

Theta software licence

This Agreement is between you and Theta Systems Limited ("**Theta**") an incorporated company in New Zealand. By accessing and using the Software you accept and agree to be bound by the terms and conditions of this Agreement ("Terms").

1. Terms

These Terms may be varied by Theta, on the posting of modified terms on Theta's website (www.Theta.co.nz) or by providing written notice to you. By continuing to access and use the Software from the date on which the Terms are updated, you agree to be bound by the updated Terms.

2. Licence

- a. Subject to these Terms, Theta grants you a limited, personal, non-transferable and non-exclusive licence to use and display the Software and provide access to use the Software to your employees and contractors for your internal business uses for the Term.
- b. You shall not make the Software available, nor permit any other person or entity, to use the Software on a sub-licensed or other basis.
- c. Licence Fee – any fee payable for the Software (Fee) will be detailed on Theta's website at www.theta.co.nz. The Fee will be invoiced to you and charged to your credit card. Payment of the Fee must be made in advance of your use of the Software.
- d. Theta may suspend or terminate your access to the Software where you fail to pay any Fee due to THETA under these Terms on the due date.
- e. Access to the Software is subject to the following conditions:
 - i. you must not attempt to undermine the security or integrity of any third party hosting the Software.
 - ii. you must not attempt to gain access to materials other than those you have been given permission to access within the Software or on the systems on which the Software is hosted.
 - iii. you must not transmit or input to the Software any content or files that may be in violation of any law, offensive, in breach of copyright or trade secret, or which may damage any other computing devices or software.

3. Support

- a. Updates: From time to time Theta will make available amended versions, releases, updates, bug fixes and error correction and other modifications to the Software (collectively, "Updates"). All Updates will be deemed a part of the Software licenced to you under these Terms.

b. Assistance: Theta will provide you with access to the Theta help link (internet based access) to log issues and faults with the Software. Theta will attend to logged issues on a prioritised basis during Theta's normal business hours Monday to Friday (excluding public holidays).

c. Error Correction:

Theta will use reasonable endeavours to correct Software faults through Updates. Software faults are a function of an item of the Software not operating in accordance with the warranties set out below. Theta will use its reasonable endeavours to correct Software faults:

- i. which are not attributable to malfunction of equipment or software other than the Software; or
- ii. which are not attributable to incorrect use of the Software by you.

Theta will at its own option either advise you as to the correction or avoidance of the Software faults or make available Updates in a timely manner. Where the Software is hosted by a third party, Theta will provide the Update to the third party for it to make available for your use.

4. Theta's warranties

- a. Theta warrants that the Software will perform in substantial conformance with the online help published for the Software.
- b. Theta warrants that the Software does not infringe any copyright or trade secret of any third party arising under law. Theta's sole obligations in the event of breach of this warranty are those set out in this clause. Theta indemnifies you from costs, expenses, losses, damages, judgments arising out of any breach or alleged breach of the warranty in this clause to the limit of the liability established in the following clause; PROVIDED THAT you have notified Theta in writing as soon as practicable of any such infringement, suspected infringement or alleged infringement and you cooperate with Theta in the defence of such claim. Theta shall have the right to control the defence or settlement of any claim. If in Theta's determination your use of the Software is or is likely to be enjoined by any action or proceeding,
- c. Theta shall have the right, at its expense, to:
 - i. obtain the right for you to continue to use the Software; and/or
 - ii. modify the Software to avoid any infringement of the rights of third parties as set out in the first sentence of clause 4(b); and/or
 - iii. create or procure for you the right to use a substitute for such portions of the Software that avoid any actual or alleged infringement or violation. Upon Theta making any remedy available to you, such remedy will be in lieu of Theta's indemnity obligation set out in the third sentence of clause 4(b).

