

Explanatory Statement

Public Lending Right Act 1985

Public Lending Right Scheme 2016

Issued by the Authority of the Minister for the Arts

Purpose

The purpose of the *Public Lending Right Scheme 2016* (the Scheme) is to set out a process which the Public Lending Right Committee (the Committee) must follow to determine the eligibility of persons to be creators or publishers under the Scheme and specify how payments will be calculated and made to successful claimants. It is made by the Minister for the Arts under subsection 5(1) of the *Public Lending Right Act 1985* (the Act).

The Act provides the legislative framework for the Scheme to, amongst other things, recognise the loss of income by Australian creators and publishers of books held in public lending libraries.

The Committee, established under the Act, has certain functions in relation to the Scheme and provides advice to the Minister on the operation of the Scheme.

This Instrument is a Legislative Instrument for the purposes of the *Legislation Act 2003* (LA).

Details of the Scheme are set out in Attachment 1. The Scheme essentially remakes the *Public Lending Right Scheme 1997*, which is due to sunset on 1 October 2015.

Regulation Impact Statement

The *Public Lending Right Scheme 1997* (a sunset instrument) has been reviewed and the Department has certified that it is working efficiently and effectively, in lieu of a Regulation Impact Statement, consistent with the Government's best practice regulation requirements (OBPR ID: 21121).

Statement of Compatibility with Human Rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out in Attachment 2.

Consultation

No consultation was undertaken on the making of the Scheme as no substantive alterations to the arrangements under the *Public Lending Right Scheme 1997* have been proposed.

Notes on Sections

Part 1 – Preliminary

Section 1 provides that the title of the Instrument is the *Public Lending Right Scheme 2016*.

Section 2 provides that the Instrument commences on the day after it is registered on the Federal Register of Legislation.

Section 2A provides that legislative authority of the Instrument is subsection 5(1) of the Act.

Section 2B provides that this Instrument repeals the *Public Lending Right Scheme 1997*. The 1997 Instrument was due to sunset, however, to avoid any confusion as to when the new (replacement) Instrument comes into operation, this repeal provision has been included.

Section 3 sets out the definitions of key terms used in this Instrument, including the term ‘book’. The definition of ‘book’ is provided to clarify that certain categories of material (such as audio-visual kits, electronic books, magazines and other serial publications), are explicitly excluded from the Scheme. Such exclusions are consistent with the intent of the Act to focus the Scheme on what would commonly be understood as a book.

In addition, material designed for a single use, such as sticker books and workbooks, are also excluded. These kinds of material are not considered to be the types of publications envisaged as being covered by the Act, as they are designed to be used once by one person.

Paragraph (h) of the definition of ‘book’ provides that the Committee may, by determination exclude other material from the Scheme. It is necessary to include such a provision to ensure material which falls outside the intent of the Act can be specifically excluded from the Scheme. The Committee, which is appointed by the Minister under the Act and comprises representatives of Australian authors, of the publishing industry and of the library sector, is considered well placed to determine what material should be excluded from the Scheme.

The Schools Catalogue Information Service, operated by Education Services Australia, is now identified in the definition of an Australian national bibliographic database. This definition has been expanded to ensure that the Scheme captures educational books held in classified libraries that may not have a listing in the national database managed by the National Library of Australia.

Part 2 – Eligibility

Division 1 – Purpose of Part

Section 4 sets out the purpose of Part 2 and has four subsections. The provisions comprising this Part specify that the Committee must determine a claimant’s eligibility in accordance with a set of eligibility criteria under the Scheme as well as the eligibility of the book that is claimed for. The Committee also determines the amount of the payment, if any, for each claim in accordance with the Scheme.

Division 2 – Eligible Creator

Section 5 sets out the eligibility criteria for the creator of a book and has three subsections.

Subsection 5(1) allows the Committee to determine that an individual is the creator of a book.

Subsection 5(2) provides two mandatory criterion for eligibility, namely that the individual is the sole creator of the book, or one of no more than five creators, and that the individual is eligible to receive royalty payments for the sale of copies of the book.

Subsection 5(3) sets out discretionary criteria that the Committee may have regard to when assessing eligibility. These include, whether the creator is named in the book's entry in an Australian bibliographic database, whether the creator has received royalty payments in advance or has a continuing financial interest in the book as well as any other matters the Committee considers relevant. The note accompanying the section reminds readers that the Scheme only applies to creators who are Australian citizens or ordinarily resident in Australia. This reflect subsection 3(2) of the Act.

Division 3 – Eligible Publisher

Section 6 sets out the eligibility criteria for the publisher of a book and has five subsections.

