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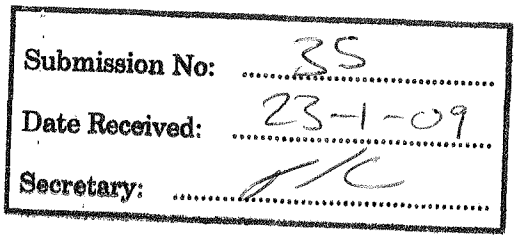
ARTS LAW CENTRE OF AUSTRALIA
Art & Law

23 January 2009

Committee Secretary
Standing Committee on Climate Change, Water, Environment and the Arts
PO Box 6021
House of Representatives
Parliament House
CANBERRA ACT 2600



By Email: ccwea.reps@aph.gov.au

Dear Committee

Submission on Resale Royalty Right for Visual Artists Bill 2008

Thank you for the opportunity to comment on the Resale Royalty Right for Visual Artists Bill 2008 (**Bill**).

The Arts Law Centre of Australia (**Arts Law**) is a not for profit community legal centre that provides services to over 5,000 artists and arts organisations each year of which 35% are from the visual arts and crafts sector. Arts Law through its specialist Indigenous service, Artists in the Black, also provides advice to Indigenous artists throughout Australia. In 2008 we spent approximately 14 weeks on-country advising and educating Indigenous artists, with extensive travel through remote parts of Western Australia, the Northern Territory and South Australia.

Summary

Arts Law strongly supports the introduction of a meaningful and effective resale royalty right for visual artists, in line with the optional resale royalty right provided for in article 14*ter* of the *Berne Convention for the Protection of Literary and Artistic Works*. Without resale rights, visual artists, unlike other creators, do not get a direct benefit as their work increases in value and popularity. Popular musicians reap the

benefits from royalty income as sales of their music skyrocket, as will writers who have a bestseller, but a visual artist currently gets very little reward as prices for their work go up.

Our submission is in two parts:

- Part One presents our objections to clause 11;
- Part Two presents our remaining comments regarding the Bill.

In summary we note:

- clause 11 is unnecessary. It will be highly detrimental to visual artists and a 5% resale royalty on all commercial resales is unlikely to dampen the visual arts market;
- clause 11 results in the scheme being difficult to administer, leading to increased costs and decreased efficiency;
- clause 11 makes the scheme complicated and difficult to apply, which is likely to create uncertainty and possibly market instability. These problems are overcome by deleting clause 11;
- the frequency with which artworks are resold has been grossly overestimated by the Government, which commissioned a report based on the assumption that artworks are resold every 2, 5 or 10 years. Research based on industry experience and analysis of actual sales indicates that on average artworks are sold every 20 years;
- Indigenous artists and their communities desperately need the benefits now – by deleting clause 11 these communities would benefit as soon as possible;
- the requirement that artists are identified at the time of commercial resale is unfair and should be removed;
- the threshold should be reduced from $1000 to $500 and should be based on the total sale price inclusive of all fees, charges and taxes; and
- the collecting society should collect all royalties.

PART ONE: CLAUSE 11

Arts Law's objections to clause 11

Clause 11 provides that for works created before the commencement of the scheme, the resale royalty will not be payable on the first transfer of the work, regardless of whether that transfer is a commercial resale. Arts Law objects to clause 11 because:

- it will be many decades before the scheme will be fully functioning. The Government modelling was based on assumptions that works would be resold every 2, 5 or 10 years. Works are not resold this frequently. For example, Clifford Possum Tjapaltjarri's work *Warlugulong* was painted in 1976 and first sold in 1977 for $1,200. It was nineteen years before it was resold in 1996 for $36,000 and a further 11 years before it was sold again, this time for $2.4 million. Viscopy's conservative estimate, based on its significant experience of the visual arts market, is that on average there is 20 years between each reselling of a work.[1] Thus on average it is likely to be around 40 years before an artist receives his or her first resale royalty payment on works created prior to the commencement of the scheme;

