

**TELEVISION NEW ZEALAND LIMITED**

**NEW ZEALAND FILM ARCHIVE**

**PRODUCTION LIBRARY SERVICES AGREEMENT**

## **PARTIES:**

1. TELEVISION NEW ZEALAND LIMITED ("**TVNZ**")
2. THE TRUST BOARD KNOWN AS "THE NEW ZEALAND FILM ARCHIVE" incorporated on 9 March 1981 under the provisions contained in the Charitable Trusts Act 1957 ("**Archive Manager**").

## **BACKGROUND**

- A. TVNZ holds and manages an archive of television-related materials dating from the start of television broadcasting in New Zealand. These materials represent taonga that are relevant to the historical and cultural heritage of New Zealand and to New Zealanders' sense of their national identity and are used frequently in TVNZ's day-to-day business, particularly for TVNZ's production of news and current affairs programmes.
- B. These materials and the facility that houses them are being transferred to the Crown. The facility is being transferred to LINZ and will be managed by DIA, and the materials are being transferred to MCH. MCH intends to appoint The New Zealand Film Archive as the Archive Manager to provide certain public access, preservation, maintenance and digitisation services to MCH.
- C. The Archive Manager will also provide Production Library Services to TVNZ from the Archive Facility under this Agreement. Under the Archive Collection Agreement, the Archive Manager will offer employment to certain TVNZ employees who have provided production library services to TVNZ at the Archive Facility before the Transfer Date.

## **THE PARTIES AGREE AS FOLLOWS:**

### **1 Definitions and interpretation**

#### **1.1 Definitions**

In this Agreement, unless the context otherwise requires:

**'Agreement'** means this production library services agreement and the appendix attached to it.

**'Archive Collection'** means the Card Index System and all audio, visual and audio-visual material:

- (a) broadcast and/or held by TVNZ (and its predecessors) from the beginning of television broadcasting in New Zealand until the Transfer Date, which is held by TVNZ at the Archive Facility on the Transfer Date, including any film, negative, tape or other medium of that material, regardless of whether:
  - (i) TVNZ holds sole or joint copyright in that material; or
  - (ii) TVNZ holds no copyright in that material;
- (b) that is subject to a Disposal authority issued pursuant to the Public Records Act authorising the transfer of the material by TVNZ to MCH, with effect from the date specified in that Disposal; and
- (c) includes any TVNZ programming material broadcast after the Transfer Date and sent by TVNZ to the Archive Facility,

but excludes any intellectual property rights in the above materials.

**'Archive Collection Agreement'** means the "Transfer of TVNZ Archive Collection and Employees Agreement" between TVNZ, MCH and the Archive Manager, dated on or about the date of this Agreement.

**'Archive Facility'** means the land situated at 181a Taita Drive, Avalon, Lower Hutt Avalon, held in computer freehold register 570366, and the buildings, fixtures and fittings, and plant held there on the Transfer Date, known as the TVNZ Archive, which is owned by TVNZ as at the date of signing this Agreement, but excluding the Archive Collection and various TVNZ equipment and technology identified in the Archive Collection Agreement.

**'Archive Facility ASP'** means the Agreement for the Sale and Purchase of the Archive Facility between TVNZ and LINZ, dated on or about the date of this Agreement.

**'Card Index System'** means the manual card-based cataloguing system, which contains information on certain Archive Collection works that may not have a record in the Database.

**'Crown'** means Her Majesty the Queen in right of New Zealand.

**'Database'** means the electronic BASIS database maintained by TVNZ before the Transfer Date relating to the Archive Collection (excluding the Card Index System).

**'DIA'** means the Crown acting through the Chief Executive of the Department of Internal Affairs.

**'Disposal'** has the same meaning as in section 4 of the Public Records Act 2005 and in relation to a public record or local authority record, means:

- (a) the transfer of control of a record; or
- (b) the sale, alteration, destruction, or discharge of a record.

**'DPL'** or **'Digital Production Library'** means the IT project currently underway by TVNZ to build a digital file based production library in Auckland.

**'Existing Employee'** means a TVNZ employee (currently numbering 11) who works at the Archive Facility at the Transfer Date, but excludes the TVNZ 'Database Administrator' and the 'TVNZ Archive Manager'.

**'Extraordinary Event'** means an event that is beyond the reasonable control of the party immediately affected by the event which makes it impossible or illegal to perform, or prevents compliance with or performance of, a party's obligations under this Agreement. An Extraordinary Event does not include industrial disputes or strikes, a lack of funds or any risk or event that the party claiming could have prevented or overcome by taking reasonable care. Examples include:

- (a) acts of God, lightning strikes, earthquakes, tsunamis, volcanic eruptions, floods, storms, explosions, fires, pandemics and any natural disaster;
- (b) acts of war (whether declared or not), invasion, actions of foreign enemies, military mobilisation, requisition or embargo;
- (c) acts of public enemies, terrorism, riots, civil commotion, malicious damage by a third party, sabotage, rebellion, insurrection, revolution or military usurped power or civil war;
- (d) contamination by radio-activity from nuclear substances or germ warfare or any other such hazardous properties.

