



Swerve Limited
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TERMS OF TRADE CREDIT APPLICATION SECURITY AGREEMENT

These Terms of Trade ("terms"), as amended and/or replaced from time to time, govern the supply by Swerve Limited ("we" or "us") to the person or organisation named below ("you") of the following, (but not limited to):

- i. *Goods:* including software, hardware and all relevant documentation, manuals, printed and written matter, peripherals and accessories; and
- ii. *Services:* including installing Goods, establishing computer networks made up of a combination of Goods, identifying and repairing faults, regular maintenance and reporting, upgrades, developing software, providing professional Services such as IT project management, on-site systems management and lease arrangements.

These Goods and Services may be supplied by us for your own use or for the use by one of your Customers as Lessees to you under a lease.

These Terms of Trade also act as Application for Credit and Security Agreement representing our interest in all Goods that we supply to you, pursuant to the Personal Property Securities Act 1999.

YOUR PARTICULARS (NB please promptly notify us of any changes to this information)

Trading Name:

Legal Name (if different to above):

Previous Trading Names:

Type of Entity (if not a natural person): Company Incorporated Society

Trust Incorporated Charitable Trust Partnership

Other (please specify)

Business Activity:

Company/Incorporated Society or Charitable Trust Number:

Billing Address:

Registered Address (if different to above):

Physical Delivery Address (if different to above):

Phone: Fax: E-mail: Web:

YOUR PARTICULARS (Continued)**Your Directors, Trustees or Partners (please attach a separate page if necessary):**

Full Name:

Home Address:

Full Name:

Home Address:

YOUR CREDIT INFORMATION (NB please promptly notify us of any changes to this information)

Bank: Branch: Account no:

Accountant:

Solicitor:

Paid-up Capital (if applicable): \$.....

Trade References (excluding credit cards, fuel Suppliers, landlord, power and phone suppliers, and include only trade references where you have been granted credit and where you have done business with them over the last year):

Supplier Name 1: Contact Name:

Address: Phone:.....

Supplier Name 2: Contact Name:

Address: Phone:.....

Supplier Name 3: Contact Name:

Address: Phone:.....

DIRECTORS' GUARANTEE (NB please promptly notify us of any changes to this information)

I, (Director), hereby personally guarantee all of the obligations and liabilities of (Name of the Entity) arising from this agreement and the attached Terms of Trade.

Full Name: Position:

Signature: Date:

AUTHORISED SIGNATORY

I, (Name of Authorised Signatory):

- i. confirm that I am duly authorised to execute these Terms of Trade and apply for credit; and
- ii. confirm that the information above is accurate and complete; and
- iii. agree that all Goods and Services supplied by Swerve (whether in the past or in the future) are supplied on these Terms of Trade, as amended from time to time.

Full Name: Position:

Signature: Date:

1 Ordering Goods and Services

- 1.1 To Order Goods and/or Services from us you need to be currently approved by us for credit purposes, unless we reach an alternative payment arrangement with you. We will advise you promptly if we approve you for credit purposes or withdraw our approval for any reason.
- 1.2 To place Orders on a casual basis:
 - (a) you (or the End User if you are leasing out the Goods) must:
 - discuss requirements including preferred delivery dates with us; and
 - for Goods, and for Services required to establish a Network, request our quotation (which remains current for 14 days from its date and is an invitation to treat only, not an offer to supply at the quoted price); and
 - (b) you must place an Order (an *Order*) with us.
- 1.3 We will advise you promptly of whether we accept your Order.
- 1.4 To receive Services from us regularly under an agreed hours Support Plan, you must:
 - (a) discuss your requirements with us; and
 - (b) enter into an agreement with us in the form set out in Appendix A (a *Support Plan*) where applicable.
- 1.5 We reserve the right to refuse to accept any Order of any part of an Order, and to deliver Goods by instalments, in which case each instalment will comprise a separate contract and shall be paid for as if it were a separate Order.
- 1.6 We have sole discretion to determine the amount of credit we will extend to you at any time.

