



Resale Royalty Right for Visual Artists Bill 2008

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Resale Royalty Right for Visual Artists Bill 2008

Date introduced: 27 November 2008

House: House of Representatives

Portfolio: Environment, Heritage and the Arts

Commencement: Sections 1 and 2 and Part 3 on the day of Royal Assent; all other provisions on 1 July 2009.

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

The purpose of the Bill is to create a resale royalty rights scheme so that visual artists will be able to claim a share of the proceeds of each successive commercial resale of the original of their artwork during the course of the artist's life; and that their heirs will have a similar right for a period of 70 years after the death of the artist.

Background

What is a resale royalty right?

A 'resale royalty right' is the right of an artist to claim a share of the proceeds of each successive resale of the original of a work. It is often referred to as '*droit de suite*' which literally translates as the '*right of follow up*'.¹ The resale royalty right was first introduced in France in 1920 as a response to a growing public awareness of the plight of impoverished artists in France whose works greatly increased in value to the benefit of dealers and collectors without any corresponding benefit to the artist.²

Despite this history, and although the resale royalty right debate often involves a discussion of the financial hardship of practising artists, the right appears not to have been intended originally as a means of assisting needy artists. Rather, it is a means of countering what some saw as discrimination against artists in the system of copyright.³

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1. Australian Copyright Council, '*Droit de suite: the Art Resale Royalty and its Implications for Australia*', Australian Copyright Council, Sydney, February 1989, p. 9.
 2. *ibid.*
 3. *ibid.*, p. 10.

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Artists are entitled, as copyright owners, to receive payment for reproductions of their work, in the same way that authors receive royalties for books sold, and composers receive payment for records sold and performances of their work. However, for many artists, the principal purpose of their work is the original work itself, rather than reproductions of it. The resale royalty right has the effect of redressing this imbalance in practice by giving artists whose work is not created to be reproduced, the right to share in another's exploitation of their work— that is, resale of the original.⁴

Developments in Australia

Report by the Australian Copyright Council

The possible introduction of a resale royalty right that returns to artists a percentage of the sale price has been the subject of debate in Australia for more than 20 years.

In 1988 the Australian Copyright Council was commissioned by the Australia Council to examine whether a resale royalty rights scheme was appropriate for Australia and what the shape of such a scheme might be. The resulting report of February 1989 entitled, *The Art Resale Royalty and its Implications for Australia*, recommended⁵ amendment to the *Copyright Act 1968* (Copyright Act) to create a resale royalty scheme characterised by:

- imposition of a royalty on public sales (such as auctions or commercial venues such as galleries)
- a fixed percentage royalty calculated on the full sale price above a specified threshold
- a right, operative over the full term of the copyright, inalienable and effective in relation to sales from the time of the legislation irrespective of the date of creation of the work of art
- royalty collection and distribution operated through a visual artists' collective rights administration body⁶
- civil remedies available to the artists regarding non-observance of the scheme, and
- coverage of Australian citizens and residents, with foreign nationals covered on the basis of reciprocity.

These recommendations were not implemented.

4. *ibid.*

5. *ibid.*, pp. 7–8.

6. At present [Viscopy](#)— the Visual Arts Copyright Collecting Agency—licenses the copyright in artistic works and pays the artist or copyright owner a royalty for the reproduction.

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Subsequent reports

Over time, subsequent reports addressed the same issues, for example:

- [Our Culture, Our Future](#), a report on indigenous intellectual property issues prepared in 1998 for the Aboriginal and Torres Strait Islander Commission⁷
- the Report of the [Contemporary Visual Arts and Craft Inquiry](#) (developed for the Commonwealth in 2002 and known as the Myer Report),⁸ and
- [Don't Give Up Your Day Job: an economic study of professional artists in Australia](#), a report by the Department of Economics at Macquarie University in 2003 with funding from the Australia Council.⁹

Discussion paper

In 2004, the Australian Government issued a discussion paper entitled *Proposed Resale Royalty Arrangement*¹⁰ through the then Department of Communications, Information Technology and the Arts. Again, the issues were whether a resale royalty right should be introduced, and if so, in what form? The discussion paper sought public submissions in relation to, amongst other things, the following matters:

- whether resale royalties should be directed towards those artists whose works are sold, in keeping with the principle that the right is a form of copyright owned by the artists, or whether they should be spread among many artists through a fund similar to the Australian Indigenous Art Trade Association's one, offering a form of targeted income support
- whether the scheme should direct a portion of money to both the heirs of the creator of the work and to other artists
- if the royalty is to be directed only towards the individual artist, whether the recipient base should be very broad by making the sale threshold price very low, and
- whether the royalty should be collected by a central agency, by Viscopy, or by a new statutory body.

7. See <http://www.frankellawyers.com.au/media/report/culture.pdf>, accessed on 7 January 2009.

8. See http://www.arts.gov.au/_data/assets/pdf_file/0018/12087/Report_of_the_Contemporary_Visual_Arts_and_Craft_Inquiry.pdf, accessed on 7 January 2009.

9. See http://www.australiacouncil.gov.au/_data/assets/pdf_file/0016/2905/entire_document.pdf, accessed on 7 January 2009.

10. Department of Communications, Information Technology and the Arts, '*Proposed Resale Royalty Arrangement: Discussion Paper*', Australian Government, released July 2004, http://www.arts.gov.au/_data/assets/pdf_file/0009/12024/Proposed_Resale_Royalty_Arrangement_Discussion_Paper.pdf, accessed on 7 January 2009.

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In response, the Access Economics report entitled [*Evaluating the impact of an Australian resale royalty on eligible visual artists*](#), produced for Viscopy in October 2004, concluded that:

The impact of [a Resale Royalty Right] on the Australian art market is difficult to determine because of a paucity of relevant empirical data about relevant behavioural responses to its introduction. While the size and distribution of [Resale Royalty Right] payments can be estimated, the critical question of who bears the actual economic cost of the royalty, and, most importantly whether eligible artists would be net beneficiaries of such an arrangement is not at all clear.¹¹

In May 2006, the Australian Government decided against a right of resale for Australian artists:

Resale Royalties, they argued, 'would not provide a meaningful source of income for the majority of Australia's artists'. Instead, they argued, 'research shows that resale royalty schemes bring most benefit to successful late career artists and the estates of deceased artists'. Such a scheme, they said, 'would also adversely affect commercial galleries, art dealers, auction houses and investors', and 'would not end disadvantage for Indigenous artists'.¹²

The position of Indigenous artists

On 20 June 2007, the Standing Committee on Environment, Communications, Information Technology and the Arts (the Committee) published its report entitled [*Indigenous Art: Securing the Future Australia's Indigenous visual arts and craft sector*](#).¹³

In relation to the matter of a resale royalty right, the Committee noted the comments of the Myer report which found that the case for a resale royalty scheme was particularly strong for Indigenous artists. The benefits that would flow to Indigenous artists, according to the Myer Report included:

- providing additional income to some artists
- empowering and nurturing artists
- recognising the ongoing relationship between the artist and the artist's community with the work and the owner
- providing means for artists to meet community obligations
- minimising exploitation, and

11. Access Economics, 'Evaluating the impact of an Australian resale royalty on eligible visual artists', 2004, p. 1, http://www.arts.gov.au/_data/assets/pdf_file/0015/16026/Viscopy_Access_Economics.pdf, accessed on 7 January 2009.

12. P. Anderson, 'Resale royalties and new directions for the Arts', *FUELAARTS.COM*, March 2008, p. 1.

13. See http://www.aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/report/report.pdf, accessed on 7 January 2009.

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- reducing profiteering and promoting transparency in the sector.¹⁴

In addition the Committee noted that the Myer Report cited some concerns regarding perceived risks to the Indigenous art market, collectors and artists including:

- potential negative impact on the Indigenous market
- possibility of sales in Indigenous art moving off-shore
- possibility that a resale royalty would constitute a disincentive to collectors
- risk of sales becoming more private to avoid payment of the royalty
- possible impact of the measure on galleries and collectors
- potential disadvantages to emerging artists
- the possibility that only successful artists will benefit, and
- possible creation of an elite market.¹⁵

The Committee noted that resale royalty schemes have been introduced in many European and other countries and provide a number of benefits to artists. The Committee acknowledged that there is also widespread support for such an arrangement amongst groups representing Indigenous interests in the sector.¹⁶

However, whilst the Committee was sympathetic to policy changes that will improve the circumstances of all artists, including Indigenous ones, it did not want to endorse changes that might have administrative costs but few benefits. The majority of the committee reluctantly concluded there was no clear benefit to pursuing a resale royalty scheme at that time.¹⁷

Subsequent developments

In April 2008, the Australian Government was reported as receiving a private report from Access Economics that warned a non-retrospective scheme might not collect enough money to cover administrative costs (collecting only about \$3.4 million in the first five years, rising to \$11.7 million in the first decade and \$38.5 million after 20 years—with about 20 per cent of income going on administration).¹⁸

The Australian Labor Party (ALP) has supported the concept of a resale royalty rights scheme for some time, having included reference to such a scheme in its Arts Policy Discussion Paper of

14. *ibid.*, p. 160.

15. *ibid.*

16. *ibid.*, p. 174.

17. *ibid.*, p. 175.

18. Katrina Strickland, 'Critics pressure Garrett about resale plan', *Australian Financial Review*, 27 November 2008, p. 44.

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2006.¹⁹ In announcing the scheme in May 2008, the Minister said that it ‘would reflect the particular characteristics of the Australian art market and maximise the benefits to artists’.²⁰ He anticipated that an open tender process would be conducted in the second half of 2008 to select an organisation to set up a collecting agency to administer the scheme.²¹

A debate on the Government’s proposed scheme held at Sydney’s Danks Street arts complex on 18 November 2008 revealed misgivings from both opponents and supporters of a resale royalty. According to a media report, opponents accused copyright collecting agency Viscopy of ‘empire-building’.²² However, Michael Keighery, president of Viscopy emphasised the fact that the royalty would only pertain to works bought after the scheme is introduced and only on subsequent resale. There was concern about the costs of the scheme and whether these might be in excess of 15 per cent. In that case there might not be enough money to make it worth doing and could mean that no organization would tender for the contract to run it. Further there was concern that the scheme would not activate reciprocal rights with overseas collecting agencies.²³

Viscopy and the Government advanced conflicting legal opinions on the constitutionality of making the scheme retrospective. If the Government were to attempt to make the scheme retrospective, it was noted that the auction houses might mount a High Court challenge that would delay the scheme’s planned 1 July 2009 introduction.²⁴ When the Government’s Bill was introduced on 27 November 2008, it became apparent that the planned scheme would not be retrospective.

