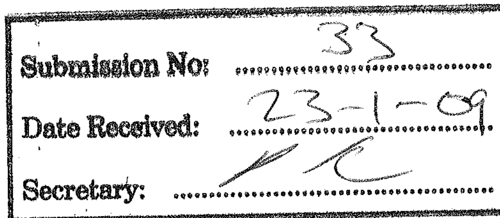

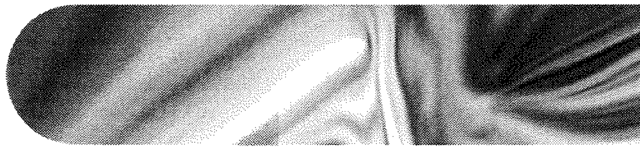

AUSTRALIAN
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COUNCIL

Submission to House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts on the Resale Royalty Right for Visual Artists Bill 2008

January 2009

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About the Australian Copyright Council

1. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Commonwealth Government's arts funding and advisory body. The Copyright Council provides information about copyright via its website, publications and training, provides free legal advice about copyright (principally to creators and arts organisations), conducts research, and represents the interests of creators and other copyright owners in relation to policy issues.

2. There are 23 organisations affiliated with the Copyright Council, each of which has members who are creators and/or owners of copyright material. Some of these affiliated organisations have made separate submissions to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts (the Committee) on the Resale Royalty Right for Visual Artists Bill 2008 (the Bill).

3. The Council is one of the six members of the Coalition for an Australian Resale Royalty (CARR). Each of the other members (Arts Law Centre of Australia, Copyright Agency Limited, National Association for the Visual Arts, Viscopy and International Confederation of Societies of Authors and Composers (CISAC)) has also made a submission to the Committee.

Summary of our position

- We strongly support the introduction of a resale right for visual artists.
- The Bill will not meet artists' reasonable expectations from the government's election promise unless Clause 11 is omitted.
- The Bill will not meet its objectives unless Clause 11 is omitted.
- The Government's concern that a Bill without Clause 11 may be detrimental to the Australian art market are misplaced.
- If the inclusion of clause 11 has been influenced by a concern that the Bill may otherwise contravene section 51(xxxi) of the Constitution, that concern is misplaced.
- In any event, there are options other than clause 11 for addressing concerns about section 51(xxxi) that would not so severely limit the scheme.
- We have concerns about some of the other provisions in the Bill, which we have outlined, but clause 11 is the major impediment to the Bill meeting its objectives.

Our support for a resale right for visual artists

4. We strongly support a resale right for visual artists. Visual artists, particularly fine artists, have fewer opportunities to benefit from copyright. The principal value of their work is in the original version. Artists' works tend not to be disseminated as copies or by electronic transmission, and thus do not generate significant copyright

royalties. And there is no equivalent for artworks of the performance right that applies to other forms of creative expression. In addition, when an artwork is resold, there are benefits to all those involved – the seller, the buyer and the intermediaries – but none to the artist.

Government's election promise

5. In its election policy, *New Directions for the Arts*, the government promised to:

    > implement a resale royalty scheme, which would provide additional support for Indigenous artists who have experienced a boom in the Indigenous art market.

6. The introduction of the right was recommended in the 2002 *Report of the Contemporary Visual Arts and Craft Inquiry* (Myer Report). Private Member's Bills to grant artists a resale right were introduced by Senator Kate Lundy in 2004 and by the Hon Bob McMullan in 2006.

7. Australian artists reasonably assumed that, like the Private Members Bills and as recommended by the Myer Report, the promised resale royalty scheme would apply to all artworks in copyright.

8. The Bill, which would only apply to artworks acquired after the legislation commences, therefore falls far short of artists' expectations.

Effect of Clause 11 of the Bill

9. The effect of Clause 11 of the Bill is to exclude the obligation to pay the royalty on sales of works acquired before the scheme commences. This means that, for existing works, the royalty will not be paid until the second resale after commencement.

10. The report commissioned by the government from Access Economics indicates that government officials assumed that most works resell in 2, 5 or 10 years, and asked Access Economics to provide modelling based on that assumption. The assumption has absolutely no basis in fact. We do not know why the government did not ask Access Economics, or someone else, to find out how often artworks *actually* resell. Even anecdotally, anyone involved in the art market could have told the officials that the times between resales is much longer than they assumed.

11. Viscopy has analysed auction sales for the 10 years from 1998 to 2008. That analysis showed that of the works sold in 1998, only 6% had sold again by 2008. This means that the modelling by Access Economics is meaningless, because it is based on wildly inaccurate assumptions.

