

and

AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED ABN 42 000 016 099 of 16 Mountain Street, Ultimo, New South Wales, 2007 (**APRA**)

AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS SOCIETY LIMITED ABN 78 001 678 851 of 16 Mountain Street, Ultimo, New South Wales, 2007 (**AMCOS**)

PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA LIMITED ABN 43 000 680 704 of Level 4, 11 - 17 Buckingham Street, Surry Hills, New South Wales, 2010 (**PPCA**)

AUSTRALIAN RECORDING INDUSTRY ASSOCIATION LIMITED ABN 72 002 692 944 of Level 4, 11 - 17 Buckingham Street, Surry Hills, New South Wales, 2010 (**ARIA**)

COPYRIGHT AGENCY LIMITED ABN 53 001 228 799 of Level 11, 66 Goulburn Street, Sydney, New South Wales (**Copyright Agency**)

VISCOPY LIMITED ABN 98 069 759 922 of Level 11, 66 Goulburn Street, Sydney, New South Wales (**Viscopy**)

(together, **We, Us, Our**)

BACKGROUND

- A.** You are an approved education and care service for children, which may include long day care services, family day care services, preschool programs and after school care programs.
- B.** APRA is a performing right collecting society whose members have assigned to it the rights of public performance and communication to the public in the APRA Works.
- C.** AMCOS is a collecting society whose members have appointed it to administer certain reproduction rights in the AMCOS Works.
- D.** PPCA is a collecting society and is the non-exclusive licensee of certain rights in the PPCA Sound Recordings.
- E.** ARIA is a trade association and is the non-exclusive licensee of certain rights in the ARIA Sound Recordings.
- F.** Copyright Agency is a collecting society for authors, journalists, photographers, visual artists and publishers and is the non-exclusive licensee of certain rights in the CA Works.
- G.** Viscopy is a rights management organisation that provides licensing services on behalf of its members for the reproduction and communication of artistic works in material like books, websites, advertising, merchandise and exhibition catalogues.
- H.** You wish to:

- (i) perform in public APRA Works and PPCA Sound Recordings;
- (ii) communicate APRA Works and transmit PPCA Sound Recordings;
- (iii) reproduce AMCOS Works and ARIA Sound Recordings in audio and audio-visual recordings;
and
- (iv) reproduce and communicate CA Works and Viscopy Works.

I. We wish to grant You a licence on the terms of this agreement.

Agreements

1. Definitions and interpretation

1.1 Definitions

Where commencing with a capital letter:

Act means the *Copyright Act 1968*;

Advertisement means any production or publication that is an announcement or promotional material designed to attract the attention of the public or any part of it to a product or service, person, organisation or line of conduct, including community service announcements and infomercials;

Agreed Rate means the interest rate for overdrafts as published by the Reserve Bank of Australia (as identified by the RBA's mnemonic FILRSBVOO) plus 2 percentage points, calculated on daily rests from the due date to the date of payment;

AMCOS Members means the members of AMCOS who have licensed AMCOS the rights licensed by AMCOS in this agreement, in respect of their musical and associated literary works;

AMCOS Works means all musical works and associated lyrics for which AMCOS has the authority to grant the licence referred to in clause 2, but does not include Production Music Works;

APRA Member means a person who has assigned to APRA the rights of public performance and communication of Musical Works in which that person owns the copyright;

APRA Works means the musical and associated literary works in which the rights of communication and public performance in Australia are owned or controlled by APRA;

ARIA Licensors means the entities published on the ARIA website by ARIA and updated from time to time as being the parties who have licensed to ARIA the rights licensed by ARIA under this agreement;

ARIA website means the ARIA website, which is located as at the date of this agreement at www.aria.com.au;

Authorised Agent means an agent authorised by Us from time to time for the purpose of this agreement;

Background Music means music played by You for the benefit of Your staff, enrolled children and visitors, and which is audible to the general public;

Broadcast has the same meaning as in the Act;

CA Member means a person who has authorised Copyright Agency to sub-license to third parties the non-exclusive right to reproduce and communicate the CA Works in which that person owns, controls or represents that they own, the copyright;

CA Works means the literary, artistic, musical and dramatic works for which Copyright Agency has the authority to grant the licence in clause 2, which are owned or controlled by a CA Member;

