

Terms of Service New Zealand

1. APPLICATION OF THE TERMS

1.1 Acceptance:

These Terms apply to the Client's use of the SaaS Service (as those terms are defined below) and to anyone using the SaaS Service under the Client's account. By signing a Pricing Agreement or accessing and using the SaaS Service, you agree to these Terms.

1.2 Non-acceptance:

If you do not agree to these Terms, you are not authorised to access and use the SaaS Service, and must immediately stop doing so.

2. CHANGES

2.1 Changes:

The Supplier may change these Terms at any time by notifying the Client of the change by email or by posting a notice on the Website. Unless stated otherwise, any change takes effect from the date set out in the notice. The Client is responsible for ensuring it is familiar with the latest Terms. By continuing to access and use the SaaS Service from the date on which the Terms changed, the Client agrees to be bound by the changed Terms.

2.2 Last updated: These Terms were last updated on 15/04/2021.

3. INTERPRETATION and status of agreement

3.1 Definitions: In this Agreement, the following terms have the following meanings, unless the context otherwise requires:

"Agreement" means these Terms and the Pricing Agreement.

"BusinessDay" means any day other than a Saturday, Sunday or public holiday in Auckland, New Zealand.

"Client" means the client named in the Pricing Agreement.

“Confidential Information” means the terms of this Agreement and any information that is not public knowledge and that is obtained from the other party in the course of, or in connection with, this Agreement. The “Supplier’s Confidential Information” includes Intellectual Property owned by the Supplier (or its licensors), including the Conqa Software. The “Client’s Confidential Information” includes the Data.

“Conqa Software” means the software owned by the Supplier (and its licensors) that is used to provide the SaaS Service.

“Data” means all data, content, and information (including Personal Information) owned, held, used or created by or on behalf of the Client, whether before or after the date of this Agreement, that is or has been stored using, or inputted into, the SaaS Service.

“Fees” means the fees set out in the Pricing Agreement, as updated from time to time in accordance with clause 7.4.

“Force Majeure” means an event that is beyond the reasonable control of a party, excluding:
(a) an event to the extent that it could have been avoided by a party taking reasonable steps or reasonable care; or
(b) a lack of funds for any reason.

“GST” means goods and services tax.

“Intellectual Property Rights” includes copyright and all rights anywhere in the world conferred under statute, common law or equity relating to inventions (including patents), registered and unregistered trade marks and designs, circuit layouts, data and databases, confidential information, know-how, and all other rights resulting from intellectual activity, and “Intellectual Property” has a corresponding meaning.

“Objectionable” includes being objectionable, defamatory, obscene, harassing, threatening, harmful, or unlawful in any way.

“Permitted Users” means those personnel of the Client who are authorised to access and use the SaaS Service on the Client’s behalf in accordance with clause 5.3.

“Personal Information” has the meaning given in the Privacy Act 1993 (New Zealand).

“Pricing Agreement” means a document entitled Pricing Agreement that refers to these Terms and is issued by the Supplier and signed by the Customer.

“SaaS Service” means the service having the core functionality described on the Website.

“Start Date” means the date that the Client signs the Pricing Agreement.

“Subscription Period” means the subscription period (e.g. monthly, annual, multi-year) set out in the Pricing Agreement or otherwise agreed by the parties in writing.

“Terms” means these terms titled Terms of Service New Zealand.

“Underlying Systems” means the Conqa Software, IT solutions, systems and networks (including software and hardware) used to provide the SaaS Service, including any third party solutions, systems and networks.

“Website” means the Supplier’s website at <https://www.conqa.hq.com/>, or such other site notified to the Client by the Supplier.

“Year” means a 12 month period starting on the Start Date or the anniversary of that date.

3.2 Interpretation: In this Agreement:

(a) clause and other headings are for ease of reference only and do not affect the interpretation of this Agreement;

(b) words in the singular include the plural and vice versa;

(c) a reference to:

(i) a party to this Agreement includes that party’s permitted assigns;

(ii) personnel includes officers, employees, contractors and agents, but a reference to the Client’s personnel does not include the Supplier;

(iii) a person includes an individual, a body corporate, an association of persons (whether corporate or not), a trust, a government department, or any other entity;

(iv) including and similar words do not imply any limit; and

(v) a statute includes references to regulations, orders or notices made under or in connection with the statute or regulations and all amendments, replacements or other changes to any of them;

(d) no term of this Agreement is to be read against a party because the term was first proposed or drafted by that party; and

(e) if there is any conflict or inconsistency between this Agreement and the terms or policies on the Website, then to the maximum extent permitted by law, the provisions of this Agreement will prevail to the extent of the conflict or inconsistency and such terms or policies must be read subject to this Agreement.

