

# Appendix 1 Terms and Conditions

## 1 Agreed Terms & Interpretation

This Agreement includes capitalised terms and phrases which are defined in one of the documents that form part of the Agreement. Unless the context requires otherwise each capitalised term or phrase shall have the same meaning in each of the document that form the Agreement.

**Additional Services** means any:

- (a) Services that is not described as in scope in the Proposal;
- (b) Ad hoc Professional Services (consulting, training, support etc) that Customer requests from time to time;
- (c) providing services to any item of software, hardware, network or equipment that is not within the defined Environments set out in the Proposal;
- (d) any other service agreed by the Parties.

**Agreement** means the content of the Proposal, the relevant sections of the Service Description that are incorporated into the Proposal and these Terms and Conditions.

**Anderson Morgan Tools** means scripts, programs and VPN connections that Anderson Morgan requires to be installed and operate on the Environment in order to facilitate the performance of the Services, including facilitating remote access and monitoring, job scheduling, build and deployment scripts.

**Australian Consumer Law** means Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

**Authorised Delegate** means a person who has authority to act on behalf of a Party in connection with this Agreement, including to authorise changes to this Agreement and to authorise Additional Services.

**Business Day** means any week day excluding a public holiday in Tasmania.

**Business Hours** means 0830 to 1730 on any Business Day in Tasmania.

**Change Request** means the process by which Parties discuss and may agree a variation to the Services or the Agreement, as set out in the Proposal.

**Confidential Information** means any non-trivial information however recorded, preserved, disclosed or communicated (whether directly, indirectly, orally or by writing), disclosed by either Party or its Representatives to the other Party or its Representatives in connection with this Agreement that,

if disclosed in writing is marked as “Confidential” or “Proprietary,” or, if disclosed orally is identified as “Confidential” or “Proprietary” at the time of disclosure and is specifically identified as confidential in a written document provided by Discloser to Recipient within 20 Business Days after the oral disclosure, or which is, or ought to have been, understood by the Parties, using reasonable business judgment, to be confidential. For clarity, Anderson Morgan’s Confidential Information includes this Agreement, including the Prices, the Services and Deliverables, the Anderson Morgan Tools, the Operations Guide, any Anderson Morgan Intellectual Property Rights and Pre-existing IP, any trade secrets, Methodologies and know-how, or other Intellectual Property Rights provided to Customer by Anderson Morgan.

**Customer Data** means any application, information of any kind (including information that is only in machine readable form) that is either:

- (a) loaded into the software on any Environment or other environment that is being managed by Anderson Morgan under this Agreement, by any person other than Anderson Morgan or its contractors;
- (b) is processed by any Environment or other environment that is being managed by Anderson Morgan under this Agreement,

except for any application, data or information that is Anderson Morgan Tools or is machine generated by the Environment.

**Deliverable** means any output from the Services that is specifically identified as a “Deliverable” in the Proposal. The term Deliverable expressly excludes (i) the Operations Guide, (ii) any configuration of, or related information in respect of, the Environment or (iii) any Open Source Code, even if physically delivered or otherwise provided to Customer by Anderson Morgan.

**Disaster Recovery** means any rectification work including re-architecture, re-design, re-development, re-deployment, re-location or variation of the Environment associated with a prolonged or permanent adverse technology event on the Environment.

**Discloser** means the Party that makes a disclosure of Confidential Information.

**Effective Date** means the date when both Parties have signed the Proposal.

**Emergency** means any act, omission event or circumstance where, in Anderson Morgan’s reasonable opinion there is a threat of destruction or loss, substantial damage or degradation, injury or compromise to any person’s safety, any property, any technology or infrastructure used in

connection with the Services, the Environment or any Customer Data.

**Environment** means the IT equipment that is to be managed and maintained by Anderson Morgan under this Agreement, and any additional items that are added to the Environment as Additional Services.

**Force Majeure Event** includes:

- (a) earthquake, fire, flood or other inclement weather conditions;
- (b) national emergency, terrorist act or war;
- (c) a malfunction or failure of telecommunications equipment or services, including the internet, or any power failure;
- (d) any consequence of a virus, trojan horse or any malicious code or denial of service attack that could not have been prevented by the use of the then current version of anti-virus software;
- (e) industrial action or inaction, government action or inaction, insolvency of a subcontractor of the relevant Party; or
- (f) a circumstance beyond the reasonable control of the relevant Party.

**Go Live Date** means the date that Anderson Morgan advises Customer that the Managed Services are ready to commence, as described in the Proposal.

**GST** means the Goods and Services Tax as defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Intellectual Property Rights** includes copyright, trade mark, service mark, patent, design, semiconductor, circuit layout rights, database rights or other rights in the nature of intellectual property rights (whether registered or unregistered), any right to registration of such rights, or any similar rights protected by statute, from time to time existing in Australia or elsewhere, including the right to keep Confidential Information confidential.

**Methodology** means the body of practices, procedures, processes, templates and rules employed by Anderson Morgan directly, or in relation to, the performance of the Services.

**New Release** means a major update to a software program that is supplied by the software provider primarily to provide new or enhanced features or benefits to its software program, but may also correct deficiencies or security issues. New Release includes include any update (even if it is a 'minor' update) to a software program that cannot be installed remotely in less than 60 minutes.

**Open Source Code** means any software code that is licensed under a license that is generally accepted to be an open source license, including GPL.

**On-Boarding Services** means the services described in the Proposal to set up and establish the technical environment and commercial framework for the Managed Services.

**On-Boarding Period** means the period during which the On-Boarding Services are provided, as set out in the Proposal.

**Operations Guide** means Anderson Morgan's run book or manual that sets out the processes and procedures for performing the Services and working with Customer. The Operations Guide may be in hard or electronic copy format and may include information posted on a wiki. The Operations Guide is Anderson Morgan's Intellectual Property and Confidential Information.

**Party** means each of Anderson Morgan and Customer.

**Patch** means a minor update to a software program that is supplied by the software provider to correct deficiencies or security issues in its software program. Patch does not include any New Release, new version or any update to a software program that cannot be installed remotely in less than 60 minutes.