Subsection 6(1) allows the Committee to determine that a person is an eligible publisher of a book.

Subsection 6(2) provides that to be an eligible publisher the person must have published the book in Australia.

Subsection 6(3) provides that to be an eligible publisher the person must be one of the following:

- a person who regularly publishes books in Australia and whose business consists, at least substantially, of the publication of books; or
- a person who owns or controls a business that, at least substantially, consists of publishing books; or
- a person who is a creator of a book; or
- a non-profit Australian organisation that published the book claimed for to advance its aims or objectives.

Subsection 6(4) and 6 (5) provide that to be an eligible publisher you must have published at least one new book or edition in the three years preceding the claim. Reprints will not count towards this requirement.

Section 7 explicitly provides that the Commonwealth, a State, and a Territory are not eligible publishers. This extends to any authorities, other than educational institutions, created under the laws of the Commonwealth, or a State or a Territory.

Subsection 8(1) outlines the matters the Committee may take into account when determining whether a person has published a book. These include (without limitation):

- the contract for publication
- who copy-edited the book
- who designed the book
- who supervised production of the book
- who supervised the printing of the book
- who marketed the book
- who assumes financial responsibility for publication.

Subsection 8(2) outlines the matters the Committee may take into account when determining whether a book has been published in Australia. These include (without limitation):

- where the contract for publication was made
- where the book was copy-edited
- where the book was designed
- where production of the book was supervised
- where the printing of the book was supervised
- where the book was marketed.

The factors listed in section 8 are intended to be practical and demonstrable examples of activities undertaken by publishers to publish a book.

Section 9 has five subsections that deal with the status of eligible publishers following certain events.

Subsection 9(1) provides that a person's status as an eligible publisher is not affected because a subsequent edition of the book is published.

Subsection 9(2) effectively provides that the status is also not affected if, for example, the publisher does not hold the rights to publish a subsequent edition of a book.

Subsections 9(3) and 9(4) state that an eligible publisher of an eligible book ceases to be an eligible publisher if the rights to publish the book are transferred to another publisher and the Committee decides that the new publisher has taken on the function of publishing the book in Australia. The former publisher ceases to be the eligible publisher of the eligible book from the date of transfer.

Subsection 9(5) sets out the requirements for a new publisher to make a claim for the eligible book. A note is included to remind readers of subsection 21(3) which deals with the scenario where a new publisher becomes the eligible publisher for an eligible book that has already been claimed for.

Division 4 – Eligible Book

Section 10 has three subsections that set out the eligibility criteria for a book under the Scheme. Subsection 10(1) states that an eligible book is a book that has:

- been allocated an International Standard Book Number (ISBN);
- been published and offered for sale, an identifiable creator or creators (not exceeding five);
- a catalogue record in an Australian bibliographic database;
- a minimum print run as determined by the Committee.

It is noted in the Scheme that books without an ISBN will still be considered an eligible book in certain circumstances.

Subsection 10(2) states that a book is not eligible if a claim under the Scheme was not lodged within five years of publication.

Subsection 10(3) states that the reprint of a book does not entitle a person to make a claim if they were already out of time under subsection 10(2).

The purpose of this requirement is to maximise the effectiveness of the Scheme to benefit claimants, as public lending libraries regularly turn over their book stocks, including removing older publications.

Part 3 – Numbers of books

Section 11 deals with estimating the number of copies of an eligible book held in classified libraries. The Committee must estimate the number of copies of books held in classified libraries annually, using library records and statistical sampling and estimation processes the Committee considers appropriate (subsection 11(2)). The approach taken by the Committee to estimate book holdings is to conduct surveys each year in a sample of classified libraries across Australia.

Subsection 11(3) states that if the survey estimates that less than 50 copies of a book are held in classified libraries across Australia, then the Committee is not required to make another estimate. The Committee must also notify all relevant claimants of the outcome of the estimate, and that no further estimates will be conducted and that they are ineligible for a payment under the Scheme.

Subsection 11(4) provides that the Committee may make another estimate of copies of the book should the book be reprinted or there be any other circumstances which occur that may affect the numbers of copies of books available in classified libraries. It is the responsibility of the claimant to inform the Committee of this change in circumstances. The number of eligible books must be estimated either in the year the claim was lodged or in the following year (subsection 11(5)). A note is included to clarify that all editions of eligible books must be counted for the estimation, including those with a different ISBN.

Subsections 12(1) and (2) provide that revised or re-issued editions of an eligible book count towards the copies of the eligible book, whether or not another ISBN has been allocated.