2 Application of Terms of Trade

- 2.1 All Goods and Services that we supply to you (whether in relation to an Order, a Support Plan or otherwise) are subject to these Terms of Trade. In addition, all Services that we supply under a Support Plan are subject to the terms of that Support Plan.
- 2.2 These Terms of Trade and any current Support Plan prevail over any document issued by you or on your behalf, even if purported to be accepted by us.
- 2.3 To the extent that there is any inconsistency between these Terms of Trade and any current Support Plan, the Support Plan will prevail.

3 Access to facilities

To help us provide you with Goods and Services you must:

- (a) ensure that we have full access to any Goods we have supplied to you, and to your (or, if applicable, the End Users') computer system, computer equipment and backup facilities, as reasonably required;
- (b) ensure that you have all necessary authorisation for any computer software that you (or the End User) use on the computer system, equipment or facilities;
- (c) ensure that your representative (or, if applicable, the End Users' representative) is on site at the same time as our representative; and
- (d) ensure that we have all the information, facilities and Services that we reasonably require to perform our obligations, and ensure that we receive help to ascertain the cause of any faults in any Goods in your (or, if applicable, the End Users') computer system, or in any other Goods or equipment.

4 Delivery

- 4.1 Whenever we accept an Order, we will endeavour to deliver the Goods to your premises (or, if applicable, the End Users' premises), or to perform the Services by the time that you (or, if applicable, the End User) and we agree. However, we will not be liable for any failure to deliver all or any part of the Goods or Services, or for any delay in delivery.
- 4.2 All claims for shortage or damage during delivery must be made directly to the carrier within the carrier's terms. Where Goods appear to be damaged you must notify the carrier and us immediately.
- 4.3 You must ensure that delivery of Goods is not refused, except where we have first agreed in writing to the refusal.

5 Prices

- 5.1 Our Prices are:
 - (a) for accepted Orders where we have provided a quotation for the relevant Goods and/or Services within the 14 days before the Order was placed, that

- quotation, plus GST and any other costs including taxes and transport costs;
- (b) for purchases of Goods which may be altered without notice
- (c) for all other accepted Orders, at our prevailing hourly rate as at the date of supply, including costs for any travel to and from your (or any End Users') site, plus GST and any other taxes or transport costs. Our hourly rate will be rounded to the next quarter of an hour, except that a surcharge of one third will apply to Services provided outside Working Hours.
- (d) For Services under any current Support Plan, the amounts set out in that Support Plan, (together the *Prices*), where applicable.

6 Payment

6.1 Orders:

Unless we agree otherwise in writing, you must pay us (in cleared and immediately available funds, without set-off, counterclaim, deduction or withholding, except as required by law) the Prices of all Goods and Services in accordance with the following timetable (the *Due Dates*):

- (a) if we are establishing a Network or other system, any and all Goods and Services provided during any calendar month, shall be invoiced and will be due and payable by the 20th of the month following the date of our invoice;
- (b) if we are providing other Goods that you intend to Lease to an End User, within 7 days of our invoice;
- (c) if we are providing other Goods for your own use, within 7 days of delivery; and
- (d) for all other Services under accepted Orders, and all other amounts that you owe us under this agreement, by the 20th of the month following the date of our invoice; and
- (e) for all amounts payable under a Support Plan, in accordance with the dates set out in the Support Plan.

