Software Licence Agreement – Downloadable

This Software Licence Agreement (**Agreement**) is made on the earlier of the date that Licensee accepts this Agreement or the date that Licensee first purchases, downloads or uses Software (**Effective Date**) and is between:

- **WingArc Australia Pty Ltd** (ABN 98 006 559 191), a Company duly incorporated in the State of Victoria in the Commonwealth of Australia with its principal business address at Level 7, 360 Collins Street, Melbourne, VIC 3000, Australia, e-mail admin@wingarc.com.au (**WingArc Australia**)

and

- any purchaser or user of the WingArc Australia products that accepts the terms of this Agreement by purchasing, downloading or using WingArc Australia Products **Licensee**)

PLEASE READ THIS AGREEMENT CAREFULLY BEFORE PURCHASING, DOWNLOADING OR USING WINGARC AUSTRALIA PRODUCTS. BY PURCHASING, DOWNLOADING OR USING WINGARC AUSTRALIA PRODUCTS, YOU SIGNIFY YOUR ASSENT TO THIS AGREEMENT, INCLUDING ANY AGREEMENTS FOR THIRD PARTY SOFTWARE THAT IS INCLUDED AS PART OF WINGARC AUSTRALIA PRODUCTS. IF YOU ARE ACTING ON BEHALF OF AN ENTITY, THEN YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO ENTER INTO THIS AGREEMENT ON BEHALF OF THAT ENTITY. IF YOU DO NOT ACCEPT THE TERMS OF THIS AGREEMENT, THEN YOU MUST NOT PURCHASE, DOWNLOAD OR USE WINGARC AUSTRALIA PRODUCTS.

Background

A)   Licensee has requested that WingArc Australia grant to it a licence to use software described in the licence certificate provided by WingArc Australia (**Licence Certificate**), which is incorporated herein by reference (**Software**).

B)   WingArc Australia has agreed to grant Licensee a limited licence to use the Software at the site location set out in the Licence Certificate (**Site Location**) in consideration for payment of and the fees set out in the Licence Certificate (**Fees**).

It is agreed

1.   **Grant of Licence.** In consideration of payment of the Fees, WingArc Australia grants to Licensee, and Licensee accepts, a limited, non-exclusive licence to install and use, during the period during which this Agreement remains in force (**Term**), the Software, on, and subject to Licensee complying with, the terms and conditions of this Agreement (**Licence**). The Software is licensed, not sold and all rights (including any intellectual property rights), in and to the Software and accompanying printed materials and any copies of the Software and materials are owned by WingArc Australia or third parties. WingArc Australia reserves all rights not expressly granted to Licensee in this Agreement. This Agreement is to be read in conjunction with any documentation made available by WingArc Australia in connection with the Software (including any instructions downloadable from the WingArc Australia website <www.wingarc.com.au>). Such documentation is incorporated into this Agreement by reference, to the extent not inconsistent with this Agreement. By installing, copying, downloading, accessing or otherwise using the Software, Licensee agrees to be bound by the terms of this Agreement.

2.   **Payment.** Licensee must pay the Fees in accordance with the Licence Certificate.

3.   **Licensee acknowledgements.** Licensee acknowledges that:

   (a)   the function for which the Software is licensed is to allow conversion of Licensee's data into databases in WingArc Australia's proprietary data format (**Cubes**), and analysis of such Cubes, and dissemination of information from such analysis, and the Licence comprises such use, and no other use;

   (b)   on termination of this Agreement, it will cease to have the right to access and analyse Cubes, nor to allow third parties to access or analyse Cubes and that any such rights will only exist pursuant to any further licence granted by WingArc Australia, at its discretion, and for such further fees and on such other terms as may be agreed;

   (c)   for the avoidance of doubt, on termination of this Agreement, it must take such action as WingArc Australia requests to give effect to the preceding paragraph;

   (d)   any breach of this clause would cause WingArc Australia irreparable harm and damages would not be an adequate remedy for any such breach, such that if it actually breaches or threatens to breach this clause, WingArc Australia will be entitled to enforce this Agreement by injunctive relief or specific performance as a remedy (in addition to other available relief) without proof of actual or special damage; and

   (e)   if this licence includes SuperTABLE, WingArc Australia may, at its discretion, grant licences to the public at large or persons of a certain class, under the SuperTABLE module, to access and further analyse Cubes made available to such persons by Licensee. The current terms of WingArc Australia's SuperTABLE licence are set out at the WingArc Australia website <www.wingarc.com.au>), and WingArc Australia may, without notice, amend such terms, and terminate, such licences as it sees fit.

