

Terms and Conditions

AGREEMENT FOR THE PROVISION OF HARDWARE, SOFTWARE, AND SERVICES ("Agreement")

Parties

- A. Designer Technology Limited, a duly incorporated company having its registered office at 6 Boston Road, Mount Eden, Auckland, 1023; ("we", "us", "our") and
- B. [client name] ("the Purchaser", "you", "your").

The parties agree as follows:

- 1. If Schedule 1 ("Application for Credit Account") is completed to our satisfaction, we may grant you credit at our absolute discretion. By completing Schedule 1 you accept any terms stated on it.
- 2. [if supplying products] If we supply Products or Services to you, that supply will be governed by the terms contained in the attached Schedule 2 ("Terms").

Signed by an authorised signatory
for and on behalf of the Purchaser:

Full Name:
Position:
Date:

Signed by an authorised signatory
for and on behalf of Designer Technology Limited:

Full Name:
Position:
Date:

SCHEDULE 1 - APPLICATION FOR CREDIT ACCOUNT

Your Proper Name:	Your Trading Name (if different):	
Organisation Type: <i>(e.g., company; society; trust; local body; government)</i>	Incorporation Number:	
Postal Address:	Delivery Address:	
Telephone Number:	Fax number:	
Nature of Business:	Have you previously applied for credit with us? (Yes/No). If 'yes' - give details:	
Person signing on your behalf: Name: Position held:	Bank and Branch Name and Branch address:	
Accountant Name: Postal Address: Telephone: Fax:	Lawyer Name: Postal Address: Telephone: Fax:	
<i>If you are a company, please provide the following for each director:</i>		
Name:	Name:	
Residential Address:	Residential Address:	
Name:	Name:	
Residential Address:	Residential Address:	
<i>Please also provide 3 trade references:</i> <i>(Excluding credit card companies, finance institutions, lawyers, accountants or utility suppliers)</i>		
Company Name	Contact Person	Telephone
1.		
2.		
3.		

Please detail here any further information which could affect our decision to grant you credit:

1. You warrant to us that the above information is complete and correct and accept that we will rely upon it.
2. You agree to at all times make full and accurate disclosure to us of any information that may affect our decision to continue granting a credit facility to you.
3. You acknowledge that we have explained that the effect of the Terms is that:
 - you will not own the hardware and operating software supplied by us until it has been paid for in full;
 - you grant a security interest in the hardware and software supplied by us, and proceeds from these items, in respect of which we may register a financing statement;
 - if you do not make payment for the hardware and operating software on time, we may repossess and sell these in order to satisfy any outstanding liability.

SCHEDULE 2 - TERMS

1 Defined terms

1.1 In this document, unless the context otherwise requires:

“**Customised Software**” means software we develop which is custom-made to your business requirements;

“**Confidential Information**” means information, know-how or data of a proprietary or confidential nature, whether existing in hard copy or soft copy form, received by either party from the other;

“**Hardware**” means network hardware and includes computer servers, peripherals, accessories, workstations, communication devices and any operating system software;

“**Including**” (or “includes”) means without limitation to the generality of the surrounding words;

“**Intellectual Property**” means any intellectual or industrial property (whether registered or not) including, patents, patent applications, copyright, designs, trade marks, service marks, trade secrets, computer code (including source, library, object, and executable code), inventions and logical sequences;

“**Products**” includes all or any of Hardware, Software, and Services, as the case may be;

“**Project**” means the activities described in any Proposal attached to these Terms;

“**Proposal**” means our response to your stated business needs;

“**Services**” means all services to be provided to you by us or on our behalf in relation to the Project, including network or software services and the design, configuration, deployment and ongoing support of Hardware and/or Software;

“**Software**” includes both shrinkwrap software and Customised Software in object code form and all relevant documentation and manuals;

“**Supplier**” means our supplier(s).

2 Price, Orders and Quotes

Validity of quotes

2.1 Our quotes are valid for 30 days from the date on the Proposal. After that we may alter our prices without further notice.

Cost of Services

2.2 Unless specified differently elsewhere, we provide Services on a “time and materials” (as opposed to fixed or ‘capped’ price) basis. Proposals for Services provide a broad estimate of the expected cost of providing the Services.

