

## Dell APEX Terms for Channel End Customers – New Zealand

Last Updated: May 11, 2023

These Dell APEX Terms for Channel End Customers (the “**Agreement**”) establishes the terms and conditions under which Dell (defined below) will provide the Dell Technologies “**APEX**” branded service (“**APEX Service**”) and any other related Dell Technologies service(s) purchased with the APEX Service (“**Related Service**”) to a Channel Partner and governs End Customer’s access and use of the APEX Service and Related Service.

An “**End Customer**” or “**You**” is a purchaser of APEX Service and Related Service from a Channel Partner for its own internal business purposes as further described in Clause 2 (The APEX Service). A “**Channel Partner**” refers to: a Dell Solution Provider or Dell Distributor partner that has enrolled in the Dell Technologies Partner Program and purchased the APEX Service and any Related Service from Dell under a separate agreement (“**Partner Agreement**”) or from an authorized Dell Distributor for resale to End Customer. References to a “Channel Partner” in this Agreement shall mean, as applicable: a Dell Solution Provider, the Dell Distributor from whom the Dell Solution Provider purchased the APEX Services and any Related Service, or both. “**Dell**” is the Dell Technologies entity which invoices Channel Partner for the APEX Service.

Pursuant to the Partner Agreement between Channel Partner and Dell, Channel Partner will cause this Agreement to be included in the terms and conditions between You and Your Channel Partner for the APEX Service and any Related Service (“**Customer Agreement**”). You and Channel Partner agree that Dell is a third-party beneficiary of this Agreement and shall have the right, exercisable in its discretion, to enforce the terms and conditions of this Agreement. You authorize Channel Partner to disclose the contents of the Customer Agreement to Dell and its Affiliates and funding partners. Any rights provided by Channel Partner to You that are greater than the rights in this Agreement shall not obligate or apply to Dell and shall be the sole responsibility of Channel Partner.

### 1. Definitions.

“**Affiliate**” means (a) with respect to You, any other entity that directly or indirectly controls, is owned by, controlled by or under common ownership or control with You; and (b) with respect to Dell means Dell Inc. and its wholly-owned or wholly-controlled subsidiaries. “Control” means more than 50% of the voting power or ownership interests.

“**APEX System**” means the Dell-branded IT hardware (“**Equipment**”) and/or software (including microcode, firmware, operating systems or applications) (“**Software**”) which are used to operate the APEX Service. References to the APEX Service include the APEX System.

“**Colocation Site**” means, where applicable, a third party Site.

“**Customer Content**” means data (including but not limited to all text, sound, video, and image files), software (including machine images), and other information You or Your End Users store, use or make available to Dell on the APEX Service. Customer Content does not include System Data relating to Your use of the APEX Service and which is described in the Service Offering Description.

“**End Users**” means Your customers or other third parties to whom You may provide a service using the APEX Service.

“**Order**” means Channel Partner’s order to Dell for the APEX Service and any Related Services that is confirmed by Dell.

“**Service Level Agreement**” or “**Service Level Objective**” means the then-current version of Dell’s performance commitments for the APEX Service. If applicable, these will be provided in the Service Offering Description.

“**Service Offering Description**” means the then-current version of the Dell document that describes the APEX Service ordered by Channel Partner for Your use.

“**Site**” means the location where the APEX System is installed. The Site will be either Your premises or a Colocation Site. You will provide Channel Partner and/or Dell with the required Site information.

“**Subscription Term**” means the period of each APEX Service in the Order, and any extensions. The initial Subscription Term begins as specified in the Order and/or the Service Offering Description.

**“Third-Party Claim”** means any third-party allegation, claim, action, demand, or lawsuit arising from or relating to: (a) Customer Content or Third-Party Products; (b) Your, or Your End Users’, use of any APEX Service and any Related Services in violation of the Agreement; (c) combination of the APEX Service with non-Dell products, non-Dell content including any Customer Content and/or any Third-Party Products; or (d) Your, or Your End Users’, infringement or misappropriation of Dell’s, Dell Affiliates’ or third parties’ intellectual property rights.

