

Catalyst Cloud Terms and Conditions

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catalyst 

open source technologists

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1. Cloud Terms and Conditions (the “Agreement”)

BETWEEN: Catalyst.Net Limited, a duly incorporated company having its registered office in Wellington, New Zealand (“Catalyst”, “We”, “Us”, or “Our”);

AND: the customer who orders the Cloud Services (“Customer”, “You” or “Your”). Cloud Services are defined in clause 2.

Your access to and use of the Cloud Services is governed by this Agreement. You represent to Us that You are lawfully able to enter into contracts. If You are entering into this Agreement on behalf of a company or other entity, then You represent to Us that You are authorised and lawfully able to bind that entity to this Agreement. You may not use the Cloud Services if You do not have such authority or if You do not agree to this Agreement.

2. Definitions

2.1 In this Agreement, unless the context otherwise requires:

Beta: Where a service is described as being in beta, that means that we do not represent or warrant that this service has yet reached a quality standard that is fit for production usage.

Cloud Services: The cloud services provided by Catalyst, including computing, storage, networks and data traffic. The Cloud Services specifically exclude call centre support, consulting services, systems administration, or software development services.

Commencement Date: The earlier of the date that You click an “I Accept” button or check box on a page containing the terms of this Agreement, or the date that You use any of the Cloud Services.

Confidential Information: of a party means all information which is, or may be, proprietary to that party, or commercially sensitive, and includes, but is not limited to, computer data and personal data including names, addresses, personal, medical or business affairs or persons associated with that party and information relating to the organisation, methods, administration, operation, business affairs, services provided by or to third parties, or financial or commercial arrangements of that party, or persons associated with the party and information of any nature, technical or otherwise, relating to any product or process in which the party or persons associated with the services on behalf of the party are involved.

It specifically excludes information which:

- a. was rightfully in the possession of the other party prior to communications leading to this Agreement; or
- b. was developed independently by Catalyst without reference to information provided by You or on Your behalf;
- c. is disclosed to Catalyst by a third party who has the lawful right to disclose the information to Catalyst; or
- d. is already public knowledge or becomes so at a future date (otherwise than as a result of a breach of clause 13).

GST: Goods and Services Tax within the meaning of the Goods and Services Tax Act 1985.

Taxes: Any and all taxes (including GST, value added tax, income tax and withholding taxes), duties and levies imposed by any competent authority in any jurisdiction.

Working Day: Any day not being a Saturday, Sunday, Wellington Anniversary day, or a public holiday recognised nationally in New Zealand.

3. Interpretation

- 3.1 For the purposes of interpretation and construction of this Agreement:
- a. the use of for example, including, or similar words shall not imply restriction; and
 - b. no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this Agreement or any part of it.

4. Term

- 4.1 This Agreement will commence on the Commencement Date and will remain in force until terminated by You or Us in accordance with clause 11.

5. Scope

- 5.1 This Agreement solely covers the defined Cloud Services. Where We also provide other services or deliverables that are not Cloud Services, alternative terms will apply. Unless otherwise agreed, such alternative services shall be governed by Our standard terms and conditions (available at www.catalyst.net.nz/terms).

6. Service Terms

- 6.1 The Catalyst Cloud Service Terms (available at <https://catalyst.net.nz/catalyst-cloud-terms>) are incorporated into this Agreement by reference.

7. Use of the Cloud Services

- 7.1 To use the Cloud Services Your Catalyst account manager must create a Catalyst Cloud account for You. You are responsible for maintaining the security of Your access credentials and for all activities undertaken under Your account. We are not responsible for any unauthorised access to Your account. You must contact Us immediately if You believe Your credentials have been compromised, stolen or lost.
- 7.2 **Rightful use of the Cloud Services**
- a. You must only use the Cloud Services with content, data or software that is: in the public domain; owned by You; or that You hold a valid license for and You must comply with the terms of that license.
 - b. You are solely responsible for the costs associated with the content, data or software You

use and for providing any information required by its licensors.

