

# SOFTWARE AS A SERVICE AGREEMENT

**BETWEEN**            **Databasik Software Pty Ltd trading as Obee Table Reservations**

ABN: 16147 833 396

(“**Obee**”)

Contact Details:

1300 446 233

support@obeeapp.com

**AND**                **The Account Owner**

(“**Client**”)

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## 1    **AGREED TERMS & INTERPRETATION**

Unless the context requires otherwise, the following phrases and capitalised words must be interpreted as follows:

- 1.1    **Access** means obtaining access to the Software via obee.com.au and obeeapp.com:
- (a)    with the Client first obtaining access to the Software via the URL issued to the Client by Obee; and
  - (b)    Users being granted the right to access the Software by the Client, whether or not Client restricts the Users’ access by password or other means.
- 1.2    **Agreement** means the terms and conditions of this Agreement.
- 1.3    **Commencement Date** means the date that the Client agrees to the terms of this Agreement by clicking the “I agree” button.
- 1.4    **Confidential Information** means in relation to each Party, any information about Obee or the Client’s business, operations or customers received by the other party under this Agreement, but excluding information:
- (a)    which is publicly known;
  - (b)    which is disclosed to the other party without restriction by a third party and without any breach of confidentiality by the third party; and

- (c) which is developed independently by the other party without reliance on any of that party's confidential information.
- 1.5 **Data** means the User's history of all their interactions created by their use of the Software including any Data entered by the Client or the User.
- 1.6 **Fees** means the amount payable for the Software, exclusive of all Taxes or as amended from time to time in accordance with this Agreement.
- 1.7 **Intellectual Property Rights** means all rights in or to any patent, copyright, database rights, registered design or other design right, utility model, trade mark (whether registered or not), brand name, service mark, trade name, eligible layout right, or any other proprietary right, any right to registration of such rights, or any similar rights protected by statute, wherever existing in the world, including all renewals, extensions and revivals of whether created before, on or after the Commencement Date.
- 1.8 **Marks** means all trade marks, service marks, logos or other words or symbols identifying the Software and Obee's business, as may be amended by Obee from time to time at its discretion.
- 1.9 **Party** means each of Obee and the Client.
- 1.10 **Personal Information** has the meaning given to it in the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) and the Data Protection Act 1998.
- 1.11 **Related Bodies Corporate** has the meaning given it by the *Corporations Act 2001* (Cth).
- 1.12 **Service Levels** means the uptime, downtime and planned maintenance provided by Obee to the Client in accordance with Obee's third party hosting providers.
- 1.13 **Software** means the Obee software called Obee®.
- 1.14 **Support & Hosting Services** means the support and hosting services provided by Obee to the Client.
- 1.15 **Tax Invoice** means an invoice that is in a form that complies with *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- 1.16 **Taxes** means any taxes, levies, duties or similar assessments of any nature, including but not limited to goods and services related, value-added, sales, use or withholding taxes, which are assessable by any local, state, federal or foreign jurisdiction.
- 1.17 **Technical Specifications** means the specifications relating to the performance and availability of the Software, the technical requirements of any device that Accesses the Software and any other technical issues that relate to the Software or the Agreement that may be posted by Obee.
- 1.18 **URL** means the URL provided to the Client by Obee to allow Access and manage use of the Software.
- 1.19 **User** means a person who has been authorized by the Client to use the Software pursuant to the Agreement.

- 1.20 **Website** means Obee' website from time to time, currently at obee.com.au and obeeapp.com.
- 1.21 The words "includes" or "including" are not words of limitation.
- 1.22 Headings are for convenience only and do not affect interpretation.
- 1.23 Where a clause contains a number of sub-clauses then, unless expressly stated otherwise, each sub-clause is an independent requirement or obligation.

## **2 SYSTEMATIC RISK OBLIGATIONS**

- 2.1 During the term, Obee will provide the Client and the Users Access to the Software in accordance with the Service Levels and this Agreement.

## **3 CLIENT'S OBLIGATIONS**

### **3.1 LICENCE TERMS**

#### **Grant of Licence**

- 4.1 Subject to payment of the Fees and Taxes, Obee grants to Client a limited, non-exclusive, non-transferable, revocable licence to:
- (a) allow Access to the Software solely for the purpose of the Client's internal business operations and in accordance with this Agreement;
  - (b) allow Users to Access the Software in accordance with the User Terms and Conditions; and
  - (c) allow the use of the Software by Client's Related Bodies Corporate and their respective contractors.