**'LINZ'** means the Crown acting through the Minister of Land Information New Zealand.

**'MCH'** means the Crown acting through the Chief Executive of the Ministry of Culture and Heritage.

**'Production Library Services'** means the production library services provided (or to be provided) by the Archive Manager to TVNZ under this Agreement, including:

- (a) receiving and storing TVNZ local programmes broadcast after the Transfer Date and sent by TVNZ to the Archive Facility;
- (b) cataloguing on the Database items of the Archive Collection requested by TVNZ, including TVNZ local programmes sent by TVNZ to the Archive Facility after the Transfer Date;
- (c) identifying and retrieving any part of the Archive Collection requested by TVNZ and delivering that material to TVNZ;
- (d) digitising works in the Archive Collection (as requested by TVNZ) for TVNZ's inclusion in the DPL; and
- (e) all incidental functions, deliverables and services customarily or necessarily required for the provision of these services.

**'PLS Breach'** means a material breach of a service obligation of the Archive Manager in clause 2 of this Agreement that significantly decreases the benefits or significantly increases the burden to TVNZ of obtaining the Production Library Services including:

- (a) TVNZ being unable to access Archive Collection works as access to the Archive Facility, Equipment, vaults, Database, Card Index System and/or the Transferring Employees is frustrated or obstructed by an act or omission of the Archive Manager;
- (b) the Archive Manager failing to meet its obligations in relation to time critical requests for Archive Collection works to be delivered to Auckland;
- (c) the Archive Manager prioritising time critical requests for Archive Collection works to be delivered to Auckland below other preservation or digitisation activities; and

(d) the Archive Manager changing systems or processes without TVNZ's approval and which result in slower, restricted or significantly more onerous requirements on TVNZ to comply with in order to extract Archive Collection works; and

(e) the Archive Manager's inability to deliver up to the average monthly level of output to the levels that were provided in 2012/2013, as described in Appendix 1, in any 2 months out of a six month period.

**'Public Records Act' or 'PRA'** means the Public Records Act 2005.

**'Transfer Date'** means 1 August 2014.

**'Transferring Employee'** means an Existing Employee who has accepted the Archive Manager's offer of employment under the Archive Collection Agreement.

**'TVNZ Archive Manager'** means the TVNZ employee in the role of archive manager who works at the Archive Facility at the Transfer Date.

**'Working Day'** means any day other than a Saturday, Sunday or a public holiday (as defined in the Holidays Act 2003) in Wellington.

## 1.2 **General construction**

In interpreting this Agreement, the following rules must be applied unless the context otherwise requires:

- 1.2.1 a reference to a clause or an appendix is to a clause or appendix of this Agreement and a reference in an appendix to a clause is a reference to a clause in that appendix;
- 1.2.2 a reference to any monetary amount is to New Zealand currency;
- 1.2.3 headings appear as a matter of convenience and do not affect the construction of this Agreement;
- 1.2.4 a reference to a statute or document includes that statute or document as amended or replaced or in the case of a statute, repealed;
- 1.2.5 a reference to a party to this Agreement includes that party's personal representatives/successors and permitted assigns;

- 1.2.6 a reference to a person includes any individual natural person, company, corporation, partnership, joint venture, association (whether corporate or unincorporated), trust, organisation, Government department, Minister of the Crown, state or agency of a state (in each case, whether or not having separate legal personality), and includes a person's executors, administrators, successors, and assigns;
- 1.2.7 the singular includes the plural and vice versa, and words importing one gender include the other genders;
- 1.2.8 a reference to time is to New Zealand time;
- 1.2.9 the use of expressions such as '**includes**', '**including**', '**for example**', and similar expressions, does not limit what else might be included.

## 2 **Production Library Service**

### 2.1 The Archive Manager:

- (a) will not for the term of this Agreement do anything (by its act or omission) to prevent or limit TVNZ's right to access and retrieve the material in the Archive Collection royalty-free;
- (b) will provide the Production Library Services in accordance with this Agreement and, in particular, in accordance with clause 2.2; and
- (c) will use its best endeavours to provide the Production Library Services to no lower standard of responsiveness, accuracy, efficiency and effectiveness than TVNZ (and producers external to TVNZ commissioned by TVNZ to produce programmes for TVNZ) received for equivalent services in the twelve months before the Transfer Date.

### 2.2 The Archive Manager will provide the Production Library Services as follows. The Archive Manager will:

#### *New Archive Collection Works*

- (a) Receive and store as part of the Archive Collection any TVNZ programming broadcast after the Transfer Date and sent by TVNZ to the Archive Facility;

### *Cataloguing*

- (b) Catalogue on the Database up to the level of items as specified in Appendix 1 - Table 4 per annum as requested by TVNZ from among the Archive Collection works, including any TVNZ programming sent by TVNZ to the Archive Facility after the Transfer Date. The Archive Manager will continue to provide those cataloguing services until TVNZ gives the Archive Manager three months prior written notice to cease providing those services, and TVNZ will use its best endeavours to cease sending programmes for cataloguing by December 31, 2015 and the Archive Manager will continue to provide cataloguing work on the same basis and at the same cost until it ceases;
- (c) Use its best endeavours to catalogue on the Database any other items in excess of that level requested by TVNZ from time to time;

