



**EARLYWORKS**

# SERVICE ACCESS AGREEMENT

## **BETWEEN**

**EarlyWorks Education Pty Ltd** (ABN 86 603 607 281) ("**EarlyWorks**", "**we**", "**us**" or "**our**")

And

**The Licensee** ("**Licensee**", "**you**" or "**your**")

(each a "**Party**", collectively the "**Parties**")

## **BACKGROUND**

- A. EarlyWorks is the developer of a unique software system for use in early childhood education organisations which is delivered via a 'software-as-a-service' ("**SaaS**") model (the "**EarlyWorks Services**" – as further defined below). EarlyWorks is the owner of copyright, trade secrets, trade marks and other Intellectual Property Rights in or related to such software and system.
- B. The EarlyWorks Services assist with the operation and management of early childhood education organisations around Australia and worldwide by providing a system which stores child educational and related information.
- C. You wish to use the EarlyWorks Services to assist with the provision of early childhood education and related services.
- D. EarlyWorks has agreed to grant you a non-exclusive license to use and access the EarlyWorks Services on the terms and conditions contained in this Agreement, which you have accepted.
- E. If you are entering into this Agreement on behalf of a company or other legal entity, you represent that you have the authority to bind such entity and its affiliates. If you do not have such authority, or if you do not agree with these terms and conditions, you must not accept this Agreement and may not use the EarlyWorks Services.
- F. You may not access the EarlyWorks Services if you are our direct competitor, except with our prior written consent. In addition, you may not access the EarlyWorks Services for purposes of monitoring their availability, performance or functionality, or for any other benchmarking or competitive purposes.

IT IS AGREED

## 1. DEFINITIONS AND INTERPRETATION

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### 1.1 Definitions

**“Acquisition Event”** means, in relation to a Party, the Party enters into, or resolves to enter into, a share transfer agreement in which more than fifty (50%) of the total number of voting shares of a Party is sold, assigned or otherwise transferred to a third party; or the effective management or control of that Party is transferred to a third party;

**“Affiliate”** means any entity which directly or indirectly controls, is controlled by, or is under common control with the subject entity. “Control” for the purposes of this definition, mean direct or indirect ownership or control of more than 50% of the voting interests of the subject entity;

**“Agreement”** means this agreement including any annexures or schedules to it;

**“Agreed Format”** means Microsoft Word, PDF or other format file as may be agreed by EarlyWorks in its discretion.

**“Australian Consumer Law”** means Schedule 2 of the *Competition and Consumer Act 2010* (Cth);

**“Australian Privacy Principles”** means the privacy principles referred to in Schedule 1 of the *Privacy Act 1988* (Cth);

**“Business Day”** means a day that is not a Saturday, a Sunday or a public holiday or any other date which has been declared by the government of Western Australia as a public holiday in Western Australia;

**“Child”** or **“Children”** means any child, children or other person in the care of the Licensee;

**“Commencement Date”** means the date the EarlyWorks Services are made available for your use;

**“Confidential Information”** means any confidential or commercial sensitive or valuable information belonging to a disclosing party (**“Discloser”**), which the other Party (**“Recipient”**) becomes aware of before or after the day of this Agreement, including but not limited to:

- (a) Source Code Materials;
- (b) All information treated by the Discloser as confidential;
- (c) Personal or private information;
- (d) Trade secrets, confidential know how, operations manuals, price lists, customer lists, client information, operation methods, advertising, and technical information; and
- (e) Any information or other document on which the word “confidential” has been marked except information:
  - (i) The Recipient creates independently of the Discloser; or

- (ii) That is public knowledge (otherwise than as a result of a disclosure in breach of this Agreement); or
- (iii) The Recipient receives from a third party without the third party imposing any obligation of confidentiality on the Recipient, and the Recipient reasonably believes in good faith that the third party has the authority to disclose such information;

**“Customer”** means the organisation using the EarlyWorks Services as described below;

**“Data”** means all electronic data, records or information (including data, records or information of children) submitted by you to the EarlyWorks Services;

**“Discloser”** means the Party disclosing Confidential Information to the Recipient;

**“Early Childhood Education Organisation”** means any child care centre, school or other organisation providing early childhood education services.

**“EarlyWorks”, “we”, “us” or “our”** means EarlyWorks Education Pty Ltd;

**“EarlyWorks Services”** means the products and services made available by us via your customer login and/or other web pages designated by us, and any other software application developed by us and modified by us from time to time, including any associated offline or on-premises components, application or executables (if applicable);

**“Educator”** means any staff member at the Licensee’s organisation whose role includes the education and supervision of Children;

**“Exploit”** means, in relation to Intellectual Property Rights, the exclusive rights to do any or all of the following acts: (i) copy, (ii) communicate to the public, (iii) publicly perform, (iv) sell, hire or otherwise distribute to the public, (v) make an adaptation or a derivative of the works or subject matter other than works in which copyright subsist; the right to the exclusive use of a trade mark in the course of trade or commerce and to prevent the use of a deceptively similar or substantially identical mark by third parties; the right to manufacture, import, sell, hire, or dispose of products comprising of or resulting from a registered design or patent; or the right to keep confidential information confidential;

**“Extraction”** means the extraction of your Data from the EarlyWorks Services into an Agreed Format and saved onto a storage device accessible to a personal computer in electronic format;

**“Extraction Fee”** means the fee prescribed by EarlyWorks and payable by the Licensee to extract any Licensee Data from the EarlyWorks Services at the time of termination of this Agreement as stipulated in Item 3 of Schedule 1;

**“Family/ies”** means parents, extended family members, carers or guardians of a Child or of Children who are under the care of the Licensee;

**“Force Majeure Event”** means an event specified below:

- (a) any act of God, including extremes of weather or nature;

- (b) any outbreak or escalation of hostilities (whether or not war has been declared) or any other unlawful act against public order or authority;
- (c) any industrial dispute;
- (d) any governmental restraint; or
- (e) any other event which is not in the reasonable control of the Parties.