Notification if hours to complete exceed estimate

2.3 We will notify you as soon as reasonably practicable if during the course of the Project it appears to us that the actual hours required are likely to exceed the ‘high’ time estimate provided in the Proposal. However, time spent in addition to the ‘high’ time estimate will still be payable by you at the agreed hourly rates.

Further costs

2.4 You will, unless otherwise agreed, pay to us in addition to the price of the Products, all GST and any other government duties, levies, or taxes in respect of the Products and the Services; and all freight, delivery and transport costs, insurance charges, and installation costs in respect of the Products.

3 Payment

Invoices

3.1 Work undertaken in the performance of a Project will be invoiced to you on a monthly basis, regardless of whether the work is partially or fully completed. Products supplied will be invoiced on delivery.

Requirement to pay

3.2 Payment for monthly services must be made to us by the 20th of the month following the month in which our invoice is issued. Payment for Products must be made by the date specified on the invoice.

When payment is deemed to be made

3.3 Payment is made only when funds have cleared through the banking system into our bank account.

No set off, deduction, etc.

3.4 Subject to clause 3.5, you agree to pay each invoice in full, without deduction by way of set-off, counterclaim, or any other legal or equitable claim.

Disputed invoices

3.5 If you have a bona fide dispute in relation to an item on any invoice, you must pay the undisputed portion of the invoice as soon as it becomes due, and the matter in dispute will then be resolved by agreement within 10 working days if possible, failing that, the dispute will be dealt with under clause 12 (Disputes).

Interest may be charged on unpaid amounts

3.6 If payment is not made in full by the due date (other than where there is a dispute pursuant to clause 3.5) we are entitled to charge you interest until we have received payment in full. Interest on the unpaid overdue balance will be calculated on a daily basis at the interest rate then applicable to an overdraft on our account with our principal bankers, plus 2% p.a. We may also charge you costs (including collection costs and legal costs on a solicitor-client basis) and suspend delivery of further Products and Services until the account (and interest) is paid. The charging of interest does not constitute a grant of credit and is in addition to our other rights and remedies arising out of the default.

Payments may become immediately due

3.7 Notwithstanding the above, all payments shall immediately become due to us if:

(a) You refuse to accept delivery of any Products;

- (b) We reasonably believe that the information in Schedule 1 is incorrect and you have failed to give us correct information satisfactory to us within 7 days of our request;
- (c) You sell or otherwise dispose of any Products which have not been paid for, without our consent;
- (d) You become insolvent, or commit any act of bankruptcy;
- (e) A receiver, liquidator or statutory manager is appointed over any of your assets or undertaking;
- (f) You make or attempt to make an arrangement or composition with your creditors; or
- (g) If you fail to comply with any of the provisions of clause 5 (Security Interest).

4 Retention of Title

Ownership remains with us until payment made

- 4.1 Ownership of the Products remains with us and will not pass to you until we receive payment in full of the purchase price of the Products and all other amounts you then currently owe to us for any reason.

Acknowledgements

- 4.2 Where Products are in your possession or control but ownership has not passed to you:
 - (a) You will keep the Products insured to their full insurable value against loss or damage in our name as unpaid vendor;
 - (b) You hold the Products as bailee for and are in a fiduciary relationship with us;
 - (c) You will keep the Products separate and readily identifiable while the Products are in your possession and control; and
 - (d) If you default in payment of an invoice (other than in respect of an amount to which a dispute under clause 3 applies) we (and our agents) will be entitled, upon notice to you and as your agent, to enter any land or premises where the Products are kept and take possession of and/or remove, and at our discretion sell or otherwise dispose of the Products removed, and credit any sale proceeds toward the moneys you owe us, without prejudice to any other remedy available to an unpaid vendor at law or equity. In exercising our rights under this clause, we will take all reasonable care to avoid damage to your premises, but will not be liable for any damage caused.

5 Security Interest

Our security interest in the Products

- 5.1 For the purposes of the Personal Property Securities Act 1999 (“PPSA”), you grant a security interest to us in any Products that we have sold

or supplied to you, to secure the price payable for the Products (and any interest or other charges payable in relation to the Products) and to secure all monies payable by you to us at any time on any account. You further agree that our security interest in the Products extends to the “proceeds” (as defined in section 16 of the PPSA) of the Products that we have sold or supplied to you.

Continuation of security interest

- 5.2 You acknowledge that the Security interest will continue until we give you a final release.

