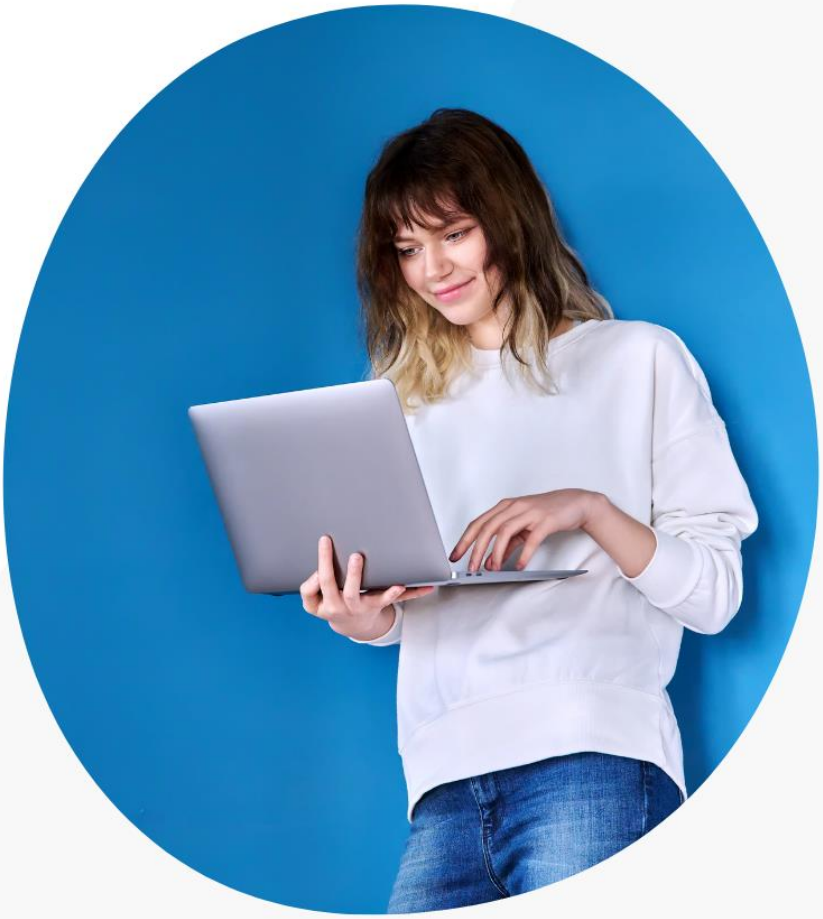
Summary Terms & Conditions



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Date: 12.10.2023
Version: 1.4

think learning

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Introduction

We've been implementing and supporting Talent Management Systems since 2013, in a range of sectors (including 50+ NHS and Healthcare organisations, Universities, and in the Professional Membership, Hospitality, Science, Finance, and Legal industries). This document provides an overview of our terms and conditions for Think-hosted Totara solutions. If you have any questions about this document, please contact hello@think-learning.com.

Proposal Terms & Conditions

This document contains information, which is confidential to Think Associates Ltd (Trading as Think Learning) and is submitted on the basis that it must not be used in any way nor disclosed to any other party, either whole or in part, except to employees or professional advisors of the organisation for the purpose of considering this proposal or otherwise without the prior written consent of Think Learning.

All the information, statements and proposals in this document are correct and accurate to the best of our present knowledge but are not intended (and should not be taken) to be contractually binding unless and until they become the subject of separate, specific agreement between the parties.

This proposal is subject to contract and should not be construed as an offer capable of acceptance. The terms and conditions of the relevant Think Learning standard contracts apply to this proposal. Successful application operation and management of the IT systems and Think Learning services are the responsibility of the user.

Think Learning's responsibilities are set forth in the various Think Learning Agreements executed, or to be executed, by both parties. In no event will Think Learning accept liability for economic loss. The degree of success that you may achieve in the use of the IT systems and support are dependent on a number of factors, many of which are not under Think Learning's control. Therefore, Think Learning does not warrant or represent that you will achieve similar results. It is your responsibility to validate the estimates furnished and to determine their relevance to your operation. Any contract which you decide to place with Think Learning as a result of this proposal will be on the terms and conditions of the

applicable standard Think Learning contract and will come into effect only upon written acceptance by a Think Learning authorised signatory following your signature.

Hosting responsibilities

This table summarises support activities, levels and responsibilities that we provide as part of our agreement with you:

Activity	Responsibility	Key terms
SSL certificates	Think Learning	We will install and manage 256-bit encrypted SSL (TLS) certificates for your domains, to secure data in transit between our servers and your users' browsers.
Server maintenance	Think Learning	Server operating system and virus protection will be kept up to date, with patches applied on a weekly basis. Server hardware will be monitored, improved and replaced where necessary, to maintain performance.
Software maintenance	Think Learning	We will conduct monthly reviews of security and performance of the relevant software. If we consider it necessary, then we will apply software updates provided by the relevant team.
Upgrades	Think Learning	The time involved in upgrading our software applications are included in the hosting/maintenance costs (additional cost for weekend working, and additional Subscription fees may apply for new extensions/features, or major releases that have higher subscription costs). Major release upgrade technical and consultancy time is included, based on a discussion and benefits analysis with you in which we make a joint decision about the timing of your upgrades. We

