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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

RESALE ROYALTY RIGHT FOR VISUAL ARTISTS BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for the Environment, Heritage and the Arts,
the Hon. Peter Garrett AM MP)

RESALE ROYALTY RIGHT FOR VISUAL ARTISTS BILL 2008

OUTLINE

The Resale Royalty Right for Visual Artists Bill ('the Bill') provides for the establishment of a resale royalty right for visual artists and an accompanying statutory scheme. The resale royalty right will be inalienable and endure for the life of the artist plus 70 years. It will entitle visual artists to a royalty payment on the sale price of any commercial resale of their original works of art over \$1,000 on works acquired after the legislation takes effect. The scheme will apply to Australian citizens or permanent residents, with foreign nationals covered on a reciprocal basis.

The introduction of a resale royalty scheme will allow visual artists to share in the commercialisation of their work in the secondary art market. This will benefit visual artists who derive their main creative income from the initial sale of original works. These artists do not have the same range of opportunities as other creators such as writers and composers to earn money through licensing reproductions, public performances or broadcasting their work.

FINANCIAL IMPACT STATEMENT

Funding of \$1.5 million over three years to support the implementation of a resale royalty scheme was committed by the Government in the 2008-09 Budget.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

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| Bill | Resale Royalty Right for Visual Artists Bill 2008 |
| EU Directive | <i>Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art</i> |
| Minister | Minister for the Environment, Heritage and the Arts |

NOTES ON CLAUSES

Part 1 - Introduction

Clause 1 – Short title

The Bill, when enacted, should be cited as the *Resale Royalty Right for Visual Artists Act 2008*.

Clause 2 – Commencement

Item 1 of the table in subclause 2(1) provides that clause 1 (Short title), clause 2 (Commencement) and any other clause of the Bill not provided for is to commence on Royal Assent.

Items 2 and 4 of the table provide that Parts 1 (Preliminary), 2 (Resale Royalty Right), 4 (Civil Penalties) and 5 (Miscellaneous) are to commence on 1 July 2009. The fixed date for the commencement of the right will provide certainty for art market businesses and consumers, and a commencement date of 1 July 2009 will align with the new financial year to assist businesses in adjusting their record keeping.

Item 3 of the table provides that Part 3 (The Collecting Society) is to commence on Royal Assent. The early commencement of Part 3 of the Bill will enable the collecting society to be appointed prior to the resale royalty right arising.

Clause 3 - Definitions

Clause 3 sets out definitions of key terms used in the Bill. Some of the more significant definitions are:

- “community body” means a body established by a community for the purposes of supporting or promoting the welfare or cultural values of the community. The body can be incorporated or unincorporated. A community body could include an Indigenous community organisation or a local community arts centre.
- “time of a commercial resale” is the earlier of the day on which ownership of the artwork is transferred under the commercial resale or the day on which consideration for the commercial resale is fully paid.

Defining the time of a commercial resale in this manner is to prevent people constructing arrangements in order to circumvent the resale royalty from being paid.

Clause 4 – Act binds the Crown

Clause 4 explains the extent to which the Bill binds the Crown (subclause 4(1)) and makes clear that it does not make the Crown liable to a pecuniary penalty or to be prosecuted for an offence (subclause 4(2)). The protection against liability for a pecuniary penalty or against prosecution for an offence in subclause 4(2) does not apply to an authority of the Crown (subclause 4(3)).

Clause 5 – External Territories

The Bill will extend to every external territory. This will avoid the possible situation in which Australian art market professionals shift their business operations to external territories to evade the scheme.

Part 2 – Resale royalty right

Division 1 – When does resale royalty right arise?

Clause 6 – Resale royalty right

Clause 6 sets out the definition of resale royalty right as the right to receive a resale royalty on the commercial resale (clause 8 defines ‘commercial resale’) of an artwork (clause 7 defines ‘artwork’).

Clause 7 – What is an artwork?

This clause defines an artwork as an original work of graphic or plastic art that is created either by an artist or artists or under the authority of the artist or artists.

The provision in paragraph 7(1)(b) for artworks to include items made under the authority of the artist provides for situations in which an artist creates a design and directs a production team (such as a bronze foundry) or a master craftsman (such as a print maker) to produce or assist in producing the final artwork.

Subclause 7(2) provides a non-exhaustive list of examples of an original work of graphic or plastic art. The list reflects the examples listed in the EU Directive.

As well as the media listed, the definition in the Bill would cover other forms of original visual arts or craft, such as: batik, weaving, or other forms of fine art textiles; installations; fine art jewellery; artist’s books; and wood carving. The definition would also capture new media art forms such as digital and video art, and to expand to cover new forms of visual artistic expression as they evolve in the future.

An artwork also includes multiple originals produced in a limited edition authorised by the artist such as an etching or a bronze sculpture. A multiple original would include any

kind of print-making, sculptural or casting technique in which the artist makes use of a template or mould.

However, the definition of an artwork excludes architecture (including a building, drawing, plan or model for a building) and original manuscripts of writers and composers (see clause 9).

Clause 7 is intended to cover works of art from which artists have limited ability to earn money by exploiting their copyright through reproductions, public performances or broadcasts. The value of such works on the secondary art market depends largely on their originality. For this reason, while authorised limited edition artworks (for example, lithographs, prints of art photography, or audiovisual art installations) are covered, items such as posters, mass-produced photographic or other prints, films and industrial design are excluded.

Clause 8 – What is commercial resale of an artwork?

