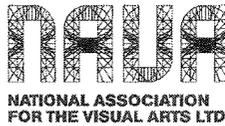


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## Submission to House Standing Committee on Climate Change, Water, Environment and the Arts on the Resale Royalty Right for Visual Artists Bill 2008 (February 2009)

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1. This submission is made by the Coalition for an Australian Resale Royalty (CARR) on behalf of its six member organisations: Arts Law Centre of Australia, Australian Copyright Council, CISAC (International Confederation of Authors and Composers), Copyright Agency Limited, National Association for the Visual Arts and Viscopy. Each of the six organisations has made an earlier submission to the House Standing Committee on Climate Change, Water, Environment and the Arts (the Committee) in relation to the Resale Royalty Right for Visual Artists Bill (the Bill).
2. Thank you for the opportunity to make this submission. The purpose of the submission is to address some issues raised by submissions from other organisations, and in evidence to the Committee in public hearings held on 5 and 6 February 2009.
3. Annexed to this submission is a fact sheet about the operation of the resale royalty right in the United Kingdom. It is intended to give the Committee some information about the actual experience in the UK to assist it to assess some of the concerns and assertions raised in submissions and evidence.
4. Also annexed is a further advice from Alan Robertson SC about Constitutional issues associated with the Bill.

### Summary of our position

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5. We have not repeated in this submission all the issues raised by CARR members in their submissions and evidence to the Committee.
6. The major recommendations CARR asks the Committee to make are:
  - That the government seeks further legal advice about:
    - whether the Bill, with clause 11 omitted, would meet the requirements of the Australian Constitution, having regard to the recent High Court decision in *Wurridjal v The Commonwealth of Australia*;
    - if the government is concerned that the Bill, without clause 11, may result in an acquisition of property on other than just terms, that the government seek further advice about options that would enable the Bill to comply with the Constitution and apply to all resales after the legislation comes into force; and
    - whether or not, under the Bill as currently drafted, Australian artists would receive royalties from other countries with resale royalty schemes, having regard to the current position of the European Commission in relation to the

requirements for artists from non-EU countries to receive royalties generated by sales in EU countries;

- That clause 23(1) be omitted from the Bill;
- That the “sale price” referred to in Clause 18 (Rate of resale royalty) be defined to include the buyer’s premium; and
- The definition of “artistic work” be amended to include the artworks listed in the Explanatory Memorandum.

## **Clause 11: exclusion of first resale after Bill comes into operation**

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### **Reasons for Clause 11**

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7. According to the evidence of the officers from the Department of the Environment, Water, Heritage and the Arts (DEWHA), clause 11 of the Bill resulted from advice the government received from the Australian Government Solicitor and from the Solicitor-General.
8. CARR has no information about the briefs to advise, what advice was received, what the reasoning for the advice was, or in what respects the advice differed from that provided to CARR by Alan Robertson SC.
9. The reference to “potential impact on property rights” in DEWHA’s evidence to the Committee, and the reference to “protect[ing] property rights” in its submission, suggest that DEWHA was concerned about the potential for the legislation to result in an acquisition of property other than just terms, and thus contravene s51(xxxi) of the Constitution.
10. DEWHA’s evidence indicated that it would have advised the government to introduce a Bill without clause 11 had it not been for its concerns about Constitutional validity. Thus it appears from DEWHA’s evidence that “allow[ing] businesses in the Australian art market to adjust to this change in their operating environment”, given in DEWHA’s submission as the second reason for clause 11, would not, on its own, justify clause 11.
11. At page 8, Mr Tucker for DEWHA said:

... there was no intention from the beginning to create a prospective scheme, that is to say that to put this arrangement in place you obviously have to go through all the checks about how we make sure that this is constitutional and within Commonwealth powers.
12. We note that if clause 11 were omitted from the Bill it would still be prospective, not retrospective, because it would only apply to acts (i.e. resales) occurring after the legislation came into force. As Alan Robertson SC points out in his advice of June 2008 at para 21:

... there is an important distinction between a statute which provides that as at a past date the law shall be taken to have been that which it was not, and the creation by statute of further particular rights or liabilities with respect to past matters or transactions.

