Server Hosting Agreement

This Server Hosting Agreement (**Agreement**) is made on the earlier of the date that Client accepts this Agreement or the date that Client first purchases or uses Hosting Services (**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 Hosting Services that accepts the terms of this Agreement by purchasing or using WingArc Australia Hosting Services (**Client**)

PLEASE READ THIS AGREEMENT CAREFULLY BEFORE PURCHASING OR USING WINGARC AUSTRALIA HOSTING SERVICES. BY PURCHASING OR USING WINGARC AUSTRALIA HOSTING SERVICES, YOU SIGNIFY YOUR ASSENT TO THIS AGREEMENT, INCLUDING ANY AGREEMENTS FOR THIRD PARTY SOFTWARE THAT IS INCLUDED AS PART OF WINGARC AUSTRALIA HOSTING SERVICES. 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 OR USE WINGARC AUSTRALIA HOSTING SERVICES.

Background

A) Client has requested that WingArc Australia provide the hosting services described in the hosting services certificate provided by WingArc Australia (**Hosting Services Certificate**), which is incorporated herein by reference (**Hosting Services**).

B) WingArc Australia has agreed to provide the Hosting Services in consideration for payment of and the fees set out in the Hosting Services Certificate (**Fees**).

It is agreed

1. **Hosting Services**. In consideration of payment of the Fees, WingArc Australia agrees to provide Hosting Services in the form of allowing the Client to upload data, text, emails, files, names, likenesses, logos, artwork, graphics, video, audio, HTML or other web design code (**Content**) on WingArc Australia's Server during the period during which this Agreement remains in force (**Term**). WingArc Australia will provide Client with a unique username and password which Client may use to access and use the Hosting Services. Client must keep the unique username and password supplied by WingArc Australia safe and secure and immediately notify WingArc Australia of any breach of this obligation. The Hosting Services are subject to the bandwidth, memory and disk space, and CPU time/usage limitations set out from time to time on WingArc Australia website <www.wingarc.com.au>, or in the Hosting Services Certificate. Each Hosting Services account has an agreed bandwidth limit as specified in the Hosting Services Certificate. Bandwidth is the amount of data transmitted to the Server by or on behalf of the Client. If:

   (a) Client's bandwidth, memory or disk space or CPU usage exceeds those limitations, or

   (b) those limitations are not specified, but WingArc Australia considers in its sole discretion that Client's bandwidth, memory or disk space or CPU usage is excessive

   WingArc Australia may at its option do any one or more of the following:

   (c) suspend or terminate the Hosting Services;

   (d) require Client to reduce its relevant resource usage to the specified or (where not specified) an acceptable level; and

   (e) charge Client additional Fees. Fees for additional monthly allowance of bandwidth are specified in the Hosting Services Certificate.

2. **Payment.** Client must pay the Fees in accordance with item 6 of the Hosting Services Certificate.

3. **Responsible Use.** Client must only use the Hosting Services in a responsible manner, and follow any (written or electronic) user manual or other instructions for use provided or made available by WingArc Australia or set out on WingArc Australia website <www.wingarc.com.au>, from time to time. Without limiting the preceding sentence, Client acknowledges that WingArc Australia can suspend its use of the Hosting Services if WingArc Australia reasonably believes that Client's use of the Hosting Services is inappropriate, abusive, illegal or otherwise:

   (a) interferes with WingArc Australia's supply of the server hosting services to its other clients or with the use of the server hosting services by any other person or infringes or is likely to infringe the intellectual property rights of any other person; or

   (b) is obscene, indecent, defamatory or threatening or sells, markets or promotes illegal products or service.

