

## **Terms and conditions**

These terms and conditions regulate the business relationship between you as a browser of our mobile application '**Kookaborrow**' (**Our App**), between you as an owner of goods, or as a provider of a service (**Owner**) and between you as a borrower of goods, or as an acquirer of services from an Owner (**Borrower**) when you download and install Our App. By using Our App as an Owner or Borrower or by using Our App in any way, you agree to be bound by these terms and conditions.

No person under the age of 18 years may use Our App or provide personal information to us. Persons under age 18 may only use Our App with the involvement and consent of a parent or legal guardian.

We are: The Trustee for the J.E. Thorley Family Trust and the Trustee for the S.D. Cluney Family Trust (as partners) trading as Kookaborrow ABN 78 310 747 970 ("**us, our**"). Our address is: Po Box 2539 Clarkson WA 6030

### **Terms and Conditions:**

#### **PART A – TERMS AND CONDITIONS APPLICABLE TO ALL USERS**

##### **1. Our contract with you**

- 1.1. This agreement contains the entire agreement between the parties and supersedes all previous agreements and understandings between the parties.
- 1.2. Each party acknowledges that, in entering into this agreement, you do not rely on any representation, warranty, information or document or other term not forming part of this agreement.
- 1.3. If you use Our App, or use Our App on behalf of another person you warrant that you have full authority to do so and you accept personal responsibility for every act or omission by you.
- 1.4. We do not guarantee that Our App is available at all times. We may change these terms from time to time. The terms that apply to you are those that are posted on Our App at the time you use Our App, on transact on Our App.
- 1.5. We may alter Our App or the processes on Our App, in whole or in part, at any time and for any reason. You may cancel your account or cease to use Our App at any time if you do not agree with any changes. If you continue to use Our App, you will be deemed to have accepted the new terms of service.

##### **2. Registered Users or Member**

- 2.1. In order to access and use Our App, you must become a registered user or member. You must complete registration by providing certain information as set out on our membership/registration page. Please refer to our Privacy Policy for information relating to our collection, storage and use of the details you provide on registration.

- 2.2. You agree to ensure that your registration details are true and accurate at all times and you undertake to update your registration/membership details from time to time when they change.

### 3. Your account with us

- 3.1. On registration, you must create a password. You are responsible for maintaining the confidentiality of your password and for preventing any unauthorised person from accessing or using your account.
- 3.2. You agree to accept responsibility for all activities that occur under your account. You should tell us immediately if you believe a person has accessed your account without your authority and you should also log in to your account and change your password.
- 3.3. We reserve the right to terminate your registration or membership at any time if you breach these terms and conditions.

### 4. Prices, additional fees and payment

- 4.1. All prices payable for Goods and our Services that you order through Our App are clearly set out on Our App for each Good or Service. On registration you agree to pay for using Our App in accordance with the pricing on Our App from time to time and subject to the Goods and Services you purchase from Our App.
- 4.2. **For Owners** – Owners set prices for Goods and Services, and if applicable, these prices include goods and services tax (“GST”), we charge a 5% commission (**Commission**) on the price you list for the Goods or Services that you are looking to hire or sell through Our App. The Commission is automatically added to the price you insert into Our App for your Goods or Services. You may change the prices for your Goods or Services at any time prior to your Goods being hired or your Services being acquired by a Borrower. You cannot change prices for your Goods or Services once they have been ‘purchased’ by a Borrower..
- 4.3. **For Borrowers** – the price you see listed for Goods or Services is the final or total price that you have to pay to hire the Goods or acquire the Services.
- 4.4. If we owe you money we will credit your credit or debit card as soon as reasonably practicable but in any event no later than 15 days from the date when we accept that repayment is due.

### 5. Security of your credit card

- 5.1. Card payments are not processed through Our App. Rather, we use one or more online payment service providers (such as Stripe) who will encrypt your card or bank account details in a secure environment.

