

Submission No:8.....
Date Received:	..20-1-09.....
Secretary: 



11 January 2009

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

Dear Mr Keele

**Resale Royalty Right for Visual Artists Bill 2008
House of Representatives Committee Inquiry**

The Australian Commercial Galleries Association (ACGA) presents the attached submission in relation to the Australian Government's proposed resale royalty scheme.

The ACGA is concerned about the practical implications of the scheme as proposed in the Bill recently introduced to Parliament. We attach to this letter an outline of the issues and concerns we have in relation to the draft Bill (Attachment A).

We note that views among the membership of the ACGA differ widely on the merits of introducing a resale royalty scheme in Australia, and that some of our members voluntarily operate schemes for artists they represent. We hasten to add that at the forefront of the minds of the ACGA membership is a strong commitment to the ethical representation of living Australian artists. Our members include the major galleries representing Indigenous Australian artists and therefore are informed about issues relating to Indigenous people.

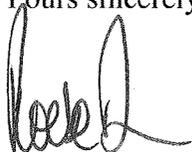
The range of views among the membership reflects concerns about the perceived practical impact of introduction of the scheme on the livelihood of artists, both positive and negative. ACGA members are also concerned about the additional administrative burden imposed on small business in a limited and volatile market. For these reasons the ACGA makes no comment on the merits or otherwise of introducing a resale royalty scheme (RRS) in Australia, and the contents of this submission should not be taken as endorsement of the Australian Government's commitment to implementing a RRS, express or implied.

The ACGA makes this submission in the spirit of trying to achieve an outcome that minimises any negative impact on the Australian art market for artists and galleries. In particular, the ACGA is concerned to ensure the primary market, which is fundamental

for the livelihood of the vast majority of Australian artists who never reach the secondary market, is not dampened.

We emphasise that we are interested in working with the Australian Government in furthering the interests of living Australian artists and the Australian art market.

Yours sincerely



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Beverly Knight
National President

ATTACHMENT A**RESALE ROYALTY RIGHT FOR VISUAL ARTISTS BILL 2008****HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON CLIMATE
CHANGE, WATER, ENVIRONMENT AND THE ARTS****AUSTRALIAN COMMERCIAL GALLERIES ASSOCIATION
SUBMISSION****GENERAL COMMENTS****Introduction**

For the reasons outlined in the cover letter to this submission, the ACGA makes no comment on the merits or otherwise of introducing a resale royalty scheme (RRS) in Australia, and the contents of this submission should not be taken as endorsement of the Australian Government's commitment to implementing a RRS, express or implied.

The ACGA is of the view any resale royalty scheme (RRS) should be designed to:

- Ensure that any royalty payments to artists are not diminished by fees and charges
- Minimise the impact on the primary market in Australia
- Minimise compliance costs for small businesses.

The ACGA notes that its main focus is the primary market and its responsibility is to member commercial galleries operating largely within the primary market. The ACGA further notes that a RRS by its very nature relates to the secondary market. Notwithstanding, the ACGA is particularly keen to ensure that implementation of a RRS in Australia does not have an inflationary or dampening impact on the primary market, or pose an additional administrative or financial burden on commercial galleries operating within the primary market, particularly in the current global economic crisis. In that regard we note that the vast majority of commercial galleries are small businesses operating in a limited and volatile market, which is highly susceptible to additional administrative and financial imposts.

Understanding the primary market, especially with respect to Indigenous Australian artists, is complex. We are concerned that the legislation, as currently drafted, may in fact have a negative impact on the Indigenous Australian art market, notwithstanding that one of the key stated intents of the draft legislation is to benefit Indigenous artists.

Clarifying the primary market for all artists (Indigenous and non – Indigenous) is vital.

Indigenous Australian Art Market

The ACGA is very concerned about the potential negative impact of the RRS on the Indigenous Australian art market arising out of the practical application of the Bill.

The proposed operation of the RRS, while well intentioned, may have serious business implications for art centres and their artists as well as for commercial galleries who either re-sell artworks or secure exhibitions by purchasing works upfront, or who otherwise support the Indigenous art industry, for example by paying stipends to artists. In that context we believe the details of the legislation need to be carefully considered to ensure the stability of the Indigenous Australian commercial art market, especially in terms of defining who is the primary 'point of sale'.

It is our understanding that if the legislation is passed, works on consignment will not be affected but any works purchased upfront will attract the royalty (although this is not clear). Many but not all art centres have consignment relationships with commercial galleries, or operate on a mixture of consignment and up front sales. For example, some art centres purchase everything an artists presents to the art centre. Others pay the artists once the item is paid for by a gallery or dealer or sold by the arts centre. In the first example all sales by the art centre would constitute first sale. Some art centres require up front payment for some works prior to exhibition, and pay their artists up front (so the artists get immediate income and the art centres can put the best works aside for exhibition). Is this then deemed a secondary sale once sent to a gallery who then sells the work?

Further, some commercial galleries pay stipends and other incentives to artists to assist them to produce a body of work for exhibition. The stipend is usually accounted for as a stock item prior to an exhibition. This can occur for many reasons and allows the commercial gallery to help the art centre and artist(s) to finance exhibitions in circumstances where they would not otherwise be able to afford to do so.

