

Hon Carmel Sepuloni

Minister for Arts, Culture and Heritage

Artist Resale Royalty scheme policy approvals  
Cabinet Material

21 September 2022

Date: 21 September 2022

Title: Artist Resale Royalty scheme policy approvals

Author: Ministry for Culture and Heritage

These documents have been proactively released by the Minister for Arts, Culture and Heritage. This package includes the Cabinet paper and other key decision papers, as listed below.

Title: Cabinet Minute of Decision (CAB-22-MIN-0316)  
Cabinet Social Wellbeing Committee Minute of Decision (SWC-22-MIN-0144)  
Cabinet paper – Artist Resale Royalty scheme policy approvals  
Regulatory Impact Statement – Artist Resale Royalty scheme

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the OIA). Where this is the case, the relevant sections of the OIA that would apply have been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Section 9(2)(f)(iv) To maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials.

**Appendix 1: Cabinet Minute of Decision (CAB-22-MIN-0316)**

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# Cabinet


## Minute of Decision

*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

### Report of the Cabinet Social Wellbeing Committee: Period Ended 12 August 2022

On 15 August 2022, Cabinet made the following decisions on the work of the Cabinet Social Wellbeing Committee for the period ended 12 August 2022:


Out of Scope

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SWC-22-MIN-0144 **Artist Resale Royalty Scheme: Policy Approvals**  
Portfolio: Arts, Culture and Heritage

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Rachel Hayward  
Acting Secretary of the Cabinet

**Appendix 2: Cabinet Social Wellbeing Committee Minute of Decision  
(SWC-22-MIN-0144)**

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# Cabinet Social Wellbeing Committee

## Minute of Decision

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### Artist Resale Royalty Scheme: Policy Approvals

**Portfolio**                      **Arts, Culture and Heritage**

On 10 August 2022, the Cabinet Social Wellbeing Committee:

- 1        **agreed** that the Artist Resale Royalty scheme (the Scheme) be established through standalone legislation with the following policy and administration settings:

#### Definition of Visual Art

- 1.1      The royalty will apply to the resale of all original visual artworks, including works produced by artists in the employment of, or commissioned by, the Crown, and works created by a group of artists, and limited editions works;
- 1.2      Toi Māori and Pacific art will be defined for the purposes of the scheme as ‘the cultural expression of Māori or Pacific peoples, which is sold on the secondary art market through art market professionals’;
- 1.3      The proposed legislation will provide a power to make regulations setting out the definition of visual art for the purposes of the scheme;

#### Eligibility for the Resale Right

- 1.4      Resale royalties will be available to citizens and residents of New Zealand and the countries with which it has constitutional relationships, and nationals or residents of a reciprocating country;
- 1.5      A resale right can be held jointly by a group of artists;
- 1.6      The royalty will apply to resales of visual artworks that:
  - 1.6.1      occur after the first transfer or sale of the artwork;
  - 1.6.2      involve an art market professional with this definition being set in regulations and periodically reviewed;
  - 1.6.3      are to and from a public institution, such as a museum;
- 1.7      The proposed legislation will provide a power to make regulations setting out the definition of art market professional for the purposes of the scheme;
- 1.8      The legislation establishing the scheme will include a power to create an Order in Council confirming reciprocal arrangements with other countries;

**Rate and Application of the Resale Royalty**

- 1.9 The royalty rate will be an additional 5 percent on the resale price (before any additions or deductions, or other charges, such as a buyer's premium, commission, or GST);
- 1.10 The royalty will apply to all resales after the commencement of the scheme, including of art created and sold before the commencement of the scheme;
- 1.11 There will not be a mandatory requirement for the royalty to apply to private resales between two individuals, however private resales will be able to voluntarily opt into the scheme;
- 1.12 Royalty payments for works which are jointly created by two or more artists will be shared equally among the artists, unless otherwise indicated in writing by these parties;
- 1.13 Resale royalties will be specifically linked to the duration of copyright which is currently for the life of the artist plus 50 years after death. If the copyright duration is extended, the resale right duration will likewise extend;
- 1.14 Artists would determine who the royalty right would transfer to in the event of their death and if an artist has not specified to whom the royalty right should transfer this will be resolved by operation of succession law;
- 1.15 The royalty right will be inalienable (unable to be waived or transferred);
- 1.16 Artists may decline to receive royalty payments, but a royalty would always be collected on an eligible resale;
- 1.17 The seller and the art market professional involved in the sale will be jointly liable for payment of the royalty;
- 1.18 Royalties declined by an artist or voluntary donations of part of an eligible artist's royalty could be held in a cultural fund, dedicated to supporting career sustainability for visual artists, further details of which will be set out in regulations;

**Management of the scheme by a government appointed collection agency**

- 1.19 A single non-government, not-for-profit, collection agency will be authorised to manage the scheme;
- 1.20 The following high-level principles will guide the operation of the collection agency. The collection agency must:
  - 1.20.1 operate in a way that is transparent, accountable and respectful;
  - 1.20.2 act in the best interests of the artists and their estates whose royalties it collects;
  - 1.20.3 be inclusive of, and recognise the different needs of, all peoples in New Zealand;
  - 1.20.4 acknowledge and respect the role of Māori as tangata whenua and provide culturally appropriate support to Māori artists;

- 1.21 The proposed legislation will devolve power to Ministers to determine the process for appointing the collection agency, including the instrument of appointment and the terms and conditions of the appointment;
- 1.22 The collection agency will be monitored by Manatū Taonga;
- 1.23 The proposed legislation will provide for Ministers to revoke the appointment of the collection agency if it is determined that the agency is not meeting its obligations under the legislation and supporting regulations;
- 1.24 The proposed legislation will provide a power to make regulations setting out how the agency would operate, how it would be monitored, what percentage of the royalty should be set aside to support the administration of the scheme and above what sale threshold the royalty should apply;

**Information gathering, reporting, and enforcement powers of the collection agency**

- 1.25 Art market professionals will be required to provide the collection agency with information in relation to the resale relevant to:
  - 1.25.1 determine whether a resale royalty should be collected on an art sale and the amount of any resale royalty payable;
  - 1.25.2 determine who is liable to make the payment;
- 1.26 The collection agency will have powers to take civil proceedings to recover any unpaid resale royalties;

9(2)(f)(iv)

**Legislative Implications**

- 3 **noted** that legislation will need to be in place and the Artist Resale Royalty scheme operational by late-2024 for New Zealand to meet its commitments under the New Zealand – United Kingdom Free Trade Agreement;
- 4 9(2)(f)(iv)
- 5 **agreed** that an Artist Resale Royalty scheme be established in New Zealand through stand-alone legislation administered by Manatū Taonga;
- 6 **invited** the Minister for Arts, Culture and Heritage to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above decisions;
- 7 **authorised** the Minister for Arts, Culture and Heritage to further develop and clarify policy matters and make decisions on minor or technical matters that arise during the drafting process, providing these decisions are consistent with the above decisions;
- 8 **agreed** that New Zealand will seek to establish reciprocal arrangements for an Artist Resale Royalty scheme with other countries, commencing with Australia;

- 9 **noted** that Manatū Taonga will initiate a review of the effectiveness of New Zealand's Artist Resale Royalty scheme within five years of enactment, with this review being an operational matter and not part of legislation.

Rachel Clarke  
Committee Secretary

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**Present:**

Rt Hon Jacinda Ardern  
Hon Grant Robertson  
Hon Kelvin Davis  
Hon Dr Megan Woods  
Hon Chris Hipkins  
Hon Carmel Sepuloni (Chair)  
Hon Andrew Little  
Hon David Parker  
Hon Poto Williams  
Hon Damien O'Connor  
Hon Peeni Henare  
Hon Willie Jackson  
Hon Jan Tinetti  
Hon Kiri Allan  
Hon Dr Ayesha Verrall  
Hon Priyanca Radhakrishnan  
Hon Aupito William Sio  
Hon Meka Whaitiri

**Officials present from:**

Office of the Prime Minister  
Office of the Chair  
Officials Committee for SWC

PROACTIVELY RELEASED



**Appendix 3: Cabinet Paper – Artist Resale Royalty Scheme: Policy Approvals**

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**[In Confidence]**

Office of the Minister for Arts, Culture and Heritage

Cabinet Social Wellbeing Committee

**Artist Resale Royalty scheme policy approvals**

**Proposal**

- 1 This paper presents policy recommendations for legislation establishing an Artist Resale Royalty (ARR) scheme in New Zealand and seeks approval to submit drafting instructions to the Parliamentary Counsel Office.

**Relation to government priorities**

- 2 An ARR scheme will contribute to the Government's priority outcome: Securing our economic recovery. COVID-19 has had a significant impact on the arts, culture and heritage sector. An ARR scheme will provide a royalty payment to visual artists when their art is resold. Manatū Taonga estimates that around 3,600 artists could benefit.
- 3 Introducing a New Zealand ARR scheme will help New Zealand meet its commitments under the New Zealand – United Kingdom (UK) Free Trade Agreement (FTA) and recently concluded NZ – European Union (EU) FTA.

**Executive Summary**

- 4 The New Zealand – UK FTA commits New Zealand to introducing a reciprocal ARR scheme within two years of the FTA coming into force, expected to be in late 2022. New Zealand committed to an ARR scheme as part of the FTA as a scheme will:
  - 4.1 allow visual artists (or their estates) to benefit from the resale of their original works, especially when their works appreciate in value over time;
  - 4.2 align New Zealand with common international practice and for New Zealand artists to benefit when their artwork is sold in reciprocating countries; and
  - 4.3 support visual artist career sustainability by enabling visual artists to access ongoing royalties in a similar way to other creative professionals (such as writers, musicians and playwrights).
- 5 I propose to introduce a scheme with a 5% royalty on the resale of visual art, including toi Māori and Pacific art. I propose the definition of visual art be broad and set out in supporting regulations. Resale royalties would be available to citizens and residents of New Zealand, and nationals or residents of a reciprocating country. The resale right would apply to resales involving an art market professional and resales to and from public institutions. The right could be held jointly by a group of artists.
- 6 The resale right would be inalienable, meaning it cannot be waived or transferred (except on death). A royalty would always be collected on eligible sales, but artists could decline to receive the royalty payment. The duration of the royalty right would be linked to the duration of copyright, which is currently the life of the artist plus 50

years following their death<sup>1</sup>. Liability for the royalty payment would be jointly shared by the seller and the art market professional.

7 A single, non-government, not-for-profit, collection agency would be authorised to manage the scheme and be monitored by Manatū Taonga. Legislation would provide the nominated collection agency with reporting powers and powers to pursue civil proceedings to recover unpaid royalties.

8 9(2)(f)(iv) [REDACTED]  
[REDACTED]  
[REDACTED] The ultimate aim is to make the scheme self-sustaining in the long-term. Once the scheme has been operating for a few years, Manatū Taonga will be better positioned to estimate a date at which revenue generated would offset operating expenditure.

## Background

9 The resale right originated in France in the 1920s as a way to provide financial support to artists and their descendants who in some cases were living in poverty.

10 The resale right has been incorporated as a discretionary provision in the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), to which New Zealand is a signatory. The Berne Convention provides that it is the role of national legislation to determine the procedure for collection and the amount of the resale royalty. Over 80 countries now have legislated ARR schemes, including the UK, Australia, and all EU nations.

11 In New Zealand, in 2008, the Government Administration Select Committee considered a Bill proposing to incorporate the ARR right in New Zealand's Copyright Act 1994. However, that Bill was discharged following the 2008 General Election.

12 New Zealand's commitments under the NZ-UK FTA require that an ARR scheme be implemented no later than two years after entry into force of the agreement. With the agreement expected to enter into force by late 2022, the ARR scheme needs to be implemented by late 2024. The recently concluded FTA with the EU similarly includes a requirement that New Zealand establish an ARR scheme that is reciprocal with the EU's regime. New Zealand is aiming to ratify the NZ-EU FTA by 2024.

## Opportunity definition

### **A New Zealand ARR scheme would allow artists to benefit financially from the long-term success of their work**

13 Currently, when a visual artist's work is sold for the first time, they receive all or a substantial part of the revenue generated from the sale, depending on whether they are selling through an intermediary. However, when that work is resold on the secondary market, there is no means for the artist/their estate to derive income from that resale.

<sup>1</sup> Under the NZ-EU FTA, New Zealand has agreed to extend copyright term by a further 20 years within 4 years of that FTA entering into force. An equivalent commitment in the NZ-UK FTA applies within 15 years of that agreement entering into force.

- 14 Auction house data from 2018 to 2020 shows an average of \$702,858 in net royalties per annum would have been distributed to New Zealand artists (and artists' estates) during this three-year period.<sup>2</sup> These royalties would have been distributed to 666 artists and artists' estates from 5,139 sales. This is likely to be an underestimate as it is based on auction house sales only and the scheme would cover sales through a range of other mechanisms. The NZ–UK FTA requires the ARR scheme to be broader than auction houses and that it include dealer galleries and independent agents.<sup>3</sup>

**With an ARR scheme New Zealand artists can receive royalties from overseas resales**

- 15 The commitment in the NZ–UK FTA also enables New Zealand to align with common international practice – more than 80 countries worldwide currently have an ARR scheme in place, including almost 80% of OECD countries.<sup>4</sup> Under overseas ARR schemes, foreign nationals are only eligible to receive royalty payments if their country of origin has a reciprocal scheme in place. An ARR scheme would give New Zealand artists the means to benefit financially when their works are resold overseas in a country which also has an ARR scheme.

**An ARR scheme would also help support visual artists' career sustainability**

- 16 A New Zealand ARR scheme is part of a suite of initiatives this Government has in place, or is proposing, that will support visual artists' career sustainability. It will enable visual artists to access ongoing royalties in a similar way to other creative professionals with whom they share the same exclusive rights afforded by copyright. However, their ability to derive income from copyright is lower than that of other creative professionals because of the nature of their work, involving the production of one-off works, or limited numbers of copies, valued for their scarcity and uniqueness.

**Options and assessment**

**Stakeholder engagement**

- 17 In June and July 2022, Manatū Taonga undertook targeted engagement on the proposals set out in this paper. Stakeholders were broadly supportive of the proposals. Key themes of this engagement were:
- 17.1 The definition of visual art needs to be broad and carefully defined, including appropriately capturing Toi Māori and Pacific art.
  - 17.2 Some stakeholders thought it important to give artists the choice to opt out of the scheme, while others said it would undermine the success of the scheme.
  - 17.3 There was strong support for investing unclaimed and declined royalties into a cultural fund to support artist career sustainability.

<sup>2</sup> 9(2)(f)(iv)

<sup>3</sup> Sales data is not available on secondary sales conducted through dealer galleries or independent agents.

<sup>4</sup> Of the 38 OECD countries, Canada, Colombia, Israel, Japan, Korea, New Zealand, Switzerland and the United States do not have an ARR scheme in place.

- 17.4 Stakeholders were broadly supportive of the proposed royalty rate and the eligibility settings, although art market professionals thought it could negatively impact their businesses. Generally, stakeholders supported linking the duration of the resale right to the duration of copyright, although some suggested the right should remain with the artist or their estate indefinitely.
- 17.5 Stakeholders expressed strong support for the collection agency to be independent of government, to work closely with artists, operate in a culturally appropriate way and be given strong enforcement powers.
- 18 Previous engagements have shown that an ARR scheme has significant public support. A survey (348 respondents) conducted in late 2019 found that 87.4% of the 348 respondents strongly or moderately favoured a scheme and only 8.3% opposed it.
- 19 Many auction houses and dealer galleries are, however, opposed to the scheme due to compliance costs and concerns it could deter sales or depress the art market. International evidence does not show a clear link between an ARR scheme and these negative impacts. Further, I do not expect that the cost to auction houses and other dealers would be significant; officials have modelled a median cost of \$180 – \$400 per annum, based on data from the UK and Australian schemes.

#### **Policy parameters for a New Zealand ARR scheme**

- 20 The NZ–UK FTA commits New Zealand to operationalising a legislated, reciprocal ARR scheme within 2 years of the agreement coming into force. Both the UK and EU FTA:
- 20.1 require that the resale right be inalienable and unable to be waived, even in advance; and
- 20.2 requires the scheme to include all acts of resale involving any sellers, buyers, or intermediaries acting in the course of business of dealing in works of art, such as salesrooms, art galleries, and, in general, any dealers in works of art.
- 21 New Zealand’s unique context needs consideration when designing an ARR scheme. New Zealand’s secondary art market is small in the global context<sup>5</sup>, and therefore, some provisions used in schemes for larger markets will not work here.
- 22 Despite its size, the New Zealand art market has a rich and unique component of Māori, and Pacific art, which contributes significantly to New Zealand’s cultural identity and wellbeing and the appeal of New Zealand art to overseas buyers. The parameters of an ARR scheme in New Zealand must be culturally appropriate for Māori, and Pacific communities, recognising and respecting the Crown’s obligations under Te Tiriti o Waitangi, and working towards supporting the United Nations Declaration on the Rights of Indigenous People.

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<sup>5</sup>The New Zealand art market was estimated to be worth approximately \$67 million in 2021, approximately half the value of the Australian art market and around 0.1 percent of the global market). Note this year was an outlier compared to previous years. For example, in 2020 the New Zealand art market was estimated to be worth \$31 million.

## Proposed policy and administration settings

- 23 I recommend a legislated ARR scheme be established in New Zealand under the following policy and administration settings.

### Policy objectives

- 24 The policy objectives of the ARR scheme are to:
- 24.1 meet NZ's obligations under Article 17.46 of the New Zealand and United Kingdom FTA to introduce a reciprocal ARR scheme within two years of the FTA coming into force;
  - 24.2 maximise the benefits of the scheme to visual artists and their estates;
  - 24.3 minimise the costs and impacts on art market professionals and the market;
  - 24.4 support a well-functioning New Zealand secondary art market; and
  - 24.5 ensure the scheme is as simple and cost effective as possible to administer with the long-term goal of ultimately becoming self-sustaining.

### Definition of visual art

- 25 The royalty will apply to the resale of all original visual artworks, including works produced by artists in the employment of the Crown or commissioned by the Crown, and works created by a group of artists and limited edition works.
- 26 The definition of visual art is dynamic and constantly evolving. Rather than including a detailed definition in primary legislation, I propose we include this in supporting regulations. This definition would seek to futureproof the scheme (particularly in relation to the emerging digital art market), ensure alignment with the Australian, EU, and UK schemes, and provide sufficient flexibility to accommodate and align with future reciprocal agreements.
- 27 I propose to take a different approach for the definition of toi Māori and Pacific art. The primary legislation will broadly define toi Māori and Pacific art as 'the cultural expression of Māori or Pacific peoples, which is sold on the secondary art market by art market professionals'. This will ensure that no form of toi Māori or Pacific art is excluded from receiving the royalty based on the definition of visual art.

