

Xcellerate IT Pty Ltd

ABN: 75 052 208 689

("Xcellerate IT")

GOVERNING TERMS AND CONDITIONS

1 Definitions and Interpretation

1.1 In these terms and conditions, the following terms have the following meanings:

Agreement means the agreement between the Parties comprised of the Proposal and any document incorporated by reference in the Proposal including these Governing Terms and Conditions, SWOs and Change Requests, as amended from time to time.

Application Support Services (or **Application Support**) means support services in relation to the Customised Solution.

Associate has the meaning given to it in the Corporations Act.

Business Day means a day on which banks are open for business in Sydney, New South Wales other than a Saturday, Sunday or public holiday in that State.

Client means the Party identified in the Proposal as the person who is to receive Services from Xcellerate IT.

Client Data means data supplied by the Client to Xcellerate IT to enable it to provide the Services.

Confidential Information with respect to either the Client or Xcellerate IT (the **Receiving Party**) means the following information, irrespective of its form or medium and whether or not it comes into existence before, on or after the commencement of the Term:

- (a) details of the Services;
- (b) any technical, commercial, financial or other information whatsoever of or about the other Party (the **Discloser**) or in connection with any of its products, services or its business; and
- (c) all information about the Discloser's business or business processes,

that is not public knowledge or known to the Receiving Party (other than as a result of a breach of a confidentiality obligation of a Party).

Consequential Loss means any Loss suffered or incurred by a Party that does not arise according to the usual course of things and includes loss of profit, lost savings, business interruption, loss of revenue, loss or diminution of goodwill, loss of business information or data and any other pecuniary loss.

Consumer Guarantee means a guarantee under Part 3-2, Division 1 of the Australian Consumer Law.

Contract Manager means a person appointed by each of the Client and Xcellerate IT to manage the performance by that Party of its obligations under this Agreement.

Corporations Act means the *Corporations Act 2001* (Cth).

Cure Notice means a written notice given by a Party that provides the other Party with:

- (a) notice that the other Party is in breach of an obligation under this Agreement;
- (b) details of the asserted breach; and
- (c) notice that the breach be remedied within the period specified in the notice, which must not be less than 30 days.

Customised Solution means the functionality developed by Xcellerate IT for the Client in relation to automated business processes utilising Tungsten Solutions.

Deliverable means the tangible items to be delivered by Xcellerate IT to the Client under this Agreement.

Developed Software means software developed specifically for the Client by Xcellerate IT under this Agreement.

Effective Date means the date on which the Proposal is accepted.

Event of Default means:

- (a) in relation to a Party (in this definition **Defaulting Party**) a breach of this Agreement by the Defaulting Party, which is capable of remedy (other than payment of Fees), and:
 - (i) in respect of which a Cure Notice is given; and
 - (ii) which the Defaulting Party fails to remedy that breach within the period of time stipulated in a Cure Notice for the breach to be remedied; and
- (b) in relation to the Client, the Client has failed to pay any Fees for 90 days after the date of the invoice.

Where Xcellerate IT is the Defaulting Party, and the breach is not capable of remedy within 30 days, an Event of Default will not have occurred in respect of Xcellerate IT if, before the expiry of the period of time stipulated in a Cure Notice for the breach to be remedied, it implements a Work-Around in respect of that breach and presents a comprehensive plan to the Client in respect of the remediation of the breach.

Excusable Event means strikes, lock-outs or other industrial disputes (whether involving the workforce of Xcellerate IT or a third party), trespassing, sabotage, theft or other criminal acts, cyber-attacks, failure of energy sources or transport network, acts of God, export bans, sanctions and other government actions, war, terrorism, riot, civil commotion, interference by civil or military authorities, national or international calamity, armed conflict, malicious damage, breakdown of plant or machinery, nuclear, chemical or biological contamination, explosions, collapse of building structures, fires, floods, storms, earthquakes, epidemics, pandemics or similar events, natural disasters or extreme adverse weather conditions.

Fees means the fees payable to Xcellerate IT for providing the Products and/or Services which may be set out in the Proposal, a SWO, a Change Request or otherwise agreed between the Parties in writing.

Hosting Services means the provision of hosting services, in respect of Tungsten Solutions, by or on behalf of Xcellerate IT under this Agreement.

Insolvency Event in relation to a person (**insolvent Party**) means:

- (a) the insolvent Party ceases or takes steps to cease to conduct its business;
- (b) the insolvent Party enters into or resolves to enter into any arrangement, composition or compromise with or assignment for the benefit of its creditors or any class of them;
- (c) the insolvent Party is unable to pay its debts when they are due or is deemed under the Corporations Act to be insolvent;
- (d) a liquidator or provisional liquidator is appointed to the insolvent Party or a receiver, receiver and manager, administrator, trustee or similar official is appointed over any of the assets or undertakings of the insolvent Party; or
- (e) an application or order is made or a resolution is passed for the winding up of the insolvent Party.

Intellectual Property Rights means all intellectual property rights, including but not limited to patents, copyright, registered designs, trade secrets, trademarks, inventions and discoveries and any application or right to apply for registration of the foregoing.

GST means the tax imposed by the GST Act.

GST Act means A New Tax System (Goods and Services Tax) Act 1999 (Cth) and the related imposition Acts of the Commonwealth.

Law means any:

- (a) Commonwealth, State, Territory or local government legislation in force in Australia or any law of a foreign jurisdiction applicable to the Services, including regulations, by-laws, declarations, ministerial directions and other subordinate legislation;
- (b) common law applying in Australia; and
- (c) government agency requirement or authorisation (including conditions in respect of any authorisation).

Loss includes any liability, damage, costs (including legal costs on a solicitor and own client basis) and other outgoing, and any diminution in value of, or deficiency of any kind, in anything.

Material means any documentation, documented methodology or process, data or other material in whatever form, including reports, specifications, diagrams, designs, flowcharts, logic diagrams and listings, business rules and requirements, user manuals, user guides, operations manuals, training materials and instructions.

Milestone means any event or outcome, that Xcellerate IT is obliged to achieve under a SWO.

Party means Xcellerate IT and/or the Client as the case may require.

Project Manager means a person appointed by each Party to manage the delivery of Services undertaken by Xcellerate IT.

