

Standard Terms of Service

Last updated: 24 January 2022

1 AGREEMENT

- 1.1 These Terms of Service, together with any Service Order and all applicable Makeshapes policies, form the Agreement that governs your use of the Makeshapes Services. For some of our Makeshapes Services, additional terms may also apply.
- 1.2 If you are purchasing Makeshapes Services on behalf of a company or other legal entity: (a) you represent that you have the authority to bind that company or entity to the Agreement and (b) you acknowledge that the Agreement applies both to the entity and to Users individually. The parties to the Agreement are Makeshapes Limited, a New Zealand company with the NZBN 9429048545709 (**Makeshapes** or **We**) and the Customer (the **Customer** or **You**).

2 TERM

- 2.1 The Agreement is effective from the earlier of the date that your account is confirmed or the date that you access the Makeshapes Services and continues until all Service Orders have expired, unless terminated earlier in accordance with clause 11.

3 MAKESHAPES SERVICES AND RESPONSIBILITIES

- 3.1 You have the right to access and use the Makeshapes Services specified in the applicable Service Order subject to the terms of the Agreement.
- 3.2 Makeshapes will provide the Makeshapes Services: (a) in accordance with applicable laws and government regulations; and (b) subject to all restrictions or limitations specified in the applicable Service Order and these Terms of Service.
- 3.3 Where we provide you with access to Beta Services, you acknowledge such services are made available on an “as is” or “as available” basis and may contain bugs, errors and other problems. You assume all risks and all costs associated with your use of the Beta Services. We exclude all warranties and all liability in relation to Beta Services. In return for providing you access to the Beta Services, you agree to provide us with full feedback regarding the services, for ongoing development.

4 CUSTOMER OBLIGATIONS

- 4.1 You are responsible for: (a) the conduct of your Users including their compliance with the Agreement and all applicable Makeshapes policies; and (b) complying with any laws applicable to your use and your Users’ use of the Makeshapes Services.

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- 4.2 You must not make the Makeshapes Services available to any third party or commercially exploit the Makeshapes Services in any way including by selling or licensing the Makeshapes Services.
- 4.3 You must comply with any applicable laws relating to minors. You must not use or access the Makeshapes Services if you are under the age of 18, or any other minimum age in the jurisdiction where you reside, unless your parent, guardian or caregiver has consented in accordance with applicable law.
- 4.4 The Customer, not Makeshapes, is responsible for all Customer Content, and for reviewing and moderating Customer Content. We have no liability for Customer Content including any offensive, indecent, objectionable, harmful, or inaccurate content, or content that infringes the rights of third parties.

5 FEES

- 5.1 You will pay all fees specified in the applicable Service Order. Except as otherwise specified in a Service Order, payment obligations are non-cancelable, fees paid are non-refundable, and quantities cannot be reduced during the relevant Service Order term.
- 5.2 The currency and payment terms for our fees are set out in the relevant Service Order.
- 5.3 Fees do not include any taxes, levies, duties, including, value-added, sales, goods and service, assessed by any jurisdiction whatsoever (collectively, **Taxes**). You are responsible for paying all Taxes associated with your purchases under the Agreement. If we have a legal obligation to pay or collect Taxes for which Customer is responsible under the section, we will invoice you and you will pay that amount unless you provide a valid tax exemption certificate authorised by the appropriate taxing authority. For clarity, Makeshapes is solely responsible for taxes assessable against it based on its income, property, and employees.
- 5.4 You must pay fees electronically in cleared funds without any set off or deduction. You are responsible for any transactional expenses or fees charged by your bank or our bank in relation to your payment of the fees.
- 5.5 If any charge you owe under the Agreement is 10 days or more overdue, we may, without limiting its other rights and remedies, suspend the relevant Makeshapes Services (or part of them) until the outstanding amounts are paid.
- 5.6 We may charge interest on overdue amounts. Interest will be calculated from the due date to the date of payment at an annual percentage rate equal to the corporate overdraft reference rate applied by our primary trading bank or equivalent at the due date plus 5% per annum.
- 5.7 We may change our fees at any time, provided that any changes will not apply to current Service Order(s) (changes will only apply to new Service Orders).

