John R Walker

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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

7 February, 2009

Dear Mr Keele

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

Thank you for the chance to speak directly with the committee members and I am pleased that the parliament of Australia is taking an active interest in this issue, whatever the result.

For the sake of brevity, I did not read my full statement to the committee. I have attached the prepared statement. There were some important points in it that I left out and I am aware that at times it might have been difficult to hear me.

I believe that, if the linkage between 'inalienable' and 'compulsory collection' can be severed, and thus the payment of collection fees in support of the scheme ceases to be compulsory, then the way is open fora scheme aimed at community benefit, without bringing up the issues that Rupert Myer raised about hypothecated tax.

There is an inherent paradox about the scheme which has been present from its beginning, and is somewhat similar to Zeno's famous paradox about the Cretan.

On the one hand:

- If it was to be a duty levied on all resales, whose costs of administration were paid for by a tax on successful artists' income, the resulting money could be used for community purposes. But obviously this would make it a tax, and being an additional sales tax to GST, would surely be unacceptable.

On the other hand:

- If it is a pure royalty, then it will be like the parable of the talents: to those who have many, much will be given; to those who have little, it will all be taken away. There is simply no reason or necessity to make artists participation in such a scheme, aimed at rewarding the successful artist, compulsory.

This paradox, an inherent self-contradiction, means that the *concept*of the scheme oscillates between two mutually irreconcilable final states. And it explains why Mr Garrett's current proposal is being opposed from two opposite directions. In one case, a pure royalty would not deliver "an appropriate level of income for the collection society" and would not generate funds for community purposes.

In the other case, a pure royalty, will reward those artists most favoured by the market and burden the arts community with costs, to no obvious benefit or reason.

A possible solution to this paradox

A royalty right is actually two, quite separate terms. The first word,'royalty',describes a payment; the second term,'right', describes a right of control belonging to a particular individual. If the word 'inalienable' is attached to the word 'royalty' it reverts to its evolutionary origins in a duty owed to the crown (a 'divine' right). On the other hand, if 'inalienable' is attached to the word 'right', it remains an individual right, and thus the obstacle to an openly, community benefit purpose is removed. The obstacle, as I perceive it, is that CARR hasbolted the royalty to the right: something that has never happened to any other royalty in Australia.

If 'inalienable' is attached to 'right' rather than 'royalty', the path is cleared to the middle way between extreme individualism and authoritarian compulsion. Dare I suggest that *free* mutual association is a very Australian way of dealing with looking after each other.

In normal royalty rights, it is the right of the control of usage that can be transferred or sold. Therefore in an inalienable right, it is the right of control of usage that needs to be made inalienable. To extinguish the individual right of choice of control is to make it literally an alienated right.

The reason why this whole business is so circular is because the term 'inalienable' could be attached to either the 'royalty' or the 'right'. A decision as to which term inalienable attaches to, is, I think, necessary for this to progress.

Regarding the issue of compensation, personally, I have no desire to collect a retrospective right. Therefore, allowing artists like me the freedom to NOT retrospectively collect a royalty would reduce the unknown quality of any compensation cost. I cannot speak for anyone other than myself, however, it might be worth asking of the few hundred most successful artists in Australia as to their willingness to forego any retrospective right.

You don't get to be any good as an artist unless you have a lot of imagination, which is another word for compassion.

According to the ACGA figures, the primary market is worth about $90million per annum and I think this is an under-estimation. A retrospective royalty would generate about $6-8million per annum. I would hope that protecting the primary market which is worth more than ten times what a potential royalty might generate will take primary precedence in your deliberations.

Lastly, I have expected that at some point some threat will be made by CARR to 'commit suicide', if they are not given what they want. I suggest that given the current catastrophic decline in Britain and USA, it should not be too hard to find a few well qualified professionals to manage the implementation of the scheme. Employment in Australia will be a lot better than unemployment in London.

Yours sincerely

John R Walker

Attachment: Standing Committee Statement

Anne Sanders

Committee Secretary
Artists Resale Royalty Bill Enquiry
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7 February, 2009

Dear Mr Keele

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

I am very grateful for the opportunity to present to, answer questions from the Committee. Their informed approach and collegiality was deeply appreciated.

After the meeting, I overheard Joanna Cave CEO Viscopy in conversation with Phoebe Dunn, CEO ACGA, in which Ms Cave claimed that DACS had never charged 25% commission. I note that in giving evidence to the committee, Ms Cave did not contradict Mr Walker's claim regarding DACS being forced to drop its collection fee from 25% to 15% as a direct result of the competition posed by the establishment of the ACS. I would like to bring to the committee's attention (as this related to a clarification question put by Chair, Ms George to Phoebe Dunn about actual international administration commission percentages) the following information.

