

HOME > SERVICE AGREEMENT

SOFTWARE AS A SERVICE AGREEMENT – GENERAL TERMS

Updated – 02/12/2024

[VIEW HISTORIC VERSIONS](#)

THE PARTIES AGREE AS FOLLOWS:

These General Terms apply to and govern the Customer's access to and use of the Services purchased as set out in any one or more Order Form.

1. Term

1.1 The Agreement will operate for the License Term unless terminated earlier pursuant to the *Termination clause*.

1.2 A separate and distinct Agreement is formed between ELMO and the Customer each time an Order Form is entered into by the parties.

2. Representatives

2.1 The parties represent that each person appointed as Representative in an Order Form has the authority to act on the appointing party's behalf for all purposes in connection with that Agreement. A party may at any time replace its nominated Representative by giving written notice to the other party.

3. Nature of relationship

3.1 ELMO enters into this Agreement and agrees to perform the Services as an independent contractor. Nothing in this Agreement is intended to create, or is evidence of, a relationship of employment, partnership, agency or joint venture between Customer and ELMO, or between Customer and any of ELMO's Personnel.

4. Provision of Services

4.1 ELMO will provide the Services to Customer in accordance with the terms of the Agreement.

4.2 In providing the Services, ELMO will:

- (1) effect Delivery of the Services after execution of an Order Form;
- (2) give appropriate notification to Customer for all Scheduled Downtime in compliance with clause 9.3(3) of the General Terms;
- (3) provide the Services with all due care and skill;
- (4) work together with Customer to implement the Services in accordance with the, if any, estimated implementation schedule set out in the Scope of Work; and
- (5) comply with all applicable laws and regulations and all industry and professional standards and codes in Australia and New Zealand which relate to the supply of the Services.

5. Customer obligations and acknowledgements

5.1 Customer is obliged to:

- (1) pay the Fees without set-off or deduction;
- (2) pay for any additional charge agreed in advance if the Customer requests ELMO to provide services which are not specified in the Scope of Works;
- (3) adhere to the invoicing and payment terms contained an Order Form;
- (4) pay interest on any invoice not paid in accordance with the payment terms outlined in the Order Form at the rate of the Reserve Bank's cash rate plus 4% and calculated daily from the due date of the invoice;
- (5) pay for any legal costs incurred by ELMO on a solicitor to client basis to enforce payment of the Fees; and
- (6) ensure the reasonable availability of Customer's Representative when resolving a service related incident or request.

5.2 Customer acknowledges and agrees that:

- (1) Customer understands that the Services to be provided by ELMO are in the form of Software as a Service and ELMO may, by giving 60 days' written notice, replace an existing Service with another service where the License Fee for the new service is not

greater than the License Fee for the existing Service being replaced and the functionality of the new service complies with the Service inclusions and scope of the Service, as stated in the Agreement, that is being replaced;

(2) the ability of ELMO to provide implementation and integration Services is conditional upon the Customer providing ELMO prompt and clear instructions;

(3) Customer has adequate and appropriate resources to:

(a) facilitate the implementation of the Services with ELMO; and

(b) operate the Services during the License Term;

(4) the Services are not intended, nor should they be used, as a substitute for professional advice or judgment or to provide legal advice with respect to Customer's particular circumstances;

(5) ELMO will not be responsible for any third party application or service not under ELMO's control;

(6) the Services provide Configuration options;

(7) implementation of modules may only be undertaken concurrently through written agreement between the parties and in accordance with module pre-requisites requirements;

(8) it is responsible for identifying and authenticating all Users, approving access by such users to the Services, for controlling against unauthorised access by Users, and for maintaining the confidentiality of usernames, passwords and account information and accepts responsibility for all activities of users, including individuals who were not authorised to have access to the Services, that occur under the Customer and User's usernames, passwords or accounts.

(9) where SMS notifications are included as part of the Services, ELMO will have no liability for any charges incurred by the User responding to those SMS messages or any other carrier costs of the User; and

(10) the ELMO Software AI Terms published at <https://elmosoftware.com.au/ai-terms-conditions/> is incorporated into the Agreement; and

(11) Customer's liability to pay the Fees (excluding any Renewal Period Fee) arises upon entry into the Agreement, notwithstanding that ELMO has agreed to accept payment of the License Fee by way of annual instalments as set out in an Order Form.

