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### **Submission in Response to Resale Royalty Discussion Paper**

The Arts Law Centre of Australia (Arts Law) acknowledges the further work that has been done by Government to progress the recommendation of the Myer Report to introduce a resale royalty scheme in Australia and welcomes the opportunity to comment upon the Government's Discussion Paper. However, we urge the Government to progress beyond the discussion phase and take action to implement a legislative resale royalty scheme in Australia.

Arts Law is the national community legal centre for arts practitioners. Arts Law provides advice, education and advocacy services each year to over 2000 Australian artists and arts organisations operating across the arts and entertainment industries. Arts Law does not represent a particular group with specific interests. Rather, we support the broad interests of creators, the vast majority of whom are emerging or developing artists.

Together with key industry organisations, National Association for the Visual Arts (NAVA), the Australian Copyright Council (ACC) and Viscopy, Arts Law has previously raised with Government our position on some of the major issues that need to be addressed in a resale royalty scheme (see joint submission of Arts Law, NAVA, ACC and Viscopy dated October 2003). In addition to our comments below, we refer to, and rely upon that submission which is attached with this letter.

#### **1. Should Australia introduce a resale royalty arrangement? What are your primary reasons for your support or lack of support for such an arrangement?**

Arts Law has advocated for the introduction of resale royalties in Australia for several years and has recently raised the issue with Government. We refer to our emails to Senator Rod Kemp and Mr Darryl Williams of 31 March 2004, joint submission of October 2003, as well as our submission to the Myer Inquiry (December 2001).

The major reasons that Arts Law supports a resale royalty scheme are that:

- it will provide an additional income stream to some artists (and their families)
- it recognises the value of artists to Australian society
- it provides Australian artists with an internationally recognised right.

The right of artists to resale royalties as recognised in the Berne Convention (optional right in Art 14<sup>ter</sup>), has been available in some European countries since the 1920s and under the European Union Directive on the Resale Right is to be introduced throughout Europe by 2006 (full implementation by 2012). To provide Australian artists with this right would not only further harmonise Australia's copyright laws with Europe but would also send a strong message about the value Australia places on artists and their work both locally and in an international context.

The Discussion Paper correctly points out that “*while most visual artists and craft practitioners are able to receive a primary financial benefit from the initial sale of their work they are less likely to receive secondary remuneration for subsequent uses (including reproduction)*”. This is in contrast to writers and musicians who often receive licence payments for use of their work. Rather than it being a problem with the business model of the art world as suggested by the Discussion Paper, Arts Law would say that it is the very nature of artistic works that limits the income available through current copyright rights such as reproduction.

Resale royalties are akin to copyright in that artists are rewarded for the ongoing economic use of their creative efforts with the economic return from resale being connected to the value of the work (which may also be related to the popularity of the artist and their work). The fact that resale royalties are more often paid to artists later in their career or to their estate after death provides the artists (and their heirs) with a financial reward for investment in a career in the arts. One can infer from the Throsby and Hollister report, *Don't Give Up Your Day Job*<sup>1</sup>, that the years spent by an artist building his or her reputation, is likely to have involved a significant financial sacrifice, not only for the artist, but for their family, particularly during the early to mid career years. Resale royalties could be seen as a type of superannuation for artists (who often will have not been in a position to contribute to such a scheme during their career as an artist).

## **2. What should be the primary objectives of a resale royalty arrangement in the Australian environment?**

The following objectives should underpin a resale royalty scheme in Australia:

- Increase potential sources of income for artists
- Provide means of rewarding artists for their contribution to the increased value of their work
- Benefit the greatest number of artists as possible
- Minimise the administrative burden on art dealers
- Ensure that rights provided are enforceable by artists or by the organisation representing their interests.

## **3. Who do you consider would be the principal targets of resale royalty arrangements and why?**

Resale royalties should be payable to all Australian artists and their heirs whose work is resold. The scheme should aim to maximise returns to artists. Whilst the injustices affecting many Indigenous artists are profound, the principles and objectives of a resale scheme should apply to all Australian artists.

However given to the well-publicised inequities experienced by Indigenous artists who receive no share at all from enormous increases in the resale value of their work, the establishment of a resale royalty scheme would provide some acknowledgement of the

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<sup>1</sup> David Throsby and Virginia Hollister, *Don't Give Up Your Day Job*, Australia Council, 2003

huge contribution that Indigenous artists have made to the development of the Australian art market.

It is also important that the benefits of resale royalties flow to the artist's heirs, particularly families, which may have made significant economic sacrifices during the artist's lifetime.

#### **4. What kind of resale royalty arrangement would deliver best benefits to the intended beneficiaries and why?**

Arts Law is strongly of the view that legislation is needed to implement a successful resale royalty scheme. This could be done through amendments to the Copyright Act. The scheme needs to be mandatory and enforceable as a voluntary scheme raises the possibility of professional art intermediaries not paying.

