# **NDS Learn & Develop WORKFORCE ESSENTIALS Terms of Use**

Please read these terms and conditions (**Terms**) very carefully. They form a binding agreement

between you and National Disability Services Limited (ACN 008 445 485) in respect of your use of the Workforce Essentials solution (**Services**). By subscribing and receiving or otherwise using the Services, you:

 Represent to us that you have authority to accept the Terms either on your own behalf or on behalf of your organisation;

 Represent to us that you have read and understand all of the Terms, as well as any other documents the Terms refer to (including but not limited to our privacy policy);

 Must comply with all of the Terms for the duration of your subscription to the Service, as well as any Terms that continue to operate after the contract term of your subscription has ended.

## **1. Definitions**

(a) **Authorised User** means the persons employed by you or contracted by you to perform service.

(b) **Confidential Information** means information disclosed to or known by you as a consequence of or through your relationship with us not generally known in the industry in which we are or may become engaged and our financial, technological (including designs, technical and other specifications or standards), strategic, market or business information, including information related to research and development, budgets, purchasing, accounting, engineering, manufacturing, marketing,

merchandising and selling, prices, margins, rebates, costs, inputs, concepts not reduced to writing, processes not reduced to writing, methods not reduced to writing, customer and supplier lists, source and object codes and details and technology developed by or on behalf of us.

(c) **Contract Term** means the term of your subscription to the Services.

(d) **Intellectual Property** means designs, copyright, trade marks, patents, trade and business names, inventions, techniques, discoveries and improvements, concepts, adaptations, computer programs, code, processes and know how (whether registered or unregistered) and includes names, brands, marks, logos, indicia, software, drawings, trade secrets, technical data, formulae and data bases and a reference to **Intellectual Property Rights** or rights in Intellectual Property means and includes all right, title, interest and goodwill in Intellectual Property including moral rights and related rights.

(e) **Marks** means any trade mark, registered or unregistered, held (as a licensee or otherwise) or owned by us in Australia or elsewhere in relation to the Services.

(f) **Personal Information** has the meaning set out in the *Privacy Act 1988* (Cth).

(g) **Services** means the proprietary software and suite of learning materials known as

‘Workforce Essentials’ developed and made available by us, including any upgrades or modifications made by us from time to time.

(h) **Proprietary Rights** means all right, title, interest and goodwill including our Intellectual

Property Rights in and with respect to the Services.

(i) **Subscription Fee** means the annual fees applicable to your use of the Services for the duration of the Contract Term as detailed in Annexure A.

## **2. Licence to use the Services**

2.1 We grant you a revocable, non-exclusive, non-transferrable licence to use the Services in accordance with these Terms.

2.2This licence is personal to you or your organisation. You are not permitted to grant any other person access to the Services, or grant a further licence in respect of it, other than in accordance with these Terms.

## **3. Authorised use**

3.1 Subject to clause 4.2, you, and any Authorised User, may use the Services in accordance with these Terms.

3.2 You must not make the Services available in excess of the permitted number of users of your selected Licence Tier as expressly agreed between us and you.

3.3 The Services are programmed to track the number of deployed copies of the Services. You: (a) consent to us doing this; and

(b) must not hinder, impede, alter, prevent, or otherwise distort, the operation of such

tracking and reporting functions.

## **4. Subscription Fees**

4.1 The amount of the Subscription Fee payable depends on the Licence Tier and Contract Term selected by you.

4.2 We shall issue a Tax Invoice to you prior to provision of the Services. Payment is due 7 days from the date of the Invoice. Payment of the invoice constitutes acceptance of the Terms and Conditions.

4.3 We may make the Services available for a limited period (a “Contract Term”). You must pay the Subscription Fee prior to the Services being made available and on the first day of each subsequent annual Subscription Period, or as such other times as we may reasonably require.

4.4 We may change the Subscription Fee at any time. If we do so we will publish the revised Subscription Fee on our website and inform you in writing. The revised Subscription Fee will take effect at the start of the next subscription period following the date of the publication.

4.5 You may cancel your subscription at any time before the end of the subscription period. You will continue to receive the Service until the end of the subscription period in which you cancelled and the cancellation will take effect from the end of the current period.

4.6 If you are in default in relation to payment of the Subscription Fee we may withdraw access without further notice to you.

## **5. Term**

5.1 The term of this agreement will commence on the date of your acceptance of these Terms, or payment of the Subscription Fees, whichever is earlier, and shall continue until the end of any Contract Term or this Agreement is terminated or expired, whichever is the earlier.

5.2 If we grant you this licence for a fixed period of time, the licence granted by these Terms will expire whenever that period of time ends.

## **6. Termination**

6.1 We may immediately terminate these Terms if:

(a) you fail or refuse to make, or we do not receive in full and in cleared funds, any payment of the Subscription Fee or any part of the Subscription Fee; or

(b) in our reasonable opinion, you have caused damage (whether permanent or not) to the

Services, including but not limited to the corruption of data, files or code;

(c) you breach any term or condition of these Terms and fails to remedy such breach to our satisfaction within seven (7) days of notification from us.

