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22 January 2009

Standing Committee on Climate Change, Water, Environment and the Arts  
PO Box 6021  
House of Representatives  
Parliament House  
CANBERRA ACT 2600  
AUSTRALIA

Dear Members of the Standing Committee on Climate Change, Water, Environment and the Arts

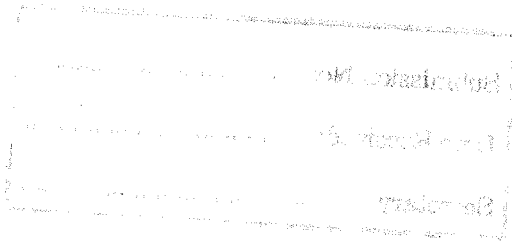
***Inquiry into Resale Royalty Right for Visual Artists Bill 2008 (the Bill)***

Thank you for the opportunity to comment on the *Resale Royalty Right for Visual Artists Bill 2008*.

Copyright Agency Limited (CAL) is a collecting society with over twenty years' experience managing its more than 12,000 members' copyright interests. As almost 1,000 of its members are visual artists, CAL takes a great interest in the possible expansion of Australia's intellectual property framework to include resale royalty, which will benefit Australian visual artists.

CAL is a strong advocate for the adoption of a resale royalty scheme in Australia as it:

- allows creators to share in the value of their works when they are resold, including indigenous artists;
- provides incentive for future creation of artistic works;
- represents the respect and value accorded to artists as contributors to the development of the Australian culture and community;
- is a right contained in Article 14ter of the Berne Convention;
- is consistent with the Australia-US Free Trade Agreement: Article 17.4.6(b) which makes provision for the establishment of a resale royalty in accordance with Article 14ter of the Berne Convention;



- would harmonise Australia's intellectual property framework with that of the EU, including the UK, and various other jurisdictions, which would allow Australian artists to benefit from similar schemes overseas.

CAL understands that the viability of a resale royalty scheme for Australian artists was first considered by the Whitlam government in the early 1970s. Since that time, the Australian art market has developed to a point where it can - and should - support such a scheme. In its 2007 election platform, the current government promised to implement an Australian resale royalty for the benefit of Australian visual artists.

Australia's artists, unlike those in more than 50 other countries, do not share in the secondary market for their works. According to the Chair of Viscopy and eminent Australian artist, Michael Keighery, auction houses do benefit, typically taking buyers' premiums of 20% on sales. However, the creators of those artistic works do not.

The scheme should be implemented only in such a way that provides a reasonable return to Australian visual artists in a timely and efficient manner. Authors and musicians have parallel schemes which provide these benefits.

CAL has reviewed the draft legislation tabled in parliament in November 2008, and believes elements of the scheme need reconsideration. CAL supports the implementation of a resale royalty in principle, however, the proposed scheme *does not* deliver on the Government's 2007 electoral promise to Australian artists of a scheme which will provide equitable returns. We believe the terms of the Bill mean that the policy objectives underpinning the adoption of a resale royalty scheme will not be achieved unless various key elements contained in the Bill are removed or amended.

Some of these elements include:

*Resales which will attract a royalty payment*

CAL is part of an industry group, the Coalition for an Australian Resale Royalty (CARR). CARR is aware that the limitation of the scheme to second and subsequent sales of works has been determined by government based on concerns that if the resale royalty were to apply to all commercial resales upon implementation, the constitutional validity of the scheme may be challenged. CAL leaves substantive comment on this legal issue for other members of CARR to address in their submissions.

However, together with our CARR colleagues, we believe the approach taken to the possibility of challenge is overly defensive. We are persuaded by advice obtained by CARR from Senior Counsel that a resale royalty scheme *can* have full application to all commercial resales once a scheme is implemented into Australian law and be constitutionally sound.

The consequence of restricting the application of a resale royalty scheme to only apply to the second and subsequent sales after the legislation is implemented means that the

intended impact of a resale royalty scheme will not be fully felt for more than a generation.

CAL believes that the impact of this restriction, found in draft section 11 of the Bill, was not adequately assessed in its formulation and should be removed. It is a blunt device and CAL believes alternatives should be further explored. We are aware of the alternatives suggested in our colleagues' submissions from CARR, and support recommendations they make in this regard.

