

1. Introduction

1.1 In these Terms of Engagement (**Terms**):

(a) **we** or **us** means FrankCapability Limited;

(b) **you** or **your** means the customer that is booking Capability Development Services on our website <https://frankcapability.co.nz/> (**Website**);

(c) **Personnel** means the individual(s) that you have identified as a recipient of Capability Development Services (which may include you and/or your specific personnel); and

(d) references to **providing Capability Development Services to you** includes providing and/or enabling your Personnel to access Capability Development Services online and/or in person. For clarity, unless expressly agreed otherwise, Capability Development Services are provided via online learning modules and/or online meetings.

1.2 Our agreement with you (**Agreement**) comprises these Terms, the details of the specific Capability Development Services that you book in accordance with clause 2, our Privacy Statement, our Website Terms and, if applicable, any additional terms and conditions or data protection agreement that we agree directly with you in connection with Capability Development Services from time to time.

1.3 This Agreement governs all Capability Development Services that we provide to you and/or your Personnel. By booking Capability Development Services on our Website, you confirm that you have read, understood and accept this Agreement (including these Terms), as well as our Privacy Statement and Website Terms (available on our Website).

2. Booking Capability Development Services

2.1 You can book Capability Development Services by following the process on our Website (and any other requirements we notify to you from time to time).

2.2 By booking Capability Development Services you request the relevant Capability Development Services from us and your booking is subject to our confirmation by email (at our discretion). You acknowledge that:

(a) Capability Development Services may have limited numbers, minimum numbers or other constraints (which we will notify to you, if applicable); and

(b) we reserve the right to move participants to an alternative Course Date (agreed with you), at any time prior to the Course Date, if the minimum numbers for a Capability Development Services course are not met. If you do not agree to the proposed change of Course Date, we will provide a full refund.

2.3 We will provide the Capability Development Services that you have selected and we have confirmed, in accordance with this clause 2.

3. Fees, Invoicing & Payment

3.1 You agree to pay us the Course Fee for the Capability Development Services that are confirmed in accordance with clause 2 plus any applicable tax in accordance with the Goods and Services Tax Act 1985. We will provide an invoice for each course.

3.2 You must pay each invoice to our Bank Account (notified to you) within 20 days from the date of the invoice.

3.3 You must pay the Course Fees in full without deduction, withholding, set-off or counterclaim.

3.4 If any Course Fees remain unpaid for more than 40 Business Days beyond their due date (**Outstanding Amounts**), we may:

- (a) immediately suspend the provision of any or all Capability Development Services to you; and
- (b) charge interest at 12% per month on the Outstanding Amounts from the due date of payment until the date the Outstanding Amounts are paid.

You must reimburse us for any costs and expenses we incur in recovering Outstanding Amounts.

3.5 We may charge additional Course Fees if events beyond our control (including your acts or omissions) affect our ability to perform Capability Development Services as originally planned or if you ask us to perform additional tasks, provided that you have approved any additional Course Fees in writing.

3.6 You agree to reimburse us for any out-of-pocket costs or expenses reasonably and properly incurred by us in relation to Capability Development Services we provide to you. We will obtain your approval before incurring any individual out-of-pocket costs or expenses.

4. Personal Information and Customer Materials

4.1 We may collect, use and disclose personal information about your Personnel that you or they provide to us, for the purpose of providing Capability Development Services. To the extent that you provide any personal information about your Personnel to us, you confirm that you are authorised to do so by the relevant individual and you have informed the individual that they have the right to contact us to access and, if applicable, request correction of any personal information that we hold about them.

4.2 If the Capability Development Services are expected to involve the sharing of any data sets, or other personal information, by us to you, or you to us, we will enter into a separate data protection agreement with you.