#### **Licence Exclusions**

- 4.2 Client must not:
- (a) modify, pledge, sub-license, lease, rent, loan, assign or create derivative works based on the Software including its user interfaces; or
  - (b) copy, adapt, translate, distribute, publish, communicate to the public, or create any adaptation, translation or derivative based on the Software unless expressly permitted by the Agreement or the law;
  - (c) reverse engineer, de-compile, disassemble or extract any element of and/or otherwise access, examine, share or discover any source code, object code, algorithms, methods or techniques embodied in the Software; or
  - (d) remove, alter or obscure, any disclaimer or notice, or any restricted right legend, trademark, copyright or other ownership right legend appearing in the Software, on a screen or any print out from the Software.

- 4.3 The Client grants Obee a non-exclusive, royalty free, worldwide, licence to use, modify, disclose and access Client's Data:
- (a) for the purpose of providing Access to the Software under this Agreement;
  - (b) for the purpose of complying with Obee's obligations at law.
- 4.4 Client acknowledges and agrees that:
- (a) the Software is provided on a shared service basis to the Client and other clients from a common code base and Obee may from time to time, without the prior consent of Client:
    - (i) change, add or delete the functions, features, performance or other characteristics of the Software to enhance its features and functionality, and if such change, addition or deletion is made, the specifications of the Software shall be amended accordingly;
    - (ii) correct errors and/or patch the Software; and
    - (iii) amend the Technical Specifications.
  - (b) Obee will provide notice (including via email) of major changes or new versions of the Software by posting the information on the Website. Obee does not guarantee that any change, addition, deletion, error correction or patch will be compatible with any application, other software or interface that connects to or interfaces with the Software that has been made by or on behalf of Client. Obee will not be liable for any loss, damage or expense which Client may incur as the result of any change, addition, deletion, error correction or patch, in any circumstances.
  - (c) Client and its Users are solely responsible for entering Data into the Software, maintaining that Data and ensuring that it is accurate and not false, misleading or deceptive nor is it likely to mislead or deceive.
  - (d) it will comply with all applicable laws in connection with the Access to the Software and the Agreement.

## **5 AUDIT**

- 5.1 Obee may access the Software to carry out an audit of Client's records and systems (and their logs) that relate to the Agreement. Obee shall be entitled to access Client's system, at no cost, to make copies of any of the Client's records and systems (and their logs) that it examines.
- 5.2 The costs of the review in clause 5.1 will be borne by Obee, unless the review shows that Client has not used the Software in accordance with the Agreement and as a result has underpaid Obee by more than 10% of the total Fee payable for the Software. If this occurs then the costs of the audit will be promptly reimbursed by the Client.
- 5.3 If the Client has not used the Software in accordance with the Agreement then in addition to any other remedy Obee may have, the Client must immediately pay to Obee the difference between the Fee for the Software that should have been paid if

the Client had acquired the relevant access rights, less the Fees actually paid for the Software under this Agreement.

## **6 SUPPORT & HOSTING SERVICES**

### **Support**

- 6.1 Obee will provide the Client the Support & Hosting Services in accordance with the Service Levels.
- 6.2 Obee will respond to all support requests from the Client within 2 business days and to make every effort to correct errors in respect of the Software within a reasonable time frame.

### **Training Services**

- 6.3 Obee will provide the Client with a one hour training session over the phone free of charge per year. Additional training can be provided at the Client's request at Obee's current fees for training as agreed between Obee and the Client.

## **7 WARRANTIES**

- 7.1 Except as expressly provided by this Agreement and to the extent permitted by law, Obee exclude all guarantees, warranties or conditions (whether implied by statute, general law, custom or otherwise) or representations and, in particular, exclude any guarantee, warranty, condition or representation that the operation of the Software will be uninterrupted or error free or that the Software will be fit for a particular purpose. The Client acknowledges that the nature of computer software and technology is such that the operation of the Software will not be uninterrupted or error free and the Client has relied on its own judgement in determining whether the Software is suitable for the purposes for which it intends to use the Software.
- 7.2 The Client warrants that:
  - (a) its Data does not breach any relevant laws, regulations or codes;
  - (b) its Data does not infringe the Intellectual Property Rights of any third party;
  - (c) it will comply with all applicable laws and regulations in the jurisdiction where the Client Accesses and publishes content using the Software; and
  - (d) to the extent that the Data contains its customers' personal data or information or the personal data or information of a third party, it has obtained the necessary consents in order to transfer or permit access to this data in accordance with the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) and Data Protection Act 1998 and as contemplated under this Agreement.

## **8 PAYMENT AND INVOICING**

- 8.1 Client must pay Obee the Fees and Taxes within 14 days of receipt of a tax invoice from Obee in accordance with the terms and conditions set out on the tax invoice.

