**AGREEMENT FOR PUBLIC AVAILABILITY OF CONTENT**

**DATED** [Insert Date]

**BETWEEN**

1. **BROADCASTING COMMISSION** (**NZ On Air**)
2. **[INSERT PLATFORM OWNER’S FULL LEGAL NAME]** (**Platform Owner**)

**BACKGROUND**

The Platform Owner owns and/or holds exclusive rights to content that was funded by NZ On Air. The content may:

1. arise under any type of project (including for development or production); or
2. be at any stage of completion (including under projects that are only part way through).

The Platform Owner is entering into this agreement so that such content is available for the NZ public to watch, free of charge and in a timely manner, should the Platform Owner fail to, or not be able to, broadcast or publish the content for any reason.

**AGREEMENT**

1. **DEFINITIONS AND INTERPRETATION**
   1. **Definitions.** In this agreement:

**Business Day** means any day other than:

* + 1. a Saturday, a Sunday or a public holiday in Wellington or Auckland; and
    2. the period between 26 December in any year and 5 January the next.

**Digital Media Trust** means:

* + 1. the Digital Media Trust, a charitable trust board incorporated under the Charitable Trust Act 1957); or
    2. an alternative organisation notified by NZ On Air to the Platform Owner from time to time.

**Exclusive Content** means all content:

* + 1. prepared by or on behalf of a Producer;
    2. funded in whole or part by NZ On Air; and
    3. licensed exclusively to the Platform Owner,

whether before or after the date of this agreement, including all forms of that content, all revisions to that content and all additional content reasonably required for the broadcast or publication of that content as intended under the applicable NZ On Air Funding Agreement.

**Force Majeure** means:

* + 1. act of God, fire, earthquake, storm, flood, or landslide;
    2. sabotage, riot, civil disturbance, insurrection, epidemic, national emergency (whether in fact or law) or act of war (whether declared or not); and
    3. requirement or restriction of, or failure to act by, any government, semi-governmental or judicial entity,

but does not include:

* + 1. any event which the party affected could have avoided, prevented or overcome by implementing reasonable precautions against the event; or
    2. a lack of funds for any reason.

**In-House Content** means content:

* + 1. prepared by or on behalf of the Platform Owner (or any member of the Platform Owner’s Group) for broadcasting or publishing by the Platform Owner in accordance with the applicable NZ On Air Funding Agreement; and
    2. funded in whole or part by NZ On Air,

whether before or after the date of this agreement, including all forms of that content, all revisions to that content and all additional content reasonably required for the broadcast or publication of that content as intended under the applicable NZ On Air Funding Agreement.

**Notice to Fix** means a notice issued by NZ On Air under clause 3.5.

**Platform Owner’s Group** means the Platform Owner and its Related Companies (as defined in section 2(3) of the Companies Act 1993, including any entity that would be a related company within that definition if incorporated as a company in New Zealand).

**Producer** means a third party (not being a member of the Platform Owner’s Group) who agreed with NZ On Air to prepare content, whether before or after the date of this agreement, and includes their representatives, successors and assignees.

**Publishing Covenants** means, in relation to any Exclusive Content and/or In-House Content, the Platform Owner’s agreement to broadcast and/or publish, and not exclusively license or assign, that content as set out in any:

* + 1. NZ On Air Funding Agreement; or
    2. Covenant to Publish given to NZ On Air.

**Rights Notice** means a notice issued by NZ On Air under clause 4.1.

* 1. **Interpretation**. In this agreement:
     1. **Defined Terms:** Words or phrases appearing in this agreement with capitalised initial letters are defined terms and have the meanings given to them in this agreement.
     2. **Inclusions:** Reference to “includes” means “includes without limitation”, and “include”, “included” and “including” have corresponding meanings.
     3. **Person:** Reference to a person includes:
        1. a corporation sole, a body of persons, whether corporate or unincorporated, and any national, state, regional or local government body or agency; and
        2. that person’s representatives, successors and assignees.
     4. **Singular and Plural**: The singular includes the plural and vice versa;
     5. **Statutes and Regulations**: A reference to any enactment, regulation or expression of Government policy is a reference to that enactment, regulation or policy as amended, or to any enactment, regulation or policy substituted for it, and any reference to an enactment includes all regulations made under that enactment.
     6. **Writing**: A reference to “written” or “in writing” includes all modes of presenting or reproducing text in a form that is legible, permanently visible and capable of being retained and stored (which to avoid doubt may include email).

