



My Profiling

Subscriber Agreement

This agreement governs the use of the Software and is entered into between eLearning Australia Pty Ltd ACN 059 102 813 (**ELA**) and any person accessing and using the Software (**Subscriber**). By clicking 'I Agree' on this agreement or by using or continuing to use the Software, the Subscriber accepts that this agreement applies to the Subscriber's use of the Software.

1 Software

- 1.1 Subject to the terms of this agreement, ELA agrees to provide to the Subscriber a limited, non-transferable, revocable, non-exclusive license to use the Software for the Term, from the Commencement Date.
- 1.2 The licence granted in clause 1.1 is conditional upon the continued existence of the sub-licence granted by the Organisation to the Subscriber pursuant to the Organisation Agreement and terminates simultaneously with the termination or expiry of that sub-licence.
- 1.3 The accessibility and functionality of the Subscription will vary depending on whether the Organisation has assigned administrative privileges to the Subscription or not.
- 1.4 ELA, the Organisation or another subscriber associated with the Organisation who has administrator privileges (**Administrator**), may alter the accessibility and functionality of the Subscription without the Subscriber's consent or knowledge.

2 Software Updates

- 2.1 ELA may update or otherwise modify the Software at any time for any reason.
- 2.2 Updates take place automatically and are mandatory for the Subscriber's continued access to the Software.
- 2.3 The Subscriber acknowledges that the compatibility of the Software and the specifications required to access the Software with certain devices may vary over time.
- 2.4 From time to time, ELA may implement updates to the Software which require the Subscriber to use third party software, content, websites, add-ons or plugins (**Third Party Software**) . If the Subscriber uses Third Party Software, it must do so at its own risk and subject to any terms and conditions imposed by that third party.

3 ELA's Rights

- 3.1 ELA may (but is not obliged to):
 - a. monitor the use of the Software by the Subscriber;
 - b. cancel or alter the Subscription, the Subscriber's credentials or any Subscription Data entered into the Software at its discretion, where the Subscriber breaches a term of this agreement or otherwise uses the Software in a manner which ELA reasonably believes is inappropriate;

- c. reset the credentials required to access a Subscription or otherwise alter the configuration and features of the Software accessible to the Subscriber at the request of the Organisation, an Administrator, the Subscriber or otherwise;
- d. respond to any request by a Subscriber for assistance or technical support in relation to the Software.

4 Subscriber Obligations

4.1 Throughout the Term, the Subscriber must:

- a. not sub-licence, assign, sell, transfer or otherwise dispose of its right to use the Software to a third party;
- b. not intentionally enter incorrect or unreliable Subscriber Data into the Software;
- c. use the Software in accordance with this agreement and the User Manuals;
- d. ensure that all credentials provided to access the Software (such as usernames and passwords) are kept secure and confidential;
- e. prohibit access to the Software via the Subscription by anyone other than the Subscriber;
- f. enter Subscriber Data into the Software in accordance with the User Manuals;
- g. accept sole responsibility for obtaining and maintaining any equipment and ancillary services (such as a reliable internet connection) required in order to access and use the Software;
- h. make reasonable attempts to resolve any issues with the Software before requesting support from ELA;
- i. accept sole responsibility for retaining its own copies of any Subscriber Data;
- j. provide ELA with access to the Subscriber's equipment as reasonably required for ELA to assist with a request for technical support;
- k. not directly or indirectly reverse engineer, decompile, disassemble or otherwise attempt to discover, access or extract the source code, object code or underlying structure, ideas, know-how or algorithms in respect of the Software;
- l. not modify, translate, create Improvements to, create derivative works based on, copy, archive, reproduce, sub-licence, rent, lease, re-sell, distribute, syndicate, display, perform or otherwise use the Software except as permitted by this agreement, by law or by consent via notice from ELA;
- m. not do anything which could interfere, disable, overburden or otherwise impair the regular functioning, performance or intended use of the Software;
- n. not attempt to access the Software using unauthorised automated means;
- o. not attempt to upload viruses, spyware or other malicious code to the Software;
- p. not obtain or commission Improvements to the Software from third parties;
- q. not remove any proprietary notices or labels from the Software;
- r. not enter Subscriber Data, or otherwise use the Software, in a manner which is defamatory, threatening, discriminatory, profane, obscene, illegal or which infringes third party rights; and

- s. not make any false, defamatory, misleading or deceptive statement or representation regarding ELA and/or the Software;
- t. not hinder or prevent ELA from performing required maintenance or from updating the Software;
- u. not use the Software with unsupported equipment, software, configurations or other conflicting services.

