

## Terms of Use for Testers

These Terms of Use, including as amended from time to time, set out the basis on which LoadTeam purchases Testing Services from Testers. They apply to the relationship LoadTeam has with its Testers and all contracts that LoadTeam may enter into from time to time with a Tester. 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.

For the removal of doubt, Testers are not employees of LoadTeam and these Terms of Use are not intended to constitute an employment agreement of any kind.

In consideration for LoadTeam providing the Tester with the ability to provide Testing Services, the Tester offers the Tester's services to LoadTeam on a continuing basis as set out in these Terms of Use.

By ticking the "I agree to the Terms of Use" box when setting up and Account or offering to perform Tests, you confirm that either:

- (a) you are a Tester intending to enter into a Contract with LoadTeam in a personal capacity, that you are over 18 years of age, and that you agree to comply with the Terms of Use; or
- (b) you are an employee, agent or subcontractor of a Tester who has been given the necessary authorisations by the Tester to perform Tests, to agree to comply with the Terms of Use and to enter into a Contract with LoadTeam, in each case on behalf of the Tester.

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:

<b>"Account"</b>	An account set up by the Tester on the Platform and which enables the Tester to perform Tests pursuant to a Contract.
<b>"Client Website"</b>	The website owned or controlled by LoadTeam's client and in relation to which the Test is performed.
<b>"Contract"</b>	The contract between LoadTeam and the Tester formed in accordance with clause 3.1 and the offer to provide Testing Services pursuant to these Terms of Use.
<b>"Force Majeure Event"</b>	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, changes to the law, disasters, explosions, fires, floods, riots, terrorist attacks and wars).
<b>"Intellectual Property Rights"</b>	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).
<b>"LoadTeam"</b>	LoadTeam Limited t/a LoadTeam a company registered in New Zealand with company number 5705274, NZ Business Number 9429041761168.
<b>"LoadTeam Software"</b>	The then latest version of LoadTeam's proprietary software client known as "LoadTeam Tester" which may be downloaded in machine executable object code from the Platform.
<b>"Payment"</b>	The payment made by LoadTeam for a Test, as specified by LoadTeam from time to time on the Platform less PayPal fees, LoadTeam's administrative fee of US\$0.25 per month on uncollected balances and any other deductions as set out in clause 6.
<b>"Platform"</b>	LoadTeam's proprietary web portal at <a href="http://www.loadteam.com">www.loadteam.com</a> (or at such other URL as LoadTeam may from time to time notify the Tester) that may be used by the Tester to set up and access the Tester's Account, download the LoadTeam Software, offer to perform Tests and submit Test Results.
<b>"Test"</b>	A load and performance test performed by the Tester in relation to a Client Website using the LoadTeam Software and the submission by the Tester on the Platform of the Test Results generated by such test, in each case pursuant to a Contract.
<b>"Test Results"</b>	All telemetry data relating to the Client Website, as generated by the Test and delivered electronically by the Tester to LoadTeam using the LoadTeam Software.
<b>"Tester"</b>	The person or entity which sets up an Account.

- 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. LoadTeam Software**

- 2.1 Subject to clause 2.2, LoadTeam hereby grants to the Tester a non-exclusive licence to download and install one copy of the LoadTeam Software on one single physical desktop or laptop computer, and thereafter to use the LoadTeam Software for the sole purpose of carrying out Tests.
- 2.2 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 Tester under clause 2.1 is subject to the following prohibitions:
- (a) the Tester must not install (or attempt to install) the LoadTeam Software on a virtual machine or in a hosted (or “cloud”) environment;
  - (b) the Tester must not use the LoadTeam Software for any purpose other than for performing Tests. For the avoidance of doubt, the Tester may not use the LoadTeam Software for performing website testing services for or to any third party;
  - (c) the Tester must not sub-license its right to use the LoadTeam Software or to perform Tests;
  - (d) the Tester must not permit any unauthorised person to access or use the LoadTeam Software or to perform Tests;
  - (e) the Tester must not permit more than one copy of the LoadTeam Software to be used per IP address;
  - (f) the Tester must not (and must not permit any third party) to reverse engineer, decompile, disassemble, modify, adapt or make error corrections to the LoadTeam Software, or to the protocol utilised by the LoadTeam Software;
  - (g) the Tester must not make any backup or other copies of the LoadTeam Software; and
  - (h) the Tester must not publish or distribute the Test Results to any third party or allow communication disparaging LoadTeam in any way.
- 2.3 The Tester shall use reasonable endeavours, including reasonable security measures, to ensure that no unauthorised person may gain access to the LoadTeam Software.
- 2.4 The Tester shall ensure that the desktop or laptop computer on which the LoadTeam Software is installed:
- (a) meets the minimum hardware and software (including browser) requirements specified by LoadTeam on the Platform;
  - (b) has sufficient free processing power and network bandwidth to perform Tests; and
  - (c) without prejudice to clause 9.3(f), has state-of-the-art and fully updated anti-virus and anti-malware installed and activated on it.
- 2.5 The Tester must not use the LoadTeam Software:
- (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.
- 2.6 For the avoidance of doubt, the Tester has no right to access the software code (including object code, intermediate code and source code) of the LoadTeam Software.

