

## DEED OF SETTLEMENT

THIS AGREEMENT IS MADE AS A DEED ON 19 DECEMBER 2019

### PARTIES

**COPYRIGHT AGENCY LIMITED** ABN 53 001 228 799 of Level 12, 66 Goulburn Street Sydney New South Wales 2000 (**Copyright Agency**)

**THE CROWN IN RIGHT OF THE STATE OF NEW SOUTH WALES**, acting through the **NSW Department of Communities and Justice**, Level 4, Henry Deane Building, 20 Lee Street, Sydney New South Wales 2000 (**State**)

### BACKGROUND

- A. Copyright Agency is a collecting society declared under section 153F of the *Copyright Act 1968 (Act)*, and represents its members in relation to the communication of their works to the public.
- B. The State makes government copies within the meaning of that term in section 183 of the Act, and communicates works to the public in reliance on that section.
- C. Copyright Agency and the State have been parties to agreements regarding payment of equitable remuneration for government copies and communications to the public made in reliance on section 183 of the Act, most recently an agreement dated 1 July 2010 (**2010 Agreement**).
- D. The 2010 Agreement expired on 30 June 2012.
- E. The parties were unable to reach a new agreement and Copyright Agency commenced the Proceedings.
- F. The parties have agreed to settle the Proceedings on the terms set out in this Agreement.

### AGREEMENT

#### 1. Definitions and interpretation

##### 1.1 Definitions

**Act** means the *Copyright Act 1968 (Cth)*;

**Agency** means:

- (a) prior to the commencement of the GSE Act, a NSW "public sector agency" as defined in section 3(1) of the former *Public Sector Employment and Management Act 2002*; and
- (b) otherwise, a NSW "government sector agency" as defined in section 3(1) of the GSE Act;

**Agreement** means this deed between the Parties;

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**Claims** means all claims (other than those arising under this Agreement), including suits, actions, proceedings and liabilities and claims for interlocutory relief, costs (including costs reserved or ordered but presently unpaid), damages and interest;

**Commencement Date** means the day on which this Agreement is signed by whichever Party is the last to sign this Agreement.

**Correctly Rendered Invoice** has the meaning given to that expression in clause 7.1.1;

**Educational Institutions** means educational institutions whose copying is covered by a remuneration notice under Part IVA of the Act;

**Equitable Remuneration** means:

- (a) in respect of the Retrospective Period, the Settlement Sum; and
- (b) in respect of the Prospective Period, the amount calculated in accordance with clause 2.5;

**FTE** means, in respect of a Year, the aggregate number of full-time equivalent employees of all Participating Agencies determined by reference to the NSW Workforce Profile Report for the preceding Year, subject to any adjustment in accordance with clause 2.5.2;

**Government Copies** means government copies (as defined in the Act) of Works and published editions of Works;

**GSE Act** means the *Government Sector Employment Act 2013* (NSW) as amended from time to time;

**In-Scope Uses** means copying and communication of Works by Participating Agencies (including Government Copies);

**Journal** means a literary Work which is a periodical published in print or electronic or any other format, predominantly comprising technical, scholarly, professional, academic or scientific information, other than a Magazine or a Newspaper;

**Magazine** means a literary work which is a periodical published in print or electronic or any other format, which contains popular or general interest material, other than a Journal or a Newspaper;

**Newspaper** means a Work, other than a Journal or Magazine: which:

- (a) contains news or current affairs of special or general interest in separate literary works;
- (b) is published at regular intervals in a paper or electronic edition as a newspaper or similar periodical; and
- (c) which is available to the public, whether or not by subscription;

**NSWPSC** means the New South Wales Public Service Commission;

**NSW Workforce Profile Report** means the annual NSW government sector workforce data compiled by the NSWPSC as the basis for the annual workforce profile report tabled in the NSW Parliament by the NSW Public Service Commissioner;

**Participating Agencies** means:

- (a) for the Retrospective Period, all Agencies excluding Educational Institutions and State Owned Corporations; and

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- (a) for the Prospective Period, all Agencies excluding Educational Institutions and State Owned Corporations, subject to any annual adjustment advised by the State in accordance with clause 2.5.2;

