

Terms & Conditions of FitPotato App

Last Updated 8 March 2019

1. Introduction

Welcome to the FitPotato mobile application (**App**).

The App is owned and operated by FitPotato Ventures Pty Ltd ACN 166 993 068 (**FitPotato, we, us, our**).

The use of the App and our website, www.fitpotato.com.au (**Site**), is subject to the following Terms & Conditions and any additional terms and conditions, policies (including our Privacy Policy) and notices made available by us on the App or the Site from time to time (together, **Terms of Use**). In the Terms of Use, "you" means the person accessing or using the App or the Site.

2. Using FitPotato

2.1 By applying to become a Participant, opening the App, logging onto the Site, making or purporting to make or organise a Commitment via the App or the Site, you irrevocably submit to and are bound by these Terms of Use including:

2.1.1 your obligations with respect to content you upload via the Service (clause 2.7);

2.1.2 your responsibility with respect to your Account (clause 3.1);

2.1.3 our liability to you (clause 4.1); and

2.1.4 your liability to us (clause 4.2).

2.2 We reserve the right to modify or terminate the Service or your access to the Service for any reason, without notice, at any time and without any liability to you.

2.3 If you do not agree to these Terms of Use, you must immediately exit and not use or access the App and the Site.

2.4 You acknowledge and agree that FitPotato provides you with access to the Service in consideration for and in reliance upon your agreement to be bound by these Terms of Use.

2.5 You agree that we may include any advertising and promotions on the App or Site at our sole discretion. The manner, mode and extent of such advertising and promotions are subject to change without specific notice to you.

2.6 Your Conduct

While using the Service, you will not:

2.6.1 upload any viruses or other malicious code;

2.6.2 use or access the App or the Site if you are unable to form legally binding contracts or are under the age of 18;

2.6.3 post, distribute, upload, publish or disseminate any illegal, discriminatory, threatening, defamatory or offensive content;

- 2.6.4 post spam, unsolicited or bulk electronic communications, chain letters or pyramid schemes;
- 2.6.5 harvest or otherwise collect information about other Participants, including email addresses, without their consent;
- 2.6.6 breach any provision of the Terms of Use. All or some of the Terms of Use may change from time to time and it is your responsibility to remain familiar with the most current versions;
- 2.6.7 solicit other Participants' login information or attempt to access an Account belonging to someone else;
- 2.6.8 use Service in any manner which might damage, disable, overburden, or impair the App or the Site or interfere with any Participant's use and enjoyment of the Service, such as a denial of service attack;
- 2.6.9 defame, bully abuse, harass, stalk, threaten or otherwise violate the legal rights (such as rights of privacy and publicity) of our staff or other Participants;
- 2.6.10 offer any contest, giveaway or sweepstakes using the Service without our prior written consent;
- 2.6.11 put yourself or anybody else in danger while using the Service (including while participating in or organising a Commitment);
- 2.6.12 fail to comply with all applicable laws, rules and regulations during your use of the App and the Site, including without limitation, laws related to copyright;
- 2.6.13 facilitate or encourage any violations of these Terms of Use; or
- 2.6.14 infringe any third party's rights including intellectual property rights.

2.7 Content

- 2.7.1 All content that is transmitted via the Service is the responsibility of the originator of such content and we cannot ensure the accuracy or authenticity of such content. You acknowledge and agree that you access any content at your own risk and you will be solely responsible for any damage or loss to you or any other party arising from such access. We have no duty to monitor, edit or remove any content.
- 2.7.2 We reserve the right, but are not obliged to remove content where we consider it may be illegal, discriminatory, threatening, defamatory or offensive.
- 2.7.3 You warrant that all information and material that you submit, post, distribute, upload, publish or disseminate (including information you provide to us when registering an Account) via the Service (**your content**) is accurate, true, complete and not misleading (including by omission).
- 2.7.4 We will rely on the truth, accuracy and completeness of your content and may suffer loss and damage in the event it is inaccurate, false, incomplete or misleading. You must update your content as necessary to maintain its truth, accuracy and completeness.
- 2.7.5 We reserve the right at all times to disclose your content to third parties as necessary to satisfy any applicable law, regulation, legal process or governmental request, or to edit, refuse to post or to remove any of your content, in whole or in part, in our sole discretion.

2.8 Commissions

If you are introduced to the Service by a third party, that third party may have received a commission for the introduction.

2.9 Interruptions

FitPotato makes no and expressly disclaims any representation or warranty that the Service will be available or secure for use by you at all times or at any particular time, including during and for the duration of any particular Commitment Period.