**“Third-Party Products”** means hardware, software, products, or services that are not Dell-branded. Third-Party Products are not embedded components of the APEX Service.

## **2. The APEX Service.**

**2.1 Scope.** The Agreement applies to the APEX Service and any Related Services Channel Partner ordered for resale to You and governs Your rights, responsibilities and restrictions associated with Your purchase and use of, and access to, the APEX Service and any Related Service.

### **2.2 Site Options and Requirements.**

**A. Dell Colocation Site.** If You ordered a Dell offered Colocation Site option (where available), then (a) Dell will be responsible for arranging hosting of the APEX System in an appropriate data center environment; and (b) the following clauses of the Agreement will not apply: Clause 4.2 (Shipment), Clause 4.3 (Title to APEX System), Clause 4.4 (Risk of Loss; Insurance), Clauses 6.2.A(b) (Generally) and 6.2.B (Additional Recovery Rights), Clause 7.2 (Site Access), and Clause 7.5 (Replaced Parts).

**B. Non-Dell Colocation Site.** If You locate the APEX System at a non-Dell provided Colocation Site, then You will be responsible for ensuring that Dell has the required level of access required in Clause 7.2 (Site Access) to the non-Dell provided Colocation Site. You agree to hold Dell harmless from and against any and all disputes, claims or controversies (whether in contract, tort (including negligence) or otherwise) resulting from Your locating the APEX System at a non-Dell provided Colocation Site.

**C. Landlord Waiver.** If requested by Dell or Channel Partner, You will arrange for Your Colocation Site landlord to sign a landlord waiver agreement confirming Dell’s ownership of the APEX System and Dell’s right to access the APEX System in connection with the APEX Service and this Agreement.

**2.3 Service Offering Description.** The scope and details of the APEX Service, including the Dell-offered Colocation Site option, are provided in the Service Offering Description. Unless otherwise defined in the Service Offering Description, the references in the Service Offering Description to “Customer” or “you” shall be understood as a reference to the End Customer that is entitled to receive the APEX Service, except that for pricing, billing, refund, ordering (including without limitation, expansion, extensions, and add-ons), cancellation, and similar financial terms, the references to “Customer” or “you” shall mean the Channel Partner.

**2.4 Use and Ownership of the APEX Service and Related Services.** You may access and use the APEX Service only: (a) during the Subscription Term; (b) for Your internal business purposes (which may include providing services to Your End Users if permitted in the Service Offering Description); and (c) in accordance with the Agreement. If the APEX Service includes Software that is licensed by Dell, then You will only use the Software: (i) in connection with Your use of the APEX Service and as provided in the Agreement; (ii) for the Subscription Term; and (iii) in accordance with Dell’s [End User License Agreement](#) (“EULA”). You must not: (1) resell or rent the use of the APEX Service; or (2) use the APEX Service in support of an offering, or for a purpose, which is intended to compete with Dell’s APEX Service business. If Dell believes a problem with the APEX Service is caused by, or results from, Customer Content, or Your use of the APEX Service, then You agree to cooperate with Dell in order to identify and resolve the problem. You agree that Dell owns all rights, titles, and interests in and to the APEX Service and any Related Services and all improvements, enhancements, modifications, and derivative works, and all intellectual property rights in all of these. Your rights to use the APEX Service are limited to those specifically stated in writing in the Agreement. You agree that You do not have any other implied rights in, or to, the APEX Service or any Related Services. Dell reserves all rights not granted to You in the Agreement.

**2.5 Cloud Service Provider Partners.** Notwithstanding Clause 2.4 (Use and Ownership of the APEX Service and Related Services), or the EULA, if You are a Cloud Service Provider partner in good standing in the Dell Technologies Partner Program, then You shall be entitled to use the APEX Service and any Related Services, including any Software licensed by Dell, to provide services to Your End Users during the Subscription Term unless otherwise provided in the



Service Offering Description. This license right is a nonexclusive and nontransferable right to use Software solely in order to utilize, process and manipulate the information, data and records of the End User stored on, controlled by or accessed through the APEX Service and/or any Related Services.