- auction sales for the period 1998 to 2007 reveal that only 6% of works had resold within 10 years.[2] Based on these figures, if the first transfer of existing works is excluded then in the first 10 years of the scheme artists would receive only 13% of the income they would receive if the royalty applied to *all* commercial resales.[3] This is extremely disappointing for artists;

- the Government emphasised the importance of the scheme delivering benefits to Indigenous communities, yet it will be many generations before the full benefits of the scheme reach these communities. Based on figures for auction house sales in the first half of 2008, by deleting clause 11 and reducing the threshold to $500, the resale royalty scheme, had it been operating in that 6 month period, would have delivered $3 million worth of

[1] Viscopy, *Implications of the Australian Government's Proposed Resale Royalty Scheme*, November 2008, pages 5-6.
[2] Figures based on research by Viscopy of actual auction sales 1998-2007. See Viscopy, *Implications of the Australian Government's Proposed Resale Royalty Scheme*, November 2008, p 13.
[3] Ibid.

resale royalties for 800 artists. Of these 30% of the recipients would have been Indigenous;[4]

- it will make it substantially more difficult, time consuming and therefore costly to administer the scheme because it will be necessary to research the sales history of each work in order to assess whether the royalty applies. Indigenous artworks are likely to be the most difficult to research because many artists give different paintings the same name.[5] The administrative process is far simpler if clause 11 is deleted as all that must be determined is whether the work is being sold for the first time, the name of the artist and whether the resale royalty right has expired (the right is of the same duration as copyright and can be worked out easily by finding out whether the artist is still alive, and if they are not, when they passed away);

- the costs of establishing the administration for the scheme will be high and in the first few decades of the scheme, due to clause 11, there will be few royalties collected from which these costs can be recouped. This can only be avoided by deleting clause 11 or by having the Government contribute millions of dollars towards the administration of the scheme over the first few decades;

- a smaller percentage of the royalty will end up in artists' pockets due to the increased costs of administering the scheme. There are 'clear requirements for the collecting organisation to ensure administrative costs are kept to a minimum with the maximum revenue possible returned to artists',[6] however it will not be possible for the collecting society to keep costs low if only a small proportion of resales qualify for the royalty;

- compliance may be lower as it will be costly for the collecting society to monitor compliance. Due to economies of scale, monitoring of compliance is far more cost effective where there are a greater number of works which qualify for the royalty;

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[4] These figures are quoted from the Coalition for an Australian Resale Royalty (CARR) briefing paper dated 22 December 2008, page 2 based on analysis by Viscopy.

[5] For example, Pedro Wonaeamirri is a Tiwi artist Arts Law met in 2008. Of the 10 works of his featured on the website of his art centre many have the same name and are created in the same year, such as the two Pwoja 2005 works and the two Tutuni 2006 works. See http://www.jilamara.com and go to 'Gallery' then 'Pedro Wonaeamirri'.

[6] Commonwealth, *Second Reading Speech,* House of Representatives, 27 November 2008, Hansard page 2, (Peter Garrett, Minister for the Environment, Heritage and the Arts).

- it makes the implementation and operation of the scheme complicated and difficult to understand and thus is unlikely to lead to a smooth transition. The complexity is likely to cause uncertainty, which can be detrimental for the market;

- it will require substantial and costly education of the arts sector, including buyers, sellers and artists, as the complicated nature of when the royalty is to apply makes a clear and simple message impossible to deliver. Failure to provide education could result in high levels of non-compliance with the right as well as disappointment and frustration for those visual artists who fail to understand the complexity of the scheme and why they will not get a royalty on each commercial resale of their work;

- clause 11 is unnecessary in terms of market impact. It is said the scheme 'introduces the right in such a way as to ensure minimal impact on Australia's art market' and that it will 'allow the art market to adapt gradually to the new right'.[7] We believe the experience in Australia will reflect the experience in the UK, which was that the art market did not suffer when a resale royalty right for all commercial resales was introduced in the UK 3 years ago.[8] Clause 11 is therefore unnecessary and will be highly detrimental for visual artists;