- c. You are solely responsible for properly handling all legal notices relating to Your use of the Cloud Services.

7.3 Violation or Abuse of the Cloud Services

- a. You cannot use the Cloud Services for illegal activities or objectionable content.
- b. You cannot connect to any other systems, hosts or networks unless You have permission to communicate with them. Unauthorised activities include intentional interference with other systems and interception of data traffic not owned by or destined for You.
- c. You cannot use the Cloud Services to violate the security of any system, computer, network, communication system or software. Examples of such activities include trying to circumvent controls imposed by systems (such as access controls or data encryption), reverse engineering software except as allowed by law, and brute force attacks.

7.4 Monitoring and Enforcing the Rightful Use of the Cloud Services

- a. We reserve the right, but do not assume the obligation, to monitor and investigate any violations or misuse of the Cloud Services. If We suspect any abuse, violations or misuse of the Cloud Services by You, We may temporarily suspend the Cloud Services in whole or in part.
- b. If You become aware of abuse, violations or misuse of the Cloud Services, You will immediately notify Us.
- c. If We become aware of any unlawful security breach, abuse, violation or misuse of the Cloud Services that potentially affect You or Your data, we will notify You as soon as reasonably practicable.

8. Disclaimers

- 8.1 We do not offer the Cloud Services to individuals. You represent to Us that You are obtaining the Cloud Services for the purposes of use in a business. The New Zealand Consumer Guarantees Act 1993 does not apply to this Agreement.
- 8.2 We do not warrant that the Cloud Services will be uninterrupted, error-free, or free of any harmful components.
- 8.3 We do not warrant that Your content and third party content will be secure or not otherwise lost or damaged. You acknowledge that there are risks inherent in Internet connectivity that could result in the loss of Your privacy, Your content and/or third party content.
- 8.4 We disclaim any and all warranties not expressly stated in this Agreement, including the implied warranties of merchantability, fitness for a particular purpose, satisfactory quality, and non-infringement, to the fullest extent permitted by law.

9. Liability

- 9.1 We will not be liable to You for any indirect, consequential, special or exemplary damages (including damages for loss of business profits, business interruption, loss of business information,

data, goodwill or other non-pecuniary loss), even if We have been advised or should have been aware of the possibility of such damages or loss.

- 9.2 We will not be liable for any damages, compensation or reimbursement arising out of or in connection with:
- a. any unauthorised access to, modification of, or deletion, destruction, damage, loss or failure to store any of Your content or any other data;
 - b. Your inability to use the Cloud Services;
 - c. termination or suspension of this Agreement, or Your access to or use of the Cloud Services;
 - d. Our discontinuation of any of Our Cloud Services, whether in its entirety or in part;
 - e. any unscheduled downtime of Our Cloud Services for any reason, including system failures, loss of mains power or network connectivity, or any other interruptions;
 - f. the cost of contracting a third party to provide the Cloud Services; or
 - g. any investments, expenditures or commitments made by You in relation to this Agreement or the Cloud Services.
- 9.3 Notwithstanding anything in this Agreement to the contrary, the maximum liability of Catalyst for any claim under or in connection with this Agreement, whether arising in contract, tort (including negligence) or otherwise, will be limited to the total amount You actually paid for the Cloud Services during the calendar year in which the claim is made.

10. Indemnity

- 10.1 You agree to indemnify Us, Our employees and Our directors against all costs, charges and legal claims that may arise from Your use of the Cloud Services, including Our legal costs on an attorney-client basis. This clause confers a benefit on, and is intended to be enforceable by, each of the indemnified employees and directors, in accordance with the Contracts (Privity) Act 1982.
- 10.2 If We are obliged to co-operate with a compulsory legal process relating to Your account, You will reimburse Us Our legal costs on an attorney-client basis and pay for Our compliance activities on a time and materials basis at Our then-current standard hourly rates.
- 10.3 In the event of any claim under clause 10.1:
- a. We will notify You of the claim as soon as is practicable and, to the extent permissible by law, permit You (at Your cost) to handle all negotiations for settlement and to control and direct any litigation that may follow; and
 - b. if You have control of the claim:
 - i. You shall handle all negotiations of the claim and diligently conduct any litigation or negotiations using competent counsel and in a manner that does not adversely affect Our name or reputation;
 - ii. We will provide all reasonable assistance to You (at Your cost) in the handling of any negotiations and litigation; and
 - iii. You will keep Us informed of the defence or the claim and will not enter into any settlement or compromise in relation to the claim without Our consent (which will

not be unreasonably withheld).

