

28 February 2023

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Resale Right for Visual Artists Bill

Purpose

1. We have considered whether the Resale Right for Visual Artists Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 23528/13.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with section 14 (freedom of expression). Our analysis is set out below.

The Bill

4. The purpose of the Bill is to establish an Artist Resale Royalty Scheme (the scheme) in New Zealand. The scheme will provide a mandatory resale right to eligible visual artists, entitling them to receive a royalty payment when their qualifying artwork sells on the secondary market.
5. Under the scheme, the resale royalty obligation will apply only when a transaction involves a market professional or a public institution, and not when resale occurs between private individuals (although private individuals can “opt-in” to the scheme). Conversely, the rights holder can choose to decline a royalty payment if they wish not to interact with the scheme.
6. A single non-government collection agency will be authorised to manage the collection and distribution of resale royalties. The Bill devolves power to Ministers to appoint the collection agency and to revoke that appointment if the agency does not meet its obligations under the scheme.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

7. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any

- form. The right to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
8. Clause 21 of the Bill includes provisions that require an art market professional, or other specified party to a qualifying resale, to provide certain information to the authorised collection agency for each qualifying resale they undertake. This can include personal information about the seller, the buyer, or their agents.
 9. These requirements *prima facie* limit the right to freedom of expression affirmed by section 14.
 10. Where a provision is found to limit any particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justifiable in terms of section 5 of that Act. The section 5 inquiry is approached as follows:²
 - a. Does the provision serve an objective sufficiently important to justify some limitation on the right or freedom?
 - b. If so, then:
 - i. is the limit rationally connected to the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?
 11. We have concluded that the limits on the right to freedom of expression in the Bill appear to be justified under section 5 of the Bill of Rights Act because:
 - a. the Bill's objective of supporting a well-functioning New Zealand secondary art market is sufficiently important to justify limiting the right; and
 - b. the information provision requirements are rationally connected to the Bill's objective. They place obligations on art market professionals to provide the information necessary for the collection agency to manage, collect and distribute resale royalties for the scheme;
 - c. the limits on freedom of expression appear reasonable and proportionate to the objective. Art market professionals, or other specified parties to a resale, are in the best position to supply the relevant information necessary for the collection agency to monitor and manage compliance with the scheme.

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

² *Hansen v R* [2007] NZSC 7.

Conclusion

12. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



Jeff Orr
Chief Legal Counsel
Office of Legal Counsel