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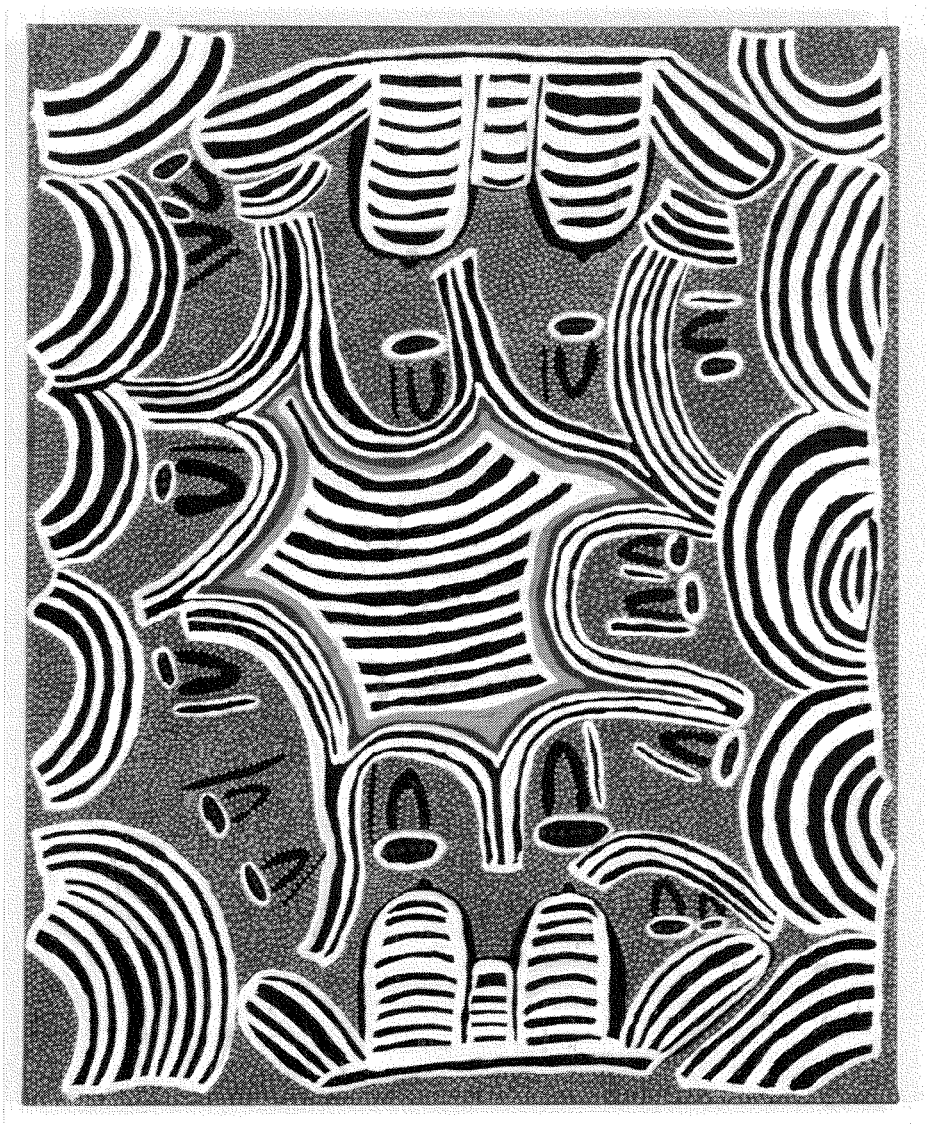
Visual Arts Copyright Collecting Agency

viscopy

Going once, going twice, gone...



Gloria Temarre Petyarr (c. 1945 -)
Awelye 1989
synthetic polymer paint on canvas 150 x 120cm
copyright Gloria Petyarre
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Submission to the Standing Committee on Climate Change, Water, Environment and the Arts

on the draft

Resale Royalty for Visual Artists Bill 2008

Going once, going twice, gone...

