


# Sotheby's

EST. 1744

926 HIGH STREET ARMADALE VIC 3143 PH: 03 9509 2900 FX: 03 9563 5067  
www.sothebys.com SOTHEBY'S AUSTRALIA PTY LTD ABN 48 004 742 509

|                |   |
|----------------|---|
| Submission No: | 24  |
| Date Received: | 22-1-09   |
| Secretary:     |  |

22/01/2009

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

Dear Ms George,

Thank you for the opportunity to provide comment to the House Standing Committee Inquiry into the *Resale Royalty Bill, 2008*.

Regrettably, Sotheby's believes the Bill fails to establish a framework that is suitable for adoption by art market practitioners on a national basis. Therefore, we have concerns about the ability of the resale royalty to deliver intended policy benefits to Australia's visual arts community.

Sotheby's Australia is committed to being an active and valued contributor to identifying, developing and assisting in the protection of Australia's visual arts community. In this context we would welcome the opportunity to participate in the Committee's public hearing and speak our views on the Bill.

Kind regards,



Ms Lesley Alway  
Managing Director, Sotheby's Australia

CC. Mr Peter Keele, Committee Secretary



## Executive Summary

Sotheby's Australia is concerned that the Resale Royalty Scheme proposed in the *Resale Royalty Bill 2008* will be difficult to administer, impossible to regulate and may depress future primary and secondary art market sales which remain a crucial support mechanism for Australian visual artists.

In the event the Government proceeds with this policy, we believe the *Resale Royalty Bill 2008* must make the following amendments:

- Amend Division 6 s: 32 (duration of right)
  - **to apply to living artists only**
- Incorporate a cap on royalty payments.
  - **impose a maximum royalty payment of \$12,500.**
- Amend Division 3 s: 18 (rate of royalty)
  - **a flat rate of 3% should apply**

Despite strong objection from some sectors in the Australian Arts Industry, we believe it is essential the *Resale Royalty Bill 2008* retain Division 1 s: 11 (resale royalty right on artworks in existence when Act commences):

- **apply to artworks produced after date of introduction (1/07/2009)**

Finally, Sotheby's expresses its concerns about the policy consequences of the proposed Resale Royalty Scheme. We urge the Committee to observe the experience of Resale Royalty Schemes in other jurisdictions, particularly the UK, and encourage deeper analysis of industry trends specific to the Australian Art market.

Sotheby's believes the Government should reconsider passing the *Resale Royalty Bill 2008*. In the event legislation is passed, we encourage Government to postpone introducing the scheme until the economic climate stabilises so the impact on the art market can be accurately assessed. At a minimum, the Government needs to incorporate the recommended amendments in this submission to sustain the vitality of the Australian visual arts industry.

## Introduction

Sotheby's actively supports Australia's visual art sector. We do this directly through the promotion and sales of Australian art and complying with existing current Copyright regulation. We are also very proud of our partnerships with institutions that foster the careers of living Australian artists including Gertrude Contemporary Art Spaces, the Australian Centre for Contemporary Art and The Art Gallery of New South Wales.

We acknowledge that the Resale Royalty Scheme is a Rudd Government election commitment but do not believe this represents sound policy, particularly in the current economic environment. We argue that the proposed Resale Royalty Scheme will fail to deliver several of the objectives outlined by Minister Garret in his speech introducing the *Resale Royalty Bill 2008* to Parliament on November 28, 2008.

For the reasons outlined below, Sotheby's recommends the Government:

- Reconsider the appropriateness of this legislation to securing tangible benefits for those artists who need it the most
- Delay the introduction of amended legislation for at least 18 months to two years until the implications of the current global economic turmoil on the art market is better understood (if the Bill does proceed).
- Incorporates amendments suggested in this paper to maximise benefits for living Australian artists and minimise the impact on the Australian art market (if the Bill does proceed).

Whilst there are a number of other issues about the legislation that are of concern, we have chosen to comment on those that directly affect Australia's secondary art market.

