

Terms and Conditions for Short Courses



August 2020

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These Terms and Conditions form part of the contract between Open Universities Australia Pty Ltd (“OUA”, “we” or “us”) and each New Provider or Continuing Provider (“Provider” or “you”).

1. Appointment

- 1.1. OUA appoints the Provider to provide Services to OUA Students for the Term in accordance with the terms and conditions set out in the Agreement.
- 1.2. The Provider’s appointment under the Agreement is non-exclusive. The Provider acknowledges and agrees that OUA may appoint other Higher Education Providers on similar terms to provide short courses which may or may not be similar to or the same as the OUA Accessed Short Courses.

2. Term

The Agreement commences on and from the Commencement Date and continues for the Term unless terminated earlier in accordance with the Agreement.

At the end of each Term, unless either party gives written notice to the other party of its intention not to renew at least 90 days before the end of a Term, the Term will automatically renew for successive twelve (12) month periods.

3. OUA’s obligations

- 3.1. To enable the Provider to provide the Services to OUA Students, OUA must:
 - 3.1.1. use all reasonable commercial endeavours to conduct sales and marketing activities designed to promote the Platform;
 - 3.1.2. collect information from persons who visit the Platform with a view to facilitating their enrolment in OUA Accessed Short Courses or other Short Courses;
 - 3.1.3. operate the Platform to facilitate (when appropriate) the enrolment of OUA Students in OUA Accessed Short Courses;
 - 3.1.4. undertake any services, activities or responsibilities which are expressly allocated to OUA in the Agreement or the Service Level Requirements;
 - 3.1.5. provide any Personnel, facilities or other resources which are stated in the Agreement or the Service Level Requirements to be provided by OUA;
 - 3.1.6. provide such OUA Student Data to the Provider as is reasonably necessary for OUA Students to enrol in and complete OUA Accessed Short Courses; and
 - 3.1.7. perform its other obligations as set out in the Agreement.

- 3.2. In performing its obligations under the Agreement, OUA must:
 - 3.2.1. meet or exceed the Service Level Requirements applicable to OUA;
 - 3.2.2. observe and comply with all Laws; and
 - 3.2.3. consider all reasonable requests from the Provider in relation to provision of the Services to OUA Students.

4. Provider’s obligations

- 4.1. Unless otherwise specified and subject to OUA’s performance of its obligations under the Agreement, the Provider is solely responsible for supplying the Services to OUA Students in accordance with the requirements set out in the Agreement.
- 4.2. The Provider must:
 - 4.2.1. develop and maintain the content of the OUA Accessed Short Courses and the method of delivering them;
 - 4.2.2. undertake any services, activities or responsibilities which are expressly allocated to the Provider in the Agreement or the Service Level Requirements;
 - 4.2.3. provide any Personnel, facilities or other resources which are stated in the Agreement or the Service Level Requirements to be provided by the Provider;
 - 4.2.4. provide the Services to OUA Students who enrol through OUA to study OUA Accessed Short Courses with the Provider in accordance with the terms of the Agreement;
 - 4.2.5. comply with, and manage, all regulatory and other requirements imposed by Law applying to the development and delivery of each OUA Accessed Short Course;
 - 4.2.6. provide all reasonably necessary facilities, clerical support, libraries and other relevant resources and Personnel required to deliver each OUA Accessed Short Course to a standard at or above those provided to the Provider’s own distance education students;
 - 4.2.7. assist OUA with its planning and strategy regarding OUA Accessed Short Courses;
 - 4.2.8. perform its other obligations as set out in the Agreement.

- 4.3. In performing its obligations under the Agreement, the Provider must:
- 4.3.1. meet or exceed the Service Level Requirements applicable to the Provider;
 - 4.3.2. exercise due care, skill and judgement and at all times act in accordance with the highest professional principles and standards;
 - 4.3.3. observe and comply with all Laws; and
 - 4.3.4. Implement all of OUA's reasonable requirements in connection with the Agreement.
- 6.6. In delivering the Services, the Provider must comply with the following conditions:
- 6.6.1. each OUA Accessed Short Course must be available to be delivered to any OUA Student, subject to the student having adequate access to email and the Provider's Learning Management System;
 - 6.6.2. each OUA Student enrolled in an OUA Accessed Short Course must be given login details within the timeframe specified in the Service Level Requirements;
 - 6.6.3. where completion of an OUA Accessed Short Course is subject to a requirement for the OUA Student to complete practical training or supervised field practice, the Provider must provide each OUA Student registered in the OUA Accessed Short Course with a reasonable opportunity to complete the requirement (including by offering placements on a regional basis);
 - 6.6.4. each OUA Accessed Short Course must:
 - 6.6.4.1. be provided with due care and skill, by suitably qualified Personnel of the Provider and must be fully supported and resourced by the Provider; and
 - 6.6.4.2. comply with all applicable Laws; and
 - 6.6.5. the academic content and quality of the OUA Accessed Short Course must be of a standard which is at least the same as similar to Short Courses offered by the Provider to its on-campus students.

5. Students

- 5.1. The Provider agrees that OUA Students will enrol in OUA Accessed Short Courses via the OUA Website or with OUA directly.
- 5.2. Subject to clause 5.3, the Provider must not set any prerequisites for an entry level, undergraduate OUA Accessed Short Course, without advising OUA of such prerequisites in a timely manner.
- 5.3. The Provider may refuse to accommodate any person undertaking an OUA Accessed Short Course who does not have access (direct or indirect) to email and the Learning Management System for the course.
- 5.4. The Provider must not encourage, solicit, induce or otherwise entice any OUA Student to cancel his or her enrolment in an OUA Accessed Short Course.
- 5.5. Nothing in clause 5.4 prevents the Provider from enrolling an OUA Student in response to a direct application made voluntarily by the OUA Student.

