

INSUL SOUND INSULATION PREDICTION SOFTWARE

Licence Terms

These Licence Terms (**Licence Terms**), along with the terms set out in the Marshall Day Acoustics (**MDA**) Contract Schedule (collectively **this Agreement**) govern your use of the Software. If you have entered into another agreement with us concerning specific services or software, then the terms of that agreement take precedence where it conflicts with this Agreement.

1.0 DEFINITIONS AND INTERPRETATION

1.1 Definitions

In these Licence Terms, unless the context indicates otherwise:

Access Codes means the access code(s) provided to the Customer, System Administrator and/or Authorised Users by MDA, enabling Authorised Users to access the Site and/or the Software, including user ID and password(s);

Access Device means the access equipment (including Safenet Sentinel and HASP Keys) provided to the Customer, the System Administrator and/or Authorised Users by MDA, enabling Authorised Users to access and use the Software;

Aggregated Data means any data or information arising from MDA's aggregation of data (including Customer Data) relating to the Software users;

Agreement means the agreement to which these Licence Terms are attached;

Authorised User means an employee or individual contractor of the Customer authorised by the Customer to use the Software;

Business Day means any day excluding Saturdays, Sundays and statutory public holidays in Auckland;

Commencement Date means in respect of any Software, the date that the Customer first downloads or has access to use that Software;

Contract Schedule means the MDA Contract Schedule in respect of the Software which is owned, or permitted to be licensed, by MDA for which the Customer wishes to obtain a licence to use;;

Customer Data means any information and data collected by and stored in MDA's (or its third party service provider's) systems and/or servers as a result of the Customer's use of the Software but excludes, for the avoidance of doubt, any data collected by MDA in the course of making the Software and related services available to the Customer;

Defect means a bug, error or defect in the Software;

Documentation means any instruction manuals, user guides and/or other information made available by MDA to its customers generally in connection with the use of the Software;

Initial Term means the term of this Agreement, as set out in clause 2.2 of the Contract Schedule;

Insolvency Event means, in respect of a party:

- (a) that party has gone into liquidation or a receiver or statutory manager is appointed in respect of itself or any material part of its assets (other than for the purposes of a solvent restructuring);

- (b) that party has ceased to exist, other than as part of an amalgamation, in which the party is one of the companies being amalgamated;
- (c) that party has made an application to a court for, or a resolution has been proposed or any other step has been taken in anticipation of, the appointment of an administrator, or an administrator has been appointed;
- (d) any step has been taken to enter into any arrangement between that party and its creditors;
- (e) that party has become unable to pay its debts as they fall due or is presumed under applicable legislation to be unable to pay its debts; or
- (f) is the subject of any event analogous in nature to those listed in (a) to (e) of this definition, under the laws of any relevant jurisdiction;

Intellectual Property means trade marks, rights in domain names, copyright, patents, registered designs, circuit layouts, rights in computer software, databases and lists, rights in inventions, confidential information, know how and trade secrets, operating manuals, quality manuals and all other intellectual property, in each case whether registered or unregistered (including applications for the grant of any of the foregoing) and all rights or forms of protection having equivalent or similar effect to any of the foregoing which may subsist anywhere in the world, including the goodwill associated with the foregoing and all rights of action, powers and benefits in respect of the same;

Licence means the licence granted by MDA to the Customer to access and use the Software and Documentation as set out in clause 2.2 of these Licence Terms;

Licence fees means the licence fees agreed by the Customer and MDA or its agent;

Licence Type means the licence type granted by MDA to the Customer, set out in the Contract Schedule;

Losses means losses, damages, costs and expenses;

Permitted Purpose means the purpose(s) for the Software and Licence Type, granted by MDA, set out in the Contract Schedule;

Runtime Licence means a licence granted for a computer network that permits use of the Software on any computer or device connected to that computer network;

Site means the website hosted and maintained on behalf of MDA at *insul.co.nz* (or other replacement URL notified by MDA from time to time);

Software means the software set out in the Contract Schedule, being software which is owned, or permitted to be licensed, by MDA as modified or updated by MDA (during the Term);

System Administrator has the meaning given to that term in clause 4.4 of these Licence Terms;

Term means the term of this Agreement, as set out in clause 11.1 of these Licence Terms;

Update means any modification or enhancement of, or improvement to, the Software which is made available by MDA from time to time during the Term;

Upgrade means a significant release of the Software incorporating a feature or capability not present in the Software in the previous release, which is made available by MDA to its customers generally from time to time during the Term; and

Upgrade Fee has the meaning given to that term in clause 4.2 of these Licence Terms.