Contents

1. Executive summary

When the Australian Government announced in early 2008 its commitment to implementing a resale right in Australia, artists applauded the decision. The Government's initial stance was unambiguous in its recognition of the weak bargaining position occupied by most artists at some point – if not the entirety – of their careers and the sacrifices artists (and their families) usually make in its pursuit. There was a clear intention to correct some of the injustices experienced by artists generally and Indigenous artists in particular and also a desire to encourage Australian artists to keep making work and contributing to the creative economy. At that stage, there was every indication that the Government intended to introduce a comprehensive and fully functioning scheme which would deliver tangible benefits to Australian artists and bring Australia into line with the ever expanding international resale right community.

When the draft Bill was released however, artists were in for a shock. What is now implied is legislation which severely compromises the right and provides only for a limited scheme. If implemented unamended, the proposed Bill will:

- fail to deliver meaningful benefits to the majority of Australian artists during their lifetimes
- miss an opportunity to address injustices experienced by Indigenous artists
- put Australia out of step with the rest of the world
- risk depriving Australian artists of foreign resale royalties
- place unnecessary burdens on the art trade
- compromise the ability of the appointed collecting society to efficiently and cost effectively manage the right

The Government has offered a limited explanation for its apparent change of heart. A difficulty arising from the Australian Constitution has been cited as a justification for an altered approach in one important aspect of the draft Bill. No explanation has been forthcoming for certain other changes which are of concern for artists.

Whatever the rationale, one thing is certain: in its present form, the scheme will not work. However, we do believe that with some changes, a comprehensive and fully functioning resale royalty scheme can be achieved which will deliver meaningful benefits for artists without harming the Australian art market, thus achieving the Government's objectives. We sincerely hope that the Committee takes the opportunity presented by this inquiry to make the case for amending the draft Bill.

2. About Viscopy

Viscopy is Australasia's rights management organisation for the visual arts. Viscopy provides copyright licensing services for a wide and varied customer base (including all the major Australian auction houses and public galleries) on behalf of our members. We represent over 7,000 Australian and New Zealand artists and/or their heirs and beneficiaries. Our membership includes many famous names as well as up and coming artists and almost half of our members are Indigenous artists. We also represent some 40,000 international artists and/or estates in the Australasian territory through reciprocal agreements with over 42 visual arts rights management agencies around the world.

Viscopy is governed by a democratically appointed board of directors which includes artists and business experts. We operate on a not-for-profit basis which means that we charge artists a fee (deducted as a proportion of the royalties we collect on their behalf) in order to cover the costs of providing our services.Viscopy has grown from an organisation initially subsidised by public funding to a self-supporting and thriving collecting society. In the financial year ending June 2008, our turnover was $2.6 million. Viscopy has recently appointed Joanna Cave (formally of DACS in the UK) as its new Chief Executive. DACS was instrumental in successfully campaigning for the Artist's Resale Right in the UK and following its implementation in 2006, now manages the collection and payment of resale royalties to artists providing a service which is widely regarded as the best in the world.

Viscopy welcomes this opportunity to contribute to this Committee inquiry taking place in the House of Representatives. In our submission, we aim to make a constructive contribution to the public consultation process. In order to achieve this, we will be drawing on our knowledge as the leading representative of artists and their heirs in Australia and our experience as a rights management organisation specialising in the field of the visual arts. We will also comment on the research undertaken by Access Economics on behalf of the Department of the Environment, Water, Heritage and the Arts ("DEWHA"). In conjunction with this, we will share our own analysis of real auction sales data which we have undertaken in order to examine the potential impact of the draft Bill.

3. The story so far

Presently, when a works of art increases in value and is resold, the profits – which can be substantial - are delivered to collectors and art dealers whilst the creator of the work – the artist - gains nothing. The resale right aims to address this inequity by entitling artists (or their heirs and beneficiaries) to receive a royalty each time their artworks are sold by a gallery, dealer or auction house.

The resale right has its origins in France. Following the death of the great French painter, Jean François Millet, the value of his paintings rose dramatically. A painting which Millet had previously sold during his lifetime for 1,200 francs was auctioned for 1 million francs whilst his family was left destitute. This prompted a national scandal which in 1920 prompted the French Government to introduce the law of *droit de suite*, entitling artists to an on-going stake in the commercial value of their work. Furthermore, the French law enabled the heirs of an artist who may be left without means of support after the death of a spouse and/or parent to benefit from the resale right for a limited period of time, in line with copyright.

