

1. Introduction

- 1.1 By accessing the Website and/or the App, you consent to be bound by these terms of use, which together with your completed Account Application and our Privacy Policy, form a binding agreement between you and us (**Agreement**). If you do not agree with these terms, do not access the Website or the App.
- 1.2 If you are accessing the App on behalf of a Customer, you confirm that you have the authority to act on behalf of that entity.
- 1.3 From time to time we may need to make changes to these terms of use. We will notify you of any by posting them on our Website or by emailing you, and you agree by continuing to access or use the Website and/or the App to be bound by the updated terms.
- 1.4 All capitalised terms used in these terms of use are defined in section 21 below.

2. Term

- 2.1 This Agreement (and your subscription to the Service) shall commence on the date that you register your Account and accept these terms of use, and shall continue for the initial subscription period in your Account Application (**Initial Subscription Period**), unless terminated earlier in accordance with the terms of this Agreement.
- 2.2 This Agreement will automatically renew at the end of the Initial Subscription Period (and, as applicable, each Renewal Subscription Period) for a further period equal to the Initial Subscription Period (each a **Renewal Subscription Period**), unless you notify us in writing (prior to the end of the relevant period) that you do not wish to renew your Agreement.
- 2.3 We will provide you with notice (by email) of any upcoming Renewal Subscription Period no less than 30 days prior to the expiry of the current subscription period.

3. Service

- 3.1 Subject to compliance by you with this Agreement we grant to you and you accept from us, a non-exclusive, non-transferable and non-assignable right for you (and your Authorised Users) to:
- (a) access and use the Service and Output Data during the Term solely for the Authorised Purpose; and
 - (b) supply the Output Data to your clients for their use in connection with the relevant Project (but not for any other property or for any other commercial use or resale).
- You acknowledge and agree that Output Data is Project specific, and may only be used in connection with the specific building that is the subject of that Project. If we become aware that Output Data has been used by you (or any of your Authorised Users or clients) in connection with any property or building project that is not the subject of the relevant Project, without limiting any other remedy available to use for such breach, we may charge you for such use.
- 3.2 If you wish to access and use the App, you must become a registered user and activate an Account via the Website.
- 3.3 You warrant that all information supplied by you and your Authorised Users to us via the Website and/or the App (including all Customer Data) is accurate, complete and up to date. You acknowledge that the Service (and the accuracy

and reliability of the Output Data) depends on the entry by you and your Authorised Users of accurate, complete and up to date Customer Data.

4. Authorised Users

- 4.1 You are responsible for keeping all your access information for the App and the Service, including email addresses and log-on credentials, secret and secure. Without limiting the foregoing, you agree:
- (a) not to disclose and to ensure that Authorised Users do not disclose their user name or log-on credentials to any other person;
 - (b) to ensure that none of your Authorised Users (or any other person under your control) attempts to gain unauthorised access to the App or the Service; and
 - (c) to inform us immediately of any known or suspected unauthorised access to and use of the App, Service, Output Data or Third Party Data.
- 4.2 You acknowledge and agree that each login (username and password) is personal to an individual Authorised User, and that each Authorised User that wishes to use the Service must have his or her own login. You will not create, use, allow or promote generic or shared logins.
- 4.3 You must notify each Authorised User of the terms of this Agreement and ensure that each of them strictly comply with these terms. You shall be responsible (and liable) for any failure of any Authorised User to comply with the terms of this Agreement (as if it were a breach by you of this Agreement).

5. Restrictions on use

- 5.1 In respect of your (and your Authorised Users' and clients) access to and use of the Service and Output Data you will comply (and will ensure your Authorised Users comply) with all user documentation, applicable laws and instructions and policies notified by Actually from time to time.
- 5.2 You must not (and must ensure your Authorised Users do not):
- (a) access the Service or Output Data other than for the Authorised Purpose;
 - (b) use the Service in a manner that may damage, disable, overburden or impair either the Service or the networks connected to the Service;
 - (c) use the Website, the App, the Service or any Output Data for any fraudulent or discriminatory purposes, or in a way that may breach any law or cause harm to any person;
 - (d) modify, translate, reverse engineer, decompile, disassemble or create derivative works of the Website, App, Service or Output Data (or any part of them) or otherwise attempt to: (i) defeat, avoid, by-pass, remove, deactivate or otherwise circumvent any software protection mechanisms in the Website or the App (including any mechanism used to restrict or control the functionality of the Service); or (ii) derive the source code or the underlying ideas, algorithms, structure or organisation form of the Service (or any part of it); or
 - (e) distribute through (or upload into) the Website or the App any attachment, document, image, data or file that: (i) infringes on any copyright, patent, trade secret, trademark or other third party proprietary rights; (ii)