- d. Notwithstanding and without limiting the foregoing provisions of clause 4(b), Theta shall not be obligated to indemnify you to the extent such infringement, suspected or alleged infringement arises from:
 - i. use of the Software in a combination by any means and in any form with computer software and/or systems, including, but not limited to hardware, not specifically approved or recommended by Theta, if such claim would not have occurred but for such combination;
 - ii. use of the Software in non-conformance with these Terms; or
 - iii. modification or alteration of the Software without prior consent in writing of Theta, if such claim would not have occurred but for the modification or alteration.
- e. Except for the express warranties made in these Terms, THETA MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, WITH RESPECT TO THE SOFTWARE OR SUPPORT AND ANY WARRANTIES OTHERWISE IMPLIED BY COMMON LAW OR STATUTE OR ARISING OUT OF CUSTOM OR COURSE OF DEALING ARE EXCLUDED FROM THESE TERMS TO THE FULLEST EXTENT PERMITTED BY LAW. EXCEPT AS EXPRESSLY PROVIDED IN THESE TERMS, THETA DOES NOT REPRESENT, WARRANT OR COVENANT THAT THE FUNCTIONS CONTAINED IN THE SOFTWARE WILL MEET ANY REQUIREMENTS OR NEEDS OF YOU, OR THAT THE SOFTWARE WILL OPERATE ERROR FREE, OR IN AN UNINTERRUPTED FASHION, OR THAT ANY DEFECTS OR ERRORS IN THE SOFTWARE WILL BE CORRECTED, OR THAT THE SOFTWARE IS COMPATIBLE WITH ANY PARTICULAR PLATFORM.

5. Limitation of liability

You agree that Theta's cumulative liability for damages under or in connection with these Terms, regardless of the form of action, is limited to the fees paid by you to Theta in the 12 months preceding the warranty/claim event. IN NO EVENT SHALL THETA BE LIABLE (REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, OR OTHERWISE) FOR ANY INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES (INCLUDING, WITHOUT LIMITATION, ANY LOSS OF DATA OR RECORDS, LOST PROFITS OR OTHER ECONOMIC LOSS) ARISING OUT OF OR IN CONNECTION WITH THESE TERMS AND/OR ANY OBLIGATION OF CONFIDENTIALITY, EVEN IF THETA HAD BEEN ADVISED OF THE POSSIBILITY OF, OR COULD HAVE FORESEEN, SUCH DAMAGES OR LOSSES. You acknowledge and agree that the amount of the fees payable under these Terms is related to the foregoing limitations on Theta's liability and that the fees would be greater if Theta's liability were not so limited.

6. Intellectual property

- a. As between the parties, all copyrights and all other intellectual property rights in or related to the Software and the services provided by or on behalf of Theta shall

remain at all times the property of Theta and/or its licensors and you shall acquire no rights in any of the foregoing except as expressly provided in these Terms. You agree not to, and not to permit others to, use, copy, reproduce, display, deploy, perform, distribute, transmit, make available, or create derivative works of the Software or Documentation to decompile or reverse engineer any of the Software provided by or on behalf of Theta except as expressly permitted at law to do so.

- b. Title to, and all intellectual property rights in, the data stored by the Software remains with you ("Data"). However access to the Data is contingent on you having a current licence and any applicable Fees being paid in full and on time.

7. Data protection

- a. For the purpose of this clause "data controller", "data processor", "data subject", "personal data", "personal data breach", "processing", "sub-processor", "supervisory authority" and "appropriate technical and organisational measures" shall have the meanings ascribed to them in the Data Protection Legislation. "Data Protection Legislation" means applicable legislation protecting the personal data of natural persons, including the EU Data Protection Directive 95/46/EC and Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 ("GDPR"), together with binding guidance and codes of practice issued from time to time by relevant supervisory authorities.
- b. The parties acknowledge and agree that you are the data controller in respect of any personal data that Theta may process in the course of providing the Software (other than business contact data processed by Theta to allow it to manage your account). The parties acknowledge that New Zealand is a country which the European Commission has recognised as ensuring an adequate level of protection for the rights of individuals in connection with the transfer of their personal data outside the European Economic Area.
- c. Theta agrees to:
 - i. only use or handle the data transferred by you within the framework of these Terms and on the instruction of you or as otherwise required by applicable laws;
 - ii. promptly refer to you any requests, notices or other communication from data subjects, the Information Commissioner or any supervisory authority, for you to resolve;
 - iii. provide such information to you as you may reasonably require, and within the timescales reasonably specified by you, to allow you to comply with the rights of data subjects, including subject-access rights, or with notices served by the Information Commissioner or other supervisory authority;
 - iv. within 90 days of termination of these Terms, return to you or delete all personal data processed under these Terms;
 - v. implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk associated with Theta's processing of the personal data; and
 - vi. promptly notify you upon becoming aware of any personal data breach.