6.2 On termination of these Terms:

(a) You or any Authorised Users must not access or attempt to access the Services;

(b) we may immediately deny you access to the Services at our sole discretion and we will not be liable for any damage or loss suffered by you as a result; and

(c) to the extent permitted by law, you will not be entitled to a refund of any Subscription Fees paid by you, unless the termination arose as a direct result of a breach of these Terms by us, in which case the balance of any prepaid Subscription Fees may be repaid to you.

Any termination of the licence granted under these Terms shall not affect any accrued rights or liabilities of either party, nor shall it affect any provision of these Terms, which is expressly or by implication intended to continue in force after such termination.

## **7. Ownership and use of Our Intellectual Property**

7.1 We licence (not sell) the Services to you. The Proprietary Rights are and will remain exclusively our property, or the property of third parties from whom we have a license. You must use all reasonable endeavours to safeguard the Proprietary Rights.

7.2 You acknowledge that we are and remain the owner (or authorised user or licensee) of all Intellectual Property in and with respect to the Services, including all copies of the material contained in the Services and all modifications, enhancements, improvements, derivative works, content additions or changes and upgrades to the Services, as well as the data, information and Personal Information (to the extent permitted by law) created by you or generated through your use of the Services.

7.3 Except with our prior written consent you must not, and must not allow or cause any other person (except as otherwise expressly authorised under these Terms) to:

make any copy, adaptation, translation, arrangement or version of the Services;

(b) reverse compile, reverse engineer, decompile or disassemble the Services other than as permitted by applicable law and then only to the extent that we are not permitted by that applicable law to limit or exclude the right of you to do so;

(c) conceal, alter or cover any product identification or notices of any proprietary or copyright restrictions from the Services;

(d) deal with the Services, in a manner which is not permitted under these Terms;

(e) download, print, copy, burn, capture, re-transmit, stream or re-stream, record or reproduce the Services, by any means;

(f) allow unauthorised access to the Services;

(g) alter, change, remove, obscure or add to any notices or other indications (including copyright notices) as to the ownership of or any other labels, symbols, logos, legends or Marks affixed to or embodied in the Services;

(h) frame, deep link or establish unauthorised links to any part of the Services.

## **7.4 You agree that:**

(a) you may only use our Intellectual Property if agreed, in writing, by us; (b) the use of any of our Intellectual Property must at all times include an

acknowledgment of our ownership of all Intellectual Property Rights therein;

(c) you may not use or allow the use of any of our Intellectual Property in connection with any other program, services or business or as part of the corporate or any trade name;

(d) you will not register or otherwise carry on business as a company, partnership, joint venture or such other business or organisation, directly or indirectly, using any name, mark or logo identical with or similar to any of our Intellectual Property or Marks;

(e) you must not nor attempt to vary or cancel any registration of any of our Intellectual

Property or Marks;

(f) you will not represent or otherwise imply that you are the owner or creator of the Services or that you have the proprietary rights to the Services or that you are anything other than a non-exclusive licensee of ours. You shall refer all enquiries from any person to use in relation to the potential commercial use of the Services to us;

(g) you must not apply nor attempt to register any Intellectual Property which is identical with or similar to any of our Intellectual Property; and

(h) we have an absolute right of approval overall production and use by you of any of our

Intellectual Property.

7.5 If requested by us, you will promptly return to us or permanently delete or destroy (at our election) all Confidential Information and any items consisting of or bearing any of our Intellectual Property.

7.6 If this agreement comes to an end, you must stop all use of the Services, Marks, Confidential

Information and our other Intellectual Property.

## **8. Combined Services**

In any instance where you combine the Services with programs or data of others, you shall indemnify, defend, and hold us harmless from any damages, losses, costs or expenses (including legal fees on a solicitor and own Authorised User basis) incurred by us, if such combination infringes any patent, trade mark, copyright, or trade secrets of others. The indemnity under this clause is a continuing, irrevocable and unconditional indemnity.

## **9. Privacy**

9.1 We are committed to protecting your privacy and the privacy of any Personal Information provided to us.

9.2 You acknowledge that through your use of the Services, we may obtain access to Personal

Information that may relate to you.

9.3 This Personal information shall be used and disclosed by us for the purpose of providing, improving or developing the Services only and providing you with the support services that are required from you. By you agreeing to these terms you consent to this use and disclosure. Your Personal Information will not be used, or disclosed for any other commercial reason.

9.4 You warrant to us that you will comply with the Australian Privacy Principles and the *Privacy Act 1988* in the collection, use and protection of any Personal Information as it pertains to you or the Authorised Users.

## **10. Confidential Information**

You may be granted access to our Confidential Information. You:

(a) acknowledge that the Confidential Information remains our property;

(a) must not disclose the Confidential Information to any third party without our express written consent or required by law.

