

THE CLIENT AGREES TO THIS AGREEMENT UPON THE OCCURRENCE OF ANY OF THE FOLLOWING: (1) SIGNING AND RETURNING TO KAPLAN (VIA EMAIL OR OTHERWISE) THE SUBSCRIPTION FORM ISSUED UNDER THIS AGREEMENT, (2) ITS USERS COMMENCING USE OF THE PRODUCT AFTER THE CLIENT RECEIVES THAT SUBSCRIPTION FORM, OR (3) PAYING TO KAPLAN ANY FEES DUE UNDER THIS AGREEMENT, WHICHEVER OCCURS FIRST. NO FURTHER ACTION IS REQUIRED BY THE PARTIES FOR THIS DOCUMENT TO FORM A BINDING AGREEMENT BETWEEN THEM.

1 Definitions and interpretation

1.1 Definitions

In this Agreement:

Agreement means these terms and conditions and includes the Subscription Form.

ASIC means the Australian Securities & Investments Commission.

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

Client Content means training materials and other content that is developed or owned by the Client and made available to Users via the Product.

Client, Commencement Date and Initial Term have the meanings specified in the Subscription Form.

Content means all training materials, information, data, readings, assessments, questions, audio, videos, multimedia and other content (including as updated from time to time) accessible via the Product, but excluding Client Content, Reports and User Data.

Confidential Information means all Kaplan's or its Related Bodies Corporate's information that would reasonably be regarded as confidential and is disclosed to the Client, or that the Client otherwise receives, 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 or Kaplan's Related Bodies Corporate;
- (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.

Feedback means any information, responses or other feedback that the Client or the Users provide to Kaplan regarding errors, problems, defects or suggestions for changes and improvements in respect of the Product or the Content.

Fees means (as applicable) the prices specified in the Subscription Form for the Initial Term or the

prices notified to or agreed with the Client for a Renewal Period.

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.

Kaplan means Kaplan Education Pty Ltd (ABN 54 089 002 371) trading as Kaplan Professional.

Kaplan's Privacy Policy means Kaplan's privacy policy available at http://www.kaplanprofessional.edu.au/About_Us/Privacy_Policy.

Personal Information has the meaning given to that term in the Privacy Act.

Privacy Act means the *Privacy Act 1988* (Cth).

Product means the Ontrack online platform and includes any manuals, guides or other materials made accessible by Kaplan to support use of the Product.

Purpose means training and education for Users in connection with their professional learning and development.

Regulators means ASIC and other Australian regulatory or government bodies.

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

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

Reports means reports generated by or accessible via the Product, or provided by Kaplan to the Client, its Related Bodies Corporate or Users, relating to one or more Users' use of the Product, which typically will include details of the training and education the relevant User(s) have undertaken.

Subscription Form means the "Ontrack Subscription Form" that Kaplan has issued to the Client in connection with this Agreement.

Subscription Options means the subscription options specified in the Subscription Form or otherwise agreed between the parties in writing, being different options for the Content packages that may be available via the Product to applicable Users in accordance with this Agreement;

Term means the Initial Term and, where this Agreement is renewed pursuant to clause 2.2, each applicable Renewal Period.

User Data means data that Users enter or submit when using the Product, including their responses to assessments and questions, but does not include the Reports.

User Limit means (for a Client that pays the Fees upfront) the quantity of Users stated in the Subscription Form (across all Subscription Options) or subsequently varied in accordance with clause 6.3(a).

Users means the Client's or its Related Bodies Corporate's employees, directors, officers or other personnel who access and use the Product under this Agreement (across all Subscription Options).

1.2 Interpretation

In this Agreement, unless a contrary intention appears, reference to:

- (a) "including" and similar expressions are not words of limitation;
- (b) the singular includes the plural and vice versa;
- (c) money amounts are to Australian currency unless otherwise specified;
- (d) a document (including this Agreement), policy or statute includes any variation or replacement of it;
- (e) the word 'person' includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association, or any Regulator; and
- (f) a group of persons or things is a reference to any two or more of them jointly and to each of them individually.

