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14 January 2009

Mr Peter Keele
Committee Secretary
Standing Committee on Climate Change, Water, Environment and the Arts
PO Box 6021
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Parliament House
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AUSTRALIA

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SUBMISSION RE: PROPOSED RESALE ROYALTY RIGHT FOR VISUAL ARTISTS BILL 2008

Dear Sir,

The introduction of this Bill would not be in the interests of the Australian community.

I urge the Committee to recommend, at the very least, that any decision to implement an Australian Resale Royalty be delayed until or unless a model can be created which could resolve the exhaustive list of complications and inequities which are inevitable in the execution of this Bill.

The whole premise of the Resale Royalty and the structure of the proposed Bill, while on the surface sounds supportive of the art community, will be enormously damaging to our market and to our artists, will be a burden on our legal system and is fundamentally un-Australian.

To follow are a series of arguments as to why this Bill would be unworkable and that if Australia was to introduce a Resale Royalty we would be disadvantaged both domestically and internationally. The main proposition is that even though models exist in other countries, our own situation is not comparable with these markets. Especially within a global economic downturn the introduction of this Bill at this time would be devastating for the Australian art market.

Background:

The introduction of the Resale Royalty in the UK in 2006 was fought "tooth and nail" by the Blair Labor government and its opposition, but due to the requirement of the E.U. to "harmonise" the UK had an obligation to fall into line. It did so, however, with a number of conditions and has recently announced to further delay the inclusion of deceased artists until *at least* 2012, knowing the damage that including artists' estates would have on their entire market and commercial systems.

It is extremely relevant that the Irish government has also recently announced its intention to delay the inclusion of deceased artists within their model until at least 2012.

Even though the French were the initiators of the Resale Royalty and are held up by the supporters of an Australian Resale Royalty as a model for which the world should follow, it is extremely powerful evidence against the introduction of such a scheme in Australia that the French have recently changed their tune. In order to combat the reduction in their market, the French have not only reduced their rate of "droite de suite" to below 3% (and capped at Euro 12,500) but it has been reported that the French government are now taking steps to repeal their legislation to exclude artist's estates from their model after 2012.[1]

The UK implementation of the Resale Royalty has drawn much criticism toward its government: Supporters of the scheme are unhappy with its structure while even artists who have the most to gain have distanced themselves from the control of the collecting agencies, and of course dealers and auction houses have been greatly disadvantaged. Now the world economy is in a downturn, the art market will surely suffer and this burden will be the destruction of many in the art trade.

Much of the information and statistical data supplied by the supporters of the Resale Royalty in Australia is biased, sourced from reports commissioned by the collecting agencies who aim to derive income from it to strengthen their own position, and relates to information sourced in the British art market (an enormous market in relation to the Australian art market) during the 2006-2007

(boom) period. The supporters also claim to have the further support of 100,000 artists, which they clearly do not. As of today's date, 14 Jan 2009, the petition on the website of the "Coalition for an Australian Resale Royalty" (CARR) has 1300 names.[2] i.e. a little more than 1% of the artists they claim to 'represent', although there is no requirement that the names included in the petition be artists, nor indeed that they even be Australian citizens or residents and should therefore be ignored.

Information and statistics gathered from another report, *The Impact of Artist Resale Rights on the Art Market in the United Kingdom*, written in February 2008 by Toby Froschauer and commissioned by the UK Antiques Trade Gazette[3], sourced information from major and minor auction houses, dealers and artists in London and throughout the UK, strongly refutes the claim that the Resale Royalty has been positive, productive or beneficial to any party including the collecting agencies themselves.

Indeed, this report suggests that the introduction of the Resale Royalty has been detrimental to the emerging artists which it aims to benefit and especially the dealers in low value works to whom it has made dealing in such items unviable.

We now have the valuable opportunity to collate factual data over the next full market cycle by studying the UK, Irish and European experience. To embark on our own implementation of a Resale Royalty Bill without taking full advantage of this period of observation would be unnecessarily hasty.

The Art Market Reality:

The supporters of the Resale Royalty all seem to accept the basic, fundamental flaw of this proposed Bill, and of any other model that exists around the world; that the overwhelming benefit of such a Resale Royalty will be to less than a dozen, already wealthy, individuals. The supporters make the point, "why shouldn't those ten artists benefit?" The answer is that in accepting this, the supporters misrepresent the purpose of the Resale Royalty scheme, to provide benefit to "struggling artists", when in fact it is detrimental to these artists and to those who support and trade in their work.

Another unchallenged fact of the nature of the art market is that the overwhelming majority of new works of art depreciate rather than appreciate. Figures indicating a regular annual percentage growth in the value of Australian art are taken from a small selection of well known, successful artists, who are regularly seen in the secondary auction market. Art collectors generally buy with the hope that the work will appreciate, but most will experience more individual commercial losses than gains.

Art collectors generally purchase work with this knowledge and with the understanding that they are receiving intangible value from the works they buy. They also do so to give support to artists' primary and secondary markets. In the rare event that the sale of a work of art provides a commercial gain (taking into account the costs of housing, maintaining, insuring and selling the item) it is very common for that gain to be re-invested in the art market.

Collectors buy work that they admire. In the situation that a work increases in value then it shows a confidence in the work of the artist, which attracts more collectors. The artist directly benefits by public auction records of higher sale prices as it enables them to increase their asking prices at their primary galleries.