6. OUA Accessed Short Courses

- 6.1. At the Commencement Date, the OUA Accessed Short Courses which the Provider must make available through OUA for study by OUA Students are:
 - 6.1.1. for a New Provider, as listed in the Application.; or
 - 6.1.2. for a Continuing Provider, as agreed at the end of the previous Catalogue Rollover.
- 6.2. Subject to clauses 6.3 and 6.4, the parties may amend the list of OUA Accessed Short Courses during Catalogue Rollover or by agreement in writing.
- 6.3. The Provider must not cancel or withdraw any OUA Accessed Short Course unless:
 - 6.3.1. the Provider has provided a minimum of 6 months' written notice to OUA and otherwise complies with reasonable teach out obligations in relation to the relevant OUA Accessed Short Course after expiry of the notice in accordance with clause 23; or
 - 6.3.2. OUA has approved that the OUA Accessed Short Course is to be replaced with a similar but superior Short Course.
- 6.4. OUA must not cancel or withdraw any OUA Accessed Short Course unless:
 - 6.4.1. OUA has provided the Provider with a minimum of 6 months' written notice; or
 - 6.4.2. as otherwise agreed by the Provider.
- 6.5. OUA Students will be offered academic credit in accordance with the Provider's then current Academic Policies regarding the granting of academic credit.
- 6.7. The Provider must create and provide access to the Study Materials.
- 6.8. The Provider must work with OUA to optimize timely and affordable access by OUA Students to textbooks.
- 6.9. The Provider must:
 - 6.9.1. have Academic Policies for determining and responding to requests for extensions of time to complete assessments, and ensure that the Academic Policies are available to OUA Students at all times;
 - 6.9.2. provide high quality assessment practices in accordance with the Service Level Requirements.
- 6.10. OUA acknowledges the application of the Provider's Academic Policies to OUA Students who are enrolled in an OUA Accessed Short Course.
- 6.11. The Provider will follow its own Academic Policies with respect to its grading system for OUA Students and will use its best endeavours to provide final grade results to OUA within 10 Business Days of the end of each Teaching Period in accordance with the Service Level Requirements.
- 6.12. If the Provider wishes to renew the Agreement and continue to participate on the OUA Platform in the following academic year, the Provider must cooperate in the following process administered by OUA and known as "Catalogue Rollover":
 - 6.12.1. The process begins in late July each year during the Term and continues until the Catalogue Rollover Date.
 - 6.12.2. OUA will commence the process by inviting the Provider to update its Short Course Catalogue for the following academic year. OUA will specify the information required, the format of the information and the deadlines for submission.

- 6.12.3. The Provider must provide updated information to OUA about its Short Course Catalogue, including any changes to pricing and availability of shorty courses for the following academic year.
 - 6.12.4. The Provider may add or remove courses to its Short Course Catalogue during the process.
 - 6.12.5. OUA may advise the Provider, by giving notice in writing at least 30 days' before the end of Catalogue Rollover, of the Provision Fee that OUA will pay to the Provider in respect of enrolments in OUA Accessed Short Courses in the following academic year.
 - 6.12.6. OUA may advise the Provider, by giving notice in writing at least 3 months' before the end of Catalogue Rollover, of any variations to these Terms and Conditions which will apply to all Provider Participants on the OUA Platform after the end of Catalogue Rollover.
- 6.13. If either party ("first party") objects to the amendments to the Agreement proposed by the other party during Catalogue Rollover, the first party may give notice in writing of the objection to the other party ("Notice of Objection") no later than 7 days before the end of Catalogue Rollover. OUA may remove from the OUA Website Pre-Enrolment Information about any OUA Accessed Short Courses that are the subject of a Notice of Objection.
- 6.14. In the absence of a Notice of Objection served under clause 7.25, all amendments to the Agreement proposed by the other party during Catalogue Rollover are deemed to be agreed and take effect after 5 pm on the last day of the Term.

7. Information management

- 7.1. The Provider must:
 - 7.1.1. provide OUA with all Pre-enrolment Information;
 - 7.1.2. ensure that the Pre-enrolment Information are accurate, complete and provided within the timeframe specified in the Service Level Requirements (or, if no timeframe is specified, within a reasonable timeframe as requested by OUA); and
 - 7.1.3. within 20 Business Days of receiving an invoice from OUA, reimburse OUA, as a debt due and payable, any Losses incurred by OUA as a result of any Pre-enrolment Information being inaccurate, incomplete or not being provided on time.
- 7.2. If OUA requires the Provider to change any Pre-enrolment Information before publication:
 - 7.2.1. OUA will notify the Provider in writing and provide reasons for the changes required; and
 - 7.2.2. Unless the change would result in the Publication Materials being inaccurate, incomplete or in breach of the Provider's Academic Policies, the Provider must make the changes required by OUA and resubmit the Publication Materials to OUA within the timeframe specified in the Service Level Requirements or as notified by OUA from time to time.
- 7.3. The OUA Handbook and program information about Short Courses available through OUA will be developed by OUA in consultation with the Provider.

