

# Totara Subscription Agreement

Between

Catalyst IT Australia Pty Limited

And

Client's Full Name

## 1 Totara Subscription Agreement

- 1.1. PLEASE READ THIS AGREEMENT CAREFULLY BEFORE PURCHASING OR USING TOTARA SERVICES. BY USING OR PURCHASING TOTARA SERVICES, CUSTOMER AGREES TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS AGREEMENT. IF YOU ARE ACTING ON BEHALF OF AN ENTITY, THEN YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO ENTER INTO THIS AGREEMENT ON BEHALF OF THAT ENTITY, AND REFERENCES IN THIS AGREEMENT TO "YOU" REFER TO SUCH ENTITY AND ALL INDIVIDUALS ACCESSING TOTARA SERVICES ON BEHALF OF SUCH ENTITY. IF CUSTOMER DOES NOT ACCEPT THE TERMS OF THIS AGREEMENT, THEN IT MUST NOT PURCHASE OR USE TOTARA SERVICES.
- 1.2. This Subscription Agreement, including all schedules and appendices attached ("**Agreement**") is between the purchaser or user of Totara Services (defined below) that accepts the terms of this Agreement ("**Customer**", "**you**" or "**your**"), and Catalyst IT Australia Pty Limited ("**Catalyst**", "**we**", "**us**" or "**our**"). The commencement date of this Agreement ("**Commencement Date**") is the earlier of the date that the Customer signs or accepts this Agreement and the date that the Customer uses Totara Services.

## 2 Definitions and Interpretation

- 2.1. In this Agreement, unless the context otherwise requires:

**Business Day** means any day other than a Saturday or Sunday or a statutory public holiday in Australia.

**Designated Contacts** means the individuals designated by you during the purchase process and agreed to by us who are authorised to contact our customer support staff.

**Documentation** means the documentation for the Totara Enterprise Edition provided to Customer in conjunction with this Agreement, which may include, but is not limited to:

- manuals, guides and other written material in print or electronic book format;
- videos;
- training slides and material; and
- public or private online documentation in the form of wikis, forums or blogs.

**Error** means a reproducible defect in the Totara Enterprise Edition when operated on a Supported Environment, which causes the Totara Enterprise Edition not to operate substantially in accordance with Documentation and which is timely reported to Catalyst as provided herein.

**Error Correction** means a modification or patch that brings the Totara Enterprise Edition into substantial conformance with Documentation, or a procedure, routine or other information that enables you to avoid the practical adverse effect of an Error.

**Force Majeure Event** means an event or occurrence which is beyond the reasonable control of a party, but does not include strikes, lock-outs or any other form of labour dispute or delay caused by contractual or labour relations between the parties and any of their employees, agents, sub-contractors or suppliers, or inability to perform due to lack of available funds.

**Intellectual Property Rights** means all rights in any jurisdiction in patents, trademarks, trade secrets, copyrights, and other rights of a similar nature, including applications and/or registrations in connection with the foregoing and all other rights with respect thereto anywhere in the world, all rights of priority under international conventions to make such applications and the right to control their prosecution, and all rights under amendments, continuations, divisions and continuations-in-part of such applications; and all rights under corrections, reissues, patents of addition, extensions and renewals of any such grant, registration and/or right.

**Non-Production Instance** means any instance of the Totara Enterprise Edition that is not a Production Instance.

**Maintenance Release** means an update to an existing version of the Totara Enterprise Edition 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.

**New Version Release** means a new version of the Totara Enterprise Edition containing new features or enhancements to functionality. A New Version Release is designated by an increase in the version number. e.g. from 1.5 to 1.6 or 1.0 to 2.0.

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

**Second-level Support** means the support we provide relating to application issues, but does not include support in the form of code changes. If you are a hosted customer, Second-level Support includes support of the hosted environment.

**Subscriber Portal** means online user community located at <http://community.totara.lms.com>, access to which is provided to all Totara subscribers.