## About Sotheby's Australia

Sotheby's Australia is a wholly owned subsidiary of Sotheby's Inc. which is listed on the New York Stock Exchange. As the only publicly listed Auction House, Sotheby's complies with extremely high standards of transparency and accountability. Sotheby's Australia has maintained offices in Sydney and Melbourne since 1982 and is regarded as one of Australia's leading auction houses. We are a key office of Sotheby's Asia region which has been identified as a growth market. We report to Head Office in New York via the Asian Regional Head Office in Hong Kong which is increasingly becoming the major art centre in Asia. In addition to the Australian Art auction business, we actively consign material from Australian clients to Sotheby's international auction centres, primarily London, New York and Hong Kong.

On average we conduct 3 Important Australian Art auctions, 2 Decorative Arts auctions and 2 Aboriginal Art auctions annually. In addition, Sotheby's Australia provides direct employment for 24 people as well as a number of casual staff, interns and trainees as well as indirect employment for a range of specialised service providers.

## The Australian Art Market

The size of the commercial art market in Australia is difficult to quantify because of the range of players including auction houses, commercial galleries, private dealers and artist run galleries, all of whom sell art in the commercial market. Because of its public nature, the auction sector is the easiest to quantify and in 2008 is estimated at \$114,688,000.<sup>1</sup> This represents a 35% decline in the value of art sales achieved in 2007.<sup>2</sup> 2007 was an aberrant year for the Australian art market and was fuelled by major sales such as the Qantas Corporate Collection and the global asset boom. The Australian art market, particularly the auction sector is one of the most competitive in the world with five auction houses (Sotheby's, Bonhams and Goodman, Deutscher and Hackett, Deutscher and Menzies and MossGreen) competing in a relatively small market. Internationally, the market is dominated by two tier one Auction Houses, Sotheby's and Christies.

---

<sup>1</sup> John Furphy Pty Ltd., 2008, *Australian Art Sales Digest*, <<http://www.aasd.com.au/AnnualAuctionTotals.cfm>>, viewed 23/12/2009

<sup>2</sup> Total value of sales in 2007 was \$175,630,000. John Furphy Pty Ltd., *op cit*, 2008,

## Comments on the Resale Royalty Bill

Sotheby's is concerned that the Resale Royalty Scheme proposed in the *Resale Royalty Bill 2008* will be difficult to administer, impossible to regulate and may depress future primary and secondary art market sales which remain a crucial support mechanism for Australian visual artists.

We draw the Committee's attention to the Minister's stated intent behind the Resale Royalty Scheme: "by enshrining in law the right of artists and their heirs to receive a benefit from the secondary sale of their work, we are building an environment where the talent and creativity of visual artists receives greater reward and recognition".<sup>3</sup> Sotheby's believes that the Resale Royalty Scheme will fail to deliver these objectives and identify our concerns at three levels: policy intent, policy implementation and policy consequences.

### Policy Intent

Sotheby's believes the Resale Royalty policy fails the tests of fairness and effectiveness in three key respects:

#### 1. ***The Resale Royalty Scheme will be ineffective in its support of the majority of artists.***

On the surface, the Resale Royalty Scheme holds out great promise to living artists to supplement meagre incomes. In reality, such a scheme is likely to chiefly benefit the most successful artists or their estates. This has been well documented in both international and local research.<sup>4</sup> A policy requiring the establishment of an expensive and sophisticated bureaucracy to implement, manage and monitor the scheme, will in fact primarily be returning the greatest benefits to well established and potentially, more successful artists and their heirs. This appears to be a poor policy outcome where those who need the most assistance will benefit the least.