Where possible, we will notify you in advance of the time and duration of any suspension of access to the Service, but do not represent or warrant that it will do so on every occasion, on any particular occasion or any occasion at all.

For the avoidance of doubt, we are not responsible in circumstances where the Service or any part of it is unavailable at any time due to a power outage or server outage. We have no control over, and no responsibility for, the functioning network with which you use to access the Service.

2.10 Suspension

Without limiting our other remedies, we may limit, suspend or terminate your Account, prohibit access to the Service or any part of it, delay or remove content, and take technical and legal steps to keep you off the App or Site for any reason.

In particular, where we consider that your Step Tracking Device has been tampered with, we will suspend your Account.

3. Registration and Account

3.1 Registration of Participants

- 3.1.1 A person may not participate in a Commitment unless they have an Account.
- 3.1.2 You may apply to FitPotato for an Account by completing the application form which applies to the type of Account you wish to register.
- 3.1.3 We may accept or reject an application for an Account in our absolute discretion by giving notice to you to that effect.
- 3.1.4 If we accept your application you will be given access to a registered Account with the features associated with the type of Account you registered.
- 3.1.5 You are responsible for keeping your login details secret and secure.
- 3.1.6 You are responsible for your Account and any activity that occurs through your Account. You must not sell, license, assign or transfer your Account.
- 3.1.7 You must notify us immediately if you suspect or ought to suspect any unauthorised use of or access to your Account or any other breach of security.
- 3.1.8 You are only permitted to have one Account.
- 3.1.9 Where you are applying for an Account on behalf of a third party, you warrant that you have capacity and authority to bind that third party to these Terms of Use. You will not apply for an Account for a third person without this authority and capacity.

3.2 Commitments

- 3.2.1 Once you have set up an Account, you will be permitted to register a Commitment.
- 3.2.2 You may participate in a weekly Public Commitment.
- 3.2.3 Commitments are for rolling 1-week periods and start on the day shown as the start date when you select a group to join and will continue for a period of 1 week (**Commitment Period**).
- 3.2.4 When making your Commitment, you must pay the Entry Fee upfront before joining the group. The Entry Fee may change from time to time and will be prominently displayed in the App prior to joining a group.
- 3.2.5 If you change your mind within 24 hours of the commitment starting we offer a no questions asked refund policy, which you can request by submitting a customer support ticket via the App.
- 3.2.6 All Commitments automatically renew every week until you notify us otherwise, and the Entry Fee will be charged to your payment source on file upon renewal. Upon renewal, Participants will be notified via email/push notification of their entry fee payment and their renewed Commitment details. Participants may cancel their rolling Commitments at any time within 24 hours of them renewing and our no questions asked refund policy applies as per 3.2.5.

3.3 Required Attendances

- 3.3.1 If you fail to meet the Required Attendance during the Commitment Period, you will not have met your Commitment. Users who have completed all their sessions in the current week all receive an equal distribution of the weekly prize. No other users receive any portion of the prize. If all users do not complete all their sessions in a particular week, there will be no prize distribution for the group for that week.
- 3.3.2 You will be able to confirm that you have attended a Session in the following ways:
 - (a) using the App to record that you have walked or run at least a minimum number of steps, as shown in the commitment rules and summary screens. You must open the FitPotato app to sync your steps before the end of the week. Any steps completed prior to joining a group do not count. Any steps that are not synced prior to the week ending will not be counted.

If we form the view, acting reasonably, that any Sessions under clause 3.3.2, are not genuine, that Session shall not be valid and will not count towards your Required Attendance. Additionally, if we form the view, acting reasonably, that you have forgotten to check out under clause 3.3.2(a), we may (but are not obliged to) notify you that that Session will not be valid, in which case it will not count towards your Required Attendance.

3.4 Payment

- 3.4.1 In order to join a Commitment, you must pay the Entry Fee. The Entry Fee is displayed in the summary screen prior to joining a group.
- 3.4.2 We may, at our sole discretion, decide that a Commitment does not have enough participants, and we may either cancel the Commitment or delay its start. We will notify Participants via email/push notification whenever this happens.
- 3.4.3 The Entry Fee can be paid by the following methods:

- (a) debited from your credit card;
- (b) Apple Pay; or
- (c) deducted from any Account Credits you have accrued.

3.4.4 You may select your preferred method of payment but we are hereby authorised to debit or deduct the Entry Fee by any of the above methods in the event your preferred method of payment is unsuccessful.

3.4.5 If you request a chargeback directly from your bank without contacting us first, we are entitled to suspend or cancel your Account indefinitely until the issue is resolved.

