

Terms of Use for Clients

These Terms of Use including as amended from time to time apply to the relationship a Client has with LoadTeam and all contracts that LoadTeam may enter into from time to time with a Client. They are negotiable and can be varied for each Contract provided the variation is recorded and agreed in writing between the parties. Consequently please read these Terms of Use carefully.

By ticking the "I agree to the Terms of Use" box when submitting a Test Definition, you confirm that either:

- (a) you are a Client intending to enter into a Contract with LoadTeam in a personal capacity, and that you agree to comply with the Terms of Use; or
- (b) you are an employee, agent or subcontractor of a Client who has been given the necessary authorisations by the Client to purchase and pay for the Testing Services, to agree to comply with the Terms of Use and to enter into a Contract with LoadTeam, in each case on behalf of the Client.

If you are unable to provide one of the above confirmations, you must not tick the "I agree to the Terms of Use" box, or otherwise use or access the Testing Services.

1. Definitions and Interpretation

1.1 Except to the extent expressly provided otherwise, in these Terms of Use:

"Account"	An account set up by the Client on the LoadTeam Website and which enables the Client to submit Test Definitions.
"Charges"	The charges for the Testing Services, as specified by LoadTeam on the LoadTeam Website or directly with the Client.
"Client"	The person or entity which sets up an Account and submits a Test Definition.
"Client Confidential Information"	Information disclosed by the Client to LoadTeam in connection with the submission of a Test Definition.
"Client Website"	The website identified in a Test Definition, including its content and any third party content and resources contained in, referred to, or accessible from, such website.
"Contract"	A contract between LoadTeam and the Client made up of a Test Definition that has been accepted by LoadTeam, these Terms of Use including as amended from time to time and any documents expressly referred to in each of them.

"Force Majeure Event"	An event, or a series of related events, that is outside the reasonable control of the party affected (including failures of the internet or any public telecommunications network, failures of LoadTeam’s hosting or connectivity providers, hacker attacks, denial of service attacks, virus or other malicious software attacks or infections, power failures, industrial disputes affecting any third party, illness, changes to the law, disasters, explosions, fires, floods, riots, terrorist attacks and wars).
"Intellectual Property Rights"	All intellectual property rights wherever in the world, whether registrable or unregistrable, registered or unregistered, including any application or right of application for such rights (and these "intellectual property rights" include copyright and related rights, database rights, confidential information, trade secrets, know-how, business names, trade names, trademarks, service marks, passing off rights, unfair competition rights, patents, petty patents, utility models, semi-conductor topography rights and rights in designs).
"LoadTeam"	LoadTeam Limited t/a LoadTeam a company registered in New Zealand with company number 5705274, NZ Business Number 9429041761168 and where the context requires, its authorised Testers.
"LoadTeam Website"	The website at www.loadteam.com , or at such other URL as LoadTeam may from time to time notify the Client.
"Platform"	LoadTeam’s proprietary web portal that may be accessed by the Client via the LoadTeam Website to submit Test Definitions, receive the Testing Services and pay the Charges.
"Test Definition"	A request for LoadTeam to provide Testing Services, as submitted by the Client using the Platform.
"Testing Services"	The website load and performance testing services carried out by multiple third party testers that LoadTeam provides to the Client pursuant to a Contract.

- 1.2 In these Terms of Use, a reference to a statute or statutory provision includes a reference to:
- (a) that statute or statutory provision as modified, consolidated and/or re-enacted from time to time; and
 - (b) any subordinate legislation made under that statute or statutory provision.
- 1.3 The clause headings do not affect the interpretation of these Terms of Use.

1.4 In these Terms of Use, general words shall not be given a restrictive interpretation by reason of being preceded or followed by words indicating a particular class of acts, matters or things.

2. Testing Services

2.1 The Client may from time to time submit Test Definitions. The acceptance of a Test Definition by LoadTeam will result in the formation of a separate Contract between LoadTeam and the Client. Until a Test Definition is accepted by LoadTeam in writing no Contract exists between the parties and once the Testing Services have been provided pursuant to a Contract, the Contract is at an end. For the avoidance of doubt, LoadTeam may accept or reject a Test Definition at its entire discretion and, in the event of rejection, without any obligation to provide a reason for such rejection.