Following a harmonisation initiative in Europe in 2006, the Artist's Resale Right now exists in over 50 countries around the world. In its modern form, it provides a free market mechanism for the encouragement and support of artists who are at last able to benefit from an income stream in common with other creators such as writers and composers whose ability to earn royalties when their works become popular and/or valuable is well-established.

4. Positive aspects of the draft Bill

Viscopy is delighted that the Australian Government wishes to demonstrate its commitment to Australian cultural life through introduction of the Artist's Resale Right. Certain aspects of the draft legislation are to be commended:

a. The inalienability provisions, without which artists would undoubtedly face pressure to give up their right

b. The joint and several liability provisions which will ease the collection of royalties and aid effective enforcement of the right

c. The commitment to appointing via a competitive tender process a collecting society to transparently and efficiently manage the right on behalf of artists

d. The duration of the right, which entitles artists to bequeath their royalties to their families

e. The scope of the right, which includes most types of artworks

5. Our main concerns

We have two main concerns with the draft Bill:

1. Section 11 limits the scheme to artworks acquired after the law comes into effect and then resold. Art works which were acquired before the law comes into effect must be resold twice in order to attract a royalty.

2. Section 23(1) appears to enable artists to waive their automatic entitlement to receive resale royalties, in contradiction to inalienability provisions in the draft Bill.

It is Viscopy's view that these sections, if included in the final legislation, will give rise to serious problems and will severely compromise the effectiveness of the right.

5.1 Only a handful of artists will benefit during their lifetimes

The effect of section 11 is that a resale royalty will not be paid on the first resale of art works that were acquired prior to the commencement of the scheme. Those works will not be eligible for a royalty until they are sold for a second (and subsequent) time following commencement. It may take many years for these works to enter the secondary market. For works of art which are acquired after the law is introduced, a royalty will be due when those works are resold for the first time. However, the same issue arises for these works which are unlikely to change hands for a long period of time, if at all.

DEWHA asked Access Economics to assess what levels of royalties would be generated for artists if their artworks are resold at intervals of 2 years, 5 years and 10 years. Access Economics acknowledges that it does not have any real data on the frequency of which artworks are resold. It says that, without such data, modeling the implications of a limited scheme, of the kind the Government is proposing to implement in the draft Bill, is "necessarily imprecise in nature"[1] and the results are "at best only indicative"[2]. The justification for the inclusion of Section 11 appears to be rest on the assumption that that artworks change hands regularly and rapidly. Unfortunately, this assumption is incorrect.

Viscopy has analysed real auction sales data for the 10 year period from 1998 to 2008. That analysis shows that, of the works sold in 1998, only 6% had sold again by 2008. This figure supports the widely held view that the majority of art works are not resold in quick succession. Typically, private collectors buy works to keep and enjoy for their lifetimes and often to bequeath as part of their estates. Museums and cultural institutions buy to add to their

[1] Access Economics, *Design Aspects of an Australian Resale Royalties Scheme* (April 2008) at p23
[2] ibid at v

permanent collections for the public benefit. Investors might be more inclined to buy and sell artworks with greater frequency but only when a profit on the investment can be realized. It is important to understand that artworks are not traded like commodities and with few exceptions are not resold rapidly or frequently. Many artists will not live to see their works resold more than once during their lifetimes.

Access Economics claim (based only on modelling) that the royalties that will be collected in the first 10 years could be as much as $34 million. Viscopy's analysis of real data shows that if the draft Bill is implemented unamended, the value of the royalties for artists is a good deal less than this. Our analysis shows that royalties collected during the first 10 years will amount to approximately $4.6 million over the ten year period (which averages out at about $460,000 per year).

This is a fraction of the royalty income that would otherwise be generated if the scheme applies to all artworks protected by copyright (in line with all other resale right schemes in the world) from the moment of implementation.

The consequence of the limitation in section 11 is that the vast majority of artists will not receive any benefit from the scheme for many, many years and possibly not during their lifetimes. In its report, Access Economics acknowledges that a limited scheme as currently envisaged may "operate with little return to artists" for a number of years.[3]

As part of our research, we looked at the available sales data for a number of our members in order to compare the resale royalties they would have received between 1997 and 2008 under a fully functioning scheme (that applied to all works in copyright at the time the scheme commenced) with what they would have received under a limited scheme as outlined in the Government's draft Bill. The results are provided below.