1.2 Interpretation

In these Licence Terms, unless the context indicates otherwise:

- (a) **Defined Expressions:** expressions defined in these Licence Terms have the defined meaning throughout this Agreement;

- (b) **Headings:** clause and other headings are for ease of reference only and will not affect the interpretation of this Agreement;
- (c) **Parties:** references to any party include that party's successors and permitted assigns;
- (d) **Persons:** references to a person include an individual, company, corporation, partnership, firm, joint venture, association, trust, unincorporated body of persons, governmental or other regulatory body, authority or entity, in each case whether or not having a separate legal identity;
- (e) **Plural and Singular:** references to the singular include the plural and vice versa; and
- (f) **Inclusive Expressions:** the term **includes** or **including** (or any similar expression) is deemed to be followed by the words "without limitation".

1.3 Terms to Prevail

If there is a conflict between a provision in:

- (a) the Contract Schedule; or
- (b) these Licence Terms,

the descending order of precedence set out above will apply.

2.0 ACCESS, USE AND THE CUSTOMER'S RESPONSIBILITIES

2.1 Provision of Access

MDA will provide to the Customer access to and use of the Software and the Documentation on the basis set out in this Agreement. The Software and any Documentation will be made available to the Customer by means of:

- (a) **Download:** download from the Site; or
- (b) **Media:** via a USB flash drive or other media provided by MDA,

it being acknowledged by the Customer that download and/or use of the Software may require use of an Access Code provided by MDA.

2.2 Grant and Scope of Licence

Subject to any particular terms that may be recorded in the Contract Schedule for the Software, MDA grants to the Customer a non-exclusive, personal, non-sub-licensable, non-transferable licence for the Authorised number of Users or Runtime Licences, as applicable, to access and use the Software and the Documentation for the Permitted Purpose during the Term on the terms set out in this Agreement. Except as and to the extent authorised under applicable law, any other use of the Software or Documentation without MDA's prior written consent will be a material breach of this Agreement.

2.3 Customer Restrictions

Except as expressly set out in these Licence Terms or to the limited extent permitted by applicable law, the Customer will not:

- (a) **Permit Access:** permit any third party to access or use the Software or Documentation or use the same on behalf of any third party (which includes operating any form of facility on behalf of any third party or operating a software bureau or similar service);
- (b) **Modify etc:** adapt, modify, translate or create derivative works from the Software or Documentation, nor permit the Software or any part of it to be combined with, or become incorporated in, any other software;
- (c) **Decompile/Reverse Engineer:** attempt to discover or gain access to the source code of the Software or de-compile or reverse engineer the whole or any part of the Software;

- (d) **Interfere with the Software:** interfere with the proper working of the Software and, in particular, must not attempt to circumvent security, licence control or other protection mechanisms, or tamper with, hack into or otherwise disrupt the Software or Site or any associated computer system, server or internet-connected device;
- (e) **Circumvent Restrictions:** employ any hardware, software, device or technique to pool connections or reduce the number of devices or users that directly access or use the Software or Site in order to circumvent any restrictions on the scope of authorised use in this Agreement; or
- (f) **Remove Proprietary Notices:** obscure, amend or remove any proprietary notice on, or visible during the operation or use of, the Software or Documentation.

2.4 Customer's Obligations

The Customer will:

- (a) **Keep Software Secure:** comply with the access and control requirements in clause 2.3 of these Licence Terms;
- (b) **Control and Supervise Use:** control and supervise access and use of the Software, and ensure that the Software is only accessed and used by Authorised Users in accordance with these Licence Terms;
- (c) **Comply with Instructions:** comply with MDA's instructions in relation to access to and use of the Software;
- (d) **Comply with Laws:** comply with all applicable laws relating to the Customer's use of the Software;
- (e) **Obtain Equipment etc:** be responsible for obtaining and maintaining all equipment, software and systems needed to enable the Customer to receive and use the Software;
- (f) **Provision of Assistance etc:** provide all assistance and information reasonably required by MDA in order to perform its obligations under this Agreement;
- (g) **Notify of Infringement:** promptly notify MDA on becoming aware of any person infringing MDA's Intellectual Property rights in the Software and/or Documentation;
- (h) **No Dealings:** not sub-license, assign, transfer, lease, rent, distribute or resell the Software, or any rights to access or use the Software, to any other person
- (i) **Instructions:** comply with MDA's reasonable instructions relating to access to, and use of, the Software;
- (j) **Authorised Users:** be responsible for all use of the Software by Authorised Users as if such use was use by the Customer, and the Customer acknowledges that MDA will not be responsible for any misuse of the Software by the Authorised Users; and
- (k) **Copies:** ensure that it copies the Software only for back-up and disaster recovery purposes.