### A royalty of 5% of the resale price with no cap on the maximum payable

- 28 I recommend the royalty be a flat rate of 5%, before any additions or deductions, or other charges, such as a buyer's premium, commission or GST. The royalty will apply to all resales after the scheme commences, including art created and sold before its commencement.
- 29 A 5% royalty rate strikes a balance between royalties going to artists and not placing too large a financial burden on buyers, sellers and art market professionals. The purchase price threshold above which the 5% royalty would be payable would be set

through regulations and reviewed periodically to ensure it remains consistent with the objectives of the scheme and accounts for other factors, such as inflation. 9(2)(f)(v) [REDACTED] This will be tested through consultation ahead of Cabinet decisions on regulatory settings.

**Eligibility requirements to receive the royalty**

- 30 Resale royalties would be available to citizens and residents of New Zealand and countries with which New Zealand has a constitutional relationship (Tokelau, Niue and Cook Islands) and to nationals or residents of a reciprocating country.
- 31 The resale royalty would apply to:
- 31.1 resales of original visual artworks that occur after the first transfer or sale of the artwork;
  - 31.2 resales that involve an art market professional (e.g. an art auctioneer, dealer gallery, broker or someone engaged in the business of dealing art<sup>6</sup>); and
  - 31.3 resales to and from a public institution, such as a public gallery or museum<sup>7</sup>.
- 32 All resales meeting the above eligibility criteria would be subject to the scheme, including resale of works purchased directly from or gifted by an artist or their estate.
- 33 The resale right could be held jointly by a group of artists. In this instance, the royalty payment would be divided equally, unless agreed otherwise in writing by the artists.
- 34 The detail of what constitutes an art market professional would be set through regulations and reviewed periodically to ensure it remains fit for purpose. The definition will need to remain consistent with the requirements of the UK and EU FTAs. Officials will also further engage with Māori and Pacific legal and art experts to ensure that the definition of art market professional is inclusive of mechanisms for resale where Māori and Pacific art is prominent.
- 35 The resale royalty would not apply to private resales between two individuals. This is consistent with other legislation such as the Fair-Trading Act 1986 and Consumer Guarantees Act 1993.
- 36 However, sector engagement found a strong interest in enabling private resales to voluntarily opt into the scheme. Parties involved in the private resale would determine the royalty rate they wish to pay, though the collection agency will encourage a 5% rate. This seeks to help address current inequities in secondary art market sales where Māori, Pacific and female artists are particularly underrepresented.

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<sup>6</sup> Sales through online platforms like Trade Me will be included where an art market professional is using the platform to resell eligible visual art, but not where two private individuals are using it to transact a sale.

<sup>7</sup> Public museums and public art galleries will be covered by the scheme, with further decisions required to inform regulatory settings that outline how the scheme will apply to them, recognising their unique role as an institution providing a benefit to the public. This includes determining whether these institutions are included under the definition of art market professional.

**The duration of the resale right would be linked to the duration of copyright**

- 37 I recommend the duration of the resale right be specifically linked to the duration of copyright, which is currently for the life of the artist plus 50 years. In the instance of works created by multiple artists, 50 years begins on the death of the final contributing artist. Linking the proposed ARR legislation directly to copyright ensures that when the copyright duration is extended<sup>8</sup>, the resale right duration would likewise be extended, and reflect any future changes to ensure consistency and simplicity.
- 38 Artists would determine who the royalty right would transfer to in the event of their death. This could include an immediate family member, their broader estate, or the iwi they are affiliated to. If an artist has not specified who the royalty right should transfer to, this would be resolved by operation of succession law.

**The royalty right would be inalienable, but artists could decline to receive a royalty**

- 39 In accordance with the Berne Convention, and both the UK and EU FTAs, the resale right would be inalienable - not assignable or able to be transferred except upon the death of the artist. Without this policy, artists may struggle to prevent imposition of a waiver or transfer of the royalty right as a condition of sale.
- 40 However, artists may choose to decline to receive the royalty payment, giving them an element of control over how they benefit from future sales of their work.<sup>9</sup>
- 41 I am currently exploring the viability of introducing a cultural fund alongside the ARR scheme, dedicated to supporting career sustainability for visual artists. The funding would come from royalties declined by an artist or voluntary donations of part of an eligible artist's royalty. Details of how a cultural fund would work, including how long the collection agency must hold a royalty for unidentifiable artists, would be detailed in supporting regulations. This work would also consider whether artists should have the right to determine where any royalties they decline are invested.
- 42 I am proposing to include provision in the legislation to empower this within the regulations, as required.

**Liability for payment of the royalty would be shared by the seller and the art market professional**

- 43 There would be joint liability for payment of the resale royalty, which would operate as follows:
- 43.1 joint liability would sit with the seller and the seller's agent or art-market professional who would each be responsible for paying 50% of the royalty;

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<sup>8</sup> Under the NZ-EU FTA, New Zealand has agreed to extend copyright term by a further 20 years within 4 years of that FTA entering into force. An equivalent commitment in the NZ-UK FTA applies within 15 years of that agreement entering into force.

<sup>9</sup> There is a difference between an artist 'waiving' their right, and 'declining' to receive a royalty payment. No artist can waive their royalty right because the right is inalienable. However, an artist can decline to receive a royalty payment, as they are not waiving their right, but choosing how to act in relation to the royalty payment.



43.2 if there is no seller's agent, then liability is shared between the seller and the buyer's agent.

44 This approach means the cost of paying the royalty would be met equally by the buyer and seller of the artwork and spreads the financial burden of the transaction. It is also common practice in international ARR schemes.

**A single, non-government, not-for-profit, collection agency would manage the scheme**

45 An ARR scheme requires an organisation to collect royalties and take enforcement action in cases of non-compliance. I recommend the collection agency be a non-government, not-for-profit organisation.

46 This is similar to most overseas schemes, including Australia, the UK and many EU nations. The Australian collection agency is a Non-Government Organisation (NGO) with an existing role in collecting and distributing copyright royalties and a similar NGO exists in New Zealand (Copyright Licensing New Zealand). If such an NGO were to administer a New Zealand ARR scheme it would already have existing systems, processes and capabilities in place that could be adapted relatively easily to manage the collection of resale royalties.

47 I recommend a single agency manage the scheme because funding more than one agency, such as in the UK scheme, would increase costs and make it more difficult for the scheme to ultimately become self-sustaining.

48 Being not-for-profit and independent of government, the appointment of an NGO could also help assuage some of the concerns (particularly from art market professionals) that the scheme is simply another government "tax" on the market.

49 The proposed legislation would provide a mechanism for the collection agency to be appointed that devolves power to Ministers to determine the instrument of appointment and the terms and conditions of the appointment. Ministers would also be able to revoke the appointment of the collection agency if it is determined that the agency is not meeting its obligations.

50 The collection agency would be monitored by Manatū Taonga. I consider Manatū Taonga is best placed to undertake this role as it is the government's principal advisor on the cultural system and has the sector expertise, monitoring experience and relationships required to perform this role.

51 I recommend legislation include the following principles to guide the operation of the collection agency. The collection agency must:

51.1 operate in a way that is transparent, accountable and respectful;

51.2 act in the best interests of the artists and their estates whose royalties it collects;

51.3 be inclusive of and recognise the different needs of all peoples in New Zealand;

51.4 acknowledge and respect the role of Māori as tangata whenua and provide culturally appropriate support to Māori artists.

52 Details of how the collection agency would operate and be monitored will be set out in supporting regulations. Supporting regulations would also set out what percentage of the royalty should be set aside to support the administration of the scheme.

9(2)(f)(iv)

Setting the administration fee amount in regulations provides the flexibility to change it in the future if required.

**Legislation will provide for information gathering and enforcement powers**

53 Art market professionals will be required to provide the collection agency with information on all resales so the agency can determine whether a resale royalty should be collected, the amount of the royalty payable, and who is liable for payment.

54 In drafting the legislation, Manatū Taonga will work with the Office of the Privacy Commissioner to ensure all information gathering powers comply with relevant privacy legislation. It will also work with Inland Revenue to ensure that the information powers minimise tax compliance costs for artists.

55 The collection agency will have powers to take civil proceedings to recover any unpaid resale royalties. The seller and art market professional will be liable for such civil action because they are liable for payment of the royalty. The remedies would include orders requiring the provision of information needed to administer the scheme, and payment of royalties and recovery of court costs.

**International reciprocity of the scheme**

56 Under the Berne Convention and a New Zealand ARR scheme, New Zealand artists will receive royalties from sales of their work in all countries that have ARR schemes and with which New Zealand has a reciprocal arrangement in place. Similarly, artists who are nationals or residents of other countries with reciprocal ARR schemes will be entitled to receive royalties if their work is resold in New Zealand.

57 New Zealand's ARR legislation will include a power to make an Order in Council applying some or all of the scheme to a reciprocating country. New Zealand will negotiate reciprocal understandings in Berne Convention countries.

**Implementation**

9(2)(f)(iv)

9(2)(f)(iv)

9(2)(f)(iv)

**Review of the scheme five years after enactment**

59 The scheme will be reviewed within five years of its enactment. I propose this review would be an operational matter and not part of the legislation. I would bring any proposed changes to regulatory settings to Cabinet for consideration.

**Alternative options considered**

60 I have considered other options to support visual artists, including encouraging philanthropy, encouraging voluntary resale royalty arrangements, additional funding, increasing exhibition fees paid by public galleries, and tax incentives. None of these options would meet the commitments in the NZ-UK FTA, so have been discounted.

**Te Tiriti o Waitangi implications**

61 In developing these proposals Manatū Taonga has considered the role of government in ensuring that the scheme supports rangatiratanga and oritetanga. For a full analysis of Treaty implications refer to Appendix 1.

**Financial implications**

62 The intention is that the ARR scheme will be self-sustaining in the long-term with the fee that the collection agency deducts from each royalty payment covering the costs of administration.

63 However, the Crown would need to cover initial implementation costs 9(2)(f)(iv)  
[Redacted text]

64 9(2)(f)(iv)  
[Redacted text]

9(2)(f)(iv)  
[Redacted text]

65 9(2)(f)(iv) [REDACTED] 12

66 As the New Zealand art market continues to grow, I anticipate the level of ongoing subsidy required would reduce and ultimately the scheme would become self-sustaining. However, given the market fluctuations in artwork sales, it is difficult to predict when the New Zealand scheme would be self-sustaining.<sup>13</sup>

67 In addition to the proposed initial Crown investment, the collection agency would be generating revenue through the administration fee deducted from royalties collected. This would enable it to build financial reserves over this period which could be used to cover future shortfalls between revenue and annual operating costs.

### Legislative Implications

68 The ARR scheme will rely on a range of existing legislation in order to operate, including the Fair-Trading Act 1986, the Secondhand Dealers and Pawnbrokers Act 2004 and the Protected Objects Act 1975. No changes to existing legislation are required to enable the introduction of the scheme.

69 I recommend the scheme be established through standalone legislation for simplicity and because the timeframe for potential changes to copyright legislation, the other potential vehicle for the scheme, is much longer than the FTA commitment to implement it. 9(2)(f)(iv) [REDACTED]

70 The proposed Act will bind the Crown, meaning that, in the rare event the Crown resells any qualifying works of art on the secondary art market, it will pay a royalty.

### Impact Analysis

#### Regulatory Impact Statement

71 Regulatory impact analysis requirements apply to the proposals in this paper and a Regulatory Impact Statement is attached.

72 A cross-agency panel has assessed the RIS and considers it meets the QA criteria. While some of the regulatory choices are finely balanced, the analysis presents a sound case for the preferred set of options. Iterative local consultation and the consideration of other jurisdictions' experiences provide a level of context and depth.

73 The RIS acknowledges limitations in relation to data and financial modelling, which mean the scale of expected costs and benefits is less certain. These limitations, and the fact some detailed settings are yet to be determined, detract slightly from the RIS's persuasiveness, but not to the extent of affecting the overall confidence Cabinet can place in its conclusions.

<sup>12</sup> 9(2)(f)(iv) [REDACTED]

<sup>13</sup> Based on sales figures from 2016-2020, there would have been shortfalls ranging from \$169,000 to \$194,000 in revenue generated for the collection agency through administrative fees. Sales from 2021 would have provided an estimated operating surplus of \$44,000, but there is no guarantee this would be sustained.

### Climate Implications of Policy Assessment

74 A climate implication assessment is not required.

### Population Implications

75 Population implications are provided in Appendix 2.

### Human Rights

76 The proposals in this Cabinet paper appear to be consistent with the New Zealand Bill of Rights Act 1990, and the Human Rights Act 1993. A final view will be possible once the legislation has been drafted.

### Consultation

77 The following government agencies and Crown entities have been consulted: the Ministries of Business, Innovation and Employment, Foreign Affairs and Trade, Justice and Social Development, Inland Revenue, Te Puni Kōkiri, Te Arawhiti, The Treasury, and the Ministries for Women, Pacific Peoples and Ethnic Communities, Accident Compensation Corporation, Creative New Zealand, Museum of New Zealand Te Papa Tongarewa, and the Office of the Privacy Commissioner. The Department of the Prime Minister and Cabinet has been informed.

78 Further targeted engagement alongside the development of the Bill will inform proposals for the supporting regulations for the scheme. These proposals will come to Cabinet for approval to consult publicly in 2023.

### Communications

79 Subject to Cabinet's decisions, I will announce the decision to authorise the drafting of a Bill establishing an ARR scheme in New Zealand and that I will be seeking funding for the scheme's initial implementation and administration.

### Proactive Release

80 This paper will be proactively released, subject to redaction of financial information, under the Official Information Act 1982.

### Recommendations

The Minister for Arts, Culture and Heritage recommends that the Committee:

1 **Agree**, the Artist Resale Royalty scheme be established through standalone legislation with the following policy and administration settings:

#### Definition of Visual Art

1.1. The royalty will apply to the resale of all original visual artworks, including works produced by artists in the employment of, or commissioned by, the Crown, and works created by a group of artists, and limited editions works;

- 1.2. Toi Māori and Pacific art will be defined for the purposes of the scheme as ‘the cultural expression of Māori or Pacific peoples, which is sold on the secondary art market through art market professionals’;
- 1.3. The proposed legislation will provide a power to make regulations setting out the definition of visual art for the purposes of the scheme;

**Eligibility for the Resale Right**

- 1.4. Resale royalties will be available to citizens and residents of New Zealand and the countries with which it has constitutional relationships, and nationals or residents of a reciprocating country;
- 1.5. A resale right can be held jointly by a group of artists;
- 1.6. The royalty will apply to resales of visual artworks that:
  - 1.6.1. occur after the first transfer or sale of the artwork;
  - 1.6.2. involve an art market professional with this definition being set in regulations and periodically reviewed;
  - 1.6.3. are to and from a public institution, such as a museum;
- 1.7. The proposed legislation will provide a power to make regulations setting out the definition of art market professional for the purposes of the scheme;
- 1.8. The legislation establishing the scheme will include a power to create an Order in Council confirming reciprocal arrangements with other countries;

**Rate and Application of the Resale Royalty**

- 1.9. The royalty rate will be an additional 5 percent on the resale price (before any additions or deductions, or other charges, such as a buyer’s premium, commission, or GST);
- 1.10. The royalty will apply to all resales after the commencement of the scheme, including of art created and sold before the commencement of the scheme;
- 1.11. There will not be a mandatory requirement for the royalty to apply to private resales between two individuals, however private resales will be able to voluntarily opt into the scheme;
- 1.12. Royalty payments for works which are jointly created by two or more artists will be shared equally among the artists, unless otherwise indicated in writing by these parties;
- 1.13. Resale royalties will be specifically linked to the duration of copyright which is currently for the life of the artist plus 50 years after death. If the copyright duration is extended, the resale right duration will likewise extend;

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- 1.14. Artists would determine who the royalty right would transfer to in the event of their death and if an artist has not specified to whom the royalty right should transfer this will be resolved by operation of succession law;
- 1.15. The royalty right will be inalienable (unable to be waived or transferred);
- 1.16. Artists may decline to receive royalty payments, but a royalty would always be collected on an eligible resale;
- 1.17. The seller and the art market professional involved in the sale will be jointly liable for payment of the royalty;
- 1.18. Royalties declined by an artist or voluntary donations of part of an eligible artist's royalty could be held in a cultural fund, dedicated to supporting career sustainability for visual artists, further details of which will be set out in regulations;

**Management of the scheme by a government appointed collection agency**

- 1.19. A single non-government, not-for-profit, collection agency will be authorised to manage the scheme;
- 1.20. The following high-level principles will guide the operation of the collection agency. The collection agency must:
  - 1.20.1. operate in a way that is transparent, accountable and respectful;
  - 1.20.2. act in the best interests of the artists and their estates whose royalties it collects;
  - 1.20.3. be inclusive of, and recognise the different needs of, all peoples in New Zealand;
  - 1.20.4. acknowledge and respect the role of Māori as tangata whenua and provide culturally appropriate support to Māori artists;
- 1.21. The proposed legislation will devolve power to Ministers to determine the process for appointing the collection agency, including the instrument of appointment and the terms and conditions of the appointment;
- 1.22. The collection agency will be monitored by Manatū Taonga;
- 1.23. The proposed legislation will provide for Ministers to revoke the appointment of the collection agency if it is determined that the agency is not meeting its obligations under the legislation and supporting regulations;
- 1.24. The proposed legislation will provide a power to make regulations setting out how the agency would operate, how it would be monitored, what percentage of the royalty should be set aside to support the administration of the scheme and above what sale threshold the royalty should apply;

**Information gathering, reporting, and enforcement powers of the collection agency**

- 1.25. Art market professionals will be required to provide the collection agency with information in relation to the resale relevant to:
  - 1.25.1. determine whether a resale royalty should be collected on an art sale and the amount of any resale royalty payable;
  - 1.25.2. determine who is liable to make the payment;
- 1.26. The collection agency will have powers to take civil proceedings to recover any unpaid resale royalties;

**Financial Implications**

2 [REDACTED]

**Legislative Implications**

3 **Note** legislation will need to be in place and the Artist Resale Royalty scheme operational by late-2024 for New Zealand to meet its commitments under the New Zealand – United Kingdom Free Trade Agreement;

4 [REDACTED]

5 **Agree** that an Artist Resale Royalty scheme be established in New Zealand through stand-alone legislation administered by Manatū Taonga;

6 **Invite** the Minister for Arts, Culture and Heritage to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above proposals;

7 **Authorise** the Minister for Arts, Culture and Heritage to further develop and clarify policy matters and make decisions on minor or technical matters as required for the drafting of the Bill, providing these decisions are not inconsistent with decisions made by Cabinet;

8 **Agree** that New Zealand will seek to establish reciprocal arrangements for an Artist Resale Royalty scheme with other countries, commencing with Australia;

9 **Note** the Ministry for Arts, Culture and Heritage will initiate a review of the effectiveness of New Zealand’s Artist Resale Royalty scheme within five years of enactment, with this review being an operational matter and not part of legislation;

10 **Note** the Minister for Arts, Culture and Heritage will announce that a Bill establishing a Visual Artist Resale Royalty scheme will be introduced to the House in 2023.