- 7.4. OUA may edit, with the approval of the Provider, any Pre-enrolment Information before publication on the OUA Website or in the OUA Handbook provided that OUA does not inaccurately describe an OUA Accessed Short Course.
- 7.5. OUA will, at its own cost, publish (whether in hard copy, by electronic means or a combination of the two formats) the OUA Handbook on an annual basis.
- 7.6. The Provider must perform and satisfy each and every representation and warranty made by the Provider in Pre-enrolment Information published in the OUA Handbook or on the OUA Website.
- 7.7. If there is any inconsistency between the published OUA Handbook and the version of the OUA Handbook that is available from time to time on the OUA Website, the version of the OUA Handbook that is available on the OUA Website will take precedence.
- 7.8. The Provider consents to OUA publishing the Pre-enrolment Information in the OUA Handbook and on the OUA Website
- 7.9. If the Provider believes the information in the OUA Handbook or on the OUA Website is no longer accurate, the Provider must provide OUA with updated information in accordance with the Service Level Requirements.

8. Quality assurance and evaluation

- 8.1. The Provider must ensure that:
 - 8.1.1. the content, instructional design and production quality of the Services and Study Materials provided to OUA Students are to a standard that is:
 - 8.1.1.1. considered acceptable by the Provider's Academic Board or equivalent;
 - 8.1.1.2. consistent with the equivalent services, products and materials provided by the Provider to distance education students and conforms generally to the principles of effective distance education; and
 - 8.1.2. all Services and Study Materials are delivered in accordance with industry best practice.
- 8.2. OUA may survey OUA Students about their experience using the Services.
- 8.3. If OUA conducts a survey of OUA Students in accordance with clause 8.2 and prepares a report of the survey results in relation to OUA Accessed Short Courses, then OUA must provide a copy of the report to the Provider within 1 month after the date of preparation of the report.
- 8.4. Each year during the Term of the Agreement, OUA may complete an Annual Portfolio Review with the Provider.
- 8.5. The Provider must cooperate with OUA as reasonably required by OUA for it to complete each Annual Portfolio Review, including by sending representatives to any meetings required by OUA.
- 8.6. The Provider and OUA will work together to address and, where applicable, implement OUA's findings from each Annual Portfolio Review as soon as reasonably practicable.

9. Tuition Fees for OUA Accessed Short Courses

- 9.1. The tuition fees payable by an OUA Student for accessing an OUA Accessed Short Course are the fees published by OUA as notified to OUA by the Provider from time to time.
- 9.2. The Provider acknowledges and agrees that:
 - 9.2.1. tuition fees for OUA Accessed Short Courses are payable to OUA;
 - 9.2.2. The Provider's entitlement to any share of the tuition fee (including any Provision Fee) for a Short Course is conditional on OUA receiving the tuition fee for that Short Course;
- 9.3. The Provider:
 - 9.3.1. acknowledges and agrees that the Provision Fees are the only amounts payable to the Provider by OUA and OUA Students in consideration for delivery of the Services to OUA Students; and
 - 9.3.2. must not impose any other charge, fee or levy on any OUA Student.

10. Payments to Provider

- 10.1. The Fees payable by OUA to the Provider from the Commencement Date are:
 - 10.1.1. For a New provider, as set out in in the Application; or
 - 10.1.2. For a Continuing Provider, as agreed at the end of the previous Catalogue Rollover.
- 10.2. The Fees are the only amounts payable by OUA to the Provider under the Agreement and are exclusive of all Taxes which, if applicable, will be borne by the Provider.
- 10.3. Subject to clause 9.2.2, if the Provider performs the Services as required by the Agreement, OUA will pay the Provider a Provision Fee for each OUA Accessed Short Course that an OUA Student is enrolled in at the Close of Enrolment Date.
- 10.4. Fees will be paid by OUA on or before the last Friday in the calendar month immediately following the calendar month in which OUA receives a correctly rendered invoice issued by the Provider in accordance with clause 10.5. An invoice is correctly rendered if the invoice:
 - 10.4.1. is issued at the time permitted under clause 10.5; and
 - 10.4.2. provides a breakdown of the Provision Fees being invoiced.
- 10.5. Within 20 Business Days of the Close of Enrolment Date for each Teaching Period, OUA will provide a data file to the Provider confirming the number of OUA Students enrolled in OUA Accessed Short Courses for that Teaching Period as at the Close of Enrolment Date (OUA Invoicing File).
- 10.6. Within 20 Business Days of receiving the OUA Invoicing File, the Provider must perform a reconciliation of the OUA Invoicing Data against its own records and either:
 - 10.6.1. notify OUA in writing of any discrepancies identified during the reconciliation; or
 - 10.6.2. issue OUA with an invoice for all Fees payable by OUA for the applicable Teaching Period.
- 10.7. If the Provider gives notice to OUA under clause 10.6.1, the parties must use their best endeavours to resolve the discrepancy within 10 Business Days. If the discrepancy is not resolved within that time, the issue may be referred to dispute resolution under clause 21 by either party.

- 10.8. Within 10 Business Days of resolution of a discrepancy in accordance with clause 10.7, the Provider must issue an invoice to OUA for all Fees payable by OUA for the applicable Teaching Period.