The supporters of the Resale Royalty Bill will inevitably refer to the extraordinary result of a very small number of (mainly) Aboriginal artists, as these sales induce the most emotional response. The sale of Johnny Warangkula's *Water Dreaming at Kalipinypa 1972* is the most quoted as selling for approximately $200 in 1972 and more than $400,000 in the year 2000. This was, and remains, one of the greatest prices ever achieved for a work by an Aboriginal artist and its success caused an explosion of activity in the market for the works of many, many Aboriginal artists. The fact that $200 was a respectable amount of money in 1972 (a John Brack painting could be purchased at the same time for less), and that the work actually changed hands at least once (in 1997 it went to auction with a reserve of $50,000) prior to its extraordinary result in 2000 is generally ignored.

The lobbyists for the Resale Royalty describe this event as one of the great travesties of our time, when in fact it was one of the most positive and constructive moments in the Aboriginal art market, giving enormous exposure to the quality of Aboriginal art and enormous new confidence to a much wider audience.

Since then the Aboriginal art market has enjoyed an extraordinary boom to the benefit of artists, their communities and their dealers. Prices for new Aboriginal art have skyrocketed across the board and many new 'stars' have been born. This market is now unsustainable and the bubble is set to burst. Values for many thousands of works of art have now fallen substantially and the collectors who originally purchased these works will suffer the capital losses.

<u>The Argument for Reciprocity:</u>

The supporters make the point that Australian artists are disadvantaged due to the introduction of the scheme in the UK. They argue that, since Australia does not have a Resale Royalty, when an Australian artist's work is resold in Europe or the UK they currently do not receive royalties, so we should align ourselves.

However, as proposed, the Australian model would be the most expensive in the world (British and European structures have much lower percentage rates and the royalty is capped at the equivalent of €12,500). This would mean that less valuable Australian artists who sold in Europe would receive a lesser amount in royalties than in Australia. It would also mean that those collectors wishing to sell more valuable work (of $500,000 or greater) would be better off selling it overseas in the USA where there is no royalty payable, or in the UK / Europe where there is a cap.

It also seems that if there was British art sold in Australia, then the amount that Australians would have to pay in royalties and sent overseas to British artists would be a greater amount than if an English person purchased the same work in England, and therefore also a greater amount than if an English person purchased an Australian work in England.

This is not fair, and is not in the interests of the Australian community.

Australia is in the fortunate position of being able to reject the Bill on the grounds that its costs will greatly outweigh the benefits. The UK tried, but was unable to reject it. The information sheet published by Department of the Environment, Water, Heritage and the Arts (DEWHA), "*Australia's new Resale Royalty Scheme: How will it work*"[4], lists 49 countries in which a Resale Royalty exists, (including for example Bolivia, Burkina Faso, Congo, Holy See, Mongolia, Mali and Senegal). However, of those countries only in nine would there be any real chance that an Australian work of art may be publically sold and will therefore have little or no benefit to Australian artists.

Evidence of the massive confusion which exists about the state of international reciprocity is seen by the difference in the number of countries which currently have a Resale Royalty in place quoted by DEWHA as 49 and the number quoted by Viscopy in their report of November 2008 *"Implications of the Australian Government's Proposed Resale Royalty Scheme"*[5], which quotes 33 countries.

<u>The Argument for Acknowledging Cultural Value:</u>

The supporters of the Resale Royalty make the point that by introducing this Bill we are acknowledging the value and contribution of Australian visual artists to the culture of our country. This seems to suggest that we currently do not, when millions of dollars of government funding, private philanthropy, gifts and bequests to our cultural institutions in support of our visual culture currently takes place.

Importantly, the most tangible way that a nation can show support for its visual artists is for there to be a vibrant art market in which the artists receive both financial and moral support as people actually purchase their work. Art Collectors are the life-blood of a vibrant culture, and we should be focusing our attention to building confidence in the market and rewarding those who participate in the activity of buying art. The Resale Royalty Bill will discourage some from participating in the art market at all.

Already there are collectors who avoid buying works by artists represented by Viscopy because they can choose to support other artists who do not charge a copyright fee for illustration of their work in auction catalogues. This is particularly the case for lower valued or emerging artists where the copyright fees payable can be 10% of the value of the work of art.[6]

The Argument for the Protection of Aboriginal Artists:

The reality of the Aboriginal art market is that there is a wide range of work, of varying quality, sold in various contexts and markets. With government support, regional Art Centres were developed in an attempt to assist and organise the transactions of each community and develop ties between the communities, public institutions and commercial dealers. If effective support and assistance to Aboriginal artists is one of the main aims of this legislation, then support of these Aboriginal community art centres would be a far more effective use of funds.

Aboriginal artists, like non-Aboriginal artists, can choose to participate in the commercial systems operating and/or they can choose to sell their works directly to dealers or the public (in which case this may be a cash payment and no income tax is paid). The fact that some artists participate in the cash economy and then may be informed of their work selling for amounts in excess of their payment is not something that is limited to Aboriginal artists. However, in each and every case the individuals choose to do so.

This practise may also be damaging to the commercial galleries who have supported the artist and attempted to maintain market confidence by providing clear attribution and authentication and by providing sound provenance and exhibition history. But again, it is the choice of the individual artist to make, and the choice of the gallery or dealer as to whether they wish to continue to represent the artist.

The Argument that Any Additional Income Received by Artists is Beneficial:

An unchallenged fact is that the vast majority of eligible artists will receive very small payments, if any at all. For an artist to recoup the income lost from one person deciding against the purchase a $10,000 work of art from the artist's gallery, they will need to receive royalty payments from the equivalent auction sales of $120,000. (i.e. the artist's net return from a gallery sale of $10,000 after 40% commission would be $6,000, which is 5% of $120,000).

