
BENCHMARK LMS PTY LTD

WEBSITE TERMS AND CONDITIONS OF USE

TERMS AND CONDITIONS

1 About the Platform

1.1 Welcome to the Learning at Work platform (the “**Platform**”). The Platform is a web based service that offers users with the opportunity to:

- (a) Create, sell, purchase and/or use a variety of online courses and other learning services through the Platform; and
- (b) publish customised courses (the “**Courses**”), Applications (the “**Apps**”) and other learning services through the Platform’s online Course Store (the “**Store**”) for other Users to purchase and use.

(collectively referred to as the “**Services**”).

1.2 The Platform is operated by Benchmark LMS Pty Limited, (ABN 4816 8195 757) (“**Benchmark**”). Access to and use of the Platform, or any of its associated products or Services, is provided by Benchmark. Please read these terms and conditions (the “**Terms**”) carefully. By using, browsing and/or reading the Platform, this signifies that you have read, understood and agree to be bound by the Terms. If you do not agree with the Terms, you must cease usage of the Platform, or any of its products or Services, immediately.

1.3 Benchmark reserves the right to review and change any of the Terms by updating this page at its sole discretion. When Benchmark updates the Terms, it will use reasonable endeavours to provide you with notice of same. Any changes to the Terms take immediate effect from the date of their publication. Before you continue, we recommend you keep a copy of the Terms for your records.

2 Acceptance of the Terms

2.1 You accept the Terms by registering for the Services and/or making any payment as required under the Terms. You may also accept the Terms by clicking to accept or agree to the Terms where and if this option is made available to you in the user interface.

3 Registration to use the Services

3.1 In order to access the Services, you must first register for an account through the Platform (the “**Account**”).

3.2 As part of the registration process, or as part of your continued use of the Services, you may be required to provide personal information about yourself (such as identification or contact details), including:

- (a) an email address and/or preferred username;
- (b) a mailing address;
- (c) a telephone number;
- (d) a password
- (e) whether you intend to use the Services as an individual or as a business entity; and
- (f) a nominated administrator who will operate the Account on your behalf (only where you nominate that you will be using the services as a business entity.)

- 3.3 You warrant that any information you give to Benchmark in the course of completing the registration process will always be accurate, correct and up to date.
- 3.4 Once you have completed the registration process you will be a registered user of the Platform (“**User**”) and agree to be bound by the Terms. As a User you will be granted immediate access to the Services.
- 3.5 You may not use the Services and may not accept the Terms if:
- (a) you are not of legal age to form a binding contract with Benchmark; or
 - (b) you are a person barred from receiving the Services under the laws of Australia or other countries including the country in which you are resident or from which you use the Services.

4 Subscription to use the Member Services

- 4.1 In order to access the Member Services (as set out in clause 5 below), you must first purchase a subscription through the Platform (the “**Subscription**”) and pay the applicable fee for the selected Subscription (the “**Member Fee**”).
- 4.2 In purchasing the Subscription, you acknowledge and agree that it is your responsibility to ensure that the Subscription you elect to purchase is suitable for your use.

5 The Member Services

- 5.1 Only registered Users of the Platform (“**Members**”) may access the Member Services, a description of which is set out on the “Services Description” section of the Platform (the “**Services Description**”).
- 5.2 You acknowledge and agree that where you, as an individual, represent a business entity, the name and details of which you must enter during registration as set out in clause 3 above (the “**Business Entity**”):
- (a) You are subscribing to the Member Services on behalf of and with the authority and consent of the Business Entity; and
 - (b) the Licence granted to You pursuant to clause 10.1 shall also include a non-exclusive, non-assignable, non-sublicensable, revocable right granted to the Business Entity, to access the Member Services, for the purposes expressly described in the Services Description.
- 5.3 If the Services Description specifies a minimum term, then the subscription of a Member for the Member Services is for that minimum term (“**Minimum Term**”) and, unless otherwise specified in the Services Description, cannot be cancelled or terminated by the Member prior to the expiry of the Minimum Term.
- 5.4 Upon expiry of the Minimum Term, the Subscription shall automatically renew for subsequent successive terms equal to the Minimum Term on the same terms and conditions, unless either We or the Member provides at least 30 days written notice prior to the expiry of the Minimum Term or any renewal term, in which case the Member’s subscription to the Member Services shall terminate at the end of the Minimum Term or the then current renewal term.
- 5.5 A Member may only access the Member Services from a web browser operated by the Member, solely for the purpose(s) specified in the Services Description and subject to the provisions set out in the Services Description and in these Terms.
- 5.6 You acknowledge and agree that you are responsible for the payment of all costs associated with accessing the Platform, including but not limited to internet access costs, web browser and computer