6.2 Failure to pay by the Due Dates:

If you do not pay us by the Due Dates (whether in relation to an Order or a Support Plan) you will be in default, and we may:

- (a) charge you default interest of 2.0% per month calculated on a daily basis on the overdue amount, from the due date until the date when payment is made. The charging of default interest does not imply the granting or an extension of credit; and
- (b) recover from you (as a debt owing) all costs incurred in attempting to obtain payment, including legal costs (on a solicitor and own client basis), debt collection costs and administrative charges; and
- (c) as your irrevocably appointed agent for the purposes of this clause, and without prejudice to any of our other rights, enter any premises where we reasonably believe Goods are stored and remove them, without notice. We will not be responsible for, and you indemnify us against, any damage caused or loss or liability incurred in entering the premises or removing the Goods. We may resell the Goods and apply the proceeds to reduce the amount that you owe us; and
- (d) exercise any of our remedies for default under clause 12 or at law; and
- (e) suspend delivery of, or performance of, further Goods and Services until the arrears are paid in full.

7 Information about you

7.1 You authorise us to:

- (a) collect and hold personal and credit information about you from any source we consider appropriate. We may use this information to determine your credit worthiness, credit history or credit capacity, for debt collection or any related purpose, or for providing you with information about our Goods and Services; and
- (b) disclose the personal and credit information to anyone else (including our related parties and shareholders) for the purposes set out in clause 7.1(a).

7.2 You must notify us of any change in circumstances that may affect the accuracy of any personal or credit information that we have collected about you under these Terms of Trade.

7.3 All payments will become immediately due and payable:

- (a) if we have reasonable cause to believe that the information which you have supplied to us in your credit application is incorrect or no longer correct, and you have failed to give us satisfactory corrected information to us within 5

- Business Days of our request; or
- (b) if you sell or otherwise dispose of any Goods without our consent, which have been paid; or
 - (c) for any reason contained within clause 13.1 of these Terms of Trade; or
 - (d) make, or attempt to make an arrangement with our Supplier(s); or
 - (e) fail to comply with any of the provisions of these Terms of Trade
- 7.4 If you are an individual (i.e. a natural person), you may access and request correction of any personal information that we hold about you as an identifiable individual, subject to the restrictions within the Privacy Act 1993.
- 8 Risk and ownership of Goods**
- 8.1 Risk of loss, deterioration or damage from any cause, of any Goods that we supply to you, passes to you on delivery of the Goods to you (or, if applicable, the End User, if we deliver them to an End User).
- 8.2 With the exception of software which is subject to license, we retain ownership of the Goods until you have paid us all amounts that you owe us in relation to all Goods and Services that we have supplied to you. If any Goods are mixed or commingled (as defined in the Personal Property Securities Act 1999) (*PPSA*) with other Goods before payment, we will own the resulting mixed or commingled Goods as if they were Goods that we had supplied.
- 8.3 After delivery, but while ownership of Goods remains with us:
- (a) you must ensure they are stored so they are clearly identifiable as belonging to us;
 - (b) you may (unless we advise you otherwise, or you have breached these Terms of Trade) use, lease at market rates, or sell for full value, the Goods in the ordinary course of your business. If you lease or sell the Goods, you must hold the proceeds (separately and in identifiable form) in trust for us, and pay them into a bank account nominated by us if we request this;
 - (c) except as provided in clause 8.3(b), you must not grant anyone any interest in or charge over the Goods; and
 - (d) you must insure the Goods at your cost, naming us as loss payee, for full replacement cost against all risks. We may apply the proceeds of any insurance payment to reduce the amount that you owe us.
- 9 Personal Property Securities Act 1999**
- 9.1 You acknowledge that:
- (a) these Terms of Trade are a Security Agreement for the purposes of section 36 of the *PPSA*;
 - (b) we take a security interest in all Goods that we have previously supplied to you (if any) and all Goods that we will supply to you in the future, to secure (with equal priority) payment of all amounts that you owe us;
 - (c) the security interest will continue until you have paid all amounts owing; and
 - (d) you waive your right to receive a verification statement under section 148 of the *PPSA*.
- 9.2 You:
- (a) will promptly sign any further documents, provide any further information, or do any other thing that we reasonably require to perfect and maintain the perfection of our security interest (including by registering a financing statement or financing change statement);
 - (b) indemnify (and if requested reimburse) us for all expenses that we incur in registering a financing statement or financing change statement or releasing Goods charged by the statement; and
 - (c) will give us 14 days' prior written notice of any change in your name, address, contact details, trading name, business practice or any other details, and use your best endeavours to ensure that any applicable financing change statement is registered disclosing your new details.
- 9.3 To the fullest extent permitted by law, you and we contract out of section 114(1)(a) of the *PPSA*, and out of your rights referred to in sections 107(2)(c), (d), (h), and (i) of the *PPSA*. If, and for so long as, we are not the secured party with priority over all other secured parties in respect of any particular Goods, you and we agree that section 109(1) of the *PPSA* does not apply to those particular Goods.
- 10 Returns**
- 10.1 You acknowledge and agree that returns shall only be accepted by us in accordance with our (or our Suppliers') Returns Policy, and that you may receive a credit for Goods returned only where we have consented in writing.