The whole premise that an artist will benefit from the resale of their work depends on the fact that their work is re-offered and re-sold. The reason many struggling artists will not benefit from the Resale Royalty is that their work is rarely re-sold. The reason that successful artists will benefit greatly is that their work *does* re-sell, and it is for this reason that there is confidence in their market and they can command higher prices from their primary point of sale.

Those vying for the position of the Collecting Agency do not accept that the economic situation of artists may be compromised by the introduction of the Resale Royalty. Since the Collecting Agency will be taking their commission/administration fee from a large number payments, they are in a much more sound position to benefit from the scheme, especially as numerous payments will be unable to be made to artists or heirs who are unable to be located and this cash will be retained.

The Argument that the Art Market will "Easily Absorb the Cost, as it has the Buyer's Premium":

Currently the buyer's premium at major auction houses is 20%. In perspective, the commission an art dealer charges an artist is in most cases between 33% and 50%. A secondary market dealer, who invests capital in stock (supporting artists' markets) and outlays funds to promote exhibitions, may put anything from a 10% to 100% margin on their stock.

The auction house buyer's premium is one of the only declared commissions in the market place and is, in fact, at the lower end of the transaction-cost range in the art market. Auction houses employ many highly skilled, specialist staff; produce high-cost catalogues which become valuable research tools for collectors, curators and historians; and have massive overheads. Auction houses have a vested interest in presenting the work of artists in its best possible light so to attract the most interest and reach the highest market price.

Total auction turnover in the year 2006 was $104 million. In 2007, when most of the statistical data was gathered by the supporters of the Resale Royalty, the auction turnover experienced an abnormally high turnover, in line with the international boom, of $175 million. However, in 2008 at the first sign of economic uncertainty, the auction turnover dropped to $114 million. "Total value art sold by auction in Australia decreased by $60.9 million, a fall of almost 35%. In future years, the total sales achieved in 2007 may be viewed as a market aberration."[7] The effect of the global economic crisis on the world market, and on the viability and profitability of auction houses is already being felt. Sotheby's internationally reported it required borrowings of US$250 million in late 2008 and reported fourth quarter losses of US$46 million, and a 67% decline in net income over the same period last year.[8]

The Australian art auction market took its first major casualty last year with the closure of Joel Fine Art, and further casualties seem imminent.

The fact is that auction houses are not bulging with money: if the buyer's premium was so excessive then they would not be in debt or go out of business. Auction houses negotiate hard to attract the best stock and participate in a fast paced, highly pressurised and high risk environment. They are keenly aware that adding to the complexity and cost of a transaction will be a major deterrent to many buyers and sellers, as already the market must deal with a number of inconsistent added costs such as GST and copyright on top of the buyer's premium.

Adding to the cost and complexity of auction house transactions will reduce turnover, reduce the exposure of artists to the wider market and direct the transaction of high value work towards private, hidden deals. This will be detrimental to the viability of auction houses and detrimental to artists who greatly benefit from the exposure that auction sales provide.

The Issue with "Copyright":

There are many and varied legal issues relating to the possible introduction of the Resale Royalty Bill. Although the premise by the government was to 'link' the Royalty to items defined in the Copyright Act, the proposed Bill already makes alterations and exceptions which will cause massive confusion, conflict and costly litigation.

In both cases, i.e. the Copyright Act and the Resale Royalty Bill, not only are the definitions of "artistic works", or those items eligible for copyright or a Resale Royalty open to much challenge, but by failing to make provision for the "Fair Dealing" by owners of original works of art wishing to sell the original works, it has created a loophole which has enabled Viscopy to become a powerful monopoly costing our public institutions enormously (and therefore tax-payers) and drains the Australian art market of essential funds (and sends them overseas).

In any other area of our community, the owner of an object or item has the right to market that item by illustrating it in media such as online trading posts, brochures, newspapers or magazines.

It is ludicrous to envisage the owner of a Holden car or a hand-made piece of furniture needing copyright permission to illustrate those items in the newspaper. But, in Australia, if you own an original "work of art" you are required to have copyright approval in order to illustrate the item in an attempt to sell the original.

The Free Trade Agreement with the USA:

Australia has signed a "Free Trade Agreement" with the USA. As a result, the timing of our Copyright term was extended from 50 years after the author's death, to 70 years after death, in line with the law in the USA. In the USA, however, there are provisions for "Fair Use" which extend much further than the minimal definition of "Fair Dealing" in Australia.

Australia has already made an agreement with the USA. However, Australians, including our educational, cultural and research institutions as well as our consumers are still disadvantaged that we do not enjoy the same sensible provisions of "Fair Use" than the residents of the USA. If we introduce the Resale Royalty, will the USA follow suit?

Prior to the Free Trade Agreement being introduced, a number of reasoned arguments were submitted to various committees with the aim to balance the rights of copyright holders and users. This has not occurred and we are now contemplating yet another 'alignment' with Europe which will create further imbalance and detriment to Australian's while moving further away from the USA Free Trade Agreement already signed.

Currently, Viscopy charges the owners of works of art a fee (which in many cases is up to 7.5% (+GST) of the value of the work of art) to reproduce it in a catalogue for sale, whether or not the work is ultimately successfully sold.

In effect, with regard to the current copyright fees charged by Viscopy, a virtual Resale Royalty already exists. For example, if a $5,000 work is illustrated full-page in an auction catalogue, the copyright fee is $276(+GST) or 6% of the value of the work of art. CARR is not only lobbying for the introduction of a compulsory, retrospective and blanket "tax" on art sales, but seeks to retain the existing copyright impost, so to effectively double charge art collectors. In such a case, the royalty charges on the sale of an emerging artist's $2,000 work at auction (before commission is charged) could be up to 20% of the total value of the work.