12. Viscopy's analysis also shows that if a resale royalty scheme had been introduced in 1998, and applied only to works acquired after 1998, then it would have generated only 13% of the income that would have been generated if the scheme had applied to all artworks in copyright.

Reasons for Clause 11

Publicly stated reasons for Clause 11

13. According to the Second Reading Speech, the reasons for Clause 11 are to:

    - ensure that purchasers of artworks are aware at the time they make their purchase that a royalty may be payable to the artist if they choose to resell the work, and
    - allow the art market to adapt gradually to the new right, to avoid a negative impact on the art market.

Ensure purchasers are aware of the royalty

14. While we acknowledge the desirability, in principle, of giving art purchasers notice that if they ever sell the work they will be obliged to pay the artist a royalty, it is vastly outweighed by the need for the scheme to deliver real benefits to artists. In addition, the amount paid to artists (5%) is very small compared to the commissions paid to intermediaries by sellers.

15. Many things could affect the amount that a buyer, at the point of purchase, might contemplate receiving on sale. These include increases in intermediaries' commissions and other fees, changes to taxes payable, and changes to the market value for artwork.

Avoid negative impact on art market

16. To our knowledge, concerns that the resale royalty would have a negative effect on the art market in Australia are merely speculative, and not borne out by the experience in the United Kingdom, where the art market boomed in spite of the introduction of an artists' resale royalty. There was no evidence, in the United Kingdom, that the royalty had any negative impact on the art market.

Other apparent reason for Clause 11

17. We have been informed by government officials that the government has received advice in relation to Constitutional issues relating to the artists resale royalty. We have not seen that advice, and have no information about what questions the government's advisers were asked to answer.

18. CARR, via the Arts Law Centre of Australia, sought its own advice from Senior Counsel with expertise in Constitutional law. That advice, date 30 June 2008, was that a resale royalty could be introduced without contravening section 51(xxxi) of the Constitution (which deals with acquisition of property on other than just terms), or without being characterised as a tax under section 55 of the Constitution.

19. Following introduction of the Bill, CARR sought supplementary advice about whether the Bill, with clause 11 omitted, would contravene section 51(xxxi). The advice was

that it would not. Both advices have been provided to the government and can be made available to the Committee.

20. We note that there is no reference to the Constitution in any of the government's public statements about its resale right policy. We understand that the government's decision to include clause 11 may have been influenced by the advice it received, but we do not know to what extent. The absence of reference to Constitutional issues suggests that the main reason for Clause 11 is the government's concern about the effect of a fully-functioning resale royalty scheme on the art market.

Objectives of the Bill

21. The Committee has been asked to examine the content and structure for the Bill to ensure that it meets the objectives set out in the Bill and the Minister's Second Reading speech.

22. There are no objectives in the Bill itself.

23. The Outline of the Bill in the Explanatory Memorandum to the Bill says:

> The introduction of a resale royalty scheme will allow visual artists to share in the commercialisation of their work in the secondary art market. This will benefit visual artists who derive their main creative income from the initial sale of original works. These artists do not have the same range of opportunities as other creators such as writers and composers to earn money through licensing reproductions, public performances or broadcasting their work.

24. The Minister's Second Reading Speech indicates that the Bill's objectives are to:

- address a situation which is plainly inequitable;
- give artists an ongoing economic interest in the value of their works;
- enlarge the creative endeavour of artists;
- recognise artists' contribution to our economy, community and identity;
- increase the transparency of the art market;
- entitle artists to royalties from overseas schemes; and
- not adversely affect the art market.

Why the Bill does not meet its objectives

25. The only objective met by the Bill is to make no impact on the art market. The paltry amounts that would be generated by the Bill, compared to a fully-functioning scheme, means that none of the other objectives would be met for a very long time (much longer than the 10 years that seems to be anticipated by the government).

26. Omitting clause 11 from the Bill would result in all objectives being met.

Royalties from overseas schemes

27. The government appears to assume that the Bill would generate royalties from overseas. It is by no means clear that this assumption is correct. This is a practical issue as much as a legal one.

28. Article 14*ter* of the Berne Convention provides:

> (1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.
>
> (2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.
>
> (3) The procedure for collection and the amounts shall be matters for determination by national legislation.

29. Even if there is an obligation under the Berne Convention for other countries with resale schemes to collect royalties for Australian artists, our understanding is that that obligation would only apply to works acquired after commencement of the Australian legislation. As far as we know, the systems used by overseas collecting agencies would not enable them to differentiate sales of works acquired before commencement from sales of works acquired after. It is unlikely that they would be prepared to upgrade their systems just to cater for sales of Australian works.