- violates any law, statute, ordinance or regulation; (iii) is defamatory, libellous or obscene; or (iv) contains viruses, trojan horses, worms, time bombs, or similar harmful programming routines.
- 5.3 With respect to all Output Data made available to you, you must:
- (a) not (and ensure your Authorised Users do not) make any representations, promises or guarantees to your clients regarding the accuracy, completeness or reliability of any Output Data you provide to them; and
 - (b) ensure that your clients understand and acknowledge that any Output Data they receive is to be used solely for the purpose of the relevant Project (not for commercial use or resale) and that any cost estimate included in the Output Data constitutes an estimate only and not a quote.
- 6. Ownership**
- 6.1 Subject only to your rights to access and use the Output Data in clause 3.1 and your rights in the Customer Data specified in clause 7.1:
- (a) the Website, App, Service (including any underlying software, databases and other information included in the Service) (together the **Actually Materials**) and the Output Data are protected by copyright and other interests and are proprietary and confidential to us (or our third party licensors and/or suppliers); and
 - (b) all rights, title and interest in and to the Actually Materials, including associated intellectual property rights, are and will remain vested in us or our third party licensors or suppliers (as applicable).
- 6.2 Beyond the rights expressly granted in this Agreement, nothing contained in this Agreement confers on you any right or interest in, or licence or permit to use, any of the Actually Materials or Output Data or any of the intellectual property rights in them.
- 6.3 If you (or any of your Authorised Users or clients) provide us with ideas, comments or suggestions relating to the Service or Website (**feedback**):
- (a) we may use or disclose the feedback for any purpose; and
 - (b) all rights in that feedback, and anything created as a result of that feedback (including new material, enhancements, modifications or derivative works), are owned solely by us.
- 7. Data**
- 7.1 All Customer Data will be (and will remain) owned by you (or your clients or Authorised Users, as applicable). However, you grant to us a licence to access, use and disclose your Customer Data for the purposes of providing the Service, exercising our rights and performing our obligations under this Agreement, improving the Service and communicating with you about the Service, your Agreement and any other matters that may be of interest. We may also disclose your Customer Data in connection with a proposed purchase or acquisition of our business or assets, where required by applicable law or any court, or in response to a request by a legitimate law enforcement agency.
- 7.2 All Output Data will be (and will remain) owned by us and we may, subject to our privacy obligations under this Agreement and at law, use such data for any purpose during the Term or following the end of the Term. Your rights to access, use and disclose the Output Data for your Projects are as specified in clause 3.1.
- 7.3 All Third Party Data (including to the extent it or any derivative of it is incorporated into any Output Data) will be (and will remain) owned by the relevant third party provider of such data.
- 7.4 You grant to us a non-exclusive royalty free world-wide and irrevocable licence permitting us to copy, anonymize, aggregate, process and display Customer Data to derive anonymous data (including statistical and usage data), and data about the Website, the App, the Service and/or individual Projects, and your use of the Service, provided such data cannot be used to identify your Authorised Users or any other individual (**Anonymous Data**). We may combine or incorporate such Anonymous Data with or into other similar data and information available, derived or obtained from other clients, licensees, users, or otherwise (when so combined or incorporated, referred to as **Aggregate Data**). We will be the owners of all rights, title and interest in and to the Anonymous Data and Aggregate Data.
- 7.5 You warrant and represent that:
- (a) you have the right to grant the rights in clauses 7.1 and 7.4 in respect of all Customer Data, and input the Customer Data into the Service in the manner anticipated by the Agreement and the Service; and
 - (b) use of the Customer Data by us, you or any of your Authorised Users or clients in the manner anticipated by this Agreement and the Service will not breach any laws or the rights of any person (including the privacy or intellectual property rights of any person).
- 7.6 You are solely responsible for maintaining a copy of all Customer Data and your Output Data. We do not make any guarantees around loss or corruption of any Customer Data or Output Data.
- 7.7 We reserve the right to remove or replace, any content or data (including any Third Party Data or Output Data) from the Service that may expose us to potential liability, if we lose our right to access and use any Third Party Data or if we consider that your continued access to the relevant Third Party Data may place us in breach of any law or any third party contract.
- 8. Trial**
- 8.1 We may offer you a free trial of the Service. Any free trial offered by us will commence on the day that we make the trial service available to you and will end on the last day of the trial period specified on the Website. You may not register for (or allow any other person to register on your behalf for) any more than one free trial of the Service. If it is determined that you have directly or indirectly obtained access to more than one free trial, we will charge you the relevant fees applicable to the Service provided during your additional trial(s).
- 8.2 At the end of a trial period, we will disable your access to the Service (and will remove your Customer Data from the App within 90 days of the end of the trial period, or within