Subclause 8(1) provides that a commercial resale of an artwork is where the transfer:

- of ownership of the artwork is from one person to another for monetary consideration; and
- is not the first transfer of ownership of the artwork; and
- is not otherwise one of an excluded class.

The definition of a commercial resale is limited to transfers of ownership for monetary consideration to assist with ease of administration.

The first transfer of ownership would include transfers from the artist by sale, gift, exchange for goods or services, or inheritance. Including all such categories will avoid situations in which artists are pressured to exchange their works rather than sell them at the first point of transfer to delay triggering the resale royalty right until the third transfer of ownership. This will ensure that artists begin to benefit sooner from the entry of their artworks into the marketplace.

The scheme will not include private sales between individuals, nor organisations not in the business of dealing in works of art. The costs of imposing a royalty on private sales would outweigh the benefits. The scheme will cover sales from a private seller to a public institution and vice versa.

Therefore, subclause 8(2) provides that transactions that transfer ownership of an artwork from one individual to another that does not involve an art market professional acting in that capacity are an excluded class of transfer.

Subclause 8(3) defines art market professional as an auctioneer, owner or operator of an art gallery, owner or operator of a museum, art dealer or person otherwise in the business

of dealing in artworks. This includes the manager of a major private or corporate art collection.

Clause 9 – No resale royalty right on certain works

The resale royalty right does not exist for the commercial resale of:

- a building, or a drawing, plan or model for a building; or
- a circuit layout within the meaning of the *Circuit Layouts Act 1989*; or
- a manuscript (in whatever form) of a literary, dramatic or musical work.

Copyright ensures that authors, composers and other creators have an ongoing economic right to benefit from the commercialisation of their work. Therefore, there is no resale royalty right on such works.

Clause 10 – No resale royalty right unless consideration above threshold

There is no resale royalty right on a commercial resale of an artwork where the sale price is less than \$1,000 (paragraph 10(1)(a)). If the sale price is paid in foreign currency, the threshold amount is worked out using the exchange rate applicable at the time of the commercial resale that is equivalent to \$1,000.

Placing a threshold on the minimum resale price before a royalty is imposed will reduce the administrative costs associated with making multiple, very small payments to artists. In setting the threshold level, the maximisation of returns to artists (and ensuring that benefits are spread across a greater number of artists) has been balanced against administrative efficiency as relates to both the collecting agency and the art market professionals required to comply with the scheme.

Paragraph 10(1)(b) provides that if a higher threshold amount is prescribed by the regulations, there is no resale royalty payable on a sale price less than that higher amount. This provision allows for adjustments to be made to the threshold in future to reflect factors such as inflation and potential changes to the art market.

Subclause 10(2) defines sale price on a commercial resale of an artwork as the amount paid for the artwork by the buyer on the commercial resale including GST, but does not include any other taxes or buyer's premium payable on the sale. The resale royalty is to be calculated on the amount that most closely reflects the value of the artwork. Inclusion of other amounts such as buyer's premium (a fee for service) or other taxes added to the hammer price would weaken the connection between the resale royalty payment and the value of the artist's work

Clause 11 – Resale royalty right on artworks in existence when Act commences

This clause provides that if an artwork exists when this Part commences, no resale royalty right exists on the first transfer of ownership of the artwork on or after

commencement. This includes where the transfer of ownership is under a commercial resale.

Therefore, only works acquired or created after 1 July 2009 will trigger a resale royalty payment when they are resold through the secondary art market. The prospective application of the right will help protect the property rights of people who bought artworks not knowing that a resale royalty would be payable when they resold them. It will also allow businesses in the Australian art market to adjust to this change in their operating environment, ensuring a smooth transition to the resale royalty scheme.

The following examples illustrate the way in which the scheme will work in practice:

- A sculpture created in 1994 by a now-deceased artist and first purchased in 1995 sells at auction for a sale price of \$800,000 in August 2009, after the scheme has commenced. There will be no resale royalty payable to the artist on this sale, as it is the first transfer of ownership of the work following the introduction of the resale royalty right. The same sculpture is sold again through a dealer in July 2010 for a sale price of \$900,000. This second sale triggers a resale royalty payment of \$45,000 which would be paid to the heirs of the deceased artist.
- A collector who had purchased a limited edition etching in 2001 for \$5,000 dies in 2010, after this Bill comes into effect, and leaves the etching to her son in her will. In 2012, the son sells the etching at auction for a sale price of \$7,000. This resale triggers a resale royalty payment to the artist of \$350, as the seller (the son) had acquired the work following the introduction of the resale royalty right.
- On a trip to Arnhem Land in September 2009, after this Bill comes into effect, a gallery owner buys a painting outright from an Aboriginal artist for \$10,000. The gallery owner puts the painting up for sale at an exhibition in December 2009, where it is purchased by an investor for a sale price of \$16,000. Even though this is the first resale of the work, it triggers a resale royalty payment to the artist of \$800 as the gallery owner had acquired the work following the introduction of the resale royalty right.

Division 2 – Who holds resale royalty right?

Clause 12 – Who holds resale royalty right?

This clause sets out who holds the resale royalty right of an artwork at the time of any given commercial resale and includes provisions relating to single or joint creators of the artwork, as well as their successor/s. The provision would assist in determining how the right will be passed on in cases where an artist has either not created a will or created a will but not specified who will receive the resale royalty right.

Subclause 12(1) deals with the circumstance where an artwork was created by a single artist and the artist is identified (clause 13 defines ‘identified’) and living at the time of a commercial resale. In this case, the resale royalty right on the commercial resale is held by the artist provided he or she satisfies the residency test (clause 14 sets out the residency test) at the time of the commercial resale. For example, if a painting is sold at

auction, the artist identified in the auction catalogue would hold the right if he or she is still alive and is either an Australian artist or an artist from a reciprocal country (as set out in the residency test).