Activity	Responsibility	Key terms
		also implement minor, performance- or security-related updates as part of our general hosting and maintenance services. We may ask you to test new functionality on a stating site, and approve it, before we deploy it to your live environment.
Provision of working software	Core developers	Core developer teams (including Think Learning and Totara) are responsible for providing core code, in line with SLAs, provided as part of your Subscription.
Backup	Think Learning	Backups are implemented using automated routines. Daily and differential backups are stored on a cycle of 7 days.
Monitoring	Think Learning	Servers are monitored using automated tools, which alert technicians via email and SMS if any hardware or connectivity problems are found.
Restore	Think Learning	In cases of hardware failure, we will replace hardware (liaising with our hosting partner) and restore the most recent effective backup of the data. If client requests a backup for other reasons (e.g. to revert data entered in error), a charge may be made.
First line support (to end-user learners and managers)	Client	Client power users and administrators will be trained by Think Learning, and are responsible for dealing with queries from learners, managers and other internal stakeholders
Second line support	Think Learning	Think Learning consultants will be available to answer queries from trained client administrators
Third line support	Think Learning	Think Learning consultants will escalate issues to our technical team, if they cannot be solved at 1st or 2nd level.

Activity	Responsibility	Key terms
Code-line support (Totara only)	Totara core developers	Your Totara subscription contributes to the cost of a team of developers, who fix and develop the core Totara code. Think Learning will liaise with Totara core developers if a code-line issue is identified. Think Learning will also act as client representative with Totara, requesting longer-term enhancements and new functionality that are in the best interests of our clients.

Our Client Services team.

Our support services run from 0900-1700 a day, 5 days a week for general scheduled tasks. We will take any action necessary to address or repair faults in Hosting Software without any prior notice to you. If such faults or remedial action result in an interruption to the provision of the Service, you will be notified as soon as practicable.

We use an online Helpdesk ticketing system to track and log issues. We will make this ticketing system available to key members of the Client providing the ability to log issues.

We then categorise and respond to issues depending on seriousness:

Severity	Priority definition	Target response time	Fix time	Service level failure
S1	Critical - site offline for all users	1 hr respond	1 day	If the fault persists for 72 hours or more
S2	High - functionality issues affecting the ability of multiple users to complete significant online tasks and where no workaround exists	4 hrs respond	2 days	If the fault persists for 240 hours or more
S3	Medium - minor issues affecting one or more users' ability to complete online tasks, or more significant issues where a workaround exists.	8 hrs respond	3 days	N/A
S4	Low - suggestions for improvement/development	16 hrs respond	5 days	N/A

The times quoted are human response times only (you will also receive instant automatic acknowledgement of your issue). Though every effort will be made to resolve issues within the shortest amount of time and where possible within these times, it is not always possible until diagnosis of the individual issue/request to predict resolution time. All response/assessment times apply within business hours: 0900-1700.

The Zendesk ticketing system provides initial visibility to Think Learning across all teams, and in particular the Client Services and the Development teams, so that

the request can be actioned. The teams will then decide the appropriate response based upon:

- Support requests and changes;
- Incident management;
- Problem management.

Your Support budget represents an amount of purchased time which is used to pay for all the 'administrator support' interactions between you (the client) and us (Think). Standard online 2nd and 3rd line support covers off-site support, helpdesk responses, booked calls/webinars, and other activities requested by client (e.g. site configuration).

We track time used against the Support budget in our timesheet system at our standard rates of £110/hr (£825/day) for problem-solving and consultancy, or £90/hr for administration tasks, explanations and straightforward configuration work via our helpdesk. 20% of the overall support budget is not formally tracked by our teams, and is accounted for by quick, adhoc query responses, access to our online Helpdesk, and further Support-based reporting and analysis. We take a proactive, collaborative approach to this, working hard to ensure that support queries receive long-term solutions (with detailed responses designed to prevent issue recurrence).

We track/report Support budget usage for you, so that you can make informed, timely decisions about whether or not extra budget is required during the contract. You do NOT pay anything for us to fix confirmed bugs with the system, or confirmed technical issues with our hosting services.

Where your users or administration team can perform some function themselves (for example, data uploads or creation of courses), and opt to ask Think Learning to perform this function, this would attract an additional charge.

Requests to customise or configure the software would be discussed and priced as a specific job. Major customisations may affect the overall annual support cost.

In addition to 2nd line support delivered by the Client Services team there is also a nominated Client Relationship Manager who is available for escalated issues, to meet on request, and for account reviews (as arranged).

All subscribers to Totara software are allowed to nominate a small number of core users who have access to the Totara support forums and Totara HQ email support desk. However, generally we find it more efficient for clients to direct queries via Think Learning and for us to manage the Totara HQ support desk relationship.

Contracting and payment terms.