5 Intellectual Property Rights

- 5.1 All right, title and interest in the Software is owned, retained and vests upon creation, in ELA.
- 5.2 Nothing in this agreement gives the Subscriber any right, title or interest in the Software other than as a licensee pursuant to clause 1.
- 5.3 The Subscriber retains any right, title and interest it holds in the Subscriber Data.
- 5.4 All right, title and interest in any Metadata vests in ELA upon creation.
- 5.5 ELA retains all right, title and interest in the User Manuals, which may only be used by the Subscriber internally for the purpose of learning how to use the Software.
- 5.6 ELA collects, holds and discloses Personal Information, Subscriber Data and Metadata in accordance with its Privacy Policy and, with respect to Personal Information, the *Privacy Act 1988* (Cth).

6 Confidential Information

- 6.1 The Subscriber must keep the Confidential Information confidential and secure and not use the Confidential Information other than for the purpose of exercising its rights and performing its obligations under this agreement.

7 Suspension

- 7.1 In addition to its other rights and remedies, ELA may suspend or restrict the Subscriber's access to the Software where:
 - a. ELA reasonably believes that the Subscriber is in breach of this agreement or is otherwise using the Software inappropriately or contrary to law;
 - b. scheduled downtime or other maintenance to the Software or ELA's systems is required;
 - c. suspension or restriction of access to the Software is permitted by the Organisation Agreement; or
 - d. the suspension or restriction arises in connection with circumstances beyond ELA's reasonable control.

8 Termination

- 8.1 ELA may terminate this agreement immediately if:
 - a. the Subscriber breaches a term of this agreement;

- b. ELA becomes aware of any act or omission by the Subscriber, or a third party in connection with the Subscriber, which ELA reasonably believes could result in harm or legal liability for ELA or damage to its reputation; or
 - c. the Organisation Agreement or the sub-licence granted to the Subscriber by the Organisation thereunder is terminated or expires.
- 8.2 The Subscriber may terminate this agreement at any time by deactivating, deleting or no longer using the Subscription.

9 Effect of termination

- 9.1 On termination of this agreement ELA will terminate the Subscriber's access to the Software and the Subscription and archive any Subscriber Data.
- 9.2 ELA may withhold and retain possession of Subscriber Data or any other property it holds of the Subscriber, until any amounts owing to ELA under the Organisation Agreement or otherwise are paid by the Organisation.

10 Disclaimer

- 10.1 The Software is provided 'as is' and 'as available' with all faults and without any warranty, guarantee or representation made by ELA as to the accuracy, reliability, availability, security, suitability or completeness of the Software. Specifically, ELA does not guarantee, warrant or represent that the Software:
 - a. is provided error free or uninterrupted;
 - b. is free of viruses or other spyware that could damage or destroy the Subscriber's device or Subscriber Data; or
 - c. will generate output from input Subscriber Data which can be relied upon, particularly with respect to making determinations regarding competency for training course certification.
- 10.2 To the maximum extent permitted by law, ELA disclaims, and the Subscriber agrees to release ELA, its officers, affiliates, representatives, contractors and employees from, all liability for any loss or damage (including, but not limited to, special, indirect, punitive, consequential loss or damage, loss of profits or loss of data), howsoever arising directly or indirectly in connection with the Software, any Third Party Software, the Subscriber's use of the Software, the Subscriber Data, any data recorded within the Software by a third party and any breach of this agreement by the Subscriber.
- 10.3 This agreement does not purport to limit any non- waivable rights that the Subscriber may be entitled to by law. Where ELA's liability cannot be fully excluded by law, ELA limits its maximum liability, at ELA's option, to:
 - d. the supply of the Software again; or
 - e. the payment of the cost of having the Software supplied again.

11 Indemnity

- 11.1 The Subscriber agrees to indemnify and hold ELA and its officers, employees, representatives, agents and contractors harmless from and against any liability, loss, damage, costs (including legal costs), expenses or other liability which may be suffered or incurred by ELA arising out of, or in connection with the Subscriber's use of the Software, the

Subscriber Data and any breach of this agreement by the Subscriber.

- 11.2 The indemnity given by the Subscriber above is limited to the extent that any grossly negligent act or omission of ELA has contributed to the liability arising.

12 Variations

- 12.1 ELA may vary this agreement at any time. The Subscriber may receive notice of material variations when the Subscriber next accesses the Software. The Subscriber's continued use of the Software means the Subscriber accepts this agreement as varied. The Subscriber is responsible for reviewing this agreement regularly and keeping itself apprised of any variations. The latest version of this agreement will always apply.

