

**NEW MUSIC SCOTLAND LIMITED**

**MEMBERS' AGREEMENT**

**Consortium for joint promotional activities, joint tenders,  
joint delivery of services, joint funding applications and lobbying**

# NEW MUSIC SCOTLAND LIMITED MEMBERS' AGREEMENT

## BACKGROUND

- (A) New Music Scotland Limited (NMS) has been formed as a consortium body to carry on business as new music network connecting makers who are creating/performing new and innovative music and sounds with promoting organisations, providing a supportive environment for innovation in music and enabling collaboration with other art-forms and sectors. It will facilitate joint promotional activities, joint tenders, joint delivery of contracts, joint funding applications and lobbying.
- (B) The parties to this Agreement are members of NMS and wish to record in writing the agreement which they have reached as regards the activities of NMS, the management of NMS, and the respective rights and obligations of the parties.

## 1 DEFINITIONS

1.1 The following definitions will apply throughout this Agreement:

**“Approved Annual Plan”** means, relation to any Financial Year, the Plan for that Financial Year in the form approved by the Members under clause 11;

**“Board”** means the directors of NMS in office from time to time;

**“Board Resolution”** means a resolution passed by majority vote at a quorate meeting of the Board which has been duly convened in accordance with the provisions of the Constitution;

**“Constitution”** means the constitution of NMS in force from time to time;

**“Financial Year”** means each period for which NMS is required to produce accounts in accordance with the relevant statutory requirements;

**“Members”** means founding members, being the subscribers to the Memorandum of Association of NMS, and any additional bodies admitted as members of NMS (under the terms of this Agreement and the Constitution) from time to time – but excluding any such body which has ceased to be a member of NMS;

**“Parties”** means (unless and until a Deed of Adherence is executed in pursuance of clause 16, in which case the Deed of Adherence shall incorporate a new

definition of this expression) the founding members, being the subscribers to the Memorandum of Association of NMS; “**Party**” shall be interpreted accordingly;

“**Sub-contract**” means a sub-contract entered into between NMS and a Member for the delivery of services to NMS, to assist NMS in fulfilling its obligations under any services contract under which NMS has the role of service provider.

## 2 **PURPOSE OF NMS**

### 2.1 NMS shall:

- 2.1.1 carry on business as a new music network bringing together makers who are either wholly or partially engaged in creating/performing new and innovative music and sound, and promoting organisations;
- 2.1.2 provide a supportive environment for innovation in music and sound;
- 2.1.3 encourage and facilitate collaboration with other art-forms and sectors;
- 2.1.4 establish and maintain communication mechanisms for new music in Scotland;
- 2.1.5 actively campaign for the commissioning and programming of new music;
- 2.1.6 increase the awareness and profile of new music in Scotland, both nationally and internationally;
- 2.1.7 explore and disseminate new ways of developing audiences for new music;
- 2.1.8 develop and submit joint tenders for the delivery of services, and (in the context of successful tenders) serve as the contracting party in entering into the principal services contract with the relevant public authority or other body;
- 2.1.9 coordinate and monitor the performance of the Members under Sub-contracts, decide upon the division of work as among the Members under Sub-contracts (to the extent that the division of work is not determined under the principal services contract in each case) and consequently the level of payments under Sub-contracts;
- 2.1.10 submit applications for funding, to support any project or other initiative, or the conduct/development of ongoing operations, of NMS and/or any of the Members; and

2.1.11 where appropriate, lobby public bodies and other relevant organisations on behalf of members.

### **3 CONTRIBUTIONS TO SET-UP COSTS**

3.1 Each of the Members shall pay to NMS, within seven days after the date of this Agreement, the sum of £5, £10, £20 or £30 respectively dependent on membership category, in order to assist with the funding of the set-up costs associated with the formation of NMS and other preliminary expenditure.

3.2 For the avoidance of doubt, the payments under clause 3.1 shall be taken to be contributions made by each of the Members in furtherance of their respective purposes, and will not be treated as loans to NMS.