“**GST**” means any goods and service tax imposed by the GST Law;

“**GST law**” means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), as amended from time to time, any associated legislation, e.g. any legislation that imposes GST, and any regulations, to the extent they are related to any such legislation;

“**Harm**” means any loss, damage, costs (including reasonable legal costs), expense or liability;

“**Insolvency Event**” means, in relation to a Party:

- (a) a receiver, receiver and manager, trustee, administrator or other controller (as defined in the *Corporations Act 2001* (Cth)) in each State and Territory of Australia or any similar applicable legislation or similar official is appointed over any of the assets or undertaking of the other Party;
- (b) the Party suspends payment of its debts generally;
- (c) the Party is or becomes unable to pay its debts when they are due or is or becomes unable to pay its debts or is presumed to be insolvent within the meaning of the *Corporations Act 2001* (Cth);
- (d) any step is taken by a mortgagee to take possession or dispose of the whole or part of a Party’s assets, operations or business;
- (e) the Party enters into or resolves to enter into, or has taken any steps to enter into any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them;
- (f) the Party ceases to carry on business or threatens to cease to carry on business;
- (g) a resolution is passed or any steps are taken to appoint, or to pass a resolution to appoint, an administrator; or
- (h) an application or order is made for the winding up or dissolution of the other Party, or a resolution is passed or any steps are taken to wind up or dissolve the other Party, otherwise than for the purpose of an amalgamation or reconstruction that has the prior written consent of the first Party.

“**Intellectual Property**” means the Software, the Website and any other property of EarlyWorks in which Intellectual Property Rights subsist;

“**Intellectual Property Rights**” means the rights to Exploit the Intellectual Property, including any copyright pertaining to literary works (including, without limitation, in the content of our Website, the

source, object and other codes, whether or not in human readable language, comprising our Software), artistic works (including, without limitation, in any photographs, images, the Graphic User Interface, design and appearance of our Website and the Software), cinematograph films, sound recordings, musical works and any other subject matter in which copyright subsists in accordance with the *Copyright Act 1968* (Cth); any trade mark rights in the EarlyWorks Education brand and in the Software; any design rights, patent rights and any other rights known as intellectual property or sui generis rights anywhere in the world (including Australia);

“**Licence**” means a licence granted under this Agreement;

“**Malicious code**” means viruses, worms, time bombs, Trojan horses and other harmful or malicious code, files, scripts, agents or programs;

“**Moral Rights**” means the rights described as moral rights in accordance with Part IX of the *Copyright Act 1968* (Cth), including the right of attribution of authorship, the right to prevent false attribution of authorship and the right of integrity of authorship and prevent derogatory treatment;

“**Privacy Policy**” means the EarlyWorks privacy policy information (as amended from time to time) compliant with the Australian Privacy Principles and as set out on our Website and Software;

“**Recipient**” means the Party receiving Confidential Information;

“**Schedule**” means a schedule annexed to this Agreement;

“**Software**” means the software provided by EarlyWorks to the User and through which the EarlyWorks Services are provided under the terms of this Agreement;

“**Software Modifications**” are described in clause 5.7;

“**Source Code Material**” means the source code for the most current version of the EarlyWorks Services supplied by us to you, and all software, associated libraries, documents and information necessary to enable a suitably skilled person to deploy, maintain and further develop the EarlyWorks Services in good working order;

“**Subscription Fee**” means the fee for each User to subscribe to the EarlyWorks Services as described in Item 2 of the Schedule;

“**Term**” means the term of this Agreement as specified at Item 1 of the Schedule and includes any renewal thereof;

“**Users**” means individuals who are authorised by you to use the EarlyWorks Services, for whom subscriptions to EarlyWorks Services have been ordered, and who have been supplied user identifications and passwords by you (or by us at your request). Users may include, but are not limited, to your employees, consultants, contractors and agents, and third parties with which you transact business;

“**Website**” means our website located at [earlyworks.net.au](http://earlyworks.net.au) or related domain alias;

“You” or “Your” means, where the Licensee is an individual, the Licensee, or where the Licensee is a company or any other legal entity, that company or other legal entity on behalf of which you are accepting this Agreement and Affiliates of that company or entity.

1.2 In this Agreement, unless the contrary intention appears:

- (a) any term defined in the statement of the names and descriptions of the Parties has the meaning there defined;
- (b) a reference to any legislation or provision of any legislation includes any modification or re-enactment of the legislation or any legislative provision substituted for, and all legislation and statutory instruments and regulations issued under, the legislation;
- (c) words denoting the singular include the plural and vice versa;
- (d) words denoting individuals or persons include bodies corporate and trusts and vice versa;
- (e) headings are for convenience only and do not affect interpretation;
- (f) a reference to a clause, paragraph or schedule is a reference to a clause, paragraph or schedule of this Deed;
- (g) a reference to any document or agreement includes reference to the document or agreement as amended, novated, supplemented, varied or replaced from time to time;
- (h) words denoting any gender include either gender;
- (i) where any word or phrase is given a definite meaning in this Deed, any part of speech or other grammatical form in respect of the word or phrase has a corresponding meaning;
- (j) a reference to an amount of money is a reference to the amount in the lawful currency of the Commonwealth of Australia;
- (k) a reference to a time and date in connection with the performance of an obligation under this Deed by a Party is a reference to the time and date in Perth, Western Australia, notwithstanding that the obligation is to be performed elsewhere;
- (l) where, by virtue of this Deed, the day on or by which any act, matter or thing is to be done is a Saturday, a Sunday or a public holiday in the place in which the act, matter or thing is to be done, then that act, matter or thing will be done on the next succeeding day which is not a Saturday, a Sunday or a public holiday.
- (m) a covenant, representation or warranty on the part of two or more persons binds them jointly and severally; and
- (n) a covenant, representation or warranty for the benefit of two or more persons is for the benefit of them jointly and severally.