30 days if requested by you), unless you become a registered user of the Service on a paid basis. Services provided during any trial period are supplied on an "as is – where is" basis, and as such any warranties given by us in these terms of use do not apply.

9. Fees

9.1 In consideration of your (and your Authorised Users') use of the Service, you will pay us the Fees.

9.2 Our Fees are exclusive of all taxes, levies, or duties imposed by taxing authorities, and you shall be responsible for payment of all such taxes, levies, or duties. If Actually is required to pay or collect any goods and services or value-added tax on any fees charged under this Agreement, then such taxes and/or duties will be billed to and paid by you.

9.3 We may increase the Fees on each renewal of your subscription period. We will provide you with no less than 30 days notice of the increased fees that will apply upon renewal.

10. Payment of Fees

10.1 The annual subscription fee portion of your Fees is payable in advance), as specified in your Account Application, and all other Project related fees and costs will be payable at the time you add the relevant Project to your Account. Details of your Fees (paid and payable) can be accessed on your Account. Your continued access to the Service and your Output Data is strictly subject to payment by you of the Fees in accordance with this clause 10. You may arrange for your clients to make payment of Fees (in the manner required by this Agreement) on your behalf, but you acknowledge and agree that the relevant Project related services will not be accessible via the Service until such time as the relevant Project Fees have been paid in full by you or your client.

10.2 Unless otherwise agreed in writing with us, Fees shall be payable by credit card. Credit card transactions are securely processed by Stripe, and are subject to the Stripe terms of service available on their website. Stripe is solely responsible for such transactions and we exclude all liability for such transactions to the extent not restricted by law. Stripe maintains administrative, technical, and physical procedures to protect information stored on its servers, as outlined within its own privacy policy.

10.3 If you default in payment of any amount payable under this Agreement, we may:

- (a) suspend the provision of the Service until such time as you have made payment in full of all amounts due and owing under this Agreement;
- (b) charge interest on the unpaid amount from the due date until the date of actual payment at 2% per annum over the base overdraft facility rate charged by our bankers from time to time, compounded monthly until paid; and
- (c) charge you all costs incurred by us in connection with the recovery of the unpaid amounts, including the charges from debt recovery services and legal fees on a solicitor and own client basis.

11. Termination and suspension

11.1 You may terminate this Agreement at any time on written notice to us.

11.2 We may terminate this Agreement on no less than 30 days written notice to you.

11.3 We may immediately by notice in writing to you, terminate this Agreement (or, in our discretion, suspend the provision of the Service) where:

- (a) you fail to comply with any term of this Agreement and do not remedy the breach within 10 days of receiving notice of the breach from us;
- (b) you (or any of your Authorised Users or personnel) breach, or attempt to breach, any of our security protocols or systems on the Website or the App, or access (or attempt to access) an Account that does not belong to you;
- (c) you (or any of your Authorised Users or clients) use (or attempt to use) Output Data for any purpose other than the Authorised Purpose;
- (d) there is an appointment of any type of insolvency administrator in respect of your affairs;
- (e) required by law; or
- (f) we consider it necessary or desirable to do so to protect our interests or reputation or the interests or reputation of any Third Party Data supplier.