2.2 LoadTeam allocates the number of testers specified in the Client's Test Definition. While LoadTeam uses all reasonable endeavours to ensure that the number of testers carrying out the Testing Services is equal to the number of testers specified in the Client's Test Definition, the nature of Testing Services is such that the actual number of testers may be less the number specified in the Test Definition. The Client accepts that a reduced number of testers is a risk associated with the provision of Testing Services beyond the control of LoadTeam. If a minimum number of testers are required then LoadTeam recommends that the Client agree to retain a number of testers in excess of the minimum number of testers required by the Client. The Client accepts that the Client has no claim against LoadTeam in the event the actual number of testers is less the number specified in the Test Definition. In the event that the number of Testers is less than the number specified in the Test Definition and the results of the Testing Services do not achieve the Test Definitions or commercial objectives of the Client set out in the Contract, then without limiting the foregoing or LoadTeam accepting any liability to the Client whatsoever, LoadTeam may in its sole discretion provide a refund of fees actually paid to LoadTeam calculated in accordance with clause 5.4.

2.3 Subject to clause 2.4, LoadTeam hereby grants to the Client a non-exclusive licence to access and use the Platform for the purposes of submitting a Test Definition, receiving the Testing Services and paying the Charges.

2.4 Except to the extent expressly permitted in these Terms of Use or as required by law on a non-excludable basis, the licence granted by LoadTeam to the Client under clause 2.3 is subject to the following prohibitions:

- (a) the Client must not use the Testing Services for any purpose other than for the load and performance testing of the Client Website;
- (b) the Client must not sub-license its right to access the Platform or use the Testing Services;
- (c) the Client must not permit any unauthorised person to access the Platform or use the Testing Services;
- (d) the Client must not use the Testing Services to provide website testing services to third parties; and
- (e) the Client must not publish or distribute the results from the Testing Services or allow communication disparaging LoadTeam in any way.

2.5 The Client shall use reasonable endeavours, including reasonable security measures, to ensure that no unauthorised person may gain access to the Client's Account.

2.6 The Client must not use the Testing Services in any way that causes, or may cause, damage to the Testing Services or the Platform, or impairment of the availability or accessibility of the Testing Services to other clients of LoadTeam.

2.7 The Client must not use the Testing Services:

- (a) in any way that is unlawful, illegal, fraudulent or harmful; or
 - (b) in connection with any unlawful, illegal, fraudulent or harmful purpose or activity.
- 2.8 For the avoidance of doubt, the Client has no right to access the software code (including object code, intermediate code and source code) of the Platform.
- 2.9 LoadTeam may suspend the provision of the Testing Services with immediate effect if any Charges are unpaid, in whole or in part.

3. Client Website

- 3.1 The Client hereby grants to LoadTeam a non-exclusive licence to copy, reproduce, store, test, distribute, publish, export, adapt, edit and translate the Client Website to the extent reasonably required for the performance of LoadTeam's obligations and the exercise of LoadTeam's rights under the Contract, together with the right to sub-license these rights to its testers, other subcontractors, and hosting, connectivity and telecommunications service providers, in each case to the extent reasonably required for the performance of such obligations and the exercise of such rights.

4. No assignment of Intellectual Property Rights

- 4.1 Nothing in these Terms of Use or in the Contract operate to assign or transfer any Intellectual Property Rights from LoadTeam to the Client, or from the Client to LoadTeam.