Contracting: Upon agreement to contract (initial or renewal contract), we will work with you to agree a formal, signed contract. Contracting may be based on any of these options:

- G-Cloud Standard Contract
- NHS Standard Terms and Conditions
- Think Learning Standard Contract
- Client Standard Contract

We will include details of our Service Level Agreements as part of the contracting process. And we will agree a payment schedule with you, as relevant to the contracting approach and period. We generally require at least 50% of first year costs to be paid up-front, to cover initial outlays (LMS Subscription, and hosting costs), but we can accommodate staged payments for other elements.

Invoicing and Payment: We require a Purchase Order (PO) Number before work is delivered (including scheduling/running a kick-off meeting for new project or implementation work, or for third party software provision/support). On receipt of a PO Number we will issue (post and/or email) an invoice with the following terms:

- Invoices are to be paid within 30 days by bank transfer to the following account:
- Starling Bank
- Think Associates Ltd. Sort code: 60-83-71. Account number: 69900202. Reference: Please quote invoice number.
- We reserve our right to charge interest on late paid invoices at the rate of 8% above bank base rates under the Late Payment of Commercial Debts (Interest) Act 1998 and The Late Payment of Commercial Debts Regulations 2013.

Late/Overdue payments: We will ensure that you are given timely alerts/reminders of upcoming milestone and payment points (at least two months before contract renewal due date, and one month before stage payment due date), and we liaise closely with procurement/finance departments to work through potential obstacles to payment. In the event that payment is not received (outside of contractual dispute/termination process), the following process may need to be initiated:

- Stage 1: 30 days after starting implementation or project work without a purchase order, or 30 days after the payment due date: end any on-going implementation, custom developments or configuration work, and for live sites limit Client Services support to resolving any 'Critical' or 'High' priority site issues (as defined in the Think Learning Support SLA).
- Stage 2: 60 days: end Client Services support.
- Stage 3: 90 days: Remove site access and agree data handover/purge measures.

Renewal Policy: In preparation for your contract renewal your Think Learning Account Manager/Client Relationship Manager will contact you at least three months before the renewal point to arrange an account meeting. The aim of the account meeting will be to review the contract provision, and to discuss plans and requirements for the new contracting period. If we do not have the option to extend an existing, formal contract, we will work with you to create a contract using the most appropriate Terms and Conditions.

Termination: if the contract ends during a Subscription year, please note that although contract costs for that year are mostly non-refundable (the third-party software subscription, hosting, and a proportion of support costs are committed up-front, annually), we will refund other unspent support budget from the most recent support invoice period, which remains after any transition/handover processes and interactions are complete.

End User Licence Agreements

Think Learning will be formally contracted as a Data Processor, and you (our client) will be Data Controller. This means that we can only store and process data in line with your specific instructions. Our contracts with you will include a

data processing schedule which defines specifically what data we will be storing, where, how and for what purpose.

In using these Services, you agree to be bound by the End User Licence Agreement and Product Licence & Subscription Agreement provided by Totara Learning Ltd, and/or other relevant End User Agreements used in the delivery of the Services. We (Think Associates Ltd, t/a Think Learning) shall bear no liability for non-conformant delivery of services which result from your inability to be bound by these End User Licence Agreement and Product Licence & Subscription Agreements

By using or purchasing Totara services from Think Learning, you agree to be bound by the terms and conditions of the Totara TXP Subscription Agreement. We are able to extend and customise your Totara code, to best fit organisational requirements. Where clients contribute to the development of bespoke functionality enhancements, they have influence over the functionality/features created; we may at our absolute discretion then absorb the cost of hosting/maintaining/upgrading the bespoke code in the codebase (in line with core Totara release versions). We reserve the right to make these developments available to other clients, at our discretion. Intellectual Property which is specifically owned by the client under a proprietary licence (e.g. Competency frameworks, or bespoke e-learning modules) will be provided to the client by us on request at any time during, or immediately after the end of a contract.

If either party terminates an agreement for Services, then we will provide you with a copy of all user and site data. We will not provide a copy of the Totara TXP code, nor copies of any bespoke software code developed in the course of delivering the Service, because each Totara partner is responsible for their own Totara code, and code created by us is for use by our client community only. Before contracting (and/or upgrading to Totara v13), you must read and agree to the Totara Learning Ltd End user licence agreement as presented in this document and updated from time to time at https://www.totaralearning.com/en/licence.

Totara TXP Subscription Agreement.

This Subscription Agreement, ("Agreement") is between you ("Customer") and Totara Learning (as defined below) and is effective as of the date this Agreement is accepted by Customer ("Commencement Date"). By accessing, installing or otherwise using Totara Enterprise Extensions, Customer acknowledges that Customer has read, understands and accepts the terms of this Agreement.

1.1 TOTARA ENTITY; DEFINITIONS

1.1.1 Totara Entity. "Totara Learning" shall refer to:

1.1.2 if Customer is located in New Zealand, Asia, or Oceania (other than Australia): Totara Learning Solutions Ltd, with an address at Level 2, 186 Willis Street, Te Aro, Wellington 6011, New Zealand.

1.1.3 if Customer is located in Australia: Totara Learning (Australia) Pty Limited, ABN 41 620 245 294, with an address at Suite 11, Level 11, GPO Box 4836, 60 Castlereagh Street, Sydney, NSW 2000, Australia.