4. SaaS Service

4.1 General: The Supplier must use reasonable efforts to provide the SaaS Service:

(a) in accordance with this Agreement and applicable law;

(b) exercising reasonable care, skill and diligence; and

(c) using suitably skilled, experienced and qualified personnel.

4.2 Non-exclusive:

The Supplier’s provision of the SaaS Service to the Client is non-exclusive. Nothing in this Agreement prevents the Supplier from providing the SaaS Service to any other person.

4.3 Availability:

(a) Subject to clause 4.3(b), the Supplier will use reasonable efforts to ensure the SaaS Service is available on a 24/7 basis. However, it is possible that on occasion the SaaS Service may be unavailable to permit maintenance or other development activity to take place, or in the event of Force Majeure. The Supplier will use reasonable efforts to publish on the Website and/or notify the Client by email advance details of any unavailability.

(b) Through the use of web services and APIs, the SaaS Service interoperates with a range of third party service features. The Supplier does not make any warranty or representation on the availability of those features. Without limiting the previous sentence, if a third party feature provider ceases to provide that feature or ceases to make that feature available on reasonable terms, the Supplier may cease to make available that feature to the Client. To avoid doubt, if the Supplier exercises its right to cease the availability of a third party feature, the Client is not entitled to any refund, discount or other compensation.

4.4 Additional services:

The Supplier may, from time to time, make available to the Client additional services to supplement the SaaS Service upon the Client's request, on terms to be agreed between the Supplier and the Client.

5. CLIENT OBLIGATIONS**5.1 General use: The Client and its personnel must:**

(a) use the SaaS Service in accordance with this Agreement solely for the Client's own internal business and other lawful purposes; and

(b) not resell or make available the SaaS Service to any third party, or otherwise commercially exploit the SaaS Service.

5.2 Access conditions: When accessing the SaaS Service, the Client and its personnel must:

(a) not impersonate another person or misrepresent authorisation to act on behalf of others or the Supplier;

(b) correctly identify the sender of all electronic transmissions;

(c) not attempt to undermine the security or integrity of the Underlying Systems;

(d) not use, or misuse, the SaaS Service in any way which may impair the functionality of the Underlying Systems or impair the ability of any other user to use the SaaS Service;

(e) not attempt to view, access or copy any material or data other than:

(i) that which the Client is authorised to access; and

(ii) to the extent necessary for the Client and its personnel to use the SaaS Service in accordance with this Agreement;

(f) neither use the SaaS Service in a manner, nor transmit, input or store any Data, that breaches any third party right (including Intellectual Property Rights and privacy rights) or is Objectionable, incorrect or misleading; and

(g) comply with any terms of use or policies on the Website, as updated from time to time by the Supplier.

5.3 Personnel:

(a) Without limiting clause 5.2, no individual other than a Permitted User may access or use the SaaS Service.

(b) The Client may authorise any member of its personnel to be a Permitted User, in which case the Client will provide the Supplier with the Permitted User's name and other information that the Supplier reasonably requires in relation to the Permitted User.

(c) The Client must procure each Permitted User's compliance with clauses 5.1 and 5.2 and any other reasonable condition notified by the Supplier to the Client.

(d) A breach of any term of this Agreement by the Client's personnel (including, to avoid doubt, a Permitted User) is deemed to be a breach of this Agreement by the Client.

5.4 Authorisations: The Client is responsible for procuring all licences, authorisations and consents required for it and its personnel to use the SaaS Service, including to use, store and input Data into, and process and distribute Data through, the SaaS Service.

6. DATA**6.1 Supplier access to Data:**

(a) The Client acknowledges that:

(i) the Supplier may require access to the Data to exercise its rights and perform its obligations under this Agreement; and

(ii) to the extent that this is necessary but subject to clause 9, the Supplier may authorise a member or members of its personnel to access the Data for the purposes set out in clause 6.1(a)(i).