13 General

- 13.1 Except as expressly provided to the contrary in this agreement, nothing in this agreement will constitute the parties as principal and agent, employer and employee, partners or otherwise liable for the acts or omissions of any other party.
- 13.2 This agreement records the entire agreement between the parties in relation to its subject matter. It supersedes all prior contracts, arrangements, understandings or negotiations by, or between, the parties in relation to the subject matter of this agreement.
- 13.3 Clauses 6, 10 & 11 survive termination of this agreement.
- 13.4 The failure, delay or omission by a party to exercise, or to partially exercise, a right, power or remedy under this agreement does not operate as a waiver of that right, power or remedy. A party which exercises, or partially exercises, a right, power or remedy maintains its right to further exercise the same right, power or remedy or to exercise another right, power or remedy. A party waives a right, power or remedy only by explicitly doing so in a written notice to the other party and the waiver is strictly limited to the matters specified in the notice.
- 13.5 The rights, powers, authorities, discretions and remedies of a party under this agreement do not exclude any other right, power, authority, discretion or remedy.
- 13.6 If any provision of this agreement is determined by a court or other competent tribunal or authority to be illegal, invalid or unenforceable then:
- a. where the offending provision can be read down so as to give it a legal, valid and enforceable operation of a partial nature it must be read down to the extent necessary to achieve that result;
 - b. where the offending provision cannot be read down then that provision must be severed from the agreement in which event, the remaining provisions of this agreement operate as if the severed provision had not been included; and
 - c. the legality, validity or enforceability of that provision in any other jurisdiction or of the remaining provisions in that or any other jurisdiction is not affected,

but only to the extent that is consistent with giving substantial effect to the intentions of the parties under this agreement.

- 13.7 This agreement is governed by the law of Queensland, Australia. Each party submits to the jurisdiction of the courts in Queensland in connection with matters concerning this agreement.

14 Definitions and interpretation

14.1 Definitions

In this agreement, the following definitions will apply:

Subscriber Data means:

- a. any raw information or data input entered into the Software by the Subscriber;
- b. any information or data output generated by the Software as a result of the input of information or data as per (a) above;

and includes any Intellectual Property Rights therein, but which excludes any Metadata.

Commencement Date means the date on which the account allocated to the Subscription is activated.

Confidential Information means any information relating to ELA's business and Software (in any format), which is confidential in nature, including but not limited to:

- a. all ideas, concepts, know-how and trade secrets, techniques, processes, programs, specifications, databases, drawings, records, reports, software, source code, object code, materials, photographs, documents or User Manuals developed by, or relating to ELA;
- b. any information relating to the business affairs, accounts, marketing plans, prospects, research, products or finances of ELA; and
- c. any information that would be of commercial value to any of ELA's competitors.

Improvement means any adaptation, improvement, modification, derivative of, enhancement made to or any development thereof.

Organisation Agreement means the agreement between ELA and the Organisation, which grants the Organisation a right to allocate a Subscription to the Subscriber.

Intellectual Property Rights means:

- a. all present and future industrial, intellectual or proprietary rights conferred by statute, at common law or in equity anywhere in the world, whether issued or pending, registered or unregistered, including all forms of copyright, patents, trademarks, designs, trade secrets, inventions, discoveries, know-how, confidential information, plant varieties and circuit layouts, including any Improvements thereto; and
- b. all statutory and common law rights including the right to sue for damages and other remedies against third parties for infringement or misuse of the related intellectual property, whether or not the infringement or misuse took place before the date of this agreement and retain all amounts recovered in any action (whether

as to damages, or following an account of profits or on any other basis) obtained as a result of any such action.

Metadata means all data, excluding Subscriber Data but including data derived from Subscriber Data, which provides descriptive, technical, statistical and other metadata type information regarding the Subscriber's use of the Software and includes all Intellectual Property Rights therein.

Personal Information has that meaning given to it in the *Privacy Act 1988* (Cth).

Privacy Policy means ELA's privacy policy as amended from time to time, accessible via <https://app.mytrainingplan.com.au/pages/privacy-policy/>

Software means ELA's suite of software products as tools for vocational education and training as accessible via computer software and mobile device applications and marketed together as 'My Profiling,' including the following components:

- a. + Profiling;
- b. + Assessment;
- c. + RPL; and
- d. + Training Plan;

plus any Improvements and Intellectual Property Rights therein.

Subscription means the right for the Subscriber to use the Software granted pursuant to clause 1, via an account to be allocated to the Subscriber by the Organisation.

Term means the term of the Organisation Agreement.

User Manual means any instructional or marketing materials, in any form, provided or presented to the Subscriber for the purposes of assisting the Subscriber in using the Software, including but not limited to, any operating guidelines, manuals, templates, videos, presentations, handouts and videos.

14.2 Interpretation

In this agreement, unless the context otherwise requires:

- a. words denoting any gender include all genders;
- b. headings are for convenience only and do not affect interpretation;
- c. the singular includes the plural and vice versa;
- d. any schedule or annexure attached to this agreement forms part of it;
- e. a reference to a party includes its legal personal representatives, successors and permitted assigns;
- f. a reference to a person includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity;
- g. a reference to a statute or other law includes regulations and other instruments under

it and consolidations, amendments, re-enactments or replacements of any of them;

- h. unless expressly stated to be otherwise, the meaning of general words is not limited by specific examples introduced by 'including', 'for example' or similar inclusive expressions; and
- i. a reference to this agreement means this agreement and includes any variation or replacement of this agreement.