Authorised for lodgement

Hon Carmel Sepuloni



Minister for Arts, Culture and Heritage

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## Appendix One: Te Tiriti o Waitangi implications

- 1 There is a deep interconnectedness between ngā toi Māori (Māori arts) and mātauranga Māori. Ngā toi Māori are a fundamental part of Māori culture and identity and contribute to iwi/Māori social and cultural wellbeing as well as informing Māori understanding and care of te taiao (the natural world/environment). Māori have long told us that culture and the arts play a large part in hauora Māori (wellbeing). Ngā toi Māori also contributes significantly to New Zealand’s national identity, reputation and economy, thereby providing public value and benefit for all New Zealanders.
  
- 2 In line with article 2 of the Te Tiriti (rangatiratanga), officials considered the option of enabling Māori to opt out of the scheme, to give Māori full autonomy to negotiate their own resale royalty arrangements. However, data on current voluntary arrangements indicates that only a small number of well-established, wealthy artists have been able to negotiate their own royalty deals with buyers of their work, that the royalty rate has been well below 5% (e.g., 2.5%) and that these have only ever applied to the first resale. Negotiating a royalty beyond a first resale would be impossible without empowering legislation. Furthermore, we are concerned that a scheme that provides an opt out could drive perverse outcomes. If the opt out mechanism is manipulated to generate a ‘condition’ for selling work, this would have a negative impact on Māori artists and their financial returns from this scheme, thereby impacting the ability of the scheme to deliver on article 3 of Te Tiriti (oritetanga).
  
- 3 Māori artists who do not wish to accept payment can donate their royalties to another party, if they wish to do so. In line with article 3 of Te Tiriti (oritetanga) officials looked at how best to ensure Māori receive equal benefit from the scheme. The proposed settings seek to give effect to article 3 by enabling royalty rights to be held jointly by artists. This recognises that individualised and exclusive rights are a western concept that does not align well with the way ngā toi Māori is often created, or the social structures that exist within Māoridom.
  
- 4 Officials will seek to ensure that the definition of art market professional is inclusive of mechanisms for resale where Māori art is prominent and will undertake further engagement to refine this definition so that it is inclusive of these mechanisms. Officials will work with Māori legal and art experts to do this and this refined definition will be included in supporting regulations. This approach is necessary because Manatū Taonga data shows Māori artworks are underrepresented in traditional auction house sales. Officials are also proposing the scheme uses a broad, non-prescriptive definition of ngā toi Māori that encompasses all forms of Maori cultural expression. This approach would ensure sales of Māori cultural expression through an art market professional are not excluded from the scheme by prescriptive legislation.
  
- 5 In line with article 1 of the Treaty (kāwanatanga) officials have considered what the role of Government should be in ensuring that this scheme supports rangatiratanga and oritetanga. Further to the above, Government will ensure that the collection agency has an operational framework that helps give effect to oritetanga and rangatiratanga, by requiring: Māori to be included in governance and decision-making; the collection agency to work with Māori artists and their beneficiaries to ensure the fair and appropriate distribution of royalties; and the agency to collect,

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retain and use information in a way that supports Māori, within the boundaries of existing Privacy law, to keep track of their works in a way Māori currently cannot.

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## Appendix Two: Population Implications

Group	How the proposal may affect this group
Māori	<p>Around 12.3% of visual artists are Māori compared with the total working age population of 13%. Feedback from Māori artist indicates that a lot of sales of Māori art are undertaken online and directly in a primary sale, and that many Māori artists do not have dealer galleries or public galleries promoting their work. Māori could therefore be less likely to benefit from these proposals than other groups.</p> <p>Individualised and exclusive ownership is a western concept that does not align with the way Māori and Pacific arts are often created, or the social structures that exist within Māori and Pacific communities. The ARR scheme will enable the resale right to be held by joint artists to recognise this.</p> <p>The separate definition of ngā toi Māori and Pacific art in primary legislation will help ensure that the scheme captures the broadest possible spectrum of Māori and Pacific cultural expression.</p>
Pasifika	<p>Approximately 4,000 Pasifika were employed in the arts and creative sector in 2018, approximately 4% of the market.</p> <p>Engagement and available data indicate Pasifika artists are more likely to sell or gift their works online and directly in primary sales, than using dealer galleries or auction houses so Pasifika may receive less financial benefit from the ARR scheme than other groups.</p>
Women	<p>It is likely that female artists in New Zealand would receive less royalty payments under an ARR scheme than male artists. Of the visual artists selling works for over \$1,000 between 2019 and 2021 in New Zealand, 38% were female and 62% were male.</p> <p>In recognition of the identified gender imbalance in art sales and recommendations from the Ministry for Women, officials will progress the ability for a voluntary opt-in mechanism for private sales alongside legislation.</p>
Seniors	<p>Many successful New Zealand artists are seniors. It is anticipated that seniors will receive a large proportion of royalties generated.</p>
Disabled people	<p>Engagement suggests works by disabled artists rarely exceed \$1,000 so it is unlikely disabled people would receive significant financial benefit from the ARR scheme. However, consultation with the sector found that lowering the threshold to capture artwork created by disabled artists was not preferred.</p> <p>The regulations outlining the operations of the collection agency will include provisions to ensure the ARR scheme is accessible for disabled visual artists and recognises their agency over their artworks and royalty payments.</p>
Other ethnic communities	<p>Asian, Middle Eastern, Latin American, and African artists experience barriers to creating and exhibiting work in New Zealand. These barriers limit their ability to sell work on the primary art market which could limit their opportunities to benefit from the ARR scheme.</p>

**Appendix 4: Regulatory Impact Statement – Artist Resale Royalty Scheme: Policy Approvals**

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# **Regulatory Impact Statement**

## **Artist Resale Royalty scheme**

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# Regulatory Impact Statement: An Artist Resale Royalty Scheme

## Coversheet

Purpose of Document	
Decision sought:	This analysis has been developed to inform Cabinet decisions on implementation of an Artist Resale Royalty (ARR) scheme in New Zealand.
Advising agencies:	Ministry for Culture and Heritage
Proposing Ministers:	Minister for Arts, Culture and Heritage
Date finalised:	TBC
Problem Definition	
<p>The United Kingdom – New Zealand Free Trade Agreement (FTA), signed in February 2022, commits New Zealand to introducing a reciprocal ARR scheme within two years of the FTA coming into force (entry into force is likely late 2022).</p> <p>New Zealand committed to an ARR scheme as part of the FTA because a scheme would provide the opportunity for visual artists to benefit from their work on an ongoing basis, aligns New Zealand with common international practice in relation to the resale right, and contributes to supporting visual artists' career sustainability.</p>	
Executive Summary	
<p><b>Background</b></p> <p>The resale royalty right originated in Europe in the late 19th century as a way for artists and their families to continue to benefit from their work after its creation. The right is enshrined in the 1971 Berne Convention and enables visual artists to receive a royalty when their work is sold on the secondary art market. New Zealand is a signatory to the Convention but does not have an ARR scheme in place.</p> <p>Over 80 countries currently have legislation implementing the Berne Convention and establishing a resale royalty right, including the United Kingdom (UK), Australia, and all European Union (EU) member states.<sup>1</sup> Almost 80 percent of the Organisation for Economic Co-operation and Development (OECD) countries have ARR schemes in place.</p> <p>The FTA with the UK commits New Zealand to introducing an ARR scheme within two years of the FTA's entry into force. The UK FTA was signed in February 2022 and New Zealand is aiming to complete domestic ratification processes and have the agreement enter into</p>	

<sup>1</sup> There is no single confirmed list of countries which have an ARR scheme, although this list provides an indication and appears to be largely accurate [Indicative list of countries whose legislation provides for the resale right \(adagp.fr\)](#)



force in late 2022<sup>2</sup>. To pass legislation in time for an ARR scheme to be in place by late 2024 (two years after the FTA entering in force), work needs to be progressed now.

The recently concluded NZ – European Union (EU) FTA also includes a requirement that New Zealand establish an ARR scheme within two years of this FTA coming into force. The EU FTA is not yet signed and will likely not be in force until 2024.

### ***The proposal***

The proposal is to implement a New Zealand ARR scheme which would:

- establish a consistent and regulated approach to the resale right which would be inalienable and so could not be waived or transferred away from the artist;
- provide eligible visual artists (or their estates) with a resale royalty of five percent when their original artwork sells on the secondary market with the seller and art market professional jointly liable for payment of the royalty;
- be administered by a non-government, not-for-profit collection agency which would deduct an administration fee from royalties collected to meet administration costs and which would be monitored by the Ministry for Culture and Heritage (the Ministry);
- enable New Zealand artists to benefit when their artwork is sold overseas in a country with a scheme and with which a reciprocal arrangement has been agreed.

### ***Impacts of proposal***

Benefits would include royalties paid to artists. Modelling suggests a net average of \$702,858 per annum would have been distributed to artists and estates between 2018 and 2020 9(2)(f)(iv). A substantive part of the royalties would go to well-established artists (or estates) whose work commands a higher price at auction. Less well-known and emerging artists would still receive modest remuneration. Resale royalties may constitute income under the Income Tax Act 2007, but further analysis is needed to determine whether a royalty payment constitutes taxable income to the recipient. There would also be non-monetary benefits to artists who have indicated, through engagement, that a royalty affirms their cultural and societal contribution.

9(2)(f)(iv)

Ongoing operational costs would be offset in part by the revenue generated from charging the administrative fee on royalties collected. 9(2)(f)(iv)

There would also be an impact on art market professionals who would have administrative responsibilities. International evidence from the UK and Australian schemes suggests the administrative and economic burden on art market professionals would likely be low.

### ***Consultation and engagement with key stakeholders***

Since 2007, stakeholders have been engaged on this work on multiple occasions. Engagement indicates there is general support for an ARR scheme, but some auction houses, dealer galleries and art collectors are opposed due to the perceived costs.

As part of the development of policy proposals in 2022, the Ministry conducted targeted engagement with key stakeholders, both from the art sector and other government agencies.

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<sup>2</sup> Note the timing of entry into force is also dependent on the UK completing its own ratification process.

This engagement showed extensive support for an ARR scheme with a range of diverse views on what settings the scheme should have and how the scheme should be implemented.

### Limitations and Constraints on Analysis

Consideration and analysis of the options were limited by the UK FTA commitment to operationalise a reciprocal ARR scheme in New Zealand. This has resulted in a focus on the option of a legislated ARR scheme (noting the FTA provides considerable flexibility as to how the scheme is designed and implemented in New Zealand).

There is an overall lack of transparency around the art market in New Zealand and the government does not monitor market trends. The Ministry's analysis is informed by auction house sales data (purchased from the Australian Art Sales Digest) which we estimate comprises approximately 80 percent of the secondary art market in New Zealand. We have little visibility of the remaining 20 percent.

The analysis of this proposal is informed partly by insights and experiences from the implementation and operation of comparative overseas ARR schemes, including in Australia, the UK and EU nations. The New Zealand market is considerably smaller than many overseas markets and so may be impacted differently; we have not been able to identify an overseas country which has a similar sized art market to New Zealand, and which also has an ARR scheme (Ireland has a comparable population, but a larger art market).

Widespread engagement with key stakeholders was not carried out in 2022. This was due in part to timeframes for introduction of the ARR Bill and also due to the fact that policy proposals are broadly in line with what was consulted on in 2020 and there will be an opportunity in the Select Committee process for groups and individuals to bring their views before Members of Parliament. Our targeted engagement suggests stakeholder views are largely unchanged from previous 2019 and 2020 engagement.

Engagement with Māori was also less widespread than hoped and limited response was received which was attributed to short timeframes and the considerable engagement with Māori being undertaken across government on a range of other issues. Further engagement with Māori will be conducted as part of the development of supporting regulations.

Overall, the Ministry has a reasonable degree of certainty that these limitations and constraints have not significantly impacted the degree of confidence Ministers should have when considering this analysis to inform their decisions.

### Responsible Manager(s) (completed by relevant manager)

Emma Spooner  
Policy Manager  
Arts Policy  
Ministry for Culture and Heritage

[Signature]

[Date signed out]

### Quality Assurance (completed by QA panel)

Reviewing Agency: Ministry for Culture and Heritage and Department of Internal Affairs

Panel Assessment & Comment: A cross-agency panel has assessed the RIS and considers it meets the QA criteria. While some of the regulatory choices are finely balanced, the analysis presents a sound case for the preferred set of options. Iterative local consultation and the consideration of other jurisdictions' experiences provide a level of context and depth.

The RIS acknowledges limitations in relation to data and financial modelling, which mean the scale of expected costs and benefits is less certain. These limitations, and the fact some detailed settings are yet to be determined, detract slightly from the RIS's persuasiveness, but not to the extent of affecting the overall confidence Cabinet can place in its conclusions.

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## Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

### The UK FTA commits New Zealand to introducing a reciprocal ARR scheme

- 1 The recently negotiated FTA between the UK and New Zealand commits New Zealand to introducing a reciprocal ARR scheme within two years of the FTA's entry into force (Article 17.46 of the FTA).
- 2 This proposal needs to be addressed now in order to pass legislation in time for a reciprocal ARR scheme to be operational by late 2024 (two years after New Zealand is aiming to complete domestic ratification processes for the UK FTA to come into force in late 2022).

### Background to resale royalty right

- 3 The resale royalty right or *droit de suite* (French for "right to follow") originated in the late 19th century as a way for artists and their families to continue to benefit from their work after its creation, particularly when that work's value increased significantly. The right enables visual artists to receive a royalty when their work is sold on the secondary market.
- 4 The resale right is enshrined in the 1971 Berne Convention which is an international agreement governing copyright and which affirms artists' "inalienable right to an interest" in a resale of their work. However, the Convention has no legal force in the absence of national legislation implementing the Convention. New Zealand is a signatory to the Convention but does not have an ARR scheme in place.
- 5 Over 80 countries currently have legislation implementing the Berne Convention and establishing a resale royalty right, including the UK, Australia, and all EU member states. Thirty of the 38 countries in the OECD have implemented an ARR scheme to date.<sup>3</sup> The USA (one of the largest global art markets) does not have a national ARR scheme, although California has its own scheme.<sup>4</sup> While ARR schemes differ from country to country, they all provide the artist with the inalienable right to a royalty on eligible secondary sales of their artwork in that country.
- 6 A New Zealand ARR scheme has been under consideration for more than 15 years. In 2008, the previous Government introduced the Copyright (Artists' Resale Right) Amendment Bill<sup>5</sup>, however, following a change in government, the Bill was discharged in 2009 before it reached its third reading. Work commenced on renewed legislation in 2018 but was put on hold in March 2020 due to the need to prioritise the COVID-19 response.

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<sup>3</sup> Of the 38 OECD countries, Canada, Colombia, Israel, Japan, Korea, New Zealand, Switzerland and the United States do not have an ARR scheme in place.

<sup>4</sup> The 1977 Californian scheme has essentially been nullified after the Ninth Circuit of the Supreme Court ruled in 2018 that the Federal US Copyright Act 1978 pre-empts the resale royalty Act, meaning only works sold between 1977 and 1978 are eligible for a resale royalty when resold under the Californian scheme.

<sup>5</sup> Refer New Zealand legislation website:  
<https://www.legislation.govt.nz/bill/government/2008/0184/latest/whole.html> - DLM1319114

- 7 The current proposals for an ARR scheme draw extensively on previous work done including previous policy analysis, engagement with key stakeholders and submissions received through the 2008 Select Committee process.

## **The Status Quo**

### ***Copyright law enables creative professionals to benefit financially from their work, but options for visual artists are limited compared to other creatives***

- 8 The Copyright Act 1994 recognises the rights of creators of works to benefit from reproductions and repeated use of those works, assuming the duration of copyright has not expired. For example, musicians and composers receive royalties for performances of their music and novelists receive payment for sales of multiple copies of books they write and for sale of film rights. Visual artists can grant a licence to a book publisher to reproduce their painting for the cover of a novel and receive a fee in exchange.
- 9 Whereas other creative professionals generally derive copyright income for multiple reproductions or repeat performance of their works, visual artists' primary income is largely limited to the one-off initial sale of their individual works on the primary art market. For most visual artists, other than limited copyright licencing, the ability to generate additional revenue from a work currently ends with that first sale.

### ***In New Zealand, some visual artists are negotiating their own voluntary ARR arrangements with varying degrees of success***

- 10 Some New Zealand visual artists (usually established artists) are negotiating their own voluntary ARR arrangements with auction houses and dealers. These royalty arrangements can usually only be attached to the first resale of the work and not any subsequent resale.
- 11 There is no uniform or consistent approach, and the terms of the arrangements differ depending on what artists can negotiate. The success of these voluntary arrangements varies, and it is usually established/well-known artists who negotiate arrangements as they have the status and bargaining power to do so. Without government intervention, the status quo is expected to remain broadly unchanged. Some artists will continue to negotiate voluntary ARR schemes with various auction houses and dealers.

## **There are links with other government work programmes**

### ***Review of the Copyright Act 1994***

- 12 There are linkages between the resale right and copyright and the discharged 2008 Bill proposed to give effect to an ARR scheme by amending the Copyright Act 1994. However, the Copyright Act 1994 is currently under a comprehensive review led by the Ministry of Business, Innovation and Employment (MBIE). This review has been delayed due to the need to prioritise the response to COVID-19 and MBIE advise there are currently no specific timeframes for its completion.
- 13 The FTAs with the UK and EU also include a commitment to extend the duration of copyright in New Zealand from 50 years after death to 70 years which will align more

closely with overseas jurisdictions (such as the UK and Australia).<sup>6</sup> This would have implications for an ARR scheme as it is proposed the duration of the resale right be specifically linked to the duration of copyright.

### **Response to Wai 262**

- 14 The Wai 262 claim to the Waitangi Tribunal examined the Crown's policies and laws as they affect indigenous knowledge (mātauranga Māori) and taonga, including indigenous flora and fauna, the environment, Māori culture and products of Māori culture such as toi Māori (Māori art). A subsequent Waitangi Tribunal report, *Ko Aotearoa Tēnei*, explored a Crown–Māori partnership that moves beyond historical Tiriti grievances and recommended reforms that present opportunities for innovation, to leverage New Zealand's unique identity and to strengthen its international position as well as delivering direct benefits to Māori.
- 15 In April 2019, Cabinet agreed to progress development of a whole-of-government strategy to address the issues set out in the Wai 262 claim and *Ko Aotearoa Tēnei*. This decision recognised the clear benefits of a collaborative approach to protect, promote, and preserve mātauranga Māori and taonga, and also the risks of upholding the status quo. The Ministry is participating in the whole-of-government work programme, Te Pae Tawhiti: Wai 262, and is working to ensure an ARR scheme would have the necessary flexibility to account for any future changes arising from this work programme, for example, in relation to toi Māori.

### **Work to support economic stability and sustainability of artists' careers**

- 16 In the context of the post-COVID-19 rebuild, the Ministry is taking a longer-term approach towards investing in a sustainable future for artists and creative professionals. An ARR scheme is situated within this broader context and is a component of a suite of initiatives relating to artists' career sustainability including the Ministry's COVID-19 recovery funding and the Creative Careers Service pilot.