- clause 11 presumably also relates to the objective 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'.[9] The evidence is that the resale royalty will have little impact on the seller of the artwork (the person who purchased the work prior to commencement of the scheme). The liability to pay the resale royalty in the UK is essentially the same as the proposed Australian provision. It places joint and several liability on the seller and the agent of the seller, or if there is no seller's agent then the agent of the buyer or on the buyer in the absence of an agent for either the buyer or seller.[10] The experience in the UK has been that it is most often the buyer, not the seller or agent, who pays the 5% royalty. This indicates that deleting

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[7] Ibid.
[8] Design and Artists Copyright Society (**DACS**), *Submission to the Government Consultation on Artist's Resale Right: The Derogation for Deceased Artists, September 2008*, downloaded from http://www.dacs.org.uk/pdfs/DACS%20submission.pdf on 15 January 2009, page 2.
[9] Commonwealth, *Second Reading Speech*, House of Representatives, 27 November 2008, Hansard pages 2-3, (Peter Garrett, Minister for the Environment, Heritage and the Arts).
[10] See regulation 13 of the *Artist Resale Right Regulations 2006* (UK) and clause 20 of the Resale Royalty Right for Visual Artists Bill 2008 (Cth).

clause 11 will have little impact upon people who purchased artworks prior to the commencement of the scheme;[11]

- from Labor election commitments and statements made prior to the Bill being released, visual artists could reasonably have expected a fully functioning resale royalty scheme that would deliver benefits to the current generation of visual artists and beyond. This can only be achieved by deleting clause 11;

- the delay in the scheme becoming fully functioning means Australian visual artists are likely to miss out on resale royalties from sales of their works overseas. In all other countries where there is a resale royalty right, the right has applied to all resales of works sold after commencement of the right. It is highly questionable whether Australian artists will qualify for resale royalty income in overseas countries while the Australian scheme remains so severely limited; and

- if the government is concerned that requiring a resale royalty payment for the first commercial resale of a work might be an acquisition of property other than on just terms and thus in contravention of s 51(xxxi) of the Constitution, that concern is ill-founded as the Coalition for an Australian Resale Royalty (**CARR**)[12] obtained advice from senior counsel that the Bill does not contravene s 51(xxxi) and that if there remains any doubt regarding the constitutional validity of the scheme, then there are standard drafting techniques available to preserve the validity of the legislation. Arts Law can attend the committee hearing or speak with government representatives to discuss ways in which the legislation may be drafted to ensure any s 51(xxxi) concerns are dealt with effectively and in a manner that produces no risk for the government.

The Bill will fail to achieve the Government's objectives

Minister Garrett argues the resale royalty scheme addresses a situation that is 'plainly inequitable',[13] that it is 'long overdue',[14] and that the Government is seeking

[11] DACS, above n 9, page 11.
[12] Arts Law is a member of the Coalition for an Australian Resale Royalty (CARR), along with the Australian Copyright Council, the Copyright Agency Limited, the International Confederation of Societies of Authors and Composers (CISAC), the National Association for the Visual Arts (NAVA) and Viscopy.
[13] Commonwealth, *Second Reading Speech,* House of Representatives, 27 November 2008, Hansard page 2, (Peter Garrett, Minister for the Environment, Heritage and the Arts).
[14] Ibid.

to 'get the balance right', achieve certainty and bring fairness to visual artists.[15] The scheme is intended to be 'administratively simple and straightforward to understand'[16], administrative costs are to be kept to a minimum,[17] and there is to be a smooth transition.[18]

Arts Law is strongly of the view that deleting clause 11 would vastly improve certainty for the art market, would be clearer, more straightforward and thus would facilitate a smoother transition. It would be much simpler and more cost effective to administer. In our view, it would be a huge step towards getting the balance right so that visual artists' contribution to Australia's economic and cultural life is properly recognised and so they get a 'fair share in any future success their work achieves.'[19] Deleting clause 11 would bring the Bill closer to the Government's stated intentions.

