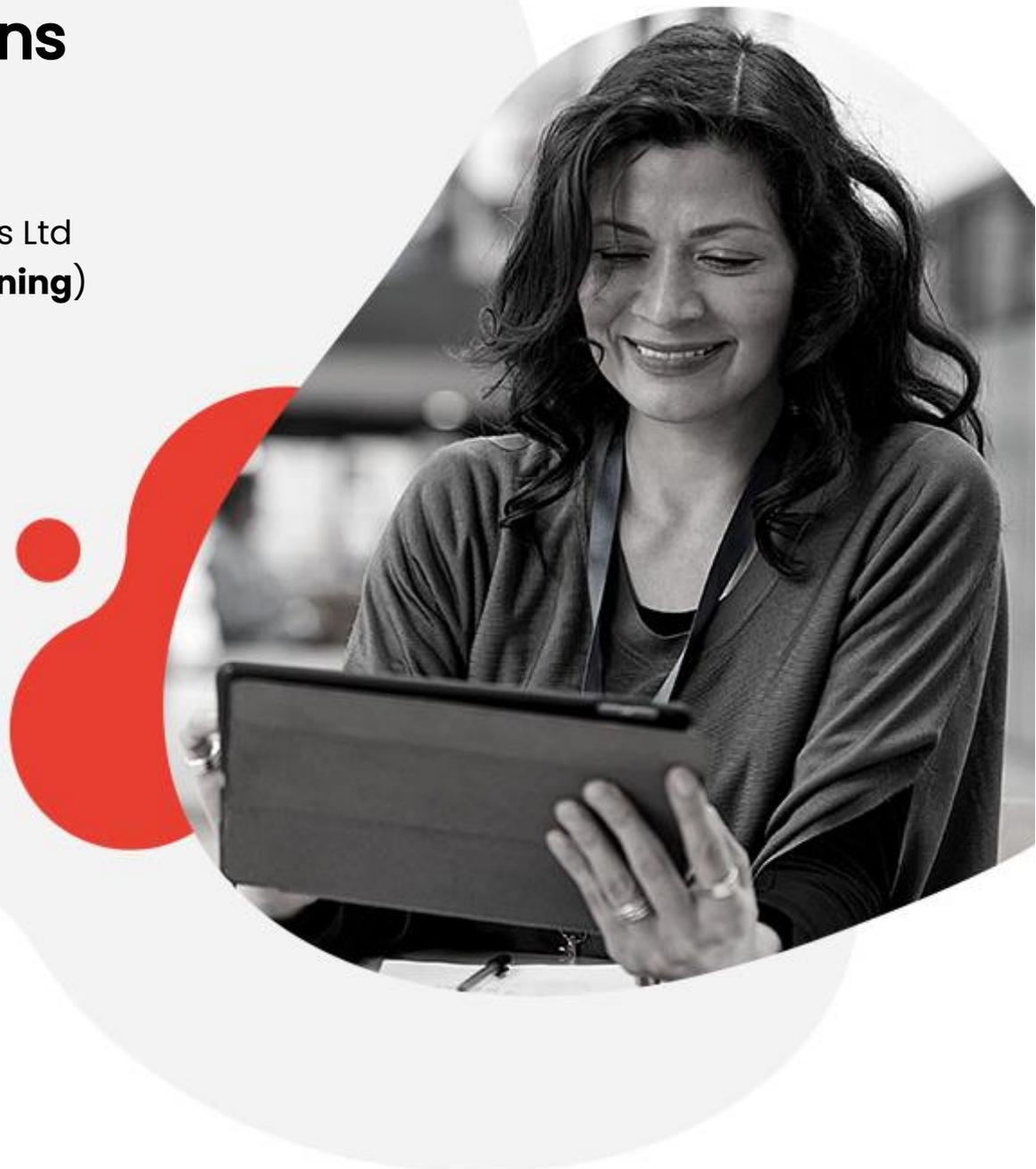


G-Cloud 13 Terms & Conditions



Think Associates Ltd
(T/A **Think Learning**)



AUTHOR THINK LEARNING

Date 16 May 2022

Version 1.1

Contents.