**Personal Information** means any information or data that is subject to any Privacy Law.

**Pre-existing IP** means any Intellectual Property Rights that existed prior to the date when the Proposal is signed or that are developed independently of this Agreement.

**Price** means the amounts payable for each of the Services, exclusive of all Taxes, as set out in the Proposal.

**Privacy Law** means any law, regulation or common law which governs the use of information that is about, identifies or can be used to identify, any identifiable individual, or which is generally understood in the relevant jurisdiction to protect an individual's privacy and/or to govern the collection, use, disclosure or transmission of Personal Information or data.

**Proposal** means the document to which these Terms and Conditions are attached and which includes the details of the Deliverables, Services, the purpose and required outcomes (if any) of the Service, Price, Taxes and other details relating to transaction under this Agreement.

**Recipient** means the Party that receives a disclosure of Confidential Information.

**Related Body Corporate** has the meaning given to it by the *Corporations Act 2001*.

**Representatives** means the employees, agents, contractors of a Party, or those of any Related Body Corporate, and the professional representatives of a Party providing advice in relation to this Agreement, including the lawyers, bankers, auditors, accountants and insurers of a Party.

**Service Description** means the description of the Services that is set out in the Proposal under the heading "Services Description".

**Services** means the On-Boarding Services, Managed Services, including Additional Services and Disengagement

Services which are described under the relevant headings in the Proposal.

**Site** means the physical location(s) of the Environments as set out in the Proposal.

**Taxes** includes any GST, sales taxes, duties, withholding taxes, levies, tariffs, imposts or other charges levied by any federal, state or local government in Australia or elsewhere, that arise out of or in connection with any Deliverable, the Services or the Agreement, and any interest, penalties or liabilities incurred on such amounts, but excludes taxes based on the income of Anderson Morgan.

**Term** means the Initial Term and any period of Further Term as set out in clause 2.

**Time and Materials Rates** means the rates (exclusive of Taxes), as set out in the relevant section of the Proposal.

**Third Party Provider** means any provider of (a) any part of the Environments; (b) any services related to the Environments; or (c) hardware, operating system, other software or technology that is connected to, or operates with, the Environments.

The words "includes" or "including" are not words of limitation.

## 2 Term

2.1 Unless stated otherwise in the Proposal:

- (a) the Initial Term commences on the date of the Parties enter into this Agreement, and continues for a period of 12 months (or such other period set out in the Proposal) from the Go Live Date (**Initial Term**).
- (b) Anderson Morgan may provide Customer with written notice of the Prices payable for the Services for a renewal of the same period (or a different period if specified) and any changes to the terms and conditions (**Renewal Notice**) that would apply for the subsequent period of the Term at least 60 days prior to the end of the current period of the Term.
- (c) If Customer wants to renew the Managed Services, Customer must at least 30 days prior to the end of the Term advise Anderson Morgan in writing that Customer accepts the Prices, period and any new terms and conditions set out in the Renewal Notice and that Customer would like Anderson Morgan to renew the Services for that further period (**Further Term**).
- (d) Where Customer has provided written notice to renew the Term, the Agreement shall be renewed for the period, on the terms and conditions and Prices set out in the Renewal Notice, commencing immediately following the end of the current Term.

## 3 Services

- 3.1 Anderson Morgan must perform the Services during the Term in accordance with this Agreement.
- 3.2 Anderson Morgan must meet or exceed the Service Levels during the Term, except to the extent that the failure to meet or exceed the Service Level is caused or contributed to by any:
  - (a) any circumstance set out in clause 6.5;
  - (b) Emergency; or
  - (c) Force Majeure Event.
- 3.3 If Anderson Morgan performs and Services in relation to any software, hardware, network or other equipment that is out of scope of the Environment(s) and/or the Services Description (including any moves, adds or changes) then Customer must pay for such Additional Services using the Price that Customer is paying for such personnel or resources at the time.
- 3.4 Anderson Morgan is solely responsible for the method of performing the Services, and may perform the Services via telephone, remotely, online or by onsite attendance.
- 3.5 Where any part of the Environment ceases to comply with its manufacturer's specifications, becomes unsupported by its original manufacture or ceases to have spare parts readily available, for any reason other than a breach of this Agreement by Anderson Morgan, (**Unserviceable**), then:
  - (a) Customer must promptly either restore or repair the part of the Environment so that ceases to be Unserviceable or Customer must pay Anderson Morgan to restore or repair the part of the Environment so that it ceases to be Unserviceable;
  - (b) such Environment is excluded from any applicable Service Levels for the period that Environment is Unserviceable.

## 4 Customer's Obligations

- 4.1 Customer must, at its own cost:
  - (a) permit Anderson Morgan to install and operate the Anderson Morgan Tools on the Environments;
  - (b) provide Anderson Morgan with remote access, on a 24 x 7 basis, to all relevant components in the Environments and the Anderson Morgan Tools to enable Anderson Morgan to conduct support services (including error correction and installation of Patches) remotely, including any passwords or access rights or requirements;

