

Departmental Disclosure Statement

<i>Resale Right for Visual Artists Bill</i>

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry for Culture and Heritage.

The Ministry for Culture and Heritage certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

10 March 2023

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Part One: General Policy Statement

Introduction

This Bill establishes an Artist Resale Royalty (**ARR**) scheme in New Zealand. The scheme provides a mandatory resale right to eligible visual artists that entitles them to receive a royalty payment when their qualifying artwork sells on the secondary art market.

The Free Trade Agreement between New Zealand and the United Kingdom of Great Britain and Northern Ireland (the **NZ–UK FTA**) requires New Zealand to introduce a reciprocal ARR scheme within 2 years of the NZ–UK FTA coming into force in 2023. The Free Trade Agreement between the European Union and New Zealand (the **NZ–EU FTA**) also commits New Zealand to introducing an ARR scheme within 2 years of the NZ–EU FTA coming into force.

To meet the terms of both free trade agreements, legislation is required because an ARR scheme cannot be implemented through private solutions or existing arrangements. New legislation is required because the alternative, amending the Copyright Act 1994, is not desirable because that Act is under review with no expected time frame for completion.

Policy objectives

The policy objectives of the ARR scheme are to—

- meet New Zealand’s obligations under Article 17.46 of the NZ–UK FTA and Article 18.14 of the NZ–EU FTA to introduce an ARR scheme within 2 years of those free trade agreements coming into force:
- maximise the benefits of the scheme to visual artists and their estates:
- minimise the costs and impacts on art market professionals and the secondary art market:
- support a well-functioning New Zealand secondary art market:
- ensure that the scheme is as simple and cost-effective as possible to administer, with the long-term goal of it ultimately becoming self-sustaining.

Those objectives seek to create a scheme that provides benefits to visual artists and their estates without negatively impacting the secondary art market or placing an undue burden on art market professionals and buyers and sellers of art. A simple scheme will encourage compliance and reduce cost so that the scheme can ultimately be sustained without government funding.

Eligibility for resale right

The resale right will enable the right holder (the artist or, if the artist is deceased, their estate) to receive a royalty payment each time their artwork is resold on the secondary art market. The resale right will apply only when ownership in a work is transferred by sale after the first transfer of ownership of that work by the artist (it will not apply to the first transfer or sale of an artwork).

The right will be available to New Zealand citizens (including those residing overseas) and individuals domiciled or resident in New Zealand, as well as to nationals and residents of countries with which New Zealand has a reciprocal arrangement in place. This aligns with the requirements of the NZ–UK FTA and will ensure that a wide range of artists benefit and that right holders are easy to identify.

In line with the requirements of the NZ–UK FTA and the NZ–EU FTA, the resale right will be inalienable and unable to be waived or assigned regardless of whether the artist who created the artwork owns the copyright for that work. The resale right will be able to be transmitted only upon the death of the holder of the right. On death, the resale right will pass to the person entitled to it under the artist’s will. This will enable artists to determine who they want to inherit the right, which could include their iwi or hapū. If there is no will, the right passes by operation of succession law.

The duration of the resale right will be the same as the duration of copyright in a work, which is currently the life of the artist plus 50 years after their death. The resale right has linkages to copyright and having the same duration for both ensures that the 2 rights will be aligned. If the duration of copyright extends in the future to 70 years post-death (as has been committed to under both the NZ–UK FTA and the NZ–

EU FTA), the duration of the resale right will also extend to 70 years post-death via a consequential amendment to this legislation.

Resales covered by resale right

A resale royalty will only be payable on sales that are equal to or above a specified minimum threshold in value, with this dollar threshold to be set through supporting regulations. The Bill specifies that this threshold must sit within the range of \$500 – \$5,000. Almost all international ARR schemes have a minimum threshold because having no threshold (and therefore covering all sales, even those of very low value) is not administratively feasible or cost-effective. The rationale for the proposed range is that a threshold lower than \$500 would make the scheme administratively unviable and a threshold above \$5,000 would only benefit a small number of wealthy and established artists and their estates, which is misaligned with the scheme's objectives.

Not every visual artwork will be covered by the scheme. The Bill defines visual artwork for the purposes of the scheme by first clarifying what art is excluded (a building, literary work, dramatic work, or musical work, as defined in the Copyright Act 1994) and then by clarifying what artworks are included. The examples in the Bill have been chosen to be inclusive of the range of artworks sold in New Zealand and they include specific reference to the “cultural expression of Māori and Pacific peoples” as well as to “ethnic and cultural varieties of the listed artworks”. The Bill provides the flexibility to exclude other forms of artwork further through regulations. This will enable the scheme to respond to any significant developments or changes in artistic practice.

