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Australian Version 0-3I

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*Licence*¹

THE WORK (AS DEFINED BELOW) IS PROVIDED UNDER THE TERMS OF THIS CREATIVE COMMONS PUBLIC LICENCE ("CCPL" OR "LICENCE"). THE WORK IS PROTECTED BY COPYRIGHT AND/OR OTHER APPLICABLE LAW. ANY USE OF THE WORK OTHER THAN AS AUTHORISED UNDER THIS LICENCE AND/OR APPLICABLE LAW IS PROHIBITED.

BY EXERCISING ANY RIGHTS TO THE WORK PROVIDED HERE, YOU ACCEPT AND AGREE TO BE BOUND BY THE TERMS OF THIS LICENCE. THE LICENSOR GRANTS YOU THE RIGHTS CONTAINED HERE IN CONSIDERATION OF YOUR ACCEPTANCE OF SUCH TERMS AND CONDITIONS.

1. Definitions

a. "**Collective Work**" means a work, such as a periodical issue, anthology or encyclopaedia, in which the Work in its entirety in unmodified form, along with a number of other contributions, constituting separate and independent works in themselves, are assembled into a collective whole. A work that constitutes a Collective Work will not be considered a Derivative Work (as defined below) for the purposes of this Licence.

b. "**Derivative Work**"² means a work that reproduces a substantial part of the Work, or of the Work and other pre-existing works protected by copyright, or that is an adaptation of a Work that is a literary, dramatic, musical or artistic work. Derivative Works include a translation, musical arrangement, dramatisation,³ motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work⁴ may be adapted, except that a work that constitutes a Collective Work will not be considered a Derivative Work for the purpose of this Licence. For the avoidance of doubt, where the

¹ Please note that some spellings have been changed to conform to Australian usage, which generally follows UK usage. This should ensure that only two spelling branches arise within the English versions: US English and International English (as used in the UK and Australian versions).

² These changes address the lack of a *sui generis* exclusive right to create "derivative works" under Australian copyright law, but accommodate the closest analogous exclusive rights.

³ "Fictionalization" has been deleted because there is no exclusive right under Australian copyright to control fictionalizations.

⁴ Definition of Derivative Work has been amended to acknowledge that only Part III works (literary, dramatic, musical or artistic works) can be the subject of the adaptation right granted by the Copyright Act. Part IV subject-matter (such as films, sound recordings or broadcasts) are still incorporated into the definition of Works even though the Copyright Act excludes them from being "works" *per se*, as these can be subject to the provisions of this licence other than in relation to the adaptation right.

Work is a musical composition or sound recording, the synchronization of the Work in timed-relation with a moving image ("**synching**") will be considered a Derivative Work for the purpose of this Licence.⁵

c. "**Licensor**" means the individual or entity that offers the Work under the terms of this Licence.

d. "**Moral rights law**" means laws under which an individual who creates a work protected by copyright has rights of integrity of authorship of the work, rights of attribution of authorship of the work, rights not to have authorship of the work falsely attributed, or rights of a similar or analogous nature in the work anywhere in the world.⁶

e. "**Original Author**" means the individual or entity who created the Work.

f. "**Work**"⁷ means the work or other subject-matter protected by copyright that is offered under the terms of this Licence, which may include (without limitation) a literary, dramatic, musical or artistic work, a sound recording, cinematograph film, a published edition of a literary, dramatic, musical or artistic work or a television or sound broadcast.

g. "**You**" means an individual or entity exercising rights under this Licence who has not previously violated the terms of this Licence with respect to the Work, or who has received express permission from the Licensor to exercise rights under this Licence despite a previous violation.

g. "**Licence Elements**" means the following high-level licence attributes as selected by Licensor and indicated in the title of this Licence: Attribution, Noncommercial, ShareAlike.

2. Fair Dealing and Other Rights. Nothing in this Licence excludes or modifies, or is intended to exclude or modify,⁸ (including by reducing, limiting, or restricting) the rights of You or others to use the Work arising from fair dealings or other limitations on the rights of the copyright owner or the Original Author under copyright law, moral rights law or other applicable laws.

3. Licence Grant.¹ Subject to the terms and conditions of this Licence, Licensor hereby grants You a worldwide, royalty-free, non-exclusive, perpetual (for the duration of the applicable copyright) licence to exercise the rights in the Work as stated below:⁹

⁵ Note that under Australian law, "synch rights" are, strictly speaking, an aspect of the reproduction right (rather than the adaptation right) even though a work may be arranged or adapted for the synchronisation. Nonetheless, under this deeming provision, the Licence treats synchronisations in the same way as it treats Derivative Works.

