**Last Updated 12 December 2023**

**Software End User License Agreement (“EULA”)**

**1. DEFINITIONS**

1.1 In this EULA, the following words will have the following meanings:

“**Agile**” means Agile Workspace Limited, a New Zealand company with a company number of 5899397 and NZBN 0f 9429042216759 and whose registered offices is at 31 Boston Road, Grafton, New Zealand;

“**Agile’s Infringement Warranty”** has the meaning given to that term in clause 4.9;

“**Agile’s Specification Warranty”** has the meaning given to that term in clause 4.1;

**“Confidential Information"** means any information of or provided by a party that a reasonable person would assume - by its form, nature, content or mode of transmission – to be confidential, whether written or oral but it excludes information which: (i) was rightfully in the possession of other party or known to it prior to its receipt from the discloser; (ii) was rightfully disclosed to the recipient by a third party; (iii) is publicly available (and didn’t become public because of a breach of confidentiality by the recipient); and/or (iv) is independently developed by the recipient without use or reference to the discloser’s information.

“**Customer**” means the legal entity or person that purchased a licence to use the Software in the System located at the Sites;

**“Distributor”** means Agile’s authorised distributor and support provider from whom the Customer purchased the System, or such other authorised support provider that Agile may appoint to replace them from time to time;

**“Documentation”** means operating manuals, user guides, specifications and other printed or electronic materials relating to the Software and officially published by Agile from time to time for general availability to licensees or end-users of the Software;

**“Intellectual Property Rights”** means all industrial and intellectual property rights whether conferred by statute, at common law or in equity in or relating to the Software, System or the Documentation, including all copyright and similar rights that may subsist in works or other subject matter, rights in relation to inventions (including all patents and patent applications), trade secrets and know-how, rights in relation to designs (whether or not registrable), rights in relation to databases, rights in relation to semi-conductor topographies or integrated circuit layouts, rights in relation to registered and unregistered trade marks, business names and rights in relation to domain names;

**“Permitted Person”** means any employee or contractor of the Customer;

**“Permitted Use”** means use of the Software and Documentation solely in conjunction with the System purchased by the Customer and installed at the Sites;

**“Personal Information”** has the meaning given to that term in the *Privacy Act 1988* (Cth);

**“Privacy Law”** means the *Privacy Act 1988* (Cth), including all applicable privacy codes approved under that Act and the Australian Privacy Principles within that Act;

“**Sites**” means the premises owned, leased or controlled by the Customer where the System is installed;

**“Software”** means all software, firmware, applications and computer code (in both source and object code form) within the System, including the master controller software, the firmware in the desk pucks and locks, the applications installed on the kiosks, the applications installed on end user devices such as iPhones and the administrator/system management software and also includes all Upgrades;

“**System**” means:

* 1. the total number of Smartalock branded locks purchased by the Customer along with the Smartalock branded kiosks, slave controllers, master controllers, and associated software and apps used to operate that hardware;
	2. the total number of Floorsense or Floorsight branded pucks and occupancy sensors purchased by the Customer along with the Floorsense branded tablets, slave controllers, master controllers, and associated software and apps used to operate that hardware; and
	3. all associated cables, card readers, power relays, desk height controllers, iPads, and LAN switches also provided by Agile to form part of that system;

**“Upgrades”** means any releases, patches, bug-fixes, upgrades, improvements, developments, new versions, new features or other updates of any of the Software released by Agile from time to time, either for general availability to licensees of the Software or developed for specific customers of Agile;

**“Term”** means the period of 15 years; and

“**Warranty Period**” means in relation to the Software, the period of two years from the date that such Software was first commissioned at a Site for a Customer and put into operational use by the Customer, and such additional period (if any) for which for which the Customer has purchased and continues to maintain a valid licence to access the System via the Distributor.

**2. LICENCE**

2.1  For the Term, Agile grants to the Customer and the Customer accepts, a non-exclusive, non-transferable licence to use the Software and Documentation solely for the Permitted Use.