1.1.4 if Customer is located in Europe, Middle East or Africa: Totara Learning (Europe) Ltd., with an address at Suite 417 4th Floor, Tower Point, 44 North Road Brighton, BN1 1YR, United Kingdom.

1.1.5 if Customer is located in North America, South America, or in a country or region not covered by (a) through (c) above: Totara Learning, Inc., with an address at PO Box 7775 #95930, San Francisco, CA 94120, USA.

1.2 Definitions. In this Agreement:

1.2.1 Customer Computers means computers owned or controlled by Customer.

1.2.2 Documentation means the documentation for the Totara Platform available on Totara Learning's website or that Totara Learning may otherwise make available to Customer from time to time.

1.2.3 Number of Active Users means, with respect to a Production Instance, the total number of unique user accounts through which a user may access Totara

Enterprise Extensions whether or not any such accounts are subsequently suspended.

1.2.4 Order means an ordering document, purchase agreement, sales order, agreement or other similar document pursuant to which Customer has purchased a subscription to Totara Enterprise Extensions, whether directly from Totara Learning or indirectly from an authorized partner of Totara Learning.

1.2.5 Production Instance means an instance of the Totara Platform which is deployed to support an active operational learning management business process of the Customer in use by the Customer's personnel.

1.2.6 Supported Environment means the combination of hardware, operating system and database platform that together meet the minimum system configuration requirements for the proper use and operation of the Totara Platform as set out in the Documentation.

1.2.7 Third Party Software means software licensed by third parties including software licensed under open source licenses such as those approved by the Open Source Initiative.

1.2.8 Totara EE Proprietary means software which is a part of Totara Enterprise Extensions but which is not Third Party Software.

1.2.9 Totara EE TPS means software which is part of Totara Enterprise Extensions which is Third Party Software.

1.2.10 Totara Core means the software based on Moodle software as further described in the Documentation.

1.2.11 Totara Enterprise Extensions means certain proprietary software modules developed by Totara Learning, as further described in the Documentation.

1.2.12 Totara Platform means Totara Learning's software platform, consisting of (a) Totara Core, and (b) Totara Enterprise Extensions.

1.3 LICENSE AND RESTRICTIONS

1.3.1 License Grant. Subject to Customer's full and ongoing compliance with the terms and conditions of this Agreement, Totara Learning hereby grants Customer a limited, non-exclusive, non-transferable, non-sublicensable right during the Term to: (i) access, use, and modify Totara Enterprise Extensions as part of the Totara Platform for the number of Production Instances for which Customer has

purchased a subscription (as indicated in the applicable Orders) and, to the extent such Production Instances are deployed on Customer Computers, reproduce and use a copy of Totara Enterprise Extensions as a part of the Totara Platform on such Customer Computers, in each case, in accordance with the Documentation for its internal business purposes only and (ii) authorize individual users to access and use Totara Enterprise Extensions as part of the Totara Platform (each an "Authorized User") in accordance with the Documentation, provided that Customer shall be responsible for all such access or use of the Totara Platform as if such access or use had been its own. Customer may have additional rights under separate licenses applicable to Totara Core, and Customer's use of Totara Core shall be subject to the terms of those separate licenses.

1.3.2 Restrictions. Except to the extent such restriction is expressly prohibited by applicable law, and other than as expressly set forth in this Agreement, as an express condition to the rights granted to Customer with respect to Totara Enterprise Extensions, Customer will not, and will not assist or permit any third party or Authorized User to: (i) disclose (or allow access to) the source code of Totara Enterprise Extensions (or any information derived from such source code) to any third party who is not under an obligations to keep such source code confidential; (ii) remove or modify any copyright notices in the source code for the Totara Platform or Documentation; (iii) take any action with respect to the implementation of the Totara Platform that would render Totara Enterprise Extensions subject to any obligation or be licensed pursuant to any open source software license terms; (iv) sell, lease, or otherwise transfer to any third party or sublicense Customer's access to or use of the Totara Platform other than to Authorized Users as a part of a larger service that consists of the Totara Platform and additional value adds, content or functionality; (v) use the Totara Platform on behalf of third parties; (vi) use the Totara Platform to violate, misappropriate or infringe the rights of any third party; (vii) interfere with or circumvent any feature of the Totara Platform, including any security or access control mechanism; (viii) use Totara Enterprise Extensions in any way not specifically authorized in this Agreement or in a manner that violates Totara Learning's Acceptable Use Policy (available at https://help.totaralearning.com/display/TPD/Acceptable+use+policy; or (ix) attempt to do any of the foregoing.

1.3.3 Active Users. The Number of Active Users for a given Production Instance shall not exceed the number indicated on the applicable Order. Customer

acknowledges that Totara Learning or its authorized partners, as applicable, may require Customer to pay additional fees in the event the Number of Active Users for a given Production Instance exceeds the amount indicated on the applicable Order, and Customer agrees to timely pay such amounts.

1.3.4 Third Party Software. Customer acknowledges that some portions of the Totara Platform contain Third Party Software. Use of such Third Party Software may be governed by separate licenses, which shall be identified in the Documentation, on Totara Learning's website, or in other material provided or made available to Customer by or on behalf of Totara Learning.

