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NAVA gratefully acknowledges the assistance provided by the Australian Government through the Australia Council, its arts funding and advisory body, and by the Visual Arts and Craft Strategy, an initiative of the Australian, State and Territory Governments.

20 January 2009

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

ccwea.reps@aph.gov.au

Dear Sir/Madam

Re: Resale Royalty Right for Visual Artists Bill 2008

The National Association for the Visual Arts (NAVA) appreciates the opportunity to make a submission in relation to the Resale Royalty Right for Visual Artists Bill 2008 introduced into parliament by the Arts Minister Peter Garrett on 27th November 2008.

NAVA is the peak body representing and advancing the professional interests of the Australian visual arts, craft and design sector. Representing a constituency of over 25,000 artists as well as other art professionals and organisations, NAVA has been a long standing supporter and advocate for resale royalty rights for artists.

NAVA has made many previous submissions to Government in relation to this right in which we have detailed the arguments and provided statistical data and examples supporting the value of this benefit to Australian artists. These would be available from the Department of Environment, Water, Heritage and the Arts or from NAVA if needed.

Most of the points that we would wish to make will be covered in the submissions from the Australian Copyright Council and the Arts Law Centre of Australia. However, we wish to reaffirm some of the main points. NAVA is very pleased that the current government has carried forward its election commitment to introduce resale royalty right legislation. However, while NAVA supports various aspects of the Bill, we have some very serious concerns over a couple of crucial aspects of the proposed model. We believe that these have the capacity to completely undermine the efficacy and viability of the scheme as a whole.

i) Constitutional Issue

We understand, that the Government has been advised that there is a risk that legislation requiring payment of the royalty on resales, of works acquired before commencement could be held by the High Court to result in an acquisition of property on other than just terms, and therefore would be in breach of the Constitution. This seems to have been the deciding factor in the Government's decision to draft the Bill so that for works acquired before the legislation comes into force, the royalty will not be payable until the second resale after commencement.

To test the impact of delaying the application of the right until the second sale, Viscopy undertook detailed analysis of all auction sales over the last 10 years. The findings were that in this 10 year period only 6% of all works were resold a second time. By contrast, the modelling, commissioned by the government from Access Economics, was based on a false assumption that all works resell much more frequently. Their findings were based on an estimate of this being a period of 2, 5 or ten years. This assumption has obviously

not been tested against actual sales data, and would explain why the Government has operated on an erroneous assumption that, after 10 years, royalties would be payable on most works in copyright.

In anticipation of the Government's concern, the Coalition for an Australian Resale Royalty (CARR) group commissioned advice from a Senior Counsel specialising in constitutional law. He was unequivocal in his view that the Government could introduce a resale royalty right, consistently with the requirements of the Australian Constitution, that applies to works acquired before as well as after commencement of the legislation. Given the seniority and experience of the Senior Counsel, we would strongly recommend that the Government further investigate how the legislation could be redrafted to avoid this problem.

ii) Alternative Option

One option for the government is to include a provision in the Bill for compensation in the event that the legislation results in a challenge that it is acquisition of property on other than just terms. As an example, the funds could be collected from first resales and placed in a trust fund pending an expedited decision by the High Court. If the court's decision upheld the proposition that the first resale was acquisition of property on other than just terms, the money could be returned to the payer. Alternatively if the court decided the opposite, the funds could then be passed on to the artists. Given the alternative, the art sector would be willing to take the (small) risk.

This is an option that has been exercised in other legislation, including the Copyright Act. In some legislation, the compensation is payable by the government. However, alternatively another model is evident in section 116AAA of the Copyright Act, (which relates to amendments to the Copyright Act in 2005 where performers were granted a share in the copyright in existing sound recordings), the compensation is payable by a performer rather than by the government.

iii) Loss of Income to Artists

Viscopy's analysis of auction sales over the last 10 years indicates that only $780,000 would be collected under this Bill in the first year, and similar amounts for many years after that. This represents 13% of the estimated $6M that would be collected if all works in copyright were included in the scheme.

iv) International Reciprocity

In relation to other countries that grant a resale right, Australian artists may be entitled to royalties from resales in these countries, and foreign artists may be entitled to royalties under Australia's legislation. Because the Bill only applies to resales of works acquired after the commencement, there is real doubt that it would entitle Australian artists to royalties from other countries such as the UK. These other countries would not have the mechanisms in place to distinguish between first and subsequent resales, and it is hard to imagine that they would complicate their way of operating simply to accommodate the Australian exemptions.
This again denies Australian artists another possible income stream.

v) Increased Administration Burden

One of the virtues of a scheme immediately applied to all resales of works in copyright is its simplicity of administration. With the current Bill, the burden of having to research the provenance of every artwork being resold to determine whether it was a first or subsequent resale would be incredibly onerous for the declared society. This added together with the vastly reduced income from administration fees makes the scheme extremely unattractive as a viable business proposition.

vi) Loopholes

It is not hard to see how easy it would be for any dealer or auction house to get around the resale fee requirement by simply renaming the artwork. Unless the works were

photographed each time they were offered for sale, it would be difficult to detect. And even if this was the case, as with auction house catalogues, the degree of scrutiny and historical research that this would require would be unviable for the declared society. It is likely to result in substantial avoidance. While responsibility lies with the intermediary to prove that it is not a second resale, it would still require a high degree of scrutiny to test the validity of their claims.

vii) Opting Out
We understand that in relation to rights management, the artist can choose not to be represented by the declared society but to deal directly themselves. We believe that this disadvantages the artists and encourages the intermediaries to offer incentives to artists to choose this option, making artists more vulnerable to exploitation.

viii) Threshold
NAVA notes that the right will apply to commercial resales, for more than $1,000, of works acquired after the legislation comes into force. NAVA had recommended that the threshold when the right is applied should be $500 so that the maximum number of artists could benefit. According to our estimates the commission taken by the declared society at 15% would be sufficient to cover the cost of administration on $500 sales, which should be the only rationale for any threshold being applied.

ix) Definition of artwork
NAVA notes that the definition of an artwork applies to original works "of graphic or plastic art", which include pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs. While other mediums are not exempted, NAVA would recommend that the definition should take account of the fact that art works can be made in almost any medium, especially in installation work which is a very common form of contemporary practice. Also since the advent of a range of new technologies, artists also are frequently making works in film, video, and digitally (eg on-line and on mobile phones) which are being sold to public and private collectors.

x) Administration of payments
NAVA supports the condition that the Minister is to appoint a sole collecting society to collect and distribute the royalties, and that the society must meet the criteria set out in the Bill – for example, it must be a company limited by guarantee and entitle all people entitled to royalties to become its members. NAVA would strongly support the appointment of one of the existing copyright collecting societies with experience and capacity in the visual arts area.

Recommendations
NAVA strongly recommends that:
i) the Government redrafts the Resale Royalty Right for Visual Artists Bill 2008 so that it will apply immediately to all resales of works in copyright to avoid the problems elaborated in this submission
ii) artists not be given the option to use any means other that the declared society to manage the resale royalty revenue collection and payment
iii) the definition of an artwork be expanded to include works in all mediums (eg new media and installation).

Yours sincerely

Tamara Winikoff
Executive Director