## **2. EARLYWORKS SERVICES**

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- 2.1 **Provision of EarlyWorks Services.** We will make the EarlyWorks Services available to you pursuant to this Agreement during a subscription term. You agree that your acceptance of the terms of this Agreement or purchase of the EarlyWorks Services hereunder are neither contingent on the delivery of any future functionality or features nor dependent on any oral or written representations made by us regarding future functionality or features.
- 2.2 **EarlyWorks Services.** EarlyWorks Services includes the current features of the Software.
- 2.3 **Technical Support.** During the Term of the agreement, technical support will be provided to a designated representative of the licensee in the event that the Software does not perform as designed and/or you require our assistance in understanding how the Software works.

### 3. LICENCE

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- 3.1 **Grant of Licence.** From the Commencement Date of any subscription to the EarlyWorks Service for the duration of the Term, we grant to You a non-exclusive, revocable Licence to access and use the EarlyWorks Services, or specific modules thereof, in accordance with the terms and condition of this Agreement
- 3.2 **Non-exclusive.** You acknowledge that this Licence is non-exclusive and that we may grant similar Licences with respect to the EarlyWorks Services to any third party at any time at our sole discretion.
- 3.3 **No sub-licensing.** You acknowledge and agree that you must not grant sub-licenses to any subsidiaries or any third party.
- 3.4 **No assignment.** You acknowledge and agree that this Agreement cannot be assigned to any third party except in accordance with clause 16.11 and 16.12 of this Agreement.

### 4. USE OF THE SERVICES

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- 4.1 **Our responsibilities.** We will:
- (a) Provide our basic support for the EarlyWorks Services in accordance with clause 2.3 above to you at no additional charge. Additional support and/or training can be purchased separately under the conditions specified under Item 4 of the Schedule;
  - (b) Use commercially reasonable efforts to make the EarlyWorks Services available 24 hours a day, 7 days a week, except for:
    - (i) Planned downtime (of which we will give at least 8 hours prior notice via the EarlyWorks Services and which we will schedule to the extent practicable during the hours that minimize impact on childcare hours); or
    - (ii) Any unavailability caused by Force Majeure Events; and
  - (c) Provide the EarlyWorks Services only in accordance with applicable laws and government regulations.
- 4.2 **Our Protection of Your Data.** We will use all commercially reasonable efforts to maintain appropriate administrative, physical, and technical safeguards for protections of the security, confidentiality and integrity of Your Data.

We will not:

- (a) Modify your Data except as expressly permitted by you; or
- (b) Disclose your Data except as expressly permitted by you or compelled by law in accordance with clause 8.3 (Compelled Disclosure) or as expressly permitted in writing by you; or
- (c) Access your Data except to provide the EarlyWorks Services and prevent or address service or technical problems, or at your request in connection with child education support matters.

4.3 Notwithstanding the above, no transmission of data over the internet is completely secure, and accordingly, we make no warranties whatsoever that your Data will be safe, secure and protected from any unauthorised access or interference.

4.4 **Your Responsibilities.** You will

- (a) Be responsible for Users' compliance with this Agreement;
- (b) Be responsible for the accuracy, quality and legality of your Data and the means by which you acquire your Data;
- (c) Be responsible for obtaining and maintaining internet access, including payments for all internet access charges, in connection with your use of the EarlyWorks Services and acknowledge that failure to do so may mean, among other things, you are unable to use the EarlyWorks Services or enjoy any other right which might otherwise be available to you under this Agreement;
- (d) Use every effort to prevent unauthorised access to or use of the EarlyWorks Services, and notify us promptly of any such unauthorised access to or use of the EarlyWorks Services;
- (e) Use the EarlyWorks Services only in accordance with applicable laws and government regulations; and
- (f) Ensure that all minimum software and hardware requirements for your use of, or access to, the EarlyWorks Services are met.

4.5 You will not:

- (a) Make the EarlyWorks Services available to anyone other than Users;
- (b) Sell, resell, rent, lease, sub-license or assign the EarlyWorks Services;
- (c) Use the EarlyWorks Services to store or transmit Data:
  - (i) which infringes on a third party's rights, including (without limitation) any Intellectual Property Rights; or
  - (ii) which is defamatory to any person; or
  - (iii) which is otherwise unlawful or tortious; or
  - (iv) which is a violation of the privacy of any person;
- (d) Use the EarlyWorks Services to store or transmit Malicious Codes;



- (e) Interfere with or disrupt the integrity or performance of the EarlyWorks Services or third party data contained therein; or
- (f) Attempt to gain unauthorised access to the EarlyWorks Services or their related systems and networks.

#### 4.6 **Your obligations**

- (a) You agree to follow our reasonable directions, including any guides or other instruction, in regards to the manner of the use of the EarlyWorks Services.
- (b) You will promptly pay all taxes, duties, fees or other amounts payable to any government, semi-governmental or regulatory authority in respect of this Licence, and will indemnify EarlyWorks with respect to the same.
- (c) You will exercise your rights under this Agreement in relation to using EarlyWorks Services at your sole risk and expense and for your sole benefit and not as our representative, agent, partner, joint venturer or employee.

#### 4.7 **Prohibited Use of Software and EarlyWorks Service**

You must not:

- (a) Copy the Software (in whole or in part) onto any other servers, workstations, storage devices or media;
- (b) Remove any codes, information or data (including your Data) in any manner or form except as permitted under this Agreement or with our prior express written consent;
- (c) Use the EarlyWorks Services (including the Software) in any manner other than as set out in this Agreement. You are expressly prohibited from examining, copying or reverse engineering the source code of the Software or copying any user interfaces or screens.

4.8 A breach of the above clause 4.7 is a material breach of this Agreement and will result in the immediate termination of this Agreement.

