



Resale Royalty Right for Visual Artists Act 2009

No. 125, 2009

**An Act to create a right to resale royalty in relation
to artworks, and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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Resale Royalty Right for Visual Artists Act 2009

No. 125, 2009

**An Act to create a right to resale royalty in relation
to artworks, and for related purposes**

[Assented to 9 December 2009]

The Parliament of Australia enacts:

Resale Royalty Right for Visual Artists Act 2009 No. 125, 2009 1

Section 1

Part 1—Preliminary

1 Short title

This Act may be cited as the *Resale Royalty Right for Visual Artists Act 2009*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	9 December 2009
2. Sections 3 to 5	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	9 June 2010
3. Part 2	At the same time as the provisions covered by table item 2.	9 June 2010
4. Part 3	The day on which this Act receives the Royal Assent.	9 December 2009
5. Parts 4 and 5	At the same time as the provisions covered by table item 2.	9 June 2010
Note:	This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.	

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Definitions

In this Act:

art market professional has the meaning given by subsection 8(3).

artwork has the meaning given by section 7.

buyer, in relation to the commercial resale of an artwork, means a person to whom, either alone or together with one or more other persons, ownership of the artwork is transferred under the commercial resale.

civil penalty provision has the meaning given by section 40.

collecting society means the society for the time being appointed as the collecting society under section 35.

commercial resale has the meaning given by section 8.

community body means a body (whether incorporated or unincorporated) established by a community for the purposes of supporting or promoting the welfare or cultural values of the community.

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Federal Court means the Federal Court of Australia.

GST has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999*.

identified, in relation to an artist of an artwork, has the meaning given by section 13.

permanent resident means a person:

- (a) who is not an Australian citizen; and

Section 4

- (b) whose normal place of residence is situated in Australia; and
- (c) whose presence in Australia is not subject to any limitation as to time imposed by law; and
- (d) who is not an unlawful non-citizen.

personal information has the same meaning as in the *Privacy Act 1988*.

resale royalty right has the meaning given by section 6.

residency test has the meaning given by section 14.

rules, in relation to the collecting society, means the provisions of the memorandum and articles of association of the society.

seller, in relation to the commercial resale of an artwork, means a person who, either alone or together with one or more other persons, transfers ownership of the artwork under the commercial resale.

succession test has the meaning given by section 15.

time of a commercial resale is the earlier of:

- (a) the start of the day on which ownership of the artwork is transferred under the commercial resale; and
- (b) the start of the day on which consideration for the commercial resale is fully paid.

unlawful non-citizen has the same meaning as in the *Migration Act 1958*.

works of visual art has a meaning affected by subsection 7(2).

4 Act binds the Crown

- (1) This Act binds the Crown in each of its capacities.
- (2) This Act does not make the Crown liable to a pecuniary penalty or to be prosecuted for an offence.
- (3) The protection in subsection (2) does not apply to an authority of the Crown.

5 External Territories

This Act extends to all the external Territories.

Part 2 Resale royalty right

Division 1 When does resale royalty right arise?

Section 6

Part 2—Resale royalty right

Division 1—When does resale royalty right arise?

6 Resale royalty right

Resale royalty right is the right to receive resale royalty on the commercial resale of an artwork.

7 What is an *artwork*?

- (1) An *artwork* is an original work of visual art that is either:
 - (a) created by the artist or artists; or
 - (b) produced under the authority of the artist or artists.
- (2) *Works of visual art* include, but are not limited to, the following:
 - (a) artists' books;
 - (b) batiks;
 - (c) carvings;
 - (d) ceramics;
 - (e) collages;
 - (f) digital artworks;
 - (g) drawings;
 - (h) engravings;
 - (i) fine art jewellery;
 - (j) glassware;
 - (k) installations;
 - (l) lithographs;
 - (m) multimedia artworks;
 - (n) paintings;
 - (o) photographs;
 - (p) pictures;
 - (q) prints;
 - (r) sculptures;

- (s) tapestries;
- (t) video artworks;
- (u) weavings;
- (v) any other things prescribed by the regulations.