### *Retrieval*

- (d) Comply with the reasonable terms of any requests by TVNZ (and producers external to TVNZ, commissioned by TVNZ to produce programmes for TVNZ) to access, inspect, retrieve, copy, digitise, use, modify and publish any Archive Collection works (each a **Retrieval Request**), including by providing services from Archive Manager employees to meet up to the same level of requests and issues per annum as specified in Appendix 1 - Table 1 which will require up to the same level of hours as specified in Appendix 1 - Table 2 and 3 for dub preparation, research, viewing and technical suite dubbing and transfer associated with the access requests from TVNZ;
- (e) Use its best endeavours to comply with a Retrieval Request if TVNZ makes requests in excess of the level referred to in paragraph (d);
- (f) Identify, retrieve and deliver materials in the Archive Collection requested by TVNZ as soon as reasonably practicable and, in any event, use reasonable endeavours to provide such materials within:
  - (i) The same day for News and Current Affairs requests and within the hour for urgent requests. If the deadline for urgent requests cannot be met in spite of the Archive Manager acting in accordance with this Agreement, then this is to be immediately referred to the TVNZ Archive Manager (or other person notified



by TVNZ). The Archive Manager will provide an on-call service for news requests on weekends, after hours and on statutory holidays as requested by the TVNZ Archive Manager (or other person notified by TVNZ);

- (ii) Two Working Days for licensing requests from TVNZ for commercial footage sales with a response to these requests provided within two hours (outlining the estimated time to complete). For urgent requests the deadline is to be negotiated and if a deadline cannot be agreed then the issue is to be referred to the TVNZ Archive Manager (or other person notified by TVNZ);
- (iii) Three Working Days for TVNZ production, TVNZ's commissioned programme and all other TVNZ requests not described above with a response to these requests provided within two hours (outlining the estimated time to complete). For urgent requests the deadline is to be negotiated and if a deadline cannot be agreed then the issue it to be referred to the TVNZ Archive Manager (or other person notified by TVNZ);

If any deadline cannot be met or agreed and is referred to the TVNZ Archive Manager (or other person notified by TVNZ) under clauses (i), (ii) and/or (iii), the TVNZ Archive Manager (acting reasonably) will set and advise the deadline. The Archive Manager will use reasonable endeavours to satisfy the request within that advised deadline.

#### *Digitisation*

- (g) Not limit TVNZ's right to access to the Archive Facility and any TVNZ equipment transferred to MCH under the Archive Collection Agreement during the 35 month period post the Transfer Date, as required by TVNZ to complete digitisation of Archive Collection works for use in the DPL, to the extent that this does not conflict with any other Production Library Service obligations;

#### *Transferring and Non-transferring Employees*

- (h) Make available to TVNZ the services of the Transferring Employees for the period reasonably requested by TVNZ from time to time;

- (i) Ensure that the services provided by the Transferring Employees include following TVNZ's reasonable requests when engaged in any activity related to the Production Library Services;
  - (j) Not limit the right of TVNZ (acting reasonably) to space and facilities at the Archives Facility for the TVNZ Database Administrator, TVNZ Archive Manager and TVNZ's Senior Support Engineer and contractors to provide services to TVNZ from the Archive Facility until 31 December 2015. The space and facilities will be provided to TVNZ in the same or similar manner that TVNZ used the space and facilities for these purposes before the Transfer Date.
- 2.3 Subject to clauses 2.4 and 2.5, TVNZ will pay the Archive Manager the following service fees (in equal monthly instalments a month in arrears following receipt of a valid tax invoice) or pro rata part thereof for the Production Library Services fees as follows:
- (a) Fee until cataloguing services cease between 1 July 2015 and 31 December 2015 (as that date is notified by TVNZ) \$419,100 (plus GST) per annum; and
  - (b) Fee after cataloguing services cease (as notified by TVNZ) \$171,000 (plus GST) per annum.
- 2.4 The service fee in clause 2.3(b) will be adjusted for inflation (based on the Consumer Price Index all categories) at each anniversary date of 1 July 2016.
- 2.5 TVNZ will pay the Archive Manager for the actual and reasonable costs of:
- (a) any use of the Archive Collection that exceeds the service volumes specified in clauses 2.2(b) and 2.2(d); and
  - (b) any cataloguing services required by TVNZ after 31 December 2015,
- so long as the Archive Manager demonstrates to TVNZ's satisfaction (acting reasonably) that the Archive Manager has incurred such costs. Such costs will not include any access, margin or royalty fee.
- 2.6 The Archive Manager will not do anything to prevent or limit the exercise of the following rights that may be vested in TVNZ by the Crown under the Archive Facility ASP and/or the Archive Collection Agreement:

- (a) the right to maintain fibre links into the Archive Facility in perpetuity in order to transfer Archive Collection works retrieved by TVNZ under the Production Library Service to TVNZ's Auckland, Wellington and Christchurch premises;
- (b) the right to locate technical equipment required to operate these links within the rack space of the Archive Facility's technical environment as at the Transfer Date;
- (c) any right to remove Archive Collection works from the Archive Facility that may be granted to TVNZ by MCH during the 36 month period post the Transfer Date and for periods of up to 6 weeks, for the purpose of digitising those materials into the DPL.

