2

Matters raised in relation to the Bill

What is an artwork?

2.1 What is art? The *Resale Royalty Right for Visual Artists Bill 2008* has defined art as:

> 7(1) An artwork is an original work of graphic or plastic art that is either:
>
> (a) created by the artist or artists; or
>
> (b) produced under authority of the artist or artists.
>
> (2) Works of graphic or plastic art include pictures, collages, paintings, drawings, engravings, prints, lithographs, sculpture, tapestries, ceramics, glassware and photographs.

2.2 The Explanatory Memorandum notes that the above is a non-exhaustive list and may include other items such as batiks, weaving, or other form of fine art textiles, installations, fine art jewellery, artist's books and wood carvings. The definition would also cover new media art forms such as digital and video art, and expand to cover new forms of visual artistic expression as they evolve in the future. In essence, clause 7(1) is intended to cover works of art from which artists have limited ability to earn money by exploiting their copyright through reproductions, public performances and broadcasts.[1]

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1 *Resale Royalty Right for Visual Artists Bill 2008, Explanatory Memorandum*, pp. 4-5.

2.3 Many people will have other views about what constitutes art. If major difficulties do arise then the Committee would suggest that changes be made to this coverage, by way of regulation under s.6(a) of the *Legislative Instruments Act 2003* in order to reflect the contemporary nature of artwork at the time.

2.4 The Arts Law Centre proposes that clause 7 should be redrafted to provide terms that are more familiar such as replacing 'graphic' and 'plastic' with the term 'visual'.[2] It also recommends that detail contained in the Explanatory Memorandum be inserted in clause 7 so as to help clarify the extent of artwork to be covered by the Bill.[3]

2.5 Viscopy also the supports the use of the term 'visual art' rather than 'graphic and plastic art', which it maintains is more appropriate in the Australian context.[4]

2.6 Others have suggested that the definition of artwork should be similar to that contained in the *Copyright Act 1968* and artwork must have artistic quality.[5]

What resales are to be subject to the royalty?

2.7 Under the current Bill, according to Viscopy, the agency that has to administer the scheme will have considerable difficulty establishing what secondary resales constitute a qualifying resale.[6]

2.8 Clause 11 states that the first transfer of ownership of existing artwork at commencement will be excluded. This transfer may or may not be commercial in nature. If it is not a commercial transaction then difficulties are likely to arise in determining what constitutes a transfer of ownership. Without some legal documentation to show that the artwork has been transferred (inheritance) from one party to another it will be very difficult for the collecting society to determine whether a commercial resale after the commencement of the scheme will incur the royalty.

2.9 If all commercial resales were subject to the royalty after the commencement of the scheme then this difficulty would not arise.

2 Arts Law Centre of Australia, *Submission No. 35,* p. 10.
3 Arts Law Centre of Australia, *Submission No. 35,* p. 10.
4 Viscopy, *Submission No. 36,* p. 13.
5 R Dearn and M Rimmer, *Submission No. 31,* pp. 75, 76.
6 Viscopy, *Submission No. 36,* p. 13.

2.10 The Australian Commercial Galleries Association (ACGA) believes the exclusion of private sales from the scheme may inadvertently assist unscrupulous practices such as 'carpet-bagging'.[7]

2.11 Others are concerned about the growing influence of the Internet and use of such sites as eBay and Red Bubble.[8] Some have expressed concerns about the coverage of the scheme and the extent to which it will involve a range of other types of commercial artwork transactions.[9]

2.12 The Committee acknowledges that difficulties will arise with respect to what resales attract a royalty under the proposed scheme. The Committee also believes that linking only art market professionals, as defined in clause 8, with commercial resales may inadvertently exclude other 'commercial resale' involving people not normally engaged in the Australian art market. Regardless of what is to be included under the definition of a commercial resales, the challenge for the collecting society and others will be to adequately track these sales. Clause 8(3)(e) may need to be clarified so as not to exclude organisations that are generally not in the business of dealing in art (eg second-hand furniture dealer) but, nonetheless, find themselves selling artwork as a result of a deceased estate, bankruptcy or some other specified event and that do not come under the current definition of an art market professional. Similarly, 'commercial' resales through the Internet could avoid paying a royalty.

Threshold and sales price

2.13 From a practical point of view, a minimum threshold is necessary to overcome the problem of the royalty paid being offset by the cost of administering the scheme.

2.14 The Coalition for an Australian Resale Royalty (CARR) have recommended that the threshold be lowered to $500. According to CARR, the lowering of the threshold will increase the amount of royalties for visual artists. However, from their own modelling, the amount of revenue raised under a CARR (500) scheme compared to

7 Australian Commercial Galleries Association, *Submission No. 8,* p. 3.

8 B Clark, *Transcript of Evidence*, 6 February 2009, p. 9.

9 L Alway and D Hackett, *Transcript of Evidence,* 6 February 2009, pp. 9, 10.

their CARR (1000) scheme is only marginally higher ($35.76 million compared to $35.39 million).[10]

2.15 Clause 10(1)(b) allows for future adjustments to the threshold through regulatory instrument to reflect such factors as inflation or any key changes to the Australian art market.

2.16 Sotheby's said the legislation is being promoted on the basis that the artist will benefit as a result of the rising value of their artwork.[11] In fact, the royalty is imposed on all resales; even if the seller makes a loss. The Italian scheme imposes the royalty on only net increase (capital gain) in price. However, the cost of administration could rise substantially due to the complexities of trying to assess the actual net increase in the sales price. Some would argue that it is unfair to put an additional impost on the seller if the sale results in a net loss.[12]

2.17 Most schemes, possibly for administrative ease, have opted to use the actual resale price (whether higher or lower than the previous sale price) on which to calculate the royalty.

2.18 The Committee also notes that the original scheme, as outlined in the *Issues Paper: Australian Resale Royalty Scheme for Visual Artists – Framework and Parameters* (Department of the Environment, Water, Heritage and the Arts, 2008), suggested the royalty be calculated on the sale price net of taxes.[13] Clause 10(2) currently states that the sale price for the purpose of calculating the royalty includes the GST.

2.19 According to the Explanatory Memorandum, the royalty should be based on the sale price that most closely reflects the value of the artwork. If this is the case then the Copyright Agency Limited, the Art Law Centre of ACGA would argue that the sales price includes buyer's premiums as well because this price would best reflect the full price paid by the buyer.[14]

2.20 DEWHA told the Committee that the inclusion of the GST was based on advice from Treasury.[15]

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10 Viscopy, *Implications of the Australian Government's Proposed Resale Royalty Scheme,* November 2008, p. 14, http://www.viscopy.com/pdfdocuments/implicationsof proposedresalescheme.pdf.

11 Sotheby's, *Transcript of Evidence,* 6 February 2009, p. 2.

12 Sotheby's, *Transcript of Evidence,* 6 February 2009, p. 2.

13 Department of the Environment, Water, Heritage and the Arts, *Issues Paper: Australian Resale Royalty Scheme for Visual Artists – Framework and Parameters,* 2008, p. 1.

14 Copyright Agency Ltd, *Submission No. 30,* p. 6; Arts Law Centre of Australia, *Submission No. 35,* p. 11; and Australian Commercial Galleries Association, *Submission No. 8,* p. 3.

15 DEWHA, *Transcript of Evidence,* 5 February 2009, p. 10.

2.21 The Committee believes that the royalty rate should be calculated on a price that is easy to identify and is understood by all parties to the transaction. Sales price plus 10 per cent GST should fit that description.

Treatment of existing artwork

2.22 Clause 11, the treatment of existing artwork, has been central to this inquiry. Those who oppose the royalty scheme argue that if the scheme does go ahead, the inclusion of clause 11 will allow the Australian art market time to adjust. On the other hand, those who favour a royalty scheme argue that the retention of clause 11 will seriously undermine the short-to-medium benefits, if at all, to most visual artists.