5.3 Each party warrants that it has the authority to enter into this Agreement and to perform its obligations under this Agreement and that a party's signatory has authority to bind them to the obligations herein.

6. ELMO help desk

6.1 ELMO will provide the following help desk support in respect of the Services:

- (1) Nominated Customer administrator support: Monitored Monday – Friday 6:30 AM to 7:30 PM AEST (excluding NSW and National public holidays)
- (2) User self service website: Available 24/7

6.2 The help desk will support the Customer post implementation by:

- (1) providing basic clarification of Software features and functionality;
- (2) investigating reported Software issues and assist in identifying their cause;
- (3) assisting nominated customer administrators in the resolution of Software issues arising from user error and/or lack of knowledge of the Software; and
- (4) escalating service incidents to development for resolution, as further described in the Scope of Works.

6.3 For the avoidance of doubt, Software issues arising from a Software defect, as determined by ELMO, shall not consume the help desk free monthly hours stated in the Scope of Works.

7. Service requests

7.1 In support of the Services ELMO will respond to service related incidents and/or requests submitted by Customer within the following time frames:

- (1) 0-4 hours (during business hours) for issues classified as High priority.
- (2) Within 24 hours for issues classified as Medium priority.
- (3) Within 3 working days for issues classified as Low priority.

7.2 Remote assistance will be provided in-line with the above timescales dependent on the priority of the support request.

7.3 In this clause:

- (1) **High priority** means a critical system malfunction which severely impairs the end-user access to the Services;
- (2) **Medium priority** means a critical system malfunction which severely impairs the administrative access to the Services; and
- (3) **Low priority** means any system malfunction which does not severely impair user or administrative access to the Services.

8. Systems management

8.1 ELMO will proactively manage and monitor all application server hardware devices. ELMO will proactively monitor the status of the operating system, disk I/O,

memory, and processes, critical application layer daemons and processes.

8.2 All servers, applications and networks supporting the hosting of the Software, will be operated, monitored and administered by ELMO (or such third party as is deemed appropriate by ELMO) 24 hours daily, every day, with no exclusion for holidays. In order to provide such coverage, ELMO may utilise a mixture of onsite and on-call support staff, automated server monitoring and automated paging technology.

8.3 ELMO will install new equipment, software releases, upgrades fixes, patches and other items necessary to maintain its servers and systems to leading industry standards at no additional cost to Customer.

9. Hosting

9.1 Server details

The Software is hosted on an IaaS provider operating in a physically secured co-location facility located in Australia. ELMO uses data centre hosting facilities that hold internationally recognised security certifications.

9.2 Network uptime

ELMO guarantees that its Services will have a Network Uptime of 99.5% per annum.

9.3 In this clause:

(1) **Network Outages** is any unplanned or unscheduled interruption in Service availability during which Customer is unable to access the Services due to a problem in ELMO's network.

(2) **Network Uptime** is the total time across the License Term that the Services are available via the Internet, assuming that Customer has established connectivity, and shall include any Schedule Downtime but not include any Network Outages.

(3) **Scheduled Downtime** is any ELMO scheduled interruption of the Services, for the purpose of network or Software upgrades, or replacement of any equipment in order to provide a better service. Scheduled downtime occurs during notified downtime periods, with as much advance warning as possible via e-mail to the designated Customer Representative with a minimum of 48 hours notice. Scheduled downtime wherever possible will be conducted between the hours of 10pm to 3am AEST to minimise organisational disruption.

10. Suspension of Services

10.1 If any amount owing by Customer under the Agreement is 30 or more days overdue, ELMO may suspend the Services and/or implementation of the Services until all outstanding Fees are paid by Customer in full.

10.2 ELMO may also suspend the Service, without notice, if it is required to do so by law or government or law enforcement authority.

10.3 Should the Services and/or implementation of the Services be suspended in accordance with clause 10.1, then such suspension will not impact on the License Term or Customer's obligation to pay the License Fee.

11. Confidentiality

11.1 The parties agree to keep the Confidential Information confidential.

11.2 A party must not, and must not permit any of that party's officers, employees, agents, contractors or related entities to disclose or announce to any person, the provisions of the Order Form or Confidential Information, other than:

- (1) to that party's professional advisors under a duty of confidentiality;
- (2) as required by law;
- (3) to enforce this Agreement; or
- (4) with the prior written consent of the other party.