4.3 If you supply us with any information or materials in connection with the Capability Development Services (the **Customer Materials**), you grant us and our Related Companies a non-exclusive, royalty-free licence to use the Customer Materials to provide the Capability Development Services to you and you represent and warrant to us and our Related Companies (as a continuing warranty) that:

- (a) you hold all necessary legal rights, title, consents and authority to provide the Customer Materials to us;
- (b) your supply of the Customer Materials to us, and our use of the Customer Materials for the purpose referred to above, will not infringe the Intellectual Property Rights of any person; and
- (c) none of the Customer Materials constitute “personal information” for the purposes of the Privacy Act 2020 (subject to clause 4.2 above).

5. Intellectual Property

5.1 Each party (or its licensors) owns all of its Intellectual Property Rights that existed at the commencement of this Agreement (the **Pre-Existing IP**).

5.2 Subject to clause 5.1, we (or our licensors) own all right, title and interest, including Intellectual Property Rights, in our Capability Development Services (including all materials provided in connection with our Capability Development Services) at all times. For clarity, this includes:

(a) any enhancements, variations, improvements or modifications to our Capability Development Services; and

(b) any new Intellectual Property Rights developed in the course of providing Capability Development Services.

5.3 If, notwithstanding clause 5.2, any Intellectual Property Rights in any of our Capability Development Services (other than your Pre-Existing IP) vests in you, you assign those Intellectual Property Rights to us or our nominee with effect from creation, and agree to do all things reasonably required by us to give effect to such assignment.

5.4 You must not remove, copy, use or mask our brand, logo, trade mark, copyright notice or other proprietary marking included in any materials provided in connection with our Capability Development Services without our prior written consent.

5.5 We grant you a limited (non-exclusive, non-transferable, royalty free) licence for you and your Personnel to access and use any course materials that we provide to you for your (and your Personnels') use in connection with Capability Development Services (**Course Materials**), solely for the purpose of participating in the relevant Capability Development Services. Your personnel may download one copy of any applicable Course Materials for their personal use to participate in Capability Development Services. They may not reproduce or distribute Course Materials without our prior written approval in writing.

6. Third Party Data

6.1 Our Capability Development Services may incorporate products, services, data and information that is provided to us by third parties, including data from government agencies, stock exchanges and/or publicly available information sources (the **Third Party Data**).

6.2 You acknowledge that we use Third Party Data for the purpose of providing Capability Development Services to you on an "as is" and "as available" basis and we do not independently verify that Third Party Data is available, accurate, up to date and/or complete. We exclude all responsibility and liability for any Third Party Data, including any inaccurate, incomplete, out of date or unavailable Third Party Data.

6.3 You must comply with any terms and conditions applicable to any Third Party Data notified by us to you from time to time including any obligation to include a third party copyright or other notice in connection with the relevant data.

6.4 Some data and information used in providing Capability Development Services is or may be licensed under a Creative Commons Attribution 4.0 International (CC BY 4.0) license. It is attributed to the NZ Treasury.

7. No Implied Warranties

7.1 To the maximum extent permitted by law:

(a) our Capability Development Services (including all materials provided in connection with our Capability Development Services) are provided to you on an “as is” and “as available” basis and we do not provide any representations or warranties, conditions or guarantees whatsoever. Any implied terms, conditions, guarantees or warranties are expressly excluded; and

(b) we do not provide advice or make any recommendations in relation to decisions that you or your Personnel may make.

8. Limitation of Liability

8.1 If you are not satisfied with any Capability Development Services, you must provide us with the opportunity to re-perform the relevant Capability Development Services or otherwise resolve the issues that have arisen. To the extent permitted by law, this is the sole remedy for any breach of this Agreement by us.

8.2 If, notwithstanding clause 8.1, we have any liability under or in connection with this Agreement, to the maximum extent permitted by law:

(a) our total aggregate liability to you for any loss, damage or liability arising out of or in connection with this Agreement will be limited to the total Course Fees paid by you to us for the applicable Capability Development Services; and

(b) we will not be liable for any:

(i) indirect, special or consequential loss or damage whatsoever; or

(ii) loss of profits, revenue, data, goodwill, customers or opportunity or loss of or damage to reputation.

8.3 The limitations and exclusions on liability in this clause 8 will apply irrespective of the legal basis for the applicable claim, including contract, equity, tort (including negligence) or statute.