Case Study 1 - Rachel Nimilga

Ms Nimilga is a traditional owner from Croker Island in the Northern Territory. She is the beneficiary of the estate of her father, artist Jimmy Mijaw Mijaw.

Under a fully functioning scheme, Ms Nimilga would have received $3,733. Under the Government's proposed scheme she would have received nothing.

In the case of artists like Rachel Nimilga, the small amount of income she would have received over 10 years under an all resale scheme might seem insignificant. However even these small amounts of income can have significant positive effects in maintaining culture and raising living standards in remote communities.

Case Study 2 - Banduk Marika

Ms Marika is an Indigenous artist and elder from Yirrkala in the NT. She is also the beneficiary of her father Malaman Marika's estate.

Under a fully functioning scheme, Ms Marika would have received $17,151. Under the Government's proposed scheme she would have received nothing.

[3] ibid at p22

Case Study 3 - Gloria Petyarre

Gloria Petyarre (whose work graces the front cover of this submission) is one of Australia's most important living Indigenous artists and an elder from Utopia in the Northern Territory.

Under a fully functioning scheme, Gloria Petyarre would have received $41,173. Under the Government's proposed scheme she would have received $207.

Case Study 4 - Judy Cassab

Judy Cassab is a distinguished artist based in Sydney. She has twice won the Archibald prize.

Under a fully functioning scheme, Ms Cassab would have received $17,026. Under the Government's scheme he would have received $975.

5.2 Australian artists may be denied royalties from overseas

Implementing a resale scheme with the section 11 limitation will mean that the Australian scheme is unique. No other country in the world which operates a resale right has legislated with such a provision. Thus, Australia will be out of step with all other countries, an eccentricity acknowledged by Access Economics in its report to DEWHA which points out that while resale schemes vary in some details from country to country, one of the general features common to all schemes is that the right "applies retrospectively i.e. to all secondary art sales occurring after the introduction of the scheme."[4]

In line with the Berne Convention, all countries providing a resale right for their nationals are obliged to offer the right on a reciprocal basis to artists from other countries which also provide for the right. However, it is important to note that in Europe, this requirement is further qualified so that Member States are not obliged to recognise the resale rights of nationals from countries which do not operate what can be described as a "fully functioning scheme". In 2008 the European Commission demonstrated its interpretation of this requirement by removing from Schedule 2 (the instrument by which European Member States offer reciprocal treatment to non-European nationals) 26 non-European countries. Notwithstanding the fact the Artist's Resale Right exists in all of these countries, this action was taken on the basis that there was insufficient evidence that these countries operate fully functioning schemes i.e. effective law which is efficiently managed and which generates royalties for artists.

The Australian scheme (as currently drafted) would differ significantly from that which exists anywhere else in the world. It would be difficult to manage effectively and, as we have demonstrated, it would fail to generate a meaningful royalty stream. There is every reason therefore to believe that it would not be considered to be a fully functioning scheme. So if the draft Bill is implemented unamended, there is a serious risk that Australian artists would not be entitled to receive royalties from any sales of their works which occur in European countries (and possibly others). This is would be extremely regrettable, since there is a valuable market for the Australian art in the UK especially. Auction sales dedicated to Australian art take place on a regular basis and there are several UK based galleries specialising in modern Australian art. Work by Indigenous artists is particularly popular with buyers in the UK.

[4] ibid at 2

Even if the Australian scheme were recognised overseas, it is doubtful that Viscopy's affiliate societies which administer the resale right in their territories would have the means or the will to identify eligible sales in accordance with the particular rules applying in Australia.

5.3 Management of the resale right will be seriously compromised

It seems clear from Minister Garrett's second reading speech on the draft Bill and his Ministerial Statement of October 2008 that it is the Government's intention to deliver a scheme which is administratively simple, straightforward to understand and cost effective. Viscopy does not believe that this draft Bill meets these objectives. The section 11 limitation would give rise to serious difficulties (as well as creating a potential loophole) for art dealers and auctioneers and would create a particular challenge for the appointed collecting society in calculating whether or not a royalty should be collected. Section 23(1) adds a layer of complexity and uncertainty that will make the scheme difficult and more costly to administer. It will create uncertainty for the art trade about whether or not a royalty is payable, and it will create extra work for the collecting society in determining whether or not a royalty is to be collected.