2.5 MDA's Right to Audit

The Customer must permit MDA and/or its nominees, at all reasonable times and on reasonable advance notice, to inspect and have access to any premises, and computer equipment and systems at those premises, at which the Software or any Documentation is being accessed or used, for the purpose of verifying that Customer is complying with the terms of the Licence.

3.0 MDA'S RESPONSIBILITIES

3.1 Care, Skill and Diligence

MDA will, in providing the Software under this Agreement, act with due care, skill and diligence.

3.2 Notice of Planned Unavailability

MDA will use reasonable endeavours to give advance notice of any planned Software unavailability or outage by email.

4.0 UPDATES, ACCESS AND SUPPORT

4.1 Update

MDA may, at its sole discretion, make Updates available to the Customer during the Term at no additional charge to the Customer. Any such Updates will be made to the Software in accordance with MDA's standard practices and procedures.

4.2 Upgrades

MDA may, at its sole discretion, make Upgrades available to the Customer during the Term. Upgrades may be subject to additional fees (**Upgrade Fee**) in which case the Upgrade will be made available to the Customer subject to payment of the applicable Upgrade Fee.

4.3 Internet Connection

Without limiting clause 2.4(e), the Customer will be responsible for maintaining a suitable internet connection to enable it to download the Software via the Site.

4.4 System Administrator

The Customer will designate a contact and one alternate as the responsible party for communicating with MDA or its agent during the Term (System Administrator). The Customer's System Administrator may establish accounts for Authorised Users under this Agreement.

4.5 Access

The Customer acknowledges that:

- (a) Access to and use of the Software by the Customer and Authorised Users will require use of an Access Code or Access Device.
- (b) The Customer is responsible for ensuring the security and confidentiality of the Access Codes and Access Devices.
- (c) The Customer will be responsible for all use of the Software and actions taken through use of the Access Codes and Access Devices provided by MDA for use by the Customer and Authorised Users. The Customer must immediately notify MDA if it becomes aware of any unauthorised use of any Access Codes or Access Devices or any unauthorised access to the Site or the Software.

4.6 Suspension of Access

MDA may suspend the Customer's access to the Site and/or Software if it becomes aware of any unauthorised access to or use of the Site and/or Software using the Access Codes or Access Device.

4.7 Software Support

MDA, at its sole discretion, may provide the Customer with support services at no charge to the Customer.

5.0 INTELLECTUAL PROPERTY

MDA's Intellectual Property: All Intellectual Property rights in the Software, the Documentation, the Site and MDA's logos, trade marks and any other thing developed or created by MDA under or connection with this Agreement (together, **MDA IP**) are owned by MDA and/or its licensors. The Customer acknowledges and agrees that there is no transfer of title, Intellectual Property or ownership of the MDA IP (or any part of it) to the Customer under this Agreement.

6.0 FEES AND PAYMENT

6.1 Licence Fees

The Customer must pay the Licence Fee to MDA or its agent.

6.2 Upgrade Fees

If the Customer wishes to receive an Upgrade during the Term, it must pay the Upgrade Fee to MDA or its agent under clause 4.2 before the Customer or any of its Authorised Users may access and install the Upgrade.

6.3 Currency

All monetary amounts in this Agreement are stated and are payable in New Zealand dollars, unless expressly stated otherwise.

6.4 Review of Licence Fees

MDA may review and vary the Licence Fees at any time on or after expiry of the Initial Term on giving the Customer not less than two months prior written notice of such variation.

6.5 GST

All Licence Fees and Upgrade Fees are exclusive of GST. The Customer must pay GST to MDA or its agent at the time that it pays the Licence Fees and/or Upgrade Fees, at the rate and in the manner prescribed by applicable law.

6.6 Due Date for Payment

The Customer must pay the Licence Fees before the Commencement Date.

6.7 Default Interest for Late Payment

The Customer must pay interest at the default interest rate of 10% per annum (or, if lower, the maximum rate permitted by applicable law) on any overdue amounts owed by the Customer under this Agreement, calculated daily from the due date until the actual day of payment. Customer will pay all reasonable costs (including collection costs) incurred in recovering or attempting to recover any such overdue amounts.

6.8 Suspension of Access

In addition to its rights in clause 6.7 of these Licence Terms, MDA may suspend the Customer's access to the Software if the Customer fails to pay any amount by the due date for payment.

7.0 WARRANTIES

7.1 Warranty

MDA warrants that MDA has the right and authority to grant the Licence to the Customer in accordance with these Licence Terms.