The Discussion Paper suggests an industry self-regulated scheme with some enthusiasm providing the example of the advertising industry's Code of Ethics. In our view a code of conduct is a very different form of self-regulation to one requiring the voluntary distribution of money. The evidence to date indicates that unless the scheme is mandatory far fewer artists will benefit.

Currently, as the Discussion Paper points out, there are some galleries running voluntary schemes, but these are very few in number. Some of the voluntary arrangements have involved the use of contracts. These contracts can be complex and enforcement can be extremely problematic when an artist is a 3<sup>rd</sup> party beneficiary under the agreement. Artists, even if entitled to payment under such an agreement, may well be unable to enforce their rights because of the legal difficulties and the costs involved.

The Discussion Paper also suggests alternative arrangements to benefit Indigenous artists in particular, giving the examples of voluntary agreements and the ICIP Toolkit project. The problems with contracts are noted above and whilst the ICIP Toolkit project is a good initiative, there has been slow progress to date given that it was proposed over 12 months ago, was allocated a small budget, and a tender document is still to be produced. Also Arts Law is of the view that the resale royalty scheme should apply to all Australian artists.

#### **5. Are there unique features of the Australian art market which need to be considered in designing a workable resale royalty scheme?**

The information available for the Discussion Paper on the Australian art market was acknowledged as incomplete. The omission of sales through commercial galleries would certainly have an impact on the modelling, particularly in relation to outcomes for Indigenous artists. It is important that this aspect of the Australian art market is properly understood and considered in evaluations of the benefits of resale royalties to artists.

It may also be useful to consider how the terminology "resale royalties" might be misinterpreted by Indigenous artists and communities, in view of the association with large royalty payments linked to mining. It may be better to term the payments as "resale rights" to avoid confusion and unrealistic expectations.

As noted in the Discussion Paper, the auction house Lawson Menzies, has introduced a scheme whereby 2% of the commission on sales of Indigenous works are donated to a foundation for the benefit of Aboriginal communities. Whilst this is an admirable initiative it should not replace a resale royalty scheme, as the foundation scheme ignores the underlying principle for a resale scheme, that is, the ongoing interest the artist has, (and for Indigenous artists this may extend to the community), in the use of the work, including its resale. The foundation scheme also could be interpreted as paternalistic with the implication that Aboriginal people are incapable of handling the money themselves.

The relative small size of the Australian art market has previously been used as a reason for not introducing a resale royalty scheme. However, the Discussion Paper notes the ongoing growth of the Australian market and comparative figures provided for 6 countries indicate that several of the smaller European countries where resale royalty schemes are operating have markets of a comparable size to Australia.

We note that the largest market for Australian works is in Australia and the distance of Australia from other markets are generally viewed as reasons why it is unlikely that sales of Australian work will move overseas to jurisdictions without resale royalties.

## **6. What are the most important principles underpinning the choice of model or the form of resale royalty arrangement?**

Arts Law as the national community legal centre for artists and arts organisations, advocates a model that provides the highest level of royalty payments to the greatest number of artists and their estates. It is important that the scheme applies to all resales involving a professional intermediary, including auction houses, private galleries and agents, and online auctions where there is a connecting factor between the sale and the Australian resale right legislation (refer to joint submission October 2003).

We acknowledge however, that the Government must consider issues such as the financial impact of the scheme on small business and the need to ensure that small business is supported to implement the scheme. Resources for education and initial financial and/or technological support may need to be provided by Government, as is often the case when Government introduces new financial arrangements eg GST, BAS, changes to treatment of charities.

## **7. What works should be covered by the arrangement and why?**

The resale scheme should apply to all resales of the original embodiment of artistic works, as defined by the Copyright Act, except buildings or permanent non-removable parts of buildings (see joint submission October 2003). The right should also apply to reproductions made in limited editions (eg numbered prints, photographs or craftworks). As stated in the joint submission, the right should also cover newer forms of expression such as multimedia works and installations which may be resold by a professional intermediary but may not be covered by the current definition of "artistic work". This may be an opportune time to review the definition of "artistic work" in the Copyright Act, particularly in view of the recommendation in the Myer Report to monitor the practical application and case law developments with respect to the definition of artistic work (recommendation 3.8).

As stated in the joint submission, the resale right should also apply to foreign works sold in Australia, where the artist is a national of a country with an equivalent scheme under which Australian artists are entitled to benefit.

