



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

**HOUSE OF
REPRESENTATIVES**

STANDING COMMITTEE ON CLIMATE CHANGE, WATER,
ENVIRONMENT AND THE ARTS

Reference: Resale Royalty Right for Visual Artists Bill 2008

THURSDAY, 5 FEBRUARY 2009

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**HOUSE OF REPRESENTATIVES STANDING COMMITTEE
ON CLIMATE CHANGE, WATER, ENVIRONMENT AND THE ARTS**

Thursday, 5 February 2009

Members: Ms George (*Chair*), Dr Washer (*Deputy Chair*), Mr John Cobb, Mrs D’Ath, Mr Dreyfus, Mrs Irwin, Ms Livermore, Ms Marino, Mr Scott and Mr Zappia

Members in attendance: Mrs D’Ath, Mr Dreyfus, Ms George, Ms Marino, Dr Washer and Mr Zappia

Terms of reference for the inquiry:

Resale Royalty Right for Visual Artists Bill 2008

WITNESSES

**BEAN, Ms Lynn Frances, First Assistant Secretary, Arts, Department of the Environment,
Water, Heritage and the Arts..... 1**

**McINNES, Mr Paul, Assistant Secretary, Arts Policy and Access, Department of the
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**TUCKER, Mr Mark, Deputy Secretary, Department of the Environment, Water, Heritage and
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Committee met at 10.44 am

BEAN, Ms Lynn Frances, First Assistant Secretary, Arts, Department of the Environment, Water, Heritage and the Arts

McINNES, Mr Paul, Assistant Secretary, Arts Policy and Access, Department of the Environment, Water, Heritage and the Arts

TUCKER, Mr Mark, Deputy Secretary, Department of the Environment, Water, Heritage and the Arts

CHAIR (Ms George)—Good morning. I declare open this public hearing of the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts and welcome you all here today. The committee is inquiring into the Resale Royalty Right for Visual Artists Bill 2008. The Minister for the Environment, Heritage and the Arts, after his second reading speech on 27 November last year, asked the House to refer this bill to our committee for consideration and report back to parliament. The committee is aware of the debate that has been going on for many years regarding the desirability or otherwise of establishing a resale royalty scheme for visual artists. Our role today and tomorrow is to examine the bill to see whether or not it will achieve its stated aims and objectives. To this extent, the committee is keen to hear from witnesses regarding the content and structure of the bill and whether they believe this proposed resale royalty scheme will deliver real benefits to visual artists.

Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. In this regard, the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee has received the department's submission and it, along with other submissions, has been authorised for publication. I now invite you to make an opening statement if you so wish before we proceed to questions and discussion.

Mr Tucker—Thank you, Madam Chair. I thank you and the committee for giving us this opportunity to appear. As you said, the committee has our submission, and we think attachment A of the submission covers many of the issues that came to us in the development of the bill. And from looking at the submissions that the committee has received we think they have covered most of those issues as well. To make the best use of the committee's time we are happy to take questions.

CHAIR—Are the other representatives of the department happy to proceed in that manner?

Ms Bean—Absolutely.

CHAIR—We have given consideration to the background information and the details provided in the submission. Obviously you would be aware that there is some debate about clause 11 in particular. I understand from the secretariat that legal advice from counsel—attached to the submissions from the Arts Law Centre, which has a contrary legal opinion to that provided in the discussions that led to the bill in its current form—has been referred to the

department. Could you please tell us what you have done with that advice and whether you would like to make any comments specifically in relation to that.

Mr DREYFUS—I wanted to ask a couple of preparatory questions before then because we are deeply interested in the fact that this advice has been sent to you. CARR has gone to the trouble of seeking senior counsel's advice and now that that has been forwarded to the department we are interested in your views on it. Can we ask you to state why it was that the exclusion was made in the first place. In other words, why was clause 11 of the bill drafted so as to exclude the first transfer from the resale royalty?

Ms Bean—Essentially all those structural issues are based on advice from the Australian Government Solicitor's office and indeed from the Solicitor-General. It is a general government policy that we not disclose that legal advice.

Mr DREYFUS—That is understood. We are not seeking to go to what that advice is, but we will probably have to resolve this in some way. We are seeking to know why it is, because the explanatory memorandum is silent on this point as to what was the reason for the adoption of the structure and your first answer is advice received from the Australian Government Solicitor and the Solicitor-General.

Ms Bean—That is right.

Mr Tucker—Can I add to that, partly I think also to address the chair's question. All the options were considered about ways that we could make the scheme essentially retrospective. So all options were considered, but the legal advice that came through was that with the potential impact on property rights it was best to make the scheme prospective.

CHAIR—So, returning to my original question: what has been the response from the department and from A-G's to the contrary opinion that has been provided?

Ms Bean—Once we received that—because we had taken advice previously from the Australian Government Solicitor—we went back to them, and they referred it to the Solicitor-General. He provided commentary to us on the AGS advice and the senior counsel advice—I am sorry, I cannot remember the name of the senior counsel—so we then based the final form of the bill on advice essentially from the Solicitor-General.

CHAIR—Are you saying in effect that the original advice on which the legislation has been drafted remains the current state of play in terms of—

Ms Bean—Yes.

Mr McInnes—Yes, that is correct.

CHAIR—The EU directive giving effect to the Berne convention does allow member states to choose how to impose liability. Just thinking aloud, there may be a way to construct an argument in relation to that part of the legislation that maybe imposes the liability on the buyer and not the seller so that the issue of just compensation for property may not be centre stage. Was that issue considered?

Ms Bean—That was considered, yes.

CHAIR—That was considered, and why was that—

Ms Bean—Again, part of the advice that we were provided with was that that was not sufficient.

CHAIR—But my understanding is that the legal advice on which the legislation has been based suggests that the clause as constructed deals properly with the constitutional rights of property on just terms within section 51 of the Constitution. We have had senior counsel advice to the contrary. We have been looking at the application of the resale royalty right in other countries. So all those issues were examined before you came to this decision?

Ms Bean—In very great detail.