### **5. SERVICE & SOFTWARE DEVELOPMENT, IMPROVEMENTS & MODIFICATIONS**

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- 5.1 You must only use the EarlyWorks Services in strict accordance with this Agreement.
- 5.2 **Ongoing Development.** Throughout the Term of this Agreement, we may (at our sole discretion) perform additional development works or modifications to the EarlyWorks Services.
- 5.3 **Compliance with Laws.** In developing the EarlyWorks Services, we agree to comply with all applicable standards, awards, laws and regulations (including without limitation, awards and laws applicable to our employees).
- 5.4 **Notification of Defects.** You must notify us if any defect is found to exist in the Software or the EarlyWorks Services provided by us. Where you notify us of any defect, we will use our best efforts to remedy that defect at our cost, provided only that such defect is not caused by any development, modification, adaptation or improper use of the Software or EarlyWorks Services performed by you or another User.

- 5.5 **You must not Modify or Adapt.** You must not develop, modify or adapt the source code of the EarlyWorks Services or develop any new interoperable or independent modules to the EarlyWorks Services without our express prior written consent.
- 5.6 **Your Requested Improvements.** You may request improvement or modifications to the EarlyWorks Services at any time. However, both Parties agree that this does not confer upon us any obligation to perform the improvements or modifications. Where we do develop the EarlyWorks Services in accordance with your request, any improvement or modification to the EarlyWorks Services (and all Intellectual Property Rights in any such improvement or modification to the EarlyWorks Services) shall remain our property.
- 5.7 **Where You do Modify.** Notwithstanding clause 5.5 above, where any improvements, modifications and/or additions are made to the Software (or any data created or generated by the Software) ("**Software Modifications**") are developed or suggested by you, you agree that the Software Modifications vest in us from the time of their creation or otherwise is assigned to us, including all Intellectual Property Rights in such modifications and/or additions. You agree to do all things necessary, including to supply a complete copy of the source code and all supporting documentation relevant to any source code that it develops and to sign any further agreement or document as may be necessary to give full effect to this sub-clause 5.7.
- 5.8 We agree to grant you a revocable, non-exclusive royalty-free licence to use the Software Modifications (which do not incorporate any of the EarlyWorks Services or Source Code Material); and
- 5.9 You warrant that where any Software Modifications are developed:
- (a) You have the right to grant the assignment described at sub-clause 5.7; and
  - (b) Without limiting any other specific provision of this Agreement, the Software Modifications do not infringe the Intellectual Property Rights of any third party; and
  - (c) The assignment granted by you will not infringe the Moral Rights of any person; and
  - (d) The Software Modifications are free from any defect.

## 6. SUBSCRIPTION FEES AND PAYMENT FOR EARLYWORKS SERVICES

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- 6.1 **Subscription Fees.** You will pay all Subscription Fees as specified at Item 2 of the Schedule:
- (a) Subscription Fees are paid in arrears and are based on the maximum number of active child records in use during the immediately preceding monthly period,
  - (b) Payment obligations are non-cancellable and Fees paid are non-refundable, and
- Subscription Fees are based on monthly periods that begin on the subscription start date and the same day of each month thereafter.
- An initial once-off setup fee as specified under Item 2 of the Schedule is payable with the first invoice.
- 6.2 **Invoicing and Payment.** Invoiced charges are due 7 days from the invoice date. Invoices will be issued via email to you in Australian dollars. GST (and other taxes) where applicable will be added to our charges. Unless agreed to in writing, payment must be made by Direct Debit.

Refer to <https://getearlyworks.com.au/direct-debit> for fees and charges. The Direct Debit Request Form located at <https://getearlyworks.com.au/direct-debit> must be completed prior to the subscription start date.

- 6.3 **Overdue Charges.** If any charges are not received from you by the due date, then at our discretion
- (a) Such charges may accrue late interest at the rate of 9.5% of the outstanding balance per annum, compounded daily, from the date such payment was due until the date paid, and/or
  - (b) We may condition future subscription renewals on payment terms shorter than those specified in Clause 6.2 (Invoicing and Payment).
- 6.4 **Suspension of Service and Acceleration.** If any amount is owing by you under this or any other Agreement for our services such that it is 14 or more days overdue, we may, without limiting our other rights and remedies, suspend the EarlyWorks Services to you until such amounts are paid in full. We will give you at least 7 days' prior notice that your account is overdue, in accordance with clause 15 (Notices), before suspending the EarlyWorks Services to you
- 6.5 **Payment Disputes.** We will not exercise our rights under Clause 6.3 (Overdue Charges) or 6.4 (Suspension of Service and Acceleration) if you are disputing the applicable charges reasonably and in good faith and are cooperating diligently to resolve the dispute.
- 6.6 **Taxes.** Unless otherwise stated, our fees do not include any taxes, levies, duties or similar governmental assessments of any nature, including but not limited to GST, value-added, sales, use or withholding taxes, assessable by any local, state, provincial, federal or foreign jurisdiction (collectively, "**Taxes**"). You are responsible for paying all Taxes associated with your purchases hereunder. If we have the legal obligation to pay or collect Taxes for which you are responsible under this paragraph, the appropriate amount will be invoiced to and paid by you, unless you provide us with a valid tax exemption certificate authorised by the appropriate taxing authority.

## 7. PROPRIETARY RIGHTS, INTELLECTUAL PROPERTY

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- 7.1 **Reservation of Rights in Services, IP ownership.** Subject to the limited rights expressly granted hereunder, we reserve all rights, title and interest in and to the EarlyWorks Services, including all related intellectual property rights. No rights are granted to you hereunder other than as expressly set forth herein. Specifically, all Intellectual Property Rights in the EarlyWorks Services and Software developed during the Term of this Agreement and at any other time, belong to us. Nothing in this Agreement transfers or assigns any of our Intellectual Property Rights in EarlyWorks Services and the Software to you whatsoever. Additionally, nothing in this Agreement affects the ownership of any pre-existing Intellectual Property Rights in any tools, object libraries, methodologies and materials used by us to produce the EarlyWorks Services and the Software.
- 7.2 **Restrictions.** You will not:
- (a) Permit any third party to access the EarlyWorks Services and Software; or

- (b) Create derivative works based on the EarlyWorks Services and Software except as authorised herein; or
- (c) Copy, frame or mirror any part or content of the EarlyWorks Services and Software, other than copying or framing on your own intranets or otherwise for your own internal non-commercial purposes; or
- (d) Reverse engineer the EarlyWorks Services or Software; or
- (e) Access the EarlyWorks Services or Software in order to:
  - (i) Build a competitive product or service, or
  - (ii) Copy any features, functions or graphics of the Services.