**Subscription Fee(s)** means the fees specified in 14.

**Subscription Term** is defined in clause 4.

**Supported Environment** means a hardware, operating system and database platform meeting the minimum system configuration requirements for the proper use and operation of the Totara Enterprise Edition as set out in Documentation.

**Taxes** means any form of taxation, levy, duty, customs fee, charge or impost of whatever nature excluding any taxes based solely on the net income of Catalyst.

**Totara Community Edition** means the then-current unsupported beta version of Totara Learning's learning management software that contains experimental features and modules that have not been tested, and that Totara Learning makes available to the general public for download and use, but for which Catalyst does not provide support, and any other version(s) that Totara Learning offers as a community version, which may include later versions of the Totara Enterprise Edition that are no longer eligible for support.

**Totara Enterprise Edition** means the then-current stable version of the Totara Learning learning management software that Catalyst makes available to Customers in connection with the purchase of support and maintenance plans, and any prior version that is still under support pursuant to Totara Learning's Lifecycle policy, but excluding "end-of-life" versions, and excluding the Totara Community Edition.

**Totara Learning** means Totara Learning Solutions Limited.

**Totara Product** means the Totara Community Edition or the Totara Enterprise Edition.

**Totara Product Core Components** means:

- those core code components of the Totara Enterprise Edition attributable to, and the Intellectual Property Rights of, Totara; and
- excludes any code components attributable to the Moodle product, available from a standard release of Moodle from <http://download.moodle.org/> (or other such successor website), or any other components of the Totara Enterprise Edition contributed or owned by third parties.

**Totara Services** means the services described in clause 4.

**Updates** means any releases (including any preproduction releases) of the Totara Enterprise Edition created or made available by Totara Learning, including bug fixes, improvements, enhancements, translations, localizations, new versions or releases, releases on additional operating environments, and other changes to the Totara Enterprise Edition.

2.2. In this Agreement, unless the context otherwise requires:

- a. time is of the essence, in all respects;
- b. a reference to a "person" includes an individual, firm, company, corporation or unincorporated body of persons, or any state or government or any agency thereof (in each case, whether or not having separate legal personality), and a reference to a "company" includes a person;
  - i. reference to "dollars" and "\$" refers to United States dollars (US\$) exclusive of Taxes unless specifically stated otherwise;
  - ii. the singular includes the plural and vice versa, where the context requires; and
  - iii. in the event of any conflict between the provisions of the main body of this Agreement and any of the Schedules, then the main body of the Agreement will prevail.

### 3 Term

- 3.1. **Initial Subscription Term:** The initial Subscription Term will begin on the Commencement Date and will run for an initial term of one (1) year, which will thereafter automatically renew for additional one (1) year terms unless a party provides the other party with a notice of non-renewal at least ninety (90) days prior to the end of the then current term (collectively, the “**Subscription Term**”).
- 3.2. **Failure to renew:** The failure to renew this Agreement will not affect any rights you may have under the GNU General Public License or other applicable open source software license, but will cease any obligation of Catalyst to provide updates, maintenance, support services or other services provided pursuant to this Agreement.
- 3.3. **Reinstatement of Support:** If you have terminated or elected not to renew this Agreement, you can elect to reinstate support for an existing installation upon written agreement between you and Catalyst and provided that at the time you elect to reinstate support for an existing installation, we still offer such support required by you in respect of the Totara Enterprise Edition and that you pay, prior to us providing such support services required by you:
  - a) the Subscription Fees for the period when you did not receive maintenance; and
  - b) the Subscription Fee for the current Subscription Term.

