

AGREEMENT

THIS AGREEMENT IS MADE ON

PARTIES

(Insert name of Department/Agency)

AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED ABN 42 000 016 099 of 6-12 Atchison Street, St Leonards, Sydney, New South Wales (**APRA**)

BACKGROUND

- A.** Under section 183(1) of the *Copyright Act 1968* (the Act), the *(insert – Department/Agency)* is entitled to do, and to authorise other persons to do, acts comprised in the copyright in works and subject matter other than works, for the services of the Commonwealth.
- B.** Section 183(4) of the Act requires the *(insert – Department/Agency)* to inform the copyright owner of the doing of an act of copyright under section 183(1), and to furnish the copyright owner with such information as to the doing of the act as the copyright owner reasonably requires.
- C.** Section 183(5) of the Act provides that the terms for the doing of an act of copyright under section 183(1) are such terms as are agreed between the *(insert – Department/Agency)* and the copyright owner or, in default of agreement, as are fixed by the Copyright Tribunal.
- D.** APRA is the owner of the copyright in Music in respect of the rights contained in sections 31(1)(a)(iii) and (iv) of the Act, for the agreement of terms under section 183(5) of the Act, and for the receipt of royalties which may be paid in accordance with such terms.
- E.** The parties have reached agreement on the terms for Performance of Music by the *(insert – Department/Agency)* and persons authorised by the *(insert – Department/Agency)*
- F.** To the extent that:
- (a) the *(insert – Department/Agency)* authorises other persons to Perform Music for the services of the Commonwealth;
 - (b) the *(insert – Department/Agency)* Performs Music or authorises other persons to Perform Music for the benefit of employees of the *(insert – Department/Agency)* ; and
 - (c) the Performances described in paragraphs (a) and (b) do not fall within section 183(1) of the Act,

the *(insert – Department/Agency)* has requested that APRA grants it a licence for those purposes and APRA has agreed to do so on the terms set out in this agreement.

AGREEMENTS

1. Definitions and interpretation

1.1 Where commencing with a capital letter:

Act means the *Copyright Act 1968*, and includes any re-enactment or amended form of that Act as in force from time to time;

APRA Repertoire means Music in which the Performing Right for Australia is vested in APRA;

Consumer Price Index means the Index of that title All Groups Sydney published by the Australian Bureau of Census and Statistics or any authority substituted by Statute, related to base year 1989-90 equals 100, and **September Quarter** means the quarter year ending 30 September;

Dramatic Context means in conjunction with acting, costumes, scenic accessories, and scripted dialogue or other dramatic effects, or as a ballet;

Financial Year means a period of 12 months ending on 30 June or the relevant part of such period occurring after the commencement or prior to the termination of this agreement;

Full-Time Staff Equivalent means the equivalent full-time employees of the *(insert – Department/Agency)* as set out in any official documentation of the *(insert – Department/Agency)* and as ascertained in accordance with the *(insert – Department/Agency)* usual procedures;

FTE Rate means the rate referred to in clause 5.3;

Grand Right Work means an opera, operetta, musical play, revue or pantomime to the extent that it consists of musical works and associated lyrics written expressly for it;

Music means musical works, and any literary works to the extent that they are normally used as lyrics in association with the musical works by the copyright owner for Australia, in relation to which the right of public performance is vested in APRA for Australia;

Performance, in relation to a Work, means the performance of the Work in public within the meaning of section 31(1)(a)(iii) of the Act, but excludes:

- (a) a performance by or for the benefit of an educational institution; and
- (b) a performance for profit, being a performance in a place of public entertainment within the meaning of section 39 of the Act;

Performance Notice means a notice given or, but for this agreement, required to be given under section 183(4) of the Act in relation to the Performance of Music;

Performing Right, in relation to Music, means the exclusive right to cause, or authorise, the Performance of Music in public in Australia, within the meaning of section 31(1)(a)(iii) of the Act;

Rate means, for any Financial Year, the rate per Full Time Staff Equivalent determined in accordance with clause 5;

Royalty means remuneration payable by the (*insert – Department/Agency*) in respect of a particular Financial Year in accordance with clause 5, as part of the terms under section 183(5) of the Act for the Performance of Music by the (*insert – Department/Agency*) in that Financial Year; and

Work has the meaning ascribed to it by the Act.