Indigenous artists and their communities need a fully functioning scheme

The potential of the resale royalty right to help overcome disadvantage for Indigenous artists and their communities is widely recognised. This has been a central theme for introducing the right and Government commissioned research has called for the introduction of the right for Indigenous artists and for visual artists generally.[20]

Arts Law has worked extensively with Indigenous artists. Since Arts Law's specialised Indigenous service, Artists in the Black, commenced in 2004, Arts Law has provided direct legal advice services to 1,097 Indigenous artists and arts organisations throughout Australia, represented clients through casework services either directly or in partnership with private law firms in 50 matters and has run educational workshops, seminars and forums attended by 3,085 Indigenous people. Arts Law therefore has a direct understanding of the difficulties faced by Indigenous visual artists in urban, rural and remote communities.

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[15] Commonwealth, *Ministerial Statement*, House of Representatives, 21 October 2008, Hansard p 9707, (Peter Garrett, Minister for the Environment, Heritage and the Arts).
[16] Commonwealth, *Second Reading Speech,* House of Representatives, 27 November 2008, Hansard page 2, (Peter Garrett, Minister for the Environment, Heritage and the Arts).
[17] Ibid.
[18] Commonwealth, *Ministerial Statement*, House of Representatives, 21 October 2008, Hansard p 9707, (Peter Garrett, Minister for the Environment, Heritage and the Arts).
[19] Commonwealth, *Second Reading Speech,* House of Representatives, 27 November 2008, Hansard page 2, (Peter Garrett, Minister for the Environment, Heritage and the Arts).
[20] The introduction of a resale royalty right was a recommendation of the Department of Communications, Information Technology and the Arts, *Report of the Contemporary Visual Arts and Craft Inquiry* (2002), commonly referred to as the Myer Report; and Terri Janke's report, prepared for the Aboriginal and Torres Strait Islander Commission, *Our Culture Our Future: A Report on Australian Indigenous Cultural and Intellectual Property Rights* (1998).

Indigenous visual artists and their communities need to start benefiting as soon as possible from the scheme, not via a scheme that will take several generations before it is fully functioning. In our experience, monies generated through visual arts not only benefit individual artists but also the artist's community, increasing employment opportunities, providing safe places to work, and generating non-Government income that is distributed widely within the community.

Indigenous art represents a significant proportion of Australia's art market

Indigenous Australians comprise approximately 2.6% of the Australian population but have a much higher representation in the visual arts industry. The 2007 figures for sales of artworks by Australian artists reveal that 24% of those artists were Indigenous.[21] Viscopy estimates that Indigenous artists would receive 30% of the income generated by the resale royalty right.[22]

Because Indigenous artists represent a significant proportion of the Australian art market, a fully functioning resale royalty scheme stands to provide significant benefits to Indigenous communities. Clause 11 means that substantial benefits will be lost to Indigenous communities whilst everyone else in the art market continues to benefit from the artist's work. There is no compelling evidence that a resale royalty scheme will dampen the market. Clause 11 is unjustifiable and cannot be said to be necessary for achieving a smooth transition or for the constitutional validity of the legislation.

Monies are commonly distributed widely in remote Indigenous communities

Arts Law has directly witnessed the prevalence of Indigenous cultural practices whereby money and other goods are shared widely among community members. For example, when an artist receives payment for an artwork it is common for the artist to share the money with several family members and sometimes other community members. It is not just money that is shared. The sale of Indigenous artworks enables successful artists to purchase cars, boats and other goods. A car owned by an artist can provide transport opportunities for many members of the community. In remote communities Arts Law saw how 'painting money' allowed one household to buy a new refrigerator and washing machine. In another community a

[21] Commonwealth, *Second Reading Speech,* House of Representatives, 27 November 2008, Hansard page 2, (Peter Garrett, Minister for the Environment, Heritage and the Arts).
[22] Coalition for an Australian Resale Royalty (CARR) *Briefing Paper* dated 22 December 2008, page 2 based on analysis by Viscopy of auction sales for the first half of 2008.

successful artist had purchased a boat so he could provide his family with fresh fish and attend to cultural maintenance in remote locations.