(b) The Client must arrange all consents and approvals that are necessary for the Supplier to access the Data as described in clause 6.1(a).

6.2 Analytical Data: The Client acknowledges and agrees that:

(a) the Supplier may:

(i) use Data and information about the Client's and the Client's end users' (if any) use of the SaaS Service to generate anonymised and aggregated statistical and analytical data ("Analytical Data");

(ii) use Analytical Data for the Supplier's internal research and product development purposes and to conduct statistical analysis and identify trends and insights; and

(iii) supply Analytical Data to third parties;

(b) the Supplier's rights under clause 6.2(a) above will survive termination or expiry of this Agreement; and

(c) title to, and all Intellectual Property Rights in, Analytical Data is and remains the Supplier's property.

6.3 Agent:

(a) The Client acknowledges and agrees that to the extent Data contains Personal Information, in collecting, holding and processing that information through the SaaS Service, the Supplier is acting as an agent of the Client for the purposes of the Privacy Act 2020 (New Zealand) and any other applicable privacy law.

(b) The Client must obtain all necessary consents from the relevant individual to enable the Supplier to collect, use, hold and process that information in accordance with this Agreement.

6.4 Backups of Data:

While the Supplier will take standard industry measures to back up all Data stored using the SaaS Service, the Client agrees to keep a separate backup copy of all Data uploaded by it onto the SaaS Service.

6.5 International storage of Data:

The Client agrees that the Supplier may store Data (including any Personal Information) in secure servers in various overseas territories and may access that Data (including any Personal Information) in New Zealand, Australia and various overseas territories from time to time.

6.6 Indemnity:

The Client indemnifies the Supplier against any liability, claim, proceeding, cost, expense (including the actual legal fees charged by the Supplier's solicitors) and loss of any kind arising from any actual or alleged claim by a third party that any Data infringes the rights of that third party (including Intellectual Property Rights and privacy rights) or that the Data is Objectionable, incorrect or misleading.

7. FEES

7.1 Fees:

The Client must pay to the Supplier the Fees monthly in advance, subject to clause 7.2. The Fees exclude GST, and the Client is solely responsible for the payment of any taxable supplies under this Agreement.

7.2 Invoicing and payment:

(a) On or about the last Business Day of each calendar month, the Supplier will provide the Client with a valid tax invoice relating to the SaaS Services provided during that calendar month (or any part periods preceding that calendar month, if any).

(b) The Client must pay the Fees:

(i) on or before the 20th day of each month immediately following the period that each invoice relates to; and

(ii) electronically in cleared funds without any set off or deduction.

7.3 Overdue amounts:

The Supplier may charge interest on overdue amounts. Interest will be calculated from the due date to the date of payment (both inclusive) at an annual percentage rate equal to the corporate overdraft reference rate (monthly charging cycle) applied by the Supplier's primary trading bank as at the due date (or, if the Supplier's primary trading bank ceases to quote that rate, then the rate which in the opinion of the bank is equivalent to that rate in respect of similar overdraft accommodation expressed as a percentage) plus 2% per annum.

7.4 Increases:

(a) By giving at least 20 Business Days' notice, the Supplier may increase the Fees with effect from the start of a Subscription Period, which will be deemed to be the Fees listed in the Pricing Agreement once updated under this clause.

(b) If the Client does not wish to pay the increased Fees, it may terminate this Agreement in accordance with clause 12.1(b). If the Client does not terminate this Agreement in accordance with clause 12.1(b), it is deemed to have accepted the increased Fees.

8. INTELLECTUAL PROPERTY

8.1 Ownership:

(a) Subject to clause 8.1(b), title to, and all Intellectual Property Rights in, the SaaS Service, the Website, and all Underlying Systems is and remains the property of the Supplier (and its licensors). The Client must not contest or dispute that ownership, or the validity of those Intellectual Property Rights.

(b) Title to, and all Intellectual Property Rights in, the Data (as between the parties) remains the property of the Client. The Client grants the Supplier a worldwide, non-exclusive, fully paid up, transferable, irrevocable licence to use, store, copy, modify, make available and communicate the Data for any purpose in connection with the exercise of its rights and performance of its obligations in accordance with this Agreement.