Mr Tucker—Also, there was no intention to arrive at the conclusion we were after; it was the advice that the government received, and, in terms of the risk on potential constitutional issues, it decided to take the course of action it has taken.

Mr DREYFUS—Given that the Coalition for an Australian Resale Royalty, CARR, has provided this committee—and through this committee the department—with Mr Robertson's advice, has the department given any thought to obtaining further advice?

Ms Bean—As I said before, the department did obtain further advice from the Solicitor-General.

Mr DREYFUS—About Mr Robertson's advice?

Ms Bean—Yes.

Mr DREYFUS—Has the department considered obtaining advice from anyone else?

Ms Bean—No.

Mr Tucker—Government policy is that on constitutional matters we go to the government solicitors.

Mr DREYFUS—I do not think this is the appropriate place to argue about that.

Ms Bean—One of the legal practice directions—I think that is what they are called; I cannot exactly remember the title, but there is a series of legal practice directions issued by the Attorney-General's Department—does require us to stick with AGS and/or the Solicitor-General in relation to constitutional matters.

CHAIR—Is it correct that in other countries that have adopted the principle of resale royalties the scheme has not been limited to apply on a prospective basis?

Ms Bean—There are a lot of different schemes in different countries. I think that is probably the case. We have not examined the fine detail of every single country, but in the main countries certainly that is the case. But there are 54 countries, and we have not looked at every detail of every one of those schemes.

Mr Tucker—Your proposition is probably correct, Madam Chair. The particular issue that we have on this one is the form of the Australian Constitution.

CHAIR—As I understand, the Berne convention states that a visual artist has the inalienable right to an interest in any sale of work subsequent to the first transfer by the author of the work. Does that convention make any specific commentary on the issue of liability for the seller, the buyer or any other agents involved in the resale?

Ms Bean—Not to my knowledge. As I said, this has been implemented in different ways in different countries. For example, the German scheme provides support to artists through a centralised funding pool. That is not even imposed on the buyer or the seller.

CHAIR—There is no constraint in the convention that we have signed up to in terms of how liability is to be worked through?

Ms Bean—No. Certainly the scheme, as devised, is within the scope of the Berne convention.

CHAIR—But if there were potential alterations to the construction of clause 11 at the moment?

Ms Bean—If that were to happen, we would take further advice from the Office of International Law, but generally I would not think so.

CHAIR—The other issue, before I go to other members, is the situation with regard to Indigenous visual artists. It has been very central to this debate. My concern as a layperson is that, in the event of the death of a visual artist, and the 70-year right to the royalty remaining, and in the event that the Indigenous artist did not leave a will, do you believe that the legislation is adequately drafted to deal with that situation?

Ms Bean—Yes. It was specifically in thinking about Indigenous communities and issues of succession in Indigenous communities that we put in the provision relating to not-for-profit organisations being able to be recipients of the right.

CHAIR—When you say not for profit, would that legally be wide enough to cover within it donation to an Indigenous community?

Ms Bean—Yes. In fact it goes further than not for profit. It is also for incorporated and unincorporated associations. They do not even have to be incorporated; it can be a community group.

Mr Tucker—This is a much bigger issue than just this bill in the scheme that is in place. For example, an Indigenous artist may have works that they have just completed and have not even put up for sale. They will have assets that are not covered by the will. Subsequently what is done

with that will have to be worked out. So the answer to that question is to put wills in place for Indigenous people and Indigenous artists. The bill cannot cover all those matters or solve that issue.

CHAIR—We will pursue that in our discussions tomorrow. There was also the issue of modelling. We have had some advice from Viscopy, using modelling based on turnover of artwork, which suggests that the scheme as proposed may not be fully operational for 20 to 40 years. It seems the turnover is roughly 20 years. Specific modelling undertaken by Access Economics had various ranges in it—two years, five years, 10 years. What is your response to the modelling that Viscopy have provided the committee?

Mr Tucker—I can probably answer that first and then turn to my colleagues. Much of that is fairly imprecise and speculative, because the market information is not as well known as it is now. I think, in some senses, it is not known exactly what the time ranges are going to be. That is why various scenarios were modelled—to see what the possibilities might be.

Mr McInnes—The modelling is one of a range of sources of advice that we sought. The nature of the market, as Mr Tucker has said, is such that authoritative data is not available. I think Access Economics acknowledged that in their report. It is important to note that the modelling was based on auction house results only and not all sales through, for example, the commercial gallery framework. And I think Access Economics have estimated that that might approximately double the amount of royalty that might be collected. But it is very imprecise and it is very difficult to determine. In terms of the kinds of modelling scenarios, we did consult quite widely with the individual parts of the sector.

CHAIR—So if you have consulted widely why was the 20-year auction not modelled for its impact?

Mr McInnes—We were seeking an indication of what the likely impacts would be. The advice we had at the time was that it could be as much as 20 years but in all likelihood it might be somewhere in between.

Mr Tucker—I think two issues come in as a result of that. One is obviously the return to artists. That comes back to the prospectivity issue which we talked about before. The other issue is making sure that the scheme is sufficiently resourced to be able to do its job in that time. That is obviously an issue for the government in leading up to whatever the turnover time is to make it self-funding. So the first issue really comes back to the prospectivity issue and the second one really is about administering the scheme.

CHAIR—It will be interesting to hear the response to the arguments you have put when we traverse this in further detail tomorrow. I will now turn to other members of the committee who may wish to ask you questions.

Dr WASHER—I guess clause 20—who pays—is an issue for me, amongst a few other issues here. The worry is of course that the compliance cost of all these things is going to be high when you want to get artists and their ancestors to get the optimum amount with minimum compliance costs. But we have a situation of buyers, sellers and selling agents being jointly and severally

liable to pay for the resale royalty. That does sound complex, when possibly we could just have the buyer handle that aspect. Why was it proposed to do it that way?

Mr McInnes—I think it broadly reflects the principle that it is the seller who benefits the most from the sale. But also the issue of joint and several liability was supported by the visual arts sector.