## 6. Licence to use Our App and Intellectual Property

- 6.1. We grant you a limited, non-transferable, non-exclusive, non-assignable, non-sub licensable, revocable licence to download, install and operate Our App on any approved smartphone, tablet or other device that you own or control that meets our minimum requirements for Our App (**Licence**).
- 6.2. Your Licence to download, install and use Our App is subject to your compliance with any eligibility criteria or other provisions set out in these terms and conditions.
- 6.3. You may not make any use of Our App except as permitted by the Licence and you may not do or authorise the commission of any act that would or might invalidate or be inconsistent with our intellectual property rights in Our App. Without limiting the foregoing provisions of the Licence, you must not, under any circumstances, sell or resell access to Our App or scrape, republish, mirror or otherwise rent, lend, lease, sell, redistribute, sublicense, copy or duplicate Our App or any content you obtain via Our App.
- 6.4. You acknowledge that your use of Our App may not be error free and your use of Our App may be interrupted. Our App may be unusable while we are conducting maintenance of Our App or of our website, or as a result of any telecommunications failure or fault, or if your device loses internet connectivity or other matter beyond our reasonable control. To the extent possible by law, we shall not have any liability in respect of any of the foregoing matters.
- 6.5. Except as permitted under the Copyright Act 1968 (Cth), you are not permitted to copy, reproduce, republish, distribute or display any of the information on Our App without our prior written permission.
- 6.6. The Licence to access and use the information on Our App does not include the right to use any data mining robots or other extraction tools.
- 6.7. If you Post on Our App by placing images, text, copy, photos or videos (**Your Material**) then you grant us a non-exclusive, royalty free, irrevocable licence to use Your Material in any way we deem fit and to use Your Material in any promotional material we deem fit, such as but not limited to email marketing campaigns and other online or app based marketing purposes (such as but not limited to Facebook, Instagram etc) and physical marketing materials.
- 6.8. In relation to Your Material, you consent to an infringement of your moral rights, for example the right to be identified as the author and your right to object to derogatory treatment of your work as provided in the Copyright Act 1968.
- 6.9. Apart from Your Material, all rights, title and interest in Our App or photos, images or logos on Our App are subject to copyright under the Copyright Act 1968 (Cth) and are solely owned by us and our affiliate businesses and/or companies. This includes, but is not limited to, all images, photos, text, information, graphics and videos.

- 6.10. You may not copy, modify, publish, transmit, transfer or sell, reproduce, create derivative works from, distribute, perform, display, or in any way exploit any of the Content on or from Our App, in whole or in part.
- 6.11. You may not use our name or logos or trademarks or those belonging to other third parties that have Posted on Our App without the prior written consent of us or that third party (as relevant).

## **7. Service Warranties**

- 7.1. Certain legislation including the Australian Consumer Law (**ACL**) in the Consumer and Competition Act 2010, and similar consumer protection laws and regulations may confer you with rights, warranties, guarantees and remedies relating to the provision of services by us to you which cannot be excluded, restricted or modified (**Statutory Rights**).
- 7.2. Our liability is governed solely by the ACL and these terms and conditions. We exclude all conditions and warranties implied by custom, law or statute except for your Statutory Rights. Unless the Statutory Rights apply, the services, and all other material and work is provided to you without warranties of any kind, either express or implied; and we expressly disclaim all warranties of any kind including but not limited to implied warranties of merchantability and fitness for a particular purpose.
- 7.3. If your Statutory Rights apply because you are a consumer as defined in the ACL, then we guarantee that the services we supply to you:
  - 7.3.1 are rendered with due care and skill;
  - 7.3.2 will be fit for the purpose that we advertise; and
  - 7.3.3 will be supplied within a reasonable time.
- 7.4. To the extent we are unable to exclude liability, our total liability for loss or damage you suffer or incur from using Our App, hiring Goods or acquiring Services, is limited to us refunding to you the amount you have paid us for the services to which your claim relates, minus any payment processing fee or payment gateway refund fee, and minus any payments to Owners.

## **8. Disclaimers**

- 8.1. All the conditions, warranties or other terms implied by the law of any county other than the Commonwealth of Australia are excluded from this agreement to the extent permitted by law.
- 8.2. We may make improvements or changes to Our App, or to our services, at any time and without advance notice.
- 8.3. You are advised that Content may include technical inaccuracies or typographical errors. This is inevitable in any large mobile application, especially where members of the general public have the ability to upload text

and photo information onto Our App. We would be grateful if you bring to our immediate attention any that you find.

