

1 Definitions

- 1.1 **ACARA** means the Australian Curriculum, Assessment and Reporting Authority.
- 1.2 **Applicable Laws** means any applicable laws (including orders, by-laws and regulations) in the jurisdiction in which the Subscriber or Authorised User that you are interacting with or located or which in any way govern or affect the Subscriber and Authorised User's use of the website.
- 1.3 **Authorised Users** means employed teachers or other staff and enrolled students of the Subscriber during the Subscription Period.
- 1.4 **Australian Consumer Law** means Schedule 2 of the *Competition and Consumer Act 2010* (Cth).
- 1.5 **BOSTES** means the Board of Studies, Teaching and Educational Standards NSW.
- 1.6 **Commencement Date** means the date in which the Subscriber purchased the Product.
- 1.7 **Conditions** means these Terms and Conditions of Use.
- 1.8 **Copyright Act** means the *Copyright Act 1968* (Cth).
- 1.9 **Copyright Statement** means the copyright statement accessible on the Website.
- 1.10 **Default Event** means any:
- (a) material breach of these Conditions;
 - (b) misuse of the Product or Product Material;
 - (c) breach of the Copyright Statement; and
 - (d) breach of any warranty as described in clause 13 of these Conditions.
- 1.11 **Expiry Date** means twelve (12) months from the date on which Subscriber purchases the Product.
- 1.12 **FAQs** means the Frequently Asked Questions contained on the Website.
- 1.13 **GST** means the Goods and Services Tax as created by the GST Act.
- 1.14 **GST Act** means *A New Tax System (Goods and Service Tax) Act 1999* (Cth).
- 1.15 **Order Form** means the order form contained on the Website which the Subscriber must complete prior to making payment of the Subscription Fee.
- 1.16 **Intellectual Property** means all Product Material and literary, artistic works and other copyright works, processes, designs, user content, whether or not registrable in the Commonwealth of Australia or throughout the world which the Subscriber is granted access to whilst utilising the Product or Product Material.
- 1.17 **Privacy Policy** means the privacy policy accessible on the Website.
- 1.18 **Product** means the numeracy assessments, numeracy curriculum and/or literacy assessments provided by the Product Provider which is accessible by Subscribers through the Website.
- 1.19 **Product Material** means all workbooks, modules, activities, learning guides, assessments, results analysis, games and related materials which make up the Product.
- 1.20 **Product Selection Box** means the digital boxes which appear under the "purchase" section of the Website which the Subscriber selects to purchase the relevant Product.
- 1.21 **Product Provider** means AKOSMS Pty Ltd (ACN 621 127 204) as trustee for the Spitty Family Trust trading as Essential Assessment.
- 1.22 **Subscriber** means a learning institution which has purchased a Subscription for the Subscription Period on the terms and conditions contained in these Conditions.
- 1.23 **Subscriber's Account** means the account created by the Product Provider to allow the Subscriber to access the Product and the Product Material, including the Subscriber's log in information and password.
- 1.24 **Subscription** means the non-exclusive licence granted by the Product Provider to the Subscriber for use of the Product and the Product Material.
- 1.25 **Subscription Period** means the period between Commencement Date and the Expiry Date.
- 1.26 **Subscription Fee** means the fee paid by the Subscriber to utilise the Product.
- 1.27 **System Downtime** means any scheduled maintenance, service requirements or system error which results in the Website, Product or Product Material being unavailable for use by the Subscriber, whether or not such downtime is in the control of the Product Provider.
- 1.28 **User** means any individual or entity who uses or accesses the Website, including without limitation a Subscriber.
- 1.29 **VCAA** means the Victorian Curriculum and Assessment Authority.
- 1.30 **Website** means <http://www.essentialassessment.com.au>.

