

Ontrack Online Training Agreement Terms & Conditions

1 Definitions and interpretation

1.1 Definitions

In this Agreement:

ASIC means the Australian Securities & Investments Commission.

Business Day means a day in which all banks are open for retail banking business in New South Wales other than a Saturday or a Sunday.

Client Content means training materials developed by the Client and made available to Users as part of the Product.

Client, Commencement Date, Fees, Product and Initial Term have the meanings given in the Details or as specified in the Subscription Form.

Content means training materials (which includes without limitation any industry news, market/economic updates in particular sectors, case studies, technical updates on statutory or regulatory changes or knowledge reviews) developed by Kaplan or licensed by Kaplan under this Agreement and made available to Users, as part of the Product.

Confidential Information means all Kaplan's information which would reasonably be regarded as confidential, disclosed to the Client before or after the Commencement Date including the terms of this Agreement but excluding information which:

- (a) the Client can prove it possessed before the relevant information was disclosed or made available to it by or on behalf of Kaplan;
- (b) is lawfully acquired prior to the date of disclosure under this Agreement by the Client from a third party without restrictions as to its use or disclosure; or
- (c) is in or becomes part of the public domain other than as a result of the breach by the Client of this Agreement.

Details means the details of this Agreement as set out in the table on page 1, or as specified in the Subscription Form.

Disaster Recovery Plan means the plan described in the Annexure to this Agreement.

Intellectual Property Rights means all statutory and other proprietary rights (including rights to require information be kept confidential) in respect of copyright, know-how, trade secrets, trade marks, designs, patents and all other rights relating to intellectual property.

Product means an online training program comprising planning, training and reporting functionality and includes the Supporting Documentation, Reports and Updates.

Purpose means training for the purpose of satisfying the ongoing statutory training requirements for persons who provide financial

product advice to retail clients on behalf of the Client.

Related Body Corporate has the meaning given to that term under the *Corporations Act 2001* (Cth).

Renewal Period means a period of equivalent duration to the Initial Term.

Reports means any full and exception reports containing details of training undertaken by users generated by the Product or by Kaplan in connection with the Product and supplied to the Client by Kaplan.

Subscription Form means the Ontrack Subscription Form which the Client must complete if the Client does not sign a written copy of this Agreement.

Supporting Documentation means manuals, guides and other material developed by Kaplan to support the Product.

Term means the Initial Term and each Renewal Period.

Updates means new training material (including any industry news, market/economic updates in particular sectors, case studies, technical updates on statutory changes and knowledge reviews), which is made available by Kaplan through the Website.

User Data means data provided by Users in completing tasks required as part of using the Product but does not include the Reports.

User Guide means any supporting documentation that Kaplan produces to assist Clients with using the Product.

Users means the people who are given access to the Product under this Agreement, being the Client's nominated employees or authorised representatives, or the Client's Related Bodies Corporate or their nominated employees or authorised representatives.

Website means the site accessible at the Internet address www.kaplan.edu.au or such other address as notified in writing to the Client by Kaplan.

1.2 Interpretation

In this Agreement:

- (a) "Including" and similar expressions are not words of limitation.
- (b) Money amounts are stated in Australian currency unless otherwise specified.
- (c) The Details form part of this Agreement.
- (d) The provisions of the Details, including any special conditions, override the provisions of these Terms and Conditions to the extent of any inconsistency.

2 Licence

2.1 Grant of licence

From the Commencement Date, Kaplan grants to the Client:

- (a) a non-exclusive licence for the Users to use the Product for the Term and solely for the Purpose; and
- (b) a perpetual non-exclusive licence to use the Reports for the Client's business purposes, including providing individual Users with details of their training records, and providing information to regulators and industry bodies, unless such provision would breach the law.

2.2 Passwords and profiles

The Client:

- (a) acknowledges that the Product is password protected and that each User's password is unique to that person and must not be used by any other person (including any other User);
- (b) must give Kaplan details of each User as requested (including User email addresses and nominated areas of advice for the purpose of the training);
- (c) must not and must ensure that each User does not disclose password details to any person other than the relevant User;
- (d) must not permit, authorize or facilitate any access or use of the Product to any person who is not a User; and
- (e) acknowledges that Kaplan may monitor activity on the server and will maintain user access logs.

2.3 Intellectual Property Rights

All existing and future Intellectual Property Rights, title and interest in the Product is, and shall at all times remain, the sole and exclusive property of Kaplan.

3 Term and renewal

3.1 Term

- (a) This Agreement begins on the Commencement Date and continues for the Initial Term specified in the Details or the relevant Subscription Form unless otherwise terminated in accordance with this Agreement.
- (b) The minimum Term cannot be less than 12 months.