Proposal means the proposal prepared by Xcellerate IT in respect of the Product and/or the Services and accepted by the Client and into which these Service Terms and Conditions are incorporated.

Product means any product the Client acquired as set out in the Proposal.

Rate means the sum of the Reserve Bank of Australia's *Cash Rate* as published from time to time plus 5%.

Services means the services acquired by the Client as described in the Proposal, a SWO and/or a Change Request.

Service Work Order (or **SWO**) means a written order for any Services prepared by Xcellerate IT and signed, or otherwise agreed in writing including by email exchange, by the Client and Xcellerate IT.

Tax means a tax, levy, charge, impost, fee, deduction, withholding or duty of any nature, including, without limitation, stamp and transaction duty or any goods and services tax (including GST), value added tax or consumption tax, which is imposed or collected by a Government Agency, except where the context requires otherwise. This includes any interest, fine, penalty, charge, fee or other amount imposed in addition to those amounts.

Tax Invoice has the meaning set out in the GST Act.

Time and Materials means Fees that are charged based on time worked at Xcellerate IT's prevailing hourly rates plus material used, unless otherwise agreed.

Term means the term of this Agreement which commences on the Effective Date and ends on completion of Services unless terminated earlier in accordance with this Agreement.

Third Party Solution means any Product supplied directly by a supplier (other than Tungsten or Xcellerate IT) to the Client.

Tungsten means Tungsten Automation Corporation (formerly Kofax, Inc.).

Tungsten Solution means any software product supplied by Tungsten.

Work-Around means an arrangement which allows Xcellerate IT to overcome a breach of its obligations under this Agreement without remedying the underlying cause of the breach.

- 1.2 In these terms and conditions, unless the context otherwise requires:
- (a) words denoting any gender include all genders;
 - (b) headings are for convenience only and do not affect interpretation;
 - (c) the singular includes the plural and vice versa;
 - (d) a reference to a Party includes its successors and permitted assigns;
 - (e) a reference to a person includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity;
 - (f) a reference to a statute or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them; and
 - (g) unless expressly stated to be otherwise, the meaning of general words is not limited by specific examples introduced by “including”, “for example” or similar inclusive expressions.
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2 Product and Services

2.1 Xcellerate IT will provide Services to the Client.

2.2 The Client acknowledges and agrees that:

- (a) any Tungsten Solution or Third Party Solution will be licensed or provided as a service direct by Tungsten or the Third Party (as the case may require) to the Client; and
 - (b) the Client’s right to use any Tungsten Solution or Third Party Solution will be governed by the applicable software license or service agreement of Tungsten or that Third Party (as the case may be); and
 - (c) the additional terms and conditions set out in Schedule 1 apply to Application Support Services.
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3 Order of Precedence and SWO Process

3.1 After the Effective Date, at the request of the Client, Xcellerate IT will prepare the initial draft of each SWO.

3.2 The Client and Xcellerate IT will cooperate in good faith to prepare, approve and execute each SWO.

3.3 If there is any inconsistency between the documents comprising the Agreement, the following order of precedence applies (to the extent of the inconsistency):

- (a) any Change Request (to the extent it expressly varies the Agreement);
 - (b) the relevant SWO;
 - (c) the Proposal; then
 - (d) these Master Governing Terms and Conditions.
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4 Performance of Services

4.1 Xcellerate IT must in the performance of the Services:

- (a) comply with all Laws applicable to the provision of the Services;

- (b) provide the Services in a diligent and professional manner with the degree of skill and care that is normally exercised by recognised professional persons who supply services of a similar nature;
 - (c) deploy sufficient numbers of personnel and sufficient technical resources to deliver the Services; and
 - (d) ensure that its personnel have appropriate skills and training to perform the Services.
- 4.2 Xcellerate IT must ensure that all its employees comply with:
- (a) the Client's policies and procedures as notified to Xcellerate IT (including workplace health and safety policies) while working at a location controlled by the Client; and
 - (b) Xcellerate IT's obligations under these terms and conditions in respect of the Client Data and the Client's Confidential Information.
- 4.3 Xcellerate IT must prepare and keep accurate, clear and concise records of all activities it engages in with respect to the Services.
- 4.4 The Client acknowledges and agrees that:
- (a) Xcellerate IT neither:
 - (i) gives any warranties or performance commitments in relation to any Tungsten Solutions and/or Third Party Solutions; nor
 - (ii) guarantees the performance by Tungsten and/or a Third Party of its obligations under any contractual arrangement between the Client and Tungsten and/or that Third Party;
 - (b) when Hosting Services are provided:
 - (i) Hosting will be outsourced by Xcellerate IT and/or Tungsten to the Microsoft Azure or AWS Platform, unless otherwise specified;
 - (ii) the Client must rely on the undertakings made by Microsoft's commitments to service levels and business continuity in respect of the Azure environment, details of which are available on request to Xcellerate IT; and
 - (iii) Xcellerate IT does not warrant or guarantee the performance of the Azure environment; and
 - (c) the undertakings made by Microsoft regarding Azure include commitments to service levels and business continuity.

5 Change Request

- 5.1 If either Party requires a change to the Proposal, that Party must issue a written change request (**Change Request**) in respect of each change to the other Party's Project Manager (**Receiving Party**).
- 5.2 Each Party is responsible for its own costs and expenses in preparing and issuing a Change Request and responding to a Change Request issued by the other Party.
- 5.3 Each Party acknowledges and agrees that a Change Request may result in either an increase to the Fees payable by the Client or a reduction in those Fees depending on the subject matter of the Change Request.
- 5.4 For a Change Request to be effective, it must be duly executed by both Parties.
- 5.5 Promptly after receipt of a Change Request, each Party's Project Manager must meet to discuss the proposed change and, within 10 days, the Receiving Party must advise the other Party whether the change is accepted or rejected.

- 5.6 If the Change Request is accepted by the Receiving Party, the Change Request must be duly executed by both Parties and will come into effect on and from the date of execution or otherwise as agreed between the Parties.
- 5.7 Once signed by each Party in accordance with this clause 5.3, a Change Request will vary, and form part of, this Agreement.
- 5.8 In relation to Application Support Services, any requested changes to the Customised Solution:
- (a) requiring up to five days' labour will be dealt with as a Change Request; and
 - (b) requiring more than five days' labour will be dealt with under a new SWO.