1.2 In this agreement, unless the contrary intention appears:

- (a) monetary references are references to Australian currency;
- (b) words in the singular number include the plural and vice versa;
- (c) a reference to a person includes a partnership and a body whether corporate or otherwise;
- (d) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings; and
- (e) a reference in this agreement to an enactment, or a provision of an enactment, is a reference to that enactment or provision as amended, replaced or re-enacted from time to time during the term of this agreement.

2. Term

This agreement commences with effect from 1 July 2002 and continues, subject to early termination under clause 14, for an initial period of two years. After the expiry of the initial term, the agreement will continue for successive one year periods until terminated by either party on at least 1 month's notice, terminating on the anniversary of this agreement.

3. Scope of agreement

3.1 This agreement constitutes for the purposes of section 183(5) of the Act an agreement on the terms for any Performance of Music. Neither party may during the term of this agreement make an application to the Copyright Tribunal in relation to the fixing of such terms or further terms.

3.2 Nothing in this agreement must be construed as in any way limiting or derogating from rights enjoyed or provided to the (*insert – Department/Agency*) other than under section 183 of the Act to do, or authorise the doing of, acts comprised in the copyright in Music.

3.3 Subject to clause 3.4, APRA grants the (*insert – Department/Agency*) a licence to authorise other persons to Perform Music solely for the services of the Commonwealth where those Performances do not fall within section 183(1) of the Act provided that:

- (a) each authorisation is in writing and given prior to the Performance; and
- (b) the (*insert – Department/Agency*) retains copies of all authorisations and produces them to APRA on request.

3.4 APRA grants the (*insert – Department/Agency*) a licence to Perform Music and authorise other persons to Perform Music for the benefit of employees of the (*insert – Department/Agency*) where those Performances do not fall within section 183(1) of the Act provided that:

- (a) the Performance:
 - (i) is for the benefit of employees of the (*insert* – Department/Agency) ; and
 - (ii) takes place at premises belonging to the (*insert* – Department/Agency) or at functions and places provided that the general public is not admitted; and
- (b) any authorisations comply with clauses 3.3(a) and (b).

3.5 This agreement does not set out the terms for, or extend to or authorise:

- (a) the communication of Music to the public; or
- (b) the performance of:
 - (i) any Grand Right Works in their entirety;
 - (ii) any musical work and associated lyrics (in whole or in part) in a Dramatic Context;
 - (iii) any musical work and associated lyrics (in whole or in part) composed or used for ballet if accompanied by a visual representation of that ballet;
 - (iv) any choral work of more than 20 minutes' duration in its entirety;
 - (v) any musical work and associated lyrics so as to burlesque or parody the work;
 - (vi) any musical work with new or substituted lyrics, or any lyrics which have been notified by APRA as prohibited; or
 - (vii) the performance of any sound recording.

4. Performance notices not required

APRA waives any right under section 183(4) of the Act (including any right arising by operation of regulations made under the Act) to be notified of the Performance of Music during the term of this agreement by the (*insert* – Department/Agency).

5. Assessment and payment of royalties

5.1 The (*insert* – Department/Agency) must pay to APRA a Royalty in respect of the Performance of Music by the (*insert* – Department/Agency) in each Financial Year during the term of this agreement.

5.2 The Royalty is the FTE Rate current for that Financial Year multiplied by the number of Full- Time Staff Equivalents of the (*insert* – Department/Agency) for the then immediately preceding Financial Year.

5.3 The rate per Full-Time Staff Equivalent:

- (a) for the Financial Year commencing 1 July 2002 is \$0.59 (GST exclusive); and
- (b) each succeeding Financial Year is the Rate for the immediately preceding Financial Year increased or decreased, as the case may be, by the percentage increase or

decrease in the Consumer Price Index between the last two September Quarters preceding the Financial Year.