### **3. Modifications.**

3.1 **Generally.** Dell may modify the APEX Service from time to time. Modifications may include optional new features for the APEX Service, which You may use subject to the then-current Service Offering Description or changes to components of the APEX System. Dell will inform Channel Partner of material modifications either by email, through the APEX Console, through a Dell sales representative, or directly through the APEX Service, and the Channel Partner will inform You. Your continued use of the APEX Service after the date of any modification will be considered as Your and Channel Partner's acceptance of the modified APEX Service and any associated changes to the Service Offering Description.

### **4. Payment, Shipment, Title to APEX System, and Insurance.**

4.1 **Payment of Fees.** You must pay Channel Partner for all APEX Service and Related Services fees You incur, and this obligation is absolute, unconditional and non-cancellable and shall not be subject to any abatement, reduction, set off, defense, delay or counterclaim for any reason whatsoever. Your uncured failure to pay Channel Partner of amounts owed when due constitutes a material breach of this Agreement, and You authorize Channel Partner to inform Dell of such event.

4.2 **Shipment.** Dell will ship the APEX System to the Site when included as part of the APEX Service. The terms and process for shipment and delivery of the APEX System will be stated in the applicable Service Offering Description.

4.3 **Title to APEX System.** Dell owns all rights, title, and interest in the APEX System (including any replaced parts), and the APEX System must be returned to Dell at the end of the Subscription Term (or promptly upon replacement with respect to replaced Equipment or parts). The APEX System will be identified as Dell's and You will not remove, cover, or alter plates, labels or any other markings placed upon the APEX System by Dell. The APEX System is NOT subject to any of the liens and security interests of Your lender(s). Further, You cannot use the APEX System as collateral for a loan or as security against any debt. You will immediately notify Dell in writing if Your lenders or creditors or other third parties claim any rights to, or seek to take possession of, the APEX System.

4.4 **Risk of Loss; Insurance.** You are responsible for all damage to the APEX System while at Your Site. You will insure (or cause to be insured) the APEX System with a reputable insurance company against all: (a) liability whatsoever to any third party arising from Your use of the APEX System; and (b) loss or damage to the APEX System from all insurable risks for its full replacement cost; and (c) other risks that a prudent person would reasonably insure. In regard to (a) and (b), Dell will be named as both additional insured and loss payee respectively. When requested, You will provide Dell with evidence that the required insurance is in effect. You must immediately notify Dell of any loss claim and You agree not to settle any insurance claims without Dell's prior written agreement.

4.5 **Financial Statements.** You agree to provide Your financial statements (prepared in accordance with generally accepted accounting principles) and other financial information relating to an Order or the Agreement ("**Customer Financial Information**") within five business days as Channel Partner or Dell may reasonably request from time to time; the provision of Customer Financial Information being subject to the applicable confidentiality terms as provided for in the Agreement, and You consent to providing the Customer Financial Information to Channel Partner and Dell. Any determination by Channel Partner or Dell, at any time, that any information provided pursuant to this paragraph is wrong, misleading, or not authentic, shall constitute a material breach of this Agreement.

### **5. Suspension.**

5.1 **Generally.** Dell may suspend all APEX Services and any Related Services subject of a current Order if: (a) You are in material breach of the Agreement and have not cured that breach within 10 days from Dell's notice; (b) You failed to pay Channel Partner's invoice(s) for APEX Services or any Related Services when due; (c) Channel Partner is in material breach of the Partner Agreement (including failure to pay Dell invoices when due) and has not cured that breach within 10 days from Dell's notice; or (d) with immediate effect if You or Channel Partner breaches Dell's [Acceptable Use Policy](#), including all Dell updates to the Acceptable Use Policy during the Subscription Term ("**AUP**"). Dell will give Channel Partner notice before suspending the APEX Service(s) and any Related Services if permitted by law or unless Dell reasonably believes that providing notice presents a risk of harm to the APEX Service(s), to other users of the APEX Service(s), or to any person or property, in which case, Dell will provide notice as soon as feasible or permitted. Dell will promptly reinstate



the APEX Service(s) and any Related Services once Dell agrees that the issue(s) causing the suspension has been resolved.