Commencement Date means the date of this Agreement;

Confidential Information means, in respect of a party, trade secrets and other commercially valuable information relating to the party and its business;

CPI means the All Groups Consumer Price Index Number for the 8 capital cities published on a quarterly basis by the Australian Bureau of Statistics or any other price index substituted for it by the Australian Bureau of Statistics or any other Australian Government body;

Download means the process of making a digital copy of audio or audio visual materials from the internet onto a storage device including but not limited to a personal computer hard drive, server, mobile phone or any peripheral device;

Education and Care Purpose means the sole purpose of use at Your facility for the teaching or supervision of children at that facility;

Format means:

- (a) in relation to audio recordings, cassettes, compact discs, CD recordable, DVD recordable and any other digital audio coding format (such as MP3 or MIDI); and
- (b) in relation to video recordings, video cassettes in the VHS format, CD recordable, DVD recordable and any other digital multimedia format (such as MP4);

Grand Right Work means an opera, operetta, musical play, ballet, review or pantomime to the extent that it consists of words and music written expressly for it;

GST means goods and services tax or similar value added tax levied or imposed in Australia pursuant to the *A New Tax System (Goods and Services Tax) Act 1999 (GST Act)*, or otherwise, on a supply;

Insolvency Event means, in relation to a party, that the party goes into liquidation, has a receiver or receiver and manager appointed to it or any part of its assets, enters into a scheme or arrangement with creditors or suffers any other form of external administration; the relevant party becomes an insolvent under administration as defined in section 9 of the *Corporations Act 2001* or action is taken which could result in that event;

Licence Fee means the amount payable under clause 4.1;

Licensed Places means the maximum number of children who can be educated and cared for at Your facility at any one time, as stated on the Your regulations and service approval;

Month means a calendar month;

Music means APRA Works, AMCOS Works, ARIA Sound Recordings, and PPCA Sound recordings;

Music In The Workplace means music played by whatever means for benefit of employees at the Your facility in places where the general public is not admitted;

Music On Hold means music played by the use of radio, CD, tape or other storage device when operated by way of audio device on a telecommunications system at Your facility to telephone callers on hold;

Musical Work has the same meaning as in the Act;

Music Video means a cinematograph film:

- (a) produced for the primary purpose of promoting:
 - (i) the performer of the Sound Recording; or
 - (ii) the Sound Recording,
of a musical work embodied in the sound track of the cinematograph film; and
- (b) made with the permission of the owners of the copyright in the musical work and Sound Recording respectively;

PPCA Labels means the record labels published on the PPCA Website by PPCA and updated from time to time on the PPCA Website as being the record labels owned or operated by PPCA Licensors;

PPCA Licensors means the entities published by PPCA on the PPCA Website and updated from time to time as being the parties who have licensed to PPCA the rights licensed by this agreement;

PPCA Sound Recordings means the Sound Recordings for which PPCA has the authority to grant the licence in clause 2, which are owned or controlled by a PPCA Licensor and released on a PPCA Label;

PPCA Website means the PPCA website, which is located as at the date of this agreement at www.pcca.com.au;

Production Music Work means any musical work for which AMCOS is granted the right to license reproductions of the sound recording of that work;

Quarter means a 3 monthly period commencing on 1 January, 1 April, 1 July or 1 October, throughout the Term;

Reproduction means a copy of a PPCA Sound Recording, ARIA Sound Recording, AMCOS Work, CA Work or Viscopy Work or part of it;

Rate means, as applicable, in respect of:

- (a) the 12 month period 1 July 2015 to 30 June 2016, \$2.75 (excluding GST);
- (b) the 12 month period 1 July 2016 to 30 June 2017, \$2.90 (excluding GST); and
- (c) each 12 month period after 30 June 2017, the Rate applicable to the previous 12 month period plus CPI;

Sound Recording has the same meaning as in the Act;

Term means the period set out in clause 7;

Viscopy Member means a person who has authorised Viscopy to administer and license to third parties the non-exclusive right to reproduce and communicate the Viscopy Works in which that person owns, controls or represents that they own, the copyright;

Viscopy Works means the artistic works for which Viscopy has the authority to grant the licence in clause 2, which are owned or controlled by a Viscopy Member;

Works means APRA Works, AMCOS Works, PPCA Sound Recordings, ARIA Sound Recordings, CA Works and Viscopy Works, or each of them as relevant;

Your Event means an event at the Your facility (or some other venue) organised or authorised by You, including live musical performances by children or staff, including staff entertainment for which no entry fee is charged; and

Your Intranet means any secure password protected repository where content can only be accessed by Your staff provided that access is for the Education and Care Purpose.