Where an artist, who is identified as the sole creator of an artwork, is deceased at the time of a commercial resale and who satisfied the residency test immediately before his or her death, the resale royalty right on the commercial resale is held by the successor/s in title to the right provided that each of those entities satisfies the residency test at the time of the commercial resale and the succession test (subclause 12(2)). An artist therefore is permitted to divide their right between a number of successors.

An example would be where at the time of the introduction of the legislation, an artist who is already deceased and therefore has not specified who would be the beneficiary of the resale royalty right. All of the artist's property has been left to his or her son. Under paragraph 12(2)(a) the son as the only successor in title to the right would hold the resale royalty right.

If the artwork was created by more than one artist, subclause 12(3) provides that the resale royalty right on a commercial resale of an artwork is held by:

- each living artist who is identified and who satisfies the residency test at the time of the commercial resale; and
- each successor or successors in title to the right, from each identified artist who is no longer living and who satisfied the residency test immediately before his or her death, provided that the successor satisfies the residency test at the time of commercial resale and the succession test.

This provision allows for the right to be held by artists as 'tenants in common', so that each artist is able to leave their portion of the right to their heirs, rather than the right being shared between the remaining living artists once a joint creator dies.

Subclause 12(4) provides that if an entity holds the resale royalty right on the commercial resale of an artwork by operation of subclauses (2) or (3) or by earlier operation of this subclause, and the entity has since died or been wound up, the resale royalty right on the next commercial resale is held by each successor or successors in title to the right that satisfies the residency test at the time of the next commercial resale and the succession test.

By tying the crystallisation of the right to the time of each commercial resale, it means that the holder of the right may change over time. For example, the right will transfer from artists to heirs, and to heirs of heirs, over time. Similarly, if the residency status of a right holder changes in between sales, they may either gain or lose eligibility to hold the right at the time of subsequent commercial resales.

Clause 13 – Meaning of identified

Subclause 13(1) is intended to assist in determining which artist created the artwork in which a resale royalty right exists. As the right will either be held by the artist or his or her heirs (or heirs' heirs) it is important to be able to identify the artist in order to determine who the current right holder is (as set out under clause 12). This subclause provides that a person is 'identified' as an artist of an artwork at the time of a commercial resale of the artwork, if at that time, the person's identity is known to any key party who was involved in the creation of the work, the transaction, or the collection of the royalty on that transaction. This could be either:

- the seller;
- a buyer;
- any art market professional acting as the agent of a buyer or a seller;
- the collecting society; or
- where the artwork is by more than one artist, by another artist of the artwork.

Subclause 13(2) provides that a person is 'identified' as an artist of an artwork at a time other than at the time of a commercial resale of the artwork, if at that time, the person's identity as an artist of the artwork is known to the collecting society or where the artwork is by more than one artist, by another artist of the artwork.

For example, the artist may operate under a pseudonym but his or her identity is known to one of the people listed above. In this case they could still be classed as identified and be eligible to hold the right. In addition, there is provision under clause 24 for artists to notify the collecting society claiming that he or she holds the resale royalty right of an artwork. Therefore, an artist operating under a pseudonym can notify the collecting society of his or her right to the resale royalty and remain anonymous publicly.

Clause 14 – Residency test

This clause sets out the residency requirements that a potential right holder must meet in order to be eligible to hold the right at the time of any commercial resale (as set out in clause 12). An individual satisfies the residency test at a particular time if that person, at that time, is an Australian citizen, a permanent resident of Australia or a national or citizen of a country prescribed as a reciprocating country in regulations (subclause 14(1)).

A country will be prescribed as a reciprocating country on the basis of their implementation of the Article 14^{ter} of Berne Convention for the Protection of Literary and Artistic Works.

A corporation satisfies the residency test at a particular time if it is incorporated under the *Corporations Act 2001* or under the law of a country prescribed as a reciprocating country or it carries on an enterprise in Australia or a country prescribed as a reciprocating country at that time (subclause 14(2)). This would allow foreign charitable organisations registered under Australian law or the law of a reciprocating country or an Australian charity that operates overseas to benefit from the scheme.

An unincorporated body satisfies the residency test at a particular time if it carries on an enterprise in Australia at that time (subclause 14(3)). The definition of community body as set out in clause 3, would ensure that the royalties left to Australian community bodies would continue to benefit the Australian community.

Clause 15 – Succession test

This clause sets out the test for determining whether an entity, who is a successor in title to the resale royalty right, satisfies the succession test in order to be considered an eligible right holder at the time of any given commercial resale (as set out in clause 12). The purpose of this test is to set out how the right can be passed on from one right holder to another each time an existing right holder dies (or ceases to exist in the case of an organisation) within the duration of the right.

An entity satisfies the succession test if the entity meets either criteria 1 and 2 (in subclauses 15(2) and (3)) or criteria 3 and 4 (in subclause 15(4) and (5)). Criteria 1 and 2 apply when a person passes on the right to a successor (whether a person or an organisation). Criteria 3 and 4 apply when an organisation is passing on the right to another organisation. An organisation cannot pass the right on to a person.

To satisfy criterion 1, the entity must have received its interest in the right by testamentary disposition or in accordance with the rules of intestate succession, on the death of an individual (subclause 15(2)). This can include where an entity inherits the right on the death of an artist or on the death of a person who inherited the right from an artist or the artist's successors.