2 Interpretation

In these Conditions, unless inconsistent with the context or subject matter:

- 2.1 a reference to a person includes any other legal entity and vice versa;
- 2.2 words importing the singular number include the plural number and vice versa;
- 2.3 a reference to a party includes the party's heirs, executors, successors and permitted assigns;
- 2.4 headings are for reference purposes only;
- 2.5 where any word or phrase is given a defined meaning any other part of speech or other grammatical form concerning the word or phrase has a corresponding meaning;
- 2.6 references to writing include any mode of representing or reproducing words in tangible and permanently visible form, and includes email;
- 2.7 unless otherwise stated, a reference to a monetary amount is a reference to an Australian dollar currency amount; and
- 2.8 an obligation of two or more parties binds them jointly and each of them severally.

3 Scope of Agreement

- 3.1 These Conditions together with our Privacy Policy form the basis on which:
 - (a) a User may access and use the Website; and
 - (b) a Subscriber may access and use the Product and Product Material.
- 3.2 Access to the Website, Product and Product Material is granted subject to these Conditions to the exclusion of anything to the contrary.
- 3.3 A User is deemed to have agreed to be bound by these Conditions by accessing the Website. These Conditions are not binding on Essential Assessment until the Order Form is accepted by it.
- 3.4 Should a User object to any Conditions, that User should immediately cease use of, and access to, the Website and should not request a Subscription.
- 3.5 The Subscriber's objection to or failure to object to any of the any of these Conditions stated by the Product Provider herein does not alter the following Conditions.
- 3.6 The Product Provider retains the right to amend, vary or alter these Conditions from time to time during the Subscription Period. Such amendments, variations or alterations come into effect immediately on publication on the website.
- 3.7 The Product Provider retains the right to amend, vary or alter the Subscription Fee from time to time. In such circumstances, the Product Provider will provide notice on the Website or will issue a notice to the Subscriber's email address.
- 3.8 The Website may allow Users to enter personal information (such as name and contact details). The Product Provider will use this information in accordance with the Privacy Policy.

4 Previous Dealings

- 4.1 Previous dealings shall not have any effect on these Conditions and are hereby expressly excluded.

5 Term

- 5.1 Use of the Product and the Product Material is limited to Subscribers within the Subscription Period.
- 5.2 Upon the Expiry Date, the parties acknowledge that the Subscriber's Account will automatically be disabled by the Provider. These Conditions shall continue to govern use of the Product and Product Material and shall not merge on the Expiry Date.
- 5.3 The parties agree and acknowledge that the Subscription Period automatically extends for a further period of 12 months following the Expiry Date of the Subscription Period unless either party provides the other party with not less than 60 days written notice before the Expiry Date of their intention to not enter into the automatically renewed period.

6 Payment of Subscription Fee

- 6.1 The parties agree and acknowledge that the Subscriber will be provided with a Subscriber's Account and will be granted access to the Product upon payment of the Subscription Fee.
- 6.2 By clicking the Product Selection Box, the Subscriber agrees and acknowledges that the Subscriber will be bound to pay the Subscription Fee.
- 6.3 The Subscription Fee will be payable in the manner as specified on the Website at the time the order for the Product is placed.
- 6.4 Where any part of the Subscription Fee or other monies payable by the Subscriber under or in connection with these Conditions are not paid by its due date, the Product Provider reserves the right to suspend the Subscriber's access to the Product until all overdue amounts have been received by the Product Provider in cleared funds.
- 6.5 The Subscriber must pay all fees and other amounts under these Conditions without set-off or claim under any circumstances including if a dispute exists.
- 6.6 Depending on the method of payment the Subscriber uses to pay the fees, additional charges may be incurred (such as card processing charges).
- 6.7 To the extent permitted by law, all amounts paid are non-refundable.

7 Goods and Services Tax

- 7.1 Unless otherwise stated, the parties agree and acknowledge that the Subscription Fee is exclusive of GST. Where the service provided is subject to GST, it will be added and charged to the Service Provider and will make up the Subscription Fee.