**Party** means Copyright Agency or the State, as the case may require and Parties means both Copyright Agency and the State;

**Proceedings** means proceedings CT1 of 2017 in the Copyright Tribunal of Australia;

**Prospective Period** means the period from 1 July 2019 to 30 June 2023;

**Retrospective Period** means the period from 1 July 2012 to 30 June 2019;

**Settlement Sum** means the total amount of [redacted]

**State Owned Corporation or SOC** is as defined in section 3(1) of the *State Owned Corporations Act 1989* (NSW) as amended from time to time;

**Survey Plan** means a drawing, map or plan of real property which is made under NSW legislation or similar legislation of another State or Territory of Australia by a registered or licenced surveyor;

**Teaching Service** is as defined in section 44 of the *Teaching Service Act 1980*;

**Work** means a literary, dramatic, musical or artistic work within the meaning of the Act other than:

- (a) a literary work that consists of a computer program or a compilation of computer programs;
- (b) for the purposes of this Agreement, a Survey Plan;
- (c) for the purposes of this Agreement, Newspapers, but only for the purposes of communication or reproduction in or from an electronic form; and
- (d) a Work included in a sound recording or a cinematograph film.

**Year** means each consecutive 12 month period from 1 July to 30 June, and if the Agreement terminates other than on a 30 June, the last Year is the period from 1 July until the date of termination.

## 1.2 Interpretation

### 1.2.1 Unless the context otherwise requires:

- (a) a word which denotes:
  - (i) the singular denotes the plural and vice versa; and
  - (ii) a person includes an individual, a body corporate, an association, a joint venture, a partnership, a government and any other legally recognised entities; and
- (b) where a word or phrase is given a defined meaning in clause 1.1, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning if in capitals;
- (c) a reference to:
  - (i) any legislation includes any regulation or instrument made under it and any amended, re-enacted or replacement legislation;

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- (ii) payments to a party includes payments to another person on the direction of the party;
- (iii) money is to Australian dollars unless otherwise stated; and
- (iv) any thing (including any amount) is a reference to the whole and each part, and a reference to a group of persons is a reference to all of them collectively, to any two or more collectively and to each individually.

1.2.2 In this Agreement:

- (a) clause headings are for convenience only and do not affect interpretation; and
- (b) "includes" is not a word of limitation.

1.2.3 Each term of this Agreement which binds or benefits two or more parties binds or benefits them jointly and severally.

## 2. Equitable Remuneration

### 2.1 Waiver and agreement for sections 183(4) and 183(5) of the Act

2.1.1 Copyright Agency, acting on behalf of all Relevant Copyright Owners:

- (a) waives any right that the Relevant Copyright Owners may have under section 183(4) to be informed of, and furnished with, information as to the doing of any act comprised in their copyright in Works, during the Retrospective Period and Prospective Period, where the act was, or is, done or authorised by the State; and
- (b) agrees, for the purposes of section 183(5), that the terms for the doing of the act during the Retrospective Period and the Prospective Period, is that the State pays the Equitable Remuneration to Copyright Agency, in accordance with this Agreement.

2.1.2 In clause 2.1.1, the expression "**Relevant Copyright Owners**" means –

- (a) for Government Copies, all copyright owners (which, for the avoidance of doubt, does not include copyright owners of Survey Plans insofar as those Plans are concerned); and
- (b) for all other uses in reliance on section 183, the copyright owners who have authorised the collection of equitable remuneration under this Agreement for the use of their Works, including the copyright owners represented by Copyright Agency by virtue of an agreement with a foreign collecting society for the exchange of rights.

2.1.3 Clause 2.1.1 does not apply with respect to making a Work available to the public (including to any person who is not an employee of a Participating Agency) by electronic form including by email to entities external to the State or by display on a website.

2.1.4 The Parties agree that for the purposes of this clause 2.1.3, the expression "making a Work available to the public" does not include making a Work available to a person who is engaged in or by a Participating Agency (for example, an employee, contractor or volunteer of a Participating Agency).