3.4.6 Please note that Apple Pay is a secure third party payment gateway operator and FitPotato as no control over or responsibility for payments made via Apple Pay.

3.5 Reward

3.5.1 At the end of each weekly Commitment, any missed sessions will be calculated and a proportion of the Weekly Prize distributed as a Reward to all users who have completed all the required number of sessions, within 14 business days of the commitment ending. We also guarantee that the Reward will not be less than the Entry Fee paid.

3.5.2 Your Reward will be calculated in accordance with our published policies. It will be an equal proportion of the Weekly Prize for the corresponding Commitment Period.

3.5.3 The amount of your Reward depends on how many other Participants also completed all their sessions during your Commitment Period. If everyone completes all their sessions, everyone receives an equal share of the Weekly Prize as their Reward for that Commitment.

3.5.4 If all Participants do not complete any sessions for the Commitment period, the amount of the Reward is \$0.00 for all Participants.

3.5.5 We do not transfer the value of the Reward to you. We will issue an Account Credit only for the value of the Reward.

3.5.6 We will transfer the value of or any portion of your Account Credits upon receipt of a valid written request to us. Provided you have sufficient Account Credits, we will transfer you the amount requested as soon as reasonably practicable.

3.5.7 There is no minimum amount of Account Credits required to request a withdrawal.

3.6 Forgiveness

3.6.1 We may forgive a failure to meet a Commitment and refund any relevant payments made due to this failure in our absolute discretion, following receipt of a valid written request from you. Some of the circumstances where we may consider a refund include:

- (a) where you were ill or have suffered some type of injury;
- (b) where a close family member has been ill or passed away;
- (c) where you have been the victim of a crime (for example, if your Step Tracking Device has been stolen);

(d) where the Service is otherwise unavailable;

3.6.2 If you have requested a refund for any reason, including any reason set out above, we may request information confirming the validity or truthfulness of reason for the request (for example, medical certificates, police reports or photographs).

3.6.3 In the event your Step Tracking Device has suffered from a fault (such as failure to connect to the internet or other malfunction), it is expected that you will take reasonable steps to record your Session by other means and also provide sufficient evidence showing the malfunction (eg. via photos). Evidence of your Session recorded by these means may be requested when considering whether to provide a refund.

3.7 Closing your Account

3.7.1 You may close your Account at any time provided you do not owe any Fees or Commitment Amounts or any other money.

3.7.2 Any purported cancellation of your Account by you does not release you from, or affect, any accrued obligation under these Terms of Use.

4. Liability

4.1 Our liability

4.1.1 To the fullest extent permitted by any applicable law, FitPotato excludes all implied representations, warranties, terms and conditions of any kind whatsoever (whether implied by common law, statute or otherwise) and the application or availability of any statutory rights (including any implied representations, warranties, terms or conditions or any statutory guarantees that any goods or services supplied under these Terms of Use are of satisfactory quality or fit for their purpose).

4.1.2 To the fullest extent permitted by any applicable law, FitPotato will not be liable to you (whether under these Terms of Use or otherwise) for any indirect or consequential loss, loss of profit, data loss, damage to reputation, additional borrowing loss, effects of any insolvency, damage to reputation, claims or allegations by a third party that any material breaches that third party's rights (including intellectual property rights). You release and forever discharge FitPotato from any such liability.

4.1.3 If you have a dispute with another Participant, you release us (and our officers, directors, agents, subsidiaries, joint venturers and employees) from claims, demands and damages (actual and consequential) of every kind and nature, known and unknown, arising out of or in any way connected with such disputes.

4.1.4 To the extent FitPotato is able to limit the remedies available under these Terms of Use, FitPotato expressly limits its liability for breach of a non-excludable statutory guarantee to the following remedies (at its election):

(a) the supply of services again; or

(b) payment of the cost of having the services supplied again.

4.1.5 You agree that in the event you incur any damages, losses or injuries that arise from or are connected with our acts or omissions, damages are an adequate remedy and you irrevocably waive any right to seek interim, interlocutory or final injunctive relief or specific performance of these Terms of Use and you will have no

right to restrain the development, distribution, advertising, exhibition or exploitation of any website, property, product, service or other content owned or controlled by us including the App.

4.2 Your liability

- 4.2.1 You indemnify us (and our officers, directors, agents, subsidiaries, joint venturers and employees) against any claim or demand, including legal fees and costs (on a full indemnity basis), made against us by any third party due to arising out of or in connection with your use of the Service.
- 4.2.2 You indemnify us (and our officers, directors, agents, subsidiaries, joint venturers and employees) against any loss or damage suffered or incurred by us in connection with your use of the Service or your negligent act or omission.