- 8.4. Use of Our App is at your own risk. To the extent permissible by law, unless the Statutory Rights apply, we do not make any, and exclude all express or implied warranties, representations, statements, terms and conditions relating to your use of Our App.
- 8.5. We are not liable in any circumstances for special, indirect or consequential loss or any damages whatsoever resulting from loss of use, loss of data or loss of revenues or profits, whether in an action of contract, negligence or otherwise, arising out of or in connection with your use of Our App or the Services.

## **9. Matters beyond our reasonable control**

- 9.1. There may be instances where we may not be able to perform certain or all obligations that we have agreed to in this agreement because of something beyond our reasonable control, which may include but is not limited to, events that constitute a force majeure which may include: lightning, flood, severe weather, fire, explosion, terrorist activities, anything done by a government body or other competent authority, industrial disputes, technical difficulties, power outages, hardware difficulties, software difficulties or other acts, events or omissions that affect our capacity to perform certain or all obligations that we have agreed to in this agreement. There may be other reasons too, not expressly set out here. In these cases, you irrevocably and unconditionally agree that we do not accept responsibility or liability for not providing you with access to, and use of, Our App or for breaching our obligations.

## **10. Posting Policy: Restrictions on what you may Post to Our App**

If you Post Content on Our App then you agree that you will not, nor allow anyone else to, Post Content on Our App which is or may:

- 10.1. be malicious or defamatory;
- 10.2. be commercial audio, video or music files where the intellectual property rights in those files is not yours not licensed to you;
- 10.3. be illegal, obscene, offensive, threatening or violent;
- 10.4. be sexually explicit or pornographic;
- 10.5. be likely to deceive any person or be used to impersonate any person, or to misrepresent your identity, age or affiliation with any person;
- 10.6. give the impression that it emanates from us or that you are connected with us or that we have endorsed you or your business;
- 10.7. solicit passwords or personal information from anyone;

- 10.8. be used to sell other goods or services (i.e. goods not being offered for hire on Our App, or services not being offered to be provided through Our App) or for any other commercial use;
- 10.9. link to material specified in this paragraph;
- 10.10. send age-inappropriate communications or Content to anyone under the age of 18.

#### **11. Posting Policy: Your Posting - restricted content**

In addition to the restrictions set out above, a Posting must not contain:

- 11.1. hyperlinks, other than those specifically authorised by us;
- 11.2. keywords or words repeated, which are irrelevant to the Content Posted;
- 11.3. the name, logo or trademark of any organisation other than yours;
- 11.4. inaccurate, false, or misleading information, half-truths or information that is wrong or misleading in any way.

#### **12. Posting Policy: Posting Content**

- 12.1. If you Post Content to any public area of Our App it becomes available in the public domain. We have no control who sees it or what anyone does with it.
- 12.2. Even if access to your Content is behind a user registration it remains effectively in the public domain because someone has only to register and log in, to access it. You should therefore avoid Posting unnecessary confidential information.
- 12.3. You irrevocably authorise us to publish feedback, comments and ratings through Our App about your activity on Our App, even though it may be defamatory or critical of you. You indemnify us on a full indemnity basis for any loss or damage you suffer due to our publishing feedback, comments and ratings or other users of Our App Posting feedback, comments or ratings about you after lending or borrowing an item.
- 12.4. Posting Content on Our App does not change your ownership of the copyright in it. Apart from a licence we have to use Your Material, we have no claim over the copyright in Your Material and we will not protect your rights for you.
- 12.5. You understand that you are personally responsible for your breach of someone else's intellectual property rights, defamation, or breach of any law, which may occur as a result of you Posting any Content.
- 12.6. You accept all risk and responsibility for determining whether any Content is in the public domain and not confidential.
- 12.7. We do not solicit ideas for improvement of our Our App, but if you do send to us material of any sort, you are deemed to have granted us an irrevocable royalty free licence to use it.