5. Charges

- 5.1 The Client shall pay the Charges prior to the Testing Services being provided by using the PayPal payment gateway on the LoadTeam Website. LoadTeam does not accept any other form of payment, and does not issue invoices or receipts in respect of the Charges or payments.
- 5.2 The Client acknowledges that LoadTeam shall have no obligation to provide or, as applicable, continue to provide the Testing Services unless and until the Charges for the Testing Services have been paid in full.
- 5.3 The Charges are inclusive of New Zealand sales tax.
- 5.4 If LoadTeam agrees to a refund under clause 2.2 the refund will be calculated by taking the fee actually paid to LoadTeam for the number of testers specified in the Test Definition less the Charges for the actual number of testers that carried out the Testing Services. Such a refund shall be paid to the Client using PayPal. Without limiting the provisions of clause 9 The Client agrees that a refund in accordance with this clause constitutes the Client's sole and exclusive remedy with respect to any loss, cost or harm that the Client may suffer in the event of a breach or claimed breach of clause 2.2.

6. LoadTeam's confidentiality obligations

- 6.1 LoadTeam shall:
- (a) keep the Client Confidential Information strictly confidential;
 - (b) not disclose the Client Confidential Information to any person without the Client's prior written consent, and then only under conditions of confidentiality no less onerous than those contained in these Terms of Use;
 - (c) use the same degree of care to protect the confidentiality of the Client Confidential Information as LoadTeam uses to protect LoadTeam's own confidential information of a similar nature, being at least a reasonable degree of care; and
 - (d) act in good faith at all times in relation to the Client Confidential Information.
- 6.2 Notwithstanding clause 6.1, LoadTeam may disclose the Client Confidential Information to LoadTeam's officers, employees, professional advisers, insurers, agents and subcontractors who:

- (a) need to know the Client Confidential Information for the purpose of or in connection with the performance by LoadTeam of its obligations and the exercise by LoadTeam of its rights under the Contract; and
 - (b) are bound by a written agreement or professional obligation to protect the confidentiality of the Client Confidential Information.
- 6.3 This clause 6 imposes no obligations upon LoadTeam with respect to Client Confidential Information that:
 - (a) is known to LoadTeam before disclosure under these Terms of Use and is not subject to any other obligation of confidentiality;
 - (b) is or becomes publicly known through no act or default of LoadTeam; or
 - (c) is obtained by LoadTeam from a third party in circumstances where LoadTeam has no reason to believe that there has been a breach of an obligation of confidentiality.
- 6.4 The restrictions in this clause 6 do not apply to the extent that any Client Confidential Information is required to be disclosed by any law or regulation, by any judicial or governmental order or request, or pursuant to disclosure requirements relating to the listing of the stock of LoadTeam on any recognised stock exchange. For the removal of doubt but without limiting LoadTeam's general obligations in connection with Client Confidential Information, LoadTeam will co-operate with and provide information to law enforcement, judicial or other governmental agencies.
- 6.5 The provisions of this clause 6 shall continue in force for a period of 5 years following the date on which LoadTeam has provided the Testing Services pursuant to the Contract, at the end of which period they will cease to have effect.

7. Warranties

- 7.1 LoadTeam warrants to the Client that:
 - (a) LoadTeam has the legal right and authority to enter into the Contract and to perform its obligations thereunder; and
 - (b) LoadTeam will comply with all applicable legal and regulatory requirements applying to the exercise of LoadTeam's rights and the fulfilment of LoadTeam's obligations under the Contract.
- 7.2 LoadTeam warrants to the Client that:
 - (a) subject to clause 5.4, the Testing Services will comply in all material respects with the Test Definition;
 - (b) it has taken all commercially reasonable steps to ensure that the Platform will be free from viruses, worms, Trojan horses, ransomware, spyware, adware and other malicious software programs; and
 - (c) the Platform will incorporate security features reflecting the requirements of good industry practice.
- 7.3 LoadTeam warrants to the Client that the Testing Services will not infringe the Intellectual Property Rights of any person in any jurisdiction and under any applicable law.
- 7.4 If LoadTeam reasonably determines, or any third party alleges, that the use of the Testing Services by the Client in accordance with the Contract infringes any person's Intellectual Property Rights, LoadTeam may at its own cost and expense (and by way of the Client's sole and exclusive remedy):
 - (a) modify the Testing Services in such a way that they no longer infringe the relevant Intellectual Property Rights; or
 - (b) procure for the Client the right to use the Testing Services in accordance with the Contract; or

- (c) if neither of the options set out in (a) or (b) are commercially or technically practicable in the sole discretion of LoadTeam, terminate the Contract and refund to the Client all Charges previously paid in respect of the Testing Services.