4.   **WingArc Australia acknowledgement.** WingArc Australia acknowledges that it acquires no rights in any Cubes, other than a non-exclusive licence to store same, on servers maintained by or on behalf of WingArc Australia, to the extent necessary to give effect to this Agreement. Further terms applicable to such server storage are set out at the WingArc Australia website <www.wingarc.com.au>. WingArc Australia may, not more than once in any calendar year and on not less than two days notice, audit Licensee's use of the Software to ensure compliance with this Agreement.

5.   **Back-up Copy.** Licensee may make a single back-up copy of the Software and use such back-up copy solely for archival purposes and to reinstall the Software at the Site Location if the initial installation at the Site Location ceases to operate for any reason. Except as expressly permitted by the local law of the Site Location, Licensee must not otherwise make copies of the Software. Despite the foregoing, Licensee must not loan, rent, license, lend or otherwise transfer the Software or back-up copy to any person without WingArc Australia's prior written consent (to be given, with or without conditions, or withheld at WingArc Australia's absolute discretion). Except as otherwise expressly provided in this clause, Licensee must not install, use, access, display or run the Software at any location other than at the Site Location.

6.   **Limitations on Reverse Engineering etc.** Licensee must not, and must not allow others to, copy, decompile, reverse engineer, disassemble, attempt to derive the source code of, decrypt, modify or create derivative works of the Software, or any part thereof (except as and only to the extent any foregoing restriction is prohibited by applicable law or to the extent as may be expressly permitted by this Agreement).

7.   **Third party software.** Portions of the Software use or include third party software and other copyrighted material set out at the WingArc Australia website <www.wingarc.com.au>). Licensee agrees to not install nor use such third party software and other copyrighted material other than to the extent necessary to use and install the Software in accordance with this Agreement. Despite the preceding sentence, Licensee agrees not to install nor use such third party software and other copyrighted material contrary to any provisions set out at the WingArc Australia website <www.wingarc.com.au>.

8. **Downloads, upgrades, new versions.** Licensee may make such copies of printed materials accompanying the Software (including material available for download through access to the WingArc Australia website <www.wingarc.com.au>, or any website accessed via that website) as is reasonably necessary to properly exercise the Licence. Licensee acknowledges that all such copies remain WingArc Australia's property and all such downloads are undertaken, and materials used, at Licensee's own discretion and risk and that it is solely responsible for any damage to any computer, system or network or loss of data arising in relation to such activities. The Software does not include phone or other support, nor any entitlement to upgrades, bug-fixes or further versions (which support, upgrades, bug-fixes or further versions WingArc Australia may make available at its discretion), save that WingArc Australia agrees to provide the services (including support pursuant to the Customer Support Guide applicable from time to time), if any, as specified in the Licence Certificate (**Services**).

9. **Term and termination.** This Agreement will commence on the Effective Date and, unless terminated earlier, will continue in force for the initial term specified in the Licence Certificate (**Initial Term**), and on expiration of the Initial Term this Agreement will be deemed renewed for subsequent terms each of the duration specified in the Licence Certificate (each a **Renewal Term**), unless one of the parties provides written notice of termination to the other party of not less than 60 days before the expiration date of the Initial Term or then current Renewal Term. Either party may provide such notice entirely in its discretion, and with or without cause and without any liability. In no event shall any provision of this Agreement operate to characterise this Agreement as being a perpetual agreement. Without prejudice to any other rights WingArc Australia may have under this Agreement or at law, this Agreement will terminate without notice to Licensee if Licensee breaches any provision of this Agreement. On termination of this Agreement, WingArc Australia has no obligation to refund any Fees and Licensee must uninstall and destroy all copies of the Software (including any parts of the Software) and all Cubes, then in its possession custody or control. All clauses which by their nature, including clauses 3, 6, 10, 11, 12 and 13, and any rights or obligations which have accrued before this Agreement ends, will continue in accordance with their terms.