1.3.5 Modifications. Subject to Totara Learning's rights in Totara Enterprise Extensions, and Documentation, as between Totara Learning and Customer, Customer shall own any enhancements, changes, upgrades, bug fixes, or other modifications made by Customer to Totara Enterprise Extensions, or the Documentation ("Modifications"), provided, however, that in no event may Customer use, distribute, commercialize or otherwise exploit any Modifications or modified version of Totara Enterprise Extensions except in connection with its authorized use of Totara Enterprise Extensions without Totara Learning's prior written permission. In the event Customer provides any Modifications to Totara Learning, such Modifications shall be deemed Feedback.

1.3.6 Ownership. Customer agrees that as between Customer and Totara Learning, Totara Learning owns all right, title and interest in and to the Totara Platform. Except for the rights explicitly granted to Customer hereunder, nothing in this Agreement shall constitute a transfer or assignment by either party to the other of any intellectual property rights owned or otherwise controlled by such party, and each party hereby reserves all rights not expressly granted hereunder.

1.3.7 Feedback. In the event Customer provides any comments, suggestions, or feedback regarding the Totara Platform, or any improvements, modifications or enhancements to the Totara Platform (collectively, "Feedback"), Customer hereby grants to Totara Learning , under all intellectual property rights Customer currently or may in the future acquire, a worldwide, nonexclusive, irrevocable, perpetual, transferrable, sublicensable, fully paid-up and royalty-free license to use, reproduce, disclose, sublicense, distribute, modify and, make, have made, sell, offer for sale, import, practice any processes or methods related thereto, or otherwise exploit such Feedback without restriction. Customer warrants that it has the rights necessary to provide the Feedback and to grant the foregoing rights to Totara Learning.

1.3.8 Government Rights. Totara Enterprise Extensions and the Documentation are commercial computer software and commercial computer software documentation. If Customer is a U.S. Government agency, this Agreement constitutes the entire agreement between the parties and is binding on government users in accordance with Federal Acquisition Regulation (FAR) 48 CFR 12.212 (for non-defense agencies) or Defense FAR Supplement (DFARS) 48 CFR 227.7202 (for defense agencies).

1.4 CUSTOMER RESPONSIBILITIES

1.4.1 Registration. Prior to installing or using the Totara Platform on a Production Instance controlled or maintained by Customer or by an authorized partner of Totara Learning, Customer will ensure that the details of each Production Instance is provided to Totara Learning as Totara Learning or its authorized partners may reasonably request from time to time. Customer may also be required to provide Totara Learning with certain information during registration or installation of the Totara Platform. Customer consents to the provision of such information to Totara Learning and Totara Learning's use of such information. Customer shall promptly notify Totara Learning and, if applicable, its authorized partners in the event of changes to any information provided to Totara Learning or its authorized partners during the Term.

1.4.2 Customer Satisfaction and Feedback. During the Term and for one year after, Customer shall, upon Totara Learning's reasonable request, provide to Totara Learning information about Customer's use of the Totara Platform, including information regarding any issues, feedback, or suggestions that Customers may have with or for the Totara Platform ("Customer Satisfaction Information"). Customer hereby permits Totara Learning to use such Customer Satisfaction Information in order to market, promote and improve the Totara Platform or any of Totara Learning's other products or services.

1.4.3 Supported Environment and Backups. Customer shall ensure that each Production Instance controlled or maintained by Customer is run within a Supported Environment, and shall follow industry standard procedures for maintaining the security and integrity of any data Customer generates or provides on or through the Totara Platform.

1.4.4 Support. Customer acknowledges that Customer may be required to implement maintenance releases or error corrections as a condition to receiving

support for the Totara Platform, including from Totara Learning's authorized partners, and that certain outdated versions of the Totara Platform may receive little or no support at all. Without limiting the foregoing, Totara Learning shall not be obligated to provide any support to Customer except as otherwise agreed in writing by Customer and Totara Learning from time to time.

1.5 PRIVACY AND DATA PROTECTION

1.5.1 Scope: This Section applies to the extent the parties Process Personal Data subject to EU Data Protection Law in the context of this Agreement.

1.5.2 Definitions:

1.5.3 The terms "Controller", "Data Subject", "Personal Data", "Processor", and "Processing" have the meaning given to these terms in the EU General Data Protection Regulation 2016/679 (as amended and replaced from time to time) ("GDPR").

1.5.4 "EU Data Protection Law" means the GDPR and the e-Privacy Directive 2002/58/EC (as amended by Directive 2009/136/EC, and as amended and replaced from time to time) and their national implementing legislations; the Swiss Federal Data Protection Act (as amended and replaced from time to time); the UK Data Protection Act (as amended and replaced from time to time); and the Data Protection Acts of the EEA countries (as amended and replaced from time to time).