Overseas schemes

More than 30 countries have resale royalty schemes²⁵ which vary in such matters as:

- what artwork is covered
- the royalty rate

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19. Peter Garrett, MP, ‘[Federal Labor Arts Policy Discussion Paper](#)’, Australian Labor Party, 2006, p. 13.
 20. The Hon P. Garrett MP, Minister for the Environment, Heritage and the Arts, [Resale royalty rights for Australia’s visual artists](#), media release, 13 May 2008, <http://www.environment.gov.au/minister/garrett/2008/pubs/budmr20080513i.pdf>, accessed on 7 January 2009.
 21. *ibid.*
 22. Katrina Strickland, ‘[High Court challenge looms over royalty scheme](#)’, *Australian Financial Review*, 20 November 2008, p. 48.
 23. *ibid.*
 24. Katrina Strickland, ‘[Resale royalties may face constitutional hitch](#)’, *Australian Financial Review*, 21 August 2008, p. 7.
 25. The [Design and Artists Copyright Society](#) offers a list of countries which have a resale royalty right.

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- the minimum threshold sale price at which the royalty applies, and
- the calculation of the sale price (inclusive or exclusive of taxes).

All these factors have an impact on transaction costs and who benefits from the resale royalty right. Most of the schemes provide purely individual direct benefits, but some (such as that operating in Norway since 1948) provide for collective form of resale royalty paid to an artists' mutual aid fund which is used to help aged artists or to provide grants to young artists. Some such as in Germany divide the money collected between individual payments and collective benefit.²⁶

In 2002, a World Intellectual Property Organisation (WIPO) paper on the collective management of copyright and related rights (the [WIPO Paper](#)) outlined the German, Hungarian and French collection systems, and described the latter as a simple, 'easy and cost-effective' procedure.²⁷

European Union

In September 2001, the European Union adopted the [European Council Directive](#) (2001/84/EC) on the resale right for the benefit of the author of an original work of art.²⁸ It obliged all member states to introduce the right by 1 January 2006 for living artists, and by 1 January 2012 for the benefit of heirs and estates of artists who have died within the previous 70 years. Key provisions to be implemented were inalienability, a sliding scale starting at four per cent for works over €3,000 to 0.25 per cent for works over €500,000, and a maximum resale royalty of €12,500 payable on any one sale. The Directive allowed for some discretion with respect to such matters as:

- lowering the minimum sale threshold of €3,000²⁹
- increasing the minimum royalty from 4 per cent to 5 per cent on sales in the lowest band, up to €50,000, and
- an optional exemption for works acquired from the artist less than three years before the sale and sold for a price not exceeding €10,000.³⁰

United Kingdom

A report for the Arts Council of England, [Implementing Droit de Suite \(artists' resale right\) in England](#) (the ACE Report) provided an overview of the resale royalty schemes operating in

26. Department of Communications, Information Technology and the Arts, op. cit., p. 17.

27. See http://www.wipo.int/arab/en/meetings/2002/muscat_forum_ip/pdf/iptk_mct02_i6.pdf, accessed on 7 January 2009, p. 19.

28. The text of the Directive is available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32001L0084&model=guichett, accessed on 7 January 2009.

29. Article 3, European Council Directive 2001/84/EC.

30. Article 1(3), European Council Directive 2001/84/EC.

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Belgium, Denmark, Finland, France, and Germany as well as the scheme in California, although many of the statistics are now outdated.

In enacting regulations to adhere to the EU Directive the United Kingdom adopted [The Artist's Resale Right Regulations 2006](#) (the UK Regulations). Subregulation 3(1) provides that:

- (1) The author of a work in which copyright subsists shall, in accordance with these Regulations, have a right ('resale right') to a royalty on any sale of the work which is a resale subsequent to the first transfer of ownership by the author ('resale royalty')

Further, subregulation 12(4) provides that:

- (4) The sale of a work is not to be regarded as a resale if—
- (a) the seller previously acquired the work directly from the author less than three years before the sale; and
- (b) the sale price does not exceed 10,000 euro.

The UK Regulations did not establish an artists' fund or collection by one main agency. This was one of the options envisaged in the ACE Report and is a feature of the German model, much admired by the ACE Report as 'most efficient' in its ability to monitor auction sales and keep collecting costs down.³¹

Germany

Germany is the EU's largest art market behind the UK and France, and the system running there since 1965 includes an inalienable right transferable to heirs and continuing for 70 years after the artist's death. The system has effected a broad payment recipient reach in the following ways:

- an artist is entitled to 5 per cent of the sale price
- gross sale price includes commission fees and taxes
- the minimum sale threshold price is set at just €1
- the scheme applies to public and private sales (although in practice is only enforced on public sales)
- the artists' collecting society, *Bild-Kunst* (BK), has the right to request sales information of art dealers and auction houses, and payment collection is co-ordinated by an independent, *Ausgleichsvereinigung Kunst*, and then transferred to the BK, and
- part of the money collected goes to a *Sozialwerk* scheme for 'artists in need' (for example, 'in emergency cases, occupational disability or old age'), where those artists do not qualify for an

31. Clare McAndrew and Lorna Dallas-Conte, *Implementing Droit de Suite (artists' resale right) in England*, The Arts Council of England, London, 2002, pp. 29–32.

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official pension from the *Künstlersozialversicherungsgesetz* (a government social security scheme for artists),³² and

- part of the money goes to a *Kulturwerk* (cultural work) scheme which fosters and supports contemporary fine art through, for example, competitions.³³

New Zealand

In April 2007, the New Zealand Government released its *Resale Royalty Right for Visual Artists: Discussion Paper*³⁴ and in May 2008, the Government introduced the Copyright (Artists' Resale Right) Amendment Bill 2008 (the NZ Bill). The purpose of the Bill is to amend the *Copyright Act 1994 (NZ)* in order to establish a royalty payment scheme for artworks resold on the secondary art market.³⁵ The NZ Bill provides for a resale right that:

- applies to artists who are residents or citizens of New Zealand, or who are nationals of reciprocating countries that offer a similar right to nationals of New Zealand
- entitles an artist to receive a resale royalty payment each time an original artistic work is resold on the secondary art market
- will apply only where ownership in a work is transferred by sale after the first transfer of ownership of that work by the artist. It will not apply to the first sale or transfer of an artistic work, and it will not apply to sales between private individuals.
- will apply to an artistic work in which copyright exists, including limited editions made by the artist or made under the artist's authority, but excluding works of architecture (being a building or a model of a building)
- is inalienable and cannot be waived, assigned, or charged
- can be transmitted only on the death of the holder of the resale right
- will be an additional percentage of the resale price (excluding tax charged under section 8 or 11 of the *Goods and Services Tax Act 1985 (NZ)*)

32. See Bild-Kunst, 'Foundation social fund', http://www.bildkunst.de/html/index_e.html, accessed on 7 January 2009.

33. S. Stern, 'The Collecting Societies – How is Droit de Suite exercised?', *E-zine*, vol. 16, iss. 4, April 2002. See also [International Confederation of Societies of Authors and Composers](#), and [Collection of artists' resale royalties in Germany through VG Bild-Kunst](#). A description of the Bild-Kunst's cultural fund is available at http://www.bildkunst.de/html/index_e.html, accessed on 7 January 2009.

34. See <http://www.mch.govt.nz/publications/resale-royalty/ResaleRoyaltyPublicDiscussionPaper.pdf>, accessed on 18 December 2008.

35. See the New Zealand Parliament's Bills Digest No. 1619 at <http://www.parliament.nz/en-NZ/PubRes/Research/BillsDigests/1/9/7/48PLLawBD16191-Copyright-Artists-Resale-Right-Amendment-Bill-2008.htm> accessed on 18 December 2008.

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- will apply only to sales that are above a specified minimum threshold in value to be set, along with the rate, by regulation
- will engender royalties payable to those entitled under a deceased artist's will (or their successors), for the same duration as copyright in a work, being 50 years after the death of the artist
- will engender a resale royalty when an artistic work is sold on the secondary art market through any auction house, gallery, dealer, or other intermediary or professional involved in the business of dealing in works of art, with the seller, together with the art-market intermediary or professional involved in the sale, jointly and severally liable for payment of a resale royalty (or, if there are no agents, the seller and the buyer, as long as they are acting in the course of the business of dealing in artistic works).³⁶
- will involve the collection of royalties through a compulsory collection system by the sole collecting agency on behalf of artists, whether or not they are members of that agency.

The NZ Bill was referred to the Government Administration Committee (the Select Committee) and has not yet been enacted. The Select Committee's report is not due until 30 June 2009.³⁷

Arguments for a royalty scheme in Australia

The principal arguments for a resale royalty scheme are that it is broadly supportive of Australia's international treaty obligations and that it would assist artists in recovering resale royalties from overseas.

Australia is a party to a number of international copyright treaties and conventions including:

- [Berne Convention for the Protection of Literary and Artistic Works](#) (the Berne Convention)
- World Trade Organisation [Agreement on Trade-Related Aspects of Intellectual Property Rights](#) (TRIPS Agreement)
- WIPO Copyright Treaty
- WIPO Performances and Phonograms Treaty
- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention), and
- Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (Geneva Phonograms Convention).³⁸

36. *ibid.*

37. See 'Select Committee Details: Government Administration', http://www.parliament.nz/en-NZ/SC/Details/GovAdmn/6/a/1/00DBHOH_BBSC_SCGA_1-Business-before-the-Government-Administration.htm, accessed on 7 January 2009.

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International copyright protection is achieved under these treaties and conventions through the principle of 'national treatment'. Essentially, each convention member country gives the same rights to the nationals of other convention countries as it gives to its own nationals under its own law. The laws of members of the conventions or treaties must conform with the minimum rights specified in the conventions or treaties.³⁹

An artist or his or her family is thus entitled to royalties for the sale of work after the first sale, but the right is subject to the conditions imposed by the laws of individual contracting members. A principle of 'reciprocity'⁴⁰ is also at play so that an author can claim a resale royalty, as provided in the convention, when in a foreign country to the same extent as home nationals but only if the author's home state also recognises the '*droit de suite*'.⁴¹

Consistent with the Berne Convention, the sale of an Australian work will usually only attract a resale royalty in a country if a reciprocal right exists in Australia for artists of that country. If Australia does not have a scheme then Australian artists whose work is sold abroad could be missing out on payments that would otherwise be due. This will become more significant as more Indigenous art attracts sales.

Some other arguments which favour the introduction of a resale royalty right scheme are:

- The effect of the present copyright provisions is to unfairly prejudice visual artists. The introduction of a resale royalty scheme would ensure that the visual artist is fairly rewarded and is encouraged to create further works.⁴²

38. For further details, see the Attorney-General's Department website at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_IsAustraliancopyrightmaterialprotectedoverseas, accessed on 22 December 2008.

39. Article 14 of the Berne Convention provides that:

- (1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.
- (2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.

40. [Article 5](#), Berne Convention and the TRIPS Agreement.

41. Alexander Weatherall, 'Harmonising the Droit de Suite: a Legal and Economic Analysis of the EC Directive and an Overview of the Recent Literature', *German Working Papers in Law and Economics*, Vol. 2003: Article 22, at <http://www.bepress.com/gwp/default/vol2003/iss1/art22>, accessed on 22 December 2008.

42. Australian Copyright Council, *op. cit.*, p. 25.

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- It is unfair for speculators to benefit from the intrinsic value of an art work to the exclusion of the creator of that work and the artist should share in this recognition of the true value.⁴³
- A resale royalty right could provide a means of authentication of artworks. Each artist would have to give some public notice of his or her claim which would assist in authentication.⁴⁴

Arguments against a royalty scheme in Australia

Arguments against a resale royalty scheme in Australia include:

- A resale royalty scheme does not assist those who really need help, but those who are popular and who would be commanding high prices for their current works.
- A resale royalty scheme is difficult to police and the administrative costs are high. These difficulties may not be outweighed by the benefit to the artist. Almost all the high administrative costs would be borne by a small percentage of successful artists.⁴⁵
- The effect of a resale royalty scheme is reduced in the modern art market where an increasing number of works are held by single owners for longer periods, for example corporate purchasers and acquisitions by government.⁴⁶
- A resale royalty scheme is based on the belief that young artists sell works at below their true value because of a slow popular understanding and appreciation of the artists who are ahead of their time. The problem with a resale royalty scheme is the relatively brief time period over which it operates (the copyright period of life plus 70 years) as compared with the time it takes for popular appreciation of works to catch up.⁴⁷
- A resale royalty scheme runs counter to usual notions of property ownership, that is, what a purchaser buys belongs to him, the purchaser assuming the risk of its value decreasing and taking the profit if its value increases.⁴⁸
- A resale royalty scheme will inhibit the local art market in so far as collectors will hesitate to buy works which are still within the copyright term. The costs of the resale royalty scheme will be passed on to purchasers in the form of higher prices. Higher prices will cause purchasers to buy less art and may encourage art sales to go underground or offshore to places which have no such scheme.⁴⁹

43. *ibid.*, p. 26.

44. *ibid.*, p. 27.

45. *ibid.*, p. 29.

46. *ibid.*, p. 28.

47. *ibid.*, p. 27.

48. *ibid.*, p. 29.

49. *ibid.*

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Committee consideration

At its meeting on 4 December 2008, the Selection of Bills Committee deferred consideration of the Bill until its next meeting.⁵⁰

Financial implications

Funding of \$1.5 million over three years to support the implementation of a resale royalty scheme was committed by the Government in the 2008–09 Budget.⁵¹

Main provisions

Part 1—Preliminary

Clause 3 of the Bill contains relevant definitions including, but not limited to, the following:

- **‘buyer’** in relation to the commercial resale of an artwork, means a person to whom, either alone or together with one or more other persons, ownership of the artwork is transferred under the commercial resale.
- **‘collecting society’** means the society appointed under section 35⁵²
- **‘seller’** in relation to the commercial resale of an artwork, means a person who, either alone or together with one or more other persons, transfers ownership of the artwork under the commercial resale.
- **‘time of a commercial resale’** is the earlier of:
 - the start of the day on which ownership of the artwork is transferred under the commercial resale, and
 - the start of the day on which consideration for the commercial resale is fully paid.

Part 2—Resale Royalty Right

Division 1 of Part 2 sets out the basic framework for resale royalty rights.

50. Selection of Bills Committee, *Report No. 17 of 2008*, 4 December 2008, paragraph 4.

51. The Department of Environment, Water, Heritage and the Arts, [Budget Statements 2008-09](#), Commonwealth of Australia, Canberra, p. 26; and Hon. Peter Garrett, Minister for the Environment, Heritage and the Arts, [‘Resale Royalty Rights for Australia’s Indigenous Artists’](#), media release, Canberra, 13 May 2008.

52. More information about the **‘collecting society’** is contained in Part 3 of the Bill.

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Clause 6 defines a *'resale royalty right'* as 'the right to receive resale royalty on the commercial resale of an artwork'. **Subclause 7(1)** defines *'artwork'* as an original work of graphic or plastic art that is either:

- created by the artist or artists, or
- produced under the authority of the artist or artists.⁵³

According to **subclause 7(2)**, *'works of graphic or plastic art'* include 'pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs'.⁵⁴

The term *'commercial resale'* of an artwork is defined in **subclause 8(1)** as having occurred if:

- ownership of the artwork is transferred from one person to another for monetary consideration, and
- the transfer is **not** the first transfer of ownership of the artwork.

Subclause 8(2) excludes from the definition of 'commercial resale' those transfers which do not involve an art market professional acting in that capacity.⁵⁵ This means that the scheme will not include private sales between individuals or organisations which are not in the business of dealing in works of art.

Clauses 9–11 make clear that a *'resale royalty right'* does **not** exist in the following circumstances:

- for the commercial resale of a building, drawing, plan or model for a building, a circuit layout, or for a manuscript of a literary, dramatic or musical work: **clause 9**⁵⁶
- for the commercial resale of an artwork where the sale price⁵⁷ is less than AUD\$1 000 or its equivalent in foreign currency or a higher amount if that amount is prescribed by regulations: **clause 10**

53. This provides for situations in which an artist creates a design and directs a production team such as a bronze foundry, or a master craftsman such as a print maker produces or assists in producing the final artwork. See Explanatory Memorandum, p. 4.

54. This is in accordance with the description in Chapter 1, Article 2, Paragraph 1 of the EU Directive.

55. An *'art market professional'* is an auctioneer, the owner or operator of an art gallery, the owner or operator of a museum, an art dealer, or a person otherwise involved in the business of dealing in artworks: **subclause 8(3)**.

56. This is consistent with Paragraph 19 of the preamble to the EU Directive.

57. *'Sale price'* means the amount paid for the artwork by the buyer including GST, but not including any buyer's premium or other tax payable on the sale: **subclause 10**.

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- for those artworks in existence at the commencement of Part 2 of the proposed Act, on the first transfer of ownership even if that transfer is a commercial resale: **clause 11**.⁵⁸

Division 2 of Part 2 defines who holds the resale royalty right.

Where the artwork is created by a single artist who is living at the time of the resale, the resale royalty right is held by the artist if he or she satisfies the ‘residency test’ at the time of the commercial resale: **subclause 12(1)**.⁵⁹

Where the artwork was created by a single artist who is no longer living but who satisfied the residency test immediately before their death, the resale royalty right is held by their successors in title as long as they satisfy the residency test **and** the ‘succession test’ at the time of the resale: **subclause 12(2)**.⁶⁰

Where the artwork was created by more than one artist, each artist who is living at the time of the commercial resale holds the resale royalty right on the same terms as subclause 12(1). Where an artist is no longer living at the time of the commercial resale, the resale royalty right is held in the same terms as subclause 12(2): **subclause 12(3)**.

Under **clause 13**, resale royalty rights will only accrue to a living artist, or to the successors in title of an artist who is no longer living, if the person is ‘*identified*’ as the artist of the artwork at the time of the commercial resale by:

- a seller or buyer of the artwork
- an art market professional acting as agent for a buyer or seller of the artwork
- the collecting society,⁶¹ or
- for an artwork which was created by more than one artist, one of the other artists.

The ‘*residency tests*’ for an individual, a corporation and an unincorporated body are outlined in **clause 14**. In particular **subclause 14(1)** provides that an individual satisfies the residency test if

58. The Explanatory Memorandum provides the following useful example:

‘A sculpture created in 1994 by a now-deceased artist and first purchased in 1995 sells at auction for a sale price of \$800 000, in August 2009, after the scheme has commenced. There will be no resale royalty payable to the artist on this sale, as it is the first transfer of ownership of the work following the introduction of the resale royalty right. The same sculpture is sold again through a dealer in July 2010 for a sale price of \$900,000. This second sale triggers a resale royalty payment of \$45 000 which would be paid to the heirs of the deceased artist.’: p. 7.

59. The ‘*residency test*’ is defined in clause 14.

60. The ‘*succession test*’ is defined in clause 15.

61. The role of ‘the collecting society’ is covered in Part 3.

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they are an Australian citizen, or a *'permanent resident'* of Australia,⁶² or a citizen of a country prescribed as a reciprocating country.⁶³

There are four criteria to the *'succession test'* which is set out in **clause 15**. An entity satisfies the succession test by either satisfying both criteria 1 and 2, namely:

- the entity received its interest in the resale royalty right as an inheritance under a Will (or other testamentary disposition) or under the rules of intestacy following the death of an individual: **subclause 15(2) and**
- the entity is either an individual, charity, charitable institution, community body or a trustee who has a beneficial interest in the resale royalty right: **subclause 15(3)**

or satisfying both criteria 3 and 4, namely:

- the entity received its interest in the resale royalty right upon the winding up of a charity, charitable institution or community body: **subclause 15(4) and**
- the entity is a charity, charitable institution or community body 'formed for substantially the same purposes as the body that was wound up': **subclause 15(5)**.

Clause 16 sets out the amount of resale royalty right payable to each artist if there is more than one creator of the artwork. Where all of the artists are living, each artist is entitled to an equal share of the resale royalty right unless they have agreed to apportion the shares differently and that agreement does not give a share of the resale royalty right to a person other than the living artist (other than through testamentary disposition such as a Will, or by operation of the rules of intestacy): **subclause 16(1)**. Where one of the identified artists is no longer living but satisfied the residency test immediately before their death, it is the share they would have been entitled to if they had been alive, identified and satisfied the residency test at the time of the resale: **subclause 16(2)**.

Under **clause 17**, a mark or name appearing on an artwork which purports to identify a person as an artist of that artwork is prima facie evidence that the person is the artist of the artwork.

Clause 18 provides that the resale royalty is payable at the rate of five per cent (5%) of the sale price on the commercial resale of an artwork.

Division 4 of Part 2 of the Bill deals with liability to pay resale royalty.

62. **Clause 3** contains the definition of *'permanent resident'* which means a person who is not an Australian citizen and whose normal place of residence is situated in Australia. In addition, their presence in Australia is not subject to any limitation as to time imposed by law, and they are not an unlawful non-citizen.

63. Clause 53 provides for the making of regulations prescribing matters for the purposes of the proposed Act.

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Resale royalty is a debt due to the holder or holders of the resale royalty right: **clause 19**. Payment of the resale royalty is to be made by the seller, the buyer or any art market professional who is acting as agent for either the seller or the buyer, all of whom are jointly and severally liable for the debt: **clause 20**.⁶⁴ This could lead to a circumstance where one party to an agreement for the sale of an artwork may be required to pay the resale royalty, despite having agreed with the other party that they would pay it, and having expected that the royalty was paid at the time of the sale.

The liability to pay the resale royalty arises at the time of the commercial resale of the artwork: **clause 21**.

Division 5 of Part 2 of the Bill sets out the manner in which the collecting society is to collect the resale royalty. The process is essentially as follows:

- The seller or the seller's agent must give the collecting society a notice of the commercial resale in writing within 90 days beginning at the time of the commercial resale: **clause 28**.⁶⁵ Failure to give the notice in the required terms incurs a civil penalty of 200 penalty units for individuals (an amount of \$22 000) and 1 000 penalty units for corporations (an amount of \$110 000): **subclause 28(1)**.
- The collecting society is empowered by **clause 29** to request in writing that a person whom it believes to be a seller, buyer, agent of a seller or buyer, or an art market professional involved in a commercial resale of an artwork, provide it with information about the commercial resale so that it can determine the amount of the resale royalty payable and who is liable to make the payment.
- The information sought by the collecting society can relate to a commercial resale which occurred up to six years prior to the request. The information must be provided within 90 days of the date of the request. Failure to provide information in accordance with the notice incurs a civil penalty of 100 penalty units for an individual (an amount of \$11 000) and 500 penalty units for corporations (an amount of \$55 000): **subclause 29(2)**.
- Once the collecting society has become aware of the commercial sale of an artwork (either by receiving a notice from the seller or by any other means) and has formed a belief on reasonable grounds that an entity may hold a resale royalty right, it must publish a notice of the commercial resale on its website: **clause 22**.

64. *'Joint and several'* means 'together and separate'. When used in connection with the liability of two or more persons, it means that each person is liable together and individually. The liability may be enforced against all, or any, or only one of the persons bound by joint and several liability. *Butterworths Concise Australian Legal Dictionary*, third edition, LexisNexis Butterworths, Australia, 2004, p. 238.

65. This is in line with the EU Directive which states that it is the seller who is responsible for the resale royalty.

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- The holder or holders of the resale royalty right have 21 days from the date of that publication to notify the collecting society that they do **not** require the collecting society to collect the royalty or enforce the right on their behalf: **subclause 23(1)**. Unless the collecting society has received the notice within the specified time from the holder or **all** the holders of the resale royalty right, then the collecting society is required to collect the retail royalty on behalf of the resale royal right holder or holders.
- At the same time, an entity which claims to hold a resale royalty right or interest *may* give the collecting society a written notice setting out, amongst other things, the proportion of the resale royalty right to which they claim they are entitled: **clause 27**. Where the collecting society requires further information about the entity or the relevant proportion of the resale royalty right, the collecting society is empowered to serve a notice on the entity requiring the information be provided within a specified time of no less than 60 days: **subclause 27(2)**.
- Once the collecting society has received the resale royalty, it *must* pay to each entity which has established a resale royalty right by way of a clause 27 notice the amount of that royalty and must also use its best endeavours to locate any other resale royalty rights holder in order to pay that entity its proportional share: **subclause 26(1)**. The collecting society may deduct an administration fee from the amount of the resale royalty payable, but the fee must not amount to a tax: **subclause 26(2)**. According to **subclause 26(3)** the Minister may limit the amount of the administration fee to be imposed.

Where the collecting society erroneously pays resale royalty on a commercial resale of an artwork to a person who does not actually have a resale royalty right, then the amount wrongly paid is a debt due by the person who received the royalty payment to the person who is the actual holder of the royalty right: **subclause 30(1)**. Similarly, where the collecting society erroneously pays a person a higher proportion of resale royalty than they were entitled to receive, then the difference between amount paid and the person's actual resale royalty share is a debt due by the person to the other holder or holders of the resale royalty right: **subclause 30(2)**. In either of those circumstances the holder of the resale royalty right can ask the collecting society to collect or enforce repayment of the amount on their behalf: **subclause 30(3)**.

Under **clause 31**, where the collecting society has received resale royalty but cannot, during a period of six years from the time of the commercial resale, locate the holder of the resale royalty right then it *must* distribute the amount with interest earned, less the collecting society's administration fee:

- to the remaining resale royalty right holders who can be located,
- if the resale royalty rights holder cannot be located, to the persons who paid the resale royalty, or
- if the payer cannot be located, retain the amount for use in the collection and distribution of resale royalties and the enforcement of resale royalty rights.

Where there is only one artist of the artwork, the resale royalty right continues to subsist until the end of 70 years after the end of the calendar year in which the artist dies: **paragraph 32(a)**.

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Similarly, where there is more than one artist of the artwork, each proportion of the resale royalty right held by each artist continues to subsist until the end of 70 years after the end of the calendar year in which that artist dies: **paragraph 32(b)**.

Part 3—The collecting society

A body may apply to the Minister⁶⁶ to be appointed as the collecting society: **subclause 35(1)**. The Minister must decide whether to appoint the body or to refuse to appoint the body as the collecting society: **subclause 35(2)**. Either of those decisions may be reviewed by the Administrative Appeals Tribunal: **paragraph 49(a)**.

The Minister may only appoint one body at a time: **subclause 35(3)**.

A body cannot be appointed as the collecting society unless:

- it is a company limited by guarantee and incorporated under the *Corporations Act 2001*: **paragraph 35(4)(a)**
- all resale royalty right holders are entitled to become its members: **paragraph 35(4)(b)** and
- its rules prohibit the payment of dividends to its members: **paragraph 35(4)(c)**.

In addition paragraph **35(4)(d)** requires that the rules of the collecting society contain provisions which may be determined by legislative instrument⁶⁷ by the Minister to ensure the interests of resale royalty rights holders and their agents including:

- the collection of amounts of resale royalty
- distribution of amounts collected by the society
- holding on trust by the collecting society of amounts, and
- access to records of the collecting society by holders of resale royalty rights or their agents.

Under **paragraph 35(2)(a)** the Minister must not appoint a body as the collecting society for a period longer than five years.

Clause 36 provides that the Minister may, by notice published in the *Gazette*, revoke the appointment of the collecting society in circumstances where:

- it is not functioning adequately as a collecting society: **subparagraph 36(1)(a)(i)**⁶⁸

66. Applying section 19A of the *Acts Interpretation Act 1901*, a reference to ‘the Minister’ is a reference to the Minister for the Environment, Heritage and the Arts.

67. Under the *Legislative Instruments Act 2003*, a ‘legislative instrument’ is required to be tabled in both Houses of the Parliament and is subject to disallowance.

68. This decision is reviewable by the Administrative Appeals Tribunal under **paragraph 49(b)**.

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- it is not acting in accordance with its rules or in the best interests of its members: **subparagraph 36(1)(a)(ii)**
- it has altered its rules so that they do not comply with the requirements of paragraphs 35(4)(b)–(d): **subparagraph 36(1)(a)(iii)**, or
- it has refused or failed, without reasonable excuse, to comply with the requirements that it prepare an annual report for the Minister,⁶⁹ provide annual audited accounts to the Minister⁷⁰ and send copies of any altered rules to the Minister:⁷¹ **subparagraph 36(1)(a)(iv)**.

In addition, the Minister may revoke an appointment at the written request of the collecting society: **paragraph 36(1)(b)**. The revocation of the appointment takes effect on the day on which the notice is published in the Gazette, or on a later day if specified: **subclause 36(3)**.

Part 4—Civil penalties

Clause 39 provides that the collecting society may apply on behalf of the Commonwealth to the Federal Court or the Federal Magistrates Court for an order that a person who has contravened a ‘civil penalty provision’ in the proposed Act (currently **clauses 28 or 29**) must pay the Commonwealth the amount of the pecuniary penalty.⁷² The application must be made within six years of the contravention: **subclause 39(1)**.

If the Court is satisfied the person has contravened a ‘civil penalty provision’, the Court may order the person to pay an amount of pecuniary penalty which the Court considers appropriate for each contravention, but not more than the amount specified in the relevant provision: **subclause 39(2)**. **Subclause 39(3)** sets out the matters to which a Court must have regard in determining the pecuniary penalty.

If the Court orders a person to pay a pecuniary penalty it is payable to the Commonwealth and the Commonwealth may enforce the order as if it were a judgment of the Court: **clause 43**.

Under **clause 44**, the Federal Court or Federal Magistrates Court must not make a pecuniary penalty order against a person for a contravention of a civil penalty provision if the person has been convicted (in criminal proceedings) of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention.

Civil proceedings for a pecuniary penalty order are stayed (or put on hold) if criminal proceedings are started against the person before the civil proceedings have been resolved: **subclause 45(1)**. If the person is not ultimately convicted in the criminal proceedings, the civil proceedings may be resumed: **subclause 45(2)**.

69. Under clause 36.

70. Under clause 37.

71. Under clause 38.

72. The phrase ‘civil penalty provision’ is defined in clause 40.

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If civil proceedings have been taken and completed against the person for alleged contravention of a civil penalty provision, regardless of the outcome of those proceedings, criminal proceedings may still be brought against the person ‘for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision’: **clause 46**. The subsequent criminal proceedings do not infringe the rule against double jeopardy (often expressed as *autrefois acquit* or *autrefois convict*), being that no person can be tried (or punished) for the same offence twice.⁷³

Part 5—Miscellaneous

Clause 48 provides that it is a criminal offence for a person who has acquired information in the course of carrying out their functions under the proposed Act to make a record of, disclose or otherwise use the information. The penalty is imprisonment for two years. A person does not commit an offence in the following circumstances:

- where the person records, discloses or uses the information in the course of performing their duties under the Act: **paragraph 48(2)(a)**
- where the person acquires the information for any other lawful purpose: **paragraph 48(2)(b)** and
- where the person to whom the information relates consents to the recording, disclosure or use of the information: **paragraph 48(2)(c)**.

Clause 50 sets out the jurisdiction of the Federal Court as follows:

- to enforce a resale royalty right on the commercial resale of an artwork
- to determine who is the holder of a resale royalty right
- to enforce the payment of a share of the resale royalty right from the collecting society
- to recover amounts of resale royalty wrongly paid by the collecting society
- to enforce the civil penalty provisions, and
- relating to any other matters under the Act.

Clause 51 extends the same jurisdiction to the Federal Magistrates Court.

73. The Model Criminal Code Officers Committee (Commonwealth Attorney-General’s Department) issued a discussion paper on double jeopardy in November 2003. Following the receipt of public submissions, that Committee released a report in March 2004, which was then considered by the Standing Committee of Attorneys-General at its meeting on 18-19 March 2004. According to the Attorney-General’s website: ‘This matter remains with the Standing Committee of Attorney-Generals’. For further information on the issue of double jeopardy in Australia, see http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Doublejeopardyreformproposals-March2004, accessed on 7 January 2009.

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Clause 53 sets out the authority of the Governor-General to make regulations under the proposed Act.

Concluding comments

As can be seen from the 'Background' section of this digest there have been a number of formal inquiries into the issue of a resale royalty right. Some have made recommendations in favour of a resale royalty scheme such as the one proposed by this Bill, and others, in particular the Senate Standing Committee on Environment, Communications, Information Technology and the Arts as recently as 2007, did not. Furthermore, even within the art world, there are mixed views about whether the proposed scheme will ensure that resale royalties actually reach those to whom they should be paid.

That being the case, it would be prudent to include within the Bill a requirement that the scheme be reviewed by Senate Committee within three years of its commencement, to assess its overall effectiveness.

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