### **4 SUBMISSION OF JOINT TENDERS**

4.1 On any occasion when NMS is to submit a joint tender to a public authority or other body for the delivery of services, NMS shall discuss and agree with the Members:

4.1.1 the nature and extent of each Member's participation in the delivery of services or other activities required for the implementation of the services contract outlined in the invitation to tender;

4.1.2 a broad outline of the arrangements for overall co-ordination and management of the delivery of services should the tender be successful;

4.1.3 the financial projections relating to delivery under the services contract, including (where applicable) any necessary capital expenditure;

4.1.4 the basis on which work under Sub-contracts (and any work to be sub-contracted to parties which are not Members) would be allocated;

4.1.5 the manner in which payments due under Sub-contracts would be calculated, and other key terms and conditions which would apply under Sub-contracts;

4.1.6 any issues of liability or risk for individual Members arising out of the requirements of the invitation to tender;

4.1.7 the procedure for preparing, reviewing, adjusting and finalising the tender submission, the approach to be taken in relation to any tender presentation, and any other requirements that may arise in connection with the tender process.

5 **DELIVERY OF SERVICES UNDER CONTRACTS/SUB-CONTRACTS**

5.1 Where NMS enters into a services contract with a public authority or other body where services are to be sub-contracted by NMS to one or more Members:

5.1.1 each of the Members which are to deliver services as sub-contractors to NMS shall enter into a sub-contract in such terms (reflecting the principles agreed under clause 4, where applicable) as NMS may reasonably prescribe;

5.1.2 NMS will make payments under the Sub-contracts in accordance with the terms of the Sub-contracts;

5.1.3 NMS will not, without the consent of all of the Members involved in the services contract, agree to any amendment to the principal contract or waive any obligation of the public authority (or other body) under the principal contract;

5.1.4 NMS will pursue any right or remedy open to NMS under the principal contract in relation to any breach of the principal contract by the public authority (or other body), and will distribute any sum so recovered (under deduction of the costs associated with pursuing the claim) among those of the Members which have suffered a loss as a result of the breach;

5.1.5 NMS will notify each of the Members involved in the services contract of any notices which it receives from the public authority (or other body) under the principal contract or of any options exercised by NMS under the principal contract, to the extent that (in each case) the notices or options would be relevant to that Member's interests.

6 **APPLICATIONS FOR FUNDING**

6.1 On any occasion when NMS is to submit a joint application for funding to a public authority, charitable foundation or other body, NMS shall discuss and agree with the Members:

6.1.1 the nature and extent of each Member's participation in the delivery of the project or initiative (or, as the case may be, conduct and/or development of existing operations) which is/are to be the subject of the funding application;

6.1.2 a broad outline of the arrangements for overall co-ordination and management of the delivery of the project or initiative (where applicable) should the application be successful;

6.1.3 the financial projections relating to delivery of the project or initiative (where applicable);

- 6.1.4 the basis on which funding received in pursuance of the application (if successful) would be allocated among the Members;
  - 6.1.5 any issues of liability or risk for individual Members arising out of the funding application;
  - 6.1.6 the procedure for preparing, reviewing, adjusting and finalising the funding application, the approach to be taken in relation to any presentation, and any other requirements that may arise in connection with the application process.
- 6.2 Where a funding application by NMS for delivery of a project or initiative (or, as the case may be, conduct and/or development of existing operations) is successful, the Member or Members which are to be responsible for delivery or implementation shall enter into an agreement with NMS (including provisions under which they accept responsibility for complying with grant conditions and/or other obligations imposed by the funder) in such terms as NMS may reasonably prescribe.

## **7 LOBBYING**

- 7.1 NMS will only lobby on issues relevant to the broad interests of Members in respect of the objects of the co-operative.
- 7.2 NMS will discuss and agree campaigns with Members prior to being implemented.

## **8 ADDITIONAL CONTRIBUTIONS**

- 8.1 The Parties acknowledge that it is the intention that any surpluses generated in any Financial Year by NMS shall be carried forward to meet the anticipated cash flow requirements of NMS in the subsequent Financial Year.
- 8.2 If any funding beyond what is provided for in clause 3 is required to support the operations of NMS, the Members will enter into discussions in good faith to determine the level of additional funding which should be secured, the source(s) of such funding, and the terms on which such funding should be provided by any of the Members as additional contributions and/or obtained from any other party; the Members will co-operate in good faith to implement any arrangements which are so agreed.
- 8.3 For the avoidance of doubt, none of the Members shall be under any obligation to provide funding to NMS (beyond what is provided for in clause 3) unless it agrees to do so in pursuance of clause 8.2.

