

## Dell Cloud Solutions Agreement – New Zealand

This Cloud Solutions Agreement between you and Dell, governs your use of and access to the Solution. The term “**Agreement**” refers collectively to these terms and conditions and, as applicable: (i) the Solution Description for the applicable Solution; (ii) if you purchased directly from Dell, any order form referencing or incorporating the Solution Description (an “**Order Form**”); and (iii) the Cloud Solutions Agreement Acceptable Use Policy (“**AUP**”).

This Agreement is effective upon your: (a) execution of a Solution Description or an Order Form; (b) acceptance of these terms pursuant to an online or offline process; (c) accessing or using the Solution; or (d) acceptance of terms between you and a reseller that reference this Agreement. “**You**,” “**your**” or “**Customer**” means the end-user entity which you represent, and which may be further identified in the applicable Solution Description, Order Form, End User Acknowledgment Form or online order process, and includes any of your affiliates that expressly agree to, or are otherwise legally bound by, this Agreement. “**Dell**,” “**us**,” “**we**” or “**our**” means Dell New Zealand Limited, on behalf of itself and its suppliers and licensors, or the Dell entity identified on your Solution Description or Order Form and includes any Dell affiliate with which you place an order for the Solution. Your purchase of the Solution is solely for your internal business use and may not be resold.

### 1. Definitions

“**Activation Instructions**” means any instructions, user IDs, software license keys or passwords that Dell or the applicable Cloud Partner provides you to enable you to activate or access a specific Solution.

“**Confidential Information**” means: (i) data you transmit to us or store as part of the Solution or information provided to us on an Order Form; (ii) Dell pricing and other Solution terms, Activation Instructions, marketing and sales information, know-how, audit and security reports, product development plans, data center designs (including non-graphic information you may observe on a tour of a data center), or other proprietary information or technology provided to you (including Software); and (iii) Trade Secrets or any information designated as Confidential. Information developed without reference to another party’s Confidential Information, or that is a part of or enters the public domain or otherwise is made available to a party without a violation of confidentiality, will not be Confidential Information.

“**Customer Content**” means any information or data provided by you or your End Users in connection with your or your End Users’ use of the Solution, including any text, software, music, sound, photographs, graphics, video, messages, files, attachments or other materials transmitted to us or stored or used on the Solution.

**“End User”** means each individual or entity that Customer has authorized to access and use a Solution, including any individual or entity that purchases a Customer Solution.

**“Intellectual Property”** means all patents, applications for patents, copyrights, moral rights, author’s rights, rights of publicity, mask works, Trade Secrets, know-how, contract rights, licensing rights and/or any other intellectual or proprietary rights recognized by any jurisdiction, whether now existing or hereafter arising. Intellectual Property also includes corporate names, trade names, trademarks, service marks or other proprietary designations.

**“Services”** means any and all services performed by us, a Cloud Partner, or a combination thereof as described in one or more Solution Descriptions.

**“Software”** means any software, library, utility, tool or other computer or program code, in object (binary) or source-code form, as well as the related documentation, provided by us in connection with a Solution. Software includes software locally installed on your systems and software accessed through the Internet or by other remote means including websites, portals and cloud-based solutions to utilize a Solution in accordance with this Agreement.

**“Solution”** means the combination of the Services performed and Software provided by us or our Cloud Partner to you pursuant to a Solution Description. Solutions include any Partner Solutions.

**“Solution Description”** means: (i) a statement of work, service description, solution description or other agreement that references this Agreement or Cloud Partner Terms; or (ii) a specification sheet or online description referenced in an Order Form.

**“Third-Party Products”** means any non-Dell or non-Cloud Partner software or services provided, made available or otherwise used in connection with the Solution, including any Customer Solution or any other Customer or third-party provided software, hardware or services.

**“Trade Secret”** means any Dell or Cloud Partner information not commonly known or available to the public, which: (i) derives economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

## **2. Quotes, Ordering and Payment**

If you purchased a Solution through a reseller, the terms and conditions of sale (including pricing) for the purchase will be as agreed between you and the reseller. This Section 2 applies to direct sales only.

We will charge amounts for Solutions as set forth in the applicable Solution Description or Order Form or, if not specified, the current list pricing provided on our website. Quoted prices will remain in effect only until the expiration date of the quote. All orders are subject to our acceptance. The number of systems, units (e.g. mailboxes, recipients, minutes etc.) and End Users for which you have purchased Solution(s) is indicated on the Order Form. Usage in excess of these numbers or for a period of time longer than the Term will result in additional costs. The additional costs per billing period will be determined by multiplying the excess usage by the contracted fee per system, unit or End User in the original Order Form. Payment must be made by credit card, wire transfer or other prearranged payment method unless we agree in writing to credit terms. Solutions are invoiced in accordance with the applicable Solution Description or Order Form beginning on the Activation Date. We, or our local affiliate(s), will invoice you locally, per the billing address(es) you provide, in the applicable currency. Invoices are due and payable within 30 days from the invoice date. We reserve the right to charge interest at the rate of 1.5% per month against overdue amounts or the maximum rate permitted by law, whichever is less. Late payment fees are recalculated every 30 days based on your current outstanding balance, which may include any previously accrued and unpaid late payment fees. Customer will pay all reasonable legal fees (including reasonable attorney's fees) and costs associated with collection of overdue amounts.