2.2  The Customer must not permit any person who is not a Permitted Person to access or use the Software or Documentation, and may not disclose the Software or Documentation to any person who is not a Permitted Person. The Customer will be liable for all acts or omissions of its Permitted Persons as if they were the acts or omissions of the Customer.

**3. RESTRICTIONS ON USE**

3.1  The Customer may not:

(a)  translate, decompile, reverse engineer, reverse compile, reverse assemble or in any manner attempt to derive the source code of the Software, or directly or indirectly allow or cause a third party to do so, except to the extent expressly permitted under applicable law;

(b)  copy the Software or Documentation (or any part of the Software or Documentation) by any means or in any form, without Agile’s prior written consent, provided that the Customer may make one copy of the Software and Documentation for backup purposes;

(c)  attempt to defeat or circumvent any hardware or software lock or licence key or code provided with, or incorporated within, the Software or System;

(d)  merge all or any part of the Software with any other software;

(e)  modify, adapt, customise, enhance or alter the Software or allow anyone other than Agile to do so, without Agile’s prior written consent, except to the extent expressly permitted under applicable law;

(f)  attempt to devise alternate software for use with the other components of the System and that eliminates the need for any of the Software, or

(g)  sell, sub-license, rent, lease or otherwise distribute the Software or Documentation (or any part of the Software or Documentation) to any other person, without the prior written consent of Agile.

3.2  The Customer will:

(a)  be solely responsible for the use of, access to and supervision, management and control of the Software and Documentation and all copies of the Software and Documentation;

(b)  effectively protect the Software and Documentation, and all copies of the Software and Documentation, at all times from misuse, damage, theft, destruction or any form of unauthorised use or access, including by implementing effective and appropriate security measures;

(c)  retain the Software and Documentation, and all copies of the Software and Documentation, under its effective control; and

(d) only install and use the Software strictly in accordance with the Documentation and any other normal operating procedures for the Software published by Agile from time to time.

3.3  The Customer may not remove, deface or obscure any notices provided on or with the Software or Documentation as to the ownership of such Software or Documentation by Agile or its licensors. The Customer will ensure that any copy of the Software or Documentation made under this EULA bears a notice stating that:

(a)  the Intellectual Property Rights are owned by Agile or its licensors; and

(b)  the Software and Documentation contain valuable information that is confidential and proprietary to Agile.

3.4  The Customer acknowledges that any breach of clauses 2.2 or 3.1 to 3.3 may cause Agile irreparable harm for which damages would not be an adequate remedy. In addition to any other remedy available to it, Agile may seek equitable relief (including injunctive relief or specific performance) against any breach or threatened breach of any of clauses 2.2 or 3.1 to 3.3 by the Customer.

**4. WARRANTY, SUPPORT AND MAINTENANCE, LIABILITY**

 **Agile’s Specification Warranty**

4.1  Agile warrants that for the Warranty Period, the Software will operate substantially in accordance with the published specifications for that Software. During the Warranty Period, if the Software does not operate substantially in accordance with the relevant specifications, then, subject to compliance the Customer’s with clauses 4.2 to 4.6 below, Agile will use commercially reasonable endeavours to either rectify the defect or provide a replacement of the relevant Software (or part of the Software) (“**Agile’s Specification Warranty**”).

4.2  To claim under Agile’s Specification Warranty, the Customer must notify the Distributor in writing of the defect. Agile has appointed the Distributor as its agent to be the first point of contact for the Customer for First and Second Level Support of the Software.

4.3  When notifying the Distributor of a defect under clause 4.2, the Customer will provide the Distributor with a documented example of such defect and as much information about the defect as practicable.

4.4  The Distributor (acting as Agile’s agent) will investigate the reported defect. Subject to clause 4.11, the Distributor will, upon verifying the defect, use commercially reasonable endeavours to either rectify such defect or provide a replacement of the relevant Software (or part or component of the Software), without additional charge to the Customer. The Distributor will also install such replacements without additional charge to the Customer.

