

XannaX Works Limited TERMS OF TRADE

These Terms of Trade apply when we do anything for you, now or in the future. They apply in addition to our existing terms and conditions applying to you the customer.

If you have any questions about them, call us on 04 499 9679 or email us on accounts@xwl.co.nz. We are always happy to help you.

1. DEFINITIONS AND INTERPRETATION

In these Terms of Trade:

- (a) 'Agreement' means these Terms of Trade;
- (b) "Confidential Information", "Recipient" and "Owner" all have meanings defined in clause 8;
- (c) 'The Customer' is the entity either named as such in our documentation or the party to whom we invoice for the provision of Products as defined below and includes the Customer's permitted assigns and successors;
- (d) 'You' or 'Your' means the Customer;
- (e) 'XannaX Works Ltd' includes our permitted assigns and successors, officers, staff, representatives, agents and any business we own or control in any way. 'We' or 'Us' means XannaX Works Ltd;
- (f) 'Equipment' means computer and telecommunications hardware, firmware and software We supply together with accessories, attachments and other parts and fittings for such equipment;
- (g) 'Interest' means the base rate of interest chargeable by our bank on commercial overdrafts on the date the payment is due or incurred plus a margin of 17%;
- (h) 'Product' means the Equipment and/or Services to be supplied to You by Us or on Our behalf;
- (i) 'Service' means the services to be supplied to You by Us or on Our behalf and includes without limitation the supply, installation, maintenance and support of Equipment and anything else We do in the course of our relationship with You;
- (j) 'Site' means the physical location where the Products are to be provided;
- (k) The rule of construction known as the contra proferentem rule does not apply to this Agreement;
- (l) Headings are for convenience only and do not affect interpretation;
- (m) The singular includes the plural and vice versa;
- (n) A reference to an enactment or any regulations is a reference to that enactment or those regulations as amended, or to any enactment or regulations substituted for that enactment or those regulations; and
- (o) A reference to "written" or "in writing" includes all modes of presenting or reproducing words, figures and symbols in a tangible and permanently visible form.

2. IMPORTANT: GENERAL CLAUSE

- (a) **We do not supply Products other than in the course of business and for business purposes. Therefore You agree that Your general rights at law in connection with the Products will to the extent permitted by law be determined by this Agreement only. In particular, You agree that the provisions of the Consumer Guarantees Act 1993 ('CGA') and Sale of Goods Act will not apply to the Products We provide under this Agreement.**
- (b) **If You purchase any Products from Us for re-supply, or incorporate any of Our Products into goods ordinarily acquired for personal household or domestic use or consumption ("Consumer Products") You warrant that:**

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- (i) If You supply the Consumer Products directly to an end user/consumer You will do so using terms and conditions of supply which exclude liability for any claims under the CGA; and
- (ii) If Your customer acquires the goods for re-supply, Your customer and each person in the distribution chain will exclude liability in its contract for supply for any claims under the CGA.

But in each case only, where the end user/consumer acquires the Consumer Products for business purposes.

You agree to indemnify Us against any costs or loss or damage caused by failure by You, Your customers or any person in Your distribution chain to properly contract out of liability to business and end users/consumers under the CGA.

3. PRICING

- (a) All prices quoted in writing are valid for the period specified on the quotation or until earlier acceptance by You. Oral quotations given by Us or on Our behalf and where no period is specified are only valid to the end of the business day upon which they are given.
- (b) We reserve the right to refuse to accept any order or any part order for any reason whatsoever, and to deliver Products by instalments, in which case each instalment will comprise a separate contract and shall be paid for as if it were a separate order.
- (c) You agree to pay not only Our fees but also:
 - 1 Any taxes or duties which We must collect or pay for the Products (such as GST);
 - 2. Storage and insurance costs, if we hold the Products before they are delivered to you;
 - 3 Any increase in the price of the Products caused by a fluctuation in the exchange rate of the New Zealand dollar; and
 - 4 The actual cost of any and all expenses reasonably incurred in the delivery of the Products to You.