The obligation to pay a resale royalty arises at the time when a visual artwork is sold on the secondary art market through a transaction involving an art market professional or a transaction to or from a public museum or public art gallery. For the purposes of the scheme, the Bill defines art market professional as “a person who is in the business of dealing in visual artworks”. The Bill also provides examples of who is considered an art market professional, specifically, auctioneers who specialise in visual artworks, art dealers, and art consultants.

While private resales between 2 or more individuals will not attract a mandatory resale royalty, the Bill provides for those involved in those sales to opt-in to the scheme and voluntarily choose to pay a resale royalty of an amount of their choosing. Stakeholder engagement found a strong interest in enabling parties of private resales to opt in to the scheme voluntarily as works by certain groups, such as Māori, Pacific, and female artists, are more likely to be resold privately. Enabling parties of private resales to opt in seeks to help address current inequities in secondary art market sales.

Payment of resale royalty

Resale royalties will be payable to living artists or to those entitled under a deceased artist's will (or their successors). The rate of the resale royalty will be an additional flat 5% of the resale price (excluding any fees such as buyer's premium, seller's commission, duty, or tax charged under the Goods and Services Tax Act 1985). A 5% royalty rate seeks to strike a balance between ensuring that royalties go to artists and not placing too large a financial burden on buyers, sellers, and art market professionals. A flat percentage royalty was chosen, rather than a sliding scale with brackets for different rates as in the United Kingdom scheme, because a flat percentage is simpler to administer and is more future-proofed because the dollar brackets would need to be adjusted for inflation.

In contrast to the United Kingdom and many European Union countries (but in line with the Australian scheme), there will be no cap on the maximum royalty payable. This acknowledges that artworks in New Zealand do not sell for the high prices seen in the United Kingdom and European Union markets. It will also be an essential factor in the scheme ultimately becoming self-sustaining as the collection agency will rely on the administrative fees taken from higher-value sales to meet the costs of collecting and distributing royalty payments from lower-value sales.

A resale royalty will always be collected on eligible resales and the right holder cannot opt out of the royalty being collected. However, the right holder can choose to decline to receive a resale royalty payment if they do not wish to interact with the scheme. Always collecting a royalty on eligible resales will prevent art market professionals from pressuring artists to opt out of the scheme as a condition of sale and also assist in protecting the long-term viability of the scheme because an administrative fee will always be collected. In the event that a royalty payment is declined, that royalty payment would go into a cultural fund for the purposes of supporting visual artists' career sustainability. In that way, the

cultural fund seeks to provide a mechanism to ensure that declined royalty payments are still redistributed to benefit the artistic community. Further details of the fund will be set out in regulations.

The seller, together with the art market professional involved in the sale, will be jointly and severally liable for payment of a resale royalty (or, if there is no art market professional, for example, with a sale between a private individual and a public museum or public art gallery, the seller and the buyer will be liable). Liability to pay a resale royalty will arise on the completion of the resale. Joint liability aligns with the United Kingdom and Australian schemes and spreads the financial burden of the royalty payment. Joint liability also means that, in the event of non-compliance, there are multiple parties who are liable for enforcement action.

Management of resale royalty scheme

A single, non-governmental collection agency will be authorised to manage the resale right, including the collection and distribution of resale royalties on behalf of artists. A non-governmental organisation (**NGO**) is commonly assigned to this role in many overseas schemes (including in Australia and the United Kingdom) as it enables the scheme to be administered independently of government. It also enables NGOs with existing systems, processes, and expertise in collecting royalties (which government does not have) to take on the role. Unlike the United Kingdom market, the New Zealand secondary art market is not large enough to sustain more than 1 agency so the Bill stipulates that there may be only 1 collection agency.

Only the collection agency will be entitled to receive information on any resale in order to secure payment of royalties, and it must treat this information as confidential in accordance with the Privacy Act 2020. Art market professionals will be required to provide relevant information on resales to the collection agency so that the agency can determine whether a royalty is payable and, if so, how much and to whom. If no art market professional is involved in the resale, then the public museum or art gallery must provide the relevant information. For private resales among those who opt in to the scheme, the individuals involved in the private resale are responsible for providing relevant information to the collection agency.

The Bill devolves power to Ministers to determine the instrument of appointment of the collection agency and the terms and conditions of the appointment. Ministers will also be able to revoke the appointment of the collection agency if it is determined that the agency is not meeting its obligations or that the agency no longer wants to act as the collection agency. The collection agency will be monitored by Manatū Taonga Ministry for Culture and Heritage, which has the necessary sector expertise and monitoring experience.