8 What is *commercial resale* of an artwork?

- (1) There is a ***commercial resale*** of an artwork if:
 - (a) ownership of the artwork is transferred from one person to another for monetary consideration; and
 - (b) the transfer is not the first transfer of ownership of the artwork; and
 - (c) the transfer is not otherwise one of an excluded class.
- (2) The transfer of ownership of an artwork from one individual to another in circumstances that do not involve an art market professional acting in that capacity, is an excluded class of transfer.
- (3) ***Art market professional*** means:
 - (a) an auctioneer; or
 - (b) the owner or operator of an art gallery; or
 - (c) the owner or operator of a museum; or
 - (d) an art dealer; or
 - (e) a person otherwise involved in the business of dealing in artworks.

9 No resale royalty right on certain works

There is no resale royalty right on the commercial resale of:

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

Part 2 Resale royalty right

Division 1 When does resale royalty right arise?

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10 No resale royalty right unless consideration above threshold

Threshold

- (1) There is no resale royalty right on the commercial resale of an artwork for a sale price of less than:
 - (a) \$1,000 or, if the sale price is paid in a foreign currency, the amount worked out using the exchange rate applicable at the time of the commercial resale that is equivalent to \$1,000; or
 - (b) if a higher amount is prescribed by the regulations—that higher amount.

Definition of sale price

- (2) The *sale price* on the commercial resale of an artwork means the amount paid for the artwork by the buyer on the commercial resale including GST, but does not include any buyer's premium or other tax payable on the sale.

11 Resale royalty right on artworks in existence when Act commences

If an artwork exists on the commencement of this Part, there is no resale royalty right on the first transfer of ownership of the artwork on or after commencement, even if the transfer of ownership is under a commercial resale.

Division 2—Who holds resale royalty right?

12 Who holds resale royalty right?

Artwork created by a single living artist

- (1) If an artwork was created by a single artist who is identified and living at the time of a commercial resale of the artwork, resale royalty right on the commercial resale is held by the artist, provided he or she satisfies the residency test at the time of the commercial resale.

Artwork created by a single artist who is no longer living

- (2) If an artwork was created by a single artist who is identified but no longer living at the time of a commercial resale of the artwork and who satisfied the residency test immediately before his or her death, resale royalty right on the commercial resale is held by:
 - (a) if there is only one successor in title to the right—that entity, provided the entity satisfies the residency test at the time of the commercial resale and the succession test; and
 - (b) if there is more than one successor in title to the right—each of those entities that satisfies the residency test at the time of the commercial resale and the succession test.

Artwork created by more than one artist

- (3) If an artwork was created by more than one artist, resale royalty right on a commercial resale of the artwork is held by:
 - (a) for each artist who is living at the time of the commercial resale—the artist, provided he or she is identified and satisfies the residency test at that time; and
 - (b) for each artist who is identified but no longer living at the time of the commercial resale, who satisfied the residency test immediately before his or her death, and through whom there is only one successor in title to the right—that entity, provided the entity satisfies the residency test at the time of the commercial resale and the succession test; and

Part 2 Resale royalty right

Division 2 Who holds resale royalty right?

Section 13

- (c) for each artist who is identified but no longer living at the time of the commercial resale, who satisfied the residency test immediately before his or her death and through whom there is more than one successor in title to the right—each of those entities that satisfies the residency test at the time of the commercial resale and the succession test.

Later successors in title

- (4) If an entity holds an interest in the resale royalty right on the commercial resale of an artwork by operation of subsection (2) or (3), or by an earlier operation of this subsection, but the entity is dead or has been wound up at the time of the next commercial resale of the artwork, resale royalty right is held on the next commercial resale of the artwork by:
 - (a) if there is only one successor in title to the right—that entity, provided it satisfies the residency test at the time of the next commercial resale and the succession test; and
 - (b) if there is more than one successor in title to the right—each of those entities that satisfies the residency test at the time of the next commercial resale and the succession test.

13 Meaning of *identified*

- (1) 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 as an artist of the artwork is known to:
 - (a) a seller of the artwork under the commercial resale; or
 - (b) a buyer of the artwork under the commercial resale; or
 - (c) any art market professional acting as the agent of a buyer or a seller of the artwork under the commercial resale; or
 - (d) the collecting society; or
 - (e) in the case of an artwork for which there is more than one artist—another artist of the artwork.
- (2) A person is *identified* as an artist of an artwork at any other time if, at that time, the person's identity as an artist of the artwork is known to:
 - (a) the collecting society; or

- (b) in the case of an artwork for which there is more than one artist—another artist of the artwork.