### 4 Subscription Fees

- 4.1. **Subscription Fees:** On the Commencement Date and annually thereafter on the anniversary of the Commencement Date, you agree to pay to us the Subscription Fees as specified in 14.
- 4.2. **Additional Fees:** Fees for additional services not included under your subscription services plan (“Subscription Plan”) or expenses incurred on your behalf will be invoiced monthly at the end of the month in which such additional services are provided or expenses incurred. The rates for the additional services will be that specified in the applicable Service Level Agreement between Catalyst and You, or (if there is no Service Level Applicable) in accordance with Catalyst's then current rates. Payment will be due on the 20th of the month following the date of the invoice.
- 4.3. **Costs:** If requested by us, you will reimburse us for all costs (including reasonable legal fees) associated with collecting overdue or dishonoured payments by you that are more than 30 days overdue.
- 4.4. **Termination:** If payment of fees is more than 30 days overdue, we shall have the option to terminate this Agreement in accordance with clause 10 upon notice in writing to you.
- 4.5. **Taxes:** Subscription Fees are exclusive of any Taxes. You will pay GST in respect of all fees and charges payable by You under this Agreement.

### 5 Subscription Services

- 5.1. **Services Provided:** The subscription services provided by Catalyst to you include the following support for a single Production Instance of the Totara Enterprise Edition, subject to the terms and conditions of this Agreement:
  - a. clarifying and assisting in the operation of the features and functions of the Totara Enterprise Edition;
  - b. clarifying content included in any of the Documentation;
  - c. assisting in identifying and verifying the causes of suspected Errors;
  - d. providing Error Corrections (in accordance with clauses 5 and 5); and

- e. providing and facilitating in the provision of access to the Subscriber Portal (where you can access new code releases, latest documentation etc.)
- 5.2. **Supported Instances:** Except with the prior written consent of Catalyst, the subscription services set out in clause 4 (and any other services under this Agreement) are provided to you in respect of a single Production Instance of the Totara Enterprise Edition. Where you wish to deploy multiple Production Instances of the Totara Enterprise Edition, you will need to sign a separate Totara Subscription Agreement or a Hosting and Support Agreement (as applicable). For the avoidance of doubt, multiple Non-Production Instances may be deployed in connection with a single Production Instance of the Totara Enterprise Edition.
- 5.3. **Customer as end-user acknowledgement:** You acknowledge and agree that we are providing the subscription services set out in clause 4 (and any other services under this Agreement) to you as an end-user and you will not provide any third party with those services, or the benefit (whether direct or indirect) of those services, and whether by way of resupply, resale, on-premise installation, multi-tenancy, or otherwise, and doing so will constitute a material breach of this Agreement and shall be sufficient grounds for Catalyst to terminate this Agreement in accordance with clause 10.1 and to immediately cease the provision of support services upon termination of this Agreement.
- 5.4. **Self Help Support Resources:** You agree that the users of the Totara Enterprise Edition under your control must first attempt to answer any questions or resolve any issues in relation to the operation of the Totara Enterprise Edition by using the following self-help resources:
- a) the Help function of the Totara Enterprise Edition;
  - b) the knowledge-base website located at <http://help.totarams.com>; and
  - c) the community forums and resources located at <http://community.totarams.com>.
- 5.5. **Contacting Customer Support:** If you are unable to resolve an issue or question in relation to the Totara Enterprise Edition using the self-help resources described in clause 5, or, if applicable, any of the Designated Contacts may contact one of our customer support representatives for Second-level Support to receive support in accordance with your Support Plan. The online support portal is located at <https://wrms.catalyst.net.nz>.
- You acknowledge that:
- i. we will provide support only in the English language and only to the Designated Contacts;
  - ii. any communication between the Designated Contacts and a customer support representative must be in English; and
  - iii. we will not provide support to any person other than the Designated Contacts.
- 5.6. **Notification of Error:** When you report an Error to us you must include a detailed description of the Error in order for us to be able to replicate the Error.
- 5.7. **Error Correction:** We will use commercially reasonable efforts to obtain an Error Correction from Totara Learning for the Errors you notified to us in accordance with clause 5. The Error Correction may:
- a) require that you install the latest Maintenance Release for the supported version of the Totara Enterprise Edition on which you reported the Error;
  - b) require multiple contacts and off-line research;
  - c) when completed, be provided in the form of a Totara Enterprise Edition patch

consisting of sufficient programming and operating instructions to implement the Error Correction, which will be provided to you via email, download or other electronic means.