- d. You authorise Theta to appoint third party sub-processors to assist in the management of the Software and the Services.
- e. You warrant that you:
 - i. own or have obtained all necessary rights, title and interest in the personal data and all intellectual property rights and other rights contained therein, as well as the consent of any data subjects, necessary for the parties to perform their respective obligations under these Terms;
 - ii. have disclosed to the data subjects in compliance with applicable laws how you will collect, use and disclose personal data; and
 - iii. will use the personal data in accordance with these Terms and that such use will not constitute an infringement of the intellectual property rights, publicity or privacy or other proprietary rights of a third party, or the violation of any applicable laws, rules or regulations or a violation of any applicable privacy policy or terms and conditions.
 - iv. will indemnify Theta from and against all reasonable losses, damages, costs, liabilities and expenses (including reasonable legal expenses) arising out of or in connection with your breach of this clause.

8. Term and termination

- a. Term: These Terms become effective on the date that the Software is first accessed by you.
- b. Termination - Theta, in addition to all other rights and remedies, has the right to terminate these Terms and all licence rights granted to you by notice in writing to you if:
 - v. you breach any material term of these Terms; or
 - vi. you become insolvent or bankrupt, or enter into liquidation or receivership under the law of any jurisdiction, whether compulsory or voluntary; or
 - vii. the Software is hosted on a third party's platform and the third party determines not to host the Software for any reason;
- c. You may terminate these Terms and your right to use the Software, with or without cause, at any time by discontinuing your use of the Software, and by deleting all copies of the Software from your computers and systems.

9. Disputes

- a. The parties must use all reasonable efforts in good faith to resolve any dispute which arises between them in connection with these Terms. This provides for a form of alternative dispute resolution and is not a reference to arbitration.
- b. A party will, as soon as reasonably practicable, give the other party notice of any dispute in connection with these Terms.

- c. Any dispute will be referred initially to a designated representative of Theta and your designated representative, who will endeavour to resolve the dispute within 10 days of the giving of the notice; and if the dispute is not resolved within the 10 days, to your Chief Executive and the Chief Executive of Theta who will endeavour to resolve the dispute within a further 10 days.
- d. If, following the dispute resolution procedure set out above, the parties fail to resolve the dispute then the parties will try to settle the dispute by mediation before resorting to litigation. Either party may initiate mediation by giving written notice to the other. The mediator shall be agreed by the parties but if the parties cannot agree on one within 5 days after the mediation has been initiated, then the mediator shall be selected by the President of LEADR Inc. (Lawyers Engaged in Alternative Dispute Resolution) or its successor.
- e. No formal proceedings for the judicial resolution of any dispute between the parties may be commenced until a dispute has proceeded through the dispute resolution processes set out in (a) to (d) above; PROVIDED THAT, with respect to any claim by Theta of actual or alleged infringement of any confidentiality or intellectual property right of, or licenced to, Theta, Theta, in its sole discretion, may at any time seek judicial resolution with or without resorting to the dispute resolution and mediation processes set out above; and
- f. All dispute resolution procedures shall be held in Auckland, New Zealand, unless otherwise agreed in writing.

10. General

- a. No waiver of any breach of any provisions of these Terms shall constitute a waiver of a prior, concurrent or subsequent breach of the same or any other provision, and no waiver shall be effective unless made in writing.
- b. Theta intends that the Software will be available to the fullest extent possible. There will be occasions that the Software may be unavailable to allow for maintenance or development activities to take place. Theta will endeavour to publish in advance to you when such activity will take place when Theta considers that the non-availability will be longer than normally expected.
- c. These Terms contain the entire agreement between Theta and you with respect to the Software and the provision of it to you by Theta, including, but not limited to, the licencing of the Software and provision of support as specified in clause 3.
- d. These Terms are governed by the laws of New Zealand. Each party submits to the non-exclusive jurisdiction of the New Zealand courts.
- e. You must not assign, transfer or grant a security interest in its rights under these Terms except if approved in writing by Theta.