1.2 Presumptions of interpretation

Unless the context otherwise requires:

- (a) a word which denotes the singular denotes the plural and vice versa;
- (b) any other agreement or document where amended or replaced means that agreement as amended or replaced;
- (c) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meaning;
- (d) a reference to a thing or an amount is a reference to the whole and each part of it; and
- (e) a person includes an individual, a body corporate, and a government.

1.3 Liability is several

To the extent that the context allows, an agreement, warranty, representation or obligation which is expressed to bind or benefit two or more persons under this agreement binds or benefits each of those persons severally. None of APRA, AMCOS, ARIA, PPCA, Copyright Agency or Viscopy will be jointly or severally liable for the performance by any other of them of its obligations under this agreement which will remain the responsibility of that other party alone.

2. Grant of licence

2.1 Grant

In consideration of and subject to the terms of this agreement, We grant to You a non-exclusive licence to:

- (a) perform in public APRA Works and PPCA Sound Recordings:
 - (i) for the Education and Care Purpose; and
 - (ii) at Your Events;
- (b) communicate APRA Works and transmit PPCA Sound Recordings by means of Music in the Workplace and Music On Hold at Your facility;
- (c) make and copy audio recordings of AMCOS Works and ARIA Sound Recordings in any Format for:
 - (i) the Education and Care Purpose; and
 - (ii) the purpose of use as Music in the Workplace and Music on Hold at the Your facility;
- (d) make and copy audio-visual recordings of AMCOS Works and ARIA Sound Recordings in any Format:
 - (i) for the Education and Care Purpose; and
 - (ii) to provide copies of such recordings to families of children enrolled at Your facility;
- (e) communicate APRA Works and PPCA Sound Recordings by way of Your Intranet system;

- (f) communicate audio-visual recordings of APRA Works and PPCA Sound Recordings made under 2.1(d) by way of email systems to families of children enrolled at Your facility for non-commercial uses only; and
- (g) reproduce and communicate CA Works and Viscopy Works for the Education and Care Purpose on the terms contained in this agreement.

3. Limitations

3.1 Limitations on rights

The rights granted to You under this agreement do not include the right to:

- (a) reproduce, Download or communicate to any other parties, the whole or part or copy of any Work, via the internet or mobile networks;
- (b) reproduce, communicate, transmit or perform any infringing copy of any AMCOS Work, APRA Work, PPCA Sound Recording, ARIA Sound Recording, CA Work or Viscopy Work;
- (c) reproduce any Music, CA Work or Viscopy Work into an Advertisement;
- (d) reproduce any cinematograph film or any literary, dramatic or artistic work included in a cinematographic film (including the lyrics associated with musical works in graphic form);
- (e) Broadcast any musical work or any Sound Recording;
- (f) make any unauthorised recordings or video recordings of performances contrary to Part XIA of the Act;
- (g) reproduce, communicate, transmit or publicly perform any Sound Recording other than ARIA Sound Recordings or PPCA Sound Recordings as applicable;
- (h) perform in public APRA Works or PPCA Sound Recordings at any event or occasion where:
 - (i) a fee for entry is charged for the purpose of making a profit; or
 - (ii) Your facility has been let for hire or otherwise to a third party;
- (i) perform in public any APRA Works or PPCA Sound Recordings beyond the precincts of the Your facility;
- (j) perform in public any Music Videos other than as expressly permitted under the Act;
- (k) perform Grand Right Works in their entirety;
- (l) perform in whole or in part any music and associated words composed or used for a ballet if accompanied by a visual representation of that ballet;
- (m) perform in its entirety any Choral Work of more than 20 minutes' duration;
- (n) perform any Music and associated words so as to burlesque or parody the work;
- (o) perform any Musical Work with new or substituted lyrics, or any lyrics which have been notified by APRA as prohibited;
- (p) reproduce or communicate CA Works and Viscopy Works in such a way that unreasonably prejudices the legitimate interests of the copyright owner in the work; or
- (q) do any other act not expressly licensed under this agreement.