6 Client Obligations

- 6.1 The Client must:
- (a) comply with the operational support procedures and policies of Xcellerate IT as notified to the Client in writing from time to time; and
 - (b) promptly record and report to Xcellerate IT, all errors and malfunctions in the Product and the Services provided by Xcellerate IT.
- 6.2 To the extent that provision of the Services is dependent on activities being undertaken by the Client as:
- (a) recorded, as Client dependencies, in the Proposal; or
 - (b) reasonably requested by Xcellerate IT from time to time,
- to enable the Services to be provided in accordance with the obligations imposed on Xcellerate IT by the Proposal, the Client:
- (c) will undertake those activities in a timely and professional manner; and
 - (d) acknowledges and agrees that Xcellerate IT will not be in breach of its obligations if its ability to perform its obligations is affected by the Client's failure or delay in completing or supplying the Services.
- 6.3 The Client grants to Xcellerate IT a free, non-exclusive, non-transferable licence to use the Client Data solely for the purpose and to the extent necessary for Xcellerate IT to perform the Services.
- 6.4 The Client:
- (a) warrants that Xcellerate IT's use of the Client Data as contemplated by this Agreement will not infringe any third-Party Intellectual Property Rights; and
 - (b) will indemnify Xcellerate IT from and against all Loss which arise out of such infringement.

7 Representations and Warranties

- 7.1 Xcellerate IT warrants to the Client that it:
- (a) has the requisite power and authority to carry out the obligations imposed on it by the Agreement;
 - (b) has the expertise, experience and the staffing resources required to perform the Services;
 - (c) will provide the Services in a manner that does not infringe the Intellectual Property Rights of any person;
 - (d) owns or has the right to use (to the extent necessary to provide the Services) all Intellectual Property Rights that it uses to perform those Service; and

- (e) has all licences, authorisations and permits required to provide the Services.
 - 7.2 The Client represents and warrants to Xcellerate IT that it has the requisite power and authority to carry out the obligations imposed on it by this Agreement and the terms of any license or services agreement relating to the Tungsten Solution and Third Party Solution.
 - 7.3 Xcellerate IT will not be liable or responsible to the Client for any Service and/or Deliverable that does not meet the requirements set out in the Proposal to the extent such failure occurs by reason of:
 - (a) the use by the Client of that Service/Deliverable for a purpose other than for which it was supplied;
 - (b) the use of that Service/Deliverable by any employee, contractor or agent of the Client who is not suitably qualified or adequately trained to do so;
 - (c) any modifications or enhancements to a Service/Deliverable implemented or effected by or on behalf of the Client that are not authorised or approved by Xcellerate IT;
 - (d) any defect, error or failure in the Service/Deliverable;
 - (e) the defect, error or failure in, any system, software, hardware or other equipment with which a Service Deliverable interoperates; or
 - (f) any Excusable Event.
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8 Fees

- 8.1 In consideration of the supply of the Product and the Services, the Client must pay to Xcellerate IT the Fees in the manner provided, in this Agreement.
 - 8.2 Fees payable by the Client for the Product and the Services will be specified in the applicable Proposal and/or SWO and/or Change Request and will be invoiced by Xcellerate IT to the Client.
 - 8.3 Unless otherwise agreed in writing, :
 - (a) Fees (if not stated to be a fixed lump-sum price) will be calculated in accordance with the rates and other pricing details set out in the Proposal applicable to the Services provided by Xcellerate IT to the Client; and
 - (b) any rates or pricing details described in the Proposal are stated exclusive of GST.
 - 8.4 All amounts payable by the Client to Xcellerate IT must be paid:
 - (a) without set-off or claim under any circumstances including, if a dispute exists in relation to the Services provided; and
 - (b) to the bank account nominated from time to time by Xcellerate IT to the Client.
 - 8.5 To reduce the risk of fraud (including but not limited to business email compromise or cyber-related scams), if the Client receives any communication purporting to change Xcellerate IT's notified bank account details or an invoice that contains different bank details, the Client must confirm the change verbally via a direct telephone call to a known and trusted contact person at Xcellerate IT. The Client is solely responsible for verifying the authenticity of such communication.
 - 8.6 Additional terms regarding Fees for Application Support Services are set out in clause 7 in Schedule 1.
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9 Contract Governance

- 9.1 On and from the Effective Date, each Contract Manager will:
 - (a) act as the contract manager for the Party who appointed such manager;

- (b) co-ordinate the supply of the Products and provision of the Services under this Agreement;
 - (c) supervise performance of each Party's obligations arising under this Agreement; and
 - (d) be responsible for resolving any issues that arise between the Parties concerning the Services.
- 9.2 The Contract Manager appointed by each Party must be a person:
- (a) with an understanding of the Proposal; and
 - (b) with the authority to make decisions on behalf of the Party it represents and take steps to procure the making of a decision by that Party.
- 9.3 Each Party warrants that the person nominated by it, as its Contract Manager, has the authority to perform to make decisions on behalf of the Party appointing them.
- 9.4 Each Party may replace their Contract Manager by giving written notice to the other. The notice must state the name of the replacement and the date on which the replacement takes effect. A Party must replace its Contract Manager if reasonably requested to do so by the other Party.
- 9.5 The Contract Managers must meet as and when requested by a Party, but no less frequently than once a month, for the purpose of:
- (a) reviewing and assess the progress of the performance of the Services;
 - (b) identify any issues of concern about the Services;
 - (c) reviewing and discussing each Party's compliance with its obligations under this Agreement;
 - (d) reviewing and discussing the need for any revisions to the contractual arrangements between the Parties;
 - (e) resolving any problems, disputes or differences arising between the Parties or any employees;
 - (f) discussing any failure of the Services to achieve any Deliverables or Milestones set out in the Proposal;
 - (g) agreeing on arrangements to remediate any performance issues identified; and
 - (h) discussing any other matter determined by a Contract Manager to be appropriate for discussion at the meeting.
- 9.6 The Contract Managers must keep records of their decisions.
- 9.7 All expenses incurred by a Contract Manager in attending a meeting are to be borne by the Party appointing that Contract Manager.