- (c) provide Anderson Morgan with the necessary facilities, equipment and resources to enable Anderson Morgan to perform the Services;
  - (d) provide Anderson Morgan with access to the premises where the Environments are located during any period when a Service Level is operating, and at least during Business Hours;
  - (e) provide Anderson Morgan access to any third party software, operating systems and hardware on which they are run, as is required for Anderson Morgan to perform the Services, as well as providing Anderson Morgan direct access to the third party's maintenance services (especially help desk support) to facilitate Anderson Morgan performing the Services;
  - (f) provide Anderson Morgan with reasonable assistance requested by Anderson Morgan in the diagnosis of any defect or problem;
  - (g) follow Anderson Morgan's reasonable directions to implement any resolution to any defect of problem;
  - (h) provide such telecommunications facilities, VPN access or other network connectivity (including on a 24 x7 basis) as may be reasonably required by Anderson Morgan to assist it to perform the Services;
  - (i) provide Anderson Morgan with complete and accurate information in a timely manner as may be needed to facilitate Anderson Morgan to perform the Services;
  - (j) make available appropriately knowledgeable personnel in a timely manner who are capable of answering Anderson Morgan's questions;
  - (k) ensure that where there are multiple stakeholders within Customer who have an interest in the Services, the person that is dealing with Anderson Morgan is authorised to represent the views of all Customer's stakeholders, has obtained those views prior to providing information or instructions to Anderson Morgan, and provides information or instructions that are the single authorised position of Customer;
  - (l) promptly make any decisions needed by Anderson Morgan to perform the Services;
  - (m) ensure that all the software in the Environments is maintained at the then current or previous release level. Customer must ensure that all New Releases to any component of the Environments are promptly implemented by Anderson Morgan via Change Request;
  - (n) ensure that Anderson Morgan has direct telephone access to the providers of support and maintenance to any component of the Environments, including the manufacturers of the hardware and operating systems, databases and applications, such access to be available during Business Hours, and any other times reasonably required by Anderson Morgan (e.g. when major New Releases are being implemented out of hours or other critical activities are planned);
  - (o) ensure that it and any of its contractors, agents or invitee do not impede, hinder or prevent Anderson Morgan performing the Service, and does not destroy, damage or vary any part of the Environment or any Anderson Morgan Performance Tools or any setting that Anderson Morgan has applied to the Environment or any Anderson Morgan Performance Tools.
- 4.2 Customer acknowledges and agrees that a failure to meet the obligations in clause 4.1 may result in delays in the provision of the Services. Anderson Morgan is not responsible for any such delays. Anderson Morgan is entitled to charge Customer for any time or expense incurred as a result of the failure of Customer to comply with its obligations under this Agreement, including those in clause 4.
- 4.3 If Customer requests a delay to, or re-scheduling of, the Services, then Customer must promptly pay Anderson Morgan for any wasted time or unutilised personnel or resources that Anderson Morgan suffers as a result, using the Prices that Customer is paying for such personnel or resources.
- 4.4 If Anderson Morgan performs any Services at Customer's offices:
- (a) Customer must provide office space and facilities to Anderson Morgan's personnel commensurate with those provided to Customer's own employees of similar standing;
  - (b) Anderson Morgan must ensure that its personnel and those of its contractors comply with the security procedures and standards as are notified to it in writing by Customer;
  - (c) Customer must provide a safe place to work for any of Anderson Morgan's personnel that are working at Customer's site.
- 4.5 Customer must at all times:
- (a) take effective back-ups of data in all its IT systems, except only in so far as it is Anderson Morgan's responsibility to take back ups of specific data items as part of the Managed Services (which will be set out specifically in the Proposal);

- (b) ensure that it has duplicate copies of all data that is provided to Anderson Morgan;
  - (c) ensure that it operates anti-virus software on all its IT systems, including the Environments, in accordance with a high standard of commercial practice.
- 4.6 Customer warrants that it has the authority to allow Anderson Morgan, its Related Bodies Corporate and their respective contractors to use the Environment s, any facilities, equipment, resources, information, data and/or Intellectual Property Rights that Customer provides to Anderson Morgan, its Related Bodies Corporate and their respective contractors and agents for use in connection with performing the Services.
- 4.7 Where the Managed Services include installing Patches or New Releases:
- (a) Anderson Morgan recommends installing any Patch or New Release in a non-production environment and testing the installation to ensure that it does not adversely affect any Customer Data, API or other technology, prior to installing the Patch or New Release in a production environment;
  - (b) if Customer requests that Anderson Morgan installs any Patch or New Release directly into a production environment, without first testing the Patch or New Release in a non-production environment Customer bears all risks associated with the integration of the Patch or New Release with any Customer Data, API or other technology;
  - (c) Customer agrees that the Managed Services do not include any work that is required to integrate the Patch or New Release with any Customer Data, API or other technology and that if Customer requires any such work the Parties must first agree a Change Request;
  - (d) Anderson Morgan may install any update/Patch that a Third Party Provider states addresses an important security flaw into the production environment immediately and without notice to Customer. Anderson Morgan is not responsible for any adverse effect on any Customer Data, API or other technology that may result;
  - (e) this does not include the installation of New Releases unless expressly stated in the Proposal.
- 4.8 Where the Managed Services includes the provision of back ups of Customer Data:
- (a) Customer acknowledges and agrees that Anderson Morgan does not know what Customer Data includes, and so Customer must promptly verify the accuracy of every back up that Anderson Morgan takes;
  - (b) the obligation to take a back up is limited to an obligation to run back up software at the agreed intervals and ensuring that the back up software does not provide a record that advises that the back up has failed.
- 4.9 Where the Managed Services does not include the provision of back ups of Customer Data:
- (a) Customer must take regular and complete back ups of Customer Data in accordance with industry best practice;
  - (b) Anderson Morgan is not liable for any loss of Customer Data, under any circumstances.
- 4.10 Where the Managed Services does not include the provision of Disaster Recovery services:
- (a) Customer acknowledges and agrees that the Services may become unavailable in the event of a Force Majeure Event, other disaster or event and that this may result in a permanent or temporary loss of Services and/or Customer Data;
  - (b) Anderson Morgan is not responsible for any loss caused or contributed to by a Force Majeure Event, other disaster or event that could have been prevented had Disaster Recovery Services been acquired.;
  - (c) Customer may request Anderson Morgan to provide assistance, such as re-architecture, re-design, re-development, re-deployment, migration or recovery work, in the event of any Force Majeure Event, other disaster or event, which may be provided as an Additional Service using the Time and Materials Rates.
- 4.11 Where the Managed Services include the provision of anti-virus scanning Anderson Morgan's obligation to provide anti-virus scanning is limited to an obligation to run commercially available anti-virus software at the agreed intervals and at the latest reasonably practical level of anti-virus database. Given the nature of viruses and protection from viruses, Trojan horses and other malicious code or events, Anderson Morgan cannot guarantee that all viruses, Trojan Horses or other malicious code or events, (including denial of service attacks) will be prevented from entering into the Environment or other of Customer's systems or be rendered ineffective.
- 4.12 Where the Managed Services does not include the provision of anti-virus scanning, Customer must at all times operate anti-virus software in accordance with industry best practice and at the latest reasonably practical level of anti-virus database.