⁶ This addresses Part IX (Moral Rights of Authors of Literary, Dramatic, Musical or Artistic Works and Cinematograph Films) of the Copyright Act, and is used in clause 2 to preserve the exceptions to moral rights (as they do not exactly mirror those in the laws relating to copyright per se).

⁷ This change addresses the lack of general protection for "copyrightable works of authorship" under Australian law. Instead, Australian copyright only protects subject-matter if it falls into the particular categories specified in the Copyright Act, as described in the examples added to the definition.

⁸ This wording mirrors the terms of section 47H of the Copyright Act, which creates certain non-excludable exceptions to copyright control for computer-programs. The CLRC's report on Contract and Copyright has recommended that these words be used to make various fair dealing provisions into non-excludable exceptions to copyright protection.

⁹ The additions in subparagraphs a. to d. reflect the exclusive rights specified in the Copyright Act.

3.

- a. to reproduce the Work, to incorporate the Work into one or more Collective Works, and to reproduce the Work as incorporated in the Collective Works;
- b. to create and reproduce Derivative Works;
- c. to publish, communicate to the public, distribute copies or records¹⁰ of, exhibit or display publicly, perform publicly and perform publicly by means of a digital audio transmission the Work including as incorporated in Collective Works;
- d. to publish, communicate to the public, distribute copies or records of, exhibit or display publicly, perform publicly, and perform publicly by means of a digital audio transmission Derivative Works;

The above rights may be exercised in all media and formats whether now known or hereafter devised. The above rights include the right to make such modifications as are technically necessary to exercise the rights in other media and formats. All rights not expressly granted by Licensor under this Licence are hereby reserved, including but not limited to the rights set forth in Sections 4(e) and 4(f).

4. Restrictions. The licence granted in Section 3 above is expressly made subject to and limited by the following restrictions:

- a. You may publish, communicate to the public, distribute, publicly exhibit or display, publicly perform, or publicly digitally perform the Work only under the terms of this Licence, and You must include a copy of, or the Uniform Resource Identifier for, this Licence with every copy or record of the Work You publish, communicate to the public, distribute, publicly exhibit or display, publicly perform or publicly digitally perform. You may not offer or impose any terms on the Work that exclude, alter or restrict the terms of this Licence or the recipients' exercise of the rights granted hereunder. You may not sublicense the Work. You must keep intact all notices that refer to this Licence and to the disclaimer of representations and warranties. You may not publish, communicate to the public, distribute, publicly exhibit or display, publicly perform, or publicly digitally perform the Work with any technological measures that control access or use of the Work in a manner inconsistent with the terms of this Licence. The above applies to the Work as incorporated in a Collective Work, but this does not require the Collective Work apart from the Work itself to be made subject to the terms of this Licence. If You create a Collective Work, upon notice from any Licensor You must, to the extent practicable, remove from the Collective Work any reference to such Licensor or the Original Author, as requested. If You create a Derivative Work, upon notice from any Licensor You must, to the extent practicable, remove from the Derivative Work any reference to such Licensor or the Original Author, as requested.
- b. You may publish, communicate to the public, distribute, publicly exhibit or display, publicly perform, or publicly digitally perform a Derivative Work only under the terms of this Licence, a later version of this Licence with the same Licence Elements as this Licence, or a Creative Commons iCommons licence that contains the same Licence Elements as this Licence (e.g. Attribution-NonCommercial-ShareAlike 2.0 Japan). You must include a copy of, or the Uniform Resource Identifier for, this Licence or other licence specified in the previous sentence with every copy or record of each Derivative Work You publish, communicate to the public, distribute, publicly exhibit or display, publicly perform, or publicly digitally perform. You may not offer or impose any terms on the Derivative Works that exclude, alter or restrict the terms of this Licence or the recipients' exercise of the rights granted hereunder, and You must keep intact all notices that refer to this Licence and to the disclaimer of representations and warranties. You may not publish, communicate to the public, distribute, publicly exhibit or display, publicly perform, or publicly digitally perform the Derivative Work with any technological measures that control access or use of the Work in a manner inconsistent with the terms of this Licence. The above applies to the Derivative Work as incorporated in a Collective Work, but this does not require the Collective Work apart from the Derivative Work itself to be made subject to the terms of this Licence.

¹⁰ The term "record" is used in the Copyright Act, instead of "phonorecord".