2.23 Clause 11 excludes the first resale of existing artwork from the date of introduction of the scheme. The Explanatory Memorandum explains:

> The prospective application of the right will help protect the property rights of people who bought artwork not knowing that a resale royalty would be payable when they resold them.[16]

2.24 The Minister, the Hon Peter Garrett, AM MP re-affirmed this in his second reading speech when he said:

> Importantly the right will only apply to resales of artworks that are acquired after the right comes into effect. This is to ensure that purchasers of artworks are aware at the time they make their purchase that a royalty may be payable to the artist if they choose to resell the work. It will also allow the art market to adapt gradually to the new right.[17]

2.25 In all other countries where similar schemes have been introduced, the royalty has been payable on all resales at the date of commencement.[18]

2.26 Two issues are at stake here. First, there is the issue of turnover of artwork and, secondly, there is the issue of the constitutional question

16 Explanatory Memorandum, p. 7.

17 Minister Garrett's second reading speech, 28 November 2008.

18 Australian Copyright Council, *Artists' Resale Royalty,* 9 December 2008, p. 2 and Access Economics, *Design Aspects of an Australian Resale Royalties Scheme,* 7 April 2008, p. 23.

underpinning the decision to exclude the first resale of existing artwork.

2.27 If artwork was re-sold quite frequently, then the uptake of royalty would not be an issue because the scheme would cover all resales after only a few years. In the Access Economics report commissioned by the Department of the Environment, Water, Heritage and the Arts in April 2008, two, five and 10 years between resales were used to assess the impact of the scheme on the art market.[19] Naturally, the higher the turnover of artwork the quicker the scheme will cover all art resales.

2.28 However, Access Economics was quick to note that:

> Modelling the implications of a prospectively applied Scheme without estimates informed by a long time series of resale data is necessarily imprecise in nature. While the assumptions adopted here follow the typical approach to modelling turnover in goods markets it does not necessarily follow that these assumptions are consistent with knowledge of the operation of art markets.[20]

2.29 The Arts Law Centre of Australia and Viscopy both maintain that the average turnover of artwork is closer to 20 years. Therefore, it is likely to be around 40 years before all artists will benefit from the resale of their artwork.[21]

2.30 Indeed, CARR used auction sales data for the last 10 years to show that under the proposed prospective scheme (current Bill) only six per cent of artwork sold within this period had been resold by 2008.[22] Therefore, CARR concluded that under this proposed scheme it would take far longer than 10 years before the scheme would capture all resales of artwork.[23]

2.31 According to CARR, the uptake of the royalty and the benefits flowing to artists would be very slow under the proposed prospective scheme.

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19 Access Economics, *Design Aspects of an Australian Resale Royalties Scheme,* 7 April 2008, p. 23.

20 Access Economics, *Design Aspects of an Australian Resale Royalties Scheme,* 7 April 2008, p. 23.

21 Arts Law Centre of Australia, *Submission No. 35,* p.3; and Viscopy, *Submission No. 36*, pp. 5, 6.

22 CARR, 'Resale Royalty Right for Visual Artists Bill 2008', Briefing Paper, 22 December 2008, p. 2.

23 CARR, 'Resale Royalty Right for Visual Artists Bill 2008', Briefing Paper, p. 2.

2.32 In the publication entitled, *Implications of the Australian Government's Proposed Resale Royalty Scheme* (November 2008), CARR used auction house sales data for the 10 year period from 1 January 1998 to 31 December 2007 to assess the impact of its proposed scheme as compared to the government's proposed scheme.

2.33 The key difference between models rests on the inclusion of all resales of existing artwork (CARR model) as opposed to the government's exclusion of the first commercial resale of existing artwork following the introduction of the scheme.

2.34 CARR used thresholds of both $500 and $1000 compared to the government's proposed threshold of $1000.[24]

2.35 Both schemes are similar with respect to the flat rate of 5 per cent and no cap.

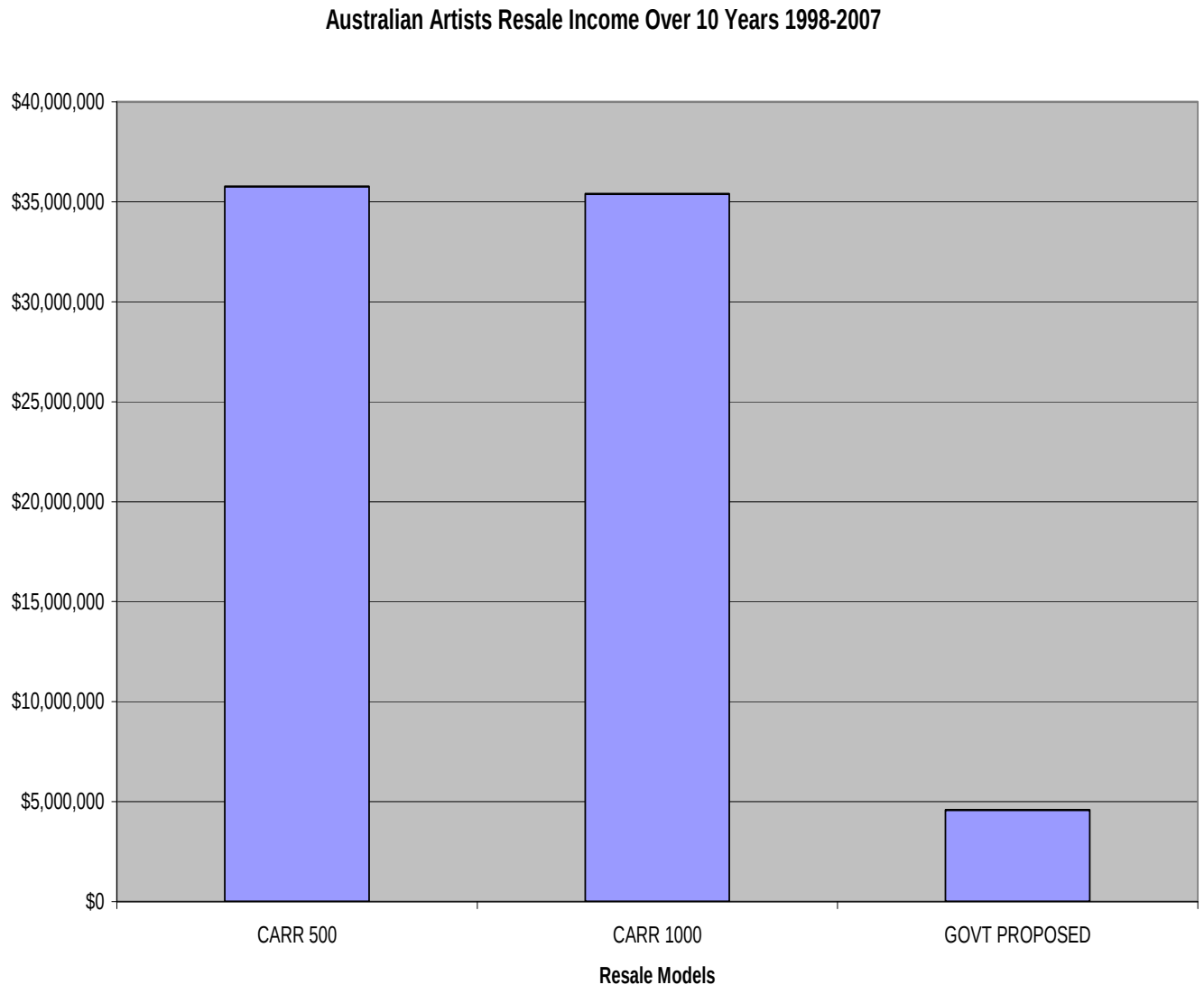
2.36 According to CARR (see also Figures 2.1-2.4 below), the impact for artists under both schemes are as follow:

- Royalties raised: CARR $35.4-35.8 million, Government $4.6 million
- Artists in receipt of royalties: CARR (500) 3176, CARR (1000) 2456, Government 845
- Indigenous artists royalties: CARR $5.25-5.3 million, Government $0.95 million
- Indigenous artists in receipt of royalties: CARR (500) 1076, CARR (1000) 900, Government 389.[25]

24 For the purpose of this exercise the CARR scheme is referred to both as CARR (500) and CARR (1000) which denotes the different threshold assumptions.