4.13 Where the Managed Services include the repair and maintenance of the Environment Customer agrees that:

- (a) if any Environment requires a replacement part, or any Equipment needs replacement, then Customer must either replace that part or Equipment or require Anderson Morgan to replace it (in which case Anderson Morgan is authorised to remove the old part or Equipment and title in the old part or Equipment immediately passes to Anderson Morgan) and Customer must pay Anderson Morgan the cost of the replacement part or Equipment and for installing it in addition to the Managed Services Price;
- (b) Customer must dispose of any packaging that the replacement part (or new Equipment) arrives in.

4.14 If Customer requests that Anderson Morgan purchases any good or service from a third party, then if Anderson Morgan agrees to do so, Anderson Morgan will only purchase such item as the lawful agent for Customer on the standard terms and conditions offered by the supplier. Customer acknowledges and agrees that it is solely responsible for complying with the terms and conditions of the contract with the supplier, and for making payment to the supplier.

4.15 In the course of providing the Services Anderson Morgan uses certain tools and services provided by local and overseas suppliers, some of which require Anderson Morgan to provide access to the Environment and the data that is within the Service. Wherever practical, Anderson Morgan has entered into agreements with such third party providers that oblige the third party supplier to maintain all Customer Data, (including any Personal Information) secure, confidential and prohibit any use of it other than for the purpose of providing their tools or services. To the extent permitted by law, Anderson Morgan disclaims any liability for any loss, damage or expense incurred by Customer in connection with the acts or omissions of such third party providers.

4.16 If Anderson Morgan recommends any third party product or service to Customer, Customer acknowledges and agrees that Anderson Morgan is not responsible for any such product or service and Customer must rely on its own due diligence and judgment prior to purchasing any such party product or service.

## 5 Restrictions

5.1 Nothing in the Agreement permits Customer to use, or permit the use of, the Managed Service, or any part of the Environments that are subject to the Managed Services, to:

- (a) transmit any content, data or information that is unlawful, abusive, malicious, harassing, tortious, defamatory, vulgar, obscene, libellous, invasive of another's privacy right or right of publicity, or racially or ethnically objectionable;

- (b) infringe the Intellectual Property Rights of any entity or person;
- (c) interfere with or disrupt Anderson Morgan's software or systems used to host the Managed Service, the Environments or other equipment or networks connected to the Managed Service;
- (d) circumvent or disclose the user authentication or security of the Managed Service or any host, network, or account related thereto;
- (e) access the Managed Service for the purpose of building a competitive product or service or copying its features or user interface.

5.2 Anderson Morgan retains the sole right and control over all aspects of the programming, composition, management, support and operation of the Environment.

5.3 The Parties acknowledge and agree that nothing in this Agreement transfers title to any part of any Environment to Anderson Morgan at any time.

5.4 Anderson Morgan may allocate IP addresses to Customer as part of the Services provided under this Agreement. Any IP addresses or other network numbers allocated to Customer are and remain the property of Anderson Morgan.

## 6 Warranties

6.1 Where the Agreement is a "consumer contract" for the purpose of being entitled to the benefit of the statutory guarantees as defined under the Australian Consumer Law:

- (a) Customer is entitled to the benefit of the statutory guarantees under sections 54 to 59 of the Australian Consumer Law in respect of any goods supplied under the agreement; and
- (b) Customer is entitled to the benefit of the statutory guarantees under sections 60 to 62 of the Australian Consumer Law in respect of any service supplied under the agreement.

6.2 Where Customer is entitled to the benefits of the statutory guarantees under sections 54 to 59 or 60 to 62 of the Australian Consumer Law, then Regulation 90 (issued under that Act) applies. Accordingly, Anderson Morgan (Launceston) Pty Ltd ABN 63 126 506 269 of 81 Cimitiere Street, Launceston, TAS, 7250, provides Customer with the following information as is required by Regulation 90. In order to make use of this service Customer must contact Anderson Morgan's support desk by email during the period of the agreement:

Email address: [support@andersonmorgan.com.au](mailto:support@andersonmorgan.com.au)

When Customer makes use of these services, Anderson Morgan will use its best efforts to provide a remedy or a workaround for any defect in the service in a timeframe that

is reasonable given the nature of the issue and the impact on Customer's business operations.

The costs for the work that Anderson Morgan provides as a Warranty Against Defects are included within the Price that are set out in the Proposal. No additional Prices are payable by Customer for this service. Customer is responsible for any expenses it incurs in using this service.

In accordance with Regulation 90 Anderson Morgan includes the following notice.

*"Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure."*

The benefits that Anderson Morgan provides to consumers under this Warranty Against Defects are in addition to any other rights or remedies a consumer may have in respect of the goods or services under the Australian Consumer Law.

6.3 In accordance with Regulation 91 of the Australian Consumer Law Anderson Morgan includes the following notice.

*"Goods presented for repair may be replaced by refurbished goods of the same type rather than being repaired. Refurbished parts may be used to repair the goods."*

6.4 Customer must comply with all laws which are relevant to Customer performing its obligations under the Agreement. Customer is solely responsible for ensuring it uses the Services and any Deliverable in accordance with all laws. Customer is solely responsible for complying with any laws relating to record keeping, audit or Privacy Law in relation to Customer Data.

6.5 Anderson Morgan is not liable for any breach of the Agreement, including any Service Level, which arises as the result of:

- (a) any component of the Environment, any item provided by a Third Party Provider or any equipment or resources supplied by or on behalf of Customer not operating in accordance with its documentation or the requirements in this Agreement;
- (b) modifications to any part of the Environments or any Deliverables that were effected or attempted by a person other than Anderson Morgan or its authorised representative;
- (c) any act, error, fault, neglect, misuse or omission of Customer, its contractors or agents;

- (d) any use, storage, dissemination, publication or handling of any Customer Data;
- (e) damage caused by the operation of any part of the Environments other than in accordance with recommended operating procedures, Operations Guide or otherwise than in accordance with the directions or recommendations of the original owner of the Intellectual Property Rights, its authorised distributor or Anderson Morgan;
- (f) any virus, denial of service attack or other malicious act or code that adversely affects the Services, Environment or Customer Data; or
- (g) a Force Majeure Event.