Mr Tucker—Partly also it is that a number of buyers do not wish their names to be known as the purchasers, so part of this arrangement was to allow an agent to act on behalf of the buyer. It is also a way, I think, to encourage people who do purchase these artworks to know that there are various ways in which pressures can be brought to bear to make sure they do pay the royalty.

Dr WASHER—We could make it ‘the buyer, or the agent of the buyer’. It is a lot simpler. If you had to be collecting this it is pretty complex, and it would be better if we made it simpler to get that guarantee that someone, or their agent, would be responsible to pay this.

Ms Bean—I would expect, particularly with auction houses, that the bulk of transactions would actually just be processed by the auction house, so that would take out a level of administrative complexity. There will be exceptions to that of course. To go back to the legal advice that we received, part of the reason it is imposed on the various players in the transaction is based on that legal advice.

Dr WASHER—Where there is an argument against this, it is that people say the cost of getting the royalty is astronomical compared to the amount given, so the simpler the better. If it were legally feasible it would be good to minimise that cost.

Mr Tucker—I think there is also another issue there in terms of cost. If it is a one-off purchase that a buyer makes it is possible they do not quite understand the scheme—it is complex for them—whereas if the auction house is the seller it will have proper procedures, records and databases and it will be a much easier, quicker and cheaper arrangement for them to make rather than the purchaser.

Dr WASHER—The reciprocal arrangements with other countries will become important—

Ms MARINO—Can I ask that question?

Dr WASHER—Sorry, I will pass that to you.

Ms MARINO—I was just going to ask about reciprocal arrangements for Australian art and artists’ work sold overseas. To what extent is that covered?

Ms Bean—Reciprocal arrangements are provided for. The bulk of Australian art is sold in Australia. There is no doubt that the best prices for Australian art are in Australia, but international reciprocity is provided for. We will work with each country and there will be a series of bilateral agreements to reciprocate. The general thing with reciprocity, though, is that countries tend not to give more than their own nationals are entitled to. For example, the UK scheme is only for living artists, so one would reasonably expect that they would not give a more generous provision than that to Australian artists and art.

CHAIR—On page 11 of the submission under the heading ‘Collection’, the paragraph reads:

The Bill provides for collective management through a single collecting society as the default model for administering the resale royalty scheme. However, the Bill also would enable a right holder to notify the collecting society that it does not want the collecting society to collect the resale royalty owing on a particular commercial resale. This does not amount to a waiver of the right, nor to a blanket ‘opt out’ provision, but allows a right holder a degree of choice in how to exercise the right in relation to particular commercial resales. The right holder would then have the option of choosing to pursue the royalty on that particular transaction as an individual.

My reading of that and the legislation seems to suggest a little bit of inherent contradictory positions if we say that we want a single collecting agency but then people can opt out and make their own individual arrangements. Am I am reading the intent of that rightly?

Ms Bean—That is basically it. There are two elements to that. One is that potentially an artist can decide that they want to do it themselves. In the consultations that was raised as an issue—some people wanted the scope to be able to do it themselves. The other component is that an artist can waive the right in respect of a particular transaction—just one. For example, if it were a charity auction or something and they had donated a painting for that auction, or someone had donated a painting other than the artist, the artist could say ‘It is a charity auction and I am not going to pursue my right there.’

CHAIR—The way the legislation is constructed does the artist makes that choice after the event?

Ms Bean—Yes, or they can make it before the event, but it obviously is of no effect until the sale happens.

CHAIR—But if we are saying that for efficacy reasons a single collecting agency is the best way to proceed, should not that collecting agency have the knowledge of which artists want to opt in or out of the scheme?

Ms Bean—It is not opting in or out of the scheme; it is opting in or out of particular resales.

CHAIR—We have had one submission that an artist may choose to exercise the right never to collect a royalty.

Ms Bean—In that case I would expect the artist to notify the collecting society. That would be the sensible thing to do if you did not want to go near it.

CHAIR—But my understanding is that the legislation as currently constructed may not adequately allow for that option to be exercised.

Ms Bean—We are confident that it does because there is a choice in the legislation. Anything else around that is essentially an issue of process and I think does not need to be in the legislation. For example, I would expect—I am partly speculating—the collecting society to have something on its website that says ‘If you want to opt out, fill in this form.’ But you do not need to legislate for that—it is up to them—and discussions as part of the tender process should include straightforward administrative systems.

CHAIR—That is an issue that has been brought to our attention in submissions, as you would be aware. We will need to reflect more on that.

Mr Tucker—I do not think there is a conflict in the intention. It is a recognition of the practicalities. We want to make sure that artists always have these rights as drafted in the legislation. As Ms Bean said, in the formation of the bill a number of artists put to us very strongly that they wanted the opportunity to collect that right themselves and not pass it on to another body. It gives the practical flexibility for that to occur while maintaining as the first step that it is a collection society that does it unless advised by the artist that the artist wishes to do it themselves, and gives a time frame to make sure that it—

CHAIR—We will hear further evidence on the application of that section—clause 23 I think it is.

Mrs D'ATH—In relation to definition of artwork in clause 7, clearly the explanatory memorandum gives a much more comprehensive description of artwork and actually incorporates things like batik, weaving and other forms of fine art, textiles and so forth. Would it have been better to include that broader definition in the bill? What was the reasoning for making the definition in the bill narrow?

Ms Bean—Essentially we adopted the European Union directive definition. The trouble is that art can sometimes be surprising. If you had tried to do an absolutely complete definition, chances are something that should not be missed would be missed or something that people do not do right now could have been missed. It was about giving a fair range of examples, and the explanatory memorandum is trying to make it clear that this is a range of examples of the sorts of things that would be covered, but it is not necessarily exclusive.

Mr Tucker—And that is the meaning of the word 'include' in there. It is not an exhaustive list and certainly in the interpretation of law the second reading speech is a very useful guide in terms of what will be taken into account and what it means. As Ms Bean said, if you attempted to list everything invariably we may miss something or there may be an art form that appears in 18 months to two years time that is not adequately covered by the law and should be.