- 5.8. If we agree to provide Error Corrections ourselves (i.e. instead of obtaining the Error Correction from Totara Learning), we will bill you on a time-and-materials basis in accordance with our then current rates. We are under no obligation whatsoever at any time to agree to undertake such services (unless we agree otherwise in a Service Level Agreement).
- 5.9. **Exclusions from Support Program:** We are not responsible or liable for providing support in connection with causes external to the Totara Enterprise Edition, including:
- a) your failure to incorporate Maintenance Releases or New Version Releases;
  - b) installation of the Totara Enterprise Edition or any New Version Releases by any party other than Catalyst;
  - c) your use of the Totara Enterprise Edition with any software or hardware other than within the Supported Environment;
  - d) modifications, alterations, or additions to the Totara Enterprise Edition by parties other than us (including modifications, alterations, or additions to the Totara Enterprise Edition made by you);
  - e) damage from any source other than us including water, humidity, fire, power surges, computer viruses, and accidents; and
  - f) errors arising out of or related to a database management server or a web server or any other third party component that is used in conjunction with the Totara Enterprise Edition (unless we are hosting the Totara Enterprise Edition at our data centre).
- 5.10. **Services due to excluded clauses:** If we agree in our sole discretion to undertake any maintenance or services required to fix an Error caused by (in our sole opinion) one or more of the causes specified in clause 5.9 these will be billed to you on a time-and-materials basis in accordance with our then current rates. We are under no obligation whatsoever to agree to undertake such services at any time.
- 5.11. **Further exclusions:** Support services provided under this Agreement exclude:
- a) Totara Enterprise Edition installation, configuration or services provided by Catalyst on-site at your location;
  - b) problems or errors in modifications to the Totara Enterprise Edition provided by third parties.

Data protection: Catalyst will:

- a) only process any personal information received from you:
  - i. for the purpose of carrying out its obligations under this Agreement and no other purpose;
  - ii. in accordance with any instructions issued by you from time to time; and
  - iii. otherwise in accordance with relevant privacy laws; and
- b) will promptly comply with any request from you requiring it to amend, transfer or delete the personal information.

## 6 Your Responsibilities

- 6.1. **Supported Environment and Operations:** You are responsible for undertaking the proper supervision, control and management of your use, and the use by your personnel, of the Totara Enterprise Edition including:
- a) providing, maintaining and assuring proper configuration of the Supported Environment;

- b) following industry standard procedures for the security of data, accuracy of input and output, and back-up plans, including restart and recovery in the event of hardware or software error or malfunction; and
  - c) maintaining a procedure external to the Totara Enterprise Edition for reconstruction of lost or altered files, data and programs. This sub-clause will not apply to you if we are hosting the Totara Enterprise Edition at our data centre.
- 6.2. **Assistance in Providing Support:** You must provide reasonable assistance to us in determining and resolving Errors you report. This assistance includes without limitation:
- a) determination activities such as performing network traces, capturing error messages, collecting configuration information and other similar activities to allow us to reproduce the Error; and
  - b) resolution activities such as access to your personnel and/or remote access to the Supported Environment.
- 6.3. **Implementation of Error Corrections:** You are responsible for performing any and all activities necessary to implement Error Corrections that we provide to you, and for responding in a timely manner to requests for information by our customer support staff. Error Corrections may include without limitation, changing, installing or reinstalling new or existing versions of web browser software or new components, or modifying processes.
- 6.4. **Designation of Designated Contacts:** You will designate a number of individuals as Designated Contacts to receive support under this Agreement and you will notify customer support of the Designated Contacts. You may change the Designated Contacts by notifying our customer support staff in writing of any such changes. For continuity purposes, we request that you retain the same Designated Contacts for at least 90 days, unless they are no longer part of your organisation.
- 6.5. **Training:** In order to maximise the benefit of the services we provide and to help speed case resolution, all Designated Contacts are required to complete basic training on the Totara Enterprise Edition using the self-paced courses available on <http://community.totarams.com>. You are responsible for the proper training of the Designated Contacts and all other appropriate personnel in the operation and use of the Totara Enterprise Edition and the Supported Environment.