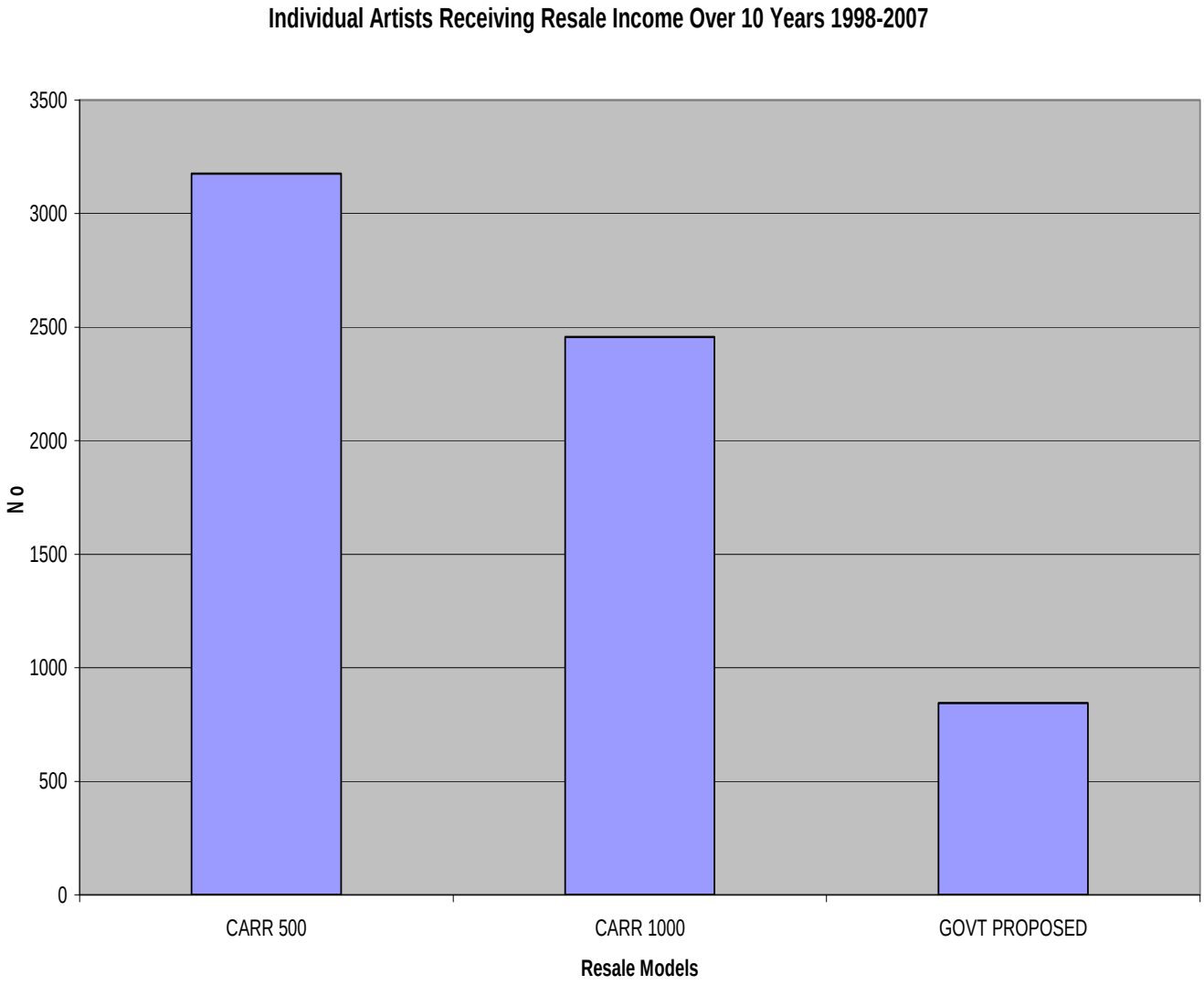
25 Viscopy, *Submission No. 36.*

Figure 2.1 Comparison of resale royalty in $A if the resale schemes had been operating for 10 years from 1/1/1998 to 31/12/2007 using auction house sales data



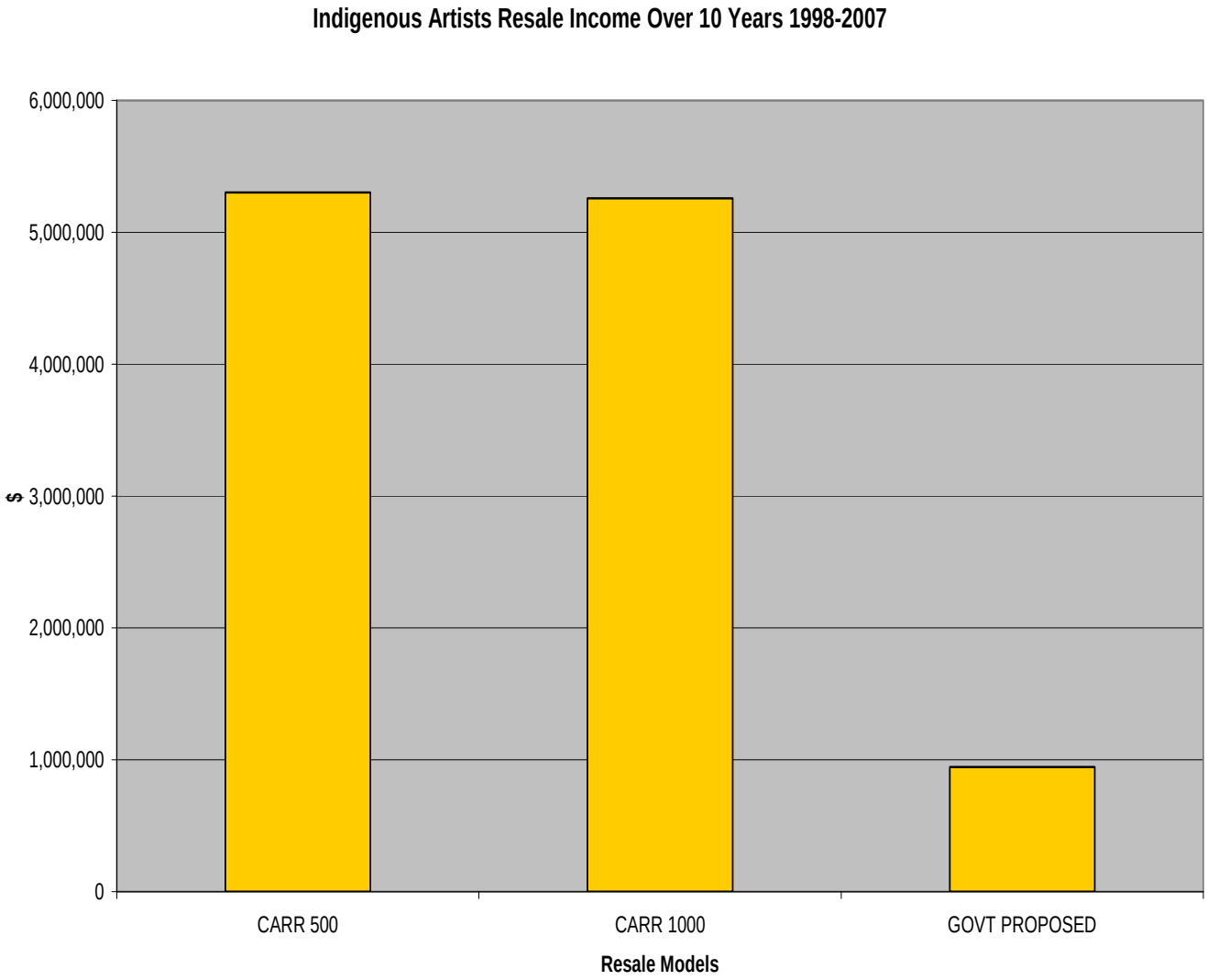
Source *IMPLICATIONS OF THE AUSTRALIAN GOVERNMENT'S PROPOSED RESALE ROYALTY SCHEME,* November 2008, p. 8.

