



## Background to the inquiry

### **The Resale Royalty Right for Visual Artists Bill 2008**

- 1.1 The *Resale Royalty Right for Visual Artists Bill 2008* (the Bill) is intended to give 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.
- 1.2 The Bill is intended to give effect to article 14ter of the *Berne Convention for the Protection of Literary and Artistic Works* ('the Berne Convention').
- 1.3 Australia acceded to the Berne Convention (as at Paris, 1971) on 28 November 1977, with entry into force on 1 March 1978. To date, 54 countries out of 164 contracting parties to the Berne Convention have introduced a resale royalty right, including the United Kingdom and other European Union member states.<sup>1</sup>
- 1.4 Article 14ter ('Droit de suite' in works of art and manuscripts) of the Berne Convention states:
  - (1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale

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1 DEWHA, *Submission No. 34*, p. 1.

of the work subsequent to the first transfer by the author of the work.

- (2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if the legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.
- (3) The procedure for collection and the amounts shall be matters for determination by national legislation.<sup>2</sup>

## Recent history

- 1.5 A resale royalty for visual artists has been under consideration in Australia for many years.
- 1.6 In 1989, the Australian Copyright Council produced a report entitled *Droit de Suite: the Art Resale Royalty and its Implication for Australia*. It recommended that the *Copyright Act 1968* be amended to create a resale royalty.<sup>3</sup>
- 1.7 In 2001, the Australian Government commissioned Rupert Myer to undertake an inquiry into the contemporary visual arts and craft sector. The inquiry received 190 submissions covering a range of issues, including the establishment of a resale royalty scheme.
- 1.8 The Myer Inquiry reported in 2002. Its executive summary stated:

A major issue for the Inquiry was whether Australia should introduce a *droit de suite* or resale royalty scheme that entitles artists to royalties when a work of art is resold in the market. The Inquiry assessed the potential benefits for visual artists, the particular issues for Indigenous artists, and the likely impact the measure would have upon the market for contemporary art and craft in Australia, having regard to international experience and local conditions. The Inquiry concluded that a resale royalty arrangement should be introduced<sup>4</sup> (Recommendation 5).
- 1.9 In 2004, following the Myer Report, the then Department of Communications, Information Technology and the Arts released a

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2 Berne Convention for the Protection of Literary and Artistic Works, Article 14ter.

3 *Bills Digest*, No. 74, 2008-09, p. 2.

4 R Myer, *Report of Contemporary Visual Arts and Craft Inquiry*, 2002, p. 8 (Myer Report).

discussion paper and sought submissions on whether Australia should introduce such a scheme. This discussion paper also attracted many submissions canvassing both the merits and concerns of establishing a resale royalty scheme for visual artists.

- 1.10 At around the same time, Viscopy Ltd commissioned Access Economics to undertake a study to evaluate the impact of an Australian resale royalty on eligible visual artists. It concluded:

The impact of a RRR (resale royalty right) on the Australian art market is difficult to determine because of a paucity of relevant empirical data about relevant behavioural responses to its introduction. While the size and distribution of RRR payments can be estimated, the critical question of who bears the actual economic cost of the royalty, and, most importantly whether eligible artists would be net beneficiaries of such an arrangement is not at all clear.<sup>5</sup>

- 1.11 The 2008 Federal budget provided for funding of \$1.5 million over three years to support the establishment of a resale royalty scheme in accordance with the ALP 2007 election commitment.

- 1.12 Also, in May 2008, the Department of the Environment, Water, Heritage and the Arts issued a discussion paper entitled *Australian Resale Royalty Scheme for Visual Artists – Framework and Parameters* and sought responses from stakeholders.

- 1.13 On 27 November 2008, the Minister for the Environment, Heritage and the Arts, The Hon Peter Garrett AM, MP introduced a Bill for an act to create a right to resale royalty in relation to artworks, and related purposes. In his second reading speech the Minister stated:

The introduction of this Bill marks a landmark day for Australian visual artists, whose right to an ongoing economic interest in the value of their artistic works will be appropriately recognised in Australia for the first time.<sup>6</sup>

- 1.14 Following the second reading speech and at the request of the Minister, the House of Representatives resolved:

That the Resale Royalty Right for Visual Artists Bill 2008 be referred to the Standing Committee on Climate Change, Water, Environment and the Arts for consideration and an advisory report by 20 February 2009.

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5 Access Economics, *The Impact of an Australian Resale Royalty on Eligible Visual Artists*, October 2004, p. 1.

6 Minister's second reading speech, 27 November 2008, p. 11644.

- 1.15 The Committee received 40 submissions and held public hearings in Canberra on 5 and 6 February 2009 (see appendix A). It took evidence from 20 witnesses, representing a range of views from stakeholders across the visual arts sector.