4.

c. You may not exercise any of the rights granted to You in Section 3 above in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. The exchange of the Work for other copyrighted works by means of digital file-sharing or otherwise shall not be considered to be intended for or directed toward commercial advantage or private monetary compensation, provided there is no payment of any monetary compensation in connection with the exchange of copyrighted works.

d. If you publish, communicate to the public, distribute, publicly exhibit or display, publicly perform, or publicly digitally perform the Work or any Derivative Works or Collective Works, You must keep intact all copyright notices for the Work. You must also give the Original Author clear and reasonably prominent credit, and (if applicable) that credit must be given in the particular way made known by the Original Author¹¹ and otherwise as reasonable to the medium or means You are utilizing, by conveying the identity (such as by name or pseudonym if applicable) of the Original Author if supplied; the title of the Work if supplied; to the extent reasonably practicable, the Uniform Resource Identifier, if any, that Licensor specifies to be associated with the Work, unless such URI does not refer to the copyright notice or licensing information for the Work; and in the case of a Derivative Work, a credit identifying the use of the Work in the Derivative Work (e.g., "French translation of the Work by Original Author," or "Screenplay based on original Work by Original Author"). Such credit may be implemented in any reasonable manner; provided, however, that in the case of a Derivative Work or Collective Work, at a minimum such credit will appear where any other comparable authorship credit appears and in a manner at least as prominent as such other comparable authorship credit.

e. For the avoidance of doubt, where the Work is a musical composition:

- i. **Performance Royalties Under Blanket Licenses.** Licensor reserves the exclusive right to collect, whether individually or via a performance rights society (e.g. ASCAP, BMI, SESAC), royalties for the communication to the public, broadcast, public performance or public digital performance (e.g. webcast) of the Work if that performance is primarily intended for or directed toward commercial advantage or private monetary compensation.¹²
- ii. **Mechanical Rights and Statutory Royalties.** Licensor reserves the exclusive right to collect, whether individually or via a music rights agency, designated agent (e.g. Harry Fox Agency) or a music publisher,¹³ royalties for any record¹⁴ You create from the Work ("**cover**

¹¹ Substantially mirrors the words of ss.195 and 195AA.

¹² Under Australian law, the applicable collecting society – the Australasian Performing Right Association (APRA) - cannot legally collect royalties for exercise of the rights of communication to the public (including broadcasting) and public performance of musical works unless those rights are first assigned to APRA. APRA's standard arrangements therefore require APRA members to assign all those rights to APRA. APRA members (who number around 33,000 and include all Australian songwriters and composers whose works are used commercially) should therefore note that because they have already assigned all these rights to APRA for their musical works, they should not use this Licence to license others with these rights unless the APRA member has exercised their rights of opt-out (ie, by obtaining a re-assignment of these rights for particular Works or categories of Works), as permitted the APRA Articles of Association. If in doubt, APRA members should first consult with APRA or a copyright professional.

¹³ In Australian practice, a music publisher will individually collect, or the AMCOS-ARIA Industry Agreement is used for collection of, the mechanical rights royalties arising from reproduction of musical works in records. Under the AMCOS-ARIA Industry Agreement, a full (unpublished) member of ARIA may enter into an exclusive agency agreement with the applicable collecting society – the Australasian Mechanical Copyright Owners Society (AMCOS) - which appoints AMCOS to collect, on an exclusive basis, the mechanical royalties owing to the member. Licensors of musical works who propose to use this

version") and distribute, subject to the compulsory licence created by 17 USC Section 115 of the US Copyright Act (or an equivalent statutory licence under the Australian Copyright Act or in other jurisdictions), if Your distribution of such cover version is primarily intended for or directed toward commercial advantage or private monetary compensation.

f. Webcasting Rights and Statutory Royalties. For the avoidance of doubt, where the Work is a sound recording, Licensor reserves the exclusive right to collect, whether individually or via a performance-rights society (e.g. SoundExchange), royalties for the public digital performance (e.g. webcast) of the Work, subject to the compulsory licence created by 17 USC Section 114 of the US Copyright Act (or the equivalent in other jurisdictions),¹⁵ if Your public digital performance is primarily intended for or directed toward commercial advantage or private monetary compensation.

g. False attribution prohibited. Except as otherwise agreed in writing by the Licensor, if You publish, communicate to the public, distribute, publicly exhibit or display, publicly perform, or publicly digitally perform the Work or any Derivative Works or Collective Works in accordance with this Licence, You must not falsely attribute the Work to someone other than the Original Author.¹⁶

h. Prejudice to honour or reputation permitted. Except as otherwise agreed in writing by the Licensor, if You publish, communicate to the public, distribute, publicly exhibit or display, publicly perform, or publicly digitally perform the Work or any Derivative Works or Collective Works in accordance with this Licence, You do not have to refrain from making a material distortion of, a mutilation of, or a material alteration to, the Work that is prejudicial to the Original Author's honour or reputation, or anything else in relation to the Work that is prejudicial to the Original Author's honour or reputation, and the Licensor either (if the Licensor is the Original Author) consents to this under Section 4.i or (if someone else is the Original Author) has obtained a valid written consent substantially in the terms of Section 4.i, given by or on behalf of the Original Author.¹⁷ii