The charges stated in any Order Form or invoice will include all duties, levies or any similar charges and will exclude GST or equivalent sales or use tax. You are responsible, on behalf of yourself and your affiliates, for the payment of all taxes and fees assessed or imposed on the Solution in any geography in which you or an End User receives the benefit of the Solution, including any sales, use, excise, good and services tax or comparable taxes, but excluding taxes for which you have provided a valid resale or exemption certificate. Should any payments become subject to withholding tax, you or your affiliates will deduct these taxes from the amount owed and pay the taxes to the appropriate tax authority in accordance with applicable tax laws. You will promptly provide us with receipts or documents evidencing these tax payments. We are not liable for any withholding tax, penalty or interest due as a result of your failure to withhold any applicable tax.

## **3. Activation**

With respect to certain Solutions, after our receipt and acceptance of an order (whether placed directly with Dell or through a reseller), you will receive Activation Instructions. The date Activation Instructions are transmitted or, in the event Activation Instructions are not required, the effective date of the applicable

Solution Description or the date an online order is executed is the “**Activation Date.**” You are required to provide, maintain and monitor one dedicated email address for the receipt of notices and other communications related to the Solution.

#### **4. Term; Renewal**

The “**Term**” for any Solution begins on the Activation Date and extends for the period indicated in the Solution Description or Order Form (or, if you purchased through a reseller, the applicable period in your order with the reseller). If you purchased directly from Dell, unless you decline auto-renewal in writing at least thirty (30) days prior to the expiration of the Term or unless auto-renewal is explicitly disclaimed in a Solution Description or an Order Form, we may automatically renew this Agreement and the related Solution(s) for a successive Term at our then-current list price. By continuing to use the Solution(s) beyond the expiration of the applicable Term, we may renew this Agreement and the related Solution(s) in our discretion for a successive Term at our then-current list price. If you purchased through a reseller, the terms and conditions of renewal for the purchase will be as agreed between you and the reseller.

#### **5. Termination**

Either party may terminate this Agreement if the other party commits a material breach and the breach is not cured within ninety (90) days of receipt of written notice describing the nature of the breach. If you purchased multiple Solutions, termination of an individual Solution will not terminate this Agreement unless the circumstances giving rise to termination generally affect all purchased Solutions. Notwithstanding the foregoing, we may terminate this Agreement or the affected Solutions upon written notice to you, and without further liability if: (i) you are delinquent on your payment obligations for 30 days or more; (ii) you violate the AUP or the Cloud Partner’s AUP; (iii) a change in our relationship with a third-party Software or technology provider or Cloud Partner has had a material adverse effect on our ability to provide the Solution; (iv) you declare bankruptcy, are adjudicated bankrupt or a receiver or trustee is appointed for you or substantially all of your assets; (v) you are or you are controlled by a direct competitor of Dell; or (vi) you purchased through a reseller and as applicable: the agreement between you and such reseller expires or is terminated; the agreement between Dell and such reseller expires or is terminated; or your reseller is delinquent on its payment obligations to Dell.

Upon expiration of the Term for all Solutions purchased pursuant to this Agreement, either party may terminate this Agreement by providing 30 days written notice. Upon termination of this Agreement, all rights and obligations under this Agreement will automatically terminate except for rights of action accruing prior to termination, payment obligations and any obligations that expressly or by implication are intended to survive termination.

## 6. Assignment

You may not assign this Agreement or any respective rights or obligations to a third-party without our prior written consent. We may assign, sell or otherwise transfer our rights under this Agreement upon our sale of a business, product line or substantially all of our assets, provided the transferee agrees to perform the obligations under this Agreement. We may subcontract or delegate in whole or in part this Agreement, provided that we remain responsible for the performance of the Solution. For purposes of this Agreement, any change of control will be deemed an assignment.

## 7. Proprietary Rights

Except for information created or otherwise owned by you or licensed by you from third-parties, including all information provided by you to us through the Solution or for use in connection with the Solution, all right, title, and interest in the Intellectual Property embodied in the Solution, including the know-how and methods by which the Solution is provided and the processes that make up the Solution, will belong solely and exclusively to us or our licensors or our Cloud Partners, and you will have no rights in any of the above, except as expressly granted in this Agreement. The Services and the Software used to provide the Solution embody valuable Trade Secrets and proprietary rights of Dell and/or our licensors or Cloud Partners and are protected by copyright laws and international copyright treaties, as well as other intellectual property laws and treaties. Any Intellectual Property developed by us during the performance of the Solution will belong solely and exclusively to us and/or our licensors or Cloud Partners.

## 8. Cloud Partners

Should you purchase a Solution from Dell that is performed by a member of Dell's cloud partner program (a "**Cloud Partner**") your Solution (a "**Partner Solution**") may be governed by additional terms and conditions that will be presented on your Order Form or during the online order process ("**Cloud Partner Terms**").