3.2 Renewal

- (a) If the Client pays the Fees upfront, Kaplan will provide the Client with 60 days prior written notice that the Initial Term is due

to expire. If the Client wishes to renew the Agreement for a successive Renewal Period, the Client must pay the upfront Fees for the Renewal Period to Kaplan before the expiry of the Initial Term, otherwise the Agreement will automatically terminate.

- (b) If the Client pays the Fees by monthly invoice, on expiry of the Initial Term this Agreement will automatically renew for successive Renewal Periods unless and until one party gives to the other at least 60 days written notice prior to the commencement of a Renewal Period that it does not wish the Agreement to extend for a Renewal Period. When this Agreement renews for a Renewal Period the Agreement will renew in accordance with Kaplan's then current Fees.

4 Payment

4.1 Fees

The Client must pay Kaplan the Fees, which are non-refundable either:

- (a) Up front on the Commencement Date;
- (b) By monthly invoice if the Client has 30 or more users, subject to an application for credit having been processed and approved prior to goods being dispatched; or
- (c) By other payment options as offered by Kaplan from time to time;

as specified in the Details or the Subscription Form.

4.2 Variation of Fees

Kaplan reserves the right to vary the Fees with 60 days written notice. If the Client:

- (a) accepts the variation the variation will take effect on expiry of the notice period; or
- (b) does not accept the variation, the Client may by written notice terminate this Agreement with effect from the expiry of the Initial Term. The Client must continue to pay the balance of the Fees as specified in the Subscription Form or Details until the expiry of the Initial Term.

4.3 Late payment

Without prejudice to Kaplan's other rights, if the Client fails to pay any amount by the due date Kaplan may charge, and the Client must pay, daily interest on the amount outstanding:

- (a) calculated from the due date of payment to the date of actual payment; and

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- (b) at an interest rate 3% above the rate quoted on the due date of payment (and if no rate was quoted on that day, the day on which it is next quoted) for business overdrafts over \$100,000 by Kaplan's principal Australian bank.

4.4 Payment Refusals

Kaplan will charge an administration Fee in accordance with Part 1 of the Annexure, in addition to the Fees payable, if the Client makes a payment by cheque or credit card which is dishonoured or refused.

4.5 Taxes

The Client must pay all taxes (including GST) in respect of this Agreement. Amounts payable by the Client under this Agreement are exclusive of any applicable taxes unless stated otherwise.

5 Additional Users

5.1 No additional Users

The Client must not allow access to the Product by a greater number of Users than the number specified in the Annexure or the Subscription Form or by persons who are not nominated Users.

5.2 Notice period for variations in the number of Users

- (a) If the Client pays the Fees upfront:
- (1) For a reduction in User numbers to have effect in a given month, Kaplan must be advised of the change by the 23rd of the preceding month. Requests to reduce User numbers received after the 23rd of the given month will not take effect until the subsequent month; or
 - (2) For an increase in User numbers to have effect in a given month, Kaplan must be advised of the change by the 23rd of the preceding month. Requests to increase User numbers received after the 23rd of the given month will not take effect until the subsequent month.
- (b) If the Client pays the Fees by monthly invoice:
- (1) For a reduction in User numbers to have effect in a given month, Kaplan must be advised of the change by the 23rd of the preceding month. Requests to reduce User numbers received after the 23rd of the given month will not take effect until the subsequent month; or
 - (2) For an increase in User numbers to have effect in a given month, Kaplan must be advised of the change by the 17th of the given month. Requests to increase User numbers received after

the 17th of the given month will not take effect until the subsequent month.

5.3 Substitution of Users

The Client may substitute a User for another nominated User by notifying Kaplan in writing.

6 Confidential Information

6.1 Acknowledgment of confidentiality

The Client acknowledges that:

- (a) all the Confidential Information is secret and confidential to Kaplan; and
- (b) any unauthorised use, reproduction or disclosure of the Confidential Information by the Client may cause loss, damage or expense to Kaplan.

6.2 Obligation of confidentiality

The Client must (except as may be required by law or with Kaplan's prior written consent) maintain the secrecy and confidentiality of the Confidential Information. If this Agreement allows the Client to disclose Confidential Information to a third party, the Client must ensure that the third party agrees to guard the confidentiality of the Confidential Information on the same terms as set out in this Agreement.

6.3 Disclosure required by law

If the Client is required by law to disclose Confidential Information:

- (a) the Client will promptly give Kaplan written notice specifying the legal requirement and the Confidential Information to be disclosed; and
- (b) the Client will ensure that the relevant Confidential Information is disclosed in a manner which minimises the disclosure.