7.3 **Your Applications and Code.** If you, a third party acting on your behalf, or a User creates applications or program code using the EarlyWorks Services or Software, you authorise Us to host, copy, transmit, display and adapt such applications and program code, solely as necessary for us to provide the EarlyWorks Services in accordance with this Agreement, and further assign, or procure the assignment of any Intellectual Property Rights in any applications or program code using the EarlyWorks Services or Software to us.

7.4 **Your Data.** For the duration of the Term, you grant us an irrevocable, non-exclusive, free, sub-licensable licence to copy, reproduce or Exploit any Intellectual Property Rights which subsist in your Data, provided only that such Exploitation of your Intellectual Property Rights is used for the purpose of displaying, extracting or producing a hard copy of the Data through our Software to any User requesting such Data, and for making back-up copies your Data.

7.5 Except for the limited rights granted by you in accordance with the above clause 7.4, we acquire no right, title or interest from you or your licensors under this Agreement in or to your Data, including any Intellectual Property Right therein.

7.6 **IP Warranty for Service.** We warrant that:

- (a) We have the right to grant the Licence described in this Agreement;
- (b) We have, and relevant subcontractors and other third parties have, the right to grant the Licence of EarlyWorks Services owned by third parties which are relevant to this Agreement;
- (c) Without limiting any other specific provision of this Agreement, the improvements and modifications provided under this Agreement do not infringe the Intellectual Property Rights of any third party; and
- (d) The assignment or licences granted by us will not infringe the moral rights of any person.

## 8. CONFIDENTIALITY

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8.1 **Protection of Confidential Information.** The Recipient will use the same degree of care that it uses to protect the confidentiality of its own confidential information of like kind (but in no event less than reasonable care):

- (a) Not to use any Confidential Information of this Discloser for any purpose outside the scope of this Agreement. And
- (b) Except as otherwise authorised by the Discloser in writing, to limit access to Confidential Information of the Discloser to those of its and its Affiliates' employees, contractors and agents who need such access for purposes consistent with this Agreement and who have signed confidentiality agreements with the Recipient containing protections no less stringent than those herein. Neither Party will disclose the terms of this Agreement to any third party other than its Affiliates and their legal counsel and accountants without the other Party's prior written consent.

8.2 **Employees.** The Recipient will take reasonable steps to ensure that its employees and contractors also observe such requirements as to confidentiality and will, at the request of the Discloser, procure that they enter confidentiality agreements.

8.3 **Compelled Disclosure.** The Recipient may disclose Confidential Information of the Discloser if it is compelled by law or a valid order of a court or tribunal having competent jurisdiction to do so, provided that the Recipient gives the Discloser prior notice of such compelled disclosure (to the extent legally permitted) and reasonable assistance, at the Discloser's cost, if the Discloser wishes to contest the disclosure. If the Recipient is compelled by law to disclose the Discloser's Confidential Information as part of a civil proceeding to which the Discloser is a party, and the Discloser is not contesting the disclosure, the Discloser will reimburse the Recipient for its reasonable cost of compiling and providing secure access to such Confidential Information.

## 9. DATA, PRIVACY & DATA PROTECTION

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9.1 **Your Data is Confidential.** All information and Data belonging to you which is uploaded, stored, generated or otherwise created using the EarlyWorks Services by You ("Your data") is Confidential Information.

9.2 **Deletion of Your Data.** The Parties agree that upon termination of this Agreement, and where:

- (a) The Licence is not extended; or
- (b) Subsequent licensing arrangements are not entered into by the Parties;

any and all of your Data remaining on the EarlyWorks Services and Software will be permanently deleted by EarlyWorks, including backups.

9.3 Notwithstanding clause 9.2 above, at your request, and upon the payment of the Extraction Fee, all of your Data may be Extracted from the Software and the EarlyWorks Services onto a storage device which is accessible to a personal computer.

9.4 **Privacy of Your Data.** Your Data will be collected, maintained and stored in accordance with our Privacy Policy and in compliance with the *Australian Privacy Principles* and the *Privacy Act 1988* (Cth).

## 10. WARRANTIES AND DISCLAIMERS

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- 10.1 **Our Warranties.** We warrant that
- (a) We have validly entered into this Agreement and have the legal power to do so; and
  - (b) Our Software and the EarlyWorks Services do not infringe on any third party's Intellectual Property Rights; and
  - (c) To the extent that the Australian Consumer Law applies to our Software and the EarlyWorks Services, we warrant that they are compliant in every respect with the consumer guarantees expressly provided for in the Australian Consumer Law, provided only that any liability arising under the Australian Consumer Law as a result of non-compliance with consumer guarantees shall, at our election, be limited to (i) the repair of the goods supplied; or (ii) the replacement of the goods supplied; or (iii) the re-supply of the services provided.
- 10.2 **No other warranties.** Apart from the warranties made in clause 10.1, no other warranties are provided by us to you whatsoever from the EarlyWorks Services supplied under this Agreement, or for any other software or other materials or documentation supplied and/or developed by us under this Agreement.
- 10.3 **Customer Requirements.** We do not warrant or represent that the functions contained in the EarlyWorks Services or associated documentation (if any) will meet your requirements.
- 10.4 **Customer Exercises Own Judgment.** You acknowledge that you have exercised your own independent judgment in acquiring the EarlyWorks Services and have not relied on any representation made by us which has not been stated expressly in this Agreement or upon any descriptions or illustrations or specifications contained in any document including publicity material produced by us.
- 10.5 **Your Warranties.** You warrant that you have validly entered into this legally binding Agreement and have the legal power to do so, or are authorised by your company or other legal entity to enter into this legally binding Agreement with us on behalf of your company or other legal entity.
- 10.6 **Disclaimer.** Except as expressly provided herein, and to the maximum extent permitted by the Australian Consumer Law, neither Party makes any other warranties of any kind, and each party specifically disclaims all implied warranties.