2.1.5 Subject to this clause 2, the Parties agree that the payment of the Equitable Remuneration by the State to Copyright Agency in accordance with this Agreement will have the effect of completely discharging any obligation on the part of the State to pay Copyright Agency or Relevant Copyright Owners under section 183, relating to the Retrospective Period and the Prospective Period.

### 2.2 Agreement for sections 183A and 183B of the Act

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- 2.2.1 The Parties agree that for the purposes of sections 183A and 183B –
- (a) this Agreement constitutes agreement on the method to be used for working out equitable remuneration payable by the State to Copyright Agency in relation to all Government Copies which may have been made, or may be made, during the Retrospective Period and the Prospective Period; and
  - (b) this Agreement constitutes agreement on the manner and times at which such equitable remuneration is to be paid during the Retrospective Period and the Prospective Period, by the State to Copyright Agency.
- 2.2.2 The Parties agree that payment of the Equitable Remuneration by the State to Copyright Agency in accordance with this Agreement will have the effect of completely discharging any obligation on the part of the State to pay Copyright Agency under section 183A or 183B in relation to the Retrospective Period and the Prospective Period.
- 2.3 Scope**
- The Parties agree that the Equitable Remuneration payable under this Agreement is in respect of all In-Scope Uses made during the Retrospective Period and the Prospective Period.
- 2.4 Retrospective Period**
- By 10 January 2020, subject to receipt of a Correctly Rendered Invoice from Copyright Agency, in respect of In-scope Uses for each Year during the Retrospective Period, the State must pay Copyright Agency an amount equal to the Settlement Sum.
- 2.5 Prospective Period**
- In respect of In-Scope Uses for each Year during the Prospective Period, the State must pay Copyright Agency Equitable Remuneration in an amount equal to \$7.30 multiplied by the FTE applicable to that Year by the following dates:
- (a) by 10 January 2020, subject to receipt of a Correctly Rendered Invoice from Copyright Agency for the Year ending 30 June 2020; and
  - (b) by 15 February in each subsequent Year of this Agreement, on receipt of a Correctly Rendered Invoice from Copyright Agency.
- 2.5.2 Copyright Agency acknowledges that in respect of the Prospective Period, the State may notify Copyright Agency of any Participating Agency which, in any subsequent Year, does not wish to be a Participating Agency ("**Excluded Agency**").
- 2.5.3 The State will provide the notification in clause 2.5.2 to Copyright Agency at the time of the notification of the FTE under clause 2.5.4(b), such notification to have effect in respect of the Excluded Agency, the subject of the notification, for the Year commencing on the next 1 July after the notification is given.
- 2.5.4 For the purposes of determining the amount of Equitable Remuneration in a Year during the Prospective Period:
- (a) the FTE for the Year ending 30 June 2019 (which shall be the basis of the invoice for the Year ending 30 June 2020) is 232,204 (the Parties agree there are no Excluded Agencies); and
  - (b) the State shall notify Copyright Agency by 15 December of each Year thereafter of the FTE for that Year and of any Excluded Agencies for the next Year.

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- 2.5.5 The parties agree that the rate of Equitable Remuneration specified in this clause 2.5 may not be relied on in determining a rate beyond the Prospective Period.

### 3. Notice of withdrawal

Within seven days of execution of this Agreement, Copyright Agency must withdraw the Proceedings.

### 4. Survey

The Parties agree to work with appropriate design experts and enter into good faith negotiations during the Prospective Period, to design a sampling system to estimate the extent and nature of copying and communications by government employees to inform negotiations by the Parties in relation to:

- (a) terms for the doing of any act by the State under section 183 (4) and (5); and
- (b) agreement on the method to be used for working out equitable remuneration to be paid by the State under sections 183A and 183B of the Act.

with respect to the period after the Prospective Period.

The Parties will seek to agree on the design of a fit-for-purpose sampling system, with the intention of implementing a system or systems that take account of cost and burden and the obligations of the Parties.