Mrs D'ATH—I certainly understand the use of 'inclusive' as opposed to 'exclusive'. It was more the case of why that inclusive list was not incorporated into the bill itself as opposed to the explanatory memorandum because you quite often see that sort of definition incorporated into a bill itself. There is no particular reason?

Ms Bean—You could have more or you could have less. We thought there were an adequate number of examples in the legislation to provide guidance to a judge, who is ultimately interpreting the legislation, of the breadth of the works that were envisaged to be included.

Mr ZAPPIA—I apologise for being late. You may well have covered this area, but I am interested in pursuing the question of the date of commencement of the royalties—the question that is subject to the legal opinion that you sought earlier on. I accept the advice that you have received. Had there been any consideration to any alternative way or mechanism of overcoming the problem relating to that advice?

Ms Bean—We canvassed lots of mechanisms and we sought legal advice in very great detail on all the options, certainly those we could think of. I can assure you it covered all the options canvassed in the various submissions.

Mr Tucker—And as I think I said earlier, there was no intention from the beginning to create a prospective scheme, that is to say that to put this arrangement in place you obviously have to go through all the checks about how we make sure that this is constitutional and within Commonwealth powers. In doing that analysis, the advice we received was that this was the best way for the legislation to be drafted.

Mr ZAPPIA—But of all the options you considered, were any worthy of consideration by this committee or by the parliament as an alternative?

Ms Bean—In terms of constitutional robustness, ultimately this is essentially what deals with all of the constitutional issues and delivers a scheme that is relatively robust.

CHAIR—Could I go to the issue of threshold and the sale price. We have had a number of submissions which argue that thresholds should be lower—some suggest \$500. I think our threshold currently in the legislation is lower than the EU's. The EU's is roughly A\$1,600, is it not?

Ms Bean—Yes.

CHAIR—Was the main rejection of the lower threshold the cost of administering the scheme and whether our way is any better?

Ms Bean—Yes. Partly it would increase the administrative costs enormously, which increases the burden and reduces the return to artists. Also, if you are looking at, say, a \$500 limit, the artist would end up getting a much smaller amount because of the administrative—with all of this there is a trade-off between return to the artists and the efficiency of the scheme. We ultimately advised the minister and the minister agreed that this was a reasonable compromise.

CHAIR—On the issue of sale price, the formulation as currently expressed in the legislation includes the GST in the calculation of the royalty. Previously, as I understand it, the royalty was to be based on the sales price net of tax payable on the sale. Why has this position changed?

Ms Bean—I am not sure that there was a previous position. I am not sure where that comes from.

CHAIR—I am advised that was in the framework and parameters paper.

Ms Bean—We certainly talked to Treasury and essentially that was the advice received from Treasury—that it should include GST.

CHAIR—Yes. That is what you say in your submission.

Mr Tucker—But again, those other options were looked at and the advice was to quote the sale price closely to the actual value of the work. When we purchase anything ourselves, it is the price of the item plus the GST.

CHAIR—Others have argued in their submissions that, if the GST is included, so should the buyer's and seller's premiums be included because the all-inclusive price would best reflect the actual value of the art work to the buyer. Do you have a comment on that?

Ms Bean—Not really.

Mr Tucker—Again it is a matter of choice.

CHAIR—Was that option or any combination of those options put to Treasury?

Ms Bean—No. We consulted Treasury in relation to the tax aspect.

CHAIR—To the GST?

Ms Bean—Yes. Potentially—I do not think there are at the moment—there are other tax aspects that could come up over time. Again, it was about finding a balance in terms of price, the nature of the charge—and I do not mean charge in a legal sense, I just mean that amount of money. They are essentially commissions, the buyer's and seller's premium. As I said, ultimately it was just a balancing judgement.

CHAIR—Do you want to add to that, Mr McInnes?

Mr McInnes—Essentially, it was based on advice from Treasury, but the intention was to keep it as close to what we interpreted to be the value of the artwork as possible. We saw that as being desirable but also consistent with broader advice that we received.

CHAIR—Could you outline in a little more detail the processes that the department would envisage in relation to how you will determine who the collective agency will be?

Ms Bean—We will be proposing an open tender process and it will be a full tender process in accordance with Commonwealth procurement guidelines—a set date, the request for tender put out, defining the requirements. Then there will be a tender assessment process and, ultimately, a decision on the recommended preferred supplier.

CHAIR—It would be a process consistent with government guidelines?

Ms Bean—A completely normal government tender process. That is what we are envisaging.

Mr Tucker—We have other mechanisms built in, such as once they are successfully operating having to report on their operations. We will obviously have contractual arrangements with such a collecting body. They would have to abide by those and we would regularly assess whether they were complying with the requirements.

Dr WASHER—That is funded by the federal government—

Ms Bean—The tender will be undertaken by the department and the costs of the tender covered by the department, although we do not pay people to tender. We do not meet their costs in putting together a bid. The government has provided \$1.5 million over three years—that is \$500,000 each year—to support the collecting society. That is on the basis that they will need to—obviously, they will have start-up expenditure. The government did not want the burden of that transfer essentially, because if the government had not provided funding for the start-up then ultimately it would have had to have been recovered from artists by the collecting society.

CHAIR—Could I just relay to you some concerns that have been raised with the committee for your response, or you may wish to take it on notice. It goes to the issue of Indigenous art. What we want to know is: in situations where small art centres buy directly from Indigenous artists, will they have to incur the resale royalty charge at the point of their first arms-length commercial resale?

Ms Bean—If an Indigenous art centre does undertake that practice, yes, they will. They will be treated as any other art dealer because that is essentially what they are. Our experience is—bearing in mind that we run what is called the NACIS program, which is the Indigenous art centres program—the art centres that adopt an outright buying practice tend to be the bigger art centres. For example, Maningrida, which is a very large, successful, well-known arts Centre in Arnhem Land, do buy direct. With the smaller art centres, what you need to also bear in mind, I think, is that the absolute bulk of transactions—probably 99 per cent, but that is speculation—would be under the \$1,000 threshold. A new arts centre just starting up, which is small and decides to go down that route, is not going to have the names, as it were, that would attract prices over \$1,000.

