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Secretary:

Committee Secretary
Artists Resale Royalty Bill Enquiry
Standing Committee on Climate Change, Water, Environment and the Arts
PO Box 6021
House of Representatives
Parliament House
CANBERRA ACT 2600

29 December 2008

Dear Sir

RE: House of Representatives Standing Committee on the Artists' Resale Royalty Bill

I am a professional artist of 30 years experience. Making art is my sole occupation. I am writing to you regarding the Artists resale royalty Bill as presented to the House of Representatives by Mr Garrett on 27 November, 2008, which has been forwarded to the above standing committee for further investigation.

I and all of the professional artists that I know, are not members of NAVA or any of the associated organizations that constitute CARR. In my opinion, these organizations seriously and wilfully mis-represent the interests of professional artists who sell their work for a living. This cluster of arts organizations represent the interests of government funded arts organizations and those employed by them. Their advocacy for this scheme has placed in the position of a very serious conflict of interest. My nickname for all of them is 'Uriah Heep".

In any sort of resale royalty scheme where participation by artists is even partly compulsory, it is impossible to completely avoid harm to the net incomes of the individual artists who are the subject of this compulsion; those artists for whom the making of art is the centre of their lives and the selling of the new artworks that they make, their principle or sole source of income. However, if viewed at the secondary level of implementation, the scheme as proposed in the draft bill, makes a fair job of a difficult task. The scheme as outlined in the draft bill avoids, as much as is possible, the loss of rights and freedoms for both the affected artists and affected art buyers by the proposed scheme. By comparison with the very bad scheme that Viscopy and its sister, lobbyist organization NAVA sought to impose on artists and art buyers, Mr Garrett's bill is definitely the better of the two options before you.

Non-retrospectivity is morally and legally right.

As a mid-career artist, I have no right to 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. Because the scheme would start off slowly here will be little need for government support: it would grow as need and collection fees grow.

The aim of Nava's and Viscopy's lobbying for a retrospective royalty has always been, to quote from NAVA's submission to DCITA in 2004: "for the copyright collection society.... [an ARR will provide] a new area of responsibility and an *appropriate level of income for its administrative services*". In my opinion, the sole aim of this scheme, as envisaged by Coalition of organizations for the Artists Resale Royalty (CARR), has always been to deliver an 'appropriate' level of income for administrative services. Non-retrospectivity is essential if participation in the scheme is to be for the art buyer a matter of choice and not a matter of retrospectively mandated duty.

Rupert Myer recommended a pure, individual royalty right. He explicitly emphasised that maintaining the nexus between *permission* and payment was vital to an individual royalty right as opposed to a form of hypothecated tax.

The compulsory 'duty' of collection imposed upon artists, as sought after by CARR, coupled with a monopoly right of collection to the collection society, is intended to transfer the *individual royalty right of control* that Rupert Myer recommended, to the collection society. Inalienable rights cannot be transferred and a licence that is for the full term of copyright and is irrevocable by the rightholder is in effect, a full transfer of that right to the collection society. This transfer makes a complete mockery of the idea of an individual right of control, let alone an inalienable right of control. The freedom for artists to say 'No' is essential if participation in the scheme is to be a free right of choice for artists and not a mandated duty.

The book, *Such is life,* begins with these words: "Unemployed at last!". The freedom to choose to not be *renumerated* by someone is a much more important freedom than a mere right to receive remuneration. Individual freedoms are essentially negative; freedom from being forced to do something, the freedom to say 'no thanks, its not for me, count me out.' In matters of groups, questions of 'rights' are questions of power. In matters of groups, 'right' describes *the power to* affect or to restrict the freedoms of other individuals within society.

For me, the power or right being sought by Viscopy, NAVA and their connected cluster of arts organizations (CARR) would have very real implications:

- It would remove from artists like me the free control of usage that I have under current copyright law; the freedom to say 'no'.
- Concurrent with the above, it would also deny me the freedom (if I was to choose to partake at all) to manage my own affairs or to join a voluntary collective management. The collection society would be a compulsory monopoly service provider.
- Stopping the making and selling of my art is not really an option, therefore I would have no freedom at all under the powers sought by CARR. My participation, in their proposed scheme, is to be absolute and mandated by law.

