



Australian Government

**Australian Government response to the House of
Representatives Standing Committee on Climate
Change, Water, Environment and the Arts Report**

Resale Royalty Right for Visual Artists Bill 2008

May 2009

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This is the Australian Government's response to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts (the Committee) report on the inquiry into the Resale Royalty Right for Visual Artists Bill 2008, as tabled on 20 February 2009.

The Government acknowledges the work of the Committee in delivering its report.

The Resale Royalty Right for Visual Artists Bill 2008 (the Bill) gives effect to the Australian Government's election policy commitment to introduce a resale royalty right for visual artists. A resale royalty, also called a *droit de suite*, entitles an artist to receive a royalty payment from subsequent sales of his or her artwork. The Bill is intended to create a resale royalty right in Australia and establish a statutory scheme to enforce the right and collect and distribute royalties.

The resale royalty right created in the Bill is intended to allow visual artists to benefit from the commercialisation of their work in the secondary art market. Visual artists derive their main source of income from the first sale of original artworks and do not currently have the same range of opportunities as other creators, such as authors and composers, to earn money through exercising the copyright in their work through reproductions, public performances or broadcasts. Visual artists and their representatives have also advocated for this right, emphasising its important symbolic significance, above and beyond the economic value, as a statement of the esteem in which Australia holds its visual arts culture.

Recommendation 1

In order to ensure the best possible description of what type of artwork is likely to be included in the scheme, as outlined in the Explanatory Memorandum, the Committee recommends that clause 7(2) of the Bill be amended to include batik, weaving, or other forms of fine art textiles; installations; fine art jewellery; artist's books; carvings; and multimedia artworks, digital and video art.

Position: Agreed

Comment

The Government considered a range of options to define 'what is an artwork?' including the definition of artistic work in the *Copyright Act 1968*, or adopting the definition applied in the European Union (EU). The selected definition was considered to represent the best balance as it focuses on the originality of the work of art (although would allow for multiple originals such as limited edition prints) and is both comprehensive and flexible.

The Government agrees to amend clause 7(2) to incorporate the examples of artworks outlined in the Explanatory Memorandum.

Recommendation 2

The Committee recommends that clause 8(3)(d) of the Bill be amended to reflect the full range of transactions involving the 'commercial' resale of artwork (eg the Internet) and to broaden the definition of art market professional to include 'art market dealer', in lieu of 'art dealer' in order to capture other commercial operators whose primary business may not be artwork but nonetheless sell artwork from time to time.

Position: Partially Agreed

Comment

It is the intention of the scheme that it will apply to all resales taking place on the secondary art market that involve an art market professional, whether as an intermediary or as one of the parties to the sale, including those taking place online. Clause 8(2) defines art market professional as an auctioneer, owner or operator of an art gallery, owner or operator of a museum, art dealer or person otherwise in the business of dealing in artworks.

The Government proposes to clarify, through the revised Explanatory Memorandum, the intention of the scheme to capture online sales and commercial operators whose primary business may not be dealing in artworks but who engage in the business of selling artwork on a fairly regular basis.

The Government does not agree that it should be the intention of the scheme to capture businesses that do not operate principally in the art market but who may sell artworks on a very occasional or intermittent basis. The reasons for this

include the greatly increased difficulty in monitoring and administering the scheme if such sales were included, and the unreasonable additional regulatory burden on such operators.

Recommendation 3

The Committee recommends that:

- *The Minister for the Environment, Heritage and the Arts seek further legal advice on the need to include clause 11 in the Bill and whether a compensation (fail-safe) clause would overcome any constitutional concerns;*
- *The Minister seek further legal advice on the possibility of amending clause 20 to exclude 'sellers' from those persons who are 'jointly and severally liable to pay the royalty on the commercial resale of an artwork'. If this change is acceptable, then it may obviate the necessity to include clause 11 because the scheme will not involve any consideration of purchase of goods on other than just terms as specified under s.51(xxxi) of the Constitution (noting that the EU Directive allows member states to choose who is liable to pay the royalty); and*
- *In the event that clause 11 remains in the Bill, the Minister provide a full explanation as to the reasoning behind this decision in any revised Explanatory Memorandum and at the resumption of the second reading debate on the Bill.*

Position:

- Agreed to seek legal advice in regard to clause 11;
- Agreed to seek legal advice in regard to clause 20; and
- Agree to provide further explanation in the Explanatory Memorandum.

Comment

The Government is satisfied that the current draft legislation is constitutionally valid. Following the receipt of further legal advice on the recommended matters, the Government remains of the view that the removal of clause 11 and amendment of clause 20 would expose the Commonwealth to significant risk.

The Government will review the current explanation contained in the Explanatory Memorandum with the view of making it clearer, however it is a matter of Government policy not to disclose the contents of legal advice.