and smartphone equipment costs, telecommunications costs, data costs, roaming charges and, if you are a Member, service charges.

6 The Member Data

6.1 As a Member, you will own all data that you transmit through or upload into the Member Services (“**Member Data**”) and that you will:

- (a) provide Benchmark an irrevocable, non-exclusive, royalty-free, worldwide licence to publicise your Member Data on the Platform and anywhere else required for the provision of the Services; and

6.2 You acknowledge and agree that:

- (a) the Member Services and/or Member Data may be hosted by Benchmark or third party suppliers on hardware or infrastructure located in or outside Australia; and
- (b) Benchmark may not own or operate the infrastructure upon which the Member Services and/or the Member Data is hosted.

6.3 Each time a Member uses the Member Services the Member warrants that:

- (a) they will only upload, input and transfer Member Data into and/or via the Member Services or disclose Member Data to Benchmark, which the Member is fully entitled and authorised to upload, input, transfer and disclose; and
- (b) the Member Data and Benchmark’s collection, use, storage and/or disclosure of same in the course of performing the Member Services, will not breach any applicable law or right of any person.

6.4 The Member is solely responsible for the accuracy, legality and quality of all its Member Data and for obtaining any permissions, licenses, rights and authorisations necessary for Benchmark to use, host, transmit, store and disclose the Member Data in connection with the provision of the Member Services.

6.5 While Benchmark will make reasonable efforts to back up Member Data, you acknowledge and agree that you are solely responsible for backing up and archiving all Member Data and that Benchmark will not be responsible for any loss, corruption or hacking of any Member Data.

6.6 You indemnify Benchmark in respect of any loss and damage Benchmark or any of the third party suppliers they use may incur in respect of any claim that any of the Member Data is lost, unavailable or corrupted or the transmission, storage, disclosure, hacking or access of any Member Data infringes the Intellectual Property Rights or other rights of any person or breaches any law, regulation, code or standard.

7 The Store and the Publisher Services

7.1 Without limiting the nature of the Member Services, you acknowledge and agree that the Member Services provide you with an opportunity to create Courses and Apps that can be, where applicable, listed for sale on the Store to be purchased by other Members through the Platform.

7.2 Notwithstanding anything to the contrary contained in these Terms, Users who have not subscribed to the Services (the “**Publishers**”) can also arrange to create, list and sell Courses through the Store although they will be unable to access the other Member Services (the “**Publisher Services**”).

7.3 In using the Publisher Services, the Publishers acknowledge and agree that that they will be required

to pay a commission on each sale of a Course through the Store (the "**Publisher Commission Fee**"). The Publisher agrees that the Publisher Commission Fee is reasonable in light of the Publisher not being required to pay the Member Fee for access to the Publisher Services.

- 7.4 The Publisher Commission Fee will be listed on the Platform and may be changed from time to time at Benchmark's sole discretion. Benchmark warrants that they will make reasonable endeavours to advise the Publisher in the event that the Publisher Commission Fee is changed.
- 7.5 You acknowledge and agree that all Courses or Apps provided by way of the Member Services or Publisher Serves are subject to any restrictions put on them by the publishers of the Courses or Apps.
- 7.6 Users shall be solely responsible for the content contained in the Courses created by them and warrant that any Courses created by them in the course of using the Member Services or Publisher Services will comply with these Terms and any other Copyright or Intellectual Property rights that apply to the content of those Courses.
- 7.7 Courses and Apps available through the Store are only available for as long as
 - (a) The Users, whether in their capacity as Members or Publishers, continues to use the Platform; and
 - (b) Benchmark continues to have the right to offer the Courses as part of the Services.
- 7.8 Benchmark may, where it is part of the Services provided to the Member or Publisher through the Platform, promote the Courses and Apps to other Users through the Platform.