Payments by you

- 5.3 We may at our sole discretion and in such manner as we determine allocate payments made by you to outstanding amounts due in relation to any Products or Services supplied by us.

Location of Goods

- 5.4 You will not move the Products that we have sold or supplied to you outside New Zealand.

Protection of security interest

- 5.5 You will not do or omit to do, or allow to be done or omit to be done, anything which could adversely affect the Products or the security interest created by these Terms.

6 Risk and Delivery

Risk

- 6.1 You are responsible for risk in the Products from the time you receive them, or they are delivered to your premises.

Effect of delays in delivery

- 6.2 We will make every effort to ensure Hardware and Software are delivered on time, and that Services are performed promptly, but we will not be liable to you for any loss or damage arising in any way from any delay in delivery of the Hardware or Software, or delay in the performance of Services. Delay in delivery of Hardware or Software, or in the performance of Services, does not entitle you to cancel any order.

Delivery to a third party

- 6.3 Where you ask us to deliver Products directly to another person, that person takes possession of the Products for you as your agent, but you are still directly responsible to us for those Products under these Terms.

Claims for damage during delivery

- 6.4 All claims for short delivery or damage during delivery must be made to the carrier within 7 days of the date of delivery. Where Products appear to be damaged or missing you must contact the carrier and us immediately.

7 Warranty

Scope of warranty for Customised Software

- 7.1 Subject to clause 10, we warrant that our Customised Software will perform according to

the specifications stated in our Proposal for a period of 60 days from the date it is installed. We do not warrant that operation of the Customised Software will be uninterrupted or error free. This warranty does not extend to (and we shall not be liable for) any delay, damage, loss, injury, failure or breakdown that you may suffer as a consequence of any defect or deficiency in our Customised Software or supplied Hardware, including any delay, damage, loss, injury, failure or breakdown to your other software programmes and hardware.

7.2 This warranty will not apply to Customised Software which is: (i) altered by any person other than us, or (ii) used in conjunction with a damaged or misused system, unless this damage or misuse is caused by us or by any Customised Software; or (iii) used in an environment, or for a purpose, for which it was not designed.

Scope of warranty for other Software

7.3 Hardware and Software (other than Customised Software) supplied by us is subject to the manufacturers' warranties only. We will pass on the benefit of those warranties to you to the extent that we are reasonably able to do this, but without being liable to you, under any warranty.

Notification of defects

7.4 You must notify us in writing of any defect found in the Customised Software during the 60 day warranty period.

Repair/replacement

7.5 We may carry out replacement or repair for a valid warranty claim during normal business hours (8.30 a.m. to 5.00 p.m. Monday to Friday (excluding public holidays)) either at your premises or ours. If you require us to remedy the defect outside of normal business hours we will charge you our standard after-hours support fee.

8 Intellectual Property and Confidentiality

IP in Products and Services remains with us or our Suppliers

8.1 You acknowledge that all Intellectual Property relating to any Product or Service remains our property, or the property of any Supplier entitled to it, and neither us nor our Suppliers transfer any right, title or interest in the Intellectual Property in any Product or Services to you other than as expressly provided by these Terms.

Your licence to use Customised Software

8.2 We grant to you a non-exclusive, perpetual, non-transferable right to use the version of Customised Software actually provided to you. This right is subject to any limitations expressly agreed to by the parties in writing. This licence does not include a right to any further versions of, or developments to, the Customised Software. Any further versions may be subject to further licence, maintenance, and support fees, at our discretion.

No dispute as to ownership of IP

8.3 You will not dispute any ownership of any Intellectual Property referred to in clause 8.1.

Use of trademarks

8.4 Neither party may use any trade marks, or trade names which are the property of the other, or any similar names, words or marks, except to the extent that they have been authorised in writing to do so.

Improvements to Customised Software

8.5 If you or your agent modifies, enhances, develops or updates ("Improvements") Software supplied by us, then these Improvements remain our property. You agree to sign any documentation we reasonably request to record our ownership of the Improvements.