In many cases this "doubling up" would be a large enough deterrent for the vendor to avoid the auction process altogether. The denial of "Fair Use" by owners wishing to sell the original, added to the impost of a Resale Royalty would, in fact, erase much of the lower-value market to the detriment of artists, collectors, dealers and auction houses.

Trade Practices (monopoly status of Collecting Agency):

Already a virtual Monopoly exists in the form of Viscopy, the Copyright Collecting Agency which is positioning itself to be the sole collecting agency of the royalties.

If Viscopy, or any other collecting agency is appointed under the existing proposed Bill, it will transgress, under Section 46 (1) of the Trade Practices Act by:

a) Eliminating or damaging a competitor in that particular market;
b) Preventing entry into that or any other market; or
c) Deterring or preventing competitive conduct in that particular market.

That is, if under the Bill artists are forced to be members of a single collecting agency, they are prevented from enjoying the freedom to manage their own affairs or to select an alternative collecting agency whose terms and conditions may be more attractive to the artist.

Unfortunately, the alternative of having multiple collecting agencies soliciting for members, each providing different information to the art trade and each attempting to collect money on behalf of artists which it does not represent, would be an even greater administrative nightmare.

This also precludes another organisation from offering an alternative for artists.

Currently, Viscopy derives 78.8% of its copyright royalty income from National and State Museums and Galleries, Libraries, Universities and other educational institutions, and of course, Auction Houses. That is, most of Viscopy's income was sourced from charging those who collect art, those who promote art and those who educate about art.[9]

Most of the payments (60.93%) made by Viscopy in the financial year 2007/08 was sent overseas, mainly to Viscopy's international 'partner' DACS (Design and Artists Copyright Society) in the UK.[10]

Viscopy already has enormous power. It is currently demanding an increase in Copyright fees to collectors wishing to sell original works of art at auction, and as a virtual monopoly, it is able to do so without challenge. Viscopy pays no tax, at the time of writing their 2007/08 annual report had $1,800,000 cash in the bank, does not advertise its commission (admin fee) but its annual report suggests it retains over 30% of its revenue. It demands payment from auction houses within seven days and it withholds payment to its members for up to six months.[11]

Artists may currently choose to be represented by Viscopy or not. Artists may also decide whether or not to impose a copyright fee onto collectors of their work at the time of resale: most do not. In the same way that Viscopy currently collects and retains payments on behalf of artists it does not represent (then solicits for their membership), the collecting agency for the Resale Royalty, under the proposed Bill will collect on behalf of artists who may either wish to have an alternative collection mechanism (and therefore alternative cost to the artist), or indeed the agency will be able to collect royalty payments for which it is impossible to locate the beneficiary.

There will be, no doubt, massive problems if the Resale Royalty is ever levied on the resale of deceased artists' work, not limited to the situation where there may be multiple claimants to the payments.

The Inalienable right of artists:

The inalienability of the Resale Royalty is of major concern to some artists and highlights an inequity between those who will supposedly benefit from the Resale Royalty and other 'types' of artists, such as musicians. One of the basic arguments for the Resale Royalty is that it brings visual artists' rights into line with those of authors and musicians. However, in fact, both musicians and authors have the ability to choose the representatives they wish to handle the collection of royalty payments and they are also free to negotiate and sell the 'rights' to their work.

Whether or not this is advantageous or not is debatable: The fact remains that it is inconsistent. There would certainly be enormous ramifications if the government attempted to intervene and legislate that musicians were no longer able to sell their rights to a tune!

Authorship:

Further to the issue of inalienability is the issue of attribution and authorship. Although the Bill seeks to define that the inalienable right of the Resale Royalty is to the author/artist, there are situations where this will involve conflict or errors where authorship is either mistakenly, or fraudulently, attributed to another artist, or where there may be disputes over authorship by multiple collaborators.

One of the possible negative outcomes of the Bill is that some artists may authenticate works as their own when in fact they are not. Unfortunately, this is much more likely to occur if the Resale Royalty ever extends to include the work of deceased artists, as beneficiaries from estates may see a greater benefit in receiving the Resale Royalty than protecting the integrity of the artist's body of work.

Definitions:

As noted, there are enormous consequences of introducing this Resale Royalty Bill in terms of the pressure it will place on the Courts to address issues of definition (of art, artists, art professionals, sale, resale etc.).

The fact that items excluded as not being "original work of graphic or plastic art" at one time, but may be transformed into an applicable item in another time raises problems. The stage is clearly set for the courts to have to step in and make rulings about the nature of art.

The difficulties in defining eligibility will lead to legal challenges as objects are included or excluded from the Resale Royalty. The Australian designer, Mark Newson comes to mind as such an example. Select furniture, such as his "Lockheed Lounge" and an untitled cabinet created by Newson (or his workshop), has sold at auction for over US$1 million. These are copyright objects of great design and could certainly be argued that they are "original works of art". But, they could easily be rejected as "art".

The issue this raises is the selective nature of the Resale Royalty. If one piece of designed furniture applies, then why not others? If a piece of unique jewellery is included, then why not others? If the architectural plans of a building are copyright, then why is the building not subject to a Resale Royalty?