6.4 Injunctions

The Client acknowledges and agrees that a breach of this Agreement may cause Kaplan to suffer loss, damage and expense for which damages may not be adequate compensation and may be difficult to ascertain and that Kaplan may immediately seek to restrain any actual or threatened breach of this Agreement by injunction or any similar remedy.

7 Content

7.1 Kaplan Content

- (a) Kaplan will use reasonable endeavours to ensure that Products (when published) are consistent with the standard required by ASIC for the relevant competencies.
- (b) Each month, Kaplan will provide Updates to the content available on the Product. Kaplan will send an email to individual

Users notifying them of those Updates, if any, that are relevant to their areas of advice based on the profile information provided by the Client in accordance with clause 2.2(b).

- (c) The Client acknowledges that the Product has been developed and is maintained by Kaplan for the Purpose but Kaplan does not warrant that using the Product will satisfy all statutory requirements in relation to the continuing professional education needs of Users.
- (d) The Client acknowledges and agrees that any information or materials provided by Kaplan under this Agreement are provided for educational or training purposes only, do not constitute financial or other advice and cannot be relied on for providing advice.
- (e) The information or material provided by Kaplan to the Client under this Agreement is believed to be accurate at the time it was prepared. However, to the extent legally permitted, Kaplan gives no warranty as to the accuracy or comprehensiveness of the information or material and the Client must undertake its own verification enquiries before relying on the information or material.

7.2 Client Content

- (a) The Client may add Client Content to the Product.
- (b) The total amount of Client Content must not exceed one gigabyte, and must not infringe third party rights.
- (c) Client Content must not be defamatory, illegal, obscene or contain any virus or other destructive agent. Kaplan reserves the right to remove any Client Content that does not satisfy this clause in Kaplan's opinion.
- (d) The Client indemnifies Kaplan against any claim, action, damage, loss, liability, cost charge, expense, outgoing or payment suffered, paid or incurred by Kaplan in connection with the Client Content.
- (e) Kaplan will ensure that access to Client Content will be restricted to:
 - (1) Users;
 - (2) Kaplan staff, agents, contractors and suppliers who are involved in producing the Product; and
 - (3) others whose access is authorised by the Client in writing.

8 Support and maintenance

8.1 Support

Kaplan will provide to Users and the Client's training managers and administrators regarding the use of the Product:

- (a) a User guide; and
- (b) reasonable telephone IT support relating to access and software issues between the hours of 8.30 am and 5.00 pm (Sydney Local Time) on Business Days.

8.2 Maintenance

Kaplan will maintain the Product as required to seek to ensure its proper technical operation including:

- (a) correcting material errors; and
- (b) installing software updates and new versions of software components as Kaplan considers (in its sole opinion) necessary or reasonable.

8.3 Back up

Kaplan will make a regular back up copy of the Product, Client Content and User Data at least weekly and will maintain each back up copy for at least one week.

8.4 Disaster recovery

Kaplan will ensure that all procedures and systems detailed in the Disaster Recovery Plan are in effect at all times.

8.5 Technology review

The Client may, at its own expense, conduct a review of technology standards each year, and Kaplan will provide reasonable co-operation to the Client in the conduct of that review. Any resulting changes required will be completed at Kaplan's discretion.

9 Liability

9.1 Client's warranty

The Client represents and warrants that it has not relied on any representation made by Kaplan that has not been expressly stated in this Agreement.

9.2 Exclusion of implied warranties

Subject to this clause, any representation, warranty, condition or undertaking which (but for this clause) would be implied in this Agreement by law, is excluded.

9.3 Remedies

To the extent permitted by law, Kaplan's liability for any claim arising directly or indirectly from a breach of any non-excludable term or condition implied by statute (such as warranties under the *Competition and Consumer Act 2010* (Cth)) is

limited, at Kaplan's option, to one or more of the following:

- (a) if the breach relates to the supply of goods: repairing or replacing the goods or supplying equivalent goods, or paying the cost of repairing or replacing the goods or of acquiring equivalent goods; or
- (b) if the breach relates to the supply of services: supplying the services again or paying the cost of having the services supplied again.

Consequential loss

Kaplan is not liable to the Client for any special, incidental, indirect or consequential loss or damages, or loss of profits, loss of data, loss of business opportunity or liabilities in respect of third parties which may be suffered in connection with this Agreement, whether arising from breach of contract, breach of statute, tort (including any negligent act or omission) or otherwise.