4. LIABILITY

- (a) You agree that to the extent permitted by law We are not liable for any damage, harm or loss suffered by You howsoever caused including without limitation through the use, provision of or the failure to provide Our Products. This includes without limitation liability for misrepresentation, consequential loss, loss of profits, reparations, costs or loss of business or harm to third parties.
- (b) Without limiting clause 4(a) We will not be liable for problems caused directly or indirectly by
 - 1. Delay in the provision of Products;
 - 2. Improper use of Equipment; or
 - 3. Spam, any worm, virus or other malicious code; or
 - 4. Any unauthorised access to Equipment;
 - 5. Loss of data;
 - 6. Any criminal or intentionally destructive act; or
 - 7. Failure by the Customer to provide a suitable physical environment; or
 - 8. Alterations, amendments or attachments to the Products which have not been approved in writing by Us; or
 - 9. Service work not performed by Us.
- (c) We shall not be liable for failure to perform obligations if the failure results from force majeure, third party failure to perform, natural disaster, act of God, fire, explosion, industrial dispute, damage by fire, water, accident, electrical supply, environmental

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- fault (including the effects of corrosive atmospheric contaminants); illness, act of government such as a change in legislation, regulation, or order made under legislative authority, or anything beyond our control.
- (d) In the event that We are found liable for any damage or loss such liability is limited to the monies actually paid to us over the 3 (three) months preceding the date of the event giving rise to the liability.
 - (e) We agree to pass on the benefit of all warranties We receive for Products supplied to You provided that You do not by action or inaction invalidate such warranties.
 - (f) Our agreements with you are not enforceable by or intended to confer a benefit upon any third party.

5. THE CUSTOMER'S DUTIES TO US

- (a) You and everyone You are responsible for by entering this Agreement gives Us authorisation to access Your computer and communications systems in terms of Section 252 of the Crimes Act 1961 both remotely and on site;
- (b) You and everyone You are responsible for by entering this Agreement shall:
 - 1. Make sure that all information You give Us is accurate and complete;
 - 2. That You have the authority of the Business to purchase the Products and enter into this Agreement;
 - 3. Meet any requirements We tell You about, follow the instructions and comply with the standards applying to provision of our Products set by Us from time to time;
 - 4. Only use our Products for lawful functions;
 - 5. Undertake at least daily back ups of all data and Equipment;
 - 6. Enter into and comply with the licences required to use any of the Products We provide;
 - 7. Get any consents We need to provide our Products and let Us enter the Site(s) to provide our Products or anything connected with them. We will always have evidence of identity;
 - 8. Provide safe conditions for Us to provide our Products;
 - 9. Pay for any unnecessary attendances at the Site(s) by Us unless We have agreed in writing otherwise;
 - 10. Never interfere with our Products. We will not be responsible for damage resulting from unauthorised access, repairs or alterations;
 - 11. Pay for repairing or replacing any of our Products which are damaged by anyone except Us;
 - 12. Keep Us protected against any action taken against Us because of Your use of our Products or our access to and use of Your computer and communications systems while we are providing our Products. This includes payment of any costs (including full indemnity costs), reparations, damages or cost of other award against Us or incurred by us to deal with such action.
- (c) You agree that delay in delivery or performance shall:
 - 1. not entitle You to cancel any order; and
 - 2. if You fail to take delivery of the Products or any part of them or fail to provide any instructions, documents, licenses, consents or authorisations required to enable the Products to be delivered on the due date, We shall be entitled, upon giving written notice to You, to store or arrange for storage of the Products, and then risk in the Products shall pass to You, delivery shall be deemed to have taken place, and You shall pay to Us all costs and expenses (including storage and insurance charges) arising from your failure.
- (d) Unless we have expressly agreed to the contrary in writing You agree:
 - 1. That unless You have notified Us by telephone, fax or in writing within two days of delivery of the Products, You accept the Products as being in good condition,

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fit for purpose, and provided in accordance with the terms of sale either set out in this Agreement or as otherwise agreed.

