

**[NEW PART [] OF THE COPYRIGHT ACT 1968]****PRIVATE USE OF RECORDABLE MEDIA****Division 1 - Interpretation**

1 In this Part:

**collecting society** means the body that is, for the time being, declared to be the collecting society under section 10;

**distributor** means a person (such as a manufacturer, wholesaler or importer) who distributes to a seller an item of recordable media for the purpose of retail sale;

**private use royalty records** means those records created by sellers and distributors referred to in section 15.

**purchaser** means a person who purchases by way of retail purchase an item of recordable media;

**quarter** means a quarter of a calendar year, being a quarter beginning on 1 January, 1 April, 1 July or 1 October;

**recordable media** means any removable and portable item of electronic storage (such as a blank audio or video cassette containing magnetic tape, recordable compact disc or recordable DVD) of a kind ordinarily supplied for private use or uses that include private use;

**relevant copyright owner** means the owner of the copyright in a sound recording which comprises a musical work, or in that musical work, any dramatic work associated with that musical work (such as lyrics), a cinematograph film, or any work or sound recording included within that cinematograph film;

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

**seller** means a person who sells by way of retail sale an item of recordable media.

2 Without affecting the meanings of the expressions “in public” or “to the public” in this Act, “private use” wherever used in this Part means an exercise of the reproduction right under subparagraph 31(1)(a)(i), or the copying right under paragraph 85(1)(a) or 86(a), by a natural person for that person’s own private and non-commercial use, or for the private and non-commercial use of persons bound to that person by domestic ties.

**3** This Part applies to the collecting society despite anything in the rules of the society but nothing in this Part affects those rules so far as they can operate consistently with this Part.

## **Division 2 - Copying with recordable media**

### **Remunerated exception to infringement**

**4(1)** Copyright subsisting in a sound recording which comprises a musical work, or in that musical work, any dramatic work associated with that musical work (such as lyrics), a cinematograph film, or any work or sound recording included within that cinematograph film is not infringed by a private use made with an item of recordable media where a purchaser has paid a private use royalty in respect of that item in accordance with subsection 5(1).

**4(2)** Where a reproduction of a work, a copy of a sound recording, a copy of a cinematograph film, or a facsimile copy of a published edition made in reliance on subsection (1) is:

- (a) sold or let for hire by way of trade, or offered or exposed in trade for sale or hire;
- (b) used so as to cause a work reproduced to be performed in public, or a sound recording copied to be heard in public, or a cinematograph film copied to be seen or heard in public;
- (c) used so as to communicate to the public a work reproduced, a sound recording copied or cinematograph film copied; or
- (d) used otherwise than for a private use,

then subsection (1) does not apply, and shall be taken never to have applied, to the making of the reproduction or the copy.

**4(3)** Subsection (1) does not apply to the reproduction of works, or the copying of subject-matter other than works, where the reproduction or copy is made, or made possible, by the use of a circumvention device or a circumvention service where that device or service has been supplied contrary to this Act.

## **Division 3 - Private use royalty and exemptions**

### **Imposition on retail purchasers, and collection by retailers**

**5(1)** Subject to, and in accordance with, this Part, at the time of retail purchase of an item of recordable media the purchaser must pay to the seller a private use royalty in respect of the item, and the seller must receive that royalty.

**5(2)** The amount of the private use royalty is an amount determined by the Copyright Tribunal under paragraph 100X(7)(a).

**5(3)** A purchaser that fails to pay the full amount of a private use royalty to a seller in accordance with subsection (1) incurs a private use royalty debt to the collecting society of an amount equal to the royalty or the amount by which the royalty exceeds the amount paid by the purchaser as royalty, whichever is the lesser amount.

### **Remittance to the collecting society**

**6(1)** Subject to section 7, a seller that has received an amount of private use royalty under subsection 5(1) must, within 21 days after the end of the quarter in which that royalty was received, pay the received amount, less the amount determined by the Copyright Tribunal under paragraph 100X(7)(b), to the distributor from whom the seller acquired the item of recordable media to which the royalty relates, and the distributor must receive that payment.

**6(2)** A distributor that has received a payment pursuant to subsection (1) must, within 21 days after the end of the quarter in which the payment was received, pay to the collecting society an amount equal to the received amount, less the amount determined by the Copyright Tribunal under paragraph 100X(7)(c).