### Alternatives to clause 11

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13. DEWHA's evidence was that it considered a number of options following its receipt of advice, but it did not state what all those options were.
14. DEWHA was asked by Mr Zappia (at p8):

But of all the options you considered, were any worthy of consideration by this committee or by the parliament as an alternative?
15. Unfortunately, DEWHA did not respond directly to that question.
16. DEWHA's evidence indicates that imposing liability on the buyer and not the seller may have been one of the options canvassed.
17. In a meeting in September 2008 between CARR representatives and DEWHA officers, DEWHA indicated that it had considered including a "historic shipwrecks" clause in the Bill. These clauses are commonly included in Commonwealth legislation when the government is concerned that the legislation may otherwise result in an acquisition of property on other than just terms. These clauses provide that if the legislation does acquire property, within the meaning of s51(xxxi) of the Constitution, then the person from whom the property is acquired is entitled to compensation.
18. In most cases, compensation is payable by the Commonwealth. In one instance of which we are aware, however (section 116AAA of the Copyright Act 1968), the *performer* rather than the Commonwealth is liable to pay compensation. This indicates that in the current situation an option may be a historic shipwrecks clause that imposes liability on the collecting society rather than on the Commonwealth.

### DEWHA's acceptance of Viscopy's analysis

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19. At page 8, Ms Bean, for DEWHA said:

We have no reason to doubt the [Viscopy] analysis. ... Basically, I do not think that they have added the numbers up wrongly.
20. It follows that DEWHA accepts that, in relation to auction sales, the income that would be generated under the Bill would be a small percentage of the income indicated by the Access Economics modelling.
21. DEWHA points out, correctly, that the Viscopy analysis relates only to auction sales and not to sales by commercial galleries. However, as stated in the annexed fact sheet, the experience in the UK is that the rate at which artworks are resold by commercial galleries is the same as it is for auction houses.
22. We understand that DEWHA's decision to include clause 11 in the Bill was influenced by its assumptions about the frequency at which artworks resell, as set out in the Access Economics report.
23. DEWHA's acceptance of Viscopy's analysis, and the consequences of that, warrants a review of other options. Those consequences include that only a small percentage of works resold more than once in a 10 year period, and that the small number of transactions would increase the administrative cost per transaction.

**Recent High Court decision: *Wurridjal v The Commonwealth of Australia***

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24. In their evidence, Dr Matthew Rimmer and Robert Dearn referred to the recent High Court decision in *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 (2 February 2009).
25. Having not seen the advice the government has received, we do not know whether or not that advice would be affected by the High Court's decision.
26. We have received further supplementary advice from Alan Robertson SC that his earlier advice is not affected by the decision. That advice is annexed.

**Request that the Committee recommend that the government seek further advice**

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27. Having regard to DEWHA's acceptance of Viscopy's analysis of actual auction sales, and the implications of that analysis for the practical effect of clause 11, and the recent High Court decision in *Wurridjal v The Commonwealth of Australia*, we ask the Committee to recommend that:
  - the government seeks further legal advice about whether clause 11 is necessary for the constitutional validity of the Bill, and
  - if, following that advice, the government remains concerned that the Bill, without clause 11, may result in an acquisition of property on other than just terms, the government seeks further advice about options other than clause 11 for addressing that concern.
28. The further supplementary advice that we have received from Alan Robertson SC (annexed) confirms that his earlier advice would not be affected if liability were imposed on the buyer and the buyer's agent and not on the seller. Thus, in his view, the Commonwealth could enact such legislation pursuant to section 51(xviii) of the Constitution, and the legislation would not impose a tax within section 55 of the Constitution nor result in an acquisition of property on other than just terms within section 51(xxxi) of the Constitution.
29. CARR understands that if the government gets further advice, that may delay the legislation coming into force. In CARR's view, the undesirability of that delay is outweighed by the opportunity for a fully-functioning scheme.

**Clause 23(1): "opt-out" for artists**

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30. DEWHA's evidence indicates that the main reason for clause 23(1) is to allow an artist to choose to collect the royalty on a particular transaction himself or herself if the artist is concerned about the efficiency of the collecting society.
31. DEWHA also said that clause 23 was intended to allow an artist to forgo the entitlement altogether in relation to a particular transaction. The example given was a charity auction.
32. While such an approach may appear desirable in principle, it ignores the vulnerability of artists to being pressured to forgo their entitlements. That

vulnerability is the reason for clause 34 of the Bill, as acknowledged by the Explanatory Memorandum to the Bill.

