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Appendix D: Memorandum of advice

RE: CONSTITUTIONAL ASPECTS OF IMPLEMENTING A RESALE ROYALTY RIGHT IN AUSTRALIA

MEMORANDUM OF ADVICE

Arts Law Centre of Australia

43-51 Cowper Wharf Road

Woolloomooloo NSW 2011

from

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Introduction

1. In this matter I am asked to advise whether a resale royalty scheme for visual artists may be enacted by the Commonwealth Parliament consistently with certain provisions of the Constitution.

2. I first briefly describe what I understand the scheme to be before setting out my views on the more particular questions I am asked. I should however say that questions of constitutional validity frequently turn on matters of drafting with the result that it is not possible to express final views in advance of a Bill.

Background

3. The resale royalty scheme would be based on an artist's right to receive a percentage of the sale price when their original artistic works are resold. I assume this right will be created by the contemplated legislation.

4. I am instructed that a resale royalty right is generally considered to be a copyright-related right as it applies to copyright subject matter, artistic works, and because it has similar objectives to copyright protection. It is noted that the introduction of this right for visual artists would put them on a more equal footing with other creators of copyright material, such as authors and songwriters, whose works are distributed in multiples and who earn royalties each time a copy of their work is sold.

5. The principal international treaty dealing with copyright, the Berne Convention for the Protection of Literary and Artistic Works, has recognised a resale right since the late 1970s. Implementation of the right is optional for Berne Union Member States.

6. The Commonwealth Government has indicated in discussions, I am instructed, that it is concerned to implement the right in such a way that it does not offend either s. 51(xxxi) or s. 55 of the *Constitution*. It appears that, because of these constitutional concerns, the Commonwealth Government is considering limiting the application of the resale scheme to artistic works which are first created or first sold after the legislation comes into force. My instructors note that the effect of such a limitation would be to exclude all artistic works currently protected by copyright or, at least, those works that have already been sold for the first time, from the operation of the scheme.

Questions

7. The questions I am asked are as follows:

1. Does the Commonwealth Parliament have the power to enact a resale royalty scheme under section 51(xviii) of the Constitution being the power to make laws for the peace, order and good government of the Commonwealth with respect to copyrights, patents of inventions and designs, and trade marks?

2. If the answer to the first question is no, does the Parliament have the power to enact a resale royalty scheme under section 51(xxix) of the Constitution being the power to make laws for the peace, order, and good government of the Commonwealth with respect to external affairs?

3. Can a resale royalty scheme applying to all relevant artistic works protected by copyright at the time it comes into force, and providing for joint and several liability on the seller, the buyer and their respective agents, be enacted in such a way that it is not characterised as either a tax within section 55 of the Constitution or and an acquisition of property on otherwise than just terms within section 51(xxxi) of the Constitution?

4. If the scheme were properly characterised as a tax, what are the implications for how it is implemented?

5. If the scheme were properly characterised as an acquisition of property, what are the implications for how it is implemented in order to fulfil the requirement of just terms?

Question 1

8. In my view the decision of the High Court in *Grain Pool of Western Australia v. The Commonwealth* (2000) 202 CLR 479 provides strong support for the validity of legislation proposed to create a resale royalty right and to impose consequential payment rights and obligations. The majority there said, at [41], that it is within power, as the legislation upheld in *Nintendo Co. Limited v. Centronics Systems Pty Limited* (1994) 181 CLR 134 demonstrates, to determine that there be fresh rights in the nature of copyright, patents of inventions and designs and trademarks. The majority also stated that the broad term "intellectual effort" used in *Nintendo* embraces a variable rather than a fixed constitutional criterion. The "origination" or "breeding" required respectively by the *Plant Variety Rights Act* 1987 and the *Plant Breeder's Rights Act* 1994 involved sufficient "intellectual effort" in the sense of that term in *Nintendo*.

9. Further support for this conclusion is to be found in the approach to the construction of legislative powers, particularly s. 51(xviii), explained by the majority in *Grain Pool* at [16]-[20].

10. The particular passage from *Nintendo* referred to above is *Nintendo Co. Limited v. Centronics Systems Pty Limited* (1994) 181 CLR 134 at 160.

11. I therefore answer question 1 as follows: "In my opinion, Yes".

Question 2

12. Strictly this question does not arise but there is good reason also to rely on the Berne Convention referred to above and thus to enliven the external affairs power.

13. It will be recalled in *Grain Pool* that s. 5 of the *Plant Variety Rights Act* 1987 adopted a drafting technique which provided that nothing in the Act required or permitted the grant of plant variety rights in respect of a new plant variety unless, amongst other things, the grant was appropriate to give effect to the obligations of Australia under the relevant Convention. That Convention was the International Convention for the Protection of New Varieties of Plants.

14. Why, in my view, this course should be taken is that not only is there an additional head of power available, to the extent that the Commonwealth legislation gives effect to it, but also reliance on the Berne Convention would support the characterisation of the right as a right in the nature of copyright.

15. The legislation could also be framed, at least in relation to the obligation to pay amounts, as a law with respect to taxation. I understand however that that is not an attractive course for policy reasons.

16. Other available heads of power would be the interstate and overseas trade and commerce power, s. 51(i), and, to some extent, the corporations power, s. 51(xx). These latter powers would, however, probably provide incomplete support for the scheme as presently contemplated.

Question 3

17. In my view it is clear that the proposed scheme does not involve an acquisition of property within s. 51(xxxi) of the *Constitution*.

18. Even in the days when s. 51(xxxi) had a wider ambit than it now does, the contrary contention was rejected in *Nintendo Company Limited v. Centronics Systems Pty Limited* (above) at pages 160-161.

19. Their Honours said that it was of the nature of such laws under s. 51(xviii) that they confer intellectual property rights on authors, inventors and designers, other originators and assignees and that they conversely limit and detract from the proprietary rights which would otherwise be enjoyed by the owners of affected property. Their Honours also said that, inevitably, such laws may, at their commencement, impact upon existing proprietary rights. To the extent that such laws involve an acquisition of property from those adversely affected by the intellectual property rights which they create and

confer, the grant of legislative power contained in s. 51(xviii) manifests a contrary intention which precludes the operation of s. 51(xxxi).

20. Implicit in the contrary argument is that, to some extent, the proposed scheme would be retrospective. In my view this is to misunderstand the nature of retrospective laws.

21. As explained by McHugh and Gummow JJ. in *Commonwealth v. SCI Operations* (1998) 192 CLR 285 at 303, there is an important distinction between a statute which provides that as at a past date the law shall be taken to have been that which it was not, and the creation by statute of further particular rights or liabilities with respect to past matters or transactions. Their Honours referred with approval to the judgment of Jordan CJ in *Coleman v. Shell Company of Australia* (1943) 45 SR (NSW) 27 at 31.

22. In my view the proposed law would not be retrospective but would do no more than create a fresh right or "further particular rights or liabilities" with respect to the artist's copyright. The matter is also discussed in Pearce and Geddes, *Statutory Interpretation in Australia*, 6th Ed. at para. 10.4.

23. So far as concerns s. 51(xxxi) of the *Constitution* I will answer the question: "Yes, in my opinion a resale royalty scheme applying to all relevant artistic works protected by copyright at the time it comes into force, and providing for joint and severally liability on the seller, the buyer and their respective agents, could be enacted in such a way that it is not characterised as a law with respect to the acquisition of property within s. 51(xxxi)."

24. Turning to the taxation aspect of the matter, the relevant constitutional requirement, in s. 55, is that laws imposing taxation shall deal only with the imposition of taxation, and any provisions therein dealing with any other matter shall be of no effect.

25. In the present case there would be, as I understand it, no objective of raising revenue for the Government and the absence of such an objective will be significant in deciding whether an exaction, or the imposition of a liability, bears the character of taxation: see Gleeson CJ in *Luton v. Lessels* (2002) 210 CLR 333 at [13].

26. It is to be noted that Gleeson CJ considered the crucial point in *Australian Tape Manufacturers Association Limited v. The Commonwealth* (1993) 176 CLR 480 to have been that the impost in that case involved raising revenue from one group for the purpose of its application for the benefit of another group, to compensate the second group but where that second group had no prior legal right against the group from whom the revenue was to be raised. As I understand it, the proposed royalty rights scheme would create a legal right against the group from whom the money was to be raised with the consequence that the legislation should not bear the character of taxation.

27. Further, as McHugh J. pointed out in *Luton v. Lessels* at [80], before the decision in *Australian Tape Manufacturers Association Limited* it might have been thought that no imposition could be a tax unless it formed part of the Consolidated Revenue Fund. The majority in *Australian Tape Manufacturers Association Limited* held that that consideration is no longer decisive and declared the blank tape royalty to be a tax notwithstanding that it was to be paid to a collecting society. But in my opinion it remains very significant that the resale right is to be exercised through a collecting society, not by the Commonwealth Government, with the consequence that the amounts will not form part of the Consolidated Revenue Fund.

28. In my view, even assuming the correctness of *Australian Tape Manufacturers Association Limited*, the scheme could readily be drafted so as not to involve the imposition of taxation. As I have said the main point of difference would be the creation of a prior legal right in the artists against the group, being buyers and/or sellers, from whom the sums were to be raised.

29. I therefore answer this part of question 3 as follows: "Yes, in my opinion a resale royalty scheme applying to all relevant artistic works protected by copyright at the time it comes into force, and providing for joint and severally liability on the seller, the buyer and their respective agents, could be enacted in such a way that it is not characterised as a law imposing taxation within s. 55 of the *Constitution*.

Question 4

30. The requirements of s. 55 of the *Constitution* are formal. It would mean that if formulated as a tax, the provisions imposing the obligation to pay would have to be in a separate taxing or charging act. The probable consequence is that those monies would be paid into the Consolidated Revenue Fund and then an equivalent amount appropriated to the relevant purpose.

Question 5

31. As I have indicated, in my opinion the legislative scheme would not be properly characterised as an acquisition of property.

32. If that be wrong or sufficiently doubtful, there are standard drafting techniques available to Commonwealth Parliamentary Counsel to preserve the validity of the legislation by providing a mechanism for the calculation of just terms.

33. I should note that in this case however just terms would seem to largely or completely cancel out the purpose of the legislation as those terms would probably approximate the value of the royalty.

Conclusion

34. I answer the questions and advise accordingly.

Chambers **A. ROBERTSON S.C.**

30 June 2008

FURTHER MEMORANDUM OF ADVICE

1. Further to my memorandum of advice dated 30 June 2008 I am asked whether in my opinion the Resale Royalty Right for Visual Artists Bill 2008 ("the Bill"), if enacted, would be constitutionally valid if clause 11 were omitted.

2. Clause 11 provides that for existing artworks there is no resale royalty right on the first transfer of ownership of the artwork on or after commencement of the legislation.

3. In my opinion, for the reasons I gave in answer to Question 3 in my memorandum of advice of 30 June 2008, clause 11 would not be necessary to the constitutional validity of the Bill if enacted: the omission of that clause would not result in the law being a law with respect to the acquisition of property on just terms from any person within the meaning of s. 51(xxxi) of the Constitution.

Chambers **A. ROBERTSON S.C.**

18 December 2008

THIRD MEMORANDUM OF ADVICE

1. I have previously provided advice to the Arts Law Centre of Australia on this matter on 30 June 2008 and 18 December 2008.

2. I am now asked the following further questions:

> 1. Would my advice be affected if the liability to pay the resale royalty were imposed on the buyer and the buyer's agent, but not on the seller or the seller's agent?
>
> 2. Is my advice affected by the recent decision of the High Court in *Wurridjal v Commonwealth of Australia* [2009] HCA 2.

Question 1

3. At present, clause 20 of the *Resale Royalty Right for Visual Artist Bill* 2008 specifies the persons who have a liability to pay the resale royalty on the commercial resale of an artwork.

4. Clause 20 as presently drafted sets out four classes of person who are to be jointly and severally liable to pay resale royalty, those persons being:

(a) the seller or the sellers; and
(b) each professional agent for the seller; and
(c) if there is no such agent, each professional agent for the buyer; and
(d) if there be no such agent or agents, the buyer or the buyers.

5. In my opinion, if sub-clauses 20(a) and (b) were omitted it would be even more difficult than it presently is to see how the scheme involves an acquisition of property within s. 51(xxxi) of the *Constitution*.

6. This is because there would be no element of retrospectivity at all and the present clause 11 would be more clearly unnecessary. A buyer in a transaction lying entirely in the future has no present property rights in the artwork.

7. I do not know whether those who have advised the Commonwealth on the constitutional aspects of the Bill have considered this option. If the option were adopted then, in my view, clause 11 could only be necessary to achieve a particularly policy outcome rather than to ensure consistency with s. 51(xxxi) of the *Constitution*.

Question 2

8. Because the property rights and the statutory scheme under consideration in *Wurridjal* are so different from the present Bill I see nothing of significance in that aspect of the decision.

9. It does appear however that five of the justices in the majority upheld the validity and effect of s. 60(2) of the *Northern Territory National Emergency Response Act* 2007, the *Historic Shipwrecks* clause: see French CJ. at [104], Gummow and Hayne JJ at [196]-[197], Heydon J. at [334], Kiefel J. at [462]-[466] (Crennan J. allowing the demurrer on a basis anterior to the "just terms" provision effected by the *Historic Shipwrecks* clause).

10. I should add finally that nothing in *Wurridjal v The Commonwealth* would seem to lend support to the view that clause 11 of the Bill is necessary in order that the legislation will be consistent with s. 51(xxxi) of the *Constitution*.

Conclusion

11. I answer the questions and advise accordingly.

Chambers **A. ROBERTSON S.C.**

10 February 2009