## 7 New Releases of the Software

- 7.1. **Maintenance Releases Provided with Support:** We will provide to you any Maintenance Releases and New Version Releases that Totara makes generally available to end users during the Subscription Term at no additional charge. Any and all Maintenance Releases and New Version Releases are part of the Totara Enterprise Edition and are subject to the terms and conditions of this Agreement.
- 7.2. **Maintenance Release Installation:**
- a) We may designate a Maintenance Release as mandatory and may require a mandatory Maintenance Release to be applied as a pre-requisite for a problem verification, diagnosis and/or resolution.
  - b) Once a mandatory Maintenance Release is made generally available, it must be applied to the environment within six (6) months of such Maintenance Release having been made available to you or within such shorter time period as may be designated by us. After such period, all subsequent Maintenance Releases will be built on a code-line that assumes the mandatory Maintenance Release has been applied.
- 7.3. **Support of Prior Releases:** We will provide support for the most current Maintenance Releases made in relation to the then-current New Version Release and the last two

New Version Releases immediately preceding the then-current New Version Release.

- 7.4. **Installation of New Releases:** Unless we are hosting the Totara Enterprise Edition at our data centre, our support services exclude the installation or configuration of any Maintenance Releases or New Version Releases.
- 7.5. **Migration of Customisations and/or Modifications:** For customisation and/or modifications:
  - a) We provide support only for the 'out-of-the-box', unmodified Totara Enterprise Edition (including any standard configuration changes);
  - b) All Errors must be reproduced by us on such Totara Enterprise Edition before a patch or other fix will be considered;
  - c) If you have customised and/or modified Totara Enterprise Edition, our support services do not include migrating your customisations and/or modifications to any Maintenance Release or New Version Release, unless otherwise provided under a Statement of Work under which we support such customisations and/or modifications.

## 8 Licence and Intellectual Property Rights

- 8.1. **Open Source Software:** Customer acknowledges that the Totara Enterprise Edition and certain other software and materials are provided to the Customer under the terms of the GNU General Public License and/or another open source software license that may be provided by Catalyst along with such software, and the terms of the applicable license govern the use of such materials. Accordingly, any commitments, limitations, or restrictions with respect to the use and exploitation of such materials provided in this Agreement are solely with respect to and conditions of Customer's right to receive support and other related services under this Agreement, and nothing in this Agreement shall be deemed or interpreted to conflict with, negate, contradict, condition, limit, restrict, or otherwise diminish any rights Customer may have under the applicable license.
- 8.2. **Totara Intellectual Property Rights:** No right or licence, express or implied, is granted to the Customer under this Agreement for the use of any Catalyst or Totara Learning trademark, logo, service mark or other Intellectual Property Rights whether or not derived from the Totara Product including, without limitation, the distribution of any Totara Product Core Components or other Catalyst or Totara Learning Intellectual Property Rights.
- 8.3. **Pre Existing Intellectual Property Rights:** This Agreement does not change the ownership of pre-existing Intellectual Property Rights.

## 9 Warranty and Disclaimers

- 9.1. We will provide the services under this Agreement with the level of due care and diligence that might be expected from a provider of similar product maintenance and support services in respect of open source software.
- 9.2. As the Totara Product contains and constitutes open source software, no representations or warranties are made by Catalyst (or Totara Learning) in respect of the Totara Product, Documentation or any covered works in this Agreement.
- 9.3. **Disclaimers:** TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW ALL OTHER WARRANTIES AND REPRESENTATIONS NOT EXPRESSLY STATED IN THIS AGREEMENT ARE EXCLUDED, INCLUDING, BUT NOT LIMITED TO ANY IMPLIED WARRANTY OF MERCHANTABILITY, NON-INFRINGEMENT AND FITNESS FOR A PARTICULAR PURPOSE. WE DO NOT GUARANTEE THAT THE USE OF THE TOTARA PRODUCT AND THE SERVICES PROVIDED UNDER THIS AGREEMENT

WILL NOT BE INTERRUPTED OR ERROR FREE.

