

Meridian IT Australia

Service Description – mStore Flex

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mStore Flex - Terms of Service

These Keystone Channel End User Terms of Service (“End User Terms”) provide the terms that apply to the use of NetApp’s Keystone Storage-as-a-Service (“Subscription Services”), which are offered by or through an authorized NetApp channel partner (“Partner”) to its end user customer (“End User”). Once NetApp accepts a Partner Order placed by Partner, the Subscription Services will provide End User with the right to access and use NetApp’s hardware and software (“Subscription Products”). End User will pay Partner for the Subscription Services in amounts specified in the End User’s Keystone Order. Subscription Products may be physically located on or accessible at premises that End User either owns or controls, and End User is only granted limited use rights to those Subscription Products.

1. **Definitions.** Capitalized terms used but not defined in these End User Terms have the meanings set forth in the applicable Keystone Order and Service Description.
 - 1.1 **“Affiliate”** means any entity which, directly or indirectly, controls, is controlled by, or is under common control with, a party, where “control” means the power to direct or cause the direction of the management and policy of any entity.
 - 1.2 **“Committed Capacity”** means the amount of data storage capacity that is specified in a Keystone Order. Committed Capacity is defined in the type of Performance Level and the units increments identified in the Service Description.
 - 1.3 **“Consumed Capacity”** has the meaning set forth in the Service Description
 - 1.4 **“End User Information”** means any information provided by or on behalf of End User, whether or not it includes Personal Information, that is uploaded onto or used with the Subscription Products.
 - 1.5 **“Documentation”** means NetApp supplied technical documentation describing the features and functions of the Subscription Services.
 - 1.6 **“Keystone Fees”** means the applicable fees for the Subscription Services set forth in a Keystone Order, as further described in the Service Description.
 - 1.7 **“Keystone Order”** means a written or electronic order or confirmation provided to Partner by End User for the purchase of Subscription Services. At a minimum, each Keystone Order will set forth the Subscription Term, the Committed Capacity (including relevant minimum payments), the applicable Performance Level, and the applicable Rates.
 - 1.8 **“Metering Tool”** means the web-based tool provided by NetApp through which usage of the Subscription Services can be monitored as further described in the Service Description.
 - 1.9 **“Partner Order”** means the order for Subscription Services submitted to NetApp by a Partner for End User’s purchase of Subscription Services.
 - 1.10 **“Performance Level”** has the meaning set forth in the Service Description.
 - 1.11 **“Purchase Terms”** mean the applicable terms and conditions, as modified by these End User Terms, which govern the supply of the Subscription Products delivered or otherwise made available by Partner or NetApp to End User in support of the Subscription Services. The Purchase Terms may take the form of: (i) the Channel End User Terms of Service made available to End User by a Partner or (ii) the terms set forth in the NetApp’s How-to-Buy Site, which can be accessed at <http://netapp.com/us/how-to-buy/stc.html>, as applicable.
 - 1.12 **“Rate”** means the applicable rates set forth in a Keystone Order that are used to calculate the Keystone Fees.
 - 1.13 **“Recovery Fee”** means (A) NetApp’s reasonable costs of deinstallation and repossession of the Subscription Hardware; and (B) any costs associated with any damage or loss of Subscription Hardware that occurred while in End User’s possession.
 - 1.14 **“Replacement Value Fee”** means the cost of the replacement for such Subscription Hardware, calculated in accordance with NetApp’s then current price list.
 - 1.15 **“Service Description”** means the description for each Subscription Service ordered under a Keystone Order, as published on NetApp’s Keystone Terms and Conditions website, which can be accessed at <https://www.netapp.com/services/keystone/terms-and-conditions/>.
 - 1.16 **“Service Level”** has the meaning set forth in the Service Description.
 - 1.17 **“Subscription Hardware”** means hardware, including its components and spare parts, that is used by NetApp as part of the Subscription Services.
 - 1.18 **“Subscription Product(s)”** means any part or all of the Subscription Hardware and Subscription Software used by NetApp as part of the Subscription Services, whether as part of the original

configuration, or subsequently added in the ordinary course of NetApp's performance of the Subscription Services.