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1 AGREEMENT

- 1.1 These Supplier Terms and Conditions ("Supplier Terms") are entered into by and between Think Associates Ltd ("Supplier"), with offices at Mocatta House, Trafalgar Place, Brighton, BN1 4DU, and the entity agreeing to these terms ("Customer"). These Terms and Conditions are effective as of the commencement date of the Service Agreement (the "Effective Date").

2 DEFINITIONS

In these Supplier Terms:

- 2.1 "Business Day" means any day being not a Saturday, Sunday, or statutory public holiday in England.
- 2.2 "Business Hours" means 0900 to 1700 on any Business Day
- 2.3 "Maintenance Release" means an update to an existing version of the application containing error corrections or minor functionality enhancements. A Maintenance Release is designated as a numbered service pack for the current version, with no change in the version number.
- 2.4 "New Version Release" means a new version of the application containing new features or enhancements to functionality. A New Version Release is designated by an increase in the major version number (e.g. from 1.5 to 1.6 or 2.0).
- 2.5 "Open Source License" means any software license identified as a free software license by the Free Software Foundation, and "Open Source" shall have a corresponding meaning.
- 2.6 "Services" means the services to be supplied by Supplier to the Customer pursuant to these Supplier Terms, as defined in the relevant Service Description.

- 2.7 “User” means the Customer’s employees (or elected members subject to the consent of Supplier) authorised to use the Services and subject to the maximum number of permitted users. Access details (including without limitation user name and password) are specific to each User and may not be shared.
- 2.8 Other terms shall have the meaning set out in the G-Cloud Framework.

3 PRECEDENCE

- 3.1 In addition to these Supplier Terms, Customer’s purchase and use of the Service(s) shall also be subject to the G-Cloud Service Description for each Service purchased by Customer.
- 3.2 In the event of any conflict between the Supplier Terms, each Service Description, and the G-Cloud Framework Agreement, the order of precedence will be the following: the G-Cloud Framework Agreement; the applicable Service Description(s); and then these General Terms and Conditions.

4 SERVICES

- 4.1 In consideration of payment of the Charges, the Supplier shall provide, or will procure the provision of, the Services specified in the Service Description to Customer during the Term.
- 4.2 Customer acknowledges that it may need to enter into licence or subscription agreements with Totara Learning Ltd (or successor organisations), and that Supplier can only provide the Services for as long as Customer has such licence or subscription agreements in place.
- 4.3 Customer acknowledges that the Supplier will only provide Totara services for as long as the Supplier has an Alliance agreement in place

with Totara Learning. Should the Alliance agreement be terminated by the Supplier or Totara Learning, the Supplier will provide notice of termination of this G-Cloud 13 agreement.

- 4.4 Customer shall only permit the Users to use the Services and only in accordance with the express terms of these Terms and Conditions. The Customer shall not permit any other persons to use the Services unless the Customer has obtained prior written consent from Supplier.
- 4.5 If a User ceases to be either employed or authorised to use the Services the Customer shall ensure that such User shall immediately cease to use the Services.
- 4.6 Customer shall not (and shall procure that the Users shall not):
- permit any third party to use the Services;
 - use the Services on behalf of or for the benefit of any third party;
 - reverse engineer, decompile, amend, modify, vary, adapt, translate or perform any similar type of operation on the Software for any purpose or permit or allow any third party to use the Services unless it has obtained prior written consent from Supplier.

5 ON-BOARDING

- 5.1 On-boarding tasks and responsibilities will be agreed between Supplier and Customer. Supplier will provide the standard on-boarding services, as defined in the relevant Service Definition.

6 OFF-BOARDING

- 6.1 On instruction to terminate a Service, Supplier and Customer will agree an Off-boarding plan which will be completed before the date of Service Termination.

- 6.2 Supplier will return all Customer data to Customer in a secure manner. Customer is deemed to have accepted the completeness and accuracy of data within 7 business days of Supplier returning date, unless Supplier is notified otherwise in writing.
- 6.3 Supplier will, within 3 business days, act on Customer's instruction to delete all data from Supplier's systems, with the exception of any data that must be stored for statutory requirements.

