

Lexel Systems Limited (“Company”)

Supplemental Terms - Third Party Software and Services

(These Supplemental Terms form part of the Terms of Business (“Terms”) of the Company. A full copy of the Terms can be found at www.lexel.co.nz/tob or provided to the Customer on request. All sales and service to Customers are subject to the Terms unless agreed otherwise in writing by both parties)

Background

- A. From time to time the Company has or will enter into agreements with the Customer in relation to third party software and software services, to be provided by the Company to the Customer, as are more particularly set out in those agreements (“**Arrangements**”).
- B. Such Arrangements may include the provision of software or services from a third party. It may also include advice on software or third-party services agreements (including licensing terms, conditions and construct) to the Customer and/or arranging for the Company to have access to such software or services, including those needed by the Company to enable it to perform the Arrangements.
- C. The Customer acknowledges that the ability of the Company to perform the Arrangements may, from time to time, ultimately depend on the Company entering into agreements with Software Suppliers, to secure access to the software and services necessary for the Company to perform the Arrangements and/or for the Customer to receive the benefit of the Arrangements.

Agreement

1. These Supplemental Terms set out the terms and conditions that will apply to the provision of Software and Software Advice, directly or indirectly to the Customer, or utilisation of the same by the Company as part of performing the Arrangements.
2. By placing an order or continuing an Arrangement with the Company, the Customer expressly agrees that:
 - a. These Supplemental Terms vary and take precedence over any and all other terms and conditions in the existing (as of 1 December 2022) Arrangements notwithstanding any formality set out in those Arrangements regarding the way in which those terms and conditions may be varied;
 - b. These Supplemental Terms can only be varied by a subsequent written agreement between the parties that expressly refers to these Supplemental Terms and the modifications that will apply.
3. The Customer acknowledges and agrees that:
 - a. the Company’s performance of the Arrangements may ultimately depend upon the terms and conditions upon which the Software Suppliers are willing to supply and/or license the relevant Software and Services to the Company;
 - b. the Company’s entering into or maintaining existing Software agreements with Software Suppliers, in respect of the supply or licensing of Software or to enable it to receive the benefit of the Services to be used in connection with the Arrangements, is to facilitate the Customer’s direct or indirect access to such Software and Services;
 - c. the Company is, in many cases, not able to negotiate changes to the Software Suppliers’ licenses and/or their terms and conditions and that the Company is required just to accept licenses and/or those terms and conditions without variation;
 - d. the Customer is not in any better position to negotiate different terms and conditions with the relevant Software Suppliers;
 - e. the Company may be required to accept longer contractual commitments with Software Suppliers, to secure access to the relevant Software and Services, than the term of commitment under the relevant Arrangement (particularly if any of the Arrangements are terminated early);
 - f. the Software Suppliers terms and conditions often include terms that allow the Software Suppliers to unilaterally alter their terms and conditions (including, but not limited to, those matters set out in the Appendix).
4. Recognizing the need for direct or indirect access to the relevant Software, to obtain the benefit of the Arrangements, the Customer:
 - a. requests the Company to enter into such Software Suppliers agreements, with the relevant Software Suppliers, as the Company believes is necessary to enable the Company to perform the Arrangements and/or for the Customer to get the benefit of the Arrangements; and