8 Use of Product

- 8.1 Subject to clause 9, the Product Provider provides the Subscriber with a non-exclusive, non-transferable, revocable licence to access and use the Product during the Subscription Period in accordance with these Conditions. The licence to access and use the Product as granted under this clause is for Authorised Users and will be subject to such restrictions as set out on the Website at the time of signing up.
- 8.2 The Subscriber agrees and acknowledges that by paying the Subscription Fee:
 - (a) the Subscriber will only use the Product for the Product's intended purpose in accordance with the terms of these Conditions;
 - (b) the Subscriber must only sub-licence its right to access and use the Product to the Authorised Users and must not permit any unauthorised person to access or use the Product;

- (c) the Subscriber must not use or allow an Authorised User to use the Product for any purpose that is unlawful or prohibited by these Conditions;
 - (d) the Subscriber will not use or allow an Authorised User to use the Product in a manner which could damage, disable, overburden or impair the Product or Website or interfere with any other subscribers use and enjoyment of the Product and Website;
 - (e) the Subscriber must not republish or redistribute any content or material from the Product;
 - (f) the Subscriber must not directly or indirectly reverse engineer, decompile, disassemble or otherwise attempt to discover the source code, object code or underlying structure, ideas, know-how or algorithms relevant to the Product or any software, documentation or data related to the Product;
 - (g) the Subscriber must not modify, translate, or create derivative works based on the Product (except to the extent expressly permitted by the Product Provider or authorised within the Product); and
 - (h) the Subscriber must not make any alteration to the Product;
 - (i) the Subscriber's use and entitlement to access and use the Product and Product Material will expire at the Expiry Date; and
 - (j) the Subscriber is responsible for monitoring all Authorised Users' use of the Product and Product Material.
- 8.3 The Subscriber's use of the Product and all information provided by the Subscriber must not:
- (a) be false, inaccurate or misleading;
 - (b) be fraudulent, deceptive or unlawful;
 - (c) infringe any third party's rights or violate any Applicable Laws (including those governing consumer protection, criminal law or anti-discrimination);
 - (d) be in any manner which could damage, disable, overburden or impair the Product or interfere with any other party's use and enjoyment of the Product;
 - (e) be obscene, defamatory, trade libelous, unlawfully discriminatory, threatening or harassing;
 - (f) contain comments of religious, political or social nature;
 - (g) contain any viruses or otherwise affect the integrity, operation or security of the Product or Website;
 - (h) create liability for us or cause us to lose (in whole or part) the services or custom of our internet service provider, other Subscribers or Authorised Persons;
 - (i) damage the credibility or integrity of the Product, Website or us, or dilute, tarnish, or otherwise hard our brand in any way;
 - (j) breach or violate any of our policies;
 - (k) copy, store or otherwise access or use any information contained within the Product or Website for purposes not expressly permitted by these Conditions;
 - (l) use the Product or Website for any purposes that are not permitted by these Conditions or in any way that is inconsistent with the purpose of the Product or Website, or in a manner that falsely implies that we are providing endorsement, partnership or otherwise misleads others as to the Subscriber or Authorised User's affiliation with us;
 - (m) attempt to circumvent payment of any fees in anyway;
 - (n) circumvent, disable or otherwise attempt to interfere with any security related features; and
 - (o) "stalk" or harass any other Subscriber or Authorised User or collect or store any personally identifiable information about any other Subscriber or Authorised User.
- 8.4 The Subscriber agrees and acknowledges that use of the Product is limited to educational purposes and the Subscriber shall not use, distribute or reproduce the Product Material for any other purpose, whether it be for a commercial or financial purpose.
- 8.5 The Subscriber is solely responsible for all actions of its Authorised Users.
- 8.6 The Subscriber agrees and acknowledges that the Subscriber's Account is non-transferrable and may only be utilised by Authorised Users.
- 8.7 The Subscriber agrees to make all reasonable efforts to keep confidential all Subscriber's Account information, and in the event that such information is lost or disclosed to a third party, the Subscriber agrees to immediately notify the Product Provider.
- 8.8 The Product Provider makes no guarantees or gives no warranty that the Website, Product or Product Material will be available at all times or for the purpose the Subscriber may intend.
- 8.9 The Product Provider will use its best endeavors to notify the Subscriber of any planned or foreshadowed System Downtime.
- 8.10 In the event of System Downtime, the Subscriber holds harmless and releases the Subscriber from any liability, loss or claim.
- 8.11 The Subscriber holds harmless and releases the Product Provider from any liability for loss of data, including but not limited to online results and any other Product Material, whether caused as a result of System Downtime or otherwise.
- 9 Account**
- 9.1 The Product Provider in its sole discretion accept or reject an application for a Subscriber's Account, without any obligation to provide reasons. If your application for a Subscriber Account is accepted, you will be granted a non-exclusive revocable licence to access and use the Product.
- 9.2 To access and use your Subscriber Account, you will need to use an email address and password. You are solely responsible for maintaining the confidentiality of your password and you are liable for all activities that happen under your Subscriber Account, even if you do not authorise such activities (this includes the activities of your Authorised Users). You must keep