8 Your obligations as a User

- 8.1 As a User, you agree to comply with the following:
 - (a) you will use the Services only for purposes that are permitted by:
 - (i) the Terms; and
 - (ii) any applicable law, regulation or generally accepted practices or guidelines in the relevant jurisdictions;
 - (b) you have the sole responsibility for protecting the confidentiality of your password and/or email address. Use of your password by any other person may result in the immediate cancellation of the Services;
 - (c) any use of your registration information by any other person, or third parties, is strictly prohibited. You agree to immediately notify Benchmark of any unauthorised use of your password or email address or any breach of security of which you have become aware;
 - (d) access and use of the Platform is limited, non-transferable and allows for the sole use of the Platform by you for the purposes of Benchmark providing the Services;
 - (e) you will not use the Services or the Platform in connection with any commercial endeavours except those that are specifically endorsed or approved by the management of Benchmark;
 - (f) you will not use the Services or Platform for any illegal and/or unauthorised use which includes collecting email addresses of Users by electronic or other means for the purpose of sending unsolicited email or unauthorised framing of or linking to the Platform;
 - (g) you agree that commercial advertisements, affiliate links, and other forms of solicitation may be

removed from the Platform without notice and may result in termination of the Services. Appropriate legal action will be taken by Benchmark for any illegal or unauthorised use of the Platform; and

(h) you acknowledge and agree that any automated use of the Platform or its Services is prohibited.

9 Payment

9.1 Where the option is given to you, you may make payment of the Member Fee, the Publisher Commission, or any payment to be made through the Store by way of:

(a) Electronic funds transfer (“**EFT**”) into our nominated bank account; or

(b) Credit Card Payment (“**Credit Card**”).

9.2 All payments made in the course of your use of the Services are made using PayPal Australia (“**PayPal**”). In using the Platform, the Services or when making any payment in relation to same, you warrant that you have read, understood and agree to be bound by the PayPal’s terms and conditions which are available on their website.

9.3 You acknowledge and agree that where a request for the payment of the Member Fee is returned or denied, for whatever reason, by your financial institution or is unpaid by you for any other reason, then you are liable for any costs, including banking fees and charges, associated with the same.

9.4 Benchmark reserves the right to terminate or suspend your access to the Services in the event that you fail to pay the Member Fee, the Publisher Commission, or any other payment pursuant to the Services or any invoice sent by Benchmark from time to time in relation to same.

9.5 You agree and acknowledge that Benchmark can vary the Member Fee or prices in the Store at any time and that any varied Member Fee will come into effect following the conclusion of the existing Subscription period.

10 Refund Policy

10.1 Benchmark will only provide you with a refund of any monies paid through the use of the Services in the event they are unable to continue to provide the Services or if the manager of Benchmark makes a decision, at its absolute discretion, that it is reasonable to do so under the circumstances (the “**Refund**”).

11 Copyright and Intellectual Property

11.1 The Platform, the Services and all of the related products of Benchmark are subject to copyright. The material on the Platform is protected by copyright under the laws of Australia and through international treaties. Unless otherwise indicated, all rights (including copyright) in the Services and compilation of the Platform (including but not limited to text, graphics, logos, button icons, video images, audio clips, Platform, code, scripts, design elements and interactive features) or the Services are owned or controlled for these purposes, and are reserved by Benchmark or its contributors.

11.2 All trademarks, service marks and trade names are owned, registered and/or licensed by Benchmark, who grants to you a worldwide, non-exclusive, royalty-free, revocable license whilst you are a User to:

(a) use the Platform pursuant to the Terms;

(b) copy and store the Platform and the material contained in the Platform in your device’s cache memory; and

(c) print pages from the Platform for your own personal and non-commercial use.

Benchmark does not grant you any other rights whatsoever in relation to the Platform or the Services. All other rights are expressly reserved by Benchmark.