8.2 Know-how:

To the extent not owned by the Supplier, the Client grants the Supplier a royalty-free, transferable, irrevocable and perpetual licence to use for the Supplier's own business purposes any know-how, techniques, ideas, methodologies, and similar Intellectual Property used by the Supplier in the provision of the SaaS Service.

8.3 Feedback:

If the Client provides the Supplier with ideas, comments or suggestions relating to the SaaS Service or Underlying Systems (together, "Feedback"):

(a) all Intellectual Property Rights in that Feedback, and anything created as a result of that Feedback (including new material, enhancements, modifications or derivative works), are owned solely by the Supplier; and

(b) the Supplier may use or disclose the Feedback for any purpose.

8.4 Third party sites and material:

The Client acknowledges that the SaaS Service may link to third party websites or feeds that are connected or relevant to the SaaS Service. Any link from the SaaS Service does not imply any Supplier endorsement, approval or recommendation of, or responsibility for, those websites or feeds or their content or operators. To the maximum extent permitted by law, the Supplier excludes all responsibility or liability for those websites or feeds.

8.5 Client logo:

During the term of this Agreement, the Client shall permit the Supplier to use the Client's logo on the Website and the Supplier's promotional material for marketing purposes upon the Supplier's request and approval from the Client (which shall not be unreasonably withheld or delayed).

9. CONFIDENTIALITY

9.1 Security: Each party must, unless it has the prior written consent of the other party:

- (a) keep confidential at all times the Confidential Information of the other party;
- (b) effect and maintain adequate security measures to safeguard the other party's Confidential Information from unauthorised access or use; and
- (c) disclose the other party's Confidential Information to its personnel or professional advisors on a need to know basis only and, in that case, ensure that any personnel or professional advisor to whom it discloses the other party's Confidential Information is aware of, and complies with, the provisions of clauses 9.1(a) and 9.1(b).

9.2 Permitted disclosure: The obligation of confidentiality in clause 9.1 does not apply to any disclosure or use of Confidential Information:

- (a) for the purposes of performing this Agreement or exercising a party's rights under this Agreement;
- (b) required by law (including under the rules of any stock exchange);
- (c) which is publicly available through no fault of the recipient of the Confidential Information or its personnel;
- (d) which was rightfully received by a party to this Agreement from a third party without restriction and without breach of any obligation of confidentiality; or
- (e) by the Supplier if required as part of a bona fide sale of its business (assets or shares, whether in whole or in part) to a third party.

10. WARRANTIES

10.1 Mutual warranties:

Each party warrants that it has full power and authority to enter into and perform its obligations under this Agreement which, when signed, will constitute binding obligations on the warranting party.

10.2 No implied warranties: To the maximum extent permitted by law:

- (a) the Supplier's warranties are limited to those set out in this Agreement, and all other conditions, guarantees or warranties whether expressed or implied by statute or otherwise (including any warranty under Part 3 of the Contract and Commercial Law Act 2017 (New Zealand) are expressly excluded; and
- (b) the Supplier makes no representation concerning the quality of the SaaS Service and does not promise that the SaaS Service will:
 - (i) meet the Client's requirements or be suitable for a particular purpose; or
 - (ii) be secure, free of viruses or other harmful code, uninterrupted or error free.

10.3 Consumer Guarantees Act:

The Client agrees and represents that it is acquiring the SaaS Service, and entering this Agreement, for the purposes of trade. The parties agree that:

- (a) to the maximum extent permissible by law, the Consumer Guarantees Act 1993 (New Zealand) and any other applicable consumer protection legislation does not apply to the supply of the SaaS Service or this Agreement; and
- (b) it is fair and reasonable that the parties are bound by this clause 10.3.

10.4 Limitation of remedies:

Where legislation or rule of law implies into this Agreement a condition or warranty that cannot be excluded or modified by contract, the condition or warranty is deemed to be included in this Agreement. However, the liability of the Supplier for any breach of that condition or warranty is limited, at the Supplier's option, to:

- (a) supplying the SaaS Service again; and/or
- (b) paying the costs of having the SaaS Service supplied again.