4.5  Where the Distributor has been unable to rectify the defect after providing First and Second Level Support to the Customer under clause 4.4, the Customer may contact Agile to escalate the defect and request Third Level Support. Agile’s contact details are provided in clause 7.1 below, or as updated from time to time on at <https://support.smartalock.com/support/home>. Agile will investigate the escalated defect. Subject to clause 4.11, Agile will, upon verifying the existence of the defect, use commercially reasonable endeavours to either rectify such defect or provide a replacement of the relevant Software (or part or component of the Software), without additional charge to the Customer. Agile will also install such replacements without additional charge to the Customer.

4.6  To validly claim under Agile’s Specification Warranty, the Customer must:

(a)  review and follow the Agile, Floorsense and Floorsight self-help, troubleshooting and support Documentation published at <https://support.smartalock.com/support/home> before escalating a defect to Agile for Third Level Support;

(b)  be responsible for any expenses or costs incurred by Customer in making the claim, including any costs associated with Customer contacting the Distributor or Agile; and

(c)  fully co-operate with the Distributor and Agile when they are investigating and rectifying reported defects, including by allowing the Distributor and Agile access to relevant premises and systems to the extent required for that purpose.

4.7  Unless the Customer has entered into a separate extended support agreement directly with Agile, and subject to clause 4.19, the obligations under clauses 4.4 and 4.5 will be Agile’s sole obligation, and the Customer’s sole remedy, in the event of defect, issue or problem with any Software or any failure of any of the Software to operate in accordance with the relevant specifications.

4.8  To the maximum extent permitted under applicable law, Agile makes no warranty that the operation of any Software or System will be completely error-free or uninterrupted, and the Customer acknowledges and agrees that the existence of minor or cosmetic errors or interruptions will not constitute a breach of this EULA.

**Agile’s Infringement Warranty**

4.9  Agile warrants to the Customer that to the best of its knowledge, the use of the Software by the Customer in accordance with the Documentation will not infringe the intellectual property rights of any third party. If there is a breach of such warranty, Agile will indemnify the Customer in accordance with clause 4.10 (“**Agile’s Infringement Warranty**”).

4.10  Subject to clauses 4.11 to 4.19, Agile will indemnify the Customer against any and all losses, costs, expenses, demands and liabilities incurred or suffered by the Customer arising directly from a breach of Agile’s Infringement Warranty, provided that if the Customer wishes to be indemnified under this clause 4.10 it must:

(a)  promptly notify Agile of any relevant claim or legal proceeding and make no admission or settlement without Agile’s prior written consent;

(b)  allow Agile to participate in and control any defence, compromise, settlement, resolution or disposition of such claim or proceeding and if Agile elects to conduct the defence of such claim or proceeding, the Customer must:

(i)  provide Agile with reasonable assistance and information in conducting the defence of such claim or proceeding (including by ensuring the Customer’s directors, employees, agents or sub-contractors give such advice, evidence or statements as Agile may reasonably request); and

(ii)  give Agile the sole control of, and the complete authority to conduct, the defence of such claim or proceeding and to negotiate and settle such claim or proceeding, as Agile may determine in Agile’s reasonable discretion; and

(c)  allow Agile to either:

(i)  modify or substitute the infringing part of the Software to avoid continuing infringement; or

(ii)  obtain the authority to enable the Customer to continue to possess and use the relevant Software,

at Agile’s option and expense.

 In conducting the defence of any claim or proceeding under clause clause 4.10(b), Agile will comply with the Legal Services Directions 2017 (Cth), in particular with the model litigant obligations in Appendix B of those Directions.