## **9 INTELLECTUAL PROPERTY RIGHTS**

### **Ownership and Assignment**

- 9.1 All Intellectual Property Rights including adaptations, translations and derivative works in the Software or other material provided under the Agreement that are created by Obee, Client or any other person, are the exclusive property of Obee, or must vest in or be transferred to Obee immediately upon creation, as the case may be.
- 9.2 At the request of Obee, Client will assign or transfer the Intellectual Property Rights (to any adaptations, translations or derivative works of the Software or other materials in connection with any software made by Client, its contractors or agents to Obee or its designee and will sign (or procure any person to sign) any document reasonably required to assign or transfer any such Intellectual Property Rights to Obee or its designee (at Obee's cost).

### **Reserved Rights**

- 9.3 Except for the rights expressly granted by Obee to Client under the Agreement:
- (a) Obee and its licensors, if any, reserve all right, title and interest in and to the Software and other materials provided under the Agreement and all Intellectual Property Rights in them;
  - (b) no right, title or ownership interest in or to the Software or other materials provided under the Agreement whether by implication, estoppel or otherwise, is granted, assigned or transferred to Client under or in connection with the Agreement.
- 9.4 Client does not acquire any right to, or interest in, any of the Marks. Client must not at any time or in any way indicate its ownership of or any right in the Marks and must not contest the right of Obee to the use of any of the Marks.
- 9.5 Client must not remove, alter or obscure any Mark, nor attach any additional trade marks, logos, get up or proprietary or restricted use legend, on the Software or on any other materials provided under the Agreement.
- 9.6 Client acknowledges and agrees that the unauthorised disclosure, use or copying of the Software or other materials provided under the Agreement may cause Obee serious financial loss. Accordingly, if there is any unauthorised disclosure, use or copying of any Intellectual Property Rights in any of the Software or other materials provided under the Agreement, Client agrees that Obee will have the right to seek injunctive or other equitable relief.

### **Trade Marks and Marketing**

- 9.7 The Parties agree that during the term of this Agreement, the Software will be branded with the Obee ® trade mark owned by Obee.
- 9.8 Each Party agrees to allow reference to the other and the relationship under the Agreement in its marketing presentations, marketing materials, lists of customers or suppliers (as applicable), and websites as well as in discussion with prospective resellers and customers, and industry/financial analysts.

## **10 CONFIDENTIALITY**

- 10.1 Each Party agrees that it will not permit the use of the other Party's Confidential Information by, nor disclose the other Party's Confidential Information to, any third person, other than:
- (a) Obee may disclose Client's Confidential Information to its Related Bodies Corporate, and any contractors and employees of Obee or its Related Bodies Corporate;
  - (b) either Party may disclose the other Party's Confidential Information to their professional advisers,
- unless such use or disclosure is specifically authorised in writing by the other Party or by law.
- 10.2 Each Party must only use the other Party's Confidential Information for the purpose of performing the obligations under the Agreement, or if the recipient is a professional adviser, the professional adviser may use the Confidential Information for purposes connected with advising on or reporting on the Agreement.

## **11 PRIVACY**

- 11.1 Each Party must use any Personal Information of which it becomes aware in connection with the Agreement in accordance with the law.
- 11.2 Client warrants that it has obtained each of its employees and contractors' informed consent for Obee, its Related Bodies Corporate, and their respective contractors to use, store, manipulate or otherwise deal with their Personal Information for any purpose connected with the Agreement and that such usage may include transferring the data overseas to any of Obee's Related Bodies Corporate for any use, storage, manipulation or dealing for any purpose connected with the Agreement.

## **12 LIABILITY**

- 12.1 To the extent permitted by law Obee is not liable to the Client (or any party claiming through the Client) in contract (including under an indemnity), tort, breach of statutory duty or otherwise for any:
- (a) loss of profits, opportunity, revenue, data, goodwill, business or anticipated savings, pure economic loss, loss of value of equipment, loss of data or expectation loss; or
  - (b) any indirect, consequential, special, punitive or exemplary loss or damage;
- even if such loss or damage was reasonably foreseeable, arose naturally or was in the contemplation of the parties, resulting from use of the Software.
- 12.2 To the extent permitted by law, Obee's cumulative liability to the Client in respect of all claims made by the Client (or any party claiming through the Client) under or in connection with this Agreement, whether arising under contract (including under an indemnity), negligence or any other tort, misrepresentation, under statute or otherwise, will not exceed in aggregate the amount of Fees paid by Client to Obee in the 12 months prior to the initial claim.

## **Mitigation**

- 12.3 Each Party shall make every effort to mitigate any loss, damage or expense that it may suffer arising out of or in connection with the Agreement or the relationship between the Parties.