5.4 The Department must notify APRA within 3 months after the commencement of each Financial Year of the number of its Full-Time Staff Equivalents for the immediately preceding Financial Year.

6. Invoicing

6.1 After APRA's receipt of the information under clause 5.4, APRA agrees to provide the *(insert – Department/Agency)* with a tax invoice in accordance with *A New Tax System (Goods and Services Tax) Act 1999*, for the Royalty due by it in respect of the relevant Financial Year.

6.2 Subject to any arrangement which may be entered into from time to time between APRA and the *(insert – Department/Agency)*, each invoice must contain the following details:

- (a) invoice number;
- (b) date of invoice;
- (c) period of Performances covered by the invoice;
- (d) FTE Rate for the Financial Year;
- (e) total Royalty payable by the *(insert – Department/Agency)* for the Performance of Music in the Financial Year; and
- (f) any taxes and charges (including GST) payable.

7. Time for payment

Payment of Royalty due under clause 5 in respect of the Performance of Music by the *(insert – Department/Agency)* must be effected within 30 days of receipt of a correctly rendered tax invoice in accordance with clause 6.

8. Warranties

8.1 This warranty applies in relation to any Music in the APRA Repertoire or which APRA represents to be in its Repertoire which is or may be included in any Performance by the *(insert – Department/Agency)* or authorised by the *(insert – Department/Agency)* in accordance with clause 3.3 or 3.4 as the case may be during the term of this agreement.

8.2 APRA warrants that it is entitled to:

- (a) receive Performance Notices for the purposes of section 183(4) of the Act, and to waive the right to the receipt of such Notices;
- (b) negotiate the Royalty and to conclude agreement with the *(insert – Department/Agency)* on other terms for the Performance of the Music under section 183(5) of the Act; and
- (c) collect Royalties from the *(insert – Department/Agency)* as the copyright owner for the Performance of the Music.

9. APRA membership

APRA undertakes, during the term of this agreement, to respond promptly in writing to any enquiry from the (*insert – Department/Agency*) as to whether any particular Music is within the APRA Repertoire.

10. Annual report

APRA must, on request from the Commonwealth, provide the (*insert – Department/Agency*) with a copy of its most recent annual report.

11. Indemnity

11.1 APRA indemnifies the (*insert – Department/Agency*), and its officers, employees and agents from and against all actions, claims, demands, costs and expenses (including the costs of defending or settling any action, claim or demand where such costs include legal costs and expenses on a solicitor and own client basis) made, sustained, brought or prosecuted in any manner based upon, occasioned by or attributable to any infringement, or alleged infringement, of the copyright of any person, which infringement or alleged infringement occurred by reason of the Performance of Music by the (*insert – Department/Agency*) and by those authorised persons authorised by the (*insert – Department/Agency*) in accordance with clause 3.3 or 3.4 as the case may be during the term of this agreement.

11.2 The indemnity provided by APRA under clause 11.1 is subject to :

- (a) receipt by APRA of full payment of the sum due for the Financial Year in which the Performance occurred;
- (b) the Music being, or being represented by APRA to be, within the APRA Repertoire;
- (c) the (*insert – Department/Agency*) promptly notifying APRA of the action, claim or demand made, brought or threatened in respect of the infringement or alleged infringement of the copyright referred to in clause 11.1, and not settling the same without first obtaining the written approval of APRA which shall not be unreasonably withheld.

11.3 For the purposes of this clause, **infringement** means an unauthorised Performance, which would, but for the operation of section 183 of the Act or clause 3.3 or 3.4, constitute an infringement.

11.4 The indemnity in clause 11.1 is a continuing obligation separate and independent from the other obligations of APRA and survives termination of this agreement

12. Waiver

A waiver by one party of a breach of a provision of this agreement by the other party does not constitute a waiver in respect of any other breach or of any subsequent breach of this agreement. The failure of a party to enforce a provision of this agreement must not be interpreted to mean that party no longer regards that provision as binding.