- b. agrees to perform all Software and Services related obligations that may be set out in those Software Suppliers licenses and/or terms and conditions, in so far as they relate to Software or Services provided directly or indirectly to the Customer as part of the Arrangements.
5. The Customer agrees that:
- a. where the Software or Services of a Software Supplier are made available to the Customer under or in connection with an Arrangement, the Customer will comply with all terms and conditions of the relevant Software Suppliers (including any associated EULA) whether or not the Customer is specifically updated with subsequent amendments to the relevant Software Suppliers terms, conditions or EULA. The Customer acknowledges that it has the responsibility of keeping itself updated as to the relevant Software Suppliers terms and conditions and any EULA terms;
 - b. at the time the Customer orders or uses the Software, that act by itself can be considered to be acceptance by the Customer of the terms and conditions of the associated Software License or EULA.
 - c. any terms and conditions that the Company enters into with a Software Suppliers relating to:
 - i. Software or Services to be resold or licensed to the Customer;
 - ii. Software Advice to be provided to the Customer; and
 - iii. Software or Services that will be utilized by the Company,in connection with the Arrangements will apply to the Customer, in so far as they relate to the Arrangements, and the Customer agrees to comply with such terms and conditions including all amendments made to them from time to time;
 - d. it will maintain and review the relevant Software terms, conditions and details, associated with the Arrangements, including quantity, type, and term, and satisfy itself as to the correctness, suitability and conditions on a regular basis, specifically including any renewal or key milestone dates associated with such licensing or Service arrangements;
 - e. it will check and promptly advise the Company of any errors or omissions on any quote or renewal provided to the Customer and that any non-response prior to the Company placing an order on its behalf and that any failure to advise of any changes prior to an automatic renewal date deadline will constitute acceptance by the Customer of the renewal;
 - f. it will, at all times, keep all relevant administration passwords secure and not share them with any unauthorised parties or treat them in an insecure way and will, at a minimum, maintain two factor authentication and maintain full logging of use;
 - g. it will not share any advice or quotations, that are provided to the Customer by the Company or a Software Suppliers in connection with an Arrangement to any third party (and specifically not to any existing or potential alternative supplier to the Customer) without the prior written consent of the Company.
6. In respect of usage-based Software or Services, the Customer agrees:
- a. to pay for what Software and Services the Customer consumes including variable usage based fees;
 - b. that where the Company, in its sole discretion, believes it is necessary, the Company may configure caps to such usage which may result in hard stops to the Customers in accessing such Software and or Services;
 - c. that the Company will not be under any obligation to monitor or to put in place usage caps;
 - d. that if, usage caps are put in place through a decision made by the Company or at the request of the Customer, there is no commitment on the part of the Company as to how comprehensively these caps will work (if at all) or their overall effectiveness in applying a usage cap.
7. The Customer agrees that, in respect of any Software Advice that is provided to the Customer, the Company will not be responsible for any errors or omissions, on the part of the Company, in connection with that advice or the Customer reliance on it.
8. The Customer agrees that the Company will not have any liability to the Customer:
- a. where the Customer directly edits the Software configuration or other details within a Software Supplier's portal or similar and the Customer agrees to indemnify the Company for any costs or charges which the Company may become responsible for, as a result of such actions, and the cost associated with rectifying such situation; and
 - b. for any commitments, agreements, or services (including Services) that a Software Supplier provides directly or through the Company to the Customer and the Customer's sole recourse for all such matters shall be solely against the relevant Software Supplier.

9. The Customer agrees that, to the maximum extent permitted by law:
 - a. unless expressly stated in writing by the Company, the Company does not make any representation or warranty whether express, implied, statutory or otherwise in relation to the Software, Software Advice or Services provided in connection with any Arrangement and any term, condition, representation or warranty which would (but for this clause) be implied into this agreement by any legislation is expressly excluded;
 - b. neither the Company nor any of its directors, officers, employees, contractors and agents (each a "**Related Party**") will be liable in respect of any loss or claim arising under these Supplemental Terms or in respect of the provision (or non-provision) of any Software, Software Advice or Services under or in relation to these Supplemental Terms or any Arrangement except to the extent such loss or claim is caused by the Company's gross negligence, fraud or wilful default;
 - c. the Company shall not be liable in connection with any claim, under these Supplemental Terms or any Arrangement, for any indirect or consequential loss or for any loss of revenue, profits, goodwill, business or anticipated business, anticipated savings or for any business interruption, loss of data, or other indirect or consequential loss or damage;
 - d. the maximum liability of the Company under or in connection with these Supplemental Terms or any Arrangement shall be limited to the lesser of (i) 10% of the fees paid to the Company under the Arrangements over the 12 months prior to the lodgment of the claim; and (ii) \$10,000.
 10. The Customer agrees to make timely payment to the Company of all moneys due and owing to the Company under the Arrangements and the arrangements provided for under these Supplemental Terms and that any failure by the Customer to do so constitute a breach of these Supplemental Terms. If the Customer is late in relation to any payments to the Company or the Company, in its sole discretion, has concerns regarding the timely payment by the Customer of amounts that will become due and payable under the arrangements or these Supplemental Terms, the Company may require the Customer to make a prepayment of the amounts that may become due or provide security, to the satisfaction of the Company, for such amounts.
 11. The Customer agrees that the Company shall be entitled to charge the Customer interest on such any late payment of 14% per annum from the date due until the relevant amount has been paid in full (both before and after any judgement).
 12. The Customer agrees that a breach of these Supplemental Terms shall be deemed to be a material breach of all Arrangements.
 13. Notwithstanding any the terms of any Arrangement to the contrary, if the Customer breaches these Supplemental Terms or the terms and conditions of any Arrangement, the Customer agrees that the Company shall be entitled to:
 - a. terminate all or any of the Arrangements;
 - b. limit or disable the Customers ongoing access to the Software, Software Advice and Services provided under or in connection with these Supplemental Terms or the Arrangements (notwithstanding that this may prevent the Customer from accessing its data);
 - c. accelerate any payments that would have become due and payable by the Customer under or in relation to the relevant Arrangement but for the early termination of that Arrangement;
 14. In addition to any right of set off, combination of accounts, lien or other right to which the Company is at any time entitled (whether by law, contract or otherwise), without prior notice or demand, apply any amount owed or to become owing to the Customer by the Company in or towards satisfaction of any amount payable by or on behalf of the Customer under or in relation to these Supplemental Terms and, for such purpose, the Company is authorized to accelerate the date for payment of any amount owing or to be owing by the Customer to the Company.
 15. The Customer agrees to indemnify the Company against any all losses, claims, proceedings, fines, damages and liabilities suffered or incurred by the Company arising directly or indirectly from, as a result of, or in connection with the Customer breaching the terms of:
 - a. These Supplemental Terms or any Arrangement;
 - b. any Software Suppliers terms and/or EULA's entered into in connection with any Arrangement.
 16. The parties agree that the services and deliverables provided to the Customer under or in connection with these Supplemental Terms or any Arrangement are supplied for the purposes of a business, and that the Consumer Guarantees Act 1993 and sections 9, 12A, 13 and 14(1) of the Fair Trading Act 1986 do not apply to the provision of such services and deliverables.
 17. The Customer acknowledges that the Company may, from time to time, receive incentive payments from Software Suppliers and that such payments shall solely be for the benefit of the Company and the Customer shall have no right or entitlement to them or any part thereof.
 18. Should any part or provision of these Supplemental Terms be held unenforceable or in conflict with any New Zealand law, the invalid or unenforceable part of provision shall be replaced with a provision which accomplishes, to the extent possible, the original business purpose of such part or provision in a valid and enforceable manner, and the remainder of the Agreement shall remain binding upon the parties.
 19. The Customer shall not be entitled to assign its rights under these Supplemental Terms without the prior written consent of the Company.
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20. Each party shall be responsible for meeting its own costs in relation to the negotiation and entry into these Supplemental Terms.