30. Article 7.1 of the EU Resale Right Directive (2001/84) requires each EU member country to grant the resale right to non-EU foreign nationals from countries that give resale right protection to artists from the EU member country.

31. Article 7.2 provides:

> On the basis of information provided by the Member States, the Commission shall publish as soon as possible an indicative list of those third countries which fulfil the condition set out in paragraph 1. This list shall be kept up to date.

32. According to the European Commission's website, on a page last updated on 23 September 2008:

> In the Contact Committee meeting on 25 November 2005 the interpretation of these requirements was discussed. The Member States present agreed that for a third country to appear on the list, there should be legislation in place which provides for resale right and that evidence of its application should also be provided. In practice, this means that there should be arrangements in place which are administered by public or private entities which ensure that rightholders or the relevant supervisory body can have recourse to the results.
>
> A letter was sent to Member States on March 1, 2006 requesting that they provide a list of third countries which meet these requirements and that they also provide evidence of application. **To date the Commission has not been supplied with evidence for any**

third country which demonstrates that they qualify for inclusion on this list.[1]

33. We submit that the Committee should ask the governments of countries with resale schemes where Australian works are sold whether the Bill would result in royalties being payable under those countries' schemes. In addition, we submit that the Committee should ask the collecting societies in those countries whether, in practice, they would be able to identify which sales of Australian works were of works acquired after commencement.

Concerns about other provisions in the Bill

34. Whilst our major concern is clause 11, there are some other concerns we have with the Bill.

Clause 7: meaning of "artwork"

35. We are not convinced that the definition in the Bill covers all the forms of expression listed in the Explanatory Memorandum, in the fourth paragraph under the heading "Clause 7 – What is an artwork?".

36. The term "visual art" may be better than "graphic and plastic art".

37. The terms "digital art" and "video art" should be added to the list of examples in Clause 7(2); otherwise, it is not clear that they would be covered (as is intended, according to the Explanatory Memorandum).

38. Some organisations, including the Australian Society of Authors, support the payment of the royalty on resales of original manuscripts. We have no objection to such as extension. We note that manuscripts are included in Article 14*ter* of the Berne Convention, but not in the EU Directive.

Clause 9 No resale royalty right on certain works

39. If manuscripts were to be included in the works for which a royalty is paid, then Clause 9(c) would need to be omitted.

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1 http://ec.europa.eu//internal_market/copyright/resale-right/resale-right_en.htm (visited 23 December 2008).

Clause 10: No resale royalty right unless consideration above threshold

Threshold

40. CARR's position is that the threshold should be $500.

41. The lower the threshold, the more artists benefit from the scheme. The purpose of the threshold is to exclude sales for which the administrative fee would equal or exceed the royalty. Administrative costs are likely to decrease as the scheme becomes established, and with technological developments.

42. We therefore oppose Clause 10(1)(b), which would allow the setting of a *higher* threshold by regulation. If anything, the threshold should get *lower* over time.

Definition of sale price

43. In our view, the resale should be payable on the total amount payable to the intermediary, including any buyer's premium.

Clause 11: Resale royalty right on artworks in existence when Act commences

44. As stated above, we strongly argue that this clause must be omitted from the Bill.

45. The unrealistic first example on page 7 of the Explanatory Memorandum indicates why. In that example, the work is resold, for a second time, after one year. In fact, very few artworks are resold for a second time within a year; for the vast majority (94%), it is more than 10 years.

46. If clause 11 is to remain, then it should at least be amended so that a sale is exempt only if the person liable proves that the sale is exempt (for example, by providing evidence of the chain of title from artist to the seller).

Clause 12: who holds resale royalty right?

47. We do not think that the artist needs to be identified at the time of the commercial resale in order to be the holder of the right. There may be situations in which it is known, or can be presumed, that the artist meets the residency test, but the artist is not identified at the time of the resale. For example, a work may be identified as that of an Indigenous artist from a particular community, but the identity of the actual artist may not be known at the time of the sale. If a work meets the criteria for payment of the royalty, then it is up to the collecting society to identify the artist or other right holder to whom the royalty should be paid. This is what collecting societies do in relation to other copyright royalties.

48. We therefore submit that the Bill should be amended as follows:

- a new provision should be added to Division 1 requiring the royalty to be payable on a resale if:
  - the artist (or at least one of the artists if there is more than one) meets the residency test in Clause 14 (or, if the artist is dead, met it immediately before death); and
  - if the artist has died, the successor (or at least one of the successors if there is more than one) meets the residency test in Clause 14.
- the requirement for identification should be removed from Clause 12;
- clause 13 should be amended to provide that the buyer, seller and intermediaries are legally obliged to pass on to the collecting society any information they have about the identity of the artist (and, if the artist has died, the artist's successor/s in title).

