EXPLANATORY STATEMENT

Resale Royalty Right for Visual Artists (Provisions to be Contained in Collecting Society Rules) Determination 2020

Determination under paragraph 35(4)(d) of the *Resale Royalty Right for Visual Artists Act 2009*

(Issued by authority of the Minister for Communications, Cyber Safety and the Arts)

Legislative Context

The *Resale Royalty Right for Visual Artists Act 2009* (the Act) establishes the resale royalty scheme which allows visual artists to receive a 5 per cent royalty payment each time one of their works is resold on the secondary art market for $1000 or more. The Act also provides that the Minister may appoint a collecting society to administer the resale royalty scheme.

Under paragraph 35(4)(d) of the Act the Minister may determine provisions to be contained in the collecting society's rules, being provisions necessary to ensure that the interests of holders of resale royalty rights or their agents are protected adequately, including, in particular, provisions about:

(i) the collection of amounts of resale royalty; and
(ii) the distribution of amounts collected by the society; and
(iii) the holding on trust by the society of amounts for holders of resale royalty rights who are not its members; and
(iv) access to records of the society by holders of resale royalty rights and their agents.

The Minister must not appoint a body to be the collecting society unless its rules contain provisions of the kind determined by the Minister under paragraph 35(4)(d).

The *Resale Royalty Right for Visual Artists (Provisions to be Contained in Collecting Society Rules) Determination 2020* (the Determination) is made by the Minister pursuant to paragraph 35(4)(d) of the Act.

Purpose

The purpose of the Determination is to ensure the interests of holders of resale royalty rights or their agents are adequately protected.

The notes on the provisions of the new Determination are set out in **Attachment A**.

Statement of compatibility with human rights

A statement of compatibility is set out at **Attachment B**.

Regulation Impact Statement

The Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement is not required. The OBPR reference number is 25974.

Consultation

Consultation on the proposed Determination was undertaken by the Department of Communications and the Arts with Copyright Agency Limited (CAL), the collecting society appointed under paragraph 35(2)(a) of the Act. The consultation comprised the provision of a copy of the draft remade Determination and the collecting society considering and responding to a series of questions on the efficacy and impact of the provisions contained in the instrument and whether the remade Determination remains fit-for-purpose. CAL responded on 20 January 2020 noting that the remade Determination remains fit-for-purpose and reflects existing arrangements.

The new Determination repeals and remakes a sunsetting instrument without amendment.

The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

The instrument commences on the day after the date it is registered on the Federal Register of Legislation.

Attachment A

Notes on the *Resale Royalty Right for Visual Artists (Provisions to be Contained in Collecting Society Rules) Determination 2020*

Section 1 provides that the name of the instrument is the *Resale Royalty Right for Visual Artists (Provisions to be Contained in Collecting Society Rules) Determination 2020* (the Determination).

Section 2 provides that the instrument will commence on the day after it is registered.

Section 3 provides that the source of authority for making the Determination is paragraph 35(4)(d) of the *Resale Royalty Right for Visual Artists Act 2009*.

Section 4 sets out relevant definitions for the instrument.

There is a note at the beginning of section 4 of the Determination indicating that a number of expressions used in the instrument are defined in section 3 of the Act, and it includes a list of terms that are defined in the Act.

The term ***Act*** means the *Resale Royalty Right for Visual Artists Act 2009*.

Section 5 provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the Schedule, and that any other item has effect according to its terms. Only one instrument is specified in the Schedule; namely, the sunsetting Determination, titled '*Resale Royalty Right for Visual Artists Act 2009 - Determination of provisions to be contained in collecting society rules*'.

Section 6 stipulates the provisions to be contained in collecting society rules, namely:

(a) the collection of amounts of resale royalty;
(b) the distribution of resale royalty amounts collected by the society and any interest earned on those amounts, to holders of resale royalty rights;
(c) the holding on trust by the collecting society of resale royalty amounts due to holders of resale royalty rights who are not members of the collecting society or who are otherwise yet to be identified and/or located;
(d) access to the collecting society's records by holders of resale royalty rights and their agents; and
(e) a complaint notification and handling procedure for dealing with member complaints.

This ensures that the interests of resale royalty right holders and their agents are adequately protected by the rules of the collecting society.

Under the Act, the collecting society is required to collect royalties on behalf of resale royalty right holders, and to distribute royalties to the holders of those rights. The collecting society must also locate resale royalty right holders in cases where royalties have been paid but right holders have not been identified. This provision ensures that, in undertaking its functions under the Act, the collecting society's rules will protect the interests of resale royalty right holders.

These protections apply to resale royalty right holders regardless of whether they elect to become a member of the collecting society.

Access by resale royalty right holders or their agents to the collecting society's records will ensure transparency for right holders. Furthermore, a complaint notification and handling procedure provides members with an avenue of recourse.

Schedule 1

The schedule lists one instrument to be repealed, namely, the *Resale Royalty Right for Visual Artists Act 2009 - Determination of provisions to be contained in collecting society rules.*

Attachment B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Resale Royalty Right for Visual Artists (Provisions to be Contained in Collecting Society Rules) Determination 2020

The *Resale Royalty Right for Visual Artists (Provisions to be Contained in Collecting Society Rules) Determination 2020* (the Determination) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Determination

The *Resale Royalty Right for Visual Artists Act 2009* (the Act) establishes the resale royalty scheme which allows visual artists to receive a 5 per cent royalty payment each time one of their works is resold on the secondary art market for $1000 or more. The Act also provides that the Minister may appoint a collecting society to administer the resale royalty scheme.

The Determination sets out provisions, as determined by the Minister to be contained in the collecting society's rules, in accordance with paragraph 35(4)(d) of the Act.

Under paragraph 35(4)(d) of the Act the Minister may determine provisions to be contained in the collecting society's rules, being provisions necessary to ensure that the interests of holders of resale royalty rights or their agents are protected adequately, including, in particular, provisions about:

(i) the collection of amounts of resale royalty; and
(ii) the distribution of amounts collected by the society; and
(iii) the holding on trust by the society of amounts for holders of resale royalty rights who are not its members; and
(iv) access to records of the society by holders of resale royalty rights and their agents.

Human rights implications

It has been assessed whether the Instrument is compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

Having considered the likely impact of the and the nature of the applicable rights and freedoms, it has been determined that the Instrument engages the right to privacy in Article 17 of the *International Covenant on Civil and Political Rights* (the ICCPR), and the right to enjoy and benefit from culture in Article 15 of the *International Covenant on Economic, Social and Cultural Rights* (the ICESCR).

Right to privacy

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with a person's privacy. The Determination engages the right to privacy by determining that the rules of the collecting society must contain provisions providing for access to the collecting society's records by holders of resale royalty rights and their agents. This provision ensures that the interests of resale royalty right holders and their agents are adequately protected by the rules of the collecting society, as access by resale royalty right holders or their agents to the collecting society's records will ensure transparency for right holders.

Right to enjoy and benefit from culture

Article 15 of the ICESCR recognises the right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which they are the author. As noted above, the Determination ensures the interests of resale royalty right holders and their agents are adequately protected by the rules of the collecting society. The access to collecting society records improves transparency, and the Determination confirms the collecting society must have adequate provisions around collecting, distributing and holding on trust resale royalties. These requirements promote the rights of those who hold an interest to fully benefit from their artistic work.

Conclusion

The Determination is compatible with human rights because it promotes the protection of the right to privacy and the right to enjoy and benefit from culture.