13. Severability

Each provision of this agreement will, unless the context otherwise requires it, be read and construed as a separate and severable provision, so that if any provision is void or otherwise unenforceable for any reason, then that provision will be severed and the remainder will be read and construed as if the severable provision had never existed.

14. Termination

14.1 This agreement may be terminated by the (*insert – Department/Agency*) by notice to APRA, specifying the date of termination, if:

- (a) an order is made for the winding up of APRA;
- (b) a receiver or receiver and manager of any property of APRA is appointed;
- (c) a provisional liquidator or liquidator or official manager of APRA is appointed; and
- (d) APRA makes an arrangement or composition with its creditors or members.

14.2 In the event of the coming into operation of any amendment to section 183 of the Act with respect to the subject matter of this agreement, this agreement will terminate immediately.

15. Taxes

The (*insert – Department/Agency*) must pay to APRA within 30 days after the date of an invoice issued by APRA an amount on account of stamp duties and taxes, including any goods and services tax, arising in respect of this agreement.

16. Notices

16.1 Any notice or other communication which may be given to or served on APRA under this agreement will be deemed to have been duly given or served if it is in writing and signed by or on behalf of the (*insert – Department/Agency*) by the (*insert – designated contact – in the AGD agreement it is the Secretary*) and it is either delivered by hand or posted, or a copy is transmitted electronically to APRA at the address for APRA which appears below or such other address as may be notified to the (*insert – Department/Agency*) from time to time by APRA:

Director – General Performance Licensing
Australasian Performing Right Association Limited
Locked Bag 3665
ST LEONARDS NSW 1590
Telephone: 02 9935 7900
Facsimile: 02 9935 7790

16.2 Any notice or other communication which may be given to or served on the (*insert – Department/Agency*) under this agreement will be deemed to have been duly given or served if it is in writing and signed by or on behalf of APRA and it is either delivered by hand or posted or a copy is transmitted electronically to the (*insert – Department/Agency*) at the address which appears below or such other address as may from time to time be notified in writing to APRA by the (*insert – Department/Agency*) :

Insert -Contact person
Department/Agency
Address

Attention: (*insert – contact person*)

Telephone: #####

Facsimile: #####

16.3 A notification a of dispute or other communication sent by post will be deemed to have been given at the time when, in due course of the post, it would have been delivered at the address to which it is sent as ascertained in accordance with this agreement.

16.4 A notification of a dispute or other communication sent by facsimile transmission will be deemed to have been given when the machine on which it is sent reports in writing that it has been transmitted satisfactorily.

17. Entire agreement

This agreement constitutes the entire agreement between the parties and supersedes all communications, negotiations, arrangements and agreements, either oral or written, between the parties with respect to the subject matter of this agreement.

18. Dispute resolution

If there is any dispute between APRA and the Commonwealth which arises out of or in connection with this agreement either APRA or the Commonwealth may subject that dispute to the alternative dispute resolution mechanism approved by the Australian Competition Tribunal constituted under the *Trade Practices Act 1974* in relation to File Nos. 4 and 5 of 1998.

19. Variation

No agreement or understanding varying or extending this agreement is legally binding unless in writing and signed by both the (*insert – Department/Agency*) and APRA.

20. Applicable law

This agreement will be governed by and construed in accordance with the laws from time to time in force in the Australian Capital Territory and the parties agree that the courts of that Territory have jurisdiction to entertain any action in respect of, or arising out of, this agreement.

SIGNED AS AN AGREEMENT

Signed for and behalf of the
(insert – Department/Agency) by
#####

in the presence of:

.....
Signature of witness

.....
Signature of authorised person

.....
Name of witness (print)

.....
Office held

.....
Name of authorised person (print)

Signed by **Australasian Performing
Right Association Limited:**

.....
Signature of witness

.....
Signature of authorised person

.....
Name of witness (print)

.....
Office held

.....
Name of authorised person (print)