Recommendation 4

In the event that Indigenous visual artists do not make a will, the Committee recommends that clause 15(2) of the Bill be amended by adding the following words after 'rules of intestate succession'—add 'and in accordance with Aboriginal customary law'.

Position: Not Agreed

Comment

Noting that the rules of intestate succession fall under state and territory responsibility, any attempt to implement the recommendation through the addition of 'in accordance with Aboriginal customary law' to clause 15(2) would cause significant legal, and Commonwealth legal policy, issues.

The amendment may also lead to significant difficulties in the application of the Bill, in particular:

- There is no uniform body of Aboriginal customary law.
- It would be difficult to determine whether particular persons had received rights in accordance with Aboriginal customary law.
- Disputes may arise about the application and content of Aboriginal customary law in particular cases.
- These issues would be likely to cause significant difficulty in the application of clause 12 (Who holds resale royalty right?) of the Bill.

The Government considers the resale right legislation is unable to solve this larger, more complex issue regarding succession law. However, it will be important to continue education programs to help make Indigenous artists aware of the need to make provision for this potential income stream in their will. This could be incorporated through education materials as outlined in Recommendation 10.

Recommendation 5

In order to acknowledge some of the broader issues in relation to Indigenous artists and their artwork, the Committee recommends that the principle of communal ownership of artwork be reflected in part 2, division 2 of the Bill.

Position: Not Agreed

Comment

The Government considers that the issue of joint authorship is sufficiently addressed in the Bill.

The provision for joint authorship is considered to be particularly important in relation to artworks created by Indigenous artists. The issue of joint authorship

has already arisen in relation to copyright and the *Copyright Act 1968* includes provisions relating to joint authorship.

As such, the Bill provides for works of joint authorship, meaning a work produced by the collaboration of two or more artists where the contribution of each is not separate from the contribution of the other artists. In such cases, the right will be held in equal shares or in such shares as the artists agree. The right is intended to be held by the artists as 'tenants in common' so that each artist has the right to pass on his or her share of the royalty to his or her heirs.

In consultations, it was raised that while the notion of community ownership may exist in Indigenous communities, it would be most appropriate to distribute royalties only to the identified artists during the artists' lifetimes, and not to distribute royalties to the community as a whole. It would then be a matter for the artists to determine whether or not they wish to share any royalty payments they receive in accordance with notions of communal ownership. This is how the Bill is intended to operate.

The Bill provides that the right may only be held by an individual, a charity, a charitable institution or a community body. As described in the explanatory memorandum, this is intended to restrict the right from being passed on to commercial bodies that operate with the intention of generating profit. "A community body" was included expressly to allow for the right to be passed to Indigenous community bodies, as a way for Indigenous artists to recognise their understanding of communal ownership of intellectual property.

Recommendation 6

In order to prevent any unintended consequences arising from the 'secondary' resale of Indigenous artwork, the Committee recommends that Indigenous art centres that pay their artists up-front for their work be exempt from the payment of the resale royalty for artwork purchased and resold within 12 months.

Position: Not Agreed

Comment

It is estimated that there are some 110 Indigenous art centres operating across the nation, although this number is subject to variation. The majority of these art centres do not conduct secondary sales. However, some art centres operate on a total acquisitions policy, where the art centre will pay the artist upfront for the sale and then on-sell the work (usually with a mark up attached), whether that be to a customer who visits the art centre, or to another art market intermediary. This model is less common but is one used by some of the larger, successful art centres that have a high turnover or those that operate under an umbrella organisation which can cashflow this approach. It is thought by some to discourage carpet-bagging. However, it appears that a number of art centres are

reviewing their policy of total acquisition on the basis that it is not sustainable in the current economic environment.

In many cases, the \$1000 threshold would eliminate these resales from qualifying for a royalty payment under the scheme. This will minimise the burden placed on art centres.

Although untested, it is possible that art centres could adopt a model whereby they provide artists with a cash advance on future sales by consignment, rather than the current outright purchase model.

During the consultation process a number of stakeholders raised strong concerns that an exclusion period could serve as a 'loophole' to be exploited by unscrupulous dealers, particularly in relation to Indigenous artists and would introduce unnecessary ambiguity and complexity into a scheme that should be simple and easy to understand for all interested parties. In addition, it was argued that the absence of an exclusion period would encourage more transparent practice in the art market, particularly in the Indigenous art sector.

Given the uncertainty and complexity that an exclusion period may cause, the Government does not agree to its adoption, even if its application is limited to Indigenous art centres. However, the impact of the resale royalty scheme on Indigenous art centres could be considered in any review of the scheme (see Recommendation 9).

Recommendation 7

The Committee fully supports the inclusion of clause 33 (resale royalty right absolutely inalienable). However, it is mindful of the rights of the individual artist and whether or not they wish to participate in such a scheme and the need to establish a viable and robust scheme. The Committee therefore recommends that clause 23(1) be redrafted to give artists the right to opt-out of the scheme on a case by case basis but if they elect to receive royalties from future resales of their artwork this must only be done through the appointed collecting society.