33. Clause 23(1) would appear to allow an artist to systematically give notice in relation to all or many transactions. It thus has the potential, in practice, to undermine the protection given by clause 34. We note the evidence of Mr Fred Torres, at page 25, that Indigenous artists would be pressured into signing opt-out agreements.
34. There are other mechanisms for ensuring the efficiency of the collecting society that do not risk operating to the detriment of artists. These include provisions in the society's constitution that will be required as part of the tender process, and the ongoing monitoring by the government. Mr Tucker for DEWHA said, at p10:

We have other mechanisms built in, such as once they are successfully operating having to report on their operations. We will obviously have contractual arrangements with such a collecting body. They would have to abide by those and we would regularly assess whether they were complying with the requirements.
35. Because Australia is a small market, the solution of a single collecting society, monitored by the government, has been adopted for the administration of statutory licences in the Copyright Act. Part VA of the Copyright Act (which allows educational institutions to record from television and radio) requires the declaration by the Attorney-General of a single collecting society to collect and distribute copyright fees. Screenrights has been the declared society since the early 1990s.
36. Other statutory licences allow different collecting societies for different classes of works (e.g. one for written works and one for notated music under Part VB), but in practice there is only one society for each statutory licence. Copyright Agency Limited (CAL) is the declared society for Part VB of the Copyright Act (use of text, images and notated music by educational institutions) and for government use of text, images and music, and Screenrights is the declared society for Part VC (retransmission of free-to-air broadcasts) and for government recordings from television and radio.
37. There are protections for the members of Screenrights and CAL in the Copyright Act, in their constitutions, in the requirements of those organisations to report to the Attorney-General, and in the Attorney-General's power to revoke the declaration.
38. Another mechanism is the Code of Conduct Review, conducted by former Federal Court judge James Burchett QC. This is an annual review of each collecting society's compliance with the collecting societies' Code of Conduct, including its management of complaints by licensees and members.
39. Contrary to suggestions in one submission, and in evidence, there is nothing in the 2002 report of the Contemporary Visual Arts and Crafts Inquiry (the Myer report) that recommends the appointment of more than one collecting society.
40. The annexed fact sheet sets out the experience in the UK in relation to collective management of the resale right.
41. Collective management by one organisation also assists those liable to pay the royalty. Their obligation is made more complicated if they are required to first identify to whom the royalty must be paid.
42. It is not clear how, in practice, an artist would collect the royalty directly. An individual artist has no power to request information about commercial resales under clause 29.
43. In relation to charity auctions, no royalty is payable if an artist donates a painting to a charity for auction, because it is the first sale. It is unlikely that an artist would be

contacted if a painting were donated by a subsequent owner, and there is nothing to prevent artists donating the royalties they receive from the collecting society to any charity of their choice.

## The Berne Convention

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44. Australia and most other countries are parties to the Berne Convention. Article 14ter provides for an artists' resale right. Countries that are parties are not required to provide the right to artists, but, if they do, their nationals may be entitled to reciprocal treatment in other countries that also provide the right.
45. Article 14ter grants artists an inalienable right to an interest in any resale of their work, but is silent about who is liable to pay the royalty; that is a matter for national legislation.
46. The World Intellectual Property Organization Guide to the Berne Convention (WIPO Guide) indicates that the reciprocity obligation operates in two ways:
  - a foreign artist can claim royalties only to the extent that royalties are payable in the country in which the resale occurs, even if that artist's country has a more generous scheme; and
  - a foreign artist can only claim royalties on resales that would generate a royalty in the artist's country.
47. A country may choose to pay foreign artists in additional circumstances, but it is not obliged to so.
48. The WIPO Guide also says:

It is a matter for the courts to decide whether or not this reciprocity is present.
49. In our view, it would be open for a court to determine that the scheme in the Bill does not meet the requirements of Article 14ter(1), and thus does not give rise to the reciprocity obligations in Article 14ter(2).

## Requirements under the EU Directive

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50. The European Union (EU) 2001 Directive on the artists' resale right is, like other directives, intended to harmonise the laws of EU member states. As a result, there are not major differences in the laws of EU member states relating to the resale right. There is more information on this issue in the annexed fact sheet.
51. CARR has sought further information regarding the current policy of the European Commission (EC) regarding payment of royalties by EU member states to artists from non-EU states. We will pass that information on to the Committee once received.
52. CARR understands that DEWHA is also seeking information about that issue, in response to a request from the Committee during the public hearings on 5 February 2008.