11. GST

- 11.1. In this clause:
 - 11.1.1. words and expressions that are not defined in the Agreement but which have a defined meaning in the GST Law have the same meaning as in the GST Law; and
 - 11.1.2. GST Law has the meaning given to that term in the *A New Tax System (Goods and Services Tax) Act 1999*.
- 11.2. Except as otherwise provided by this clause, all consideration payable under the Agreement in relation to any supply is exclusive of GST.
- 11.3. If GST is payable in respect of any supply made by a supplier under the Agreement (GST Amount), the recipient will pay to the supplier an amount equal to the GST payable on the supply.
- 11.4. Subject to clause 11.5, the recipient will pay the GST Amount at the same time and in the same manner as the consideration for the supply is to be provided under the Agreement.
- 11.5. The supplier must provide a tax invoice to the recipient before the supplier will be entitled to payment of the GST Amount under clause 11.4.
- 11.6. If the Agreement requires a party to reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of:
 - 11.6.1. the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party is entitled; and
 - 11.6.2. if the payment or reimbursement is subject to GST, an amount equal to that GST.
- 11.7. If an adjustment event occurs in relation to a taxable supply under the Agreement:
 - 11.7.1. the supplier must provide an adjustment note to the recipient within 5 Business Days of becoming aware of the adjustment; and
 - 11.7.2. any payment necessary to give effect to the adjustment must be made within 5 Business Days after the date of receipt of the adjustment note.

12. Personnel

The Provider must ensure that all of its Personnel who carry out the performance of the Provider's obligations under the Agreement are appropriately qualified, knowledgeable and experienced in the fields necessary to efficiently and promptly perform such obligations.

13. Intellectual Property Rights

- 13.1. The parties agree that OUA retains all Intellectual Property Rights in the OUA Background Materials.
- 13.2. OUA grants to the Provider a royalty-free, non-transferable, non-exclusive, worldwide licence to use the OUA Background Materials for the Term for the purposes of, and in accordance with, the Agreement.

- 13.3. Within 20 Business Days of the End Date, the Provider must return to OUA (or, at OUA's option, destroy) all OUA Background Materials in its possession or control.
- 13.4. The parties agree that the Provider retains all Intellectual Property Rights in the Provider Background Materials and the Developed Materials.
- 13.5. The Provider grants to OUA a royalty-free, non-transferable, non-exclusive, worldwide licence to use the Provider Background Materials and the Developed Materials for the Term for the purposes of, and in accordance with, the Agreement.
- 13.6. Within 20 Business Days of the End Date, OUA must return to the Provider (or, at the Provider's option, destroy) all of the Provider Background Materials and the Developed Materials in its possession or control.
- 13.7. In relation to use of the Provider Trade Marks, OUA must:
- 13.7.1. use and apply the Trade Marks in the manner and form that the Provider (acting reasonably) approves;
 - 13.7.2. ensure that the character and quality of services provided by OUA using the Trade Marks meets the Provider's standards and requirements (as required to reasonably protect its legitimate interests in the Trade Marks), as notified by the Provider from time to time; and
 - 13.7.3. allow the Provider to inspect the services and materials on or in relation to which the Trade Marks are used, to enable the Provider to satisfy itself that OUA is complying with this clause 15.7.

14. Student Data

- 14.1. The parties acknowledge and agree that:
- 14.1.1. The collection of Personal Information about an OUA Student is regulated by Privacy Laws;
 - 14.1.2. The collection of information about an OUA Student on behalf of the Commonwealth of Australia for the purposes of HESA is regulated by HESA;
 - 14.1.3. Neither party has any Intellectual Property Rights in information about an OUA Student that is regulated by Privacy Laws or HESA ("Regulated Student Data").
 - 14.1.4. A party that collects Regulated Student Data directly from an OUA Student will have statutory obligations to maintain the confidentiality of that information.
 - 14.1.5. If the Agreement requires a party to disclose Regulated Student Data to the other party, that disclosure will be governed by clause 15.
- 14.2. Subject to the Law or any other overriding legal requirements, the parties agree to share information and data (including OUA Collected Student Data, OUA Student Enrolment Data) in the performance of their obligations under the Agreement. The parties will review the method and process for this exchange of information and data at least once every 12 months.
- 14.3. Each party must use reasonable endeavours to ensure that all OUA Student Data it provides to the other party is complete and accurate.
- 14.4. The parties agree to take all reasonable efforts to ensure that data files are free of computer viruses.

15. Confidentiality

- 15.1. Each party (Recipient) acknowledges that all Confidential Information of the other party (Disclosing Party) is received and must be held by the Recipient in the strictest confidence.
- 15.2. Each Recipient may use Confidential Information of the Disclosing Party only for the purpose of performing its obligations and exercising its rights under the Agreement and only disclose Confidential Information of the Disclosing Party:
- 15.2.1. to its legal advisors, auditors, insurance advisors and other advisors who require this information to provide information or advice to the Recipient in connection with the Agreement, but only if the Confidential Information is disclosed on a confidential basis;
 - 15.2.2. to those of its Personnel who are involved in performing the Recipient's obligations under the Agreement;
 - 15.2.3. if required by Law or a court or tribunal;
 - 15.2.4. in the case of the Provider being the Recipient, only disclose Confidential Information of OUA to the Commonwealth Department of Education, the Tertiary Education Quality and Standards Agency (TEQSA) or any other body or authority with responsibility under Law for regulating the Provider's activities (or part of those activities).
- 15.3. The Recipient must ensure that its Personnel do not do or omit to do anything which, if done by the Recipient, would be a breach of this clause 15.

16. Privacy

Each party acknowledges and accepts that it is subject to the Privacy Act or any equivalent State or Territory Law relating to privacy. Each party agrees to comply, and to ensure that its Personnel comply, with all Privacy Laws applicable to that party in respect of Personal Information collected, used, disclosed and otherwise handled by it under or in connection with the Agreement.