4.3 Risk

- 4.3.1 Except as expressly set out in these Terms of Use, you use and access the Service at your own risk.
- 4.3.2 You acknowledge that the Service simply provides a platform for Participants to make and participate in Commitments. We are not liable for the outcome of Commitments. We do not guarantee the quality, safety or legality of Commitments.
- 4.3.3 You are responsible for ensuring that your Commitments and activities on the App and Site are lawful (including by ensuring you have obtained all necessary consents, permits and authorisation).

5. Intellectual Property

- 5.1 Nothing in these Terms of Use transfers any intellectual property rights incorporated in the Service to you.
- 5.2 These Terms of Use do not affect your ownership of intellectual property rights in your content (**your IP**). You grant us a perpetual, royalty-free, worldwide, irrevocable licence (including a right of sub-licence) to use, reproduce, modify, publish, translate, sell, transmit, distribute, prepare derivative works of or display your IP for our purposes.
- 5.3 You represent and warrant to us that you own or have appropriate rights to submit, post, distribute, upload, publish or disseminate your content and your IP on the App or the Site (or both).

6. Privacy

- 6.1 When you register an Account with us, you will be required to provide us with various pieces of personal information. We will collect, store, use and disclose your personal information in accordance with our Privacy Policy, which can be found at www.fitpotato.com.au/privacy.
- 6.2 At the time of collecting your personal information, we will take reasonable steps to bring our privacy collection statement to your attention. Our privacy collection statement can also be found at the end of this Privacy Policy.
- 6.3 If you would like to request a physical copy of our collection statement or Privacy Policy (or both) please contact us at www.fitpotato.com.au/contact.

- 6.4 You warrant to FitPotato that any personal information you provide to FitPotato about a natural person has been collected with that person's consent for it to be provided to us to be used in a manner contemplated by these Terms of Use including our Privacy Policy.

7. Miscellaneous

7.1 Definitions and interpretation

7.1.1 Definitions

In these Terms and Conditions, unless the context otherwise requires:

- (a) **Account** means an account for use the Service which has been approved for registration by us.
- (b) **Entry Fee** means the entry fee payable to join a commitment. The entry fee may change from time to time, and is payable for each weekly commitment. It is payable when a user initially joins a commitment, and also on each weekly renewal.
- (c) **Account Credit** means the value of any Rewards that have been credited to your Account minus any amounts that have been withdrawn or deducted in accordance with these Terms of Use.
- (d) **Push Notification** means a message sent to any user who has allowed the FitPotato App to send them push notifications
- (e) **Commitment** means the commitment to achieve the Required Attendance within the Commitment Period, and includes Group Commitments and the Public Commitment.
- (f) **Fees** means our fees published on the Site or the App or in these Terms from time to time or the fees otherwise agreed in writing between you and us plus any transaction and service fees. All fees are in USD.
- (g) **Group Commitment** means a specific group where all Participants of that group make a Commitment together and the Reward any such Participant will receive is distributed from the total of the Commitment Amounts contributed by Participants in that group that did not meet their Commitment.
- (h) **Participant** means a person that has registered an Account with us either as a participant or as an Organiser.
- (i) **Reward** means the amount distributed to Participants that complete all sessions for their Commitment which is distributed from the Weekly Prize, as calculated in accordance with these Terms of Use.
- (j) **Weekly Prize** means the amount distributed to Participants who have completed all their sessions for the Commitment.
- (k) **Public Commitment** means a Commitment which is not a Group Commitment and under which any Participant can make a Commitment and the Reward for Participants that meet their Commitment is distributed from the Weekly Prize.

- (l) **Service** means the Site and the App together with all content, forums, information sharing functions (including ability to post your content), tools, transactions and other services available at the Site or by using the App.
- (m) **Session** means:
 - (i) Completing a minimum 10,000 steps within the 24 hour period shown in the App; and
 - (ii) Allowing FitPotato access to Apple Health Steps data
 - (iii) Tracking your steps with an Apple Step Tracking Device which supports step tracking via Apple Health (eg. Apple iPhone or Apple Watch).
 - (iv) Syncing your steps before the end of your weekly commitment
 - (v) The above Session rules are subject to change. The latest rules will be presented to you via the Commitment summary and Commitment rules screens prior to you starting your Commitment.
- (n) **Step Tracking Device** means:
 - (i) An Apple device capable of tracking steps and recording the data to Apple Health. For example, Apple iPhone or Apple Watch. No third-party devices are supported or allowed to be used to track steps.