## **11. Warranties and Limited liability**

11.1 Subject to the limitations set forth in these Terms, we warrant to you that the Services will conform in all material respects to our specifications for the Services;

11.2 The express warranty set forth in clause 11.1 constitutes the only warranty given by us in respect of the Services. We do not offer or enter into any other representation warranty, condition or other term of any kind, whether express or implied (either or by custom, course of dealing or by operation of law), with respect to the Services, and all such additional warranties, conditions or other terms are hereby excluded. We expressly excludes to the extent permitted by law all warranties, conditions or other terms of satisfactory quality or fitness for a particular purpose.

11.3 We shall have no obligation under the warranty contained in clause 11.1:

(a) in the event you or any other person or entity incorporates, attaches or otherwise engages any attachment, feature, program, or device to the Services; or

(b) if any non-conformance is caused by: misuse; alteration, translation, modification, or enhancement of the Services by you or any other person or entity; computer malware; your failure to provide a suitable installation environment; your failure to provide

adequate electrical power; your failure to ensure adequate firewalls or protections; your use of supplies or materials not meeting specifications or not of sufficient size or capacity to utilise or properly utilise the Services; or use of the Services for other than the specific purpose for which the Services are designed.

11.4 Except as otherwise set out in these Terms, our sole obligation under the warranty in clause

11.1 shall be to provide within a reasonable time the response necessary to correct any non- conformance of the Services to our specifications for the Services.

11.5 We are not responsible for any loss or damage you may suffer (including the corruption and/or loss of data) as a result of any matter over which we have no control including but limited to:

(a) issues with your internet connection (however caused); (b) network errors;

(c) incompatible hardware

(d) your misuse of the Services;

(e) you or your Authorised Users not acting in accordance with instructions or directions provided by us (or on our behalf) to you;

(f) limits on available bandwidth; (g) infrastructure issues.

11.6 We will have no liability or responsibility to you or any Authorised User for any loss, damage or

injury whether arising in contract, tort, equity or otherwise which does not flow directly from a breach of these Terms, including:

(h) loss or profits or sales; (i) loss of bargain;

(j) loss of opportunity;

(k) loss of use of any application or any other computer equipment, application or data; (l) loss of time on the part of management or other staff;

(m) any indirect or consequential loss.

Our liability for any loss, damage or injury incurred or suffered by you for which we are liable under these Terms or at law shall not exceed in each instance a sum equal to the amount received from you preceding the date on which the event giving rise to the loss, damage or injury arose.

11.7 You agree to indemnify and hold us harmless against any and all costs, losses, claims, damages and liabilities whatsoever resulting directly or indirectly from any breach of these Terms by you, or any of your employees, agents or representatives. Such indemnification shall include the payment of all legal fees and other costs on a solicitor and own Authorised User basis incurred by us, including the defending of any claims or proceedings. The indemnity under this clause is a continuing, irrevocable and unconditional indemnity.

## **12. Insurance**

12.1 During the period of the Agreement, you or your employer must, at its expense hold and keep current all valid, enforceable, necessary and adequate insurances, with a financially sound and reputable insurer, to cover your business activities, and any insurable event that may arise out of your use to the Services.

## **13. Force Majeure**

13.1 We will not be liable for any delay or failure to perform our obligations if such failure or delay is due to any unforeseen circumstance or a circumstance beyond our reasonable control.

13.2 The circumstances referred to in Clause 13.1 include but are not limited to acts of nature, acts of government, labour disputes and delays in delivery.

13.3 We will notify you as soon as practicable of any anticipated delay due to force majeure. The performance of our obligations under these Terms will be suspended for the period of the delay due to force majeure.

## **14. Miscellaneous**

14.1 These Terms are governed by the laws of the State of New South Wales. In the event of a dispute the parties hereby submit to the non-exclusive jurisdiction of the courts of New South Wales or Federal courts of Australia, as applicable.

14.2 These Terms constitute the entire agreement between the parties with respect to the subject matter set out in these Terms and supersedes all prior and contemporaneous communications. It shall not be modified except by a written agreement signed on behalf of you and us by respective duly authorised representatives.

14.3 These Terms shall not be assigned or transferred by you without our prior written approval, which approval shall not be unreasonably withheld. We can assign these Terms and its rights and obligations under these Terms to any third party at any time without your approval.

14.4 You shall not be entitled to subcontract any of your obligations under these Terms without our prior written consent.

14.5 If any provision of these Terms shall be determined to be invalid, such invalidity shall not affect the validity of the remainder of these Terms.

14.6 The parties will comply with all obligations in relation to GST.

14.7 No waiver by either party of any default or breach by the other party of any of the provisions of these Terms shall constitute a waiver of any prior or subsequent default or breach of these Terms.

14.8 Subject to the limitations specified in these Terms, these Terms will inure to the benefit of and be binding upon the parties, their successors and permitted assigns.

These terms constitute the entire agreement between us and you for your use of the Services.