17. Communication

- 17.1. Each party must:
- 17.1.1. promptly consider in good faith any reasonable request made by the other party for information relevant to the Agreement; and
 - 17.1.2. actively engage in open communication as required for the successful implementation, operation and management of the Agreement and to allow each party to comply with its obligations under the Agreement.
- 17.2. Each party must appoint a Contract Manager who will be:
- 17.2.1. the first point of contact for any issues and Disputes relating to the operation of the Agreement; and
 - 17.2.2. authorised to give and receive notices under the Agreement.
- 17.3. The Contract Managers at the Commencement Date are the people described as such in the Application or as agreed at the end of the previous Catalogue Rollover.

17.4. A party may change its Contract Manager at any time by giving notice to the other party. The notice must include the name, address, phone number, facsimile number and email address of the new Contract Manager.

17.5. The Contract Managers will be responsible for:

- 17.5.1. facilitating the timely provision of information as required by the Agreement;
- 17.5.2. expediting payment arrangements, including submission of invoices and data files required to make payment;
- 17.5.3. promptly meeting to resolve any issues that arise in the operation of the Agreement; and
- 17.5.4. meeting as required to discuss the operation of the Agreement.

18. Notices

18.1. A notice or other communication required or permitted, under the Agreement, to be served on a person must be in writing and may be served:

- 18.1.1. personally on the person;
- 18.1.2. by leaving it at the person's current address for service;
- 18.1.3. by posting it by prepaid post addressed to that person at the person's current address for service;
- 18.1.4. by email to the person's current email address for service.

18.2. The particulars for service of each party are set out in the Application or as agreed at the end of the previous Catalogue Rollover.

- 18.2.1. Any party may change the address, facsimile or email number for service by giving notice to the other parties.
- 18.2.2. If the person to be served is a company, the notice or other communication may be served on it at the company's registered office.

18.3. A notice or other communication is deemed served:

- 18.3.1. if served personally or left at the person's address, upon service;
- 18.3.2. if posted within Australia to an Australian address, 2 Business Days after posting and in any other case, seven Business Days after posting;
- 18.3.3. if served by email, subject to clause 18.3.4, at the time the email containing the notice left the sender's email system, unless the sender receives notification that the email containing the notice was not received by the recipient;
- 18.3.4. if received after 5.00pm in the place of receipt or on a day which is not a Business Day, at 9.00am on the next Business Day.

19. Warranties

19.1. The Provider represents and warrants to OUA that it:

- 19.1.1. has full legal capacity and power to enter into and to perform its obligations under the Agreement;
- 19.1.2. is, and will use its best endeavours to remain during the Term, a Higher Education Provider;
- 19.1.3. will exercise all due care and skill in the provision of the Services and in any action undertaken for the purposes of or in relation to the Agreement, and will at all times act in a timely and professional manner;

19.1.4. will use Personnel to provide the Services that have appropriate qualifications and are suitably experienced and trained and capable of providing the Services as required by the Agreement; and

19.1.5. will provide the Services in accordance with all applicable Laws.

19.2. The Provider represents and warrants to OUA that:

- 19.2.1. it owns all Intellectual Property Rights in the Provider Background Materials and the Developed Materials; and
- 19.2.2. it has the right to grant the licence in clause 13.5;
- 19.2.3. it is entitled to use any Intellectual Property Rights owned by third parties which may be used by it in connection with the performance of the Services under the Agreement; and
- 19.2.4. OUA's use of the Provider Background Materials and the Developed Materials as permitted by the Agreement will not infringe the Intellectual Property Rights of any person.

19.3. OUA represents and warrants to the Provider that:

- 19.3.1. it has the right to license the OUA Background Materials to the Provider;
- 19.3.2. it is entitled to use any Intellectual Property Rights owned by third parties which may be used by it in connection with its performance of the Agreement; and
- 19.3.3. the Provider's use of the OUA Background Materials as permitted by the Agreement will not infringe the Intellectual Property Rights of any person.

19.4. The Provider must notify OUA in writing if anything happens or may happen that may affect any of the warranties given by the Provider under the Agreement or the Provider's ability to perform any of its obligations under the Agreement.

20. Liability

20.1. The Provider acknowledges and agrees that:

- 20.1.1. it is solely responsible for provision of the Services to OUA Students and for otherwise carrying out all of its obligations under the Agreement; and
- 20.1.2. OUA has no role in delivery of the Services to OUA Students other than as expressly stated in the Agreement.

20.2. OUA indemnifies and must keep indemnified the Provider from and against any:

- 20.2.1. Loss or Liability suffered or incurred by the Provider or its Personnel;
- 20.2.2. loss of or damage to property of the Provider; or
- 20.2.3. Loss incurred by the Provider in dealing with any Claim made against it or its Personnel;

arising from or connected to:

- 20.2.4. any breach of Law by OUA or its Personnel;
- 20.2.5. any third-party Claim against the Provider alleging that the OUA Background Materials or their use infringe the Intellectual Property Rights of any person
- 20.2.6. any negligent, fraudulent, unlawful, wilfully wrongful or other wrongful act or omission of OUA or its Personnel;