### **13. Posting Policy: Removal of offensive Content**

- 13.1. We are under no obligation to monitor or record the activity of any user of Our App for any purpose, nor do we assume any responsibility to monitor or police mobile app or internet-related activities. However, we may do so without notice to you and without giving you a reason.
- 13.2. If you are offended by any Content, the following procedure applies:
  - 13.2.1 your claim or complaint must be submitted to us in the form available on Our App, or contain the same information as that requested in our form. It must be sent to us by email to [info@kookaborrow.com.au](mailto:info@kookaborrow.com.au);
  - 13.2.2 after we receive notice of a claim or complaint, we may investigate at our discretion; and
  - 13.2.3 if we find the Content to be a breach of these terms and conditions then we shall remove the offending Content as soon as we are reasonably able.
- 13.3. We may remove, delete, leave or re-instate the Content about which you have complained.
- 13.4. In respect of any complaint made by you or any person on your behalf, whether arising out of a complaint or not, you now irrevocably grant to us a licence to publish the complaint and all ensuing correspondence and communication, without limit.
- 13.5. You agree that if any complaint is made by you frivolously or vexatiously you will repay us the cost of our investigation including legal fees, if any.

### **14. Hyperlinks**

- 14.1. Our App may from time to time contain hyperlinks to other applications or websites. Such links are provided for convenience only and we take no responsibility for the content and maintenance of, or privacy compliance by, any linked application or website.
- 14.2. Any hyperlink on Our App to another application or website does not imply our endorsement, support, or sponsorship of the operator of that application or website nor of the information, services and/or products which they provide.
- 14.3. You may link to Our App, or our website only with our consent. Any such linking will be entirely your responsibility and at your expense. By linking, you must not alter any of Our App's or our website's content including any intellectual property notices and you must not frame or reformat any of our pages, files, images, text or other materials. This permission is conditional upon you not portraying us in a false, misleading, derogatory, or otherwise negative or offensive manner. You may not use any logo or other proprietary graphic or trademark of ours as part of the link without our express written consent

## **15. Security of Our App**

- 15.1. If you violate Our App and/or any terms of this agreement, we may take legal action against you.
- 15.2. You agree that you will not, and will not allow any other person to:
  - 15.2.1 modify, copy, or cause damage or unintended effect to any portion of Our App, or any software used within it.
  - 15.2.2 collect, compile, or use any product listings, descriptions, or prices;
  - 15.2.3 Collect, compile, or use any information obtained from or about Our App or the Content except as intended by this agreement;
  - 15.2.4 aggregate, copy or duplicate in any manner any of the Content or information available from Our App, other than as permitted by this agreement or as is reasonably necessary for your use of Our App;
  - 15.2.5 share with a third party any login credentials to Our App.

## **16. Indemnity**

You agree to indemnify us against all costs, claims and expense arising directly or indirectly from:

- 16.1. your failure to comply with the law of any country;
- 16.2. your breach of this agreement;
- 16.3. any act, neglect or default by any agent, employee, licensee or customer of yours;
- 16.4. a contractual or negligence claim arising from; your use of Our App, or from you hiring Goods throughs Our App or you acquiring Services with Our App;
- 16.5. your breach, as either an Owner or Borrower, of the terms of the hiring contract set out in Part B of these terms and conditions; and
- 16.6. a breach of the intellectual property rights of any person.

## **17. Warranty and Product Claims from App Store and Play Store**

- 17.1. You agree that as between us and Google Inc., we are solely responsible for any product warranties pertaining to Our App, whether express or implied by law, to the extent not otherwise effectively disclaimed in these terms and conditions.
- 17.2. If you download and install Our App from the Google Play store, refunds are available from Google in the circumstances set out in clause 3.7 the Google Play Developer Distribution Agreement which you can read here - <https://play.google.com/about/developer-distribution-agreement.html>



- 17.3. You and us each acknowledge that as between you and us, we, not Google, are responsible for addressing any of your claims and of any third party relating to Our App or your or their possession and/or operation of Our App, including, but not limited to: (i) product liability claims made in respect of Our App; (ii) any claim that Our App fails to conform to any applicable legal or regulatory requirement; and (iii) claims arising under consumer protection or similar legislation in respect of Our App.

## **PART B – THE HIRING CONTRACT - TERMS AND CONDITIONS APPLICABLE TO OWNERS AND BORROWERS**

### **18. Formation of Contract between Owner and Borrower**

- 18.1. When you, as an Owner, upload information about your Goods that you would like to hire out to Borrowers using Our App, this is an offer to provide those Goods to Borrowers. When a Borrower pays to hire any of your Goods through Our App a contract is formed between the Owner and the Borrower on the terms of this agreement.

