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9 February 2009

Mr Peter Keele
Committee Secretary
Standing Committee on Climate Change, Water, Environment and the Arts
House of Representatives
Parliament House
Canberra ACT 2600

Dear Mr Keele

**Resale Royalty Right for Visual Artists Bill 2008
House of Representatives Committee Inquiry
Supplementary Submission**

The Australian Commercial Galleries Association (ACGA) presents the attached supplementary submission in relation to the Australian Government's proposed resale royalty scheme.

As noted in our previous submission, and stated during hearings conducted by the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts (the Committee) on 6 February 2009 in Canberra, the ACGA is concerned about the practical implications of the scheme as proposed in the Bill recently introduced to Parliament.

The ACGA makes this supplementary submission to clarify comments made during the hearings and to emphasise the concerns we have raised about the Bill. We are particularly concerned to ensure that the Committee understands the delineation between the primary and secondary markets in Australia, and the impact that the scheme as currently drafted could have on the primary market. The ACGA is concerned to ensure the primary market, which is fundamental for the livelihood of the vast majority of Australian artists who never reach the secondary market, is not dampened.

We emphasise that we are interested in working with the Australian Government in furthering the interests of living Australian artists and the Australian art market.

Yours sincerely

Beverly Knight
National President
Australian Commercial Galleries Association

Phoebe Dunn
Chief Executive Officer

RESALE ROYALTY RIGHT FOR VISUAL ARTISTS BILL 2008

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON CLIMATE CHANGE, WATER, ENVIRONMENT AND THE ARTS

AUSTRALIAN COMMERCIAL GALLERIES ASSOCIATION SUPPLEMENTARY SUBMISSION 9 FEBRUARY 2009

Economic Climate

The ACGA is very concerned about the potentially devastating economic impact of the proposed legislation on the Australian art market in the current economic climate. We are strongly of the view that now is not the time to introduce legislation that could have a dampening effect on primary market sales, and as a consequence on the livelihood of artists.

We believe that the Government should be focusing on policy that will assist to support the primary market through extremely difficult economic times and ultimately stimulate its growth. We urge the Government to reconsider the proposed scheme and withdraw the Bill, or at the very least delay its introduction until the Australian art market can support it.

Primary Market

The ACGA is concerned to ensure that the House of Representatives Standing Committee on Climate Change, Water, Environment and the Art (the **Committee**) understands the distinction between the primary and secondary art markets in Australia. We are strongly of the view that the current Bill does not adequately delineate between the primary and secondary markets and that this could have a devastating impact on the primary market.

As previously stated the primary market is fundamental for the livelihood of the majority of Australian artists who never reach the secondary market. Implementing a RRS could depress primary market sales and effectively negate the benefits for those artists that do achieve success on the secondary market.

Clarifying the primary market for all artists (Indigenous and non – Indigenous) is vital.

The ACGA is particularly keen to ensure that implementation of a RRS in Australia does not have an inflationary or dampening impact on the primary market, or pose an additional administrative or financial burden on commercial galleries operating within the primary market, particularly in the current global economic crisis. In that regard we note that the vast majority of commercial galleries are small businesses operating in a limited

and volatile market, which is highly susceptible to additional administrative and financial imposts.

We also reject the suggestion that an RRS will help to stimulate production, and ultimately have a flow on effect to secondary market resale payments. Quality, not quantity generates sales and creates a market for an artist. Put another way, the prospect of resale royalty payments in the future is unlikely to improve the quality of art being produced. Art is not a commodity that is produced with the intention of capitalising on secondary market resale payments. The majority of Australian artists would be horrified at the suggestion that a royalty scheme will enhance their creative output or capacity.

Indigenous Australian Art Market

As previously noted, the ACGA is very concerned about the potential negative impact of the RRS on the Indigenous Australian art market arising out of the practical application of the Bill.

The proposed operation of the RRS, while well intentioned, may have serious business implications for art centres and their artists as well as for commercial galleries who either re-sell artworks or secure exhibitions by purchasing works upfront, or who otherwise support the Indigenous art industry, for example by paying stipends to artists. In that context we believe the details of the legislation need to be carefully considered to ensure the stability of the Indigenous Australian commercial art market, especially in terms of defining when the primary 'point of sale' occurs.

As noted in our previous submission and during the 6 February 2009 hearing, the art centre model operates differently to other primary market sales. Many but not all art centres have consignment relationships with commercial galleries, or operate on a mixture of consignment and up front sales. Following are some examples of the types of transactions conducted by art centres and commercial galleries:

- The art centre purchases everything an artists presents to the art centre.
- The art centre pays the artists once the item is paid for by a gallery or dealer or sold by the arts centre.
- The art centre requires up front payment for some works prior to exhibition, and pays their artists up front (so the artist get immediate income and the art centre can put the best works aside for exhibition).
- The commercial gallery pays a stipend and/or other incentives to artists to assist an artist to produce a body of work for exhibition. The stipend is usually accounted for as a stock item prior to an exhibition. This can occur for many reasons and allows the commercial gallery to help the art centre and artist(s) to finance exhibitions in circumstances where they would not otherwise be able to afford to do so.

It is clear from the above that the tripartite relationship between artists, art centres and commercial galleries makes it difficult to distinguish between primary and secondary market sales.

There are many well-intentioned social and economic reasons why galleries (and art centres) purchase some works upfront, particularly for lesser known artists. Purchasing works prior to exhibitions transfers the risk of sale to the commercial gallery and provides important backing for art centres and artists. In this context it should also be noted that sales by art centres are not subject to the GST. In effect this means that commercial galleries will be further disadvantaged by the impost of an additional 5% on sales, which, along with the GST will not be payable by the art centre.