If a painting by an unknown artist is sold for $500 to a second-hand shop owner who sells it for $2,000, then it is sold again at auction for $4,000, three years later and attributed to the artist, John Smith, is it only due a Resale Royalty at that point or do the previous owners now owe a debt? How will the funds be collected, and how will the funds reach John Smith or the multiple beneficiaries of John Smith's estate?

If a signed, hand-painted table is sold by an auctioneer included in a "job-lot" of several items as the "contents" of a house, how will the individual value of that item be ascertained and the correct Resale Royalty paid? (Assuming that a hand-painted table top is indeed "art").

There are countless examples of the problems of definition, liability, responsibility and debt. These are discussed technically in the annexure to this document.

Sales:

A major flaw in the proposed Bill is the definition of a "Sale", in that transactions made between private individuals will not be liable to pay a Resale Royalty. Sales will only be liable if carried out by "art professionals", however, the definition of an "art professional" is also questionable.

Many collectors are known to each other and have every opportunity to meet socially and/or at art industry events, such as at functions held by our Public Galleries. It is highly likely that in order to bypass the extra burden of a Resale Royalty, private individuals may make transactions between themselves. It is also highly likely that as the only transactions of works of art that are on public record are those conducted at public auction, many sales may occur in the private rooms of dealers.

By reducing the amount of work that is sold via public auctions, the visibility of the artist in the secondary market will reduce and as a result, the growth in the artist's audience will also reduce. This will not be in the best interests of the Australian community.

The Collecting Agency:

This Bill seeks to appoint one organisation to become the sole collecting agency. It is no secret that Viscopy are seeking the position which will strengthen its relationship with its UK counterpart, DACS, whose Chief Executive, Joanna Cave, has recently been appointed to be the new Chief Executive of Viscopy to oversee the introduction of the Resale Royalty Scheme in Australia. If the Resale Royalty Bill is enacted in Australia there is a great danger that the structure of it and the terms, roles and obligations of the collecting agency will be a hastily makeshift version of the UK model, which is in a vastly different situation to the Australian context.

DACS is furious that the British government amended the Bill to allow artists to set up and administer their own collecting agencies (and thereby introducing competition and reducing the collecting agencies' commission from 25% to 15%). It is also furious that the British government has decided against the inclusion of the work of deceased artists, and they are bound to bring their fury to Australia. Currently, the bulk of Viscopy's payments to overseas are sent to DACS.

The Argument for Retrospectivity:

Although the proposed legislation will not have a retrospective effect, Viscopy is lobbying for the Resale Royalty to also apply to the first transfer of pre-existing works of art. (see Viscopy's paper, *Implications of the Australian Government's proposed resale royalty scheme*, dated November 2008)

Page 7 of the Explanatory Memorandum for the proposed Bill states (after referring to s 11 of the Bill):

"Therefore, only works acquired or created after 1 July 2009 will trigger a resale royalty payment when they are resold through the secondary art market. The prospective application of the right will help protect the property rights of people who bought artworks not knowing that a resale royalty would be payable when they resold them. It will also allow businesses in the Australian art market to adjust to this change in their operating environment, ensuring a smooth transition to the resale royalty scheme."

The government has appropriately acknowledged both that the community currently has existing property rights and that the introduction of a Resale Royalty in any form will involve adjustments (and therefore time and cost) to business.

The government may not have considered, however, that in their proposed Bill the property rights of existing owners of art (and artists) are also compromised, in that prospective purchasers of their property will naturally adjust their offer price in response to their inevitable increase in their selling charges, to the disadvantage of the current owners (and artists).

The Australian community enjoys strong, safe and fair property rights on all other transfers of asset ownership, but within the art market their rights have already been eroded by an unfair (and to most, surprising) copyright imposition and now they are to be further eroded by the imposition of a Resale Royalty. Sadly, many will just say "enough is enough".

Conclusion:

If enacted in its present form, or indeed under any model currently operating throughout the world, the Resale Royalty Bill will have so many complications that it will not be workable and in the Australian context will be incredibly damaging to the fragile art market, a market solely built on confidence.

The complexities involved in the legal structure, roles, responsibilities and rights of the Collecting Agency also makes it virtually impossible to enact the Bill at this time. The technical aspects of the legalities of the Bill itself would require lengthy review to avoid a multitude of legal actions.

The current model of the Resale Royalty Bill, although attempting to have minimal impact on the viability and health of the art market, will be very destructive. Already, however, the government is drawing fury, criticism and threats from the supporters of the Resale Royalty who are dissatisfied with the scope of the proposed Bill. These organisations have a very strong media presence, sophisticated lobbyists and are already showing that their support for the government's policy is solely reliant upon all of their own requirements, and the requirements of their international partners such as DACS, being met. They not only wish to "throw a bucket of cold water"[12] over Minister Garrett, but intend to throw another over the entire Australian art market.

The supporters' main aim is to ensure the viability of the Collecting Agency, rather than benefit artists or the art market community. Already withdrawing a massive amount of money from Australian shores, they wish to reduce the size of the Australian art market further with the introduction of retrospectivity.

Unfortunately, most of the pressure and lobbying being directed towards the government for the implementation of this Resale Royalty scheme is not originating from artists but from these Arts Bureaucracies who see a vast income stream for themselves and who seem philosophically opposed to the functioning of the commercial art market. Many artists are fundamentally opposed to the introduction of the Resale Royalty at all.

Already those in the art trade are under enormous pressure having to conduct very precise negotiations and transactions under an increasing burden of costly and time-consuming administration. Introducing the added variable of an external organisation indemnified from their errors will inevitably lead to costs and claims against dealers and auction houses for acting upon erroneous or unclear information supplied to it.