6 INTELLECTUAL PROPERTY

- 6.1 Subject to the limited rights of access and use expressly granted by the Agreement, Makeshapes, our affiliates and licensors reserve all of their rights, titles, and interests, including all Intellectual Property Rights, in and to the Makeshapes Services, all materials, systems and technology used in relation to the Makeshapes Services, and the Makeshapes Content. You must not copy, reproduce, transmit, post, distribute or create derivative works from the Makeshapes Services or the Makeshapes Content.
- 6.2 You retain all ownership and Intellectual Property Rights in Customer Content. You grant Makeshapes a worldwide, royalty free licence to use, reproduce, distribute, modify, adapt, create derivative works, or archive Customer Content in connection with the Makeshapes Services.
- 6.3 Each party consents to the other party's use (without charge) of its brand for the purpose of promoting the use of the Makeshapes Services to other potential customers. Such use must be in accordance with any brand use guidelines notified from time to time by the party owning the brand.
- 6.4 The Makeshapes Services may contain links to third-party websites, services or similar. You acknowledge that these are not controlled by Makeshapes and Makeshapes is not responsible for such third-party material in any way. You access any third party material at your own risk and you agree that Makeshapes is not responsible or liable in any way for such material.

7 DATA

- 7.1 Makeshapes will store and process data in a manner consistent with industry security standards. Makeshapes has implemented appropriate administrative, organisational, and technical systems, policies and procedures. Those safeguards include, but are not limited to, measures designed to prevent unauthorised access to or disclosure of data.
- 7.2 You represent and warrant, and it is a condition of the Agreement, that: (a) you have all necessary consents required under all applicable privacy laws in relation to any personal information which you disclose to Makeshapes or place on the Makeshapes Services; and (b) you will not include any sensitive information, any payment card information or any protected health information in any data provided or disclosed to Makeshapes or placed on the Makeshapes Services (and you acknowledge that Makeshapes is not compliant with the requirements of the Payment Card Industry Data Security Standard or the Health Insurance Portability and Accountability Act 1996 (US)).
- 7.3 You acknowledge that Makeshapes owns the rights, title, and interest in all Makeshapes Data. Makeshapes may use the Makeshapes Data for any purposes, subject always to applicable privacy laws and clause 8.
- 7.4 To the extent that a data processing agreement is required by applicable data privacy laws, Makeshapes's Data Processing Agreement applies.

8 CONFIDENTIALITY

- 8.1 “Confidential Information” means all information disclosed by a party (**Disclosing Party**) to the other party (**Receiving Party**), whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information and the circumstances of disclosure. Confidential Information of the Customer includes business plans, financial information and any commercially sensitive information you have provided us. Confidential Information of Makeshapes includes all information and materials related to Makeshapes Intellectual Property and the materials, systems and technology used to supply the Makeshapes Services, including templates, trade secrets, technical know-how, information related to customers, and business and marketing plans. Confidential Information does not include any information that: (a) is or becomes generally known to the public without breach of any obligation owed to the Disclosing Party; (b) was known to the Receiving Party prior to its disclosure by the Disclosing Party without breach of any obligation owed to the Disclosing Party; (c) is received from a third party without breach of any obligation owed to the Disclosing Party; or (d) was independently developed by the Receiving Party.
- 8.2 Each party must: (a) keep the Confidential Information of the other party strictly confidential; (b) effect and maintain adequate security measures to safeguard the other party’s Confidential Information from unauthorised access, use, or disclosure; (c) only disclose the other party’s Confidential Information to its personnel or professional advisors who have suitable confidentiality arrangements in place; and (d) give prior notice to the Disclosing Party of any disclosure compelled by law (to the extent legally permitted) and provide reasonable assistance, at the Disclosing Party’s cost, if the Disclosing Party wishes to contest the disclosure.