6.6 Customer warrants that it has the authority to allow Anderson Morgan, its Related Bodies Corporate and their respective contractors to use the Environment, any facilities, equipment and resources that Customer provides to Anderson Morgan, its Related Bodies Corporate and their respective contractors and agents for use in connection with performing the Services.

**7 Payment**

7.1 Customer must pay the Prices in accordance with the terms and conditions set out in the Proposal.

7.2 If no Prices are set out in the Proposal then Customer must pay:

- (a) a security deposit equal to 3 month's Managed Services Prices, which is due on the date when both Parties have signed this Agreement;
- (b) any Prices for Onboarding Services, which is due at the end of the Onboarding Services;
- (c) for the Managed Services, which is due quarterly in advance, throughout the Term
- (d) for any use based Services, which are due monthly in arrears, throughout the Term; and
- (e) for any ad hoc time and materials based Services, Customer must purchase blocks of hours in advance. If at the end of the Term there are any unused hours within these blocks of hours, such unused hours are forfeit without any recourse to Anderson Morgan.

7.3 Where Anderson Morgan provides Services that are charged on a use basis then:

- (a) Customer must pay for all items that were used or available to the Customer in the relevant period;

- (b) if Customer does not use all of the Services that Customer required to be made available to it, or Customer did not reach the minimum amount of usage as set out in the Proposal, then Customer must still pay for the minimum amount of usage that is set out in the Proposal and any unused Services are forfeit at the end of the period in which the service should have been used without any recourse to Anderson Morgan.
- 7.4 If Customer disputes any Tax Invoice Customer must give Anderson Morgan written notice of that dispute within 5 Business Days of receipt of the Tax Invoice, setting out the details of the dispute and the amount that Customer considers is the correct amount of the Tax Invoice. Customer must pay the disputed Tax Invoice by the due date. If the Parties subsequently agree that a different amount should have been invoiced, Anderson Morgan will either raise a credit note for any overpayment or it must issue a new Tax Invoice for any under payment.
- 7.5 Unless stated otherwise in the Proposal, all Prices are increased at the end of each anniversary of the Go Live Date by an amount that is the greater of:
- (a) the Consumer Price Index (All Groups – Hobart) as published by the Australian Bureau of Statistics; and
- (b) 5%.
- 7.6 Where any Services are provided on a time and materials basis and in no event will such Services be considered a fixed price contract. Customer must pay for the actual number of hours/days (as applicable), using the appropriate hourly/daily rate, that were performed by Anderson Morgan in providing the Services, whether this is more or less than the number of hours/days that Anderson Morgan has advised Customer as the estimated number of hours/days for the Services. Customer must pay any travelling time (including to/from Customer's site) at the same rate as for the Services, in addition to any other Prices.
- 7.7 Anderson Morgan does not guarantee any estimates for the time and materials based Services. Anderson Morgan will notify Customer as soon as practicable if any estimate will be exceeded and Customer will then have the option of terminating those specific time and materials Services by giving written notice, such notice to be provided within 2 Business Days of receipt of the revised estimate. In the event of such termination, Customer must pay all the Prices, expenses and Taxes for those specific time and materials Services that have been provided up to and including the date of termination.
- 7.8 The Prices, expenses and Taxes must be paid in accordance with the Agreement without any set-off or deduction.
- 7.9 Customer must pay Anderson Morgan the Prices, expenses and related Taxes within 10 Business Days from the date of the applicable Tax Invoice, unless stated otherwise in the Proposal. Anderson Morgan will send the Tax Invoice on or after the due date for payment specified in clause 7.2.
- 7.10 If Anderson Morgan allows (or requires) Customer to pay by a credit card, debit card or direct debit (**Approved Payment Mechanism**) Customer irrevocably authorises Anderson Morgan to deduct from any Approved Payment Mechanism that Customer has used to pay any amount under this Agreement or for which Customer has provided the details to Anderson Morgan, any:
- (a) Prices and Taxes that are due under this Agreement;
- (b) charge backs or fees, including any related Taxes, incurred by Customer for any failed transaction from the Approved Payment Mechanism, as well as Anderson Morgan's then current administration fee for dealing with any failure to receive payment; and
- (c) amount payable as damages, losses or expenses, or any amount payable under an indemnity, arising out of or in connection with this Agreement.
- 7.11 If there is any failure to make payment by the Approved Payment Mechanism by the due date for any reason, including that the Approved Payment Mechanism ceases to be valid, ceases to be authorised for debiting any amount stated in this Agreement or there is insufficient funds in the relevant account, then Customer must within 5 Business Days:
- (a) provide an alternative Approved Payment Mechanism and authorise all amounts due to be deducted from that Approved Payment Mechanism; and/or
- (b) make payment of all amounts due by another payment method agreed with Anderson Morgan.
- 7.12 Customer must pay a late charge for any failure to make any payment by the date required under the Agreement, calculated daily using a rate that is 4% over the Reserve Bank of Australia's Cash Rate, from the date that the payment first becomes overdue, to the date that the payment is received by Anderson Morgan, both dates inclusive.
- 7.13 Upon termination or expiry of this Agreement Anderson Morgan may deduct any amounts that are payable under or in connection with this Agreement from any security deposit, and Anderson Morgan must then pay the balance of the security deposit to Customer within 30 days of the date this Agreement terminates or expires.
- 7.14 Customer consents to:
- (a) Anderson Morgan obtaining from a credit reporting agency, or any person Customer authorises

Anderson Morgan to contact, any of personal or corporate information, including information relating to creditworthiness, credit standing, credit history or credit capacity (**Credit Information**), for the purposes of assessing Customer's or any guarantor's creditworthiness and/or deciding whether to grant or continue to provide credit approval to Customer; and

- (b) the provision by Anderson Morgan of any personal or corporate information, including Credit Information and any information concerning the status of Customer's account or any default, to a credit reporting agency, credit provider or person Customer authorises Anderson Morgan to contact, in connection with Anderson Morgan's use of the credit reporting agency's services, on the understanding that such information may be held by the credit reporting agency to provide its/their credit reporting services (including the provision of such services to other customers of the credit reporting agency). Customer consents to Anderson Morgan being given a consumer credit report to collect overdue payment on commercial credit.