11.3 Each party must return all Confidential Information and copies of it immediately to the disclosing party upon request in writing.

12. Data management

12.1 Backup

ELMO has a data backup policy governing the method and frequency of backing-up Customer Content and data. The data backup process must ensure that:

- (1) the data is stored securely, encrypted and its integrity is maintained; and
- (2) data back-ups are conducted daily and are stored within IaaS back-up infrastructure.

12.2 Information security

(1) ELMO will take all commercially reasonable steps to prevent unauthorised access to the Software, the Customer Content, user data and Confidential Information stored on ELMO's system infrastructure. Such steps must include as a minimum:

- (a) a hardware firewall that provides the ELMO server with protection from external unauthorised access;
- (b) access to any Customer Content or data must require a user to login. All logins must be protected with encryption; and
- (c) all Customer Content and data transmission must be conducted using SSL protection.

(2) Both parties agree to comply with ELMO's Security and Vulnerability Testing Policy published on ELMO's website at <https://elmosoftware.com.au/wp-content/uploads/2024/03/ELMO-Security-Vulnerability-Testing-Policy-1.4.pdf>.

13. Customer Content

13.1 Customer is entitled, in its sole discretion, to request ELMO to:

- (1) prevent access to the Customer Content; and
- (2) amend or vary Customer Content contained on the Software or ELMO's system infrastructure.

13.2 Customer will be charged professional services fees at ELMO's then current hourly rates (or as otherwise agreed by the parties) for services provided by ELMO pursuant to clause 13.1.

14. Intellectual Property Rights ownership and license

14.1 Pre-Existing Intellectual Property Rights

- (1) Nothing in this Agreement constitutes an assignment or transfer of ownership of a party's pre-existing Intellectual Property Rights to the other party.
- (2) Customer grants ELMO a right to access and reproduce, or otherwise use data for the limited purposes of providing the Services.

14.2 Intellectual Property Rights

- (1) Customer agrees that throughout the term of this Agreement it will:
 - (a) not use the Services to store or transmit data that infringes the Intellectual Property Rights or other propriety rights of any third party or violates third-party privacy rights;
 - (b) not, directly or indirectly, reverse engineer, decompile, disassemble, or otherwise attempt to derive the source code of the Software, or create any derivative works based on the Software;
 - (c) on the expiry or cancellation of the Agreement, immediately cease to use the Services save as expressly authorised by ELMO in writing; and
 - (d) not use the Services otherwise than as permitted by the Agreement.

14.3 License Rights

- (1) Customer grants ELMO a non-exclusive license for the duration of the License Term to use, reproduce, display, transmit, communicate, publish and adapt the Customer Content for the purpose of:
 - (a) providing the Services; and
 - (b) providing the Customer Content to authorised users of the Software in the manner described in the Scope of Work.

(2) ELMO grants Customer a non-exclusive license for the duration of the License Term to use the Software and relevant ELMO documentation for internal use only.

15. Warranties

15.1 ELMO warrants that:

(1) the Services:

(a) can be used, as contemplated by this Agreement, without the need to obtain further permits, licenses, authorisations or consents from any person;

(b) do not contain anything which ELMO is not freely entitled to make available to Customer;

(c) comply with all applicable laws and industry codes and standards in Australia and New Zealand;

(d) do not contain any information that is illegal, indecent, obscene, threatening, discriminatory, in breach of any confidence, defamatory or otherwise objectionable;

(e) do not contain any viruses, trojans, or other contaminating, malicious or destructive properties or code; and

(f) do not suggest that any entity has any sponsorship of another entity which it does not have;

(2) it owns or is licensed to use the Intellectual Property Rights in the Services and it has the right to grant the licenses and rights to Customer in the manner contemplated in this Agreement; and

(3) the use of the Services by Customer as contemplated by this Agreement:

(a) will not be illegal or unlawful and will not be in breach of any applicable law or code of Australia or New Zealand; and

(b) will not infringe the rights of any person, including any Intellectual Property Rights or similar rights of any third parties.