## 10 Termination

- 10.1. **Termination for breach:** A party shall be in default of this Agreement where:
- a) it breaches, or fails to properly or promptly perform, any of its obligations (other than payment obligations) under this Agreement, and fails to remedy that failure within 20 Business Days after receiving written notice (inclusive of the date of receipt) from the other party requiring the failure to be remedied;
  - b) it breaches a material obligation under this Agreement which is incapable of remedy;
  - c) it assigns, transfers or otherwise disposes of any right, interest, obligation or liability in contravention of this Agreement;
  - d) it becomes subject to circumstances which indicate a significant risk that it is or will become unable to pay its debts as they fall due, including but not limited to the appointment of a receiver, administrator, liquidator or similar officer, the entering into an arrangement or scheme with creditors, entry into a voluntary or involuntary bankruptcy proceeding, or like event; or
  - e) any monies due to be paid by the party pursuant to this Agreement are more than 30 days overdue.
- 10.2. **Right to terminate on default:** The non-defaulting party may terminate this Agreement immediately by written notice to the other if the other is in default as specified in clause 9.
- 10.3. **Termination or limitation of services for abuse of support:** At our sole and absolute discretion, we may terminate this Agreement, or limit the availability of product maintenance services and/or other services provided by us to you under this Agreement, immediately upon written notice to you, if, in our reasonable judgment, you are abusing the Totara Product support system provided by us. By way of example, and not by way of limitation, such abuse may include excessive requests for assistance unrelated to errors in the Totara Product or lack of cooperation with the reasonable requests of our personnel for error documentation.
- 10.4. **Force Majeure:** If a Force Majeure Event under clause 13 continues for more than 60 consecutive Business Days, or for an aggregate of 60 Business Days in any six (6) month period, then either party will be entitled to terminate this Agreement by written notice to the other party.

## 11 Effect of Termination

- 11.1. **Effect of Termination by Us:** If we terminate this Agreement because you are in default, we will retain any and all Subscription Fees paid.
- 11.2. **Effect of Termination by You:** If you terminate this Agreement because we are in default, our sole and exclusive obligation will be to promptly refund that portion of the Subscription Fee actually paid by you that is proportional to the percentage of the Subscription Term remaining at the time termination is effective.
- 11.3. **Effect of Termination on use of Totara Product:** The termination of this Agreement will not affect your rights under the GPL to use Totara Product, but will cease any updates, maintenance, support or other services provided under this Agreement.
- 11.4. **Obligations shall cease:** Subject to clauses 9 and 9, upon termination of this Agreement all further obligations of both of us under this Agreement will immediately cease, provided that:
- a) neither party will be prevented from pursuing other remedies available including injunctive relief; and

- b) any rights and remedies of either party in relation to any breach of this Agreement occurring prior to the date of termination, or any rights of either party which have accrued prior to, or which arise out of or in connection with, such termination will not be prejudiced.

## 12 Indemnity and Liability

- 12.1. **Your Indemnity:** You shall indemnify, defend and hold us and our 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 against us arising from or relating to:
  - a) any breach of a representation, warranty, acts or omission made by you; and
  - b) any action or inaction by you or any of your contractors, agents or employees which caused or is alleged to have caused damage to the person or property of a third-party, including without limitation, third-party computer equipment.
- 12.2. **Mitigation:** Each of the parties must take reasonable steps to mitigate any claim for loss or damage it may take against the other under or arising out of this Agreement.
- 12.3. **Cap:** The maximum aggregate liability of Catalyst under this Agreement shall not exceed the fees paid or payable to Catalyst by the Customer under this Agreement for the twelve (12) month period preceding the occurrence of such liability.
- 12.4. **Exclusion of indirect losses:** In no event shall either Party be liable to the other for any indirect, consequential or special losses or damages (exemplary or otherwise) arising out of or in connection with the performance or non-performance of its obligations under this Agreement.
- 12.5. **Exclusions for each party:** In no event will the measure of damages against any party for any breach of this Agreement, negligence or other action or contravention of any statute or law include, or be derived from:
  - a) any breach of this Agreement to the extent that the breach is attributable to the prior default, negligence, misconduct or breach of the other party, its employees, or agents;
  - b) any amounts for any indirect, consequential or punitive damages of any parties, including third parties; or
  - c) a Force Majeure Event.
- 12.6. In no event shall Totara Learning shall be liable to the Customer for any indirect or direct losses or damages arising out of or in connection with this Agreement.