11.4 We may also suspend access to the Website, App, Service and/or Output Data (as applicable) at any time:

- (a) for such time as is necessary to carry out maintenance determined by us to be necessary or desirable;
- (b) to reduce or prevent interference with the Website or App;
- (c) if required to do so as a result of a direction by any Third Party Data supplier.

We will endeavour to provide you with reasonable prior notice of any such suspension.

11.5 You may immediately, by notice in writing to us, terminate this Agreement where we fail to comply with any material term of this Agreement and do not remedy the breach within 10 days of receiving notice of the breach from you.

11.6 Upon termination of this Agreement (for any reason):

- (a) you must immediately cease (and ensure all Authorised Users' cease) to access the Service;
- (b) you (and your Authorised Users and clients) may continue to use Output Data in the form of reports that you have downloaded from the App (and paid for) prior to termination, provided such ongoing use is undertaken strictly in accordance with (and subject to) the terms of this Agreement;
- (c) you acknowledge and agree no Fees paid in advance and which relate to the period following termination, if any, will be refunded to you, unless this Agreement is terminated by us under clause 11.2 or by you under clause 11.5;
- (d) all of your Customer Data, other than Anonymous Data or Aggregate Data, shall be deleted from the App within 90 days (or sooner if requested by you), unless we are required to retain such data on our systems for legal compliance reasons;
- (e) any termination will be without prejudice to any prior breaches by us or by you (or any of your Authorised Users) of this Agreement; and
- (f) any provision of this Agreement intended to survive termination shall survive.