53. Given that, according to DEWHA's evidence, the EC policy was not taken into account when DEWHA sought advice about whether Australian artists would receive royalties generated by overseas sales, we ask the Committee to recommend that the government seek further advice on this issue.

### **Sale price: buyers' premium**

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54. We note the discussion of the meaning of "sale price" in the course of the public hearings on 5 February 2008 (at page 8 of the transcript).
55. We submit that the "sale price" referred to in Clause 18 (Rate of resale royalty) be defined to include the buyer's premium.
56. We note that this position is supported by the Australian Commercial Galleries Association. We also note that when artworks are valued, the value takes account of the buyer's premium.

## Submission to House Standing Committee on Climate Change, Water, Environment and the Arts on the Resale Royalty Right for Visual Artists Bill 2008 (February 2009)

### Appendix A: Europe & the UK: the facts

During the course of the inquiry, the Committee received evidence about the legal provisions for and the operation of the resale right in Europe and, in particular, the UK. Some of the evidence was incomplete or incorrect. This document aims to address this by providing relevant explanations, references and/or corrections.

The resale right exists in 26 European countries by virtue of a harmonisation initiative which resulted in a piece of legislation *Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art*. In this document, we will refer to this as “the European Directive”. All European Member States were obliged to implement the European Directive into domestic legislation by 1 January 2006.

The resale right was introduced in the UK on 14 February 2006 (some six weeks late) by The Artist’s Resale Right Regulations 2006. In this document, we will refer to this as “the UK Regulations”.

#### 1. Variations between resale royalty schemes

In the course of the inquiry, the Committee heard from DEWHA that “*there are a lot of different schemes in different countries*”. It is true that within Europe, there is some variation between schemes. However, the European Directive requires Member States to adopt the same approach to implementing key aspects of the resale right.

##### Germany

The Committee were informed by DEWHA that “*the German scheme provides support to artists through a centralised funding pool. That is not even imposed on the buyer or the seller*”. This is completely incorrect. The German scheme conforms to the European Directive in every regard, including observance of the royalty rates and liability to pay.

##### France

The Committee were informed by Deutsche and Hackett that “*the French government is now attempting to boost its market by reducing its rate of droit de suite to below three percent*.” This is completely incorrect. The French scheme conforms to the European Directive in every regard, including observance of the royalty rates.

##### UK

The Committee was informed by DEWHA that “*the UK scheme is only for living artists*”. This is misleading. Under the European Directive, it is clear that all member States must offer artists the term for resale right equivalent to the current copyright term:

*“The (17) Pursuant to Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (6), the term of copyright runs for 70 years after the author's death. The same period should be laid down for the resale right.*

The European Directive also provides for a transition period entitling four Member States (UK, Netherlands, Eire, Austria) to implement in two stages: stage one in 2006 for works by living artists & stage two by 2012 at the latest for all works of art protected by copyright (life + 70).

Accordingly, the UK Regulations provide for the term to be applied for life plus 70 years from 1 January 2012.

The table below sets out the mandatory provisions within the European Directive with explanations of any variations where these exist:

<b>Provision</b>	<b>Variations</b>
Exception to the right for first sales	None
Limitation of the right to transactions involving one or more art market professional	None
Exception to the right for transactions between private individuals	None
Application of the right to all resales	An optional exception exists for some works which are bought as stock and resold within a time-limited period
Royalty rates on a sliding cumulative scale from 4% - 0.25%	An option exists for the highest rate to be set at 5%
Cap on single royalty payments of 12,500 Euros	None
Inalienability of the right	None
Term of protection (life of the artist + 70 years after death)	4 Member States (UK, Netherlands, Eire, Austria) were offered the option to implement in two stages: stage 1 in 2006 for works by living artists & stage 2 by 2012 at the latest for all works of art protected by copyright (life + 70)

## **2. Section 11 & Section 23(1)**

**Under Section 11**, the draft Bill envisages that the right will apply not to all resales but to second resales only. This option does not exist within the European Directive, which requires that the right be applied to all commercial resales.

