



## CHANNEL END USER TERMS - AUSTRALIA

These Channel End User Terms ("Terms") set forth the direct terms and conditions between NetApp, Inc., NetApp B.V., NetApp Australia Pty Ltd or any of their affiliates ("NetApp") and Channel End User Customer ("Customer") in connection with NetApp Products and Services purchased by Customer from an authorized NetApp reseller, unless Customer has entered into a separate agreement with NetApp in connection with such Products or Services. By purchasing such Products and Services, Customer agrees to be bound by these Terms. NetApp and Customer may each be referred to as a "Party" or collectively, as the "Parties."

### 1. DEFINITIONS

- 1.1. Cloud-Based Offering.** Hardware, Software, and any Services offered, distributed, marketed, or otherwise sold by NetApp or a NetApp authorized distributor, reseller, or partner for use through a Cloud Provider.
- 1.2. Cloud Provider.** A third party designated by NetApp which offers off premises cloud-based services such as hosting, computing, networking, or storage.
- 1.3. Documentation.** NetApp supplied then current technical documentation describing the features and functions of the associated Products.
- 1.4. Hardware.** NetApp-branded hardware, including its components and spare parts, but excluding any firmware and Third Party Branded Products.
- 1.5. Products.** Hardware, Software, associated Documentation, and any Third Party Branded Products.
- 1.6. Services.** NetApp's consulting services ("Professional Services") and/or its generally available technical support and maintenance services programs ("Support Services").
- 1.7. Software.** NetApp software in object code format including (as applicable) operating systems, protocols, backup and recovery, disaster recovery, storage efficiency, and management software.
- 1.8. Third Party Branded Products.** Any hardware or software that is manufactured, developed, licensed, or otherwise made available by any entity other than NetApp and is distributed or licensed by NetApp for use in conjunction with Hardware and Software.

### 2. SOFTWARE LICENSE

- 2.1. License Grant.** Subject to these Terms and any limitations or restrictions set forth in the corresponding Documentation, NetApp grants to Customer a personal, non-exclusive, non-transferable, worldwide, limited, and revocable license, without the right to sublicense, to (a) install and use the Software for Customer's internal business purposes only, and (b) use the Documentation in support of Customer's use of the Software. The Software associated with Customer's license is either bundled with a specific storage controller identified by a unique serial number ("Controller-based licenses"), or is independent of a storage controller ("Standalone licenses"), and the license is one of the following license types: (a) "Life-of-controller": Controller-based licenses granted for the period of time during which Customer's controller is operable; (b) "Perpetual": Standalone licenses granted in perpetuity; (c) "Term": Controller-based licenses or Standalone licenses granted for a fixed period of time; (d) "Capacity": Controller-based licenses or Standalone licenses granted for a specified amount of raw storage capacity or usage; and (e) "Subscription": Controller-based licenses or Standalone licenses which may be purchased on a periodic basis. Certain license types may require the installation and use of NetApp's AutoSupport™ remote support diagnostic system. Each storage controller deployed in a cluster or a high-availability pair or group must have the same Controller-based licenses as the other storage controllers in that cluster, high-availability pair, or group. Subject to NetApp's prior written agreement, and in the context of non-disruptive operations within a cluster, Customer may deploy storage controllers with

different Controller-based licenses and failover from one storage controller to another for the time required to remedy a failure, provided that all storage controllers in the cluster have the same hardware and software support offerings in effect at all times.

- 2.2. License Restrictions.** Customer will not, nor will Customer allow any third party to (a) reverse engineer, decompile, or disassemble the Software or otherwise reduce it to human-readable form except to the extent required for interoperability purposes under applicable laws or as expressly permitted in open-source licenses; (b) remove or conceal any product identification, proprietary, intellectual property, or other notices in the Software and Documentation; (c) use the Software and Documentation to perform services for third parties in a service bureau, managed services, commercial hosting services, or similar environment; (d) assign or otherwise transfer, in whole or in part, the Software or Documentation licenses to another party or Controller-based licenses to a different storage controller; (e) install Controller-based licenses on or use them with third party hardware or any second-hand or grey market Hardware that Customer has not purchased from NetApp or a NetApp partner; (f) modify, adapt or create a derivative work of the Software or Documentation; and (g) publish or provide any Software benchmark or comparison test results.