9 REPRESENTATIONS AND WARRANTIES

- 9.1 Each party represents that it has validly entered into the Agreement and has the legal power to do so.
- 9.2 Makeshapes warrants that during the term of the Service Order or Makeshapes Services (as applicable): (a) the Makeshapes Services will perform materially in accordance with the applicable description on the Makeshapes website; and (b) the Makeshapes Services shall be provided in a workmanlike manner that conforms to the relevant, prevailing industry standards.
- 9.3 To the maximum extent permitted by law, our warranties are limited to those set out in the Agreement, and all other conditions, guarantees or warranties whether expressed or implied by statute or otherwise (including those under the Contract and Commercial Law Act 2017 (NZ)) are expressly excluded and disclaimed.
- 9.4 Your sole remedy for any breach of the limited warranties provided in clause 9.2, and Makeshapes’s sole liability for such breach, is re-supply of the defective services.

10 LIABILITY

- 10.1 To the full extent possible under applicable law, we disclaim all liability in relation to any content submitted to the Makeshapes Services by any User or customer. In addition, you acknowledge that the Makeshapes Services are not intended to be a substitute for professional advice.
- 10.2 Our maximum aggregate liability to you under or in connection with the Agreement or relating to the Makeshapes Services, whether in contract, tort (including negligence), breach of statutory duty or otherwise, will not exceed the total amount paid by the Customer for the Makeshapes Services giving rise to the liability in the 12 months preceding the first incident giving rise to liability. In no event will Makeshapes be liable to any User of the Makeshapes Services under or in connection with the Agreement or the Makeshapes Services.
- 10.3 The Customer will defend Makeshapes from and against any and all third party claims, actions, suits, proceedings, and demands arising from or related to the Customer's or any of its Users' violation of the Agreement or the Acceptable Use Policy and will indemnify Makeshapes for all losses including reasonable attorney's fees incurred and damages and other costs awarded as a result of such a claim, and any amounts paid by Makeshapes in relation to any settlement of such a claim provided that the Customer consents to such settlement (consent not to be unreasonably withheld). Makeshapes will provide the Customer with prompt notice of such a claim and allow the Customer the right to assume the exclusive defence and control, and cooperate with any reasonable requests assisting Customer's defence and/or settlement of such matter.
- 10.4 Makeshapes will defend the Customer from and against any and all third party claims, actions, suits, proceedings, and demands alleging that the use of the Makeshapes Services (as permitted under the Agreement) infringes a third party's Intellectual Property Rights, and will indemnify the Customer for all reasonable attorney's fees incurred and damages and other costs finally awarded against the Customer in connection with or as a result of, and for amounts paid by the Customer under a settlement that Makeshapes approves of in connection with such a claim provided, however, that we will have no liability if a claim arises from (a) any item provided by the Customer or Users or (b) any modification, combination or development of the Makeshapes Services that is not performed by us. The Customer must provide us with prompt written notice of any such claim and allow us the right to assume the exclusive defence and control, and cooperate with any reasonable requests assisting our defence and/or settlement of such matter. This section states our sole liability with respect to, and the Customer's exclusive remedy against us for any such claim.
- 10.5 No party is liable to the other for any loss of profit, revenue, savings, business, use, data or goodwill, or any consequential, indirect, incidental or special damage or loss of any kind.

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- 10.6 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 the Agreement or the Makeshapes Services.
- 10.7 You acknowledge that we have set our prices and entered into the Agreement in reliance on the disclaimers and limitations in this clause 10 and the same form an essential basis for the bargain between the parties.