1.5.5 Roles of the parties:

1.5.6 With regard to the Processing of Personal Data in the context of the Agreement, the parties acknowledge and confirm that (1) neither party acts as a Processor on behalf of the other party; (2) each party is an independent Controller; and (3) this Agreement does not create a joint-Controllership or a Controller-Processor relationship between the parties. The parties acknowledge and agree that the scope of each party's role as independent Controller is limited to the Processing of Personal Data for each party's own Processing purposes in the context of the Agreement.

1.5.7 Obligations of the parties:

1.5.8 Each party confirms and warrants that, in relation to the Processing of Personal Data for its own Processing purposes, including any Personal Data

disclosures to the other party, it acts as a Controller and it complies with EU Data Protection Law, in particular by:

1.5.9 Relying on a valid legal ground under EU Data Protection Law for the Processing of Personal Data, including obtaining Data Subjects' appropriate consent if required or appropriate under EU Data Protection Law.

1.5.10 Providing appropriate notice to the Data Subjects regarding the Processing of their Personal Data, in a timely manner and at the minimum with the elements required under EU Data Protection Law.

1.5.11 Responding to Data Subjects' requests to exercise their rights to their Personal Data, if and as required under EU Data Protection Law.

1.5.12 Transferring Personal Data abroad only in accordance with EU Data Protection Law. The parties agree to cooperate in good faith to ensure that international transfers of Personal Data in the context of the Agreement continue to comply with EU Data Protection Law.

1.5.13 Data protection:

1.5.14 Totara Learning will:

1.5.15 only process any personal information received from Customer:

1.5.16 for the purpose of exercising its rights and carrying out its obligations under this Agreement and no other purpose;

1.5.17 in accordance with any instructions issued by Customer from time to time; and

1.5.18 otherwise in accordance with relevant privacy laws; and

1.5.19 will promptly comply with any request from Customer requiring Totara Learning to amend, transfer or delete the personal information.

1.6 TERM AND TERMINATION

1.6.1 Term. Unless terminated earlier in accordance with the terms of this Agreement, this Agreement shall be affecting starting on the Commencement Date and shall continue for so long as Customer has an active Order (the "Term").

1.6.2 Termination Breach or Insolvency. Either party may terminate this Agreement immediately upon notice in the event the other party (i) materially

breaches this Agreement and fails to remedy such breach within 15 business days of being notified thereof, or (ii) files for bankruptcy or voluntary reorganization, or ceases to do business in the ordinary course, or undergoes a liquidation or dissolution.

1.7 EFFECT OF TERMINATION

1.7.1 Effect of Termination. Upon termination of expiration of this Agreement, any licenses (except for those granted under an open source license) granted to Customer hereunder shall immediately terminate.

1.8 WARRANTY; DISCLAIMERS

1.8.1 Mutual Warranties. Each party represents and warrants to the other that (a) this Agreement has been duly executed and delivered and constitutes a valid and binding agreement enforceable against such party in accordance with its terms; (b) it has the organizational authority required to execute, deliver and perform under this Agreement; and (c) the execution, delivery and performance of this Agreement does not violate the terms or conditions of any other agreement to which it is a party or by which it is otherwise bound.

1.8.2 Disclaimers: TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, AND EXCEPT AS EXPRESSLY PROVIDED HEREIN, TOTARA LEARNING DOES NOT MAKE, AND EXPRESSLY DISCLAIMS, ALL WARRANTIES OF ANY KIND RELATING TO THE TOTARA PLATFORM, WHETHER EXPRESS, IMPLIED, OR STATUTORY, INCLUDING, BUT NOT LIMITED TO ANY IMPLIED WARRANTY OF MERCHANTABILITY, NON-INFRINGEMENT AND FITNESS FOR A PARTICULAR PURPOSE. TOTARA LEARNING DOES NOT WARRANT THAT THE USE OF THE TOTARA PLATFORM WILL BE TIMELY, SECURE, UNINTERRUPTED OR ERROR FREE, OR THAT ANY DEFECTS WILL BE CORRECTED. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY TOTARA LEARNING, ITS AFFILIATES, PARTNERS, EMPLOYEES, AGENTS OR DISTRIBUTORS WILL CREATE A WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF ANY WARRANTY PROVIDED HEREIN.

1.9 CONFIDENTIAL INFORMATION.

1.9.1 Defined. “Confidential Information” means any information, whether in tangible or intangible form, that is disclosed by or on behalf of a party (“Discloser”) to the other party (“Recipient”) in connection with this Agreement

that is in written form and is marked with confidential marking, or that would be understood to be confidential by a reasonable person based on the nature of the information and the circumstances of disclosure; provided, however, that Confidential Information does not include any information that Recipient can establish: (i) was rightfully known to the Recipient prior to receipt from the Discloser without an obligation of confidentiality, (ii) is lawfully obtained by the Recipient from a third party without an obligation of confidentiality, (iii) is independently developed by the Recipient without reference to, or use of the Confidential Information of the Discloser, or (iv) is or becomes publicly available other than as a result of any act of, or failure to act by, the Recipient. Totara Learning's Confidential Information includes the source code to Totara Enterprise Extensions and any information contained in or derived from the source code or the study thereof.