5.3.1 The problems with Section 11

In every other country where a resale royalty scheme operates, the right applies to works which are protected by copyright. This means that determining which works qualify for a royalty is completely straightforward. In the Australian context this would mean simply applying the relevant duration period to work out whether an artist's work is protected by copyright or not. In the vast majority of cases this information is publicly available or easily obtainable. For example, Viscopy has an extensive database of Australian and foreign artists and has expertise in determining the copyright status of artworks.

If, on the other hand, the section 11 limitation were imposed on the scheme, determining eligibility would be much more difficult. In the case of all commercial resales occurring after the legislation comes into effect, it would be necessary to identify:

- whether the work being resold was created before or after the commencement date;

and

- if the work was created before the commencement date, whether the resale is the first resale after commencement (in which case it is exempt from the royalty) or a subsequent resale."

Information of this type is not necessarily readily available. An inspection of auction catalogues and sales reports illustrates the point. Typically, the information includes:

- Name of artist
- Title of work
- Medium
- Condition
- Price estimate

Catalogues will include the year in which a work was created if this in known, but frequently it is not. Whilst provenance of artworks is very important, particularly at the high value end of the market, it rarely if ever includes the history of all previous sales transactions.

The draft Bill means obtaining these two pieces of information is vital, yet it will prove difficult – if not impossible – to secure.

5.3.2 The problems with Section 23 (1)

Our concern with section 23(1) is that it introduces ambiguity about the collection of the royalty. It appears to be the Government's intention that the royalty is to be collected through the agency of an appointed collecting society rather than directly by artists or other right holders. We note, for example, that the letter of April 2008 from DEWHA to various interested parties outlining the proposed scheme stated:

"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."

Similarly, in the Minister's Second Reading Speech on the draft Bill, he stated:

"Royalties will be collected by a single collecting organisation which will be appointed by the government through a competitive and transparent tender process."

In spite of these stated intentions, the draft Bill does not appear to implement them in a clear and unambiguous fashion. Section 23(1) serves to raise the question about whether the royalty could be collected directly by an artist.

To the extent that section 23(1) notices become commonplace, they will have the effect of significantly reducing the pool of royalties to be collected making the scheme much less cost effective to administer, contrary to the Government's intention to "ensure administrative costs are kept to a minimum with the maximum revenue possible returned to artists".[5] The modest levels of the royalties likely to be generated, at least for the first twenty years or more of the scheme, has implications for the cost effectiveness of managing the resale right. Access Economics acknowledges that "the amount of royalties collected in early years of a prospectively applied Scheme may be very small, possibly too small to cover administrative costs of the scheme. Furthermore, the costs of administering a prospective scheme are likely to be greater than administering an equivalent retrospective Scheme as greater information systems would be needed to confirm an artwork's eligibility."[6] Efficient management of royalties relies on economies of scale which cannot be achieved under the draft Bill. If the royalties cannot be collected efficiently and cost effectively, artists will lose out.

We note that one of the main reasons for the success of the UK scheme, which has been cited favourably by the Government, is that the right cannot be waived or assigned and must be collected through a collecting society. Compulsory collective management is unusual in the UK, which tends to favour voluntary arrangements. However, in determining how the law should be implemented, a departure was made from the norm in recognition of the fact that collective management was the only way in which resale royalties would reach all eligible artists in the most efficient way possible.

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[5] Resale Royalty for Visual Artists Bill 2008, Second Reading.
[6] ibid

We acknowledge that imposing on artists the obligation to receive a royalty only via a collecting society will deny artists the right to manage their own resale right. However, we submit that there are very good reasons for this which outweigh any downsides for individual artists in favour of the greater good.