14 Residency test

- (1) An individual satisfies the *residency test* at a particular time if, at that time, the individual is:
 - (a) an Australian citizen; or
 - (b) a permanent resident of Australia; or
 - (c) a national or citizen of a country prescribed as a reciprocating country.
- (2) A corporation satisfies the *residency test* at a particular time if:
 - (a) it is incorporated under the *Corporations Act 2001*, or under the law of a country prescribed as a reciprocating country; or
 - (b) it carries on an enterprise, at that time, in Australia or a country prescribed as a reciprocating country.
- (3) An unincorporated body satisfies the *residency test* at a particular time if it carries on an enterprise, at that time, in Australia or a country prescribed as a reciprocating country.

15 Succession test

- (1) An entity satisfies the *succession test* in relation to resale royalty right on the commercial resale of an artistic work, if the entity satisfies:
 - (a) criteria 1 and 2 (in subsections (2) and (3)); or
 - (b) criteria 3 and 4 (in subsections (4) and (5)).

Criterion 1

- (2) The entity received its interest in the right by testamentary disposition, or in accordance with the rules of intestate succession, on the death of an individual.

Criterion 2

- (3) The entity is one of the following:
 - (a) an individual with a beneficial interest in the right;

Part 2 Resale royalty right

Division 2 Who holds resale royalty right?

Section 16

- (b) a charity or charitable institution with a beneficial interest in the right;
- (c) a community body with a beneficial interest in the right;
- (d) a person who holds an interest in the right in trust for:
 - (i) an individual; or
 - (ii) a charity or charitable institution; or
 - (iii) a community body.

Criterion 3

- (4) The entity received its interest in the right on the winding up of a charity, charitable institution or a community body.

Criterion 4

- (5) The entity is a charity, charitable institution or a community body formed for substantially the same purposes as the body that was wound up.

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

Where there is more than one artist and they are all living

- (1) If all of the holders of the resale royalty right on the commercial resale of an artwork are artists of the artwork, each artist is entitled to an equal share of the resale royalty on that commercial resale, unless:
 - (a) the artists have agreed to apportion shares in the resale royalty differently; and
 - (b) that agreement does not give a share of the resale royalty to any other person (other than through testamentary disposition or in accordance with the rules of intestate succession on the death of an artist).

Where more than one artist, but one is no longer living

- (2) If:
 - (a) there is more than one artist of an artwork; and
 - (b) one of the artists is identified but no longer living at the time of a commercial resale of the artwork; and

- (c) the artist satisfied the residency test immediately before his or her death;

it is the share of the resale royalty on the commercial resale of the artwork to which the artist would have been entitled had the artist been alive, identified and satisfied the residency test at the time of the commercial resale that passes to those holding resale royalty right on the commercial resale of the artwork through that artist.

17 Presumptions in relation to artist

If a mark or name purporting to identify a person as an artist of an artwork appears on the artwork, then the presence of the mark or name is taken to be prima facie evidence for the purposes of this Act that:

- (a) in a case where there is no other such mark or name on the artwork—the person is the artist of the artwork; and
- (b) in a case where there is another such mark or name on the artwork—the person is one of the artists of the artwork.

Part 2 Resale royalty right

Division 3 Rate of resale royalty

Section 18

Division 3—Rate of resale royalty

18 Rate of resale royalty

Resale royalty is payable at the rate of 5% of the sale price on the commercial resale of an artwork.

Division 4—Liability to pay resale royalty

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

Resale royalty on the 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.

20 Liability to pay resale royalty

The following persons are jointly and severally liable to pay resale royalty on the commercial resale of an artwork:

- (a) the seller or, if there is more than one seller, all of the sellers; and
- (b) each person acting in the capacity of an art market professional and as agent for the seller; and
- (c) if there is no such agent—each person acting in the capacity of an art market professional and as agent for the buyer; and
- (d) if there are no such agents—the buyer or, if there is more than one buyer, all of the buyers.

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.

Division 5—Collecting resale royalty

22 Collecting society to publish notice of the commercial resale of an artwork on its website

If:

- (a) the collecting society becomes aware of the commercial resale of an artwork; and
- (b) the collecting society believes, on reasonable grounds, that an entity may hold resale royalty right, or an interest in the resale royalty right, on the commercial resale under this Act;

the collecting society must, as soon as it is reasonably practicable after becoming aware of the commercial resale of the artwork, publish notice of the commercial resale on its website.