2. We have the right to refuse return of any Products for credit if in Our sole discretion the Products or the original packaging have been damaged in any way.
3. That Products specifically imported or procured on your behalf cannot be returned except by prior written approval from Us and then only on such terms and conditions as We may agree.
4. If we agree to accept the return of Products (other than defective Products) we shall be entitled to on-charge to you any costs We might incur including without limitation any taxes, duties, shipping or handling charges.
5. That where you are to ship Products to Us:
 - (i) You must ship the Products back to Us in their original or equivalent packaging, prepay shipping charges, and insure the shipment or accept the risk of loss or damage during shipment; and
 - (ii) You shall back up all data stored in the Products to be shipped and remove any removable media, such as diskettes, CD's, or PC Cards. We do not accept any liability for lost data or software. You accept full responsibility for your software and data and We are not required to advise or remind you of appropriate backup and other procedures.

6. FEES, INVOICES, AND PAYMENT

- (a) We will send You invoices for our fees unless arranged otherwise in writing. You must pay each invoice within 14 days of the date of the invoice in full without deduction or set-off. You must let Us know before the due date for payment if You think there is an invoicing error. If We agree, We will adjust the invoice. If We find there is no error, and the due date for payment has already passed, You must pay the unsettled amount immediately plus Interest.
- (b) You shall not be entitled to withhold payment of all or any of the price of the Products whilst any claim for Product failure or other breach of this Agreement is being investigated by Us.
- (c) If You do not pay an invoice by the due date for payment, We may:
 1. Stop supplying any Product We provide;
 2. Charge You Interest on the unpaid amount from the due date until paid whether demand for Interest has been made or not;
 3. Charge You for any costs We have to pay in collecting any money You owe Us. This includes the full cost to Us of exercising our legal rights to collect unpaid monies and which includes costs as between solicitor and client plus Interest on these costs.
- (d) We may alter our fees from time to time. We will give You reasonable notice of any alterations;
- (e) We may require You to pay Us a deposit;
- (f) All Equipment purchased from us is Collateral for the purposes of the Personal Property Securities Act 1999 until payment in full is made for the Products we have supplied to You:
 1. You agree that until We have received payment in full for any Collateral provided by Us to You, You give to Us a Purchase Money Security Interest in the Collateral;
 2. You shall cooperate to the extent required by Us to enable the registration of a Financing Statement on the Personal Property Security Register;
 3. You agree that We are entitled to take possession of any of the Collateral for which payment has not been made and You grant Us a right of entry for the purpose of removing such Collateral;
 4. The provisions of s114, 116, and 120 of the Personal Property Securities Act shall not apply to this Agreement.

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- (g) Although ownership of the Collateral remains with Us until our fees are paid, You acknowledge that risk in the Collateral passes to You as soon as it is provided to the Site(s).
- (h) Where We replace any Equipment the item replaced becomes our property and the replacement becomes Your property.

7. PRIVACY

- (a) You agree that We may collect information about You. You may decide whether to provide any of the information. However, if You do not provide it, We may not be able to provide Products to You.
- (b) You may ask to see information We hold about You and ask for any details that are wrong to be corrected.
- (c) We may hold the information and share it with any other person whom We consider it necessary to share it with in order to provide our Products to You.
- (d) Information obtained about You will be held throughout the relationship with Us and for seven years following the date of Your last transaction with Us or as may otherwise be required by law.
- (e) Subject to clauses 7(a) to (d) above We shall keep all information about You confidential.