### **3 Use of Archive Collection**

- 3.1 Nothing in this Agreement confers upon the Archive Manager any right, title or interest in any intellectual property rights except as specifically stated in this Agreement.
- 3.2 The Archive Manager will not breach (or cause TVNZ to breach) a third party's intellectual property rights by handling, using, publishing, copying and/or disclosing any part of the Archive Collection in breach of this Agreement.
- 3.3 TVNZ warrants and undertakes that the Archive Manager will not breach a third party's intellectual property rights by performing the Production Library Services in accordance with this Agreement.
- 3.4 Subject to the Archive Manager's compliance with law, TVNZ will not prevent the Archive Manager from copying the Archive Collection works at the Archive Facility for preservation and digitisation. The Archive Manager will not Dispose, transfer offsite, destroy or make any other change affecting the physical media comprising the Archive Collection without obtaining TVNZ's consent (which shall not be unreasonably withheld).
- 3.5 The Archive Manager will only allow access to, inspection, publishing or copying of, the Archive Collection (or any part of it) by any third party in accordance with the terms of the Archive Collection Agreement.
- 3.6 The Archive Manager will refer to TVNZ any licensing requests it receives in relation to material in the Archive Collection.

- 3.7 From time to time during the term of this Agreement, at no cost to the Archive Manager, TVNZ will provide a digital copy of materials in the Archive Collection that TVNZ has digitised since the date of this Agreement or the last time it provided materials to the Archive Manager under this clause (as applicable). The Archive Manager's use of those materials will be subject to this Agreement, the Archive Collection Agreement and law.
- 3.8 From time to time during the term of this Agreement, at no cost to TVNZ, the Archive Manager will provide a digital copy of materials in the Archive Collection that the Archive Manager has digitised since the date of this Agreement or the last time it provided those materials to TVNZ under this clause (as applicable).

#### **4 Archive Collection Database and Card Index System**

- 4.1 Nothing in this Agreement confers upon the Archive Manager any right, title or interest in the Database. The Archive Manager acknowledges that the Database is not included in the transfer of the Archive Collection from TVNZ to MCH.
- 4.2 The Archive Manager recognises TVNZ's right to handle, use and modify the contents of the Database in any manner TVNZ wishes, including managing and administering all aspects of the Database.
- 4.3 The Archive Manager acknowledges:
- (a) TVNZ's opinion that the Database is coming to end of life;
  - (b) TVNZ's obligation to MCH under the Archive Collection Agreement to maintain the Database until TVNZ notifies the Archive Manager that the DPL is operational;
  - (c) TVNZ's requirement to continue to locate the Database servers and other technical infrastructure at the Archive Facility until the DPL is operational, and for TVNZ staff to have access to this infrastructure in order to support and service this equipment;
  - (d) that once TVNZ notifies the Archive Manager that the DPL is operational, TVNZ intends to retire the Database (meaning the Database will not be available in a live, dynamic environment);
  - (e) that on or before the Database is retired, TVNZ will migrate the information in the Database to the DPL; and

(f) that, following retirement of the Database, TVNZ has no obligation under this Agreement to make the Database available to the Archive Manager.

- 4.4 Subject to clause 4.5, the Archive Manager will ensure that the Archive Collection continues to be stored in its current position in the vault so that the Database and DPL information remains accurate and TVNZ can continue to access and receive materials from the Archive Collection (through its own personnel and/or by receiving the Production Library Services from the Archive Manager) to the same or better standard of responsiveness, accuracy, efficiency and effectiveness as before the Transfer Date, without making any material change to TVNZ's operations or TVNZ incurring additional cost.
- 4.5 The Archive Manager will not make any changes to the storage locations in the vault for the Archive Collection unless approved by TVNZ in writing (such approval not to be unreasonably withheld or delayed).
- 4.6 The Archive Manager will not change, alter, remove or destroy any information in the Card Index System or other manual Archive Collection records at the Archive Facility without TVNZ's written approval (such approval not to be unreasonably withheld or delayed) and will provide for TVNZ to access these records for the term of this Agreement.
- 4.7 The Archive Manager will provide TVNZ with access to the Archive Manager's database information that describes the Archive Collection transferred to MCH. As the Archive Manager adds information to its own databases relating to the Archive Collection (including adding previously uncatalogued Archive Collection works from the Card Index System to its electronic database), then the Archive Manager will make this information available to be accessed and copied by TVNZ for use in its DPL.
- 4.8 The Archive Manager acknowledges that, under the Archive Collection Agreement, TVNZ will meet all costs of any support, and licensing and maintenance costs for the use of the Database by TVNZ and the Archive Manager in accordance with this Agreement.

## **5 Employees**

- 5.1 Without limiting the following sentences in this clause, the Archive Manager will use its best endeavours to make available to TVNZ the services of any Transferring Employee at the time and for the period reasonably requested by

TVNZ from time to time. The Archive Manager will grant any request from TVNZ for a Transferring Employee to undertake the Production Library Services in priority to any other commitment of the Transferring Employee to the Archive Manager. The Archive Manager will ensure that the Transferring Employees follow TVNZ's reasonable requests when engaged in any activity relating to the Production Library Services.