12. Warranties

- 12.1 We will use our commercially reasonable efforts to ensure that the Service is accessible by you and your Authorised Users in accordance with this Agreement.
- 12.2 In the event of any breach of clause 12.1 or any other term, condition or warranty that Actually is unable to exclude by law, your sole remedy will be (at our option) the resupply of the non-conforming Service within a commercially reasonable time or a refund of the Fees paid by you for such non-conforming Service.
- 12.3 Actually does not represent that the Service, Website or Output Data are error-free or will satisfy your requirements or any legislative or regulatory requirements that you may choose to use the Output Data in connection with. As the Service uses Third Party Data to prepare the Output Data, Actually does not provide (and expressly excludes) any warranties in respect of the accuracy, reliability or completeness of any Output Data. You acknowledge and agree that any estimates provided in the Output Data are estimates only and not quotes.
- 12.4 The obligation of Actually in clause 12.1 is in lieu of all other warranties in respect of the Website, App, Service and Output Data. To the maximum extent permitted under applicable law, all other warranties, conditions and representations, whether express, implied, statutory or otherwise, and whether arising under this Agreement or otherwise, are excluded (including, without limitation, the implied warranties of merchantability, non-infringement and fitness for a particular purpose).
- 12.5 We use commercially available anti-virus software in the provision of the Service, but we cannot guarantee that the Website or the Service will be free from viruses, trojan horses, worms, time bombs, or similar harmful programming routines.
- 12.6 You agree the Service is acquired for the purposes of a business, and as such, the guarantees provided under the New Zealand Consumer Guarantees Act 1993 (or equivalent legislation in your jurisdiction if you are not based in New Zealand) do not apply.
- 13. Liability**
- 13.1 To the extent we do become liable to you in connection with this Agreement, then all claims by you against us are limited in aggregate to the Fees paid by you in the first year of the term of this Agreement, unless such liability has arisen as a sole and direct result of our gross negligence, wilful misconduct or fraud.
- 13.2 You will indemnify us for any loss, damage or costs incurred by us from any claim (including a claim by any Third Party Data supplier), where the relevant claim arises from: (i) your (or any of your Authorised Users or clients) unauthorised use or disclosure of the Service, Third Party Data or Output Data; or (ii) any breach by you (or any of your Authorised Users) of clause 5.3 or the warranties in clause 7.5.
- 13.3 Except in respect of any liability under the indemnity in clause 13.2, under no circumstances will either you or we (or any of our third party licensors or suppliers), or any of their directors, officers or employees, be liable, whether in contract, equity, tort (including negligence, breach of statutory duty or otherwise) or any other theory of liability for any direct or indirect loss of profits, loss of revenue, loss of Customer Data, loss of anticipated savings; or for any indirect, special or consequential loss or any liquidated damages whatsoever.
- 13.4 Despite any other provision to the contrary in this Agreement, we will not under any circumstances be liable to you, any Authorised User or any third party in respect of the accuracy, reliability, availability or completeness of any Output Data or your (or your clients') use or reliance on any Output Data created by or derived from the Service, including any decisions you or your clients make in respect of a Project, which remains your (or your clients) sole responsibility.
- 14. Privacy**
- 14.1 We collect and process the Personal Information of your Authorised Users and clients when you (or your Authorised Users, as applicable) access or use the Website, the App and/or the Service. We may also collect certain information about the performance of the Website, App and Service and your (and your Authorised Users' and clients) use of the Website, App, Services and/or Output Data.
- 14.2 Our access to and use of all such Personal Information is governed by our Privacy Policy. By agreeing to this Agreement, you agree to the way we handle your (and your Authorised Users') Personal Information, as specified in (and anticipated by) these terms of use and our Privacy Policy.
- 14.3 You must comply with all Data Privacy Laws in connection with your collection, use and disclosure of the Personal Information of any person. You will not (and will ensure your Authorised Users do not) use the Services: (i) to collect Personal Information about third parties other than as anticipated by the Service; or (ii) in a way that violates (or may be considered inconsistent with) the privacy of any person.
- 14.4 You warrant that you have obtained all necessary consents and approvals from all individuals (including your clients) to ensure that we are able to lawfully process all Personal Information of such persons in the manner specified in (and anticipated by) this Agreement and the Service.
- 14.5 You will, upon becoming aware of a Security incident, or any other breach, or suspected breach, of your security safeguards, notify us without undue delay and shall provide timely information relating to the Security Incident as it becomes known or as is reasonably requested by us.
- 15. Confidentiality**
- 15.1 Unless otherwise consented in writing by one party to the other, each party will maintain the confidentiality of all Confidential Information of the other obtained pursuant to this Agreement.
- 15.2 The provisions of clause 15.1 do not apply to any information which:
- is public knowledge other than breach of this clause 15;
 - is received from a third party who is in lawful receipt of the information and is able to disclose it to the recipient without restriction;
 - is required by law to be disclosed; or
 - in the case of Actually, is necessary for Actually to disclose in order to provide the Service.
- 16. Third party websites**