## 9. Customer Solutions

If you provide End Users any non-Dell hardware, software or services (including management services) with, through or using the Solution (a "**Customer Solution**"), you must provide your End Users with this Agreement and your End Users must agree that their use of the Customer Solution is subject to the terms and conditions of this Agreement. You are responsible for any Customer Solution, including: (i) controlling the access to, and use and security of, the Customer Solution and the data residing in or processed via the Customer Solution, including the use of appropriate encryption; (ii) maintaining the security of the

passwords and other measures used to protect access to any end-user account; (iii) properly configuring the Solution to work with the Customer Solution and taking your own steps to maintain appropriate back-up of the Customer Solution, including the use of appropriate archiving ; and (iv) properly handling and processing notices claiming that the Customer Solution violates a person's rights. Customer agrees to indemnify and hold Dell harmless from and against any claims by End Users using the Customer Solution against Dell relating to the Customer Solution.

## **10. Suspension, Deletion and Modification**

We may suspend all or part of the Solution or your access to or use of data stored in the cloud: (i) if you (or the reseller, from which you purchased) are delinquent on payment obligations for 15 days or more; (ii) upon receipt of a subpoena or law-enforcement request; or (iii) when we have a commercially reasonable belief that you have breached this Agreement or that your use of the Solution poses an imminent security risk or may subject Dell to liability. We will use commercially reasonable efforts to give you at least 12 hours' notice of a suspension unless we (or the Cloud Partner) determine in our commercially reasonable judgment that a suspension on shorter or contemporaneous notice is necessary to protect us, the Cloud Partner or our customers.

For customers purchasing a Dell-delivered Solution, we may delete your Customer Content: (a) 60 days following any termination by us pursuant to Section 5 of this Agreement; or (b) if you (or the reseller, from which you purchased) fail to renew an applicable Solution Description within 60 days of expiration. For customers purchasing a Partner Solution, the retention and deletion of Customer Content will be governed by the applicable Cloud Partner Terms.

If we are providing the Solution in connection with a trial program such as a demo, evaluation, pilot or proof of concept (a "Trial"), immediately following the conclusion of the Trial we may delete Customer Content stored in the cloud without any obligation to return Customer Content to you. If, however, immediately following the conclusion of the Trial you renew the Solution for the standard term, we will keep Customer Content in the cloud in accordance with this Agreement.

We or the Cloud Partner may modify the functionality or features of the Solution at any time, provided that the modification does not materially denigrate the functionality of the Solution (as described in the applicable Solution Description) during the Term. We or the Cloud Partner will not be liable to you or any third-party for any such modification. From time to time, we or the Cloud Partner may change the location where the Solution is provided; provided, however, we or the Cloud Partner will remain responsible for the delivery of the Solution.

It may be necessary for us or the Cloud Partner to perform scheduled or unscheduled repairs or maintenance, or remotely patch or upgrade the Software, which may temporarily degrade the quality of the Solution or result in a partial or complete outage of the Solution. Although we cannot guarantee that you will receive advance notice of repairs or maintenance, we will endeavor to provide at least 7 days' notice of scheduled updates and patches or such notice as is set forth in the applicable Cloud Partner Terms.

## **11. License**

To the extent Software is provided as a part of the Cloud Solution, such Software is provided subject to the license agreement that accompanies the Software, and in the absence of such license, Dell-branded Software is subject to Dell's End User License Agreement located at [www.dell.com/eula\\_translations](http://www.dell.com/eula_translations). Customer shall be liable for any breach of this Agreement by any End User.

## **12. Privacy**

For information about our privacy practices, please read our global and country specific privacy policies at [www.dell.com/learn/us/en/uscorp1/policies-privacy-country-specific-privacy-policy](http://www.dell.com/learn/us/en/uscorp1/policies-privacy-country-specific-privacy-policy). These policies explain how we treat your personal information and protect your privacy. If your Solution Description specifies the region in which your data will be stored, we will not move the data from the specified region without notifying you other than as required by law or pursuant to lawful requests from government entities. If you purchase a Partner Solution, the privacy policy set forth in the applicable Cloud Partner terms will apply.

## **13. Customer Obligations**

You are responsible for keeping your account permissions, billing and other account information current. If you purchased directly from Dell, you must pay when due the amounts for the Solution stated in the applicable Solution Description or other agreement between you and Dell. If you purchased from a reseller, you must pay when due the amounts for each Solution stated in the applicable agreement between you and the reseller. Certain Solutions may contain features designed to interoperate with Third-Party Products or Cloud Partner services. If the Third-Party Product or Cloud Partner services are no longer made available by the applicable provider, we may stop providing the related Solution feature and you will not be entitled to any refund, credit or other compensation. In our performance of the Solution, we may obtain information related to your use of the Solution. You agree that we may use such information in an aggregated, anonymized form to assist in improving and optimizing various aspects of the Solution or in support of generic marketing activities related to the Solution.