11 CANCELLATION, TERMINATION, AND SUSPENSION

- 11.1 You may cancel the Makeshapes Services at any time. Makeshapes is not liable to refund any amount to Customer for termination of any service by Customer except if such termination is termination for breach under clause 11.2.
- 11.2 Either party may, by notice to the other party, immediately terminate the Agreement for cause if the other party breaches any material provision of the Agreement and the breach is not remedied within 30 days of the receipt of a notice requiring remedy, or the breach is not capable of being remedied, or the other party has become insolvent, liquidated or bankrupt, or becomes subject to any form of insolvency action or external administration, or ceases to continue business for any reason.
- 11.3 Without limiting any other right or remedy available to us, we may, by notice restrict or suspend the Customer's and/or any User's access to and use of the Makeshapes Services and/or delete or edit the relevant data, if we consider that the Customer and/or User (as applicable) has: (a) breached the Acceptable Use Policy; (b) breached clause 4 of these Terms of Service; (c) used the Makeshapes Services in a way which breaches any applicable law; (d) attempted to modify or tamper with the technology or systems used to provide the Makeshapes Services; or (e) inputted data that breaches or may breach any third party right including Intellectual Property Rights and/or privacy rights, or that is or may be objectionable.

12 EFFECT OF TERMINATION OR EXPIRY

- 12.1 On termination or expiry of the Agreement:
 - a the Customer's right to use the Makeshapes Services automatically ends;
 - b Makeshapes will continue to make the Supplied Data available to the Customer for a period of 30 days, after which Makeshapes may permanently anonymise or delete the Supplied Data;
 - c if the Customer requests Makeshapes to assist in extracting Supplied Data and Makeshapes agrees to do so, the Customer must pay Makeshapes for assistance on a time and materials basis at Makeshapes's then current rates;
 - d each party must return or destroy all Confidential Information of the other party in its care, custody or control to the other party; and
 - e accrued rights are not affected.

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- 12.2 If the Agreement is terminated by Customer for “cause” in accordance with clause 11.2, then Makeshapes shall refund to Customer any prepaid fees covering the remainder of the term of all Service Orders after the effective date of termination on a prorated basis.
- 12.3 Termination of the Agreement will not affect clauses 5, 7, 8, 10 or 12 or any provision of this Agreement which is expressly or by implication intended to come into force or continue on or after the termination.

13 CHANGES

- 13.1 Provided that the Makeshapes Services continue to comply with the online description, Makeshapes may at any time modify the Makeshapes Services and/or the materials and technology used to provide the services.
- 13.2 Makeshapes may change these Terms of Service and/or the Makeshapes policies at any time by notifying you of the change. Unless stated otherwise, any change takes effect from the date set out in the notice. You are responsible for ensuring you are familiar with the latest Terms of Service and/or Makeshapes policies. By continuing to access and use the Makeshapes Services from the date on which the Terms of Service or Makeshapes policy are changed, you agree to be bound by the changed terms or policy.

14 GENERAL

- 14.1 No party is liable to any other for any failure to perform its obligations under the Agreement to the extent caused by Force Majeure.
- 14.2 No person other than you and us have any right to a benefit under, or to enforce, the Agreement.
- 14.3 A right under the Agreement may only be waived in writing signed by the party granting the waiver, and is effective only to the extent specifically set out in the waiver.
- 14.4 For the avoidance of doubt, the Agreement does not create a relationship of employment, trust, agency or partnership between the parties.
- 14.5 We may subcontract the performance of all or any part of our obligations under the Agreement.
- 14.6 Each notice or other communication under the Agreement is to be made in writing and delivered by post, personal delivery, or email (if email address is provided) to the addressee at the address of the party, and marked for the attention of the person or office holder. Each party's initial addresses are set out in the Service Order.
- 14.7 The Agreement, and any dispute relating to it, is governed by 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 the Agreement.