11.3 Benchmark retains all rights, title and interest in and to the Platform and all related Services. Nothing you do on or in relation to the Platform will transfer any:

- (a) business name, trading name, domain name, trade mark, industrial design, patent, registered design or copyright, or
- (b) a right to use or exploit a business name, trading name, domain name, trade mark or industrial design, or
- (c) a thing, system or process that is the subject of a patent, registered design or copyright (or an adaptation or modification of such a thing, system or process),

to you.

11.4 You may not, without the prior written permission of Benchmark and the permission of any other relevant rights owners: broadcast, republish, up-load to a third party, transmit, post, distribute, show or play in public, adapt or change in any way the Services or third party Services for any purpose, unless otherwise provided by these Terms. This prohibition does not extend to materials on the Platform which are freely available for re-use or are in the public domain.

12 Privacy

12.1 Benchmark takes your privacy seriously and any information provided through your use of the Platform and/or Services are subject to Benchmark's Privacy Policy, which is available on the Platform.

13 General Disclaimer

13.1 You acknowledge and agree that Benchmark will use its best endeavours to ensure that the Platform and Member Services are available ninety five percent (95%) of the time each calendar month. Benchmark does not guarantee that the Platform, Member Services or Member Data or access thereto will be uninterrupted or error-free and you release and indemnify Benchmark in respect of any loss and damage in respect of any interruption, error or unavailability of the Platform, Member Services or Member Data.

13.2 Nothing in the Terms limits or excludes any guarantees, warranties, representations or conditions implied or imposed by law, including the Australian Consumer Law (or any liability under them) which by law may not be limited or excluded.

13.3 Subject to this clause, and to the extent permitted by law:

- (a) all terms, guarantees, warranties, representations or conditions which are not expressly stated in the Terms are excluded; and
- (b) Benchmark we will not be liable for any special, indirect or consequential loss or damage (unless such loss or damage is reasonably foreseeable resulting from our failure to meet an applicable Consumer Guarantee), loss of profit or opportunity, or damage to goodwill arising out of or in connection with the Services or these Terms (including as a result of not being able to use the Services or the late supply of the Services), whether at common law, under contract, tort (including negligence), in equity, pursuant to statute or otherwise.

13.4 Use of the Platform and the Services is at your own risk. Everything on the Platform and the Services is provided to you “as is” and “as available” without warranty or condition of any kind. None of the affiliates, directors, officers, employees, agents, contributors and licensors of Benchmark make any express or implied representation or warranty about the Services or any products or Services (including the products or Services of Benchmark) referred to on the Platform. This includes (but is not restricted to) loss or damage you might suffer as a result of any of the following:

- (a) failure of performance, error, omission, interruption, deletion, defect, failure to correct defects, delay in operation or transmission, computer virus or other harmful component, loss of data, communication line failure, unlawful third party conduct, or theft, destruction, alteration or unauthorised access to records;
- (b) the accuracy, suitability or currency of any information on the Platform, the Services, or any of its Services related products (including third party material and advertisements on the Platform);
- (c) costs incurred as a result of you using the Platform, the Services or any of the products of Benchmark; and
- (d) the Services or operation in respect to links which are provided for your convenience.

14 Limitation of liability

14.1 Benchmark’s total liability arising out of or in connection with the Services or these Terms, however arising, including under contract, tort (including negligence), in equity, under statute or otherwise, will not exceed the resupply of the Services to you.

14.2 You expressly understand and agree that Benchmark, its affiliates, employees, agents, contributors and licensors shall not be liable to you for any direct, indirect, incidental, special consequential or exemplary damages which may be incurred by you, however caused and under any theory of liability. This shall include, but is not limited to, any loss of profit (whether incurred directly or indirectly), any loss of goodwill or business reputation and any other intangible loss.

15 Termination of Contract

15.1 The Terms will continue to apply until terminated by either you or by Benchmark as set out below.

15.2 If you want to terminate the Terms, you may do so by:

- (a) not renewing the Subscription prior to the end of the Subscription period;
- (b) providing Benchmark with thirty (30) days’ notice of your intention to terminate; and
- (c) closing your accounts for all of the services which you use, where Benchmark has made this option available to you.