### **Advance payments**

**7(1)** Within three calendar months from the date a distributor has distributed an item of recordable media to a seller, the seller must pay to the distributor, an amount in respect of the item equal to the private use royalty that would be payable by a purchaser under subsection 5(1) in respect of the item, less the amount determined by the Copyright Tribunal under paragraph 100X(7)(b), and the distributor must receive that amount.

**7(2)** Within 21 days from the end of any quarter in which an amount has been received under subsection (1) in respect of an item, the distributor must pay the amount to the collecting society less the amount determined by the Copyright Tribunal under paragraph 100X(7) (c).

**7(3)** If a seller has made a payment under subsection (1) in respect of an item, subsection 6(1) does not require payment by the seller except to the extent that the amount paid by the seller under subsection (1) is less than the amount that, but for this subsection, would have been payable under subsection 6(1) in respect of the item.

**7(4)** If a seller has made a payment under subsection (1) in respect of an item but, for any reason, has not sold the item and no longer retains it for sale, the seller may give to the collecting society a written declaration stating the circumstances, and the amount of the payment under subsection (1) is payable by the collecting society to the seller within 21 days after receipt of the declaration.

## Offences

**8(1)** A seller that fails to receive a private use royalty from a purchaser in accordance with section 5 is guilty of an offence punishable, on conviction, by a fine not exceeding 50 penalty units.

**8(2)** A seller that fails to make a payment as required by subsection 6(1) or subsection 7(1) is guilty of an offence punishable, on conviction, by a fine not exceeding 50 penalty units.

**8(3)** A distributor that fails to make a payment as required by subsection 6(2) or subsection 7(2) is guilty of an offence punishable, on conviction, by a fine not exceeding 50 penalty units.

## Recovery of moneys

**9(1)** An amount payable under subsection 6(2) or subsection 7(2) is recoverable by the collecting society in the Federal Court of Australia or any other court of competent jurisdiction as a debt due to the society.

**9(2)** An amount payable under subsection 7(4) is recoverable from the collecting society in the Federal Court of Australia or any other court of competent jurisdiction as a debt due to the seller.

**9(3)** Jurisdiction is conferred on the Federal Court of Australia with respect to an action under subsection (1) or subsection (2)..

## Exemptions

**10(1)** Where a person or body:

- (a) purchases an item of recordable media from a seller;
- (b) pays the private use royalty; and
- (c) gives to the collecting society a receipt for the purchase of the item together with a statutory declaration made by the person, or by an officer or member of the body, as the case may be, containing:
  - (i) the prescribed particulars; and
  - (ii) a statement that the person or body will not use the item, or cause or permit it to be used, or make it available to any person for use, for the purpose of making a reproduction of a work, a copy of a sound recording, or a copy of a cinematograph film in which copyright subsists, unless the person or body is the owner or licensee of the relevant right;

the collecting society must pay to the person or body an amount equal to the amount of the royalty paid.

**10(2)** Subsection 5(1) does not apply to the purchase of second-hand recordable media.

## **Division 4 - The collecting society**

### **The collecting society**

**11(1)** Subject to this section, the Attorney-General may, by notice in the *Gazette*, declare the body named in the notice to be the collecting society.

**11(2)** The Attorney-General shall not name more than one body in a declaration and shall not make a declaration while an earlier declaration is in force.

**11(3)** The Attorney-General shall not declare a body to be the collecting society unless:

- (a) it is a company limited by guarantee and incorporated under a law in force in a State or Territory relating to companies;
- (b) all relevant copyright owners, or their agents, are entitled to become its members;
- (c) its rules prohibit the payment of dividends to its members; and
- (d) its rules contain such other provisions as are prescribed, being provisions necessary to ensure that the interests of the collecting society's members who are relevant copyright owners or their agents are protected adequately, including, in particular, provisions about:
  - (i) the collection of sums in discharge of private use royalty debts;
  - (ii) the payment of the administrative costs of the society out of amounts collected by it;
  - (iii) the distribution of amounts collected by it;
  - (iv) the holding on trust of amounts for relevant copyright owners who are not its members; and
  - (v) access to records of the society by its members.