Subclause 15(3) states that to satisfy criterion 2, an entity must be one of the following:

- an individual with a beneficial interest in the right;
- a charity or charitable institution with a beneficial interest in the right;
- a community body (defined at clause 3) with a beneficial interest in the right;
- a person who holds an interest in the right in trust for any of the persons listed at paragraphs (a) to (c).

To satisfy criterion 3, the entity must have received its interest in the right on the winding up of a charity, charitable institution or community body (subclause 15(4)). The entity must be a charity, charitable institution or community body that was formed for substantially the same purposes as the body that was wound up in order to satisfy criterion 4 (subclause 15(5)).

The intention is that commercial bodies cannot hold the right. Instead the intention is that artists are able to pass on their resale royalty right to their natural heirs or to organisations that work for the benefit of the community, rather than for profit.

For example, an artist has made provision in his will for the resale royalty right in his artwork to transfer to a regional youth arts centre, which is a charitable organisation. On the artist's death, the charitable organisation received the right by testamentary disposition. The charitable organisation meets both criteria 1 and 2 and therefore, satisfies the succession test.

In this example, the regional youth arts centre is then wound up, and as a result a youth arts charity has received the resale royalty rights held by the regional youth arts centre. If the youth arts charity was formed for substantially the same purposes as the regional youth arts centre, the charity meets the requirements in criteria 3 and 4 and would therefore satisfy the succession test. However, the right could not be transferred from the regional youth arts centre to an organisation that had a completely different purpose, such as a charitable organisation dedicated to human medical research.

Another example is that of a son of an Australian artist who is already deceased at the time of the introduction of the legislation. The son was the only successor in title and therefore, holds the resale royalty right (see paragraph 12(2)(a)). The son meets both criteria 1 and 2 and therefore, satisfies the succession test.

It would be possible for the son to make a provision in his will for the resale royalty rights he holds to transfer to an Indigenous community body. Upon the son's death, the right would transfer to the Indigenous community body for all future commercial resales. This is the case even where there were no commercial resales of the artwork during the period in which the son held the right (i.e. the son had never had the opportunity to exercise his right).

Clause 16 – Share of resale royalty right where there is more than one artist

This clause explains how the resale royalty right is to be apportioned in cases where an artwork has been jointly created by more than one artist. Where there is more than one artist and they are all living, subclause 16(1) provides that each artist of the artwork that is a holder of the resale royalty right on a commercial resale is entitled to an equal share of the resale royalty on that commercial resale. However, artists can agree to apportion the shares in the resale royalty differently between themselves. All artists who had been involved in creating the work would need to agree on the shares. The collecting society can pay the resale royalty to reflect that agreement only if the agreement does not give the share of the resale royalty to any other person (which would contradict the inalienable nature of the right) other than on the death of the artist. An artist is able to notify the collecting society under clause 24 that he or she holds a proportion of the resale royalty right.

Subclause 16(2) sets out how joint artists can transfer their proportion of the resale royalty right to their heirs. It provides that where there is more than one artist but one of the artists is no longer living and that artist was identified and satisfied the residency test immediately before his or her death, the share of the resale royalty that the deceased artist would have been entitled to is the proportion that passes to the artist's successors.

For example, an artwork was created in 1980 jointly by two artists, each of whom is identified on the work. One of the artists, an Australian citizen, is now deceased and in his will left all his rights to his wife. His 50% share of the resale royalty on a commercial resale will pass to his wife and the other 50% share will be paid to the other, still living artist.

Clause 17 – Presumptions in relation to artist

This clause establishes the presumption that if a mark or name that purports to identify a person as an artist of an artwork appears on the artwork, this is taken to be prima facie evidence that the person is the artist or one of the artists of the artwork. Where there is only one mark or name on the work, that person is taken to be the artist of the artwork. Where there is another such mark or name on the work, that person is taken to be one of the artists of the artwork.

For example, such a mark could take the form of a signature on a drawing, or a distinctive insignia stamped into a ceramic work, or a list of the 3 joint artists' names written on the back of an acrylic painting by an Indigenous art centre manager, certifying that the work was created by three particular artists working for that centre.

This clause assists in establishing the identity of the artist as set out in clause 13.

Division 3 – Rate of resale royalty

Clause 18 – Rate of resale royalty

The resale royalty payable is a flat 5% of the sale price (as defined by subclause 10(2)) on the commercial resale of an artwork.

Division 4 – Liability to pay resale royalty

Clause 19 – Resale royalty a debt due to holders of resale royalty right

Clause 19 provides for the creation of the resale royalty as a debt arising between private parties. It provides that resale royalty on a commercial resale of an artwork is a debt due to the holders of the resale royalty right on the commercial resale by those who have a liability to pay the resale royalty (clause 20 sets out persons who are liable to pay).

For example, where a seller has sold a painting by an Australian artist through an art market professional, a debt is due to the artist by the seller and, if the art market professional is acting as agent of the seller, that person. If the artist were deceased, the debt would be due to the artist's successors.

Clause 20 – Liability to pay resale royalty

Clause 20 sets out who is liable to pay resale royalty on a commercial resale of an artwork. The following persons are jointly and severally liable:

- the seller, or sellers where there is more than one; and
- each person acting in the capacity of an art market professional and agent for the seller; and
- if there is no such agent, each person acting in the capacity of an art market professional and as agent for the buyer; and
- if there are no such agents, the buyer or buyers where there is more than one.