4.11  Subject to clause 4.19, Agile will not be liable for a breach of Agile’s Specification Warranty or Agile’s Infringement Warranty, and will not indemnify the Customer under clause 4.10, to the extent that any defect, fault or infringement, or suspected defect, fault or infringement is caused or contributed to by any:

(a)  use or operation of any Software or System not in accordance with, or as reasonably contemplated by, the Documentation;

(b)  failure by the Customer to follow the Agile, Floorsense and Floorsight self-help, troubleshooting and support Documentation published at <http://support.smartalock.com/support/home>;

(c) faults, problems, changes or outages in or to any IT, WIFI or other system or software that adversely affects the operation of the Software or the System, including reboots or changes to the Customer’s LAN, other networks, upgrades to non-Smartalock, non-Floorsense or non-Floorsight software, telecommunications outages or changes to firewalls;

(d) faults, problems, changes or outages caused or contributed to by factors outside of Agile’s reasonable control, including power cuts, earthquakes, flooding, adverse weather conditions or any other Acts of God, or changes to premises, including moving desk or locker locations or change of location of offices;

(e) faults in non-Smartalock, non-Floorsense or non-Floorsight equipment, including the physical lockers in which locks are installed (such as a door hinge fault), the physical desks in which the pucks, sensors or power control relays are installed (such as a faulty sit stand motor), faults in laptops, phones, other end-user devices, accessories, attachments, supplies, consumables or other items of the Customer not supplied by Agile;

(f) faults, problems, changes or outages caused or contributed to by improvements, modifications, additions, customisations, enhancements, developments, patches releases, bug fixes or changes in or to any part of the Software or System, other than those made by Agile;

(g) use or interoperation of the Software or System with any other computer programs or software not provided by or previously approved in writing by Agile;

(h) faults, problems, changes or outages caused or contributed to by any negligent or wilful and wrong act or omission of, or breach of this EUAL by, the Customer or their personnel or any third party;

(i) incorrect configuration or installation of the Software or System, except where such incorrect configuration or installation is caused by Agile or the Distributor; or

(j)  any incorrect configuration or installation of the Software; or

(k) Customer operator errors.

In addition, the Customer must use its reasonable efforts to mitigate any loss that it suffers and to which the indemnity under clause 4.9 applies. Agile reserves the right to charge for time spent by Agile personnel on reported defects that are caused or contributed to by any of the matters listed in this clause 4.11.

**Additional guarantees under consumer laws**

4.12   The New Zealand *Consumer Guarantees Act 1993* as well as other laws in New Zealand (New Zealand “**Consumer Law**”), guarantee or imply certain conditions, warranties and undertakings, and give consumers other legal rights, in relation to the quality and fitness for purpose of certain products and services sold in New Zealand.

4.13 For products and services sold in New Zealand, if the customer is in trade and acquiring the Products, Documentation and associated services in trade, the customer agrees that the New Zealand *Consumer Guarantees Act 1993* and sections 9, 12A, 13 and 14(1) of the *Fair Trading Act 1986* will not apply, and that it is fair and reasonable that it is bound by the provisions of this clause.

4.14  Subject to clause 4.15:

* + 1. The *Competition and Consumer Act 2010* (Cth) as well as other laws in Australia provide certain guarantees that are available to consumers of certain products and services sold in Australia (Australian “**Consumer Law**”) and Agile’s goods and services sold in Australia come with guarantees that cannot be excluded under the Australian Consumer Law;
		2. For major failures with a service, the Customer is entitled:
			1. to cancel its service contract with Agile; and
			2. to a refund for the unused portion of the service, or to compensation for its reduced value;
		3. The Customer is also entitled to choose a refund or replacement for major failures with goods;
		4. If a failure with the goods or a service does not amount to a major failure, the Customer is entitled to have the failure rectified in a reasonable time – and if this is not done, the Customer is entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion; and
		5. The Customer is also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service.

4.15 However, where goods or services are not of a kind ordinarily acquired for personal, domestic or household use:

* + 1. liability under certain of these guarantees can be limited by contract; and
		2. these guarantee will not apply if the value of the relevant good or service exceeds AUD$100K.