### **Revocation of declaration**

**12.** The Attorney-General may, by notice in the *Gazette*, revoke the declaration of a body as the collecting society if satisfied that the body:

- (a) is not functioning adequately as the collecting society;

- (b) is not acting in accordance with its rules or in the best interests of those of its members who are relevant copyright owners or their agents;
- (c) has altered its rules so that they no longer comply with paragraphs 11(3)(c) and (d); or
- (d) has refused or failed, without reasonable excuse, to comply with section 13 or 14.

### **Annual report and accounts**

**13(1)** The collecting society shall, as soon as practicable after the end of each financial year, prepare a report of its operations during that financial year and send a copy of the report to the Attorney-General.

**13(2)** The Attorney-General shall cause a copy of the report sent to the Attorney-General under subsection (1) to be laid before each House of the Parliament within 15 sitting days of that House after the receipt of the report by the Attorney-General.

**13(3)** The society shall keep accounting records correctly recording and explaining the transactions of the society (including any transactions as trustee) and the financial position of the society.

**13(4)** The accounting records shall be kept in such a manner as will enable true and fair accounts of the society to be prepared from time to time and those accounts to be conveniently and properly audited.

**13(5)** The society shall, as soon as practicable after the end of each financial year, cause its accounts to be audited by an auditor who is not a member of the society, and shall send to the Attorney-General a copy of its accounts as so audited.

**13(6)** The society shall give its members reasonable access to copies of all reports and audited accounts prepared under this section.

**13(7)** This section does not affect any obligations of the society relating to the preparation and lodging of annual returns or accounts under the law under which it is incorporated.

### **Amendment of rules**

**14.** The collecting society shall, within 21 days after it alters its rules, send a copy of the rules as so altered to the Attorney-General, together with a statement setting out the effect of the alteration and the reasons why it was made.

## **Division 5 - Private use royalty records**

### **Private use royalty records**

**15(1)** In relation to a purchase to which section 5 applies, the seller must ensure that a record in the prescribed form appears on or is affixed to either the item of recordable media the subject of the purchase, or the item's container.

**15(2)** On or before the time of making the payment to the distributor referred to in subsection 6(1), the seller must create a record setting out the prescribed particulars and give to the distributor a copy of that record at the time of payment.

**15(3)** On or before the time of making the payment to the collecting society referred to in subsection 6(2), the distributor must create a record setting out the prescribed particulars and give to the society a copy of that record at the time of payment.

**15(4)** On or before the time of making the payment to the collecting society referred to in subsection 7(1), the distributor must create a record setting out the prescribed particulars and give to the society a copy of that record at the time of payment.

**15(5)** Records created in compliance with this Part must be retained by the party creating the record for a period of seven years from the date of creation.

### **Inspection of records by the collecting society**

**16(1)** The collecting society may, in writing, notify any person that the society has reason to believe has failed to make a payment as required by subsection 5(1), 6(1), 6(2), 7(1) or 7(2) that the society wishes, on a day specified in the notice, being an ordinary working day not earlier than 7 days after the day on which the notice is given, to inspect all records held by the person at the premises specified in the notice, being records that relate to the purchase, sale or distribution of items of recordable by the person, and such other records held at those premises that are relevant to compliance with this Part.

**16(2)** Subject to section 16, if a collecting society gives a notice under subsection (1), a person authorised in writing by the society may, on the day specified in the notice and during the ordinary working hours of the notified person (but not before 10 am or after 3 pm), carry out the assessment, or inspect the records, to which the notice relates and, for that purpose, may enter the premises of the seller or distributor.

**16(3)** A seller or distributor must take all reasonable precautions, and exercise reasonable diligence, to ensure that a person referred to in subsection (2) who attends the premises of the seller or distributor for the purpose of exercising the powers conferred by that subsection is provided with all reasonable and necessary facilities and assistance for the effective exercise of those powers.

**16(4)** A seller or distributor who contravenes subsection (3) is guilty of an offence punishable, on conviction, by a fine not exceeding 10 penalty units.

## **Identity cards**

**17(1)** The chief executive officer (however described) of a collecting society must issue an identity card in the prescribed form to each person authorised by the society for the purposes of subsection 16(2). The identity card must contain a recent photograph of the authorised person.

**17(2)** If an authorised person who attends or enters premises for the purpose of exercising powers conferred by subsection 16(2) fails to produce his or her identity card when asked to do so by a person apparently in charge of the premises, the authorised person must not enter or remain on the premises or exercise any other powers under subsection 16(2) at the premises.

