

24 May 2023

Arts Policy  
Manatū Taonga Ministry for Culture and Heritage  
Wellington

By email: [artistresaleroyalty@mch.govt.nz](mailto:artistresaleroyalty@mch.govt.nz)

Tēnā koe,

**Re: Feedback on *Resale Right for Visual Artists Regulations* discussion document**

## **1. Introduction**

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the *Resale Right for Visual Artists Regulations* discussion document (**discussion document**).
- 1.2 This submission has been prepared with input from the Law Society's Intellectual Property Law Committee, and makes some recommendations regarding the proposed dispute resolution processes, and reporting obligations.<sup>1</sup>

## **2. Dispute resolution processes**

- 2.1 The regulations will outline what dispute resolution process is to be used in the event the collection agency does not already have a suitable process in place.<sup>2</sup> Under this process, parties will be expected to attempt to resolve a dispute by mediation.<sup>3</sup> Where mediation is unsuccessful, parties will then have the option of resolving the matter by arbitration, or through the courts.<sup>4</sup>
- 2.2 Where a matter is resolved by arbitration, the discussion document anticipates the cost will be split evenly between the two parties.<sup>5</sup> The reasons for this proposal are unclear. In some cases, it may be appropriate to expect one party to pay more than the other party (for example, where they fail to comply with a timetable, pursue a frivolous or vexatious claim, or otherwise delay the resolution of the dispute). In such circumstances, in line with long-standing practice, the arbitrator should be able to have regard to the overall merits and the conduct of the parties, and make appropriate costs orders (which may not always result in

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<sup>1</sup> More information about this Committee can be found on the Law Society's website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/intellectual-law-committee/>.

<sup>2</sup> *Regulatory Impact Statement: Supporting regulations for Resale Right for Visual Artists Bill (RIS)*, page 62.

<sup>3</sup> Discussion document, pages 28-29.

<sup>4</sup> Discussion document, pages 28-29.

<sup>5</sup> Discussion document, page 29.

the costs being split evenly between the two parties). This is also important because the prospect of having to pay a greater proportion of costs can be a good incentive to resolve disputes at mediation, or more speedily.

- 2.3 The discussion document also states that participants are expected to meet their own costs when resolving a dispute through the courts.<sup>6</sup> Again, it is unclear why this would always be the case. The parties may be ordered to meet their own costs, but such orders should be made at the discretion of the court (again, by considering the overall merits and outcome of the case, and the conduct of the parties).
- 2.4 It may also be helpful to consider if parties should be required to appoint an arbitrator, or an arbitration service provider,<sup>7</sup> with established processes, rules, and protocols, as these will likely guide and assist those who are not familiar with the arbitration process.

### **3. Reporting obligations**

- 3.1 The regulations will require the collection agency to keep records of resale royalty transactions, the financial position of the scheme, how the scheme is impacting artists, how Māori are being represented in decision-making, and compliance with the scheme.<sup>8</sup> These records will be audited after the end of each financial year, and a copy of the “audited financial report” will be provided to the Minister, and subsequently tabled in Parliament.<sup>9</sup>
- 3.2 It is unclear whether the intention is for this “audited financial report” to include:
- a. *only* financial records (i.e., operating expenses, administrative fees collected, transactions of artworks which require a royalty, royalties collected and distributed, and payments made to the cultural fund),<sup>10</sup> or
  - b. information about *all* records kept by the collection agency (which would include non-financial records about how the scheme overall is working, how it is impacting artists, how Māori are represented in decision-making, and generally, compliance with the scheme).
- 3.3 If it is to be the former, we recommend including a separate requirement in the regulations for the collection agency to regularly publish information relating to its non-financial records (perhaps in the form of a summary or an annual report, with any personal, or commercially sensitive information redacted). This would increase accountability and transparency about the overall operation of the scheme, and promote confidence in the scheme and the collection agency. This is particularly important, given the collection agency will be acting on behalf of all artists, and receiving Government funding in the early years of the scheme for set-up costs.<sup>11</sup>

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<sup>6</sup> Discussion document, page 29.

<sup>7</sup> Of which a number of reputable service providers exist.

<sup>8</sup> Discussion document, page 24.

<sup>9</sup> Discussion document, page 25.

<sup>10</sup> Discussion document, page 24.

<sup>11</sup> RIS, page 56.

**4. Next steps**

- 4.1 We hope this brief feedback is helpful. If the Ministry has any questions, or if further discussion would assist, please feel free to contact me via Law Society Law Reform & Advocacy Advisor, Nilu Ariyaratne ([Nilu.Ariyaratne@lawsociety.org.nz](mailto:Nilu.Ariyaratne@lawsociety.org.nz)).

Nāku noa, nā

A handwritten signature in blue ink that reads "David Campbell". The signature is written in a cursive style with a large initial 'D'.

David Campbell  
**Vice-President**