You represent and warrant that you have obtained all rights, permissions and consents necessary to use and transfer any Customer data or End User data within and outside of the country in which you are located in connection with our (or our Cloud Partners') performance of the Service or your use of the Software (including providing adequate disclosures and obtaining legally sufficient consents from your employees, agents, contractors and End Users). You are responsible for the data and software you use or store in the cloud, including its maintenance, operation and compatibility in and with the cloud, and any third-party claims regarding the same. You understand and agree that neither Dell nor the Cloud Partners have control over the content of the data processed and that Dell (or the Cloud Partner, as applicable) performs the Services on your behalf. If you or an End User transmits data to a third-party website or other provider that is linked to or made accessible by the Solution, you and the End User consent to our or the Cloud Partners, as applicable, enabling such transmission, but such transmission and any related interaction is solely between you and the third-party website or provider and may be subject to additional terms and conditions provided by the third-party website or provider. Neither Dell nor the Cloud Partners will be responsible for any disclosures, modifications or deletions of your data resulting from any such transmission. Neither Dell nor the Cloud Partners make any warranties about, or will have any liability for, such third-party websites or providers.

You must use reasonable security precautions in connection with your use of the Solution and comply with the AUP and laws and regulations applicable to your use of the Solution. You must cooperate with our reasonable investigation of Service outages, security issues and any suspected breach of this Agreement. We may revise the AUP to add or modify restrictions on use of the Solutions, provided that the changes are commercially reasonable, consistent with industry norms and apply to all customers.

You will be deemed to have taken any action that you permit, enable or facilitate any person or entity to take related to this Agreement or any use of any Solution. You are responsible for the use of the Solutions by any End User and any person who gains access to your or any End User's data or the Solution as a result of your failure to use reasonable security precautions, even if the use was not authorized by you. You will ensure that End Users comply with your obligations under this Agreement and that the terms of your agreement with each End User are consistent with this Agreement and are legally enforceable. If you become aware of any violation of your obligations under this Agreement by an End User, you will immediately terminate such End User's access to the Solution.

You are responsible for selecting, obtaining and maintaining any equipment and ancillary services needed to connect to, access or otherwise use the Solution and for ensuring that the equipment is compatible with the Solution. You are responsible for properly configuring and using the Solution and taking your own steps to maintain appropriate security, protection and back-up of your data and software, including the use of appropriate encryption, back-up and archiving. You acknowledge that the Solutions are not intended to

replace and do not replace the need for you to maintain regular data back-ups or redundant data archives. You are responsible for maintaining back-up copies of your data that may be stored or processed by us in the course of our provision of Solutions. You understand and agree that we are not responsible for any loss or corruption of your data or software. You remain responsible for properly handling and processing notices claiming that your data or software violates a person's rights.

In connection with certain Solutions, we may provide you with hardware, software, equipment or other property ("**Equipment**"). The Equipment is our sole property and we may immediately take possession of the Equipment following the termination or expiration of this Agreement. You will: (a) keep the Equipment free and clear of any lien and not pledge as security or otherwise encumber the Equipment; (b) use the Equipment only to access the Solution and comply with our reasonable Equipment use instructions; (c) not remove, relocate or move the Equipment from the specific location where it was first installed without our prior written approval; (d) provide adequate, secure and proper space at your facility to install Equipment, it being agreed that we are not obligated to install Equipment in poorly ventilated, air conditioned or inadequately maintained room(s); (e) be responsible for risk of loss and damage to the Equipment equal to the present value of the Equipment's fair market value; (f) not remove, cover or alter plates, labels or other markings on the Equipment; and (g) provide a secure link such as a static IP address for the Equipment.

#### **14. Customer License Grant to Dell**

Customer grants to Dell (and the Cloud Partners, if applicable) the necessary rights to operate any Customer-provided software, including a non-exclusive, royalty-free license (which shall terminate upon termination of the applicable Solution) to install, deploy, use, execute, reproduce, display, perform and run such software (including, without limitation, guest operating systems and application programs), as are reasonable or necessary for Dell or the Cloud Partner, if applicable, to perform or provide the Solution. As between you and Dell or you and the Cloud Partner, you are responsible for providing, updating, uploading and maintaining any Customer-provided software and paying all fees associated therewith, including any software license and maintenance fees. If, in order to provide the Solution, we or our Cloud Partner, as applicable, are required to install, patch, manage or otherwise use or access software that you license from a third-party software vendor, then you represent and warrant that you have obtained a written license agreement with the vendor that permits us to perform these activities.

Customer grants to Dell or Dell's Cloud Partner, as applicable, a non-exclusive, royalty-free license to access, use, reproduce, modify, perform, display and distribute Customer and End User data as is reasonable or necessary for Dell or Cloud Partner to perform or provide the Solution. It is Customer's responsibility to obtain, at its own expense, all licenses, consents and approvals required to grant to Dell (or Dell's Cloud Partner) the rights and licenses in this Agreement.

## 15. High-Risk Disclaimer

The Solutions may not be used in hazardous environments requiring fail-safe performance, such as in the operation of nuclear facilities, aircraft navigation or communication systems, air traffic control, weapons systems, life-support machines or any other application in which the failure of the Solutions could lead directly to death, personal injury or environmental or property damage (collectively, “**High-Risk Activities**”).