1. **SCOPE OF HOLDINGS**

**[Option 1…**The Platform Owner warrants that it is the only entity in the Platform Owner’s Group with any ownership of or rights in content funded by NZ On Air.**]**

**[Option 2…**The Platform Owner warrants that the only entities in the Platform Owner’s Group with any rights or interests in content funded by NZ On Air are:

* + 1. the Platform Owner;
    2. [Entity Name]; and
    3. [Entity Name].

**[NZ On Air should also contract with the other group companies.]**

1. **BEFORE A RIGHTS NOTICE**
   1. **Compliance with Publishing Covenants**. The Platform Owner confirms it is not in breach of the Publishing Covenants and will immediately notify NZ On Air in writing if the Platform Owner breaches, or for any reason considers it is likely to breach, any Publishing Covenants.
   2. **Amendment to Exclusive Content licences.** The Platform Owner agrees for the benefit of the Producer and NZ On Air that its licence of any Exclusive Content will cease to be exclusive upon a Rights Notice being given in respect of that Exclusive Content. This licence variation does not affect any right or remedy the Producer or NZ On Air may have against the Platform Owner or any other person. Except as set out in this clause, the Platform Owner’s licence of that Exclusive Content is not affected in any way.
   3. **Licence of In-House Content**. The Platform Provider grants to NZ On Air a non-exclusive, transferable, irrevocable, sub-licensable and royalty free licence to copy, modify, broadcast, publish and otherwise commercially exploit the Platform Provider’s In-House Content following a Rights Notice being issued in respect of that In-House Content. Thislicence:
      1. is granted as at the date of this agreement; and
      2. ends in respect of any In-House Content for which the Publishing Covenants are fully complied with to NZ On Air’s satisfaction without a Rights Notice being issued for that In-House Content.

**[Optional if the Platform Owner is concerned that it can’t provide third party content to NZ On Air…**This clause only applies to third party owned content in the In-House Content, to the extent the Platform Owner’s licence for that third party content permits use by NZ On Air. However, the Platform Owner will not enter into any licence for such third party content that limits its exploitation by NZ On Air in accordance of this clause.**]**

* 1. **Copies of In-House Content**. The Platform Provider will give NZ On Air copies of all In-House Content requested in writing by NZ On Air at any time. Copies must be provided within 10 Business Days of request. NZ On Air may only use that In-House Content:
     1. following a Rights Notice in relation to that In-House Content; and
     2. pursuant to the licence granted in clause 3.3.
  2. **NZ On Air may give Notice to Fix**. If at any time NZ On Air considers, acting reasonably, that the Platform Owner:
     1. has not complied with the Publishing Covenants; and/or
     2. will not be able to, or will not, comply with the Publishing Covenants,

NZ On Air may give the Platform Owner written notice (a ***Notice to Fix***)that requires the Platform Owner to:

* + 1. remedy that non-compliance; and/or
    2. evidence to NZ On Air’s satisfaction that it will be able to, and will, comply with those Publishing Covenants,

within two weeks or any longer period specified in the Notice to Fix or subsequently agreed by NZ On Air in writing.

1. **ON A RIGHTS NOTICE**
   1. **Giving a Rights Notice**. NZ On Air may at any time give written notice to the Platform Owner (a ***Rights Notice***) in respect of any Exclusive Content and/or In-House Content if the Platform Owner has not complied with a Notice to Fix to NZ On Air’s satisfaction within the period referred to in the Notice to Fix. The Rights Notice must specify:
      1. that it is a Rights Notice under this agreement;
      2. the Exclusive Content and/or In-House Content concerned (which may be all Exclusive Content and In-House Content); and
      3. the next steps (if any) that NZ On Air requires the Platform Owner to take in accordance with this agreement.
   2. **Effect on Exclusive Content.** Ifa Rights Notice is issued in respect of any Exclusive Content then:
      1. the amendments to the Producer’s licence in clause 3.2 are applicable; and
      2. if requested in writing by the Producer of that Exclusive Content or NZ On Air, the Platform Owner will promptly (and in any event within 10 Business Days) give the Producer of that Exclusive Content copies of all of that Exclusive Content that is in the possession or control of the Platform Owner’s Group.

In this clause, “Producer” means (if applicable) any successor or assignee of the Producer’s rights to that Exclusive Content under the terms of the applicable NZ On Air Funding Agreement or otherwise.

* 1. **Effect on In-House Content.** Ifa Rights Notice is issued in respect of any In-House Content then:
     1. the license to NZ On Air in clause 3.3 is applicable; and
     2. if requested in writing by NZ On Air, the Platform Owner will promptly give NZ On Air copies of all of that In-House Content that is in the possession or control of the Platform Owner’s Group.