CHAIR—Could the unintended consequence of that be that art centres may offer lower prices to Indigenous artists at the first point of purchase?

Ms Bean—If that is the case then, to me, that is a very good reason for having the art centre bound by the legislation because, if they offer a small price to the Indigenous artist and then sell it for a big price, the artist should be entitled to the royalty.

CHAIR—You could have an alternative construction on that arrangement too, couldn't you.

Ms Bean—Realistically, certainly at this point in time, for the majority of pieces of Indigenous art \$1,000 dollars is quite a lot of money. There are some very highly priced artists who produce significant works and they can attract many, many thousands of dollars. If, for example, you have an artist who can attract \$20,000 or \$25,000 for a work, it is highly unlikely that the art centre that they work with would have the cash flow to be able to buy those works. So I do not think the situation would arise at the high end. At the lower end, as I said, most of them are under \$1,000. Potentially I suppose you could end up in a situation where something might be worth \$1,200 and the art centre buys it for, I don't know, \$999 but to me that is a very good reason for having the art centre required to pay the royalty.

Mr Tucker—You have a problem with a threshold regardless of where you set it in these circumstances, but one is proposed to be set.

Mrs D'ATH—When we were discussing threshold and sale price I was also going to talk about the rate of royalty and ask for some explanation as to why there is a flat rate and whether there should be an upper limit. Was that considered?

Ms Bean—Yes, they were. Various different rates were considered. A sliding scale was considered. The imposition of a cap was considered. The five per cent as a flat rate was essentially imposed because we took the view that it was simple. Going back to Dr Washer's point about administrative complexity, if you have a sliding scale you instantly add a layer of complexity to the work that the auction house, or whoever, has to do. The cap was considered but, again, we felt that in the Australian context it was not necessary and was inappropriate.

Mr Tucker—Can I add that each of those different models were modelled by Access Economics. In terms of the sliding scale and the cap, essentially you are disadvantaging people who are successful, and is the point of the scheme to disadvantage successful artists in that sense?

Mr DREYFUS—To follow up the question that the Chair asked before, very many community art centres are community centres. That is their operative word. And they have very close relationships with the artists—they know them; they live in the same community with them. Is it going to be possible for them to adopt other arrangements that are, in effect, a consignment arrangement?

Ms Bean—The bulk of art centres do operate on a consignment basis.

Mr DREYFUS—And for those purposes under the legislation as proposed there would be no sale?

Ms Bean—That is correct, because there is no transfer of title.

Mr DREYFUS—And because of that consignment arrangement, other than, as you say, Maningrida, which is an example which pays money and there is a sale, the resale of royalty will not arise.

Ms Bean—That is correct, because that would be the first sale.

Mr DREYFUS—And Maningrida could decide that they want to sell on consignment as well.

Ms Bean—They could indeed.

Mr DREYFUS—Or they might even determine that they might advance against a sale, which is nevertheless a consignment sale.

Ms Bean—Correct.

Mr DREYFUS—And that is not going to be caught?

Ms Bean—No. It is a resale royalty not a sale royalty, so the first sale is not caught. The piece of art produced by the Indigenous artist but sold through the art centre, as long as there is no

transfer of title to the art centre—or to anyone else for that matter—will not be caught. Yes, they could sell them on consignment; they could give them the bulk of the money but not transfer the title—give them an advance, essentially.

Mr DREYFUS—That is what I am getting at. All of you would appreciate that the reason many, if not all, the community art centres came into existence was to directly provide income to artists in these communities.

Ms Bean—One of the reasons.

Mr ZAPPIA—Of those countries which have implemented a resale royalty scheme, has there been an emergence of a black market for artworks of any sort? Are you aware whether that has been the case?

Ms Bean—Certainly not that I have heard about. I think the main argument against the development of a significant black market is the importance of provenance for art works—particularly when you are talking about art works worth many thousands of dollars. Buyers want to see a chain of transactions so they can trace the history of the work so that they know it is not a forgery. Black market sales potentially reduce the value of the provenance and hence, potentially, the ultimate value of the work.

Mr Tucker—Sales occur between individuals now. It is whether the scheme would provide an additional incentive. This is a matter of logic: if you are a seller and you want to get the best price for your work, usually the best way to get that is to test the market through an auction house or commercial arrangement.

Ms Bean—No doubt private sales will continue. Private sales have always happened and will always happen.

CHAIR—In some EU countries they do cover private sales as well, but the problem would be the enforcement issue, wouldn't it?

Ms Bean—There certainly would be an enforcement issue. It would become extraordinarily complex trying to identify and chase down individual sales. If I sell something to Mark, how is anyone ever going to know?

Dr WASHER—Just on the duration of royalty: 70 years after death is a long time. Unfortunately, art does increase in value when you die. It seems to go up if it is good, which is a bit sad but that is the reality. I have two points about that. Firstly, it seems to be biased towards the beneficiaries rather than towards the artist. And, secondly, there are reciprocal arrangements we have with people who market art from overseas through our compliance guys and that legislation would not apply. In other words: when the artist dies it terminates, but in this country the law is different.

Ms Bean—We adopted 70 years after death for a number of reasons. One is that it is extraordinarily significant to Indigenous communities. It also mirrors the copyright provisions and, given that there is a debate about how often art is sold, if a piece of art is not sold very quickly you might never attract a royalty if it is only for living artists.

In terms of reciprocity, yes, it is true that some schemes—the UK scheme, for example—only apply to living artists. With every international scheme, including ours in the mix, there are swings and roundabouts—you win some, you lose some.

Mr Tucker—Is it right that the EU directive also talks about it going to 70 years?

Ms Bean—The EU directive has the 70-year provision, yes. The bulk of European member states that have adopted the royalty already have life plus 70 years. There is some debate in the UK, but they potentially will move to that at some point.

CHAIR—Going to the issue of the cap on the royalty, it is my understanding that a number of the EU countries do in fact have a cap. By not having a cap domestically do you see any influence that that might have on the choices of artists from other countries as to where they might sell their art works?