## 16. Limited Warranty

THE SOLUTION, TOGETHER WITH ALL THIRD-PARTY PRODUCTS AND OPEN SOURCE SOFTWARE PROVIDED BY DELL, IS PROVIDED “AS IS.” TO THE MAXIMUM EXTENT PERMITTED BY LAW, DELL (INCLUDING ITS AFFILIATES, CONTRACTORS, AND AGENTS, AND EACH OF THEIR RESPECTIVE EMPLOYEES, DIRECTORS, AND OFFICERS), ON BEHALF OF ITSELF AND ITS LICENSORS, CLOUD PARTNERS AND SUPPLIERS (COLLECTIVELY AND TOGETHER WITH DELL, THE “**DELL PARTIES**”), MAKES NO EXPRESS OR IMPLIED WARRANTY WITH RESPECT TO THE SOLUTION OR ANY OF THE SOFTWARE OR SERVICES INCLUDED THEREIN, INCLUDING BUT NOT LIMITED TO ANY WARRANTY: (1) OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, SUITABILITY OR NON-INFRINGEMENT; (2) RELATING TO THE PERFORMANCE OF SOFTWARE (INCLUDING WHETHER THE SOFTWARE IS OR WILL BE SECURE, ACCURATE, COMPLETE, WITHOUT ERROR, OR FREE OF VIRUSES, WORMS OR OTHER HARMFUL COMPONENTS OR PROGRAM LIMITATIONS, OR THAT ANY ERRORS IN THE SOFTWARE WILL BE CORRECTED ) OR OUR PERFORMANCE OF THE SERVICES (INCLUDING WHETHER THE SERVICES ARE OR WILL BE UNINTERRUPTED, TIMELY OR WITHOUT ERROR) OR THE SECURITY OF THE SOLUTION OR WHETHER THE SOLUTION IS SUITABLE FOR HIGH-RISK ACTIVITIES; (3) REGARDING THE RESULTS TO BE OBTAINED FROM THE SOLUTION (INCLUDING THE ACCURACY, QUALITY, RELIABILITY, SUITABILITY, COMPLETENESS, TRUTHFULNESS, USEFULNESS OR EFFECTIVENESS OF ANY REPORTS, DATA, RESULTS OR OTHER INFORMATION OBTAINED OR GENERATED BY YOU RELATED TO YOUR USE OF THE SOFTWARE ) OR THE RESULTS OF ANY RECOMMENDATION BY US; OR (4) ARISING OUT OF ANY COURSE OF DEALING OR TRADE USAGE. ANY WARRANTY ON A THIRD-PARTY PRODUCT IS PROVIDED BY THE PUBLISHER, PROVIDER OR ORIGINAL MANUFACTURER, WHETHER OR NOT SUCH THIRD-PARTY PRODUCT IS DESIGNATED BY US AS “CERTIFIED,” “APPROVED” OR OTHERWISE. TO THE MAXIMUM EXTENT PERMITTED BY LAW, IN THE EVENT WE ARE PROVIDING THE SOLUTION IN CONNECTION WITH A TRIAL, THE SOLUTION IS PROVIDED “AS IS” AND “AS AVAILABLE” WITHOUT ANY WARRANTIES.

WITH RESPECT TO YOUR OR END USER'S USE OF THE SOFTWARE, YOU ASSUME THE ENTIRE COST OF ALL NECESSARY SERVICING, REPAIR, OR CORRECTION OF PROBLEMS CAUSED BY VIRUSES OR OTHER HARMFUL COMPONENTS, UNLESS SUCH PROBLEMS OR VIRUSES ARE THE DIRECT RESULT OF OUR GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.

YOU AGREE THAT THE OPERATION AND AVAILABILITY OF THE SYSTEMS USED FOR ACCESSING AND INTERACTING WITH THE SOLUTIONS, INCLUDING TELEPHONE, COMPUTER NETWORKS AND THE INTERNET, OR FOR TRANSMITTING INFORMATION CAN BE UNPREDICTABLE AND MAY, FROM TIME TO TIME, INTERFERE WITH OR PREVENT ACCESS TO OR USE OR OPERATION OF THE SOLUTIONS. WE WILL NOT BE LIABLE FOR ANY SUCH INTERFERENCE WITH OR PREVENTION OF YOUR OR END USER'S ACCESS TO OR USE OF THE SOLUTIONS OR THE IMPACT SUCH INTERFERENCE OR PREVENTION MAY HAVE ON OUR ABILITY TO PERFORM THE SOLUTIONS.

#### **17. Limitation of Liability**

EXCEPT FOR INFRINGEMENT/MISAPPROPRIATION OF INTELLECTUAL PROPERTY, NEITHER PARTY WILL BE LIABLE FOR ANY INCIDENTAL, INDIRECT, PUNITIVE, SPECIAL, OR CONSEQUENTIAL DAMAGES, OR FOR ANY: (a) LOSS OF REVENUE, INCOME, PROFIT, SAVINGS OR BUSINESS OPPORTUNITY; (b) LOST OR CORRUPTED DATA OR SOFTWARE, LOSS OF USE OF A SYSTEM OR NETWORK, OR THE RECOVERY OF SUCH; (c) BUSINESS INTERRUPTION OR DOWNTIME; (d) LOSS OF GOODWILL OR REPUTATION; (e) SERVICES, SOFTWARE, DELIVERABLES OR THIRD-PARTY PRODUCTS NOT BEING AVAILABLE FOR USE; OR (f) THE PROCUREMENT OF SUBSTITUTE SOLUTIONS; ARISING OUT OF OR IN CONNECTION WITH THE SOLUTIONS PROVIDED HEREUNDER.