4.16  The benefits given by Agile’s Specification Warranty and Agile’s Infringement Warranty are in addition to any other rights and remedies the customer may have under the Consumer Law applicable to the purchase of the System or Software. Except as otherwise provided by Agile’s Specification Warranty and Agile’s Infringement Warranty above, all warranties, terms, conditions, guarantees or similar, other than those which cannot be excluded under applicable Consumer Law, are expressly excluded by Agile to the extent legally permitted.

**Agile’s liability**

4.17  To the maximum extent permitted under applicable law, Agile is not responsible or liable (whether in contract, tort (including negligence), or otherwise) for any:

(a) loss or corruption of any data or information.

(b)   loss of revenue and/or profit, loss of anticipated savings, loss of goodwill or opportunity, loss of production, business interruption, or wasted management or staff time; or

(c)   other loss, damage, cost or expense of any kind whatsoever, that is indirect, consequential, or of a special nature,

arising directly or indirectly out of the Software or System or associated services or Documentation, even if Agile had been advised of the possibility of such damages, and even if such loss, damage, cost or expense was reasonably foreseeable by Agile.

4.18  Subject to clauses 4.12 to 4.17 and 4.19, the maximum liability of Agile to the Customer arising out of this EULA, or otherwise relating to the Software, System or Documentation (or associated services), will not exceed the lesser of:

(a) the fees payable by the Customer to Agile and/or the Distributor for the Software and System; and

(b) NZD100,000.00 (or, with respect to the indemnity in clause 4.10, NZD500,000).

4.19  None of the exclusions or limitations in this EULA will have the effect of limiting or excluding any liability to the extent such liability cannot be so limited or excluded by applicable law. Where Agile cannot legally limit its liability as provided in clauses 4.16 to 4.18 under applicable law, then to the extent permitted by such applicable law, Agile limits its liability under the Specification Warranty, the Infringement Warranty and any other implied guarantee (such as those under the Consumer Law) that cannot be lawfully excluded, to:

(a) in the case of the Software, System or Documentation:

* + - 1. their replacement or repair; or
			2. the supply of equivalent goods; or
			3. payment of any cost of such replacement, repair or equivalent supply; and

(b) in the case of associated services, re-performance of those services or payment of the cost of such re-performance.

The choice of remedy in paragraph (a) and (b) above will be at Agile’s election, except in the case of a major failure under the Australian Consumer Law, where the remedy will be at the Customer’s option.

**5. INTELLECTUAL PROPERTY RIGHTS**

5.1  The Customer acknowledges that:

(a)  Agile or its licensors own the Software, System and Documentation and all the Intellectual Property Rights;

(b)  the Software, System and Documentation are and contain valuable confidential and proprietary information of Agile and its licensors; and

(c)  no licence, right or other interest in the Software or Documentation or any Intellectual Property Rights is granted to the Customer, except as expressly stated in this EULA.

5.2  All improvements, modifications, customisations, enhancements or developments in or to the Software, System or Documentation made by Agile or the Customer (“**Improvements**”) and all intellectual property rights in and to them, will be owned by Agile or its licensors and are hereby assigned by Customer to Agile. The Customer agrees to execute all documents and do all things necessary to vest legal ownership of the intellectual property rights in such Improvements in Agile or its licensors.

**6. TERM AND TERMINATION**

6.1  Subject to clause 6.2, this EULA will commence on the date that the Customer first uses any of the Software and remain in full force and effect until the expiry of the Term.