Headings are included for convenience only and do not affect the interpretation of this Agreement.

2 Term and renewal

2.1 Term

- (a) This Agreement begins on the Commencement Date and terminates at the expiry of the Initial Term unless otherwise terminated in accordance with this Agreement or this Agreement is renewed in accordance with clause 2.2.

2.2 Renewal

- (a) If the Client pays the Fees upfront, Kaplan will use reasonable endeavours to provide the Client with at least 60 days prior written notice that the Term is due to expire. If the Client wishes to renew the Agreement beyond the Term for the Renewal Period, the Client must pay the upfront Fees (the amount of which, Kaplan will specify in its written notice to the Client) for the Renewal Period to Kaplan before the expiry of the Term, otherwise this Agreement will terminate at the expiry of the Term.
- (b) If the Client pays the Fees in arrears by monthly invoice, on expiry of the Term this Agreement will automatically renew for the Renewal Period (and will continue to 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 this Agreement to renew. The Fees payable for a Renewal Period will be the Fees that Kaplan notifies in writing to the Client at least 60 days prior to the commencement of that Renewal Period,

unless Kaplan and the Client agree otherwise in writing. If Kaplan does not notify the Client of the Fees for the Renewal Period in accordance with the above and no other agreement regarding Fees is reached, the Fees applying immediately prior to the commencement of the Renewal Period will apply for the Renewal Period.

3 Fees

3.1 Payment of Fees

The Client must pay Kaplan the Fees either:

- (a) upfront (for example, annually in advance) prior to the Commencement Date (or prior to the commencement of the relevant Renewal Period, where applicable); or
- (b) if the Client has obtained Kaplan's express consent to do so, monthly in arrears.

3.2 Calculation of Fees

- (a) If the Client pays the Fees upfront, Kaplan will calculate and charge the Fees based on the User Limit for the relevant period, with reference to the applicable Subscription Option applying to each User.
- (b) If the Client pays the Fees monthly in arrears, Kaplan will calculate and charge the Fees based on the number of (unique) Users that were entitled to access and use the Product at any time during the relevant calendar month, with reference to the applicable Subscription Option applying to each User.
- (c) For the purpose of clause 3.2(b), if a User was entitled to access and use the Product at any time during the relevant calendar month, the Client will be charged for that User even if the User did not access or use the Product during that month.

3.3 Taxes

Unless expressly stated otherwise, all amounts payable by the Client under this Agreement are stated exclusive of GST.

3.4 Invoicing

Kaplan will invoice the Client for the Fees (plus GST) prior to the applicable due date for payment and the Client must pay each invoice in full by the due date specified in the relevant invoice.

3.5 No refunds

Subject to clause 17.5, the Fees are non-refundable.

3.6 Charges for unauthorised Users

Without limiting Kaplan's other rights and remedies, Kaplan may charge Fees to the Client for any individuals within the Client's, or its Related Bodies Corporate's, influence or control who, when not entitled to do so under this Agreement, access, use or otherwise view the Product or the Content.

4 Licence

From the Commencement Date, Kaplan grants to the Client:

- (a) a non-exclusive, non-transferrable, non-sublicensable licence for the Users to use the Product for the Term, solely for the Purpose and subject to the terms of this Agreement; and
- (b) a perpetual non-exclusive non-transferrable, non-sublicensable licence to use the Reports for the Client's internal business purposes and to provide copies of the Reports to Users and Regulators on their request (subject to the Client's compliance with applicable laws, including the Privacy Act, and the terms of this Agreement).

5 Passwords and activity monitoring

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); and
- (b) must not, and must ensure that each User does not, disclose password details to any person; and
- (c) acknowledges that Kaplan may monitor activity on the Product and related servers and may maintain user access logs.

6 Users

6.1 Details of Users

The Client must provide Kaplan with details of each User (including first name, surname and email address) before the individual accesses or uses the Product.