10 Timing and Delay

- 10.1 Xcellerate IT must perform the Services:
- (a) in accordance with the timetable (if any) set out in a SWO; and
 - (b) in respect of Application Support Services, in accordance with Schedule 1.
- 10.2 If Xcellerate IT reasonably apprehends that, as a result of:
- (a) an Excusable Event;
 - (b) a Change Request made by the Client;
 - (c) the Client's failure or delay in completing or supplying an activity or deliverable under the Proposal, including any dependency for which the Client is responsible; or

- (d) any other event beyond the reasonable control of Xcellerate IT (to the extent Xcellerate IT has taken all reasonable steps to avoid the effect of such event on its ability to fulfil its obligations under this Agreement),

Xcellerate IT will not be able to complete an activity, achieve a Milestone or provide a Deliverable under the Proposal by the date for its completion, Xcellerate IT may extend the time for completion by a reasonable period of time.

10.3 Xcellerate IT will notify the Client in writing about:

- (a) the period of the extension; and
- (b) details of the circumstances giving rise to the need for the extension.

11 Intellectual Property Rights

- 11.1 Xcellerate IT agrees that all right, title and interest (including all Intellectual Property Rights) in the Client's Materials remains vested in the Client.
- 11.2 The Client agrees that all right, title and interest (including all Intellectual Property Rights) in Xcellerate IT's Materials remains vested in Xcellerate IT.
- 11.3 The Client grants to Xcellerate IT a free, non-exclusive, non-transferable licence to use the Client's Materials solely for the purpose and to the extent necessary to perform the Services. Xcellerate IT must comply with any directions of, or conditions imposed by, the Client in relation to the Client Materials.
- 11.4 Subject to payment of the Fees, Xcellerate IT grants to the Client a free, non-exclusive, non-transferable licence to use Xcellerate IT's Materials applicable to the Services solely for the purpose and to the extent necessary to enable to Client to enjoy the use of the Services. The Client must comply with any directions of, or conditions imposed by, Xcellerate IT in relation to Xcellerate IT Materials.
- 11.5 Unless otherwise agreed in writing:
 - (a) all existing and future Intellectual Property Rights in any Developed Software vests in and remains vested in Xcellerate IT; and
 - (b) subject to payment of the Fees:
 - (i) Xcellerate IT grants to the Client, a perpetual, irrevocable, free, transferrable licence to access and use the Developed Software; and
 - (ii) all existing and future Intellectual Property Rights in the Deliverables (excluding Intellectual Property Rights in Xcellerate IT Materials, the Developed Software and Intellectual Property Rights owned by third parties) vest in the Client.
- 11.6 A Deliverable must not include any Intellectual Property Rights owned by third Parties unless Xcellerate IT has the right to licence the use of those rights to the Client or the Client has a licence to use directly from the third party.
- 11.7 Xcellerate IT retains all rights (including Intellectual Property Rights), title and interest in the Customised Solution. The Client shall not remove or alter any copyright notice, trade marks or logos.

12 IP Infringement

- 12.1 If a Third Party claims, or the Client reasonably believes that someone is likely to claim, that all or part of:
 - (a) Xcellerate IT Materials or Developed Software (licensed for use to the Client); or
 - (b) any Deliverable (title of which passes to the Client in accordance with clause 11.5(b)(ii)),

(Affected Supplier IPR) infringes the third Party's Intellectual Property Rights, Xcellerate IT must, in addition to any other rights that the Client may have against Xcellerate IT, promptly, at Xcellerate IT's expense:

- (i) use its best efforts to secure the rights for the Client to continue to use the Affected Supplier IPR free of any claim or liability for infringement; or
 - (ii) (If it is unable, despite using its best efforts, to secure such rights) replace or modify the Affected Supplier IPR so that it ceases to infringe, but without degrading the performance or quality of the Affected Supplier IPR.
- 12.2 If Xcellerate IT is not able to rectify the Affected Supplier IPR in accordance with clause 12.1 within a reasonable period of time (as determined by the Client), in addition to any other rights that the Client may have against Xcellerate IT, Xcellerate IT must refund to the Client a pro-rata portion of the Fees paid by the Client in relation to the Affected Supplier IPR.
- 12.3 If someone claims, or Xcellerate IT reasonably believes that someone is likely to claim, that all or part of the Client's Materials infringes their Intellectual Property Rights, the Client must, in addition to any other rights that Xcellerate IT may have against the Client, promptly, at the Client's expense:
- (a) use its best efforts to secure the rights for Xcellerate IT to continue to use the Client's Materials free of any claim or liability for infringement; or
 - (b) (if it is unable, despite using its best efforts, to secure such rights) replace or modify the Client's Materials so that it ceases to infringe, but without degrading the performance or quality of the Client's Materials.

13 Confidentiality

- 13.1 During the Term, Xcellerate IT will have access to Confidential Information belonging to the Client and the Client will have access to Confidential Information belonging to Xcellerate IT.
- 13.2 Each Party (a **Recipient**) must keep confidential, and not use or disclose, any Confidential Information of the other Party.
- 13.3 The obligation of confidence in clause 13.2 extends to Confidential Information provided to or obtained by a Recipient before accepting the Proposal.
- 13.4 The obligation of confidence in clause 13.2 does not apply to Confidential Information that is:
- (a) in the public domain (otherwise than as a result of a breach of an obligation of confidence);
 - (b) independently developed by the Recipient; or
 - (c) already known by the recipient independently of his interaction with the other Party and free of any obligation of confidence.
- 13.5 A Recipient may disclose Confidential Information of the other Party:
- (a) if required by law or court order to do so and it:
 - (i) discloses only the minimum amount of Confidential Information required to satisfy the law or order; and
 - (ii) before disclosing any Confidential Information, gives a reasonable amount of notice to the other Party; and
 - (b) to officers and employees of the Recipient who:
 - (i) have a need to know (and only to the extent that each has a need to know) the Confidential Information for the purposes of implementing the Proposal; and