## 8 Intellectual Property Rights

- 8.1 As between Customer and Anderson Morgan all Intellectual Property Rights in any Customer Data remain the sole property of Customer. Customer grants Anderson Morgan, its Related Bodies Corporate and their respective contractors a non-exclusive, royalty free right to use, copy and adapt any of Customer Data that Customer provides to Anderson Morgan, its contractors and agents in connection with the Services solely for the purpose of performing its obligations under the Agreement, and such licence will terminate at the end of the Term.
- 8.2 If Anderson Morgan provides any Open Source Code to Customer, including as part of Anderson Morgan Tools, it does so as a convenience only and is not responsible for 'supplying' that Open Source Code as defined under the Australian Consumer Law. Any Open Source Code is subject to its open source license, and is not subject to any of the licensing terms, warranties, indemnities or other terms in this Agreement.
- 8.3 All Intellectual Property Rights in the Deliverables and any programs, Anderson Morgan Tools, processes, systems or materials, including the Operations Guide that are created by any person, including adaptations, translations and derivative works in any of them, are and shall remain the exclusive property of Anderson Morgan (and its licensors, if any) or shall vest in or be transferred to Anderson Morgan immediately upon creation, as the case may be.
- 8.4 Subject to clause 8.5, and the payment of the Price, expenses and Taxes due under this Agreement, Anderson Morgan grants Customer a non-exclusive, non-transferrable right to use, copy, adapt and translate any Deliverable for

its (and its Related Bodies Corporates') own internal business purposes, for the Term, at no additional cost. Customer must not sub-licence, commercialise or disclose the Deliverables, or any part or them, to any other person (other than to a contractor acting on behalf of Customer or any Related Bodies Corporate).

- 8.5 Unless otherwise stated on the Proposal, Anderson Morgan grants Customer a non-exclusive, non-transferrable right to use, copy, adapt and translate any Pre-existing IP that is owned by Anderson Morgan and that is included in any Deliverable, solely as part of the Deliverable (and not on a standalone basis or integrated with any other software), for Customer's (and its Related Bodies Corporates') own internal business purposes, for the Term, at no additional cost.
- 8.6 Anderson Morgan grants Customer (and any contractor acting on behalf of Customer) a non-exclusive, non-transferrable, royalty-free licence to install and run any Anderson Morgan Tools that are installed on the Environments for Anderson Morgan's use in connection with the Services during the Term. Customer has no right to use the Anderson Morgan Tools itself.
- 8.7 Customer grants Anderson Morgan, its Related Bodies Corporate and their respective contractors a non-exclusive, royalty free right to use, copy and adapt any of Customer's Pre-existing IP that Customer provides to Anderson Morgan in connection with the Services solely for the purpose of performing its obligations under the Agreement, and such licence will terminate at the end of the Term.
- 8.8 Except for the rights expressly granted by Anderson Morgan to Customer under this Agreement:
- (a) Anderson Morgan and its licensors, if any, reserve all right, title and interest in and to the Deliverables, its Pre-existing IP and all Intellectual Property Rights in them;
- (b) no right, title or ownership interest in or to the Deliverables or Anderson Morgan's Pre-existing IP whether by implication, estoppel or otherwise, is granted, assigned or transferred to Customer under or in connection with this Agreement.
- 8.9 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.
- 8.10 Neither Party may use the other Party's trade marks, logos, get up or other branding without the other Party's prior written consent, such consent not to be unreasonably withheld.

8.11 Customer acknowledges and agrees that the unauthorised disclosure, use or copying of the Deliverables or Anderson Morgan's Pre-existing IP may cause Anderson Morgan serious reputational or financial loss that may not be adequately compensated by monetary damages. Accordingly, in the event of any unauthorised disclosure, use or copying of the Deliverables or Anderson Morgan's Pre-existing IP, Customer agrees that Anderson Morgan shall have the right to seek injunctive relief to stop such unauthorised disclosure, use or copying.

## 9 Confidentiality

9.1 The Recipient must not use any of the Discloser's Confidential Information except in connection with the performance of its obligations specified in this Agreement.

9.2 The Recipient must not disclose the Discloser's Confidential Information to any third party without obtaining the Discloser's prior written consent, provided that the Recipient may disclose the Discloser's Confidential Information to:

- (a) its employees, agents and contractors, and those of any of its Related Bodies Corporate, who have entered into a written agreement with the Recipient that is no less protective of the Discloser's Confidential Information than this Agreement provided those persons have a need to know such information for the purposes of this Agreement; or
- (b) its lawyers, bankers, auditors, accountants and insurers, who have a need to know the information in order to provide professional advice to the Discloser relating to this Agreement.

9.3 The Recipient must use, and must ensure that any person to whom it is permitted by this Agreement to disclose the Discloser's Confidential Information to uses, the same measures to protect the Discloser's Confidential Information as it uses to protect its own confidential information, but in no event less than reasonable measures.

9.4 The restrictions of this clause 9 shall not apply to information that:

- (a) is independently developed by the Recipient without any access to the Confidential Information of the Discloser;
- (b) becomes known to the Recipient without restriction, from a third party who, to the Recipient's knowledge, was not bound by a confidentiality agreement with the Discloser, or otherwise prohibited from disclosing the information to the Recipient, or had the right to disclose it;

(c) was available to the Recipient on a non-confidential basis prior to disclosure by the Discloser;

(d) was lawfully in the possession of the Recipient before the information was disclosed to it by the Discloser;

(e) is or becomes in the public domain through no act or omission of the Recipient;

(f) the Parties agree in writing is not confidential or may be disclosed; or

(g) is required to be disclosed under an order or requirement of a court, administrative agency, or other governmental body (but only to the minimum extent required to comply), provided however, that Recipient shall provide prompt notice to Discloser of any potential disclosure and shall use its reasonable efforts to prevent disclosure of such information.