- 20.2.7. any breach of the Agreement by OUA; or
 - 20.2.8. any personal injury or death caused or contributed to by OUA or its Personnel.
- 20.3. OUA's obligation to indemnify the Provider under clause 20.2 will be reduced proportionally to the extent that a negligent act or omission of the Provider or its Personnel contributed to the Loss or Liability.
- 20.4. The Provider indemnifies and must keep indemnified OUA from and against any:
- 20.4.1. Loss or Liability suffered or incurred by OUA or its Personnel;
 - 20.4.2. loss of or damage to property of OUA; or
 - 20.4.3. Loss incurred by OUA in dealing with any Claim made against it or its Personnel, arising from or connected to:
 - 20.4.4. any breach of Law by the Provider or its Personnel;
 - 20.4.5. any third-party Claim against OUA alleging that the Provider Background Materials or the Developed Materials or their use infringe the Intellectual Property Rights of any person;
 - 20.4.6. any negligent, fraudulent, unlawful, wilfully wrongful or other wrongful act or omission of the Provider or its Personnel;
 - 20.4.7. any breach of the Agreement by the Provider; or
 - 20.4.8. any personal injury or death caused or contributed to by the Provider or its Personnel.
- 20.5. The Provider's obligation to indemnify OUA under clause 20.4 will be reduced proportionally to the extent that a negligent act or omission of OUA or its Personnel contributed to the Loss or Liability.

21. Dispute resolution

- 21.1. In the first instance, the parties will collaborate and work together to resolve any Disputes as they arise.
- 21.2. If the parties cannot resolve a Dispute within 5 Business Days, the party claiming that a Dispute has arisen must promptly give the other party a Dispute Notice.
- 21.3. The parties must attempt to resolve all Disputes by escalation through the following process:
 - 21.3.1. within 5 Business Days of the Dispute Notice date, the Contract Managers must meet to discuss the Dispute; and
 - 21.3.2. if the Dispute remains unresolved 10 Business Days after the Dispute Notice date, the following representatives of each party must meet:
 - 21.3.2.1. for OUA, the Chief Executive Officer; and
 - 21.3.2.2. for the Provider, the Academic Provost.
- 21.4. If the Dispute remains unresolved 20 Business Days after the Dispute Notice date, OUA may refer the Dispute to mediation administered by the Australian Commercial Disputes Centre (ACDC) according to its mediation guidelines.
- 21.5. If the Dispute is referred to mediation by OUA under clause 21.4:
 - 21.5.1. the parties will agree on a mediator within 10 Business Days of the expiry of the period referred to in clause 21.4, failing which the mediator will be provided by the ACDC;

- 21.5.2. the parties must conduct the mediation within 20 Business Days of the mediator being appointed;
 - 21.5.3. each party will pay its own costs in relation to attendance at, and participation in, the mediation; and
 - 21.5.4. the cost of ACDC and the appointed mediator will be shared equally between the parties.
- 21.6. Despite the existence of a Dispute, the parties must continue to perform their obligations under the Agreement.

22. Termination

- 22.1. In addition to any other rights it has to terminate the Agreement, OUA may in its sole and absolute discretion and without cause terminate the Agreement at any time by giving the Provider at least 6 months' written notice of termination.
- 22.2. In addition to any other rights it has to terminate the Agreement, the Provider may, in its sole and absolute discretion and without cause, terminate the Agreement at any time by giving OUA at least 6 months' written notice of termination.
- 22.3. Either party may terminate the Agreement immediately by notice to the other party if:
 - 22.3.1. the other party commits a material breach of the Agreement which cannot be remedied;
 - 22.3.2. the other party commits a breach of the Agreement and:
 - 22.3.2.1. fails to commence action to remedy the breach within 10 Business Days after the terminating party has served notice requiring it to do so; or
 - 22.3.2.2. having commenced action to remedy the breach, fails to complete that action as soon as possible and in any event, within 20 Business Days of the terminating party's notice; or
 - 22.3.3. an Insolvency Event occurs in relation to the other party.

23. Consequences of termination

- 23.1. Termination or expiry of the Agreement does not affect any provisions which are stated, or by their context required, to survive termination or expiry, including this clause 23 and clauses 13, 14, 15, 16, 20, 24, 25, and 26.
- 23.2. On the End Date:
 - 23.2.1. all rights granted under the Agreement cease (other than rights which accrued up to and including the date of termination or expiry or which are stated to survive termination or expiry);
 - 23.2.2. the Provider must arrange for all Provider OUA Student Data and all copies of Provider OUA Student Data in its possession or control to be provided to OUA in a form reasonably required by OUA;
 - 23.2.3. OUA must, on written request from the Provider and at the Provider's expense, arrange for all OUA Collected Student Data to be provided to the Provider in a form reasonably required by the Provider;
 - 23.2.4. each party must remove all references to the other party from its websites and promotional materials;

- 23.2.5. the parties must reconcile all Fees paid or owing to the Provider and OUA must pay any Fees that the parties agree are owing;
- 23.2.6. each party must pay all outstanding monies owed to the other party, which monies are a debt due and immediately payable; and
- 23.2.7. the Provider must comply with each of its obligations stated in the Agreement to apply on termination or expiry, including this clause 23.

24. Definitions

In the Agreement unless expressed or implied to the contrary:

Academic Policies means the Provider's regulations, statutes, policies and procedures.

Agreement means:

1. in relation to a New Provider, the contract comprised by the Application, these Terms and Conditions and the Notice of Acceptance; and
2. in relation to a Continuing Provider, the particulars of the Continuing Provider's Short Course Catalogue (including any pricing and availability of courses) as agreed between the parties during the previous Catalogue Rollover, and these Terms and Conditions (as amended).

Application means an application to OUA to become a provider participant on the OUA Platform.