- (ii) have been directed and have agreed to keep confidential the Confidential Information on terms not inconsistent with any terms of the Proposal.
 - 13.6 Each Party must take all steps and do all things necessary, prudent or desirable in order to safeguard the confidentiality of the Confidential Information of the other Party.
 - 13.7 A Recipient must immediately on termination of this Agreement or on request from the other Party:
 - (a) return to the other Party; or
 - (b) destroy and certify in writing to the other Party the destruction of, all the other Party's Confidential Information in the Recipient's possession or control other than one copy of any notes and other records that the Recipient is required by law to retain.
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14 Limitation of Liability

- 14.1 To the maximum extent permitted by Law, all express or implied guarantees, representations and warranties, other than those given expressly in this Agreement, are excluded..
 - 14.2 Nothing in this Agreement excludes, restricts or modifies any right or remedy, or any guarantee, warranty or other term or condition, implied or imposed by any legislation which cannot lawfully be excluded or limited.
 - 14.3 The Client acknowledges and agrees that in determining to enter into this Agreement it has not relied upon any pre-contractual representations, discussions, communications or acts or omissions of Xcellerate IT that are not expressly set out in the Proposal.
 - 14.4 To the maximum extent of the law, Xcellerate IT's liability to the Client in negligence or other tort, for breach of contract or breach of statutory duty, or under an indemnity in respect of any Loss suffered by the Client in relation to the provision of any element or part of the Services (**Claim**) is limited to the lesser of:
 - (a) \$500,000;
 - (b) the Fees paid by the Client to Xcellerate IT:
 - (i) up to the date of the date of Claim; and
 - (ii) under the terms of the Proposal and/or SWO and/or Change Request to which the Claim relates; and
 - (c) if the Claim relates to Application Support Services, the Annual Maintenance Fee as at the date of the Claim.
 - 14.5 To the extent lawfully permitted, neither Party is liable to the other Party for Consequential Loss under or in connection with this Agreement.
 - 14.6 To the maximum extent of the law, the liability of Xcellerate IT to the Client for breach of an applicable Consumer Guarantee or other condition or warranty implied into this Agreement by legislation is limited, at the option of Xcellerate IT, to:
 - (a) if the breach relates to goods, replacing, repairing or supplying goods equivalent to, those goods or paying the cost of replacing or repairing them or acquiring equivalent goods; or
 - (b) if the breach relates to services, re-supplying, or paying the cost of re-supplying, those services.
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15 Insurance

- 15.1 Xcellerate IT will obtain and maintain the following insurances during the Term:
- (a) professional indemnity insurance (including cyber-liability insurance) of not less than \$10 million in respect of each event and in the aggregate;
 - (b) public liability insurance of not less than \$20 million in respect of each event; and
 - (c) worker's compensation insurance in accordance with the statutory requirements of any jurisdiction in which Xcellerate IT engages employees, consultants or contractors in connection with the supply of the Service.
- 15.2 Upon request from the Client, Xcellerate IT must provide the Client with evidence of the currency of any insurances it is required to obtain.
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16 Dispute Resolution

- 16.1 The Party asserting that a Dispute has arisen may give notice to the other Party (a **Dispute Notice**).
- 16.2 A Party is not required to resolve a Dispute until a Dispute Notice is given.
- 16.3 Neither Party may begin legal proceedings (including mediation, arbitration or court proceedings) in connection with any part of this Agreement unless the steps in clause 16.4 have been followed.
- 16.4 Any Dispute must be dealt with by:
- (a) first - the Dispute will be referred to the Contract Managers who will meet and use all reasonable commercial efforts to resolve the Dispute Notice within five Business Days of the Dispute Notice being given; and (if not so resolved)
 - (b) second - if the Dispute is not resolved, the Dispute will be referred to the Chief Executive Officers of each Party who will use all reasonable commercial efforts to resolve the Dispute within 20 Business Days of the Dispute Notice being given or such longer period as may be mutually agreed by the Chief Executive Officers.
- 16.5 If a Dispute is not resolved in accordance with clause 16.4 the dispute must be submitted by either Party to mediation.
- 16.6 Either Party may commence legal proceedings if a Dispute is not resolved at mediation.
- 16.7 A Party may commence court proceedings in relation to any dispute arising in connection with this Agreement at any time where the Party seeks urgent interlocutory relief.
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17 Termination

- 17.1 A Party may terminate this Agreement by notice in writing to the other, if the other Party is the subject of:
- (a) an Event of Default; or
 - (b) an Insolvency Event.
- Termination under this clause takes effect on the day on which notice is given.
- 17.2 Termination by a Party under clause 17.1 is in addition to any claim for damages or other relief.
- 17.3 On termination of this Agreement under clause 17.1:
- (a) Xcellerate IT will stop providing the Services;
 - (b) the Client must pay Xcellerate IT within 14 days of receipt of an invoice:
 - (i) for all Fees for Services performed up to and including the day termination takes effect;

- (ii) for any costs that Xcellerate IT has reasonably incurred in connection with the provision of the Services including amounts that Xcellerate IT has paid or owes to third parties that it cannot reasonably get out of paying in connection with this Agreement (including the demobilisation of Xcellerate IT personnel deployed to provide the Services;
 - (iii) where this Agreement is terminated by Xcellerate IT due to the Client's Event of Default or Insolvency Event, to the extent not already included in paragraphs 17.3(b)(i) and 17.3(b)(ii), the balance of Fees that would have been payable had the Agreement not been terminated which the Parties agree is a reasonable and genuine pre-estimate of the loss that Xcellerate IT will suffer as a consequence of the early termination.
 - (c) each Party must immediately cease using other Party's Materials and Confidential Information (unless otherwise permitted by this Agreement) and, if requested by the other Party, comply with its request regarding Confidential Information under clause 13.7.
- 17.4 Without limiting Xcellerate IT's rights to terminate, if the Client is subject to an Event of Default, Xcellerate IT may, at its discretion elect to suspend its obligation to supply the Services until such time the Client has satisfied the relevant Cure Notice.
- 17.5 Termination or expiry of this Agreement:
- (a) does not operate as a waiver of any breach by a Party or any of its provisions;
 - (b) is without prejudice to any rights, liabilities or obligations of any Party that have accrued up to the date of the termination or expiry, including a right of indemnity;
 - (c) does not affect any provisions which by their nature survive termination or expiry.