Your notice should be sent, in writing, to Benchmark via the ‘Contact Us’ link on our homepage.

15.3 Benchmark may at any time, terminate the Terms with you if:

- (a) you do not renew the Subscription at the end of the Subscription period;
- (b) you have breached any provision of the Terms or intend to breach any provision;
- (c) Benchmark is required to do so by law;
- (d) the provision of the Services to you by Benchmark is, in the opinion of Benchmark, no longer commercially viable.

15.4 Subject to local applicable laws, Benchmark reserves the right to discontinue or cancel your membership at any time and may suspend or deny, in its sole discretion, your access to all or any portion of the Platform or the Services without notice if you breach any provision of the Terms or any applicable law or if your conduct impacts Benchmark's name or reputation or violates the rights of those of another party

15.5 Benchmark will maintain Member Data for a period of sixty (60) days following termination under this clause 14, after which time it will automatically be destroyed unless otherwise agreed to in writing.

16 Indemnity

16.1 You agree to indemnify Benchmark, its affiliates, employees, agents, contributors and licensors from and against any breach of the Terms.

17 Dispute Resolution

17.1 Compulsory:

If a dispute arises out of or relates to the Terms, either party may not commence any Tribunal or Court proceedings in relation to the dispute, unless the following clauses have been complied with (except where urgent interlocutory relief is sort).

17.2 Notice:

A party to the Terms claiming a dispute ("**Dispute**") has arisen under the Terms, must give written notice to the other party detailing the nature of the dispute, the desired outcome and the action required to settle the Dispute.

17.3 Resolution:

On receipt of that notice ("**Notice**") by that other party, the parties to the Terms ("**Parties**") must:

- (a) Within seven (7) days of the Notice endeavour in good faith to resolve the Dispute expeditiously by negotiation or such other means upon which they may mutually agree;
- (b) If for any reason whatsoever, twenty-one (21) days after the date of the Notice, the Dispute has not been resolved, the Parties must either agree upon selection of a mediator or request that an appropriate mediator be appointed by the President of the Law Society of New South Wales or his or her nominee;
- (c) The Parties are equally liable for the fees and reasonable expenses of a mediator and the cost of the venue of the mediation and without limiting the foregoing undertake to pay any amounts requested by the mediator as a pre-condition to the mediation commencing. The Parties must each pay their own costs associated with the mediation;
- (d) The mediation will be held in New South Wales, Australia.

17.4 Confidential

All communications concerning negotiations made by the Parties arising out of and in connection with this dispute resolution clause are confidential and to the extent possible, must be treated as "without prejudice" negotiations for the purpose of applicable laws of evidence.

17.5 Termination of Mediation:

If thirty (30) days have elapsed after the start of a mediation of the Dispute and the Dispute has not

been resolved, either Party may ask the mediator to terminate the mediation and the mediator must do so.

18 Venue and Jurisdiction

The Services offered by Benchmark is intended to be viewed by residents of Australia. In the event of any dispute arising out of or in relation to the Platform, you agree that the exclusive venue for resolving any dispute shall be in the courts of New South Wales, Australia.

19 Governing Law

The Terms are governed by the laws of New South Wales, Australia. Any dispute, controversy, proceeding or claim of whatever nature arising out of or in any way relating to the Terms and the rights created hereby shall be governed, interpreted and construed by, under and pursuant to the laws of New South Wales, Australia, without reference to conflict of law principles, notwithstanding mandatory rules. The validity of this governing law clause is not contested. The Terms shall be binding to the benefit of the parties hereto and their successors and assigns.

20 Independent Legal Advice

Both parties confirm and declare that the provisions of the Terms are fair and reasonable and both parties having taken the opportunity to obtain independent legal advice and declare the Terms are not against public policy on the grounds of inequality or bargaining power or general grounds of restraint of trade.

21 Severance

If any part of these Terms is found to be void or unenforceable by a Court of competent jurisdiction, that part shall be severed and the rest of the Terms shall remain in force.