

## BARCODE ESSENTIALS

### DISTRIBUTOR AGREEMENT TERMS & CONDITIONS

#### BACKGROUND:

- A. Basis has developed the Product.
- B. Basis wishes to engage the Distributor for the purpose of marketing and procuring the sale of the Product to customers within the Territory on the terms set out in this Agreement.

#### IT IS AGREED:

##### 1. Definitions

Unless the context otherwise requires, in this Agreement:

**Activated Redemption Code** means a Redemption Code that has been redeemed as a License File for the Product;

**Claim** includes any claim, damage, demand, liability, cost, loss, proceeding, right of action and claim for compensation;

**Confidential Information** means all trade secrets, ideas, know-how, concepts and information whether in writing or otherwise relating in any way to:

- a) either party, their employees or their customers;
- b) the Product;
- c) Intellectual Property Rights;
- d) Wholesale Price List;
- e) a party's affairs or business, sales, marketing or promotional information; and but does not include information that:
  - i) is, or becomes part of, the public domain otherwise than because of a breach of this Agreement by either party or a breach of an obligation of confidentiality by any person; or
  - ii) is lawfully obtained by either party from another person without any restriction as to use and disclosure (other than where the person from whom the information is obtained breaches an obligation of confidentiality by providing the information); or
  - iii) was in either party's possession prior to disclosure to it by the other party;

**Copyright** means:

- a) any copyright under the Copyright Act 1968 (Cth);
- b) any copyright under the Law of a country other than Australia; and
- c) rights in the nature of or analogous to the rights in (a) or (b) under the Law of Australia or any other country (including future copyright and rights in the nature of or analogous to copyright);

**Documentation** means the user guides, reference manuals, videos and other materials developed by Basis for use in connection with the Product;

**End User** means any Person who obtains copies of the Product solely for its own internal use from a Distributor in the Territory;

**EULA** means the written End User License Agreement between Basis and an End User pursuant to which the End User obtains the limited right to use the Product, as updated from time to time and available from <http://www.barcodeessentials.com/EULA.aspx>;

**Intellectual Property Rights** means any and all intellectual and industrial property rights throughout the world including rights in respect of or in connection with:

- a) any Confidential Information;
- b) Copyright;
- c) inventions (including patents);
- d) trade marks and service marks; and
- e) designs and circuit layouts,

whether or not now existing and whether registered or registrable and includes any right to apply for registration of such rights and includes all renewals and extensions;

**Law** means the applicable law under the governing law defined in clause 12.4;

**License File** means a coded binary file containing the Product, generated using a Redemption Code;

**Party** means a Person who is party to this Agreement and their respective successors, trustees and permitted assigns;

**Person** means and includes any individual, corporation, trust, estate, partnership, joint venture, company, association, league, governmental bureau or agency, or any other entity regardless of the type or nature thereof;

**Product** means, individually and/or collectively, the software components, packages, usage rights and Documentation specified in Item 5;

**Redemption Code** means the unique code issued for each paid order of the Product that is redeemable as a License File for the Product;

**Restock Policy** means the terms and conditions listed in clause 5;

**Technical Support** means and includes advice, training, information and other support regarding the selection, installation, maintenance, and application of the Products;

**Term** means the term of this Agreement specified in Item 2 and extended under clause 7;

**Terms of Sale** means the terms of sale as defined in clause 6.3;

**Territory** means the territory in which the Distributor's rights under this Agreement apply, being the territory specified in Item 4, as varied by agreement between the parties from time to time;

**Wholesale Price List** means the list showing the price including currency at which the Distributor may buy the Product from Basis, as notified to the Distributor by Basis and updated in writing from time to time.

## **2. Interpretation**

- a) Unless the context otherwise requires, reference to:
  - i) one gender includes the others;
  - i) the singular includes the plural and the plural includes the singular;

- ii) a person includes a partnership, body corporate, association (whether incorporated or not), government and governmental, semi governmental and local authority or agency;
  - iii) a party includes the party's executors, administrators, successors and permitted assigns;
  - iv) a statute, regulation or provision of a statute or regulation (Statutory Provision) includes:
    - A. that Statutory Provision as amended or re-enacted from time to time; and
    - B. a statute, regulation or provision enacted in replacement of that Statutory Provision;
  - v) an Item is a reference to an Item in the Schedule of Items to this Agreement;
  - vi) a clause or sub-clause is to a clause or sub-clause of or to this Agreement;
  - vii) dollars or "\$" means Australian dollars unless specifically noted.
- b) Including and similar expressions are not words of limitation.
  - c) Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.
  - d) Headings and the table of contents are for convenience only and do not form part of this Agreement or affect its interpretation.
  - e) A provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of this Agreement or the inclusion of the provision in it.
  - f) If a party consists of two or more persons, this Agreement benefits and binds them jointly and severally.
- A reference to a specific time for the performance of an obligation is a reference to that time in the state, territory or other place where that obligation is to be performed

### **3. Appointment as Non-Exclusive Distributor**

The Agreement being entered into is a non-exclusive distributor agreement and Basis makes no warranty as to the number of distributors than can be appointed within the territory.