Since the royalty rate is dictated by the legislation and the rules determining when a royalty is payable are non-negotiable, the only benefit which is arguably available to artists if they are entitled to manage their own right is the collection of royalties. It is certainly true that an artist able to collect his or her royalties from dealers and auctioneers directly will avoid the fee otherwise payable to a collecting society performing this service. It is our contention however that artists would find it difficult, if not impossible, to track all resales of their work, effectively enforce their resale right and collect their own royalties. Whilst major auction houses publish their sales records, galleries and dealers do not. It might be feasible for an artist to monitor the activities of local galleries, but doing this on a nation-wide basis would challenging, especially for artists living in remote communities. Obtaining information about overseas sales would be yet more difficult without the assistance of a collecting society and its international data exchange facilities.

An experienced collecting society will be able to manage the right on behalf of all artists and if properly equipped, will be able to collect all the royalties due, including any due from overseas. Since most collecting societies operate on a non-profit basis, the economies of scale which could be achieved should ensure the fee paid by artists to receive their royalties this way is reasonable. A single service provider (which is properly regulated) also has significant advantages for the art trade, which would otherwise be obliged to deal with multiple requests for information and royalty payments.

It is clear from overseas experience that collective management of the resale right is one of the key features of an effective scheme. Collective management keeps costs down for artists, encourages compliance from the art trade, brings accountability to the process and minimises the compliance burden on businesses.

We submit therefore that, in order to implement the Government's intention of administration of the scheme through a collecting society, the draft Bill should be amended to provide that the person liable for payment of the resale royalty must pay that royalty to the collecting society. We note, for example, that the Resale Royalty Bill 2004, introduced by Senator Lundy, had the following section:

"25(1) The art market intermediary acting on behalf of the seller shall pay the resale royalty to the collecting society."

Similarly, the Artists Resale Rights Bill 2006, introduced by Mr McMullan, had the following section:

"248AI(1) Resale right may be exercised only through a collecting society."

5.4 Artists will face pressure to give up their royalties

As well as creating difficulties with the management of the resale right, subsection 23(1) appears to provide a mechanism whereby artists or other resale right holders can direct the collecting society not to collect or enforce the collection of the royalty in relation to any particular commercial resale.

The intention behind this provision is unclear. The Government has not mentioned it in any of its statements concerning the resale royalty scheme. The Explanatory Memorandum does not shed any light on it, and our efforts to obtain an explanation of the section from the Government have been fruitless.

The presence of this section in the draft Bill is particularly perplexing given the later provisions concerning inalienability (s33) and waiver (s34). In relation to these sections, the Government has made clear statements in the Explanatory Memorandum about the importance of protecting artists from pressure to waive or give away their rights, with which Viscopy strongly agrees. A further objection we have to section 23(1) is that it would put Australia out of step with every other resale countries, since none of these allow for waiver.

We note also that Access Economics, in its report to DEWHA, did not model a resale scheme which included a waiver mechanism in the nature of section 23(1).

We believe that the protections afforded by sections 33 and 34 will be undermined by the presence of section 23(1). It is clearly foreseeable that artists will be "encouraged" or pressured into directing the collecting society not to collect a royalty on particular resales in return for some "benefit" or for avoidance of detriment. In the vast majority of cases, artists are in a weak bargaining position relative to galleries, dealers and auction houses.

6. *Minimising the burden on the art trade*

The principle responsibility for collecting and paying the royalties will fall on the collecting society appointed to manage the right. However, we understand that the Government is keen to ensure that the resale right generates royalties for artists without unreasonably burdening the art trade or harming the market for buying and selling art.

It is important to remember that art dealers and auctioneers will almost certainly pass the cost of paying the royalty on to their customers. This is common practice throughout the world – typically, the buyer pays the royalty - and the joint and several liability provision in the draft Bill allows for the same thing to happen in Australia.

It certainly true however that art dealers and auctioneers will be required to make adjustments to their business practices in order to account for resale royalties. Burden on business was a concern in the UK when the Artist's Resale Right was introduced in 2006. It is interesting to note that in the UK *"over 60% of art market professionals independently surveyed in 2007 reported that they spend less than five minutes and costs them less £10 per quarter in administration"*[7]. A separate study commissioned by the UK Government found that *"the cost of administration does not appear burdensome relative to the benefit to the artists"*[8]. As evidenced by the UK experience, the administration of the resale right need not be a nightmare for dealers and auctioneers. The appointment of an efficient collecting society which has sufficient capacity and expertise and is committed to good customer service will assist the art trade to fulfil their obligations with minimal interference in their business.