Annexed to this document is our further submission in relation to the technical aspects of the proposed legislation. This annexure clearly demonstrates that as drafted the proposed Bill is unworkable and as a matter of policy is misconceived. Careful thought must be put into the appropriateness of enacting the legislation within the Australian context at this time. If following the deliberation of this committee a decision is made to proceed, at the very minimum the legislation needs to be carefully and thoroughly reviewed in detail to address all the technical points indentified in this annexure.

Damian Hackett
Executive Director, Sydney
Deutscher and Hackett

Footnotes and appendices:

[1] *Surveys take different views of Resale Right*, Antiques Trade Gazette, London, 14 April 2008 http://www.antiquestradegazette.com/news/6667.aspx

[2](To sign the art sector petition click here (we are aiming for 2000, 1300 so far) http://www.visualarts.net.au/campaigns/current/artistsresaleroyaltyright

[3] Froschauer, T., *The Impact of Artist Resale Rights on the Art Market in the United Kingdom*, commissioned by UK Antiques Trade Gazette, London, February 2008. (ATTACHED)

[4] Department of the Environment, Water, Heritage and the Arts Fact sheet:
Australia's new Resale Royalty Scheme: How will it work? undated
http://www.arts.gov.au/__data/assets/pdf_file/0020/83306/ResaleRoyaltyRightFactSheet.pdf

[5] Viscopy information sheet, *Implications of the Australian Government's Proposed Resale Royalty Scheme*
http://www.viscopy.com/pdfdocuments/implicationsofproposedresalescheme.pdf

[6] In December 2008, Viscopy sent contracts to smaller auction houses demanding $50 per thumbnail website illustration be paid in future. On items worth less than $500 this cost ensures that they will no longer be illustrated and therefore unlikely to be handled in future.

[7] Market analysis from the Australian Art Sales Digest website:
http://www.aasd.com.au/ArtMarketReview_2008.cfm
"Total value art sold by auction in Australia decreased by $60.9 million, a fall of almost 35%. In future years, the total sales achieved in 2007 of $175.6 million may be viewed as a market aberration. Sales of works by Australian artists and Aboriginal artists fell 40.7% and 51.5% respectively."

[8] Sotheby's company position market research:
http://investing.businessweek.com/research/stocks/snapshot/snapshot.asp?symbol=BID

[9] refer to Viscopy Annual Report, p.16, download at:
http://www.viscopy.com/pdfdocuments/AnnualReport2008.pdf

[10] ibid.p.10

[11] ibid.p.6

[12] Gosford, B., *Garrett's resale royalty Part 2 - Arts Industry says "Take a Cold Shower, Pete!,* The Northern Myth, Crikey.com.au, 24 November, 2008.
http://blogs.crikey.com.au/northern/2008/11/24/garretts-resale-royalty-part-2-arts-industry-says-take-a-cold-shower-pete/

deutscherandhackett

Annexure to submission by Deutscher and Hackett to Standing Committee on Climate Change, Water, Environment and the Arts

Resale Royalty Right for Visual Artists Bill 2008

Technical aspects of proposed legislation

1. Introduction

1.1 On 28 November 2008, the House or Representatives referred the Resale Royalty Right for Visual Artists Bill (**Bill**) to the House Standing Committee on Climate Change, Water, Environment and the Arts (**Committee**) for consideration. Interested persons were invited to make submissions to the Committee.

1.2 The following submissions relate to specific technical aspects of the Bill and identify various practical considerations on how the resale royalty right will work if the Bill is passed in its current form. Submissions in relation to the policy aspects of the Bill have been addressed separately.

2. Definition of an artwork and 'what is art?'

2.1 A central feature of the Bill is that a work must be graphic or plastic "art" before a resale royalty is payable.

2.2 Having regard to the inalienable nature of the royalty right that will be established by the Bill, the Courts will now be required to answer the question "*what is art?*" within the meaning of the Bill to determine whether a royalty right exists in relation to a particular work or object. In many instances, it will be obvious whether an object is or is not "art", but in many others the answer to the question will be far more subjective.

2.3 Notably, section 10 of the *Copyright Act* 1968 (**Copyright Act**), includes many forms of "artistic works" within the definition of that term "whether the work is of artistic quality or not". In these circumstances, subjective difficulties of the question of "what is artistic?" for the purpose of the Copyright Act are avoided. However, the Copyright Act also contains a further definition of artistic work to include works of "artistic craftsmanship" – this term does incorporate notions of aesthetic value which, as discussed in the example below, illustrate the difficulties that parties, and the Courts, have when determining whether a particular work of craftsmanship is "artistic" or not. Given that the focus of the Bill is directed at graphic or plastic "art", guidance from difficulties associated with determining whether a work is of "artistic craftsmanship" are briefly discussed.

2.4 In addition, there are a number of other features of the definition of "artwork" in the Bill which are presently unclear or ambiguous. Some key matters are set out below.

2.5 Section 7(1) of the Bill defines "artwork" as "an original work of graphic or plastic art" that is either created by the artist(s) or produced under authority of the artist(s).

2.6 Section 7(2) sets out a non-exhaustive list of works of graphic or plastic art which include "pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs."

2.7 The Explanatory Memorandum (**EM**) to the Bill explains that:

(1) Artwork would cover other forms of "visual arts or craft", such as:

(a) batik, weaving or other forms of fine art textiles;

(b) installations;

(c) fine art jewellery;

(d) artists' books;

(e) wood carving;

(f) "new media art forms" such as digital and video art; and

(g) new forms of "visual artistic expression" as they evolve in the future.