8.4 In no circumstances will we have any liability whatsoever under or in connection with this Agreement:

(a) for the acts or omissions of any third party; or

(b) to any third party.

9. Confidentiality Obligations

9.1 Each party must keep confidential all Confidential Information.

9.2 Nothing in clause 9.1 prevents a party from disclosing Confidential Information:

(a) in circumstances expressly provided for in this Agreement;

(b) if disclosure is required by law, or regulator (but only to the extent required); or

(c) if disclosure is reasonably required to enable a party to perform its obligations or enforce its rights under this Agreement.

9.3 We may disclose Confidential Information to our Related Companies and their Personnel on a ‘need to know’ basis, provided that person is under a duty to keep the Confidential Information confidential in accordance with this clause 9.

10. Cancellation, changes and force majeure

10.1 Either party may cancel Capability Development Services, or change a Course Date, no less than 28 days prior to the Course Date. If you cancel less than 28 days before the Course Date, cancellation fees will apply as per the tables below. If applicable, you authorise us to deduct any such cancellation fees from any amounts paid by you in advance. If you need to cancel Capability Development Services, or change the Course Date, you must contact us using the details on our Website. Your cancellation or change request will not be effective until it is acknowledged in writing (including by email) by us.

Health-related reasons (COVID-19, Influenza, other)

Business days before start of course	Refund (% of course fees)	Transfer fee (per person, per transfer)
Less than five days	No refund	\$100 +GST

Once a course has commenced, if you are unable to complete the course for any reason, we can transfer your registration to another delivery date of the same course. We may charge you a \$100 +GST transfer fee per person per transfer.

Other withdrawals and transfers

	Refund	Transfer fee: public course	Transfer fee: private course

Business days before start of course	(% of course fees)	(per person, per transfer)	(per cohort, per transfer)
More than 28	100%	No fee	No fee
14-28	75%	\$100 +GST	\$1,000 +GST
7-13	50%	\$100 +GST	*See note
3-6	25%	\$100 +GST	*See note
2 or less	0%	\$100 +GST	*See note

*Note: No transfer allowed less than 14 days before delivery - please refer to the refund column in the table above if you need to cancel the course

10.2 We reserve the right to move participants to an alternative Course Date (agreed with you), in accordance with clause 2.2 above.

10.3 Either party may terminate this Agreement (including all bookings for Capability Development Services) immediately by written notice if the other party:

- (a) breaches a term of this Agreement which is not capable of remedy or, where the breach is capable of remedy, fails to remedy the breach within 20 Business Days of written notice of the breach; or
- (b) suffers an Insolvency Event.

10.4 We may suspend all or part of Capability Development Services without prior notice if you have or we reasonably suspect you have materially breached, or you are reasonably likely to materially breach, a term of this Agreement.

10.5 Termination or expiry of this Agreement will not affect any rights accrued prior to such termination or expiry.

10.6 We will not be liable to you for non-performance or delays in providing Capability Development Services caused by an external event beyond our reasonable control. In such event, both parties will work together to schedule an alternative Course Date.

11. General

11.1 **Governing Law:** This Agreement is governed by and to be construed in accordance with the laws of New Zealand and each party submits to the exclusive jurisdiction of the courts of New Zealand.

11.2 **Entire Agreement:** This Agreement constitutes the entire agreement of the parties about its subject matter and supersedes all previous agreements, representations and understandings.

11.3 **Priority:** To the extent of an inconsistency between the documents and any additional terms that comprise this Agreement, these Terms will prevail (unless expressly agreed otherwise in writing).

11.4 **Sub-contracting:** We may subcontract the performance of our obligations (including to a Related Company), on the basis we remain solely liable to you for the performance of our obligations.

11.5 **Assignment:** You must not assign, novate or transfer your rights or obligations under this Agreement without our prior written consent (which may be withheld in our sole discretion).

11.6 **Amendments:** Any amendment to this Agreement must be in writing signed by the parties, except where we are required to make changes to ensure compliance with applicable laws in which case we can give you notice of any such amendments required and you will be bound by the same.