11. Termination

11.1 Termination for Convenience

- a. **By You:** You may terminate this Agreement for any reason by ceasing all use of the Cloud Services and then providing Us with three (3) Working Days notice.
- b. **By Us:** We may terminate this Agreement for any reason by giving You thirty (30) Working Days notice.

11.2 Termination for Cause

- a. **By You:** You may terminate this Agreement if there is a material default or breach of this Agreement by Us, and We do not remedy the breach within thirty (30) Working Days of receiving a notice from You stating the details of the breach and what is required to remedy the breach.
- b. **By Us Without Notice:** We may terminate this Agreement immediately without notice to You if:
 - (i) any portion or all of the Cloud Services are suspended by Us;
 - (ii) required by law;
 - (iii) We believe that the use of the Cloud Services by You has become impractical or infeasible for any legal or regulatory reason; and
 - (iv) We reasonably believe that providing the Cloud Services is unduly burdensome for Us.
- c. **By Us With Notice:** We may terminate this Agreement by providing You thirty (30) Working Days notice, if We opt to change or discontinue the Cloud Services.

11.3 When this Agreement terminates all of Your rights under this Agreement cease immediately. We continue to have the right to collect any fees and charges owing.

11.4 Clauses 9, 10, 11.3, 13, 15, 16, 22, and 27 of this Agreement shall remain in full force and effect following the termination of this Agreement.

12. Suspension

12.1 We may suspend Your right to access or use any portion or all of the Cloud Services immediately upon notice to You if:

- a. the Cloud Services have been used, are being used, or will be used in breach of this Agreement;
- b. You do not cooperate with Our reasonable investigation of any suspected breach of this Agreement;
- c. You are behind on Your payment obligations for more than 15 days;
- d. You are declared or become bankrupt or insolvent, are unable to pay Your debts as they fall due, made an assignment for the benefit of creditors or similar disposition of Your assets, or become subject of any other similar or analogous action in consequence of debt;

- e. Your use of the Cloud Services may be fraudulent or may subject Us to any third party liability;
 - f. We reasonably believe that Your access to, or use of, the Cloud Services poses a security risk or may have an adverse effect on the Cloud Services, the systems or content of Our other customers; or
 - g. required by law.
- 12.2 If, in Our sole opinion it is practicable to do so, We will give You reasonable advance notice of a suspension and a chance to remedy the grounds on which the suspension is based.
- 12.3 If We suspend Your right to access or use any portion or all of the Cloud Services:
- a. You remain liable for all fees and charges that You incurred before suspension; and
 - b. You remain liable for any fees and charges for any Cloud Services to which You continue to have access, including any data storage fees and charges.

13. Confidentiality

- 13.1 Catalyst must take reasonable measures to ensure that its directors, employees, agents and sub-contractors take no action to disclose to any third party any information which is Confidential Information of the Customer.
- 13.2 Notwithstanding the foregoing, Catalyst may, if it is legally obliged to do so, deliver or provide access to such Confidential Information to any New Zealand law enforcement officer or a duly authorised Government officer (with or without prior notification to You). Catalyst will inform You about such law enforcement requests where permitted by New Zealand law.

14. Privacy Protection

- 14.1 Your data is governed by the provisions of the New Zealand Privacy Act 1993.
- 14.2 Data uploaded to or generated in a cloud region is always stored in the country that region belongs to, never in other countries.
- 14.3 Catalyst will not access or use Your data, except as necessary to maintain or provide the Cloud Services.
- 14.4 Catalyst will not share Your data with other organisations. Catalyst may, if it is legally obliged to do so, deliver or provide access to Your data to any New Zealand law enforcement officer or a duly authorised Government officer (with or without prior notification to You). Catalyst will inform You about such law enforcement requests where permitted by New Zealand law.