### **4. Stock**

During the Term, the Distributor:

- a) is not required to hold a minimum quantity of stock of the Product;
- b) may pre-purchase stock of the Product at any time:
  - i) on cash account using advertised payment options to complete payment in advance; or
  - ii) by supplying a purchase order to Basis not exceeding the value of the Distributor's available account credit, where Basis has approved a credit account for the Distributor and where the purchase orders lists:
    - A. Purchase Order number,
    - B. SKU number and name from the Wholesale Price List,
    - C. Quantity per SKU,
    - D. Goods and Services Tax (GST) as applicable to Australian entities, and
    - E. Delivery address;
- c) agrees that all stock purchased is subject to the Terms of Sale;

- d) agrees that payment is required in full prior to supply of the Product, except where Basis has approved a credit account for the Distributor and a purchase order is supplied;
- e) acknowledges that all returns of the Product are subject to the Restock Policy.

## **5. Restock Policy**

The Distributor agrees that:

- a) an application to restock a Redemption Code for a Product purchase, for refund or credit on the Distributor's account, must be submitted to Basis in writing;
- b) all refunds, if approved, will be applied to the card or account used for the original purchase, or to an alternative account nominated by the Distributor at Basis' option;
- c) an application to restock will only be accepted by Basis if:
  - i) no more than 90 days has passed since the original purchase date; and
  - ii) the Redemption Code is not an Activated Redemption Code at the date it is checked by Basis and accepted for restocking, where such date may be later than date of the Distributor's application to restock; and
  - iii) the Redemption Code was originally purchased by the Distributor;
- d) applications to restock not meeting the acceptance requirements in sub-clause (c) will be rejected;
- e) the restocking fee specified in Item 6 applies to all Redemption Codes accepted for restocking and will be deducted from any refund or credit amount.

## **6. Distributor Obligations**

### **6.1. General obligations**

During the Term, the Distributor:

- a) must promote and market the Product in the Territory;
- b) may represent itself as being an authorized distributor of the Product;
- c) must ensure that all advertising, marketing or promotional material prepared by or on behalf of the Distributor relating to the Product or using any trade mark (registered or unregistered) owned by Basis in respect of the Product complies with guidelines for promotion as issued by Basis from time to time;
- d) must use its best efforts to be competent, knowledgeable, and conversant with all aspects of the Product;
- e) must promptly communicate to Basis any complaints or technical issues with the Product made by customers;
- f) must not make any representations or warranties to customers in relation to the Product on behalf of Basis;
- g) must not engage in any false, misleading or deceptive conduct in relation the Product.

### **6.2. Sale of the Product**

- a) For all orders placed by the Distributor, the Distributor must:
  - i) pay or cause to be paid to Basis, in the manner or by the means nominated by Basis from time to time, the total price for the Product quantity ordered in accordance with the then current Wholesale Price List, including any applicable taxes;
  - ii) pay invoices issued by Basis against the order within 30 days of the invoice date;

- iii) pay a late payment fee of 15% of the total invoiced amount for invoices against the order that are not paid within 30 days of the invoice date.
- b) The Distributor acknowledges that Basis is not required to provide End User access to the Product until the purchase price for the Product has been paid in full, and is entitled to revoke an End User's access rights if the payment is subsequently dishonoured or required to be refunded to the payer.
- c) Without prejudice to any right or cause of action available to Basis to revoke End User access to the Product for non-payment by either the End User or the Distributor, and at its sole discretion, Basis may provide an End User with access to the Product in advance of payment of the purchase price by the Distributor where Basis has approved a credit account for the Distributor and the Distributor has supplied Basis with a purchase order for the Product in accordance with requirements of clause 4.