7.1.2 Interpretation

In these Terms and Conditions, unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (c) a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of these Terms of Use;
- (d) headings are for convenience and do not affect interpretation;
- (e) a reference to any document or agreement includes a reference to that document or agreement as amended, novated, supplemented, varied or replaced from time to time;
- (f) a reference to a time is a reference to Australian Eastern Standard Time or Australian Eastern Daylight Time, whichever is appropriate;
- (g) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this Agreement or any part of it;
- (h) the words "including", "for example", "such as" or other similar expressions (in any form) are not words of limitation;
- (i) a reference to a party includes its executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns; and

- (j) a reference to a person means a natural person or body corporate.

7.2 Amendments

We reserve the right to modify or replace any part or all of the Terms of Use and you agree that we may notify you of an such changes by emailing you or posting them via the App and the Site and that your use of the App or the Site subsequent to posting such changes shall constitute your acceptance of those changes.

Any amendments to the Terms of Use take effect from the date stated or, where no date is stated, from the beginning of the next day after they become available.

It is your responsibility to stay up to date with the current Terms of Use.

7.3 Set off

We may, without notice to you, apply all or any part of any amount owing to you by way of set off towards satisfaction of any money at any time that may be payable by you to us for any reason (whether under these Terms of Use or otherwise), including without limitation for any loss suffered by FitPotato due to your breach of these Terms of Use or your negligent or wrongful act or omission.

7.4 Assignment and Novation

7.4.1 We may assign and/or novate these Terms of Use to another person without prior notice or your consent.

7.4.2 You must not assign and/or novate these Terms of Use (including by transferring your Account to another person) without our prior written consent.

7.5 Notices

7.5.1 Legal notices must be served to FitPotato at the following address:

Suite 247, 189 Queen St, Melbourne Victoria 3000

7.5.2 We may give you notice of any matter or thing required or permitted to be notified to you under these Terms of Use by either:

- (a) sending you an electronic mail message to an electronic mail address nominated by you; or
- (b) posting the notice via the App or the Site.

Such notice takes effect and is deemed served from the time the electronic mail message leaves the FitPotato system or is visible on the App or Site, as the case may be.

7.6 Personal Knowledge

A reference to a matter being to the knowledge of a person means the matter is to the best of the knowledge and belief of the person after making proper enquiry including enquiry which a reasonable person would be prompted to make by reason of knowledge of a fact.

7.7 Severance

If any provisions of these Terms of Use are found to be invalid or unenforceable, then that provision will be read down or severed and that invalidity or unenforceability does not affect the validity or enforceability of the other terms and conditions.

7.8 Waiver and Exercise of Rights

- 7.8.1 A single or partial exercise or waiver of a right relating to these Terms of Use does not prevent any other exercise of that right or the exercise of any other right.
- 7.8.2 No party will be liable for any loss or expenses incurred by another party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

7.9 No Relationship

We do not have a trust relationship with you, and we do not owe you any fiduciary duty.

No party to these Terms of Use has the power to obligate or bind any other party. Nothing in these Terms of Use will be construed or deemed to constitute a partnership, joint venture or employee, employer or representative relationship between any of the parties.

7.10 Indemnities

- 7.10.1 Each indemnity in these Terms of Use is a continuing obligation, separate and independent from the other obligations of the parties and survives termination of these Terms of Use.
- 7.10.2 It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity conferred by these Terms of Use.

7.11 No Merger

The warranties, undertakings, agreements and continuing obligations in these Terms of Use do not merge on completion.

7.12 Rule of Construction

In the interpretation of these Terms of Use, no rule of construction applies to the disadvantage of the party preparing the document on the basis that it put forward these Terms of Use or any part of it.

7.13 Links to Third Party Sites

The Service may contain links to other web sites (**Linked Sites**). The Linked Sites are not under our control and we are not responsible for the contents of any Linked Site, including without limitation any link contained in a Linked Site, or any changes or updates to a Linked Site. We are not responsible for webcasting or any other form of transmission received from any Linked Site. We are providing these links to you only as a convenience, and the inclusion of any link does not imply endorsement by use of the Linked Site or any association with its operators.

7.14 Jurisdiction

These Terms of Use are governed by the law in force in Victoria, Australia. The parties irrevocably submit to the non-exclusive jurisdiction of the courts of Victoria, Australia.

We make no representation that the Service is accessible, appropriate or legally permissible for use in locations outside of Victoria, Australia and accessing and using the Service is prohibited from jurisdictions where doing so would be illegal.