9.4 Liability cap

To the extent that Kaplan's liability cannot be or is not otherwise limited according to this clause 9, Kaplan's total aggregate liability for all loss and damage suffered by the Client in connection with this Agreement, whether arising from breach of contract, breach of statute, tort (including any negligent act or omission) or otherwise, will not exceed the total amount of Fees received by Kaplan from the Client under this Agreement during the 12 months prior to the relevant event (less any amounts already paid to the Client under this clause in respect of that 12 month period).

9.5 Scope of limitations

Any provision of this Agreement which purports to exclude or limit the warranties given by or liability of Kaplan under this Agreement applies only to the maximum extent permitted by law.

10 Intellectual Property Rights

10.1 Ownership of data and information

- (a) Kaplan retains ownership of all data and information generated using the Product or other services provided by Kaplan. Kaplan grants the Client a limited licence to use the data and information generated by use of the Product or provision of the services solely for the purposes contemplated by and on the terms of this Agreement.
- (b) The Client must ensure that no person within the Client's influence or control:
 - (1) other than a User, views all or any of the Product, Updates or Supporting Documentation;
 - (2) other than those of the Client's employees who have a need to do so, views, copies, reproduces or in any way communicates the Reports; or

- (3) copies, reproduces or in any way communicates all or any of the Product, Updates or Supporting Documentation.

10.2 User Data and Client Content

- (a) The parties agree that the Client owns all Intellectual Property Rights in the Client Content.
- (b) The Client grants Kaplan a non-exclusive, non-transferable licence to use the Client Content to the extent that it is necessary to perform its obligations under this Agreement.
- (c) The parties agree that Kaplan will own all Intellectual Property Rights in the User Data. For the avoidance of doubt, the Client acknowledges that Kaplan may, at its option, disclose User Data to the User to whom that data relates, or to any person nominated by the User, at any time.

11 Termination

11.1 Termination by either party

Either party may immediately terminate this Agreement by written notice if the other party:

- (a) becomes insolvent or enters into liquidation, receivership or other insolvency administration or makes a composition or arrangement with its creditors generally or takes advantage of any statute for the relief of insolvent debtors; or
- (b) breaches this Agreement and, except where the breach is a failure to pay any money due, fails to rectify the breach within 10 Business Days of receiving written notice from the other specifying the breach and requiring its rectification.

11.2 Termination or suspension by Kaplan

Kaplan may terminate this Agreement, or suspend the Client's right to access the Product, by written notice to the Client if:

- (a) the Client has not paid an amount due under this Agreement;
- (b) the Client commits a breach of this Agreement which cannot be remedied;
- (c) the Client suffers a change in control (as defined in section 50AA of the *Corporations Act 2001* (Cth)) or ownership; or
- (d) Kaplan otherwise gives the Client 60 days written notice.

11.3 Termination by Client

The Client may terminate this Agreement if entitled under Clause 4.2(b) or 15.3 (a) 2.

11.4 Obligation on termination

On the expiration or termination of this Agreement for any reason, the Client must promptly:

- (a) pay all amounts owing under this Agreement;
- (b) cease accessing and using any Product, and ensure that all Users do the same; and
- (c) deliver to Kaplan or erase or destroy, or procure the delivery, erasure or destruction (at Kaplan's option and as applicable) of, all copies of the Product and materials containing the Confidential Information.

11.5 Other remedies

Termination of this Agreement by Kaplan is without prejudice to its other rights in respect of this Agreement.

11.6 Survival

Clauses 9, 10 and 13 - 15 survive the termination of this Agreement.

12 Product warranty and compatibility

12.1 Kaplan's warranty

Kaplan represents and warrants that to the best of its knowledge, use of the Product will not infringe the Intellectual Property Rights of any third party.

12.2 Exclusion of warranties

Kaplan does not warrant that:

- (a) the Product or the Website will operate free of errors, defects or in an uninterrupted manner; or
- (b) the Product is compatible or will inter-operate with any particular computer system or item of equipment, software (including operating systems) or data format other than as specified in any technical documentation accompanying the Product.

12.3 Alteration of specifications

Kaplan may alter the technical specifications or system requirements for the Product or for access to the Website or the medium on or by which the Product is supplied at any time by 3 months notice to the Client. The Client is solely responsible for attending to any upgrades or changes to its systems required to continue to use or access the Product or the Website.

13 Use of Client information

The Client acknowledges that Kaplan handles personal information in accordance with its Privacy Policy (available at http://www.kaplanprofessional.edu.au/About_Us/P

[Privacy Policy](#)) and consents to Kaplan using personal and other contact information provided by the Client under this Agreement for the purpose of informing the Client about other Kaplan or third party products, services or information which Kaplan thinks may be of interest to the Client. The Client may withdraw this consent at any time by written notice to Kaplan. This clause is subject to the provisions of any applicable law.