7.5 The Client warrants to LoadTeam that:

- (a) it has the legal right and authority to enter into the Contract and to perform its obligations under the Contract;
- (b) the content of, and any other resource available from, the Client Website will not be (i) pornographic or obscene, or (ii) promote, solicit or comprise any abusive, profane, threatening, indecent, vulgar, defamatory or otherwise objectionable or unlawful content or activity or (iii) of a religious or political nature;
- (c) the Client Website will be sufficiently resilient and robust to undergo the Testing Services;
- (d) neither the Client Website nor the Testing Definition will contain any computer viruses, Trojan horse, worm or any other malicious code, or undocumented or unauthorized methods for terminating or disrupting the operation of, or gaining access to, any third party computer systems or other computing resources or data, malware, or other code features which result in or cause, in whole or in part, directly or indirectly, damage, loss or disruption to all or any part of such computer systems or other computing resources; and
- (e) the carrying out of the Testing Services in relation to the Client Website by LoadTeam in accordance with the Contract will not:
 - (i) breach the provisions of any law, statute or regulation; or
 - (ii) infringe the Intellectual Property Rights or other legal rights of any person; or
 - (iii) give rise to any cause of action against LoadTeam;in each case in any jurisdiction and under any applicable law.

7.6 All of the parties' warranties and representations in respect of the subject matter of the Contract are expressly set out in these Terms of Use. To the maximum extent permitted by applicable law, no other warranties or representations concerning the subject matter of the Contract will be implied into the Contract or any related contract.

8. Acknowledgements and warranty limitations

8.1 The Client acknowledges that the Testing Services may subject the Client Website to significant stress. LoadTeam gives no warranty or representation that the performance of the Client Website will not be disrupted or otherwise adversely affected by the Testing Services.

8.2 The Client acknowledges that complex software is never wholly free from defects, errors and bugs; and subject to the other provisions of these Terms of Use, LoadTeam gives no warranty or representation that the Testing Services will be wholly free from defects, errors or bugs or that the Testing Services will not be interrupted or suspended, whether as a result of LoadTeam carrying out emergency maintenance or otherwise.

8.3 The Client acknowledges that complex software is never entirely free from security vulnerabilities; and subject to the other provisions of these Terms of Use, LoadTeam gives no warranty or representation that the Testing Services will be entirely secure.

8.4 The Client acknowledges that the Testing Services are designed to be compatible only with those types of website as are specified as being compatible on the LoadTeam Website; and LoadTeam does not warrant or represent that the Testing Services will be compatible with any other type of website.

8.5 Except to the extent expressly provided otherwise in the Contract, LoadTeam does not warrant or represent that the Testing Services will be suitable for the Client's purposes, or will provide the Client with any specific result, return on investment or other outcome.

9. Limitations and exclusions of liability

9.1 Nothing in the Contract will:

- (a) limit or exclude any liability for death or personal injury; or
- (b) limit or exclude any liability for fraud or fraudulent misrepresentation; or
- (c) limit any liabilities in any way that is not permitted under applicable law; or
- (d) exclude any liabilities that may not be excluded under applicable law.

9.2 The limitations and exclusions of liability set out in this clause 9 and elsewhere in the Contract:

- (a) are subject to clause 9.1; and
- (b) govern all liabilities arising under the Contract or relating to the subject matter of the Contract, including liabilities arising in contract, in tort (including negligence) and for breach of statutory duty, except to the extent expressly provided otherwise in the Contract.

9.3 LoadTeam shall not be liable to the Client in respect of:

- (a) any losses arising out of a Force Majeure Event; or
- (b) any loss of profits or anticipated savings; or
- (c) any loss of revenue or income; or
- (d) any loss of use or production; or
- (e) any loss of business, contracts or opportunities; or
- (f) any loss or corruption of any data, database or software.