### **6.3. Terms of sale**

During the Term, the Distributor agrees that:

- a) the Product remains the sole property of Basis until the purchase is completed by payment in full of all fees inclusive of purchase price of the product plus any applicable sales tax where such sales tax will be based on the bill-to address and the sales tax rate in effect at the time the order is processed and will only be charged tax in states, regions and territories where tax for digital goods applies in accordance with international tax treaties;
- b) all sales of the Product are final and that End User product evaluations must be completed in trial mode prior to purchase;
- c) if the Product becomes unavailable following completion of a purchase but prior to End User redemption of a Redemption Code, their sole remedy is a refund where refund requests must be submitted within 14 days of purchase and where refunds will not be offered if the product is still available or for Activated Redemption Codes or for Redemption Codes that were not purchased by the Distributor;
- d) where the product is found to be defective their exclusive and sole remedy is to obtain a replacement or refund at the discretion of Basis in accordance with the Australian Trade Practices Act of 1974;

### **6.4. Payment of costs**

The Distributor is responsible for all the Distributor's costs associated with its obligations under this Agreement including its costs of advertising, promotion, marketing, training, administration and taxes.

### **6.5. Reverse engineering**

The Distributor must not reverse engineer the Product or otherwise develop a product that serves the same or substantially similar purpose as the Product, whether or not that product also has additional uses or functions.

## **7. Term and termination**

### **7.1. Initial term**

This Agreement commences on the date of this Agreement and continues for the Term unless terminated under the terms of this Agreement.

## **7.2. Renewal**

- a) The Term of this Agreement will automatically extend for another period equal to the period specified in Item 3 on expiry of the Term unless this Agreement:
  - i) is terminated under sub-clause (b); or
  - ii) is terminated under another provision of this Agreement before the expiry of the Term.
- b) Either party may terminate this Agreement by giving written notice to the other not less than 1 month prior to the date that the Term, as extended under sub-clause (a), expires.

## **7.3. Termination for breach**

- a) Basis may terminate this Agreement by notice in writing to the Distributor if:
  - i) the Distributor continues to be in default of its obligations under this Agreement despite being given a notice identifying the relevant default and requiring the Distributor to rectify the default within a reasonable time;
  - ii) the Distributor becomes insolvent;
  - iii) the Distributor repudiates its obligations under this Agreement; or
  - iv) the Distributor, being an individual, dies or becomes mentally ill.
- b) Termination by Basis under sub-clause (a) is without prejudice to any other right or cause of action Basis may have against the Distributor.

## **7.4. Termination at will**

- a) Either party may at any time, by notice in writing to the other party, terminate this Agreement without cause.
- b) This Agreement will terminate 60 days after a notice is given under sub-clause (a) unless, before the end of this period, the party giving the notice notifies the other in writing that the notice of termination is withdrawn.
- c) Both parties additionally agree not to exercise their rights under sub-clause (a) For a period of 12 months from the date of this Agreement.

## **8. Basis Obligations**

### **8.1. Pricing information**

During the Term, and by request:

- a) the Wholesale Price List will be made available to the Distributor by Basis;
- b) variations to the Wholesale Price List will be made available to Distributors at least 30 days prior to the date at which the updated Wholesale Price List comes into effect.

### **8.2. Technical Support**

Basis is responsible for providing support to End Users in respect of the Product. Basis will give the Distributor details of how customers may access support in respect of the Product from time to time.

## **9. Warranties**

### **9.1. General Warranties**

Each party warrants that:

- a) it has the authority to enter into and perform its obligations under this Agreement; and
- b) it has the ability to perform its obligations under this Agreement.

### **9.2. Warranties by Basis**

Basis represents and warrants to the Distributor:

- a) that it is the lawful owner of the Product including any Intellectual Property Rights associated with the Product; and
- b) that the Distributor advertising, marketing, promoting or selling the Product or the use of the Product by customers will not infringe the rights, including the Intellectual Property Rights, of any person.

### **9.3. Basis does not represent or warrant**

Basis does not represent or warrant to the Distributor:

- a) that the Product is and will remain error free or virus free;
- b) that the use of the Product will be uninterrupted or reliable;
- c) that the Product is suitable for every End User's particular requirements and will meet their expectations;
- d) that the Product will be compatible with all hardware on which the Product or any part of it may be installed;
- e) that the Product will not cause a conflict with any other software installed on any hardware that the Product or any part of it may be installed on;
- f) that the Product will perform any function not designated in any specifications for the Product published by Basis from time to time;
- g) that any errors or defects in the Product will be rectified promptly or at all;

### **9.4. Warranties by the Distributor**

The Distributor represents and warrants to Basis that:

- a) it has, and will continue to have throughout the Term, all necessary consents or approvals required by Law in order to undertake its obligations under this Agreement;
- b) any information provided to Basis by the Distributor in relation to the subject matter of this Agreement before the parties entered it is true and correct;
- c) it obtained or had the opportunity to obtain or chose not to obtain legal and financial advice before entering into this Agreement.