7.2 Remedy

To the fullest extent permitted by applicable law, the Customer's sole and exclusive remedy for breach of a warranty in clause 7.1 of these Licence Terms is (at MDA's option) the re-supply of the Software or refund or waiver of Licence Fees. MDA's obligation under this clause is subject to the Customer's compliance with the terms of this Agreement.

7.3 No Reliance

The Customer acknowledges and agrees that the Customer:

- (a) must satisfy itself as to the adequacy, appropriateness and compatibility of the Software for its requirements;
- (b) has not relied on any statements or representations on the part of MDA as to the performance or functionality of the Software, except as expressly recorded in these Licence Terms; and
- (c) exercises and relies on the Customer's own professional judgement and expertise (or the professional judgement and expertise of the Customer's contractors or service providers other than MDA) in all use of the Software and decisions made on the basis of data or other outputs from use of the Software.

7.4 All Other Warranties Excluded

To the fullest extent permitted by applicable law, and except as expressly set out in these Licence Terms, MDA excludes all warranties, conditions, terms, representations, commitments and undertakings, whether express, implied, statutory or otherwise, including any condition or warranty of merchantability or fitness for a particular purpose. MDA does not warrant that the Software will meet any of the Customer's requirements, that the Software will be uninterrupted or free of Defects or that all Defects will be corrected.

8.0 LIABILITY

8.1 Liability Exclusions

MDA will have no liability to the Customer under or in connection with this Agreement (whether in contract, tort or otherwise) in respect of any:

- (a) indirect, consequential or special Losses suffered or incurred by the Customer;
- (b) loss of data, profits, revenue, business or goodwill; or
- (c) Losses suffered or incurred by the Customer, to the extent to which these result from any act or omission by the Customer or its Authorised Users (including any breach of this Agreement or failure to enter complete and accurate Customer Data into the Software).

8.2 Limitation of Liability

In no event will MDA's total liability to the Customer under or in connection with this Agreement (whether in contract, tort or otherwise) exceed the Licence Fees paid by the Customer to MDA under this Agreement in the 12 months prior to the date on which the Customer's first claim under this Agreement arose.

9.0 DATA

9.1 Input of Customer Data

The Customer must take reasonable steps to ensure that all Customer Data the Customer enters into the Software is correct and accurate. In some cases, the Customer may be able to upload files containing Customer Data to the Software. Where the Customer uploads any such files:

- (a) The Customer must (where practicable) run suitable anti-virus software. MDA will also use virus detection software, however MDA does not guarantee that any of the Customer's files stored in the Software will be virus-free.
- (b) The Customer acknowledges and agrees that MDA will have access to, and will be able to view, such files and the Customer Data on them.
- (c) The Customer must ensure that the files do not contain any content which infringes another person's Intellectual Property or which is contrary to any applicable laws. In the event that the Customer breaches this clause, without limiting any of MDA's other rights or remedies, MDA may remove the relevant files or content from the Software.

9.2 Licence for MDA

The Customer grants to MDA and MDA's contractors and service providers a non-exclusive, worldwide, perpetual, sub-licensable licence to use, store, modify and copy the Customer Data:

- (a) in order to provide the Software to the Customer and to exercise or enforce any of MDA's rights and remedies under this Agreement; and
- (b) in an anonymised form for the purposes of being aggregated with other data (including data of or relating to other Software users).

9.3 Aggregated Data

As between the Customer and MDA, MDA own all Intellectual Property arising from its creation of Aggregated Data and in Aggregated Data.

10.0 SUSPENSION

10.1 Suspension of Access to Software

MDA may suspend the Customer, or any or all of the Customer's Authorised Users', access to the Software if:

- (a) any fees or charges payable by the Customer under this Agreement are at least 10 Business Days overdue for payment; or
- (b) the Customer has committed a material breach of this Agreement,

and the Customer has failed to pay those fees or charges in full (together with any applicable default interest) or remedy that material breach to MDA's satisfaction within 5 Business Days of receiving a notice from the Customer specifying the relevant non-payment or breach and advising MDA's intention to suspend access to the Software.

10.2 Lifting of Suspension

If MDA suspends the Customer's, or the Customer's Authorised Users', access to the Software under clause 10.1, MDA will lift that suspension and allow access again once the relevant non-payment has been made in full (together with any applicable default interest) or the breach has been remedied to MDA's satisfaction.

11.0 TERM AND TERMINATION

11.1 Term of Licence

This Agreement will commence on the Commencement Date and, unless terminated earlier, will continue until either party gives notice of termination in accordance with clause 11.2 (Term).

11.2 Termination Without Cause

Either party may terminate this Agreement with effect from, or at any time after, expiry of the Initial Term by giving not less than seven days prior written notice to the other party.