2.7 LoadTeam in its sole discretion may suspend or terminate the Tester's Account and/or its licence to use the LoadTeam Software with immediate effect, at any time and for any reason. The Tester agrees that LoadTeam is not obliged to give a reason to the Tester for such suspension or termination.

### **3. Tests and Engagement**

3.1 The Tester by agreeing to these Terms of Use offers to perform Tests using the LoadTeam Software via the Platform. The allocation by LoadTeam of a Client Website to the Tester for the performance of a Test will constitute LoadTeam's acceptance of the Tester's offer, and result in the formation of a separate Contract between LoadTeam and the Tester for the performance of such Test by the Tester using the LoadTeam Software, that Contract being on the terms and conditions set out in these Terms of Use. For the avoidance of doubt, LoadTeam may, at its entire discretion, allocate one or more Client Websites to the Tester for the performance of a Test, but provides no warranty or other assurance that the Tester will be allocated any minimum number of Client Websites and/or that the Tester will be treated on an equal basis compared to other testers engaged by LoadTeam in connection with the allocation of Client Websites. The Tester agrees that by entering into these Terms of Use the Tester is making a continuing offer of the Tester's services to LoadTeam on the basis that LoadTeam may accept that offer by allocating a Client Website to the Tester for the performance of a Test as required by LoadTeam in the sole discretion of LoadTeam from time to time. Once the Testing Services have been provided pursuant to a Contract the Contract is at an end. Throughout a Contract the Tester's offer of the Tester's services continues.

3.2 Subject to clause 3.3, LoadTeam hereby grants to the Tester a non-exclusive licence to access and use the Platform for the purposes of downloading the LoadTeam Software, offering to perform Tests, submitting Test Results and receiving Payments.

3.3 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 Tester under clause 3.2 is subject to the following prohibitions:

- (a) the Tester must not access or use the Platform for any purpose other than those expressly permitted under clause 3.2;
- (b) the Tester must not sub-license its right to access and use the Platform; and
- (c) the Tester must not use any software to perform the Test other than the LoadTeam Software.

3.4 The Tester shall use reasonable endeavours, including reasonable security measures, to ensure that no unauthorised person may gain access to the Platform or the Tester's Account.

3.5 The Tester must not perform the Test in any way that causes, or may cause, damage to, or impairment of the availability or accessibility of, the Client Website or the Platform to LoadTeam's clients or other testers.

3.6 The Tester must not perform the Test:

- (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.

3.7 For the avoidance of doubt, the Tester has no right to access the software code (including object code, intermediate code and source code) of the Client Website or the Platform.

### **4. Client Website**

4.1 Subject to clause 4.2, LoadTeam hereby grants to the Tester a non-exclusive licence to copy, store and test the Client Website for the sole purpose of performing the Test.

4.2 The Tester warrants and represents to LoadTeam that, on completion of the Test, the Tester shall promptly and permanently delete all copies of the Client Website from the Tester's computer system and other media and, if requested by LoadTeam to do so, certify its compliance with this clause.

**5. No assignment of Intellectual Property Rights**

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

**6. Payments and Nature of Relationship**

6.1 For the removal of any doubt, the Tester shall only be paid for Testing Services actually performed by the Tester. LoadTeam maintains a record associated with a Tester's Account of amounts payable to a Tester for each Contract. Following verification of the Test Results submitted by the Tester pursuant to a Contract and conditional on the Tester providing LoadTeam with a PayPal account, the Tester's Account will be credited with the Payment once the credit balance on the Tester's Account in respect of all Payments reaches US\$50.00 or following the expiry of 12 months from the end of the Contract (whichever is the later) provided the Payment to be credited to the Tester in the Tester's Account exceeds the cost of transferring the funds by PayPal. LoadTeam makes payment to the Tester's PayPal account using the email address specified in the Tester's Account following which LoadTeam shall provide the Tester with a PayPal Transaction ID.