i. Moral rights law consent. Except as otherwise agreed in writing by the Licensor, if the Licensor is the Original Author, then to the extent permitted by applicable law, the Licensor unconditionally and irrevocably consents to all acts or omissions permitted by this Licence that would otherwise infringe any rights of the Licensor under moral rights law of integrity of authorship in respect of the Work. This consent applies whether the relevant acts or omissions occur before or after the consent is given, and is given for the benefit of You, Your licensees and successors in title, and anyone authorised by You or any of them to commit the relevant acts or omissions.¹⁸

5. Disclaimer

Licence should also ensure that the arrangements they might have entered into with music publishers do not prevent them from using this Licence to distribute their musical works. If in doubt, licensors should first consult with a copyright professional.

¹⁴ The term "record" is used in the Copyright Act, instead of "phonorecord".

¹⁵ Note that there is presently no Australian compulsory statutory licence for the webcasting of sound recordings.

¹⁶ Substantially reflects the wording of s.195AC-AH.

¹⁷ Substantially reflects the wording of s.195AJ-AL. Importantly, licensors who are not the original author or creator of any material they wish to license-out under this licence must first obtain a sufficiently broad consent from the author to acts or omissions otherwise infringing the author's integrity rights under Australian law. Otherwise, downstream users of the Work will risk infringing the author's integrity rights under Australian law. See end-note B for commentary on this issue.

¹⁸ Substantially reflects the requirements in s.195AW and 195AWA for the giving of a valid consent under Australian moral rights law.

EXCEPT AS EXPRESSLY STATED IN THIS LICENCE OR OTHERWISE MUTUALLY AGREED TO BY THE PARTIES IN WRITING, AND TO THE FULL EXTENT PERMITTED BY APPLICABLE LAW, LICENSOR OFFERS THE WORK "AS-IS" AND MAKES NO REPRESENTATIONS, WARRANTIES OR CONDITIONS OF ANY KIND CONCERNING THE WORK, EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ANY REPRESENTATIONS, WARRANTIES OR CONDITIONS REGARDING THE CONTENTS OR ACCURACY OF THE WORK, OR OF TITLE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT, THE ABSENCE OF LATENT OR OTHER DEFECTS, OR THE PRESENCE OR ABSENCE OF ERRORS, WHETHER OR NOT DISCOVERABLE.¹⁹

6. Limitation on Liability.

TO THE FULL EXTENT PERMITTED BY APPLICABLE LAW, AND EXCEPT FOR ANY LIABILITY ARISING FROM CONTRARY MUTUAL AGREEMENT AS REFERRED TO IN SECTION 5,²⁰ IN NO EVENT WILL LICENSOR BE LIABLE TO YOU ON ANY LEGAL THEORY (INCLUDING, WITHOUT LIMITATION, NEGLIGENCE) FOR ANY LOSS OR DAMAGE WHATSOEVER, INCLUDING (WITHOUT LIMITATION) LOSS OF PRODUCTION OR OPERATION TIME, LOSS, DAMAGE OR CORRUPTION OF DATA OR RECORDS; OR LOSS OF ANTICIPATED SAVINGS, OPPORTUNITY, REVENUE, PROFIT OR GOODWILL, OR OTHER ECONOMIC LOSS; OR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR EXEMPLARY DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS LICENCE OR THE USE OF THE WORK, EVEN IF LICENSOR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

If applicable legislation implies warranties or conditions, or impose obligations or liability on the Licensor in respect of this Licence that cannot be wholly or partly excluded, restricted or modified, the Licensor's liability is limited, to the full extent permitted by the applicable legislation, at its option, to:²¹

- a. in the case of goods, any one or more of the following:
 - i. the replacement of the goods or the supply of equivalent goods;
 - ii. the repair of the goods;
 - iii. the payment of the cost of replacing the goods or of acquiring equivalent goods;
 - iv. the payment of the cost of having the goods repaired; or
- b. in the case of services:
 - i. the supplying of the services again; or
 - ii. the payment of the cost of having the services supplied again.

7. Termination

a. This Licence and the rights granted hereunder will terminate automatically upon any breach by You of the terms of this Licence. Individuals or entities who have received Derivative Works or Collective Works from You under this Licence, however, will not have their licences terminated provided such individuals or

¹⁹ This amendment merges the two original provisions that substantially overlapped and served the same purpose.