secret and secure all usernames and passwords in relation to the Product or Website and not allow any other person to have access to your Subscriber Account.

- 9.3 A Subscriber's account may not be assigned or sublicensed without the prior written approval of the Product Provider which may be given, withheld or conditioned at the Product Provider's discretion.

10 Cancellation of Subscriber's Account by Subscriber

- 10.1 While the Subscriber may suspend, cancel or terminate the Subscriber's Account, the Subscriber agrees and acknowledges that the Subscription Fee is non-refundable and use of the Product and Product Material is limited to the Subscriber and the Authorised Users.
- 10.2 Any cancellation, suspension or termination of the Subscriber's Account of this shall not affect any accrued rights of the Product Provider, nor shall it affect any provision of these Conditions which is expressly or by implication intended to continue in force after such cancellation, suspension or termination.
- 10.3 The parties agree and acknowledge that the Subscriber's Account will be terminated upon each billing period at the Product Provider's discretion and once the Subscriber's Account has been suspended for a period of 6 months, the Product Provider will remove all of the Subscriber's information and data from its system.

11 Cancellation of Subscriber's Account by Product Provider

- 11.1 The Product Provider may suspend, cancel or terminate the Subscriber's Account if a Default Event occurs.
- 11.2 In the event that the Product Provider enforces the Product Provider's right under clause 9.1, the Product Provider reserves the right to retain the Subscription Fee.
- 11.3 Any cancellation, suspension or termination of the Subscriber's Account shall not affect any accrued rights of the Product Provider, nor shall it affect any provision of these Conditions which is expressly or by implication intended to continue in force after such cancellation, suspension or termination.

12 Obligations of Subscriber at conclusion of these Conditions

- 12.1 In the event the Subscriber's Account is suspended, cancelled or terminated pursuant to clause 8 or clause 9 of these Conditions, the Subscriber agrees and acknowledges that it shall return to the Product Provider or destroy all Product Material as specified and directed by the Product Provider.
- 12.2 From the Expiry Date, the Subscriber agrees and acknowledges that it shall return to the Product Provider all Product Material or destroy all Product Material.
- 12.3 In the event that the Subscriber breaches the Subscriber's obligations under clause 5, 6, 7, 11, 12 or 13.2 and/or distributes, copies or in any other way uses the Product Material, the Subscriber will indemnify the Product Provider for any loss, claim or damage incurred by the Product Provider as a result of such breach.
- 12.4 The parties agree that this clause 10 shall survive the termination or expiration of the Subscription Period.

13 Intellectual Property

- 13.1 The parties agree and acknowledge that all Intellectual Property remains the absolute property of the Product Provider. Use of any Intellectual Property by the Subscriber beyond the Subscription Period or which falls outside the scope of these Conditions is expressly prohibited.
- 13.2 Pursuant to the Copyright Statement, the parties agree that all Product Material is protected by the Copyright Act and that all Product Material must not be copied, reproduced, republished, downloaded, posted, broadcasted or transmitted in any way which is outside the scope of these Conditions.
- 13.3 The Subscriber agrees and acknowledges that the Subscriber shall not use the Product Material, the Website or any related content in a manner which infringes the copyright, moral rights or any other intellectual property of any third party.
- 13.4 The parties agree that this clause 11 shall survive the termination or expiration of the Subscription Period.