Arts Law has drafted over 300 wills for Indigenous artists. For a large number of these, the artists expressed their desire to share their estate widely, for example, it was common for artists to have long lists of beneficiaries and to wish to share their estate with their siblings, children, grandchildren, nephews and nieces and children adopted under customary law.

Art income is a significant source of non-government income

Income from sales of artworks is a significant source of non-government income in remote Indigenous communities, especially those that have art centres. By deleting clause 11 resale royalties will flow much more quickly to artists. This will provide benefits to the communities and incentives for working as an artist. Indigenous participation in the visual arts maintains Indigenous culture, contributes to Australia's artistic oeuvre and has clear health and economic benefits for Indigenous people working as artists under good conditions, such as those found in Indigenous owned art centres.

Resale royalty rights are long overdue

In the second reading speech, Minister Garrett stated the resale scheme is 'long overdue' yet by exempting first resales for works acquired before the laws commence, the start date of a fully functioning scheme will be dragged out for decades. The proposed scheme could easily take 30 to 50 years before it starts to deliver real benefits to Indigenous communities and in the meantime it will be everyone other than the artists who benefit.

PART TWO: OTHER PROVISIONS OF THE BILL

Clause 7: What is an *artwork?*

The definition of artwork under clause 7 would benefit from minor amendment to clarify what is intended and to more fully reflect the types of artwork to which the scheme applies. Arts Law suggests the term 'graphic or plastic art' is unnecessarily confusing as it is an expression not commonly used in the Australian visual arts context. Whilst this is the expression used in the EU Directive (and appears in the UK legislation[23]), it is clearer to use a term with which people are familiar. We therefore prefer the use of the term 'visual art'. We also recommend a reference to multimedia art be included.

Whilst clause 7(2) is a non-exhaustive list of examples of artworks, it would benefit from further detail, such as that set out in the explanatory memorandum which states the right is to apply to batik, weaving or other forms of fine art textiles, installations, fine art jewellery, artists books, wood carving, digital and video art and future forms of visual artist expression.[24] Arts Law therefore submits that clause 7(2) should be amended to read:

> (1) An artwork is an original work of ~~graphic or plastic~~ visual art that is either:
>
> (a) created by the artist or artists; or
>
> (b) produced under the authority of the artist or artists.
>
> 2) ***Works of*** ~~***graphic or plastic***~~ ***visual art*** include pictures, collages, paintings, drawings, engravings, prints, lithographs, installations, multimedia artworks, digital and video art, sculptures, carvings, tapestries, batiks, weavings, fine art textiles, ceramics, glassware, jewellery and photographs.

Clause 9: No resale right on certain works

Arts Law advocates for the scheme to include original manuscripts as we are aware that some of our writer clients have seen their manuscripts sold for significant prices. We therefore recommend clause 9(1)(c) be deleted so that writers and composers can receive a royalty when an original manuscript that they have created is sold. This is in accordance with the Berne Convention.

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[23] *Artist's Resale Right Regulations 2006* (UK).
[24] Explanatory Memorandum, Resale Royalty Right for Visual Artists Bill 2008, page 4.

Clause 10: No resale royalty right unless consideration above threshold

Arts Law strongly argues for a reduction in threshold from $1,000 (GST inclusive) to $500 (GST inclusive). Visual artists are, generally speaking, very poorly paid. In the year 2000-2001 the median income of visual artists from their creative work was only $3,100 per annum.[25] Only 2% of this income was from copyright royalties or advances whilst 54% of it was from commissions and sales of works.[26] The total median income of visual artists inclusive of their arts and non-arts related work was only $22,900.[27] Even an extra payment of just $21.25 would make a difference to people on such low incomes.[28]

Arts Law recognises that a threshold ensures the cost of collecting the royalty does not outweigh the cost of the royalty itself. Arts Law notes that the copyright collecting societies Viscopy and Copyright Agency Limited both support a threshold of $500.