### **19. Rental of Goods**

- 19.1. The Owner agrees to Rent the Goods to the Borrower for the Rental Period and the Borrower agrees to take the Goods on hire for that period and to pay the Price for the Goods for that Rental Period, together with any applicable GST, on the terms and conditions set out in this agreement. The Borrower is entitled to use the Goods for the Rental Period and for any agreed extension of the Rental Period. The Borrower agrees to return the Goods to Owner's nominated address at the end of the Rental Period.

### **20. Payment for rental**

- 20.1. The Borrower agrees to pay us for the Goods Rented for the Rental Period and we will pay the Owner within 1 business day of a Borrower Renting Goods from an Owner, together with any applicable GST.

### **21. Borrower's warranties**

- 21.1. The Borrower warrants that:
- 21.1.1 their details in Our App are correct, and remain correct, in every respect and are not misleading in anyway including, without limitation, by omission;
  - 21.1.2 if applicable, the Borrower holds a current licence valid for the type of Goods hired;
  - 21.1.3 the Borrower will not breach any copyright or other restriction in relation to or in connection with, the Goods;
  - 21.1.4 in selecting the Goods the Borrower has not relied on the Owner's skill and judgment or on any representations made by or on behalf of the Owner and the Borrower agrees that the Goods comply with their

description, are in merchantable condition and are fit for the Borrower's purpose;

- 21.1.5 if any Goods in the Borrower's possession are damaged, the Borrower must rectify the damage to the Goods, noting that fair wear and tear to the Goods is not to be considered as 'damage' to the Goods.

## **22. Borrower's obligations**

22.1. The Borrower will:

- 22.1.1 keep the Goods in first class condition and only use them as they would be used by a careful and prudent Owner;
- 22.1.2 not use the Goods for any illegal purpose;
- 22.1.3 report any damage to, or loss of, the Goods to us and the Owner immediately such damage or loss occurs;
- 22.1.4 indemnify the Owner for any loss (including legal costs) incurred by the Owner in relation to any breach of this hiring contract and for any liability arising out of any such breach.

## **23. Insurance**

- 23.1. We do not insure your Goods. We strongly suggest that you insure your Goods against loss and damage, to that end the Owner warrants that they have insurance in place for loss or damage of their Goods.

## **24. Repossession**

- 24.1. The Owner may retake possession of the Goods if the Borrower breaches any provision of this agreement.

## **25. Title to Goods**

- 25.1. The Borrower acknowledges that the Owner retains title to the Goods and that the Borrower has rights to possess the Goods as a mere bailee only. The Borrower does not have any right to pledge the Owner's credit in connection with the Goods and agrees not to do so.
- 25.2. The Borrower also agrees not to agree, attempt, offer or purport to sell, assign, sub-let, lend, pledge, mortgage let on hire or otherwise part with or attempt to part with the Goods or otherwise deal with the Goods and not to conceal or alter the Goods or make any addition, modification or alteration to, or repair of, the Goods.

**26. No waiver**

26.1. Time is of the essence of this agreement, except that no delay by the Owner in exercising any right or power will operate as a waiver of that right or power. Nor will any single or partial exercise of any right or power preclude any other or further exercise of that right or power.

**PART C – THE SERVICES CONTRACT - APPLICABLE TO ALL BORROWERS WHO ACQUIRE SERVICES**

**27. Formation of Contract between Owner and Borrower**

27.1. When you, as an Owner, upload information about Services that you would like to provide to Borrowers using Our App, this is an offer to provide those Services to Borrowers. When a Borrower pays to acquire any of your Services through Our App a contract is formed between the Owner and the Borrower on the terms of this agreement.

**28. Provision of Services**

28.1. The Owner agrees to provide the Services to the Borrower for the Price.

**29. Service Warranties**

29.1. The Owner warrants that:

- 29.1.1 the Services will be fit for purpose;
- 29.1.2 carried out with due care and skill and in a workmanlike manner; and
- 29.1.3 it holds the necessary licences, permits or approvals required to undertake or provide Services of the type required.

**PART D – GENERAL TERMS AND CONDITIONS APPLICABLE TO ALL USERS**

**30. Miscellaneous matters**

30.1. When we communicate with you we do so by email. You agree that email communications are contractually binding in the same way as properly signed and dated paper sent by post.