#### 2. ***The Resale Royalty Scheme will apply to works that achieve both a Capital Gain and Capital Loss***

A major flaw in the legislation is that the Resale Royalty Scheme will apply to a capital loss as well as capital gain. We believe the announcements and rationales used by the Government to champion the Resale Royalty Scheme have been misleading because all the examples used to illustrate how the scheme will operate assume a capital gain.<sup>5</sup>

This is both inaccurate in terms of how the scheme is proposed to operate and does not reflect the reality of the art market. Artists works fluctuate in price as market conditions and collecting taste vary over time. Like other asset classes, the art market experienced annual growth until 2007. It also experienced a significant correction in 2008. Similarly, collecting and investor taste and activity can change over time and even within an escalating market, some artists work can decline in value.

#### 3. ***The Resale Royalty Scheme is unfair as it will effectively operate as a 'lottery'***

The Resale Royalty Scheme may certainly benefit some artists financially, but will not result in an equitable spread of payments amongst all artists. In the Australian art market some artists works are traded more regularly than others. Under the proposed scheme established artists that produce high quantities of work, that are traded often, will benefit most, as opposed to artists whose work may be of greater quality, but traded less often.

The Resale Royalty Scheme lacks fairness, is ineffective and misleading in achieving its stated policy intent and we urge the Government to review the appropriateness of this policy.

<sup>3</sup> Media Release: Minister for the Environment, Heritage and the Arts, 2008, *Artists to Benefit from Resale Royalty*, media release Ref PG 147, 3/10 2008, viewed 23/12/2008, <<http://www.environment.gov.au/minister/garrett/2008/mr20081003.html>>

<sup>4</sup> K. Graddy, N. Horowitz, S. Szymanski, "A study into the effect on the UK art market of the introduction of the artist's resale right", Intellectual Property Institute (commissioned by the UK Government), London, 2008; also T. Froschauer, *The impact of artist resale rights on the art market in the United Kingdom*, Antique Trades Gazette, London, 2008 and; Access Economics, *Design Aspects of an Australian Resale Royalties Scheme*, (commissioned by the Department of the Environment, Heritage and Arts), Canberra, 7 April 2008,

<sup>5</sup> *op cit.*, media release Ref PG 147, 3/10 2008

## Policy Implementation

If the Government proceeds to implement the legislation, we strongly advocate the following key elements be amended for the reasons outlined below:

### Recommended amendments:

- Amend Division 6 s: 32 (duration of right)

- **to apply to living artists only**

It is imperative that the Resale Royalty Scheme benefit living Australian artists only and not replicate current copyright duration of right terms. We advise the Government to observe the UK Government's recent decision against implementing Resale Royalty payments to artist's estates and heirs. This provision will be reviewed again in 2012, but reinforces the UK Government's concerns about the negative impact this provision has on the art market. Similarly, French President, Nicholas Sarkozy, has personally lobbied the EU to limit the *Droit de Suite* to living artists only. It is irresponsible of the Government to ignore the concerns stemming from highly sophisticated art markets; particularly given Australia's art market is relatively young, small and more vulnerable due to its limited international reach.

- Incorporate a cap on royalty payments.

- **impose a maximum royalty payment**

In the UK and Europe, a maximum threshold of €12,500 applies for any single work each time it is sold. The primary driver behind this limit is to prevent the migration of sales to other art market centres, such as New York and Hong Kong, where Resale Royalty Schemes do not exist.

It is essential the Australian Resale Royalty Scheme incorporates a maximum royalty payment cap to prevent high value works being sold offshore. Further, this provision will deliver a more equitable spread of royalty payments and prevent disproportionate allocation of royalty payments to a few artists, their estates and the collecting society. For example, a \$1m sale will incur a royalty of \$50,000 as opposed to a \$1000 sale which incurs a royalty of \$50.

- Amend Division 3 s: 18 (rate of royalty)

- **a flat rate of 5% is too high**

Most Resale Royalties Schemes recognised by the Berne Convention apply a cumulative sliding royalty scale when calculating the amount of royalty owed on a transaction. While we commend the Government's attempts to make the scheme administratively simple and straightforward, we believe that a flat rate of 5% is excessive and may deter future sales.