From "A resale royalty right for visual artists" Options for a possible application to New Zealand, Discussion Paper April 2007, p.36:

> "The Design and Artists Copyright Society (DACS) was first to collect royalties in Britain but, after controversy over its commission rates, the Artists' Collecting Society [ACS] was set up to collect royalties also. As a result, DAC's commission rates dropped from 25% to 15% on royalties collected domestically and 10% to 0% on royalties collected from countries with reciprocating schemes. " [1]

The Artists Colleting Society itself is on record about the high cost of DACS administrative fees:

> "Before ACS was formed, DACS was the only society that could represent artists, and their commission rate on each resale could have been as high as 25 per cent.... ARR is designed to benefit living artists and as much money as possible should go directly to them. We established ACS in June 2006 to ensure that collecting societies only retain as much money as is necessary to cover basic administrative costs. Only artists should profit from this legislation. Artists now have an alternative to DACS (which has since declared *it will match the commission rate of any other organisation* 'until the true costs are known'). It is now up to artists to decide which collecting society - ACS or DACS - best represents their interests and opinions."

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[1] The quote was footnoted as follows: " *The difference between national and international collection costs is due to DAC's sister societies charging their own administration fees before forwarding proceeds to Britain.*"

The above quote is taken from:
http://www.targetwire.com/targetwire/2007/09/11/po214/po214_uk.html

The artist P J Cook is quoted on the website as saying:

> "It's right that there should not be monopoly in collecting royalties. I'm pleased about the reduction in fees to 15% and like the idea that if, at the end of the year ACS makes a profit, it will be shared between the artists."

On its website, DACS states that it aims to pay its members within 30 days of receipt of monies. Whether this was the case during the inception of the resale royalty in the UK in February 2006 and until the ACS was established in June 2006, I cannot confirm. However, what I do note is that in DAC's Payback scheme for Statutory Licences, DACS states that it takes a commission of "24% on the royalties we collect on your behalf to cover our running costs". I think it would be a fair assumption that this is more likely to be their favoured commission rate rather than the 15% charged by ACS, and which they were forced to match.

In 2004, Viscopy noted that its "current general administration fee of 25% is not unreasonable in view of the international cost comparisons from fully mature societies".

International Commission charges:

Viscopy in its 2004 submission to DCITA's Working Papers on Resale Royalty, Section 5.5 Economic Efficiencies, sub-section Transaction costs:

> "Recent evidence from successful international societies...indicate that the actual cost of administering droit de suite for a mature society ranges between 20% down to 9%, depending on the type of legislation and the sectors involved and collection arrangements... *Viscopy's current general administration fee of 25% is not unreasonable in view of the international cost comparisons from fully mature societies.*"

Although Viscopy does not cite its sources for its estimation of the range of international commission fees, I would direct the Committee to the a report by Clare McAndrew and Lorna Dallas-Conte, "Implementing Droit de Suite (artists' resale royalty) in England" which presents assessments of a number of European schemes. The table on page 11 gives a quick summary mostly ranging from 15-25%. The German model requires some comment. Although noted as 10% commission fee, for living artist a further 10% is taken for a social work fund for struggling, emerging artists. Thus living German artists face a 20% fee.

The sheer diversity of each scheme is interesting. Ms Cave's claims that the proposed Australian legislation (as it currently stands) would be unique and that this uniqueness would preclude reciprocity arrangements with the European scheme, needs to viewed with some caution.

Not-for-profit versus For-profit

Ms Cave also when questioned by the committee, described the Artists Collecting Society (ACS) as a dealer-driven, for-profit company. I draw the committee's attention to the ACS website:

> "Before legislating to implement the European Union Directive on Artist's Resale Right, the British Government carried out an extensive public consultation. In its response to this, the British Art Market Federation (BAMF) expressed concern that compulsory collective management through a sole collecting agency would "restrict the freedom of individual artists to make their own, possibly cheaper, arrangements, to collect the levy.
>
> ACS was formed as a not for profit 'Community Interest Company' and registered as such with Companies House in June 2006. We chose to form ACS as a 'Community Interest Company' to provide member artists with an added factor of confidence in their knowledge

that Companies House will keep a watchful eye over our collecting society to ensure that we continue to operate in the best interests of our member artists."

The ACS is a not-for-profit collecting society, no different to Viscopy (at least, since it changed from being a taxable, company involved in the buying of rights from artists and their on-sale at a profit, to a tax-exempt, commission based agency since 1 July 2004).[2]

I look forward to the Committee's report to the House of Representatives.

Yours truly

Anne Sanders, M.A (ANU)

Doctoral candidate in Art History, ANU

Attachment: McAndrew and Dallas-Conte

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[2] Viscopy Annual Report 2003-04, Financial Overview, p.15: "In order to satisfy the ATO and Treasury requirements for income tax exemptions, Viscopy will change the way in which it accounts for royalties from 1 July 2004. Until now, Viscopy has sold rights that it has purchased from rights owners, with the difference in the buying and selling prices our gross profit. From I July, the owners of those rights will adopt the role of seller with Viscopy recouping its costs of administering those rights from a commission on those sales."