#### *Threshold*

The Bill proposes a minimum threshold of \$1,000 for a resale royalty to apply, and provides that a higher threshold can be prescribed in associated Regulations.

CAL believes a minimum sales price below which a resale royalty would not apply should not be contained in legislation. Rather, the threshold should be set by the relevant collecting society and set by weighing administration costs against resale royalty benefits. An argument for setting the minimum threshold might be that the (reasonable) costs of administering the royalty on resales below a certain threshold would be greater than the royalty payable to the artist.

CAL believes that if a minimum threshold is to be set by government, then the rate should not be in a legislative instrument, because it is likely to require amendment as conditions change. For instance, digital technology may lead to a decrease in the administrative costs of collecting and distributing the resales collected. Alternatively, inflation may mean that a threshold becomes unreasonably low with the decrease in its real value.

CAL would support a model where *criteria* for a threshold were contained in the Act. The appointed collecting society would set the rate in accordance with the criteria. The Act would also provide for the review of the rate by the Copyright Tribunal if a licensee or artist felt that the threshold set by the society were not appropriate, with the Copyright Tribunal empowered to set a new rate if they found the existing rate to be inappropriate.

If government does determine to set a threshold in the primary legislation establishing a resale royalty scheme, CAL submits that \$1,000 is too high. It will mean that the scheme does not achieve its objective of providing a financial benefit to a broad cross-section of artists, including emerging artists. It will also mean that artists working in certain media are effectively excluded from the scheme as their works do not typically achieve resales at the rate provided, photographers for instance. A threshold of \$500 would see a greater diversity of artists benefiting from the scheme.

CAL recommends amendment to section 10 of the Bill to allow for the appointed collecting society to set a threshold in accordance with a set of criteria, reviewable by the Copyright Tribunal or another appropriate judicial body.

### *Collecting society provisions*

The Bill provides for one collecting society to be appointed by the Minister to administer the resale royalty scheme. Given the size of the Australian markets for resale works, CAL believes that one society is appropriate and will mean that administrative processes are not duplicated, and efficiency is maximised.

Section 23 of the Bill permits artists and others who hold a resale royalty right to elect *not* to receive their royalty payment through the collecting society appointed to administer the scheme. While CAL understands this is a feature of the declared collecting society model adopted by Australia for collective licensing of copyright under the Part VA, VB, VC and Part VII licences, CAL believes in relation to resale royalty there are particular concerns.

The collecting society for a resale royalty is required to collect and publicise information in relation to upcoming auctions and sales where they believe resales will attract a royalty payment. Costs will be involved in this activity. These activities are required to be carried out in respect of all resales that would attract a resale royalty payment. In the event that artists, or other resale right holders, decide they do not want to obtain their royalty through the collecting society, the collecting society will have borne the administrative costs of collecting and publicising information on their behalf without being able to recoup administrative costs. This means that those artists or resale royalty holders who choose to have their rights administered by the collecting society will bear the costs which are applicable to all resale royalty holders.

CAL is further concerned that it will be established artists and their estates which will opt out of the collecting society model. We anticipate that auction houses and galleries will approach these entities – possibly offering reduced administrative fees for the service for other rights or items or bundled into sales commissions. Artists of less valuable works, including emerging artists, will either be unaware or unable to enter into arrangements outside the collecting society. The outcome will be that less established and lower earning artists will be subsidising the administration of the right for well established artists or their estates. This is clearly not equitable.

A further consequence of permitting opting out is that the collecting society will be unable to capitalise on the economies of scale from representing a complete repertoire. This is the hallmark and fundamental basis of collective licensing of IP rights. In saying this, it must be remembered that collecting societies are not-for profit organisations set up to benefit their members. The administrative costs collecting societies charge are those necessary to operate; they do not operate to benefit investors or others engaged in the purely commercial trade in artists' works.

CAL submits that if it is government policy that artists should be able to decide on who manages their rights, they must contribute towards the costs of collection and publication that the appointed collecting society undertakes in relation to all resales.