6.2 Restrictions

The Client must not allow, permit or facilitate access to the Product by:

- (a) any person for whom the Client has not complied with clause 6.1; or
- (b) if the Client pays the Fees upfront, a greater number of Users than the User Limit.

6.3 Variations to the number of Users

- (a) If the Client pays the Fees upfront the Client may:
 - (1) only reduce the User Limit with effect from the commencement of the next occurring Renewal Period, provided the Client has agreed the reduction with Kaplan prior to the commencement of that period; and
 - (2) increase the User Limit at any time with effect from a nominated (future)

date by submitting a request to Kaplan in writing. Kaplan will invoice the Client for the additional fees payable in respect of the increase (for the balance of the Term) and the Client must pay that invoice by its specified due date; and

- (3) substitute a User for another individual at any time with effect from the start of the next calendar month, subject to compliance with clause 6.2.
- (b) If the Client pays the Fees monthly in arrears, the Client may, subject to compliance with clause 6.2(a) and provided the number of Users does not fall below 20, vary the number of Users at any time by managing the Users via the Product. For the avoidance of doubt, the Client will be charged in full for each User that was entitled to access and use the Product at any time during the relevant calendar month (even if the User was removed or added part way through that month).
- (c) A User that is substituted or removed by the Client during a calendar month will remain a User until the end of that month.
- (d) When varying the User Limit or the number of Users, the Client must do so with reference to the applicable Subscription Option(s) affected by the variation.

7 Content

7.1 Kaplan Content

- (a) Kaplan will use reasonable endeavours to ensure that the Content is accurate at the time of its publication or release.
- (b) The Content has been developed and is maintained by Kaplan for the Purpose only. The Content does not constitute financial or other advice and cannot be relied on or used for providing advice.
- (c) The Client must make its own assessment as to the suitability of the Content for the Users and the Purpose.
- (d) Despite any other provision of this Agreement, to the extent legally permitted, Kaplan does not warrant or represent that:
 - (1) using the Product or the Content will satisfy any statutory requirements in relation to the continuing professional education obligations of Users or achieve any particular learning outcomes; or
 - (2) the Product or the Content is complete or free from errors or omissions.

7.2 Client Content

- (a) The Client may upload Client Content to the Product.

- (b) The Client must ensure the Client Content does not:
- (1) 2GB in total for a scorm file or 4MB per file for any other file;
 - (2) infringe third party rights (including Intellectual Property Rights);
 - (3) be or contain anything that is defamatory, illegal or obscene; or
 - (4) contain any virus, harmful or malicious code, malware or similar.
- (c) Kaplan reserves the right to remove any Client Content that, in Kaplan's reasonable opinion, breaches, or is likely to breach, clause 7.2(b).
- (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 via the Product is restricted to:
- (1) the Users;
 - (2) Kaplan's and its Related Bodies Corporates' employees, directors, officers, contractors, suppliers or other personnel who are involved in providing, maintaining, supporting or developing the Product; and
 - (3) others whose access is authorised by the Client in writing.

8 Restrictions

The Client must ensure that:

- (a) each User only uses the Product in a manner that is consistent with the licence granted in clause 4(a) and does not:
- (1) allow, permit or facilitate non-Users to access, use or otherwise view the Product or the Content; or
 - (2) access, use or otherwise view Content that is not included in the Subscription Option applicable to that User;
- (b) the Client only uses the Reports in a manner that is consistent with the licence granted in clause 4(b);
- (c) no person (other than the Users) within the Client's, or its Related Bodies Corporate's, influence or control accesses, uses or otherwise views the Product or the Content; and
- (d) no person (including the Users) within the Client's, or its Related Bodies Corporate's, influence or control:
- (1) creates or maintains copies of the Content;

- (2) disassembles, reverse engineers or attempts to derive source code from the Product;
- (3) resells, markets, transfers or distributes the Product or the Content;
- (4) interferes or tampers with any security features of the Product;
- (5) does anything that breaches, or is likely to breach, Kaplan's Intellectual Property Rights;
- (6) uses the Product or the Content in a manner that causes, or its likely to cause, Kaplan or its Related Bodies Corporate to breach any laws; or
- (7) allows, assists or facilitates any person to do any of the matters referred to above.