## **9 MANAGEMENT OF NMS AND ITS AFFAIRS**

- 9.1 The Members shall each be entitled to examine the accounting and other records kept by or on behalf of NMS, and to be supplied with all relevant information, including management accounts, budgets and management reports (including explanations of variances against budget), the statutory accounts in respect of each Financial Year and such other financial and other

information relating to NMS as any of the Members may reasonably require to keep itself properly informed about the activities of NMS.

- 9.2 Except as otherwise agreed in writing by the Members, all dealings between NMS and any of the Members (or any individual or body connected with a Member) will be conducted on arms-length commercial terms.

## 10 **PROVISION OF SUPPORT TO NMS**

- 10.1 The parties acknowledge that it is the intention that members will provide secretarial support, HR services, ICT services, bookkeeping services and financial reporting services to NMS until funds are available to appoint freelance staff.

- 10.2 The services referred to in clause 10.1 will be recognised through fees payable by NMS at rates to be agreed between NMS and the providing member, each acting reasonably.

## 11 **ANNUAL PLANS**

- 11.1 NMS will operate on the basis of an annual plan, which will be subject to approval by the Members prior to the start of each Financial Year.

- 11.2 Once all aspects of the draft plan for a given Financial Year (whether in the form initially delivered to the Members or in some amended form which has the approval of the Board and all Members under this clause 11.2 or 11.3) have been agreed by the Members and the Board, the plan as so approved shall constitute the Approved Annual Plan for that Financial Year.

- 11.3 If the Board determines, at any time following the date on which the plan for a given Financial Year becomes the Approved Annual Plan for that Financial Year, that any of the projections or forecasts made in relation to that Financial Year are likely to be materially different from those set out in that Approved Annual Plan for that Financial Year, NMS shall provide the Members with revised projections or forecasts for that Financial Year, together with a reasonable explanation of the variations, giving Members the opportunity to comment; and that revised plan shall then be subject to approval by the Board.

## 12 **RESERVED MATTERS**

- 12.1 Each Member shall procure that NMS shall not, and separately NMS undertakes (to the extent that it can validly do so) that it shall not (except as provided for in clause 12.2), at any time, without the prior consent of Members:

12.1.1 borrow any sum of money, or grant any security over any part of NMS's assets and undertaking or make any material change in any of NMS's borrowing arrangements (which may include, without limitation, any repayment of a loan before its stated maturity);

12.1.2 acquire any assets for a consideration in excess of £5,000;

- 12.1.3 dispose of any assets for a consideration in excess of £2,500;
- 12.1.4 dispose of any assets at less than market value or enter into any other contract or arrangement which is not at arm's length and/or not on commercial terms;
- 12.1.5 incur any liability (which may include a contingent liability) to pay £5,000 or more in respect of any transaction or series of transactions;
- 12.1.6 enter into any lease under which the payments over the term of the lease may amount to £5,000 or more;
- 12.1.7 enter into a contract or other arrangement (otherwise than as contemplated in this Agreement) in which any member of the Board (or any person connected with a member of the Board) or any Member (or any of its Connected Persons) has a personal interest;
- 12.1.8 form any subsidiary company or other corporate body or make any investment which would have the effect that a company or other entity became a subsidiary undertaking of NMS;
- 12.1.9 acquire shares or other forms of equity in, or any other securities issued by, a company or any other entity;
- 12.1.10 issue any guarantee or indemnity which could involve liability in excess of £5,000 or grant a security for the benefit of any other party;
- 12.1.11 make a loan or issue any loan capital to any party;
- 12.1.12 engage any employee where his/her remuneration, including for this purpose the value of any employee benefits, will amount to £5,000 or more per annum;
- 12.1.13 make any political donation;
- 12.1.14 make any charitable donation over £1,000;
- 12.1.15 take any steps directed towards the winding-up of NMS or do any act or thing the effect of which could result in the winding-up of NMS;
- 12.1.16 incur any expenditure or liability (or authorise or permit any expenditure or liability to be incurred on behalf of NMS) in respect of any main budget head where such expenditure or liability (or such part of it as relates to the Financial Year in which it is incurred), when aggregated with all other expenditure and liabilities under that budget head incurred or expected to be incurred in respect of that Financial Year,
  - (a) exceeds 110% of the total amount of net expenditure under that budget head for that Financial Year set out in the Approved Annual Plan for that Financial Year falls; or



- (b) would cause the total net expenditure and liabilities incurred or expected to be incurred in respect of that Financial Year to exceed the aggregate expenditure for that Financial Year set out in the relevant Approved Annual Plan.