In terms of its stated aims, the European Directive is unequivocal:

*“The resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works”*

And

*“The resale right forms an integral part of copyright and is an essential prerogative for authors. The imposition of such a right in all Member States meets the need for providing creators with an adequate and standard level of protection”.*

The European Directive is also clear that the right should apply to all commercial resales:

*“The scope of the resale right should be extended to all acts of resale, with the exception of those effected directly between persons acting in their private capacity without the participation of an art market professional”.*

And

*“The right... shall apply to all acts of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art”.*

The optional “bought as stock” exception (which was only taken up by the UK) is very narrow and does not detract from the basic principle that all resales qualify.

**Under Section 23 (1)**, the draft Bill envisages that artists will be entitled to waive their entitlement to receive resale royalties. This option does not exist within the European Directive, which requires that:

*“the resale right is an unassignable and inalienable right, enjoyed by the author of an original work of graphic or plastic art, to an economic interest in successive sales of the work concerned”.*

And

*“ Member States shall provide, for the benefit of the author of an original work of art, a resale right, to be defined as an inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author”.*

This provision has been transposed into the UK Regulations which states that the

*“ Resale Right is not assignable”*

And

*“ A waiver of a resale right shall have no effect”.*

In giving evidence, DEWHA stated that *“from our judgment the design of the scheme is no more variable than what is in those EU countries”*. We do not think this is correct, given the departure in the draft Bill from two major features of European legislation which are mandatory requirements in all Member States.

To our knowledge, no other country outside Europe provides for second resales only and/or opt-outs.

Reference was also made to the resale right which exists in the USA in the state of California and may provide for artist opt-outs. We do not know if this is correct but in any case, we would like to make the Committee aware that the law has never been operational in practice in California and cannot, in our view, offer any helpful guidance.

### **3. The role of the collecting society**

The European Directive envisages that management of the resale right will be undertaken by a collecting society:

*“The Member States are responsible for regulating the exercise of the resale right, particularly with regard to the way this is managed. In this respect management by a collecting society is one possibility. Member States should ensure that collecting societies operate in a transparent and efficient manner. Member States must also ensure that amounts intended for authors who are nationals of other Member States are in fact collected and distributed. This Directive is without prejudice to arrangements in Member States for collection and distribution”.*

In the UK, this was transposed in the UK Regulations in the form of compulsory collective management:

*“ Resale right may be exercised only through a collecting society”*

Collecting society is defined as follows:

*“collecting society means a society or other organisation which has as its main object, or one of its main objects, the administration of rights on behalf of more than one artist; and The management of resale right is the collection of resale royalty on behalf of the holder of the right in return for a fixed fee or a percentage of the royalty”*

#### **4. Compulsory collective management**

The European Directive allows Member States to provide for compulsory collective management of the resale right through a collecting society. The UK Government chose to adopt this approach. This is highly unusual in the UK, which tends to prefer voluntary arrangements. However, the UK chose compulsory collective management for several reasons:

The resale right, in particular, would prove difficult, if not impossible for artists to manage individually for the following reasons:

Whilst an artist may feasibly be able to track sales or his or her sales which take place at auction (since this information is publicly available) achieving this for gallery sales would be very challenging

Enforcement of the royalty payments would be difficult for an individual to achieve  
It would be virtually impossible for an individual artist to collect any royalties due from overseas

A collecting society managing the right was preferable for galleries and auction houses, who would otherwise be faced with potentially thousands of royalty claims from individual artists

Collective management provides the most cost effective approach for artists, since economies of scale could be achieved for the benefit of all

The resale right differs in several important regards from copyright. The inalienability and non-waiver provisions means it cannot be bought, sold or given away. The circumstances in which a royalty is generated and the rate at which is paid are dictated by the European Directive, which gives no room for negotiation over commercial terms. Therefore, whilst compulsory collective management by its nature imposes a charge on artists (for the collection and payment of the royalties) it was felt that on balance, the benefits of this arrangement outweighed the down sides.

#### **5. Competing collecting societies**

The UK Regulations provide for one or more collecting society managing the right. Initially, DACS (the UK equivalent of Viscopy) was the only collecting society managing the right and was collecting resale royalties from the first day the law came into force, 14 February 2006.

Royalties are paid to artists every 30 days and all artists are charged 15% for the service. At no time has DACS ever charged 25%, as alleged by some art trade representatives giving evidence to the Committee.

Subsequently however two additional societies entered the UK market place.

Artists Resale Right Ltd (ARA Ltd) is owned by a commercial art dealer. It represents only six Russian artists and provides no information about its collections, distributions or charges to artists.

