not apply.

9. TERM AND TERMINATION

- 9.1. At the end of the Term this Agreement may continue and thereafter may be terminated by either party giving the other 3 months prior written notice to that effect. For the purposes of this clause, the Principal will be regarded as one party and the Agent and Director collectively as the other party.
- 9.2. Either party may terminate this Agreement if the other party commits a breach of an essential term by giving written notice to the other party setting out the essential term that has been breached and the details of that breach. Such termination will take effect immediately upon the Service of such notice of termination.
- 9.3. In all circumstances where a clause has been breached and it is not an essential term of this Agreement, the party not in breach will be entitled to give written notice to the other party requiring the breach to be remedied and if it is not remedied within seven days (7) the party not in breach may terminate this Agreement.
- 9.4. On termination each party must promptly return all property in its possession that is owned by the other party. In the case of brochures and/or marketing materials containing the logos of either party, those documents must be returned to the other party or, if the other party requests, such documents must be destroyed and evidence thereof provided.
- 9.5. An essential term is a term of this Agreement that is specifically identified as an essential term or is a term of this Agreement which by its nature is of fundamental importance to either party and if not included that party would not have entered this Agreement.

10. WAIVER AND VARIATIONS

- 10.1. No party shall be deemed to have waived any breach or its entitlement to expect compliance with any clause of this Agreement unless such waiver is in writing signed by the party waiving such breach or non-compliance.
- 10.2. No variation or amendment to this Agreement will have any effect whatsoever unless it is in writing and signed by all the parties to this Agreement.

11. GUARANTEE BY DIRECTOR

- 11.1. The Director guarantees to the Principal the due and punctual performance by the Agent of all of its obligations under this Agreement and such guarantee continues during the whole of the Term of this Agreement and thereafter to the extent to which there are continuing obligations on the part of the Agent owed to the Principal.
- 11.2. As a separate undertaking on the part of the Director, the Director undertakes to the Principal that if the Agent fails to perform any of its obligations under this Agreement then the Director will himself/herself perform such obligations and do all such things as the Principal may require of the Director in order to achieve compliance with any particular obligation imposed on the Agent under this Agreement.
- 11.3. The Director undertakes to indemnify and keep indemnified the Principal against any loss, liability or damage, cost or expense which the Principal might sustain as a direct or indirect result of any failure by the Agent to perform any of its obligations as set out in this Agreement or arising out of any breach by the Agent of this Agreement.

12. INDEPENDENT LEGAL ADVICE

- 12.1. The parties acknowledge and represent to each other that they have had the opportunity to seek separate and independent legal advice as to the terms of this Agreement and as to the rights conferred and obligations imposed on upon them. If any party has failed to seek such independent legal advice, that party enters this Agreement at their own risk and will not be entitled to rely upon any failure to seek such advice to avoid any obligation or liability under this Agreement.

13. WHOLE AGREEMENT AND IMPLIED TERMS

- 13.1. The parties acknowledge that the express terms of this Agreement represent the whole Agreement between them and that there are to be no implied terms implied by statute or by law into this Agreement and to the fullest extent possible all implied terms that can be expressly excluded are hereby so excluded. Nothing in this clause purports to exclude any term which under statute cannot be excluded.

14. JURISDICTION

14.1. This Agreement shall be construed in accordance with the laws of Australia and in particular the laws of the State/Territory of New South Wales and each party to this Agreement expressly consents to the jurisdiction of the Courts of the State/Territory of New South Wales for the purposes of determining any dispute arising out of this Agreement.

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

EXECUTED by all the Parties as an Agreement on the day and year 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
Print Name:

Director/Secretary
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
Print Name:

Director/Secretary
Print Name:

SIGNED BY)
John Smith)
in the presence of:

Signature of Witness
Print Name:

Signature
Print Name:

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

SCHEDULE

PART A – The Business

Manufacture of gizmos

PART B - The Purpose

To promote the principles products

PART C - The Term

Two (2) years

PART D - The Agent's Fee

\$125

PART E - The Agent's Services

to sell the products

PART F – Key Performance Indicators (the KPIs)

The Agent must sell at least 500 Products per year.

PART G - The Agent's Powers

To show the samples of the products

PART H - The Principal's Place of Business

1 Brisbane Street Brisbane 7000

SAMPLE ONLY
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PROVIDE THROUGH THE BUILDING PROCESS

NOTES TO AGENCY AGREEMENT (EXCLUSIVE)

This is an exclusive agency agreement. An exclusive agency agreement is likely to be entered into generally in either of these situations:

- where the Principal does not wish to maintain rights to undertake the same services;
- where the Principal is prepared not to appoint another agency so long as certain milestones/KPIs/minimum service levels are met by the agent.

If the Principal's business requires certain licences or certification (for example, pursuant to Federal or State laws), it may be appropriate to inquire whether the proposed Agent company has or can obtain the relevant licence or certification.

LAWLIVE recommends: This is a complex document which involves the creation of complex legal rights and obligations and may give rise to various taxation and liability consequences. The best way to use this document is to complete it, print it out, print out all of the checklists that apply to it and all other LawLive information that relates to this type of document. When you have done this, LawLive recommends you read it carefully and instruct lawyers to assist you in the finalisation of the document and that you take tax advice from your accountant or tax adviser as to any income tax, capital gains or GST consequences.