11. LIABILITY**11.1 Maximum liability:**

Subject to clause 11.3, the maximum aggregate liability of the Supplier under or in connection with this Agreement or relating to the SaaS Service, whether in contract, tort (including negligence), breach of statutory duty or otherwise, must not in any Year exceed an amount equal to the Fees paid by the Client under this Agreement in the previous six months (which in the first six months is deemed to be the total Fees paid by the Client from the Start Date to the date of the first event giving rise to liability).

11.2 Unrecoverable loss:

Subject to clause 11.3, neither party is liable to the other under or in connection with this Agreement or the SaaS Service for any:

- (a) loss of profit, revenue, savings, business, use, data (including Data), and/or goodwill; or
- (b) consequential, indirect, incidental or special damage or loss of any kind.

11.3 Unlimited liability:

(a) Clauses 11.1 and 11.2 do not apply to limit the Supplier's liability under or in connection with this Agreement for:

- (i) fraud or wilful misconduct; or
- (ii) a breach of clause 9.

(b) Clause 11.2 does not apply to limit the Client's liability:

- (i) to pay the Fees;
- (ii) under the indemnity in clause 6.6; or
- (iii) for a breach of clause 9.

11.4 No liability for other's failure:

Neither party will be responsible, liable, or held to be in breach of this Agreement for any failure to perform its obligations under this Agreement or otherwise, to the extent that the failure is caused by the other party failing to comply with its obligations under this Agreement, or by the negligence or misconduct of the other party or its personnel.

11.5 Mitigation:

Each party must take reasonable steps to mitigate any loss or damage, cost or expense it may suffer or incur arising out of anything done or not done by the other party under or in connection with this Agreement.

12. TERM, TERMINATION AND SUSPENSION

12.1 Duration:

Unless terminated under this clause 12, this Agreement and the Client's right to access and use the SaaS Service:

- (a) starts on the Start Date; and
- (b) continues for successive Subscription Periods until a party gives at least 20 Business Days' notice that this Agreement and the Client's access to and use of the SaaS Service will terminate at the end of the then-current Subscription Period.

12.2 Initial term:

If the Pricing Agreement specifies a minimum initial term, or the parties have otherwise agreed a minimum initial term in writing, the earliest date for termination under clause 12.1 will be the expiry of that initial term.

12.3 Other termination rights:

Either party may, by notice to the other party, immediately terminate this Agreement if the other party:

- (a) breaches any material provision of this Agreement and the breach is not:
 - (i) remedied within 10 Business Days of the receipt of a notice from the first party requiring it to remedy the breach; or
 - (ii) capable of being remedied;
- (b) becomes insolvent, liquidated or bankrupt, has an administrator, receiver, liquidator, statutory manager, mortgagee's or chargee's agent appointed, becomes subject to any form of insolvency action or external administration, or ceases to continue business for any reason; or
- (c) is unable to perform a material obligation under this Agreement for 20 Business Days or more due to Force Majeure.

12.4 Consequences of termination or expiry:

- (a) Termination or expiry of this Agreement does not affect either party's rights and obligations that accrued before that termination or expiry.
- (b) On termination or expiry of this Agreement, the Client must pay:
 - (i) all Fees for the SaaS Service provided; and
 - (ii) for the avoidance of doubt, any amount outstanding pursuant to any invoice provided to the Client by the Supplier in accordance with clause 7, prior to that termination or expiry.
- (c) Except to the extent that a party has ongoing rights to use Confidential Information, at the other party's request following termination or expiry of this Agreement and subject to clause 12.4(d), a party must promptly return to the other party or destroy all Confidential Information of the other party that is in the first party's possession or control.
- (d) At any time prior to one month after the date of termination or expiry, the Client may request:
 - (i) a copy of any Data stored using the SaaS Service, provided that the Client pays the Supplier's reasonable costs of providing that copy. On receipt of that request, the Supplier must provide a copy of the Data in a common electronic form. The Supplier does not warrant that the format of the Data will be compatible with any software; and/or

(ii) deletion of the Data stored using the SaaS Service, in which case the Supplier must use reasonable efforts to promptly delete that Data.

To avoid doubt, the Supplier is not required to comply with clause 12.4(d)(i) to the extent that the Client previously requested deletion of the Data.

12.5 Obligations continuing:

Clauses which, by their nature, are intended to survive termination or expiry of this Agreement, including clauses 6.6, 8, 9, 11, 12.4 and 12.5, continue in force.