8 CONFIDENTIALITY

- (a) "Confidential Information" means this Agreement and the discussions, negotiations and proposals related to this Agreement and any information exchanged, regardless of its form, in connection with or as a consequence of this Agreement concerning the business of the other party that is received by a party ("Recipient") directly or indirectly from the other party ("Owner") and includes without limitation information, data and know-how, whether technical or not, which is disclosed by the Owner, information which is either marked or stated to be confidential, or is by its nature reasonably intended to be confidential but does not include any information to the extent the recipient can show the relevant information:
 - 1. Is part of or legitimately enters the public domain;
 - 2. Is already in or comes into the unrestricted possession of the Recipient without there having been any breach of a third party's obligations of confidentiality;
 - 3. Has been independently developed by the Recipient (as evidenced by records in its possession);
 - 4. Is not intended to be confidential as evidenced by the written agreement of its Owner; or
 - 5. Legally must be disclosed, or is required to be disclosed pursuant to the listing rules of any applicable stock exchange, provided that prior to making the disclosure the Recipient of the Confidential Information has where practical given the owner of the Confidential Information notice of the request for disclosure and where practical obtained a confidentiality order or similar protection limiting the persons to whom disclosure of the Confidential Information is made if the Owner of the Confidential Information has no effective standing to address the matter itself.
- (b) The Recipient will:
 - 1. Not use, or allow the use of, the Confidential Information for any purpose other than to perform its obligations under this Agreement;

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2. Not disclose, or allow the disclosure of, the Confidential Information to anyone other than its personnel, contractors or agents who have a need-to-know for the purposes of fulfilling the Recipient's obligations under this Agreement;
3. Treat, and will ensure that its relevant personnel, Related Companies, contractors and agents treat, the Confidential Information with the utmost confidence;
4. Without limiting the above obligations, exercise the same standard of care in the treatment and protection of the Confidential Information as it exercises or should exercise for its own confidential information of a similar nature and sensitivity; and
5. On discovery of any breach of this clause by Recipient or any person in possession of Confidential Information through Recipient, immediately notify Owner of such breach and co-operate with Owner in every reasonable way to help Owner regain possession of the Confidential Information and prevent its further unauthorised use or disclosure.

9. INTELLECTUAL PROPERTY

- (a) Unless otherwise agreed in writing:
 1. Notwithstanding that You may have commissioned Us to design or otherwise create Products for You, We retain the right to use, alter, sell or license any and all copyright, any brand, idea, expression of an idea or other form of intellectual property that might exist in the Products for all purposes in all jurisdictions ("IP").
 2. Upon payment of Our charges in full You are granted a non exclusive perpetual right to the use, sale and license of the IP.
 3. If you alter the Products in which We have IP You must distinguish such alterations from the Products produced by Us.
 4. If You alter or use the Products that We have supplied in a manner that infringes or is alleged to infringe Our or a third parties IP You indemnify us against any cost, damage, loss or other harm we might suffer as a consequence of such an allegation or infringement.
- (b) We produce methods, applications and systems that We use to provide Products to Our customers and which might come into Your possession. All copyright and other rights in such material are owned by Us and do not form part of any Product we provide to You. You are not authorised to use, reproduce in any form, permit by action or inaction a third party to access or use such material.
- (c) We do warrant that to the best of Our knowledge We will have obtained any and all licenses, consents or other permissions required for us to provide Our Products to You.
- (d) However, We do not guarantee or warrant that the provision to You or Your use of Our Products will not infringe the IP of a third party.
- (e) Except under the terms of this Agreement You agree not to directly or indirectly retain Our staff or representatives that have worked for Us in the twelve (12) months preceding the date of intended retention without Our prior written consent.

10. COMPLIANCE WITH APPLICABLE U.S. LAWS

- (a) You warrant that all technology, technical data received directly or indirectly by You from Us under this Agreement is intended solely for use by You and Your customers. 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 Your customers within such countries as are not forbidden or restricted now or hereafter by 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

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United States laws, as now or hereafter exist. We expressly reserve the right to refuse any order which, in Our sole judgement is or may be in violation of such laws on the part of You or Your customers.

11 AGREEMENT APPLIES AT ALL TIMES

- (a) This Agreement applies to all Products We provide to You now or in the future and is to be read as applying in addition to any of Our existing terms and conditions applying to You. In the event of a conflict between Our existing terms and conditions and this Agreement, the terms and interpretation most favourable to Us will apply.
- (b) Unless otherwise expressly agreed in writing by Us the terms and conditions of this Agreement govern our relationship and You agree that notwithstanding any other Agreements or communications between You and Us the terms of this Agreement are paramount and take precedence in the event of any conflict.
- (c) The cancelling of any Agreement that You have with Us does not affect any rights and responsibilities which are intended to continue or come in to force afterwards. These include the rights and duties under clauses 2, 3, 4, 5, 6, 7, 8, 9, 10, this clause 11, clauses 12, 17, 18, 19 and any other clause which impliedly or expressly is to survive termination of this Agreement.