12.2 A Member shall be deemed to have given its prior consent for the purposes of clause 12.1 to any matter which is specifically budgeted for in the Approved Annual Plan applicable to the relevant Financial Year;

12.3 For the avoidance of doubt, all figures referred to in clause 12.1 are exclusive of VAT; and any VAT payable shall be disregarded in determining whether any relevant thresholds are exceeded.

### 13 **CONFIDENTIALITY**

13.1 Each Member agrees that it shall keep secret and confidential at all times, both during the time when it is a Member and following the time when it ceases (for any reason) to be a Member, all confidential information of NMS or of any of the other Members which comes into its possession or comes within its knowledge at any time.

13.2 The provisions of clause 13.1 shall not apply to any disclosure which is required by law, or in order to comply with a court or other relevant authority, or to comply with grant conditions or similar obligations.

### 14 **GUARANTEES IN RELATION TO NMS'S OBLIGATIONS**

14.1 If NMS is required to obtain a guarantee from a third party at any time to secure borrowings and/or other obligations of NMS, none of the Members shall be under any obligation to provide such a guarantee.

### 15 **EXERCISE OF VOTING RIGHTS ETC**

15.1 Each Member undertakes that it shall:

15.1.1 exercise all voting rights and other powers of control available to it in relation to NMS so as to give full effect to the terms of this Agreement;

15.1.2 sign all such documents and take all such other steps as may be reasonably necessary or appropriate to give full force and effect to the provisions of this Agreement;

15.1.3 refrain, and it shall procure that all other bodies directly or indirectly under its control refrain, from acting in a manner which hinders or prevents NMS from carrying on its affairs in a proper and reasonable manner;

15.1.4 generally use its best endeavours to promote the affairs and the interests of NMS and the successful implementation of the strategies of NMS as set by Board Resolution from time to time; and

15.1.5 refrain from taking any action for or on behalf of NMS unless such Member has the prior approval of NMS given on the basis of a Board Resolution, or the prior approval of the other Members (as appropriate), in respect of such action.

## 16 **ADMISSION OF NEW MEMBERS**

16.1 New Members may be admitted to NMS in accordance with the provisions of the Constitution, subject to the new Member becoming a party to this Agreement through signing a deed of adherence (in such terms as NMS may reasonably prescribe).

## 17 **EXPULSION OF MEMBERS**

17.1 Without prejudice to any other rights or remedies available to NMS, NMS may, with the authority of a special resolution by the Members (dealt with either at a meeting of the members or via a written resolution), terminate a Member's membership of NMS by notice in writing, but only on the grounds that the Member:

17.1.1 has committed a material breach of any of the terms of this Agreement or any Sub-contract to which it is a party, and - where the breach is capable of remedy - the Member has failed to remedy such breach within 30 days of receipt of a written notice specifying the breach and requiring it to be remedied; or

17.1.2 has committed any act of gross or persistent misconduct and/or has neglected or omitted to perform any of its duties or obligations under this Agreement or any Sub-contract; or

17.1.3 has ceased to carry on its activities, become unable to pay its debts when they fall due, become insolvent or apparently insolvent, has had a receiver, manager, administrator, administrative receiver or similar officer appointed in respect of the whole or any part of its assets or undertaking, has made any composition or arrangement with its creditors, has taken or suffered any similar action in consequence of debt, an order has been made or resolution passed for its dissolution or liquidation (other than for the purpose of solvent amalgamation or reconstruction) or has entered into liquidation whether compulsorily or voluntarily or suffered any analogous event;

17.1.4 has provided NMS with information which is false or misleading in any significant respect;

17.1.5 by its actions or inaction, has brought or might reasonably be expected to bring the other Members or NMS into disrepute.

18 **WITHDRAWAL OF MEMBERS**

18.1 A Member can withdraw from membership of NMS at any time but there will be no repayment of any additional contribution already paid for that Financial Year.

19 **DISPUTE RESOLUTION**

19.1 If any disputes or questions of any nature arise among all of the Members, or between any two or more of the Members, or between NMS and any one or more of the Members, in relation to this Agreement or any agreement entered into in pursuance of this Agreement:

19.1.1 the parties to such dispute or question shall attempt to resolve the dispute by negotiation;

19.1.2 if such dispute or question is not resolved within 28 days, the parties involved in the dispute shall thereafter attempt to resolve the dispute by such dispute resolution procedure conducted in such manner and with the assistance of such independent person as shall be agreed between them, or (failing agreement) with the assistance of an individual appointed by ACAS (at the instance of the first person applying to that organisation to make that appointment);

19.1.3 if the dispute is not resolved within a 28 day period (or such extended period as may be agreed by the parties involved in the dispute) from referral to the dispute resolution procedure, or if one or more of the parties is unwilling to participate in any form of dispute resolution procedure, the dispute shall be submitted to the jurisdiction of the Scottish courts.

20 **NO PARTNERSHIP OR AGENCY**

20.1 Nothing in this Agreement is intended to create a partnership of any kind among the Parties, or to authorise any Party to act as agent for any other.

20.2 Except to the extent expressly permitted by this Agreement, no Party will have the authority to act in the name or on behalf of, or otherwise to bind, any other Party.

21 **WAIVER**

21.1 No failure or delay by any Party to exercise any right, power or remedy will operate as a waiver of it; nor will any partial exercise preclude any further exercise of the same, or of some other, right, power or remedy.

22 **SEVERANCE**

22.1 If any provision of this Agreement is judged to be illegal or unenforceable, the remainder of the provisions of this Agreement will remain in full force and effect.

23 **FORCE MAJEURE**

23.1 No Party will be deemed to be in breach of this Agreement, nor otherwise liable to any of the other Parties, for any failure or delay in performance of this Agreement if it is due to any event beyond its reasonable control other than strike, lock-out or industrial disputes, but including (without limitation) acts of God, war, fire, flood, tempest and national emergencies; and a Party so delayed shall be entitled to a reasonable extension of time for performing such obligations.

24 **ASSIGNATION**

24.1 No Member shall be entitled to assign any of its rights or obligations under this Agreement without the prior consent of NMS.

25 **VARIATION**

25.1 This Agreement may be amended at any time by written agreement of all of the Parties.

25.2 No variation to this Agreement shall be effective unless in writing, signed by a duly authorised officer of each of the Parties.

26 **DURATION**

26.1 This Agreement shall continue in force (unless the Members otherwise agree in writing) until the date on which NMS goes into liquidation or is struck off the register of companies.

26.2 Termination of this Agreement shall be without prejudice to any right or remedy of any of the Parties in respect of any breach of the provisions of this Agreement which occurred prior to such termination.

27 **NOTICES**

27.1 Any notice required to be given under this Agreement must be given or served in writing and shall be deemed to be duly served if:

27.1.1 delivered personally to the Party to whom the notice is intended to be given; or

27.1.2 left for the Party or sent by first class post addressed to the Party at its registered office or (in the case of NMS) its principal office; or

27.1.3 (where the individual or body to whom notice is given has notified NMS of an address to be used for the purpose of electronic communication) sent to the Party in electronic form, and marked for the attention of the Party.

27.2 Any such notice shall be treated as served:

27.2.1 in the case of personal delivery, when delivered to the Party;

27.2.2 in the case of service by post, at the time when in the ordinary course of post it would reach the address to which it was posted (and to prove such service it shall be sufficient to prove that it was properly addressed and posted in accordance with the preceding provisions);

27.2.3 in the case of service by electronic form, on the next following day.

## 28 **ENTIRE AGREEMENT**

28.1 This Agreement (taken together with any agreements between NMS and any Member entered into in pursuance of this Agreement) constitutes the entire agreement and understanding among the Parties in respect of the matters dealt with within it and supersedes any previous agreement among the Parties or any of them relating to such matters.

## 29 **COSTS**

29.1 NMS shall (subject to clause 29.2) meet the legal costs associated with the drafting, adjustment and finalisation of this Agreement.

29.2 Each Member shall be responsible for its own legal costs in obtaining independent advice from the perspective of its own interests, in relation to the provisions of this Agreement.

## 30 **GOVERNING LAW AND JURISDICTION**

30.1 This Agreement shall be governed by and interpreted in accordance with Scots law.

30.2 Each of the Parties agrees to submit to the exclusive jurisdiction of the Scottish courts in respect of any claim or matter arising under or in connection with this Agreement or any other agreement entered into in pursuance of this Agreement.