## **10. Scope of Liability**

### **10.1. Distributor indemnified**

Basis indemnifies the Distributor and will keep the Distributor indemnified against any claim made against, suffered or incurred by the Distributor as a direct consequence of any breach of the warranties referred to in clause 9.2.

## **10.2. Basis released from liability**

Subject to clause 10.4(b) and except to the extent that any Claim is caused by the negligence of Basis or the breach by Basis of its obligations under this Agreement, the Distributor releases Basis from all Claims that arise against Basis in connection with this Agreement.

## **10.3. Basis Indemnified**

The Distributor indemnifies Basis and will keep Basis indemnified against all claims made against, suffered or incurred by Basis as a direct or indirect consequence of:

- a) the Distributor failing to comply with its obligations under this Agreement; or
- b) the warranties given by the Distributor under clause 9.4 being false or misleading.

## **10.4. Limitation of liability in respect of the Product**

- a) Subject to sub-clause (b):
  - i) any condition or warranty which would otherwise be implied into this Agreement by Law is expressly excluded; and
  - ii) Basis expressly excludes any liability to the Distributor or any other person in relation to the Product.
- b) Where any Law implies any condition or warranty into this Agreement and prohibits Basis from excluding its liability under the condition or warranty or modifying the application of the condition or warranty to this Agreement, that condition or warranty is deemed to be included in this Agreement. However, if permitted under the Law to do so, Basis limits its liability under that condition or warranty, at its election, to:
  - i) the resupply of the Product; or
  - ii) the cost of resupplying the Product.

## **11. Confidential Information**

### **11.1. Distributor will receive Confidential Information**

The Distributor acknowledges that it and its employees, agents and contractors may be given access to Confidential Information belonging to Basis during the Term of this Agreement.

### **11.2. Duty not to disclose**

The Distributor must keep the Confidential Information confidential and not disclose it to a third party or use it otherwise than:

- a) for the purposes for which it was disclosed;
- b) as authorised in writing by Basis;
- c) as required by Law; or
- d) by way of disclosure to the Distributor's professional advisers who have agreed to keep the Confidential Information confidential.

### **11.3. No unauthorised copying**

The Distributor must not copy any Confidential Information in any form except as necessary to perform its obligations under this Agreement or as expressly authorised by Basis.

### **11.4. Return of materials**



On termination of this Agreement, the Distributor:

- a) must return all documents and other media or copies of documents containing information which is, at the date of termination, Confidential Information to Basis; and
- b) notify Basis of any other Confidential Information that cannot be returned under sub-clause (a) and deal with that Confidential Information as Basis directs.

#### **11.5. Responsibility for employees, etc**

- a) The Distributor must ensure that its employees, agents, contractors and other persons within its control comply with this clause 11.
- b) The Distributor must ensure that each person in sub-clause (a) required to do so by Basis enters into a deed with Basis containing substantially the same terms as this clause.

### **12. General**

#### **12.1. Duty to act in good faith**

Each party must act in good faith towards the other at all times in relation to exercising their rights and obligations under this Agreement.

#### **12.2. Entire Agreement**

This Agreement is the entire agreement of the parties on the subject matter. The only enforceable obligations and liabilities of the parties in relation to the subject matter are those that arise out of the provisions contained in this Agreement. All representations, communications and prior agreements in relation to the subject matter are merged in and superseded by this Agreement.

#### **12.3. Assignment and sub-distributors**

- a) The Distributor must not assign its interest under this Agreement without the prior written consent of Basis.
- b) The Distributor must not appoint sub-distributors of the Product without the prior written consent of Basis.

#### **12.4. Governing law**

The laws of the State of New South Wales govern this Agreement and the parties submit to the non-exclusive jurisdiction of courts exercising jurisdiction there.

#### **12.5. Alterations**

This Agreement may be altered only in writing signed by each Party.

#### **12.6. Counterparts**

This Agreement may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.

#### **12.7. Severance**

Any provision of this Agreement which is unenforceable in any jurisdiction will be ineffective in that jurisdiction to the extent of the unenforceability. This will not invalidate the remaining provisions of this Agreement nor affect the enforceability of that provision in any other jurisdiction.

#### **12.8. Relationship between the Parties**

- a) Nothing in this Agreement creates the relationship of partnership, principal and agent or joint venture between the parties to this Agreement.
- b) The Distributor must not enter into any agreements or incur any liabilities on behalf of Basis without the prior written consent of Basis and must not represent to any person that it has the authority to do so.