Business Day means Monday to Friday excluding public holidays in the place where an act is done or to be done.

Business Hours means 9am to 5pm on a Business Day.

Catalogue Rollover means the process described in clause 7.24.

Catalogue Rollover Date means the last business day before 2 October each year.

Claim includes actions, proceedings, suits, causes of action, arbitrations, verdicts and judgments either at law (including negligence) or in equity or arising under a statute or as a debts dues.

Close of Enrolment Date means a date determined by OUA for each Teaching Period.

Commencement Date means:

1. in relation to a New Provider, the date specified in the Application; or
2. in relation to a Continuing Provider, the previous Catalogue Rollover Date.

Continuing Provider means a University that has:

1. participated in at least one Catalogue Rollover under a previous agreement with OUA;
2. at least one OUA Accessed Short Course displayed on the OUA Website (by agreement with OUA) as at completion of the previous Catalogue Rollover; and
3. not given notice of termination of this Agreement or any previous agreement with OUA in relation to OUA Accessed Short Courses.

Confidential Information in relation to the Disclosing Party means the terms of the Agreement and all information, of any nature and in any form, concerning the operations, dealings, organisation, Personnel, business strategies, customers, technology, Intellectual Property Rights, trade secrets or know how of the Disclosing Party and/or any customer, or supplier of the Disclosing Party (including, where OUA is

the Disclosing Party, the OUA Collected Student Data and all other information provided to the Provider for the purpose of enabling the Provider to provide the Services to OUA Students and, where the Provider is the Disclosing Party, the Provider Collected Student Data), regardless of how the information is disclosed or made available to the Recipient, and whether disclosed or made available before, on or after the date of the Agreement, but does not include information which:

1. is or becomes part of the public domain other than through breach of the Agreement or an obligation of confidence owed to the Disclosing Party;
2. the Recipient can prove by contemporaneous written documentation;
3. was already known to it at the time of disclosure by the Disclosing Party (unless such knowledge arose from disclosure of information in breach of an obligation of confidentiality); or
4. was independently developed by the Recipient; or
5. the Recipient acquires from a source other than the Disclosing Party or any of its representatives where such source is entitled to disclose it.

Contract Managers means the OUA Contract Manager and the Provider Contract Manager.

Developed Materials means any Materials created, developed or produced by or on behalf of the Provider in the course of, for the purposes of or as part of performing its obligations under the Agreement.

Dispute Notice means a notice setting out details about a dispute that is given under clause 21.1.

Do Not Call Register Regime means the *Do Not Call Register Act 2006* (Cth), Part 6 of the *Telecommunications Act 1997* (Cth), the *Telemarketing and Research Industry Standard 2007*, the *Fax Marketing Industry Standard 2011* and all related laws, statutes, regulations and determinations applicable to the Services.

End Date means the effective date on which the Agreement expires.

Fees or **Fee** means the Provision Fee.

HESA means the *Higher Education Support Act 2003* (Cth).

Higher Education Provider has the meaning given in section 16-1 of the HESA.

Insolvency Event means any of the following events:

1. a party becomes insolvent;
2. a receiver, receiver and manager, administrator, controller, provisional liquidator or liquidator is appointed to a party or a party enters into a scheme of arrangement with its creditors or is wound up;
3. a party assigns any of its property for the benefit of creditors or any class of them;
4. an encumbrancee takes any step towards taking possession or takes possession of any assets of a party or exercises any power of sale; or
5. the party has a judgment or order given against it in an amount exceeding \$10,000 (or the equivalent in another currency) and that judgment or order is not satisfied or quashed or stayed within 20 Business Days after being given.

Intellectual Property Rights means all and any patents, patent applications, trademarks, service marks, trade names, domain names, registered designs, unregistered design rights, copyrights, know how, trade secrets and rights in confidential information, URLs and all and any other intellectual property rights, whether registered or unregistered, and including all applications and rights to apply for any of the same.

Law includes:

1. the common law and equity; and
2. any statute, act of Parliament, proclamation, order in council, regulation, rule, by-law, ordinance, subordinate legislation or other regulatory measure.

Liability includes all liabilities (whether actual, contingent or prospective) and all Losses of whatever description.

Loss means loss or damage however caused whether based in tort, contract or otherwise and includes any direct loss or damage, (but expressly excludes any indirect, special or consequential loss or damage including loss of profits, loss of production, loss or corruption of data, loss of sales opportunity or business reputation, direct or indirect labour costs and overhead expense) and damage to property, personal injury and death.

Materials includes documents, papers, models, drawings, materials transcripts, computer software and programs and consumables.

New Provider means a University that has submitted an Application to OUA and received a Notice of Acceptance, but has not yet become a Continuing Provider.

Notice of Acceptance means a notice in writing from OUA to the Provider advising the Provider that OUA has accepted the Application.

OUA Accessed Short Course means a Short Course offered by the Provider, access to which is provided by OUA to OUA Students in accordance with the Agreement and as specified in the Application or as agreed at the end of the previous Catalogue Rollover.

OUA Background Materials means all Materials brought into existence by or on behalf of OUA prior to entering into the Agreement or independent of the Agreement.

OUA Collected Student Data means OUA Student Data which is collected by OUA (other than from the Provider), including OUA Student Enrolment Data.

OUA Contract Manager means the person described as such in the Application or such other person appointed by OUA from time to time under clause 17.4.

OUA Handbook means the annual OUA student handbook published by OUA and made available by OUA to all OUA Students, which includes a schedule of available Short Courses available through OUA for the relevant year, including profiles of the available OUA Accessed Short Courses and the official calendar of OUA.