## 5. Indemnities and Releases

### 5.1 Copyright Agency

#### Definitions for this clause

In this clause 5 –

**Claims** means claims, actions, suits, proceedings, damages, loss, costs and expenses, including legal expenses on a full indemnity basis;

**Indemnifies** includes to keep indemnified.

### 5.2 Indemnity by Copyright Agency

- 5.2.1 Copyright Agency indemnifies the State against all Claims, as a result of or arising out of any Claim by a third party under or in relation to In-Scope Use of Works under section 183A and relating to the Retrospective Period and the Prospective Period.

- 5.2.2 Copyright Agency indemnifies the State against all Claims, as a result of or arising out of any Claim by a third party under or in relation to In-Scope Use of Works under section 183 and relating to the Retrospective Period.

- 5.2.3 Copyright Agency indemnifies the State against all Claims, as a result of or arising out of any Claim by a Relevant Copyright Owner under or in relation to In-Scope Use of Works under section 183 and relating to the Prospective Period.

#### Benefit of indemnity

- 5.2.4 In clauses 5.2.1 to 5.2.3 a reference to "State" includes all Participating Agencies, employees, agents and contractors of the Participating Agencies (each, an Indemnified Party).

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5.2.5 The State holds the benefit of clauses 5.2.1 to 5.2.3 for itself and on trust for each other Indemnified Party.

### 5.3 Release by Copyright Agency

5.3.1 Copyright Agency hereby releases and forever discharges those Indemnified from any Claim which Copyright Agency (either on its own behalf, or on behalf of any other person) has or may allege against any of those Indemnified arising out of or in any way relating to:

- (a) the Proceedings, the facts, matters and circumstances which gave rise to the Proceedings and any other agreement, arrangement, understanding or matter related to the Proceedings or its subject matter; and
- (b) In-Scope Uses of Works under section 183 or 183A or 183B and relating to the Retrospective Period and the Prospective Period.

5.3.2 Except in the case of a breach of the terms of this Deed, or as otherwise expressly provided in this Deed, this Deed may be pleaded as a full and complete defence by a party to, or beneficiary of, this Deed to any Claim, continued or taken by or on behalf of the other party to this Deed in connection with any of the matters referred to in this Deed.

5.3.3 To avoid any doubt, the Parties agree that this clause 5 will survive any expiration of the Retrospective Period and the Prospective Period.

### 5.4 Release by the State

Subject to the terms, and with effect from the date of this Agreement, the State releases Copyright Agency and its past and present officers, employees and agents from all Claims arising out of the Proceedings, the facts, matters and circumstances which gave rise to the Proceedings and any other agreement, arrangement, understanding or matter related to the Proceedings or its subject matter.

## 6. Warranties

6.1.1 Copyright Agency warrants that:

- (a) Copyright Agency is authorised and empowered to enter into this Agreement and to give the warranties, indemnities and releases in this Agreement;
- (b) where, in this Agreement, Copyright Agency purports to act on behalf of a copyright owner, or class of copyright owners, Copyright Agency is authorised to so act;
- (c) Copyright Agency has authority to accept, on behalf of Relevant Copyright Owners, as defined in clause 2.1.2, payments which the State makes under this Agreement; and
- (d) at all times during the Retrospective Period and the Prospective Period, and as at the Commencement Date, Copyright Agency was and is the relevant collecting society for the purposes of Division 2 of Part VII of the Act in relation to all Works and published editions of Works to which this Agreement relates, that Copyright Agency has operated as such, and has not ceased operating as such.

6.1.2 Copyright Agency must promptly notify the State in writing if Copyright Agency –

- (a) is not, or is no longer, or ceases to be, the relevant collecting society for the purposes of Division 2 of Part VII of the Act in relation to all or any Works to which this Agreement relates; or
- (b) ceases or has ceased to operate as that collecting society.

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6.1.3 To avoid any doubt, the Parties agree that this clause 6 will survive any expiration of the Prospective Period.

### 7. Correctly Rendered Invoice

7.1.1 For the purpose of this Agreement, an invoice is a "**Correctly Rendered Invoice**" if, and only if –

- (a) the amount claimed in the invoice is due for payment under this Agreement;
- (b) the amount claimed in the invoice is correctly calculated in accordance with this Agreement;
- (c) the invoice correctly identifies what it relates to.