Part 4 – Payments

Division 1 – Types of Payments

Part 4 sets out the different types of payments made under the Scheme, the amounts of payments and payment methods.

Section 13 states that there are two types of payments that can be made under the Scheme, namely the creators' public lending right payment and the publishers' public lending right payment. Payments may be made to eligible creators and publishers of eligible books.

Division 2 – Amount of Payments

Section 14 has three subsections. Subsection 14(1) sets out how payments to creators are calculated, which is the estimated amount of copies of a book held in classified libraries multiplied by the relevant public lending right rate of payment.

Subsection 14(2) states that the rate of payment for creators is \$2.11 per copy of an eligible book. This figure reflects the current applicable rate and is consistent with the rate set out in the ministerial determination, *Public Lending Right Scheme 1997 (Modification No.1 of 2016)* made on 26 April 2016 for the purposes of the 1997 Scheme. The rate is reviewed by the Department annually, taking into consideration the results of the Committee's library surveys and the available Commonwealth budget, and may be subject to change in the future by ministerial determination made pursuant to paragraph 5(1)(b) of the Act. The next rate review is expected to occur in early 2017.

Subsection 14(3) states that, if there is more than one creator of a book, payments are made in proportion to their share of royalty entitlements for the book. For example, where a book was created by four creators who share equal rights, each creator will receive 25% of the lending right payment.

Section 15 has three subsections. Subsection 15(1) sets out how payments to publishers are calculated, which is the estimated amount of copies of a book held in classified libraries multiplied by the relevant public lending right rate of payment.

Subsection 15(2) states that the rate of payment for publishers is 52.75 cents per copy of an eligible book. This figure reflects the current applicable rate and is consistent with the rate set out in the ministerial determination, *Public Lending Right Scheme 1997 (Modification No.1 of 2016)* made on 26 April 2016 for the purposes of the 1997 Scheme. The rate is reviewed by the Department annually, taking into consideration the results of the Committee's library surveys and the available Commonwealth budget, and may be subject to change in the future by ministerial determination made pursuant to paragraph 5(1)(b) of the Act. The next rate review is expected to occur in early 2017.

Subsection 15(3) states that, if there is more than one publisher of an eligible book, payments are made according to any agreement in place between the publishers dealing with the division of profits or in the absence of such an agreement as the Committee considers appropriate.

Section 16 has five subsections detailing minimum and maximum payments under the Scheme.

Section 16(1) provides for the Minister to determine the minimum payment to be made to claimants under the Scheme. The Committee may also determine different minimum payment amounts for creators and publishers. If the total payment that would be payable to a claimant under the Scheme for a financial year is less than the minimum payment amount, then no amount is payable and no credit will accrue at all.

Subsection 16(2) provides for the Minister to determine the maximum payment to be made to claimants under the Scheme. It also states that the Committee may determine a different maximum payment for creators and publishers. Any amount in excess of the maximum payment is not payable and no credit will accrue.

A determination under subsection 16(1) or (2) is a legislative instrument within the definition of the LA.

The total amount payable to an eligible creator consists of all the amounts payable for all eligible books of the creator (refer subsection 16(3)).

The total amount payable to an eligible publisher consists of all the amounts payable for all eligible books of the publisher (refer subsection 16(3)).

If none of the eligible creators are paid as a result of the operation of subsection 16(1), by operation of paragraph 16(5)(a), then no payment will be payable to the publisher of the book. If this occurs then that book will not be counted when working out an overall payment, if any, to be made to that publisher.

Division 3 – Making Payments

Section 17 provides that no payment shall be made under the Scheme if the estimated number of copies of the eligible book is below fifty (50). Eligible claimants must be reasonably well represented in the collections of public libraries nationally in order to receive a payment under the Scheme. Setting the minimum amount of copies to fifty (50) assists potential claimants to judge the efficacy of making a claim and assists with the efficient administration of the Scheme. The accompanying note reminds readers that section 16 deals with minimum payments.

Section 18 states that payments under the Scheme must be made as a single payment.

Section 19 has two subsections. Subsection 19(1) provides that payments under the Scheme are payable for each financial year. Should a book be eligible for payment, the date of publication of the book and the financial year in which the claim was submitted will determine when payments commence.

Subsection 19(2) allows the Committee to consider a book's date of publication as set out in an Australian bibliographic database when determining a book's commencing year. Should the publishing rights for a book get transferred, a publisher's entitlement for public lending right payments is not affected for the financial year in which the transfer occurs. Two notes accompany section 19.

