TERMS AND CONDITIONS – ELSA PROGRAM

Between

University of Canberra (ABN 81 633 873 422) of 11 Kirinari Street, Bruce ACT 2617

and

the Customer as identified in the Order Form.

BACKGROUND

A. In consideration of payment by the Customer of the Fees, the University will provide the Customer with access to the ELSA Program on and subject to the terms of this Agreement.

AGREED TERMS

1 DEFINITIONS AND INTERPRETATION

1.1. Definitions

In this Agreement, unless the contrary intention appears:

(a) **Agreement** means the Order Form and the Terms.

(b) **Business Days** means any day other than Saturdays, Sundays, public holidays or bank holidays in the Australian Capital Territory.

(c) **Commencement Date** means the date specified in the Order Form.

(d) **Confidential Information** means all data and information exchanged between the parties for the purposes of the Agreement before, on, or after the date of the Agreement relating to the financials, operations, business, research, or technology of the disclosing party.

(e) **Customer** means the party identified in the Order Form.

(f) **Customer Data** means all data (whether or not it includes Personal Information) stored by the Customer or its Users on the ELSA Apps.

(g) **Documentation** means all user manual, training material, frequently asked questions, and similar materials relating to the ELSA Program, as provided by the University to the Customer in electronic or other form from time to time.

(h) **ELSA Apps** means the digital mobile apps owned by the University known as ELSA Patterns and Relationships, ELSA Location and Arrangement, ELSA Representations, ELSA Investigations, ELSA Educator and ELSA Families, which are accessible from the App Store (iPad) or Google Play (Android tablet).

(i) **ELSA Kits** means the tangible resources developed and provided by the University from time to time use in the ELSA Program.

(j) **ELSA Program** means the detailed, play-based digital learning program and resources for children in preschool and the foundation year of school, to explore science, technology, engineering and mathematics (STEM), which includes the ELSA Apps, ELSA Kits and Professional Learning.

(k) **Expiry Date** means the date specified in the Order Form.

(l) **Fees** means the price for the provision of the ELSA Program pursuant to this Agreement, as specified in the Order Form.

(m) **Order Form** means the order form attached to the Terms.

(n) **Permitted Purpose** means Implementing and running the ELSA Program in the Customer's center(s) or school(s)

(o) **Professional Learning** means the professional learning course for educators accessing and implementing the ELSA Program.

(p) **Subscription Limit** means the number of Users who may access the ELSA Apps pursuant to this Agreement as set out in the Order Form.

(q) **Term** means the period from the Commencement Date until the Expiry Date.

(r) **Terms** means these terms and conditions.

(s) **University** means University of Canberra ABN 81 633 873 422.

(t) **Users** means each person that the Customer has permitted to access and use the ELSA Program, including the ELSA Apps in accordance with the Agreement and includes educators at early learning centers or schools affiliated with the Customer, students or children who attend or are enrolled at the early learning center or school operated by the Customer.

1.2. Interpretation

In this Agreement, except where the contrary intention is expressed:

(a) the singular includes the plural and vice versa, and a gender includes other genders;

(b) another grammatical form of a defined word or expression has a corresponding meaning;

(c) a reference to a clause, paragraph or schedule is to a clause or paragraph of, or schedule to, this Agreement;

(d) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;

(e) a reference to A$, $A, dollar or $ is to Australian currency;

(f) a reference to time is to Canberra, Australia time;

(g) a reference to a party is to a party to this Agreement, and a reference to a party to a document includes the party's executors, administrators, successors and permitted assignees and substitutes;

(h) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;

(i) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;

(j) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;

(k) any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) binds them jointly or severally;

(l) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this Agreement or any part of it;

(m) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed, or the event must occur on or by the next Business Day; and

(n) headings are for ease of reference only and do not affect interpretation.

2   DURATION OF AGREEMENT

2.1 **Term**

This Agreement begins on the Commencement Date and continues until the Expiry Date (**Term**) unless otherwise terminated in accordance with this Agreement.

2.2 **Renewal**

The Term may be extended by successive periods of 12 months (each a **Renewal Term**), on the terms and conditions then in effect, by the Customer giving the University at least 30 days' written notice before the end of the Term or the then current Renewal Term.