The capacity for commercial galleries to continue to assist the Indigenous Australian art industry in this fashion will be affected if the legislation is passed, and accordingly, the important exposure offered for Indigenous artists through commercial galleries may be at stake. Commercial gallery representation and support is vital for growing the market for Indigenous artists and non-Indigenous artists alike, irrespective of the support given by art centres.

We are also concerned about the potential for pressure to be exerted on Indigenous artists to bequeath resale royalty rights, and believe this needs to be given careful consideration in the Bill. Such pressure can be exerted from a variety of sources, including family and extended family and unethical dealers such as carpetbaggers.

As noted in the Arts Law Centre of Australia submission to the Committee, efforts are being made to ensure Indigenous artists have wills, and the Arts Law Centre of Australia has drafted over 300 wills.¹ These programmes are vital, but this is just the tip of the iceberg, and it will be important to ensure that wills are in place for all artists. It will also be important to ensure that wills remain current and that in preparing such wills artists are not subject to the pressures noted above.

Problematic art works

We are also concerned to ensure that the operation of the RRS does not exacerbate existing issues relating to problematic art works (such as fakes and forgeries) and provenance arising within both the Indigenous and non Indigenous art markets. Rather than increasing the transparency of the art market, a key point made by the Minister in his Second Reading Speech, we are concerned that this may inadvertently assist unscrupulous practices.

For example we are concerned about the operation of the legislation in the context of problematic art works, where the 'identified' artist(s) did not actually produce the work and use various means to create false provenance. We are concerned that the legislation could incentivise such practices, through royalty payments and other means.

¹ Arts Law Centre of Australia, 2009: Arts Law Centre of Australia Submission on the Resale Royalty Right for Visual Artists Bill 2008, p .9.

In the long-term beneficiaries of estates would not be in a position to verify or authenticate art works or establish provenance. Therefore payment of a resale royalty for a problematic work could act as an authentication process for such work.

Administration fees

We remain concerned about the low level of the threshold, and the potentially high administration fees that may be charged by the Collecting Agency.

The Committee requested clarification of our comments in our earlier submission relating to administrative costs as follows:

*'The ACGA notes that international experience demonstrates that the costs of administering a resale royalty arrangement are very high, and that administration fees of 20 – 25 % are usual.'*²

A report conducted by the Arts Council of England prior to introduction of a resale right in England analysed the key features of resale royalty schemes in six countries: France, Germany; Belgium; Finland; Denmark; and California. In relation to administration fees the report notes the following³:

- France 20%
- Germany 10% administration fee, plus:
 - Further deductions of 20% of net amount for living artists, comprised of 10% for 'Sozialwerk scheme' and 10% for 'Kulturwerk scheme' (ie artists get 80% of net amount).
 - Further deduction of 10% for Kulturwerk scheme for deceased artists (so the estate gets 90% of net amount)⁴
- Belgium 15%
- Finland 25%
- Denmark Originally between 30-45% before dropping to 15%⁵.

A discussion paper prepared by the Department of Communication Information Technology and the Arts in 2004 noted that European experience suggested that the cost of administering a scheme in Australia is likely to be in the range of 10 – 40% of the royalty.⁶ DCITA notes in this discussion paper that Viscopy has estimated that the administration costs for an Australian scheme would be around 20% or less.⁷

² ACGA Submission, 11 January 2009, p. 5.

³ McAndrew, C and Dallas-Conte, L (2002), 'Implementing Droit de Suite (artists' resale right) in England', Arts Council of England 2002, p 11.

⁴ Ibid, p. 30.

⁵ Ibid, p. 39.

⁶ DCITA, 2004; 'Proposed Resale Royalty Arrangement: Discussion Paper', Department of Communication Information Technology and the Arts, Canberra, July 2004, p. 22.

⁷ Ibid, pp. 22 -23.

In our earlier submission we noted that we understood that the competitive environment in the UK (having more than one collecting society) resulted in fees payable by the artist to the collecting society being significantly reduced (from 25% to 15%).⁸ We now understand that this change occurred prior to introduction as a result of controversy over commission rates of 25% initially proposed by the Design and Artists Copyright Society:

*"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..."*⁹

Education

We reiterate our position that if a RRS is to be introduced to Australia, there should be adequate funding for training and education of the market. This includes development of and provision to the market (at no cost) documentation and products that assist with implementation of the RRS for business. We consider it particularly important that the Government makes available adequate funding to assist the sector to be 'RRS ready', for example by ensuring artists have up to date wills.

The ACGA notes that the Bill makes no reference to an educative role for the Collecting Society.

We hope that the above information assists the Committee in its consideration of the Bill and would be happy to answer any further queries the Committee might have.

Beverly Knight
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Australian Commercial Galleries Association
9 February 2009

Phoebe Dunn
Chief Executive Officer

⁸ ACGA Submission, 11 January 2009, p.6.

⁹ New Zealand Ministry for Culture and Heritage, 2007: 'A resale royalty right for visual artists, Options for a possible application to New Zealand, Discussion Paper April 2007, p.36. See also Artists' Collecting Society (ARC) Press Release, 11 September 2007 'Artists' Collecting Society (ACS) celebrates its first year and tracks over £12 million of sales for member artists' at http://www.targetwire.com/targetwire/2007/09/11/po214/po214_uk.html