It is essential to ensure the scheme is simple to understand and to apply and can be embedded into business routines with minimum fuss. Unfortunately, the implementation of Section 11 will hinder this. Because it is likely to be many, many years before most artworks are eligible

[7] *DACS Submission to the Government Consultation on Artist's Resale Right September 2008 www.dacs.org.uk*

[8] *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

for a royalty, it is likely that the scheme would fail to become embedded into the daily business practice of the art trade in a way that administration of royalties is a well established and widely understood feature of the book publishing and music industries. In its report for DEWHA, Access Economics acknowledges that, because only a proportion of sales would be subject to the royalty under a prospectively applied scheme (at least in the short to medium term), the royalty is likely to be harder to enforce and there may be more scope for avoidance.[9]

7. Addressing the Government's concerns

We note that there are two reasons given in Minister Garrett's Second Reading Speech for the inclusion of section 11:

1. *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";*

Whilst we acknowledge it would be desirable for purchasers to have prior notice of the requirement to pay royalties on resold works of art, we do not believe the desirability of such notice outweighs the entitlement of artists to a properly functioning and beneficial resale scheme.

We wish to draw to the Committee's attention that evidence from existing resale schemes (including the UK's very successful scheme) is that, in practice, the payment of the royalty is borne by buyers of artworks and not by sellers. There is no evidence from the UK or elsewhere that buyers ceased to purchase artworks or paid less than they otherwise would have because of the resale royalty. There is no reason to suppose that this would not also be the case in Australia in which case, sellers would not be adversely impacted by a fully functioning "retrospective" scheme since they will have every reasonable expectation of achieving the full value for the artwork they wish to sell.

2. *to "allow the art market to adapt gradually to the new right" so as not to have a negative impact on the art market.*

The evidence from overseas is that the introduction of a resale royalty has no adverse impact on art markets. On the contrary, the art market in the UK doubled in value from £4.2 billion to £8.5 billion since the introduction of a resale right in 2006. We note that the Australian Government does not point to any evidence that the Australian art market would be adversely impacted by the introduction of a fully functioning resale scheme. Apart from there being no evidence to support the notion that the resale right has adversely burdened the art trade, economic theory suggests the contrary. In a recent report produced by DACS in the UK, the following comments were made:

"the notion that the Resale Right has an impact on the price of art simply does not stand up to scrutiny when the behaviour and attitude of art buyers is examined. Our evidence shows that art is relatively price-inelastic; it can become more desirable the more expensive it becomes and it is acknowledged as a reliable, low risk and high performing investment. If there had been any damage inflicted on sales of art since the first stage of the Right became operational in February 2006, it would already have become apparent. In fact there is no damage[10]"

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[9] ibid at p7

[10] *DACS Submission to the Government Consultation on Artist's Resale Right September 2008 www.dacs.org.uk*

In addition to its stated concerns, we understand the Australian Government has concerns about the Constitutional implications of the Bill, although it has not made any public statements about these. We refer the Committee to the Australian Copyright Council's submission on this point which refers to independent legal advice obtained on this issue. This appears to contradict the Government's view and claims that the omission of section 11 would not render the draft Bill unconstitutional. Whilst we appreciate that the Government might be minded to be guided by its own advisors, we ask that consideration is given to the alternative opinion which is available and also that the Committee takes account of the suggestions for a possible solution made by the Australian Copyright Council in respect of the incorporation into the Bill of a historic shipwrecks clause.

8. Other matters

In addition to our main concerns with the draft Bill, we would like to draw the Committee's attention to a number of other issues which are detailed below.

8.1 Section 7 Definition of "artwork"

We support the Government's intention, as outlined in the Explanatory Memorandum, to provide a wide and inclusive definition of artwork that would encompass new forms of artistic expression, including video art and digital art. These media are becoming increasingly popular as forms of artistic expression and are already finding their place on the resale market. Video artworks by Australian artists Shaun Gladwell and Susan Norrie, for example, have become collectable works.