²⁰ This change addresses changes made to section 5 in the draft US version 2.0.

²¹ The specified options substantially mirror the permitted options in s.68A of the Trade Practices Act 1974.

entities remain in full compliance with those licences. Sections 1, 2, 5, 6, 7, and 8 will survive any termination of this Licence.

b. Subject to the above terms and conditions, the licence granted here is perpetual (for the duration of the applicable copyright in the Work). Notwithstanding the above, Licensor reserves the right to release the Work under different licence terms or to stop distributing the Work at any time; provided, however that any such election will not serve to withdraw this Licence (or any other licence that has been, or is required to be, granted under the terms of this Licence), and this Licence will continue in full force and effect unless terminated as stated above.

8. Miscellaneous

a. Each time You publish, communicate to the public, distribute or publicly digitally perform the Work or a Collective Work, the Licensor offers to the recipient a licence to the Work on the same terms and conditions as the licence granted to You under this Licence.

b. Each time You publish, communicate to the public, distribute or publicly digitally perform a Derivative Work, Licensor offers to the recipient a licence to the original Work on the same terms and conditions as the licence granted to You under this Licence.

c. If any provision of this Licence is invalid or unenforceable under applicable law, it shall not affect the validity or enforceability of the remainder of the terms of this Licence, and without further action by the parties to this agreement, such provision shall be reformed to the minimum extent necessary to make such provision valid and enforceable.

d. No term or provision of this Licence shall be deemed waived and no breach consented to unless such waiver or consent shall be in writing and signed by the party to be charged with such waiver or consent.

e. This Licence constitutes the entire agreement between the parties with respect to the Work licensed here. To the full extent permitted by applicable law, there are no understandings, agreements or representations with respect to the Work not specified here. Licensor shall not be bound by any additional provisions that may appear in any communication from You. This Licence may not be modified without the mutual written agreement of the Licensor and You.

f. The construction, validity and performance of this Licence shall be governed by the laws in force in New South Wales, Australia.²²

Creative Commons is not a party to this Licence, and, to the full extent permitted by applicable law, makes no representation or warranty whatsoever in connection with the Work. To the full extent permitted by applicable law, Creative Commons will not be liable to You or any party on any legal theory (including, without limitation, negligence) for any damages whatsoever, including without limitation any general, special, incidental or consequential damages arising in connection to this licence. Notwithstanding the foregoing two (2) sentences, if Creative Commons has expressly identified itself as the Licensor hereunder, it shall have all rights and obligations of Licensor.

Except for the limited purpose of indicating to the public that the Work is licensed under the CCPL, neither party will use the trademark "Creative Commons" or any related trademark or logo of Creative Commons without the prior written consent of Creative Commons. Any permitted use will be in compliance with Creative Commons' then-current trademark usage guidelines, as may be published on its website or otherwise made available upon request from time to time.

²² This subsection explains the licence in light of the legislative background by reference to which this licence has been drafted. A state jurisdiction is specified because if this licence is enforced in Australia, both federal and state law will apply. New South Wales is chosen simply to provide certainty to licensors and licensees with regard to governing laws.

NOTES ON SPECIFIC ISSUES

i A. TAXABLE SUPPLY ISSUES

1. Australian goods and services tax (GST)

1.1 Australian GST is imposed on a wide range of transactions including in some circumstances the supply of goods, services or grant of rights. GST is only payable in relation to supplies:

- made for consideration (whether monetary or non-monetary); and
- made in the course or furtherance of an "enterprise" carried on by the supplier. The definition of "enterprise" excludes activities done as a private recreational pursuit or hobby; and
- connected with Australia; and
- made by a supplier who is registered or required to register for GST (generally this includes enterprises that have an annual turnover of AUD50,000 or more).

1.2 The licence form may be used in a wide variety of circumstances, involving a broad spectrum of:

- (a) kinds of licensors;
- (b) kinds of licensees;
- (c) locations of licensors and licensees; and
- (d) kinds of licensed materials.

1.3 Different GST implications will arise depending on the circumstances of a particular transaction. The issue is also complicated by the practical difficulties in enforcing the licence, in that neither party signs the document or communicates on a one-to-one basis with the other regarding it. This gives rise to the following difficulties:

- licensees might have difficulty in enforcing licence provisions (including provisions in relation to GST) against licensors, as there is no obligation on licensors to identify themselves with sufficient particularity in the licensed material; and
- licensors might have difficulty in enforcing licence provisions (such as GST-related ones) against licensees, as there is no obligation on licensees to communicate their acceptance of the licence form.