- 2.3. Third Party Licenses.** Customer represents and warrants that it has obtained and/or will obtain all applicable third party licenses necessary to operate any third party software required in connection with the use of the Products and for NetApp to freely and without interruption perform the Services hereunder.

- 2.4. Software Copyright Information and Notices.** Software copyright information and other related details are included as part of notices in the documentation published by NetApp (e.g. NOTICES, TXT or NOTICES, PDF).

### 3. SERVICES

- 3.1. Services.** Services are provided by or on behalf of NetApp. Additional terms and conditions applicable to Services are set forth on NetApp's How to Buy website, at <http://netapp.com/us/how-to-buy/stc.html>.

### 4. DIRECT WARRANTY

- 4.1. Hardware Warranty.** NetApp warrants that the Hardware will materially conform to the Documentation for a period of three (3) years from the date of delivery, unless otherwise specified in the applicable Documentation ("Hardware Warranty Period"). In the event of any material nonconformity in the Hardware during the Hardware Warranty Period that is reproducible and verifiable, NetApp will, at its sole discretion and expense, repair or replace the Hardware, or refund amounts received by NetApp for the non-conforming Hardware. Replacement parts will be warranted for the remainder of the Hardware Warranty Period in effect for the original Hardware purchased, unless otherwise mandated by applicable law. For purposes of this Section 4.1 delivery is made pursuant to the applicable trade terms specified on the quotation or as agreed to by NetApp.

- 4.2. Software Warranty.** NetApp warrants that (a) the initially-shipped version of the Software will materially conform to the

Documentation; and (b) the Software media will be free from physical defects, for a period of ninety (90) days from the date of delivery or such other minimum period required under applicable law ("Software Warranty Period"). NetApp does not warrant that Customer's use of the Software will be error-free or uninterrupted. In the event of any material nonconformity in the Software during the Software Warranty Period that is reproducible and verifiable, NetApp will, at its sole discretion and expense, repair or replace the Software, or refund the amounts received by NetApp for the nonconforming Software. This warranty does not cover software, other items, or any services provided by persons other than NetApp or a NetApp authorized distributor, reseller or partner. For the purposes of this Section 4.2, if Software is pre-installed on the Hardware, delivery is made pursuant to the applicable trade terms specified on the quotation or as agreed to by NetApp. If the Software is not pre-installed on the Hardware, then for the purposes of this Section 4.2, delivery is made when NetApp makes the enabling key available to a Customer or, if an enabling key is not required, otherwise makes such Software available for download or use by the Customer.

**4.3. Limitations.** NetApp will not be liable under this warranty for claims arising from Customer's, Customer's subcontractor's, or any unauthorized third person's misuse, neglect, improper installation or testing, attempts to repair, or any other cause beyond the range of the intended use. The Hardware warranty will become void if a Hardware component is installed as an add-on to or replacement for the original Hardware, without NetApp's prior written approval. The Software warranty will become void if the Software is modified or otherwise used in violation of the Software license terms set forth in Section 2, except as authorized in writing by NetApp.

**4.3.1** In the event the supply of any goods or services to Customer or related bodies corporate constitutes a supply of goods or services to a consumer as defined in Schedule 2 to the Competition and Consumer Act 2010 as amended, these Terms will not exclude, restrict or modify any statutory condition, warranty or other obligation in relation to the goods and services to be supplied where it is unlawful to do so. NetApp's liability for breach of any such statutory condition, warranty or other obligation, including any consequential loss to:

(a) in relation to goods, at NetApp's option i) the replacement of equivalent or payment of the cost of replacing the goods; or ii) the repair or payment of the cost of having the goods repaired; and

(b) in relation to services, at NetApp's option the supplying or payment of the cost of having the services supplied again. The reseller will ensure all relevant third parties purchasers are made aware of this condition.