1.9.2 Obligations. Recipient shall: (i) maintain the Confidential Information in confidence, (ii) use at least the same degree of care to maintain the secrecy of the Confidential Information as it uses in maintaining the secrecy of its own confidential information, (iii) always use at least a reasonable degree of care in maintaining the secrecy of the Confidential Information, and (iv) use the Confidential Information only for performing its obligations under this Agreement and exercising its rights under this Agreement, unless otherwise agreed in writing by the Discloser. The Recipient shall not disclose any of the Discloser's Confidential Information to any person except to those Recipient's employees and contractors having a need to know such Confidential Information in order to accomplish the purposes and intent of this Agreement. The Recipient shall ensure that each such employee and contractor has been instructed to keep confidential the Confidential Information of the Discloser and shall ensure that each such consultant has signed a confidentiality agreement covering the Confidential Information of the Discloser.

1.9.3 Exceptions. Notwithstanding the foregoing, if a Recipient is obligated to disclose the Confidential Information of the Discloser pursuant to subpoena or other legal process, it may do so as long as it (i) provides the Discloser prior notice of such disclosure; (ii) cooperates with the Discloser in its efforts to obtain a protective order to protect such Confidential Information from further disclosure; and (iii) only discloses the Confidential Information of the Discloser which the Recipient's counsel informs the Recipient must be disclosed.

1.9.4 Return or Destruction of Materials. Upon termination or expiration of this Agreement for any reason, or upon written request from Discloser, Recipient shall

promptly return to Discloser the originals and all copies in its possession or control of Discloser's Confidential Information, and destroy any remaining copies, whether in hard copy or electronic format. Recipient will provide Discloser a written statement signed by an officer confirming the return and destruction of Discloser's Confidential Information. Unless expressly provided for in this Agreement, the Discloser shall retain all rights, title and interest in its Confidential Information.

1.10 INDEMNITY; LIMITATIONS ON LIABILITY

1.10.1 Customer Indemnity. Customer shall indemnify, defend and hold Totara Learning and its officers, directors, agents and employees harmless from and against all claims, suits, demands, actions, proceedings, judgments, penalties, damages, losses, liabilities, costs and expenses (including, without limitation, reasonable legal and expert witness fees) resulting from any and all third-party claims arising from or relating to:

1.10.2 Customer's misuse of the Totara Platform; and

1.10.3 actual or alleged infringement or misappropriation of a third party's rights related to any Modifications or any changes to Totara Core made by, for, or at the direction of Customer (including Feedback), except to the extent such infringement or misappropriation is caused by an unaltered version of Totara Enterprise Extensions.

1.10.4 Limitation of Liability:

1.10.5 EXCEPT FOR A PARTY'S BREACH OF ITS CONFIDENTIALITY OBLIGATIONS, ITS INDEMNITY OBLIGATIONS, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, PUNITIVE, EXEMPLARY, OR SPECIAL LOSSES OR DAMAGES ARISING OUT OF OR RELATED TO THE SUBJECT MATTER OF THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO ANY LOSS OF PROFITS, LOSS OF REVENUE, LOSS OF BUSINESS OR LOSS OF ANTICIPATED SAVINGS, EVEN IF A PARTY HAS BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY HEREIN. TOTARA LEARNING'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THE SUBJECT MATTER OF THIS AGREEMENT SHALL BE LIMITED TO THE AMOUNTS RECEIVED BY TOTARA LEARNING IN RESPECT OF CUSTOMER'S USE OF THE TOTARA PLATFORM UNDER THIS AGREEMENT IN

THE TWELVE MONTHS IMMEDIATELY PRECEDING THE EVENTS GIVING RISE TO THE CLAIM.

1.10.6 Force Majeure.

1.10.7 Neither party will be liable for, or be considered to be in breach of or default under this Agreement on account of, any delay or failure to perform as required by this Agreement as a result of any cause or condition beyond its reasonable control, including, without limitation, acts of God, acts of war, telecommunications or power outages, failures of the public internet, pandemics or other similar health crisis, strikes, riots, floods, earthquakes, fires and explosions ("Force Majeure Event"), provided that the affected party: (i) notifies the other of the occurrence of the Force Majeure Event, and (ii) uses all commercially reasonable efforts to mitigate the effects of a Force Majeure Event and perform its obligations despite the Force Majeure Event. If a Force Majeure Event continues for more than 60 consecutive business days (or if a party is affected by a Force Majeure Event cumulatively for more than 60 days within a six-month period) then the unaffected party may terminate this Agreement upon notice.

1.11 DISPUTE RESOLUTION

1.11.1 Disputes. Except where the Totara Learning entity entering into this Agreement is Totara Learning (Australia) Pty Limited, any dispute or claim arising out of or in connection with this Agreement or the performance, breach or termination thereof, will be resolved by binding arbitration in English at the location specified in accordance with Section 12.8 below, before a single arbitrator, in accordance with the rules specified in accordance with Section 12.8 below, and any award rendered thereon by the arbitrator shall be final, and judgment thereon may be entered in any court of competent jurisdiction. Notwithstanding the foregoing, either party may apply to any court of competent jurisdiction for injunctive relief without breach of this arbitration provision.