18 Notices

- 18.1 A notice given under any document must be in writing and delivered to a Party by email to the email address that is used by such Party at the time of giving the notice.
- 18.2 A notice is taken to be duly given and received if delivered by email on the Business Day after it is despatched provided that the sender does not receive a message to the effect that the sender is 'out of office' or that delivery has failed.

19 Miscellaneous

- 19.1 These terms and conditions may only be varied or replaced by an agreement executed by the Parties.
- 19.2 This Agreement records the entire agreement between the Parties in relation to his subject matter. It supersedes all prior contracts, arrangements, understandings, or negotiations by, or between, the Parties in relation to the subject matter of the Agreement.
- 19.3 Any part or all of any provision of any document that is illegal or unenforceable will be severed and will not affect the continued operation of the remaining provisions of that document.
- 19.4 A rule of construction does not apply to the disadvantage of a Party because the Party was responsible for the preparation of a document or any part of it.
- 19.5 Any rights and remedies that a Party may have under this Agreement are in addition to and do not replace or limit any other rights or remedies that Party may have.
- 19.6 All warranties, releases, exclusions of liability, indemnities, terms with respect to intellectual property and confidential information on the part of a Party will remain valid and binding upon that Party following expiry or termination of this Agreement.

- 19.7 The failure, delay, or omission by a Party to exercise, or to partially exercise, a right, power or remedy under these terms and conditions does not operate as a waiver of that right, power or remedy.
- 19.8 Delivery of a signed copy of any document by electronic means will have the same effect as delivery of the physical copy bearing the original signature, provided that such copy, on receipt, can be reproduced in an eye-readable form.
- 19.9 Signing of any of any document by means of a digital, electronic signature is deemed, for all purposes, to have the same legal effect as signing of a physical copy.
- 19.10 Each Party must take all steps, execute all documents, and do everything necessary or desirable to give full effect to any of the transactions contemplated by this Agreement.
- 19.11 The rights, obligations and indemnities in clause 11 (Intellectual Property Rights), clause 12 (Infringement) clause 13 (Confidentiality), clause 14 (Limitation of Liability), and clause 17 (Termination) survive the termination or expiry of this Agreement.
- 19.12 The Proposal is governed by the laws of the State of New South Wales. Each Party submits to the non-exclusive jurisdiction of courts exercising jurisdiction there in connection with all matters concerning these terms and conditions.

Schedule 1 – Application Support Service Terms and Conditions

1 Definitions

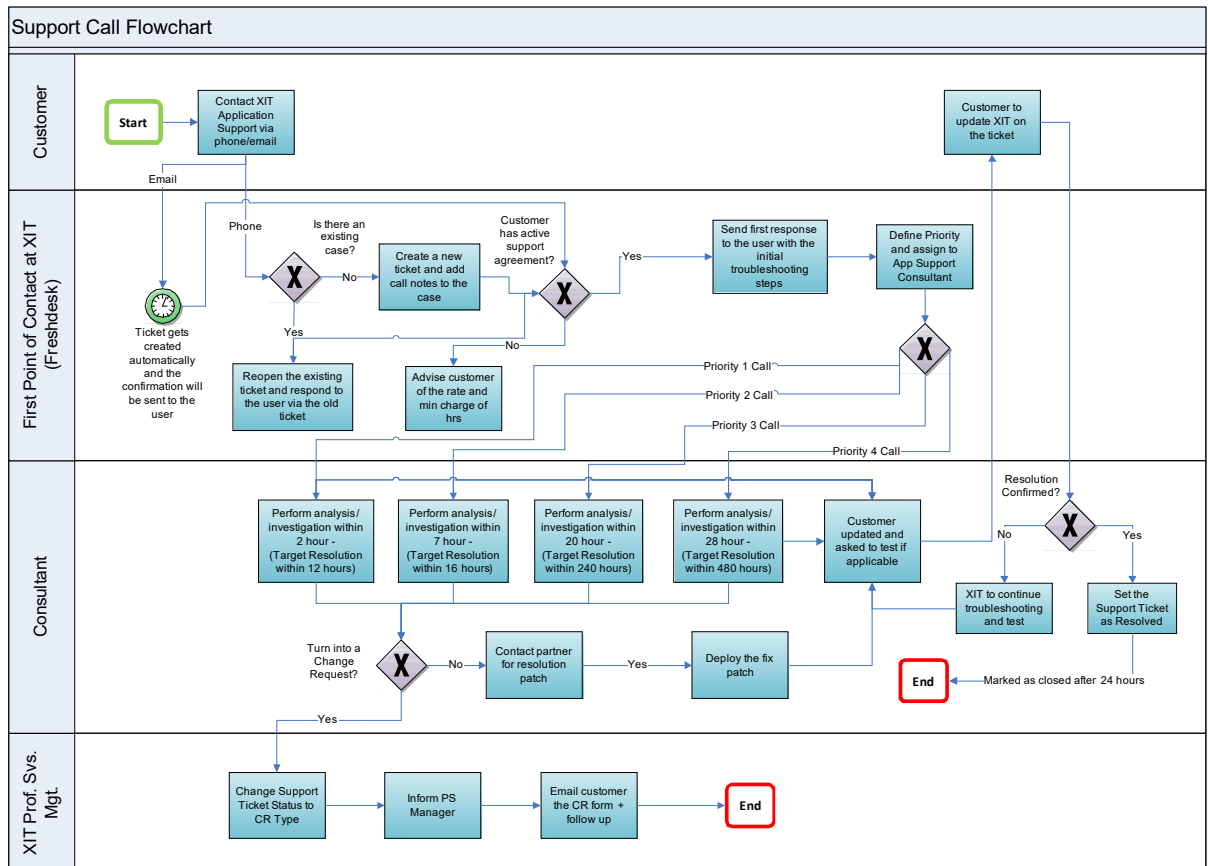
1.1 In this Schedule 1:

- (a) **Agreed Specifications** means, in respect of a Customised Solution, the specifications described in the Customer Solution Description document (CSD), Service Work Order or a Change Request (as applicable for that Customised Solution).
- (b) **Application Support Request** means a request for Application Support Services.
- (c) **Application Support Term** has the meaning in clause 6.2 of this Schedule 1.
- (d) **Licensed Software** means the standard version of the Tungsten software, supported by Tungsten, licensed by the Client in accordance with a Software License Agreement between the parties.
- (e) **Named Callers** means up to two individuals nominated by the Client, from time to time, who are authorised to submit Application Support Requests.
- (f) **Support Hours** means 9:00 am to 5:30 pm (Sydney time) on Business Days.