7 SERVICE MANAGEMENT

- 7.1 Service Levels will be applied according to the relevant Service Description.
- 7.2 Customer acknowledges that the Services may be modified and/or updated by the Supplier and/or its licensors or suppliers, which modification will be provided to Customer at no additional cost and with the objective of providing Customer with equal or enhanced Services.
- 7.3 Where a Charge applies to ongoing services and the ongoing services include applying software updates, the Charge includes the application of Maintenance Releases of software at Suppliers' discretion, but not the application of New Version Releases.
- 7.4 Where alerted by monitoring, or when necessary for security reasons, Supplier may perform mandatory services at the Customer's expense without prior approval by the Customer, such as system hardening, software reconfiguration, installation of New Version Releases, or modification of third party or Customer software, for example to seek to address security vulnerabilities. The Customer will be advised as soon as is reasonably practicable. Such circumstances shall be deemed to be a request by the Customer.
- 7.5 Where Supplier has invoked mandatory services under clause 7.4, the Customer may opt to terminate the ongoing services on one (1) Business

Day's notice. Any time reasonably expended by Supplier in decommissioning the ongoing services will be chargeable to the Customer.

- 7.6 Supplier will use its best efforts to minimise costs to the Customer, including performing the services within Business Hours where that is reasonably practicable and any such delay does not compromise either security or the functionality of Supplier or Supplier's Customers' systems.

8 SERVICE RATES

- 8.1 Where Supplier agrees to provide Services within Business Hours, Supplier's standard half day and daily rates will apply. Unless otherwise specified, requests for Services made during Business Hours will be treated as requests for Services to be performed within Business Hours.
- 8.2 Where Supplier is requested to provide Services outside Business Hours, unless otherwise specified in a Statement of Work or a Service Level Agreement, Supplier standard after-hours rate will apply at two times the standard daily rate.
- 8.3 A minimum charge of two hours applies to all requests, including those for which an estimate or quote is requested.
- 8.4 Each request by the Customer to provide Services provides implied approval to expend four hours of effort. Where Supplier expects work to take more than four hours, Supplier will seek approval from the Customer.

9 INTELLECTUAL PROPERTY

- 9.1 Supplier may incorporate its own, or Open Source or third-party Intellectual Property into a Deliverable.

- 9.2 In keeping with the underlying public benefit principles of Open Source, Intellectual Property created by Supplier for the Customer may be released by Supplier back to the open source software community. This clause applies only where the release does not contain or imply trade secrets or confidential business processes or contain any Customer data.
- 9.3 If the Supplier creates new software code during the execution of the Service, whether or not under instruction from the Customer, then in cases where the code is not licenced as Open Source the Supplier will retain Intellectual Property rights over the code.

10 END USER LICENCE AGREEMENTS

- 10.1 In using these Services, the Customer agrees 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.
- 10.2 The Supplier (Think Associates Ltd) shall bear no liability for non-conformant delivery of services which result from Customer's inability to be bound by these End User Licence Agreement and Product Licence & Subscription Agreements
- 10.3 By using or purchasing Totara services from Think Associates Ltd, the Customer agrees to be bound by the terms and conditions of the following clause (11).
- 10.4 The Supplier is able to extend and customise Customer's Totara code, to best fit organisational requirements. Where Customers contribute to the development of bespoke functionality enhancements, they have influence over the functionality/features created; The Supplier may at its absolute discretion then absorb the cost of hosting/maintaining/upgrading the bespoke code in the codebase (in line with core Totara release versions). The Supplier reserves the right to make these developments available to other clients, at its 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 the Supplier on request at any time during, or immediately after the end of a contract.

- 10.5 If either party terminates an agreement for Services, then the Supplier will provide the Customer with a copy of all user and site data. The Supplier 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 the Supplier is for use by the Supplier's client community only.
- 10.6 Before contracting (and/or upgrading to Totara v13), the Customer must read and agree to the Totara Learning Ltd End user licence agreement as presented in clause 11 of this document and updated from time to time at <https://www.totaralearning.com/en/licence>.

11 TOTARA SUBSCRIPTION AGREEMENT

11.1 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.

11.2 TOTARA ENTITY; DEFINITIONS

11.2.1 Totara Entity. “Totara Learning” shall refer to:

11.2.2 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.