### **Market context**

- 17 The New Zealand art market is comprised of the primary market, where new art comes to market for the first time, and the secondary market, where existing art that has been sold at least once before comes to market.
- 18 The total size of New Zealand's secondary art market is difficult to determine because accurate sales figures are not available for all resales. Sales data from the auction houses operating in New Zealand is available and is estimated to comprise approximately 80 percent of all secondary art sales.<sup>7</sup> On this basis, the New Zealand secondary art market was estimated to be worth approximately \$31 million in 2020<sup>8</sup>, compared to an Australian market of an estimated \$107 million and a global market of approximately \$50.1 billion.

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<sup>6</sup> The UK FTA indicates this obligation will commence within 15 years of the entry into force. The EU FTA (not yet signed) requires this commence within four years after entry into force.

<sup>7</sup> Auction house sales data was purchased from the Australian Art Sales Digest which collects detailed and comprehensive data on auction house sales in Australia and New Zealand.

<sup>8</sup> Note we have not used 2021 data because this year was a significant outlier based on data from previous years.

- 19 Both the value of New Zealand artists' work and the number of New Zealand artists' works sold in New Zealand have fluctuated over the last two decades, but overall have increased.
- 20 Appendix 1 provides further detail on New Zealand's art market including an analysis of market trends and secondary art sales since 2000.

### What is the policy problem or opportunity?

#### **The opportunity: meeting our obligations under the UK FTA provides the opportunity for visual artists to benefit from their work on an ongoing basis**

- 21 The FTA with the UK commits New Zealand to introducing a reciprocal ARR scheme within two years of the FTA coming into force (New Zealand is aiming to complete domestic ratification processes for entry into force in late 2022). New Zealand is similarly required to implement an ARR scheme within two years of the EU FTA entering into force (which is not likely to occur until 2024).
- 22 Meeting our FTA obligations would provide the opportunity for visual artists (or their estates) to benefit from their work on an ongoing basis and enjoy the long-term success of their work. Currently, when a visual artist's work is sold for the first time, the artist receives a commission on the sale. However, when that work is resold on the secondary market, there is no means for the artist (or their estate) to derive income from the resale, even if the artwork has increased substantially in value since it was first sold.
- 23 The FTAs also provide the opportunity for New Zealand to align with common international practice. More than 80 countries worldwide currently have an ARR scheme in place. In many overseas schemes, foreign nationals are eligible to receive royalties if their country of origin has a reciprocal scheme in place. However, as New Zealand does not have a scheme, New Zealand artists cannot receive royalty payments when their work sells in overseas countries that have a scheme in place.
- 24 Finally, there is also the opportunity to support visual artists' career sustainability by enabling visual artists to access ongoing royalties in a similar way to other creative professionals (such as writers, musicians, playwrights). Visual artists have the same exclusive rights afforded by copyright as other creative professionals. However, visual artists' ability to derive income from copyright is lower than that of other creative professionals because of the nature of their work. For example, musicians earn an estimated five times and writers nine times more in copyright royalties than visual artists.

#### ***We estimate around 3,600 New Zealand visual artists could potentially benefit***

- 25 It is difficult to determine the exact number of artists who could be impacted as there is no single register where all visual artists are recorded. Many visual artists also have supplementary employment to earn an adequate income and so they may be recorded under that occupation instead.
- 26 Infometrics data from March 2021 indicates there are 3,677 people classified as painters, sculptors and potters, and the Ministry has used this figure as an estimate of the number of artists who could potentially benefit. Of these, 453 (12.3 percent) identified as Māori.
- 27 Additionally, some photographers operate in the fine arts space (as opposed to commercial photography) and their work could potentially attract a resale royalty. Infometrics identifies 2,996 photographers but it is likely that only a small number of photographers would have works that would be sold through an art market professional

and so would be eligible for a resale royalty. Therefore, we have not included photographers in the estimate of visual artists impacted.

## Stakeholders and the nature of their interests

28 The key stakeholders in this area are:

- a. art market professionals such as auction houses, dealer galleries and art consultants who sell artists' work on the secondary market;
- b. public art galleries and museums which are purchasers and exhibitors of artworks and have interests in supporting artists and recognising their contribution;
- c. visual artists and their estates and artist advocacy groups, e.g., Equity for Artists;<sup>9</sup>
- d. art collectors and buyers who also sustain the art market and benefit from the purchase of art through cultural enrichment, and sometimes as an investment;
- e. online traders (e.g. TradeMe) which often – but not always – trade at the lower end of the market (less than \$1,000), which is less likely to be captured by regulation;
- f. Government agencies that have an interest in the establishment of a new regulatory regime in the secondary market;
- g. sector organisations, such as Copyright Licensing New Zealand.

### ***Stakeholder engagement has repeatedly shown that support for an ARR scheme varies***

29 Stakeholders have been engaged on this work on multiple occasions over the years including a 2007 discussion paper, Select Committee submissions on the 2008 Bill, a 2018 MBIE discussion paper, a 2019 online survey, and extensive stakeholder consultation in 2019 and 2020. This engagement has shown similar trends – that support for a scheme varies, with strong support from artists and advocacy groups/organisation, but opposition from many art market professionals.

30 As part of the development of policy proposals in 2022, the Ministry conducted targeted engagement with key sector stakeholders in June 2022. Extensive engagement was not undertaken this time which was due in part to timeframes for the introduction of an ARR Bill and also due to the assumption that overarching themes from previous engagement would be broadly the same (which they were). As targeted consultation had been carried out only two years previously, the Ministry did not consider it necessary to conduct extensive engagement in 2022.

31 Appendix 2 contains a summary of key consultation themes from 2007 to 2022.

## What objectives are sought in relation to the policy problem/opportunity?

32 This proposal seeks to achieve the following objectives:

- a. **Meet New Zealand's obligations under the UK FTA** (art 17.46) to introduce an ARR scheme within two years of the FTA coming into force **and EU FTA** (art X.12)
- b. **Maximise the benefits to visual artists** (and their estates if the artist is deceased).
- c. **Minimise the costs** to art market professionals, buyers and sellers and the broader market.

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<sup>9</sup> Equity for Artists is a group of artists advocating for equality for artists through the payment of resale royalties.



- d. **Support a well-functioning New Zealand secondary art market.**
- e. Ensure the option is as **simple and cost effective as possible to administer** with the long-term goal of ultimately becoming self-sustaining.

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## Section 2: Deciding upon an option to address the policy problem

### What criteria will be used to compare options?

- 33 Options will be assessed using the following criteria:
- a. **Feasibility of implementation and operation** – how feasibly/easily can the option be implemented and operationalised?
  - b. **Benefits to artists** – what benefits are there to artists and how equitable are the benefits to different artist groups (e.g. Māori)?
  - c. **Compliance and administration costs** – what costs are there to government and the sector (including art market professionals, buyers, sellers)?
  - d. **Flexibility/sustainability** – how flexible, sustainable, and future-proofed is the option?

### What scope will options be considered within?

- 34 Options were considered within the following scope:
- a. **The FTA with the United Kingdom.** The terms of the FTA commit New Zealand to introducing a reciprocal ARR scheme which has resulted in some other options being discounted (see paragraph 39 below).
  - b. **Previous ministerial decisions.** Work in 2019 identified the benefits of an ARR scheme to visual artists. At this time, the Minister for Arts, Culture and Heritage, agreed to the policy parameters for further work on a New Zealand ARR scheme.
- 35 A range of other options to increase support for visual artists were identified but ultimately disregarded because they would not achieve the primary objective of meeting New Zealand's commitments under the UK FTA. Other options considered were:
- a. additional government grants/funding allocated to support visual artists;
  - b. support for 'exhibition fees' in public galleries which would provide artists with a 'fee' when their artwork is exhibited in a public gallery;
  - c. tax incentives or reduced taxes/tax exemptions for visual artists.

### What options are being considered?

- 36 Government can either:
- a. **do nothing:** retain the status quo which is voluntary ARR arrangements;
  - b. **or do something:** implement regulatory change through a legislated, mandatory ARR scheme.

#### Retain the Status Quo

##### Description

- 37 The status quo involves artists negotiating voluntary ARR arrangements with art market professionals, so that the artist receives a royalty when their work is sold on the secondary market. There is no requirement to adopt these arrangements, so the onus is largely on artists to negotiate, enforce and administer these arrangements.

## Analysis

- 38 Some artists already have such arrangements in place with limited consistency and varying degrees of success. Unlike a voluntary arrangement, there is no administrative fee deducted from the royalty, so the artist would receive the full royalty payment. Voluntary ARR arrangements are generally supported by some art market professionals who have indicated the status quo is fair and regulatory change is not necessary.
- 39 The status quo does not meet New Zealand's obligations under the UK FTA or the EU FTA and would provide limited benefits to New Zealand visual artists. Voluntary ARR arrangements are difficult to enforce, and the administrative burden falls on the artist or art market professional to implement. A voluntary arrangement also has no standing overseas and so New Zealand artists would not experience any reciprocal rights when their work is sold on international secondary art markets that have a scheme in place.
- 40 There are also significant financial disincentives for individual auction houses to introduce voluntary arrangements when competitors are not required to do so. A former New Zealand auction house, Bowerbank Ninow, previously operated its own ARR 'scheme' which paid a 2.5 percent resale royalty to living artists. Engagement in 2020 indicated it was well received and supported by artists, but the auction house had to do all the administrative work (as there was no collection agency) and had to meet the entire cost of the royalty from its own fees.
- 41 Engagement indicates the ability of an artist to implement voluntary arrangements depends largely on the artist's reputation and career stage. Voluntary arrangements disproportionately favour established artists whose work is in demand and who consequently have increased 'bargaining power'. Even then, the artists may not benefit greatly as they can usually only attach the arrangement to the first resale of the work. Furthermore, a resale royalty cannot be attached retrospectively to a work that may have subsequently increased in value.
- 42 The overarching policy objective is to meet the terms of the UK and EU FTAs which require a mandatory ARR scheme. The status quo is not sustainable as New Zealand would eventually be in breach of its obligations under the UK-FTA and then the EU-FTA.

## Implement a legislated, mandatory ARR scheme (preferred)

### Description

- 43 A mandatory ARR scheme, established through legislation, would enable eligible visual artists or their estates to receive a royalty payment when their work is resold on the secondary art market through a transaction involving an art market professional. The seller together with the art market professional would be jointly liable for paying the royalty.
- 44 In line with the obligations under the UK FTA, the scheme would be reciprocal with the UK scheme and would also have the flexibility to become reciprocal with other countries' schemes as appropriate. An appointed collection agency would administer the scheme and would be authorised to collect and distribute the royalties and deduct an administrative fee to meet its costs. The Ministry would be responsible for monitoring the performance of the collection agency.

### Analysis

- 45 A legislated ARR scheme would meet New Zealand's commitments under the UK and EU FTAs and is the Ministry's preferred approach because it would:

- a. establish the inalienable nature of the resale right so the right cannot be waived or transferred away from the artist as a condition of sale;
  - b. provide a consistent and regulated approach to the resale royalty right which would benefit artists (including younger and emerging artists who often do not have the status or position to negotiate their own voluntary ARR arrangements);
  - c. enable artists' estates to benefit after the death of the artist for the right's duration;
  - d. enable New Zealand artists to benefit when their artwork is sold overseas in a country which has a reciprocal ARR scheme;
  - e. apply equally to all eligible sales, thereby standardising practice across the art market and ensuring no single art market professional is disadvantaged.
- 46 As well as meeting the requirements of FTAs, a mandatory ARR scheme has other benefits, including enabling artists to benefit from their work on an ongoing basis, aligning with common international practice, and supporting artist career sustainability.
- 47 A legislated, mandatory ARR scheme is compared to the status quo in the table on the following pages and is discussed in more detail below in relation to the criteria.

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## How does the option compare to the status quo?

### Example key for qualitative judgements:

++	much better than doing nothing/the status quo/counterfactual	+	better than doing nothing/the status quo/counterfactual
0	about the same as doing nothing/the status quo/counterfactual		
-	worse than doing nothing/the status quo/counterfactual	--	much worse than doing nothing/the status quo/counterfactual

	Status Quo (voluntary ARR arrangements)	Mandatory, legislated ARR scheme (preferred)
Feasibility of implementation and operation	0	<p>- The implementation and operation of the scheme, while more complex than voluntary arrangements, would still be relatively straightforward. The mandatory scheme would apply equally and uniformly to all art market professionals trading eligible works on the secondary art market. Operation of the scheme would be managed by a single dedicated collection agency rather than individual art market professionals managing arrangements and artists being responsible for monitoring/enforcing arrangements.</p> <p>A mandatory ARR scheme has already been implemented successfully in many countries. Reviews of the Australian and UK schemes suggest they are operating efficiently, and no negative impacts can be definitively attributed to them. Concerns raised by opponents of overseas schemes prior to their introduction have generally not materialised.</p> <p>The Ministry has taken core elements from what has worked in Australia, the UK and EU nations and has used these as the basis for a New Zealand scheme. A certain degree of alignment with overseas schemes will also make it easier to operationalise and administer any reciprocal arrangements agreed with those countries.</p>
Benefits to artists	0	<p>++ A legislated scheme would provide consistent and greater benefits to a broader range of artists than the status quo. For example, the scheme would not depend on an artist's status or prominence to negotiate voluntary arrangements. The right would exist beyond the first resale and would also exist beyond the artist's death. The royalty rate would likely be higher than is offered through voluntary arrangements, even after the admin fee is deducted.</p> <p>Auction house data from 2018 to 2020 shows \$2,108,575 in net royalties would have been distributed to 666 artists or artists' estates from 5,139 New Zealand auction sales, an average of \$702,858 per annum (after the administrative fee is deducted). Approx. 34% (\$707,468) of these net royalties (from 2,511 sales) would have gone to 447 living artists. Total net royalties per artist across the three years would have ranged from \$45 to \$75,991 with the median net royalties per artist being \$182.</p> <p>Approx. 62% of royalties would have gone to male artists and 38 percent to female artists. While a significant proportion of royalties would have gone to artists aged over 50, younger and emerging artists would still have experienced modest returns (in contrast to voluntary arrangements where emerging artists generally cannot negotiate favourable arrangements). Approx.</p>

		<p>10% of resales of artwork created by living artists between 2018 and 2020 were by Māori artists. Less than 5% of resales were of artwork by Pacific artists.</p> <p>From 2018 to 2020, approx. 66% (\$1,398,136) of net royalties from 2,607 sales would have gone to 207 artists' estates (none of this benefit would be realised under the status quo as voluntary arrangements do not apply after the artist's death). Total net royalties per estate across the three years would have ranged from \$45 to \$265,804 with the median net royalties per estate being \$490.</p> <p>There are also non-monetary benefits to artists relating to the recognition of an artist's contribution through their work. In 2013, an Australian study of visual artists reported that 90% of those surveyed found that an ARR scheme was an important confirmation for artists that they have rights, and their cultural and societal contribution is valued.<sup>10</sup></p>
Compliance and administration costs	0	<p>- There would be additional costs to government and likely additional administrative/compliance costs for art market professionals and buyers and sellers of artwork compared to the status quo. International evidence suggests the overall administrative and financial burden on art market professionals would likely be low. The UK scheme estimated 95 minutes of administration per quarter, costing £26.40 (approx. \$52 NZD) in 2021, when adjusted for UK median wage inflation. The Australian scheme estimated around \$90.68 AUD (approx. \$100 NZD) for three hours per quarter, when adjusted for 2021 median wage inflation.</p> <p>In contrast to the status quo, implementation and operation of an ARR scheme is subject to Crown investment. The administration fee deducted from royalties collected will go towards ongoing administration costs but, until the scheme can become self-sustaining, there will be a shortfall.<sup>11</sup> 9(2)(f)(iv)</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>Ongoing operational costs would be offset in part by the revenue from the 9(2)(f)(iv) administration fee, but it is difficult to predict this revenue as the art market fluctuates considerably and annual secondary art market sales can vary significantly. Based</p>

<sup>10</sup> *The economic implications of the artist's resale right*, November 2017. [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_35/sccr\\_35\\_7.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_7.pdf)

<sup>11</sup> The Australian government initially invested \$2.2 million AUD in the set up and initial annual administration of its scheme, recognising it would not be self-sustaining for some years.

		<p>on auction house data for 2016 to 2020, administration fees would have covered part of the operational costs, but there would still have been a shortfall of between \$169,000 and \$194,000 per annum.<sup>12</sup></p> <p>A future five-year forecast from 2023 to 2027 suggests the scheme could generate between 9(2)(f)(iv) per annum from administration fees. This would mean future shortfalls ranging from \$137,000 to \$155,000 in funding the operational costs. However, this only includes potential revenue from auction house sales; other sales (such as those by dealer galleries) may mean additional revenue is generated. There is currently no visibility on the total value of dealer gallery sales.</p> <p>This forecast is conservative as future sales volume and value are difficult to predict due to market fluctuations and we are cautious of underestimating how much Crown investment would be required. The small size of New Zealand's market also means fluctuations are more noticeable and will likely have a greater impact.</p>
Flexibility/ sustainability	0	<p>++ With appropriate policy settings, the ARR scheme would be sustainable long term, unlike voluntary ARR arrangements (e.g. former auction house Bowerbank Ninow's previous voluntary "scheme" was not cost effective or sustainable and so was ultimately discontinued). The intention is the ARR scheme will be self-sustaining and will not require permanent Crown funding, but it is difficult to predict when this point would be reached. The Australian scheme, introduced in 2010, is not expected to be entirely self-sustaining until 2025.<sup>13</sup></p> <p>9(2)(f)(iv)</p> <p>Once the scheme has been operating for a few years and market trends are more apparent, the Ministry should be better placed to forecast when the scheme might be expected to sustain itself without Crown funding.</p> <p>The option would be legislated but the legislation and supporting regulations would provide a degree of flexibility in how the scheme is operationalised. Including some policy settings in regulations (for example, the dollar threshold above which a royalty is collectible, the administration fee deducted, and the definitions of visual art and art market professional) will provide flexibility for future change.</p>
Overall assessment	0	2

<sup>12</sup> This estimate assumes a royalty rate of 5%, 9(2)(f)(iv)

<sup>13</sup> Notably, the Australian scheme did not apply to the first resale after commencement of the scheme *if* the artwork had been created and sold before commencement. This means the Australian scheme initially covered fewer artworks than are expected to be covered under the New Zealand scheme (and therefore it generated less revenue).

**Sub options for a legislated ARR scheme**

- 48 While the UK FTA stipulates some characteristics that a New Zealand ARR scheme must have<sup>14</sup>, it also allows considerable flexibility in the way an ARR scheme is designed and implemented in New Zealand. This means a legislated ARR scheme has a range of sub options relating to the following different policy settings the scheme might have.
- 49 Note that these sub options only cover settings of the scheme that will be in primary legislation. Other policy settings such as the level of administration fee, the dollar threshold above which a royalty applies, the detailed definition of visual art, and detail on the operation of the collection agency, will be in supporting regulations.
- 50 We have used the UK model settings as the counterfactual, throughout, which has meant that in some cases the counterfactual is the preferred option.