**5.2 Effect of Suspension.** You and Channel Partner will continue to pay all applicable fees incurred before and during any suspension. There will not be entitlement to any service credits under an applicable Service Level Agreement or Service Level Objective during any suspension.

**5.3 Termination for Suspension.** If Dell has the right to suspend the APEX Service(s) and any Related Services under Clause 5.1(d) (Suspension - Generally), then Dell also has the right to terminate the APEX Service(s) and any Related Services: (a) immediately upon written notice to You or Channel Partner in the event of a breach of the AUP; or (b) as provided under Clause 6.1(c) (Termination) provided that the 30 day cure period is considered to start from the date of Dell's first notice under Clause 5.1(a) (Suspension - Generally).

## **6. Termination.**

**6.1 Termination.** Dell may terminate the Agreement (including any Order) for cause, if: (a) You or Channel Partner becomes insolvent, admits in writing its inability to pay its debts as they mature, or makes an assignment for the benefit of creditors; (b) Your or Channel Partner becomes subject to control of a trustee, receiver, or similar authority, or to any bankruptcy or insolvency proceeding; or (c) You commit a material breach of the Agreement and have failed to cure the breach within 30 days from Dell's or Channel Partner's written notice to You.

### **6.2 Effects of Termination.**

**A. Generally.** When the APEX Service and any Related Services expire, terminate, or are rejected for any reason, You must: (a) stop using the APEX Service and any Related Services; (b) return the APEX System in compliance with the Service Offering Description, or if the Service Offering Description requires Dell to recover the APEX System, then You will provide Dell with prompt access to Your Site to recover the APEX System; and (c) return or, if requested by Dell, destroy, any of Dell's Confidential Information in Your possession or under Your control (other than information that applicable law requires You to retain). The Service Offering Description will state when Dell will delete any Customer Content. You are responsible for making sure that You have copies of all Customer Content You require prior to the date of any termination.

**B. Additional Recovery Rights.** You agree that upon expiration or termination for any reason: (a) Dell may seek a court order to enforce Dell's right to recover the APEX System from Your Site; and (b) Dell is entitled to recover from You the reasonable attorney fees resulting from this enforcement action.

**C. Recourse.** Channel Partner and You agree that Dell shall have no liability to You with respect to any suspension or termination of the APEX Service and/or any Related Services permitted under this Agreement. Your sole recourse with respect to any such suspension or termination (including refund of any pre-paid fees for the suspended or terminated APEX Service and/or any Related Service) shall be against Channel Partner.

**D. Survival.** The provisions relating to confidentiality, liability, and the ADPA (as defined in Clause 11.2 (Data Processing)) so long as Dell continues to process Your "**Personal Data**" (as defined in the ADPA), all rights of action accruing prior to termination, along with any other provision of the Agreement that, expressly, or by its nature and context, is intended to survive, will survive termination.

## **7. Support Services.**

**7.1 Generally.** The APEX Service includes the support and maintenance services described in the Service Offering Description ("**Support Services**").

**7.2 Site Access.** Dell requires the right to access the APEX System in a timely way and as provided in the Service Offering Description to provide the Support Services or Related Services. Failure to provide Dell with timely access to a Site will relieve Dell of the Support Services or Related Services obligations and Dell may also, at Dell's discretion, suspend the APEX Service.

**7.3 Changes.** You may not relocate the APEX System without Dell's prior written approval. If the applicable Service Offering Description allows You to perform the following actions, then You must notify both Dell and Channel Partner before doing so: (a) make changes to the APEX System configuration; or (b) deactivate the remote support features of any components of the APEX System. Dell will review all requests and may approve or deny them in Dell's sole discretion.



Additional fees may apply.

**7.4 Access to Customer Content.** When providing Support Services, Dell will not access or use any Customer Content stored on the APEX System unless You have authorized Dell to do so.