10. **Confidentiality and public attribution.** The terms of this Agreement and all information relating to WingArc Australia of which Licensee becomes aware (**Confidential Information**) are confidential to WingArc Australia and Licensee must keep the Confidential Information secret, secure and confidential, and must not, without the prior written consent of WingArc Australia disclose, communicate, or otherwise make known to any person any part of the Confidential Information nor use the Confidential Information other than solely for the purpose of, and to the extent necessary, to give effect to this Agreement. On termination of this Agreement or earlier request by WingArc Australia, Licensee must, at its cost, deliver to WingArc Australia or destroy (at WingArc Australia's option) any and all embodiments of Confidential Information (including in electronic form) that may be in its possession or control and Licensee's obligations in this clause 10 will continue in force in respect of each piece of Confidential Information until Licensee can prove such piece has become part of the public domain otherwise than by a breach of an obligation of confidence owed to WingArc Australia. Licensee agrees to allow WingArc Australia to refer to Licensee as a user of the Software in promotional material such as case studies and media releases. Licensee must not make any public announcement or other communication relating to WingArc Australia or the Software without WingArc Australia's prior written approval.

11. **Consent to collection and use of data.** WingArc Australia may use any information provided by Licensee pursuant to this Agreement to give effect to this Agreement and for marketing purposes, but must ensure that any of use of personal information is in accordance with its then current privacy policy, which at the Effective Date is available at the WingArc Australia website <www.wingarc.com.au> and incorporated into this Agreement by reference.

12. **Disclaimers.** To the maximum extent permitted by applicable law, the Software and Services are provided "as is" and "as available" and without representation or warranty of any kind and WingArc Australia (which for the purposes of this clause 12 and clause 13, includes any third party providers referred to in clause 7) disclaims all representations and warranties with respect to the Software and Services, whether express, implied or statutory, including any implied warranties of due care and skill, merchantability, satisfactory quality and fitness for a particular purpose. Licensee has relied on its own skill and judgement in deciding to acquire the Licence and Services and acknowledges that no representation or warranty has been made or given by WingArc Australia to any person or company on its behalf in relation to the profitability of the Software or Services or any other consequences or benefits to be obtained from the use of the Software and any accompanying printed materials, or the Services. WingArc Australia further disclaims any representation or warranty that the use of the Software will not infringe any third party rights, or be uninterrupted or error-free, that any service or Services will continue to be made available, that defects in the Software will be corrected, or that the Software will be compatible or work with any third party software or services. Licensee acknowledges that installation of the Software may affect the usability and interoperability of third party software or services.

13. **Limitation of liability.** To the extent not prohibited by applicable law, in no event will WingArc Australia be liable for personal injury, or any incidental, special, indirect or consequential damages whatsoever, including damages for loss of profits, corruption or loss of data, failure to transmit or receive any data, business interruption or any other commercial damages or losses, arising out of or related to Licensee's use of, or inability to use, the Software or any third party software in conjunction with the Software or otherwise related in any way to this Agreement, however caused, regardless of the theory of liability (contract, tort or otherwise) and even if WingArc Australia has been advised of the possibility of such damages. To the extent not prohibited by applicable law, in no event will WingArc Australia's total liability to Licensee for all damages exceed the amount of the Initial Term Fee set out in the Licence Certificate. Where any legislation implies in the Agreement any term, condition or warranty, and also renders void any provision in a contract which purports to exclude or modify the application or exercise of, or liability under, such term, condition or warranty, such term, condition or warranty will be deemed to be included in the Agreement, however, WingArc Australia's liability for any breach of such term, condition or warranty will be limited, at WingArc Australia's option, to any one or more of the following:

    (a) if the breach relates to goods:

        (i) the replacement of the goods or supply of equivalent goods;

        (ii) the repair of such goods;

        (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods; or

        (iv) the payment of the cost of having the goods repaired; and

    (b) if the breach relates to services:

        (i) the supplying of the services again; or

        (ii) the payment of the cost of having the services supplied again

14. **Force Majeure.** Failure by either party to perform its obligations under this Agreement (other than payment obligations), which arises from a cause(s) beyond its reasonable control, including labour disturbance, virus, Trojan horse, cancel bot, or other harmful code or component, communication outage, Internet outage, interruption of service, denial of service attack, breach of contract by a third party provider of gods or services (including software) to WingArc Australia, fire, threatened or actual act of terrorism, war, natural disaster or act of nature (**Force Majeure**), shall not be deemed a breach of this Agreement. In such event, this Agreement shall continue in full force and effect, provided that if the Force Majeure continues for longer than six (6) months duration, either party may terminate this Agreement on written notice.