6.2 The credit balance on the Tester's Account does not earn interest and the Payment will only be paid across to the Tester once the amount credited to the Tester in the Tester's Account meets the criteria in clause 6.1. Payment will be automatically forfeited if the Tester fails to provide LoadTeam with a current PayPal account:

- (a) within 12 months of the date on which the credit balance on the Tester's Account becomes payable to the Tester under clause 6.1; or
- (b) prior to the Tester closing their Account.

6.3 LoadTeam does not provide any form of payment other than PayPal. It is the Tester's responsibility to ensure that the PayPal account associated with the Tester's email address (as specified in the Tester's Account) is able to receive and process payments, and LoadTeam shall not be liable for any failure by the Tester to receive the Payments as a result of a problem with the Tester's PayPal account.

6.4 Each Payment is inclusive of all sales and other taxes (including GST), duties, dues, expenses, costs and other charges, and the Tester acknowledges and agrees that it is not entitled to any additional payment or compensation (whether from LoadTeam, the owner of the Client Website or otherwise) in respect of a Test, the submission of the Test Results or any other activity. The Tester will provide LoadTeam with any information, documentation or other assistance that LoadTeam might require to avoid the need to make a deduction required by law.

6.5 The Tester agrees that if LoadTeam is required by operation of law to deduct any sums from a Tester's Account LoadTeam may make such a deduction and the Payment to the Tester will be less the sums deducted. However, in the absence of an obligation on LoadTeam by operation of law, the Tester is responsible for payment of all sales and other taxes (including GST), ACC levies, duties, dues, expenses, costs and other charges payable on sums paid by LoadTeam to the Tester.

6.6 The Tester agrees that the Tester is not an employee of LoadTeam and that LoadTeam is not required to provide the Tester with any of the statutory or any other entitlements associated with an employment relationship.

- 6.7 The Tester also agrees that the parties are not in partnership or a joint venture and that the Tester is not an agent of LoadTeam or vice versa. Neither party has the right to bind the other to any arrangement or to hold the other party to an arrangement other than as set out in these Terms of Use or a Contract entered into pursuant to these Terms of Use.
- 6.8 The Tester is entitled to enter into any employment or contract for services that does not involve the provision of Testing Services or that otherwise conflict with the Tester's obligations to LoadTeam under a Contract.
- 6.9 Other than as set out in a Contract, LoadTeam is under no obligation to provide the Tester with any equipment, training or other assistance.
- 6.10 LoadTeam makes no promise that it will accept the Tester's offer to provide Testing Services and the Tester agrees that LoadTeam does not commit to any level of payment to the Tester.

## **7. Warranties**

- 7.1 LoadTeam warrants to the Tester 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 Tester that:
- (a) it has taken all commercially reasonable steps to ensure that the Platform and the LoadTeam Software (when downloaded) will be free from viruses, worms, Trojan horses, ransomware, spyware, adware and other malicious software programs; and
  - (b) the Platform will incorporate security features reflecting the requirements of good industry practice.
- 7.3 If LoadTeam reasonably determines, or any third party alleges, that the use of the LoadTeam Software in accordance with the Contract infringes any person's Intellectual Property Rights, LoadTeam may terminate the Contract without further liability to the Tester.
- 7.4 The Tester warrants and represents to LoadTeam that:
- (a) it has the legal right and authority to enter into the Contract, and to perform its obligations thereunder;
  - (b) the downloading and use of the LoadTeam Software and the performance of the Test 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) entitle the Tester to claim any compensation or other benefits from LoadTeam, other than the Payments; or
    - (iv) give rise to any cause of action against LoadTeam;in each case in any jurisdiction and under any applicable law.
- 7.5 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 Tester 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 LoadTeam Software will be wholly free from defects, errors or bugs.

8.2 The Tester 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 LoadTeam Software will be entirely secure.

## **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 Tester 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, whether resulting from viruses, worms, Trojan horses, ransomware, spyware, adware and other malicious software programs in the Client Website or otherwise.

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) NZ\$10,000;
- (b) the total amount paid by LoadTeam to the Tester during the 12 month period preceding the date of the claim; and
- (c) the liability of LoadTeam to a Client.

## **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 a Contract and/or close the Tester's Account immediately by giving written notice to the Tester at any time, at its entire discretion, and without any obligation to provide any reason therefor.
- 11.2 As the rights and obligations are personal to the Tester, either party may terminate a 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 Tester being an individual dies, becomes mentally unsound or physically unable to provide the Testing Services.

## **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 Tester'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 Tester'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 The Tester may not subcontract any of its obligations under the Contract.

## **14. Assignment**

- 14.1 The Tester may not assign, transfer or otherwise deal with its contractual rights and/or obligations under the Contract.

## **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

These Terms of Use and all Contracts between LoadTeam and a Tester are deemed to be formed in New Zealand.

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 a Client Website to the Tester 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.