- 16.1 The Website may contain links to other websites or resources over which Actually does not have control (**External Websites**). Such links do not constitute an endorsement by Actually of those External Websites. You acknowledge that Actually is providing these links to you as a convenience, and you further agree that Actually is not responsible for the content of any External Websites. Your (and your Authorised Users') use of the External Websites is entirely at your own risk and is subject to the terms and conditions of use and privacy policies located on the External Websites.
- 17. Force majeure**
- 17.1 Neither party shall be liable for any delay or failure to fulfil its obligations under this Agreement arising directly or indirectly from any circumstance beyond the reasonable control of the affected party (including, without limitation, acts of God, flood, earthquake, storm, fire, epidemic, pandemic, war, embargoes, riot or civil disturbance), provided that the affected party shall notify the other party as soon as practicable of the events and use its reasonable endeavours to continue to perform its obligations and mitigate the effects of the event.
- 18. Disputes**
- 18.1 Where any dispute arises between you and us in respect of this Agreement or the Service, you (or your representative) and Actually must first use all reasonable endeavours to negotiate in good faith in an attempt to resolve the Dispute amicably, before commencing any court or arbitration proceedings relating to a question, difference or dispute relating to this Agreement or the Service.
- 19. General**
- 19.1 Any problems that occur whilst accessing the Website or the App (or any other correspondence with us) should be notified in writing to support@actuallyapp.com at your earliest convenience.
- 19.2 Any notices to be provided by us to you pursuant to this Agreement shall be made by either posting such notice on the Website or emailing you at the email address you supplied to us for the purposes of opening your Account.
- 19.3 This Agreement is personal to you and you will not assign or transfer any of your rights under this Agreement or any part of them without our prior written consent (which may be withheld in our absolute discretion). If you are not a natural person, any change of control in your entity will be deemed an assignment.
- 19.4 This Agreement and the provision of the Service will be governed by New Zealand law and you agree to submit to the exclusive jurisdiction of the New Zealand courts in respect of any disputes or claims arising out of or in connection with the Service.
- 19.5 Nothing express or implied in this Agreement shall be construed as constituting either party as the partner, agent, employee, office or representative of, or as a joint venture with, the other party, and neither party will make any contrary representation to any other person.
- 19.6 If any of provision of this Agreement is determined to be illegal, invalid or otherwise unenforceable, then to the extent, it shall be severed and deleted from these terms and the remaining terms shall survive and continue to be binding and enforceable.
- 19.7 This Agreement constitutes the entire agreement between the parties with respect to the Website, the App and the Service.
- 20. Definitions**
- 20.1 In this Agreement unless the context otherwise requires:
- Account** means an account within the Service registered by a Customer through the Website, which enables the Customer (and its Authorised Users) to use the Service.
- Account Application** means the online form you complete and submit to Actually when registering for a free trial of the Service and/or when registering an Account for a paid subscription to the Service.
- Agreement** means your Account Application, together with these terms of use and our Privacy Policy (as amended by us from time to time).
- App** means the web based app (available on the Website), through which you may access and use the Service.
- Authorised Purpose** means for the purpose of undertaking the building design process for each Project and providing your clients with carbon data, cost estimates and performance estimates for the Project(s) you are undertaking for them.
- Authorised User** means any of the personnel of the Customer's organisation that the Customer has authorised to access and use the Service on its behalf.
- Confidential Information** means all written and oral information provided by either party to the other (and, in the case of Actually, to any Authorised User) or to which the other party (including in the case of the Customer, its Authorised Users) gain access. It is acknowledged and agreed that all information regarding the Service and the App (including any underlying software, databases and other information included in the Service) is Confidential Information of Actually.
- Customer** means the person or entity that registers to access and use the Service and in whose name the Account is created.
- Customer Data** means any and all data (in its original form) relating to you, your Authorised Users and/or your clients (including Account registration information and Project details, such as CAD designs and building product data) that you or your Authorised Users input into the Service or otherwise make available to Actually (including via the Website or the App).
- Data Privacy Laws** means privacy laws that either you or we are legally obliged to comply with, including the New Zealand Privacy Act 2020.
- Fees** means the fees payable by you to Actually for the Service (including all Project specific fees), as specified in your Account Application or on the Website, or as otherwise notified by Actually from time to time throughout the term of this Agreement.
- Output Data** means the data, information, estimates and reports made available to you (online or as part of a downloadable report) as an output of your use of the Service, but excludes any Customer Data, Third Party Data and any Actually Intellectual Property or Confidential Information.

Personal Information means information about an identifiable individual, or an individual whose identity can be reasonably ascertained from that information.

Privacy Policy means our privacy policy in place from time to time and contained on our Website at www.actuallyapp.com.

Project means a building project being undertaken by the Customer for a client, the details of which are uploaded by the Customer into the App.

Security Incident means any unauthorised or unlawful breach of security that leads to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of or access to Personal Information

Service means the online tool (that calculates cost, carbon and building performance estimates in real time for your building projects) made available to you via the App. The specific Service plan that you have subscribed for shall be as detailed in your Account Application.

Term means the Initial Subscription Period and all Renewal Subscription Periods (as defined in clause 2), subject to earlier termination of this Agreement in accordance with its terms.

Third Party Data means any data or information about (or supplied by) a third party and made available to you directly or indirectly via the Service and includes any derivatives of such Third Party Data (whether contained in Output Data or otherwise).

We, us, our or **Actually** means Counterfactual Limited, trading as Actually.

Website means actuallyapp.com or such other site as notified by us from time to time.

you means the Customer and as the context permits, includes your Authorised Users, and **your** has a corresponding meaning.