- 1.19 "Subscription Services"** means certain NetApp storage-as-a-service (STaaS) capacity, together with any additional services, that are purchased under a Keystone Order and made available to End User on a subscription basis as described in more detail in the applicable Service Description.
- 1.20 "Subscription Software"** means the software that is used by NetApp as part of the Subscription Services (whether delivered on or with Subscription Hardware or on a standalone basis).
- 1.21 "Subscription Term"** means the use term specified in a Keystone Order, including any renewal or extension periods.

2. Scope of Keystone Flex Subscription.

NetApp will provide End User with the Subscription Services identified in each Keystone Order accepted by NetApp. End User acknowledges and agrees that a Keystone Order is binding and sufficient for NetApp to calculate Consumed Capacity in accordance with the Service Description. Although Partner and End User may agree to separate transactions covering products and/or services in connection with the Subscription Services identified in the Keystone Order, NetApp will not accept any liability in relation to Subscription Services over and above those set out in these End User Terms.

3. Delivery and Consumption of Subscription Services.

3.1 Subscription Products. NetApp will determine the Subscription Products used to deliver Subscription Services. In making such determination NetApp may: (a) choose, substitute, and modify Subscription Product configurations; (b) configure, control, and direct the use of Subscription Products; (c) scale Subscription Services by adding or removing any part of the Subscription Products provided by NetApp to adjust to variations in utilization; and (d) refresh Subscription Products with new technology when reasonably deemed appropriate. End User will cooperate with NetApp to enable the installation, documentation, and utilization, of Subscription Products, including providing such access and authorization as is reasonably necessary to complete the installation. NetApp reserves the right to deinstall Subscription Products that NetApp deems unnecessary to fulfill the Service Level requirements at any time. Notwithstanding the foregoing, NetApp will have no obligation to meet the applicable Service Levels, nor add Subscription Products needed to meet such Service Levels, if End User increases usage of the Subscription Services during the final 90 days of the Subscription Term, unless the Parties have agreed in writing to renew or otherwise extend the Subscription Term prior to or during such final 90 day period.

3.2 Location and Use of Subscription Services.

End User may only use Subscription Services (a) on the Subscription Products used by NetApp in connection with the applicable Keystone Order, and (b) at the specific physical location identified on a Keystone Order where the Subscription Products are installed and maintained, whether such location is owned by or under the control of End User or any third party (each such location, an "**End User Site**"). Unless otherwise expressly permitted in a Service Description or the applicable Keystone Order, End User will not, nor will End User permit any third party to, combine, commingle, or otherwise use the Subscription Services or the Subscription Products with any hardware storage products or services (including any NetApp hardware storage products or services supplied by NetApp under a separate Keystone Order or agreement).

3.3 Changes to the Subscription Services. The processes for adjusting the Committed Capacity and the Subscription Services are described in the Service Description

4. Rights of Use for and Ownership of Subscription Products

4.1 Right to Use Subscription Products.

The Subscription Services provide End User with the right to use Subscription Products, and do not transfer any ownership or title to End User. The Subscription Services are provided to End User for End User's use for internal business purposes only and are not for resale or redistribution.

4.2 Right to Use Subscription Software.

NetApp grants End User a non-exclusive, non-transferable and revocable right to use the Subscription Software associated with the Subscription Services during the applicable Subscription Term. The Subscription Software may include software that is openly and freely licensed under the terms of a public license designated by a third party. Nothing in these End User Terms grants the End User rights that supersede those contained in an applicable license for the open source software.