16. Indemnity, Limitations and exclusions of Liability

16.1 Each party (the **Indemnifying Party**) indemnifies the other party (the **Indemnified Party**) against any and all Loss that the Indemnified Party may incur arising out of, or in connection with:

(1) any breach of this Agreement by the Indemnifying Party or any of its Personnel; or

(2) any unlawful, fraudulent or negligent act or omission by the Indemnifying Party, its employees, agents or contractors in connection with this Agreement.

16.2 Each party's liability to indemnify the other under the Agreement will be reduced proportionally to the extent that any negligent act or omission, or breach of the

Agreement by the Indemnified Party, its employees, agents or contractors contributed to the loss or liability.

16.3 Subject to clause 16.5, the liability of each party to the other under the Agreement for any Claim, howsoever arising, is limited to the first year's License Fee.

16.4 Neither party will, under any circumstances, be liable for any special, exemplary, punitive or consequential loss or damage (including without limitation, loss of profit, loss of opportunity and loss of goodwill) incurred either directly or indirectly in connection with the Agreement.

16.5 Nothing in this Agreement will:

- (1) limit or exclude any liability for death or personal injury resulting from gross negligence;
- (2) limit or exclude any liability for fraud or fraudulent misrepresentation;
- (3) limit any liabilities in any way that is not permitted under applicable law;
- (4) exclude any liabilities that may not be excluded under applicable law;
- (5) limit any liability arising from a breach of clause 14 of the General Terms;
- (6) limit any liability for the payment of Fees, interest and costs under or in connection with this Agreement.

17. Insurance

17.1 ELMO must:

- (1) maintain the following insurances throughout the License Term:
 - (a) Public Liability – \$20,000,000;
 - (b) Professional Indemnity – \$10,000,000;
 - (c) Cyber – \$5,000,000,
- (2) deliver to Customer certificates of such insurance within 5 days of a written request from Customer.

18. Force Majeure

18.1 Despite any other provision of the Agreement, a party (**Affected Party**) will not be liable to the other party for any delay or failure by the Affected Party to perform its obligations under the Agreement resulting from a Force Majeure Event.

18.2 The Affected Party must use its best endeavours to remove, overcome or minimise the effects of that Force Majeure Event as quickly as possible. This does not require the Affected Party to settle any industrial dispute in any way that it considers inappropriate.

18.3 The Affected Party must, as soon as the Force Majeure Event ceases, recommence the performance of its obligations under the Agreement. The time given to perform those obligations will be extended by the period of the Force Majeure Event (or longer if the parties agree).

18.4 If a Force Majeure Event continues for more than 60 days, the Affected Party may terminate the Agreement by notice in writing of not less than 14 days to the other party. In the event of termination under this clause, the Affected Party is not liable to the other party except to the extent of rights or obligations which accrued before termination.

19. Termination

19.1 Either party may terminate this agreement if:

- (1) The other party is in material breach of any of its obligations under this Agreement; and
- (2) The defaulting party fails to remedy the breach within 30 days, or such other period as may be agreed in writing between the parties, after receipt of a written notice from the non-defaulting party requiring rectification of the breach.

19.2 The parties may terminate this Agreement by mutual consent in writing.

19.3 Either party may, in its absolute discretion, terminate this Agreement by providing notice to the other party if the other party is the subject of an Insolvency Event.

19.4 Consequences of termination

On termination of this Agreement:

- (1) Subject to clause 19.7, each party will, except as otherwise agreed by them, cease to perform their obligations under this Agreement;
- (2) ELMO will, within a reasonable timeframe but without undue delay:
 - (a) discontinue use of all Customer Content;
 - (b) remove all Customer Content from the Software and ELMO's computer servers;
 - (c) either return all Customer Content to Customer (in .csv format and subject to clause 13) or destroy the Customer Content, as directed by Customer. If the Customer does not provide direction within 30 days of the date of termination or expiry of this Agreement, ELMO reserves the right to destroy the Customer Content without further notice to the Customer; and
 - (d) certify that it has complied with subclause 2(c) above;
- (3) each party will immediately discontinue all use of the other party's Intellectual Property Rights; and

(4) each party must return to the other, or destroy, all records of Confidential Information of the other party.

19.5 Should Customer terminate an Agreement before the end of the License Term, other than pursuant to clause 19.1 of the General Terms, the balance of the License Fee plus any other amount payable under that Agreement (including all amounts outstanding as at the date of termination as well as all amounts yet to be invoiced) will become immediately due and payable by Customer to ELMO.