This will also assist the collecting society, under clause 22, from undertaking unnecessary follow-up action following the commercial resale of artwork and prevent a multiplicity of alternative collecting agencies being established, causing confusion with respect to who is responsible for publishing notice of commercial resales and related follow-up action.

Position: Not Agreed

Comment

The Government considers that should the Bill be amended as recommended, it would effectively take away the right of a right holder to receive the royalty should he or she not wish for the collecting society to collect on his or her behalf. The

Government considers that this outcome is inconsistent with the resale royalty right being inalienable and unable to be waived (clauses 33 and 34) by compromising an individual's ability to exercise the right.

The Bill provides for collective management through a single collecting society as the default model for administering the resale royalty scheme. However, the Bill would also enable a right holder to notify the collecting society that he or she does not want the collecting society to collect the resale royalty owing on a particular commercial resale on a case by case basis. This does not amount to a waiver of the right, nor to a blanket 'opt out' provision, but allows a right holder a degree of choice in how to exercise the right in relation to particular commercial resales (clauses 33 and 34 note that a resale royalty right is inalienable and unable to be waived).

The Bill as currently drafted provides a number of safe-guards to reduce the risk of artists or other right holders being pressured not to collect royalty payments on resales. These include the requirement to notify the collecting society not to collect the royalty in writing on a case by case basis for each individual resale, limiting the time period in which such notice must be given, and ensuring that such notice occurs after the resale takes place (Clause 23(1)). Clause 34 (Waiver etc) would further protect a right holder from pressure to enter into an agreement with a vendor, buyer or art market intermediary not to collect the royalty on future sales.

Clause 35 (Appointment of the collecting society) only allows for one body to be appointed to be the collecting society at a time (subclause 35(3)). Therefore, whilst subclause 23(1) allows an artist to opt out of the scheme and to collect the royalty him or herself or through an agent, subclause 35(3) prevents an artist from establishing an alternate collecting society. The collecting society that is appointed by the Minister under clause 35 has responsibility for publishing the notice of commercial resales and for any follow-up action.

Recommendation 8

The collecting society is required to publish the details of all commercial resales of artwork on its website (clause 22(a)). It is also incumbent on the holders of the resale royalty right under clause 27(1) to provide the collecting society with written notice regarding any likely claim. It has been drawn to the attention of the Committee that some artists, whether it be a lifestyle choice or simply one of economics, may not have access to a computer.

The Committee therefore recommends that the collecting society uses its best endeavours to locate all holders of the resale royalty right through both electronic and other means. To achieve this, a visual artist's registration database should be established at the commencement of the scheme to ensure timely distribution of information and payment of royalties.

Position: Agreed in principle

Comment

The Government notes that subclause 27(1) allows holders of the resale royalty right to inform the collecting society of their claim to hold a right in any artwork, regardless of whether or not it has been offered for resale. This is not a requirement in order to be eligible for the right, but is intended to assist the collecting society to locate right holders at the time of payment.

Paragraph 26(1)(b) provides that the collecting society must use its best endeavours to locate each holder of the resale royalty right who has not already given notice of their claim under subclause 27(1). The Government anticipates that this would require the appointed collecting society to use a variety of means to locate all resale royalty right holders, including both electronic and other means.

The Government proposes that the Department of the Environment, Water, Heritage and the Arts (DEWHA) include proposed methods for locating resale royalty right holders as a criterion in the tender selection process for the collecting society. This could include exploration of the establishment of a visual artist registration database to ensure timely distribution of information and payment of royalties, although it would also be open to tenderers to suggest alternative appropriate mechanisms.

The Government notes that a number of visual arts representative organisations already maintain databases that may be of assistance in locating resale royalty right holders. It would be open to the tenderers to propose ways that partnerships could be formed so that these resources could be accessed by the collecting society.

Recommendation 9

Given the very tight reporting timeframe for this inquiry, the Committee recommends that the Department of the Environment, Water, Heritage and the Arts undertake a review of the scheme within three to five years of the commencement date.

Position: Agreed

Comment

The Government recognises that it would be appropriate for a review to be undertaken of the scheme within five years of the commencement date, given that the resale royalty scheme is a complex new measure affecting a wide variety of artists and art market participants.

Recommendation 10

In order for as many artists and their estates to benefit from the introduction of a resale royalty scheme, the Committee recommends that part of the funds set aside to establish the scheme be used to provide timely and educative material to all participants, with special attention to Indigenous artists, to help facilitate a smooth implementation of the scheme.

Position: Agreed

Comment

The Government proposes that DEWHA will include the preparation and dissemination of educative materials among the tender requirements for the successful collecting society. Details of the educative role of the collecting society would be further specified in the service contract for the appointed collecting society.