4. **Improper use.** If Client uses the Hosting Services in a way described in the preceding clause, WingArc Australia may suspend or terminate the Hosting Services without notice. If WingArc Australia incurs costs as a result of Client's misuse of the Hosting Services, WingArc Australia may pass these costs on to Client at WingArc Australia's discretion, and may take legal action against Client. Client authorises WingArc Australia to monitor its use of the Hosting Services (including any Content) to ensure that Client is complying with this Agreement. Without limiting the preceding sentence, WingArc Australia may, not more than once in any calendar year and on not less than two days notice, audit Client's use of the Hosting Services to ensure compliance with this Agreement. If WingArc Australia suspects that Client is involved in any illegal or abusive activities, WingArc Australia may (in its sole discretion) pass on any content or information that relate to these activities to any relevant authorities.

5. **Client responsibilities.** Client is responsible for:

   (a) all access and use of the Hosting Services by anyone accessing via the unique username and password supplied by us, whether authorised by Client or not, as if such access or use is by Client;

   (b) all Content, and the use by any person of Content;

   (c) obtaining and maintaining in force any consents, licences or authorisations required for Client's use of the server hosting services.

   (d) obtaining browser and internet access, and any hardware and equipment required to access and use the Hosting Services (other than any equipment provided by us).

   (e) maintaining adequate insurance cover in respect of any loss or damage to data stored on the Server.

6. **Faults.** Client must report any faults in Hosting Services to WingArc Australia as soon as Client become aware of them.

7. **Content and Back-up Copy.** Client acknowledges that it is responsible for the suitability, installation, configuration, uploading, downloading, use, operation, communication, accuracy and legality of Content, and that WingArc Australia does not monitor, install, configure, download, review, authorise, edit or alter Content. Client acknowledges and agrees that it is responsible for the back up of the Content. Client authorises and licenses WingArc Australia to copy, reproduce, Content for the purposes of providing the Hosting Services. WingArc Australia acknowledges that it acquires no rights in any Content, 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

8. **Limitations on Reverse Engineering etc.** Client must not modify or alter the Hosting Services or reverse engineer, decompile or disassemble any software forming part of the Hosting Services or otherwise reduce the same to a human readable form (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).

9. **Third party software.** Client acknowledges that it may be appropriate or necessary to use third party software or other copyrighted material as part of the Hosting Services (including third party software and other copyrighted material set out at the WingArc Australia website <www.wingarc.com.au>) and any such third party software is licensed to Client on and subject to the third party licence terms and conditions applicable to such software. Client agrees not to use such third party software and other copyrighted material contrary to any provisions set out at the WingArc Australia website <www.wingarc.com.au>.

10. **Downloads, upgrades, new versions, maintenance.** WingArc Australia may from time to time, modify, enhance, update or issue new versions of the Hosting Services. WingArc Australia will use reasonable endeavours to ensure that sufficient notification is given to Client of these changes on the WingArc Australia website <www.wingarc.com.au>. If any such change has a material adverse impact on Client's business, Client may terminate this Agreement on 30 days notice. The Hosting Services do 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 Client Support Guide applicable from time to time), if any, as specified in the Hosting Services Certificate. If requested by Client, WingArc Australia may from time to time provide additional services to Client (such as customisation work or technical services) on an time and materials fee basis in accordance with WingArc Australia's standard professional services rates. WingArc Australia may perform scheduled or unscheduled maintenance to its servers and other equipment from time to time and will use reasonable endeavours to minimise any disruption to the Hosting Services as a result of any such maintenance.

11. **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 Hosting Services 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 Hosting Services Certificate (each a *Renewal Term*), unless one of the parties provides written notice of termination to the other 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 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 may remove any or all Content from its Server without notice to Client. All clauses which by their nature, including clauses 12, 14, 15, 16 and 17, and any rights or obligations which have accrued before this Agreement ends, will continue in accordance with their terms.