As the collection agency is an NGO, the Bill does not prescribe how it must operate. However, the Bill sets out the following principles to guide the collection agency's operation, which stipulate that the agency must—

- operate in a way that is transparent, accountable, and respectful; and
- act in the best interests of the artists and their estates whose royalties it collects; and
- in carrying out its functions and duties,—
 - acknowledge and respect the role of Māori as tangata whenua and provide culturally appropriate support to Māori artists; and
 - be inclusive of, and recognise the different needs of, all peoples in New Zealand.

In return for managing the scheme, the collection agency is entitled to charge a fixed administrative fee or percentage of the royalty, with the process for setting this fee to be outlined in regulations. Regulations will also provide detail on the collection agency's operation including—

- the manner in which the agency must collect, hold, and distribute resale royalties; and
- the representation of rights holders in the management of the agency; and
- the disclosure of the financial affairs of the agency; and
- access to, and disclosure of, records held by the agency; and
- how the agency must gather, hold, and disclose that information; and

- any other matters relating to the conduct or operation of the agency.

Enforcement

Enforcement provisions will provide a mechanism in the event of non-compliance by parties who have obligations under the scheme. Non-payment of resale royalties and failure to provide information as required under the Act will be subject to civil proceedings. Civil proceedings under the Act can be pursued only by the collection agency, on behalf of the right holder. However, this would not prevent a right holder taking court action independently to enforce their right.

A court may make orders compelling the provision of necessary information to the collection agency or the payment of a resale royalty. Nothing in this Bill would affect any other power of a court.

Commencement of legislation

The Bill states the legislation will come into force on a date set through Order in Council, with this date to be no later than 1 December 2024. The date is to be set through Order in Council because the legislation cannot commence until a collection agency has been appointed and relevant systems and processes are in place for the scheme to begin operating. A commencement date of no later than 1 December 2024 will ensure that the legislation is in force within the timeframes required by the NZ–UK FTA.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p><i>Post-Implementation Review – Resale Royalty Right for Visual Artists Act 2009 and the Resale Royalty Scheme</i>, Office for the Arts, Australian Department of Infrastructure, Transport, Regional Development, Communications and the Arts, December 2019 https://www.arts.gov.au/documents/post-implementation-review-resale-royalty-right-visual-artists-act-2009-and-resale-royalty-scheme</p> <p><i>Artist’s resale right – summary of IPO survey findings</i>, UK Government Intellectual Property Office, April 2014 https://www.gov.uk/government/consultations/artists-resale-right-evidence-gathering</p> <p><i>The Economic Implications of the Artist’s Resale Right</i>, Joelle Farchy, Kathryn Grady, Fred and Rita Richman, World Intellectual Property Office, November 2017 https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=389676</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	YES
<p>This Bill seeks to give effect to New Zealand’s obligations under:</p> <ul style="list-style-type: none"> • Article 17.46 of the New Zealand–United Kingdom Free Trade Agreement • Article 18.14 of the New Zealand–European Union Free Trade Agreement <p>These agreements both commit New Zealand to introducing an Artist Resale Royalty scheme within two years of the agreement entering into force.</p> <p>https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/new-zealand-united-kingdom-free-trade-agreement/resources/signature</p> <p>https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/new-zealand-european-union-free-trade-agreement/nz-eu-fta-overview-3/</p>	

2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	YES
<p>A National Interest Analysis was prepared to inform an overall examination of New Zealand–United Kingdom Free Trade Agreement. A specific National Interest Analysis was not prepared in relation to New Zealand establishing an Artist Resale Royalty scheme.</p> <p><i>New Zealand – United Kingdom Free Trade Agreement: National Interest Analysis</i>, Ministry of Foreign Affairs and Trade, February 2022. https://www.mfat.govt.nz/assets/Trade-agreements/UK-NZ-FTA/NZ-UK-FTA-National-Interest-Analysis.pdf</p> <p>The National Interest Analysis for the New Zealand–European Union Free Trade Agreement has not yet been completed.</p>	