OUA Student means a person enrolled in an OUA Accessed Short Course in respect of whom the Provider provides the Services.

OUA Student Data means any data or information about or relating to an OUA Student which is collected by the Provider or OUA about or from OUA Students enrolled in OUA Accessed Short Course for the purposes of the Agreement.

OUA Student Enrolment Data means statistical, financial and personal data and information collected from OUA Students by OUA as part of the enrolment process.

OUA Student Enrolment File means an electronic file containing OUA Student enrolment Data.

OUA Website means the website operated by or on behalf of OUA, currently available at www.open.edu.au.

Personal Information has the meaning given in the Privacy Act.

Personnel means employees, agents, contractors or subcontractors including representatives.

Pre-enrolment Information means all information and Materials reasonably required by OUA regarding or connected with its OUA Accessed Short Courses for the OUA Handbook or for publication on the OUA Website.

Privacy Act means the *Privacy Act 1988* (Cth).

Privacy Laws means any applicable Law which relates to privacy, including the Privacy Act, the *Spam Act 2003* (Cth), the Do Not Call Register Regime, the privacy obligations in the HESA and any equivalent State or Territory Law relating to privacy.

Provider means a New Provider or a Continuing Provider.

Provider Background Materials means all Materials brought into existence by or on behalf of the Provider prior to entering into the Agreement or independent of the Agreement and includes the Provider Trademarks, the Pre-enrolment Information and the content and assessment Materials for each OUA Accessed Short Course (including Study Materials).

Provider Collected Student Data means OUA Student Data that is collected by the Provider (other than from OUA) in relation to OUA Accessed Short Course.

Provider Contract Manager means the person described as such in the Application or such other person appointed by the Provider from time to time under clause 17.4.

Provider Trade Marks means the trademarks and logos of the Provider that the Provider supplies to OUA for use in connection with the Agreement.

Provision Fee means the fee determined in accordance with clause 10.

Service Level Requirements means the service level requirements for providers as published on the OUA Website from time to time in relation to the quality or standard to which a party's obligations under the Agreement are to be performed.

Services means all services that the Provider is required to provide to OUA Students under and in accordance with the terms of the Agreement, including delivery of OUA Accessed Short Courses to OUA Students who enrol in OUA Accessed Short Courses.

Session means a study period in which OUA Accessed Short Courses may be available for study through OUA, as an alternative to a Study Period.

Short Course means a program of learning that comprises one or more components (e.g. units of competency, modules or subjects) that has been accredited by the Provider.

Student has the meaning given in the HESA.

Study Materials means, in respect of each OUA Accessed Short Course, all Materials required by an OUA Student to complete that OUA Accessed Short Course that are created by or on behalf of the Provider.

Taxes means all taxes, including excise duties, sales taxes, stamp duties, customs duties, payroll taxes, government duties, charges and fees, other than income tax and GST.

Teaching Period means the period of study in which OUA Accessed Short Courses may be available for study through OUA, as published on the OUA Website from time to time. A teaching period may be otherwise referenced as a study period, session or semester and is considered complete after the final exam (where relevant).

Term means the period from the Commencement Date until the next Catalogue Rollover Date.

24. Interpretation

- 24.1. In the Agreement, a reference to:
- 24.1.1. a person includes a firm, partnership, joint venture, association, corporation or other corporate body;
 - 24.1.2. a person includes the legal personal representatives, successors and permitted assigns of that person; and
 - 24.1.3. any body which no longer exists or has been reconstituted, renamed, replaced or whose powers or functions have been removed or transferred to another body or agency, is a reference to the body which most closely serves the purposes or objects of the first-mentioned body.
- 24.2. In the Agreement, a reference to a statute includes regulations under it and consolidations, amendments, re-enactments or replacements of any of them.
- 24.3. In the Agreement:
- 24.3.1. a reference to this or other document includes the document as varied or replaced regardless of any change in the identity of the parties;
 - 24.3.2. a reference to a clause, schedule, appendix or annexure is a reference to a clause, schedule, appendix or annexure in or to the Agreement all of which are deemed part of the Agreement;
 - 24.3.3. a reference to writing includes all modes of representing or reproducing words in a legible, permanent and visible form;
 - 24.3.4. headings and sub-headings are inserted for ease of reference only and do not affect the interpretation of the Agreement;
 - 24.3.5. where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning; and
 - 24.3.6. where the expression including or includes is used it means 'including but not limited to' or 'including without limitation'.
- 24.4. If a provision in the Agreement is held to be illegal, invalid, void, voidable or unenforceable, that provision must be read down to the extent necessary to ensure that it is not illegal, invalid, void, voidable or unenforceable.
- 24.5. The Agreement may be executed in any number of counterparts all of which taken together constitute one instrument.
- 24.6. If a payment or other act is required by the Agreement to be made or done on a day which is not a Business Day, the payment or act must be made or done on the next following Business Day.

25. General

- 25.1. The Agreement is governed by and is to be construed in accordance with the laws of Victoria, Australia.
- 25.2. The Agreement may only be varied or replaced by a document duly executed on behalf of the parties by their duly authorised officer(s).
- 25.3. Each party must promptly execute and deliver all documents and take all other action necessary or desirable to effect, perfect or complete the transactions contemplated by the Agreement.
- 25.4. Each party must pay its own legal costs and expenses in relation to the negotiation, preparation and execution of the Agreement.