11.7 **Notices:** Any notice, demand or other communication to be served on a party must be in writing. Notices sent by post will be deemed received at the end of three Business Days after posting, and notices sent by email will be deemed received on the date and time that the email was sent (as evidenced in the sender's email sent history). Notices received after 5pm on a Business Day will be deemed received on the next Business Day.

11.8 **Severability:** If any part of this Agreement is illegal or unenforceable, it will be severed and the remaining terms will continue in full force and effect.

11.9 **Waiver:** A single or partial exercise or waiver of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.

11.10 **Survival:** Any provision of this Agreement, which is by its nature a continuing obligation, will survive termination.

11.11 **Rights of Third Parties:** References in this Agreement to our Related Companies are intended for the benefit of, and to be enforceable by, our Related Companies. Subject to the foregoing, this Agreement is not intended to confer a benefit on any person other than the parties to this Agreement.

11.12 **Relationship:** We will provide Capability Development Services to you as an independent contractor. Nothing in this Agreement creates any partnership, joint venture or employment relationship between the parties.

11.13 **Non-exclusive:** This Agreement is not exclusive and you agree that there are no restrictions on us to provide any Capability Development Services to any other person.

11.14 **Counterparts:** This Agreement may be executed in any number of counterparts (including by electronic signature or by email exchange of pdf copies) which together will constitute the one instrument.

12. Interpretation

In these Terms, unless the context otherwise requires:

- (a) headings are for convenience only and do not affect interpretation;
- (b) a reference to legislation includes all regulations, orders, instruments, codes, guidelines or determinations issued under that legislation or and any modification, consolidation, amendment, re-enactment, replacement or codification of it;
- (c) a reference to “in writing” includes by email;
- (d) the words “include” or “including”, or similar expressions, are to be construed without limitation;
- (e) a reference to a party to includes that party’s successors and permitted assigns and substitutes; and
- (f) a word importing the singular includes the plural and vice versa.

13. Definitions

Capitalised terms have the meaning given to them in these Terms and the following definitions also apply:

Business Day means Monday to Friday, excluding public holidays in Wellington, New Zealand.

Confidential Information means all information that could be reasonably regarded in the circumstances as confidential, including information which relates to the business, interests or affairs of a party or its Related Companies (including materials and other Intellectual Property Rights used and/or provided by us to you in connection with our Capability Development Services), but excludes information which is:

- (a) in the public domain, other than as a result of a breach of these Terms;
- (b) Customer Materials once that Customer Materials forms part of any Capability Development Services or is provided to us;
- (c) in the possession of a party prior to the commencement of this Agreement without any obligation of confidentiality; or
- (d) is independently developed or acquired by a party prior to the commencement of this Agreement without relying on information which would itself be Confidential Information.

Course Date means course date(s) for the relevant Capability Development Services that we have notified to you on our Website or in direct communications with you.

Course Fee means the course fee for the relevant Capability Development Services that we have notified to you on our Website or in direct communications with you. Unless stated otherwise Course Fees are stated in New Zealand dollars exclusive of GST (and GST is payable in addition to the Course Fee).

Insolvency Event means an event of insolvency, including bankruptcy; the appointment of an insolvency administrator, manager, receiver or liquidator; any action related to winding up or making a material arrangement in relation to creditors; applying for any type of protection against creditors; being unable to pay its debts as they fall due; or taking or suffering any similar or analogous action in any jurisdiction.

Intellectual Property Rights means all intellectual and industrial property rights and interests throughout the world, whether registered or unregistered, including trademarks, designs, patents, inventions, databases, discoveries, circuit layouts, copyright (including source code), rights in software, Confidential Information, know-how, business names, domain names, all analogous rights and all other intellectual property rights.

Related Company has the meaning given to it in the Companies Act 1993, read as if a reference to company was a reference to any body corporate, wherever incorporated.

Capability Development Services means the Capability Development Services that you have selected and we have confirmed, in accordance with clause 2.

These Terms of Engagement were last updated on 28 February 2024.

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