## 13 Force Majeure

- 13.1. **Obligations suspended:** Where either party to this Agreement is unable, wholly or in part, by reason of a Force Majeure Event, to carry out any obligation under this Agreement and:
  - a) that party gives the other party immediate written notice of the nature and expected duration of, and the obligation affected by, the Force Majeure Event; and
  - b) that party uses all reasonable endeavours to:
    - i. mitigate the effects of the Force Majeure Event on that party's obligations under this Agreement; and
    - ii. perform that party's obligations under this Agreement despite the Force Majeure Event, then that obligation is suspended so far as it is affected by the Force Majeure Event during its continuance.

## 14 Dispute Resolution

- 14.1. **Dispute:** If any dispute arises between the parties out of or in connection with this Agreement (Dispute), either party may, by written notice to the other party, summon a meeting of the parties to the Dispute. The party claiming a Dispute shall, in its written notice to the other party, designate as its representative to attend the meeting a person with authority to settle the Dispute. The party who receives such written notice shall give notice to the other party in writing within five (5) Business Days of receipt designating as its representative to attend the meeting a person with similar authority.
- 14.2. **Negotiation:** The persons designated as authorised representatives shall meet promptly as many times as necessary to discuss the matter and to negotiate in good faith to resolve the Dispute.
- 14.3. **Mediation:** If the Dispute is not resolved by the authorised representatives within 20 Business Days of a written notice first being given by one party to the other pursuant to clause 11, the Dispute shall be referred to the mediation of a single mediator. The referral to mediation shall be commenced by a party serving written notice on the other party or parties to the Dispute stating in full the subject matter and details of the Dispute, and requiring the Dispute to be referred to a mediator to be appointed by agreement between the parties. Failing agreement between the parties within five (5) Business Days after, and exclusive of, the date of service of the written notice by one party to the other of the referral of the Dispute to mediation, the mediator shall be appointed at the request of a party by the President for the time being of the Law Society of New South Wales. The guidelines that shall govern the mediation shall be set by the parties. Failing agreement on the guidelines within five (5) Business Days after the appointment of the mediator, a party may request the mediator to set the guidelines that shall govern the mediation. The parties agree to then submit to the mediation and to act in good faith in that mediation in attempting to resolve the Dispute.
- 14.4. Any dispute that cannot be settled by mediation within thirty (30) days of commencement of such mediation shall be referred to arbitration to be conducted in Sydney, Australia, and shall be finally settled in accordance with the Commercial Arbitration Act 2010 (NSW).
- 14.5. Nothing in this clause 4 shall preclude either party from taking immediate steps to seek urgent equitable relief before a court of competent jurisdiction.

## 15 Notices

- 15.1. **Service:** Every notice or other communication given under or in connection with this Agreement will be in writing and addressed to the relevant party and delivered, posted by pre-paid registered mail, sent by electronic mail (commonly known as email) to the address, or email address of that party. The contact details for each Party are as follows:

For: the Customer

Address: [insert physical address]

Email: [insert email address]

For: Catalyst IT Australia

Address: Catalyst IT Australia Pty Limited  
501/89 York St  
Sydney, 2000 NSW

**Email:** legal@catalyst-au.net

Each party may from time to time change their contract details by serving written notice to the other party pursuant to this clause.