23 Collection of resale royalty by the collecting society

- (1) This section applies unless:
 - (a) the holder of the resale royalty right on the commercial resale of an artwork; or
 - (b) if there is more than one holder of the resale royalty right on the commercial resale of an artwork—all the holders of the resale royalty right on the commercial resale of the artwork; notify the collecting society in writing, within 21 days after notice of the commercial resale is published on the collecting society's website, that the collecting society is not to collect the resale royalty, or enforce the resale royalty right, on the commercial resale on behalf of the holder or holders of the right.
- (2) The collecting society must use its best endeavours to collect the resale royalty payable under this Act, and, if necessary, enforce any resale royalty right held under this Act, on the commercial resale of the artwork on behalf of the holder or holders of the resale royalty right.

- (3) The collecting society is not subject to the direction of any holder or holders of the resale royalty right in collecting the resale royalty or enforcing that right.

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

In proceedings for the enforcement of the resale royalty right on the commercial resale of an artwork by the collecting society:

- (a) it is to be presumed conclusively that there is at least one holder of the resale royalty right under this Act; and
- (b) it is to be presumed that the collecting society is acting on behalf of the holder or holders of the resale royalty right, unless it is proved that a notice was given to the collecting society in accordance with subsection 23(1) in relation to the commercial resale.

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

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.

26 If resale royalty is paid to the collecting society

- (1) If resale royalty on the commercial resale of an artwork is paid to the collecting society, the collecting society must:
- (a) pay to each entity that has given the collecting society notice under subsection 27(1) and established a claim to a share of the resale royalty on the commercial resale, that entity's share of the resale royalty less the collecting society's administration fee; and
 - (b) 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 subsection 27(1), and pay that holder the holder's share of the resale royalty, less the collecting society's administration fee.

Part 2 Resale royalty right

Division 5 Collecting resale royalty

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- (2) The collecting society's administration fee must not be such as to amount to a tax.
- (3) The Minister may, by notice in writing given to the collecting society, limit the administration fee to be imposed by the collecting society.
- (4) A notice given under subsection (3) is not a legislative instrument.

27 Notice of resale royalty right

- (1) An entity that claims to hold a resale royalty right, or an interest in a resale royalty right, under this Act may give the collecting society written notice in the manner and form approved by the collecting society setting out:
 - (a) the entity's name; and
 - (b) the entity's address; and
 - (c) the proportion of the resale royalty right to which the entity claims that it is entitled; and
 - (d) details of the basis on which the entity makes that claim.
- (2) The collecting society may, by written notice, request an entity that has given the society notice under subsection (1) to provide further information in support of the claim within a specified time of no less than 60 days.

28 Notice of commercial resale

- (1) A person must give the collecting society notice complying with subsection (2) of the commercial resale of an artwork if:
 - (a) the person is a seller under the commercial resale; and
 - (b) the person is:
 - (i) an Australian citizen; or
 - (ii) a permanent resident of Australia; or
 - (iii) a corporation incorporated under the *Corporations Act 2001*; or
 - (iv) a person (including a body corporate) who carries on an enterprise in Australia; or

- (v) a trustee of a trust of which one of the persons mentioned in subparagraphs (i) to (iv) (inclusive) is a beneficiary.

Civil penalty:

- (a) for an individual—200 penalty units;
 - (b) for a body corporate—1,000 penalty units.
- (2) The notice must:
- (a) be in writing; and
 - (b) be given to the collecting society within the period of 90 days beginning at the time of the commercial resale; and
 - (c) include sufficient detail to allow the collecting society:
 - (i) to work out whether resale royalty is payable on the commercial resale under this Act; and
 - (ii) to work out the amount of resale royalty payable under this Act; and
 - (iii) to identify who is liable to pay the resale royalty.
- (3) The seller may satisfy the requirement to give notice in accordance with this section through an agent.
- (4) If:
- (a) there is more than one seller under the commercial resale of an artwork; and
 - (b) one of the sellers gives the collecting society notice in accordance with this section;
- then all of the sellers are taken to have given the collecting society notice in accordance with this section.
- (5) A person who wishes to rely on subsection (3) or (4) bears an evidential burden in relation to those matters.