6.2  Each party may terminate this EULA and the licence granted under it at any time if the other party:

(a)  fails to comply with any of the terms of this EULA and

(i) that breach is incapable of remedy; or

(ii) that breach is capable of remedy but is not remedied within 14 days after the first party notifies the other party in writing of the breach;

(b)  To the extent allowed by applicable laws (including the ipso factor regime under the *Corporations Act 2001* (Cth)):

(i) ceases or threatens to cease to carry on its business, becomes bankrupt or insolvent, is unable to pay its debts as they fall due, enters into a general assignment of its indebtedness or a scheme of arrangement or composition with its creditors, or takes or suffers any similar action in consequence of debt;

(ii)  has a trustee, manager, administrator, administrative receiver, receiver, inspector under any other legislation or similar officer appointed in respect of the whole or any part of the Customer’s assets or business, or enters into liquidation (other than voluntarily for the purpose of a solvent amalgamation or reconstruction);

(c)  being an individual, dies or is physically incapacitated; or

(d)  being a partnership, is dissolved.

6.3  Upon termination or expiry of this EULA, the Customer will stop using the Software and Documentation and will at Agile’s option, but at the Customer’s cost, return or destroy all copies of the Software and Documentation in the Customer’s possession or control.

6.4  Clauses 2.2, 3, 4.8, 4.9 to 4.19, 5, 6.3, 6.4, 7 and 8 will survive termination or expiry of this EULA for any reason.

**7. CONFIDENTIALITY AND PRIVACY**

7.1 If a party (“recipient”) receives Confidential Information from the other party (“discloser”), recipient must hold it in confidence and securely, and not (unless with discloser’s prior written consent) disclose or use it except as allowed by this EULA or as required by law. Confidential Information may be disclosed to recipient’s employees, agents, professional advisors and contractors on a need-to know basis only, and recipient must ensure that those persons maintain such Confidential Information in accordance with this clause. Recipient will, on request of discloser, return to discloser all Confidential Information in its possession or certify the destruction of it.

7.2 Each party will comply with any applicable Privacy Laws when accessing, collecting, storing, transferring, using or otherwise handling Personal Information in connection with this EULA.

7.3 Without limiting clause 7.2, the Customer warrants and undertakes that it will obtain all necessary consents and authorisations from all Permitted Persons who use the System as required by the Privacy Laws. The Customer will at all times indemnify and keep indemnified Agile from and against any and all liability, losses, damages, costs and expenses awarded against, incurred or suffered by them, directly related to Customer’s breach of this clause 7.3.

7.4 Each party must notify the other promptly if it becomes aware of any breach of Privacy Laws by it and must take all reasonable steps to remediate, and mitigate the effects of, the breach as soon as practicable, keeping the other party regularly updated.

**8. GENERAL**

8.1  Agile may be contacted at:
31 Boston Road, Grafton, Auckland Central 1023, New Zealand Phone: +6492804521
E-mail: support@floorsense.nz

8.2  Neither party may assign, transfer or sub-license this EULA, or its rights and obligations under it, without the other party’s prior written consent (not to be unreasonably withheld).

8.3  If any provision of this EULA is held invalid, unenforceable or illegal for any reason, this EULA will remain otherwise in full force apart from such provisions, which will be deemed deleted.

8.4  All variations of this EULA must be in writing and signed by authorised representatives of both parties.

8.5  No failure or delay by either party to exercise any right or remedy under this EULA will be treated as a waiver of such right or remedy. No single or partial exercise of any right or remedy will present the further exercise of such right or remedy.

8.6  Specifying anything in this EULA after the words ‘include’, ‘for example’ or similar expressions does not limit what else is included.

8.7 Neither party will be liable for any delay or failure in respect of its obligations under this EULA, to the extent resulting from causes beyond its reasonable control, including strikes, labour disputes, failures of utility and hosting services providers, riots, insurrections, civil disturbances, acts of God (including fires, flood, storms and earthquakes), explosions, war and governmental actions.

8.7 This EULA shall be governed by and construed in accordance with the law of the State of New South Wales, Australia. Agile and the Customer irrevocably agree that courts of that State (and Australian Federal appeal courts) will have non-exclusive jurisdiction to hear and determine all disputes under or in relation to the Software or this EULA. Agile and the Customer waive any objections to the State of New South Wales as the forum for proceedings on the grounds of forum non-conveniens or otherwise.