**7.5 Replaced Parts.** You are responsible for removing all Customer Content stored on replaced parts of the APEX System, before their return to Dell and You agree that Dell has no liability for any Customer Content that You did not remove.

## **8. Warranty.**

**8.1 APEX Service Limited Warranty.** Channel Partner warrants that the APEX Service will be provided in material conformance with the Service Offering Description. If the APEX Service does not comply with this warranty, Channel Partner's and Dell's entire liability and Your exclusive remedies are as follows: (a) Dell will make reasonable efforts to correct the non-conformance as provided in any applicable Service Level Agreement or Service Level Objective, or if none is provided, within a reasonable period of time; and (b) if Dell is unable to correct the non-conformance for reasons for which Dell is responsible, then Dell may terminate the APEX Service and refund any fees Channel Partner pre-paid to Dell for the APEX Service that will not be provided as a result of the termination. Refund of any fees you pre-paid to Channel Partner will be as mutually agreed between You and Channel Partner. You must promptly notify Channel Partner and Dell in writing of any non-conformance claims covered by this warranty.

**8.2 Related Services Warranty.** Channel Partner warrants that the Related Services will be performed in a workmanlike manner in accordance with generally accepted industry standards. You must notify Channel Partner of Dell's failure to so perform within 10 days after the date on which such failure first occurs. In such case, Dell will use reasonable efforts to correct such failure within a reasonable period of time. If, after reasonable efforts, Dell is not able to correct such deficiencies for reasons for which Dell is responsible, then Channel Partner's and Dell's entire liability and Your exclusive remedy is that You may cause Channel Partner to terminate the part of the Order related to the Related Services for cause by having Channel Partner provide written notice to Dell of the termination.

**8.3 Limitations.** The warranties set forth in this Clause 8 (Warranty) does not apply to any Trial Service or APEX Service provided free of charge and does not cover problems caused by: (a) accident or neglect by You or any third party; (b) any Third-Party Products, or other third party items or services with which the APEX Service is used; (c) operation or use not in accordance with Dell's instructions and the applicable documentation; (d) use in a manner or for a purpose for which the APEX Service was not designed; (e) modification, alteration or repair by anyone other than Dell; or (f) other causes beyond Dell's control. Except where the APEX System is installed at a Dell provided Colocation Site, Channel Partner and Dell have no obligation for any non-compliance caused by elements of the APEX System whose original identification marks have been altered or removed or if the APEX System is installed in an environment for which it was not designed. The APEX Service is not fault-tolerant and is not designed for, and must not be used in, hazardous environments requiring fail-safe performance, including any application where the failure of the APEX Service could lead to death, bodily injury, or physical or property damage (collectively, "**High-Risk Activities**"). Dell and Channel Partner expressly disclaim any express or implied warranty of fitness for High-Risk Activities.

**8.4 Warranty Disclaimer. Other than the warranties set forth in this Clause 8 (Warranty), and to the maximum extent permitted by applicable law, Channel Partner and Dell: (a) make no other express warranties; (b) disclaim all implied warranties, including merchantability, fitness for a particular purpose, title and non-infringement; and (c) disclaims any warranty arising by statute, operation of law, course of dealing or performance or usage of trade. Dell does not warrant that the use of APEX Service or performance of the Related Services will be uninterrupted or error-free. Dell and Channel Partner are not liable for delays, interruptions, service failures, or other problems inherent in use of the internet and electronic communications or for issues related to non-Dell provided Colocation Sites. You agree that You are not relying on delivery of future functionality, public comments or advertising by Dell or Channel Partner, or product roadmaps when ordering the APEX Service from Channel Partner.**

**9. APEX Trial Services.** Through Channel Partner, Dell may provide You with the ability to evaluate free of charge certain APEX Services or a feature of the APEX Service ("**Trial Service**"). Each Trial Service commences on the date Dell first provides You or Channel Partner with access to the Trial Service and the duration of the Trial Service is stated at the time of the order from Channel Partner to Dell ("**Trial Term**"). For the purpose of Your use of Trial Services, You agree that:

(a) Use of a Trial Service is subject to the applicable Service Offering Description;

- (b) You must not disclose to any third party the results of any comparisons that You make between the Trial Service and any competitive offerings; and
- (c) Except as provided in this Clause 9 (APEX Trial Services) or otherwise stated in the Agreement, Trial Services are “APEX Services” for the purpose of other Clauses of the Agreement.