12. **Confidentiality and public attribution.** The terms of this Agreement and all information relating to WingArc Australia of which Client becomes aware (*Confidential Information*) are confidential to WingArc Australia and Client 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, Client 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 Client's obligations in this clause 12 will continue in force in respect of each piece of Confidential Information until Client 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. Client agrees to allow WingArc Australia to refer to Client as a user of Hosting Services in promotional material such as case studies and media releases. Client must not make any public announcement or other communication relating to WingArc Australia or the Hosting Services without WingArc Australia's prior written approval.

13. **Consent to collection and use of data.** WingArc Australia may use any information provided by Client 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.

14. **Disclaimers**. To the maximum extent permitted by applicable law, the Hosting 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 14 and clauses 15 and 16, includes any third party providers referred to in clause 9) disclaims all representations and warranties with respect to the Hosting Services, whether express, implied or statutory, including any implied warranties of due care and skill, merchantability, satisfactory quality and fitness for a particular purpose. Client has relied on its own skill and judgement in deciding to acquire the Hosting 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 Hosting Services or any other consequences or benefits to be obtained from the use of the Hosting Services. Without limiting the foregoing, WingArc Australia does not warrant any of the following:

    (a) that the use of the Hosting Services will not infringe any third party rights, or be uninterrupted or error-free, or will continue to be made available, or that defects in the Hosting Services will be corrected;

    (b) that the Hosting Services will be in accordance with Client's requirements; suitable for the installation, uploading, use or operation of the Content; or fit for the purposes contemplated by Client;

    (c) that the Hosting Services will be free of hackers, other unauthorised access, denial of service attacks, viruses or other malicious or harmful code;

    (d) the accuracy or quality of information received by any person via the Server.

15. Without limiting clause 14, to the maximum extent permitted by applicable law, WingArc Australia is not responsible for any of the following:

    (a) any failures or interruptions in the provision or operation of communications networks or the Internet used to access or use the Hosting Services or the Website;

    (b) any failures or interruptions in the provision or operation of Hosting Services including any failures caused by WingArc Australia's service providers;

    (c) any data loss, wrong deliveries or non-deliveries suffered in connection with the Hosting Services, including any loss or damage to any Content or other data stored on the Server;

    (d) any use of Hosting Services by a third party to whom Client has given access to the Hosting Services; and

    (e) any use of the unique username and password allocated by WingArc Australia to Client by a person other than Client.

16. **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 Client's use of, or inability to use, the Hosting Services 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 Client for all damages exceed the amount of the Initial Term Fee set out in the Hosting Services 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.

17. **Indemnity.** Client agrees to indemnify and keep indemnified WingArc Australia and its officers, employees, agents and subcontractors against any and all claims, damages, costs, loss, liability or expense arising from or incurred in connection with any of the following:

    (a) any breach by Client of this Agreement;

    (b) the Content or its use by Client or any other person;

    (c) any claim that the Content, infringe the intellectual property rights or other rights of any person; and

    (d) Client's use of the Hosting Services in breach of any Law.

18. **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.

19. **Entire Agreement.** Client acknowledges and confirms that prior to signing this Agreement it has carefully perused all provisions set out in this Agreement, including the Hosting Services Certificate. Client further acknowledges that:

    (a) this Agreement is to be read in conjunction with any documentation made available by WingArc Australia in connection with the Hosting Services (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 Hosting Services Certificate) 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 Hosting Services.

20. **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.

21. **Assignment and sub-licensing.** This Agreement is personal to Client and Client must not sell, lease or loan Hosting Services to any other person or legal entity nor grant any sub-licenses or assign any part of the burden or benefit of this Agreement, without WingArc Australia's prior written consent. Client 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.

22. **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 22 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. Client's details for receiving notices and consents are set out in the Hosting Services Certificate, with notices to be addressed to the person named as Contract Liaison Person.

23. **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.** WingArc Australia may from time to time vary these Terms and Conditions, and the amount WingArc Australia charge for the Hosting Services, by posting the change on the WingArc Australia website <www.wingarc.com.au>. Any such variation will be effective 30 days from the time of publication of such notice.

    (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.

24. **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.