

## MINDSCAPE SOFTWARE LICENCE

By clicking the “Accept” button, Customer agrees that it has read, understood, and agreed to the terms and conditions of this Software Licence Agreement between Customer Mindscape Limited (Mindscape).

### 1. General Terms

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1.1 In this Licence, unless the context otherwise requires or is specified otherwise:

**Customer** means the entity you represent when you click to accept the terms of this Licence and includes your employees, consultants, representatives and agents;

**Documentation** means all instruction manuals, user guides and other information relating to the Mindscape Software made available to Customer by Mindscape;

**Enterprise Release** means a compiled version of the standard release of the Mindscape Software together with access to source code;

**Intellectual Property Rights** means any patent, trade mark, service mark, copyright, moral rights, right in a design, know-how and any other intellectual property rights;

**Licence** means this software licence agreement, including the Schedules;

**Licence Fee** means the licence fee set out on the Mindscape website ([www.mindscape.co.nz](http://www.mindscape.co.nz)) for the version of the Mindscape Software used by Customer;

**Major Version** means an improved version of the Mindscape Software made available to Customer where the version release number changes in front of the decimal (e.g. from 2.3 to 3.0);

**Mindscape Software** means Mindscape’s proprietary software made available to Customer with this Licence;

**Minor Version** means an improved version of the Mindscape Software made available to Customer where the version release number changes only after the decimal (e.g. from 2.1 to 2.2);

**Modifications** means any modification, adaptation, alteration, translation, or derivative works made from or including the Mindscape Software;

**New Software** means any software containing any portion of the Mindscape Software or Modifications;

**Seat Licence** means a licence for one person to use one copy of the Mindscape Software on a single computer at any one time;

**Site Licence** means a licence to use the Mindscape Software by any number of Customer’s

personnel at a particular site agreed in writing between Customer and Mindscape;

**Support Services** means the support and maintenance services provided by Mindscape in accordance with clause 7;

**Trial Licence** means a time-limited licence for the purposes of trialling the Mindscape Software; and

**Warranty Period** means a period of 3 months from the date on which the relevant Mindscape Software is downloaded by Customer from the Mindscape website (www.mindscape.co.nz) or is otherwise provided to Customer (whichever is earlier).

1.2 In this Licence, unless the context requires otherwise:

- (a) words importing one gender include the others;
- (b) words importing the singular or plural number include the plural and singular number respectively;
- (c) headings are inserted for the sake of convenience of reference only and do not affect the interpretation of this Licence;
- (d) a **person** includes any individual, corporation, unincorporated association, government department or municipal authority;
- (e) a **business day** means a day other than a Saturday, Sunday or public holiday in New Zealand; and
- (f) a **day** which is not specifically described as a business day means a calendar day.

## 2. Licence

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2.1 Upon payment of the Licence Fee, Mindscape grants Customer a limited, non-exclusive, non-transferable and, subject to clause 2.4, non-sublicensable, licence to use the Mindscape Software, subject to the restrictions and limitations in the remainder of clause 2 and the following:

- (a) **Seat Licences:** if Customer is purchasing Seat Licences, it is responsible to ensure that it purchases an adequate number of Seat Licences for the number of people using the Mindscape Software;
- (b) **Site Licences:** Customer must not move the Mindscape Software from the agreed site if it is purchasing a Site Licence; and
- (c) **Trial Licences:** Customer acknowledges that the Mindscape Software that is licensed pursuant to the Trial Licence may contain timers or disabling code. However, if the Mindscape Software continues to be operable beyond the term of the Trial Licence, Customer agrees to cease using the Mindscape Software in accordance with the agreed term of the trial.

2.2 Customer will pay any third party licence fees for any other software not provided by Mindscape that may be required to operate the Mindscape Software on Customer's computers and to abide by any requirements of any such third parties' software licences except to the extent that they

violate the terms of this Licence.