## 11. INDEMNIFICATION

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- 11.1 **Indemnification by us.** We will defend you against any claim, demand, suit, or proceeding made or brought against you by a third party ("**Claim**") alleging that the use of the EarlyWorks Services as permitted by this Agreement infringes or misappropriates the Intellectual Property Rights of a third party, and will indemnify you for any damages, legal fees and costs finally rewarded against you as a result of, and for amounts paid by you under a court approved settlement of the Claim, provided that you:
- (a) promptly give us written notice of the Claim, demand, suit or proceeding made or brought against you; and

- (b) give us sole control of the defence and settlement of the Claim (provided that we may not settle any such Claim unless the settlement unconditionally releases you of all liability); and
  - (c) provide to us all reasonable assistance at our expense.
- 11.2 In the event of a Claim, or if we reasonably believe that the Software or EarlyWorks Services may infringe on any third party's Intellectual Property Rights, we may, at our discretion and expense:
  - (a) modify the EarlyWorks Services and/or Software so that they no longer infringe any third party's Intellectual Property Rights; or
  - (b) obtain a licence for your continued use in accordance with this Agreement of the EarlyWorks Services and/or Software; or
  - (c) terminate this Agreement upon thirty (30) days' written notice and refund to you any pre-paid fees covering the remainder of the Term of the Agreement subsequent to termination.
- 11.3 **Indemnification by you.** You will defend us against any Claim made or brought against us by a third party alleging that your Data, and your use of the EarlyWorks Services in breach of this Agreement:
  - (a) infringes the Intellectual Property Rights and any other rights of a third party; or
  - (b) violates any applicable law, including, without limitation, any laws relating to data collection, and any governmental or regulation in relation to the operation of Early Childhood Education Organisations; or
  - (c) arising out of a breach of this Agreement by you (including for its improper or negligent use or application of the EarlyWorks Services; or
  - (d) any wilful, unlawful or negligent act or omission of you or the Customer's employees, servants or agents);and will indemnify us, and our employees, servants and agents, from and against all Claims (including the cost of defending or settling any Claim) or for any damages, legal fees and costs finally awarded against us as a result of, or for any amounts paid by us under a court approved settlement of, a Claim.
- 11.4 Both Parties shall take out Insurance with respect to any such obligation to indemnify each other, and the amount insured against shall be no less than the cap referred to in clause 12.2 below.

## 12. LIMITATION OF LIABILITY

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- 12.1 **Limitation.** In the event that any statute implies terms into this Agreement which cannot be lawfully excluded, such terms will apply to this Agreement, save that our liability for breach of any such implied term will be limited, at our option, to any one or more of the following:
  - (a) the replacement of goods to which the breach relates or the supply of equivalent goods or services; or

- (b) the repair of such goods or resupply of the services; or
  - (c) the payment of the cost of replacing the goods or of acquiring equivalent goods or delivering equivalent services; or
  - (d) the payment of having the goods repaired.
- 12.2 **Cap.** Neither Party will be liable to the other for any single incident (“**Incident**”) arising out of or related to this Agreement shall exceed the lesser of:
- (a) AUD\$1,000,000; or
  - (b) the total amount paid by you in the preceding twelve (12) months prior to the Incident.
- 12.3 Neither Party will have any aggregate liability to the other arising out of or related to this Agreement exceeding the total amount paid by you under this Agreement.
- 12.4 Nothing in the preceding clauses 12.2 and 12.3 limits or waives your payment obligations under clause 6.
- 12.5 **No consequential loss.** To the extent applicable law permits, we will not be liable to you or any other person or entity for any direct, indirect, incidental, special or consequential loss or damages whatsoever (including for lost revenues or profits, loss of business, loss of goodwill or reputation, loss of data) arising out of this Agreement even where we have been advised of the possibility of such loss or damage, or where such loss or damage may be foreseeable.
- 12.6 **Employees.** The limitations of liability provided herein shall also apply to our officers, directors, contractors, sub-contractors and employees.

### 13. DISPUTE RESOLUTION

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- 13.1 Neither Party may commence arbitration or court proceedings (except proceedings seeking urgent interlocutory relief) in respect of a dispute in relation to this Deed (“**Dispute**”) unless it has first complied with this clause 13.
- 13.2 **Notification of Dispute.**
- (a) A party claiming that a Dispute has arisen must notify the other Party/Parties.
  - (b) Within seven (7) days after a notice is given, or within seven (7) days that a notice of a Dispute is deemed to have been received in accordance with clause 15.2 below, each Party to the Dispute must, either through themselves or a nominee, nominate in writing to the other Party a representative who is authorised to settle the Dispute on its behalf.
  - (c) During the twenty-one (21) day period after notice is given (or if the Parties agree to a longer period, that longer period), each Party or the Party’s nominee must use his or her best efforts to resolve the Dispute.
- 13.3 **Referral to Mediation.** If a Dispute is not resolved within the time specified in clause 13.2(c) above, the Dispute must be referred to mediation in accordance with the Mediation Rules of the Institute of Arbitrators and Mediators Australia (“**IAMA**”) to:



- (a) a mediator agreed to by the Parties, or if the Parties do not agree on a mediator, a mediator nominated by the Chair of the Western Australian Chapter of IAMA (or his or her delegate); and
  - (b) both Parties will use their best efforts to resolve the Dispute within the thirty (30) day period after the appointment of a mediator (or, if the Parties agree to a longer period, that longer period).
- 13.4 **Referral to Arbitration.** If the Dispute is not resolved within the time frame specified in clause 13.3(b) above, the Dispute must be referred to arbitration in accordance with the Arbitration Rules of IAMA by an arbitrator agreed to by the Parties, or if the Parties do not agree on an arbitrator, an arbitrator nominated by the Chair of the Western Australian Chapter of IAMA (or his or her delegate).
- 13.5 **Interlocutory Relief.** Nothing contained in this clause 13 will deny either Party the right to seek urgent interlocutory relief (including for an injunction) from an appropriate court in relation to any Dispute arising under this Agreement.
- 13.6 You acknowledge and agree that if you breach certain provisions of this Agreement, including, without limitation, provisions relating to the protection of our Intellectual Property Rights in the Software, that damages would not be a sufficient remedy. Accordingly, you acknowledge and agree that we will be entitled to apply for and obtain temporary or permanent injunctions against you, or declarations and orders for specific performance enforcing the provisions of this Agreement in the event of a breach by you and to prohibit or restrain any act or omission by you or any employee of you, the Customer or the Centre that would constitute a breach of this Agreement.
- 13.7 **Costs.** Each Party will bear their own costs for any dispute resolution under this clause 13, and the costs of the mediation shall be borne equally between the Parties. The costs of arbitration shall also be borne equally between the Parties, unless the arbitrator determines otherwise.

#### **14. TERM, TERMINATION AND BREACH**

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- 14.1 **Term of Agreement.** This Agreement commences on the Commencement Date and continues until all subscriptions granted in accordance with this Agreement have expired or been terminated.
- 14.2 **Term of Purchased Subscriptions.** Subscriptions purchased by you commence on the Commencement Date and continue for the subscription term specified therein. All subscriptions will automatically renew for additional monthly periods, unless either Party gives notice of non-renewal at least thirty (30) days before the end of the relevant subscription Term. The Subscription Fee shall remain the same unless we have given you written notice of an increase to the Subscription Fee at least thirty (30) days before the end of such Term, in which case the Subscription Fee shall increase and will be effective upon renewal and thereafter until the termination or renewal of the subscription. Any such increase to the Subscription Fee will not exceed twenty percent (20%) of the Subscription Fee for the subscription immediately prior to termination or renewal.
- 14.3 **Termination for Cause.** A Party may terminate this Agreement for cause:

- (a) upon fourteen (14) days' written notice to the other Party of a material breach if such breach remains uncured at the expiration of such period; or
- (b) if the other Party becomes the subject of an Acquisition Event or Insolvency Event; or
- (c) if the other Party is convicted of a criminal offence against Children, or a criminal offence carrying a jail term of five or more years, or a criminal offence involving fraud, deception, dishonesty or misleading conduct;
- (d) if the other Party is fraudulent in connection with the entry into this Agreement; or
- (e) if the other Party takes, or omits to take any action which is a ground for immediate termination of the Agreement under this Agreement; or
- (f) agrees to a discontinuance of this Agreement.

14.4 **Refund or Payment upon Termination.** Upon the termination for cause by you, we will refund you any prepaid fees covering the remainder of the Term of all subscriptions after the effective date of termination.

14.5 Upon any termination for cause by us, you will forfeit any fees you have already paid to us, and will pay any unpaid fees covering the remainder of the term of all subscriptions after the effective date of termination. In no event will any termination relieve you of the obligation to pay any fees payable to us for the period prior to the effective date of termination.

14.6 **Extraction of your Data.** Upon the termination for cause by either Party, you may request within thirty (30) days after the effective date of termination of EarlyWorks Services the Extraction of your Data from the Software, which shall, at your election, be saved in an Agreed Format and stored on a storage device accessible to personal computers, subject to the payment of the relevant Extraction Fee. After such thirty (30) day period, we will have no obligation to maintain or provide any of your Data and will thereafter, unless legally prohibited or where you owe us money or are obliged to indemnify us in accordance with this Agreement, delete all of your Data in the Software or otherwise in our possession or under our control.

14.7 **Surviving Provisions.** Each clause of this Agreement which expressly or by its nature survive the termination of this Agreement shall remain in full force and effect notwithstanding such termination.

14.8 Notwithstanding the generality of the above, clauses 6 (Fees and Payment for EarlyWorks Services); 7 (Proprietary Rights and Intellectual Property); 8 (Confidentiality); 10 (Warranties and Disclaimers); 11 (Indemnification); 12 (Limitation of Liability); 14.5 (Refund or Payment upon Termination); 14.6 (Extraction of your Data); 15 (Notices); and 16 (General Provisions) shall survive the termination of this Agreement and remain in full force and effect.

14.9 **Breach.** In the event that either Party breaches any provision of this Agreement ("**Breaching Party**"), the Party not in breach ("**Non-Breaching Party**") must give notice of the breach to the Breaching Party and require, within fourteen (14) days (or where the Non-Breaching Party specifies a longer period, that longer period) of receipt of notice, or within fourteen (14) days (or where the Non-Breaching Party specifies a longer period, that longer period) of the date that the notice is deemed to have been received in accordance with clause 15.2 below; stating the breach and require the breach to be remedied within a reasonable time frame stipulated by the Non-Breaching Party.

14.10 **Repeated Breaches.** Where you breach a provision of this Agreement (not being an essential term) on more than two (2) occasions in any twelve (12) month period and have, in each case, received written notice of breach in accordance with this Agreement, for the purposes of this Agreement, such breaches taken together are a material breach, as a result of which we shall be entitled to terminate this Agreement with immediate effect. It is agreed that the period of notice required by clause 14.9 shall be reduced to two (2) Business Days.