- 5.2 TVNZ will use best endeavours to ensure that the TVNZ Database Administrator and TVNZ Archive Manager remain employees of TVNZ in accordance with the terms of each such employee's employment contract with TVNZ until TVNZ notifies the Archive Manager that the DPL is operational (anticipated to be June to December 2015). For so long as those two employees are employed by TVNZ or for a period of 3 years from the Transfer Date (whichever is the shorter period), TVNZ will ensure that, when those TVNZ employees are not providing production library services to TVNZ, those TVNZ employees follow the Archive Manager's reasonable instructions and provide advice and assistance to the Archive Manager.
- 5.3 The Archive Manager will not make any Transferring Employees redundant in the first 12 months after the Transfer Date without first consulting with TVNZ on a reasonable basis.
- 5.4 Subject to the next sentence, TVNZ will compensate the Archive Manager for any liability for any actual redundancy costs in the two year period post Transfer Date, where the Archive Manager complies with clause 5.3 and incurs those costs in respect of a Transferring Employee on the terms of the Transferring Employee's employment contract in place immediately before the Transfer Date. TVNZ's total liability to the Archive Manager for those redundancy costs will be capped at a maximum of \$124,720.

## 6 **Step-in Actions**

- 6.1 The Production Library Services are sufficiently important to TVNZ that it requires the right to locate TVNZ staff and equipment at the Archive Facility, and to step-in to take any actions reasonably necessary or desirable (in TVNZ's opinion, acting reasonably) for TVNZ to access and retrieve content from the Archive Collection substantially in the manner that the Archive Manager is agreeing to provide the Production Library Services under clause 2.2(d), (e) and (f) (**Step-In Actions**).

6.2 TVNZ may exercise the right to take Step-In Actions only if:

(a) the following sequence of events occurs:

- (i) the Archive Manager commits a PLS Breach (regardless of whether the breach is remedied or not) on three or more occasions within a 12 month period; and
- (ii) TVNZ has given the Archive Manager written notice of three or more such PLS Breaches; and
- (iii) TVNZ has consulted with the Archive Manager's Relationship Manager in relation to those PLS Breaches in an attempt to find out the cause of those breaches and the likelihood of any other PLS Breach occurring; and
- (iv) TVNZ considers that the PLS Breaches referred to in (i) above have become so serious that TVNZ considers it necessary (acting reasonably and taking into consideration the effects of any Step-In Action) to exercise the Step-In Actions;

or

(b) TVNZ is able to access and retrieve the content from the Archive Collection when the Archive Manager is subject to an Extraordinary Event which prevents the Archive Manager from providing the Production Library Services in accordance with clause 2.2(d), (e) and (f).

6.3 If TVNZ exercises its step-in right under this clause, the Archive Manager agrees that it will instruct the Transferring Employees to follow TVNZ's instructions to enable TVNZ to take the Step-In Actions and will assist TVNZ with any activities required to exercise these rights, including the provision of office space, facilities and utilities.

6.4 TVNZ will stop exercising its Step-In Actions if TVNZ, acting reasonably, considers that, once TVNZ stops exercising its Step-In Actions, the Archive Manager will provide the Production Library Services in accordance with clause 2.2(d), (e) and (f).

6.5 TVNZ's step-in right under this clause is no more than a personal right to access and retrieve copies of Archive Collection works for its own purposes, and does not

create any legal or equitable security interest or charge in the Archive Collection or the Archive Facility that are owned by the Crown.

## **7 TVNZ Liability**

- 7.1 From the Transfer Date, except as specified in this Agreement, TVNZ will have no liability to the Archive Manager for the on-going operational costs of the Transferring Employees or the Archive Facility, the maintenance, preservation or digitisation of the Archive Collection, the Production Library Services, any costs relating to any Archive Material in association with the PRA, or, to the extent permitted by law, any other costs whatsoever.
- 7.2 To the extent permitted by law, TVNZ's entire liability to the Archive Manager under or in relation to this Agreement will be limited to the Archive Manager's direct and reasonably foreseeable losses to the extent caused by TVNZ's breach of this Agreement, regardless of whether such loss arises in contract, equity, tort (including negligence) or otherwise.
- 7.3 Without limiting clause 7.5, to the extent permitted by law, TVNZ will not, in any circumstances, be liable under or in connection with this Agreement for:
- (a) any indirect, special or consequential loss;
  - (b) any loss of profits, revenues, anticipated savings or gains, reputation, or business opportunity;
  - (c) the loss of any third party; or
  - (d) any loss exceeding the amount due and payable to the Archive Manager under this Agreement to 31 December 2015.
- 7.4 Except as specified in this Agreement, TVNZ is not obliged to pay the Archive Manager for the Archive Manager's performance or any rights granted under this Agreement.
- 7.5 TVNZ will indemnify the Archive Manager for any claim brought by a third party to the extent that the Archive Manager has breached that third party's intellectual property as a direct result of following TVNZ's express instruction given under this Agreement. That indemnity will apply only if:
- (a) the Archive Manager gives TVNZ notice of that third party's claim immediately upon receiving the claim;



- (b) the Archive Manager gives sole control of the defence of that claim to TVNZ;
- (c) the Archive Manager (at TVNZ's cost) cooperates and assists TVNZ's defence as requested by TVNZ, and
- (d) the Archive Manager does not make any settlement, agreement or other arrangement with that third party in relation to the claim;

7.6 Any liability of TVNZ under clause 7.5 will apply only to the extent the Archive Manager has mitigated its loss and clause 7.5 does not entitle the Archive Manager to recover twice for the same loss.