- 2.3 All right, title and interest in all Intellectual Property Rights for the Mindscape Software, any Modifications and the related Documentation remain vested in Mindscape. Customer acknowledges that the Mindscape Software and its structure and organisation constitute valuable trade secrets of Mindscape.
- 2.4 In no event may Customer distribute or otherwise transfer the Mindscape Software on its own to any third party or reverse engineer, decompile, disassemble, or otherwise attempt to derive the source code for the Mindscape Software. Customer agrees that it may only distribute or otherwise transfer any part of the Mindscape Software to a third party as New Software and then only if:
- (a) the New Software does not compete with any of Mindscape's software anywhere in the world without Mindscape's prior written consent (for this purposes of this clause 2.4(a), any software that is substantially similar to Mindscape software in features and functionality will be considered to be a competitive product);
  - (b) any New Software is not distributed as part of a software development library;
  - (c) the Mindscape Software is not used in a manner that is or may be detrimental to Mindscape or its reputation; and
  - (d) Customer reproduces, on all copies made by or for Customer, and must not remove, alter or obscure in any way all proprietary rights notices (including copyright notices) of Mindscape on or within the copies of the Mindscape Software and the Documentation furnished by Mindscape to Customer.
- 2.5 With respect to any Enterprise Release, Customer may use the source code to the Mindscape Software provided by Mindscape and make Modifications provided that:
- (a) Customer may only use the source code or create Modifications for testing, operating and supporting the Mindscape Software for Customer's own internal (non-commercial) purposes;
  - (b) Customer has no right to distribute, sublicense, lease, rent, loan or otherwise transfer the Mindscape Software or the Modifications to any other person anywhere in the world other than in accordance with clause 2.4; and
  - (c) Mindscape is under no obligation to provide any Support Services in respect of any Modifications not provided directly by Mindscape (support will only be provided in respect of the original compiled version of the Mindscape Software).
- 2.6 At the request of Mindscape, Customer will:
- (a) provide Mindscape with a signed statement verifying that the Mindscape Software and related Documentation is being used in accordance with this Mindscape Software Licence; and
  - (b) on receiving reasonable notice, allow a Mindscape representative access to Customer's premises, systems and equipment to verify compliance with this Mindscape Software Licence.

- 2.7 Customer will not export, directly or indirectly, the Mindscape Software, or a direct product from the Mindscape Software, or any technical data relating to the Mindscape Software, from any jurisdiction unless Customer obtains the prior written permission of Mindscape and, if appropriate, the relevant governmental authorities.

### **3. Term and Termination**

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- 3.1 The term of this Licence will commence on the date this Licence is accepted by Customer and will end on the date this Licence is terminated in accordance with this Licence. For the avoidance of doubt, this Licence terminates with respect to a Trial Licence on the date set out in writing by Mindscape.
- 3.2 Mindscape, in its discretion, may terminate this Licence immediately by notice in writing if:
- (a) Customer fails to pay any sum payable under this Licence for a period of 10 business days after that sum is due and payable under this Licence; or
  - (b) there is a material breach of this Licence by Customer and:
    - (i) the material breach cannot be rectified; or
    - (ii) the material breach can be rectified but Customer has not rectified the material breach within 30 days after receiving notice of that material breach.
- 3.3 On termination of this Licence, Customer will remain liable for any Licence Fees payable by it to Mindscape which become due for payment before or after termination.
- 3.4 On termination of this Mindscape Software Licence, Customer will immediately cease to use the Mindscape Software and the related Documentation and return to Mindscape, or destroy, all copies of the Mindscape Software and the related Documentation in Customer's possession.
- 3.5 Within 30 days of termination, Customer must certify to Mindscape in writing that it has fully complied with its obligations under clause 3.4.
- 3.6 Termination of this Licence will not affect the provisions of this Licence which are intended to continue, or should reasonably, continue after termination (whether expressly stated so or not). Termination will not affect any claim by either party against the other party arising out of any breach or failure under this Licence prior to termination.
- 3.7 If Customer fails to pay any amount when due under this Licence, then Mindscape may withhold services and/or supplies under this Licence until all amounts due have been paid in full.

### **4. Confidentiality**

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- 4.1 Customer will treat as confidential all information obtained from Mindscape. Mindscape's confidential information means any information relating to the business or affairs of Mindscape and includes, without limitation its designs, drawings, manufacturing know how, object codes, source codes, planned modifications to hardware or software, planned enhancements to hardware or software, product knowledge, quality standards, research and development, unpublished specifications, technical information, pricing and manipulated data.

- 4.2 Clause 4.1 does not extend to information which:
- (a) can be established by written records to be already known to the recipient at the time of disclosure; and
  - (b) which is in or enters the public domain through no fault of the recipient.