Part 5 – Claims

Section 20 allows the Committee to approve a claim form to be used by claimants.

Section 21 has three subsections describing the claims process.

Subsection 21(1) states that persons can complete the approved form in order to lodge a claim.

Subsection 21(2) provides that a claim for a book covers each financial year, unless the claimant is notified by the Committee that a new claim needs to be lodged.

Subsection 21(3) states that if a new publisher becomes the eligible publisher, under subsection 9(3), for an eligible book that has already been claimed for, the scheme applies as if the claim had been made by the new publisher and a new claim does not have to be lodged.

Section 22 provides for the Committee to determine in writing whether the claimant is an eligible creator or publisher under the Scheme as soon as practicable after a claim is made.

Section 23 states that the Committee may approve a creator's public lending right payment to a claimant who is an eligible creator of an eligible book.

Section 23A provides that if an eligible creator, who had made a claim for an eligible book, died during the relevant year, the Committee may approve making a payment to the creator's representative for that year.

Section 24 states that the Committee may approve a publisher's public lending right payment to a claimant who is an eligible publisher of an eligible book.

Section 25 has three subsections describing the procedure where the Committee has determined that a claimant was underpaid.

Subsection 25(1) states that this section applies should the Committee consider a claimant received less than the correct amount under this Scheme or an earlier scheme.

Subsection 25(2) provides the Committee may approve a back payment to the underpaid claimant. This payment will be made in the subsequent financial year and will be the difference between the correct amount and the amount that was paid.

Subsection 25(3) clarifies that the back payment will be made in addition to any other payment the claimant may be eligible for under the Scheme.

Section 26 states that any overpayment under this Scheme or an earlier Scheme is a debt due to the Commonwealth. The amount may be recovered through a court or as a deduction from any other payment the claimant may be eligible for under the Scheme.

Section 27 has eight subsections describing the circumstances under which the Committee cannot approve a payment. Those circumstances include where a claimant has died (except in the circumstances as described in section 23A), where the Committee is aware that the claimant is a body corporate that has been wound up, and where a claimant cannot be located after reasonable steps have been taken. If a claimant who could not be located contacts the Committee payments may resume the following financial year. In particular, subsection

27(6) states that payments that did not proceed under section 27 in a financial year will also not be payable in later financial years.

Subsection 27(8) states that the power of the Committee under section 27 to not make a payment applies to payments for any period before the exercise of the power and the financial year in which the power is exercised.

Part 6 – General

Section 28 states that the Committee must publish information about eligibility for payments under the Scheme at least once per year. The Committee may advertise the Scheme in ways it considers appropriate.

Section 29 has seven subsections detailing the applicability of claims made under earlier schemes, in summary these are:

- a book will not be eligible under the current Scheme if it had been deemed ineligible under a former scheme (refer subsection 29(1));
- claims made under an earlier scheme are recognised under the current Scheme (refer subsection 29(1));
- if no payments were made for a book under a previous scheme it will be treated as if the estimated amount of copies of the book held in classified libraries under a previous scheme was estimated under the current Scheme (refer subsection 29(3));
- a book will be treated as an eligible book under the current Scheme if payments were made in respect to the book under an earlier scheme (refer subsection 29(3));
- a creator will be treated as an eligible creator under the current Scheme if payments were made in respect to the book under an earlier scheme;
- a publisher will be treated as an eligible publisher under the current Scheme if payments were made in respect to the book under a previous scheme;
- if payments were made for a book under a previous scheme it will be treated as if the estimated amount of copies of the book held in classified libraries under a previous scheme was estimated under this current Scheme (refer subsection 29(7)).

Attachment 2**Statement of Compatibility with Human Rights**

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

Public Lending Right Scheme 2016

The *Public Lending Right Scheme 2016* (the Instrument) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Public Lending Right Act 1985* (the Act) provides the legislative framework for a Public Lending Right Scheme (the Scheme) to, amongst other things, recognise the loss of income by Australian creators and publishers of books held in public lending libraries.

The Public Lending Right Committee (the Committee), established under the Act, has certain functions in relation to the Scheme and provides advice to the Minister on the operation of the Scheme.

The Instrument sets out a process which the Committee must follow to determine the eligibility of persons to be creators or publishers under the Scheme set out in the Instrument, and specifies how payments will be calculated and made to successful claimants. This gives effect to the Public Lending Right Scheme as established under the Act.

The Instrument is in substantially the same terms as *Public Lending Right Scheme 2016*, which was due to sunset on 1 October 2016.

Human rights implications

This Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Instrument is compatible with human rights as it does not raise any human rights issues.