9.4 Neither party shall be liable to the other party in respect of any special, indirect or consequential loss or damage.

9.5 The liability of each party to the other party under the Contract in respect of any event or series of related events shall not exceed the greater of:

- (a) NZD 10,000; and
- (b) the total amount paid by the Client to LoadTeam under the Contract.

9.6 General Indemnity – without limiting the foregoing:

- (a) To the fullest extent permitted by law you indemnify and hold LoadTeam harmless from and against our full legal, external and internal costs (including without limitation for economic loss, damages, reparations, expenses settling any liability, claim or demand) to pay or otherwise deal with any claims, judgements or other actions taken against us arising directly or indirectly (whether negligent or otherwise) from our act or omission, your access to or use of the Testing Services irrespective of whether we could have avoided the claim, judgement or other action in question or whether it arose out of or in connection with your omission or conduct in connection with other users or any violation of a Contract or of any law or the rights of any third party;
- (b) Where you are acquiring Testing Services provided by or on behalf of us for business purposes, the provisions of the Consumer Guarantees Act 1993 (or any equivalent legislation in any jurisdiction) imposing any liability upon us will not apply and we will not be responsible for (and you indemnify us against) any loss, cost or harm including reparations, compensation, consequential damages, economic or financial loss, loss of profits or savings, loss of data, loss of funds or any other liability whether in contract, equity or tort arising directly or indirectly from use or the provision of the Testing Services;

- (c) Representations and agreements not expressly contained herein or incorporated by reference shall not be binding upon us as conditions, warranties or otherwise;
- (d) All conditions and warranties (including without limitation warranties of title, merchantability, fitness for a particular purpose or non-infringement) whether express, imposed or implied by law are expressly excluded to the extent permissible by law;
- (e) A Contract and any terms and/or conditions incorporated into a Contract by reference form the whole of the agreement between the parties except as varied in writing signed by the parties or as permitted by a Contract.

9.7 General limitations of liability in relation to the supply of Products

While loss or harm to property is unlikely to result from Testing Services, we accept liability for any personal injury or loss or harm to property only to the extent it is illegal for us to exclude such liability. To the extent permitted by law our liability to you for all loss, cost or harm, whether direct, indirect or consequential or whether arising from use or provision of the Testing Services or a Contract, is excluded absolutely. In the event we are found liable to you or anyone claiming through you (without accepting such a claim can be made) our liability is limited to the price actually paid to us by you or NZ\$10,000, whichever is the lesser.

9.8 Client not responsible

Without limiting the Client's obligations, responsibilities and warranties and on which LoadTeam relies to provide the Testing Services and the Client's obligations to pay LoadTeam, the Client's liability to LoadTeam for any loss, cost or harm howsoever arising LoadTeam suffers from performance of the Testing Services for the Client is limited to the price actually paid to us by you, NZ\$10,000 or the cost (including legal costs on an indemnity basis) of resolving any claim against LoadTeam arising from the Client's breach of its obligations, responsibilities and warranties, whichever is the lesser.

10. Force Majeure Event

10.1 If a Force Majeure Event gives rise to a failure or delay in either party performing any obligation under the Contract (other than any obligation to make a payment), that obligation will be suspended for the duration of the Force Majeure Event.

10.2 A party that becomes aware of a Force Majeure Event which gives rise to, or which is likely to give rise to, any failure or delay in that party performing any obligation under the Contract, must:

- (a) promptly notify the other; and
- (b) inform the other of the period for which it is estimated that such failure or delay will continue.

10.3 A party whose performance of its obligations under the Contract is affected by a Force Majeure Event must take reasonable steps to mitigate the effects of the Force Majeure Event.

11. Termination

11.1 LoadTeam may terminate the Contract and/or disable the Client's Account immediately by giving written notice to the Client at any time, at its entire discretion, and without any obligation to provide any reason therefor. If LoadTeam terminates the Contract prior to completion of the Testing Services, LoadTeam shall refund such portion of the Charges as relates to those Testing Services that have not been completed (to be determined by LoadTeam acting reasonably).