Policy setting	Sub options
The royalty rate (the rate of royalty that would be deducted from eligible sale)	<ol style="list-style-type: none"> <li>1. (Counterfactual) A graduated or sliding scale royalty rate (aligns with the UK and EU nations).</li> <li>2. A flat percentage royalty rate of 5% charged on the “hammer price” of a resale (aligns with Australian scheme).</li> </ol>
The scope of the resale right (what sales would be captured by the scheme) <sup>15</sup>	<ol style="list-style-type: none"> <li>1. (Counterfactual) Only resales where an art market professional is involved would be eligible for a royalty,<sup>16</sup> which would include sales to and from a public institution where an art market professional is involved.<sup>17</sup></li> <li>2. All resales in New Zealand would be eligible for a resale royalty, including private sales (this was an option supported by many artists through stakeholder engagement)</li> <li>3. Resales where an art market professional is involved would be eligible for a royalty, with the provision for private sales between individuals to opt in voluntarily if they wanted (those involved in the private sale would choose what royalty they wanted to pay, but 5% would be encouraged).</li> </ol>

<sup>14</sup> The UK FTA requires that the resale right be inalienable and cannot be waived, that it will apply to all acts of resale involving any sellers, buyers or intermediaries acting in the course of business of dealing artworks, and that the right will be reciprocal with the UK scheme.

<sup>15</sup> We also investigated, and discarded, the option of restricting royalties to only works that increase in monetary value (i.e. no royalty being payable on works that depreciate). A scheme of this kind once operated in Italy. While theoretically fairer to the seller (who would not make a loss on the artwork), it was difficult to administer because of a lack of transparency on initial purchase prices. Italy has since replaced this scheme with a regime consistent with the EU directive, which pays a royalty regardless of whether a work has increased in value.

<sup>16</sup> Sales through online platforms like Trade Me would be included in the instances where an art market professional is using the platform to resell eligible visual art, but not where two private individuals are using it.

<sup>17</sup> Public museums and public art galleries will be covered by the scheme, with further decisions required to inform regulatory settings that outline how the scheme will apply to them, recognising their unique role as an institution providing a benefit to the public. This includes determining whether these institutions are included under the definition of art market professional, noting the UK scheme exempts not-for-profit museums, which are open to the public, while the Australian scheme includes them within the definition of art market professionals.



Policy setting	Sub options
Eligibility to hold the resale right (who would be able to hold the resale right) <sup>18</sup>	<ol style="list-style-type: none"> <li>(Counterfactual) Only New Zealand citizens and permanent residents plus nationals and residents of reciprocating countries would be able to hold the resale right.</li> <li>New Zealand citizens<sup>19</sup>, permanent residents and anyone residing in New Zealand at the time of sale and nationals/residents of reciprocating countries would be eligible to hold the resale right.</li> </ol>
Duration of the resale right (how long the artist or artists' beneficiaries would be able to receive a royalty)	<ol style="list-style-type: none"> <li>(Counterfactual) Duration of the resale right is for the life of the artist plus 70 years after death</li> <li>Duration of the resale right mirrors the duration of copyright in the Copyright Act (currently life plus 50 years after death, changing to 70 years after death in the future as committed to in the UK and the EU FTAs).</li> <li>Duration of the resale right is for the life of the artist plus indefinite royalty duration period after death (the right exists in perpetuity after death).</li> </ol>
Provision to opt out of the scheme (whether artists or estates can opt out of engaging with the scheme or receiving a royalty)	<ol style="list-style-type: none"> <li>(Counterfactual) There is no option to opt-out of either collection or receipt of the royalties.</li> <li>Artists can opt-out of the collection agency collecting the royalty on their behalf on a case-by-case basis (as in the Australian scheme).</li> <li>Artists can opt-out of receiving the royalty but not collection of the royalty (royalties declined by artists could go into a Cultural Fund to support artists' career sustainability).</li> </ol>
Cap on the maximum royalty payable	<ol style="list-style-type: none"> <li>(Counterfactual) There would be a cap on the maximum royalty payable on a sale.</li> <li>There would be no cap on the maximum royalty payable on a sale.</li> </ol>
Collection agency (number of collection agencies and form of the collection agency)	<p><b>Number of collection agencies (a single agency or multiple)</b></p> <ol style="list-style-type: none"> <li>(Counterfactual) Multiple organisations can act as the collection agency if they meet the legislated requirements (as in the UK scheme).</li> <li>Only one organisation can act as the collection agency at any given time (as in the Australian scheme).</li> <li>There are two collection agencies, one of which is appointed solely to manage the collection and distribution of royalties for Māori artists.</li> </ol> <p><b>Form of the collection agency (what type of organisation should the agency be)</b></p> <ol style="list-style-type: none"> <li>(Counterfactual) A non-government, not-for-profit organisation (for example, Copyright Licensing New Zealand).</li> <li>A government department (most likely Manatū Toanga) is the collection agency.</li> <li>An existing Crown entity (such as Creative New Zealand) is the collection agency.</li> </ol>

<sup>18</sup> We did not consider options that did not extend eligibility to hold the right to nationals/residents of reciprocating countries. This is because both the EU and UK FTAs require the scheme be reciprocal.

<sup>19</sup> New Zealand citizens includes citizens of Tokelau, Niue, the Cook Islands, and the Ross Dependency.

Policy setting	Sub options
Enforcement regime (what enforcement powers should the collection agency have)	<ol style="list-style-type: none"> <li>1. (Counterfactual) The collection agency does not have enforcement powers, but art market professionals would be required to provide information to the collection agency so it can determine if a royalty is payable.</li> <li>2. The collection agency has the power to take civil proceedings to recover any unpaid royalties, or if the required information is not provided by a party.</li> <li>3. In addition to the power to take civil proceedings, the collection agency or another agency, has the power to issue infringement notices for non-compliance with the scheme. Note that infringement notices cannot be issued by an NGO, so would have to be issued by a government agency.</li> </ol>

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## Sub options for the rate of royalty charged on an eligible resale

Criteria	Counterfactual: As in the UK scheme, a sliding scale with brackets with different rates	Option 2: flat percentage royalty rate of 5% (as in Australia (preferred))
Feasibility of implementation and operation	0 like a graduated tax, a sliding scale is more complex to implement and operate than a flat royalty fee.	+ a flat percentage royalty rate is simpler for collection agency to implement and operate. It is also simpler for art market professionals, artists, buyers, and sellers to understand and engage with.
Benefits to artists	0 would have a small negative impact on the wealthiest artists who would receive lower royalty payments, but would reduce risk of depressing the top end of the art market.	+ flat percentage means artists whose works sell for higher prices would receive higher royalty payments, particularly beneficial for artists who have works that have increased significantly in value. No change in impact for artists whose works sell for lower prices.
Compliance and administration costs	0 increased complexity to implement and operate compared to a flat royalty rate would likely come with some minimal additional compliance and administration costs.	+ compliance or admin costs likely to be marginally lower than with a sliding scale due to increased operational simplicity and mean a higher admin fee take for the collection agency.
Flexibility/sustainability	0 dollar thresholds would need to be adjusted for inflation over time.	+ flat percentage is more future proofed as would not be adjusted for inflation. A flat percentage would also mean more revenue for the collection agency on higher value sales which would contribute to the scheme's long-term sustainability.
<b>Overall assessment</b>	0	4

51 A flat percentage royalty rate of 5 percent is simple to administer, especially when compared to the sliding scale in the EU and UK. For high value sales, a sliding scale would mean artists (or their estates) would receive a smaller royalty and so would not benefit to the same extent as with a flat percentage rate. A five percent royalty rate strikes a balance between providing financial benefits to the artist and not placing too high a burden on the sellers and art market professionals who would be liable for payment of the royalty. Modelling also suggests the benefits of a sliding scale, in not depressing the top end of the market, would not be particularly relevant in New Zealand. For example, in 2021, almost 99 percent of artworks were sold for less than \$100,000 (the likely threshold at which a sliding scale would begin to apply in line with the UK scheme) suggesting a sliding scale would apply to only a small percentage of New Zealand sales. A 5 percent rate also aligns with the Australian scheme and so would make it easier to facilitate reciprocal arrangements with Australia once negotiated.

## Sub options for the scope of the resale right

Criteria	Counterfactual: as in the UK scheme, only resales where an art market professional is involved	Option 2: all resales in New Zealand, including private sales	Option 3: as with counterfactual, all resales where an art market professional is involved, but with the option for private sales to opt in voluntarily if they desired (a 5% royalty would be encouraged) (preferred)
Feasibility of implementation and operation	0 would be relatively easy to track and enforce because sales would not be difficult to identify.	- - tracking private sales and enforcing royalty payments would be very difficult and would be administratively burdensome for the collection agency. Other legislation like the Fair-Trading Act and Consumer Guarantees Act does not apply to private resales.	0 about the same feasibility as the counterfactual as would not require private sales to be tracked and enforced (they would just opt in voluntarily).
Benefits to artists	0 would benefit artists who sell through traditional art market professional mechanisms such as auction houses but could disadvantage some artists, particularly Māori and Pacific artists and women who often sell their work through alternative mechanisms.	++ many more artists would receive royalty payments if private sales were included. Engagement also suggests Māori artists' works are more likely to sell through private transactions, so likely more Māori artists would benefit.	+ likely more artists would receive royalty payments as some (but not all) private sales would likely opt-in to paying a royalty voluntarily. Potentially more Māori artists would benefit as their works are more likely to sell through private sales.
Compliance and administration costs	0 clear, identifiable market for the collection agency to work with would make compliance and administration costs manageable.	- increased compliance and administration costs for the market if private sales are covered as more sales covered. Also, higher administrative burden for the collection agency.	0 likely similar compliance and administration costs compared to counterfactual, as private sales opting in would not add significant additional burden to collection agency or art market professionals.
Flexibility/sustainability	0 lack of complexity would help make scheme sustainable in the long-term.	- cost and burden of administering private sales could mean the scheme is not sustainable long term.	0 similar flexibility compared to counterfactual. Private sales opting in would not impact long term sustainability of scheme.
Overall assessment	0	-2	1

52 Making all resales of artwork eligible for a resale royalty would capture more artworks and would see more royalties going to artists. Engagement also suggests that Māori artists' work may be less likely to sell via sales where an art market professional is involved and so this would likely see increased royalty benefits to Māori artists. However, monitoring private sales and collecting royalties from them would not be feasible as there would be no easy way for the collection agency to know when a sale has taken place and to enforce payment of the royalty.

53 Making provision for private sales to opt in voluntarily would strike a balance between capturing more artworks for resale while also ensuring compliance and administration costs remain low and the scheme is feasible for the collection agency to administer. An opt-in for private sales would particularly benefit Māori, Pacific, and female artists whose works are more likely to sell in private sales rather than through formal mechanisms involving an art market professional. Engagement suggests some buyers and sellers would welcome the opportunity to voluntarily pay a royalty to the artist on private sales, as they would like the artist to benefit from the resale in some way. Therefore, option 2 is the preferred option. A rate of 5 percent would be encouraged for private sales, but ultimately it would be up to the individuals involved in the transaction as to how much they pay.

### Sub options for eligibility to hold the resale right

<i>Criteria</i>	<b>Counterfactual: only NZ citizens and permanent residents plus nationals and residents of reciprocating countries (consistent with UK definition of eligibility) (preferred)</b>	<b>Option 2: anyone whose work sells in NZ including nationals and residents of reciprocating countries</b>
Feasibility of implementation and operation	<b>0</b> feasible to implement and operate as collection agency would not need to track resales by artists who are not residents or citizens of NZ or a reciprocating country.	- less feasible to implement and operate as collection agency would need to track resales by artists who are not residents or citizens of New Zealand or a reciprocating country, which is likely to me more time consuming and difficult.
Benefits to artists	<b>0</b> would not extend to all sales in New Zealand so some artists whose work is sold in New Zealand would miss out on the royalty payment.	+ more artists overall would benefit compared to counterfactual as does not limit eligibility to citizens and residents of New Zealand and reciprocating countries.
Compliance and administration costs	<b>0</b> low compliance burden as New Zealand citizens and residents should be relatively easy to track down.	- greater administrative and compliance costs for the market if sales by artists who are not nationals or residents are included. Also, greater admin burden for the collection agency in identifying and tracking down artists who are not residents or citizens.
Flexibility/ sustainability	<b>0</b> would be sustainable in the long-term.	<b>0</b> would not significantly impact the long-term sustainability of the scheme.
<b>Overall assessment</b>	<b>0</b>	<b>-1</b>

54 In this case the counterfactual is the preferred option. Confining eligibility to only citizens and permanent residents of New Zealand and reciprocating countries is consistent with the definition of eligibility as defined in the Berne Convention. Limiting eligibility in this manner would be more feasible for the collection agency to administer and would not in any way limit the benefits to New Zealand citizens and residents. Therefore, on balance, option 1 is the preferred option.

## Sub options for the duration of the resale right

Criteria	Counterfactual: as in the UK scheme, duration is life of the artist plus 70 years after death	Option 2: mirrors duration of copyright in the Copyright Act (currently life plus 50 years after death, ultimately extending to 70 years after death as committed to in the FTA) (preferred)	Option 3: life of the artist, plus indefinite royalty duration period after death
Feasibility of implementation and operation	0 secondary market resales often require both image licensing fees and resale royalties to be paid at the same time so having different durations (NZ copyright is currently 50 years) would increase complexity for art market professionals and the collection agency.	+ feasible to implement and operate as less complex than counterfactual because it aligns with copyright duration in New Zealand.	- less feasible to operate, as determining the rights holder on works created beyond 70 years after an artists' death would be very difficult, it's likely significant time would be required on the part of advisors/experts, and there would be a limited pool of persons with the expertise to do this and significant competing demands on these individuals.
Benefits to artists	0 allows artists' estates to benefit for a significant period of time after death (20 years more than under current copyright law in New Zealand). Could be slightly confusing for artists estates who are familiar with copyright law and may assume they are not eligible for the payment beyond 50 years.	- artists' estates would benefit for slightly shorter period post death (until copyright duration is extended in New Zealand).	++ artists' estates would benefit from resale royalties in perpetuity, although note that artists themselves would see no additional benefit. Is preferred by some Māori artists as it better recognises the enduring kaitiaki relationship between and artists and their work than a time-limited period.
Compliance and administration costs	0 misalignment with New Zealand copyright duration would create some additional admin and compliance costs for art market professionals and could also create additional compliance costs for a collection agency, if that collection agency was also responsible for collecting image licensing fees.	+ likely fewer compliance and administrative costs than counterfactual as duration would be aligned with New Zealand copyright duration and initially be for a shorter period.	- - likely significant additional administration costs to determine the rights holder on old works (e.g. works created 200 years ago). Additional costs to the market as many more artworks would be eligible for a royalty.
Flexibility/sustainability	0 future proofed in the long-term given New Zealand's commitment in the UK and EU FTAs to extend the term of copyright to 70 years.	0 future proofed against future changes to the Copyright Act as committed to under the UK and EU FTAs.	- over time, it would become harder to identify beneficiaries for works by artists who have been deceased for a significant period of time.
<b>Overall assessment</b>	0	1	-2

55 Engagement with Māori indicated that some Māori would prefer an indefinite duration after death as it better recognises the enduring kaitiaki relationship between and artists and their work. Such an approach would have significant challenges. It is likely to be difficult to identify the creators of works deep into the past and an appropriate current eligible royalty holder. It would also add significant costs for art market professionals which could increase general non-compliance with the scheme, disadvantaging artists and undermining the viability of the scheme. It also relies on the availability of expertise that is in high-demand and may not always be readily available. We consider a time-limited duration to be more appropriate and recommend option two because it avoids a period of misalignment with New Zealand copyright and the additional administration and compliance burden for both the sector and collection agency associated with this.

56 We consider there are a number of additional ways the scheme can support the kaitiaki relationship between artists and their work, including the collection agency collecting, retaining and using information gathered through the scheme in a way that supports Māori to keep track of their works in a way they currently cannot. Consideration of whether an indefinite royalty is appropriate for any form of art/artist could be considered through review once a scheme is operational and sustainable, and providing information in relation to the royalty. Such a review would be informed by, and seek to align with, work relating to the all of government response to Wai 262, which will consider kaitiaki relationships within its scope of work.

### Sub options for opting out of the scheme

<b>Criteria</b>	<b>Counterfactual: as in the UK scheme, there is no option to opt-out of either collection or receipt of the royalty</b>	<b>Option 2: as in the Australian scheme, artists can opt out (on a case-by-case basis) of the collection agency collecting the royalty on their behalf</b>	<b>Option 3: artists can opt out of receiving royalty but not collection. Declined royalties could go into a cultural fund to support artists (preferred).</b>
<b>Feasibility of implementation and operation</b>	0 feasible to implement and operate as a royalty is always collected.	- harder to implement and operate than counterfactual because the collection agency would need to have case-by-case discussions with artists before collecting the royalty.	0 feasible to implement and operate as royalty is always collected. Artists would opt out once, so no need for case-by-case conversations to determine if the artist wants to decline the royalty.
<b>Benefits to artists</b>	0 forces artists to be part of the scheme and takes away the flexibility to negotiate their own deals. However, would guarantee royalty payments for artists, and likely at higher rates than they could negotiate voluntarily. Would protect against art market professionals	0 gives artists the flexibility to negotiate their own deals, and for Māori recognises the tino rangatiratanga they have over their artistic creations. However, could have a number of negative impacts for artists, as art market professionals could use opt outs as a condition of sale, or try and negotiate lower percentage fees as a condition of sale.	+ artists have the choice not to receive royalty, but since a royalty is still collected, there is no incentive on art market professionals to pressure artists to opt out of the scheme, as could happen with option 2. Proposed Cultural fund would provide additional benefits to artistic community.

	putting pressure on artists to opt out as a condition of sale.		
Compliance and administration costs	0 admin fee would always be collected on eligible resales which would help cover costs of administration. Simplicity of option keeps compliance costs low.	- More complex to administer than the counterfactual for the collection agency so would be more costly, with a lower admin fee take as well (in Australian Scheme approximately 12 % of eligible artists have chosen to opt out on a regularly).	0 like the counterfactual, an admin fee would always be collected on eligible resales which would help cover costs of administration. The need to opt out of receiving royalties only once means additional compliance burden is very small.
Flexibility/sustainability	0 admin fee always being collected protects the long-term viability of the scheme.	- If a significant number of artists choose to opt out the scheme could become unviable.	0 admin fee always being collected protects the long-term viability/sustainability of the scheme.
<b>Overall assessment</b>	0	-3	1

- 57 On balance, the preferred option is to provide for artists to opt out of *receiving* the royalty if desired (noting that a royalty would always be collected on an eligible sale). Like the counterfactual, this has the advantage of being relatively simple to implement and operate and ensures the admin fee is always collected so it can cover administration costs and ensure the scheme is viable long-term. but also as the added advantage of
- 58 The main disadvantage of the preferred option is that it does not give artists the flexibility to choose to be part of the scheme or to negotiate their own deals outside the scheme. For Māori artists providing this choice would also recognise their rangatiratanga over their artistic creations. However, current evidence suggests only wealthier, more established artists would be able to negotiate deals outside the framework, and still likely at lower rates than proposed in the mandatory scheme. Furthermore, given the additional compliance burden and costs the scheme places on art market professionals, enabling artists to opt-out of having the royalty collected on their behalf, could create perverse incentives where artists are pressured to opt out of the scheme by these art market professionals, preventing them from benefiting financially and undermining the long-term viability of the scheme.
- 59 The preferred option also has an additional benefit to the counterfactual, as if an artist declined to receive a collected royalty, there could be the option for that royalty payment to go into some form of cultural or philanthropic fund which would support artists' career sustainability. In this way, the royalty collected would still be contributing towards supporting visual artists which is consistent with the overarching intention of the ARR scheme. Engagement with sector stakeholders shows strong support for establishing a cultural fund and for unclaimed or declined royalties to go into this fund.
- 60 In developing settings for a cultural fund officials will also consider options for artists to determine alternatives for any royalties they decline. For example, if an artist declines to receive royalties from the scheme they could request that in the case of sales by charity auction the charity receive the royalty fee, and that it does not go to the cultural fund.