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- 14.8 The parties will use good faith and all reasonable efforts to resolve disputes arising from or relating to the Agreement by negotiating with each other first. If a dispute has not been resolved by good faith negotiation, either party may refer it to mediation in accordance with the Resolution Institute standard Mediation Agreement (NZ version). The mediation shall be conducted by a mediator and at a fee agreed by the parties. Failing agreement between the parties, the mediator shall be selected, by the Chair for the time being of Resolution Institute.
- 14.9 If any part or provision of the Agreement is or becomes illegal, unenforceable, or invalid, that part or provision is deemed to be modified to the extent required to remedy the illegality, unenforceability or invalidity. If modification is not possible, the part or provision must be treated for all purposes as severed from the Agreement. The remainder of the Agreement will be binding on you.
- 14.10 Subject to clause 13.2, any variation to the Agreement must be in writing and signed by both parties.
- 14.11 The Agreement constitutes the entire agreement of the parties with respect to its subject matter and supersedes all previous agreements, arrangements or understandings relating to that subject matter. The terms of the Agreement prevail over terms contained in any communications from either party or its personnel, even if the other party signs or otherwise purports to accept any such terms. You may not assign, novate, subcontract or transfer any right or obligation under the Agreement without our prior written consent, that consent not to be unreasonably withheld. You remain liable for your obligations under the Agreement despite any approved assignment, subcontracting or transfer.

15 INTERPRETATION

- 15.1 Definitions: In these Terms and the other documents forming part of the Agreement:

Acceptable Use Policy means the acceptable use policy published on the Makeshapes website.

Agreement means these Terms of Service, together with any Service Order and all applicable Makeshapes policies.

Makeshapes Content means: (a) all materials, information or items provided by Makeshapes to the Customer in relation to the Makeshapes Services; and (b) where Makeshapes is the "data controller" in accordance with applicable data privacy laws, the content that a User submits to the Makeshapes Services, excluding Customer Content and content owned by third parties.

Makeshapes Data means any data in relation to the Makeshapes Services, including analytical data regarding the use of the services.

Makeshapes Services means all products and services supplied by Makeshapes to the Customer including any free trial or use of Beta Services.

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Beta Services means a product or a feature or functionality that is beta, pilot, under development or evaluation or similar.

Customer means in the case of an individual accepting the Agreement on his or her own behalf, such individual, or in the case of an individual accepting the Agreement on behalf of a company or other legal entity, the company or other legal entity for which such individual is accepting the Agreement.

Customer Content means any content that the Customer (including any of its Users) submits to the Makeshapes Services, except that where Makeshapes is the “data controller” in accordance with applicable data privacy laws, Customer Content excludes User content.

Fees means the fees for the Makeshapes Services, specified in the Service Order.

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.

Intellectual Property Rights means all existing and future industrial and intellectual property rights, both in New Zealand and throughout the world, and includes any copyright, moral right, patent, registered or unregistered trade mark, registered or unregistered design, trade secret, knowhow, trade or business or company name, or other proprietary right, or right of registration of such rights.

Service Order means the order documentation outlining the specific Makeshapes Services that the Customer is purchasing and the applicable Fees.

Supplied Data means the information made available to the Customer as part of the Makeshapes Services, including any reports.

Taxes has the meaning given in clause 6.3.

User means any person accessing the Makeshapes Services in relation to the Customer, including users invited by the Customer to take part in experiences.

15.2 Interpretation: unless the context otherwise requires:

- a the singular includes the plural and vice versa;
- b a reference to materials means a reference to materials of any kind whether in the form of documentation, software or otherwise;
- c a reference to either party includes reference to its respective successors in title and permitted assigns (and where the context so permits) its personnel and representatives;

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- d any agreement not to do a thing also constitutes an agreement not to suffer or permit or cause that thing to be done;
- e the words “includes” and “including” are to be read as being followed by the words “without limitation”;
- f in the context of the submitting of content to the Makeshapes Services, “submit” includes submitting, uploading, transmitting or otherwise making available to or through the Makeshapes Services; and
- g a reference to any documentation and the Makeshapes website includes as varied or substituted.