Figure 2.2 Comparison of the number of individual artists who would have received resale income if the resale schemes had been operating for 10 years from 1/1/1998 to 31/12/2007 using auction house sales data



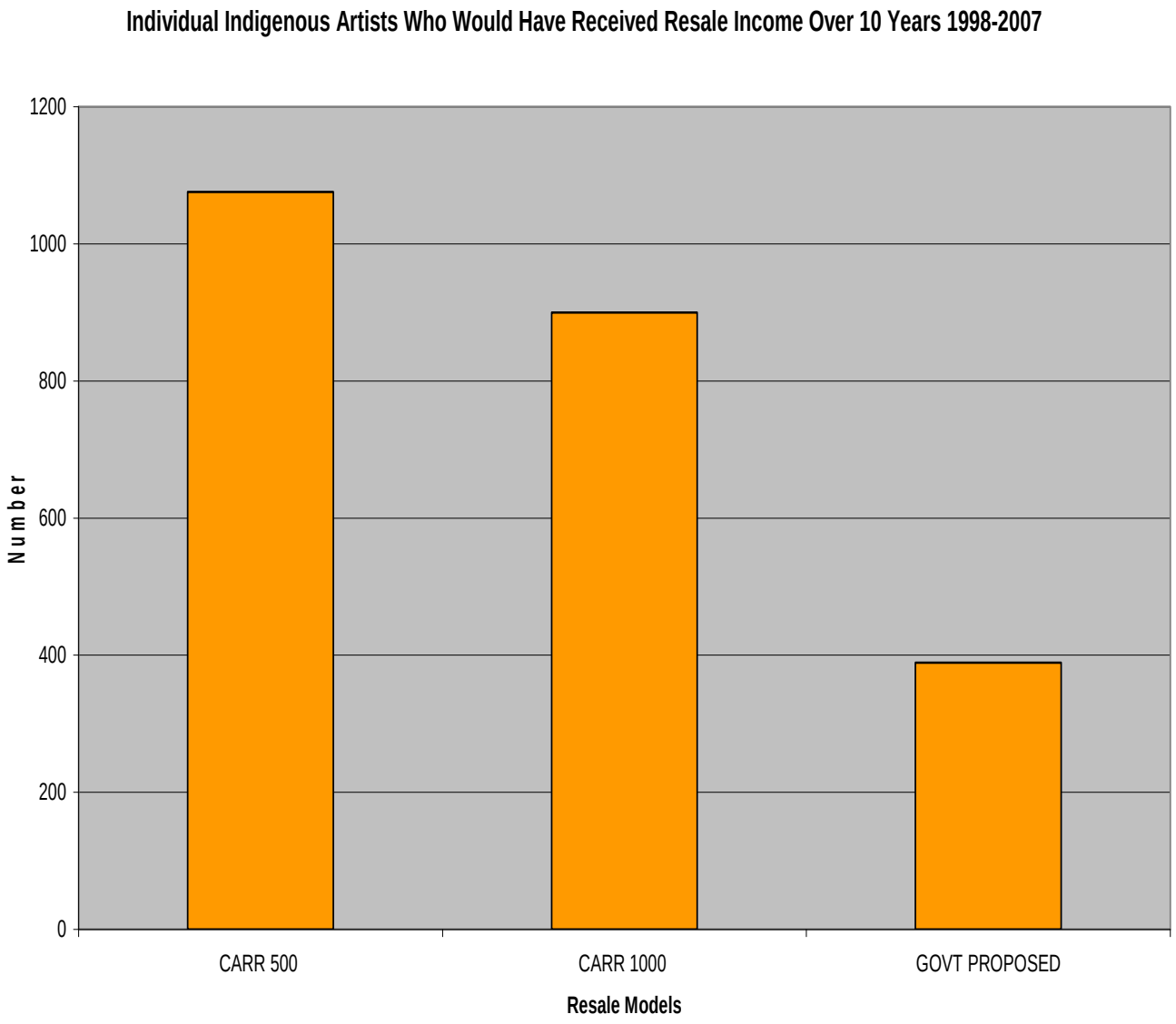
Source *IMPLICATIONS OF THE AUSTRALIAN GOVERNMENT'S PROPOSED RESALE ROYALTY SCHEME*, November 2008, p. 9.

Figure 2.3 Comparison of the amount of resale income received by Indigenous artists if the resale schemes had been operating for 10 years from 1/1/1998 to 31/12/2007 using auction house sales data



Source *IMPLICATIONS OF THE AUSTRALIAN GOVERNMENT'S PROPOSED RESALE ROYALTY SCHEME,* November 2008, p. 11.

Figure 2.4 Comparison of the number of individual Indigenous artists who would have received resale income if the resale schemes had been operating for 10 years from 1/1/1998 to 31/12/2007 using auction house sales data



Source *IMPLICATIONS OF THE AUSTRALIAN GOVERNMENT'S PROPOSED RESALE ROYALTY SCHEME,* November 2008, p. 12.

2.37 The CARR proposed scheme would deliver more royalty, and more artists (both Indigenous and non-Indigenous) would benefit.

2.38 In evidence to the Committee, witnesses estimated that sales through other art market professionals were around the same level as through the auction sales.[26] Therefore, the above figures would be considerably higher if all commercial resales were taken into account.

2.39 If turnover of artwork is closer to 20 years then the exclusion of existing artwork (clause 11) at the commencement of the scheme will provide minimal benefits to most artists.

2.40 The issue therefore comes down to whether or not existing artwork comes within the definition of acquisition of property on just terms within s.51(xxxi) of the Constitution or whether the scheme simply creates a fresh right or further particular rights or liabilities with respect to the artist's existing copyright.

2.41 Many artists, as evidenced by the large number of proforma submissions and the reported 2,000 plus signatories to a petition to the Minister, stated their unhappiness that existing artwork will be excluded at the commencement of the scheme. They believe that this exclusion will deny the current generation of artists receiving significant royalties.[27]

2.42 Sotheby's and Deutscher and Hackett have both stated that in the event of the Bill proceeding, they vigorously support the retention of clause 11 because it will 'provide certainty to the market' and help the art market adjust to the new regime.[28]

2.43 John Walker, a local artist, opposes the scheme but would support the retention of clause 11:

> As a mid career artist, I have no right and certainly don't *deserve* a royalty on resales of the hundreds of artworks I have sold at good prices to buyers years ago; buyers who were innocent of knowledge of a *future* royalty. These buyers gave me bread and wine for my journey. I am grateful for the help and support they gave me.[29]

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26 DEWHA, *Transcript of Evidence*, 5 February 2009, p. 17; Deutscher and Hackett, *Transcript of Evidence*, 6 February 2009, p. 9.

27 D Bowen, *Submission No. 2*; S Smart, *Submission No. 3*; P Drysdale, *Submission No. 4*; and R Piggott, *Submission No. 5*.

28 Sotheby's Australia, *Submission No. 24,* p. 4; Sotheby's, *Transcript of Evidence*, 6 February 2009, p.2; Deutscher and Hackett, *Submission No. 17,* pp. 13, 14.

29 JR Walker, *Submission No. 1,* p. 1.

2.44 The Bill as drafted is based on legal advice that artwork comes within the purview of acquisition of property on just terms within s.51(xxxi) of the Constitution.

2.45 Mr Tucker, Deputy Secretary, Department of the Environment, Water, Heritage and the Arts (DEWHA), said:

> ...there was no intention to arrive at the conclusion we were after; it was the advice that the government received, and, in terms of the risk on potential constitutional issues, it decided to take the course of action it has taken.[30]
>
> I think it would be unusual for a government and a parliament to, where there has been advice from the Solicitor-General about constitutional validity, introduce a bill that they thought may not be constitutionally valid.[31]

2.46 The *droit de suite* concept which underpins every resale royalty scheme assumes that the relationship between the artist and his/her artwork is ongoing and continues even after the artwork has been sold.

2.47 The Arts Law Centre of Australia has provided a memorandum of advice by Mr Robertson SC of the NSW Bar (see Appendix D) which puts forward a contrary view that the proposed scheme does not involve an acquisition of property within s.51(xxxi) of the Constitution. Rather, all the resale royalty scheme would do is to create a fresh right or further particular rights or liabilities with respect to the artist's copyright which is already in existence.[32]

2.48 This view is also supported by Mr Dearn and Dr Rimmer, who stated in evidence that:

> …We are of the view that the preferable position is that the legislation is supported by the intellectual property power and that there would not necessarily be a problem in terms of acquisition of property on just terms.
>
> …governments can always seek to put in place compensation provisions to deal with the chance that the other view will prevail to satisfy the requirement in terms of just terms, and

30 DEWHA, *Transcript of Evidence,* 5 February 2009, p. 3.

31 DEWHA, *Transcript of Evidence*, 5 February 2009, p. 15.

32 Arts Law Centre of Australia, *Memorandum of Advice,* para 29.

> clearly that was demonstrated in the northern territory intervention case.[33]

2.49 Indeed, the compensation option has been exercised in other legislation, including the Copyright Act.[34] The Arts Law Centre of Australia and the National Association for the Visual Artists Ltd. (NAVA) also support this position:[35]

> In some legislation, the compensation is payable by the government. However, alternatively, another model is evident in section 116AAA of the Copyright Act, (which relates to amendments to the Copyright Act 2005 where performers were granted a share in copyright in existing sound recordings), the compensation payable by a performer rather than by the government.[36]

2.50 The advice of Mr Robertson SC and the evidence of Mr Dearn and Dr Rimmer have drawn the Committee's attention to four recent cases in which the High Court has ruled on whether or not a particular event involves the acquisition of property on other than just terms:

- *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479
- *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134
- *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480
- *Wurridjal v Commonwealth* (2009) HCA 2 (2 February 2009)

2.51 The first two judgments would seem to support the conclusion that a resale royalty scheme would not be interpreted as an acquisition of property on unjust terms. In other words, the removal of clause 11 would not render the scheme unconstitutional.