4. Your obligations

4.1 Licence Fees

The Licence Fee payable to Us by You for each Licence Year is calculated as follows:

$$\text{Licence Fee} = \text{Rate} \times \text{LP}$$

Where;

Rate means the Rate applicable to that Licence Year;

LP means the number of Licensed Places at the Your facility.

4.2 Payment

4.2.1 Subject to clause 4.4, the Licence Fee referred to in clause 4.1 must be paid to AMCOS (on behalf of Us) for each Licence Year in advance on entering into this agreement and on each anniversary of that date.

4.2.2 Subject to clause 4.4, AMCOS will calculate the Licence Fee payable for the relevant Licence Year (on behalf of Us) and issue a tax invoice to You for the Licence Fee payable for that Licence Year.

4.3 Supply of information

Subject to clause 4.4, on or before entering into this agreement and on each renewal of this agreement, You will provide to AMCOS (on behalf of Us) the number of Licensed Places at Your facility.

4.4 Authorised Agents

If you have obtained this licence through an Authorised Agent, then clauses 4.2 and 4.3 do not apply to You, and:

- (a) the Licence Fee referred to in clause 4.1 must be paid to that Authorised Agent for each Licence Year in advance on entering into this agreement and on each anniversary of that date;
- (b) the Licence Fee payable for the relevant Licence Year will be calculated by that Authorised Agent and that Authorised Agent will issue a tax invoice to You for the Licence Fee payable for that Licence Year; and
- (c) on or before entering into this agreement and on each renewal of this agreement, You will provide to that Authorised Agent the number of Licensed Places at Your facility.

5. Warranties and Indemnities

5.1 Your warranties

You warrant that You:

- (a) have, or will procure, consent from any relevant persons to enable You to communicate to AMCOS (on behalf of us) any personal information contained in the information supplied under clauses 4.3 or 4.4 and for Us or an Authorised Agent to use that personal information for the purposes of this agreement; and
- (b) have, and will at all times during the Term maintain, the requisite computer, financial and other systems to enable You to perform Your obligations in accordance with this agreement.

5.2 Our indemnity

Each of Us indemnifies You against all damages, losses, costs and expenses, including reasonable legal fees, incurred by You arising out of any action, claim, demand or proceeding by any APRA Member or AMCOS Member or PPCA Licensor or ARIA Licensor or CA Member or Viscopy Member, any licensee of the APRA Member or AMCOS Member or CA Member or Viscopy Member in respect of the copying, reproduction, public performance or communication or transmission of Works under this agreement by You, provided that:

- (a) You promptly notifies APRA or AMCOS or PPCA or ARIA or Copyright Agency or Viscopy as the case may be of the claim;
- (b) You have complied with the terms of this agreement; and
- (c) APRA or AMCOS or PPCA or ARIA or Copyright Agency or Viscopy as the case may be is permitted to conduct the defence to the claim in Your name.

5.3 Exclusions and survival

The indemnities provided in clause 5 survive termination of this agreement.

6. Records and audit

6.1 Records

You must keep accurate books of account and other records in sufficient detail to ensure that all amounts payable to Us under this agreement can be properly ascertained.

6.2 Audit

- 6.2.1 We may on 7 days' notice to You audit or examine Your books of account and other records to determine the correctness of any report or payment under this agreement.
- 6.2.2 You must pay the cost of the audit or examination if it establishes that the information provided by You resulted in the amounts payable under this agreement being understated by more than 5%.

7. Term

Subject to earlier termination in accordance with clause 8, this agreement commences on the Commencement Date and will continue for a period of 12 months after which date it will continue for further 12 month periods, provided that the Licence Fee is paid in respect of each renewed period in accordance with clause 4.1.

8. Termination

8.1 Termination by Us

8.1.1 We may collectively but not individually terminate this agreement by notice in writing if You:

- (a) breach this agreement in a material respect and fail to rectify such breach within 14 days of receiving written notice to do so;
- (b) fail to pay any sum when due under this agreement within 14 days after the due date; or
- (c) suffer an Insolvency Event.