11.3 Termination for Cause

Either party (the First Party) may terminate this Agreement at any time and with immediate effect by written notice to the other party (the Second Party) if the Second Party:

- (a) **Material Breach:** is in material breach of any of its obligations under this Agreement, and has failed to remedy the breach within 30 days of receiving written notice from the First Party to remedy the breach; or
- (b) **Insolvency:** suffers an Insolvency Event.

11.4 Consequences of Termination

On termination of this Agreement:

- (a) **Customer to Cease Using Software:** The Customer must cease to access, and discontinue all use, of the Software;
- (b) **Documentation:** The Customer must destroy any copies of the Documentation in its possession or control;
- (c) **Outstanding Fees:** The Customer will pay any outstanding Licence Fees, Upgrade Fees or other amounts payable under this Agreement within 7 days of termination;
- (d) **Customer Data:** MDA will provide reasonable assistance to facilitate the orderly transfer of the Customer Data then under MDA's possession or control to the Customer in a manner and in a format determined by MDA acting reasonably;
- (e) **Licences:** all licences in this Agreement will terminate automatically unless expressly provided otherwise;
- (f) **Rights and Remedies:** the termination will be without prejudice to either party's rights and remedies in respect of any breach of this Agreement by the other party, where the breach occurred before the termination; and
- (g) **Survival:** the provisions of clauses 6, 8, 9.3 and 11.4, together with those other provisions of this Agreement that expressly or by implication are intended to come into force or continue in force on or after its expiry or termination, will remain in full force and effect.

12.0 AMENDMENTS

12.1 Amendments by Notification

MDA may from time to time amend this Agreement (at its absolute discretion, subject only to clause 13.1(c)) by providing notice of the amendments by email and/or on the Site (each a form of Notification). Any such amendments:

- (a) may be provided in the form of an updated version of this Agreement;
- (b) will take effect on the date specified in MDA's Notification or (where MDA has provided an updated version of this Agreement) on the effective date specified at the start of the updated version of this Agreement (which date must, in either case, be at least 10 Business Days after MDA's Notification); and
- (c) must not provide, or have the effect of providing, that MDA no longer has any obligations to provide the Software to the Customer.

12.2 Amendments by Agreement

Any other amendments to this Agreement must be agreed by both parties in writing.

13.0 GENERAL

13.1 Assignment

The Customer may not assign or otherwise transfer any of its rights or obligations under this Agreement to any other person without MDA's prior written consent. MDA may assign or transfer any or all of its rights or obligations under this Agreement at its sole discretion.

13.2 Subcontracting

MDA may appoint subcontractors to perform any of MDA's obligations under this Agreement. MDA will remain primarily liable to the Customer for any breaches of this Agreement by its subcontractors.

13.3 Force Majeure

Neither the Customer or MDA (**First Party**) will be liable for any act, omission or failure by the First Party under this Agreement if that act, omission or failure results directly from an event or circumstances beyond the reasonable control of the First Party, provided that:

- (a) whenever the First Party becomes aware that such a result has occurred or is likely to occur, the First Party will notify the other accordingly; and
- (b) the First Party will continue to use its best endeavours to perform its obligations as required under this Agreement.

13.4 Governing Law and Jurisdiction

This Agreement are governed by the laws of New Zealand. The Customer and MDA submit to the non-exclusive jurisdiction of the New Zealand courts in respect of all matters relating to this Agreement.

13.5 Entire Agreement

This Agreement and the documents and information referred to in this Agreement record the entire understanding and Agreement between the Customer and MDA relating to the matters dealt with in this Agreement, and supersede all previous understandings or Agreements (whether written, oral or both) relating to these matters.

13.6 Notices

Any notices required under this Agreement must be in writing and delivered by registered post or email to:

- (a) In the case of notices to MDA, MDA's address as set out on the Site.
- (b) In the case of notices to the Customer, the Customer's address as provided to MDA or its agent on purchase of the Software. Any notice MDA sends to the Customer will be deemed to have been received by the Customer 5 Business Days after posting or, if sent by email, at the time of transmission (provided MDA does not receive an automated delivery failure notification).

13.7 Remedies

The rights, powers and remedies provided under this Agreement are cumulative and are in addition to any rights, powers or remedies provided by law.

13.8 Waiver

Any waiver by the Customer or MDA of any rights or remedies under this Agreement will be effective only if recorded in writing. No failure to enforce any provision of this Agreement at any time by either the Customer or MDA will in any way affect, limit or waive the Customer's or MDA's right to subsequently require strict compliance with this Agreement.