### Sub options for a cap on maximum royalty payable

<b>Criteria</b>	<b>Counterfactual: as in the UK scheme, a cap on maximum royalty payable</b>	<b>Option 2: no cap on the maximum royalty payable on a resale (preferred)</b>
Feasibility of implementation and operation	0 would be feasible to implement and operate with no additional impacts.	0 no additional impact compared to the counterfactual.
Benefits to artists	0 would result in lower royalty payments for artists whose work sells above the cap threshold, however, these would be the wealthiest artists who need the payment the least.	+ artists whose works sell for higher prices as the royalty they could receive would not be capped.
Compliance and administration costs	0 would not be particularly costly to administer. Could result in a lower take in admin fees and the ability of the collection agency to use admin fees on high value sales to cover compliance and admin costs associated with low value sales. However, this would be minimal as artworks in New Zealand do not sell for high prices as seen in markets where there is a cap.	0 no additional impact compared to counterfactual because artworks in NZ do not sell for high prices as seen in markets where there is a cap (such as UK/EU). For example, based on 2021 sales data, of 5,106 artworks sold at NZ auctions, only 52 (around 1%) sold for more than \$200,000 and so would have resulted in a royalty payment of more than \$10,000.
Flexibility / sustainability	0 unlikely to impact many sales in New Zealand for the reasons stated above so would not impact sustainability of the scheme.	0 no additional impact compared to the counterfactual.
<b>Overall assessment</b>	0	1

61 A resale royalty right is an economic right due to the artist; it would not be consistent with that right to set a cap and disadvantage successful artists whose work attracts higher prices. Additionally, other percentage charges incurred on the sale of artwork, such as GST and the fees of art market professionals, are not capped in any way. Therefore, on balance, we do not consider a cap is necessary or desirable in the New Zealand context.

### Sub options for number of collection agencies (i.e. one or multiple)

<b>Criteria</b>	<b>Counterfactual: two or more collection agencies as in the UK scheme</b>	<b>Option 2: single collection agency as in Australian scheme (preferred)</b>	<b>Option 3: two collection agencies, one of which is appointed to manage collection of resale royalties for Māori artists only</b>
Feasibility of implementation and operation	0 would significantly increase the complexity around setting up and operating the scheme.	+ more feasible to implement and operate as would only be contracting one collection agency.	0 no additional impact compared to the counterfactual as would require contracting two organisations.

Benefits to artists	0 could make the scheme unnecessarily complicated for artists.	0 likely no additional impact compared to the counterfactual.	++ dedicated collection agency for Māori artists enables dedicated focus on supporting and working with Māori artists and supports meeting Crown Treaty obligations.
Compliance and administration costs	0 would create significant additional compliance and administration costs, in particular, around the costs of setting up the scheme.	+ likely fewer compliance and administrative costs with reporting to a single collection agency compared to two. Administration costs to government would be lower, particularly to set up the scheme.	0 no additional impact compared to counterfactual. Contracting two collection agencies is the same as in the UK scheme and would likely have similar costs to the art market and to government.
Flexibility/sustainability	0 the New Zealand art market is not large enough to generate the admin fees needed to sustain two or more collection agencies, therefore the scheme would be unviable.	++ much more sustainable than the counterfactual as the New Zealand art market is not large enough to sustain the cost of two collection agencies.	0 no additional impact compared to the counterfactual. Would also make the scheme unviable.
<b>Overall assessment</b>	0	4	2

62 While a second dedicated Māori collection agency would provide strong benefits to Māori artists, the New Zealand secondary market is simply not large enough to sustain more than one agency long-term. Multiple collection agencies would mean the scheme would be financially unviable and Crown funding (at a higher level than for a single agency) would very likely be required on a permanent basis. Therefore, the preferred option is a single collection agency. However, in lieu of a Māori collection agency we are proposing that the single collection agency has mandated Māori representation at senior levels and on its board. Having established the preference for a single agency, there are also options for the preferred form the collection agency should take; these options are analysed below.

### Sub options for the form of the collection agency (what type of organisation should act as the collection agency)

Criteria	Counterfactual: as with UK scheme an existing non-government, not-for-profit organisation (e.g. Copyright Licensing New Zealand (CLNZ) (preferred)	Option 2: a government department (e.g. Manatū Taonga)	Option 3: an existing Crown entity (e.g. Creative New Zealand)
Feasibility of implementation and operation	0 is feasible to implement and operate. If an NGO like CLNZ were engaged, it would already have existing systems, capabilities, and relationships in place due to its role collecting and paying copyright royalties to artists. These could be adapted relatively easily for operation of the scheme. An NGO could assuage concerns from art market professionals that the	- less feasible to implement and operate as a government department would not have existing systems and capabilities in place.	- less feasible to implement and operate as no existing Crown entities have these systems and capabilities in place.

	scheme is a government "tax", thereby helping ensure compliance.		
Benefits to artists	0 an existing non-government organisation like CLNZ would already have relationships with artists due to its role collecting and paying copyright royalties.	- Manatū Taonga does not have the existing relationships with artists that a non-government organisation like CLNZ or a Crown entity like Creative New Zealand has.	0 no additional impact compared to counterfactual
Compliance and administration costs	0 Existing NGO like CLNZ would be less costly to government as existing systems and capabilities in place. Some art market professionals already pay copyright royalties to CLNZ so there is existing relationship and process to help compliance.	- more costly to administer due to lack of existing systems and capabilities and potentially greater compliance burden for art market professionals as does not take advantage of art market relationships and synergies.	- more costly to administer due to lack of existing systems and capabilities and potentially greater compliance burden for art market professionals as does not take advantage of art market relationships and synergies.
Flexibility/sustainability	0 changes to the collection agency's functions would not require changes to legislation as with a Crown entity, so more flexible and easier to change following review.	0 changes to the Ministry's functions would not require changes to legislation as with a Crown entity so more flexible and easier to change following review.	- likely less flexible as any future changes to collection agency's functions would require change to the Crown entity's legislation.
Overall assessment	0	-3	-3

63 A not-for-profit NGO is generally the precedent in overseas schemes, such as in Australia and the UK, and would enable the scheme to be administered independent of government. The Australian collection agency is an NGO with an existing role in collecting and distributing copyright royalties and a similar NGO exists in New Zealand (Copyright Licensing NZ). If such an NGO were to administer the ARR scheme it would already have existing systems, processes and capabilities in place which could be adapted relatively easily to manage resale royalties.

64 On balance, the counterfactual, a not-for-profit NGO appointed as the collection agency is the preferred option as it would enable the scheme to be administered independent of government and, assuming an appropriate NGO is appointed, would have existing sector relationships as well as systems and processes in place. Dedicated resource and capability could be provided to work with and support Māori artists. Combining this preferred option with the preferred option for a single collection agency, means the overall preferred option is a single, non-government collection agency.

### Sub options for enforcement regime

<b>Criteria</b>	<b>Counterfactual: as with the UK no enforcement powers but art market professionals are required under legislation to provide information</b>	<b>Option 2: collection agency has power to take civil proceedings to recover any unpaid royalties or if required information is not provided</b>	<b>Option 3: civil proceedings and infringement notices (infringement notices would have to be issued by a government agency)</b>
Feasibility of implementation and operation	0 feasible to implement and operate, but would be hard for collection agency to ensure compliance with scheme.	0 is feasible to implement compared to counterfactual. Australian example suggests civil proceedings unlikely to be used. However, if civil proceedings are taken, then additional administration impacts compared to status quo.	-- less feasible to implement as if an NGO is preferred as the collection agency, a separate government agency would need to administer the infringement notices which adds complexity.
Benefits to artists	0 does the absolute minimum to protect against non-compliance with the scheme. Put's onus on artist to take civil proceedings for non-payment which would be time consuming and costly for artists.	+ likely greater benefits to artists as enforcement regime provides deterrent to non-payment of royalties, even if not used regularly. Collection agency would be taking action rather than the artist having to take civil proceedings.	++ greater benefits to artists as infringement notices provide additional deterrent to non-payment of royalties to artists. Collection agency would be taking action rather than the artist having to take civil proceedings.
Compliance and administration costs	0 low cost to collection agency, but high costs for any artists that want to take civil proceedings in response to non-compliance.	- additional costs to collection agency if it has to pursue civil proceedings. There would be compliance costs on art market professionals if proceedings taken against them.	-- infringement notices would place increased compliance and administration costs on art market professionals and art market. Likely additional costs to collection agency and government to administer the regime.
Flexibility/sustainability	0 lack of sufficient deterrent could lead to significant non-compliance with scheme impacting viability of scheme in long-term.	+ civil proceedings provide enforcement option for collection agency and better protect viability of the scheme.	+ infringement notices provide additional enforcement option for collection agency if needed and better protect the viability of scheme.
<b>Overall assessment</b>	0	1	-1

65 Overall, an enforcement regime with the provision for civil proceedings (option 2) is the preferred approach and also aligns with other schemes internationally, including the UK and Australia. Australian experience suggests civil proceedings are an appropriate deterrent to non-compliance.

66 We do not consider stronger enforcement provisions, such as infringement notices, are required as art market professionals who refuse to comply with the scheme would face a significant risk to their reputation and business. Infringement notices also could not be issued by an NGO (preferred option for the collection agency) which would add an additional complexity to the scheme. We considered the option of criminal penalties, but these are neither proportionate nor appropriate to the scheme.

## What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

### A mandatory ARR scheme is the preferred option

- 67 On balance, we consider a mandatory ARR scheme is most likely to meet the policy objectives because it will meet obligations under the UK FTA (and future obligations under the EU FTA), it will enable artists (or their estates) to benefit financially from the resale of their work, and it will, with the appropriate policy settings, be simple and effective with minimal compliance and administrative costs for the market.
- 68 Based on the analysis of which policy setting sub options would best meet the objectives and deliver the highest net benefits, we consider a mandatory ARR scheme should:
- establish a flat 5 percent royalty rate on eligible artworks with no cap on the maximum royalty payable;
  - apply to resales of artworks where an art market professional is involved with the provision for private sales to opt in voluntarily;
  - apply to artworks created by a New Zealand citizen or permanent resident, or a national or resident of a reciprocating country;
  - apply for the same duration as the duration of copyright as outlined in the Copyright Act 1994 (currently life of the artist plus 50 years post-death);
  - have provision for artists to opt out of receiving the royalty if desired (a royalty would always be collected on eligible resales);
  - authorise a single, non-government, not-for-profit collection agency to administer the scheme, have the power to take civil proceedings, and deduct an administration fee from royalties collected in order to meet its costs.

### Te Tiriti o Waitangi implications of the preferred option

- 69 In line with Article 2 of the Te Tiriti (rangatiratanga), we considered the option of enabling Māori to opt out of the scheme, to give them full autonomy to negotiate their own resale royalty arrangements. However, data on current voluntary arrangements indicates that only a small number of well-established, wealthy artists have been able to negotiate their own royalty deals with buyers of their work, that the royalty rate has been well below 5% (e.g., 2.5%) and that these have only ever applied to the first resale. Negotiating a royalty beyond a first resale would be impossible without empowering legislation. Furthermore, we are concerned that a scheme that provides an opt out could drive perverse outcomes. For example, an opt out could trigger art market professionals to undermine the ARR scheme and incentivise acting in bad faith to achieve sales. If the opt out mechanism is manipulated to generate a 'condition' for selling work, this would have a negative impact on Māori artists receiving a royalty payment and their financial returns from this scheme, thereby impacting the ability of the scheme to deliver on Article 3 of Te Tiriti (oritetanga).
- 70 In line with Article 3 of Te Tiriti (oritetanga) we looked at how best to ensure Māori can equitably benefit from the scheme. Sales data shows Māori artwork is underrepresented in traditional auction house sales. Between 2018 and 2020, approximately 10 percent of artworks resold when the artist was living and two percent of artworks when the artist was deceased were created by Māori artists.

- 71 To help ensure this inequity is not replicated in the payment of resale royalties, we are proposing:
  - a. there is a voluntary opt in for private sales, which will likely enable more Māori to benefit
  - b. that the future definition of art market professional (to be defined through supporting regulations) is inclusive of mechanisms for resale where Māori art is prominent. Further engagement, including with Māori legal and art experts, will be undertaken to refine this definition
  - c. that the scheme use a broad, non-prescriptive definition of Toi Māori that encompasses all forms of Māori cultural expression to ensure sales of Māori cultural expression through an art market professional are not excluded from the scheme because of a prescriptive legislative definition.
- 72 Furthermore, the proposed settings seek to give effect to Article 3 by enabling royalty rights to be held jointly by artists. This recognises that individualised and exclusive rights are a western concept that does not align well with the way ngā toi Māori art is often created, or the social structures that exist within Māoridom.
- 73 In line with Article 1 of Te Tiriti (kāwanatanga), officials have considered what the role of Government should be in ensuring that this scheme supports rangatiratanga and oritetanga. In addition to the aforementioned considerations, Government will ensure that the collection agency has an operational framework (set out in regulation) that helps give effect to oritetanga and rangatiratanga, by requiring Māori to be included in key decision-making, including representation at senior levels and on the board of the organisation. It will also require the collection agency to work with Māori artists and their beneficiaries to ensure the fair an appropriate distribution of royalties and by requiring the agency to collect, retain and use information in a way that supports Māori, within the boundaries of existing privacy law, to keep track of their works in a way they cannot currently do so.

**What are the marginal costs and benefits of the option?**

- 74 The below marginal costs and benefits is based on modelling up to 2020. We have deliberately not included sales data from 2021 as this year was a significant outlier, with \$67 million of sales through auction houses, compared with \$31 million in 2020.
- 75 The modelling only includes auction house sales. Other secondary market sales, such as those by dealer galleries and art consultants (approximately 20% of art market professional sales), are not included as there is currently no visibility of these sales, neither are private resales for the same reason.

Affected groups	Comment	Impact	Evidence Certainty
<b>Additional costs of the preferred option compared to taking no action</b>			
<b>Regulated groups</b>			
Auction houses and dealer galleries	Administrative costs to art market professionals are expected to be low based on evidence from reviews of the UK and Australian schemes (conducted in 2014 and 2019 respectively). In the UK scheme, the median time spent on administration per quarter was estimated at 95 minutes, costing £26.40 (approx. \$50 NZD) when adjusted to the 2021 UK median wage.	Low	Medium – based on data from reviews of the UK and Australian schemes and then adjusted for wage inflation.

	In the Australian scheme, an average of three hours per quarter for estimated, costing 90.68 AUD (approx. \$98 NZD) when adjusted to the 2021 Australian median wage.		
Costs to sellers and buyers on the secondary market and to art market professionals	5% additional charge on the hammer price of art works sold on secondary market. Sellers and art market professionals would be liable for payment. Art market professionals are likely to pass costs on to buyer. From 2018 to 2020, an average of 9(2)(f)(iv) in royalties would have been collected on eligible artworks (before admin fee deducted).	9(2)(f)(iv) [REDACTED] [REDACTED] [REDACTED] [REDACTED]	Medium – based on auction house sales data purchased from the Australian Art Sales Digest
<b>Regulators</b>			
Collection agency / Crown	There will be costs to the Crown to implement and administer the scheme (the intention is the scheme will become self-sustaining so permanent ongoing Crown funding will not be required). There will also be monitoring costs for the Ministry.  9(2)(f)(iv) [REDACTED] [REDACTED] [REDACTED] [REDACTED]	9(2)(f)(iv) [REDACTED] [REDACTED]	Medium – 9(2)(f)(iv) [REDACTED] [REDACTED]
<b>Total costs</b>			
<b>Total monetised costs</b>	Costs to art market professionals, buyers and sellers on the market 9(2)(f)(iv) Costs to the Crown 9(2)(f)(iv)	9(2)(f)(iv) [REDACTED] [REDACTED]	Medium
<b>Total Non-monetised costs</b>	Administrative impacts for art market professionals	Low	Medium
<b>Additional benefits of the preferred option compared to taking no action</b>			
<b>Regulated groups</b>			
Visual artists and their estates	Resale royalty payments minus 9(2)(f)(iv) administration fee. Note resale royalties may constitute income and would therefore be taxable. Data shows that from 2018 to 2020, a net total of \$702,858 per annum would have been distributed to artists and their estates.	<b>\$0.702m per annum</b>	Medium Based on data from Australian Art Sales Digest, comprising data on NZ auction house sales (estimated to be approx. 80% of sales)
Visual artists	Recognition of visual artists' contribution to wider New Zealand society and culture	<b>Medium</b>	High
Secondary art market	More comprehensive and consistent regulation of the secondary art market	<b>Medium</b>	High
<b>Others (eg, wider govt, consumers, etc.)</b>			
Crown	Possible tax revenue to Crown (requires further analysis)	<b>Low</b>	Low
Communities, audiences,	By helping to sustain an artist's career, the scheme could help promote cultural capability	<b>Medium</b>	Medium

and wider society	and belonging (one of the wellbeing domains in The Treasury's Living Standards Framework).		
<b>Total benefits</b>			
<b>Total monetised benefits</b>	Income from resale royalties to artists (minus admin fee) Potential tax revenue to the Crown (yet to be confirmed)	<b>\$0.702m per annum</b>	Medium
<b>Non-monetised benefits</b>	Stronger regulation of the secondary art market and wider societal benefits	<b>Medium</b>	Medium