Ms Bean—I suppose theoretically that is the case, but generally art tends to get its highest price in the home country of the artist. Australian art is more likely to get a better price here than in Wellington, say. New Zealand art is more likely to get a better price in New Zealand than here. There are some large centres in the world, like London and New York, where everyone buys and sells regardless of nationality. But Australia is not one of those. Australia would be seen as fairly remote for most international sellers and buyers.

CHAIR—As chair of the committee I would like to return to clause 11. We have been asked to look at the legislation to see whether it gives effect to the principles that underpin it. Obviously the issue of a perspective application of the legislation is the vexed issue of this debate. Your statements this morning say that the construction of the legislation has been based on the advice of the Solicitor-General, which we are not privy to. We have received contrary advice that suggests an opinion different from that. You indicate that you have sent that advice off for further examination, and presumably nothing has altered in the opinion of the Solicitor-General.

Mr Tucker—That is correct.

CHAIR—As a lay person who chairs the committee, I find it very difficult to make a reasoned response on this issue without actually being able to see the original advice and the response to the contrary opinion. You indicate that this is standard government practice. Is it possible that the committee, as part of its recommendation, request access—recommend to the minister that to make an informed view about those issues—

Mr Tucker—That is a matter for the government, as we said. We cannot do that. We are bound by the rules under which we operate as public servants.

CHAIR—Are you aware of situations where a committee might seek that the minister or the government obtain advice in addition to the Solicitor-General's, or is it common practice to rely on the Solicitor General?

Mr Tucker—I am certainly aware of Senate committees asking us regularly for copies of advice, which we always politely decline. I am not aware, certainly in my experience, of a committee asking for further advice.

Ms Bean—Not in my experience, either.

Mr Tucker—But you are committee and I assume you have some sorts of powers. Perhaps the secretariat knows more than we do on this matter.

Mr DREYFUS—How do you think this might be resolved to the satisfaction of the public or those with a particular interest in this legislation? We have made public the advice of eminent counsel from Sydney—Mr Robertson—who has provided what appears to be cogent reasoning at some considerable length. That advice has been given to this committee. It is on the public record so that anybody interested in the proceedings of this committee can immediately read it, as indeed they can read the 37 submissions that we have received. If nothing else occurs, we might well be reporting in a way that suggests that this advice has been received and this is what it says and it is there for all to read and that you for reasons of legal professional privilege have been unable to go further with the advice upon which you have relied in drafting the legislation. It is not a very satisfactory position in terms of explaining the process of legislation to the Australian public.

Mr Tucker—We certainly realised and discussed before we came in the dilemma for the committee on this matter, and for that matter for other people who have made submissions and are interested in the legislation. But, as I said before, we are bound by the practices under which we work. It is best that we say that is a matter for the government. I do not really have a clever way to resolve it, I am sorry.

Dr WASHER—I put this hypothetically: if we were to ignore your advice and take the other advice and put that into legislation it would ultimately be tested in the courts. So the determination will be made in the courts. So, Mark, I guess that is the risk you take. Is that not true? It would have to be a court decision ultimately to judge the legislation. I do not understand the legal system; I imagine that would go to court if someone challenged it.

Mr DREYFUS—The Commonwealth has been legislating for a century in ways which have sometimes ultimately been found to be unconstitutional. That has not prevented the legislation being passed in the first place.

Mr Tucker—I think it would be unusual for a government and a parliament to, where there has been advice from the Solicitor-General about constitutional validity, introduce a bill that they thought may not be constitutionally valid. I can only say that and you cannot make that judgment, of course.

CHAIR—In your deliberations was there any assessment of the likelihood or otherwise of a challenge?

Ms Bean—Yes. Essentially that is all part of the whole mix when you are looking at constitutional validity. There is an issue about the Commonwealth generally—the Public Service, the parliament and executive—putting in place something that was known to be invalid.

As a public servant I would certainly not regard that as proper behaviour. We work to make it as robust as we can. But within the context of that, you do look at the risks and the level of risk of different solutions.

Mr Tucker—I think it is fair to say that in developing the bill and talking to different stakeholders, some of them were aware of this potential constitutional problem. While not saying that they would test the legislation, certainly if they felt aggrieved and the arrangements were subsequently causing costs to them there is potential for them to challenge the legislation.

CHAIR—I guess that will be a critical issue that the committee will need to give further thought to in terms of responding to the parliament as requested. Are there any other matters that anyone wants to raise?

Dr WASHER—I would like to tease this out a little further, if I may. I think Mark has shown great wisdom here and that is why I asked him about some of this. It would be nice to have bipartisanship on this; I would certainly like to see that happen. This is a hypothetical but it could be a significant one: if the Senate precipitated for whatever reason an inquiry to look at this, what you are saying—I think you pre-empted this—is that if they asked the same question you would give them the same answer. So really that would achieve little.

Mr Tucker—That is correct.

Dr WASHER—To pre-empt that, that would achieve nothing anyway.

Mr Tucker—The Senate can decide what the Senate wants to do in terms of inquiries but we are bound by the rules under which we operate, and it would be the same answer to a Senate committee.

Mr DREYFUS—I am wondering whether, while you are here, I can ask about the actual effect of section 11—the real-world effect. In their submission to us, which you have, Viscopy have been critical of the Access Economics work—or perhaps not so much critical of the work as noting the acknowledgement by Access Economics that they did not have any real data. Is that right?

Ms Bean—The data is not robust. I mean, it is not well collected. The modelling was based on auction house data because that was what was able to be accessed. There is very little data collected on sales through commercial galleries, for example.

Mr DREYFUS—It is just that I read in the Viscopy submission:

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.

Do you have a comment on that?

Ms Bean—Again, we have not re-analysed it to confirm that. I am assuming that that is a perfectly reasonable analysis, but it does not take into account the sales through other than auction houses.

Mr Tucker—So it does not take into account commercial gallery sales, for example.

Mr DREYFUS—The point of it being that, in its present form, this scheme is not going to generate very much income.