4.3 Additional Restrictions.

In addition to restrictions set forth in the Purchase Terms, End User will not, nor will End User permit any third party to: (a) relocate any of the Subscription Products from the End User Site(s) without the prior written consent of NetApp, which consent will not be unreasonably withheld; (b) reconfigure, modify, add to or impair any portion of Subscription Products, whether with third party products or otherwise, except as expressly permitted in the Keystone Order or as mutually agreed in writing by the Parties; (c) use the Subscription Products or Subscription Services in breach or excess of any limitations prescribed by NetApp in these End User Terms or the associated Keystone Order or related documentation; (d) use the Subscription Products or Subscription Services and related documentation to perform services for third parties in a service bureau, managed services, commercial hosting services, or similar environment unless otherwise agreed to in writing by NetApp; or (e) assign or otherwise transfer, in whole or in part, End User's use rights or licenses to the Subscription Services, the Subscription Products, or the related documentation to another party, unless otherwise agreed to in writing by NetApp.

4.4 Risk of Loss; Title.

NetApp retains sole and exclusive title to the Subscription Products and all of their components. End User is solely responsible for any loss or damage to the Subscription Products from the date of delivery to the date of final disposition of the Subscription Products as provided in **Section 9.3(a)** and the applicable Keystone Order.

5. End User Responsibilities.

5.1 Ongoing Cooperation.

Ongoing Cooperation. End User will, at all times during the period from the date of delivery of any Subscription Products to the date of final disposition of such Subscription Products under **Section 9.3(a)** and the applicable Keystone Order: (a) promptly notify NetApp if the Subscription Products or any part of them are lost, stolen, destroyed or damaged beyond repair, or are the subject of condemnation, confiscation, seizure or requisition of title to or use of the same; (b) ensure that the Subscription Products do not suffer any loss or damage caused, whether directly or indirectly, by End User or any party acting by or through End User; (c) permit NetApp to inspect the Subscription Products at any time during End User's regular business hours, with reasonable prior notice, subject to End User's reasonable security procedures; (d) promptly notify NetApp in writing of any changes caused by planned or unplanned events impacting End User's environment (such as space, power, network, security, etc.) that may impact the Subscription Products (e.g., maintenance, upgrades); and (e) provide NetApp remote access to perform implementation and monitoring services beyond basic installation.

5.2 Metering Tool.

End User will at all times during the Subscription Term keep the Metering Tool remote client connection fully operational, without disabling, blocking, modifying or otherwise interfering with its functionality or its ability to communicate with NetApp. If the Metering Tool does not function due to End User interference or conflict with any third-party products that End User uses, then End User will promptly remove the interference or the conflicting products. If End User fails to do so within

seven days of notice from NetApp of such failure, or if the Metering Tool is unavailable because of the acts or omissions of End User for more than 30 days, then NetApp may (i) suspend the provision of Subscription Services until the Metering Tool operability is restored, or (ii) terminate the Subscription Services.

6. Performance Levels, Service Levels and Disclaimers.

6.1 Performance Levels. NetApp will provide the Subscription Services in accordance with the Performance Levels selected by End User, subject to the applicable Service Levels.

6.2 Applicability of Purchase Terms. The parties agree that certain rights, obligations and warranties affecting the ordinary and customary sales of NetApp products and services are included in the Purchase Terms. To the extent applicable, such rights, obligations and warranties are deemed to apply to Subscription Products owned by NetApp and made available to End User in connection with the use of the Subscription Services, subject at all times to these End User Terms and the Service Description.

6.3 Disclaimer of Warranties. NETAPP MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE REGARDING THE SUBSCRIPTION PRODUCTS AND SUBSCRIPTION SERVICES PROVIDED UNDER THIS AGREEMENT. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAWS, NETAPP SPECIFICALLY DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, TITLE, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT, AND ANY WARRANTIES ARISING OUT OF ANY COURSE OF DEALING. TO THE EXTENT PERMITTED BY APPLICABLE LAWS, THE SERVICE LEVEL REMEDIES SET FORTH IN THE SERVICE DESCRIPTION ARE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES FOR ANY FAILURE ON BEHALF OF NETAPP TO PROVIDE THE SUBSCRIPTION PRODUCTS AND THE SUBSCRIPTION SERVICES IN ACCORDANCE WITH THE PERFORMANCE COMMITMENTS SET FORTH THEREIN.