Clause 12(2): reference to "entity"

49. We are not sure why the term "entity" has been used in clause 12(2). While Clause 15 indicates that an individual can be an "entity" for the purposes of Clause 12, the term "entity" usually indicates a legal person (such as a company) rather than a natural person.

Clause 23(1): collection of resale royalty by the collecting society

50. The Explanatory Memorandum does not provide a reason for Clause 23(1). As far as we know, there are no equivalent provisions in other resale royalty schemes. Unfortunately, we have no information from the government in response to our requests for information about the purpose of the clause.

51. When read together with Clause 20 (liability to pay), Clause 26 and Clause 34 (right cannot be waived), it seems that the purpose of Clause 23(1) may be to allow the royalty to be paid direct to the artist, rather than via the collecting society (Clause 20 imposes a liability to pay the right holder, but does not say that that must occur via the collecting society).

52. If the clause is intended to allow direct payment to artists, this would reflect a change in policy from that outlined in the government's May 2008 issues paper "Australian Resale Royalty Scheme for Visual Artists – Framework and Parameters", which said that under the government's proposed scheme:

> The resale right is only to be exercised through a collecting society, not by individual artists or art market intermediaries. This will help ensure fair distribution of royalty payments to artists through a transparent and accountable process.

53. We support this policy. It simplifies administration for the people liable to pay the royalty, and safeguards the interests of artists.

54. If a significant proportion of the royalties are paid direct to the right holders, then the administration fee for the royalties collected by the collecting society is likely to be higher than if the collecting society were collecting royalties for all right holders. In addition, the collecting society will not be able to ensure that all rights holders are receiving the royalties due to them under the legislation. There is a risk that the purpose of clause 34, which prohibits waiver, could be undermined. That purpose, according to the Explanatory Memorandum, is:

To prevent artists being exploited and pressured into waiving or otherwise dealing detrimentally in their right to receive resale royalty.

55. For these reasons, we submit that Clause 23 should be omitted from the Bill.

56. We assume that the purpose of, and justification for, clause 23 will be revealed in the course of the Committee's hearings, and we may seek an opportunity to respond when that occurs.

Clause 22: collecting society to publish notice of the commercial resale of an artwork on its website

57. If Clause 23(1) is amended as we have submitted, then Clause 22 has no purpose and should also be omitted.

58. The collecting society may, of course, choose to publish information about sales in order to enhance administration of the scheme.

59. There should be a provision that obliges sellers, buyers and intermediaries to notify the collecting society of all transactions (post commencement) of works whose artists meet the residency test, to assist the society to identify whether a sale is first sale or a resale and, if clause 11 remains, to identify whether a post-commencement resale is the first or second resale.

Clause 26(3): Minister may give notice to collecting society limiting the administration fee

60. We are not sure what the legal effect of such a notice would be. The society's obligations regarding its administrative costs should be governed by its obligations to its members under its constitution, and be part of the appointment process set out in Clause 35. The administrative fee could form part of the reporting requirements in Clause 37, and could be a factor in a revocation of appointment under Clause 36.

61. There is a risk that the Minister may give notice limiting the administration fee to an unrealistic amount. The administration fee for a scheme that applied to all works in copyright would likely be around 15%. The administration costs under the Bill are likely to be much higher, however, because of the small number of transactions to be administered.

Clause 28: Notice of commercial resale

62. There is no express requirement in the Bill in Clause 20 or elsewhere that a commercial resale have a connection with Australia in order for the liability to pay the royalty to arise. Other provisions would affect the *enforceability* of the liability but not limit the liability itself. For example, Clause 19 provides that the royalty is a debt due to the right holder, and Clause 12 provides that the right holder must meet the residency test; Clause 25 provides that the right is only enforceable in an Australian court.

63. The Bill may therefore apply to a commercial resale where the seller has no connection with Australia.

64. In our view, a commercial resale should give rise to a liability to pay the royalty if:

    - the seller is covered by Clause 28(1)(b); or
    - the buyer is covered by Clause 28(1)(b); and
    - the sale takes place in Australia.

65. The obligation to notify should apply to the buyer if the seller is not covered by the criteria in Clause 28(1)(b).

66. We note that the obligation to notify would apply for commercial resales exempted by Clause 11, as well as commercial resales for which a royalty is payable. We submit that the obligation should also apply to other transfers of ownership exempted by Clause 11 where an art market professional is involved, because the information may assist the collecting society to determine whether a subsequent transaction is a commercial resale subject to the resale royalty right..

Libby Baulch
Executive Officer
January 2009