11 Warranties and liability

- 11.1 Where Goods are covered by a manufacturer's Warranty we will pass on the benefit of the Warranty to you without being directly liable to you under any Warranty.
- 11.2 Where Goods are subject to a Return-to-Base Warranty, you are responsible for returning them to us or to the manufacturer (as provided by the Warranty), and you are responsible for additional costs including (but not limited to) transport.
- 11.3 We do not warrant that the Goods will be error-free or that we will be able to correct all errors in the Goods, any Network, or your (or, if applicable, the End User's) computer system.
- 11.4 You acknowledge that the Goods and Services are acquired for the purposes of a business, and that the Consumer Guarantees Act 1993 will not apply.
- 11.5 You will indemnify us and keep us indemnified against all costs (including legal costs on a client and own solicitor basis), expenses, losses (including loss of profits, data or business opportunity), or damages that we suffer or incur as a result of any claim by an End User, whether in tort (including negligence), breach of statutory duty, equity or otherwise.
- 11.6 If, despite the other provisions of these Terms of Trade, we are found to be liable to you, then our liability is limited to an amount equal to the price you paid for the particular Good or Service in respect of which the liability arises.
- 11.7 You indemnify us against all costs, expenses, losses, damages or claims arising in any way as a result of your failure to comply with any part of these Terms of Trade.

12 Compliance with applicable US laws

- 12.1 You warrant that all technology, technical information and technical data received directly or indirectly by you from us under these Terms of Trade is intended solely for the use of you and your customers.
- 12.2 All "Direct Products" (as defined in the United States Department of Commerce Comprehensive Export Schedule) of such technology, technical information and technical data are intended solely for the use of you and/or your customers within such countries as are not forbidden or restricted now or hereafter by the United States Export Administration laws; and those Direct Products shall not be exported except in strict compliance with all United States Export Administration laws and all other applicable United States laws as now or hereafter exist.
- 12.3 We expressly reserve the right to refuse any Order which, in our sole judgment, is or may, be a violation of such laws on the part of you and/or your customers.

13 Default and termination

- 13.1 If we have reasonable grounds to believe that:
- you are in default of these Terms of Trade; or
 - you have become insolvent or have ceased or threatened to cease to carry on all or substantially all of your business or operations; or
 - a receiver or manager has been appointed in respect of any part or the whole of the your assets or business; or
 - any resolution has been passed or proceedings have been commenced to wind you up; or
 - you have entered into a formal proposal for compromise with creditors under the Companies Act 1993,
- we may:
- not supply you with any more Goods or Services, or defer supplying you with them; and
 - treat any Order or Support Plan as having been cancelled or terminated by you; and
 - enforce our security interest in the Goods.
- 13.2 If we withdraw our approval of you for credit purposes, we may treat any Support Plan as having been cancelled or terminated by you.
- 13.3 Termination or cancellation of any Order or Support Plan will not affect the rights, powers, remedies, obligations, duties and liabilities of either party which have accrued before termination or expiry.

14 Intellectual Property

- 14.1 You acknowledge that we (or our Supplier) are the sole owner of all Intellectual Property (including business know-how, ideas, methodologies, routines, systems and processes) relating to or arising, directly or indirectly, out of the Goods and Services that we supply to you, or developed or contributed to by us in relation to any information, fault, repair or documentation that we supply to you, or as a result of us performing Services or any other work for you.

- 14.2 You agree not to use any Trademarks or other Intellectual Property rights which are legally our (or our Suppliers') property, except as authorised by us (or our Supplier).
- 14.3 You agree not to cause or permit anything which may interfere with, damage or endanger our (or our Suppliers') Trademark or other Intellectual Property rights, or to assist others to do so.
- 14.4 You agree not to register any business name or develop any Trademark or other form of Intellectual Property right of any kind incorporating the word "Swerve".
- 14.5 Should your account with us be terminated for any reason whatsoever, you must immediately discontinue any authorised use of any Trademark or other intellectual property rights which are the property of us (or our Suppliers) in any form whatsoever, and thereby you shall not use those Trademarks or other Intellectual Property rights directly or indirectly.
- 14.6 This clause 14 shall survive the termination of this agreement.

15 Confidential information

- 15.1 Each party agrees to always keep the other party's Confidential Material confidential and not to:
- (a) use the Confidential Material for any purpose other than for the purpose for which it was supplied; or
 - (b) copy or reproduce any of the Confidential Material in any way, except where disclosure is necessary to enable an End User to use Goods or Services under lease, or where the party that owns the Confidential Material has consented to disclosure.
- 15.2 On request, each party will ensure that any Confidential Material (including any copies of it) that it possesses or controls (and, where that party is a Lessor, that an End User possesses or controls) and that belongs to other party is returned to that other party.
- 15.3 This clause 15 shall survive the termination of this agreement.

16 Resolving disputes

- 16.1 You agree to contact us in writing before the invoice due date with any dispute you have.
- 16.2 Any amount that is payable on the resolution of the dispute:
- (a) must be paid by you within 5 Business Days of the date on which the dispute was resolved; and
 - (b) may be subject to default interest of 2.0% per month calculated on a daily basis on the resolved amount from the date that the dispute is resolved.
- 16.3 The parties will use all reasonable endeavours to resolve any dispute between them. If the parties cannot resolve the dispute between themselves, they will refer the dispute to mediation, which will be conducted in Terms of Trade of the LEADR New Zealand Inc. standard mediation agreement.
- 16.4 Nothing in this clause will preclude either party from taking immediate steps to seek urgent equitable relief before an appropriate court.

17 General

- 17.1 *Employees and contractors:*
During the term that we provide Goods and/or Services to you and for six months thereafter, you will not, whether directly, indirectly through an associated company, or otherwise, solicit for employment any person who we have employed or contracted. You and we agree that this restraint of trade is reasonable in all circumstances. However, if a court of competent jurisdiction finds it to be unenforceable, you and we agree to accept any modification of the duration of the restraint concerned which the court sees fit to impose, or if it does not see fit, which may be required to make the restraint enforceable.
- 17.2 *Entire agreement:*
These Terms of Trade, and any current Support Plan, constitute the entire agreement between you and us in relation to their subject matter. They supersede all earlier negotiations, representations, Warranties, proposals, communications, understandings and agreements.
- 17.3 *Amendments:*
You may amend, replace or cancel these Terms of Trade or any current Support Plan with our prior written agreement (but not otherwise). We may amend, replace or cancel these Terms of Trade of any current Support Plan by giving you one month's written notice of the change.
- 17.4 *Force majeure:*
We are not required to perform any obligation under these Terms of Trade or a

Support Plan if prevented from doing so by any event beyond our reasonable control. If we cannot fulfill our obligations under any Order or Support Plan for more than 30 days because of this event, either you or we may immediately cancel that Order or Support Plan by written notice to the other party.