**17(3)** A person is guilty of an offence punishable on conviction by a fine not exceeding 1 penalty unit if:

- (a) the person has been issued with an identity card;
- (b) the person stops being an authorised person; and
- (c) the person does not, immediately after he or she stops being an authorised person, return the identity card to the relevant collecting society.

**17(4)** An authorised person must carry his or her identity card at all times when exercising powers under subsection 16(2).

## **Confidentiality of records**

**18** A person who, whether directly or indirectly, makes a record of, or discloses or communicates to a person any information obtained under the operation of section 15 or 16, except for the purposes of the administration of this Part, is guilty of an offence punishable, on conviction, by a fine not exceeding 10 penalty units.

## **Division 6 - Miscellaneous**

### **Copyright owners may authorise copying**

**19** Nothing in this Part affects the right of the owner of the copyright in a work or other subject-matter to grant a licence authorising a person to make or cause to be made, a sound recording, or a copy of a sound recording, of the work or other subject-matter without infringing that copyright.

**20** If -

- (a) a copyright owner brings a copyright infringement action against a person in respect of an alleged infringement by use of an item of recordable media; and
  - (b) a private use royalty has been paid in respect of that item,
- a court may take the payment into consideration in the quantification of any monetary award.

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**[CORRESPONDING DRAFT JURISDICTION OF COPYRIGHT TRIBUNAL PROVISIONS – TO BE ADDED TO THE COPYRIGHT ACT]**

**Determination of amount of private use royalty and related compensation**

**100X(1)** Expressions used in this section that are also used in Part [] have the same meanings as they have in that Part.

**100X(2)** An application may be made to the Tribunal for an order determining the amount per item of recordable media that is payable under Part [] by way of private use royalty.

**100X(3)** An application may be made by any person or body that the Tribunal considers has an interest in the matter that is the subject of the application, including the collecting society, a seller, a distributor, a purchaser or a relevant copyright owner.

**100X(4)** On an application made under subsection (3), the Tribunal may, if the Tribunal considers it convenient, require the applicant to advertise the fact of the application to persons who might apply to the Tribunal under subsection (6).

**100X(5)** The parties to an application are:

- (a) the applicant; and
- (b) such persons or organisations as are made parties to the application under subsection (6).

**100X(6)** Where a person or an organisation applies to the Tribunal to be made party to an application and the Tribunal is satisfied that the person or organisation has an interest in the matter that is the subject of the application, the Tribunal may, if it thinks fit, make that person or organisation a party to the application.

**100X(7)** Subject to subsections (8) and (9), the Tribunal shall consider an application under subsection (2) and, after giving the parties to the application an opportunity of presenting their cases, shall make an order determining:

- (a) the amount of a private use royalty that is payable under subsection 5(1);
- (b) an amount of compensation for a seller, in respect of compliance with Part [], expressed as a percentage of the private use royalty; and
- (c) an amount of compensation for a distributor, in respect of compliance with Part [], expressed as a percentage of the private use royalty.

**100X(8)** In making an order under paragraph (7)(a), the Tribunal:

- (a) must take into account all relevant matters including the value, or likely value, of the statutory licence contained in section 4 in respect of items of recordable media; and
- (b) may determine, or make provision for determining, amounts of a private use royalty which vary according to the type or variety of recordable media in respect of which the royalty is to be paid.

**100X(9)** In making an order under paragraph (7)(b) the Tribunal must take into account all relevant matters, including the actual or likely costs and expenses incurred, and labour undertaken, by a seller in complying with sections 5, 6 and 7, including any actual or likely financial costs for a seller of temporarily outlaying funds in order to comply with section 7.

**100X(10)** In making an order under paragraph (7)(c), the Tribunal must take into account all relevant matters, including the actual or likely costs and expenses incurred, and labour undertaken, by a distributor in complying with sections 6 and 7, and also including any actual or likely financial benefits for a distributor of temporarily holding amounts received from sellers under subsection 7(1).

**100X(11)** An order under subsection (7) shall remain in force until the earlier of the order's revocation or, where the order specifies a period during which it is to remain in force, the expiry of that period.

**100X(12)** The Tribunal may refuse to consider an application under this section made less than 5 years after the making of the last order under this section in relation to the same class of items unless the Tribunal is satisfied that there has been a substantial change in any of the matters relevant to the determination of the amount of the royalty or the amount allowed by way of seller or distributor compensation.

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