Their scheme is a very uncivil proposal.

The scheme advocated by this coalition of management organisations is also bad design. A royalty scheme where the provision of the service of collection is vested in a monopoly service provider and where freedom of control over the use *or* non-use of the royalty is alienated from the individual right-holder is a design for maximising costs and minimising individual freedoms. It would result in a management that was not answerable to its 'owner'. And worse still if retrospectively applied it would result in a management that would have 70 years of dead artists

to 'service' and thus be well insulated from the harm the scheme will do to living artists for decades to come. Collection societies are protected by commercial-in-confidence provisions and not subject to the same rigorous scrutiny applied to statutory organizations. The current collection society, Viscopy, has a long history of excessive costs, serious inefficiency and waste, and dependency on tax-payer funding to keep it afloat. Its current collection costs are approximately 37c in the dollar, and in the past they have at times been in excess of 50c in the dollar. The organization was virtually insolvent in 2004.

Clause 22 of the Bill

This clause grants artists a 21 day period, after the publication of notice by the collection society of an affected resale, the freedom to instruct the society *not* to collect that individual artist royalty payment. 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. It deals well with the design and individual rights issues that would otherwise arise from an hypothecated tax on artist right-holders. Fully compulsory collection would change the payment of the collection *fee-for-service* by the artist into a mandated, automatic 'duty' imposed upon the artist to support the costs of management of the scheme.

Agencies of any sort (for example, real estate, artist representatives or copyright collection agencies) have a contractual arrangement with the person who receives the payment that their services affect. Agents are paid by the person who receives payment, not by the person who makes the payment. Viscopy, which is a very poor service provider and has developed a keen interest in compulsion, will attempt to argue that its services are not paid for by its artists' clients. Viscopy will attempt to fudge the simple truth that it is a provider of services to artists, not to those who make the royalty payments.

Clause 22 is a more cost-effective way of dealing with the sort of problems that have led to the need for, and the increased costs involved in, the setting up of what are now three collecting societies in the UK. In the UK, whilst collection of the resale royalty is automatic, there is no monopoly over the service of collection. A 'who's who' of Britain's living artists led by Lucien Freud - the 'cash cows' for the collecting society - were sufficiently unhappy with the costs of collection (25%) and the authoritarian style of management of the scheme under DACs (at the time under the direction of Joanna Cave), that they left and formed their own society in partnership with Bridgeman House: the Artists Collecting Society. It forced a reduction in the collection fee from 25% to 15%. The third agency is fairly mysterious; it has a paid up £1 shareholder, a post office box and an email address. In the UK, it is quite clear that there will soon be many agencies. The Australian alternative of a sole collection agency combined with a non-fully compulsory participation is a better design.

Many UK artists were fundamentally opposed to the concept of resale royalties, however, harmonisation with European laws over-rode both their opposition and the strong opposition of the British New Labour government to the scheme. Australia is *not* a member of the EU.

I accept that the committee is principally concerned with implementation issues; however there is a major flaw with resale royalties, from the point of view of the right-holder, that needs to be stated. A royalty on the *resale* of art is definitely *not* an *incentive* for new art sales. Any sort of

resale royalty will to some degree negatively affect *net* demand in the primary market. I believe that Access Economics, in its 2004 modelling of a fully retrospective scheme and it more recent modelling of the proposed scheme has seriously underestimated the costs of a resale royalty to all artists.

Some important facts about the incomes of exhibiting artists need to be emphasized:

- Artworks when first exhibited for sale are not cheap. They typically range in price from $2,000 to $50,000, or more.
- For obvious commercial reasons, artists cannot publicly drop their asking prices below what they were in the past.
- Most artists have more works available for sale than they have buyers; **a lost buyer is lost income**.
- Most artists derive their income from the sale of typically 20 works per year.