Arts Law submits that the definition of sale price should be on the total price, inclusive of GST, buyer's premiums, agent's fees and any other taxes or charges. We do not believe this would deter sales of artworks and in our view it more closely reflects the value of the painting, since buyers and sellers calculate these fees into their transaction. We support the artist receiving 5% of the market value of the artwork. From a basic economics principle, the market value of the artwork is what the seller is willing to accept and what the buyer is willing to pay for the transfer of the artwork from the buyer to the seller, an amount that necessarily takes into consideration all taxes fees and charges.

Arts Law notes that the additional fees can add to a substantial proportion of the sale price. For example, a work selling at auction for $154,000 might be made up of the following component:

Hammer price of artwork	= $100,000
Buyer's premium of 15%	= $ 15,000
Seller's fee of 25%	= $ 25,000
GST of 10% (inc premiums)	= $ 14,000
Total price	= $154,000

[25] David Throsby and Virginia Hollister, *Don't Give up your Day Job: An Economic Study of Professional Artists in Australia*, Australia Council, Sydney, 2003, page 45, table 34.
[26] Ibid, page 103, table 8.1
[27] Ibid, page 45, table 34.
[28] The figure of $21.25 is calculated as 5% of $500 minus an assumed administration fee of 15%. Administrative fees will be higher than 15% if clause 11 is retained.

The resale royalty on the above sale, if based on the total price, would be $7,700 and on the hammer price would be only $5,000. The extra $2,700 represents a small percentage increase on the cost for the buyer whilst delivering a substantial benefit to an artist on a low income.

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

There are many arguments in favour of deleting clause 11, as discussed in Part One of this submission.

Clauses 12 and 13: Who holds resale royalty right? and Meaning of *identified*

Arts Law submits that it is unnecessarily restrictive that the artist must be identified at the time of the commercial resale. The explanatory memorandum does not provide a reason for this requirement and it appears the main purpose of clauses 12 and 13 is to determine who is the artist (or artist's heirs) entitled to the resale royalty right. Whilst it is necessary for the person to be identified before they can be paid the royalty, Arts Law submits this identification should be permitted at any time within the 6 year distribution period allowed for under clause 31. If the person cannot be identified within this period then the royalty would be considered an unclaimed royalty and would distributed or returned in accordance with clause 31.

Some examples of artists that may be especially disadvantaged by the requirement that they be identified at the time of commercial resale include:

- artists who choose to work pseudonymously. Whilst this can be overcome by the artist registering with the collecting society, the registration may need to occur prior to the work being sold for the person to qualify as being 'identified' at the time of commercial resale;

- artists working in mediums where it is common for an artist's name not to be reproduced with the artwork – this is generally more common in digital and graphic arts;

- artists that are illiterate and do not sign or mark their works. This is especially likely to operate to the disadvantage of Indigenous artists in remote communities where there are much higher rates of illiteracy than in the wider Australian community; and

- Indigenous artists living in remote communities are less likely to have regular contact with the commercial art world and to delegate a greater proportion of the business side of art production to agents. This increases the chance of the identity of the artist not being associated with the work. This may be especially true of older works, still in copyright, but from a time when Indigenous art was not as highly valued or carefully documented.

Arts Law therefore submits that the requirement in clause 12 that the artist be 'identified ... at the time of a commercial resale of the artwork' be deleted as these provisions are unnecessary and will operate unfairly.

Clause 13 should be amended to remove the reference to being identified 'at the time of a commercial resale'. It should also include a requirement that the people identified in clause 13(1), namely the seller, buyer, agent or co-creators of the artwork, provide any information they have about the identity of the artist or the artist's heirs to the collecting society upon a request from the collecting society.