19.6 Should Customer terminate the Agreement in accordance with clause 19.1 of the General Terms, ELMO will refund any pre-paid License Fees it has received that are attributable to the period after the date of termination.

19.7 On termination of the Agreement the accrued rights and liabilities of the parties as at termination, and clauses *Confidentiality, Intellectual Property Rights, Warranties, Indemnities, Insurance, Consequences of termination, Notices, Governing law, Definitions and interpretation* and this clause will survive and continue in full force and effect.

20. Dispute Resolution

20.1 If a dispute, other than a dispute in relation to payment of Fees by Customer arises between the parties in relation to the Agreement, the dispute must be dealt with in accordance with this clause.

20.2 Any party claiming that a dispute exists must notify the other party in writing of the nature of the dispute, providing detailed particulars of the dispute together with any documents in support.

20.3 Upon service of a notice in accordance with clause 20.2 the parties will attempt in good faith to resolve the dispute through negotiations between a director or senior executive of each of the parties with authority to settle the relevant dispute.

If the dispute is not resolved within 14 days of service of a notice under clause 20.2, or such other period as may be agreed in writing between the parties, legal proceedings may only then be commenced.

21. Data Privacy and Data Protection

21.1 ELMO's Data Privacy & Protection Policy as published on ELMO's website at www.elmosoftware.com.au/privacy applies to this Agreement.

21.2 ELMO will:

(1) notify the Customer as soon as reasonably practicable but no later than 48 hours of any unauthorised use, access, interference or loss involving any Customer Content that amounts to an eligible data breach as defined by the *Privacy Act 1998* (Cth) (a **Data Security Incident**);

- (2) keep the Customer updated about the Data Security Incident;
- (3) take all reasonable preventative actions to stop the Data Security Incident and mitigate the effect of the Data Security Incident;
- (4) co-operate reasonably with the Customer in any investigation in respect of the Data Security Incident.

22. GST

22.1 If any supply made under or in connection with the Agreement is a taxable supply, the consideration that the recipient of that taxable supply must otherwise pay or provide for that taxable supply is increased by the amount of any GST payable in respect of that taxable supply, subject to a valid tax invoice being delivered to the recipient.

22.2 Words or expressions used in this clause and Agreement which have a particular meaning in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the same meaning, unless the context otherwise requires.

23. Notices

23.1 Customer's Representative and ELMO's Representative may represent Customer and ELMO respectively, for the purposes of the Agreement.

23.2 Each of Customer's Representative and ELMO's Representative is capable of giving and receiving any notices required to be given or received for the purposes of the Agreement and doing all things necessary to be done by a party under the Agreement.

23.3 A notice, consent or other communication under the Agreement is only effective if it is in writing, signed and either left at the addressee's address or sent to the addressee by mail, or e-mail.

23.4 A notice, consent or other communication that complies with this clause is regarded as given and received:

- (1) if sent by mail, 3 working days after it is posted;
- (2) if sent by e-mail, when the sender receives confirmation on its server that the message has been transmitted.

23.5 A party's postal address and email address are those set out in an Order Form, or as last notified by the party.

24. Assignment

24.1 Neither party will assign or transfer all or any of its rights or obligations under this Agreement without the prior written consent of the other party.

25. Subcontractors

25.1 ELMO may, at its discretion, engage subcontractors to assist in the provision of services outlined in an Order Form, provided that such subcontractors are bound by confidentiality and non-disclosure obligations consistent with the terms of the General Terms. ELMO shall remain fully responsible for the performance of the subcontractors and the delivery of Services to the Customer.

26. Preparation of Document

26.1 No party will be deemed to be the author or drafter of the Agreement or any part of it. No rule of construction or interpretation will apply to construe any provision of the Agreement against a party on the basis that the provision was put forward by that party and/or operates to the benefit of that party.

27. Waivers

27.1 Failure to exercise, or any delay in exercising, any right or remedy provided under the Agreement or by law will not constitute a waiver of that (or any other) right or remedy, nor will it preclude or restrict any further exercise of that (or any other) right or remedy.

28. Costs

28.1 Except as otherwise expressly stated in the Agreement, each party will be responsible for all its own costs incurred in the negotiation of the Agreement.