**4.4. Exclusive Warranties.** EXCEPT AS SPECIFICALLY PROVIDED IN SECTION 4.5 BELOW, THE FOREGOING WARRANTIES AND REMEDIES ARE EXCLUSIVE AND ARE IN LIEU OF ALL OTHER CONDITIONS, WARRANTIES AND GUARANTEES, EXPRESS OR IMPLIED, EITHER IN FACT OR BY OPERATION OF LAW, STATUTORY OR OTHERWISE INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT. NETAPP NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR IT ANY OTHER LIABILITY IN CONNECTION WITH THE SALE, INSTALLATION, MAINTENANCE OR USE OF ITS PRODUCTS, AND NETAPP MAKES NO WARRANTY WHATSOEVER OF ANY NONSTANDARD OR THIRD-PARTY BRANDED PRODUCTS SUPPLIED BY IT HEREUNDER.

**4.5. Australian Consumer Law.** NetApp goods come with guarantees that cannot be excluded under the Australian Consumer Law. Customer is entitled to a replacement or refund for a major failure and to compensation for any other reasonably foreseeable loss or damage. Customer is also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure. These rights may be lawfully limited in respect of goods or services not ordinarily acquired for personal, domestic household use or consumption. For further details regarding these guarantees and any other limitation applied to them, please contact:

**NetApp Australia Pty Ltd**

**Email:** [dl-warranty@netapp.com](mailto:dl-warranty@netapp.com)

**Tel:** 02 97795600

**Level 7, 100 Pacific Highway, North Sydney, NSW 2060, Australia**

## **5. INTELLECTUAL PROPERTY RIGHTS AND PROTECTION**

**5.1. General.** The Software and Documentation is licensed, not sold, to Customer. It is protected by intellectual property laws and treaties worldwide, and contains trade secrets, in which NetApp and its licensors reserve and retain all rights not expressly granted to Customer. No right, title, or interest to any trademark, service mark, logo, or trade name of NetApp or its licensors is granted to Customer.

**5.2. IP Claims.** Subject to the terms and conditions of this Section, NetApp will defend or settle any claim brought by a third party against Customer that Hardware, Software, and Documentation sold and delivered by or for NetApp to Customer under these Terms infringe any patent, trademark, or copyright ("IP Claim"). NetApp will pay settlement amounts or, if applicable, damages and costs finally awarded by a court of competent jurisdiction (collectively, "Damages") against Customer to the extent such Damages are specifically attributable to the IP Claim, provided that Customer: (a) promptly notifies NetApp in writing of the IP Claim; (b) provides information and assistance to NetApp to defend such IP Claim; and (c) provides NetApp with sole control of the defense or settlement negotiations.

**5.3. Remedies.** NetApp may, at its option, substitute or modify the Product, or the relevant portion thereof, so that it becomes non-infringing; procure any necessary license; or replace the Product. If NetApp determines that none of these alternatives is reasonably available, then Customer may return the Product and NetApp will refund Customer's purchase price.

**5.4. Exclusions.** Notwithstanding anything to the contrary in these Terms, NetApp has no obligation or liability for any claim of infringement that arises from or relates to: (a) NetApp's compliance with or use of designs, specifications, inventions, instructions, or technical information furnished by or on behalf of Customer; (b) Product modifications made by or on behalf of Customer without NetApp's prior written authorization; (c) Customer's failure to upgrade or use a new version of the Product, to make a change or modification requested by NetApp, or to cease using the Product if requested by NetApp; (d) the Product, or any portion thereof, in combination with any other product or service; (e) Third Party Branded Products; (f) services offered by Customer or revenue earned by Customer for such services; or (g) any content or information stored on or used by Customer or a third party in connection with a Product.

**5.5. Entire Liability.** Notwithstanding any Term to the contrary in these Terms, this Section 5 states NetApp's entire liability and Customer's sole and exclusive remedies for IP Claims.