EXCEPT FOR INFRINGEMENT/MISAPPROPRIATION OF INTELLECTUAL PROPERTY, NEITHER PARTY'S TOTAL LIABILITY FOR ANY AND ALL CLAIMS ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT (INCLUDING WITH RESPECT TO ANY SOLUTIONS PROVIDED HEREUNDER) IN ANY 12-MONTH PERIOD WILL EXCEED THE TOTAL AMOUNT RECEIVED BY DELL FROM YOU (OR FROM YOUR RESELLER, IF YOU HAVE PURCHASED FROM A RESELLER) DURING THE PRIOR TWELVE (12) MONTHS OF THIS AGREEMENT FOR THE SPECIFIC SOLUTION GIVING RISE TO SUCH CLAIM(S).

THESE LIMITATIONS, EXCLUSIONS AND DISCLAIMERS WILL APPLY TO ALL CLAIMS FOR DAMAGES, WHETHER BASED IN CONTRACT, STRICT LIABILITY, NEGLIGENCE, TORT OR OTHERWISE. THE PARTIES AGREE THAT THESE LIMITATIONS OF LIABILITY ARE AGREED

ALLOCATIONS OF RISK CONSTITUTING IN PART THE CONSIDERATION FOR OUR SALE AND PERFORMANCE OF THE SOLUTION TO CUSTOMER, AND SUCH LIMITATIONS WILL APPLY NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY AND EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LIABILITIES.

## **18. Confidentiality**

Confidential Information may not be disclosed except to affiliates, employees, agents and subcontractors who “need-to-know” it and who have agreed in writing to treat the Confidential Information under terms at least as restrictive as those in this Agreement. Each party agrees to take the necessary precautions to maintain the confidentiality of the other party’s Confidential Information by using at least the same degree of care as such party employs with respect to its own Confidential Information of a similar nature, but in no case less than a commercially reasonable standard of care to maintain confidentiality. If a recipient is required by a court or government agency to disclose Confidential Information, the recipient will provide reasonable advance notice to other party before making the disclosure.

## **19. Indemnification**

We will defend and indemnify you from and against any claims, damages, liabilities, losses, costs and expenses (including reasonable attorneys’ fees) arising out of or relating to any third-party claim or action that the Solution (excluding Third-Party Products and open source software) infringes or misappropriates that third-party’s Intellectual Property rights enforceable in the country in which the Solution is sold to you. In addition, if we receive prompt notice of a claim that, in our reasonable opinion, is likely to result in an adverse ruling, then we will, at our option: (i) obtain a right for you to continue using the Software or that allow us to continue performing the Services; (ii) modify the Software or Services to make them non-infringing; (iii) replace the Software or Services with a non-infringing equivalent; or (iv) refund any pre-paid fees for the allegedly infringing Services that have not been performed or provide a reasonably depreciated or pro rata refund for the allegedly infringing Software. Notwithstanding the foregoing, we will have no obligation under this Section 19 for any claim resulting or arising from: (1) modifications of the Software or Services that were not performed by or on behalf of us; (2) the combination, operation or use of the Software or Services in connection with a Third-Party Product (the combination of which causes the claimed infringement); or (3) our compliance with your written specifications or directions, including the incorporation of any software or other materials or processes provided by or requested by you. This Section 19 states Customer’s exclusive remedies for any third-party Intellectual Property claim or action, and nothing in this Agreement or elsewhere will obligate us to provide any greater indemnity to Customer. This paragraph of Section 19 will not apply in the case of a Trial.

You will defend and indemnify the Dell Parties from and against any claims, damages, liabilities, losses, costs and expenses (including reasonable attorneys' fees) arising out of or relating to any third-party claim or action relating to: (a) your failure to obtain or maintain any appropriate license, Intellectual Property rights or other permissions, regulatory certifications or approvals associated with technology or data provided by you, or associated with Software, Third-Party Products or other components directed or requested by you to be installed or integrated as part of the Solution; (b) your breach of this Agreement or violation of any applicable law, regulation or order; (c) any inaccurate representation regarding the existence of an export license or any allegation made against the Dell Parties due to your violation or alleged violation of applicable Applicable Trade Laws; (d) you providing any Excluded Data to Dell; (e) tax liabilities that are your responsibility pursuant to Section 2; (f) your use of the Solution; (g) the failure of any End Users to comply with your obligations under this Agreement; and (h) your provision of your own services, software, technology or solution.

Each party will defend and indemnify the other party against any third-party claim or action for personal bodily injury, including death, to the extent directly caused by the indemnifying party's gross negligence or willful misconduct in the course of performing its obligations under this Agreement.

## **20. Indemnification Procedure**

The indemnified party will: (i) promptly notify the indemnifying party in writing of any claim; (ii) grant the indemnifying party sole control of the defense and resolution of the claim; and (iii) cooperate with the indemnifying party, at the indemnifying party's expense, in defending and resolving the claim. Failure to provide prompt notice, however, will not affect the indemnifying party's obligations to the extent the failure does not materially prejudice the indemnifying party's ability to defend the claim.