4.3 This clause 4 will survive termination of this Licence.

## **5. Warranties and Remedies**

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- 5.1 Mindscape warrants that it has full power and authority to license the Mindscape Software and that during the Warranty Period the Mindscape Software will perform substantially in accordance with the Documentation published by Mindscape with respect to the operation of the Mindscape Software.
- 5.2 Mindscape does not warrant that the Mindscape Software will meet Customer's requirements or that operation of the Mindscape Software will be uninterrupted or error free. Customer acknowledges that the Mindscape Software is of a complicated and technical nature and may have minor or inherent defects.
- 5.3 Mindscape will not be liable for any failure of the Mindscape Software if Modifications to the Mindscape Software, or changes to the operating environment of the Mindscape Software have been made by any person other than Mindscape.
- 5.4 Customer's sole and exclusive remedy under the warranty given in clause 5.1 will be limited to (at Mindscape's option):
- (a) the correction or reconfiguration of defects in the Mindscape Software;
  - (b) replacement or modification of the Mindscape Software in whole or in part if Mindscape considers acting reasonably, that such replacement or modification is justified or that the Mindscape Software will become non-infringing; or
  - (c) obtaining the appropriate licence to allow Customer to continue using the Mindscape Software.
- 5.5 Except for the warranties expressly given under this Licence, all express or implied warranties and representations by Mindscape (including warranties as to condition, quality, performance, merchantability, durability or fitness for purpose) are excluded to the extent permitted by law. In particular, Customer confirms that it has not relied, and will not rely, on any oral representation made by Mindscape or upon any descriptions, illustrations or specifications contained in any catalogues and publicity material produced by Mindscape and Customer understands that such materials are only intended to convey a general idea of the products and services to which they relate. Customer acknowledges that it is entering into this Licence for the purposes of a business and that the Consumer Guarantees Act does not apply to any goods or services delivered by Mindscape under this Licence.

## **6. Liability**

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- 6.1 Mindscape will not be liable to Customer in relation to any claim in respect of or arising out of

this Licence or the subject matter of this Licence (whether in tort, contract, in respect of any indemnity, or otherwise) for:

- (a) loss of profits, revenue, anticipated savings or goodwill;
- (b) any indirect, special, incidental or consequential loss or damage, even if Mindscape has been advised of the possibility; or
- (c) any data which is lost, corrupted, deleted or altered.

6.2 If Mindscape is held liable to Customer for claims in respect of or arising out of the supply of Mindscape Software, then Mindscape's total liability (whether in contract tort, equity, in respect of any indemnity or otherwise) is not to exceed (in the aggregate) the lesser of:

- (a) the actual loss or damage directly suffered by Customer; and
- (b) the total Licence Fee actually paid to Mindscape by Customer for the Mindscape Software giving rise to the claim,

provided that:

- (c) in respect of the warranty set out in clause 5.1, Customer's sole remedy and Mindscape's total liability is limited to the terms of clause 5.4; and
- (d) in respect of the warranty set out in clause 8.1, Customer's sole remedy and Mindscape's total liability is limited to the terms of clause 8.2.

6.3 Mindscape will not be liable for any claim made in relation to this Licence later than six months after the initial event giving rise to the claim.

## **7. Support and Maintenance**

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7.1 Upon the payment of the Licence Fee, Mindscape, or a third party nominated by Mindscape, will in relation to any compiled version of the Mindscape Software:

- (a) provide online support in a dedicated forum;
- (b) make Minor Versions freely available to Customer to download until the next available Major Version is made commercially available by Mindscape; and
- (c) make Major Versions available to Customer for a licence fee.

7.2 The Support Services do not include services provided by Mindscape relating to or resulting from:

- (a) misuse of the Mindscape Software or failure to use the Mindscape Software in accordance with the related Documentation;
- (b) unauthorised attempts to repair, replace, modify or maintain the Mindscape Software by persons other than Mindscape; or

- (c) support of prior releases or versions of the Mindscape Software after six months from the date Mindscape offered a Major Version to Customer.

7.3 Upon payment of the support fee for priority support, Mindscape will provide additional support services in accordance with its Software Support Terms.

## **8. Support Warranties**

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8.1 Mindscape warrants that the Support Services will be of a professional quality conforming to generally accepted industry standards and procedures.

8.2 Customer's exclusive remedy, and Mindscape's entire liability, if Mindscape is unable to perform the Support Services as warranted, will be the re-supply of the deficient Support Services.

## **9. Obligations of Customer**

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9.1 Customer will:

- (a) pay the Licence Fee and any support fee (if applicable) in accordance with Mindscape's payment terms posted on Mindscape's website or otherwise advised to Customer;
- (b) promptly report to Mindscape all program errors which Customer discovers;
- (c) ensure that:
  - (i) an authorised representative is available to be the prime point of contact with Mindscape in the event of any problems and queries; and
  - (ii) such authorised representative has a good understanding of the Mindscape Software, its operation and its hardware and operating environment;
- (d) make all reasonable efforts at investigation and diagnosis of any suspected defects or errors before contacting Mindscape. Persistent failure to do this may result in the levying of additional charges by Mindscape, at its option, after warning in writing of such charges being levied; and
- (e) maintain a list of all hardware, communications and software problems to assist with the diagnosis and resolution of any defects or errors.