## **6. CONFIDENTIALITY**

**6.1. General.** "Confidential Information" means any information disclosed by a Party to the other Party in connection with these Terms that (a) is marked "confidential" or "proprietary at the time of disclosure; (b) if disclosed orally or visually, is designated "confidential" or "proprietary" at the time of disclosure and summarized in a writing delivered to the receiving Party within thirty (30) days of disclosure; or (c) by its nature or the circumstances surrounding disclosure, should reasonably be considered confidential or proprietary. "Confidential Information" shall include any reproduction of such information, but shall not include information that: (a) is or becomes a part of the public domain through no act or omission of the receiving Party; (b) was in the receiving Party's lawful possession prior to the disclosure and had not been obtained by the receiving Party either directly or indirectly from the disclosing Party; (c) is lawfully disclosed to the receiving Party by a third party without restriction on the disclosure; or (d) is independently developed by the receiving Party.

**6.2. Treatment of Confidential Information.** Confidential Information will remain the property of the disclosing Party. Each Party will have the right to use the other's Confidential Information solely for the purpose of fulfilling its obligations under these Terms. Each Party agrees

(a) to hold the other Party's Confidential Information in confidence for a period of three (3) years from the date of disclosure; and (b) to disclose the other Party's Confidential Information only to those employees or agents who have a need to know in furtherance of these Terms and who are required to protect such Confidential Information against unauthorized disclosure under terms no less restrictive than those set forth herein. The receiving Party will protect the Confidential Information from unauthorized use, access, or disclosure in the same manner as it protects its own proprietary information of a similar nature, and in any event with at least a reasonable degree of care. The receiving Party may disclose the disclosing Party's Confidential Information to the extent such disclosure is required pursuant to a judicial or administrative proceeding, provided that the receiving Party gives the disclosing Party prompt written notice thereof and the opportunity to seek a protective order or other legal remedies.

**6.3. Return/Destruction.** Upon the disclosing Party's written request, all Confidential Information (including all copies thereof) of the disclosing Party will be returned or destroyed, unless the receiving Party is required to retain such information by law, and the receiving Party will provide written certification of compliance with this Section 6.3.

## 7. LIMITATION OF LIABILITY

**7.1. Liability Exclusions.** Regardless of the basis of claims (e.g., contract, tort, or statute) in no event will NetApp or its suppliers or subcontractors be liable to Customer for special, incidental, indirect or consequential damages; downtime costs; loss or corruption of data; loss of revenues, profits, goodwill or anticipated savings; procurement of substitute goods and/or services; interruption of business; Customer's failure to comply with applicable "non-erasable" and "non-rewriteable" U.S. government regulations; the acts and omissions of any Cloud Provider; and Customer's failure to obtain any applicable third party licenses necessary to operate any third party software required in connection with the use of the Products and for NetApp to freely and without interruption perform the Services. This exclusion is independent of any remedy set forth in these Terms.

**7.2. Cumulative Liability.** To the extent that limitation of liability is permitted by law, NetApp's liability is limited to US\$1,000,000. This limitation is cumulative and not per incident.

**7.3. Exceptions.** The limitations set forth in Sections 7.1 and 7.2 above will not apply to liability for death or personal injury caused by negligence, gross negligence, willful misconduct, fraud, any other liability which cannot be excluded under applicable laws, or to IP Claims under Section 5.

## 8. COMPLIANCE WITH LAWS

**8.1. Compliance.** Each Party will comply with all applicable laws and regulations.

**8.2. Export.** Customer acknowledges that Products and Services supplied by NetApp under these Terms are subject to export controls under the laws and regulations of the United States, and other countries as applicable, and that Products and Services may include export controlled technologies, including without limitation encryption technology. Customer agrees to comply with such laws and regulations and, in particular, represents and warrants that it: (a) will not, unless authorized by U.S. export licenses or other government authorizations, directly or indirectly export or re-export Products and Services to (or use Products and Services in) countries subject to U.S. embargoes or trade sanctions programs; (b) is not a party, nor will it export or re-export to a party, identified on any government export exclusion lists, including but not limited to the U.S. Denied Persons, Entity, and Specially Designated Nationals Lists; and (c) will not use Products and Services for any purposes prohibited by United States law, including but without limitation, the development, design, manufacture, or production of nuclear, missile, chemical biological weaponry or other weapons of mass destruction. Customer agrees to provide NetApp with end use and end user information upon NetApp's request. Customer will obtain all required authorizations, permits, or licenses to export, re-export or import, as required. Customer

agrees to obligate, by contract or other similar assurances, the parties to whom it re-exports or otherwise transfers Products and Services to comply with all obligations set forth herein.