1.4 The following comments can therefore only be made at a high level of generality with no particular application to specifically contemplated licensing transactions using the Creative Commons licence form. The comments would have to be carefully elaborated if they were to be applied to any particular licensing transaction or scenario using the Creative Commons licence form.

1.5 For some licensing transactions involving use of a Creative Commons licence, the GST legislation will not, on its terms, impose an obligation on the licensor to pay GST.

Examples may be where:

- (a) the supply is not connected with Australia; or
- (b) the recipient of the supply is not registered (and is not required to be registered) for GST and is not required to disclose an Australian Business Number (ABN); or
- (c) the supply is not made in the course or furtherance of an "enterprise" (eg, because it is an activity done as a private recreational pursuit or hobby); or
- (d) the supply constitutes an export that is treated as GST-free.

Special GST rules also apply for educational institutions and charities, so that some (but not all) of their activities might be treated as GST-free.

1.6 For other licensing transactions involving use of a Creative Commons licence, it is possible that the GST legislation will impose an obligation on the licensor to pay GST. Importantly, it should be noted that:

- (a) the grant of copyright licence contemplated by the Creative Commons licence form would arguably constitute a "supply" within the meaning of the GST legislation;
- (b) the restraints and positive obligations on the licensee contemplated by the Creative Commons licence form would arguably constitute "consideration" within the meaning of the GST legislation. In this regard, note that:
 - (i) the statutory definition of "consideration" is potentially broader than "consideration" within the common law meaning for the purposes of contract law, as it includes any act or forbearance in connection with the supply of anything, or in response to or for the inducement of a supply of anything. It is therefore possible that even if a licence in the Creative Commons form is held contractually unenforceable for (say) illusory/bad consideration at common law, those matters might nevertheless still fall within the literal bounds of the statutory definition of "consideration".
 - (ii) it is not necessary that there be any legal obligation to provide the consideration.

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- (iii) where the consideration is not expressed in money, the consideration is "the GST inclusive market value of that consideration". Although it can be hard to value such non-monetary consideration, the preponderance of authority favours the view that difficulties in determining the amount of consideration cannot of itself justify the conclusion that no consideration exists.
 - (c) The combination of the licensing transaction under a Creative Commons licence and other transactions between the licensor and licensee might also affect the analysis, such that additional supplies and/or consideration could be construed.
- 1.7 Where a transaction involving use of a Creative Commons licence is such as to attract the imposition of GST liability on the licensor, there may be circumstances allowing the licensor to argue that the GST payable in the transaction is zero because the GST inclusive market value of that consideration is zero. Equally, however, there may also be other circumstances in the transaction that make such arguments difficult.
- 1.8 It is also possible that a licensee, in undertaking to abide by certain conditions, may be treated as making a supply to the licensor in return for the licence.
- 2. Practical implications**
- 2.1 Given that there is a material risk that the Creative Commons licence form may be used in some circumstances in which GST liability will be imposed on the licensor, there are at least two broad approaches that could be taken as to the management of that risk:
- (a) Option 1 - the Creative Commons licence can be silent about this risk, so that the practical burden of the risk remains with the licensor.
 - (b) Option 2 - the Creative Commons licence expressly provides that the licensor can recover from the licensee the amount of GST payable (by the licensor to the Australian Taxation Office). This Option tries to transfer the practical burden of the risk to the licensee. This Option is not uncommon in commercial licensing practice, and it is rare for licensees to object to its imposition in commercial transactions provided there is certainty regarding both the imposition of liability and the quantum of liability.
- 2.2 There are practical difficulties associated with both Options. In both cases, a licensor may not know (as a matter of course and without taking special measures) when the licence has been invoked and who invoked it. In one sense, adopting Option 1 (rather than Option 2) would be consistent with acknowledging this practical difficulty; that is, why should a licensor bother including contractual rights to recover GST amounts from the licensee when the licensor will not (as a matter of course) have that practical opportunity?

For present purposes, Option 1 has been adopted in the drafting: that is, the Creative Commons licence is silent about the risk of imposition of GST on the transaction, so that the practical burden of the risk remains with the licensor.