In no event will an indemnifying party consent to the entry of any judgment or enter into any settlement with respect to any third-party claim without the prior written consent of the indemnified party (not to be unreasonably withheld) unless the judgment or settlement involves only the payment of money damages, without admission of fault, and expressly and unconditionally releases the indemnified party from all liabilities and obligations with respect to the claim.

## **21. Additional Information**

**A. Independent Contractor Relationship; No Third-Party Beneficiaries.** The parties are independent contractors. No provision of this Agreement creates an association, trust, partnership or joint venture or imposes fiduciary duties, obligations or liability between you and us. Neither party will have any rights, power or authority to act or create an obligation, express or implied, on behalf of another party except

as specified in this Agreement. This Agreement does not and is not intended to confer any rights or remedies, express or implied, upon any person other than the parties hereto.

**B. Excused Performance.** A party shall not be liable to the other for any delay in performing its obligations if the delay is caused by circumstances beyond its reasonable control, provided that the other party is promptly notified in writing. If the circumstance lasts longer than 30 days, then the other party may terminate, in whole or in part, this Agreement or the affected Service Agreement or Software Agreement by giving written notice to the delayed party. This Section shall not relieve either party of its obligations under this Agreement (including payment), but rather will only excuse a delay in performance. In the case of a delay arising under this Section, Customer acknowledges and agrees that its data may not be recoverable and accepts responsibility for re-entry of such data.

**C. Trade Compliance; Excluded Data.** You are subject to and responsible for compliance with the export control and economic sanctions laws of the United States, Canada, the European Union and other applicable jurisdictions (collectively, “**Applicable Trade Laws**”). The Solution may not be used, sold, leased, exported, imported, re-exported, or transferred except in compliance with the Applicable Trade Laws. You represent and warrant 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. Trade Compliance requirements available at [www.dell.com/tradecompliance](http://www.dell.com/tradecompliance) contain further information and requirements on compliance with Applicable Trade Laws and then-current restrictions You must adhere to. Customer acknowledges that data processed in the Solution may contain personally identifiable information and associated metadata, and further agrees as data controller to comply with applicable privacy laws and/or regulations related to the provision of data. Customer Content, software or any Customer Solution that you provide in connection with the Solution will not: (i) be classified or listed on the U.S. Munitions list; (ii) contain defense articles or defense services; (iii) contain ITAR-related data; or (iv) include protected health information subject to specific federal or state privacy or data security requirements (items (i) – (iv) collectively, the “**Excluded Data**”).

**D. Regulatory Requirements.** We are not responsible for determining whether any Third-Party Product used in the performance of the Solution satisfies the local regulatory requirements of the country in which the Third-Party Product is delivered, and we are not obligated to provide any Software or perform any Services where we become aware that the resulting Software or Services do not satisfy local regulatory requirements.

**E. Revision to Online Terms.** Any revisions to this Agreement (other than to the AUP) (“Revisions”) are not effective until the underlying Solution Description or Order Form is renewed or extended following the date we publish the Revisions on our website.

**F. Order of Precedence.** If there is a conflict between the terms of any of the documents that comprise this Agreement, the documents will prevail in the following order: (i) the Solution Description or Order Form, (ii) these terms and conditions, the (iii) AUP; provided, however, that for Partner Solutions, as between Customer and the Cloud Partner, the Partner Terms will prevail over any of the terms of any of the documents that comprise this Agreement. Prevailing terms will be construed as narrowly as possible to resolve the conflict while preserving as much of the non-conflicting terms as possible, including preserving non-conflicting provisions within the same paragraph, section or sub-section.

**G. Entire Agreement; Severability.** This Agreement is the entire agreement between you and Dell with respect to its subject matter and supersedes all prior oral and written understandings, communications or agreements between you and Dell for the Solution. Except as otherwise provided for in Section 21.E, no amendment to or modification of this Agreement, in whole or in part, will be valid or binding unless it is in writing and executed by authorized representatives of both parties. If any provision of this Agreement should be found to be void or unenforceable, the provision will be stricken or modified, but only to the extent necessary to comply with the law, and the remainder of this Agreement will remain in full force and will not be terminated. In entering into this Agreement, neither Party is relying upon any representations or statements of the other that are not fully expressed in this Agreement; rather each Party is relying on its own judgment and due diligence and expressly disclaims reliance upon any representations or statements not expressly set forth in this Agreement.

**H. Governing Law.** This Agreement and ANY CLAIM, DISPUTE, OR CONTROVERSY (WHETHER IN CONTRACT, TORT, OR OTHERWISE, INCLUDING STATUTORY, COMMON LAW, INTENTIONAL TORT AND EQUITABLE CLAIMS) BETWEEN YOU AND DELL PARTIES arising from or relating to this Agreement, its interpretation or the breach, termination or validity thereof, any relationships which result from this Agreement (including, to the full extent permitted by applicable law, relationships with third-parties who are not signatories to this Agreement), Dell's advertising, or any related service (a "Dispute" ) shall be governed by the laws of New Zealand without regard to conflicts of law.