21. Unless the context requires otherwise:

“**EULA**” means an end user licensing agreement relating to Software that is provided to the Customer or utilized in connection with an Arrangement that is issued by the Software Suppliers that owns, licenses or distributes the Software, which agreement sets out the terms and conditions of use which will apply to the Customer in directly or indirectly utilizing the Software. Where a Software Supplier provides support under a statement of work, that statement of work will also be included under this definition.

“**SAAS**” includes any Software which is delivered as a service, as opposed to as a license only.

“**Services**” includes any services directly or indirectly provided by a Software Supplier to the Company and/or the Customer in connection with an Arrangement.

“**Software**” includes any software sold, licensed, provided as SAAS or otherwise provided to the Company by a Software Supplier that the Company resells, sublicenses or otherwise makes available, directly or indirectly, to the Customer under or in connection with any Arrangement and shall expressly include any Software Supplier software or service that the Company utilizes in performing its obligations to the Customer under any Arrangement.

“**Software Advice**” means any advice that Company provides to the Customer regarding the Software, or its terms and includes such advice as may be provided directly to the Customer by a Software Supplier, in each case, in relation to an Arrangement.

“**Software Supplier**” means any owner, supplier or distributor of Software that is licensed or otherwise made available to the Company, which the Company then makes available, directly or indirectly, to the Customer under or in connection to any Arrangement. This term shall also include any intermediary used by the Software Supplier in making the Software available to the Company and/or the Customer through the Company.

22. These Supplemental Terms will be governed by and construed in accordance with the laws of New Zealand

Appendix A

As examples of Software Supplier's terms and conditions, these may typically include and not limited to:

1. Automatic renewals of licensing for another term, with or without notice to the Customer.
2. Renewal provisions that have short notice periods / limited windows within which to advise whether renewal is requested or not.
3. No or little advance notice of upcoming renewals.
4. No obligation to agree to any variation to licensing terms.
5. Not renewing may result in an inability to access software and/or data.
6. Price increases for changes requested
7. No ability to changing licensing partners during the term
8. No licensing downgrades or changes within a licensing term.
9. Licenses may be locked to a company or a user and cannot be transferred to other companies or users or may have a minimum period before reassignment is possible.
10. That outages in software licensing, services or support may occur.
11. That data backups may not be included in the software licensing or services.
12. That technical support of the Software Suppliers products and services is not provided as part of the software licensing unless explicitly stated.
13. Terms and conditions, including pricing, may be altered by the Software Supplier during the term