When I, like most artists, sell a work, I retain 60% of the sale price and pay the remainder to the costs involved in the marketing and selling of the work. For each $10 of a new sale, I earn $6 in income. Under an ARR scheme, if a work of mine was resold, I would collect 5% of the resale price (less the collection fee) as a royalty. Thus for each $10 of resale, I would earn less than 50 cents in income. This disparity – 60% *net* earnings on a new sale and 5% *gross* earnings on a resale – is important in understanding the potential of ARR to *reduce* living artists' incomes. If only a molehill of buyers of new works were to get cold feet now about the impact of a royalty on the resale price of their investments, then the artist will need, in the future, a mountain of resales to recoup that initial loss.

For example, if just one sale of $10,000 was to fall through because of a buyer getting cold feet, then the artist has lost $6,000 in the hand. This lost $6,000 is equivalent to the resale royalty payable (at 5%) upon more than $120,000 worth of future resales. If an artist were to lose just three sales of $10,000 in the first 30 years of their creative life, he or she would need the royalties payable upon future resales of more than $360,000 to just recoup those three lost primary market sales. My major works sell for between $50 - $88,000. Buyers for works of this scale and price are rare. If the imposition of this resale royalty scheme was to result in the loss of just one major sale of $88,000, then I would need in excess of $1,000,000 of future resales in order to recoup the net $52,800 of lost income that this one lost sale represented. I hope you would agree that these are very unattractive odds. In the first twenty or so years of an artist's career, $6,000 *now* can make all the difference between success and defeat.

I feel that there would be reasonable grounds for artists to seek compensation for the lost income that the imposition of this scheme represents. It is true that in the initial years of the scheme in the UK, there was little discernable effect upon the market, however, the UK was experiencing an extreme bubble economy in which people paid little attention to the long term verities of investment and were willing to gamble in just about anything. Those days are over and most serious art collectors are actually cautious and careful buyers.

To prevent the scheme from being an anti-innovation policy, the government could allocate funds for the direct purchase of young artists' artworks and thus offset the loss of buyers for younger and less well-established artists. This could be done by rehabilitating and reinvigorating the *Parliament House Art Collection* and perhaps directing investment to *Artbank,* a statutory body,

with a proven and respected track record. Direct purchase from young artists would also be a much more effective way of injecting money directly into the art economy and thus in line with current government stimulus policy.

I have attached a copy of a letter from the British Secretary of State for Innovation, Universities and Skills, The Rt Hon John Denham MP, which outlines the reasons why the British Government is delaying the further extension of the scheme to deceased artists, in response to the difficult economic climate and the effect this has had on the art market.
The difficult economic times ahead, and the poor argument for a **compulsory**, mandated resale royalty scheme, make a very strong case for delaying of the implementation of such a scheme for several years until the economic outlook has improved.

It has been uncritically assumed that an inalienable right of control of usage equals automatic, compulsory collection. However, this is not true. Provided the right of control of usage is inalienable, that is, not permanently waivable, then the right of control of actual usage can remain a matter of individual free choice and thus the scheme can be managed in the same way as any other royalty, by a mixture of individual management and a voluntary collective management.

This would provide the following benefits. The costs would quite low. Artists who perceive it to be harmful or pointless would not participate and therefore require no management, and the government could focus its resources upon a voluntary management scheme aimed principally at the remote indigenous communities.

I ask the committee to consider the inclusion of a sunset clause in the legislation, based upon recommendations undertaken by a triennial review of the scheme by an *independent judicial and policy mechanism*. Resale royalties are a very unknown quantity. It is quite possible that they may prove to be harmful and a major drain on public and private resources for decades to come. Therefore, the inclusion of a independent review mechanism followed by a mechanism to rescind legislation, if deemed necessary, would be prudent.

Further to this written submission, I would like to register my wish to appear before the Standing Committee as a witness.

Yours sincerely,

John R Walker
Artist

1. copy of letter, the Rt. Hon. John Denham MP (UK)