**I. Jurisdiction and Venue.** The parties agree that any Dispute will be brought exclusively before the courts located in New Zealand. The parties further agree to submit to the personal jurisdiction of the courts located in New Zealand, and agree to waive any objections to the exercise of jurisdiction over the parties by such courts and to venue in such courts.

**J. Waiver.** The failure by us to enforce any provision of this Agreement will not constitute a present or future waiver of such provision nor limit our right to enforce such provision at a later time. All waivers must be in writing to be effective.

**K. Attorneys' Fees.** In any Dispute (other than as provided in Section 3B), each party will bear its own attorneys' fees and costs.

**L. Notices.** Notice to us under this Agreement must be in writing and sent by overnight courier or certified mail to Dell New Zealand Limited, Attn: Head of ANZ Legal, c/o Simpson Grierson, RQW, 88 Shortland Street, Auckland Central, Auckland 1010, New Zealand.

## **SUPPLEMENTAL TERMS AND CONDITIONS FOR CUSTOMER AND/OR END USERS IN NEW ZEALAND:**

For Customers and/or End Users who receive or are given access to the Solution or Customer Solution in New Zealand, these supplemental terms and conditions shall apply. Customer shall be responsible for ensuring compliance by End Users with the terms of this Agreement including these supplemental terms and conditions.

### **1. Data Privacy.**

1.1 You expressly authorise Dell to use, reproduce, modify, perform, display and distribute your and End User's data as is reasonable or necessary for Dell to perform or provide the Solution.

1.2 You acknowledge and expressly consent that the Solution is provided from facilities located outside of New Zealand and any data or information you provide through the Solution (including personal information protected by privacy laws) will be transmitted and stored outside of New Zealand. You agree that the stored information may be subject to the applicable laws and jurisdiction of the place of such facilities.

1.3 You will be responsible to ensure that you have obtained all rights, permissions, and consents or have provided disclosures necessary to use and transfer such data and information outside of New Zealand in conjunction with Dell's performance of the Solution. Once such data or information has been transferred to Dell you will have been deemed to have obtained the necessary consent and authorisations.

1.4 You will also be responsible to ensure that you are permitted to disclose or transfer data and information outside of New Zealand under any laws that may be applicable to your business, including the data and information collected and used by or in the course of conducting your business.

1.5 You acknowledge and expressly consent that Dell may, in the normal course of business, make worldwide transfers of personal information on its corporate systems, to other entities, agents or subcontractors in the same group of companies, or to other relevant business partners who may have incidental access to personal information. When making such transfers, Dell shall ensure appropriate protection is in place to safeguard personal information transferred under or in connection with this Agreement.

1.6 You will be solely responsible for all access of information requests made by individual and legal entities permitted by local legislation. Dell shall use its reasonable efforts to assist Customer to comply with its obligations, subject to the payment by Customer of Dell's reasonable professional charges for the time engaged by Dell staff in so doing and any indemnification as applicable.

### **CLOUD SOLUTIONS AGREEMENT ACCEPTABLE USE POLICY**

This Cloud Solutions Agreement Acceptable Use Policy (the “**AUP**”) sets forth certain limitations and restrictions required in connection with your use and your End Users' use of: (i) the Solutions, and (ii) any online portal, console, dashboard or similar interface used in accessing the Solutions (the “**Portal**”). We may revise this AUP from time to time to add or modify restrictions on your use or your End Users' use of the Solutions or the Portal. If you or your End Users violate this AUP, we may suspend or terminate your use or your End Users' use of the Solutions.

Terms used in this AUP that are capitalized and not otherwise defined have the meanings set forth in the Dell Cloud Solutions Agreement.

You are prohibited from: (1) attempting to use or gain unauthorized access to our or to any third-party's networks or equipment; (2) permitting other individuals or entities to copy the Solutions; (3) providing unauthorized access to or use of Activation Instructions; (4) attempting to probe, scan or test the vulnerability of the Solutions or of a system, account or network of Dell or any of our customers or suppliers; (5) interfering or attempting to interfere with service to any user, host or network; (6) engaging in fraudulent, offensive or illegal activity of any nature; (7) uploading any content, or engaging in any activity, that is pornographic, obscene, harassing, abusive, slanderous or defamatory or that encourages, promotes or expresses racism, hatred, bigotry or violence; (8) engaging in any activity that infringes the intellectual property rights or privacy rights of any individual or third-party; (9) transmitting unsolicited bulk or commercial messages; (10) intentionally distributing worms, Trojan horses, viruses, corrupted files or any similar items; (11) restricting, inhibiting or otherwise interfering with the ability of any other person, regardless of intent, purpose or knowledge, to use or enjoy the Solutions (except for tools with safety and security functions); or (12) restricting, inhibiting, interfering with or otherwise disrupting or causing a

performance degradation to any Dell (or Dell supplier) facilities used to deliver the Solutions.

We may investigate suspected violations of this AUP. We may report suspected violations of this AUP to applicable law-enforcement authorities or third-parties and may cooperate with any investigation of illegal activities associated with your use or your End Users' use of the Solutions, the Portal, the system or network, or any violation of this AUP.

Dell Cloud Solutions Agreement - New Zealand

Revision Date: November 2024