## **10. Communication Conditions**

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10.1 As a condition of this Licence, if Customer uses any communication tools made available by Mindscape (such as any forum, chat room or message centre), Customer agrees only to use such communication tools for lawful and legitimate purposes. Customer must not use any such communication tool for posting or disseminating any material unrelated to the use of the Mindscape Software including (but not limited to): offers of goods or services for sale, files that may damage any other person's computing devices or software, content that may be offensive to any of our other users, or material in violation of any law (including material that is protected by copyright or trade secrets which Customer does not have the right to use).

- 10.2 When Customer makes any communication, Customer represents that it owns the content of the communication. Mindscape is under no obligation to ensure that the communications are legitimate or that they are related only to the use of the Mindscape Software. As with any other web-based forum, Customer must exercise caution when using the communication tools made available by Mindscape. However, Mindscape does reserve the right to remove any communication at any time in its sole discretion.
- 10.3 Customer indemnifies Mindscape against all claims, costs, damage and loss arising from Customer's breach of this clause 10.

## **11. Disputes**

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- 11.1 The parties will attempt to settle any dispute arising from or relating to this Licence in accordance with this clause 11.1 before resorting to external dispute resolution mechanisms, except where the party seeks urgent interlocutory relief.
- 11.2 A party claiming that a dispute has arisen under or relating to this Licence will immediately notify the other party in writing specifying the nature of the dispute.
- 11.3 On receipt of the notice, the parties will use all reasonable endeavours to resolve the dispute by discussion, consultation, negotiation or other informal means.
- 11.4 If, within 14 business days of the notice of the dispute, the parties do not agree on a dispute resolution technique or if the dispute is not resolved, then either party may refer the dispute to mediation. The mediation will be conducted in terms of the LEADR New Zealand Inc. standard mediation agreement. The mediation must be conducted by a mediator and at a fee agreed by the parties. Failing agreement between the parties within three business days of referral to mediation, the mediator will be selected and his/her fee determined by the Chair for the time being of LEADR New Zealand Inc. Each party is to bear its own costs in mediation and pay half the costs of the mediation.

## **12. No Solicitation**

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- 12.1 During the term of this Licence and for a period of six months following its termination, Customer will not solicit any of Mindscape's employees, independent contractors or agents.

## **13. Force Majeure**

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- 13.1 Neither party will be responsible or liable for any delay or failure in the performance of its obligations under this Licence if such delay or failure is due to circumstances outside its reasonable control including, without limitation, acts, omissions, systems, networks, equipment or data of the other party or the acts, omissions, systems, networks, equipment or data of any third party (including, without limitation, the Internet or any telecommunications network or equipment), acts of God, natural disaster, riot, terrorism, malicious damage, fire, or acts of any governmental authority. This clause 13.1 does not apply to any obligation to pay money for liabilities incurred prior to any such extraordinary circumstance occurring.

## **14. General**

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- 14.1 This Licence constitutes the entire agreement of the parties about its subject matter and



supersedes any previous understandings or agreements on that subject matter. Without limiting the generality of the foregoing, where any invoice terms, delivery terms, shipping terms, payment terms or order terms conflict with or are inconsistent with the terms of this Licence, the parties agree that the terms of this Licence will prevail.

- 14.2 If any part or a provision of this Licence is judged invalid or unenforceable in a jurisdiction it is severed for that jurisdiction and the remainder of this Licence will continue to operate.
- 14.3 A provision or a right under this Licence may not be waived except in writing signed by the party granting the waiver.
- 14.4 A party may exercise a right, power or remedy under this Licence at its discretion, and separately or concurrently with another right, power or remedy. A single or partial exercise of a right, power or remedy by a party under this Licence does not prevent a further exercise of that or of any other right, power or remedy.
- 14.5 This Licence may not be varied except by agreement in writing signed by the parties.
- 14.6 Customer will not assign or otherwise transfer this Licence or any of its rights or obligations under this Licence, whether in whole or in part, without the prior written consent of Mindscape.
- 14.7 This Licence is to be governed by and construed in accordance with the laws of New Zealand and the parties submit to the exclusive jurisdiction of the New Zealand courts.