7. Limitation of Liability. The limitation of liability terms in the Purchase Terms will apply to these End User Terms.

8. Intellectual Property Rights and Protection.

The Intellectual Property Rights and Protection terms in the Purchase Terms will apply to these End User Terms.

9. Termination.

9.1 Termination for Cause.

In addition to the termination rights described in the Purchase Terms, either NetApp or End User may, by giving written notice thereof to the defaulting party, terminate these End User Terms as of the date of such notice, if: (a) either party fails to perform or observe any other material obligation, covenant or agreement contained in these End User Terms, and such failure continues and is not substantially cured within thirty (30) days after written notice thereof, or (b) any representation, warranty, covenant or agreement furnished by either party herein shall prove to have been materially false or misleading when made.

9.2 Termination for Insolvency.

In addition to the termination rights described in the Purchase Terms, either NetApp or End User may, by giving written notice thereof to the defaulting party, terminate these End User Terms as of the date of such notice, if either party becomes insolvent, files, or has filed against it a petition under applicable bankruptcy or insolvency laws which is not dismissed within 90 days, proposes any dissolution, composition or financial reorganization with creditors, makes an assignment for the benefit of creditors, or if a receiver, trustee, conservator, liquidator or similar agent is appointed or takes possession with respect to any property or business of such party. Notwithstanding the preceding sentence, End User may not terminate these End User Terms if NetApp continues to perform its obligations under these End User Terms and the related Service Description, such that End User's access to the Subscription Services is not materially impaired or adversely impacted, subject to any additional conditions or assurances that may be required by a duly authorized court,

or imposed by or upon a trustee or administrative agent under applicable insolvency or bankruptcy laws.

9.3 Effects of Termination.

In addition to the terms set forth in the Purchase Terms:

- Upon termination or expiration of these End User Terms or any applicable Keystone Order, End User will:
 - promptly discontinue use of, and delete, all data uploaded on the Subscription Products by End User within the affected Subscription Services; and (ii) return in accordance with the guidelines provided or otherwise make available to NetApp any Subscription Hardware provided by NetApp as part of the affected Subscription Services in the same condition as when originally delivered, ordinary wear and tear excepted. End User must also, at NetApp's request, promptly return or destroy all copies of the Subscription Software and related Documentation, including any license enablement keys, in End User's possession or under End User's control, with all End User Information or proprietary and confidential information removed. End User acknowledges that any End User Information remaining on any Subscription Hardware returned to NetApp may be disposed of or destroyed by or on behalf of NetApp without any liability to NetApp, and NetApp disclaims all liability for the removal or for the protection of any such End User Information.
- Subject to express terms in the Keystone Order permitting the retention of some or all of the Subscription Hardware, failure by End User to return the Subscription Hardware within 15 calendar days following the expiration of the Subscription Term or termination of these End User Terms will entitle Partner, in its sole discretion, to invoice End User either: (A) the Replacement Value Fee, or (B) the Keystone Fees accruing until final return by End User, which will not be less than the applicable Minimum Payment amounts payable immediately prior to the expiration of the Subscription Term or termination of these End User Terms. In addition to Partner's right to invoice the Replacement Value Fee or the Keystone Fees accruing until final return pursuant to the previous sentence, if End User does not return the Subscription Hardware within 15 calendar days following expiration of the Subscription Term or termination of the End User Terms and Partner has not invoiced End User the Replacement Value Fee, NetApp shall have the right to recover the Subscription Hardware from End User, and Partner shall have the right to charge End User the Recovery Fee.
- In the event of termination or expiration of a Keystone Order, NetApp may also, in its sole discretion,
- cease the supply of the Subscription Services under any or all affected Keystone Orders,
- suspend or terminate delivery of the Subscription Services, and terminate all rights to use the Subscription Software and related documentation, and
- require End User to disable use of and/or access to the Subscription Products, and return the Subscription Products in accordance with this **Section 9.3**.
- If NetApp terminates the End User Terms or an applicable Keystone Order for cause under **Section 9.1** or insolvency under **Section 9.2**, End User will promptly pay to Partner or to NetApp (as directed by NetApp):
 - any past due amounts
 - the Keystone Fees that are to become due for the remaining Subscription Term
 - any amounts payable pursuant to **Section 9.3(b)**.