15. **Entire Agreement.** Licensee acknowledges and confirms that prior to signing this Agreement it has carefully perused all provisions set out in this Agreement, including the Licence Certificate and other documentation referred to in this licence as available at the WingArc Australia website <www.wingarc.com.au>. Licensee further acknowledges that:

    (a) this Agreement is to be read in conjunction with any documentation made available by WingArc Australia in connection with the Software (including any instructions downloadable from the WingArc Australia website <www.wingarc.com.au>) and such

documentation is incorporated into these terms and conditions by reference, to the extent not inconsistent with these terms and conditions; and

(b) this Agreement (including the Licence Certificate and other documentation referred to in this licence as available at the WingArc Australia website <www.wingarc.com.au>) constitutes the entire understanding between it and WingArc Australia and that it supersedes all proposals, representations and communications, oral or written, passed between the parties with respect to the Software.

16. **Governing law.** This Agreement is governed by the law in force in Victoria, Australia from time to time and the parties irrevocably submit to the non-exclusive jurisdiction of the courts of Victoria, Australia and any courts which may hear appeals from those courts.

17. **Assignment and sub-licensing.** The Licence is personal to Licensee and Licensee must not grant any sub-licenses nor assign any part of the burden or benefit of this Agreement, without WingArc Australia's prior written consent. Licensee must execute a novation of WingArc Australia's rights and obligations under this Agreement to a related body corporate of WingArc Australia or to a third party acquiring or all or a substantial part of WingArc Australia's assets. This Agreement will be binding on, and enure for the benefit of, each party and their respective successors in title and permitted assigns.

18. **Notices.**

(a) A notice or consent under this Agreement is only effective if it is:

(i) in writing, signed by or on behalf of the person giving it;

(ii) addressed to the person to whom it is to be given; and

(iii) either:

a. delivered or sent by pre-paid mail (by airmail, if the addressee is overseas) to that person's address; or

b. sent by e-mail to that person's e-mail address and the machine from which it is sent does not immediately produce an error report.

(b) A notice or consent that complies with this clause 18 is regarded as given and received:

(i) if it is delivered or sent by e-mail:

(A) before 5.00 pm on a day which is a day when banks are generally open for business at the place of receipt (*Business Day*), - on that day; or

(B) on a day which is not a Business Day, or after 5.00 pm on a Business Day - on the next Business Day; and

(ii) if it is sent by mail:

(A) within Australia – three Business Days after posting; or

(B) to or from a place outside Australia – seven Business Days after posting,

(c) WingArc Australia's details for receiving notices and consents are set out in the Parties section. Licensee's details for receiving notices and consents are set out in the Licence Certificate.

19. **General.**

(a) **Costs.** Each party must bear and is responsible for its own costs in connection with the preparation, execution and carrying into effect of this Agreement.

(b) **Amendment.** This Agreement cannot be varied unless in writing and signed on behalf of both parties and the variation must specifically refer to its intention to supersede this Agreement.

(c) **Counterparts.** This Agreement may be executed in counterparts. All counterparts together will be taken to constitute one instrument.

(d) **Nature of relationship.** Nothing in this Agreement and no action taken by a party pursuant to this Agreement will constitute or be deemed to constitute a partnership association, joint-venture or other co-operative entity between the parties and neither party will have any authority to bind the other in any way.

(e) **Severability.** Any provision of this Agreement which is unenforceable or partly unenforceable in any jurisdiction is, where possible, to be severed to the extent necessary to make this Agreement enforceable. Any such severability does not invalidate the remaining provisions of this Agreement nor affect the validity or enforceability of that provision in any other jurisdiction.

(f) **Waiver of rights.** A right may only be waived in writing, signed by the party giving the waiver, and:

(i) no other conduct of a party (including a partial exercise of, a failure to exercise, or delay in exercising, the right) operates as a waiver of the right or otherwise prevents the exercise of the right;

(ii) a waiver of a right on one or more occasions does not operate as a waiver of that right if it arises again; and

(iii) the exercise of a right does not prevent any further exercise of that right or of any other right.

20. **Construction.** In this Agreement, the following rules of construction apply.

(a) Headings are for convenience only, and do not affect interpretation.

(b) The Background forms an integral part of this Agreement and shall be construed accordingly.

(c) The words *includes* and *including* are not words of limitation.

(d) If the date on or by which any act must be done under this Agreement is not a day when banks are generally open for business in Victoria, Australia (*Business Day*), the act must be done on or by the next Business Day.

(e) A reference to:

(i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;

(ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;

(iii) this or any other document includes the document as novated, varied or replaced and despite any change in the identity of the parties;

(iv) writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes fax transmissions; and

(v) a clause is a reference to a clause of this Agreement.