1.11.2 NOTICES

1.11.3 Notice. All notices and other communication required or permitted to be given to a party pursuant to this Agreement shall be sent in writing via email and such notice shall be deemed duly given, on the business day that the email is received, provided, however, that if such email is not received prior to 5:30pm local time on a business day, then such notice is deemed to have been received on the immediately following business day. Notices to Totara Learning shall be

sent to subscriptions@totaralearning.com, and notices to Customer shall be sent to the email address provided by Customer to Totara Learning during registration or Totara Learning's authorized partner. Each party may change its email address for notice by providing notice of such change in accordance with this Section.

1.12 GENERAL

1.12.1 Assignment. Customer may not, without Totara Learning's prior written consent, assign any of its rights or obligations hereunder, including in connection with a change of control, merger, sale of all or substantially all of its assets, or similar transaction, each of which, for the avoidance of doubt, shall be deemed an assignment hereunder. Totara Learning may freely assign its rights or obligations under this Agreement. Any assignment in violation of the foregoing shall be null and void. This Agreement shall be binding upon the parties hereto, and their respective successors and permitted assigns.

1.12.2 Compliance with Laws. Each party shall, in performing its respective obligations hereunder with this Agreement, comply with all applicable laws and regulations.

1.12.3 Independent Contractor. The parties' relationship is that of independent contractors, and nothing in this Agreement will be construed to create a partnership, joint venture or employment relationship between the parties, nor authorize either party to bind the other to any warranty, representation, obligation, covenant, or otherwise.

1.12.4 Entire Agreement. This Agreement constitutes the entire agreement (express and implied) between the parties relating to the subject matter of this Agreement and supersedes any prior or contemporaneous agreement, understanding and arrangement relating thereto, whether written or oral, other than the terms of any separate applicable open source license. This Agreement may only be amended, supplemented or novated in writing executed by both parties.

1.12.5 Pay own costs: Except as otherwise provided in this Agreement, each of us will pay our own costs of, and incidental to, the negotiation, preparation, execution and enforcing, or attempting to enforce, this Agreement.

1.12.6 Severability. Any provision in any statute or other law that is inconsistent with this Agreement will not apply, to the extent that contracting out of that provision is permitted, and to the extent such statute or law cannot be contracted

out of, the provision of this Agreement that conflicts with such statute or law will be interpreted to give the greatest effect to the original intent while complying with the applicable statute or law, or if incapable of such interpretation will be deemed severable and severed from this Agreement, and the remainder of the Agreement will remain in force.

1.12.7 Waivers. Any delay, failure or forbearance by a party to exercise (in whole or in part) any right, power or remedy under, or in connection with, this Agreement will not operate as a waiver of such right, power or remedy. The waiver of any breach of any provision of this Agreement will not be effective unless that waiver is in writing and is signed by the party against whom that waiver is claimed. A waiver of any breach shall not be, or be deemed to be, a waiver of any other or subsequent breach.

1.12.8 Governing Law and Jurisdiction. The laws governing this Agreement, and the jurisdiction and processes for resolving disputes arising hereunder will depend on the Totara Learning entity has entered into this Agreement, as specified in Section 1.1, as follows:

1.12.9 If the Totara Learning entity is Totara Learning Solutions Ltd, this Agreement and all matters arising out of or relating to this Agreement, will be governed by the laws of New Zealand, and subject to Section 10, the parties irrevocably submit to the exclusive jurisdiction of the courts of New Zealand with respect to any legal action, suit or proceeding or any other matter arising out of or in connection with this Agreement. The location of arbitration under Section 10 will be Wellington, New Zealand, and the arbitration will be conducted in accordance with the Arbitration Act of 1996 other than the provisions of clauses 3(1)(a), 5(1)(a) and 7 of Schedule 2 to the Arbitration Act of 1996.

1.12.10 If the Totara Learning entity is Totara Learning Inc., this Agreement and all matters arising out of or related to this Agreement will be governed by the laws of California, and subject to Section 10, the parties irrevocably submit to the exclusive jurisdiction of the courts located in the City and State of San Francisco, California with respect to any legal action, suit or proceeding or any other matter arising out of or in connection with this Agreement. The location of arbitration under Section 10 will be San Francisco, California, and the arbitration will be conducted in accordance with the American Arbitration Association's Commercial Arbitration Rules.

1.12.11 If the Totara Learning entity is Totara Learning (Europe) Ltd, this Agreement and all matters arising out of or related to this Agreement will be governed by the

laws of England and Wales, and subject to Section 10, the parties irrevocably submit to the exclusive jurisdiction of the courts located in London, England with respect to any legal action, suit or proceeding or any other matter arising out of or in connection with this Agreement. The location of arbitration under Section 10 will be London, England, and the arbitration will be conducted in accordance with the rules of the London Court of International Arbitration.

1.12.12 If the Totara Learning entity is Totara Learning (Australia) Pty Limited, this Agreement and all matters arising out of or related to this Agreement will be governed by the laws of Australia, and subject to Section 10, the parties irrevocably submit to the exclusive jurisdiction of the courts located in Sydney, Australia with respect to any legal action, suit or proceeding or any other matter arising out of or in connection with this Agreement.

Thank you

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think learning