Confidential Information

8.6 Each party agrees to ensure that all Confidential Information is not disclosed to any third party without prior written consent, and that all Confidential Information made available to employees is on the basis that those employees at all times maintain strict confidentiality. Each party accepts that it is responsible for any unauthorised use or disclosure of any Confidential Information by any employee or contractor. Each party agrees to deliver to the other, destroy or otherwise deal with as directed all material containing or incorporating Confidential Information according to the reasonable directions of the original holder of that Confidential Information

9 Non-solicitation of employees

9.1 Each party agrees that it will not, whether on its own account or for any other person, solicit or entice, or endeavour to solicit or entice away from the other party, any person who is employed by, or contracted to, the other party, during the period of that person's engagement with the other party in the performance of these Terms and during the following 6 months.

10 Limitation of Liability

Supplier's limitation

10.1 To the maximum extent permitted by law, except as specifically set out in these Terms, or contained in any warranty statement provided with the Products, all conditions, warranties and representations in respect of the quality, merchantability, fitness for purpose, condition, description, manufacture, design or performance (or otherwise) of the Products whether implied by statute, common law, law merchant, trade usage, custom or otherwise, are expressly excluded.

10.2 Notwithstanding any other provision in these Terms, our liability (and the liability of anyone that we are responsible for) to you for any costs, claims, losses and expenses made against you or incurred by you resulting from any cause whether arising at law (including negligence), by statute,

in equity or otherwise arising from the relationship between you and us is limited to direct losses or damages up to the value of the Products and Services that we have supplied to you, or to the amount of \$10,000, whichever is the lesser in the 3 month period immediately preceding the month in which the event on which the claim is based occurred. For the purposes of this clause, direct losses or damages excludes:

- (a) any losses or damages arising from delay, increase in operating costs, loss of profit, use, production, income, business, loss or corruption of information, data or records, contract or goodwill of any person;
- (b) any indirect or consequential loss; and
- (c) any loss resulting from liability to any third party.

10.3 Except as provided in clause 10.2, our liability to you, whether in tort (including negligence), contract, breach of statutory duty, equity or otherwise arising from the relationship between us and you is excluded to the fullest extent permitted by law.

No liability for events beyond our reasonable control

10.4 We will not be liable to you for any losses, costs or damage caused by events beyond our reasonable control, including any external factors affecting performance of the Products or Services provided by us, including telecommunications and network breakdowns and power surges.

Customer's limitation

10.5 Your liability under or in connection with the performance of these Terms, whether in tort or contract or equity or on any other basis, is limited to an amount equivalent to all sums paid or payable under these Terms, but this does not limit your liability to pay any invoices properly issued under these Terms. This clause 10.5 does not limit your liability for a breach of clause 8 (Intellectual Property and Confidentiality).

10.6 The provisions of this clause 10 shall survive termination of these Terms.

11 Consequences of your default

We may realise our security interest

11.1 To the extent permitted by law, if you breach these Terms or any other payment obligation to us:

- (a) Each security interest created in our favour will become immediately enforceable.
- (b) We may, at any time, by notice to you declare all or any part of the moneys you owe us to be due and payable immediately, upon demand or at a later date as we may specify.
- (c) We may:
 - i. Take possession of and either sell or retain the Products;
 - ii. Pay any expenses incurred in the exercise of any such powers out of the revenue from, or proceeds of realisation of, the Products; and
 - iii. Appoint a receiver in respect of any Products (without your consent) and any receiver is authorised to do anything referred to in these Terms and otherwise to exercise all rights and powers conferred on a receiver by law.