## 8 **Extraordinary Events**

8.1 The parties will not be liable to each other for any failure to perform their obligations under this Agreement to the extent that the failure is due to an Extraordinary Event.

8.2 A party which wishes to claim suspension of its obligations due to an Extraordinary Event must notify the other party as soon as reasonably possible. The notice must state:

- (a) the nature of the circumstances giving rise to the Extraordinary Event;
- (b) the extent of that party's inability to perform under this Agreement;
- (c) the likely duration of that non-performance; and
- (d) what steps are being taken to remedy, or reduce the impact of the Extraordinary Event on the performance of its obligations.

8.3 If a party is unable to perform any obligations under this Agreement for 20 Working Days or more due to an Extraordinary Event, the other party may terminate this Agreement immediately by giving notice.

## 9 **Review and Renewal**

9.1 Each party will appoint (and maintain the appointment of) a senior manager to be the relationship manager for that party in relation to this Agreement (each a **Relationship Manager**). A party may change its Relationship Manager by giving written notice to the other party. The initial Relationship Manager for each party is:

<b>Party</b>	<b>Relationship Manager</b>
TVNZ	Jeff Hayward
The Archive Manager	Frank Stark

9.2 The Relationship Managers will meet upon the reasonable written request from time to time to:

- (a) oversee the operation of this Agreement;
- (b) receive, review and provide direction from performance reporting provided under this Agreement; and
- (c) be a point of escalation for any dispute under or in relation this Agreement.

A Relationship Manager may also invite a senior manager from MCH to attend any relationship meeting between the parties.

9.3 Renewal: the rights and obligations contained in this Agreement continue for the term of this Agreement. However the parties acknowledge that this Agreement will need to be reviewed and amended after 31 December 2016. For the period after the review has been completed (or other time agreed by the parties), the Archive Manager agrees that:

- (a) it will continue to provide the Production Library Services; and
- (b) the charges will be for the Archive Manager's actual and reasonable costs expected to provide the Production Library Services, so long as the Archive Manager demonstrates to TVNZ's satisfaction (acting reasonably) that such costs have or will be incurred. Such costs will not include any access, margin or royalty fee.

## 10 **Dispute Resolution**

10.1 If any dispute arises out of or in connection with the Agreement, either party may issue a dispute notice to the other party setting out the nature of the dispute (**Dispute Notice**).

- 10.2 Upon the receipt of a Disputes Notice under clause 9.1, each Party shall within 1 Working Day nominate a representative for the purposes of negotiating or resolving the dispute.
- 10.3 The parties' respective representatives shall then meet (either in person, by video or phone) and attempt to resolve the dispute within 5 Working Days of the Dispute Notice. If the dispute is not resolved by the parties' respective representatives within those 5 Working Days, the dispute shall be referred to the Chief Executives of each party for resolution.
- 10.4 If the dispute is not resolved within 20 Working Days of receipt of a Dispute Notice under clause 10.1, then either party may, by written notice to the other party (**Mediation Notice**), require the dispute to be submitted to mediation in New Zealand in accordance with the provisions of the then-current LEADR New Zealand Incorporated Standard Mediation Agreement (**Mediation**).
- 10.5 The Mediation will be conducted by a mediator, and at a fee, agreed by the parties. If the parties fail to agree such matters within 10 Working Days following the date of the delivery of the Mediation Notice, the Chair for the time being of LEADR New Zealand Incorporated will select the mediator and determine the mediator's fee. The parties will share equally the cost of the mediator's fee.

## 11 Confidentiality and publicity

- 11.1 Each party (the **Receiving Party**) will treat the content (but not the existence) of this Agreement and all information made available by another party (the **Disclosing Party**) under or in connection with this Agreement as strictly private and confidential, except to the extent that:
- (a) the information becomes public knowledge otherwise than by the Disclosing Party's own disclosure;
  - (b) disclosure is required by law, in which case, (to the extent permitted by law) as soon as reasonably practicable, the Receiving Party will notify the Disclosing Party of the requirement, the time by when the Receiving Party will disclose the information and the information that the Receiving Party intends to disclose; or
  - (c) the Disclosing Party has consented in writing to the disclosure;

11.2 such disclosure is to MCH. Each party will take specific steps to ensure that its personnel and representatives observe the obligations set out in this clause 11.

## 12 Termination

12.1 This Agreement will start on the date the second party signs this Agreement and will continue until terminated in accordance with clauses 8.3 or 12.