2.52 In the Blank Tape Case, the majority judgment concluded that if the 'royalty' had been levied on vendors of blank tapes this would have amounted to an unconstitutional acquisition of property on other than just terms. However, the majority held the Act to be invalid because their Honours concluded that the levy was in fact a tax and hence did not comply with s.55 of the Constitution. In the minority, Justices Dawson and Toohey, in a strong dissent, found that the blank tape

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33 R Dearn and M Rimmer, *Transcript of Evidence,* 6 February 2009, p. 39.

34 R Dearn and M Rimmer, *Submission No. 31,* p. 74.

35 Arts Law Centre of Australia, *Submission No. 35,* p. 6; and NAVA, *Submission No. 28,* p. 2.

36 NAVA, *Submission No. 28,* p. 2.

levy did not constitute an 'acquisition of property' within the meaning of s.51(xxxi) of the Constitution.

2.53 In *Nintendo v Centronics*, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said:

> That the operation of s.51(xxxi) to confine the content of other grants of legislative power, being indirect through a rule of construction, is subject to a contrary intention either expressed or made manifest in those other grants. In particular, some of the other grants of legislative power, clearly encompass the making of laws providing for the acquisition of property unaccompanied by any quid pro quo of just terms. Where that is so, the other grant of legislative power manifests a contrary intention which precludes the abstraction from it of the legislative power to make such a law.[37]
>
> …It is of the nature of such laws that they confer such rights on authors, inventors, and designers, other originators and assignees and that they conversely limit and detract from proprietary rights which would otherwise be enjoyed by the owners of affected property. 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 or confer, the grant of legislative power contained in s.51(xviii) manifests a contrary intention which precludes the operation of s.51(xxxi).
>
> The cases also establish that a law which is not directed towards the acquisition of property as such but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity is unlikely to be susceptible of legitimate characterization as a law with respect to the acquisition of property for the purposes of s.51 of the Constitution. The Act is a law of that nature. It cannot properly either in whole or in part, be characterized as a law with respect to the acquisition of property for the purposes of that section.

37 Quoted with approval by French CJ (at [91]), Crennan J (at [360]) in *Wurridjal v Commonwealth.*

> …Consequently, it is beyond the reach of s.51(xxxi)'s guarantee of just terms.[38]

2.54 Mr Dearn and Dr Rimmer, in evidence to the Committee, also conclude that:

> [We] have deliberated about the matter and we think the preferable view would be that the right of resale legislation is much more similar to the circuit layouts case[Nintendo], in the sense of it is another sui generis [one of a kind] piece of legislation that is being created.[39]

2.55 The NT Intervention Case considered whether the Commonwealth intervention laws involving a grant of lease over the Maningrida land constituted an acquisition of Land Trust property that was not on just terms within the meaning of s.51(xxxi) of the Constitution. The majority held that the creation of the statutory lease constituted an acquisition of property but did not breach the Constitution, due to the compensation provisions in the *Northern Territory National Emergency Response Act*.[40] All of the judgments consider the question of acquisition of property on other than just terms.

2.56 In particular it is worth noting the judgment of French CJ, where (at [91]) his Honour said:

> A law which is not directed to the acquisition of property as such, but which is concerned with the adjustment of competing rights, claims or obligations of persons in a particular relationship or area of activity, is unlikely to be susceptible of legitimate characterisation as a law with respect to the acquisition of property for the purposes of s.51(xxxi). Such a law would therefore be beyond the reach of the just terms guarantee.[41]

2.57 Several of the judgments in the NT Intervention Case also consider the use of 'fail-safe' measures similar to s.21 of the *Historic Shipwrecks Act 1976* or s.4AB of the *Customs Act 1901*.

2.58 The significance of this very recent decision of the High Court is that it may clarify this difficult area of the law and warrant the seeking of further advice which takes the High Court decision into account.

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38 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, pp. 160, 161.

39 R Dearn and M Rimmer, *Transcript of Evidence,* 5 February 2009, p. 39.

40 High Court of Australia, Press Release, 2 February 2009, p. 2.

41 *Wurridjal v Commonwealth* (2009) HCA 2 (2 February 2009), para 92

2.59 Given the significance of clause 11 on the impact of the scheme and the benefits to artists from the commencement date, and also in view of the most recent High Court judgment, the Committee would ask the Minister to seek further legal advice with respect to whether the scheme would be unconstitutional if clause 11 was omitted and whether a 'compensation' or 'fail-safe' clause could be inserted in the legislation, to cover the possibility of a future legal challenge in relation to the acquisition of property on other than just terms.

2.60 The Committee would also suggest that, if after having obtained further legal advice the government was still of the opinion that the scheme would be unconstitutional should clause 11 be omitted, the reasoning for that decision should be explained in any revised Explanatory Memorandum and by the Minister at the resumption of the second reading debate on the Bill.

Reciprocity

2.61 The Minister, in his second reading speech, said:

> Because the right is recognised in the Berne convention for the protection of Literary and Artistic Works, it will be possible for Australia to establish arrangements with other countries which acknowledge the right to a royalty for Australian artists whose work is sold in those countries.[42]

2.62 The International Confederation of Societies of Authors and Composers (CISAC) claims that, because of the prospective nature of the proposed scheme that will result in a limited application in the early years of the scheme, other countries may not enter into a reciprocal arrangement with Australia:

> …It is not difficult to envisage a view being formed of the effect of clause 11 of the Bill **not** in reality providing such protection, with the consequent effect of disentitling Australian artists to the proceeds of schemes in place in Europe.[43]

42 Minister's second reading speech, 28 November 2008.

43 CISAC, *Submission No. 27,* p. 3.

2.63 It is not clear cut what view would be taken, as the Berne Convention is open to interpretation and it will depend also on the willingness of countries to enter into a reciprocal arrangement.

2.64 However, in evidence to the Committee, Mr Cottle, CISAC, and Ms Cave, Viscopy, said there was a very high risk that the proposed Australian scheme would not be viewed as a 'fully functioning scheme' according to the European Commission's interpretation within Schedule 2 of its reciprocity instrument dealing with non-European nationals.[44] At present, clauses 11 and 23, dealing with treatment of existing artwork and the right to opt out of the scheme, are at odds with EU schemes.

2.65 DEWHA advised the Committee that its advice indicated that the details of the Australian proposed scheme would not be delved into by other countries and, whilst acknowledging that the various schemes all have pluses and minuses, the risk of non-reciprocity would be low.[45]

Treatment of Indigenous artwork

2.66 Many people have commented in recent years on the high prices being fetched for Indigenous artwork which have benefited the buyers and art dealers while the creators of this artwork and their communities are still living in third world conditions:[46]

> The sale of the late Clifford Possum Tjapaltjarri's painting for $2.4 million highlights the obscenity of the art market. Possum received only $1200 for the picture in 1977, and neither he nor his family will get a cent from the sale
>
> …it is manifestly unfair that the very people—the artists—without whose talent and effort works of art would never even exist should be excluded from benefiting from the enormous profits being made in the secondary art market. The remedy for this injustice is a resale royalty scheme[47]

44 Viscopy and CISAC, *Transcript of Evidence*, 6 February 2009, pp. 15, 19.

45 DEWHA, *Transcript of Evidence*, 5 February 2009, pp. 18, 19.

46 R Dearn and M Rimmer, *Submission No. 31,* p. 105.

47 R Dearn and M Rimmer, *Submission No. 31,* p. 108 (D Richardson, letter to the *Adelaide Advertiser*, 26 July 2007).

2.67 Many argue that in order to ensure the benefits are spread as widely as possible across the Indigenous arts community the removal of clause 11 and the lowering of the threshold to $500 would greatly assist.[48]

2.68 Indigenous people represent only 2.6 per cent of the Australian population but in 2007, art sales by Australian artists revealed that 24 per cent of these artists were Indigenous.[49]

2.69 Under the existing proposal, Indigenous artwork may be unintentionally treated differently from other artwork. A number of small Indigenous arts centres pay artists up front for their artwork and hence the next resale from the centre will trigger the royalty payment. When this occurs, small art centres may revise the initial payment to the artist simply because the 'second' resale could only be a matter of weeks away after the 'primary' sale and these centres will have to pay the royalty.[50]

2.70 Notwithstanding the possible early payment of a resale royalty, the Indigenous artist may be worse off depending on whether they received a lower price initially for their artwork, how much the art centre resells the piece for and the administrative charge claimed by the collecting society.