**8.3. Anti-Bribery.** Each Party shall comply with all applicable country laws relating to anti-corruption or anti-bribery, including but not limited to the requirements of the U.S. Foreign Corrupt Practices Act, as amended, the U.K. Bribery Act, and legislation implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

## 9. MISCELLANEOUS

**9.1. Termination.** These Terms are effective until terminated. Customer may terminate these Terms at any time upon written notice to NetApp. NetApp may terminate these Terms immediately upon written notice to Customer if Customer commits a material breach of these Terms, including failure to remit payments when due (whether payable to NetApp or its authorized third party financing partners in connection with an Approved Financing Agreement, described in Section 9.7 below) and, in the event that the breach is remediable, Customer fails to remedy it within thirty (30) days of NetApp's written notice requiring Customer to do so. Upon termination of these Terms, all rights to use the Software and Documentation cease and Customer will, at NetApp's request, promptly return or destroy all copies of the Software and Documentation, including any license enablement keys, in Customer's possession or under Customer's control, unless the license granted to Customer under Section 2.1 is a perpetual license and Customer remains in full compliance with these Terms.

**9.2. Cloud-Based Offering Notice.** Customers buying Cloud-Based Offerings must also comply with the Cloud Provider's applicable terms. Customer is responsible for its Cloud Provider selection, including but not limited to assessing Cloud Provider's services, compliance, and security. Customers using Cloud-Based Offerings to provide customer services may only do so if: (a) its users agree to terms limiting NetApp's liability in a manner no less protective than these Terms; (b) its users provide legally required consents for data storage, use, transfer or handling; and (c) its services comply with applicable laws and regulations, including but not limited to data protection regulations.

**9.3. Force Majeure.** Neither Party will be liable to the other for any alleged loss or damages resulting from acts of God, acts of civil or military authority, governmental priorities, fire, floods, earthquakes, epidemics, quarantine, energy crises, strikes, labor trouble, terrorism, war, riots, accidents, shortages, delays in transportation or any other causes beyond the reasonable control of a Party (collectively, "Force Majeure").

**9.4. Data Privacy and Recovery.** Customer is solely responsible for personal data managed or stored using Products and agrees to comply with all applicable data privacy laws. Customer will be solely responsible for management of its data back-up, data recovery, and disaster recovery measures. Customer assumes responsibility for undertaking the supervision, control, and management of NetApp Hardware and Software including following industry-standard processes, procedures, and requirements: (a) for the security of data, accuracy of input and output, and back-up plans, including restart and recovery in the event of a Force Majeure event or a Hardware or Software error or malfunction; and (b) for reconstruction of lost or altered files, data, and programs. NetApp will not be responsible or held liable for Customer's internal processes and procedures related to the protection, loss, confidentiality, or security of Customer's data or information.

**9.5. Hazardous Environments.** Products are not designed or intended for use in or in the design, construction, operation, or maintenance of a nuclear facility or similar hazardous environment. NetApp will not be liable for any damages resulting from such use.

**9.6. Product Evaluation.** Subject to these Terms, as amended by this Section, NetApp may loan Products to Customer at no cost for a ninety (90) day period from the initial delivery of the Products to Customer, or such other period as agreed by NetApp in writing, for evaluation purposes. Such Products may only be used in a non-production environment to

assess the suitability of the Products for Customer's needs. Notwithstanding Section 4 above, the evaluation Products are provided and licensed to Customer on an "AS IS" basis and all warranties, whether express, implied, statutory or otherwise are excluded to the maximum extent permitted by applicable laws.