The above lists persons that are liable to pay for the resale royalty depending on the scenario of the commercial resale. The seller or sellers are always liable, and one of the other parties to the sale as listed above (this can be one or more people) is jointly liable in a chain of descending order from those most closely connected with the seller through to the buyer or buyers at the other end. For example, the seller and buyer are jointly and severally liable to pay the resale royalty on a commercial resale of an artwork if there are no agents for either the seller or buyer. However, if the seller has sold the artwork through an art market professional who is an agent for the buyer, the seller and that person are jointly and severally liable.

It is anticipated that in practice, the decision regarding who will actually pay the resale royalty will be worked out during contractual negotiations between the parties to the commercial resale. However, where it is not specifically negotiated between the parties, the parties are liable as set out in this clause.

Clause 21 – When does the liability to pay resale royalty arise?

Liability to pay resale royalty on the commercial resale of an artwork arises at the time of the commercial resale of the artwork. See comments in clause 3 above in relation to the definition of the time of the commercial resale.

Division 5 – Collecting resale royalty

Clause 22 – Collection of resale royalty by the collecting society

Clause 22 requires the collecting society to publish a notice on its website as soon as it is reasonably practicable after becoming aware of the commercial resale of an artwork if the collecting society reasonably believes that an entity may hold the resale royalty right, or an interest in the resale royalty right, on the commercial resale under this Bill.

The publication of the notice will enable holder or holders of the resale royalty right to notify the collecting society (under subclause 23(1)) that it does not want the collecting society to collect the resale royalty on the commercial resale.

Clause 23 – Collection of resale royalty by the collecting society

This clause applies unless the holder, or where there is more than one holder, all the holders, notify the collecting society in writing within 21 days after the notice in clause 22 is published that the collecting society is not to collect the resale royalty or enforce the resale royalty right on behalf of the holder or holders of the right (subclause 23(1)). If there are three holders of the resale royalty right on the commercial resale and one holder notifies the collecting society under subclause 23(1) but the other two holders of the resale royalty right do not, the collecting society will collect the resale royalty for all holders of the resale royalty right. Therefore, all right holders must agree that they do not wish the collecting society to enforce their right in relation to a particular commercial resale. The reason is that it would create a greater administrative burden on the collecting society and potentially create confusion among art market professionals if the resale royalty collected is not always a flat 5% of the sale price.

Subclause 23(2) requires the collecting society to use its best endeavours to collect the resale royalty payable under this Bill and, if necessary, enforce any resale royalty right under this Bill, on the commercial resale of the artwork on behalf of the holder or holders of the resale royalty right. In collecting the resale royalty or enforcing the right, the collecting society is not subject to direction of any holder or holders of the right (subclause 23(3)).

Clause 24 – Presumptions to be made in enforcement proceedings brought by the collecting society

This clause provides that in proceedings for the enforcement of the resale royalty right on the commercial resale of an artwork by the collecting society, it is presumed:

- conclusively that there is at least one holder of the resale royalty right under this Bill; and
- that the collecting society is acting on behalf of the holder or holders of the resale royalty right unless it is proved that notice was given in accordance with subsection 24(1) in relation to the commercial resale.

Clause 25 – Resale royalty right under this Act only enforceable in Australian jurisdiction

This clause provides the resale royalty right held under this Act is only enforceable in an Australian federal court, or a court of a State or Territory of competent jurisdiction.

Clause 26 – If resale royalty is paid to the collecting society

If resale royalty on a commercial resale of an artwork is paid to the collecting society, the collecting society must pay to each entity that has given notice under subclause 27(1) and established a claim to a share of the resale royalty on the commercial resale, that entity's share but is able to deduct from that share the collecting society's administration fee

(paragraph 26(1)(a)). The collecting society must use its best endeavours to locate each holder of the resale royalty right on the commercial resale of the artwork who has not given the collecting society notice under subclause 27(1) and pay that holder their share of the resale royalty less the collecting society's administration fee (paragraph 26(1)(b)).

Subclause 26(2) provides that the collecting society's administration fee must not be such as to amount to a tax. It must instead constitute a fee for service.

The Minister may, by notice in writing given to the collecting society, limit the administration fee that the collecting society can impose (subclause 26(3)). This notice is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* as it is not legislative in character (subclause 26(4)). This provision provides an ability for the Minister to prevent the collecting society from setting its fees too high, and failing to consider the best interests of the right holders in balancing its administration costs.

Clause 27 – Notice of resale royalty right

Clause 27 allows an entity that claims to hold a resale royalty right, or an interest in the resale royalty right, under this Act to inform the collecting society that the entity holds the right.

Subclause 27(1) provides that the notice should be in the form approved by the collecting society. The notice should set out the entity's name, address, proportion of the resale royalty right to which the entity claims to be entitled and the details of the basis on which the entity makes that claim.

The collecting society may request an entity who has given notice under subclause 27(1) to provide further information in support of the claim within a specified time, not less than 60 days.

Clause 28 – Notice of commercial resale

Subclause 28(1) imposes an obligation on a person to give notice to the collecting society of the commercial resale of an artwork if the person is a seller under the commercial resale and provided that the seller has a connection with Australia that meets the criteria set out in paragraph 28(1)(b).

Non-compliance with this provision carries a civil penalty of 200 penalty units for an individual or 1000 penalty units for a body corporate. A penalty unit means \$110 (section 4AA *Crimes Act 1914*).

The notice provided under subclause (1) must comply with the requirements in subclause 28(2). The notice must be in writing and be given to the collecting society within 90 days of the commercial resale (paragraphs 28(2)(a) and (b)). The notice must also include sufficient detail to allow the collecting society to work out whether resale royalty is

payable on the commercial resale under this Act, the amount payable and to identify who is liable to pay.