Mr Tucker—We actually had this discussion before. The two issues that it raises is the prospectivity issue—

Mr DREYFUS—I am sorry if I am going over something you have already covered. I had to go and speak in the chamber.

Mr Tucker—There is the prospectivity issue, which we have been through in terms of the constitutional arrangements, and the second one is having sufficient funds to allow the society to do its work. The government has made funds available for the next three years to assist with that. Obviously, as the scheme rolls out over time, it will have to look at whether further support is required or sufficient funds are being collected to allow it to be self-funding. I think that particular point of view in a way also argues for the 70 years, because some artists with that sort of turnover may not necessarily benefit, but their estates and children and so on may benefit over time with that longer period.

Mr DREYFUS—Do you think that Viscopy's position, as taken in the submission that we have received, which is that the legislation in its present form is not likely to be of benefit to very many artists is correct?

Mr Tucker—It comes back to that prospectivity issue. If it is retrospective, as we all know and as people say, it will be much more beneficial. But we have a hurdle in that the government is currently deciding that it will go on the advice that to be constitutional legislation it needs to take the prospective route.

Mr DREYFUS—I am really just trying to confirm whether or not the criticisms expressed are correctly made. I am not trying to get to practical effect in asking these questions.

Ms Bean—We have no reason to doubt the analysis. But, as I said, it does not take into account other sales other than those through auction houses. Basically, I do not think that they have added the numbers up wrongly.

CHAIR—Do we know roughly what the split is between auction houses and other forms of sale?

Ms Bean—With think it is about half and half. I do not have any sense of—

CHAIR—A different pattern—

Ms Bean—whether there is a relationship between the age of the work and how it is sold—that is, whether young works are sold privately or older works are always sold through auction houses. I do not have any sense of that.

CHAIR—I think Access Economics acknowledges the limitations of the data in their modelling.

Mr Tucker—If the scheme is introduced then, over time, we will have that data.

Mr DREYFUS—In the Viscopy submission, a second criticism was expressed about clause 11 and the non-reciprocity that might arise with other countries if the scheme were introduced in its current form. Just to restate for those present, the point being made is that resale right schemes are available in some 50 countries throughout the European Union but the reciprocity that the Berne convention confers is limited to or can be denied to countries which are not operating as a ‘fully functioning scheme’—that is the phrase that is used. Have you given thought as to whether or not the Australian scheme, if introduced in the form proposed in this legislation, would be seen as a fully functioning scheme for the purposes of the Berne convention?

Ms Bean—Yes, certainly. Schemes are different all round the world. There are pluses and minuses. There are high rates. There is the German scheme, as I mentioned before, which has a central government fund that pays money to artists. In some ways you could argue that that is not a fully functioning scheme. With reciprocity arrangements generally, we find it unlikely that countries would go into significant detail in matching different clauses. In addition, it is quite a significant statement for a country to refuse to meet an obligation under a convention.

Mr DREYFUS—I would beg to differ with that. We have regular fights with countries around the world over pension reciprocity which are of exactly the same nature and probably more significant.

Ms Bean—Certainly our advice was that it was unlikely that countries would delve into the detail.

Mr DREYFUS—I am trying to zero in on this a bit, on the proposition expressed to us here that because of the—I will paraphrase it—significant differences between the scheme as set out in this legislation and the schemes in particular operating in European countries, the proposition put forward is that 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. Have you assessed that risk?

Ms Bean—Yes and certainly we have taken advice from the Office of International Law and from the Department of Foreign Affairs and Trade and our assessment is that it is not a serious risk.

Mr DREYFUS—Are you able to flesh that out at all as to why? I am not asking for legal advice—

Ms Bean—No, essentially it is what I said before.

Mr DREYFUS—but is that because there are not significant differences or is the suggestion that other countries will not look too hard?

Ms Bean—A bit of both essentially. It is partly because every scheme is different. Potentially some of the European ones are the same. Broadly you are looking at different schemes all over the place and it is an overall balance of meeting the obligations. We would think it unlikely that there would be a focus on one particular—

Mr Tucker—I am wondering whether the issue you are getting at might be what you were saying before, Lynn. The benefits that might arise from an Australian artist, say, selling in the UK market, would be those associated with the UK scheme, so they would not give beneficial treatment. I am not sure whether that is where your question is trying to get to.

Mr DREYFUS—Reciprocity in this context is always about enforcement. It is a mechanism.

Ms Bean—For example, the UK scheme applies only to living artists. It is not the model set out in the Berne convention. I would not recommend to government that we refused reciprocity to the UK scheme, even though there is a fundamental component of it that is less than generous.

Mr DREYFUS—I am pleased to hear it.

Ms Bean—I think bureaucrats in other countries will be doing exactly the same thing and governments in other countries will make similar decisions. That is essentially what I mean about pluses and minuses.

Mr DREYFUS—You may not know anything about this but we are told in this submission that in 2008 the European Commission removed from schedule 2 to the Berne convention—described here as the instrument by which European member states offer reciprocal treatment to non-European nationals—26 non-European countries and that this action was taken on the basis that there was insufficient evidence that these countries operate fully functioning schemes.

Ms Bean—I do not know anything about that.

Mr DREYFUS—Is that something the department could look into and give some further advice to the committee about?

Ms Bean—We certainly can look into it.

Mr DREYFUS—It is going to the point of whether or not, if the scheme is enacted in the form set out in this bill, reciprocity is likely to be available particularly in light of this action by the European Commission last year.

Ms Bean—We can certainly make inquiries about that.

Mr DREYFUS—We would appreciate that.

Mr Tucker—I am just trying to recall the Viscopy copy submission. I think the main issue of the bill, which they were raising, was the prospectivity issue and that it might influence reciprocity.

Mr DREYFUS—That is certainly so. Viscopy, that is coming to talk to us tomorrow, made the point that, first, only a handful of artists would benefit during their lifetime because of the structure that has been adopted in clause 11, and that Australian artists may be denied royalties from overseas, which is the point I have just been pursuing, because that is the denial of reciprocity. They made a couple of other points. ‘Management of the right will be severely compromised’ and another point that they really go to is clause 23 about artists facing pressure to give up their royalties. So I do not think that it is right to say that they are only concerned about the retrospectivity or otherwise.