12.2 If the Archive Manager ceases to be MCH's appointed Archive Manager for the purpose of the Archive Collection, or becomes insolvent, has a receiver appointed or enters liquidation (each a **Default Event**), the Archive Manager will notify TVNZ immediately of that Default Event. TVNZ may terminate this Agreement for cause immediately upon written notice if the Archive Manager suffers a Default Event.

12.3 TVNZ may terminate this Agreement at its discretion by giving the Archive Manager 6 months prior written notice.

12.4 The Archive Manager may terminate this Agreement if TVNZ fails to make a payment that is due and owing in accordance with this Agreement, the Archive Manager gives notice of that failure to TVNZ (copied to TVNZ's Chief Financial Officer) and its intention to terminate the Agreement if payment is not made within 14 days, and TVNZ does not make that payment within those 14 days. The Archive Manager may not terminate this Agreement for any other reason.

12.5 Upon termination of this Agreement, any right under this Agreement for the Archive Manager to access, use, copy, make available, store or in any other way handle the Archive Collection and the Database will end.

## 13 Notices

13.1 Any notice or other communication under this Agreement must be in writing, executed by the party giving the notice and served at the address and to the person set out below or as otherwise previously notified in writing by the receiving party.

TVNZ:

Brett McAnulty

100 Victoria Street West

The Archive Manager:

Frank Stark

PO Box 11-449

Auckland 1010

Wellington 6011

Facsimile: 09 916 7900

Phone: 04 384 7647

Phone: 09 916 7935

Mobile: 021 661 433

Mobile: 027 226 4913

13.2 Any notice or document will be deemed to be duly given or made if:

- (a) if sent by email, on the date and time the email is sent;
- (b) in the case of personal delivery or a letter sent from outside New Zealand, when delivered; and
- (c) in the case of a letter sent from within New Zealand, on the third Working Day after posting.

13.3 Any notice delivered outside the hours of 8.30am-5pm on a Working Day in Auckland will be deemed delivered on the next Working Day.

## **14 Miscellaneous**

### **Assignment and subcontracting**

14.1 Neither party may assign any of its rights or subcontract or transfer any of its obligations under this Agreement without the prior written consent of the other party. Any TVNZ consent (which will not unreasonably be withheld) may be conditional on any third party signing a deed of accession (or any other document reasonably requested by TVNZ) in favour of TVNZ on terms satisfactory to TVNZ. In any event, the Archive Manager will remain responsible for the performance of its obligations under this Agreement, and for all the acts and omissions of its subcontractors and assignees (if any).

### **Amendments**

14.2 No amendment to this Agreement will be effective unless it is in writing and signed by all parties.

### **No partnership**

14.3 Nothing contained in this Agreement is to be deemed or construed to constitute TVNZ or the Archive Manager as the agent or representative of the other or to

create any trust, fiduciary relationship or partnership between them. More particularly, no party will have any authority to act or incur any obligations on behalf of another party except as stated in this Agreement.

### **Severability**

14.4 If any provision of this Agreement is held to be invalid, illegal or unenforceable, the invalidity, illegality or unenforceability of that provision is not to affect the operation, construction or interpretation of any other provision of this Agreement, with the intent that the invalid, illegal or unenforceable provision is to be treated for all purposes as severed from this Agreement.

### **No waiver**

14.5 A waiver of any provision of this Agreement will not be effective unless given in writing, and then it will be effective only to the extent that it is expressly stated to be given. A failure, delay or indulgence by either party in exercising any power or right will not operate as a waiver of that power or right. A single exercise or partial exercise of any power or right will not preclude further exercises of that power or right or the exercise of any other power or right.

### **Entire agreement**

14.6 This Agreement, the Archive Collection Agreement and the "Archive Facilities Agreement for Sale and Purchase" between TVNZ and the Crown acting through the Minister of Land Information New Zealand, is the entire agreement between the parties regarding the provision of the Production Library Services and the Archive Manager's use and handling of the Archive Collection, and the various access rights to the Archive Facilities and Archive Collection, and replaces all earlier negotiations, representations, warranties, understandings and agreements, whether oral or written, between TVNZ and the Archive Manager.

14.7 Nothing in this Agreement limits the rights and obligations of TVNZ under the Archive Facility ASP or the Archive Collection Agreement.

14.8 The Archive Manager agrees that its breach of this Agreement (if any) will be deemed a breach of the Archive Manager's agreement with MCH to provide preservation, maintenance and digitisation services in respect of the Archive Collection.

## **Contracts (Privity) Act**

14.9 This Agreement will not and is not intended to confer any benefit on or create any obligation enforceable by any person not a party to this Agreement.

## **Governing law**

14.10 This Agreement is to be governed by and construed in accordance with New Zealand law.

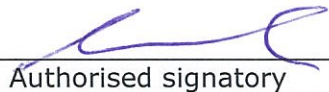
## **Condition**

14.11 This Agreement is subject to and conditional upon TVNZ notifying the Archive Manager in writing no later than 3 weeks before the Transfer Date that the Archive Collection Agreement and the Archive Facility Agreement have become unconditional. This clause is inserted for the benefit of both parties and neither party may unilaterally waive satisfaction of this condition.