14 Confidentiality

- 14.1 The Subscriber agrees and acknowledges all information, Product Material and data which the Subscriber accesses during the Term is considered confidential information (**Confidential Information**).
- 14.2 In the event the Subscriber copies, reproduces, republishes, broadcasts or transmits any Confidential Information to any third party, the Subscriber agrees to indemnify the Product Provider for any loss or damage resulting from such disclosure.
- 14.3 The parties agree that this clause 12 shall survive the termination or expiration of the Subscription Period.

15 Relationship of Parties

- 15.1 Nothing in these Conditions or the User's use of the Website establishes or creates a joint venture, partnership, consortium, franchise, employment or agency relationship between Product Provider and Users or Subscribers.

16 Warranties

- 16.1 The Subscriber warrants to the Product Provider that the Subscriber:
- (a) has the authority to enter into these Conditions;
 - (b) is responsible for the Authorised Users use of the Product, Product Material and Website;
 - (c) has read the FAQs prior to paying the Subscription Fee;
 - (d) will monitor and regularly attend to reviewing these Conditions and the FAQs during the Subscription Period;
 - (e) is not bankrupt or insolvent;
 - (f) has completed all corporate and other necessary action required to be taken to enter into these Conditions;
 - (g) will comply with its obligations under clause 5, clause 7, clause 10, clause 11 and clause 12 of these Conditions.
- 16.2 The parties agree and acknowledge that any breach by the Subscriber of the warranties contained in clause 13.1 will be considered a material breach of these Conditions.

17 Indemnities

- 17.1 The Subscriber indemnifies and holds harmless the Product Provider for any loss, claim or damage incurred by the Product Provider for any misuse of the Product, Product Material, Website Confidential Information and Intellectual Property.

18 Disclaimers

- 18.1 In the event that the supply of the Product is deemed to be supply under the Australian Consumer Law, the parties agree that nothing in these Conditions excludes, restricts or modifies the exercise of any right or remedy or the imposition of any liability under the Australian Consumer Law.
- 18.2 To the maximum extent permitted by law, the Product Provider expressly and irrevocably disclaims any liability whatsoever for any loss or damage in connection with the use of the Product, including but not limited to, any representations made by the Product Provider in respect of the Product or Product Material supplied to the Subscriber by virtue of the Website.
- 18.3 Subject to the Australian Consumer Law, the entire risk of the Subscriber's use of the Product or Product Material is to the maximum extent permitted by law, is limited to the amounts paid by the Subscriber in the past twelve (12) months and the Product Provider will have no liability whatsoever for any loss, harm, damage cost or expense or any direct, special, indirect, punitive or consequential loss or damage in respect of the Subscriber's use of the Product or Product Material.
- 18.4 If the Product Provider is liable to the Subscriber in relation to a failure to comply with a guarantee that applies under Division 1 of Part 3-2 of the Australian Consumer Law that cannot be excluded, the Product Provider's total liability to the Subscriber for that failure is limited to, at the option of the Product Provider:
- (a) in the case of services, the resupply of the services or the payment of the cost of resupply; and
 - (b) in the case of goods, the replacement of the goods or the supply of equivalent goods, or the repair of the goods, or the payment of the cost of replacing the goods or of acquiring equivalent goods, or the payment of the cost of having the goods repaired.
- 18.5 The Product Provider makes no representation and gives no warranty or guarantee as to the suitability, accuracy, quality, performance or fitness for purpose of the Product or the Product Material and the parties agree and acknowledge that all such warranties or undertakings are excluded.
- 18.6 The User should use its own discretion in the selection of the Product and Product Materials and where required seek professional advice from suitably qualified professionals regarding their own specific needs and the suitability of the Product and Product Materials for those needs.
- 18.7 The Product Provider does not take any steps to confirm the identity of any of the Subscribers or Authorised Users. As Subscriber and Authorised User authentication on the internet is difficult, particularly in cases of fraudulent or misleading conduct, the Product Provider cannot and does not confirm nor warrant or guarantee as to each of the Subscriber's or Authorised Users purported identity, licenses or location.
- 18.8 The Product Provider has no control over the actions over any partner featured on the Website and does not make any representations in respect of their ability to provide any goods or services and is not responsible for any Loss suffered by the Subscriber or Authorised User in their dealings with such featured partners.
- 18.9 The Subscriber agrees and acknowledges that any of the information contained in the Product, Product Material or Website is not to be considered professional advice or a formal