ACS is a subsidiary of a privately owned commercial image hire business, The Bridgeman Art Library was sponsored by the British Art Market Federation (the art trade industry body that campaigned against the resale right in the UK). ACS represents more artists than does ARA Ltd, but nothing is known about its collections and distributions. ACS charges 15%, the same as DACS.

#### **6. The balance of resale transactions between auctions and galleries**

In the UK, 60% - 70% of resale royalties are collected from auction sales. Between 30% - 40% of resale royalties are collected from galleries and dealers.

There is no difference whatsoever between the rate of turnover of artworks between auctions and galleries.

#### **7. Additional reading material**

The Committee may be interested to refer to the following documents for additional background reading:

- DACS Submission to the Government Consultation on Artist's Resale Right, September 2008 [www.dacs.org.uk](http://www.dacs.org.uk)
- A study into the effect on the UK art market of the introduction of the Artist's Resale Right Imperial College, 2007 on behalf of the UK Intellectual Property Office [www.ipo.gov.uk](http://www.ipo.gov.uk)
- The Artist's Resale Right Regulations 2006 [www.ipo.gov.uk](http://www.ipo.gov.uk)
- Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [www.europa.eu](http://www.europa.eu)

**CARR, February 2009**

**RE: CONSTITUTIONAL ASPECTS OF IMPLEMENTING A  
RESALE ROYALTY RIGHT IN AUSTRALIA**

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**THIRD MEMORANDUM OF ADVICE**

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Arts Law Centre of Australia  
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Woolloomooloo NSW 2011

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**RE: CONSTITUTIONAL ASPECTS OF IMPLEMENTING A RESALE  
ROYALTY RIGHT IN AUSTRALIA**

**THIRD MEMORANDUM OF ADVICE**

1. I have previously provided advice to the Arts Law Centre of Australia on this matter on 30 June 2008 and 18 December 2008.
2. I am now asked the following further questions:
  1. Would my advice be affected if the liability to pay the resale royalty were imposed on the buyer and the buyer's agent, but not on the seller or the seller's agent?
  2. Is my advice affected by the recent decision of the High Court in *Wurridjal v Commonwealth of Australia* [2009] HCA 2.

**Question 1**

3. At present, clause 20 of the *Resale Royalty Right for Visual Artist Bill 2008* specifies the persons who have a liability to pay the resale royalty on the commercial resale of an artwork.
4. Clause 20 as presently drafted sets out four classes of person who are to be jointly and severally liable to pay resale royalty, those persons being:
  - (a) the seller or the sellers; and
  - (b) each professional agent for the seller; and
  - (c) if there is no such agent, each professional agent for the buyer; and
  - (d) if there be no such agent or agents, the buyer or the buyers.
5. In my opinion, if sub-clauses 20(a) and (b) were omitted it would be even more difficult than it presently is to see how the scheme involves an acquisition of property within s. 51(xxxi) of the *Constitution*.
6. This is because there would be no element of retrospectivity at all and the present clause 11 would be more clearly unnecessary. A buyer in a transaction lying entirely in the future has no present property rights in the artwork.
7. I do not know whether those who have advised the Commonwealth on the constitutional aspects of the Bill have considered this option. If the option were adopted then, in my view, clause 11 could only be necessary to achieve a particularly policy outcome rather than to ensure consistency with s. 51(xxxi) of the *Constitution*.

**Question 2**

8. Because the property rights and the statutory scheme under consideration in *Wurridjal* are so different from the present Bill I see nothing of significance in that aspect of the decision.
9. It does appear however that five of the justices in the majority upheld the validity and effect of s. 60(2) of the *Northern Territory National Emergency Response Act 2007*, the *Historic Shipwrecks* clause: see French CJ. at [104], Gummow and Hayne JJ at [196]-[197], Heydon J. at [334], Kiefel J. at [462]-[466] (Crennan J. allowing the demurrer on a basis anterior to the “just terms” provision effected by the *Historic Shipwrecks* clause).
10. I should add finally that nothing in *Wurridjal v The Commonwealth* would seem to lend support to the view that clause 11 of the Bill is necessary in order that the legislation will be consistent with s. 51(xxxi) of the *Constitution*.

**Conclusion**

11. I answer the questions and advise accordingly.

*Chambers*

**A. ROBERTSON S.C.**

*10 February 2009*