Clause 18: Rate of resale royalty

Arts Law strongly supports the proposed royalty of a flat rate of 5%. This is clear, easily applied and calculated and can be easily understood by consumers, thus encouraging certainty in the market. It is administratively simple and sees a fair return for artists whilst being an amount unlikely to dampen the market. Arts Law notes the art market has boomed in recent years, despite the introduction of a 15% buyer's premium at auction sales.

Clause 20: Liability to pay resale royalty

Arts Law strongly supports the drafting of clause 20, which places joint liability for the resale royalty upon the seller and either the art market professional, art agent or the buyer. This strengthens the scheme significantly and reduces the likelihood that the royalty will not be received by the artist, a problem that has plagued numerous schemes in other countries.

Clause 23: Collection of resale royalty by the collecting society

Clause 23(1) provides that the collecting society is not to collect the resale royalty if the holder of the right notifies the collecting society that it is not to collect or enforce the right. Arts Law is concerned this could be used as an indirect means for obtaining a waiver of the resale right, despite the fact that under clause 34 a waiver is to have

no effect. Artists traditionally have a weak bargaining position which leads to them easily being pressured into consenting to an infringement or waiver of their rights. For example, although the moral rights amendments under the *Copyright Act 1968* (Cth) do not permit a waiver of moral rights, they do permit a consent to infringement and in our experience this device is commonly used and thus artists' moral rights are compromised.[29] Arts Law therefore submits that clause 23(1) be deleted in order to ensure the benefits flow to all visual artists.

If clause 23(1) is aimed at allowing the artist to directly collect the royalty fee, rather than for the collecting society to collect it, then the Bill should be amended to reflect this. Arts Law does not support this amendment because in our view the collecting society should collect all royalty fees in order to make the scheme strong and viable. We believe having only the collecting society collect the royalty will ensure a much higher compliance with payment of the royalty and due to economies of scale will enable the collecting society to keep its administrative fees lower, therefore seeing a greater proportion of the royalty being passed on to artists.

Allowing artists to collect the royalty directly would also have the consequence that lucrative artists might benefit more than non-lucrative artists, but it is the latter that are likely to be in greater need of the royalty payment. Where the royalty is large it is economically practical for a highly paid artist to collect the royalty directly. Where the royalty is smaller it is likely to be cheaper for the artist to allow the collecting society to collect it. This could result in a situation where the collecting society is collecting a high proportion of small royalties, but a low proportion of higher royalties. This would obviously be more expensive for the collecting society and as a result they would need to pass on these costs to the artist, resulting in a higher administration fee that would have greatest impact on artists on lower incomes.

Clause 28: Notice of commercial resale

Arts Law believes the notification requirement in clause 28 is an essential part of an effective scheme. We support the comments made in the submission by the Australian Copyright Council that a commercial resale, 'should give rise to a liability to pay the royalty if:

- the seller is covered by Clause 28(1)(b); or

[29] Sections 195AW and 195AWA of the *Copyright Act 1969* (Cth).

- the buyer is covered by clause 28(1)(b); and
- the sale takes place in Australia.'

We agree with their submission that the obligation to notify should apply to the buyer if the seller is not covered by the criteria in clause 28(1)(b) and that it should apply to all transfers of ownership where an art market professional is involved.

Clause 34: Waiver etc.

Arts Law submits that this clause would be stronger if it was clear that an agreement to fail to collect the resale royalty is void. Arts Law therefore suggests clause 34 be amended as follows:

> 2) An agreement to share, ~~or~~ repay or fail to collect a resale royalty, other than an agreement mentioned in paragraph 16(1)(b), is void.

Further information

Please contact Robyn Ayres or Serena Armstrong if you would like us to expand on any aspect of this submission, verbally or in writing. We can be contacted at artslaw@artslaw.com.au or on 02 9356 2566.

Yours faithfully

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