29. Entire Agreement

29.1 The General Terms, together with any applicable Order Forms, Schedules and variations, contains the entire understanding between the parties, and supersedes all previous discussions, communications, negotiations, representations, warranties and agreements, in respect of its subject matter. If the General Terms are inconsistent with anything contained in an Order Form or Schedule, the Order Form then Schedule, then General Terms prevails to the extent of the inconsistency.

30. Severance

30.1 If any provision of the Agreement is determined to be illegal, invalid, void or voidable the legality or validity of the remainder of the Agreement will not be affected and will continue in full force and effect.

31. Governing law

31.1 This Agreement will be governed by and construed in accordance with the laws of New South Wales.

32. Jurisdiction

32.1 The parties submit to the exclusive jurisdiction of the Courts of New South Wales.

33. Definitions and interpretation

33.1 In this Agreement:

(1) **Agreement** means the agreement that forms between ELMO and the Customer in accordance with clause 1.1 of the General Terms and is comprised of the General Terms, an Order Form, Schedules and any variations.

(2) **Claim** means any prosecution, claim, complaint, disadvantage, writ, action, proceeding, suit, damage, demand, cause of action, arbitration, debt, dues, verdict, judgment, cost and expense or other like matter whether present, prospective or contingent, whether arising at law, in equity or under statute, and whether or not the facts, matters or circumstances giving rise to that claim, complaint, disadvantage, writ, action, proceeding, suit, damage, demand, cause of action, arbitration, debt, dues, verdict, judgment, cost or expense is known or unknown to all of the parties or any one or more of them on the date the Agreement is entered into.

(3) **Confidential Information** means in relation to either party, all information which is disclosed by one party to the other relating to any proposed or existing network, products, services, technologies, designs, personnel, concepts, methodologies, business or affairs of the disclosing party and includes both verbal and written information and may include but is not limited to, any commercial, financial or technical information and which:

(a) either party has marked as confidential or proprietary;

(b) either party, orally or in writing, has advised the other party is of a confidential nature; or

(c) due to its character or nature, a reasonable person in a like position and under like circumstances would treat as confidential, but does not include information which:

(d) is now or becomes generally available to the public other than through a breach of this Agreement;

(e) has become or becomes available to either party without an obligation of confidence;

(f) is independently developed by the recipient, its officers, employees, agents or contractors; or

(g) is required by law, a court or governmental order to be disclosed.

(4) **Configuration** means utilising the current functionality contained within the Software to select workflows, notifications, branding and data structure. It does not include customisation or development to support Customer specific requirements that fall outside of the existing functionality of the Software.

(5) **Content Library** means the published list of eLearning and video courses provided by ELMO. ELMO reserves the right to vary the courses available in the Content Library.

- (6) **Customer** means the entity identified in an Order Form.
- (7) **Customer Content** means all content, information, data, materials and Intellectual Property Rights developed and owned by Customer and made available to ELMO by Customer for hosting on the Software.
- (8) **Delivery** means the act of ELMO sending an email to Customer's nominated administrator containing the Software URL, and log-in details.
- (9) **ELMO** means ELMO Software Pty Ltd ABN 13 102 455 087 of Level 27, 580 George Street Sydney NSW 2000
- (10) **Fees** means the Setup Fee, the Licence Fee, the Renewal Period Fee and all other amounts payable by Customer to ELMO under the Agreement as provided for in the Order Form.
- (11) **Force Majeure Event** means any circumstance not within the reasonable control of the party affected by it which results in the party not being able to observe or perform on time one of its obligations pursuant to this Agreement, other than payment of the License Fee, and includes an act of God, an industrial dispute, war declared or undeclared, civil disturbance, act or omission of government or other competent authority, fire, lightning, explosion or flood.
- (12) **General Terms** means these Software as a Service General Terms.
- (13) **HR Core** means ELMO's HR Core System.
- (14) **HR Modules** means, as the context requires, Recruitment, Onboarding, LMS (including Content Library) and PMS.
- (15) **IaaS** means Infrastructure as a Service.
- (16) **Initial License Term** means the period identified in the Order Form.
- (17) **Insolvency Event** means in respect of a party (the **Insolvent**), any one or more of the following:
- (a) the appointment to the Insolvent of an administrator, receiver and manager, liquidator, controller trustee in bankruptcy, controlling trustee or any other external administrator of an equivalent kind;
 - (b) where the Insolvent commits an act of bankruptcy as defined in section 40 of the *Bankruptcy Act 1966*, or where an application to a court or an order for the winding up of the Insolvent is made, or where anything analogous or having a substantially similar effect to any of the preceding events happens under the law of any applicable jurisdiction.
- (18) **Intellectual Property Rights** means all intellectual and industrial property rights subsisting (in any part of the world) in any media now in existence or developed in the future including rights in the nature of any patent, trade mark or service mark, copyright including future copyright, design, logo, database right, business name,