1. **DISPUTES**
   1. Except where a party seeks urgent equitable relief, it may not commence court proceedings unless it has first complied with this clause 5 (Disputes).
   2. If any dispute arises between the parties in relation to this agreement, it will be referred for resolution to senior managers of each party by written notice by either party (**Dispute Notice**). If the dispute is not resolved within 5 Business Days of the Dispute Notice (or such longer period as both parties agree), the dispute will be referred to mediation and the chairperson for the time being of the Resolution Institute (or his or her nominee) will be requested to appoint a mediator. For contact details see <https://www.resolution.institute/>.
   3. If the dispute has not been resolved within one month (or such longer period as the parties may agree) of the Dispute Notice, then either party may issue a written notice (**Arbitration Notice**) referring the dispute to arbitration in accordance with the Arbitration Act 1996 (excluding clauses 4 and 5 of the Second Schedule to that Act). The award in the arbitration will be final and binding. The place of arbitration will be Wellington, New Zealand. The tribunal will consist of a sole arbitrator, to be appointed by agreement of the parties, but if the parties fail to reach such agreement within 10 Business Days of the date of the Arbitration Notice, then the arbitrator will be appointed by the chair of the Resolution Institute (or his/her nominee). The arbitrator so appointed will be a retired judge of the High Court or Court of Appeal, a Queen's Counsel or equivalent. The arbitration will be conducted as quickly as possible and, as far as is practicable, the arbitrator will issue his or her award within four months of his or her appointment. When determining the procedure and scheduling of the arbitration, the arbitrator will take this time period into consideration.
   4. Each party will pay its own costs associated with this dispute resolution procedure unless the mediator or other dispute resolution co-ordinator determines otherwise.
2. **GENERAL**
   1. **Agreement not confidential.** The parties acknowledge that the existence and terms of this agreement are not confidential to either of them.
   2. **Further assurances.** The Platform Owner warrants that it will, at any time at the request of NZ On Air:
      1. execute all documents and do all acts as may be necessary in order to vest, secure or enforce any rights of NZ On Air in respect of the Content Rights.
      2. give NZ On Air all assistance in the power of the Platform Owner to enable NZ On Air to enjoy the full benefit of all Content Rights.
   3. **Rights enforceable.** The provisions of this agreement benefitting a Producer and the Digital Media Trust areintended to be enforceable by those persons. However, this agreement may be amended without obtaining the consent of either of them.
   4. **Notices.** All notices to a party must be delivered by hand or sent by post, courier, or email to that party's address below, or replacement address notified by that party:

**NZ On Air**

[TBC]

**Platform Owner**

[TBC]

A notice will be considered to be received:

* + 1. if delivered by hand or courier, on the date it is delivered;
    2. if sent by post within New Zealand, on the 3rd Business Day after the date it was sent;
    3. if sent by email, at the time the email enters the recipient's information system as evidenced by a delivery receipt requested by the sender and it is not returned undelivered or as an error.
  1. **Counterparts.** This agreement can be validly signed by each party signing a separate, identical copy of this agreement and sending it to the other party. The signed copies can be printed documents or emailed copies.
  2. **Assignment**. NZ On Air may assign or novate all of its rights and obligations under this agreement to another Government agency that takes over its functions in respect of this agreement, effective on written notice to the Platform Owner.
  3. **Amendments**. This Agreement can only be amended as agreed in writing and signed by both parties.
  4. **Entire agreement**. This Agreement represents the entire agreement between the parties relating to the Content. This Agreement replaces all prior proposals or agreements and all communications between the parties relating to the subject matter of this agreement.
  5. **Severability**. Any invalid, illegal or unenforceable provision of this agreement will be amended to the minimum extent necessary to ensure that it is not unlawful and, as far as is possible, to ensure that it is consistent with the intent and effect of the provision. The remaining provisions will be enforceable as if such unlawful provision had not been included in this agreement. If the provision is unable to be amended without materially altering the intent and effect of the provision, it will be severed, and the remaining provisions enforceable, but only if the severance does not frustrate this agreement.
  6. **Waivers**. Any delay or failure by NZ On Air, Producers or the Digital Media Trust to use any right under this agreement, will not operate as a waiver of such right.

**SIGNATURE**

This agreement is agreed in consideration of the sum of $1, receipt of which is acknowledged by the Platform Owner.

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| --- | --- |
| For NZ On Air by  *Signature*  Name:  Position:  Date: | For the Platform Owner by:  *Signature*  Name:  Position:  Date: |