2.71 DEWHA told the Committee that it believed that these arrangements, whereby small Indigenous art centres buy directly from the artists, involve purchases of artwork priced less than $1000 and hence would not be eligible for a royalty payment on the next resale.[51] DEWHA told the Committee that the bulk of art centres operate on a consignment basis. Therefore, the royalty payment would not be imposed on the first sale from these centres.[52]

2.72 This unintended consequence could be overcome by introducing a special 'resale exemption' which excludes resales of artwork that occur within a specified period after the 'primary' sale under certain conditions. According to the UK Resale Right Regulation 2006:

> …where the seller previously acquired the work directly from the artist less than three years before the sale, and the sale price does not exceed €10,000; in other words, the regulations

48 A French, *Submission No. 39*, p. 3 and *Supplementary Submission No. 39a,* p. 1.

49 Arts Law Centre of Australia, *Submission No. 35,* p. 8.

50 Australian Commercial Galleries Association, *Submission No. 8,* p. 2.

51 DEWHA, *Transcript of Evidence*, 5 February 2009, p. 11.

52 DEWHA, *Transcript of Evidence*, 5 February 2009, p. 12.

> apply only to sales made three or more years after the artist's first studio sale or transfer of ownership, and to all sales exceeding €10,000 even if they are made within the first three years after the artist's first studio sale or transfer of ownership.[53]

2.73 ACGA supports such a special resale exemption clause where small art galleries pay Indigenous artists up front for their paintings.[54]

2.74 Under normal sales conditions, art centres/commercial galleries sell artwork on commission and the artist will receive no payment until such time as the 'primary' sale has been concluded. Under this scenario, the art centre would have little incentive to discount the price because no royalty payment would be made on this sale.

2.75 Another potential difficulty relating to Indigenous artwork is that many Indigenous artists give different paintings the same name and therefore it may be very difficult to ascertain which painting, if any, is eligible for a royalty payment under the proposed scheme.[55] If all resales were included in the proposed scheme this difficulty would not arise.

2.76 Identification of artwork for the purpose of receiving a royalty may pose some problems for artwork that has not been signed but these issues are more likely to be resolved over time with the use of electronic identification tags or similar.

2.77 A more critical issue surrounds the succession in title, particularly from the point of view of Indigenous artists. Clause 15(2) covers normal tests with respect to the rules of intestate succession. However, according to the Arts Law Centre:

> Under the intestacy laws, which vary from state to state, in most cases the order in which estates of an Aboriginal artist is distributed is not in accordance with Aboriginal customary law or probable wishes of the Aboriginal person who had passed away.[56]

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53 See http://www.artquest.org.uk/artlaw/artists-resale-right/arr-regulations-2006.htm, p. 4 (accessed 5 January 2009).

54 Australian Commercial Galleries Association, *Submission No. 8,* p. 2.

55 Arts Law Centre of Australia, *Submission No. 35,* p. 4.

56 Crikey website, http://blogs.crikey.com.au/northern/2008/11/07/garrets-resale-royalty-proposal-views (accessed 24/11/2008), p. 4.

2.78 Others have suggested the Bill should recognise the scope for communal ownership of Indigenous artwork in the same way that clause 12 recognises single and joint ownership of artwork.[57]

2.79 Given that the Bill proposes to extend the right for 70 years after the death of an artist, John Oster, Executive Officer, Desart, says there is a lot at stake with respect to the succession of an artist's rights and intellectual property after death:

> …there isn't a lot of understanding amongst artists about the need for wills, what they involve at whitefella law and there are a whole lot of perceptions about who owns the painting, who owns the cultural values behind the painting or work of art and therefore who should be the beneficiary for that.[58]

2.80 The Arts Law Council of Australia has been doing a lot of work in recent years with Indigenous artists in the Kimberley and Northern Territory to assist them with the preparation of wills and provision of other educational services:

> Since Arts Law's specialised Indigenous service, Artists in Black, commenced in 2004, Arts Law has provided direct legal services to 1,097 Indigenous artists and arts organisations throughout Australia, represented clients through casework services either directly or in partnership with private law firms in 50 matters and has run educational workshops, seminars and forums attended by 3,085 indigenous people.
>
> …Arts Law has drafted over 300 wills for Indigenous artists. For a large number of these, the artists expressed their desire to share their estate widely, for example, it was common for artists to have long lists of beneficiaries and to wish to share their estate with their siblings, children, grandchildren, nephews and nieces and children adopted under customary law.[59]

2.81 A 'community body', as contained in clause 3, is defined as:

> …a body (whether incorporated or unincorporated) established by a community for the purpose of supporting or promoting the welfare or cultural values of the community.

57 R Dearn and M Rimmer, *Submission No. 31,* p. 113.

58 Crikey website, http://blogs.crikey.com.au/northern/2008/11/07/garrets-resale-royalty-proposal-views (accessed 24/11/2008), p. 4.

59 Arts Law Centre of Australia, *Submission No. 35,* pp. 7, 9.

2.82 This would enable Indigenous artists to spread their estate widely and according to Aboriginal customary law, but this could only be achieved if a will has been made to that effect or the intestate laws recognised this broad principle concerning communal sharing of estates.

Royalty rate

2.83 The flat rate of five per cent has been widely supported by those in favour of the scheme. It simplifies the scheme and would not involve complicated calculations as experienced in the current EC sliding scale scheme.

2.84 In the event that the Bill proceeds, Sotheby's requested that the rate be set at three per cent and there be a cap of $12,500.[60]

2.85 The Australian Commercial Galleries Association requested that the rate be a sliding scale similar to the EU scheme.[61]

Who pays and will it impact on the primary art market?

2.86 While the government believes that the scheme will have minimal impact on the Australian art market, any new impost in a market is likely to cause some behavioural changes between those directly involved in that market.

2.87 Clause 20 states that the seller, agents and buyers are jointly and severally liable to pay the royalty on the commercial resale of an artwork. However, depending on the supply and demand conditions, the actual costs may be borne by one particular party:

> In the long term, the actual burden or incidence depends upon the difference between the elasticity (or price responsiveness) of demand of purchasers in the secondary art market, and the elasticity of supply of artists in the primary market. Depending on the relevant elasticities, the economic incidence may be passed 'back' to the artist (reflected in a

60 Sotheby's Australia, *Submission No. 24,* p. 4.

61 Australian Commercial Galleries Association, *Submission No. 8,* p. 5.

> lower price and/or quantity of art in the primary market) or 'forward' to the purchaser (reflected in a higher price and/or lower quantity in the secondary market).[62]

2.88 Viscopy, in evidence to the Committee stated that:

> The common approach taken by most member states [EU] is to provide for joint and several liability, as proposed under the draft bill. This is very sensible approach because, in practice, the managing agent can collect the royalties directly from the dealers and auctioneers rather than try to collect from private individuals. Dealers and auctioneers are then free to decide whether they wish to pass the cost of the royalty on to either of their customers – the seller and/or buyer. In the vast majority of case – well over 90 per cent – the cost is passed on to the buyer.[63]
>
> …That works very well in practice.