(2) An artwork will also include "multiple originals" produced in a limited edition, including a kind of print-making, sculptural or casting technique "in which the artist makes use of a template or mould". However, the EM also states that value of artworks on the secondary market "depends largely on their originality. For this reason, while authorised limited edition artworks (for example, lithographs, prints of art photography, or audiovisual art installations) are covered, items such as posters, mass-produced photographic or other prints, films and industrial design are excluded."

2.8 The EM expressly identifies that the definition of artwork in clause 7 is "intended to cover works of art from which artists have limited ability to earn money by exploiting their copyright through reproductions, public performances or broadcasts".

2.9 At a technical level, the concept of "artwork" in the EM appears far more expansive than the actual text of the Bill provides. The Bill is carefully limited to "an original work of graphic or plastic art". By contrast, the EM contemplates "multiple" originals, which is suggestive of copying or reproduction, rather than true originals. The EM also refers to "visual arts or craft" and to new forms of "visual artistic expression".

2.10 To the extent that the Bill is intended to cover forms of art wider than "graphic or plastic art", or an "original" work, these matters should be expressly set out in the text of the Bill itself. It is presently far from clear on a reading of the Bill how, for example, multiple copies can each constitute an "original" work, let alone the circumstances when multiple copies of a work will cease being "original".

2.11 The EM identifies deficiencies in the current copyright regime as a factor in determining what works of art the Bill is intended to cover. The overlapping application of the Bill and the Copyright Act presents further challenges. While the definition of "artistic work" in the Copyright Act and "artwork" in the Bill have superficial similarities, important differences exist and to the extent that a work might legitimately be subject to the Copyright Act but **not** the Resale Royalty Bill, significant confusion might arise in determining where the Bill 'stops' and the Copyright Act continues.

2.12 The definition of "artistic work" under the Copyright Act "means":

> (a) a painting, sculpture (including a cast or model made for purposes of sculpture), drawing (including a diagram, map, chart or plan), engraving (including an etching, lithograph, product of photogravure, woodcut, print or similar work not being a photograph) or photograph, whether the work is of artistic quality or not;
>
> (b) a building or a model of a building, whether the building or model is of artistic quality or not; or
>
> (c) a work of artistic craftsmanship whether or not mentioned in paragraph (a) or (b);

2.13 As already noted, save as to definition (c) relating to "artistic craftsmanship", authors, owners and users of copyrighted artistic works have not been required to make any assessment as to "artistic quality" or otherwise of the work.

2.14 In relation to works of "artistic craftsmanship", some evaluation of artistic expression of a work is required. This is often difficult, as the recent leading High Court case, *Burge v Swarbrick*[1], illustrates. In this case, the Court was asked to determine whether a "plug" (i.e. a hand-crafted full scale model of the hull and deck for a customised yacht) was a work of "artistic craftsmanship". A unanimous High Court held that it was not and in doing so stated:

> "It may be impossible, and certainly would be unwise, to attempt any exhaustive and fully predictive identification of what can and cannot amount to "a work of artistic craftsmanship" within the meaning of the Copyright Act as it stood after the 1989 Act. Determining whether a work is "a work of artistic craftsmanship" does not turn on assessing the beauty or aesthetic appeal of work or on assessing any harmony between its visual appeal and its utility. The determination turns on assessing the extent to which the particular work's artistic expression, in its form, is unconstrained by functional considerations."[2]

2.15 While some guidance might be taken from the High Court's decision in *Burge*, the definition of art within the meaning of the Bill appears to be much wider than the concept of "artistic craftsmanship" under the Copyright Act. It will accordingly create more uncertainty as parties and Courts attempt to apply it in particular cases.

3. Art market professional

3.1 A "commercial resale" of an artwork will not arise under the Bill in circumstances that do not involve an art market professional "acting in that capacity": section 8(2).

3.2 The term art market professional includes "a person otherwise involved in the business of dealing in artworks": section 8(3)(e). The EM states that an art market professional "includes" a manager of a "major" private or corporate art collection. Neither the EM nor the Bill give significant guidance on when a person might be "dealing" in artworks or what is the "business of dealing".

3.3 The EM does not sufficiently clarify the plain words of section 8 and if the Bill is only intended to capture true "professionals", then the text of section 8 should be amended to clarify the concept.

3.4 By way of example, there are many individuals with active interest in art collections. Although such person's activities would rarely be considered their primary vocation, they might nonetheless possess many works of art (routinely totalling in the tens or hundreds of thousands of dollars and sometimes millions) and possess a very sophisticated understanding of art and art markets. Analogous to individuals who privately buy and sell shares on the stock market, such a person might be considered an "art market professional" in the sense that they are literally "involved" in the "business of dealing in artworks" and they would be "acting in that capacity" at the time of any sale of their privately held works.

4. Sale price

4.1 The resale royalty is calculated by reference to the "sale price", which is defined in section 10 of the Bill. It is not clear how a "sale price" for a particular work might be calculated in circumstances where the work is sold together with a large number of other objects (whether or not art). For example, a collection of works might be sold for a single sum – some of those works might attract a resale royalty and others might not. A business might be sold with all of its assets, including a collection of corporate artwork owned by the business but on a long term lease with a gallery. Is the "sale price" the current book value of the works or is it determined in some other way?

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[1] [2007] HCA 17.
[2] Ibid at [83].

5. Liability as a debt due

5.1 Section 19 of the Bill provides that resale royalty is a debt due "on" the commercial resale of the work and section 20 provides that liability to pay the resale royalty arises at the time of the commercial resale of the artwork.