10. Data Ownership, Management and Security

10.1 As between the parties:

- NetApp retains all right, title and interest in and to Functional Data, and may collect and use Functional Data to provide and improve the Subscription Services and NetApp's other products and services. For purposes of this **Section 10**:
"Functional Data" means data which does not contain End User Information or Personal Information, which is generated as NetApp provides the Subscription Services and which informs

NetApp in the development, deployment, operations, maintenance, and securing of the Subscription Services

- “*Personal Information*” is defined in the NetApp Privacy Policy, at <https://www.netapp.com/us/legal/privacypolicy/index.aspx>.
- End User retains all right, title and interest in and to End User Information. NetApp acquires no rights in End User Information, other than the rights End User grants to NetApp hereunder to provide the Subscription Services to the End User.
- To the extent necessary for such use, NetApp will use End User Information solely to provide the Subscription Services including, if applicable, related Subscription Services.
- NetApp will not disclose End User Information outside of NetApp or its Affiliates except to the extent required to make the Subscription Services available for End User use or to the extent such disclosure is required by applicable law. NetApp will give End User reasonable notice of a request of a governmental or regulatory body for End User Information to allow End User to seek a protective order or other legal remedies (except to the extent NetApp’s compliance with this Section would cause it to violate a court order or other legal requirement).
- Article 28(1) of the European Union General Data Protection Regulation (“*GDPR*”) requires an agreement between a controller and processor, and between a processor and sub processor, that processing of Personal Information be conducted in accordance with technical and organizational measures that meet the requirements of the GDPR and ensure the protection of the rights of data subjects. Additional terms and conditions applicable to NetApp acting in a role as a data processor are set forth at <https://www.netapp.com/us/how-to-buy/index.aspx>.
To the extent NetApp acts as a data processor, as defined in the California Consumer Privacy Act, of Personal Information on End User’s behalf, NetApp will not retain, use, or disclose such Personal Information for any purpose other than providing Subscription Services to End User in accordance with these End User Terms. NetApp certifies that it understands the foregoing restrictions and will comply with them.

10.2 End User is responsible for the migration of End User Information onto or from any Subscription Products deployed in connection with the Subscription Services.

10.3 Except to the extent NetApp expressly agrees to perform such migration services in a Keystone Order, NetApp will not be responsible or held liable for End User’s internal processes and procedures related to the protection, loss, confidentiality, or security of End User Information, or the data or information of any of End User’s Affiliates or end user customers.

10.4 To the extent NetApp’s Subscription Services expressly include the delivery of certain data protection, data durability and/or data security services (as specified in a Keystone Order and as further described in the Service Description), NetApp will implement reasonable technical and organizational safeguards designed to protect End User Information against unauthorized loss, destruction, alteration, access, or disclosure in accordance with the terms and conditions contained or referenced in the Keystone Order. NetApp may modify such safeguards from time to time, provided that such modifications will not materially reduce the overall level of protection for End User Information.

If NetApp discovers a Security Incident has occurred, NetApp will notify End User promptly and without undue delay unless otherwise prohibited by law or otherwise instructed by a law enforcement or supervisory authority. In addition to providing such notification, NetApp will promptly take reasonable steps to mitigate the effects of the Security Incident and to minimize any damage resulting from the Security Incident. End User must notify NetApp promptly about any possible misuse of its accounts or authentication credentials or any Security Incident of which it becomes aware related to the Subscription Services.