2 Application Support

2.1 Xcellerate IT operates an application support helpdesk system, Freshdesk. Requests for Application Support can be made by email, phone or via the Freshdesk Support Portal (enquire for access).

2.2 The flowchart below depicts the Application Support process:



2.3 An Application Support Request may be one of the following:

- (a) a report of unexpected behaviour of the Customised Solution with a deviation from the Agreed Specifications; or
- (b) questions or requests with respect to the functionality and technical information of the Licensed Software or Customised Solution.

2.4 The handling of an Application Support Request is summarised as follows:

Issue Submission	Collation of the issue information to log a ticket with Xcellerate IT
Initial Response	The acknowledgement from Xcellerate IT Application Support that an Application Support Request has been created, Ticket ID number created, Priority Level assessed and the initial problem description documented.
Diagnosis	To determine the cause of the issue and the methodology required to resolve the ticket and bring the system/feature to an operational status.
Resolution	Ability to identify the root cause of the support ticket and to provide feedback and a fix to the Client.
Closure	<p>Application Support calls are deemed closed as follows:</p> <ul style="list-style-type: none"> • By the Client • By Xcellerate IT when a resolution has been provided • The issue cannot be reproduced after reasonable attempts by either the Client or Xcellerate IT • When a call has had no activity/response from the Client for 5 business days <p>Note: A call may be reopened if the same issue reappears</p>

2.5 Issue Submission

- (a) Once the Client identifies an issue, it is their responsibility to log this with Xcellerate IT by calling (02) 8228 6600, sending an email to support@xcellerateit.com or by the Freshdesk Support Portal.
- (b) All raised issues are assigned a unique ticket number
- (c) Upon logging an issue, the Client must provide (as applicable):
 - (i) error logs;
 - (ii) screen shot;
 - (iii) any changes to the browser, back-end finance system, infrastructure, networks, database, IT security or the servers/VMs;
 - (iv) detailed information to reproduce the issue; and
 - (v) any anecdotal information from the users.
- (d) Xcellerate IT will provide a ticket status report, on request, describing each case with the following information:
 - (i) ticket number;
 - (ii) company that reported the issue;
 - (iii) priority (defined by clause 2.9 in this Schedule);
 - (iv) current status;

- (v) description of the ticket; and
- (vi) creation date.

2.6 Diagnosis

- (a) Tickets are reviewed by the Application Support Lead and assigned to the appropriate Xcellerate IT Application Support resource.
- (b) Once a ticket number is assigned, the Xcellerate IT Application Support resource will perform analysis of the ticket and review the information provided by the Client and the following determination/status may occur:
 - (i) falls outside the scope of Application Support;
 - (ii) the ticket has already been resolved;
 - (iii) the ticket is already assigned and is a work in progress;
 - (iv) the ticket does not qualify as an issue i.e. the product or solution is operating in accordance with the specifications; or
 - (v) the ticket contains inadequate information.

Note: Open tickets are reviewed and triaged daily by the Application Support Lead, with a review twice weekly with Xcellerate IT management.

Depending on the status of the ticket and the agreed SLA in clause 2.9, Xcellerate IT will decide to escalate to Level 2 (Xcellerate IT Technical Consultant/Lead Engineer/Technical Lead) or Level 3 (Tungsten Support).

2.7 Application Support Requests are categorised as follows:

Priority	Definition
Critical (URGENT)	The system is inoperable (show-stopper)
Serious (HIGH)	Some features of the system are impacted but the overall system is operational. A temporary Workaround could be considered.
Minor (MEDIUM)	Minor impact on the functionality e.g. incorrect error message, intermittent fault.
No Impact (LOW)	Has no impact on the operation of the solution e.g. enquiry, new user setup/training or a request for an enhancement.

2.8 The Client may advise the priority level of the Application Support Request when a ticket is created. If Xcellerate IT does not agree on the chosen Priority Level, it will seek mutual agreement, however if agreement cannot be reached, Xcellerate IT's decision on the priority level will be final.

2.9 Xcellerate IT undertakes to comply with following target responses and resolution times for any Application Support Request subject to the conditions in clause 2.10:

Priority	Initial response	Analysis / Investigation	Target Resolution
Critical (URGENT)	1 hour	2 hours	12 hours
Serious (HIGH)	3 hours	7 hours	16 hours
Minor (MEDIUM)	12 hours	20 hours	240 hours
No Impact (LOW)	16 hours	28 hours	480 hours

- 2.10 The response times in clause 2.9 are subject to the following conditions and qualifications:
- (a) Application Support is provided during Support Hours;
 - (b) the Client provides required information and data without delay in accordance with Clause 2.5 (issue submission) and 4.2;
 - (c) the Application Support Request is submitted by a Named Caller;
 - (d) the Client provides sufficient information (acknowledging that delays or insufficient details may affect response times);
 - (e) Xcellerate IT is not liable for the delays in resolution times when the issue is random, inexplicable or insufficient details are provided by the Client;
 - (f) Xcellerate IT will test and provide the required fix
 - (g) Xcellerate IT will provide test scenarios and evidence where it deems necessary.
- 2.11 The Client is responsible for backing up its systems before Xcellerate IT commences any work.
-