2.89 The proposed resale royalty scheme is similar to other operating schemes in that the liability to pay the royalty is 'joint and several liability on the seller, the agent of the seller and the buyer'. The Arts Law Centre of Australia believes that the UK experience suggested that the buyer was more likely to pay the royalty. Therefore, if this was repeated in Australia, clause 11 would have minimal impact.[64]

2.90 DEWHA, in its submission, commented that the liability to pay provision is consistent with the EU Directive:

> As the seller is always one of the liable parties, this model is also consistent with the EU Directive, which argues that the seller should bear the burden of responsibility as they earn the greatest financial benefit from the resale. The EU directive does, however, allow member states to choose how to impose liability.[65]

2.91 This approach appears to assume a rising market but that may not always be the case. Further, if DEWHA has modelled the Bill on the EU Directive then there may be scope for the government to impose liability on the seller and thus avoid the need to have clause 11 (see Appendix D).

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62 Access Economics, *Evaluating the Impact of an Australian Resale Royalty on Eligible Visual Artists* (report for Viscopy), October 2004, p. 10.

63 Viscopy, *Transcript of Evidence,* 6 February 2009, p. 19.

64 Arts Law Centre of Australia, *Submission No. 35*, p. 5.

65 DEWHA, *Submission No. 34,* p. 11.

2.92 The Committee did not receive any hard empirical data that may have shed some light on the type of behaviour of buyers and sellers in the Australian art market. The Myer Report similarly concluded that:

> On balance, it can probably be concluded that, 'given the state of the empirical evidence in hand, intelligent, well meaning persons, equally well informed about economic theory, may well disagree about the efficiency of the artists' resale rights'.[66]

2.93 Myer looked at the wealth distribution and impact effects of a royalty scheme on the Australian art market. He concluded:

> Nevertheless, the fact that the majority of resale royalties would be distributed to more successful artists, or their heirs, does not undermine the stated object of resale royalties in the Australian context: to allow creators to benefit economically from the appreciation of their works of art.[67]

2.94 The Myer report went on to say that the impact of a resale royalty on the market is difficult to predict due to lack of data. However:

> …the Inquiry finds that the measure (royalty) will not necessarily have a detrimental effect upon the Australian market for contemporary visual art and craft.[68]

2.95 In its submission, Viscopy cited a report by the Design and Artists Copyright Society (DACS) in the UK which commented that:

> The notion that the Resale Right has an impact on the price of art simply does not stand up to scrutiny when the behaviour and attitude of art buyers is examined. Our evidence shows that art is relatively price-inelastic; it can be more desirable the more expensive it becomes and it is acknowledged as a reliable, low risk and high performing investment.[69]

2.96 Another report found that:

> The UK Government bitterly fought the introduction of the *droit de suite* scheme, arguing that the levy would cost up to

66 Myer Report, p. 162.
67 Myer Report, p. 163.
68 Myer Report, p. 165.
69 Viscopy, *Submission No. 36,* p. 12.

> 5000 industry jobs and would divert trade to the US and Switzerland to avoid it.[70]

2.97 Of course, this did not occur because the global economy was booming and the UK art market grew strongly. The UK scheme was to extend this right to deceased artists by 2010 (70 years). However, the UK Government wrote to the European Commission in late 2008 indicating that, due to changed economic circumstances, they would invoke Article 8(3) of the EU Directive and delay the extending of the scheme to deceased artists until 2012.

2.98 An independent study of the impact of the Artists Resale Right (ARR) scheme on the UK market concluded:

> Since the introduction of the ARR in the UK there has been an unprecedented boom in the global market for contemporary art. This has enabled the UK to maintain its competitive position until now, in spite of the levy, although the US contemporary art market has fared even better. The extension of the royalty to the work of deceased artists will greatly increase the risk that the UK will be bypassed in the valuable market for 20th century art. It should be noted that the UK's main rivals in the global art market have not so far introduced ARR, so the risk that sales will be diverted away from the UK will increase, particularly if the unusually strong market were to weaken.[71]

2.99 Anecdotal evidence would suggest that when an economy is booming art prices will also rise and that people will not be overly worried about the price for a particular work of art (price inelastic). It is at times like this that many people will have a great deal more discretionary income from which to purchase various forms of artwork. However, when the economy is slowing people are more likely to have less discretionary income and price may become more of an issue with respect to the purchase of artwork (price elastic). A case could also be made that people may re-evaluate their investment portfolios when there is an economic downturn and this may result in artwork becoming a more desirable asset compared to shares or property.

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70 P Lewis, *The Resale Royalty and Australian Visual Artists: Painting the Full Picture*, 2003, p. 10.

71 T Froschauer, *The Impact of Artists Resale Rights on the Art Market in the United Kingdom*, January 2009, p. 5.

2.100 Without further empirical data, it is difficult for the Committee to say whether artwork is price elastic or inelastic, whether the buyer or seller will end up paying the royalty or whether the cost of royalty scheme is likely to be borne by artists in the primary market.

Who benefits?

2.101 A number of people have claimed that the scheme will only benefit the very successful artists and their estates.[72] Also it is claimed that the scheme is a bit of a lottery in that the bigger winners will be artists whose artwork is turned over at a faster rate.[73]

2.102 It has also been suggested that for many artists their artwork is unlikely to be resold and hence they would never benefit from either a retrospective or prospective scheme.

2.103 Viscopy, in their evaluation of the proposed scheme, claim that if the scheme had applied to sales from 1998 to 2007, only 845 artists would have benefited and shared in a total royalty payment of $4.6 million.[74] However, if the royalty applied to all resales, the number of beneficiaries would rise substantially with 2,456 artists sharing in $35.4 million.[75]

2.104 The actual amount of royalty collected and the likely number of beneficiaries will very much depend on the state of the Australian art market. It is estimated that art sales in Australia fell from a high of $175.6 million in 2007 to only $114.7 million in 2008.[76] Therefore, it will be very hard to predict what level of royalty payment is likely to be achieved on a year to year basis and assessments of past sales will at best only provide some indication of likely royalty payments in the future.

72 Sotheby's Australia, *Submission No. 24,* p. 3 and J Davila, *Submission No. 21*, p. 3.

73 Sotheby's Australia, *Submission No. 24,* p. 3.

74 Viscopy, *Submission No. 36,* appendix 1.

75 Viscopy, *Submission No. 36,* appendix 1.

76 Sotheby's Australia, *Submission No. 24,* p. 2 and Deutscher and Hackett, *Submission No. 17,* p. 7.

Collecting society—role and responsibility

2.105 The decision to opt for one collecting society is premised on the size of the Australian art market, the objective of keeping fees as low as possible and likely efficiency gains to be achieved by one operator:

> Evidence from successful collecting societies in Europe suggests the costs of administrating resale royalty systems range from 9-20 per cent of revenue raised.[77]

2.106 Access Economics in its report to DEWHA suggested an even wider range of costs:

> DCITA (2004) stated that administration costs can range from 10%to 40% in Europe (where such schemes operate), with high administration costs rendering such schemes impractical (as is apparently the case in Italy). McAndrew and Dallas-Conte (2002) estimate that administrative costs vary between 10% and 30% depending on market size (economies of scale) and the state of organisation of the collecting society.[78]

2.107 In 2002, Viscopy, in evidence to the Myer Inquiry, stated that it could administer a resale royalty scheme for around 10 per cent.[79] However, another witness stated that if one looks at the recent history in relation to other copyright services, a far higher amount is more likely to be charged by the collecting society.[80]

2.108 Evidence from auction houses have claimed that, while the scheme provides for an adequate administration fee to be charged by the collecting society to undertake the collection and distribution of royalties obtained from the resale of artwork, art market professionals will have to absorb or pass on the costs associated in complying with the scheme:

> Adding to the cost and complexity of the auction house transactions will reduce turnover, reduce the exposure of artists to the wider market and direct transactions of high value work towards private, hidden deals. This will be detrimental to the viability of the auction house and

77 Myer Report, p. 162.

78 Access Economics, *Design Aspects of an Australian Resale Royalties Scheme,* 7 April 2008, p. 2.

79 Myer Report, p. 162.

80 JR Walker, *Submission No. 1,* p. 3.

> detrimental to artists who greatly benefit from the exposure that auction sales provide.[81]
>
> …There appears to be no calculation of the costs to the businesses to which this will apply. These have been described by your 'independent advisers' as minimal. This is incorrect. Prior to its introduction in the UK in 2006, similar advice was that each transaction would cost businesses 'as little as 40p ea'. A review of the scheme conducted in 2008, showed that the real averaged cost per transaction excluding set up was £23 per transaction; including set up was £53 per transaction—or approximately AUD $60 & $120. The advice is skewed to sell the concept and is neither balanced nor realistic.[82]

2.109 Auction houses and art market professionals have claimed that they will incur costs in order to comply with the scheme. However, it is unclear how much these costs will be and whether or not they will be able to pass this on to the buyer or seller.[83] As with any new scheme, the costs are likely to be higher at the beginning but to fall over time once the scheme is fully functioning and everyone becomes familiar with their respective roles and obligations.