**10. Third-Party Offerings.** Dell may offer Third-Party Products for use with the APEX Service through an online marketplace, or using Dell’s then-current Third-Party Product resale programs (e.g. “Extended Technologies Complete”, “Software & Peripherals (S&P)”). Third-Party Products You order from Channel Partner through these resale programs are referred to as “**Third-Party Offerings**”. You may use Third-Party Offerings, at Your option, if available. If You choose to use Third-Party Offerings, You are responsible for complying with any terms applicable to the Third-Party Offerings, including any separate fees imposed by the provider of that Third-Party Offering (whether payable to Dell or directly to the third-party provider). You agree to comply with the standard license, services, warranty, indemnity, and support terms of the third-party manufacturer/supplier (or an applicable direct agreement between You and the third-party manufacturer/supplier) for the Third-Party Offering. Even if Dell invoices for them, Dell does not provide support services for Third-Party Offerings. You or Channel Partner must contact the applicable third-party directly for support. **Third-Party Offerings are provided “AS IS”. Any warranty, damages or indemnity claims against Dell for Third-Party Offerings are expressly excluded.** Dell may suspend or terminate provision and hosting of any Third-Party Offerings at any time, and that suspension or termination will not be deemed a material change to the APEX Service for the purpose of Clause 3 (Modifications).

**11. Data Protection.**

**11.1 Security Measures.** Without limiting Dell’s obligations under this Data Protection Clause, Dell will provide the APEX Service or any Related Service as applicable in compliance with reasonable and appropriate security measures stated in the [APEX Information Security Measures Addendum](#), including all updates during the Subscription Term (“**AIMSA**”). The AIMSA and the applicable Service Offering Description define the administrative, physical, technical and other safeguards applied to Customer Content residing in the APEX Service. You are responsible for applying appropriate security measures to Customer Content including: (a) controlling access You provide to Your personnel and/or End Users; (b) configuring the APEX Service appropriately; (c) ensuring the security of Customer Content (e.g., through encryption) while it is in transit and at rest; and (d) backing up Customer Content consistent with the requirements of Clause 14.2 (Prevention and Mitigation). You acknowledge that You are solely responsible for ensuring that You have implemented appropriate security measures for Customer Content and Your intended use of the APEX Service. You acknowledge that uploading Customer Content to the APEX Service does not constitute a disclosure by You of Your Confidential Information to Dell.

**11.2 Data Processing.** Where Dell’s provision of the APEX Service or any Related Service to You involves the processing of Personal Data (any information relating to an identified or identifiable natural person which is Processed by Dell in the performance of the APEX Service or any Related Service) which is subject to any data protection and privacy laws to which You or Dell is subject and which are applicable to the APEX Service or any Related Service (including where applicable, the EU General Data Protection Regulation (“GDPR”), UK GDPR, the California Consumer Privacy Act and other similar laws) and Dell acts as Processor (an entity which processes the Personal Data on behalf of the Controller) on behalf of You as Controller (an entity which, alone or jointly with others, determines the purposes and means of the processing of the Personal Data), the Dell APEX Data Processing Addendum, including all updates during the Subscription Terms (“**ADPA**”) shall apply as between Dell, as Processor, and You, as Controller. Dell will act as an authorized data processor in respect of the data processing activities related to the APEX Service or any Related Service as applicable. You are responsible for providing any necessary legal notices to Your personnel and/or End Users and obtaining any legally required consents related to Your use, collection, disclosure, sharing, cross border data transfer, and processing of Personal Data.