8.2 Termination by You

You may terminate this agreement by notice in writing if:

- (a) We or any of Us individually breach this agreement in a material respect and fail to rectify such breach within 14 days of receiving written notice to do so; or
- (b) an Insolvency Event occurs in respect of Us or any of Us individually.

9. Dispute resolution

9.1 Disputes

9.1.1 Subject to clause 9.1.2, if any dispute arises out of or in connection with this agreement, any party may submit that dispute to the alternative dispute resolution procedure offered by APRA in accordance with the terms of its authorisations under the *Competition and Consumer Act 2010*.

9.1.2 If any dispute arises relating solely to PPCA matters, then any party may refer that dispute for resolution in accordance with the PPCA's Complaints Handling and Dispute Resolution Policy available on the PPCA website.

9.2 Copyright Tribunal

Nothing in this clause 9 affects the right of any party to seek a determination from the Copyright Tribunal of Australia in relation to the subject matter of this agreement.

10. Confidentiality

10.1 Obligation to keep confidential

Subject to clauses 10.2.1 and 10.2.2, We must:

- (a) keep the Confidential Information confidential;
- (b) not use the Confidential Information for any purpose other than the performance of Our obligations under this Agreement and to the limited extent necessary for the purpose of meeting Our bona fide legal obligations to Our respective members in respect of the Works;
- (c) only disclose the Confidential Information to Our officers who have a need to know the Confidential Information and have agreed to keep it confidential; and
- (d) take all other steps necessary to keep the Confidential Information confidential.

10.2 Exclusions

10.2.1 Our obligations under clause 10.1 do not apply to any of Your Confidential Information that We can demonstrate to Your reasonable satisfaction:

- (a) was in APRA's or AMCOS' or PPCA's or ARIA's or Copyright Agency's or Viscopy's possession at the time of disclosure and was not acquired in breach of an obligation of confidence or under an obligation of confidence;
- (b) is in the public domain, other than as a result of a breach of confidence by Us;
- (c) is acquired from a third party, provided that it was not acquired from or by the third party unlawfully or in breach of an obligation of confidence; or

- (d) is required to be disclosed by law, but only to the extent so required to be disclosed and provided that We provide You with reasonable prior notice, and further provided that We have not and do not enter into any contractual arrangements with licensees that require the disclosure of the Your Confidential Information.

10.2.2 With respect to information supplied under this agreement, We may:

- (a) subject to clause 10.1, use the information to enable the accurate distribution of money to Our respective members or to other persons entitled to share in such distribution; and
- (b) disclose that information to Our respective auditors for the purposes of an audit, and other of their respective professional advisers, provided such auditors and advisers have agreed to keep it confidential.

10.3 Privacy

We must treat any personal information received under this agreement in accordance with Our respective privacy policies.

11. Miscellaneous

11.1 Entire agreement

This agreement embodies the entire understanding and agreement between the parties as to its subject matter. All previous negotiations, understandings, representations, warranties, memoranda or commitments in relation to, or in any way affecting, the subject matter of this agreement are merged in and superseded by this agreement.

11.2 Amendment

Other than as set out in this agreement, this agreement may only be varied by the written agreement of the parties.

11.3 Assignment

A party may not assign a right under this agreement.

11.4 Waiver

11.4.1 No waiver by AMCOS, APRA, ARIA, PPCA, Copyright Agency or Viscopy of any breach of any provision of this agreement shall operate as a waiver of another breach of the same or of any other provision of this agreement.

11.4.2 No waiver by You in respect of any breach of any provision in this agreement shall operate as a waiver of another breach of the same or of any other provision of this agreement.

11.5 Notices

11.5.1 A notice under this agreement must be in writing and may be given to a party by:

- (a) delivering it to the address of the party;
- (b) sending it by pre-paid post to the address of the party; or
- (c) sending it by email to the email address notified for this purpose

11.5.2 Any notice will be deemed to have been received by the addressee:

- (a) if delivered in person, when delivered to the addressee;

- (b) if posted, at 9.00 am on the fourth business day after the date of posting to the addressee whether delivered or not; or
- (c) if sent my email, immediately after dispatch.

11.6 Governing law

This Agreement shall be construed in accordance with the laws in force in New South Wales and the parties agree to submit to the jurisdiction of New South Wales courts.