### Assumptions for modelling of costs and benefits

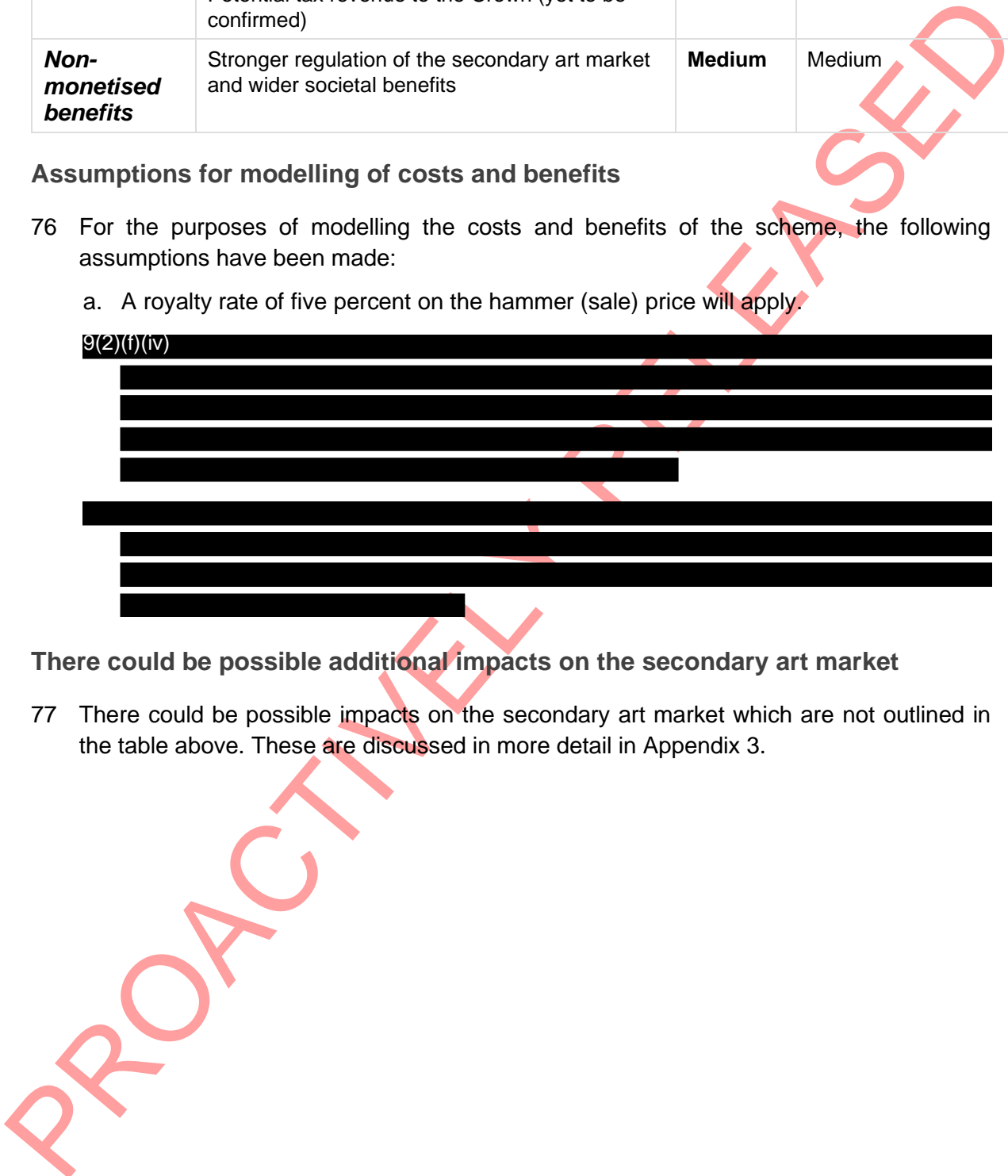
76 For the purposes of modelling the costs and benefits of the scheme, the following assumptions have been made:

- a. A royalty rate of five percent on the hammer (sale) price will apply.

9(2)(f)(iv) [Redacted text block]

### There could be possible additional impacts on the secondary art market

77 There could be possible impacts on the secondary art market which are not outlined in the table above. These are discussed in more detail in Appendix 3.





# Section 3: Delivering an option

## How will the new arrangements be implemented?

### Implementation of the scheme

#### Collection agency

- 78 A dedicated government-appointed collection agency would be authorised to administer the ARR scheme and would be responsible for its ongoing operation. The legislation would provide a mechanism for the collection agency to be appointed. The responsible Minister would be given the power to determine the process for appointing the collection agency (on advice from the Ministry), including the instrument of appointment and the terms and conditions of the appointment.<sup>20</sup> This could be through a robust tender process and a contractual arrangement with the Ministry.
- 79 Legislation will also make provision for the responsible Minister to revoke the appointment of the collection agency if the Ministry determines the agency is not meeting its obligations under legislation, supporting regulations or any contractual arrangements.
- 80 Details of how the collection agency would operate will be set out in supporting regulations, including how it will work with art market professionals and artists to collect and distribute the royalty to artists and how it will be monitored. Further analysis will be done alongside Inland Revenue to determine any tax implications of the scheme.
- 81 The collection agency would be provided with necessary information from relevant parties (including buyers, sellers, and art market professionals) to secure payment of a royalty, to ascertain whether a royalty is payable, or to calculate the royalty amount that is due. Any data and information collected and held would be done so in line with the principles of the Privacy Act 2020.
- 82 The collection agency will have powers to take civil proceedings to recover any unpaid resale royalties. The seller and art market professional (as those jointly liable for payment of the royalty) would be liable for such civil action. Remedies could include orders requiring the provision of information needed to administer the scheme, and payment of royalties and court costs (but not injunctions or requirements to pay damages).

#### Introduction of legislation

- 83 Current timeframes propose introduction of a Bill to the House in February 2023 with the intention that the Bill pass its third reading by late August 2023.

9(2)(f)(iv) [Redacted]  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

<sup>20</sup> In the Australian scheme, the responsible Minister appoints the collection agency.

## **Communications and education**

- 85 Feedback from stakeholder consultation is that it will be key that relevant parties are aware of the ARR scheme, including understanding their rights and obligations under the scheme.<sup>21</sup>
- 86 The collection agency will have a key role in promoting understanding of the scheme and engaging with key players in the sector. Alongside enactment of the legislation, the Ministry would run a communications and education process targeting stakeholders within the sector including art market professionals, art collectors, and artists and their estates. Art market professionals dealing in secondary artworks will also have a role in ensuring that all sellers and buyers are aware that a resale royalty may apply to a transaction including who is responsible for paying the royalty and how much it could be.
- 87 Creative New Zealand advised in 2019 that an education campaign around the reality of how little most artists currently receive from their work, and how an ARR scheme would benefit them, would be useful in raising awareness. This will include communicating that the resale royalty is not a new “tax” as such; rather, it represents a recognition of the artist’s work and their broader cultural and societal contribution.

## **Impact on other legislation**

- 88 Implementing an ARR scheme will not require changes to any existing legislation. However, the scheme will rely on a range of other New Zealand legislation to operate. For example, the Copyright Act 1994, the Privacy Act 2020, the Fair Trading Act 1986, and potentially the Income Tax Act 2007 will dictate certain aspects of how the scheme operates in the New Zealand context.

## **Risks and mitigations**

- 89 There are risks with introducing an ARR scheme, but these can be mitigated:

<b>Risk</b>	<b>Mitigation</b>
Art market professionals do not report sales and/or the art market goes underground (to the black market).	Communications and education will be important in promoting better understanding of experience overseas with ARR schemes – i.e. no negative impacts have been unequivocally attributed to overseas schemes. As a last resort, the legislation will provide enforcement powers for the collection agency to take action in the event of non-compliance. Art market professionals would also risk reputational damage through non-compliance.
Artworks are sold privately to avoid paying a resale royalty.	This was raised at the time of the introduction of the UK and Australian schemes. However, there is no evidence of this occurring. Effective communication that the royalty is not a “tax” per se, but a recognition of the artist’s investment in their work and their contribution, will help mitigate this possibility.  Art market professionals are generally able to broker the highest price for an artwork (even after fees and commissions are added on). An additional 5% is unlikely to change that and unlikely to mean more artworks are sold privately to avoid a royalty.

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<sup>21</sup> International evidence highlights the importance of ensuring all parties are aware of and understand their obligations – after the introduction of the Australian scheme, one gallery incurred a \$10,000 AUD liability due to an alleged lack of understanding of the legislation.

<p>NZ artists' work on the secondary market is sold overseas to avoid paying a resale royalty</p>	<p>At the time of the introduction of the UK scheme, there were concerns sales would move overseas, particularly to New York; however, this has not materialised.</p> <p>Effective communication with the art market will help mitigate this concern in New Zealand. Australia (the closest large art market to NZ) already operates an ARR scheme, so there would be no benefit in NZ's secondary art market moving there. It is intended NZ's scheme will be reciprocal with the Australian scheme (subject to this being agreed).</p>
<p>The scheme may not be self-sustaining because of the small size of the New Zealand art market</p>	<p>The scheme will be designed to be ultimately self-sustainable, but ongoing government subsidy may be required, and/or an increase in the administration fee deducted from the royalty. The scheme will be monitored regularly and amendments to some settings in regulations (for example, the administration fee and threshold) may be required.</p>
<p>Those in the art market are not aware of the scheme or how the sales process works in practice</p>	<p>Government will promote understanding of the scheme through effective education processes and communications on a national scale.</p>

### How will the new arrangements be monitored, evaluated, and reviewed?

- 90 The Ministry would be the overall steward of the scheme and its enabling legislation. It is anticipated the new arrangements will be monitored through:
- a. regular collection of data and reporting by the appointed collection agency
  - b. regular monitoring and evaluation, by government, of the collection agency's performance
  - c. a full review, five years after enactment of the legislation, to determine the performance and impacts of the scheme and whether any changes are necessary.

#### **Collection of data and reporting by the collection agency**

- 91 The collection agency would be required to report regularly on a range of factors to enable government to monitor the overall scheme. Details of the agency's reporting requirements would be in regulations but would likely include reporting on the transactions of artwork, reporting on its financial affairs, and disclosing its records of royalties paid.
- 92 To assist in its reporting requirements, the collection agency would be expected to collect data and information. The Ministry has already collected some data which has been used to investigate historical sales patterns in art auction houses over the last 20 years to assess its impact on the art market. This data would be used to agree on performance targets with the collection agency and to provide a benchmark for the five-year review of the legislation. New data would need to be collected on auction houses once the scheme is operational to assess auction house trends and impacts.
- 93 Data has already been collected on the performance and impact of overseas schemes on their domestic markets, specifically the UK and Australian schemes which have been in operation since 2006 and 2010, respectively. The data also covers implementation and operational issues such as compliance requirements and collection agency costs, which has been used to inform the parameters for the New Zealand scheme and will help assess its performance after enactment.

## ***Government monitoring and evaluation of the collection agency by the Ministry for Culture and Heritage***

- 94 The performance of the collection agency would be monitored by the Ministry which would ensure the collection agency is operating as intended and in line with the legislation. Monitoring will include annual reporting requirements on the operation of the collection agency and will help provide reassurance that the scheme is operating as intended.
- 95 As the government's principal advisor on the arts and cultural sector and the department responsible for the policy for the ARR scheme, the Ministry is well placed to monitor the collection agency and to conduct any review of the legislation. The Ministry also has extensive experience monitoring Crown entities within the arts and cultural system. The monitoring arrangement would not be a formal arrangement as with the monitoring of a Crown entity, but akin to a more informal arrangement such as the Ministry's monitoring relationship with the Antarctic Heritage Trust (an NGO).
- 96 Additionally, the Ministry has a wider programme to support sustainable careers for the cultural sector. The Ministry will be monitoring the extent to which artists' careers are sustainable and becoming more so over time, including the status of professional artists over time, as a system-level indicator of the wider success of an ARR scheme.

### ***Review of the scheme and enabling legislation***

- 97 The impact and effectiveness of establishing a resale royalty right in New Zealand would be reviewed within five years of the enactment of legislation, as occurred with the Australian scheme. The review would be an operational matter and not part of legislation.
- 98 A five-year timeframe would allow time for the scheme to be fully operational and for sufficient resales data to have been collected to support an effective and useful review. If implementation of the scheme results in significant unexpected and negative impacts, it may be appropriate to carry out the review at an earlier date.
- 99 The post-implementation review would likely be undertaken by the Ministry as the steward of the legislation. Stakeholders and parties impacted by the scheme would have opportunities to raise concerns during the consultation phase of the review.
- 100 The review would cover matters such as:
- a. the design and details of the ARR scheme, including the settings such as threshold, eligibility, royalty rate, administrative fee;
  - b. the scheme's impact on the art market, including on art market professionals, buyers and sellers, and on the overall market;
  - c. impacts for visual artists, including a focus on Māori artists in terms of financial benefits, increased wellbeing, and recognition of their work.
- 101 We anticipate the review would also consider whether a five-year period provides enough data for a conclusive measure of the impacts of the scheme. A further review after ten years, as occurred for the UK scheme, may be necessary to measure the long-term impacts of the scheme more accurately.

## Appendices

### Appendix 1: Context of the New Zealand secondary art market

#### ***Art is sold on the secondary market in a range of ways***

The Australian Art Sales Digest estimates around 80 percent of art sold on the New Zealand secondary art market is through auction houses. Some, but not all, dealer galleries sell work on the secondary market, often the work of the contemporary artists they represent.

Art is also sold on online marketplaces (for example, TradeMe), but these transactions are generally at the lower end of the art market (under \$1,000), with sellers preferring the assistance of an art market professional to promote and sell more valuable works (as this generally leads to a higher sale price). Artwork is also sometimes sold by private treaty between individuals without involving an art market professional.

In the art world, an art market professional is generally considered to be someone involved in the business of commercial dealing in works of art (including auctioneers, art dealers, art gallery operators, and agents).

#### ***The New Zealand secondary art market is small in the global context***

The total size of New Zealand's secondary art market is difficult to determine because accurate sales figures are not available for dealer galleries, online or private sales. However, comprehensive sales data from the auction houses operating in New Zealand is available and this is estimated to comprise approximately 80 percent of all secondary art sales.<sup>22</sup>

On this basis, the New Zealand secondary art market was estimated to be worth approximately \$67 million in 2021, up from \$31 million in 2020. This was about half the value of the Australian secondary art market in 2021 (approximately \$120.8 million) up from \$107 million in 2020,<sup>23</sup> and around 0.1 percent of the global market of approximately \$50.1 billion in 2021. Notably, both the Australian and New Zealand art markets grew from 2020 to 2021, with a substantive increase in the value of NZ artists' artworks sold, while the global art market shrunk by 22 percent, a decrease which has been largely attributed to the impacts of COVID-19.<sup>24</sup>

#### ***Since 2000, the New Zealand secondary art market has fluctuated but has grown overall***

Both the value of New Zealand artists' work and the number of NZ artists' works sold in New Zealand have fluctuated over the last two decades, but overall have increased. 2021 saw a significant increase in the value of artwork sold (an increase of almost 130 percent from the 2020 sales value). It is unclear whether the 2021 sales value data is an outlier or whether it is indicative of a rapidly increasing trend in the value of New Zealand's secondary art market.

#### ***Secondary art market costs are built into secondary sale prices***

Secondary art sale prices include substantive costs over and above the 'hammer price'. Auction houses charge a buyer's premium on top of the hammer price for each lot. The buyer's premium is typically 17% - 20% plus GST, depending on the auction house. Buyer's premiums have increased over time; one auction house charged a 10% buyer's premium (plus GST) in

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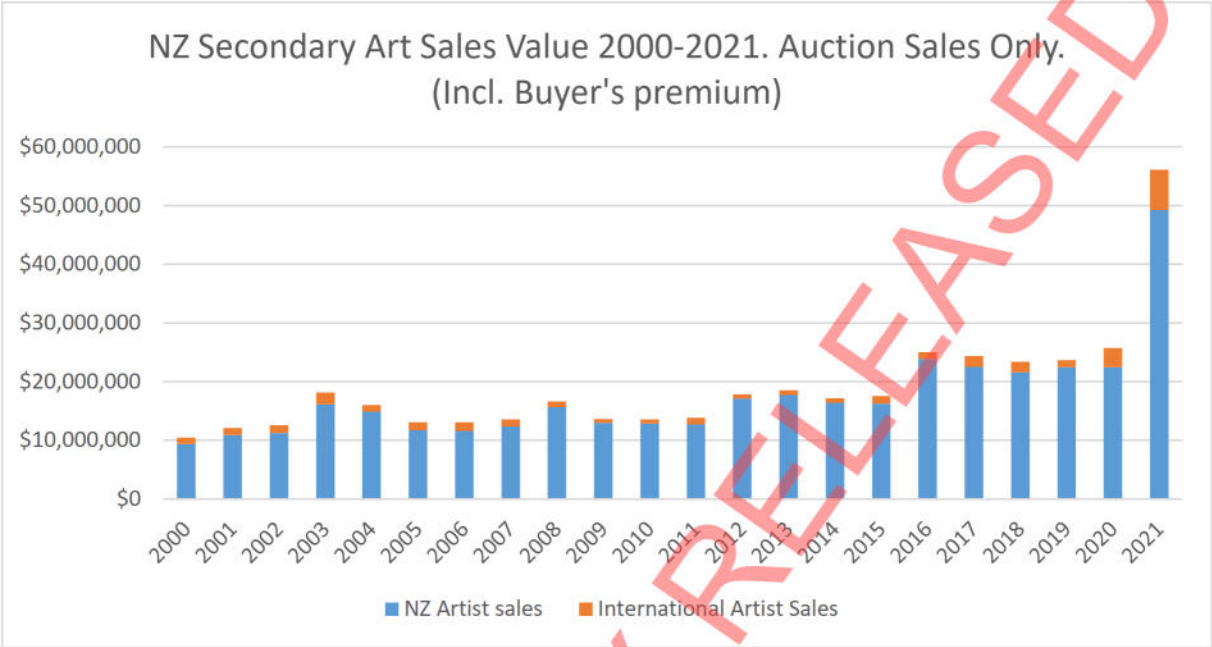
<sup>22</sup> Auction house sales data was purchased from the Australian Art Sales Digest.

<sup>23</sup> We have not used sales data from 2021 as part of our modelling the year was a significant outlier from previous years and therefore less suitable for comparison.

<sup>24</sup> The Art Market 2021, Art Basel and UBS Global Arts Market Report, 2021.

2002, but now charges 17% plus GST. Sellers also pay a commission to the auction house once their artwork is sold. The amount is subject to negotiation but can be as high as 20%.