## Overseas experience

- 1.16 A resale royalty scheme has been in place in a number of countries for many years (see Appendix C). Estimates of the actual number of countries that have introduced such a scheme range from 30 to over 50.<sup>7</sup>
- 1.17 These schemes vary in content and coverage. Some countries have opted for a flat royalty rate (eg France and Germany) while others have chosen a sliding scale (eg Belgium). A number of countries have introduced thresholds before the rate takes effect (eg UK) while others have imposed the royalty on the increased value (capital gain) of the artwork (eg Italy and Brazil). Some schemes only cover living artists (eg UK) while others cover the estates of artists up to 70 years after their death (eg 70 years France, 50 years Luxembourg).
- 1.18 The administration of these schemes varies from state-run/government-owned collecting agencies (eg Belgium) to privately operated businesses (eg France). Coverage can also vary. Some schemes only cover the resales through auction houses and commercial galleries and art houses. Further, some schemes allow artists to opt out, but in the majority of schemes there is an inalienable right bestowed on artists and that right cannot be transferred or waived. Coverage can also extend to foreign artists if reciprocal arrangements have been entered into between countries.
- 1.19 Resale royalty rights are covered by the Berne Convention and signatories to this convention can opt to enter into reciprocal arrangements where similar resale royalty schemes are in place.
- 1.20 The legal underpinning of the royalty schemes ranges from stand alone legislation, amendment to existing copyright legislation and statutory regulation to voluntary schemes.
- 1.21 The European Union (EU), in 2001, issued a directive (Directive 2001/84/EC) in relation to resale royalty rights for visual artists in an attempt to bring all member countries into line in order to minimise or eliminate any likely market distortions between member countries:

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<sup>7</sup> Minister's second reading speech, *Hansard*, 28 November 2008; Deutscher and Hackett, *Submission No. 17*, p. 5; and Viscopy, *Submission No. 36*, p. 4.

The fact that this international market exists, combined with a lack of resale rights in several Member States and the current disparity as regards national systems which recognise that right, make it essential to lay down transitional provisions as regards both entry into force and the substantive regulation of the right, which will preserve the competitiveness of the European market.<sup>8</sup>

1.22 The directive sets minimum levels/conditions for a range of matters relating to the establishment and administration of a resale royalty scheme:

- A minimum threshold may not under any circumstances exceed €3,000
- A variable rate with a maximum royalty not exceeding €12,500
  - ⇒ 4% for the portion of the sale price up to €50,000
  - ⇒ 3% for the portion of sale price from €500,001 to €200,000
  - ⇒ 1% for the portion of the sale price from €200,001 to €350,000
  - ⇒ 0.5% for the portion of sale price from €350,001 to €500,000
  - ⇒ 0.25% for the portion of the sale price exceeding €500,000

(Member States have an option to apply 5% to the first level of sale and if the threshold is less than €3,000 a rate of no less than 4% is to be applied to that amount.)

- The royalty is calculated on a sale price net of tax.
- The royalty to continue during the life of the artist and for 70 years after his/her death (Directive 93/98/EEC). This entitlement may not be enforced until 2010 where a Member State has not introduced a resale royalty at the time of the 2001 Directive. A further two year extension to this requirement can be sought by a Member State subject to certain conditions (eg the UK has just sought an extension claiming uncertain economic conditions).
- Method of collection to be left to the Member State to determine.
- Third-country nationals to be entitled to receive royalties subject to their home state offering similar rights. Subject to residency tests, non-nationals residing in a member state are entitled to enjoy similar rights.
- Art market professional must furnish all necessary information to artists entitled to such a royalty for a period up to 3 years after a resale.

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8 Directive 2001/84/EC of the European Parliament and of the Council, 27 September 2001, para 8.

- This directive came into force on 1 January 2006 (ie Member States had to introduce a scheme into domestic law subject to the requirements above). For example, the UK introduced the Artists Resale Right Regulations in February 2006.
  - Progress of the uptake of the scheme will be reported to the European parliament no later than 1 January 2009 and every 4 years thereafter.
- 1.23 In May 2008, the New Zealand government introduced the Copyright (Artist's Resale Right) Amendment Bill. Consideration of this bill was deferred due to the calling of an election in late 2008. The bill has been reinstated for consideration by the 49th parliament.
- 1.24 The proposed NZ scheme has the following aspects:
- \$NZ500 threshold
  - 5% flat rate
  - Single collection agency
  - No upper limit
  - Will not apply to the first resale or transfer of artwork following the introduction of the scheme
  - Sales between private individuals will be excluded
  - Right will continue until 50 years following the death of the artist
  - Residency requirements and/or reciprocity must be met before royalty can be claimed
  - Resale right may not be alienated

## Conclusion

- 1.25 There is no one guiding principle underpinning the various schemes in operation around the world. Most have been established to help redress the imbalance between the treatment of other artists (eg authors, musicians) by recognising an ongoing relationship between the visual artist and their work in accordance with article 14ter of the Berne Convention.
- 1.26 The debate about the establishment of a similar scheme in Australia has grown over the past decade. In particular, the pressure to have our artists treated in a similar fashion to artists overseas and the ability of our artists

to benefit from existing schemes through reciprocal agreements has been central to this debate.

- 1.27 The income support argument has also been central when considering Indigenous artists in Australia.
- 1.28 Ideally, if Australia is to introduce a scheme it should be primarily for the direct benefit of Australian visual artists but at the same time it should be similar in design and structure to those already in existence so as to maximise these benefits through country to country reciprocity agreements mandated through the Berne Convention.