The seller can provide notice through an agent (subclause 28(3)). For example, in drawing up a contract with a gallery dealer to sell a sculpture on the seller's behalf, the seller could specify that the gallery dealer had to agree to notify the collecting society of the commercial resale of the sculpture,

Subclause 28(4) provides that if there are multiple sellers, then any one of them can discharge the obligation to notify the collecting society of the commercial resale on behalf of all the sellers. It outlines that where there is more than one seller under the commercial resale and if one seller provides notice in accordance with subclause 28(2) to the collecting society, all sellers are taken to have given the collecting society notice in accordance with the section.

A person who wishes to rely on subsection (3) or (4) bears the evidential burden in relation to those matters (subclause 28(5)). The evidential burden is reversed because that information is within the knowledge of the person wishing to rely on the subsections.

Clause 29 – Requesting information about the commercial resale of an artwork

Subclause 29(1) provides that the collecting society can request, in writing, a person give the collecting society information in relation to a commercial resale relevant to determining the amount of any resale royalty payable on the commercial resale under this Act and who is liable to make the payment. The information requested must be necessary for the purpose of securing payment of the resale royalty that is due. Therefore the collecting society can only ask for such information from a person if the collecting society believes on reasonable grounds that that person is one of the following:

- a seller under a commercial resale of an artwork;
- a buyer under a commercial resale of an artwork;
- an agent of a seller or buyer under a commercial resale of an artwork;
- an art market professional otherwise involved in a commercial resale of an artwork.

A request for information made in accordance with subclause 29(1) and made within 6 years of a commercial resale must be complied with within 90 days (subclause 29(2)). Non-compliance with this provision carries a civil penalty of 100 penalty units for an individual and 500 penalty units for a body corporate. A penalty unit means \$110 (section 4AA *Crimes Act 1914*).

Clause 30 – Recovery of amount wrongly paid by the collecting society

This clause sets out how the royalty payment must be treated in cases where it has been incorrectly paid. Therefore, clause 30 establishes an entirely separate collection and enforcement mechanism from those established by clauses 22 and 23.

If the collecting society pays resale royalty to a person who does not hold a resale royalty right on that commercial resale, or an interest in such a right, the amount wrongly paid is a debt due by the person to whom it was paid to the holders of the resale royalty right on the commercial resale (subclause 30(1)). For example, if a person falsely held himself or herself out to be the artist of a particular work and was paid the resale royalty on a commercial resale of the artwork (as the collecting society had taken his or her claim on good faith), that person would owe a debt to the holder/s of the resale royalty right.

If the collecting society pays a holder of resale royalty right more than that holder's share of the resale royalty on a commercial resale, an amount equal to the difference between the payment and that holder's share of the resale royalty is a debt due by the person to whom it was paid to the other holders of the resale royalty right on the commercial resale (subclause 30(2)). For example, where there are two creators of an artwork and the collecting society has incorrectly paid the resale royalty on a commercial resale of the artwork to one artist, that artist owes the difference between that payment and his/her share (50% of the total royalty paid, or as otherwise agreed between the artists) to the other artist.

Subclause 30(3) allows the holder of the resale royalty right on a commercial resale of an artwork to request the collecting society to collect or enforce repayment of an amount under this section on the holder's behalf. For example, the artist in the example above could ask the collecting society to recover the debt owed by the other artist on his/her behalf.

Where requested to do so under subclause 30(3), the collecting society may collect or enforce repayment of an amount under this section on the holder's behalf and is subject to the direction of the holder of the right in doing so (subclause 30(4)).

Clause 31 – Return of unclaimed resale royalty

This clause sets out what the collecting society must do with the royalty payment in cases where it is unable to locate the right holder.

Subclause 31(1) provides that if resale royalty is paid to the collecting society on the commercial resale of an artwork and the collecting society has been unable to locate the holder of the resale royalty right on the commercial resale or an interest in the right for a period of 6 years beginning at the time of the commercial resale, the collecting society must deal with that holder's share, together with interest earned on that share, less the collecting society's administration fee, in accordance with subsection (2).

Subclause 31(2) sets out the manner in which the collecting society must deal with a resale royalty where it has been unable to locate the holder of the resale royalty right. The subclause provides that the collecting society must distribute the amount in equal shares to the remaining holders of the resale royalty right who can be located or if they are unable to be located, distribute the amount in equal shares to the persons who paid the

resale royalty and who can be located, or where no such person can be located, the collecting society may retain the amount to use in the collection and distribution of resale royalties and the enforcement of resale royalty rights.

Division 6 – Other characteristics of resale royalty right

Clause 32 – Duration of resale royalty right

This clause provides that the duration of a resale royalty right is 70 years following the death of the artist. If there is only one artist, it is 70 years after the end of the calendar year in which the artist dies. Where there is more than one artist of the artwork, in relation to the proportion of the resale royalty right held by or through a particular artist, it is the end of the calendar year in which the artist died.

Clause 33 – Resale royalty right absolutely inalienable

This clause provides that, except to the extent permitted under the succession test in clause 15, the resale royalty right is absolutely inalienable, whether by way of, or in consequence of, sale, assignment, charge, execution, bankruptcy, insolvency or otherwise. This provision is to prevent artists being pressured into assigning their right. For example, it will be unlawful for an artist to give their right to a buyer in order to secure a slightly higher primary sale price. It would also render void any attempt by the right holder to use the royalty right as security for a loan, and would also mean that any income from the right would not be available for distribution amongst the right holder's creditors in the case of bankruptcy, insolvency or other cases.