## 8. Confidentiality

### Definition of Confidential Information

8.1.1 For the purpose of this clause 8, "**Confidential Information**" includes –

- (a) the Settlement Sum, and any computation relating thereto;
- (b) information designated or marked as confidential;
- (c) information which is, by its nature, confidential;
- (d) information which is known or ought to be known by the recipient as confidential;
- (e) information which one Party notifies the other Party is confidential; and
- (f) information disclosed or imparted in circumstances denoting confidence.

8.1.2 Subject to clauses 8.2.1 and 8.2.2, no Party may (except in the proper course of performance of this Agreement) disclose to any person, without the previous consent in writing of the other Party, Confidential Information of the other Party.

### 8.2 Permitted Disclosures

8.2.1 The obligations of confidentiality set out in this clause 8, do not:

- (a) prevent disclosure which is required by law or constitutional convention;
- (b) apply to information that is in the public domain, other than by breach of an obligation of confidence;
- (c) prevent disclosure to the Party's legal advisers or a court or tribunal; or
- (d) prevent disclosure to the Party's other professional advisers who are under an obligation of confidentiality.

8.2.2 Without limiting the State's other rights under or in relation to this clause 8, the State may at any time use or disclose information relating to Copyright Agency or this Agreement, including confidential information of Copyright Agency to which this clause 8 applies:

- (a) to satisfy the requirements of parliamentary accountability;
- (b) pursuant to *Government Information (Public Access) Act 2009*;



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- (c) pursuant to the *Ombudsman Act 1974*;
- (d) to the Auditor-General for the purposes of satisfying his or her duties of office; and
- (e) otherwise to satisfy any public disclosure obligations of the State.

8.2.3 For the avoidance of doubt, each Party consents to the other Party making this Agreement publically available, subject to redaction of the Settlement Sum.

### 9. Costs

Each Party will bear its own costs and expenses in relation to the Proceedings, including all legal and other expenses relating directly or indirectly to the negotiation, preparation and execution of this Agreement and all documents incidental to it.

### 10. Miscellaneous

#### 10.1 Entire agreement

10.1.1 This Agreement embodies the entire understanding and agreement between the Parties as to its subject matter.

10.1.2 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.

10.1.3 Unless otherwise indicated, amounts stated in this Agreement do not include GST.

10.1.4 In relation to any GST payable for a taxable supply by a party under this Agreement, the recipient of the supply must pay the GST subject to the supplier providing a tax invoice.

10.1.5 The Parties acknowledge their shared understanding that the payment of Equitable Remuneration does not attract GST.

#### 10.2 Governing law and jurisdiction

This Agreement is governed by and must be construed in accordance with the laws of New South Wales. Each Party:

- (a) irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New South Wales and all courts which have jurisdiction to hear appeals from those courts; and
- (b) waives any right to object to proceedings being brought in those courts for any reason.

#### 10.3 Severability

If any provision of this Agreement is invalid or of no force or effect under any statute, then this Agreement is to be construed as if that provision is not in this Agreement, but the remainder of this instrument retains its full force and effect.


#### 10.4 Variation

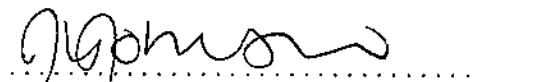
This Agreement may not be varied except in writing signed by the Parties.

**Deed of Settlement**


**SIGNED AS A DEED**


Signed, sealed and delivered by **Copyright Agency Limited**, in accordance with section 127 of the *Corporations Act 2001* (Cth);

  
.....  
Signature of director  
**JASON EADES**  
.....  
Name of director (print)

  
.....  
Signature of director/secretary  
**Josephine Johnston**  
.....  
Name of director/secretary

Signed, sealed and delivered for, and on behalf, of the **Crown in right of the State of New South Wales, acting through the Department of Communities and Justice** by its authorised delegate but not so as to incur personal liability, in the presence of:

  
.....  
Signature of witness  
**L. KABAN**  
.....  
Name of witness (print)

  
.....  
Signature of authorised person  
**Deputy Secretary, DCJ**  
.....  
Office of authorised person