3   ELSA PROGRAM

3.1 **Provision of ELSA Program**

(a) With effect from the Commencement Date, the University will provide the ELSA Program to the Customer for the Term in accordance with this Agreement. In providing the ELSA Program to the Customer, the University will:

(i) make available and provide the Professional Learning to the Customer's educators at the times and in the manner as agreed between the University and the Customer, or as specifically set out in the Order Form;

(ii) supply the Customer with the number of ELSA Kits as specified in the Order Form;

(iii) grant to the Customer and its Users a non-exclusive, revocable, non-transferable licence to use the ELSA Apps on the terms and conditions of this Agreement.

3.2 **ELSA Kits**

(a) Subject to clause 5 of these Terms, title and risk in the ELSA Kits will pass to the Customer upon receipt of the ELSA Kits by the Customer.

(b) If the Customer requires additional or replacement ELSA Kits, the Customer may request these from the University and the University will supply the additional or replacement ELSA Kits for an additional fee as agreed in writing by the parties.

3.3 **ELSA Apps**

(a) The Customer acknowledges and agrees that the ELSA Apps are not compatible with Chromebooks or laptop devices. The ELSA Apps are designed for tablet devices only, however the ELSA Educator and ELSA Families app are also compatible with tablets and smartphones.

(b) The Customer is responsible for maintaining control over which Users can access the ELSA Program within the Subscription Limit.

3.4 **Use of the ELSA Program**

(a) The Customer must only access and use the ELSA Program:

(i) in accordance with this Agreement.

(ii) for the Permitted Purpose; and

(iii) in accordance with any reasonable requirements notified by the University from time to time.

(b) The Customer must not use the ELSA Apps in excess of the Subscription Limit.

(c) Except as expressly permitted under this Agreement, the Customer must not, and must not allow any other person to:

(i) permit or allow any other person other than its Users access (directly or indirectly) to the ELSA Program or Documentation;

(ii) sub-licence, disclose, resell, publish, transmit or otherwise make available to any third party other than its Users any part of the ELSA Program or Documentation;

(iii) modify, copy or create derivative works based on the ELSA Program or reverse engineer the ELSA Apps;

(iv) send or store unlawful material (including malicious code) by means of the ELSA Apps;

(v) attempt to gain unauthorised access to, or disrupt or bypass the security, integrity or performance of, the ELSA Apps or any data contained in it;

(vi) use the ELSA Apps in a manner reasonably likely to adversely affect other users of the ELSA Apps; or

(vii) use the ELSA Program for the purpose of creating a competitive product, program or service or copying its features, information or the user interface of the ELSA Apps.

3.5 **Customer Responsibilities**

The Customer must:

(a) provide its own internal facilities (including tablets, software, telecommunications facilities and internet connectivity) necessary for utilizing the ELSA Program, in particular the ELSA Apps;

(b) do all things necessary so that the University is able to provide the ELSA Program in accordance with this Agreement;

(c) ensure that at least one educator per center or school operated or owned by the Customer has successfully completed the Professional Learning within six (6) months of the Commencement Date;

(d) comply with all laws in connection with the access and use of the ELSA Program and this Agreement;

(e) comply with the University's reasonable directions relating to the ELSA Program; and

(f) maintain the confidentiality of all login credentials allocated to the Customer and its Users and not disclose them to any third party.

3.6 **Users**

The Customer is solely responsible for any access to or use of the ELSA Program by its Users and must ensure that its Users comply with this Agreement. This includes Users that are affiliates, or students attending or enrolled with affiliates of the Customer (**External Users**).

4 FEES

4.1 Payment of Fees

The Customer must pay the University all Fees within 30 days of the date of the invoice provided by the University.

5 INTELLECTUAL PROPERTY

5.1 Ownership

The ELSA Program, Professional Learning, ELSA Kits and Documentation are protected by intellectual property laws. The University reserves all rights (including Intellectual Property Rights) in relation to the ELSA Program, Professional Learning, ELSA Kits and Documentation. The Customer has no proprietary or other interest in the ELSA Program and Documentation and, subject to clause 5.2, transfers any right, title or interest in the ELSA Program or Documentation to the Customer.

5.2 Grant of licence

The University grants to the Customer a non-exclusive, non-transferable and limited licence for the Customer and its Users to access and use the ELSA Program and the Documentation during the Term in accordance with this Agreement, so that the Customer may receive the full benefit of the ELSA Program.