29 Requesting information about the commercial resale of an artwork

- (1) If the collecting society believes on reasonable grounds that a person is:
- (a) a seller under a commercial resale of an artwork; or

Part 2 Resale royalty right

Division 5 Collecting resale royalty

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- (b) a buyer under a commercial resale of an artwork; or
- (c) an agent of a seller or buyer under a commercial resale of an artwork; or
- (d) an art market professional otherwise involved in a commercial resale of an artwork;

the collecting society may, in writing, request the person to give the collecting society information in relation to the commercial resale relevant to determining:

- (e) the amount of any resale royalty payable on the commercial resale under this Act; and
- (f) who is liable to make the payment.

(2) If:

- (a) a request is made to a person in accordance with subsection (1); and
- (b) the commercial resale in relation to which the request was made occurred within 6 years before the request was made;

the person must comply with the request within 90 days after it is given.

Civil penalty:

- (a) for an individual—100 penalty units;
- (b) for a body corporate—500 penalty units.

30 Recovery of amount wrongly paid by the collecting society

- (1) If the collecting society pays resale royalty on the commercial resale of an artwork 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.
- (2) If the collecting society pays a holder of resale royalty right on the commercial resale of an artwork more than that holder's share of the resale royalty on that 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.

- (3) A holder of the resale royalty right on the commercial resale, or an interest in that right, of an artwork may request the collecting society to collect, or enforce repayment of, an amount under this section on the holder's behalf.
- (4) The collecting society may, if requested to do so by a holder of the resale royalty right or an interest in the right, 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.

31 Return of unclaimed resale royalty

- (1) If:
 - (a) resale royalty is paid to the collecting society on the commercial resale of an artwork; and
 - (b) despite using its best endeavours, the collecting society is unable to locate a holder of the resale royalty right on the commercial resale or an interest in the right during a period of 6 years beginning at the time of the commercial resale; the collecting society must deal with that holder's share of the resale royalty together with interest earned on that share less the collecting society's administration fee, in accordance with subsection (2).
- (2) The collecting society must:
 - (a) distribute the amount in equal shares to those of the remaining holders of the resale royalty right who can be located; or
 - (b) if no such person can be located—distribute the amount in equal shares to the persons who paid the resale royalty and who can be located; or
 - (c) if no such person can be located—retain the amount for use in the collection and distribution of resale royalties and the enforcement of resale royalty rights.

Division 6—Other characteristics of resale royalty right

32 Duration of resale royalty right

Resale royalty right continues to subsist in relation to an artwork until the end of 70 years after:

- (a) if there is only one artist of the artwork—the end of the calendar year in which the artist dies; or
- (b) if there is more than one artist of the artwork then, in relation to the proportion of the resale royalty right held by or through a particular artist—the end of the calendar year in which the artist dies.

33 Resale royalty right absolutely inalienable

Except to the extent permitted under the succession test, resale royalty right is absolutely inalienable, whether by way of, or in consequence of, sale, assignment, charge, execution, bankruptcy, insolvency or otherwise.

34 Waiver etc.

- (1) A waiver of a resale royalty right is of no effect.
- (2) An agreement to share or repay a resale royalty, other than an agreement mentioned in paragraph 16(1)(b), is void.

Part 3—The collecting society

35 Appointment of the collecting society

- (1) A body may apply to the Minister to be appointed as the collecting society.
- (2) After receiving the application, the Minister must do one of the following:
 - (a) appoint the body to be the collecting society, by notice in the *Gazette*, for a period not exceeding 5 years specified in the notice;
 - (b) refuse to appoint the body to be the collecting society.
- (3) Only one body may be appointed to be the collecting society at a time. A body must not be appointed to be the collecting society while another body is appointed to be the collecting society.
- (4) The Minister must not appoint a body to be the collecting society unless:
 - (a) it is a company limited by guarantee and incorporated under the *Corporations Act 2001*; and
 - (b) all resale royalty right holders are entitled to become its members; and
 - (c) its rules prohibit the payment of dividends to its members; and
 - (d) its rules contain provisions of the kind determined by legislative instrument by the Minister, 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

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- (iv) access to records of the society by holders of resale royalty rights and their agents.