Clause 34 – Waiver etc.

A waiver of a resale royalty right has no effect (subclause 34(1)). Subclause 34(2) provides that an agreement to share or repay a resale royalty, other than an agreement between joint artists to apportion shares in the resale royalty differently, is void. The purpose of this clause is to prevent artists being exploited and pressured into waiving or otherwise dealing detrimentally in their right to receive resale royalty.

Part 3 – The collecting society

Clause 35 – Appointment of the collecting society

This clause requires the Minister, on receiving an application from a body seeking appointment as a collecting society under subclause 35(1), to appoint, or refuse to appoint, the body to be the collecting society (subclause 35(2)). The appointment by the Minister under subclause 35(2) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* as it is not legislative in character.

The decision by the Minister under subclause 35(2) is reviewable by the AAT (see paragraph 49(a)).

Subclause 35(3) provides that only one body may be appointed as the collecting society at a time and that a body must not be appointed to be the collecting society while another body is appointed to be the collecting society.

Subclause 35(4) sets out the requirements a body must meet before the Minister can appoint it to be the collecting society. The requirements include that the body be a company limited by guarantee and incorporated under the *Corporations Act 2001*, that all resale royalty rights holders are entitled to become members and that the body's rules prohibit the payment of dividends to its members.

The Minister may determine, by legislative instrument, other matters that the rules of the body need to make provision for to ensure that holders of a resale royalty right and their agents are adequately protected (paragraph 35(4)(d)). This includes access by rights holders and their agents to records of the collecting society, such as details of the royalty due to them and the action the collecting society has taken to collect or enforce their right.

Section 27A of the *Administrative Appeals Tribunal Act 1975*, which requires a person who makes a reviewable decision to give any person who interests will be affected by the decision, notice of the decision and the right of the person to have the decision reviewed, will be complied with in making the appointment.

Clause 36 – Revocation of appointment

This clause allows the Minister to revoke the appointment if the Minister is satisfied that the body appointed as the collecting society:

- is not functioning adequately as the collecting society;
- is not acting in accordance with its rules or in the best interests of those of its members who are resale royalty right holders;
- has altered its rules so they no longer comply with paragraphs 35(4)(c) to (d); or
- has refused or failed, without reasonable cause, to comply with clauses 37 or 38.

The clause also allows for the body appointed as the collecting society to request, in writing, that the Minister revoke the appointment and the Minister can revoke the appointment if he or she is satisfied it is in the best interests of those holding resale royalty rights to do so (paragraph 36(1)(b)).

The Minister may, by notice in the *Gazette*, revoke the appointment (subclause 36(2)). The revocation takes effect on the day on which the notice is published in the *Gazette*, or a later day if specified in the notice (subclause 36(3)).

A revocation of the appointment by the Minister under subclause 36(2) is reviewable by the AAT (see paragraph 49(b)).

Section 27A of the *Administrative Appeals Tribunal Act 1975*, which requires a person who makes a reviewable decision to give any person who interests will be affected by the decision, notice of the decision and the right of the person to have the decision reviewed, will be complied with in revoking the appointment of a collecting society.

Clause 37 – Annual report and accounts

The collecting society is required to prepare an annual report on its operations each financial year ending on or after 30 June 2010 and provide a copy to the Minister (subclause 37(1)). The Minister must cause a copy of the report to be laid before each House of Parliament within 15 sitting days of that House after receiving the report (subclause 37(4)).

The report must not contain any information that is commercial in confidence or personal information (subclause 37(2)). Subclause 37(3) requires the collecting society, in satisfying itself whether information to be included in the report is commercial-in-confidence, to consider each of the following:

- whether release of the information would cause competitive detriment to a person; and
- whether the information is in the public domain; and
- whether the information is required to be disclosed under another law of the Commonwealth, a State or a Territory; and
- whether the information is readily discoverable.

Subclause 37(5) imposes an obligation on the collecting society to keep proper accounting records detailing the society's transactions and its financial position. The accounting records must be kept in a manner that will enable true and fair accounts of the society to be prepared (subclause 37(6)). The collecting society must have its accounts audited each financial year and must send a copy of the audit to the Minister (subclause 37(7)).

The collecting society must provide reasonable access to copies of all reports and audited accounts prepared under this clause to its members (subclause 37(8)).

Subclause 37(9) provides that this clause 37 does not affect any reporting obligations relating to annual returns or accounts under the law under which it is incorporated.

Clause 38 – Amendment of rules

This clause provides that if the collecting society alters its rules, it must send a copy of the altered rules to the Minister within 21 days along with a statement setting out the effect of the alteration and the reasons it was made. This is an additional measure to hold

the collecting society accountable and to ensure it continues to act in the best interests of its members.

Part 4 – Civil penalties

Division 1 – Obtaining an order for a civil penalty

Clause 39 – Court may order person to pay pecuniary penalty for contravening civil penalty provision

This clause provides that the collecting society may apply on behalf of the Commonwealth to the Federal Court or Federal Magistrates Court within 6 years of a person (the wrongdoer) contravening a civil penalty provision for an order that the wrongdoer pay the Commonwealth a pecuniary penalty (subclause 39(1)). The wrongdoer may be ordered by the Court to pay the Commonwealth for each contravention a pecuniary penalty if the Court is satisfied the wrongdoer has contravened a civil penalty provision (subclause 39(2)).