trade name, brand name, commercial name, circuit layout, trade secret or confidential information (including in the case of the parties, their Confidential Information), inventions, discoveries, processes, methods, know-how, computer software, scientific, technical and product information and any other similar or analogous rights, whether or not registered or registrable.

(19) **License Fee** means the total amount payable in respect of the Initial License Term as set out in the Order Form **and** for the avoidance of doubt excludes the Setup Fee.

(20) **License Term** means the Initial License Term and any **Renewal** Period.

(21) **LMS** means ELMO's Learning Management System.

(22) **Loss** means any losses, damages, costs, **expenses**, Claims or liabilities (including to a third party) of any kind.

(23) **Onboarding** means ELMO's Onboarding System.

(24) **Order Form** means a written and signed ordering document in the prescribed form that specifies the Services to be provided thereunder that is entered into between the Customer and ELMO and includes any Schedules or annexures thereto.

(25) **Payroll** means ELMO's Payroll System.

(26) **Personnel** means the employees, agents or contractors of a party.

(27) **PMS** means ELMO's Performance Management System.

(28) **Recruitment** means ELMO's Recruitment System.

(29) **Remuneration** means ELMO's Remuneration System.

(30) **Renewal Period** means any renewal period which **arises** in accordance with the Order Form.

(31) **Renewal Period Fee** means the annual fee payable by Customer for the Renewal Period calculated each year as follows:

The amount of the License Fee paid by Customer in the preceding year plus an additional 5%.

(32) **Representative** means the person appointed by each party to act on its behalf pursuant to clause *Representatives*, and who are, as at the date the Order Form, listed in the Order Form.

(33) **Rewards and Recognition** means ELMO's Rewards and Recognition System.

(34) **Rostering/Time & Attendance** means ELMO's Rostering/Time & Attendance System.

(35) **Scope of Work** means the scope of work attached at Schedule 1 of an Order Form.

(36) **Services** means the services described in an Order Form and includes the Software.

(37) **Setup Fee** means the setup fees identified in the Order Form.

(38) **Software** means the Software as a Service modules to be provided by ELMO as part of the Services.

(39) **Software as a Service** means the software licensing and delivery model in which ELMO centrally hosts pre-built software which is then accessed by the Customer via the internet using a web browser. The pre-built software provides specific Configuration options.

(40) **Survey** means ELMO's Survey System.

(41) **User** means an individual who is authorised by Customer to use the Services on the Customer's behalf to whom Customer (or ELMO at Customer's request) has supplied a user identification and password.

(42) **User License** means an active user within the Software.

33.2 In the interpretation of this Agreement:

(1) headings, footnotes or sidenotes in this Agreement are included for ease of reference only and are not to be used in construing the provisions of any clause;

(2) reference to the plural includes the singular and vice versa, reference to any gender will include all other genders and reference to a person will include firms and corporations;

(3) where a party is a natural person, reference to that party will include that party's executors administrators successors and assigns of every description and where a party is a firm or corporation, reference to it will include its successors and assigns of every description;

(4) each of the terms conditions and provisions of this Agreement will be construed as a separate and independent provision;

(5) any obligation on the part of 2 or more persons will bind each of them, and each of their successors and assigns of every description, jointly and severally;

(6) any reference to 'including' will not limit any preceding words; and

(7) a reference to "dollars" or "\$" is to the lawful currency of Australia.



ELMO Software acknowledges Traditional Owners of Country throughout Australia and recognises their continuing connection to lands, waters and communities. We pay our respect to Aboriginal and Torres Strait Islander cultures; and to Elders past and present.

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