## **13 INDEMNITY**

- 13.1 Client agrees to indemnify Obee against all liability, damage, loss, cost, fees (including reasonable legal fees) arising out of or in connection with:
- (a) the breach of any warranties give by the Client under this Agreement;
  - (b) any and all unauthorized use of the Software;
  - (c) injury to or death of any person caused by any act or omission by or on behalf of the Client or its personnel; and
  - (d) damage to any real or tangible property caused by any act or omission by or on behalf of the Client or its personnel.
- 13.2 Certain legislation may imply warranties or conditions or impose obligations, remedies or guarantees which cannot be excluded, restricted or modified except to a limited extent. Such legislation may, for example, impose non-excludable guarantees that goods are of acceptable quality or that services will be rendered with due care and skill (with certain remedies available to consumers for certain breaches of such guarantees). To the extent that such legislation applies, this Agreement must be read subject to those statutory provisions.

## **14 TERM & TERMINATION**

- 14.1 The Agreement commences on the Commencement Date and continues on a month to month basis unless terminated pursuant to this Agreement.
- 14.2 The Agreement will continue for as long as the Client Accesses the Software or gives 30 days written notice to terminate the Agreement.
- 14.3 Obee may immediately terminate the Agreement by giving Client written notice if:
- (a) the Client breaches any of the provisions of clauses 3, 7, 9, 10, 11 and 13;
  - (b) Client ceases to carry on business, is unable to pay its debts as they fall due, enters into liquidation, has a controller, managing controller, liquidator or administrator appointed; or
  - (c) there is a merger, sale of substantially all of the assets, or change of control, of Client. A "change of control" is deemed to occur when an entity acquires 50% or more of the voting shares or equity interest in Client or 50% or more of the assets of Client, in the event of a change of a majority of the Board of Directors (or majority of the partners if a partnership) of Client or if there is a change of effective control of Client.

## **Consequences of Termination**



- 14.4 Termination of the Agreement for any reason does not:
- (a) release the Client from the obligation to pay any Fees to Obee whether due before or after termination of the Agreement. Obee has no obligation to refund any amounts paid to Obee by the Client for the Software; or
  - (b) discharge either Party from any liability which has been incurred by that Party prior to termination of the Agreement.
- 14.5 In addition to the right of termination in clause 14.3, Obee is entitled to through technical or other means, suspend Access to the Software for any period that the Client is in breach of any provision of the Agreement.

## 15 FORCE MAJEURE

- 15.1 Neither Party will be liable for any delay in performing any of its obligations (except for an obligation to pay) if such delay is caused by circumstances beyond the reasonable control of the Party so delaying (including any act of God, terrorism, fire, flood, strike, lock-out or other form of industrial action or software, hardware, telecoms or other computer failure).

## 16 DISPUTES

- 16.1 If a dispute arises, each Party must not commence any court proceedings relating to the dispute unless it has complied with the provisions of this clause, except to seek urgent interlocutory relief.
- 16.2 A Party claiming that a dispute has arisen must notify the other in writing giving details of the dispute ("**Notification**").
- 16.3 On receipt of a Notification, the Parties must use reasonable endeavours to resolve the dispute.
- 16.4 If within 10 days of receipt of a Notification the Parties fail to resolve the dispute, the Parties must refer the dispute to their respective managers or equivalent representatives. Each Party must ensure that its representative uses reasonable endeavours to resolve the dispute.
- 16.5 If the dispute is not resolved within 30 days pursuant to clause 16.4, either party may commence court proceedings.

## 17 GENERAL

### Notices

- 17.1 All notices must be legible and in English and addressed to the recipient at the address or e-mail address set out in this Agreement, or any other address or e-mail address that a party may notify to the other party in writing from time to time.

### Assignment and Novation

- 17.2 Client must not assign, subcontract, mortgage or otherwise transfer or novate or dispose of the whole or any part of the Agreement without the prior written consent of Obee. Obee may assign its rights and obligations under this agreement without notice to the Client

**Invalid or unenforceable provisions**

- 17.3 If a provision of this Agreement is invalid or unenforceable in a jurisdiction, it is to be read down or severed in that jurisdiction to the extent of the invalidity or unenforceability and that fact does not affect the validity or enforceability of that provision in another jurisdiction or the remaining provisions.

**Entire Agreement**

- 17.4 The Agreement records the entire agreement between the Parties in relation to its subject matter. The Agreement supersedes all previous negotiations, understandings or agreements in relation to the subject matter.

**Relationship of Parties**

- 17.5 The Parties' relationship is that of independent contractors and the Parties do not intend to create by this Agreement any form of partnership, employment, agency or trust relationship and neither Party has, and neither Party will represent that it has, the authority to act for, or incur any obligation on behalf of, the other party.

**Applicable Law**

- 17.6 The Agreement is governed by the laws of New South Wales, Australia. Each Party irrevocably and unconditionally submits to the non-exclusive jurisdiction of New South Wales and waives, without limitation, any claim or objection based on absence of jurisdiction or inconvenient forum.