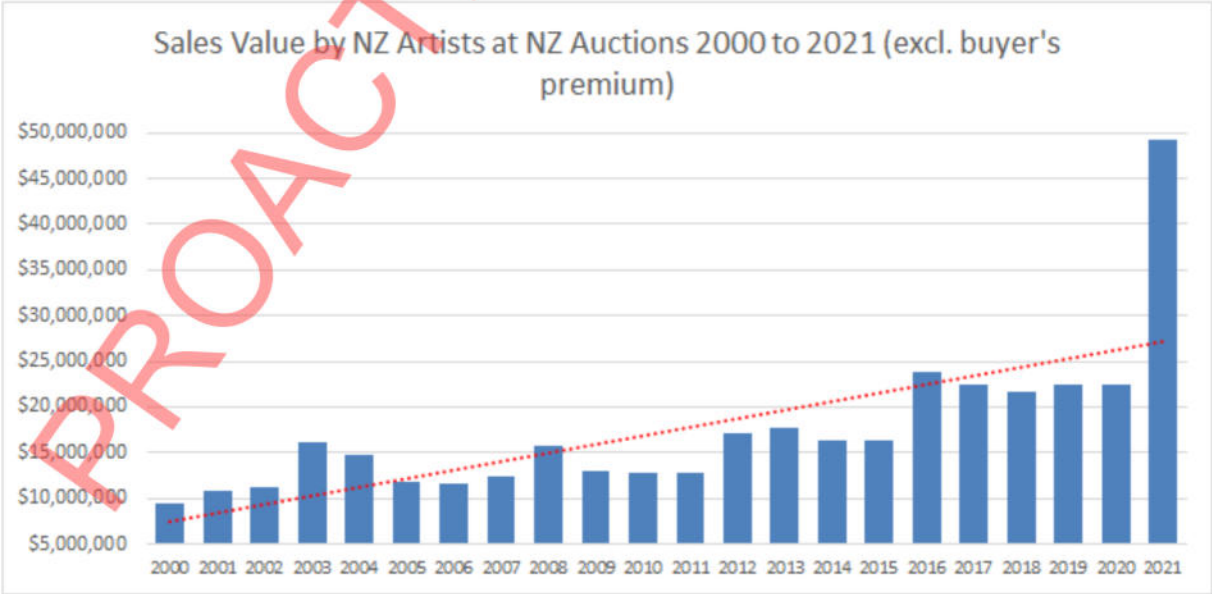
**Auction sales data from 2021 shows that the New Zealand art market for NZ artists and international artists has grown significantly since 2015 – especially for New Zealand works**



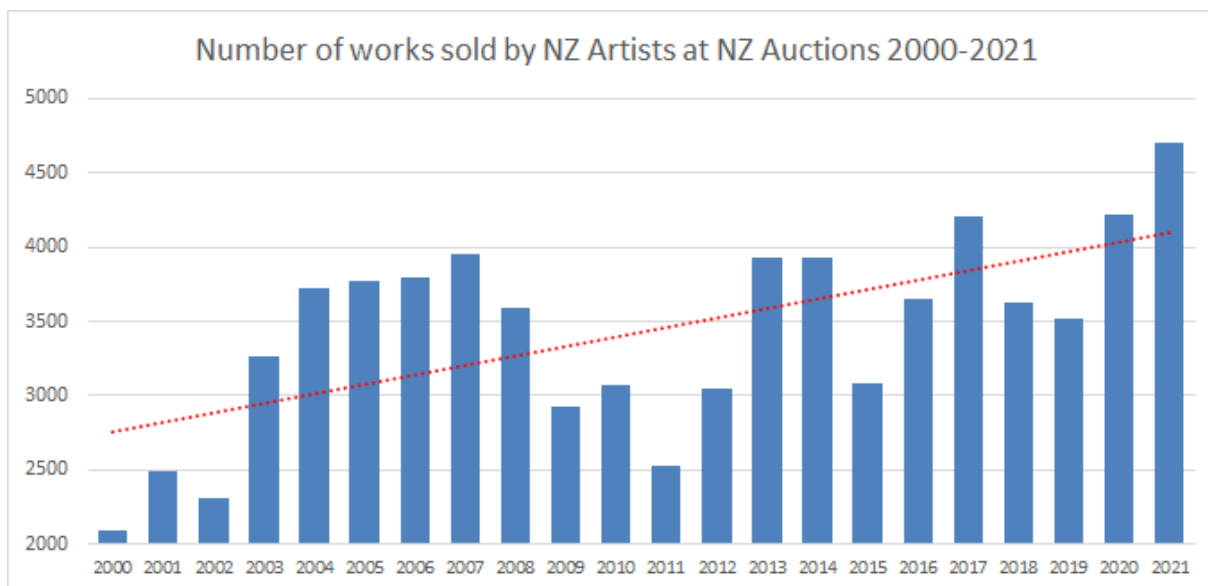
**Figure 1: NZ secondary art sales value 2000-2021 (includes both NZ artists and international artists' work sold in NZ)**

The above graph shows how the value of artwork sold on the NZ secondary art market (both by NZ artists and international artists) has grown significantly since 2000. Works by NZ artists make up the majority of sales by value, with the remainder made up of artworks created by international artists but sold on the NZ secondary market.

**Since 2000, both the sales value and number of New Zealand artists' works sold through auction houses in New Zealand have fluctuated but trended upwards**



**Figure 2: sales value of artworks by NZ artists sold at NZ auctions 2000-2021**



**Figure 3: number of artworks by NZ artists sold at NZ auctions 2000-2021**

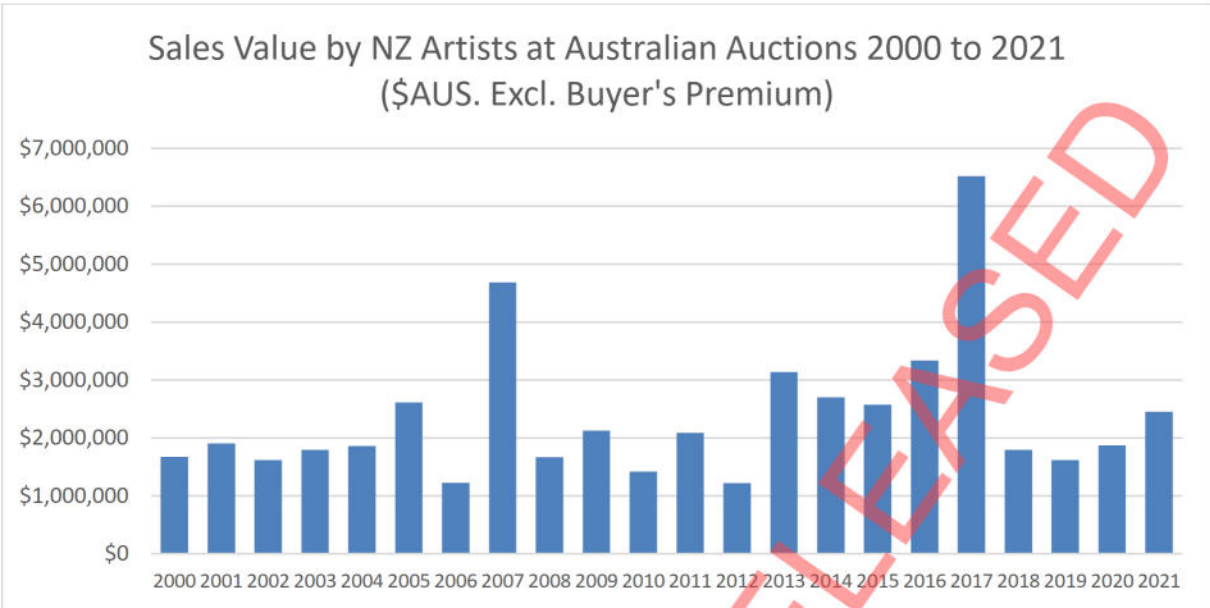
As figures 2 and 3 above show, both the sales value of NZ artists' work and the number of NZ artists' works sold in NZ have fluctuated over the last two decades, but overall have increased substantially.

From 2020 to 2021 in particular, there has been a substantive increase in the value of NZ artists' artworks sold. During this period, the total sales value of NZ artists' work sold at NZ auction houses increased from \$21.05 million in 2020 to \$48.32 million in 2021, an increase of almost 130 percent (Figure 2). However, the actual number of artworks sold only increased by around 13 percent, from 4,512 to 5,106 artworks (Figure 3) meaning the average value per sale increased significantly in 2021.

It is unclear exactly what has driven this substantive growth in the NZ market at a time when the global market has decreased but there have been suggestions it is linked to art buyers having more disposable income available due to COVID-19 lockdowns and travel restrictions. An examination of individual works sold in 2021 shows there were several artworks sold for substantive prices, which will have skewed the 2021 sales figures (19 percent of the 2021 sales value was from ten artworks alone). Notably, of the top twenty sales by New Zealand artists in the last ten years, half were in 2021.

It is also unclear whether the 2021 sales value data is an outlier or whether it is indicative of a rapidly increasing trend in the value of NZ's art market. Views of one expert are that sales will fall over the next few years. Therefore, the 2021 figure should be treated with caution when predicting future market trends.

**We do not know the volume and value of NZ art works sold internationally, except in Australia where the value of New Zealand artworks sold since 2000 has been variable.**



**Figure 4: Sales value by NZ artists at Australian auctions 2000-2021**

We do not have data on NZ artworks sold internationally as this data would be collected individually by the various countries (if collected at all). Data on NZ artworks sold in Australia is available as this was included in the data purchased from the Australian Art Sales Digest. The value of NZ art sold in Australia since 2000 has fluctuated from around \$1.1 million to a 2017 high of \$6.5 million.

PROACTIVELY RELEASED



## Appendix 2 – Summary of key stakeholder views and consultation from 2007 to 2022

### ***Responses to the 2008 Bill showed general support from artists, but opposition from auction houses, dealer galleries and most art collectors***

A Ministry for Culture and Heritage discussion paper, released in April 2007, canvassed options for a potential ARR scheme as well as alternatives to a scheme. The Ministry received 202 submissions on the paper. Two thirds of these submissions favoured the introduction of a mandatory ARR scheme, and one third was opposed.

The Government Administration Select Committee on the draft Bill received 119 submissions, including 57 form submissions. Taking all 119 submissions into account, 58% (69) were in support, 4% (5) neutral and 38% (45) opposed.

Consultation on the 2008 Bill showed that artists and advocacy groups were mostly in favour of the scheme while auction houses and art collectors opposed it, along with some dealers and galleries/museums.

### ***A 2018 MBIE discussion paper included a question on visual artists' rights and received strong support for an ARR scheme***

In November 2018, as part of the review of the Copyright Act 1994, MBIE released a Copyright Issues paper that asked 'What are the problems (or benefits) with the rights the Copyright Act [1994] gives visual artists (including painting, drawings, prints, sculptures etc.)? What changes (if any) should be considered?'

The paper received twenty-six responses to this question, twenty-three advocating for the introduction of an ARR scheme. Comments supporting an ARR scheme included:

- schemes are in place overseas with no discernible negative impact on the art markets in those countries;
- without a scheme, visual artists miss out on potential royalties when their works are sold on the secondary market, or in global markets;
- an ARR scheme recognises the rights and value of visual artists.

### ***A 2019 online survey showed there is strong support from artists, but many art market professionals are opposed***

A targeted online survey, conducted in late 2019 by Manatū Taonga, attracted 348 responses from the visual arts sector. The survey indicated strong overall support for an ARR scheme; 87.4% of respondents being strongly or moderately in favour and 8.3% opposed.

The survey found that professional artists, particularly those with less professional experience, were more likely to support a scheme, while those in roles supporting visual arts (such as auction houses, art dealers, galleries etc.) were less likely to support a scheme. Reasons for supporting a scheme included;

- enabling artists to share in the long-term success of their work;
- providing some financial security and contributing to sustainable careers;
- bringing the visual arts into line with other artistic works such as musical and theatrical works.

Overall, 9.9% of respondents did not support introducing an ARR scheme, 2.0% were moderately opposed, 6.3% strongly opposed, and 1.1% were unsure or did not know if they supported or opposed. The main reasons for opposing a scheme were:

- it would have negative impacts on the art market;
- it would be difficult and costly to administer;
- the status quo is fair and a scheme would not really benefit emerging artists but rather established artists whose works sell for higher prices.

### ***Engagement in 2019 and 2020 showed similar trends***

Policy work in 2019 and 2020 on an ARR scheme (before it was halted due to COVID-19) was informed by targeted consultation with key stakeholders. This included targeted face-to-face consultation with arts organisations (including Toi Māori Aotearoa), academics, community art spaces, dealer galleries, art collectors, auction houses, online platforms (including TradeMe), Copyright Licensing New Zealand, and artists at all stages in their careers (from students and young emerging artists to established artists). Key government agencies were also consulted.

### ***Targeted engagement in 2022 showed strong support for a scheme and provided key insights on settings for the scheme***

As part of the development of policy proposals in 2022, the Ministry once again conducted targeted engagement with key stakeholders, both from the art sector and other government agencies. This engagement did not seek feedback on whether New Zealand should have an ARR scheme (as this has already been agreed to through the FTA), rather engagement tested the proposed policy and administration settings. Key themes of engagement were:

- Consistent with previous engagement, stakeholders were broadly supportive of the proposals but there were some differing views on some of the specific policy settings.
- We received extensive feedback on the definition of visual art with stakeholders emphasising this will need to be carefully defined including appropriately capturing Toi Māori and Pacific art. Stakeholders welcomed the opportunity to contribute to the definition of visual art as part of the development of supporting regulations.
- We heard different views on whether artists should be able to opt out of the scheme; some stakeholders thought it important to give artists the choice (and enable Māori artists to exercise tino rangatiratanga) while others said it would undermine the success of the scheme. There was strong support for investing unclaimed/declined royalties into a cultural fund to support artists' career sustainability.
- Stakeholders were broadly supportive of the proposed royalty rate and the eligibility settings, although art market professionals continued to express concerns about the financial impact of the scheme on their businesses. Generally, stakeholders supported linking the duration of the royalty right to the duration of copyright, although some suggested the right should remain with the artist or their estate indefinitely, particularly in relation to Māori artwork.
- Stakeholders expressed strong support for the collection agency to be independent of government and emphasised it will need to work closely with artists and operate in a culturally appropriate way. Officials also heard that strong enforcement powers would be required to ensure compliance with the scheme.

### ***Engagement with Māori in 2022***

Between June and August 2022, Manatū Taonga undertook targeted engagement 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 in relation to the proposals.

Key themes from engagement were:

- that the scheme should recognise collective ownership, support the legacy and stories of the works, the creation of art and the philosophy in which the artist undertakes their work.
- the importance of the scheme aligning with Wai 262 and Waitangi Tribunal recommendations
- that the scheme should recognise connection to taonga and kaitiaki obligations
- that the definition of Toi Māori should be broad and inclusive
- that the collection agency should have Māori representation and governance and provide guidance regarding allocation of the funds, or what should happen if the artist cannot be found in instances of collective or Māori ownership.
- that the definition of art market professional needs to be broad to capture the mechanisms through which Māori art is sold.

In addition to these conversations Manatū Taonga was approached by over 30 prominent Māori artists expressing their support for a New Zealand Artist Resale Royalties scheme.

### ***NZ-UK FTA National Interest Analysis (2022)***

- The National Interests Analysis (NIA) for the NZ-UK FTA was produced by the Ministry of Foreign Affairs and Trade, working with New Zealand stakeholders and agencies across Government. The NIA assesses the likely costs and benefits for New Zealand entering into the FTA, as well as whether it is in New Zealand's national interest to ratify the agreement. This includes an assessment of the costs and benefits of implementing an ARR as required under the FTA. The NIA was published on 1 March 2022 following signature of the FTA, and was examined by the Foreign Defence, Affairs and Trade Select Committee (alongside the treaty text) in March-April 2022.

### Appendix 3 – Possible additional impacts on the secondary art market

There could be possible additional impacts on the secondary market such as market being depressed economically due to additional costs and administrative impacts of the scheme, and less artwork being sold. This would have flow-on effects for the financial viability of the scheme.

The risk of depressing the art market through forcing art sales overseas or onto the black market and by reducing the number of artworks sold is a concern highlighted by art market professionals both in New Zealand and in some overseas countries where schemes have been introduced. Internationally, however, no negative impacts have been identified that could unequivocally be attributed to the introduction of an ARR scheme.<sup>25</sup> Indeed, art market growth in the UK for a five-year period after the introduction of an ARR scheme was higher than for any other country and higher than average total market growth worldwide.<sup>26</sup>

Similarly in Australia, no evidence was found that people were electing to sell overseas or conduct private sales solely to avoid having to pay a royalty.<sup>27</sup> The Australian legislation was introduced in 2009 during the Global Financial Crisis and Australian art market professionals generally agree that ‘simply by its presence, the scheme is influencing buyers’ behaviour and that this has had a negative (but difficult to quantify) impact on sales’.<sup>28</sup> Nonetheless, the Australian secondary art market has grown since 2009 and continues to trend upwards.

A comprehensive report published by the United States Copyright office found that ‘even though the available quantitative information can be interpreted in various ways, there is certainly no conclusive proof that the UK or EU markets have suffered (or for that matter benefitted) directly or indirectly from the [artists’] resale royalty’.<sup>29</sup> The United States has not introduced a national ARR scheme.

Overall, experience from international schemes suggests resale royalties are not costly enough for sellers of artwork to relocate in order to avoid paying the royalties and that art will nearly always be sold where it’s likely to get the best market price. The cost of exporting an artwork to an overseas market where there is no ARR scheme is also often higher than the actual royalty payable if the artwork was not exported and sold in a market where an ARR scheme was in effect.

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<sup>25</sup> *Artist’s resale right – Summary of IPO survey findings*, 2014, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/375378/artists-resale-rights-ipo-survey.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/375378/artists-resale-rights-ipo-survey.pdf)

Post-implementation Review – *Resale Royalty Right for Visual Artists Act 2009* and the Resale Royalty Scheme, 2019, [post-implementation-review-resale-royalty-right-for-visual-artists-act-2009-and-the-resale-royalty-scheme.pdf](https://www.copyright.gov/records/post-implementation-review-resale-royalty-right-for-visual-artists-act-2009-and-the-resale-royalty-scheme.pdf)

*The economic implications of the artist’s resale right*, November 2017. [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_35/sccr\\_35\\_7.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_7.pdf)

<sup>26</sup> *The economic implications of the artist’s resale right*, November 2017. [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_35/sccr\\_35\\_7.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_7.pdf)

Katy Graddy, Noah Horowitz and Stefan Symanski, *A study into the effect on the UK art market of the introduction of the artist’s resale right*, UK Intellectual Property, 2008.

<sup>27</sup> Post-implementation Review – *Resale Royalty Right for Visual Artists Act 2009* and the Resale Royalty Scheme, 2019, [post-implementation-review-resale-royalty-right-for-visual-artists-act-2009-and-the-resale-royalty-scheme.pdf](https://www.copyright.gov/records/post-implementation-review-resale-royalty-right-for-visual-artists-act-2009-and-the-resale-royalty-scheme.pdf)

<sup>28</sup> Post-Implementation Review - *Resale Royalty Right for Visual Artists Act 2009* and the Resale Royalty Scheme, 2019, <https://www.arts.gov.au/documents/post-implementation-review-resale-royalty-right-visual-artists-act-2009-and-resale-royalty-scheme>

<sup>29</sup> *Resale Royalties: An Updated Analysis*, Office of the Register of Copyrights, December 2013: <https://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf>