



## Tax Laws Amendment (Resale Royalty Right for Visual Artists) Bill 2009

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Law and Bills Digest Section

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## Tax Laws Amendment (Resale Royalty Right for Visual Artists) Bill 2009

**Date introduced:** 16 September 2009

**House:** House of Representatives

**Portfolio:** Treasury

**Commencement:** The formal provisions commence on Royal Assent. Schedule 1 commences at the same time as Part 2 of the proposed *Resale Royalty Right for Visual Artists Act 2009*.<sup>1</sup>

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

Primarily, the Tax Laws Amendment (Resale Royalty Right for Visual Artists) Bill 2009 ('the Tax Bill') amends three tax Acts to ensure that the body appointed by the Arts Minister as the collecting society for resale royalty right payments under the proposed *Resale Royalty Right for Visual Artists Act 2009* is not taxed on amounts it collects and passes on to visual artists (or their estates), nor on interest paid to the society in relation to these royalties.<sup>2</sup> The Tax Bill also ensures that the collecting society is exempt from paying tax on the first five per cent of its total income or \$5 million in an income year (whichever is the lesser amount).

The Tax Bill streamlines the income tax treatment of payments made to or from the collecting society to bring them into line with the income tax treatment of payments made to or by copyright collecting societies. It also simplifies the tax law provisions that currently apply to copyright collecting societies.

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1. As at the time of writing, the Resale Royalty Right for Visual Artists Bill 2009 (which was previously cited as 'the Resale Royalty Right for Visual Artists Bill 2008') has not yet been enacted. The homepage for that Bill is available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4010%22>, viewed 13 October 2009. Four government amendments were passed by the Main Committee on 7 September 2009, and the Bill was read a third time in the House of Representatives on 8 September 2009. It was introduced into the Senate on 9 September 2009.
  2. See footnote 1 above.

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## Background

### Resale Royalty Right for Visual Artists Bill 2009

The Resale Royalty Right for Visual Artists Bill 2009 ('the substantive Bill') was introduced by the Rudd Government on 27 November 2008. That Bill establishes 'the right of an artist to claim a share of the proceeds of each successive resale of the original of a work'.<sup>3</sup> The term '*resale royalty right*' is defined in proposed section 6 of the substantive Bill as 'the right to receive resale royalty on the commercial resale of an artwork'. The royalty may be paid to visual artists (or their estates), provided certain residency and other tests are satisfied.<sup>4</sup> It is not payable if the sale price is less than \$1000 or such other amount as may be prescribed by regulations.<sup>5</sup> In the case of existing artwork, the royalty is not payable on the first transfer of ownership that occurs after the commencement of the proposed Act.<sup>6</sup> The resale royalty is set at 5 per cent of the sale price on the commercial resale of an artwork.<sup>7</sup>

A body may apply to the Arts Minister to be the collecting society for the royalty scheme.<sup>8</sup> The Arts Minister must either refuse the application or appoint the body as the collecting society for a period not exceeding five years. There can be only one collecting society at any time. Among other requirements, the collecting society must be a company limited by guarantee and be incorporated under the *Corporations Act 2001*. All resale royalty right holders must be entitled to become members of the body, and the body's rules must prohibit the payment of dividends to its members.<sup>9</sup> The Minister may revoke the appointment if certain statutory criteria are met.<sup>10</sup>

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3. J Gardiner-Garden and P Pyburne, *Resale Royalty Right for Visual Artists Bill 2008*, Bills Digest, no. 74, 2008–09, Parliamentary Library, Canberra, 2009, viewed 13 October 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2FLVMS6%22>
  4. See proposed Part 2 of the substantive Bill, particularly proposed Division 2.
  5. Proposed section 10 of the substantive Bill.
  6. Proposed section 11 of the substantive Bill.
  7. Proposed section 18 of the substantive Bill. For further details and a critique of matters contained in the substantive Bill, see J Gardiner-Garden and P Pyburne, *Resale Royalty Right for Visual Artists Bill 2008*, Bills Digest, op. cit.
  8. Proposed section 35 of the substantive Bill.
  9. *ibid.*
  10. Proposed section 36 of the substantive Bill.

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### Position of significant interest groups/press commentary

In the last two months, there has been some mention of the substantive Bill in the media but there has been no mention of the Tax Bill itself. The press commentary on the substantive Bill has in part arisen in the context of the merger of two leading houses in the Australian art auction market—the purchase by Bonhams & Goodman of Sotheby's Australia from its international parent—and claims about the relevance and fragility of the Australian art market in the global arena.<sup>11</sup>

The very people who will be eligible to hold royalty resale rights (and thus receive royalties) under the proposed *Resale Royalty Right for Visual Artists Act 2009* are themselves ambivalent about the merits of the proposed resale royalty scheme, even though similar schemes operate successfully in other nations.<sup>12</sup> For example, Wendy Whiteley, the widow of artist Brett Whiteley, said that in theory the scheme is a good thing, but painter John R Walker said: 'For just about every artist [the legislation] is of dubious value, except possibly for indigenous artists'. Walker said that when he sells an artwork, he only gets 60 per cent of the sale price, and so if the five per cent resale royalty causes 'just one person to not buy one of his works, it would take the resale royalty on a dozen paintings to make up for that lost sale'.<sup>13</sup> Similarly, Helen Brack, the widow of painter John Brack, thinks the scheme will make her family's life more complicated. She already receives copyright royalties and says that the resale royalty payments will be 'just something else you have to keep track of'.<sup>14</sup>

### Basis of policy commitment

The resale royalty right scheme was part of the election platform of the Australian Labor Party in 2007. The particular issue of the streamlined income tax treatment of the royalty payments was contained in the *Updated Economic and Fiscal Outlook 2008–09*, released by the Treasurer and the Minister for Finance and Deregulation on 9 February 2009.<sup>15</sup>

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11. K Strickland, 'Three's company, four's no crowd', *Australian Financial Review*, 3 October 2009, p. 2.
  12. See, for example, K Strickland, 'Resale royalty a lost battle for secondary art dealers', *Australian Financial Review*, 20 August 2009, p. 3, and M Boland, 'Flawed vision cops pasting', *The Australian*, 4 September 2009, p. 12.
  13. M Boland, 'Flawed vision cops pasting', op. cit.
  14. *ibid.*
  15. The Treasury, *Updated Economic and Fiscal Outlook 2008–09*, Table 1: Revenue measures since the 2008-09 MYEFO, Appendix A: Policy decisions taken since the 2008-09 MYEFO, p. 48, [http://www.budget.gov.au/2008-09/content/uefo/download/UEFO\\_05\\_Appendix\\_A.pdf](http://www.budget.gov.au/2008-09/content/uefo/download/UEFO_05_Appendix_A.pdf), viewed 14 October 2009.

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## Committee consideration

At the time of writing, the Tax Bill has not been referred to a committee. However, the substantive Bill was the subject of inquiry and report by the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts. Details of the inquiry, including the committee's report published in February 2009, are at <http://www.aph.gov.au/house/committee/ccwea/resaleroyalty/report.htm>, viewed 14 October 2009. Subject to some refinements, such as the expansion of the definitions in the Bill to include all commercial transactions of a broader range of artwork than contained in the substantive Bill as originally introduced, the committee recommended that the Bill should be passed.<sup>16</sup>

## Any consequences of failing to pass the Tax Bill

If the Tax Bill is not passed, but assuming the substantive Bill is passed, the resale royalty collecting society would be taxed on payments received and held on behalf of resale royalty right holders under the trust tax rules in Division 6 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936).<sup>17</sup> Resale royalty right holders will also be taxed on any payments they receive (as personal income) to the extent tax has not already been assessed as payable by the collecting society—although this event will occur even if the Tax Bill is passed.

## Financial implications

The Explanatory Memorandum for the Tax Bill states that the revenue impact of the streamlined income tax treatment of the resale royalty right scheme is 'unquantifiable'.<sup>18</sup> This statement accords with the notation in the *Updated Economic and Fiscal Outlook*

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16. Essentially, the refinements recommended by the Committee were taken up in the amendments agreed to by the Main Committee of the House of Representatives on 7 September 2009. See the Schedule of Amendments at [http://parlinfo.aph.gov.au/parlInfo/download/legislation/sched/r4010\\_sched\\_cd45cc12-626a-40b3-a7f4-15ac3b256ed6/upload\\_pdf/Resale%20Royalty%2008.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/sched/r4010_sched_cd45cc12-626a-40b3-a7f4-15ac3b256ed6/upload_pdf/Resale%20Royalty%2008.pdf;fileType=application%2Fpdf), viewed 22 October 2009.
  17. Part III of the ITAA 1936 deals with liability to taxation. Specifically, Division 6 of Part III deals with taxation of trust income. A copy of the ITAA 1936 is available electronically at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/itaa1936240/](http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/), viewed 14 October 2009.
  18. Explanatory Memorandum, Tax Laws Amendment (Resale Royalty Right for Visual Artists) Bill 2009, p. 3.

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2008–09 which states that ‘[t]he nature of the measure is such that a reliable estimate cannot be provided’.<sup>19</sup>

## Main provisions

### *Income Tax Assessment Act 1997*

**Items 1 to 17** of **Schedule 1** to the Bill amend the *Income Tax Assessment Act 1997* (ITAA 1997).

**Items 1 and 2** amend section 10–5, which sets out a list of provisions in the ITAA 1997. **Item 1** inserts a sub-heading that refers to ‘collecting societies’. That sub-heading is then expanded to include not only payments of royalties by copyright collecting societies but also payments by the resale royalty collecting society.<sup>20</sup> **Item 2** makes a consequential amendment to remove the stand-alone reference to ‘payments to members of copyright collecting societies’ that currently exists in section 10–5 (and which, if not removed, would result in a duplicate entry for copyright collecting societies in section 10–5).

**Items 3 and 4** amend section 11–15 of the ITAA 1997, which sets out a list of ordinary or statutory income which is exempt from taxation only if it is derived by certain entities. **Item 3** replaces the existing reference to both the copyright and non-copyright income of copyright collecting societies (and the applicable paragraphs in subsection 51–43(2)) with a more general reference to ‘copyright collecting societies’ and section 51–43. **Item 4** inserts reference to ‘resale royalty collecting societies’ and **proposed section 51–45**.

**Items 5–6** make amendments to existing sections 15–20 and 15–22 as a consequence of other amendments made by the Tax Bill.

**Item 7** inserts **proposed section 15–23** to set out the tax treatment that will apply to a payment by the collecting society to a royalty right holder. It makes it clear that the proposed section (and not Division 6 of Part III of the ITAA 1936) applies to any payment made to a resale royalty right holder by the collecting society under proposed section 26 of the *Resale Royalty Right for Visual Artists Act 2009*.<sup>21</sup> It also makes it clear that such a payment is to be included as part of the royalty right holder’s assessable income, except to

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19. The Treasury, *Updated Economic and Fiscal Outlook 2008–09*, op. cit.

20. A ‘copyright collecting society’ collects or derives, and distributes copyright royalties on behalf of its members. The term is defined more fully in the ITAA 1997 (eg section 995–1) and the *Copyright Act 1968*.

21. As mentioned earlier, Part III of the ITAA 1936 deals with liability to taxation. Specifically, Division 6 of Part III deals with the taxation of trust income.

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the extent that the directors of the collecting society are or have been assessed, and are liable to pay tax (as a trustee), under existing sections 98, 99 or 99A of the ITAA 1936.<sup>22</sup>

**Item 8** repeals existing section 51–43 and replaces it with two new provisions: **proposed section 51–43** and **proposed section 51–45**. **Proposed section 51–43** makes the income collected or derived by a copyright collecting society exempt from income tax, and **proposed section 51–45** makes the income collected or derived by a resale royalty collecting society exempt from income tax. The two provisions are in virtually identical terms—which, from the standpoint of predictability, is a good thing because the income of the two different types of collecting societies should be taxed in the same way.

**Proposed sections 51–43 and 51–45** apply to the relevant societies if Division 6 of Part III of the ITAA 1936 applies to the income of the society (which, broadly speaking, applies if the collecting society is holding the moneys on trust). Under the amendments, royalties and interest on royalties collected or derived by the relevant society are exempt from tax, as is any other amount relating to copyright or resale royalty rights (whichever is relevant to the particular society whose income is being assessed) that are derived by the society in an income year and are prescribed by the regulations for the purposes of this exemption. Further, other ordinary and statutory income derived by the society in an income year is also exempt from income tax to the extent it does not exceed the lesser of:

- (i) 5 per cent of the total of the ordinary and statutory income derived by the society in the income year, and
- (ii) \$5 million or such other amount as is prescribed by the regulations.<sup>23</sup>

**Item 10** repeals existing Division 410 and inserts a **new Division 410** in its place. The amendment extends the scope of the current division to provide that both copyright collecting societies and the resale royalty collecting society must give notice to any

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22. The text of these sections is available electronically at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/itaa1936240/s98.html](http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s98.html) (section 98, which deals with the liability of a trustee to be assessed and pay tax on the income of the trust estate in certain circumstances, such as where the beneficiary of the trust is under a legal disability), [http://www.austlii.edu.au/au/legis/cth/consol\\_act/itaa1936240/s99.html](http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s99.html) (section 99, which provides that certain trust income is to be taxed as income of an individual), and [http://www.austlii.edu.au/au/legis/cth/consol\\_act/itaa1936240/s99a.html](http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s99a.html) (section 99A, which provides that certain trust income is to be taxed at a special rate), viewed 20 October 2009.

23. These amounts are the same as appear in existing section 51–43 (income collected or derived by a copyright collecting society). The text of the existing provision is available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/itaa1997240/s51.43.html](http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s51.43.html), viewed 20 October 2009.

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member of the society to whom the society makes a payment.<sup>24</sup> The notice must be given at the time of the payment and must be in the approved form. No indication is given in the Tax Bill or the Explanatory Memorandum for the Tax Bill as to the format or content of the approved form. While the lack of prescription may allow for flexibility in changing the form and the matters required to be notified, the situation is to be contrasted with existing section 410–5, which provides that if a copyright collecting society makes a payment to a member of the society, it must give the member a written notice stating the following matters:

- (a) the name of the society and the member; and
- (b) the total amount of the payment; and
- (c) the amount of the payment on which the directors of the society are or have been assessed, and are liable to pay tax, under section 98, 99 or 99A of the *Income Tax Assessment Act 1936*; and
- (d) the amount of the payment that is to be included in the member's assessable income under section 15–22 of this Act [the ITAA 1997].

**Items 11 to 17** amend section 995–1 of the ITAA 1997, which is the definitions section for that Act. **Items 15, 16 and 17** respectively define the terms ‘*resale royalty*’, ‘*resale royalty collecting society*’ and ‘*resale royalty right*’ by reference to the meaning of those terms in the proposed *Resale Royalty Right for Visual Artists Act 2009*. **Items 13 and 14** repeal the definition of the terms ‘*copyright income*’ and ‘*non-copyright income*’—it will not be necessary to define these terms once revised section 41–43 is enacted (see **item 8** above).

#### *Income Tax (Transitional Provisions) Act 1997*

**Item 18** replaces the phrase ‘copyright income, and non-copyright income’ with the phrase ‘ordinary income, and statutory income’ in subsection 410–1(1) of the *Income Tax (Transitional Provisions) Act 1997*. That section currently provides that a copyright collecting society to which section 51–43 of the ITAA Act 1997 applies, may elect that, from 1 July 2004, the section apply to all copyright income, and non-copyright income, collected or derived by the society on or after 1 July 2004. The amendment in **item 18** needs to be made as a consequence of the change in the terminology used to refer to income types in **revised section 51–43** (**item 8** above).

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24. See **proposed section 410–5** (copyright collecting society must give notice to member of society) and **proposed section 410–50** (resale royalty collecting society must give notice to holder of resale royalty right).

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### *Taxation Administration Act 1953*

**Item 19** repeals existing section 288–75 in Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) and replaces it with a new provision. Existing section 288–75 sets out the administrative penalty that must be paid by a copyright collecting society if it fails to give notice as required by section 410–5 of the ITAA 1997. The proposed revision expands the provision to provide that the resale royalty collecting society is liable to the same administrative penalty as a copyright collecting society. The penalty contained in the revised provision is the same for both types of society, and is the same as the penalty contained in the existing provision—20 penalty units (or \$2200).<sup>25</sup>

Ordinarily, under subsection 4B(3) of the *Crimes Act 1914*, if the copyright collecting society or resale royalty collecting society is a corporation, a court may, ‘if the contrary intention does not appear and the court thinks fit’, increase the penalty by a maximum of five times the amount of the maximum penalty that a court could impose on a natural person convicted of the same offence. In the case of section 288–75 of the TAA 1953, the corporation could be liable to a penalty of up to 100 penalty units (or \$11 000).

It is, however, not clear if subsection 4B(3) of the *Crimes Act 1914* applies in the case of the resale royalty collecting society. A body must be a company limited by guarantee and be incorporated under the *Corporations Act 2001* in order to be eligible for appointment as the resale royalty collecting society.<sup>26</sup> The collecting society cannot therefore be a natural person, but it makes no sense for the TAA to specify a penalty that applies to anything other than a body corporate. To avoid any doubt, it may be prudent for this issue to be addressed expressly in the Tax Bill.

**Item 20** provides that the amendments made by Schedule 1 to the Tax Bill apply in relation to the 2009–10 income year and later income years.

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25. The term ‘penalty unit’ is defined in section 4AA of the *Crimes Act 1914* as \$110.

26. See the criteria for appointment set out in proposed section 35 of the proposed *Resale Royalty Right for Visual Artists Act 2009*.

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