- 15.2. **Receipt:** Every notice or other communication sent by prepaid letter will be deemed to have been received when delivered personally or three days after it has been put into the post.
- 15.3. **Electronic communications:** In the case of electronic transmission by email sent by us, a notice or other communication will be deemed to have been received at the time specified in the email transmission which was not returned as undeliverable or as containing any error. In the case of electronic transmission by email sent by you, a notice or other communication will be deemed to be received, upon receipt by Catalyst.

## 16 General

- 16.1. **Assignment:** We may assign our rights or obligations under this Agreement, upon giving notice to you. You may only assign your rights or obligations under this Agreement, with our prior written consent (which may be given in our absolute discretion). Any change in control or of more than 50% shareholding in you (if you are a company) shall be deemed an assignment.
- 16.2. **Compliance with laws:** Each of us will, in performing our respective obligations under and in connection with this Agreement, comply with all relevant statutes and other laws.
- 16.3. **Entire Agreement:** Subject to any amendment in accordance with clause 12, this Agreement constitutes the entire agreement, understanding and arrangement (express and implied) between both of us relating to the subject matter of this Agreement and supersedes and cancels any previous agreement, understanding and arrangement relating thereto, whether written or oral. 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.
- 16.4. **Variations:** We may amend this Agreement at any time by giving you 30 days notice in writing of any proposed change. If you do not accept the proposed amendments, you may terminate this Agreement by notice in writing at any time within the 30 days prior to the change coming into effect. If we do not receive notice of termination from you prior to the change coming into effect, you will be deemed to have accepted the amended Agreement.
- 16.5. **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.
- 16.6. **Non-solicitation:** You agree that you will not during the term of this Agreement or for a period of two (2) years from the termination or expiry of this Agreement, whether for yourself or for any other person, solicit, approach or entice or endeavour to entice away any employees, agents, contractors, consultants or any other staff member of Catalyst or any of Catalyst's related entities.

- 16.7. **No waiver by action:** 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.
- 16.8. **Waiver to be in writing:** 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.
- 16.9. **Governing Law and Jurisdiction:** This Agreement shall be governed by the laws of Australia, and the courts of Australia shall have exclusive jurisdiction to hear and determine all issues that may arise under or in relation to this Agreement.

## 17 Execution

For and on behalf of Catalyst IT  
Australia Pty Ltd by an authorised  
representative in accordance with its  
constitution and s127 Corporations  
Act:

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Director Signature

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Director Signature

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Director Name

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Director Name

---

Date

---

Date

For and on behalf of [ insert Client  
name] Pty Ltd by an authorised  
representative in accordance with its  
constitution and s127 Corporations  
Act:

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Director Signature

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Director Signature

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Director Name

---

Director Name

---

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Date

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Date

## Schedule A Support Plan and Subscription Fees

During each Subscription Term, the following support services will be provided to you, subject to the terms and conditions of this Agreement:

- clarifying and assisting in the operation of the features and functions of the Totara Enterprise Edition;
- clarifying content included in any Documentation;
- assisting in identifying and verifying the causes of suspected Errors;
- providing Error Corrections (in accordance with clauses 5 and 5);
- providing and facilitating the provision of access to the Subscriber Portal; and
- new releases of the Software.

Plan	Enterprise 500	Enterprise 3K	Enterprise 5K	Enterprise 10K	Enterprise 20K	Enterprise 50K	Enterprise 250K
Number of active users	< 500	< 3,000	<5,000	<10,000	<20,000	< 50,000	< 250,000
Issue reporting	Support portal	Support portal	Support portal	Support portal	Support portal	Support portal	Support portal
Annual Subscription Fee (All	\$2,950	\$4,950	\$7,450	\$9,950	\$14,950	\$19,950	\$29,950

prices in \$USD)							
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**Note:** “Active users” in the table above refers to those users who are registered and have logged into the Totara Learning Management System (the **System**) during the Subscription Term, and do not include those users who have previously registered and/or hold training records but have not logged into the System during the Subscription Term or users who have never logged in.