14.11 **Upon termination of this Agreement:**

- (a) we may give you written notice of the termination of this Agreement; and
- (b) within seven (7) days of the date of termination, you must cease using the EarlyWorks Services and must return to us (at your own cost) any property belonging to us or any related entity including all material and copies of materials in which part of the EarlyWorks Services or other Confidential Information is stored; and
- (c) acknowledge and agree that your obligations under the Surviving Provisions are still in full force and effect.

## 15. NOTICES

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15.1 Any notice, consent, approval, demand or other communication to be given or made under this Agreement (unless otherwise provided):

- (a) must be in writing; and
- (b) must be signed by or on behalf of the Party giving or making it; and
- (c) must be delivered in any of the following modes:
  - (i) by registered mail;
  - (ii) by hand delivery; or
  - (iii) by email; and
- (d) may be addressed, delivered or transmitted to a Party to receive it at its registered office or principal place of business for the time being, or at the address or email address notified to each other Party from time to time.

15.2 Any instrument sent or communication made in accordance with clause 15.1 above will be deemed to have been received:

- (a) if delivered by hand or electronic mail, on the next Business Day after the day of its delivery or transmission; or
- (b) if sent by pre-paid certified mail, on the seventh (7<sup>th</sup>) Business Day after the day of posting.

## 16. GENERAL PROVISIONS

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16.1 **Further Assurances.** Each Party must:

- (a) do or cause to be done all acts and things necessary or desirable to give effect to the provisions of this Agreement; and
- (b) refrain from doing all acts and things that could hinder performance by any party of this Agreement.

16.2 **Entire Agreement.** This Agreement:

- (a) excludes all conditions, warranties and terms implied by custom, general law or statute (except ones that by law may not be excluded); and
- (b) is the entire Agreement between Parties about its subject matter; and
- (c) In relation to that subject matter, supersedes any prior:
  - (i) understanding or agreement between the Parties; and
  - (ii) condition, warranty, indemnity or representation so imposed or made by a Party.

16.3 **Amendments.** This Agreement may only be varied, supplemented or replaced by a document in writing executed by each of the Parties.

16.4 **Severance.** If any provision of this Agreement should be held to be invalid in any way or unenforceable by any court, such provision or part will be deemed modified to eliminate the invalid element and, as so modified, such provision or part will be deemed to be part of this Agreement as though originally included in the Agreement. The remainder of the Agreement shall not, in any way, be affected or impaired and this Agreement shall be construed so as to most nearly give effect to the intent of the Parties as it was originally executed.

16.5 **Waiver.** The failure of a Party at any time to insist on the performance of any provision of this Agreement is not a waiver of that Party's rights to insist on the performance of that or any other provision of this Agreement at any future date.

16.6 **Costs.** Each Party shall bear its own costs in relation to the preparation and execution of this Agreement.

16.7 Except to the extent it is otherwise expressly provided in this Agreement, you will pay all stamp duty (if any) on this Agreement and on any instrument or other document executed to give effect to any provision of this Agreement.

16.8 **Relationship of the Parties.** The Parties acknowledge that they are independent Parties and no relationship of partnership, agency or employment is expressly or intended to be implied into this Agreement.

16.9 **Force Majeure.** Each Party hereby releases the other from any claim, liability or responsibility pursuant to this Agreement concerning the other Party's failure to perform any obligation where such failure is due to a Force Majeure Event. No such failure will entitle a Party to terminate this Agreement and where such failure occurs, all times provided for in this Agreement will be extended for a period commensurate with the period of delay.

- 16.10 **Jurisdiction and Choice of Law.** This Agreement will be governed by and construed in accordance with the laws of the State of Western Australia, and the Parties hereby submit to the exclusive jurisdiction of the courts of the State of Western Australia and courts that have jurisdiction to hear appeals from any of the courts of the State of Western Australia.
- 16.11 **No Assignment.** You may not assign any of your rights or obligations under this Agreement, whether by operation of law or otherwise, without our prior written consent, which is not to be unreasonably withheld.
- 16.12 Notwithstanding the foregoing, you may assign this Agreement in its entirety, with notice to us, to your Affiliate or in connection with a merger, corporate re-organisation or an Acquisition Event, provided only that the assignee is not our competitor.
- 16.13 Any assignment otherwise than in accordance with clause 16.12 above may, at our sole discretion, result in the termination of this Agreement. In the event of such termination, clause 14.5 will apply.

## **SCHEDULE 1**

### **Item 1: Term**

Minimum twelve (12) months, thereafter, automatically renewed monthly.

### **Item 2: Subscription Fees**

In consideration of entering into this Service Access Agreement, the Licensee agrees to pay to EarlyWorks the sum of AUD\$1.45 per active child record per month (exclusive of GST). The minimum monthly fee is AUD\$29.95 per month (exclusive of GST). Subscription Fees are paid in arrears and are based on the maximum number of active child records in use during the immediately preceding monthly period.

A once-off setup fee of AUD\$99 (exclusive of GST) is payable with the initial invoice.

Refer to <https://getearlyworks.com.au/direct-debit> for direct debit fees and charges.

### **Item 3: Extraction Fee**

The fee for the extraction of the Customer's Data from the EarlyWorks Services into an Agreed Format and saved in a storage device accessible to a personal computer for external reporting or backup purposes is charged at our standard technical consulting rate of AUD\$150 per hour (exclusive of GST). A standard administrator level extract is available for \$300 (exclusive of GST) which includes an extract of all significant reports in Microsoft Word Format. Extraction at individual educator or family level is not available.

### **Item 4: Additional Support and/or Training Fee**

The fee for additional support and training is charged at our standard customer consulting rate of AUD\$150 per hour (exclusive of GST) plus reasonable expenses. This fee is payable within seven (7) days of the support and/or training being delivered. Reasonable expenses may include, but are not limited to, items such as travel, accommodation, room hire, equipment hire, catering and/or the printing of hardcopy training material such as user guides and other manuals.