15. Intellectual Property

- 15.1 This Agreement does not change the ownership of pre-existing intellectual property or the status of new intellectual property created during the term of this Agreement.
- 15.2 This Agreement does not grant Us any rights to Your data or intellectual property, except for the limited rights that are needed to run the Services.

- 15.3 The Cloud Services are based on open source software and We will provide the source code for them on Your request.

16. Force Majeure

- 16.1 We will not be liable for any delay or failure to perform any obligation under this Agreement to the extent that such delay or failure arises from any cause reasonably beyond Our control, including acts of God, strikes, lockouts, riots, acts of war, terrorism, loss of mains power or network connectivity, epidemics, localised disease outbreaks, governmental action, fire, earthquake or other disasters occurring after the Commencement Date.

17. Changes to the Services or Application Program Interfaces ('APIs')

- 17.1 Catalyst reserves the right to change, discontinue or deprecate the Services (in part or as a whole), any features or functionality of the Services, or any APIs from time to time.
- 17.2 In the event of any material change to the Cloud Services or any features or functionality of the Cloud Services, Catalyst will use reasonable efforts to provide You with notice in accordance with clause 20.
- 17.3 In the event that We change, discontinue or deprecate any APIs, We will use commercially reasonable efforts to continue supporting the previous version of any APIs changed, discontinued or deprecated for a period of six (6) months after the change, discontinuation or deprecation, except if continuing to support the API would pose a security or intellectual property issue, or is proscribed by law.

18. Changes to this Agreement

- 18.1 We may amend this Agreement from time to time by notifying You in accordance with clause 20. By using Our Cloud Services after the notification of the new version, You agree to be bound by the new version.

19. Payment

- 19.1 The Cloud Services which are intrinsically volume based are charged on the volume used within the billing period. For example, network traffic is charged at a rate per GB. Other cloud services are charged at an hourly granularity. For example, storage is charged on an hourly basis at a rate per GB, with the quantity being the peak storage use within the hour. The Cloud Services fees can be found at <https://www.catalyst.net.nz/catalyst-cloud/prices>. Fees are set on a monthly basis. Changes to the fees are published and take effect for the next month, provided that this is not less than ten (10) Working Days from the date of publication.
- 19.2 We may increase or add new fees and charges for the Cloud Services by giving you at least thirty (30) days notice.
- 19.3 Invoices are issued on a monthly basis, in the first five (5) Working Days of a month for Cloud Services used in the previous month. Invoices are due on the 20th of the month issued. You agree to

pay Us all costs of recovering unpaid invoices, for invoices that are overdue by more than two months.

19.4 All fees and charges are exclusive of Taxes. You will pay Taxes in respect of all fees and charges payable by You under this Agreement.

20. Notices

20.1 Any legal notice that We are required to give You under this Agreement will be sent to the primary email address associated with Your account at the time of sign up, and additional legal contacts registered with Us subsequently.

20.2 Any technical notice that We are required to give You under this Agreement will be sent to the primary email address associated with Your account at the time of sign up, and additional technical contacts registered with Us subsequently.

20.3 You must keep Your email addresses current. You can update your contact information or register additional contacts by creating a support request via our dashboard.

20.4 Any legal notice that You are required to give Us under this Agreement may be sent to Us by:

- a. email (legal.correspondence@catalyst.net.nz);
- b. personal delivery (Level 6 Catalyst House, 150 Willis Street, Wellington 6011, New Zealand);
- c. facsimile (+64 4 499 5596); or
- d. registered post (Catalyst.Net Limited, Level 6 Catalyst House, 150 Willis Street, Wellington 6011, New Zealand).