- (d) You will pay all of our costs, losses and other liabilities (including legal expenses on a solicitor-client basis) incurred or sustained by us in connection with the exercise, enforcement or preservation, or attempted exercise, enforcement or preservation, of any right arising pursuant to the security interest granted under these Terms.
- (e) We have all other rights conferred by law (including under Part 9 of the PPSA) in relation to the Products and may, in your name or otherwise, at any time, do anything that you could do in relation to the Products.
- Further assurances*
- 11.2 If requested by us, you must promptly do all things (including signing any document) and provide all information necessary to enable us to perfect and maintain the perfection of any security interest granted to us by you (including the registration of a financing statement). You must give written notice to us immediately if you change the name of your company.
- Proceeds of sale of repossessed Products*
- 11.3 Where we take possession of the Products under clause 11.1, we may sell the Products by any means at any time. From any proceeds resulting from such a sale we may deduct all costs incurred in connection with the sale and all moneys owed (even if not invoiced) to us by you on any account (to the extent to which we have priority over any other interested parties). Nevertheless, we may recover from you any shortfall from a sale or attempted sale under this clause 11.3.
- Application of the PPSA*
- 11.4 Nothing in these terms limits or otherwise adversely affects our rights under the PPSA. You waive your rights under sections 114(1)(a), 116, 120(2), 121, 125, 129, 131, 132, 133 and 134 of the PPSA and your right to receive a copy of the Verification Statement or a Financing Change Statement relating to our Security Interest
- 12 Disputes**
- Scope*
- 12.1 The parties agree to follow the processes set out in this clause 12 in respect of any dispute arising between them in connection with these Terms, the Products or the Services (“Dispute”).
- Representatives*
- 12.2 If the parties cannot resolve a Dispute, then either party may initiate the dispute resolution procedure set out in this clause 12 by giving written notice to the other party and naming its representative. The party receiving the notice must within 10 days give written notice to the other party naming its representative. Each representative must have authority to settle the Dispute.
- Negotiation*
- 12.3 Within 14 days after the parties have been advised of each other’s representatives, the representatives must enter into negotiations to try to resolve the Dispute.
- Mediation*
- 12.4 If the Dispute is not resolved within the following 14 days then the parties must immediately refer the Dispute to mediation.
- 12.5 The mediation must be conducted in terms of the LEADR New Zealand Inc. Standard Mediation Agreement. The mediation must be conducted by a mediator (and at a fee) agreed by the parties. Failing agreement between the parties, the mediator will be selected and his/her fee determined by the Chair for the time being of LEADR New Zealand Inc.
- Arbitration*
- 12.6 Any Dispute which cannot be settled by mediation within 14 days of the matter being referred to mediation, will be submitted to arbitration before a single arbitrator appointed by the President of the New Zealand Law Society, in accordance with the Arbitration Act 1996 (excluding clauses 4 and 5 of the Second Schedule). The decision of the arbitrator will be final and binding.
- Court*
- 12.7 Nothing in this clause 12 will preclude either party from taking immediate steps to seek urgent equitable relief before a New Zealand Court.
- 13 Other**
- Consumer Guarantees Act and certain other laws are excluded*
- 13.1 Despite anything else contained in these Terms:
- (a) the parties agree that they are both in trade and the Products and Services supplied under these Terms will be acquired by you solely for your business purposes; that the provisions of the Consumer Guarantees Act 1993 will not apply to these Terms or our agreement with you, and that it is fair and reasonable to exclude their application; and you acknowledge that you have had a reasonable opportunity to review these Terms, discuss these Terms with us, and receive advice from your legal advisors, if you wished to do so;
- (b) The parties exclude the application of the United Nations Convention on Contracts for the International Sale of Goods from these Terms and our agreement with you; and

- (c) The parties agree that the goods and services supplied under these Terms are supplied and acquired in trade within the meaning of the Fair Trading Act 1986, that sections 9, 12A, and 13 of the Fair Trading Act 1986 will not apply to these Terms; our agreement with you; or the Products and Services supplied under these Terms and our agreement with you, and that it is fair and reasonable to exclude their application.

Waiver/variation

- 13.2 If we fail to enforce any terms or to exercise our rights under these Terms at any time, we have not waived those rights. Any waiver or variation of these Terms that is agreed to will not be effective unless signed by both parties.

Right to vary

- 13.3 We may vary these Terms by posting the varied terms on our website. The varied terms will come into effect 1 month after they have been posted on the website and will apply to orders made by you after that effective date.

Applicable law and jurisdiction

- 13.4 These Terms will be governed by and construed in accordance with the laws of New Zealand. In relation to any legal action or proceedings arising out of or in connection with these Terms (“Proceedings”), without limiting clause 12 (Disputes) each party irrevocably submits to the non-exclusive jurisdiction of the courts of New Zealand and waives any objections to the proceedings in any New Zealand court on the grounds of venue or on the grounds that the proceedings have been brought in an inconvenient forum.

Entire Agreement

- 13.5 These Terms, and any other document incorporated by express reference, form the entire agreement between us relating to their subject matter and supersede any prior agreements and undertakings between us with respect to that subject matter.

Construction

- 13.6 If there is any conflict between these Terms and any other document forming part of our agreement with you, these Terms shall prevail.

Structure

- 13.7 These Terms will be deemed to be incorporated into any and each Proposal, estimate and/or service level agreement that we issue to you.