36 Revocation of appointment

- (1) This section applies if:
 - (a) the Minister is satisfied that the body appointed as the collecting society:
 - (i) is not functioning adequately as the collecting society; or
 - (ii) is not acting in accordance with its rules or in the best interests of those of its members who are resale royalty holders; or
 - (iii) has altered its rules so that they no longer comply with paragraphs 35(4)(b) to (d); or
 - (iv) has refused or failed, without reasonable excuse, to comply with section 37 or 38; or
 - (b) the body appointed as the collecting society requests the Minister, in writing, to revoke the appointment and the Minister is satisfied that it is in the best interests of those holding resale royalty rights to do so.
- (2) The Minister may, by notice in the *Gazette*, revoke the appointment.
- (3) The revocation takes effect on the day on which the notice is published in the *Gazette* or, if a later day is specified in the notice, on that later day.

37 Annual report and accounts

- (1) The collecting society must, as soon as practicable after the end of each financial year ending on or after 30 June 2010, prepare a report of its operations during that financial year and send a copy of the report to the Minister.
- (2) The collecting society must not include in that report any information that the society is satisfied:
 - (a) is commercial-in-confidence; or
 - (b) consists of personal information of an individual.

- (3) In satisfying itself whether information to be included in a report is commercial-in-confidence, the society must consider each of the following:
 - (a) whether release of the information would cause competitive detriment to a person;
 - (b) whether the information is in the public domain;
 - (c) whether the information is required to be disclosed under another law of the Commonwealth, a State or a Territory;
 - (d) whether the information is readily discoverable.
- (4) The Minister must cause a copy of the report sent to the Minister under subsection (1) to be laid before each House of the Parliament within 15 sitting days of that House after the receipt of the report by the Minister.
- (5) The society must keep accounting records correctly recording and explaining the transactions of the society (including any transactions as trustee) and the financial position of the society.
- (6) The accounting records must be kept in such a manner as will enable true and fair accounts of the society to be prepared from time to time and those accounts to be conveniently and properly audited.
- (7) The society must, as soon as practicable after the end of each financial year, cause its accounts to be audited by an auditor who is not a member of the society, and must send to the Minister a copy of its accounts as so audited.
- (8) The society must give its members reasonable access to copies of all reports and audited accounts prepared under this section.
- (9) This section does not affect any obligations of the society relating to the preparation and lodging of annual returns or accounts under the law under which it is incorporated.

38 Amendment of rules

The collecting society must, within 21 days after it alters its rules, send a copy of the rules as so altered to the Minister, together with

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a statement setting out the effect of the alteration and the reasons why it was made.

Part 4—Civil penalties

Division 1—Obtaining an order for a civil penalty

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

Application for order

- (1) Within 6 years of a person (the *wrongdoer*) contravening a civil penalty provision, the collecting society may apply on behalf of the Commonwealth to the Federal Court or the Federal Magistrates Court for an order that the wrongdoer pay the Commonwealth a pecuniary penalty.

Court may order wrongdoer to pay pecuniary penalty

- (2) If the Court is satisfied that the wrongdoer has contravened a civil penalty provision, the Court may order the wrongdoer to pay to the Commonwealth for each contravention the pecuniary penalty that the Court determines is appropriate (but not more than the relevant amount specified for the provision).

Determining amount of pecuniary penalty

- (3) In determining the pecuniary penalty, the Court must have regard to all relevant matters, including:
 - (a) the nature and extent of the contravention; and
 - (b) the nature and extent of any loss or damage suffered as a result of the contravention; and
 - (c) the circumstances in which the contravention took place; and
 - (d) whether the person has previously been found by a court in proceedings under this Act to have engaged in any similar conduct.

Part 4 Civil penalties

Division 1 Obtaining an order for a civil penalty

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Conduct contravening more than one civil penalty provision

- (4) If conduct constitutes a contravention of 2 or more civil penalty provisions, proceedings may be instituted under this Act against a person in relation to the contravention of any one or more of those provisions. However, the person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.

40 What is a *civil penalty provision*?

A subsection of this Act (or a section of this Act that is not divided into subsections) is a *civil penalty provision* if:

- (a) the words “civil penalty” and one or more amounts in penalty units are set out at the foot of the subsection (or section); or
- (b) another provision of this Act specifies that the subsection (or section) is a civil penalty provision.

41 Contravening a civil penalty provision is not an offence

A contravention of a civil penalty provision is not an offence.