The Court will determine the appropriate amount of the pecuniary penalty, which is not more than the relevant amount specified for the provision (subclause 39(2)). The Court must have regard to all relevant matters in determining the pecuniary penalty, including:

- the nature and extent of the contravention;
- the nature and extent of any loss or damage suffered as a result of the contravention;
- the circumstances in which the contravention took place; and
- whether the person had previously been found by the Court in proceedings under this Bill to have engaged in similar conduct.

Subclause 39(4) provides that if conduct constitutes a contravention of 2 or more civil penalty provisions, proceedings may be instituted against the person in relation to the contravention of any one or more of those provisions. However, that person is not liable for more than one pecuniary penalty under this clause 39 in respect of the same conduct.

Clause 40 – What is a *civil penalty provision*?

This clause provides that a subclause (or clause) of the Bill is a civil penalty provision if either the words “civil penalty” and one or more amounts in penalty units is set out at the end of the subclause (or clause) or if another provision of the Bill specifies that the subclause (or clause) is a civil penalty provision.

Clause 41 – Contravening a civil penalty provision is not an offence

This clause provides that a contravention of a civil penalty provision is not an offence.

Clause 42 – Persons involved in contravening civil penalty provision

Subclause 42(1) provides that a person must not:

- aid, abet, counsel or procure a contravention of a civil penalty provision;
- induce (by threats, promises or otherwise) a contravention of a civil penalty provision;
- be in any way directly or indirectly knowingly concerned in, or party to, a contravention of a civil penalty provision; or
- conspire to contravene a civil penalty provision.

Subclause 42(2) deems that this Part applies to a person who contravenes subclause 42(1) in relation to a civil penalty provision as if the person had contravened the provision.

Clause 43 – Recovery of a pecuniary penalty

This clause provides that if the Federal Court or Federal Magistrates Court orders a person to pay a pecuniary penalty that the penalty is payable to the Commonwealth and the Commonwealth can enforce the order as if it were a judgment of the Court.

Division 2 – Civil penalty proceedings and criminal proceedings

Clause 44 – Civil proceedings after criminal proceedings

This clause provides that the Federal Court or Federal Magistrates Court must not make a pecuniary penalty order against a person for contravention of a civil penalty provision if that person has been convicted of an offence for substantially the same conduct as that constituting the contravention.

Clause 45 – Criminal proceedings during civil proceedings

This clause provides that proceedings for a pecuniary penalty order against a person for a contravention of a civil penalty provision are stayed if criminal proceedings are started or have already been started against the person for an offence that is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention (subclause 45(1)).

Subclause 45(2) provides that if the person is not convicted of the offence, proceedings for contravention of a civil penalty provision may be resumed. Otherwise, the proceedings for the order are dismissed.

Clause 46 – Criminal proceedings after civil proceedings

This clause provides that criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of a civil

penalty provision regardless of whether a pecuniary order has been made against the person.

Clause 47 – Evidence given in proceedings for penalty not admissible in criminal proceedings

This clause sets out how evidence of information given or evidence of production of documents by an individual in proceedings for a pecuniary penalty order against the individual can be used in criminal proceedings.

Part 5 – Miscellaneous

Clause 48 – Offence – unauthorised dealing with information

This clause provides that it is an offence for a person to make a record of, disclose or otherwise use information that was acquired by the person in the course of performing functions or exercising powers under this Bill (subclause 48(1)).

Subclause 48(2) sets out the defences to the section. It is not an offence if the person is authorised to deal with information, where the person:

- records, discloses or otherwise uses the information in the course of performing duties or exercising powers under this Bill; or
- acquires the information for any other lawful purpose; or
- obtains consent of the person to whom the information relates to the recording, disclosure or use of the information.

A person must not be required to disclose information that the person acquired in the course of performing functions or exercising powers under this Bill, or produce a document or part of a document containing such information, to a court unless that disclosure or production is necessary for the purposes of this Bill (subclause 48(3)).

Clause 49 – Review by Administrative Appeals Tribunal

This clause provides that applications may be made to the Administrative Appeals Tribunal for the review of a decision by the Minister under subclause 35(2) to appoint or refuse to appoint a body to be the collecting society (paragraph 49(a)) or a decision by the Minister under clause 36(1)(a) to revoke the appointment of a body as the collecting society (paragraph 49(b)).

Clause 50 – Jurisdiction of Federal Court

This clause confers jurisdiction on the Federal Court with respect to the following actions:

- for the enforcement of resale royalty right on the commercial resale of an artwork;
- to determine who is the holder, or who are the holders, of a resale royalty right on the commercial resale of an artwork;
- to enforce the payment of a share of the resale royalty right on the commercial resale of an artwork from the collecting society;
- to recover amounts of resale royalty wrongly paid by the collecting society;
- for the enforcement of civil penalty provisions; and
- relating to any other matters arising under this Bill.

Under section 4 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth), State and Territory Supreme Courts would also have jurisdiction in these matters.

Clause 51 – Jurisdiction of the Federal Magistrates Court

This clause confers jurisdiction on the Federal Magistrates Court with respect to the actions listed. The matters conferred are the same as those conferred on the Federal Court (see above explanation of clause 50).

Clause 52 – Additional effect of Act

This clause provides that the Act also has the effect it would have if its operation were expressly confined to:

- giving effect to the International Convention for the Protection of Literary and Artistic Works (the Berne Convention);
- matters external to Australia; or
- matters of international concern.

Clause 53 – Regulations

The Governor General may make regulations prescribing matters prescribed or permitted by this Bill to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Bill.

Any such regulations are legislative instruments under section 6(a) of the *Legislative Instruments Act 2003*.