5.3 Ownership of modifications and improvements

(a) The University owns all improvements, adaptations and modifications made to the ELSA Program and Documentation and all related Intellectual Property Rights, including any suggestions, enhancement requests, recommendations or other feedback provided by the Customer or Users. The Customer assigns any and all rights the Customer may have in those improvements and modifications to the University and agrees to execute all additional documents requested by the University to give effect to such assignment.

(b) To the extent that the University (or its licensees or assignees) develops any updates, new versions or new releases of the ELSA Program, they will be owned exclusively by the University.

6 CUSTOMER DATA

6.1 Ownership of Customer Data

The Customer will own and retain all right, title and interest in and to the Customer Data.

6.2 Responsibility for Customer Data

The Customer is responsible for the content of all Customer Data and for complying with all applicable laws in respect of the Customer Data.

6.3 Licence to use Customer Data

The Customer grants the University a non-exclusive licence to copy, reproduce, store, adapt, edit and otherwise use the Customer Data:

(a) to the extent reasonably required for the performance of the University's obligations under this Agreement; and

(b) for internal research, education and business analytics purposes.

6.4 Security of Customer Data

The University will implement reasonable security measures to protect any Customer Data that is hosted on the ELSA Apps from unauthorised access and disclosure.

6.5 Access to Customer Data

Customers can access class-level summary data on request by emailing the team at team@elsa.edu.au. Requests will take seven (14) days turnaround. On cancellation or non-renewal of the ELSA program Customers may also access class-level data upon request.

7 CONFIDENTIAL INFORMATION

7.1 Each party (**Recipient**) must keep any Confidential Information disclosed to it confidential and must not deal with it in any way that might prejudice its confidentiality.

7.2 Clause 7.1 does not extend to disclosures:

(a) required by law; or

(b)   to a Recipient's officers or employees who have a need to know for the purposes of the Agreement (but only to the extent that each has a need to know) and before disclosure, have been directed by the Recipient to keep that Confidential Information confidential.

8   PRIVACY

8.1   Compliance with Privacy Laws

(a)   For the purpose of this clause 9, '**Personal Information**' has the same meaning as in the Privacy Laws.

(b)   To the extent that any Customer Data comprises Personal Information, the University will comply with the applicable requirements of the *Information Privacy Act 2014* (ACT), including without limitation the Territory Privacy Principles, with respect to such Personal Information (**Privacy Laws**).

(c)   The University maintains a privacy policy in respect of the ELSA Program, which sets out the parties' obligations in respect of Personal Information and is available here - https://elsa.edu.au/privacy/.

9   WARRANTIES

9.1   Mutual warranty

Each party warrants that:

(a)   it has the right to enter into this Agreement; and

(b)   it will comply with all applicable laws.

9.2   University warranty

The University warrants that:

(a)   the ELSA Apps will materially conform with any specifications, features or functions claimed in the Documentation for the ELSA Program; and

(b)   any services to be provided by the University pursuant to this Agreement will be performed with due skill and care.

9.3   Exclusion of warranties

(a)   While the University has taken due care in developing the Hosted Service, to the extent permitted by law, the University does not warrant and excludes all representations and warranties that:

(i)   the ELSA Apps are error-free or have no defects;

(ii)   access to the ELSA Apps will be uninterrupted or error free;

(iii)   the ELSA Apps are free from malicious code;

(iv)   the ELSA Apps are compatible with all operating systems, hardware or browsers; or

(v)   that the ELSA Program will meet the Customer's or its User's requirements.

(b)   To the extent permitted by law, all implied conditions, warranties and rights, together with any implied by custom or other circumstances, are excluded.

10   INDEMNITY AND INSURANCE

10.1 IP Indemnity

(a)   The University indemnifies the Customer against all losses suffered or incurred by the Customer arising directly out of, or in connection with, any claim, action or proceedings against the Customer by a third party in connection with the Customer's use of the ELSA Program and the Documentation, alleging that the ELSA Program or the Documentation infringes the Intellectual Property Rights of any third party (**Infringement Claim**).