## **8. What duration should apply and why?**

As stated in our joint submission, the resale royalty right should be of the same duration as copyright. The Discussion Paper's review of overseas models indicates that this is the duration most frequently adopted (cf the shorter period in California) and is consistent with the EU directive and international practice. For reasons stated above the model needs to ensure that the benefits flow not only to the artists during their lifetime, but to the family of the artist after their death. It may be worthwhile considering whether the categories of beneficiaries entitled to receive resale royalties upon the artist's death need to be extended in relation to Indigenous artists as it may be appropriate for community, as well as family, to be included.

**9. Should artists be able to assign, waive or sell the resale royalty in their works, and why?**

In accordance with the EU Directive and international practice the resale right should be inalienable. The right should vest with the artist and not be able to be waived, nor should there be the ability for artists to consent to non-payment of resale royalties. There should also be the requirement that the Collecting Society pay the royalty to the artist (rather than to someone else). This recognises the potential pressure that could be placed on artists to waive or assign their rights and the uneven bargaining position of many artists.

**10. Should there be a threshold level for the resale of works and if so at what level should that be set and why?**

In principle the resale royalty scheme should apply to all resales with no set threshold. However in view of realities of collection and distribution, it may be necessary for a threshold to be set. Although research on the impact of a threshold is still ongoing, we note that in the European Union countries the threshold must be less than 3,000 Euros and that the current maximum is 1,700 Euros. In view of the European experience and the current information available it would appear that a threshold in the range of \$1000 - \$3000 would be appropriate. However we understand that Viscopy is further researching this issue and we reserve the right to make further submissions on this issue once that research is available.

**11. What rate of royalty should apply and why? Also should the royalty be set at a flat rate or on a sliding scale and why?**

As previously outlined in the joint submission Arts Law supports a flat rate royalty of 5%. This results in the collection of the largest amount of royalties and the largest average return to artists. Whilst EU Directive uses a sliding scale to determine the rate, our understanding is that most European jurisdictions currently have a flat rate in the range of 3-5%. The reasons for the European Union adopting a sliding scale were largely about reaching a position acceptable to all member countries. The same issues do not arise in Australia eg the maximum amount of resales in Australia is much lower. The flat rate is simple, easier to administer for resellers and is understood by all parties.

If the Government were to adopt a sliding scale this would have a significant bearing on the threshold established as well as the rate which should apply to the lower end of the market. Arts Law, as an industry body which supports the adoption of a flat rate model, would want the opportunity to further consider the impact of a sliding scale.

**12. What type of organisation should administer any arrangement and what factors should be used to assess and ensure performance of such a body.**

Resale royalties should be collected by a declared collecting society. Viscopy is currently the most appropriately placed organisation to administer the scheme.

The use of a collecting society which is not-for-profit is to be preferred to a for-profit organisation, as it is the business of a collecting society to maximise returns to artists (or other rights holders).

The accountability mechanisms currently in place for declared collecting societies should apply, including:

- Code of Conduct which requires a complaints process
- Annual reviews of compliance with the Code of Conduct
- Requirement that Annual Reports be tabled in parliament

- Financial accountability requirements.

The other accountability requirements for collecting societies as set out in the Copyright Act (s135R) would also apply.

A collecting society is also preferred over a Government agency as the mechanics of a resale royalty scheme would be substantially different to Public Lending Rights and Educational Lending Rights (currently administered by DCITA) as these do not involve the collection of monies from 3<sup>rd</sup> parties, with the funding for the schemes coming from the Government.

**13. If you do not support the resale royalty, do you consider alternative support arguments are more appropriate? If so, what kind?**

Whilst Arts Law supports a resale royalty, this is but one mechanism for increasing the income stream of artists in Australia. It does not negate the need for other support mechanisms being available to visual artists and craftspeople, such as increased funding to the visual arts and many of the other proposals outlined in the Myer Report.

**14. What do you consider the likely impact of your preferred position on the possible groups affected and on the Australian art market?**

The introduction of a resale royalty scheme would have a positive impact on Australian artists and Australia's standing internationally as a country which supports the arts. Whilst the resale scheme will not reward all artists financially it will provide an additional source of income for many artists and their families. Arts Law is unable to comment on the impact on the professional art intermediaries although we note that the art market appears to have grown in recent years despite new imposts such as the buyer's premium, capital gains tax, and the GST.

**15. Do you have any other issues?**

In order for the resale scheme to be implemented effectively it is important that there is a properly funded education campaign so that artists, sellers and buyers of artworks and the intermediaries understand the rights and obligations of all the parties involved.

Arts Law would encourage the Government to proceed without delay to draft legislation to implement a resale royalty scheme. If the Government was to adopt a different model to the one preferred by industry bodies such as Arts Law, NAVA, ACC and Viscopy, we would request that further consultation takes place.

Please do not hesitate to contact Arts Law if you have any queries about this submission.

Yours faithfully

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