5.2 The Bill does not expressly set out any limitation on actions for recovery of the royalty. For the avoidance of doubt, the Bill or the EM should set out that the various limitation Acts apply, particularly in circumstances where a person is not aware that any debt has arisen. Alternatively, the Bill could provide that a debt expires 6 years after it was first established and where no person has sought to recover any resale royalty connected with the sale of the work.

5.3 A simple example might involve the purchase and resale of high value items such as personal jewellery, vases or particular types of furniture (e.g. some antiques or customer designed furniture). Such items might be held in a household for many years before being passed down through the family (say, by estate) before being sold to an small business antique shop or a jeweller, as the case might be. Some of those items may or may not be "artwork", which itself might involve a difficult assessment. Likewise, it might not be clear whether small business owners are an "art market professional" in the sense that they are otherwise "involved in the business of dealing in artworks".

5.4 Assuming in this example that such transactions might involve "artworks" and "art market professionals", the initial transfer of ownership of the works from the estate to the successors will be the "first transfer" of ownership within the meaning of section 8(1)(b). Upon sale to the antique shop or jewellers, the sellers will be unwittingly liable, as a debt due and presently payable, for resale royalty on proceeds of each of those items. Indeed, upon resale by the shop owner of those items to its subsequent customers, a further resale royalty will be payable by the shop owner (and assuming it is not paid), the shop owner's customers will be jointly and severally liable for that further debt.

6. Actions by the Collecting Society

6.1 Sections 23 establishes an obligation upon the Collecting Society to collect resale royalty debts, whether or not the ultimate holder of the resale royalty right is known. The Collection Society "must" use its best endeavours to collect resale royalties: section 23(2). The exception to this obligation is where the actual holder of the right has positively notified the Collecting Society, in writing, that the society is not to collect resale royalties on their behalf.

6.2 Section 24 provides that in any action brought by the Collecting Society for enforcement of a resale royalty, it is "presumed conclusively" that there is at least one holder of the resale royalty.

6.3 There might be many instances where the identity of the holder of rights might be never known or established. For example, where artwork has been bequeathed to a person by testate, the origin (i.e. creator) of the work might never be established and the only person likely to accurately know such information will have passed away. The creator might not in fact be an Australian resident or person to whom any resale royalty is payable.

6.4 Yet the effect of the regime established by sections 23 and 24 is that a royalty holder will be "presumed conclusively" and a resale royalty will need to be paid to the Collecting Society (assuming there is otherwise a "commercial resale" of an "artwork"), even though it appears plain that the holder of the right (if one even exists) might never be established.

6.5 Having regard to section 31, a person will not be entitled to the return of any such "royalties" required to be paid to the Collecting Society until 6 years have passed. Even then, the Collecting Society will first deduct any "administrative fees" before returning those amounts.

7. Notice of commercial resale

7.1 Section 28 of the Bill provides that a person "must" give the Collecting Society notice of details of a commercial resale of an artwork if that person is a "seller" of the artwork. A failure to give

notice is a civil penalty contravention with maximum penalty of $22,000 for an individual and $110,000 for a body corporate.

7.2 Liability for contravening this provision appears to be strict, even where a person fails to comply with this provision because they were not aware of, or were unable to determine, that:

(1) The sale of the work was "artwork" within the meaning of the Act. As noted above, what is "art" is frequently a difficult question to answer as the cases relating to "artist craftsmanship" under the Copyright Act illustrate.

(2) The transaction involved an art market professional "acting in that capacity".

(3) The transaction involved an art market professional at all, let alone being able to determine whether the transaction occurred in circumstances where a person involved was in the business of dealing in artwork".

7.3 As with the example above in relation to the antique store or the jewellery store, it might not be readily obvious to many people whether an object is "artwork" to which a Notice must be given. The effect of section 28 of the Bill compounds the consequences of ignorance or bad judgment, even if made in good faith, for making a wrong assessment.

7.4 At the very least, a person should not be liable for pecuniary penalties unless they refuse to comply with the notice requirements or knowingly provide false information. The Bill should be amended accordingly in this respect.

8. Responding to compulsory information requests

8.1 Section 29 provides the Collecting Society with a power to compel a person to provide information in relation to a relevant commercial resale of an artwork. Section 29(2) states a person "must" comply with a request.

8.2 A failure to comply with a request exposes a person to maximum pecuniary penalties of $11,000 and a body corporate to maximum penalties of $55,000.

8.3 Section 29 should be amended as follows:

(1) to provide that the section does not apply to the extent a person is not capable of complying with the request; and

(2) to expressly state that the section does not require a person to disclose information that is the subject of legal professional privilege.

8.4 The suggested amendments above are consistent with other forms of legislation involving compulsory powers, such as section 155 of the *Trade Practices Act* 1974.

9. Certain agreements void

9.1 Section 34(2) states that any "agreement" to "share or repay" a resale royalty (other than a relevant agreement between joint creators) is "void".

9.2 At the least, this section should be expressly to only void such agreements "to the extent" that they purport to share or repay resale royalties to avoid unintended consequences. As noted above, in many cases it will be far from clear whether a work is an "artwork" within the meaning of the Resale Royalty Act, as opposed to simply being an "artistic work" within the meaning of the Copyright Act. For example, to the extent that two parties – e.g. the creator and his or her employer – agreed in good faith to deal with the copyright of that work and believed in good faith that no royalty right was payable, the terms of that agreement might inadvertently constitute a sharing or repayment of the royalty right. If so, the entire agreement would appear to be void (this could void the initial transfer of ownership of the work, if that was also a term of the agreement).