There are many well-intentioned social and economic reasons why galleries (and art centres) purchase some works upfront, particularly for lesser known artists. Purchasing works prior to exhibitions transfers the risk of sale to the commercial gallery and provides important backing for art centres and artists. The capacity for commercial galleries to continue to assist the Indigenous Australian art industry in this fashion will be affected if the legislation is passed, and accordingly, the important exposure offered for Indigenous artists through commercial galleries may be at stake.

We consider that in this context the up front purchase of works for the purposes of exhibition (as opposed to dealing) should be excluded from the definition of resale.

Clarifying where the primary market starts and finishes for all artists (Indigenous and non-Indigenous) is vital.

Problematic art works

We are also concerned to ensure that the operation of the RRS does not exacerbate existing issues relating to problematic art works (such as fakes and forgeries) and provenance arising within both the Indigenous and non Indigenous art markets. This is particularly concerning in the context of the proposal to exclude private sales (see below). Rather than increasing the transparency of the art market, a key point made by the Minister in his Second Reading Speech, we are concerned that this may inadvertently assist unscrupulous practices.

SPECIFIC COMMENTS

Exclusion of private sales (clause 8)

- The ACGA is concerned that this will have the effect of driving underground art market sales, and could seriously impact on the primary market. This acts as a disincentive for buyers and purchasers to use art market professionals, which in turn impacts on vital relationship between artists and commercial galleries. In the long term this could have a serious impact on the viability of the Australian visual arts market generally. By excluding such sales art market professionals are effectively being taxed at 15%. Works that are sold privately to avoid the resale royalty will end up with uncertain or broken provenance.
- The ACGA is further concerned that, in the Indigenous art context, excluding private sales will encourage an increase in ‘carpet-bagging’. As noted above, rather than increasing the transparency of the art market, a key point made by the Minister in his Second Reading Speech, we are concerned that this may inadvertently assist unscrupulous practices.

Definition of sale price (clause 10)

- We are very concerned that the definition of ‘sale price’ does not include any buyer’s premium on the sale. This is not consistent with other legislation – for example under the federal Government’s Taxation Incentive Scheme a valuation includes buyer’s premium and GST. This in effect means that commercial galleries will be disadvantaged as compared to auction houses under the current Bill.

Threshold (clause 10)

- We remain concerned about the low level of the threshold, and the potentially high administration fees that may be charged by the Collecting Agency.

1 July 2009 (clause 11)

- The ACGA is of the view that the legislation should come into effect in relation to works acquired or created no sooner than one year after its commencement (as opposed to 1 July 2009), keeping in mind that the Bill may not yet be passed by that date.

Point of sale (clause 8 and 11)

- It is not entirely clear in the legislation when the point of sale occurs and liability to pay the royalty arises. This may apply, for example, to works that are 'sold' to public galleries prior to July 2009, but in respect of which money is not paid and title does not pass until after July 2009.

Many public galleries buy works from commercial galleries but, with the agreement of the gallery and the artist, do not pay for the works until some time later (often 12 months or more), when acquisition monies are released from the public gallery's budget. Commercial galleries that handle resales of artists they represent often do so because they prefer important works of that artist to be placed with public galleries for the benefit of the artists and the public, but may have to remit 15% (10% GST and 5% resale royalty) long before they and the vendor receives money from the public gallery.

Meaning of identified (clause 13)

- We are concerned about the operation of the legislation in the context of problematic art works, where the 'identified' artist(s) did not actually produce the work. For example, the ACGA understands that it is a known practice among carpetbaggers to photograph artists in front of works to 'prove' the works were created by that artist, and use these photographs to create false provenance. Again this provision could have the effect of incentivising such practices.
- In the long-term beneficiaries of estates would not be in a position to verify or authenticate art works or establish provenance. Therefore payment of a resale royalty for a problematic work could act as an authentication process for such work.

Rate of Royalty (clause 18)

- The ACGA is of the view that a sliding scale is preferable as a means of reducing the overall impact on the market (in circumstances where the collecting agency is entirely government funded). The ACGA is also of the view that consistency with and reciprocity to European markets is preferable, and accordingly suggests that adopting the EU's sliding scale would be sensible.

Liability to pay (clause 20)

- We are concerned that it is unclear who has **primary** responsibility for paying for the resale royalty under the current formulation of the Bill.
- We note that many art collectors choose to sell their works through commercial galleries because they do not want the publicity associated with auction house sales. Privacy for many art collectors is very important, and current support for the art market may be affected if privacy is at stake (see also comments under clauses 28 and 29 below).
- We also note that it is not clear whether it applies to charity auctions, and if it does who has responsibility to pay in this instance. Many commercial galleries and artists donate works to charity auctions all the time, but may rethink this practice if it would attract the royalty.

Collection (clause 23)

- We are concerned that 21 days may not be sufficient time for the holder of resale royalty right to opt-out of collection, particularly given that ‘notification’ only occurs via a website.