20.5 Any notice that You are required to give Us related to security vulnerabilities, suspicious activity, security breaches, misuse, violation or abuse of the Cloud Services may be sent to Us at security@catalyst.net.nz.

20.6 Any notice that You are required to give Us under this Agreement will be deemed to be received:

- a. if sent by email, one hour after the time on the Business Day it actually comes to Our attention in readable form;
- b. in the case of personal delivery, when delivered;
- c. if sent by facsimile, upon production of a transmission report by the machine from which the facsimile was sent, which indicates the facsimile was sent in its entirety to the facsimile number of the recipient; and
- d. five (5) Business Days after they have been posted via registered post within New Zealand.

20.7 We may change Our contact details by giving You written notice in accordance with this clause 20.

21. Deemed Actions

21.1 You are responsible for controlling access to Your Cloud Services. You are deemed to have taken any action performed by a third party who uses Your Cloud Services. In addition to Your other

obligations, in the case that any third party takes any action that causes You to be in breach of this Agreement, You must immediately terminate their access to the Cloud Services.

22. Disputes and Remedies

- 22.1 The parties agree to use their best efforts to resolve any dispute that may arise under this Agreement through good faith negotiations.
- 22.2 No party shall commence any arbitration or litigation in relation to this Agreement unless it has first conducted a meeting with the chief executive or equivalent of the other party for the purpose of endeavouring to resolve the dispute on mutually acceptable terms.
- 22.3 Any dispute arising under this Agreement that cannot be settled by negotiation between the parties shall be submitted to mediation. Either party may initiate mediation by giving written notice to the other party. If the parties do not agree on a mediator within five (5) Working Days of the notice, the mediator will be selected by the president of LEADR (Lawyers Engaged in Alternative Dispute Resolutions). The parties shall bear the mediator's fees equally.
- 22.4 Any dispute that cannot be settled by mediation shall be referred to arbitration. Any arbitration will be conducted in Wellington in accordance with the Arbitration Act 1996. If the parties cannot agree on an arbitrator within five (5) Working Days of notice, the arbitrator will be selected by the president of LEADR (Lawyers Engaged in Alternative Dispute Resolutions). The decision of the arbitrator shall be final and binding on the parties. The parties shall bear the arbitrator's fees equally.
- 22.5 The parties shall continue to perform their obligations under the Agreement as far as possible as if no dispute had arisen pending the final settlement of any dispute.
- 22.6 Nothing in this clause 22 shall preclude either party from taking immediate steps to seek urgent equitable relief before a court of competent jurisdiction.

23. Not Partnership

- 23.1 You do not have any power, right or authority to bind Catalyst, or to assume or create any obligation or responsibility, expressed or implied, on behalf of Catalyst. Nothing contained in this Agreement shall be construed as constituting You and Catalyst as partners or joint venturers, or as creating the relationship of employer and employee, or principal and agent between them or otherwise create any other relationship than that of seller and a purchaser as set forth in this Agreement.

24. No Waiver

- 24.1 A failure by Us to exercise, or delay in exercising, any right under this Agreement will not operate as a waiver of that right. Any such waiver will not constitute a waiver of any subsequent or continuing right or of any other provision in this Agreement.

25. Publicity

25.1 You must obtain Our permission prior to using Our name or brand in combination with Your own or otherwise associating Your business with Us.

26. Severability

26.1 Any illegality, unenforceability or invalidity of any provision of this Agreement does not affect the legality, enforceability or validity of the remaining provisions of this Agreement.

27. Governing Law

27.1 This Agreement shall be governed by New Zealand law, and the courts of New Zealand shall have exclusive jurisdiction to hear and determine all issues that may arise under or in relation to this Agreement. However, this clause does not limit Our right to seek orders in overseas courts for recovery of debts owed by You.

28. Entire Agreement

28.1 There are no conditions, warranties or other terms affecting the arrangements between Catalyst and You, other than those referred to in this Agreement. This Agreement contains the whole of the contract between Catalyst and You, and supersedes all prior agreements and understandings, if any, with respect to the transactions contemplated herein.