9 Support and maintenance

9.1 Support

Kaplan will provide general helpdesk support to Users regarding the Product via phone and email between 8.30 am and 5.30 pm (Sydney Local Time) on Business Days. Self-help guides will also be available to Users via the Product.

9.2 Maintenance

Kaplan will maintain the Product in good working order, including by correcting material errors and periodically providing updates.

9.3 Back-up

Kaplan will create and maintain for a reasonable period regular back-up copies of the Client Content and User Data.

9.4 Updates

The features and functions of the Product are subject to change from time to time at Kaplan's discretion, but any changes will not diminish or remove existing features and functions unless the diminished or removed feature or function is being updated or replaced with another feature or function or the change will not materially reduce or negatively impact the Users' experience.

10 Compatibility

10.1 No warranty

Kaplan does not warrant that the Product is compatible with all devices, computers and operating systems or data formats, or will operate in an uninterrupted manner.

10.2 Minimum system requirements

- (a) It is the Client's responsibility to ensure that the operating systems and browsers that Users use to access the Product meet the Product's minimum system requirements set out in schedule 1 to this Agreement and as updated from time to time.

- (b) Kaplan may update the minimum system requirements for the Product from time to time. If an update will impact the Users' ability to access the Product, Kaplan will provide the User's with at least 90 days' prior notice via the Product.
- (c) The Client acknowledges that security issues may arise if the minimum system requirements are not met. Kaplan disclaims all liability for such issues.

11 Intellectual Property Rights

11.1 Ownership

Subject to clause 11.2, the parties agree that Kaplan owns all existing and future title, interest and Intellectual Property Rights in the Product, the Content, the Reports, the User Data and any other data or information generated using the Product or other services provided by Kaplan.

11.2 Client Content

- (a) The parties agree that the Client owns all Intellectual Property Rights in the Client Content.
- (b) The Client grants to Kaplan and its Related Bodies Corporate a non-exclusive, non-transferable licence to use the Client Content to the extent necessary to perform Kaplan's obligations under this Agreement.
- (c) Despite clause 9.3, Kaplan is not required to retain the Client Content beyond the termination of this Agreement.

11.3 Kaplan's warranty

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

12 Privacy and data security measures

- (a) If Kaplan handles Personal Information about a User in connection with this Agreement, Kaplan will ensure that it does so in a manner that complies with the Privacy Act and Kaplan's Privacy Policy.
- (b) To the extent required by the Privacy Act, Kaplan will seek a User's consent to its handling of their Personal Information.
- (c) Kaplan will maintain commercially reasonable data security measures that are designed to safeguard the Client Content, the Reports and the User Data from unauthorised access, use or disclosure.
- (d) The Client must notify Kaplan promptly if it becomes aware of or reasonably suspects (including as a result of a User's access or use of the Product) any security breach relating to the Product, the Content, the Client Content, the Reports or the User Data, including any loss, theft or unauthorised use, access or disclosure.

13 Disclosure of Reports and User Data

Kaplan may disclose Reports, User Data and other information relating to Users to Regulators, the Client, the Client's Related Bodies Corporate, the relevant User and any person that the relevant User directs or nominates from time to time (for example, their current, future or prospective employer). To the extent applicable, Kaplan will comply with the Privacy Act in connection with any such disclosure.

14 Feedback

- (a) Kaplan welcomes Feedback from the Client and the Users in respect of the Product and the Content.
- (b) Feedback can be emailed to pdmail@Kaplan.edu.au.
- (c) The Client agrees that Kaplan will own (free of charge), and the Client waives any rights in, any Feedback provided to Kaplan and it will be deemed Kaplan's Confidential Information.
- (d) Kaplan may use Feedback in any manner it deems fit, including incorporating it in its products and/or services, but is under no obligation to do so.