14.12 If the condition in clause 14.11 is not met by the due date, the chief executives of TVNZ, the Ministry for Culture and Heritage, DIA and the Archive Manager will meet to agree the most expeditious way to proceed with the transaction under this Agreement, the Archive Facility ASP and the Archive Collection Agreement. If the parties do not agree in writing to proceed with the transaction by the date that is one week before the Transfer Date, the Agreement may be cancelled by either party giving written notice to the other party of cancellation of the Agreement. In that case, this Agreement will have no effect and the parties will not have any rights or remedies against each other.

**EXECUTION**

\_\_\_\_\_  
Signed for and on behalf of Television  
New Zealand Limited by



\_\_\_\_\_  
Authorised signatory

Name *KEVIN KENRICK*

Date *16.06.14*

\_\_\_\_\_  
Signed for and on behalf of the  
Trustees of The New Zealand Film  
Archive by



\_\_\_\_\_  
Authorised signatory

Name *Laise Baker*

Date *11.6.14*



## APPENDIX 1 – TVNZ Archive Output data

<b>TVNZ TELEVISION ARCHIVE</b>														
<b>2012/2013 Library Statistics</b>														
<b>Table 1</b>														
<b>Production / Archive</b>														
	<b>Jul</b>	<b>Aug</b>	<b>Sep</b>	<b>Oct</b>	<b>Nov</b>	<b>Dec</b>	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>Jun</b>	<b>YEAR</b>	
<b>2012/2013</b>														<b>2012/2013</b>
<b>REQUESTS</b>	255	218	164	299	219	157	132	214	205	176	257	192	2,488	
<b>ISSUES</b>	938	779	670	756	753	511	517	668	823	706	935	647	8,703	
Requests = E-mail or phone requests for Archive Collection works received by TVNZ Archive														
Issues = Number of Archive collection works (tapes) issued in response to Requests.														
<b>Table 2</b>														
<b>Hours of Dub Prep, Research and Viewing (associated with above Issues):</b>														
	<b>Jul</b>	<b>Aug</b>	<b>Sep</b>	<b>Oct</b>	<b>Nov</b>	<b>Dec</b>	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>Jun</b>	<b>YEAR</b>	
Avalon Studios	1	1	44	1	0	2		2	34	55	1	1	142	
Digital TV										1			1	
Māori Programmes	32	17	15	15	29	9	10	19	15	15	22	19	218	
Māori Television Service	2	4	5	3	1	1	1	17	12	4	8	2	58	
News and Current Affairs	79	52	35	51	40	19	18	28	30	31	44	34	460	
Other TVNZ Users	13	15	17	12	14	3	6	7	21	13	14	20	154	
Local Production	25	34	48	117	94	57	35	71	36	29	81	71	698	
Licensing	100	94	91	108	79	89	36	80	82	55	106	101	1,021	
Heartland	5	7	4	17	6	6	9	7	11	4	2	2	80	
<b>Total</b>	<b>257</b>	<b>224</b>	<b>258</b>	<b>324</b>	<b>263</b>	<b>186</b>	<b>115</b>	<b>231</b>	<b>240</b>	<b>207</b>	<b>279</b>	<b>249</b>	<b>2,832</b>	
<b>Table 3</b>														
<b>3 Hours of Archive Technical Suite Utilisation (Dubbing / transfer activity)</b>														
	<b>Jul</b>	<b>Aug</b>	<b>Sep</b>	<b>Oct</b>	<b>Nov</b>	<b>Dec</b>	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>Jun</b>	<b>YEAR</b>	
Production	166	142	113	153	166	97	108	151	199	192	212	175	1,872	
Licensing	34	27	29	39	78	29	22	65	89	107	89	92	698	
<b>Total</b>	<b>200</b>	<b>169</b>	<b>142</b>	<b>192</b>	<b>243</b>	<b>126</b>	<b>130</b>	<b>216</b>	<b>287</b>	<b>299</b>	<b>300</b>	<b>267</b>	<b>2,570</b>	
<b>Table 4</b>														
<b>Items Catalogued by Archive Cataloguers</b>														
	<b>Jul</b>	<b>Aug</b>	<b>Sep</b>	<b>Oct</b>	<b>Nov</b>	<b>Dec</b>	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>Jun</b>	<b>YEAR</b>	
News & Production Database:	194	202	187	224	277	120	128	121	207	320	187	225	2,392	
Sports Database:	3	26	21	10	7	5	11	19	16	21	8	10	157	
Rock Archive Database:	51	51	48	35	61	65	27	55	36	62	57	53	601	
Drama Database:	47	17	22	34	41	21	0	32	38	7	67	10	336	
Stock Data Base:	2	1	6	2	0	0	5	1	0	0	2	4	23	
Copyright:	11	5	8	8	5	4	4	11	9	4	3	3	75	
<b>Total</b>	<b>308</b>	<b>302</b>	<b>292</b>	<b>313</b>	<b>391</b>	<b>215</b>	<b>175</b>	<b>239</b>	<b>306</b>	<b>414</b>	<b>324</b>	<b>305</b>	<b>3,584</b>	
Items = Programmes which are sent to Archive to be catalogued to varying levels of detail (depending on TVNZ rights position) and added to the Database.														
This activity at Archive will cease once the TVNZ DPL replaces the current Archive Database.														