11.2.3 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.

11.2.4 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, BNI 1YR, United Kingdom.

11.2.5 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.

11.3 Definitions. In this Agreement:

11.3.1 Customer Computers means computers owned or controlled by Customer.

11.3.2 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.

- 11.3.3 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.
- 11.3.4 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.
- 11.3.5 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.
- 11.3.6 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.
- 11.3.7 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.
- 11.3.8 Totara EE Proprietary means software which is a part of Totara Enterprise Extensions but which is not Third Party Software.
- 11.3.9 Totara EE TPS means software which is part of Totara Enterprise Extensions which is Third Party Software.
- 11.3.10 Totara Core means the software based on Moodle software as further described in the Documentation.
- 11.3.11 Totara Enterprise Extensions means certain proprietary software modules developed by Totara Learning, as further described in the Documentation.

- 11.3.12 Totara Platform means Totara Learning’s software platform, consisting of (a) Totara Core, and (b) Totara Enterprise Extensions.

11.4 LICENSE AND RESTRICTIONS

- 11.4.1 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.
- 11.4.2 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.

- 11.4.3 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.
- 11.4.4 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.
- 11.4.5 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.

- 11.4.6 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.
- 11.4.7 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.
- 11.4.8 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).

11.5 CUSTOMER RESPONSIBILITIES

- 11.5.1 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.
- 11.5.2 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.

- 11.5.3 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.
- 11.5.4 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.

11.6 PRIVACY AND DATA PROTECTION

- 11.6.1 Scope: This Section applies to the extent the parties Process Personal Data subject to EU Data Protection Law in the context of this Agreement.
- 11.6.2 Definitions:
- 11.6.3 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").
- 11.6.4 "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).

- 11.6.5 Roles of the parties:
- 11.6.6 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.
- 11.6.7 Obligations of the parties:
- 11.6.8 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:
- 11.6.9 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.
- 11.6.10 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.
- 11.6.11 Responding to Data Subjects' requests to exercise their rights to their Personal Data, if and as required under EU Data Protection Law.
- 11.6.12 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.
- 11.6.13 Data protection:

- 11.6.14 Totara Learning will:
- 11.6.15 only process any personal information received from Customer:
- 11.6.16 for the purpose of exercising its rights and carrying out its obligations under this Agreement and no other purpose;
- 11.6.17 in accordance with any instructions issued by Customer from time to time; and
- 11.6.18 otherwise in accordance with relevant privacy laws; and
- 11.6.19 will promptly comply with any request from Customer requiring Totara Learning to amend, transfer or delete the personal information.

11.7 TERM AND TERMINATION

- 11.7.1 Term. Unless terminated earlier in accordance with the terms of this Agreement, this Agreement shall be effecting starting on the Commencement Date and shall continue for so long as Customer has an active Order (the “Term”).
- 11.7.2 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.

11.8 EFFECT OF TERMINATION

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

11.9 WARRANTY; DISCLAIMERS

11.9.1 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.

11.9.2 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.

11.10 CONFIDENTIAL INFORMATION.

11.10.1 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.

11.10.2 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.

11.10.3 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.

11.10.4 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.

11.11 INDEMNITY; LIMITATIONS ON LIABILITY

11.11.1 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:

11.11.2 Customer's misuse of the Totara Platform; and

11.11.3 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.

11.11.4 Limitation of Liability:

11.11.5 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.

11.11.6 Force Majeure.

11.11.7 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.

11.12 DISPUTE RESOLUTION

11.12.1 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.

11.13 NOTICES

11.13.1 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.

11.14 GENERAL

11.14.1 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.

- 11.14.2 Compliance with Laws. Each party shall, in performing its respective obligations hereunder with this Agreement, comply with all applicable laws and regulations.
- 11.14.3 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.
- 11.14.4 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.
- 11.14.5 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.
- 11.14.6 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.

- 11.14.7 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.
- 11.14.8 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:
- 11.14.9 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.
- 11.14.10 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.

- 11.14.11 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.
- 11.14.12 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



Think Learning
+44 (0) 1273 025 078
hello@think-learning.com

Mocatta House, Trafalgar Place, Brighton, BN1 4DU