- 11.2 Either party may terminate the Contract immediately by giving written notice of termination to the other party if:
- (a) the other party is dissolved, ceases to conduct all (or substantially all) of its business, is or becomes unable to pay its debts as they fall due, is or becomes insolvent or is declared insolvent and/or bankrupt, or convenes a meeting or makes or proposes to make any arrangement or composition with its creditors;
 - (b) an administrator, administrative receiver, liquidator, receiver, trustee, manager or similar is appointed over any of the assets of the other party; or
 - (c) an order is made for the winding up of the other party, or the other party passes a resolution for its winding up (other than for the purpose of a solvent company reorganisation where the resulting entity will assume all the obligations of the other party under the Contract);
 - (d) The Client being an individual dies, becomes mentally unsound or physically unable to perform a Contract.

12. Notices

12.1 Any notice from one party to the other party under the Contract must be given by one of the following methods (using the relevant contact details set out in the Client's Account and clause 12.2):

- (a) delivered personally or sent by courier, in which case the notice shall be deemed to be received upon delivery; or
- (b) sent by recorded signed-for post, in which case the notice shall be deemed to be received two business days following posting;

provided that if the stated time of deemed receipt is not within Business Hours, then the time of deemed receipt shall be when Business Hours next begin after the stated time.

12.2 LoadTeam's contact details for notices under this clause 12 are as follows:

PO Box 25543
Featherston Street
Wellington 6146
New Zealand

12.3 The addressee and contact details set out in the Client's Account and clause 12.2 may be updated from time to time by a party giving written notice of the update to the other party in accordance with this clause 12.

13. Subcontracting

13.1 LoadTeam may subcontract any of its obligations under the Contract, provided that LoadTeam shall remain responsible to the Client for the performance of any subcontracted obligations.

14. Assignment

14.1 The Client may not assign, transfer or otherwise deal with its contractual rights and/or obligations under the Contract without the prior written consent of LoadTeam.

15. No waivers

15.1 No breach of any provision of the Contract will be waived except with the express written consent of the party not in breach.

15.2 No waiver of any breach of any provision of the Contract shall be construed as a further or continuing waiver of any breach of that provision or any other provision of the Contract.

16. Severability

16.1 If a provision of the Contract is determined by any court or other competent authority to be unlawful and/or unenforceable, the other provisions will continue in effect.

16.2 If any unlawful and/or unenforceable provision of the Contract would be lawful or enforceable if part of it were deleted, that part will be deemed to be deleted, and the rest of the provision will continue in effect.

17. Third party rights

17.1 The Contract is for the benefit of the parties, and is not intended to benefit or be enforceable by any third party.

18. Entire agreement

18.1 These Terms of Use and a Contract entered into pursuant to these Terms of Use constitute the entire agreement between the parties in relation to its subject matter, and shall supersede all previous agreements, arrangements and understandings between the parties in respect of its subject matter.

18.2 Neither party will have any remedy in respect of any misrepresentation (whether written or oral) made to it upon which it relied in entering into the Contract.

19. Law and jurisdiction

19.1 Contract formed in New Zealand

All Contracts between LoadTeam and a client are deemed to be formed in New Zealand upon acceptance of a Test Definition by LoadTeam.

19.2 New Zealand Law to apply

Irrespective of the location of the parties or the act or omission giving rise to action arising out of or in connection with a Contract, the parties agree that:

- a. New Zealand law is to apply to all matters arising out of or in connection with a Contract and provision of the Testing Services;
- b. the Contract is formed in New Zealand;
- c. the provision of the Testing Services and all liability issues are to be resolved under New Zealand law;
- d. they each submit to New Zealand jurisdiction in respect of all matters arising out of or in connection with a Contract and the Testing Services; and
- e. it is essential to LoadTeam's decision to enter into a Contract and to provide the Testing Services that the parties submit to and accept New Zealand jurisdiction.

19.3 Exclusive choice of Court

Each Contract is subject to the exclusive jurisdiction of the New Zealand Courts in Wellington, New Zealand.