In order to give effect to this intention, however, we submit that the terms "digital art" and "video art" should be added to the list of examples in section 7(2). The reason for this is that we are concerned the use of the term "graphic and plastic art" imports the notion of a work that is static. We would also like to see the use of a term such as "visual art" which is arguably better understood in the Australian context that the European expression "graphic and plastic art".

8.2 Section 9 Drawings, plans and models of buildings

Whilst we support the exclusion from the Bill of buildings themselves, we submit that drawings, plans and models of buildings should be eligible for a resale royalty under the scheme. Drawings, plans and models sometimes have significant value as artworks in their own right and there seems to be no good reason to exclude them from the scheme. The scheme will, of course, only apply to those works which are resold on the secondary market above the threshold price.

8.3 Subsection 10(1) Threshold

Viscopy has previously proposed a threshold of $500. We note that the draft Bill proposes a threshold of $1000. No doubt the Committee will be aware that the lower the threshold, the greater the number of artists who will benefit.

8.4 Subsection 10(2) Definition of "sale price"

We submit that the sale price on which the royalty is paid should include any buyer's premium levied on the hammer price by auction houses. Excluding the buyer's premium from the sale price would have the effect of discriminating unfairly against galleries and dealers whose "fee for service" is included in the price rather than being separately levied in the form of a premium. Exclusion of the buyer's premium also undermines the principle that the royalty should be paid as a proportion of the sale price, which for art works purchased at auction is the amount that the buyer pays and includes the buyer's premium.

8.5 Section 12 Who holds the resale royalty right?

We are concerned about Division 2 of Part 2 (sections 12 and 13) of the draft Bill which deals with the identity of the holder of the right. This Division provides that a person is the holder of the resale right if he or she is identified at the time of a commercial resale of an artwork created by that person.

We do not see why identification needs to take place at the time of the sale, and we submit that it should be a matter for the collecting society to determine the identity of the holder to whom the royalty must be distributed within the relevant 6 year distribution period as allowed for in section 31.

8.6 Section 28 Notice of commercial resale

Section 28 provides for notice of a commercial resale to be given to the collecting society by the seller or through an agent of the seller. While Viscopy approves of the requirements of this section, we are of the view that the obligation to provide notice should be imposed jointly and severally on the same parties who are liable to pay the royalty in accordance with section 20.

Imposing the requirement on individual sellers alone would be onerous for those individuals and could make enforcement difficult for the collecting society. The art market professionals involved are the ones most likely to be in the best position to give such notice. Our suggested amendment would also bring this obligation into line with the rights of the society to request information from relevant parties under section 29.

9. Conclusion

Our conclusions can be simply summarised:

- A limited scheme as currently proposed in the draft Bill will fail artists, burden the art trade and be out of the step with international standards

- A fully functioning resale royalty scheme will deliver meaningful benefits to artists, minimise the burden on the art trade whilst achieving the Government's objectives for an Australian resale royalty scheme

Therefore, we urge the Committee to recommend that the Government implement a comprehensive and fully functioning resale scheme by omitting from the draft Bill:

1. section 11

and

2. subsection 23(1)

There are four additional issues, slightly to one side of the main issues and we make the following recommendations to the Committee in respect of these:

3. Ensure the definition of qualifying artworks includes video art, digital artworks and architectural plans and drawings

4. Define sale price as the price paid by the buyer which, in the case of auction purchases, will include buyer's premium

5. Entitle the collecting society to determine the identity of the holder to whom the royalty must be distributed within the relevant 6 year distribution period

6. Ensure the obligation provide notice of a resale is imposed jointly and severally on the same parties who are liable for paying the royalty

We believe that artists have been given every reason to believe that they will be provided with a legal right which is equivalent to that enjoyed by their peers in other countries and to which they are morally entitled. The priority for Viscopy is to ensure that a fully functioning resale royalty scheme is implemented in Australia which ensures artists (and their beneficiaries) receive the recognition and reward they deserve and which is so long overdue for their creative contribution to the cultural life and identity of Australia.

We are committed to working closely with the Australian Government and all in the art market to make this a reality so that the Australian resale royalty scheme is a meaningful and successful piece of legislation which achieves its original aims.

We would welcome an opportunity to appear before the Committee at the public hearings in order to present our views in person.

Viscopy, 23 January 2009