(b)   The University will have no obligation under clause 8.1 to the extent that the Infringement Claim arises from:

(i)   the Customer's non-compliance with the Documentation or any instruction, directions or specifications issued by the University in relation to the ELSA Program from time to time;

(ii)   the combination use of the ELSA Program with any system or information not provided by the University, to the extent that such combination materially contributed to the infringement;

(iii)   the failure of the Customer to use an update of the ELSA Apps where infringement would have been avoided; or

(iv)   the use of the ELSA Program in a way contrary to this Agreement or the intended use of the ELSA Program.

(c)   If an Infringement Claim is made, then the University may elect at its sole discretion to do one or more of the following:

(i)   modify, or arrange for the modification of, the ELSA Program (but without adversely affecting its functionality) to render its use non-infringing;

(ii)   at no cost to the Customer, render the relevant activity non-infringing by procuring the right to exercise the relevant Intellectual Property Rights of the relevant person; or

(iii) terminate this Agreement and refund the Customer a pro-rata amount of any paid Fees in respect of the balance of the Term and clause 12.3 will apply.

10.2 Insurance

The University must have and maintain insurance cover sufficient to cover any loss or costs that may be incurred and for which the University is liable in connection with the provision of the ELSA Program, including, as applicable, product liability insurance, public liability, and professional indemnity insurance.

11   LIMITATION OF LIABILITY

11.1 Exclusion of consequential loss

Despite any other provision of this Agreement and to the maximum extent permitted by applicable law, neither party is liable to the other under contract, tort or otherwise in any circumstances for any indirect, economic, special or consequential loss or damage, or in any event for any loss of revenue, loss of production, loss of use, loss of profit, loss of anticipated savings or loss of data.

11.2 Liability cap

Liability is limited to the cost of the program.

12   TERMINATION

12.1 Termination for cause

Either party may terminate this Agreement immediately by notice in writing if the other party breaches a provision of the Agreement and fails to remedy that breach within 10 Business Days after receiving notice to do so, or where the breach is not capable of remedy.

12.2 Termination for convenience

The Customer may, in its absolute discretion, terminate this Agreement without cause at any time by giving one (1) months' notice to the University.

12.3 Effect of termination

Upon termination of this Agreement for any reason:

(a)   unless expressly set out otherwise, the University is not required to provide the Customer any refund of any paid Fees;

(b)   all rights and licences granted under this Agreement terminate on and from the date the terminate takes effect, and the Customer must immediately cease to use the ELSA Program, specifically the ELSA Apps;

13   MISCELLANEOUS

13.1 Survival

Clauses 1, 5, 6, 7, 8, 9, 10, 11 and 13 survive termination or completion of the Agreement.

13.2 Governing law

This Agreement is governed by the laws in force in the Australian Capital Territory and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of the Australian Capital Territory.

13.3 No assignment

The Customer may not transfer, assign or sublicence its rights under the Agreement without the prior written consent of the University.

13.4 Force majeure

Neither party is liable for any failure to perform or delay in performing any obligations under this Agreement (other than an obligation to make payment) to the extent the failure to perform or delay is caused by a circumstance beyond its reasonable control, including fire, flood, war, acts of terrorism, pandemic, directions, regulations or legislation of any

government (**Force Majeure Event**). The obligations of either party is suspended to the extent to which it is affected by the relevant Force Majeure Event as long as the Force Majeure Event continues.

13.5 **Subcontracting**

The University may subcontract the performance of any part of its obligations without the Customer's consent. The University will remain responsible to the Customer for the performance of any subcontracted obligations.

13.6 **Variation**

This Agreement can only be amended by mutual written agreement.

13.7 **Entire agreement**

This Agreement is the entire agreement between the parties.

13.8 **Severability**

If any provision of this Agreement is unenforceable, illegal or void or makes this Agreement or any part of it unenforceable, illegal or void, then that provision is severed, and the rest of this Agreement remains in force.

13.9 **Compliance with University policies**

The Customer must observe the University's by-laws, rules, and policies, as notified to the Customer.

13.10 **Inconsistency**

The Order Form prevails to the extent of any inconsistency with the Terms.

14. NOVATING TO COMPANY

a) The ELSA program is currently being offered through the University of Canberra and the University will be issuing tax invoices to you. However, it is anticipated that a separate company will be established which will assume the future responsibility of offering the ELSA program.

b) By purchasing ELSA you agree to novate this agreement to the established company once it is operational?

c) Please note that any change in the entity offering the ELSA program will not result in any change to the people who are now supporting you with the ELSA program and these people will remain based at the University.