**9.7. NetApp Approved Financing.** These Terms also apply to "Financed Software," which means Software and Documentation licensed to Customer for a limited period of use pursuant to the terms of a financing agreement between Customer and NetApp or its authorized third party financing partner (an "Approved Financing Agreement" or "AFA"), subject to the following: (a) the particular Financed Software, period of use, installation site, and other transaction-specific conditions will be as agreed in the applicable AFA; and (b) notwithstanding anything to the contrary in these Terms, all licenses for Financed Software terminate at the expiration of the term of the AFA unless otherwise expressly agreed in the AFA, or when sooner terminated by NetApp (whether in accordance with these Terms or the AFA). Customer agrees that the license granted under Section 2 above and NetApp's termination rights under Section 9.1 above may be affected by an authorized third party financing partner's rights under the applicable AFA, even if such partner has paid to NetApp all or any portion of the license fees for the Financed Software.

**9.8. Modification, Substitution, Discontinued Product.** NetApp will have sole discretion, at any time, to change, substitute, or discontinue Products. NetApp will use commercially reasonable efforts to provide sixty (60) calendar days' prior notice of any such changes.

**9.9. Waiver.** Any waiver or failure to enforce any provision of these Terms on any occasion will not be deemed a waiver of any other provision or of such provision on any other occasion. Either Party's exercise of any right or remedy provided in these Terms will be without prejudice to its right to exercise any other right or remedy.

**9.10. Severability.** In the event any provision of these Terms is held by a court of competent jurisdiction to be unenforceable for any reason, such provision will be changed and interpreted to accomplish the objectives of such provision to the greatest extent possible under applicable law and the remaining provisions hereof will be unaffected and remain in full force and effect.

**9.11. Assignment.** Customer may not assign any rights or delegate any obligations under these Terms without the prior written consent of NetApp. Any purported assignment by Customer without NetApp's prior written consent will be null and void. NetApp may use subcontractors to fulfill its obligations under these Terms.

**9.12. Independent Contractors.** The relationship of the Parties under these Terms is that of independent contractors. Nothing set forth in these Terms will be construed to create the relationship of principal and agent, franchisor/franchisee, joint venture, or employer and employee between the Parties. Neither Party will act or represent itself, directly or by implication, as an agent of the other Party.

**9.13. Publicity.** No advertising, publicity releases, or similar public communications concerning these Terms, the Products, or the Services will be published or caused to be published by either Party without the prior written consent of the other Party. Notwithstanding the foregoing, Customer agrees to be mentioned in the list of buyers of NetApp Products and/or Services and that its logo and trademark may be used for this purpose only.

**9.14. Audit.** Customer grants NetApp and its independent accountants the right to audit Customer or Customer's subcontractors once annually during regular business hours upon reasonable notice to verify compliance with these Terms. If the audit discloses Software over-usage or any other material noncompliance, Customer will promptly pay to NetApp any fees, notified to Customer, and the reasonable costs of conducting such audit.

**9.15. General.** These Terms are governed by and construed in accordance with the law of the State of New South Wales. The Parties agree to disclaim the application of the United Nations Convention on Contracts for the International Sale of Goods. NetApp reserves the right to control all aspects of any lawsuit or claim that arises from Customer's use of the Products. If required by NetApp's agreement with a third party licensor, NetApp's licensor will be a direct and intended beneficiary of these Terms and may enforce them directly against Customer. These Terms may not be changed except by an amendment accepted by an authorized representative of each Party. In the event of a dispute between the English and non-English version of these Terms (where translated for local requirements), the English version of these Terms will govern, to the extent permitted by applicable laws. These Terms represent the entire agreement and understanding between NetApp and Customer with respect to the Products. They supersede any previous communications, representations or agreements between NetApp and Customer and prevail over any conflicting or additional terms in any quote, purchase order, acknowledgement, or similar communications between the Parties.

**9.16. Use Restriction.** Products and Services are for Customer's use and are not for resale or redistribution.