15 Confidential Information

15.1 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.

15.2 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.

15.3 Disclosure required by law

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

- (a) the Client will (to the extent permitted at law) 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 that minimises the disclosure.

15.4 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.

16 Liability

16.1 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.

16.2 Exclusion of implied warranties

Subject to this clause 16, any representation, warranty, condition or undertaking which (but for this clause) would be implied in this Agreement by law, is excluded.

16.3 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.

16.4 Consequential loss

Kaplan is not liable to the Client for any special, incidental, indirect or consequential loss or damages, 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.

16.5 Liability cap

To the extent that Kaplan's liability cannot be or is not otherwise limited according to this clause 16, 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 in connection with this Agreement in respect of that 12 month period).

16.6 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.

17 Termination

17.1 Termination by either party

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

- (a) subject to any applicable laws that prohibit termination in such circumstances, 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.

17.2 Termination by Kaplan

Kaplan may immediately terminate this Agreement 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.

17.3 Obligations on termination

On the termination of this Agreement for any reason, the licence in clause 4(a) ceases immediately and the Client must:

- (a) ensure that all Users immediately cease accessing and using the Product and the Content;
- (b) pay to Kaplan within 7 days after the date of termination all amounts owing by the Client under this Agreement; and
- (c) deliver to Kaplan or erase or destroy, or procure the delivery, erasure or destruction (at Kaplan's option and as applicable) all Confidential Information in the Client's or its Related Bodies Corporate's possession or control (excluding any Reports).

17.4 Other remedies

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

17.5 Refund in limited circumstances

If Kaplan terminates this Agreement under clause 17.2(d) and the Client has pre-paid any Fees in respect of the balance of the Term remaining after termination, then Kaplan will refund to the Client the

amount of those pre-paid Fees relating to the balance of the Term remaining after termination.

17.6 Survival

Clauses 4(b), 7.2(d), 8(b), 8(d), 11.1, 12(d), 13, 14, 15, 16, 17.3, 17.6 and 18 survive the termination of this Agreement.

18 General

18.1 Notices

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

- (a) must be in English and given by personal service, post or email;
- (b) must be in writing addressed to a party at the postal address or email address for that party (or, in the case of the Client, the Client's training manager) specified in the Subscription Form or any other address last notified by the party to the sender by notice given in accordance with this clause; and
- (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, 5 Business Days (or 12 Business Days, if addressed outside Australia) after the date of posting to the addressee whether delivered or not; or
 - (3) if sent by email, 24 hours after the email was sent unless the party sending the email knows, or reasonably ought to suspect, that the email (including any attachments) were not delivered to the addressee's server or domain,

but if the delivery 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.

18.2 Entire agreement

This Agreement contains the entire understanding and agreement of the parties concerning its subject matter and supersedes all previous agreements,

negotiations and representations or statements by either party about that subject matter.

18.3 Variation and waiver

A provision of this Agreement or a right created under it, may not be waived or varied except in writing, signed by the party or parties to be bound.

18.4 Force majeure

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

18.5 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.

18.6 Construction

No rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of, or seeks to rely on, this Agreement or any part of it.

18.7 Order of precedence

These terms and conditions override the Subscription Form to the extent of any inconsistency between those documents.

18.8 Relationship of parties

The parties to this Agreement are independent contractors and nothing in this Agreement constitutes a partnership, joint venture, agency or other joint relationship between the parties.

18.9 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.

18.10 Governing law

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

Ontrack Client Terms and Conditions



Schedule 1 – Minimum system requirements

Operating System	Browsers Versions				
	Microsoft Edge	Internet Explorer	Mozilla Firefox	Google Chrome	Safari
Windows 10	80 and 81	11	75	81 And 80	-
Windows 8.1	80	11	75	81 And 80	-
Windows 7	80	11	75	81 And 80	-
Mac - Cataline	-	-	-	81 And 80	13