30.2. If any term or provision of this agreement is at any time held by any jurisdiction to be void, invalid or unenforceable, then it shall be treated as changed or reduced, only to the extent minimally necessary to bring it within the laws of that jurisdiction and to prevent it from being void and it shall be binding in that changed or reduced form. Subject to that, each provision shall be interpreted as severable and shall not in any way affect any other of these terms.

- 30.3. The rights and obligations of the parties set out in this agreement shall pass to any permitted successor in title.
- 30.4. No failure or delay by any party to exercise any right, power or remedy will operate as a waiver of it nor indicate any intention to reduce that or any other right in the future.
- 30.5. Any communication to be served on either party by the other shall be delivered by e-mail. It shall be deemed to have been delivered, if sent to the address from which the receiving party has last sent e-mail: within 48 hours if no notice of non-receipt has been received by the sender.
- 30.6. In the event of a dispute between the parties to this agreement, then they undertake to attempt to settle the dispute by engaging in good faith with the other in a process of mediation before commencing arbitration or litigation.
- 30.7. This agreement does not give any right to any third party.
- 30.8. Neither party shall be liable for any failure or delay in performance of this agreement which is caused by circumstances beyond his reasonable control, including any labour dispute between a party and its employees.
- 30.9. In the event of any conflict between any term of this agreement and the provisions of the constitution of a limited company or any comparable document intended to regulate any other corporate or collective body, then the terms of this agreement shall prevail.
- 30.10. The validity, construction and performance of this agreement shall be governed by the laws of the Western Australia.

### **31. Definitions**

In this agreement:

Borrower	means a person who Rents or hires Goods from the Owner using Our App;
Content	means any content in any form such as but not limited to text, photographic images, videos, icons, emoji, published on Our App by us, by you, or by any third party with our consent;
Goods	means any goods that the Owner has uploaded to Our App which are available for Rent or for hire to the Borrower and includes all accessories and other equipment;
GST	has the same meaning as in the A New Tax System (Goods and Services Tax) Act 1999 (Cth);
Owner	means a person who Rents or hires Goods to a Borrower using

	Our App;
Our App	means the Kookaborrow mobile application platform facilitating the hiring of Goods and the acquisition of Services where these terms and conditions are placed and includes all web pages controlled by us including any and all subdomains;
Post	means display, exhibit, publish, distribute, transmit and/or disclose information, Content and/or other material on to Our App, and the phrases "Posted" and "Posting" shall be interpreted accordingly;
Price	means the Owner's price for the Good(s) published on Our App which is current at the time this agreement is formed;
Rent	means the Owner renting or hiring out Goods to the Borrower for the Rental Period for the Price.
Rental Period	means the period of time selected by the Borrower in Our App beginning on the date specified in Our App as the commencement date and ending on the earlier of the date set out in Our App as the end date or the date on which the Goods are returned to the Owner, or, if the Goods are stolen or damaged beyond repair, the date on which the insurance company confirms that it will accept that the Goods have been stolen or damaged beyond repair;
Services	means the services being offered to be provided by Owners to Borrowers, through Our App.

## **32. Interpretation**

In these terms and conditions unless the context otherwise requires:

- 32.1. a reference to a person is a reference to one or more individuals, whether or not formally in partnership, or to a corporation, government body, or other association or organisation;
- 32.2. by accessing Our App, you unconditionally and irrevocably agree to be bound by these terms and conditions, all applicable laws and/or regulations and you agree that you are responsible for this compliance
- 32.3. these terms and conditions prevail over any terms proposed by you;
- 32.4. any agreement by any party not to do or omit to do something includes an obligation not to allow some other person to do or omit to do that same thing;
- 32.5. any obligation of any person arising from this agreement may be performed by any other person;

- 32.6. in this agreement references to a party include references to a person to whom those rights and obligations are transferred or passed as a result of a merger, division, reconstruction or other re-organisation involving that party;
- 32.7. the headings to the paragraphs and schedules (if any) to this agreement do not affect the interpretation;
- 32.8. a reference to an act or regulation includes new law of substantially the same intent as that act or regulation; and
- 32.9. if there is any conflict between these terms and conditions and other terms and conditions on Our App, these terms and conditions will prevail.