12.6 Rights to restrict:

Without limiting any other right or remedy available to the Supplier, the Supplier may restrict or suspend the Client's access to the SaaS Service and/or delete, edit or remove the relevant Data if the Supplier considers that the Client (including any of its personnel) has:

- (a) undermined, or attempted to undermine, the security or integrity of the SaaS Service or any Underlying Systems;
- (b) used, or attempted to use, the SaaS Service:
 - (i) for improper purposes; or
 - (ii) in a manner, other than for normal operational purposes, that materially reduces the operational performance of the SaaS Service;
- (c) transmitted, inputted or stored any Data that breaches or may breach this Agreement or any third party right (including Intellectual Property Rights and privacy rights), or that is or may be Objectionable, incorrect or misleading; or
- (d) otherwise materially breached this Agreement.

12.7 Process:

- (a) The Supplier must notify the Client where it restricts or suspends the Client's access, or deletes, edits or removes Data, under clause 12.6.
- (b) Clause 12.4(d)(i) will not apply to the extent that it relates to Data deleted or removed under clause 12.6.

13. GENERAL**13.1 Force Majeure:**

Subject to clause 13.2, neither party is liable to the other for any failure to perform its obligations under this Agreement to the extent caused by Force Majeure, provided that the affected party:

- (a) immediately notifies the other party and provides full information about the Force Majeure;
- (b) uses its best efforts to overcome the Force Majeure; and
- (c) continues to perform its obligations to the extent practicable.

13.2 Exception to Force Majeure:

Clause 13.1 does not excuse a party from any obligation to make a payment when due under this Agreement.

13.3 Rights of third parties:

No person other than the Supplier and the Client has any right to a benefit under, or to enforce, this Agreement.

13.4 Waiver:

To waive a right under this Agreement, that waiver must be in writing and signed by the waiving party.

13.5 Independent contractor:

Subject to clause 6.3, the Supplier is an independent contractor of the Client, and no other relationship (e.g. joint venture, agency, trust or partnership) exists under this Agreement.

13.6 Notices:

If the Supplier needs to contact the Client, the Supplier may do so by email or by posting a notice on the Website. The Client agrees that this satisfies all legal requirements in relation to written communications. The Client may give notice to the Supplier under or in connection with these Terms by emailing the signatory Business Manager.

13.7 Severability:

(a) If any provision of this Agreement is, or becomes, illegal, unenforceable or invalid, the relevant provision is deemed to be modified to the extent required to remedy the illegality, unenforceability or invalidity.

(b) If modification under clause 13.7(a) is not possible, the provision must be treated for all purposes as severed from this Agreement without affecting the legality, enforceability or validity of the remaining provisions of this Agreement.

13.8 Variation: Subject to clauses 2.1 and 7.4, any variation to this Agreement must be in writing and signed by both parties.

13.9 Entire agreement:

This Agreement sets out everything agreed by the parties relating to the SaaS Service, and supersedes and cancels anything discussed, exchanged or agreed prior to the Start Date. The parties have not relied on any representation, warranty or agreement relating to the subject matter of this Agreement that is not expressly set out in this Agreement, and no such representation, warranty or agreement has any effect from the Start Date. Without limiting the previous sentence, the parties agree to contract out of sections 9, 12A and 13 of the Fair Trading Act 1986 (New Zealand) or any equivalent provisions in comparable legislation in other jurisdiction(s), and that it is fair and reasonable that the parties are bound by this clause 13.8.

13.10 Assignment and subcontracting:

(a) The Client may not assign, subcontract or transfer any right or obligation under this Agreement without the prior written consent of the Supplier. Any change of control of the Client is deemed to be an assignment for which the Supplier's prior written consent is required under this clause. In this clause, "change of control" means any transfer of shares or other arrangement affecting the Client or any member of its group which results in a change in the effective control of the Client.

(b)The Supplier may at any time directly or indirectly assign, transfer or otherwise dispose of any of its rights or interests in, or any of its obligations or liabilities under, or in connection with, this Agreement.

13.11 Law:

This Agreement is governed by, and must be interpreted in accordance with, the laws of New Zealand. Each party submits to the non-exclusive jurisdiction of the Courts of New Zealand in relation to any dispute connected with this Agreement.

Last update: 14/04/2021