17.5 *No waiver:*

Any exercise or failure to exercise any right or remedy available to us does not limit our rights to exercise that or any other remedy. A waiver of any of these Terms of Trade must be in writing and signed by one of our authorised officers.

17.6 *Relationship:*

You and we are independent contractors. Nothing in these Terms of Trade or any Support Plan should be interpreted as constituting a relationship as agent, partner, contractor, officer or employee. You are not entitled to enter into any obligations on our behalf without our express written consent.

17.7 *Notices:*

Notices under these Terms of Trade or a Support Plan, or that are required by statute, law or regulation, must (unless otherwise provided) be in writing and delivered by hand, prepaid mail, facsimile or email to the principal business address of the person being notified. The notice will be deemed to have been received at the time when actually delivered if delivered by hand, upon confirmation of successful transmission if sent by facsimile or email, or 3 days after posting if sent by mail.

17.8 *Assignment and subcontracting:*

You may assign or transfer your benefits or obligations under these Terms of Trade or any current Support Plan with our prior written consent (but not otherwise). We may assign or subcontract our benefits or obligations (or both) under these Terms of Trade.

17.9 *Partial invalidity:*

If any part of these Terms of Trade or any Support Plan or their application is or becomes invalid or unenforceable, the remainder will remain enforceable to the greatest extent permitted by law.

17.10 *Express rights:*

Our exercise of any express right set out in these Terms of Trade is without prejudice to any other rights, powers or remedies available to us in contract, at law or in equity, including any rights, powers or remedies which would be available to us if the express right was not set out in these Terms of Trade.

17.11 *Third parties:*

These Terms of Trade do not create any obligations enforceable by any third party, including any End User.

17.12 *Law:*

These Terms of Trade and any current Support Plan are governed by New Zealand law and the parties submit to the non-exclusive jurisdiction of the New Zealand courts.

17.13 *Definitions:*

In these Terms of Trade:

Confidential Material means:

- (a) all information and other material relating to our business, employees, Goods and Services which we make available, or have previously made available to you; or
- (b) any report or material which we produce as a direct or indirect result of any work that we carry out for you, and anything that you derive from this information and material but excluding everything which:
 - is generally available to the public (but not because you or anyone you are responsible for has disclosed it or allowed it to be disclosed); or
 - you or a third party have independently developed or acquired, except where this was derived from information sourced from us which otherwise comes within this definition of Confidential Material.

Goods means all Goods that we supply to you from time to time, provided that:

- (a) (but solely for the purpose of the application of the PPSA) where the Goods supplied are your inventory, all references to Goods shall, in respect of those Goods, be read as references to inventory while they are held as inventory; and
- (b) where the Goods supplied are not or are no longer held as your

inventory, all references to Goods shall, in respect of those Goods, mean the Goods described in any relevant Order form, packing slip or invoice (or its equivalent, whatever called) prepared by us and relating to those Goods, on the basis that each such Order form, packing slip or invoice (or its equivalent) is deemed to be assented to by you, incorporated in, and form part of, these Terms of Trade, and (unless the context requires otherwise) includes all proceeds of such Goods and any product or mass which the Goods subsequently become part of.

Terms of Trade refers to this entire agreement which acts as Terms of Trade, Credit Application and Security Agreement.

Working Hours means the hours between 8.30 am and 5.00 pm on a Business Day.

Business Day means Monday to Friday, excluding public holidays observed in Auckland.

17.14 *Construction of these Terms of Trade:*

Headings: headings appear for convenience and do not affect the construction of these Terms of Trade;

Including: a reference to "including" or "includes" means without limitation;

Negative obligations: a reference to a prohibition against you doing anything includes a reference to you not permitting, suffering or causing that thing to be done;

Parties: a reference to a party to these Terms of Trade or any other document includes that party's personal representatives/successors and permitted assignees;

Person: a reference to a person includes a corporation, partnership, trust or sole trader and also includes a body of persons, whether incorporated or unincorporated.