14 Disclosure of Client information

The Client consents to Kaplan disclosing any information concerning the Client's use of Kaplan's products or services or the results of that use to ASIC and other regulatory or government bodies and to the Client's employer or prospective employer (if applicable) in the following situations:

- (a) where disclosure is legally required; and
- (b) in the case of disclosure to an employer or prospective employer, where the employer has paid for the Kaplan product or service or where the employer or prospective employer is seeking to verify information given to it by the Client concerning the Client's use of Kaplan's products or services.

15 General

15.1 Notices

Any notice or other communication to or by a party to this Agreement:

- (a) may be given by personal service, post or facsimile;
- (b) must be in writing addressed to the person at the address or fax number specified in the Details or to any other address last notified by the party to the sender by notice given in accordance with this clause;
- (c) is deemed to be given by the sender and received by the addressee:
 - (1) if delivered in person, when delivered to the addressee;
 - (2) if posted, 2 Business Days (or 6, if addressed outside Australia) after the date of posting to the addressee whether delivered or not; or
 - (3) if sent by facsimile transmission, on the date shown on the transmission report by the machine from which the facsimile was sent,

but if the delivery or receipt is on a day which is not a Business Day or is after 4.00 pm (addressee's time) it is deemed to have been received at 9.00 am on the next Business Day.

15.2 Entire agreement

This Agreement contains the entire understanding and agreement of the parties concerning its subject matter and supersedes all previous oral or written representations or statements by either party. It may only be varied by a written document signed by each party.

15.3 Variation

(a) Kaplan may propose variations to this Agreement at any time by giving the Client at least 60 days prior written notice. If the variations:

1. do not reduce the Client's rights or increase its obligations, the variation will take effect on expiry of the notice period; or
2. do reduce the Client's rights or increase its obligations, the Client may within the notice period elect to reject the variations and terminate this Agreement, by writing (fax or post) to Kaplan. If the Client does not reject the variations and terminate this Agreement, the variations will take effect on expiry of the notice period. If the Client terminates this Agreement under this clause and has pre-paid any Fees in respect of the balance of the Term, then Kaplan will refund the amount of those pre-paid Fees to the Client.

(b) Kaplan reserves the right to recover any costs from the Client, incurred, as a result of the Client making changes to the terms and conditions of this Agreement.

15.4 Force majeure

Kaplan is not responsible or liable for any delay in or failure to perform any obligation under this Agreement due to causes or events beyond its reasonable control.

15.5 Nature of indemnities

Each indemnity in this Agreement:

- (a) is an additional, separate and independent obligation of the party giving that indemnity; and
- (b) survives the termination or expiration of this Agreement.

15.6 Severability

The invalidity or unenforceability of any one or more of the provisions of this Agreement does not invalidate or render unenforceable the remaining provisions of this Agreement.

15.7 Counterparts

If this Agreement consists of a number of counterparts, each is an original and all the counterparts together constitute the same document.

15.8 Assignment

The Client must not assign or otherwise deal with its rights under this Agreement without Kaplan's prior written consent. Kaplan may assign its rights under this Agreement.

15.9 Governing law

This Agreement is governed by and construed in accordance with New South Wales law, and the parties irrevocably submit to the jurisdiction of the Courts of that State and of the Commonwealth of Australia.

Annexure

PART 1 – Fees

[\$**amount**] (including GST) per User (**per User Fee**)

No. of Users: [**number**]

The total Fees are the Per User Fee x the no. of Users.

Payment Refusals

Payments by cheque or credit card which are dishonoured or refused will incur an administration Fee of \$100.

PART 2 - Disaster Recovery Plan

The disaster recovery plan covers the following areas:

- (a) single drive failure
- (b) complete machine failure
- (c) multiple machine failure.

The disaster recovery document details the actual steps required under each of the operations.

Single drive failure

The system is built on a hardware raid platform. This means that if a single drive fails the system will continue operating. The status of the drives are constantly monitored and if any single drive fails, various support messages will be sent to the relevant support staff so the situation can be rectified.

In case of drive failure a spare drive is kept. The new drive will be fitted as soon as possible.

Complete machine failure

The hardware configuration of the machine is identical. If a complete failure occurs, the first step is to activate the failed service on one of the other machines to resume site operation.

The failed machine is then removed and the fault rectified.

Once the fault is rectified, if required, the system is reinstalled from the last backup tape and the machine is the tested and reconfigured back into service.

Multiple machine failure

If multiple machine failure or data centre failure occurs, we will install the latest backup data into our test machines and redirect the website to these machines. These machines are of a lower spec than the hosting machines but will enable the site to continue functioning.