12. JURISDICTION

- (a) Notwithstanding that Our Products may be advertised as being available for sale in jurisdictions outside of New Zealand, Products are only available for purchase within New Zealand.
- (b) This Agreement and the supply of Our Products is to be interpreted under New Zealand law and the parties submit to the jurisdiction of the New Zealand Courts located in Wellington.

13. ALTERING THESE CLAUSES

- (a) We may at our sole discretion alter or remove existing clauses of this Agreement or add new ones.
- (b) We will tell You about any alterations by sending You at least one months' notice before they come into effect. We will never alter this stipulation.

14. SERVICE OF NOTICES

- (a) We will send bills and other notices to the last street address, e-mail address or fax number You have given Us. We will assume any:
 - 1. Invoice or notice has been delivered 2 days after We send it;
 - 2. E-mail has been received when it has been sent to the e-mail address We sent it to even if it has not been downloaded from the internet service provider hosting the e-mail address;
 - 3. Fax has been received when We receive confirmation of transmission.
- (b) You may send any notice to Us by:
 - 1. Posting it in a pre-paid letter to XannaX Works Limited, PO Box 23-064, Wellington 6140; or
 - 2. Delivering it personally to XannaX Works Limited, L7, Petherick Tower, 38 Waring Taylor St, Wellington 6011; or
 - 3. Sending it by fax to 04 499 0353.
- (c) If You change Your street address, e-mail address, telephone number or fax number please tell Us by calling Us on 04 499 9679.

15. MEETING OUR DUTIES THROUGH AGENTS

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We may have an agent perform any of the obligations We have to You. Any such agent and their officers, employees, contractors or agents shall have the benefit of this and any Agreement that confers a benefit on Us.

16. TRANSFERRING RESPONSIBILITIES

- (a) We may transfer our side of this Agreement to someone else. We will tell You if We do this.
- (b) You may not transfer this Agreement or any benefit or obligation of it to anybody. If You are a Business and Your management or control is altered, then this will be treated by Us as a transfer of this Agreement entitling Us to end it.

17. EACH CLAUSE SEPARATELY BINDING

Each clause of every Agreement You have with Us is separately binding. If for any reason We or You cannot rely on any clause, all other clauses are binding.

18. NON-WAIVER

Any failure by Us to enforce at any time or for any period any one or more of the terms of this Agreement is not a waiver of them or of the right at any time subsequently to enforce all terms and conditions of this Agreement.

19. DISPUTES AND REMEDIES

- (a) Nothing in this clause shall preclude any action We consider appropriate to collect any amounts owing to Us.
- (b) The parties agree to use their best efforts to resolve any dispute that may arise under the Agreement through good faith negotiations. Except as provided in clause 6, no party shall commence any arbitration or litigation in relation to this Agreement unless it has first invited the other party to meet with it for the purpose of endeavouring to resolve the dispute on mutually acceptable terms.
- (c) Any dispute arising under this Agreement which cannot be settled by negotiation between the parties or their respective representatives shall be submitted to mediation before commencing any litigation. Either party may initiate mediation by giving written notice to the other party.
- (d) If the parties cannot agree to a mediator within two working days of a notice calling for mediation, the mediator will be selected by the President for the time being of the Wellington District Law Society.
- (e) Mediation shall be in Wellington and the parties shall share equally the cost of the mediator but shall otherwise meet their own costs for preparing for and attending mediation.
- (f) The parties shall continue to perform their obligations under the Agreement as far as possible as if no dispute had arisen pending the final settlement of any matter referred to mediation.
- (g) Nothing in this clause shall preclude either party from taking immediate steps to seek urgent equitable relief before a Wellington Court.

20. INDEPENDENT ADVICE

You acknowledge that prior to completing this Agreement You have had the opportunity to obtain such advice, including independent legal advice, as You require regarding this Agreement and its effects.