A further concern is that auction houses and commercial galleries, which are generally private companies, will be acting as collecting societies without any of the checks and balances to which other collecting societies, not just declared collecting societies, as public companies, are subject. This is inconsistent with the model of independent, non-profit collection societies subject to the rigorous reporting and accountability requirements to safeguard the interests of copyright owners.

CAL submits that if an entity is engaged in administering the payment of a resale royalty, they should be required to comply with the same reporting and accounting requirements and subject to the same review and audit provisions as the appointed collecting society is for these transactions.

#### *Administrative Fees*

Section 26(3) of the Bill provides that the administrative fees imposed by the collecting society can be limited by notice of the Minister to the collecting society. CAL submits that if this is the case, then any such notice must take account of the actual administrative costs incurred by the collecting society for the operation of a resale royalty. These costs would include the collation and publication of resale royalty data, maintenance of IT systems, and staffing and other running costs of the collecting society associated with the administration of the resale royalty.

CAL submits that such a power is not necessary. CAL is of the view that there are sufficient constraints on the collecting society in relation to setting an appropriate administrative deduction. The collecting society is already required under section 37 of the Bill to prepare an annual report of its operations, including audited accounts, for the previous financial year and to provide it to the Minister for tabling in parliament, and made available to its members. Among the details which would be included in this report would be the administrative fees charged by the collecting society. If the administrative fees charged by the collecting society were considered to high, the Minister could ask the collecting society for an explanation, and failing a satisfactory explanation, there is already a mechanism for the Minister to revoke the collecting society's appointment to administer the scheme.

#### *Manuscripts*

Section 9 of the Bill excludes manuscripts of literary, dramatic or musical work from the operation of a resale royalty scheme. As an organisation which represents Australian literary authors, CAL believes the resale royalty should extend to manuscripts. When manuscripts are traded on the commercial market, it is the original, manually created version of the work which is being valued – and it is therefore in the same position as an original visual art work being resold. Australian author, Frank Moorehouse has said, 'manuscripts are a writers' superannuation'. Writers' manuscripts are likely to increase in value as the reputation of the author develops – and authors who have sold or donated their manuscripts should be in a position to share in the resale prices which are achieved when their works are resold.

### *Buyers' Premium*

Section 10(2) of the Bill excludes the buyer's premium from the sale price on which a resale royalty is calculable. CAL submits that a resale royalty should be payable on the sale price inclusive of the buyer's premium.

CAL argues this as it is part of the price paid by the purchaser, and therefore part of the work's value, and also because not to do so distinguishes between auction houses which typically apply such premiums to sales and commercial galleries which do not. This skews the market, and leads to diminished returns to artists where a buyer's premium is charged.

### *Foreign Recognition of Australia's resale royalty*

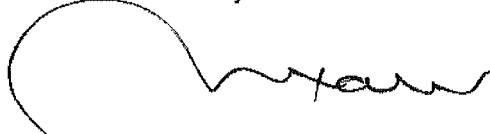
The scheme in its current form means that foreign markets in which Australian works are resold which have a resale royalty in place may not extend reciprocal rights to us because our scheme would fall short of what are considered minimum standards. In particular, the limitation of the scheme to only apply to second and subsequent sales after the scheme is implemented, and the consequent shrinking of works to which a resale royalty will apply so that it doesn't offer full returns for many decades, is the one critical element which would cause concern for foreign countries. The UK is a large market for Australian works, especially indigenous Australian works, and it would be a further blow if Australian artists were not in a position to enjoy returns from the resales of their works in the UK because our scheme was considered to fall below a minimum standard required.

### **Conclusion**

Australia is ready for a resale royalty but it must be of real financial benefit to the artists for whom it exists. They've waited a long time for it, and any scheme should be designed without overly restrictive limitations. There is an increasingly expressed cynicism among visual artists at the proposal for a scheme restricted to operating at a fraction of the capacity it should when compared with that, say, of the UK. Australian artists deserve to benefit from a world class resale royalty scheme.

The Bill proposes a scheme that will not deliver effective returns to artists for many decades and therefore deserves reformulation consistent with the clearly espoused principles set by the Government in its policy documents.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jim Alexander', written over a large, light-colored circular scribble.

Jim Alexander  
Chief Executive