42 Persons involved in contravening civil penalty provision

- (1) A person must not:
- (a) aid, abet, counsel or procure a contravention of a civil penalty provision; or
 - (b) induce (by threats, promises or otherwise) a contravention of a civil penalty provision; or
 - (c) be in any way directly or indirectly knowingly concerned in, or party to, a contravention of a civil penalty provision; or
 - (d) conspire to contravene a civil penalty provision.
- (2) This Part applies to a person who contravenes subsection (1) in relation to a civil penalty provision as if the person had contravened the provision.

43 Recovery of a pecuniary penalty

If the Federal Court or Federal Magistrates Court orders a person to pay a pecuniary penalty:

- (a) the penalty is payable to the Commonwealth; and
- (b) the Commonwealth may enforce the order as if it were a judgment of the Court.

Division 2—Civil penalty proceedings and criminal proceedings

44 Civil proceedings after criminal proceedings

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

45 Criminal proceedings during civil proceedings

- (1) Proceedings for a pecuniary penalty order against a person for a contravention of a civil penalty provision are stayed if:
 - (a) criminal proceedings are started or have already been started against the person for an offence; and
 - (b) the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention.
- (2) The proceedings for the order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings for the order are dismissed.

46 Criminal proceedings after civil proceedings

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 penalty order has been made against the person.

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

Evidence of information given or evidence of production of documents by an individual is not admissible in criminal proceedings against the individual if:

- (a) the individual previously gave the evidence or produced the documents in proceedings for a pecuniary penalty order against the individual for a contravention of a civil penalty provision (whether or not the order was made); and
- (b) the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the contravention.

However, this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order.

Part 5—Miscellaneous

48 Offence—unauthorised dealing with information

- (1) A person commits an offence if:
- (a) the person makes a record of, discloses or otherwise uses information; and
 - (b) the information was acquired by the person in the course of performing functions or exercising powers under this Act.

Penalty: Imprisonment for 2 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (2) This section does not apply if:
- (a) the person records, discloses or otherwise uses the information in the course of performing duties or exercising powers under this Act; or
 - (b) the person acquires the information for any other lawful purpose; or
 - (c) the person to whom the information relates consents to the recording, disclosure or use of the information.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

- (3) A person to whom this section applies must not be required to:
- (a) disclose information that the person acquired in the course of performing functions or exercising powers under this Act to a court; or
 - (b) produce all or part of a document that contains information of that kind to a court;

unless that disclosure or production is necessary for the purposes of this Act. For this purpose, *court* includes any tribunal, authority or person having power to require the production of documents or the answering of questions.

49 Review by Administrative Appeals Tribunal

Applications may be made to the Administrative Appeals Tribunal for a review of a decision of the following kind:

- (a) a decision of the Minister under subsection 35(2) to:
 - (i) appoint a body to be the collecting society; or
 - (ii) refuse to appoint a body to be the collecting society;
- (b) a decision of the Minister to revoke the appointment of a body as the collecting society in circumstances to which section 36 applies because of paragraph 36(1)(a).

50 Jurisdiction of Federal Court

Jurisdiction is conferred on the Federal Court with respect to actions:

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

51 Jurisdiction of the Federal Magistrates Court

Jurisdiction is conferred on the Federal Magistrates Court with respect to actions:

- (a) for the enforcement of resale royalty right on the commercial resale of an artwork; and
- (b) to determine who is the holder, or who are the holders, of a resale royalty right on the commercial resale of an artwork; and

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- (c) to enforce the payment of a share of the resale royalty right on the commercial resale of an artwork from the collecting society; and
- (d) to recover amounts of resale royalty wrongly paid by the collecting society; and
- (e) for the enforcement of civil penalty provisions; and
- (f) relating to any other matters arising under this Act.

52 Additional effect of Act

Without limiting its effect apart from this section, this Act also has the effect it would have if its operation were expressly confined to:

- (a) giving effect to the International Convention for the Protection of Literary and Artistic Works concluded at Berne on 9 September 1886 as revised from time to time; or
- (b) matters external to Australia; or
- (c) matters of international concern.

53 Regulations

The Governor-General may make regulations prescribing matters:

- (a) prescribed or permitted to be prescribed by this Act; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

*[Minister's second reading speech made in—
House of Representatives on 27 November 2008
Senate on 9 September 2009]*

(226/08)

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