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- 2.3 Regardless of which Option is taken, licensors and licensees should be provided with commentary noting this potential risk and strongly suggesting that they take their own professional tax advice before using the Creative Commons licence form. This is particularly important, if Option 1 is adopted, so as to minimise and mitigate the risks for Creative Commons (as an organisation) arising from third party use of the Creative Commons licence form. In addition, there appears to be nothing to stop variants of the Creative Commons licence form being developed, that:
- (a) adopt Option 2; and
 - (b) include particular mechanisms by which the licensor can identify/authenticate individual licensees, and perhaps even strengthen the legal enforceability of the licence (eg by obtaining stronger manifestations of consideration and assent from individual licensees).
- 2.4 In addition, the Australian Taxation Office (ATO) could be requested to provide a binding private ruling on the matter. Such an application would need to be made on behalf of an identified licensor (or licensors) and in relation to a particular proposed transaction. It would only be binding on the ATO in relation to that particular transaction (or transactions). However, the ATO would not normally depart from its position in relation to other identical transactions. This would involve some effort and delay and it is possible (but not certain) that the ATO would agree that there are no taxable supplies involved in the licensing transactions (or that any taxable supplies are for consideration that is of no value). This would give practical comfort to users of the Creative Commons licence that they are complying with their GST obligations.

3. **Comparative approaches**

It is useful to note that the two other common law countries that are participating in the Creative Commons internationalisation project and which have comparable taxation schemes (the UK and Ireland) have remained silent on the issue in their licence versions. Neither licence mentions the Value Added Tax (VAT) operating in those countries.

ii B. **MORAL RIGHTS**

1. **Background**

The US version of the CC Attribution, Non-Commercial Share-Alike licence has limited provisions for moral rights. Clause 4.d provides, in effect, for a right of attribution of authorship. In the Australian version, this right has been simply translated into Australian legal terms.

Australian moral rights legislation (contained in Part IX of the *Copyright Act 1968* (Cth)) gives authors the following additional rights:

- (a) a right not to have authorship of a work falsely attributed (ss 195AC - 195AH) and

(b) a right of integrity of authorship of a work.

2. Possible Options

iCommons Australia considers that there are three options with regard to treatment of these rights in the licence:

- silence;
- assertion of these rights; or
- disavowal of the rights.

The US version takes the option of silence (except in relation to attribution). The Canadian version takes the option of a disavowal of the integrity right (by way of a waiver of integrity rights). At present, it is not clear what option the UK version will ultimately adopt.

3. Silence

If the licence is silent on the issues of false attribution and integrity of authorship, then the last sentence in clause 3 is likely to operate to reserve those rights. It states:

“All rights not expressly granted by the Licensor are hereby reserved, including but not limited to the rights set forth in Sections 4(e) and 4(f).”

The default position, then, will be that the author is, in effect, reserving his or her moral rights. This appears to be the current position for Australian licensors who already use the US version of the licence and for the original authors of works currently licensed under the US version. Arguably, such a position introduces unnecessary and easily avoidable ambiguity.

4. Assertion

Moral rights can be asserted in the licences either by mirroring the language of the Australian Copyright Act, or by explicit reference to the legislation.

In the first Australian draft, assertion of moral rights was provisionally drafted as the default position, subject to contrary indications by the licensor on a case-by-case basis. The first drafts of the UK and Canadian licence versions also chose to assert the moral rights existing under the laws of those countries.

The pragmatic approach taken in the first draft of the Australian version was to maintain consistency with the philosophical position taken in the first drafts of the UK and Canadian licence versions but, consistent with the CC drafting style, to avoid statutory references that would be cryptic to laypeople or lawyers from outside the jurisdiction.

Pragmatic reasons, additional to those identified above, for asserting moral rights include the following:

- It is arguable that where the licensor is not the Original Author, a default disavowal by a copyright owner of all moral rights of the author will carry more risk for both licensor and licensee than a default assertion of those rights. That is, if the licensor was wrong in disavowing those rights by default, the consequences are likely to be more drastic for both licensor and licensee than if the licensor wrongly asserts those rights by default (since it seems unlikely that an Original Author would seek legal redress for a mistaken enforcement of his or her lawful rights).
- Where the licensor chooses to take measures to assure a legally effective disavowal of moral rights, the present drafting allows the licensor the opportunity to defeat the default assertion of those rights. The argument here is that if a licensor goes to the trouble of obtaining moral rights consents that are valid for the purposes of the moral rights legislation, it should be little inconvenience for them to take the extra step of positively expressing that disavowal with the licence. Whereas, if the default drafting required due diligence to confirm that a moral rights consent had been obtained and then a positive assertion of those rights if they had not been obtained, this might lead to either unreliable consents (because licensors who are not the Original Author might not bother to perform such due diligence) or to non-dissemination of the works (because the transaction cost for the licensor is too high).

5. Disavowal

In August 2004, iCommons Canada decided to reverse its previous decision and expressly waive the right of integrity in the Canadian version of the licence (in so doing, iCommons Canada nonetheless chose to continue to affirm the right against false attribution). The primary reason cited for taking this course was to maintain interoperability with the US version of the licence, which does not mention the right of integrity. When announcing its decision to disavow the integrity right, iCommons Canada stated that it intended to encourage CC to add integrity as an extra licence element that a licensor may elect to choose. Version 2.4 of the Canadian licence, which includes the express disavowal of the integrity right, was launched on 30 September 2004.

