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WHAT'S IN A SUPPLY AGREEMENT?

This paper covers the function and indicative terms of a Supply Agreement. Sometimes this is a stand-alone agreement. Other times the terms may be part of a broader arrangement, such as a Franchise Agreement.

The function of a Supply Agreement is to record obligations to sell and buy quantities of goods over time. If the Purchaser of the goods is restricted as to where or to whom the goods may be on-sold, the arrangement is usually called a Distribution Agreement and has additional terms to that effect.

Parties: The parties will be the vendor of the goods (who perhaps is not the manufacturer of those goods) (**Vendor**) and the purchaser of those goods (who perhaps will on-sell the goods or use them in manufacture) (**Purchaser**).

Supply: The Vendor agrees to sell the goods to the Purchaser who agrees to buy them.

Time: The supply usually starts on execution of the agreement. It usually ends on the earliest of:

- a specified termination date (subject to any rights of extension or renewal)
- breach of contract by a party for a specified number of days
- insolvency of a party.

Scope of Goods: The agreement will identify the goods concerned. It may also set out the specifications of those goods, such as their source, composition, size or colour. It might also bring in any improved goods of the same kind that the Vendor later makes available to the market. The Vendor may (but usually does not) promise to develop and enhance the goods during the period. If operating or maintenance instructions are required by end-users, these should be included.

Exclusivity: Does the agreement prohibit the Vendor from (directly or through a third party) selling the same goods in the same market as the Purchaser?

Manufacturing: The Vendor may be obliged to supply a fixed quantity, or to supply only to order, or to supply only if sufficient inventory is on hand to satisfy orders. The agreement might say that if the Vendor has competing buyers for the same inventory, the Vendor is obliged to prefer this Purchaser.

Intellectual Property: If the goods are of a kind protected by a patent or registered design, then usually:

- the Vendor warrants it owns the intellectual property and that it does not infringe a third party's rights
- the Vendor must maintain registration of the intellectual property during the supply
- the Vendor may be obliged to take steps against an infringer of the intellectual property.

Orders: How many days in advance must the Purchaser place an order with the Vendor? Is there a minimum quantity for any one order? May the Vendor decline an order in whole or in part?

Take or pay: If the Vendor is sourcing goods specifically for the agreement, the Purchaser may become subject to "take or pay" – if the Purchaser does not order and pay for a minimum quantity, the Vendor may sell the shortfall to a third party and have recourse to the Purchaser if net sale proceeds are less than what would they would have been on a sale to the Purchaser.

Prices: While price depends on the circumstances, these are relevant:

- Are prices inclusive of weighing, testing, certification, packaging, GST, shipping and transport costs?
- Are prices in Australian dollars?
- Are prices changeable over time and if so, by reference to what?
- Is there a discount for volume?
- Is the Purchaser assured of prices no higher than those being charged by the Vendor to third parties?
- Is a deposit payable with each order?
- Are prices secured by a letter of credit, bank guarantee or other security?

- When is the price payable?
- Is there a discount for early payment?

Product Warranties: The Vendor may be required to warrant that goods supplied:

- conform to specifications in the agreement
- conform to the order
- are shipped in time to meet the requirements of the order
- conform to those product warranties that the Purchaser will give to its customers when it on-sells the goods.

If the Vendor intends to limit its liability for a defective supply, this should be stated. Often a Vendor will undertake to repair or replace defective goods, but not be liable for any consequential loss the Purchaser or its own customer may suffer.

Risk of loss or damage: At what time does risk of loss or damage to the goods pass from the Vendor to the Purchaser?

Title: At what time does title (ownership) in the goods pass from the Vendor to the Purchaser?

International Aspects: An agreement between residents of different countries should address:

- whether *The United Nations Convention on Contracts for the International Sale of Goods* will apply
- whether *Incoterms 2000* (published by the International Chamber of Commerce: ISBN 92-842-1199- 9) will apply
- if payment is supported by a letter of credit, the rules of *The ICC Uniform Customs and Practice for Documentary Credits* (published by the International Chamber of Commerce: ISBN 92-842-1155-7).

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