**11.3 Required Disclosures.** If Dell is required by a government body or court of law to disclose any Customer Content, Dell will provide You with notice and a copy of the demand as soon as practicable, unless prohibited by applicable law. Dell will take reasonable steps at Your expense to contest any required disclosure if requested by You.

**12. Confidentiality.**

**12.1 Scope.** Information disclosed by You or Dell to the other in connection with the Agreement will be treated as “**Confidential Information**” if it is marked or identified as “confidential” or similar designation, or should reasonably be known by the receiver to be confidential. Confidential Information does not include information that is: (a) rightfully in the receiver’s possession without prior obligation of confidentiality from the discloser; (b) a matter of public knowledge; (c)

rightfully furnished to the receiver by a third party without confidentiality restriction; or (d) independently developed by the receiver (including its Affiliates) without reference to the discloser's Confidential Information.

**12.2 Protection.** The receiver will: (a) use Confidential Information of the discloser only for the purposes contemplated in the Agreement; and (b) protect Confidential Information from unauthorized disclosure to third parties for the following time periods: (i) indefinitely with respect to technical information about a discloser's products and services (including the APEX Service) or any information about unreleased products or services; and (ii) 3 years from the date of receipt for all other Confidential Information. The obligations under this Clause will survive any termination of the Agreement.

**12.3 Exceptions.** Either You or Dell may disclose Confidential Information: (a) to an Affiliate or to a subcontractor or supplier used by Dell to provide the APEX Service or the Related Service provided that they comply with the foregoing; and (b) if required by a government body or court of law, provided that the receiver gives the discloser reasonable notice, if permitted by law, so that the discloser may contest the disclosure or seek a protective order.

**12.4 Feedback.** Any feedback, enhancement requests, corrections, or suggestions that You provide to Dell or Channel Partner in connection with a Trial Service, the APEX Service, or a Related Service ("**Feedback**") is Dell's Confidential Information. You agree that Dell may use the Feedback without any restriction from You or compensation to You, and You assign to Dell all rights in, and to, Feedback.

**13. Monitoring.** Dell monitors the APEX Service and collects telemetry data relating to Your use of the APEX Service as further provided in the Service Offering Description.

## **14. Limitation of Liability.**

**14.1 Limitation on Damages.** Your, Channel Partner's and Dell's (including Dell's suppliers and Affiliates) for all disputes arising under the Agreement is limited to the greater of: (a) \$50,000 (or the equivalent in local currency); or (b) the amount You paid to Channel Partner for the APEX Service and any Related Services during the 12 months immediately before the events giving rise to any dispute. This limitation applies even if any limited remedy in the Agreement is found to have failed in its essential purpose. In addition, neither You, Channel Partner, nor Dell (including Dell's suppliers and Affiliates) shall be liable to the other for any special, consequential, exemplary, punitive, incidental, or indirect damages, or for lost profits, loss of revenue, loss or corruption of data, loss of use, or procurement of substitute products or services, even if the party alleged to be liable has knowledge of the possibility of such damages. The foregoing limitations and exclusions do not apply to: (i) Your obligation to pay for the APEX Service and any Related Services, (ii) Your obligation to pay for damage to or loss of the APEX System, (iii) Your violation of the restrictions on use of the APEX Service, (iv) Your or Channel Partner's violation or misappropriation of the other party's (including Dell's) intellectual property rights, or (v) where prohibited by applicable law. Channel Partner (and Dell, Dell's suppliers and Dell's Affiliates) has no liability for any damages resulting from Your use or attempted use of Third-Party Products, or Free Software or Development Tools (both as defined in the EULA).

**14.2 Prevention and Mitigation.** You are solely responsible for Customer Content. You will implement IT architecture and processes enabling You to prevent and mitigate damages in line with the criticality of the Customer Content for Your business and its data protection requirements, including a business recovery plan. You will: (a) provide for a backup process on a regular (at least daily) basis and backup relevant data before Dell performs any remedial, upgrade or other works on the APEX Service or Your IT systems; (b) monitor the availability and performance of Your IT environment, including the APEX Service; and (c) promptly react to messages and alerts received from Dell or through notification features of the APEX Service and immediately report any issue You identify to Dell. To the extent that Dell has any liability for loss of Customer Content, Dell will only be liable for the cost of commercially reasonable and customary efforts to recover the lost Customer Content from Your last available backup.