As noted above, iCommons Australia's analysis is that the silence on the integrity right in the generic (US-based) licence version is likely to operate to reserve moral rights under the generic licence version, if that generic licence version is used and interpreted according to the laws of places like Australia. On this analysis, iCommons Canada's express waiver of the right of integrity appears to force a divergence between the legal effect of the generic licence version in Australia (arguably, implying a reservation of the integrity right) and the iCommons Canada version (express waiver) of the integrity right.

It is important to appreciate that an express waiver of the integrity right in CC licences has strong CC community appeal, in addressing user concerns that assertion of the integrity

right could prove to be an unjustifiable fetter on the popular adoption of the CC concept. From that perspective, it cannot be denied that choosing to expressly waive the integrity right in porting the CC licences has a popular appeal across all jurisdictions.

There are, nonetheless, important practical issues that need to be addressed if one is to disavow the integrity right in the CC licences. The most significant is in relation to a licensor who is not the original author or creator, for example a licensor who has taken an assignment or appropriate licence of copyright. Under Australian law, the moral rights of the author are personal to that author, so that the licensor in this situation has no right to waive the author's integrity right under the CC licence. Rather, all the licensor can do (as a matter of law) is seek a consent from the author to acts or omissions otherwise infringing the author's integrity rights, and ensure that the consent is in sufficiently broad terms to cover the acts or omissions of any CC licensee. This therefore means an increased practical risk that uninformed CC licensors who license third party-sourced materials under a CC licence may overlook their responsibility to obtain the integrity right consent from all relevant third parties.

iCommons Australia does see the great value in the jurisdictions with express moral rights regimes maintaining a common position on the issue. Regardless of whether or not one accepts the cogency of the considerations leading iCommons Canada to adopt a position that disavows the integrity right, there are strong drivers for iCommons Australia to move from the initial drafting position - expressly affirming the integrity right - to a position that expressly disavows the integrity right (via a moral rights consent mechanism that accommodates the practical issues described above).

For this reason, the current version of the iCommons Australia licence (to which this commentary is attached) includes the following language, that expressly disavows the integrity right (via a moral rights consent mechanism that accommodates the practical issues described above):

*g. **False attribution prohibited.** Except as otherwise agreed in writing by the Licensor, if You publish, communicate to the public, distribute, publicly exhibit or display, publicly perform, or publicly digitally perform the Work or any Derivative Works or Collective Works in accordance with this Licence, You must not falsely attribute the Work to someone other than the Original Author.*

*h. **Prejudice to honour or reputation permitted.** Except as otherwise agreed in writing by the Licensor, if You publish, communicate to the public, distribute, publicly exhibit or display, publicly perform, or publicly digitally perform the Work or any Derivative Works or Collective Works in accordance with this Licence, You do not have to refrain from making a material distortion of, a mutilation of, or a material alteration to, the Work that is prejudicial to the Original Author's honour or reputation, or anything else in relation to the Work that is prejudicial to the Original Author's honour or reputation, and the Licensor either (if the Licensor is the Original Author) consents to this under Section 4.i or (if someone else is the Original Author) has obtained a valid written consent substantially in the terms of Section 4.i, given by or on behalf of the Original Author.*

*i. **Moral rights law consent.** Except as otherwise agreed in writing by the Licensor, if the Licensor is the Original Author, then to the extent permitted by applicable law, the Licensor unconditionally and irrevocably consents to all acts or omissions permitted by this Licence that would otherwise infringe any rights of the Licensor under moral rights law of integrity of authorship in respect of the Work. This consent applies whether the relevant acts or omissions occur before or after the consent is given, and is given for the benefit of You, Your licensees and successors in title, and anyone authorised by You or any of them to commit the relevant acts or omissions.*

If a policy decision is made in the future to accommodate affirmation of integrity rights protection under future iCommons Australia licences, a provision to do so should be relatively easy to include. For instance, a new clause 4.h could read:

*h. **Prejudice to honour or reputation prohibited.** Except as otherwise agreed in writing by the Licensor, if you publish, communicate to the public, distribute, publicly exhibit or display, publicly perform, or publicly digitally perform the Work or any Derivative Works or Collective Works, You must not do anything that results in a material distortion of, the mutilation of, or a material alteration to, the Work that is prejudicial to the Original Author's honour or reputation, and You must not do anything else in relation to the Work that is prejudicial to the Original Author's honour or reputation.*