



Software License and Support Agreements



TOWNSENDS BUSINESS
& CORPORATE **LAWYERS**



What I need to know about...

Software License and Support Agreements

Licensing of software

While Bill Gates was still learning how to turn on a toaster, the computer industry made a huge decision that would affect us all. It was decided that software would be licensed, not sold. This means that the creators of software could let others use it while retaining ownership.

We all sign up to become licensees whenever we use over-the-counter software. No-one ever bothers to negotiate (or for that matter even read) the small print in the license any more than we read or negotiate the terms of an airline ticket, car park ticket or a department store receipt.

However, from time to time, we may become either the licensee or the licensor of so-called specialist software used in business. In these circumstances, the terms of the license become significant.

What is included in software license agreement?

Software license agreements need to contain certain terms and conditions to be effective. These include:

- What is the software being licensed? Is it clearly described?
- What is the term of the license?
- What exactly does the license entitle the licensee to do?
- What payment will be made for licensing the software and how/when?
- Is the license exclusive in any way?
- What happens if that exclusivity is breached?
- Will the licensor install the software?
- How can the agreement be terminated?
- How can the licensee access the source code if the licensor is bankrupt?
- What are the terms of any updates and alterations to the software?

- Is maintenance a part of the license and, if so, on what basis?
- Will the licensor provide upgrades? Does it have to?
- Is the licensor offering any warranties?
- What are the licensor's rights and is there a prohibition on reverse engineering?
- Is there a limitation of liability, especially for consequential loss?

It is important to consider the following issues:

- If the supplier is not the owner, does the supplier have the right to grant the licence? Is the licence consistent with the supplier's rights with respect to the software? Has the supplier obtained the owner's consent? Will the supplier indemnify a user against any claim by the creator/owner of the software and can they support it financially?
- Is the license fee linked to the licensee's performance? If you are a company, your directors may have to sign personal guarantees that the obligations under the agreement will be performed.
- If you are the supplier, be careful of what representations you make about the software, as you may be liable for misleading and deceptive conduct under the Competition and Consumer Act 2010 (Cth).
- As a licensee, the software license agreement may prohibit you from challenging the ownership of the software except as agreed in the license agreement, modifying the software without permission or using the software on unauthorised equipment.
- As a supplier, have you considered who will hold the source code? Have you concerns about the entity holding the source code? Will you be able to access the code if the supplier is wound-up?
- You should include an indemnity clause in the software license agreement requiring the licensee to indemnify you in the event a third party customer suffers any loss or damage from the use of the goods.
- As a licensee you must check the warranties given by the supplier to ensure that your interests are protected.

Software support agreements

Software support agreements ensure ongoing maintenance and troubleshooting of the software by the licensor. These agreements usually contain terms and conditions such as:

- the duration of the support services, usually renewable annually
- a description of the services being provided, eg. helpline, on-site, etc.
- response time guarantees
- procedures to be followed in response centre operations
- the identity of persons entitled to access and/or order support services
- fees, eg. lump sum for basic cover and extra charges for extra work
- exclusions from support services
- warranties for support services, including consequential loss exclusion
- updates and new releases.

Disclaimer: The information in this document is general information only and cannot be relied upon as a substitute for professional advice. No action should be taken until (and we will not be liable to anyone unless) we have provided specific advice relevant to the particular circumstances