Mr Tucker—I do not think that we could see from the administration of the scheme or the way that it is designed in terms of ‘for the life of the artist plus 70 years’, for the threshold, or for a non cap in any way, that that would be seen by other countries as something that they would not recognise—

Mr DREYFUS—If that is the department’s view that is very helpful to know that. It is a point that would be of concern if there are sufficient differences between the Australian scheme as presently proposed to be adopted and the schemes in operation in some 50 countries.

Mr Tucker—All those countries have different arrangements on some of those. For example, some countries will have a threshold; some countries will have a sliding scale; some countries will have a flat rate. The UK does not have anything in place for the 70 years after the death of the artist. There is an EU directive which says that they should have 70 years after the death of the artist—some of the other EU countries do. So there is quite a lot of variability even within the EU and they still have reciprocal arrangements between those as countries. So from our judgment the design of the scheme is no more variable than what is in those EU countries. I must admit that it was a quick reading and I did not have a chance to read through the Viscopy submission in detail, but it seemed to me to come back more to this arrangement and whether it was going to be a retrospective scheme or not and, as we have said, that comes back to a constitutional issue for the Australian government.

CHAIR—Viscopy in their submission also raised concerns about section 23 and the rights of individual artists who pursue the royalty outside the scope of a collective collection agency and we indicated that there might be some need to tighten up, in our view, that section. They go on to argue:

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”. 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.

Do you want to make any comments on the public record in response to those concerns?

Ms Bean—There certainly is potential for people to opt out. Again, it is about striking a balance. Not having an opt-out provision is quite draconian. To force people to go down a single route is quite draconian. At the moment, if you do not force people to go down the single route then this is probably, in a sense, the softest alternative. There were certainly a number of people and particular artists we consulted who were very keen to see an opt-out provision. I guess the ultimate test will be how efficient the collecting society is, because I would have thought the No. 1 reason that artists would opt out would be a very high administrative fee. They might think they could do better by collecting it themselves. So if you have an efficient and effective collecting society then that would be easy and convenient for artists.

CHAIR—But my reading of the legislation is that it goes beyond the notion of opting out. You can opt out through the processes of a collective agency, but you then confer on the individual who opts out additional rights, which I think undermine the basis of the collective—

Ms Bean—Sorry, I am not quite sure what additional rights they would get.

CHAIR—They could then go and pursue their own arrangements for the resale.

Ms Bean—They could.

CHAIR—If many people chose to exercise that option wouldn't it really strike at the efficacy of a collective agency?

Ms Bean—Yes, it would. If half the artists opted out then that would be half the administrative fees gone. So the cost per transaction would become higher. If you have a much smaller number of transactions, that would certainly be true. My thesis is that the remedy for that is to have an efficient collecting society.

CHAIR—But it becomes less efficient, in a hypothetical sense, the more you allow individual people the right to opt out, presumably.

Mr Tucker—Well, the more individuals who decide to opt out would perhaps make it less efficient, but people will make their own judgments on what is best for them. If the royalty they are going to receive is \$100, for example—which it could be—is it worth their time and effort to go and collect \$100 or to allow a collecting society to collect that money, take a small administrative component off it and return the rest to the artist? People will make those judgments all the time.

CHAIR—It is certainly, as has been said, a matter of balance. Maybe in the view of some people the balance could be struck in a different manner to that expressed in the current legislation. That is an issue that we—

Mr Tucker—And that is part of the reason that we would put monitoring and reporting arrangements in place to look at what the collecting society does in the end, because if we see that it is not coming out the way we expected—and it is our expectation that most people will use the collecting society—then we will have to come back to the government.

CHAIR—So it is true, in terms of your earlier statement, that the main concerns related to sections 11 and 23. They had not, in any great detail, raised the reciprocal rights issue, although Mr Dreyfus has pointed to some issues that we would like to get further advice about from you. In view of the very short deadline—we have to have this report finalised next week—could you get back to us?

Ms Bean—We will certainly see what we can do for you.

Mr DREYFUS—I want to ask a very general question. Quite a few of the submissions have suggested that struggling artists will not get much out of this scheme because of where the threshold is at and the slowness of turnover. What does the department think about the suggestion that only artists who are already established and doing quite well are going to receive, potentially, quote good sums of money, but struggling artists whose works are not selling for great prices will not?

Ms Bean—I think, in a sense, is self-evident. If you do not get much for your work then five per cent of not much is very not much, isn't it? But if your work sells for significant sums then, yes, you will get a significant amount of money. But beyond that I think the scheme will mature. It will settle in and over time prices will go up and more works will come within the scope of the scheme. So over time more artists will receive money from the scheme.

Mr Tucker—Can I add that I notice in one of the submissions there is a complaint that our scheme was more generous than many of the overseas schemes.

Mr DREYFUS—More generous?

Mr Tucker—More generous.

CHAIR—But one of the only ones that I am aware applies prospectively! At this point I think we have explored as much as we can productively explore in the absence of the legal advice on which the whole scheme is built, but that is an issue that is beyond your scope to assist us with. We thank you for your attendance here this morning, for answering our questions to the best of your capacity as public servants and for helping us to do what the parliament has entrusted this committee to do to the best of our abilities. As chair, and having no great expertise either in matters of law or the arts, I am very indebted to the fact that those gaps in my knowledge have been compensated for by the contribution of others and by the secretariat. We look forward to receiving the further advice concerning reciprocal rights.

Mr Tucker—Certainly. And my thanks to you, Madam Chair, and to the committee.

CHAIR—The secretariat will send you a copy of the transcript for any corrections that need to be made. Could you also send the secretariat the additional material to which I have referred. Hansard will conclude this part of the public hearing—to be resumed in the morning.

Resolved (on motion by **Dr Washer**, seconded by **Mr Dreyfus**):

That this committee authorises publication of the transcript of the evidence taken at the public hearing today.

Committee adjourned at 12.06 pm