Collecting Society (clauses 26 and 35)

- We remain concerned that there will be a single Collecting Society and that it will be a private entity. In particular we are concerned that there will be no competitive tension that will limit the level of administration fees, notwithstanding the operation of subclause 26(2), and that this will impact on the artists.
- The ACGA is of the view that the Collecting Society should be wholly government funded so that the total amount of the royalty collected by the Collecting Society is passed on to the artist(s). Further the Collecting Society should be adequately resourced to ensure that any additional administrative burden on small business is minimised, and that there is appropriate level of training for and education of the art market. This includes development of and provision to the market (at no cost) documentation and products that assist with implementation of the RRS for business. The ACGA notes that the Bill makes no reference to an educative role for the Collecting Society.
- The ACGA notes that international experience demonstrates that the costs of administering a resale royalty arrangement are very high, and that administration fees of 20 – 25 % are usual. The ACGA believes that any proposed resale royalty scheme should be designed so that the artists and the art market generally are not burdened by the high costs associated with administering the scheme. It is for this

reason that the ACGA is proposing that the Collecting Society be entirely government funded.

- The ACGA understands that the competitive environment in the UK (having more than one collecting society) has resulted in fees payable by the artist to the collecting society being significantly reduced (from 25% to 15%). Such competition has the capacity to maximise the return to artists, but should only be contemplated if it does not add to compliance costs for small businesses in the significantly smaller Australian art market.

Notice of sale (clause 28) and requesting information (clause 29)

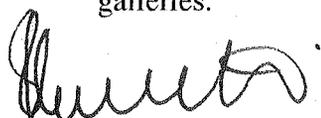
- We are concerned that the proposed basis for notification of sales will create unnecessary paperwork, inefficiencies and additional administrative burdens, particularly for commercial galleries. We remind you that the vast number of primary market commercial galleries are very small businesses operating in a volatile market and are already under significant pressures. We recommend that the process for notification and requesting further information occur electronically, and be as simple as possible.
- The ACGA also believes that rights of access to information should be designed to minimise any potential dampening of the primary market. In particular limiting the timeframe within which information can be sought from the buyer, seller and intermediary is important. The EU model of three years offers an example for consideration.
- We are also concerned that the proposal to require a response within 90 days may not be sufficiently flexible for small business operators.
- Finally we note that **privacy** is paramount to many art collectors. We are concerned to ensure that the proposed form of notice does not impinge on the privacy of the vendor and the buyers of works. In this context we are concerned about the proposal for details of sales to be published on the website of the Collecting Society. Many collectors choose to resell works through commercial galleries because they do not want the publicity associated with auction house sales. Any scheme which impacts on the privacy of the vendor (and the purchaser) may result in a dampening of the market, which is already extremely vulnerable in the current economic climate.

Return of unclaimed resale royalties (clause 31)

- There seems little incentive for the Collecting Agency to use its best endeavours to find the relevant parties. We suggest that this clause be strengthened to require publication of unclaimed resale royalties in public newspapers for a specified period.

Educative role

- The ACGA notes that the Bill makes no reference to an educative role for the Collecting Society.
- We consider it important that the Collecting Society is appropriately funded to undertake education of the arts community and the general public in relation to the RRS. In particular we are keen to ensure that the Government makes available adequate funding to assist artists and art centres to be 'RRS ready', for example by ensuring artists have up to date wills. We are also keen to ensure that education and training extends to all aspects of the sector, including commercial galleries.



Beverly Knight
National President
Australian Commercial Galleries Association
January 2009



Phoebe Dunn
Chief Executive Officer

ATTACHMENT B

About the Australian Commercial Galleries Association

The ACGA is the peak national body representing commercial art galleries in the primary market. It has over fifty members throughout Australia. Importantly, the ACGA is a not for profit body receiving no public funding and is almost entirely supported by annual membership fees. Inevitably this means our resources are tight and that we must add value to our activities where we can.

The ACGA is a strong industry association whose members are amongst the most important and exciting galleries in Australia with a commitment to professional and ethical practice in the primary visual art market.

The ACGA exists to represent, promote and further the interests of Australian galleries whose core business is the ethical representation of living Australian artists. A central tenet of the ACGA's mission is to develop Australian artists' livelihood and reputation while contributing to an enhanced public understanding of contemporary Australian art in the primary market. Simultaneously the ACGA advocates for recognition of the close, complex and long-term partnership role commercial galleries have with artists.

The ACGA seeks to contribute to the visual arts in a way that enhances understanding of and support for the primary market while cultivating sound entrepreneurial ethics and an ever-strengthening national and international market for Australian art.

The ACGA operates under a federated structure, with State and Territory chapters working in conjunction with a National Board. The current Board members are: Beverly Knight (National President); James Makin, (VIC/TAS Chair and Secretary); Stella Downer (ACT/NSW Chair); Bruce Heiser (QLD Chair); Dr Diane Mossenson (WA Chair), Karen Brown (SA/NT Chair) and Arthur Roe (National Treasurer). Phoebe Dunn is the current Chief Executive Officer of the ACGA.