2.110 The Arts Law Centre of Australia[84] and Viscopy[85] are concerned that administration costs may be high in the first few decades of the scheme if only a few resales qualify for a royalty, but a lot of time and effort is still expended trying to sort out what is in and what is out of the scheme.

2.111 If costs are to be kept low from the commencement of the scheme, the Arts Law Centre believes that the government may need to contribute millions of dollars until the scheme covers all resales.[86]

2.112 Deutscher and Hackett claim that a virtual resale royalty already exists in the form of the copyright fees charged by Viscopy to reproduce artwork in catalogues that are produced prior to an auction

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81 Deutscher and Hackett, *Submission No. 17,* p. 8.

82 Australian Antique and Art Dealers Association, *Submission No. 32,* p. 3 and T Froschauer, *The Impact of the Artists Resale Rights on the Art Market in the United Kingdom,* January 2008, pp. 10-11.

83 ACGA *Transcript of evidence,* 6 February 2009, p. 48.

84 Arts Law Centre of Australia, *Submission No. 35,* p. 4.

85 Viscopy, *Submission No. 36,* p. 9.

86 Arts Law Centre of Australia, *Submission No. 35,* p. 4.

or major art sale.[87] If this charge remains then according to Deutscher and Hackett, the introduction of a royalty scheme will in effect mean a 'double' royalty.

2.113 ACGA believe that international experience has resulted in fees as high as 20–25 per cent and this is why they prefer the scheme to be entirely government funded so as to maximise the amount of royalty paid to the artist.[88] The Australian Copyright Council suggested a figure of around 15 per cent would be likely if all resales were included but a higher figure may result under the proposed 'prospective' scheme.[89]

2.114 Another issue regarding the role of the collecting society concerns privacy - in particular, what the collecting society must publish on their website following a commercial resale of artwork. It is not clear under clause 22 what level of information will be published.[90] If privacy is not maintained then some people may be reluctant to undertake to purchase or sell their artwork commercially.

2.115 This matter would need to be clarified before the scheme commences so as to avoid any unintended consequences.

2.116 Clause 31 deals with the issue of unclaimed royalties. ACGA believes that there may be little incentive for the collecting society to find the holder(s) of the resale royalty right and that this clause should be strengthened to specify exactly what steps are to be taken to locate such holders (eg place notices in public newspapers).[91]

2.117 In light of some of the concerns raised above, a review of the scheme may be appropriate after three to five years.

Inalienability of the right

2.118 Clause 33 provides a safeguard for artists from being pressured to giving up their right to obtain a royalty on the resale of their artwork.

87 Deutscher and Hackett, *Submission No. 17,* p. 9.
88 Australian Commercial Galleries Association, *Submission No. 8,* p. 6.
89 Australian Copyright Council, *Submission No. 33,* p. 10.
90 Australian Commercial Galleries Association, *Submission No. 8,* p. 6.
91 Australian Commercial Galleries Association, *Submission No. 8,* p. 6.

2.119 However, unlike musicians and authors, visual artists will be represented by one collecting society and they will not be free to negotiate and sell the rights to their work.[92]

2.120 The succession test (clause 15), allows the artist to transfer this right to a charitable institution that works for the benefit of the community, rather than for profit. The clear intention of the royalty right is that it is not to be traded as a normal commodity or held by a commercial entity. Rather the artist can pass on the resale royalty right to their natural heirs or to not-for-profit organisations.

2.121 The Myer Report[93] recommended that a royalty scheme be introduced (recommendation 5) but it did so on the proviso that the scheme should give the artists the right to participate in or opt out of the scheme.

2.122 Notwithstanding clause 33, which expressly states that the resale right is absolutely inalienable, artists can exercise their right to say 'no' to the collecting society to collect the resale royalty or enforce the resale royalty right on behalf of the holder(s) of the right (clause 23 (1)).

2.123 According to Mr Walker:

> This is a *good solution* to the riddle of a 'right' to which you cannot say 'no'. It equally protects young and vulnerable artists from being forced into a general waiving of possible future rights and protects older artists from being forced into automatic support of the management of the scheme.[94]

2.124 Clause 23(1) also appears to give artists the right to collect the royalty themselves or come to some other arrangement with the auction house or art market professional. A number of submissions have commented that this is far from clear in the way the Bill is drafted:

> …the draft bill does not appear to implement it in a clear and unambiguous fashion. Because there is no such clear provision, section 23(1) serves to raise the question about whether the royalty could be collected directly by an artist.[95]

2.125 If the above is the stated intention of clause 23(1) then the Committee would suggest that it be redrafted so as to remove any ambiguity.

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92 Deutscher and Hackett, *Submission No. 17,* p. 11.

93 *Report of the Contemporary Visual Arts and Craft Inquiry,* 2002.

94 JR Walker, *Submission No. 1,* p. 3.

95 Viscopy, *Submission No. 36,* p. 9.

2.126 In evidence, DEWHA stated:

> There is certainly a potential for people to opt out. Again, it is about striking a balance. Not having an opt-out provision is quite draconian. To force people to go down a single route is quite draconian.
>
> …There were certainly a number of people and particular artists we consulted who were very keen to see an opt-out provision. I guess the ultimate test will be how efficient the collecting society is, because I would have thought the No.1 reason that artists would be locked out would be a very high administrative fee. They might think they could do better by collecting it themselves. So if you have an efficient and effective collecting society then that would be easy and convenient for artists.[96]

2.127 If artists did collect the royalty themselves, the collecting society would still be required to publish details of commercial resales of artwork on their website (clause 22) and monitor upcoming auction and other sales.

> The collecting society for a resale royalty is required to collect and publicise information in relation to upcoming auctions and sales where they believe resales will attract a royalty payment
>
> …These activities are required to be carried out in respect of all resales that attract a resale royalty payment. In the event that artists, or other resale right holders, decide they do not want to obtain their royalty through the collecting society, the collecting society will have borne the administrative costs of collecting and publicising information on their behalf without being able to recoup administrative costs. This means that those artists or resale royalty holders who choose to have their rights administered by the collecting society will bear the costs which are applicable to all resale royalty holders.[97]

2.128 At the moment, clause 23 (1), clause 33 and clause 35 are sending conflicting messages. The inalienable right (clause 33) seems to be supported by all parties. However, the opt-out options (clause 23(1)) seem to be at odds with the desire to establish one collecting society (clause 35).

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96 DEWHA, *Transcript of Evidence,* 5 February 2009, p. 20.

97 Copyright Agency Ltd, *Submission No. 30,* p. 4.

2.129 If individual artists elect to collect the royalty themselves or if they negotiate with other art market professionals to collect it on their behalf, the legislation, as currently drafted, is silent on the powers that the artist or their appointed agent will have with respect to the right to demand information and the power to collect the royalty. If they expect the collecting society to exercise their powers to achieve a satisfactory outcome, then it would seem unfair not to expect the collecting society to charge a fee for this part of the service.

2.130 While DEWHA has maintained that it is a question of balance, the Committee believes that there are too many options at present and if a number of artists exercise their rights in a variety of ways, the scheme could become an administrative nightmare. On the face of it, it would appear very difficult for individual artists or their appointed agents to collect their royalties if they do not have similar powers to the collecting society. If lack of choice is the issue then the appointment of more than one collecting society may be desirable. Alternatively, if the size of the Australian art market warrants only one collecting society, artists who elect to receive the royalty will have to use that agency. However, artists could still retain the right to opt out of receiving the royalty on a case by case basis or on an ongoing basis.

Penalties

2.131 As with most schemes which require the cooperation of various individuals and agencies, penalties can be imposed for non-compliance or supplying false information. Clauses 28 and 29 set maximum charges for failure to comply.

2.132 If difficulties arise with interpretations regarding 'artwork', 'commercial resales' and 'art market professionals' then it would not be unreasonable to expect that penalties would be imposed until such time as these matters are clarified.