**14.3 Limitation Period.** Except as stated in this Clause, all claims must be made within the period specified by applicable law. If the law allows the parties to specify a shorter period for bringing claims, or the law does not provide a time at all, then claims must be made within 18 months after the event(s) giving rise to a dispute occurs.

## **15. General.**

**15.1 Governing Law; Jurisdiction.** The Agreement and all disputes in connection with the Agreement and/or the APEX Service are governed by the substantive laws in force in New Zealand, without regard to its conflict of law rules, and the exclusive place of jurisdiction for any dispute will be in New Zealand. In any event, neither the U.N. Convention on Contracts



for the International Sale of Goods, nor the Uniform Computer Information Transaction Act will apply to the Agreement or any dispute.

**15.2 Trade Compliance.** You are subject to and responsible for compliance with the export control and economic sanctions laws of the United States, the European Union and other applicable jurisdictions (collectively, "Applicable Trade Laws"). The APEX Service, Related Service, and any other services are for Your authorized use under this Agreement, and may not be used, sold, leased, exported, imported, re-exported, or transferred except in compliance with the Applicable Trade Laws. You represent and warrants that You are not the subject or target of, or located in a country or territory that is the subject or target of economic sanctions under the Applicable Trade Laws. For further information about geographical restrictions and compliance with Applicable Trade Laws, visit [Dell Trade Compliance](#).

**15.3 Independent Contractors, Third-Party Rights.** Dell, Channel Partner, and You are independent contractors for all purposes under the Agreement and cannot obligate any other party without prior written approval. The parties do not intend anything in the Agreement to allow any party to act as an agent or representative of a party, or the parties to act as joint venturers or partners for any purpose. No party is responsible for the acts or omissions of any other.

**15.4 Force Majeure.** Dell will not be liable for failure to perform its obligations during any period if performance is delayed or rendered impracticable or impossible due to circumstances beyond Dell's reasonable control.

**15.5 Assignment and Subcontracting.** Neither Channel Partner or You will assign, transfer or novate the Agreement, or any right or obligation or delegate any performance without the other party's or Dell's prior written consent, which consent will not be unreasonably withheld. Notwithstanding the foregoing: (a) Dell may use Affiliates or other qualified subcontractors to perform its obligations, provided that Dell will remain responsible for their performance; and (b) Dell may assign rights to payments arising from the APEX Service and any Related Services without Your or Channel Partner's consent.

**15.6 Waiver and Severability.** Failure to enforce a provision of the Agreement will not constitute a waiver of that or any other provision of the Agreement. If any part of the Agreement is held unenforceable, the validity of the remaining provisions will not be affected.

**15.7 Notices.** The parties will provide all notices under the Agreement in writing. You and Channel Partner must provide notices to the local Dell entity which invoices for the APEX Service. You and Channel Partner consent to receiving notices from Dell through the APEX Console or as otherwise provided in the Agreement.

**15.8 References.** You agree that Dell may identify You as an APEX Service and any Related Services customer in promotional or marketing materials provided that such materials do not disclose Your Confidential Information.

**15.9 Entire Agreement, Conflict and Order of Precedence, Modifications.** The following are part of the Agreement: (a) the AUP; (b) the ADPA; (c) the AISMA; and (d) the Service Offering Description. In the event of conflict, they will prevail in the following order: (i) the Service Offering Description (and all documents incorporated into it); (ii) the Agreement; (iii) the AUP; (iv) the ADPA; and (v) the AISMA. All content referenced in the Agreement by hyperlink is incorporated into the Agreement in its entirety and is available to You in hardcopy form upon Your request. Dell may, in its sole discretion update the AUP, the AISMA, and the ADPA at any time. Dell will provide written notice to Channel Partner if any such updates result in a material modification under Clause 3 (Modifications).