## 10 Privacy

10.1 The Parties must:

- (a) comply with the requirements of any Privacy Law in the state, territory or country in which the party (and/or the individual about whom the Personal Information relates) is located, and in any state, territory or country to which the Personal Information is to be sent; and
- (b) only use, manipulate, store, process and handle Personal Information for the purposes of meeting its obligations under this Agreement or as may be required by law.

10.2 Customer warrants that Customer has obtained the express informed consent from each individual about whom Anderson Morgan will obtain Personal Information from Customer in connection with this Agreement, for Anderson Morgan, its Representatives and their permitted successors, assignees and sublicensees to use that individual's Personal Information in any manner that may be reasonably contemplated by this Agreement and/or is stated in Anderson Morgan's privacy policy (as available on Anderson Morgan's website), including a transfer interstate and/or overseas to the countries stated in the privacy policy.

## 11 Liability and Indemnity

11.1 Where Customer is entitled to a statutory guarantee under sections 54 to 59 of the Australian Consumer Law, then unless Customer can prove that it is not fair or reasonable for Anderson Morgan to rely on this limitation, then Anderson Morgan's liability for breach of such statutory guarantee is limited to one of the following, at Anderson Morgan's option:

- (a) the replacement of the goods or the supply of equivalent goods;
- (b) the repair of the goods;
- (c) the payment of the cost of replacing the goods or of acquiring equivalent goods;
- (d) the payment of the cost of having the goods repaired.

11.2 Where Customer is entitled to a statutory guarantee under sections 60 to 62 of the Australian Consumer Law, then unless Customer can prove that it is not fair or reasonable for Anderson Morgan to rely on this limitation, then Anderson Morgan liability for breach of such statutory guarantee is limited to one of the following, at Anderson Morgan's option:

- (a) supplying the services again; or
- (b) payment of the cost of having the services supplied again.

11.3 Subject to clause 11.1 and 11.2, to the extent permitted by law, Anderson Morgan is not liable to Customer in contract, tort (including negligence), breach of statutory duty or otherwise in respect of any loss, damage or expense arising out of or in connection with the Agreement that:

- (a) is an indirect, consequential, special, punitive or exemplary loss, damage or expense, even if Anderson Morgan has been advised of, knows of, or should have known of the possibility of such loss, damage or expense;
- (b) is for loss of profits, loss of revenue, failure to realise expected savings, lost or damaged data, business interruption or loss of goodwill;
- (c) is for an amount that exceeds the amounts paid under the Agreement in the three months prior to the date the claim first arose, subject to clause 11.4.

11.4 Anderson Morgan's liability is not capped to the amount set out in clause 11.3(c) where that liability arises:

- (a) from breach of Anderson Morgan's obligations of confidentiality set out in clause 9;
- (b) from breach of Anderson Morgan's obligations of privacy set out in clause 10;
- (c) fraud or wilful misconduct by Anderson Morgan, its directors, officers, employees contractors or agents,

other than where that liability is subject to the indemnity in clause 11.5.

11.5 Customer must indemnify and hold harmless Anderson Morgan against any loss, damage or expense (including reasonable lawyer's fees) arising out of, or in connection with, any claim or allegation relating to:

- (a) any breach of clauses 5.1 or 6.4;
- (b) the storage, processing, modification, publication, handling or other use of Customer Data for the purpose of Anderson Morgan performing its obligations under this Agreement,

except the extent that the loss, damage or expense has been caused solely by a breach of this Agreement by Anderson Morgan.

## 12 Insurance

12.1 Anderson Morgan must effect and maintain, or be the beneficiary of, for the Term (and in the case of professional indemnity or errors and omissions insurance for a period of 3 years following the termination or expiry by the passing of time of this Agreement), insurance policies with an insurer with a Anderson Morgan Best Rating of no less than A- (or equivalent rating from another reputable rating agency) for:

- (a) public and product liability for an insured amount of no less than \$10,000,000 per occurrence and in the annual aggregate;
- (b) professional indemnity or errors and omissions for an insured amount of no less than \$1,000,000 per occurrence and in the annual aggregate;
- (c) workers' compensation as required by law.

## 13 Restraint

13.1 Customer must not, without the prior written consent of Anderson Morgan, for a period of 12 months after the last day of the performance of Services under the Agreement, either on his own account (or for any person, company or entity) cause, facilitate or procure any other person, company or entity to employ, contract or enter into any other arrangement, directly or indirectly:

- (a) to receive the services of any Anderson Morgan's employees who provided Services under the Agreement or who dealt with Customer in connection with that Proposal; or
- (b) with any of Anderson Morgan's contractors (or any individuals employed by, or contracted to, the contractor) that provided services in connection with the Agreement, where the services that are to be provided to Customer relate to the same or similar work to the work that was provided under that Proposal.

- 13.2 The Parties agree that the:
- (a) remedy of damages may be inadequate to protect Anderson Morgan's interests from Customer's breach of clause 13.1, and, if clause 13.1 is breached Anderson Morgan is entitled to obtain injunctive relief, or any other remedy, in any court; and
  - (b) restrictions in clause 13.1 are necessary to protect the legitimate interests of Anderson Morgan.

## 14 Termination

- 14.1 Anderson Morgan may immediately terminate or suspend part or all of the Agreement by giving Customer written notice if Customer:
- (a) has not paid any amount owing under this Agreement within 5 Business Days of the date when it should have been received under this Agreement;
  - (b) breaches any material provision of the Agreement and the breach is incapable of remedy or has not remedied within 20 Business Days of written notice from Anderson Morgan specifying the breach;
  - (c) ceases to carry on business;
  - (d) being a company; is unable to pay its debts as they fall due, enters into liquidation, has a controller, managing controller, liquidator or administrator appointed;
  - (e) being an individual: is unable to pay its debts as they fall due, lodges a declaration of intention under the *Bankruptcy Act 1966* (Cth), enters into a debt agreement, enters into a personal insolvency agreement or becomes bankrupt, whether voluntarily or involuntarily; or
  - (f) merges with another entity, sells substantially all of Customer's assets, or is subject to a change of control. A "change of control" is deemed to occur when an entity acquires 50% or more of the voting shares or equity interest in Customer or 50% or more of the assets of Customer, in the event of a change of a majority of the Board of Directors (or majority of the partners if a partnership) of Customer or if there is a change of effective control of Customer.
- 14.2 Anderson Morgan may suspend the performance of the Services if an Emergency occurs.
- 14.3 Anderson Morgan may terminate this Agreement in part or whole by giving 20 Business Days written notice of termination, such notice of termination to be given at any time after the end of the Initial Term.