recommendation and any such representations and warranties are hereby excluded.

- 18.10 The parties acknowledge and agree that:
- (i) Victorian Curriculum F-10 content elements produced in the Product or Product Materials are copyright to VCAA, reproduced with permission; and
 - (ii) the VCAA does not endorse or make any warranties regarding Victorian Curriculum F-10 content elements produced in the Product or Product Materials. The Victorian Curriculum F-10 and related content can be accessed directly at the VCAA website at <http://www.vcaa.edu.au>.
- 18.11 The parties agree and acknowledge that:
- (i) ACARA material produced in the Product or Product Materials is copyright to ACARA, reproduced with the permission of ACARA;
 - (ii) ACARA neither endorses nor verifies the accuracy of the information provided and accepts no responsibility for incomplete or inaccurate information. In particular, ACARA does not endorse or verify that:
 - (A) the content descriptions are solely for a particular year and subject;
 - (B) all the content description for that year and subject have been used; and
 - (C) the author's material aligns with the Australian Curriculum content description for the relevant year and subject. You can find the unaltered and most up to date version of this material at the ACARA website at <http://www.australiancurriculum.edu.au>.
- 18.12 The parties agree and acknowledge that any sample examination papers or model answers accompanying the BOSTES materials are not part of the BOSTES materials and are in no way endorsed or authorised by BOSTES NSW. BOSTES NSW takes no responsibility for any errors in the reproduction of the BOSTES materials.
- 18.13 This disclaimer applies to the fullest extent permitted by law and shall survive termination or expiration of these Conditions.

19 Assignment

- 19.1 The Product Provider may assign or novate its interest under these Conditions without notice. The Subscriber must not assign or novate its interest under these Conditions without the prior written consent of the Product Provider.

20 Severability

- 20.1 Any provision of these Conditions which is prohibited or unenforceable in any jurisdiction is ineffective as to that jurisdiction to the extent of the prohibition or unenforceability. This does not invalidate the remaining provisions of these Conditions nor does it affect the validity or enforceability of that provision in any other jurisdiction.

21 No Adverse Construction

- 21.1 The Subscriber agrees that these Conditions may not be construed adversely against the Product Provider solely because the Product Provider prepared them.

22 No Waiver

- 22.1 The Product Provider's failure to enforce any provision of these Conditions at any time or for any period of time will not be construed to be a waiver of such provisions or the Product Provider's rights to enforce each and every provision of these Conditions. A waiver of a power or right shall be ineffective unless it is in writing and signed by the Product Provider.

23 Compliance with laws

- 23.1 Except as expressly provided to the contrary in these Conditions, all representations, warranties, terms and conditions in relation to the Products, whether implied or expressed, are hereby excluded unless otherwise not permitted to be excluded by law.

24 Jurisdiction

- 24.1 These Conditions will take effect and be construed in all respects in accordance with the laws of the State of Victoria, Australia. The parties irrevocably submit to the jurisdiction of the State of Victoria for all proceedings arising in connection with these Conditions.

25 Survival of Conditions

- 25.1 The provisions of these Conditions shall continue to apply after the expiration or termination of these Conditions.