3 Application Support Exclusions

- 3.1 For Tungsten TotalAgility (TTA) Cloud, InvoiceAgility and AP Essentials, Application Support Services do not include:
- (a) changes made by the Client to its backend that affect the functionality or performance of the Customised Solution;
 - (b) professional services/consulting effort for:
 - (i) Change Requests; or
 - (ii) major and minor version upgrades;
 - (c) installation and configuration of workstations or scanners;
 - (d) maintenance, configuration and upgrade of non-production environments (DEV and TEST);
 - (e) work performed outside of Support Hours;
 - (f) malfunctions caused by the Client's use of the Customised Solution with third-party applications or hardware not specified in Xcellerate IT's documentation;
 - (g) additional solution training outside the agreed Deliverables; or
 - (h) malfunctions caused by a fault in products not developed by Xcellerate IT that affect the operation of the Customised Solution.
- 3.2 For Tungsten TotalAgility (TTA), Tungsten Capture (TC) and Tungsten Transformation Module (TTM), Application Support Services do not include:
- (a) changes made by the Client to its backend that affect the functionality or performance of the Customised Solution;
 - (b) professional services/consulting effort for:
 - (i) Change Requests; or
 - (ii) major and minor version upgrades;
 - (c) installation cost of Tungsten updates and fix packs;
 - (d) installation and configuration of workstations or scanners;
 - (e) maintenance, configuration and upgrade of non-production environments (DEV and TEST);
 - (f) synchronisation of Tungsten environments (DEV, TEST and PROD);

- (g) work performed outside of Support Hours;
 - (h) malfunctions caused by the Client's use of the Customised Solution with third-party applications or hardware not specified in Xcellerate IT's documentation
 - (i) additional solution training outside the agreed Deliverables;
 - (j) malfunction resulting from the Client's use of the Customised Solution in operating systems not specified in Xcellerate IT's specifications; or
 - (k) malfunctions caused by a fault in products not developed by Xcellerate IT that may the operation of the Customised Solution.
-

4 Application Support Inclusions

- 4.1 Application Support Services includes the Customised Solution specified in the Customer Solution Description document, Services Work Orders and Change Requests.
 - 4.2 The scope of Application Support Services includes:
 - (a) diagnosis of problems or performance deficiencies of the Licensed Software;
 - (b) resolution of the problem or performance deficiencies of the Licensed Software;
 - (c) Application Support for defects within the scope of the Customised Solution; and
 - (d) Application Support during Support Hours.
-

5 Client Undertakings

- 5.1 For Application Support Services related to Tungsten TotalAgility (TTA) Cloud, InvoiceAgility and AP Essentials the Client undertakes to:
 - (a) allow only Named Callers to communicate with Xcellerate IT regarding Application Support Requests;
 - (b) ensure that each Named Caller has appropriate competency in the Customised Solution and its environment;
 - (c) make best efforts to resolve issues using manuals, documentation (including tailored documentation created by Xcellerate IT as part of the deployed solution), and its own experience and knowledge before submitting an Application Support Request to Xcellerate IT;
 - (d) during the handling of an Application Support Request, provide Xcellerate IT with:
 - (i) system messages;
 - (ii) screen dumps;
 - (iii) sample documents;
 - (iv) copies of error messages; and
 - (v) information and data concerning any actions or changes made by the Client, together with any relevant supporting documentation.
- 5.2 For Application Support Services related to Tungsten TotalAgility (TTA), Tungsten Capture (TC) and Tungsten Transformation Module (TTM), the Client undertakes to:
 - (a) allow only Named Callers to communicate with Xcellerate IT regarding Application Support Requests;
 - (b) ensure that each Named Caller has appropriate competency in the Customised Solution and its environment;
 - (c) ensure that the recommended network, hardware, and software configuration is compatible with production volumes and desired performance;

- (d) not install software on the environment where the Customised Solution is installed that may interfere with its operation or maintenance;
- (e) before installing an update or a new version, test it in a test environment identical to the environment in which the current installation of the Licensed Software and customised solution operates, and ensure that a full backup of the solution/environment is made;
- (f) ensure that the environment necessary for remote access is kept in working order and reserved exclusively for that purpose;
- (g) make best efforts to resolve issues using manuals, documentation (including tailored documentation created by Xcellerate IT as part of the deployed solution), and its own experience and knowledge before submitting an Application Support Request to Xcellerate IT;
- (h) during the handling of an Application Support Request, provide Xcellerate IT with:
 - (i) system messages;
 - (ii) screen dumps;
 - (iii) sample documents;
 - (iv) copies of error messages; and
 - (v) information and data concerning any actions or changes made by the Client, together with any relevant supporting documentation.

5.3 The Client is responsible for:

- (a) backing up its environment and for managing those backup copies; and
- (b) carrying out comprehensive testing in its development/test environment prior to promoting any changes to Production.

5.4 To the extent permitted by law, Xcellerate IT will not be liable for any delay, defect, or failure in the performance of the Application Support Services to the extent that such delay, defect, or failure is caused or contributed to by the Client's failure to comply with its obligations under clauses 5.1, 5.2 or 5.3 (as applicable).

6 Term of Application Support Services

6.1 Application Support Services are provided in 12 month periods.

6.2 This Agreement, in respect of Application Support Services, will renew automatically for successive 12-month terms (each an **Application Support Term**) unless:

- (a) either Party gives the other at least three months' written notice before the end of the then-current Application Support Term that it does not wish to renew; or
- (b) the Agreement is otherwise terminated in accordance with its terms.

7 Fees for Application Support Services

7.1 In addition to clause 8 of this Agreement, the following applies to Application Support Services:

- (a) the Annual Application Support Fee in the Proposal is calculated on the development effort of the Customised Solution. When the total support effort is nearing 75% utilisation for the applicable Application Support Term, Xcellerate IT will notify the Client with the option of:
 - (i) purchasing additional days within a minimum purchase of one day for each month left in the applicable Application Support Term; or

- (ii) moving to Time & Materials for the remainder of the period after 100% utilisation;
- (b) the Annual Application Support Fee is invoiced in advance and must be paid within 30 days of the invoice date;
- (c) additional Application Support Services not included in the Proposal will be charged on a Time and Materials basis, unless otherwise agreed;
- (d) the Annual Application Support Fee is subject to a 7.5% per annum increase after the initial Application Support Term;
- (e) further changes to, or development of, the Customised Solution may incur an increase to the Annual Application Support Fee;
- (f) Application Support Services provided outside of Support Hours may incur additional charges at Xcellerate IT's discretion as follows:
 - (i) for work undertaken outside Support Hours on a Business Day, at a rate of 1.5 times the agreed services rate for normal working days.
 - (ii) for work undertaken on a non-Business Day, a rate of two times the agreed services rate.
- (g) Change Requests relating to changes to the Customised Solution may increase the overall cost of the Application Support Services proportionately.