- 14.4 Customer may immediately terminate the Agreement by giving Anderson Morgan written notice if Anderson Morgan:
- (a) breaches any material provision of the Agreement and the breach has not remedied within 20 Business Days of written notice from Customer specifying the breach;
  - (b) ceases to carry on business, is unable to pay its debts as they fall due, enters into liquidation or has a controller, managing controller, liquidator or administrator appointed.
- 14.5 Where the Agreement is subject to Australian Consumer Law, Customer may terminate this Agreement in accordance with the Australian Consumer Law.

## 15 Consequences of Suspension or Termination

- 15.1 If Anderson Morgan suspends any Service in accordance with this Agreement it must promptly recommence the Service once the default has been remedied or the Emergency has passed (as applicable). Customer must continue to pay the Prices during any period of suspension.
- 15.2 Termination or expiry of the Agreement for any reason does not:
- (a) release Customer from the obligation to pay any monies to Anderson Morgan whether due before or after termination of the Agreement;
  - (b) excuse the payment of any instalment of the Price, nor does it entitle Customer to any refund of any instalment of the Price; or
  - (c) discharge either Party from any liability which has been incurred by that Party prior to termination of the Agreement.
- 15.3 At the end of the Agreement:
- (a) Anderson Morgan shall have the right to enter on Customer's site and take possession of its equipment, resources, Anderson Morgan tools and other Intellectual Property Rights;
  - (b) each Party must immediately return to the other Party or certify in writing to the other Party that it has destroyed, all copies and partial copies of the other Party's Confidential Information or any material that includes the other Party's Intellectual Property Rights.
- 15.4 If Anderson Morgan terminates the Agreement under clause 14.3 then Customer shall not be required to pay any Prices for any period that is after the last day of the Agreement, and if Anderson Morgan has received any Prices in advance that relate to a period after the last day of

the Agreement, Anderson Morgan shall refund them promptly after the least day of the Agreement (subject to deducting any amounts due to Anderson Morgan under this Agreement).

## 16 General

- 16.1 Customer agrees and acknowledges that Anderson Morgan may pay or receive a commission or rebate or other incentive to suppliers, resellers or other third parties who become involved with Customer and/or the Services.
- 16.2 Neither Party will be liable for any delay or failure to perform its obligations under the Agreement if such delay is due to a Force Majeure Event.
- 16.3 Each Party must promptly sign any documents reasonably requested by the other Party to affect any provisions or requirements for any part of the Agreement.
- 16.4 Any notice that is to be given under the Agreement must be in writing and signed by the person giving the notice. Any notice must be hand delivered to the address or sent by prepaid post to the address of the recipient as set out in the Agreement. Anderson Morgan may send a notice by email to any email address that Customer has used to communicate with Anderson Morgan.
- 16.5 Each Party must promptly notify the other of any change of address or contact details, and such details shall be incorporated into the Agreement from the date following the date of receipt.
- 16.6 Any notice sent in accordance with the Agreement is deemed to have been received if:
- (a) hand delivered, on the date of delivery;
  - (b) if posted from Australia to an address in Australia using pre-paid priority letter, within 5 Business Days after the date of posting;
  - (c) when posted from an address outside of Australia, within 7 Business Days of the date when it was posted;
  - (d) if sent by Anderson Morgan by email, within 1 Business Day of the time that the email was sent, provided no notice of failure has been received by the sender within that Business Day.
- 16.7 Customer may give any notice that it is providing under the Australian Consumer Law, in accordance with that law.
- 16.8 Customer must not transfer, assign or novate the whole or any part of the Agreement without the prior written consent of Anderson Morgan.
- 16.9 Anderson Morgan may transfer, assign or novate the whole or any part of this Agreement without the prior written consent of Customer. Notwithstanding any other provision in the Agreement, Anderson Morgan may disclose any of Customer's Confidential Information that is reasonably necessary to affect any transfer, assignment or novation.
- 16.10 No provision of the Agreement shall be deemed waived, amended or modified by either Party, unless the waiver, amendment or modification is in writing and signed by both Parties.
- 16.11 If any provision of the Agreement is for any reason declared invalid or unenforceable the validity of the remaining portion of the Agreement will not be affected and the remaining portion will remain in force.
- 16.12 Except as expressly provided otherwise in the Agreement, the Parties' rights and remedies under the Agreement are cumulative and there is no obligation to exercise a particular remedy. If a Party is in breach of the Agreement, the non-breaching Party may avail itself of all other rights, equity or otherwise.
- 16.13 To the extent permitted by law:
- (a) 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 and expressly excludes the pre-printed terms and conditions of Customer's purchase order (if any);
  - (b) all conditions, warranties, guarantees or rights, including any implied by custom or other circumstance, that are not expressly specified in this Agreement, are excluded.
- 16.14 The Agreement may be signed in any number of counterparts, each of which shall be original, and any one of which shall be deemed to be validly executed if evidenced by a facsimile copy of the executing Party's signature with the same effect as if the signatures were on the same document.
- 16.15 The Parties consent to dealing with each other using electronic means.
- 16.16 Nothing in the Agreement is to constitute or be deemed to constitute a partnership among the Parties, joint venture, employment relationship, fiduciary relationship or franchise arrangement. Subject to clause 4.14 neither Party is authorised to act as agent for the other.
- 16.17 The Agreement is governed by the laws of Tasmania, Australia. The Parties submit to the exclusive jurisdiction of the courts of Tasmania, Australia and any courts competent to hear appeals from those courts.