### Recommend retention of the second sale provision:

If the legislation is implemented, we would strongly advocate the retention of the following provision, despite strong objection from some other sectors of the industry.

- Retain Division 1 s: 11 (resale royalty right on artworks in existence when Act commences):
  - **apply to artworks purchased after date of introduction (1/07/2009)**

We agree with the Bill's principle to recognise property rights of current owners and intent to provide "certainty to the market". Whilst this will provide a lag in the application and flow of royalties, we concur with the Government's assessment that such a lag is vital to enable appropriate communication and education to the art market. If the scheme is introduced within the proposed timeframe (July 1, 2009), the collection and administration of the Resale Royalty Scheme is likely to be compromised and deemed ineffective. In the current environment, the creation of confusion or uncertainty would be even more detrimental to the art industry. This provision will allow the art market to educate its staff and clients and develop the necessary

systems to collect royalty payments. This provision is essential to ensure a smooth transition for the introduction of the scheme, should it go ahead.

## Policy Consequences

It is inevitable that most policy instruments, particularly those that intervene strongly in industry, result in unintended consequences. Sometimes these are only apparent after implementation, but often it is possible to foreshadow consequences from looking at the experience of similar policies in other jurisdictions, or from a deeper analysis of specific industry characteristics or trends. Sotheby's draws the Committee's attention to three potential negative consequences arising from the proposed scheme.

- **The greatest benefit will go to a small minority of artists and artist estates**

UK experience demonstrates the greatest benefit goes to the most successful artists, rather than those who most need income support.<sup>6</sup> As the proposed Resale Royalty Scheme will be recognised by the Berne Convention, further scrutiny and consideration of the shape of the UK Resale Royalty Scheme is warranted.

- **It may encourage less art market transparency**

The complexity of the art market and diversity of its players will make effective regulation of the scheme extremely difficult and there is uncertainty as to how the scheme can be monitored, particularly where sales are less public than through auction or commercial galleries.

- **It may constrict the art market**

Visual artists rely on a buoyant primary and secondary art market for the exhibition and promotion of their work. As the Resale Royalty Scheme will apply to artworks irrespective of capital gain or capital loss, future art sales may be depressed as any additional impost or regulation creates disincentives for the purchase of art.

## Conclusion

Australia is fortunate to have a significant and acclaimed art industry. It is the result of entrepreneurial skill and the passion of artists, dealers, auction houses, collectors; it also stems from significant Government investment at all levels over many years. However, the industry remains fragile and parochial. We are yet to see Australian artists work featured in major international collections, exhibitions or auction catalogues except on an irregular basis. Whilst an international market was starting to develop for Aboriginal art (in the USA, Europe and Asia), this has been severely affected by the global downturn, demonstrating just how vulnerable this sector is. The best support for mechanism for artists is a healthy and robust primary and secondary art market, rather than a small and intermittent levy.

The Resale Royalty Scheme based on an uncapped levy of 5% will provide a large return to a small group of already commercially successful artists and artist estates, but will result in very small returns to the majority of artists and generate confusion and uncertainty in the small and vulnerable Australian art market. This outcome hardly seems an effective use of the scarce Government resources required to establish and monitor such a scheme. We would advocate more effectively targeted support to younger and emerging artists to assist in the development of their careers as well as increased support for the development of local and international markets for Australian art, through both public and private collector bases, as the most sustainable way of ensuring a growing demand and ongoing livelihood for Australian artists over the longer term.

Sotheby's remains opposed to the Resale Royalty policy and encourages the Government to reconsider the proceeding with the proposed legislation. In the event it passes legislation, Sotheby's recommends the Government postpone the introduction of the Resale Royalty Scheme until the economic climate stabilises so the impact on the art market can be accurately assessed. At a minimum, we urge the Government to adopt the recommended amendments outlined in this submission to sustain the vitality of the Australian visual arts sector.

---

<sup>6</sup> K. Graddy, N. Horowitz, S Szymanski, *op cit.*, p. 2