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p><i>Regulatory Impact Statement: Artist Resale Royalty Scheme</i>, Ministry for Culture and Heritage, August 2022, https://www.treasury.govt.nz/publications/risa/regulatory-impact-statement-artist-resale-royalty-scheme</p> <p>Some information in the Regulatory Impact Statement is withheld consistent with section 9(2)(f)(iv) of the Official Information Act 1982. This is because some decisions are yet to be made by Ministers and Cabinet and so this information is withheld to protect the confidentiality of advice tendered by Ministers of the Crown and officials.</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
<p>The Regulatory Impact Statement (RIS) identified above did not meet the threshold for receiving an independent opinion on the quality of the RIS from the RIA team based in the Treasury.</p> <p>A cross-agency Quality Assurance Panel from the Ministry for Culture and Heritage and the Department of Internal Affairs reviewed the RIS and considered it meets the quality assurance criteria set out in the RIS framework.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	YES
<p>The definitions of 'visual artwork' and 'art market professional' for the purposes of the scheme were not addressed in the Regulatory Impact Statement. This is because these terms were originally to be defined in supporting regulations rather than the Bill. Following advice from the Parliamentary Counsel Office and the Legislation Design Advisory Committee, these terms are now defined in the Bill.</p>	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
<p>The Ministry for Culture and Heritage has worked with two sector advisory groups to define 'visual art' and 'art market professional' so these terms can be included in the Bill in a way which future-proofs the scheme while still ensuring it can operate effectively. The work of these two groups has strongly informed the definitions included in the Bill.</p> <p>The two groups (a General Advisory Group and a Māori Advisory Group) included the expertise and perspectives of artists (including Māori and Pacific artists), art market professionals, art law experts, the museums and galleries sector, and the royalty collection sector.</p> <p>The Treasury's Regulatory Impact Analysis team has determined that the proposal to include the definitions of visual art and art market professional in the Bill is exempt from the requirement to provide a RIS on the grounds that it has no or only minor impacts on businesses, individuals, and not-for-profit entities.</p>	

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
The potential costs and benefits of this Bill are provided in the Regulatory Impact Statement which can be accessed at https://www.treasury.govt.nz/publications/risa/regulatory-impact-statement-artist-resale-royalty-scheme	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
Information on the level of effective compliance and the nature and level of regulatory effort can be found in the Regulatory Impact Statement which can be accessed at https://www.treasury.govt.nz/publications/risa/regulatory-impact-statement-artist-resale-royalty-scheme	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

This Bill is consistent with New Zealand's international obligations under the Free Trade Agreements with the United Kingdom and the European Union which each require the introduction of an Artist Resale Royalty scheme.

Both Free Trade Agreements require that the resale right be inalienable, that it will apply to all acts of resale involving any sellers, buyers or intermediaries acting in the course of business of dealing artworks. The Free Trade Agreement with the UK also requires that the resale right be reciprocal. This Bill is consistent with those requirements.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Ministry for Culture and Heritage considered the Treaty of Waitangi implications of an Artist Resale Royalty scheme in New Zealand including how policy proposals aligned with the Articles of the Treaty. Te Puni Kōkiri and Te Arawhiti were consulted on the policy proposals and their feedback incorporated. The Ministry also consulted the Treaty Provisions Oversight Group.

The Ministry conducted targeted engagement in 2022 with key Māori stakeholders including Māori artists, galleries, representative bodies such as Toi Māori Aotearoa and Toi Iho Charitable Trust, and Māori art and legal experts. Over 30 prominent Māori artists also approached the Ministry expressing their support for a New Zealand Artist Resale Royalty scheme.

The Regulatory Impact Statement provides further information on consideration of the Treaty of Waitangi implications of the Artist Resale Royalty scheme and can be accessed at <https://www.treasury.govt.nz/publications/risa/regulatory-impact-statement-artist-resale-royalty-scheme>

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

NO

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:

(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?

NO

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?

NO

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	NO

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>External stakeholders have been consulted extensively on the policy proposals to be given effect by this Bill. This includes through the select committee consideration on the discharged 2008 Bill, extensive stakeholder engagement in 2019-20, and targeted engagement in 2022 on policy proposals.</p> <p>Appendix 2 of the Regulatory Impact Statement provides a summary of key stakeholder views and external consultation from 2007 to 2022 and can be accessed at https://www.treasury.govt.nz/publications/risa/regulatory-impact-statement-artist-resale-royalty-scheme</p> <p>Stakeholders will be further consulted on the policy proposals for the supporting regulations for the legislation including through a proposed public consultation process in April-May 2023.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>Many of the policy details of this Bill are based closely on policy settings within the UK and Australian Artist Resale Royalty schemes. The UK scheme has been operational since 2006 and the Australian scheme since 2010 and they have provided some indication of how the policy details of the New Zealand scheme may operate. However, it is acknowledged the UK and Australian secondary art markets are different and, therefore, the New Zealand scheme may have different impacts in the New Zealand context.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO

4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO