Australian Government

Department of Communications, Information Technology and the Arts

# Proposed Resale Royalty Arrangement

# Discussion Paper

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## INTRODUCTION

The Australian Government is committed to ensuring the sustainability and vitality of Australia's visual arts and craft sector. As a direct result of this commitment, the Government commissioned Mr Rupert Myer to conduct the Contemporary Visual Arts and Craft Inquiry. The Report of the Inquiry—known as the Myer Report—was released in September 2002.

One of the recommendations of the Myer Report was that the Government introduce a resale royalty arrangement. A resale royalty, also called a *droit de suite*, entitles the artist to a royalty payment when a work of art he or she has created is resold.

The Myer Report examined several issues in his discussion of the resale royalty right. These included consideration of the object of the right, the magnitude of royalties likely to be collected, the efficiency of resale royalty schemes, the distribution effects arising from resale royalties and the possible impact of the right on the Australian art market.

The Government has been examining the issue of resale royalty closely since the release of the Report. This includes conducting research into recent international developments and analysing the likely impact of a resale royalty scheme on Australian artists and the market for contemporary art.

This paper presents that research and is intended to stimulate broad discussion about whether it would be desirable to introduce some form of resale royalty arrangement in Australia. It outlines three possible models for an Australian resale royalty scheme and presents information on the possible impact of a resale royalty on Australia's visual artists.

The discussion paper has been prepared by the Department of Communications, Information Technology and the Arts. It draws on the work of many researchers and writers. A list of key references can be found at the conclusion of the paper in **Appendix D**.

## CALL FOR SUBMISSIONS

This discussion paper has been prepared to inform the design of a resale royalty arrangement. If such a scheme is to be introduced, it is critical that it is designed with a clear set of objectives in mind and is well adapted to Australian conditions. In preparing a submission you might like to comment on the following matters:

- whether or not Australia should introduce a resale royalty;
- what form an Australian resale royalty scheme should take;
- how a resale royalty scheme could operate; and
- whether or not alternative means of support for visual artists are more appropriate.

Further questions you may wish to consider in preparing a submission are set out at **Appendix C**.

There is currently limited information about the particular characteristics of the art market in Australia. Any information that you would like to contribute in this regard that may inform the design of a possible resale royalty arrangement would also be welcome.

**Please send your submission by Friday 13 August 2004 to:**

**Mr Mark Taylor**
**General Manager, Arts and Regional**
**Department of Communications, Information Technology and the Arts**
**GPO Box 2154**
**Canberra ACT 2601**

**Or email your submission to: resale.royalty@dcita.gov.au**

## WHAT IS A RESALE ROYALTY?

An artist's resale royalty entitles an artist to receive a royalty payment from subsequent sales of their original work. It is also known as *droit de suite* (literally 'follow-up right'), which was the name given to the first scheme of this kind in France in the 1920s.

The following section provides background information regarding the concept of resale royalty (or *droit de suite*), the history of its adoption in other countries and how the discussion to date has unfolded in Australia.

## HISTORY OF THE RESALE ROYALTY RIGHT

First discussed in the 1860s, *droit de suite* became law in France in the 1920s. In his article, 'The resale royalty and Australian visual artists: painting the full picture', Paul Lewis has relayed three historical anecdotes which claim to have been the catalyst for the French legislation.[1]

The first is that the widow of painter Jean-Francois Millet (1814–1875) and her family were found living in poverty just as the resale price of her husband's work was escalating dramatically.

The second is that the *droit de suite* was introduced to assist the widows of artists killed in the 1914–18 World War.

The final (less romantic but more easily verified) theory is that the *droit de suite* legislation was inspired by an initiative of 13 art enthusiasts, who contributed 250 francs per year over 10 years to purchase the work of emerging artists. A collection of these works, including works of Picasso, van Gogh, Gauguin and Matisse, was sold at auction in 1914 and the group quadrupled their investment. Article 10 of the group's contract required them to distribute 20 percent of the profits to the artists on a proportional basis. The concept was widely discussed in Paris and embraced by the French Parliament.

Since the introduction of the French scheme, resale royalty schemes have been adopted in a number of international jurisdictions. However, the parameters and effectiveness of these schemes can differ quite markedly, depending on the model and the administration arrangements for the scheme. For some international examples on the effect of a *droit de suite* scheme see **Appendix A**.

[1] Lewis, P. (2003), p 307.

## INTERNATIONAL CONTEXT

### The Berne Convention

The *Berne Convention for the Protection of Literary and Artistic Works* (the Berne Convention) of 1886 was the first multilateral copyright treaty. Australia became a signatory to the Berne Convention in 1978. In 1979 the Convention was revised to establish the following international framework for resale royalties:

> *Article 14ter*
> [‘*Droit de suite*’ in Works of Art and Manuscripts: 1. Right to an interest in resales; 2. Applicable law; 3. Procedure]
>
> (1) The author, or after his death the persons or institutions authorised 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 person belongs so permits, and to the extent permitted by the country where this protection is claimed.
>
> (3) The procedure for collection and the amounts shall be matters for determination by national legislation.

As resale royalties are optional under the Berne Convention, a number of signatories to the Convention have not introduced the right—including Australia.

### International examples of resale royalty

In some jurisdictions, resale royalty schemes are operational in name only, with no administration or enforcement provisions in place. Others depart from the more typical interpretation of the resale royalty as a right that benefits the specific individual creator by utilising the royalty as a common social fund for artists.

A table providing further information about resale royalty schemes in other countries can be found at **Appendix A**.

### European Harmonisation

While many countries in the European Union had introduced resale royalty schemes by 2000, there were some notable exceptions, including the United Kingdom, Ireland, the Netherlands and Austria. In response to concerns that this was causing trade distortions in the European market, in July 2001 the European Union passed a Directive creating an obligation on member countries to adopt resale royalty legislation by 2006, with full implementation required by 2012.[2] This harmonisation is aimed at ensuring a uniform level of protection and a level playing field in the European art market.

The Directive specifies the introduction of royalties on the basis of a sliding scale starting at 4 percent for works of art over 3,000 Euro to 0.25 percent for works worth over 500,000 Euro or up to a maximum limit of royalties' payable of 12,500 Euro. It is applicable to all professional secondary sales and endures for 70 years after the artist's death.

In preparation for the implementation of resale royalty in the UK, the Arts Council of England commissioned researchers to examine models of best practice for collecting and distributing resale royalty in countries other than the UK.[3] (Table 7 at **Appendix A** presents a summary of some resale royalty schemes in other countries.)

There are currently pressures within the European Union to reduce both the rate and the duration of the resale right due to a range of factors, including strong concerns expressed by several member nations that the implementation of a resale royalty would lead to the movement of art sales to other jurisdictions where resale royalties do not apply.[4]

## THE CONTEXT FOR DISCUSSION IN AUSTRALIA

In Australia, discussion of the issue of resale royalty has occurred sporadically over the last 25 years. A number of reports have examined the issue—such as the 1989 Australian Copyright Council report, *The Art Resale Royalty and Its Implications for Australia*.

Other reports, such as those of the Copyright Law Review Committee (CLRC)[5], refer to resale royalty in broader discussion of copyright in Australia. The 1998 report *Our Culture: Our Future Report on Australian Indigenous Cultural and Intellectual Property*, [prepared for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission by Michael Frankel and Company and Terri Janke, Arts] also recommended a resale royalty for artists. The report claimed that:

> the right to receive a resale royalty is relevant to all artists, but especially to Indigenous artists, because the recognition of Indigenous work in the fine-art

[2] European Parliament and the Council of the European Union (2001a).

[3] McAndrew, C. and Dallas-Conte, L. (2002).

[4] Pfennig, G. (2001), p 4**.**

[5] Copyright Law Review Committee (1999) "Simplification of the *Copyright Act 1968* PART 2, Categorisation of Subject Matter and Exclusive Rights, and Other Issues", at http://www.law.gov.au/clr/Simplification%20of%20the%20Copyright%20Act%201968%20-%20Part%202.htm. In the report the CLRC recommended that a *resale royalty* not be implemented as a component of a 'distribution right'. However, it also noted that the issue of whether a resale royalty should be recognised in Australia is a significant policy issue which may warrant further examination. [paragraph 4.53].

> market over recent years has resulted in an enormous increase in the value of work produced, say, 20 years ago. The recent example of Johnny Warangkula Tjupurrula highlighted the issue for Indigenous artists: a painting originally sold for $150 brought $260,000 at auction.[6]

The example of the Johnny Warangkula Tjupurrula painting cited above resonates strongly with many Australians and is often repeated in media reports and discussions of the need for a resale royalty, especially for Indigenous artists. One of the findings of the Myer report was: "The case for a resale royalties scheme is particularly strong for Indigenous artists".[7]

## The Australian art market

The possible introduction of a resale royalty scheme needs to be considered in the context of the particular characteristics of the Australian art market.

In terms of the stability and strength of the Australian art market, 2003 was the third record-breaking year in four years for the market. The Australian auction sales market alone has grown from $19.4 million to $91.8 million in ten years (see Table 1). However, Australia is largely peripheral to the international art market, which is dominated by New York and London.[8] Of all the work produced by Australian artists in the last century, it is the Indigenous Australian art sector that is most conspicuous in the international art market—this sector has enjoyed a dramatic rise in demand over the last 30 years.

Sales of Australian contemporary art can happen in a number of different ways. For example, transactions can occur directly between artist and buyer; an artist may engage an agent as an intermediary; an artist may be represented by a gallery or galleries, with exclusive or non-exclusive rights to sell their work; or an artist may be commissioned to produce a specific work. Auction houses are involved in both first (or primary) sales and secondary sales (or resales)—with the majority of transactions being resales. The resale market also includes private transactions between collectors; sales through commercial galleries; and sales involving other intermediaries, including through the Internet.

There is some anecdotal evidence of growth in sales conducted over the Internet, particularly between Indigenous art centres (representing Indigenous artists) and international collectors.

### *Auction houses*

It is generally acknowledged that auction houses dominate the resale market in Australia. There are around 20 auction houses in Australia, the biggest of these being Christie's,

[6] Ibid p 210.
[7] *Myer Report* (2002), p 167.
[8] Kennedy, B. (2003).

Sotheby's and Deutscher-Menzies. Table 1 shows the development of the Australian art auction market over the last ten years. The market is by its nature volatile, and sales outcomes are particularly difficult to predict. As stated in the Myer Report, "the market is dynamic and subject to rapid change".[9]

**Table 1: Growth in the Australian auction sales market (1993–2003)[10]**

| Year | Total sales results | % Difference Between Years |
|---|---|---|
| 1993 | $19.4 million | |
| 1994 | $26.1 million | 35% |
| 1995 | $27.1 million | 4% |
| 1996 | $37.8 million | 39% |
| 1997 | $33.5 million | -11% |
| 1998 | $49.7 million | 48% |
| 1999 | $68.7 million | 38% |
| 2000 | $78.1 million | 14% |
| 2001 | $70.4 million | -10% |
| 2002 | $79.2 million | 13% |
| 2003 | $91.8 million | 16% |

Despite two noticeable declines in the market (1997 and 2001), there has been a clear and quite remarkable overall increase in the volume of sales during this period.

***Commercial galleries***

It is difficult to find data that accurately captures the commercial gallery sector. While the ABS conducted a survey on commercial art galleries in Australia in 1999–2000,[11] the data needs to be interpreted carefully as the survey included 31 Indigenous art and craft centres—there are in reality over 100. In the survey, a commercial art gallery was defined as a business whose primary activity is the display and sale of artworks. The survey did not include sales of artworks by businesses such as art museums, department stores and market stalls.

Nevertheless, the survey does provide a starting point for consideration of the commercial gallery sector and its place in the resale market. The survey found that there were 514 commercial art gallery businesses operating in Australia at the end of June 2000, with total sales of $218 million, of which $106 million comprised first sales sold on commission. Interestingly, the most significant expense for these businesses was the purchase of artworks for resale at $44 million (36 percent of total expenses).

An earlier edition of the survey found that the total value of all artworks sold by commercial galleries in 1996–97 was $131 million.[12] This indicates that the commercial

[9] *Myer Report* (2002), p 240.
[10] Furphy, J. (2004).
[11] Australian Bureau of Statistics, *Commercial Art Galleries 1999-2000*, Cat. No. 8651.0.
[12] Australian Bureau of Statistics, *Commercial Art Galleries 1996-1997*, Cat. No. 8651.0.

gallery sector experienced strong growth over the period 1997–2000, with an apparent 66 percent increase in total sales value.[13]

Based on a Yellow Pages search under the category ‘Art Galleries’ for Australia’s capital cities, and excluding public galleries, artist-run initiatives, framing businesses, community art centres and duplicate, there were approximately 640 identifiable gallery businesses. On face value, this suggests that the commercial gallery sector—much like the auction house sector—is growing and changing and is part of a broader, dynamic and unpredictable marketplace.

Detailed information about commercial gallery sales—such as the balance between sales of Australian and non-Australian art or contemporary and non-contemporary art, or details of individual sales—is not publicly available. For this reason it has not been possible to include secondary sales from commercial galleries in analysis and modelling of possible resale royalty schemes.

### *Types of sales*

The principal market for resales of contemporary Australian art is Australia. In 2003, there were 4,146 works sold in Australia’s auction houses for $1,000 or more, with 98 percent of these by Australian artists—comprising 84 percent non-Indigenous and 14 percent Indigenous works. In addition, 50 percent of the works sold were by *living* Australian artists.[14]

## Who buys art in Australia?

No recent demographic data appears to exist on visual art purchasers in Australia. However, information from the most recent *ABS Household Expenditure Survey* (Cat no 6535.0, 1998-99) and from auction houses and the Australian Commercial Art Galleries Association suggests they include high-income individuals, large Australian corporations and a variety of overseas investors and corporations.

The results of the *ABS Household Expenditure Survey 1998-99* suggest that purchasing art is predominantly an activity for high-income earners, with the highest expenditure on paintings, carvings and sculptures being by households in the top 20 percent of income earners. This group has an average weekly household income of $1,996. The households within it were likely to own a house, possibly with a mortgage, and to include a couple with dependent children. Table 2 below shows average weekly household expenditure on paintings, carvings and sculptures, according to household income. Expenditure by the households in the highest income quintile considerably exceeds that of other households.

[13] Note that the ABS advises that “users should take care in comparing the 1999–2000 results with the results of the 1996–97 survey as the 1999–2000 survey had a wider coverage, especially in regard to Aboriginal and Torres Strait Islander art centres”.
[14] Furphy (2004).

**Table 2: Weekly household expenditure on visual arts, by income level***

| Lowest 20 percent | Second quintile | Third quintile | Fourth quintile | Highest 20 percent | All households |
|---|---|---|---|---|---|
| $0.12 | $0.35 | $0.47 | $0.63 | $2.12 | $0.74 |

*Note: Relative Standard Errors are high (25-50 percent)

Total expenditure by households on paintings, carvings and sculptures in 1998–99 was $274 million.

Differences also exist across the states. Table 3 shows average weekly household expenditure on paintings, carvings and sculptures, according to state of residence. Results for the Northern Territory and the Australian Capital Territory were not recorded. South Australia had the lowest level at $0.26, with New South Wales and Western Australia having the highest at $1.08.

**Table 3: Weekly household expenditure on visual arts, by state**

| NSW | Vic | Qld | SA | WA | Tas |
|---|---|---|---|---|---|
| $1.08 | $0.53 | $0.39 | $0.26 | $1.08 | $0.76 |

It is possible that the profile of art buyers might increasingly include less wealthy individuals in the population. A number of organisations are presenting art shows that aim at demystifying the world of visual art purchasing by keeping works of art at an affordable level. *The Australian* reported on 'The Affordable Art Show' and stated that:

> …you don't need deep pockets to become an art collector. There are planned art shows in Sydney and Melbourne where the prices will range from $100 to $5000. The report stated that Australia is the third country to take up the "Affordable Art baton.[15]

Auction houses and the Australian Commercial Art Galleries Association act as intermediaries between artists and consumers. These organisations do not make statistics on art buyers publicly available, possibly due to security or privacy concerns regarding the disclosure of information on the buyer population. However, there is anecdotal evidence suggesting that the buyer population comprises a varied cross-section of generally wealthy people.

One identifiable source of art purchasing is philanthropy. The Myer Report includes the statement that:

> Philanthropic organisations, individual benefactors and corporate supporters all play a role in the contemporary visual arts and craft sector. The Australia Business Arts Foundation (AbaF) estimates that in 1999–2000 museums and galleries received $34 million from donations, bequests and fundraising, and $20 million from sponsorship. Little of this is for the direct support of contemporary visual arts and craft. With respect to Indigenous visual art and craft, philanthropy is virtually

[15] Safe, G. (2004).

non-existent.[16]

The University of NSW's College of Fine Arts journal, *Artwrite*,[17] includes an estimate that only 1–3 percent of the population is considered serious art collectors. *The Sydney Morning Herald* reported last year that Aboriginal art is being sold at record prices overseas, mostly Europe and North America, implying a significant foreign component among buyers of Indigenous works.[18]

## Who makes art in Australia?

The 2003 study *Don't Give Up Your Day Job*[19] , commissioned by the Australia Council and conducted independently by economist Professor David Throsby and Virginia Hollister, examined a random sample of artists registered with artist organisations. The study estimated that there were around 9,250 professional visual artists (painters, sculptors, illustrators) in Australia. Throsby estimated the mean age of Australian visual artists to be 47. Women made up 60 percent of visual artists, and 9 percent of visual artists did not have English as their first language.

Throsby found that visual artists tend to be highly trained, with 91 percent reporting formal training of around five years in total. Eighty percent of visual artists are freelance or self-employed working an average of 37 hours per week. Thirty-four percent of visual artists have been unemployed at some time (64 percent received benefits), with a mean period of unemployment being 17 months at any one time.

From the Throsby sample survey, visual artists are one of the lowest paid in the arts field. They supplement their $20,000 arts work income with $9,300 of paid work in other areas. Expenses incurred by visual artists in their art practice averaged $10,900 (a median expense of $4,400).[20]

Throsby's profile of visual artists does not take into account Indigenous visual artists living in remote communities but appears to include urban-based Indigenous artists.[21]

According to the 1996 census, there were 910 Indigenous full-time arts professionals in Australia, which is considered to understate significantly the true number of Indigenous artists.[22] In 1997, researcher Colin Mercer estimated that there were about five to six

[16] *Myer Report* (2002), p 41.
[17] www.artwrite.cofa.unsw.edu.au/.
[18] Gibson, J (2003).
[19] Throsby, D. and Hollister, V. (2003).
[20] Up-to-date information on the earnings received by artists could be purchased for $300 from the ABS (Cat No. 6306.0) Employee Earnings and Hours, Australia, under the Minor grouping of 2531 Visual Arts and Craft Professionals.
[21] Throsby, D. and Hollister, V. (2003), p 13.
[22] Guldberg, H.H. (2000), p 61.

thousand Indigenous visual artists in Australia.[23]

## Characteristics of the Indigenous art market

The Indigenous visual arts sector is growing at a rapid rate (see Table 4) and its growth is considered by many to be "one of indisputable success".[24] The rise in popularity of Indigenous art has had a number of beneficial flow-on effects for remote Indigenous communities, such as the establishment of Indigenous art centres which facilitate the production and marketing of Indigenous art and craft. "Frequently the art centre is the only income-generating community enterprise and it becomes a focal point for artists, their families, and other community members."[25] Indeed, in many cases, the production of Indigenous art is a principal source of income for many residents in these communities. However, any attempt "to analyse the economics of the Indigenous arts industry today is hampered by one major shortcoming: an absence of reliable industry statistics".[26]

In terms of the value of the industry, "there are [sic] no data on the Indigenous art industry as a whole, and the limited statistical data that do exist are too incompatible to provide the basis for an accurate understanding of the market".[27] However, researcher Jon Altman has estimated that by the late 1990s the value of the Indigenous art market was approaching $200 million a year[28], of which up to 80 percent comprised manufactured or 'tourist art', rather than the 'fine art' product that would could potentially enter the resale market.

Some elements of the Indigenous visual arts sector are structured quite differently from the non-Indigenous sector. For example, Indigenous art centres have no parallel in the non-Indigenous sector. These centres operate in remote Australia and many are owned and controlled by Indigenous people. Most art centres are incorporated associations or are under the auspices of incorporated associations such as community councils. A small number of art centres are companies, subsidiaries of companies, trusts, or women's centres that have evolved to become art centres. The Department of Communications, Information Technology and the Arts estimates that approximately 110 art centres currently operate throughout Australia, primarily in remote Indigenous communities in Western Australia, northern Queensland and the Northern Territory.

In 1996–97, commercial art galleries sold $14.6 million worth of Indigenous artworks. Of the 457 identified galleries, 72 were involved in first sales (totalling $4.4 million) and

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[23] Mercer, C. (1997).
[24] Altman, J. (2003).
[25] Wright, F. (1999), p. 143.
[26] Altman, J., "The Indigenous visual arts industry: Issues and prospects for the next decade", *Artlink* Vol.20 No.1 p 86.
[27] Altman, J., Hunter, B., Ward, S. & Wright, F. (2002), p 11.
[28] Kleinert, S. & Neale, M. (2000), p 467.

57 in secondary sales ($10.2 million). In terms of total art sales, this accounted for 7 percent of total first sales of Australian art and 15.5 percent of secondary sales.[29]

The growth in secondary sales of Indigenous art is also reflected in the rate of growth in sales through auction houses. These sales are documented in the table below.

**Table 4: Indigenous art sales made through auction houses 1988 –2003**

| Year | Dollar value |
|---|---|
| 1988 | $873,000 |
| 1997 | $3,807,500 |
| 1999 | $4,500,000 |
| 2003 | $9,500,000 |

*Source: Australian Art Sales Digest information*

In June 2002, Sotheby's annual Aboriginal Art auction achieved sales of $5.3 million with sales by some individual artists achieving record prices.

The Sotheby's 2003 auction generated $7.9 million. At this auction Emily Kngwarreye's painting *Untitled (Spring Collaboration) 1991* was sold for $509,300, three paintings by Rover Thomas, sold for over $300,000 each, while a contemporary canvas by Mick Namarari reached $213,000.[30]

In an article in the *Sydney Morning Herald*, a Sotheby's manager, Benedict Pownall, is reported as saying: "We are delighted at this sale because it augurs well for the future of Australian indigenous art."[31] An estimated 50 percent of the works had been sold to international bidders based mostly in Europe and America.

The annual Sotheby's auction currently dominates the Indigenous visual art resale market. In response to this market, three of Australia's biggest auction houses will enter the market by holding their own sales this year, with four of the five events to be held in Sydney. The *Sydney Morning Herald* recently reported that Aboriginal art is now worth $10 million a year to the salesrooms—up from only $620,000 a decade ago.[32]

[29] Guldberg, H.H. (2000), p 53.
[30] Copeland, J. (2003).
[31] Gibson, J. (2003).
[32] Maslen, G. (2004).

## POSSIBLE AIMS OF A RESALE ROYALTY ARRANGEMENT

If Australia is to introduce an effective resale royalty arrangement, it will be very important to ensure that the scheme's objectives are clear, and that its design and parameters are set to meet those objectives. The Government is particularly interested in feedback that addresses the rationale for introducing a resale royalty scheme.

The following discussion draws on the policy objectives of a resale royalty scheme proposed in economic and legal literature on the subject (see bibliography at **Appendix D**). It also draws on the arguments put forward on the issue in submissions to the Contemporary Visual Arts and Craft Inquiry.

The objectives discussed in this section are those of:

- providing income support for artists;
- ensuring that artists share in the increased value of their work;
- enshrining a perceived right of visual artists;
- redressing a perceived inequity between the rights of visual artists and other creative artists;
- providing additional incentives for artists to continue practising; and
- empowering artists by recognising their contribution to the economic and cultural life of the nation.

### Providing income support for artists

It is often argued that implementing a resale royalty arrangement would increase the income of contemporary visual artists. In the Australian context this is sometimes presented as being particularly important for Indigenous artists.

There is also a widely held perception that artists' incomes are generally very low, which is supported by Throsby's report, *Don't Give Up Your Day Job*. The report examined the economic situation of Australian artists, revealing most artists cannot make a living from their profession, with 50 percent of artists earning less than $7,300 per annum from their art. For visual artists the situation is particularly stark, with evidence showing that visual artists' incomes from arts related work have declined from $26,800 per annum in 1986–87 to $21,100 per annum in 1992–93 and $20,000 per annum in 2000–01.[33]

Research suggests that, in terms of income supplementation, resale royalty schemes bring most benefit to successful, late-career artists with strong reputations, whose work is regularly traded, and brings limited benefits for emerging and less successful artists. A resale royalty is payable once a work of art is traded for a second time, and therefore

[33] Throsby, D. and Hollister, V. (2003), p 45.

benefits artists who produce works that investors compete to collect. Resale royalty schemes do not appear to provide significant supplementary income for emerging artists in the early stages of their careers, because they are generally selling works for the first time. Collectors will also generally hold on to works until (and *if*) their value appreciates with the rise of the artist's reputation.

This finding is supported by modelling using 2003 auction sales data, the results of which are discussed in more detail in **Appendix B**.

International experience suggests that not all artists support a resale royalty scheme. The British lobbying group *Artists Against Droit de Suite*, which includes such established artists as David Hockney, Karen Appel and Emma Sargeant, has criticised the scheme saying that it "was designed to benefit artists, but instead creates a shameful inequality between famous artists on the one hand and struggling artists on the other".[34]

A resale royalty is also a relatively untargeted mechanism for providing income support, in that secondary sales are initiated by collectors and are unrelated to the income levels of creators. For artists, this process would appear to be something of a lottery. For example, a mid-career artist whose work is purchased for inclusion in a major art collection (such as one of the state art galleries) may find that their work is no longer in circulation or available for resale and that they therefore do not benefit from a resale royalty. The same would be true for an artist whose work is treasured by a collector and for that reason is not resold.

In some jurisdictions, this issue is addressed by remitting funds obtained from resale royalties into a joint fund, rather than directly to individual artists. For example, a communal fund exists in Norway where a tax is imposed on the sale of works of art. The revenue accrued from this tax is deposited into a central fund for the benefit of professional artists in need and their families. In Germany, auctioneers and art dealers pay five percent of their sales of 20$^{th}$ century art to the German collecting society for the visual arts, Bild-Kunst. A portion of this is then distributed to young and emerging artists. In addition, in Germany 5–7 percent of the value of first sales made by dealers, commercial galleries and auction houses are contributed to the social security administration.[35]

While these approaches may help to ensure that the benefits of a scheme are distributed in a more targeted fashion, the Myer Report indicated that:

> The proceeds of resale royalties should be paid directly to the individual artists, rather than to a communal fund, as this scheme is a type of taxation on secondary art sales, rather than a legitimate royalty for artists.[36]

[34] Cited in "Artists criticise royalties deal", CNN.com/WORLD, 3 July 2001.
[35] *Myer Report* (2002), p 169.
[36] *Myer Report* (2002), p 169.

## Ensuring that artists share in the increased value of their work

A common argument raised by many in the art sector is that it is both unjustifiable and inequitable that originating artists (and their families) do not benefit directly from secondary sales of their original creative works. Strongly held views regarding this issue are often cited in discussions of the Indigenous art market—particularly in connection with evidence indicating that artworks continue to be purchased at the point of sale for considerably less than open market value. While the Indigenous visual art resale market has grown dramatically in recent years there are many indications that Indigenous artists have not always enjoyed the benefits of this growth. The most frequently-cited example of this is the resale of *Water Dreaming at Kalipinypa* by artist Johnny Warangkula Tjupurrula for $486,500 in 2000, after an original purchase price of approximately $150. At the time of the resale, the elderly Tjupurrula was in a nursing home in Alice Springs.[37]

Some people believe strongly that the increased value of a work of art is latent in that work at the time of its creation. The increased value of a particular work over time is seen as an indicator of the price that the originating artist should have received at first sale. A resale royalty is therefore perceived to be an important recognition of the artist's role as the creator of value. A resale royalty is considered to be a payment that has been owing to the artist since the time of creation of the artwork but deferred until second and subsequent sales. Another way of expressing this concept is that artists are believed to have an inalienable investment in their creative works that periodically pays dividends.

This argument privileges the artist as the sole creator of the economic value of a work of art. It does not appear to take into account the role of art critics, gallery owners and dealers in nurturing an artist's reputation and publicising an artist's work, the availability of the artist's work, the overall economic conditions, the life-span of the artist, and other complexities of the art market.

From an investor's point of view, purchasing the works of young and unknown artists carries a high degree of risk. An informed investor in contemporary art enters the art market with the knowledge that in many cases there will not be a resale market for purchased works. In addition, of those works that are resold, only some will increase in value and of those, very few will increase dramatically. When purchasing a work of contemporary art from an emerging artist, the buyer assumes nearly all of the risk associated with the transaction. On that basis it could be argued that the investor is entitled to accept the full benefit of any increase in value.

[37] The resale of *Water Dreaming* has been referred to in numerous articles and commentary on the issue of resale royalty, including:

- "Knocked down; still out", *The Age*, 29 September 2003.
- "Aboriginal painting draws record price", ABC AM archive, 27 June 2000 at www.abc.net.au/am/s143886.htm.
- Senator Kate Lundy, Second Reading Speech on *Resale Royalty Bill 2004*, Parliament House, 13 March 2004.

Further, some opponents of resale royalty have questioned the basis of the scheme on the grounds that it punishes individuals who are purchasing works of contemporary art. It has been argued that purchasing original art works is the ultimate form of support for visual artists and that investors in contemporary art should not be required to pay artists a second time, especially if an artwork decreases in value.

Some of the major concerns that have been expressed regarding the Indigenous art market are about unscrupulous business practices and possible exploitation of Indigenous artists. In particular, there is concern that high secondary prices in comparison with primary prices are an indication that some Indigenous artists may not be receiving a fair price at first sale. As a result, it could be argued that these artists may deserve to share in any secondary sale profits.

It is possible that a concerted effort to inculcate more professional and ethical business practices and ensure that the Indigenous art market is operating in accordance with the consumer protection provisions of the *Trade Practices Act 1974* and state legislation would have a more positive effect for Indigenous artists than the introduction of a resale royalty scheme. These issues are discussed in more detail below in the section, *Options for a resale royalty arrangement*.

### Enshrining a perceived right

A resale royalty scheme is viewed by some as enshrining what they perceive to be an inalienable right of visual artists or craft practitioners to an economic interest in successive sales of their work. Advocates often point to the acknowledgment of this right in France since the introduction of legislation in the 1920s and now throughout the European Union.

Hetti Perkins, senior curator at the Art Gallery of New South Wales, has also argued that the benefits of a resale royalty for the Indigenous art sector in particular include recognising the intrinsic cultural and personal relationship some artists have with their works, as well as an Indigenous artist's responsibilities to their extended family and local community.[38]

### Redressing a perceived inequity between the economic situation of visual artists and craft practitioners and that of other artists

One argument that is sometimes raised in relation to the proposed introduction of a resale royalty scheme is that current copyright provisions do not sufficiently remunerate visual artists in comparison with other types of creators. This is often said to be because visual artists do not usually benefit from the increased value of their work in the same way as

[38] Perkins, H. (2001).

other creators (such as published authors and composers, who can often receive steady remuneration over time).

Copyright is designed to stimulate innovation by giving the creators of copyright material the exclusive right to control certain uses of that material. Without copyright, creators would not be able to control and benefit effectively from the use of their work. Creators such as authors and composers whose works tend to be reproduced on a fairly regular basis, often receive significant secondary remuneration in the form of licence payments.

However, while most visual artists and craft practitioners are able to receive a primary financial benefit from the sale of their initial work, they are less likely to receive secondary remuneration for subsequent uses (including reproduction) of their works. This is possibly due to the sector's current business model.

## Providing additional incentives for artists to continue practising

It is sometimes argued that a resale royalty would enhance existing incentives for artists to continue practising. The existence of incentives for artists to continue to work and to build their reputations is generally recognised within the sector as being very important. As the value of an artist's work generally increases over a lifetime, it is in the mutual interests of both artists and investors that artists create a body of work and develop their reputations over time. Denis Savill, of Savill Galleries, is referred to in a recent article on art investment as saying that "investors should … concentrate on artists committed to their careers and artwork".[39]

Given the fact that a resale royalty—more often than not—rewards artists later in their careers, the existence of a resale royalty arrangement could operate as an additional incentive for those artists to continue to create work. It has been argued by some that this additional incentive exists regardless of the actual economic benefits that flow to artists.

Bearing in mind the low average earnings of most visual artists, it has also been argued that the existence of additional economic incentives, such as resale royalties, is of special importance.

## Empowering artists and encouraging greater recognition of their contribution to the cultural and economic life of the nation

It may be the case that the introduction of a resale royalty in Australia would elevate the status of artists and, in this way, assist artists to assert their interests more effectively in the market place. A resale royalty could recognise and reward the contribution visual artists make to the cultural and economic life of Australia.

[39] Weekes, P. (2004), p 33.

In Australia, it appears that the arts and craft sector appreciates the fact that established artists will be the principal beneficiaries of a resale royalty scheme and that there would be limited economic benefits for most artists. Nevertheless, many people in the sector place significant symbolic value on a resale royalty scheme as a general means of enhancing the status of artists generally in the community.

## PRACTICAL CONSIDERATIONS

Existing literature and analyses of resale royalty schemes in other jurisdictions can inform discussion of the desirability of the introduction of a scheme in Australia. However, there are also many areas of uncertainty due to the unique characteristics of the Australian art market. This section focuses on the practical implications of implementing a resale royalty in Australia.

### Economic analysis

What economic benefit will resale royalty bring to Australian artists? While the economic benefit of a resale royalty is often cited as an important objective, most economists consider that "it discourages artistic production and does not support needy (rising) artists but rather increases the incomes of already established artists".[40]

**Appendix B** addresses the relative economic benefit to artists from nine different models of resale royalty, each with different parameters.

### Impact on the market

It would be counterproductive for all concerned—artists, galleries, auction houses and collectors—if a resale royalty scheme suppressed the market for Australian contemporary art.

Whatever the administrative arrangements and parameters of a resale royalty scheme, it is clear that a resale royalty would create a new impost on the secondary sales sector. While there are some successful international businesses operating in the secondary art market, most commercial galleries in Australia are small businesses, operating with low profit margins in a high-risk environment.

It is difficult to assess the extent to which an additional impost such as a resale royalty would affect the profitability of galleries and auction houses in terms of the additional administrative costs that those organisations would be required to meet.

[40] McAndrew, C. and Dallas-Conte, L. (2002), p 19.

However, it is worth noting that the Australian market has accommodated the introduction of increased auction house fees and commissions, and capital gains and goods and services taxes. In the face of these changes, the Australian art market has clearly strengthened over the last ten years (see Table 2).

It has also been argued that a resale royalty in a small market such as Australia's could harm the primary market for Australian art by depressing first sale prices. Paul Lewis has provided an example from the German artist George Baselitz, who claims that resale royalty harms the primary market for an artist's work. "For example, if galleries were forced to pay artists a percentage of the resale value of the work, the gallery may not unreasonably demand a lower price when purchasing the painting from the artist in the first place".[41]

There are also fears that the introduction of a resale royalty could lead to the relocation of secondary art sales to other jurisdictions where a resale royalty scheme is not in place, as appears to be happening elsewhere. For example, in the European Union a number of member states have expressed serious concerns that royalty payments may be contributing to art sales shifting to markets where a resale royalty does not apply.[42]

While the Myer Report found that Australian art receives higher prices in Australia than overseas,[43] international demand for Australian art—particularly Indigenous art—is increasing, which may create greater incentive for sales lots to be relocated. While any proposed sale involving the shipping of artworks would have transportation costs as a disincentive, relocation of sales to other jurisdictions is a possibility that should not be disregarded.

It is also possible that increasing use of virtual salerooms and on-line auctions could facilitate the relocation of sales to other jurisdictions without a resale royalty (for example, possibly through the use of choice of law provisions in on-line sale contracts). Similarly, long-term lease arrangements and contracts of sale may also be used to effect the movement of works to other markets without a resale royalty.

## Cost of administering a scheme

The expense of administering a resale royalty arrangement in Australia must be considered in weighing its potential benefits.

If the experience in Europe is taken as a guide, the cost of administering a resale royalty scheme in Australia is likely to be in the range of 10–40 percent of the royalty. In some instances (for example, in Italy) royalties are not collected due to prohibitive administrative costs. In its submission to the Contemporary Visual Arts and Craft

[41] Lewis, P. (2003), p 312.
[42] Pfennig, G. (2001), p 4.
[43] *Myer Report* (2002), p 164.

Inquiry, the Visual Arts Copyright Collecting Agency, Viscopy, estimated that it could administer a scheme for around 20 percent or less. This would not include set-up costs.

In most schemes, administration expenses are subtracted from the royalty itself. If a resale royalty is applied to all transactions, including those with a low threshold resale price, it is possible that the cost of administering the scheme would outweigh the benefit of the royalty. In a small market, a high minimum threshold would likely be necessary, in order to outweigh administration costs. Unfortunately this would also mean that fewer artists would benefit from the resale royalty scheme.

If we were to introduce a scheme in Australia in line with the Berne Convention, then reciprocity arrangements would apply – that is, an artist would be entitled to resale rights in a foreign country where comparable rights exist in their own country. The extra work required by reciprocity arrangements may also increase costs. For instance, in Australia the proportion of overseas work sold at auction is minimal—2 percent of 2003 auction sales. Depending on the size of the royalty payments due to an individual overseas artist, it could prove economically inefficient to manage the administration of those payments.

The reciprocal nature of any scheme would be governed by the Berne Convention. The threshold price, which is the level at which a royalty would become payable, may also affect reciprocal obligations.

Further information about the relative administration costs of potential models for an Australian resale royalty scheme can be found in the section on *Outcomes for Artists*.

## Minimum threshold

Most jurisdictions specify a minimum sale amount before the resale royalty will come into effect. This is in recognition of the need to ensure that administrative costs do not outweigh the royalty. In the European Union Directive, a minimum sale amount of EUR 3,000 (or approximately AU$4,500) applies.

However, sector organisations such as the National Association for the Visual Arts (NAVA), Viscopy, the Australian Copyright Council and the Arts Law Centre of Australia have recently stated that:

> The rationale for a minimum threshold is that the administration costs of collecting and distributing the fee may account for most or all of the fee.[44]

The Australian market is fairly small in comparison with the United Kingdom, France, Germany and many other European jurisdictions. Given the relative economies of scale, a higher minimum threshold may be necessary.

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[44] National Association for the Visual Arts, Viscopy, Australian Copyright Council, The Arts Law Centre of Australia, *Resale Right: The Major Legislative Issues*, Position paper, 2003.

## Which works of art should be covered?

Resale royalty schemes generally cover all original and tradeable works of contemporary visual art—including, but not necessarily limited to, original paintings, drawings and sculptures. This scope is common to all jurisdictions with a resale royalty scheme in place.

The business of defining art is nevertheless not easy. Depending on definitions of a work of art, lithographs, engravings, photographs, models, tapestries, ceramics and glassware may also be covered by a resale royalty scheme.[45]

Under the *Copyright Act 1968* an ***artistic work*** is defined as:

> (a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;
>
> (b) a building or model of a building, whether the building or model is of artistic quality or not; or
>
> (c) a work of artistic craftsmanship to which neither of the last two preceding paragraph does not apply; but does not include a circuit layout within the meaning of the *Circuit Layouts Act 1989*.

## Which transactions should be encompassed?

Generally, resale royalties apply to public sales involving art professionals through auction houses and commercial galleries. Private sales are excluded. The increasing use of the Internet to conduct transactions could mean that there is less need to separate public and private transactions.

## The rate for calculating a royalty

In most jurisdictions, resale royalty rates are between 2 and 5 percent. The EU Directive specifies a sliding scale for calculating the royalty:

- 4 percent for the portion of the sale price up to EUR 50,000;
- 3 percent for the portion of the sale price from EUR 50,000.01 to 200,000;
- 1 percent for the portion of the sale price from EUR 200,000.01 to 350,000;
- 0.5 percent for the portion of the sale price from EUR 350,000.01 to 500,000;
- 0.25 percent for the portion of the sale price exceeding EUR 500,000.[46]

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[45] Lewis, P. (2003), p 308.
[46] European Parliament and the Council of the European Union (2001a).

Under the EU Directive, the resale price to which the resale royalty applies is the net price—that is, the sale price less the cost of sale.

Some other jurisdictions (including Brazil, Chile, Peru, Turkey and Uruguay) calculate the percentage royalty only on the increase in resale in real terms. While this seems to be an equitable position to adopt on behalf of the vendor, it raises issues of determining how the increased value of a work of art is to be determined. Where there are unambiguous sale documents available this is relatively straightforward. It becomes more complex in circumstances where works have been gifted or bequeathed; where original documents are missing or inconclusive; and where works have undergone value-enhancing, such as conservation treatments or re-framing.

NAVA, Viscopy, the Copyright Agency Limited and the Arts Law Centre of Australia have advocated a fully legislated scheme, with a low minimum threshold and a blanket flat rate resale royalty of 5 percent on all public sales.

A possible compromise between the relatively complicated EU sliding scale approach and the flat rate advocated by the sector organisations noted above could be a four-point sliding scale.

### Maximum payments

The European Union Directive stipulates that the total amount of the royalty may not exceed EUR 12,500 (or AU$18,750). While this provides a cap on royalties in relation to individual sales, it does not provide a cap on cumulative payments to artists as a result of multiple sales of artworks.

Modelling based on 2003 Australian auction sales suggests that the maximum royalty collected for any one sale could be around $60,000 if a flat 5 percent royalty rate was applied or around $6,000 if a sliding scale on the sale price was utilised. This calculation is based on the sale of *The Outstation* by Russell Drysdale for $1.194 million in 2003.

## Collection and distribution of royalty

In existing schemes, collecting societies or government institutions are responsible for the collection and disbursement of royalties.[47] While the European Union Directive does not specify that a collecting society is necessary for the collection and distribution of the royalties, it does state that "a collecting society is one possibility" and that "Member States must ensure that amounts intended for authors who are nationals of other Member States are in fact collected and distributed". The Myer Report stated that "a collecting agency may be the best model for the collection and distribution of a resale royalty in Australia".[48]

Permitting individual artists to represent their own resale royalty interests is another option raised by the Myer Report. However the Myer Report also noted that an artist cannot enforce resale royalty terms in an initial contract of sale on subsequent purchases, which could have an impact on the effectiveness of a scheme of this nature.[49]

The Myer Report did not consider the possibility of a government organisation managing the royalties. This is the case with the Public Lending Right (PLR) and Educational Lending Right (ELR) schemes, which are administered within the Department of Communications, Information Technology and the Arts. A review of the PLR Scheme in 1999 estimated the administrative cost of this scheme to be 8.7 percent of the total amount distributed. A 2003 review of the ELR Scheme estimated administrative costs to be 6 percent of the total amount distributed. The average cost of administration of resale royalty schemes internationally is generally higher.

The Myer Report also did not consider industry self-regulation and the development of an industry code of conduct. However, several commercial galleries are already known to pay a voluntary resale royalty to artists in their stables, such as the Sydney-based Watters and Legge galleries.

As discussed earlier, it is difficult to determine the administrative efficiency of a possible resale royalty arrangement. Nevertheless, a rudimentary analysis of the transaction costs in the context of the potential benefits—as outlined above—may give a clearer picture of the expense of administering a scheme.

Clare McAndrew and Lorna Dallas-Conte (2002) in their examination of the impact of *droit de suite* in England, based their estimate of administration expenses on the 18 percent average administration costs for states in the EU with resale royalty.[50]

In their report, McAndrew and Dallas-Conte conclude that there appear to be several advantages of central collection, including the following:

[47] Cliche, D., (1994).
[48] *Myer Report* (2002), p 384.
[49] *Myer Report* (2002) p. 169.
[50] McAndrew, C. and Dallas-Conte, L. (2002), p 27.

- It is easier to establish and maintain cooperation with artists and the art trade if one central agency has sole responsibility for collecting royalties.
- There will also be economies of scale in monitoring and administration costs from dealing with a larger quantity of artists and sellers, making the collection system more efficient and cost-effective.
- A central collecting society can gain sales information in a manner that is least disruptive to the art trade.
- It is easier to gather and evaluate statistics on collection and distribution when there is only one central agency. [51]

As the Australian art market is comparatively small in the global context, administration costs may be significant in proportion to total sales. However, it may be possible to minimise administrative costs by adopting a minimum sale price threshold for the introduction of the royalty—as is the case under the European Union Directive.

## Inalienability of a resale royalty

Most resale royalty schemes stipulate that the right to royalties is inalienable—it cannot be assigned or waived. This means that art vendors cannot buy the resale royalty from the artist. This relates to the notion that an artist does not have the same level of bargaining power as a gallery owner. It is sometimes argued that "if art dealers were able to persuade artists to waive their future resale royalty claims, then art dealers may make the assignment of resale royalties a contractual condition in any purchase of an artwork".[52]

## The duration of a resale royalty

The Myer Report proposed that a resale royalty should be available to the artist and the heirs of the artist.[53] The duration of a resale royalty is typically related to the duration of copyright in the jurisdiction effecting the resale royalty right. In Australia, current copyright provisions specify the term of copyright as the life of the artist plus 50 years. It is anticipated that Australia will extend the term of copyright as an outcome of the recently introduced *US Free Trade Implementation Bill 2004* to life plus 70 years.

In France, where the period is life plus 70 years, evidence suggests that 70 percent of resale royalties are paid to the heirs of seven artists (including Picasso and Matisse). In order to avoid this situation in Australia an option would be to restrict the payment of a resale royalty to living Australian artists.

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[51] McAndrew, C. and Dallas-Conte, L. (2002), pp. 45-46.
[52] *Myer Report* (2002), p 385.
[53] *Myer Report* (2002), p 385.

### Resale royalties payments to international artists

A key principle of Article 14*ter* of the Berne Convention is the principle of reciprocity. If Australia is to introduce a resale royalty that is covered by the Berne convention, the works of international artists that are resold in Australia may attract a royalty payment.

Auction sales data for 2003 from the *Australian Art Sales Digest* reflects that most sales of $1,000 or more in Australia are of work by Australian artists (around 98 percent). The remaining 2 percent would be shared between 52 overseas artists, with an average royalty payment of around $837.[54]

The Contemporary Visual Arts and Craft Inquiry found that there is more demand for Australian art in Australia than overseas and that consequently Australian art receives higher prices in Australia than overseas. This indicates that, while a fully legislated Australian resale royalty scheme would make Australian artists eligible to benefit from similar legislated schemes in other countries under the principle of reciprocity, the extent to which this might be realised is likely to be minimal. However, this is likely to increase as the overseas royalty market for Australian art improves (particularly for Indigenous art).

## OUTCOMES FOR ARTISTS

The Myer Report found that, if Australia introduced a resale royalty arrangement, "a substantial amount of benefit would be enjoyed by artists, as estimates indicate that resale royalties calculated on 1999–2000 sales would amount to approximately $6.75 million".[55]

This estimate was based on a scheme characterised by a flat resale royalty rate of 5 percent, a term of 50 years after the artist's death (consistent with current Australian copyright arrangements) and no minimum resale price threshold.

The Department of Communications, Information Technology and the Arts considered the actual outcomes for artists resulting from a range of alternative models for a resale royalty scheme.

In this section we summarise research on the economic benefits artists might expect to receive from a resale royalty. Ten models for a resale royalty are tested, using actual auction sales data. These are summarised in
Table 5 below.

The three key variants in the ten models tested are:

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[54] Furphy, J. (2004).
[55] *Myer Report* (2002), p 162.

- the minimum price threshold;
- the rate of the royalty; and
- the duration of the royalty.

## Table 5: Summary of outcomes under different resale royalty models

| Model | Threshold | Sliding / flat rate | Duration | % of 2003 auction sales captured | Total value of work sold | Total royalties collected | Number of artists | % Indigenous artists | Average royalty | Max royalties to an artist | Min royalties to an artist | Estimated admin costs (18%)[56] |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **1.** | $8,000 | Sliding | Copyright | 63% | $57.56m | $1.43m | 255 | 26% | $5,600 | $83,000 | $250 | $314,000 |
| **2.** | $5,000 | Sliding | Copyright | 66% | $60.96m | $1.54m | 344 | 28% | $4,489 | $85,000 | $165 | $339,000 |
| **3.** | $1,000 | Sliding | Copyright | 72% | $65.89m | $1.72m | 823 | 26% | $2,095 | $91,000 | $33 | $379,000 |
| **4.** | $0 | Sliding | Copyright | 73% | $67.35m | $1.75m | 1391 | 17% | $1,261 | $91,500 | $2 | $385,000 |
| **5.** | $8,000 | Flat 5% | Copyright | 63% | $57.56m | $2.36m | 255 | 26% | $9,250 | $120,000 | $330 | $518,000 |
| **6.** | $5,000 | Flat 5% | Copyright | 66% | $60.96m | $2.5m | 344 | 28% | $7,266 | $204,000 | $205 | $550,000 |
| **7.** | $1,000 | Flat 5% | Copyright | 72% | $65.89m | $2.72m | 823 | 26% | $3,300 | $207,000 | $40 | $600,000 |
| **8.** | $0 | Flat 5% | Copyright | 73% | $67.35m | $2.76m | 1391 | 17% | $1,985 | $207,000 | $2 | $606,000 |
| **9.** | $5,000 | Portion -based sliding | Copyright | 66% | $60.96m | $1.76m | 344 | 28% | $5,120 | $106,000 | $165 | $387,000 |
| **10.** | $5,000 | Sliding | Life of artist | 25% | $22.69m | $0.66m | 173 | 29% | $3,800 | $75,000 | $165 | $144,000 |

[56] See the discussion on administration expenses for the basis for this percentage.

A full analysis of findings under three key models can be found at **Appendix B.**

### *Threshold*

There are many possible models for a resale royalty scheme. For the purposes of this paper, the focus is on three key variants that seem to have the most influence on the outcomes for artists:

On the issue of threshold, the modelling is based on four different scenarios:

- an $8,000 minimum sale price threshold;
- a $5,000 threshold;
- a $1,000 threshold; and
- no threshold.

### *Rate*

The different threshold levels have then been applied using a flat rate of 5 percent and with a sliding scale.

The sliding scale employed is an adaptation of that specified in the European Union Directive. The sliding scale in the EU Directive is quite complicated, in that it necessitates calculation of multiple percentages for any significant sales, breaking the sale price into ‘portions’.

A more straightforward sliding scale is utilised for the purposes of this paper, calculated as a percentage of the sale price—rather than the percentage of distinct portions of the sale price—and with fewer points on the scale:

- no resale royalty payable on sales up to the minimum sale price threshold;
- 4 percent of the sale price for sales up to $100,000;
- 2 percent of the sale price for sales from $100,000 to $500,000; and
- 0.5 percent of the sale price for sales exceeding $500,000.

However, one model has been tested that more closely reflects the EU Directive portion-based sliding scale:

- no resale royalty payable on sales up to the minimum sale price threshold;
- 4 percent for the portion of the sale price up to $100,000;
- 2 percent for the portion of the sale price from $100,000 to $500,000; and
- 0.5 percent for the portion of the sale price exceeding $500,000.

A flat rate of 5 percent is the expressed preference of those organisations advocating a resale royalty in Australia. The royalty rate in European Union countries generally ranges from 3 percent to 5 percent.

### *Duration*

In terms of the duration of the royalty, the limited modelling presented in **Appendix B** is based on outcomes under the full term of copyright, which under the *US Free Trade Implementation Bill 2004* is extended by 20 years to life plus 70 years.

A limited analysis of outcomes under a model where the duration of the right is limited to the life of the artist has also been undertaken. The model tested has a $5,000 minimum threshold and a sliding scale and the results are summarised in Table 5.

Consistent with the European Union Directive that the royalty apply only to public sales involving art professionals, the foundation for all models is auction sales data for the year 2003 from the *Australian Art Sales Digest* (AASD).[57] This excludes resales at commercial art galleries.[58]

## Comparative Analysis

There are broad similarities across the models in terms of their outcomes for artists.

### Top 5 artists

Under all models, the five top-grossing artists take a sizeable proportion of total royalties payable—ranging from 24 percent to 39 percent. This appears to substantiate one of the key arguments made against resale royalty in European countries.

It is interesting to note that the *share* of royalties to top-grossing artists is highest under the model which restricts royalties to living artists only. However the *payment range* to top-grossing artists is lowest under this model ($34,000–$75,000).

### Impact of the different models on individual artworks

A flat 5 percent royalty rate tends to increase dramatically returns to any one artist. For instance, under the sliding scale model with a $5,000 threshold, the estate of Russell Drysdale would be entitled to around $45,000 based on 2003 art auction sales. When the 5 percent rate is applied with the same threshold level, royalties to Russell Drysdale's estate would jump to around $204,000. If—as is the case for Drysdale in 2003—an artist's works sold for a particularly high price, the 5 percent rate boosts considerably total returns for that artist.

It is interesting to compare the different royalty payments that would be applicable to sales of particular works of art across different models. Table 6 below presents examples of royalties payable on four works by recognised artists sold at auction in 2003.[59]

[57] Furphy, J. (2004).

[58] Note that, although the Myer Report drew a correlation between data from the AASD and secondary sales through commercial art galleries, this market segment is actually quite different and there is no firm data available on the proportion of secondary sales occurring through commercial galleries.

[59] An 18 percent administration fee has been deducted from the royalty collected for each work of art, consistent with the approach taken in the analysis outlined in Appendix B.

**Table 6: Examples of royalties payable on the sale of four works of art under three different models**

| Artist | Artwork Title | Sale Price | Royalty under sliding scale on sale price | Royalty under Portion-based sliding scale | Royalty under 5% royalty rate |
|---|---|---|---|---|---|
| Margaret Olley | *Still Life with Lemons 1991* | $76,375 | $2,505 | $2,505 | $3,131 |
| Charles Blackman | *Boats at Williamstown 1956* | $164,500 | $2,698 | $4,338 | $6,745 |
| Rover Thomas | *Lake Gregory (Buragu) in the Wet Season 1988* | $474,500 | $7,782 | $9,422 | $19,455 |
| Brett Whiteley | *View from the Sitting Room Window, Lavender Bay 1991* | $705,000 | $2,891 | $10,681 | $28,905 |

The flat 5 percent rate returns the highest royalty payment for any artwork. When the sliding scale is applied directly to the sale price, this has the effect of moderating the royalty payable on a top-pricing artwork. However, returns are highest under the 'sliding scale on sale price' model for those works that are just under the sale price cut-off for the next (lower) percentage rate—such as the Rover Thomas work above, which is eligible for a 2 percent royalty rate rather than the 0.5 percent royalty rate that would apply for sales from $500,000.

The majority of art that sold at auction in 2003 sold for less than $100,000. This means that, for most artists, under either sliding scale proposal a 4 percent royalty would apply—as is evident from the Margaret Olley example above.

Nevertheless, for those works that do sell for in excess of $100,000, the calculation of the royalty payable would be more administratively complicated under the 'portion-based sliding scale' than under the 'sliding scale on sale price' model. This is because, for any one transaction, multiple percentages need to be applied to determine the royalty. For instance in the Brett Whiteley example above, the following calculations would apply:

- 4 percent of $100,000 = $4,000
- 2 percent of $400,000 = $8,000 = $13,025; less 18 percent admin fee = $10,681
- 0.5 percent of $205,000 = $1,025

## Indigenous artists

Outcomes for Indigenous artists do not seem to support introduction of a resale royalty scheme, where that scheme is introduced on the basis of perceived increased benefits for Indigenous artists. Non-Indigenous Australian artists dominate the royalty payments under all models. Across the models, Indigenous artists do not feature in the top royalty payment tier and the top-grossing Indigenous artists receive significantly less than the top-grossing non-Indigenous Australian artists.

Benefits that would flow to Indigenous artists differ significantly under the models presented, with average royalty payments ranging from $1,000 (sliding scale, no threshold) to $5,000 (5 percent rate, $8,000 threshold).

Models without a minimum threshold capture a far greater number of individual Indigenous artists than other models. However no threshold also means that a significant proportion of these artists would receive very minor benefits—with up to 25 percent of Indigenous artists receiving payments of less than $100.

### Overseas artists

There does not appear to be justifiable concern that introducing a resale royalty would result in a net outflow of royalty payments from Australia. The Australian art market is dominated by sales of Australian art. Overseas artists would be eligible for only minor royalty benefits under the principle of reciprocity under all models. However, it could be expected that to provide those royalty payments to qualified overseas artists would necessitate some additional administrative expense.

### Benefits to living artists

Where modelling extends the duration of a resale royalty right beyond the lifespan of an artist, the estates of deceased artists benefit more than living artists. This reflects a common market trend for a recognised artist's work to appreciate significantly following his or her death.

### Payments to female artists

One clear outcome under all models is that women do not feature in the top payment ranges. There are only two top-grossing female artists in the upper payment ranges—Emily Kame Kngwarreye and Margaret Olley—and a general domination of non-Indigenous male artists throughout the higher royalty payment levels under all models.

Further, the data reveals that the number of male artists whose work was resold at auction in 2003 far surpasses the number of female artists. For instance, under the $5,000 threshold models, female artists account for only 28 percent of total artists eligible for a resale royalty.

### Key differences between the models

While the proportion of payments to living artists relative to deceased artists may be broadly similar under the models, the number of artists captured is quite different.

- The higher $8,000 threshold captures 122 living artists and 135 deceased artists, with total royalties to the living artists of $600,000 and total royalties to the deceased artists of $840,000—when a sliding scale is applied.
- When the modelling extends to all resales, the number of living artists (875) is well above the number of deceased artists (516). However, the payment levels do not reflect this difference, with total royalties of $780,000 to the living artists and $980,000 to the deceased artists—when a sliding scale is applied.

Average payments to living and deceased artists also vary considerably between the models.

- Under the $8,000 threshold, the average payment to a living artist is $4,900 and $6,200 to a deceased artist.

- When all resales are eligible for a royalty, the average payment to a living artist is $890 and $1,900 to a deceased artist.

### Lower payment ranges

Under each of the models considered, there is a clear disparity between the number of artists who would benefit from significant royalty payments and the number of artists who would receive comparatively lower payments. The disparity is greatest for those models that apply a lower minimum sale price threshold or no threshold at all.

- When a $1,000 threshold is applied with a flat 5 percent royalty rate, 0.6 percent of the total artists eligible for royalties would receive 29 percent of the total royalties and 91 percent of artists would receive only 15 percent of total royalties.
- When no threshold is applied under the ‘sliding scale on sale price’ model, 0.4 percent of total artists would be eligible to receive 24 percent of the royalties and 96 percent of artists would receive 23 percent of the royalties.

### Administration costs

While the actual cost of administration is likely to vary as a percentage of the royalty collected, lower (or no) threshold models which generate higher levels of royalty also require greater administration costs, reflecting the increased number of payments to artists. The administrative expense is also likely to rise considerably for those models that lead to a significant proportion of eligible artists receiving very minor benefits, as the cost–benefit ratio is diminished. However, it is also important to note on this point that many supporters of a resale royalty right would contend that from an artists’ perspective, a royalty payment of any amount is worth collecting and distributing, whether it be $5 or $5,000.

- Under the $8,000 threshold sliding scale model, the lowest royalty payment is around $250.
- Under the models that apply to all resales, the lowest royalty payment is $2.

It might also be expected that the ‘portion-based sliding scale’ model would create higher administrative expenses, given it demands more complex royalty calculation than the other models.

## OPTIONS FOR A RESALE ROYALTY ARRANGEMENT

Should the Australian Government decide to introduce a resale royalty arrangement in Australia it could do so in a number of different ways. For example, the Government could:

- amend the *Copyright Act 1968* to fully legislate a resale royalty;
- require industry to introduce a self-regulated resale royalty scheme, through amendments to the *Copyright Act 1968* or other legislation specifying reporting requirements; or
- work with the sector to encourage contract-based resale royalty arrangements between artists and dealers.

There are relative advantages and disadvantages with each of these approaches, and these are examined more fully in the following discussion. Should a resale royalty scheme be introduced, some considerations that might influence the type of arrangement would include:

- *The preferences of the sector*

- Most of the submissions to the Contemporary Visual Arts and Craft Inquiry on resale royalty expressed a preference for national legislation.[60] Submissions tended to reflect the view that, because of the relative bargaining power of artists and art market intermediaries, a voluntary model would not necessarily result in a large number of artists negotiating resale royalties. However, the Report did not go so far as to recommend that a legislated scheme be introduced.

- Auction houses and galleries may well prefer to establish an industry designed form of resale royalty arrangement. The Lawson–Menzies auction house has already announced its plans to donate 2 percent of the proceeds of all art it sells to an independent foundation it is creating for health, education and community development initiatives in Indigenous communities.

- *The process for developing and implementing the scheme*

- Development of a successful fully legislated scheme would necessitate detailed consultation with all relevant stakeholders and require resolution of a range of complex legal issues, which may take some time.

- Developing an industry code would involve stakeholders directly in designing and implementing a workable scheme. It would be 'owned' by the industry and would present an opportunity for stakeholders to work together to address concerns about maximising benefits to artists while also minimising the impost on collectors and businesses. An industry code has the potential to be implemented more quickly than a fully legislated scheme, and would also provide for more flexibility.

- A contract-based model would build on existing industry practice, and would be most likely to minimise compliance costs and the impact on the commercial galleries sector. Moreover if the Government were to assist in the development of model contracts, there would be potential to address concerns about the relative power imbalance between artists and dealers.

- *Reciprocal rights in other jurisdictions*

- An industry code scheme or a contract-based scheme would both be less likely than a legislated scheme to attract reciprocal rights in other jurisdictions with a resale royalty right.

- However, if payments were centrally collected there may be an option for the collecting body to negotiate reciprocity arrangements directly with collecting societies in other jurisdictions.

The various options are discussed below.

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[60] *Myer Report* (2002), p 166.

## A fully legislated scheme

A fully legislated scheme would impose a legal requirement to pay a percentage of the resale price of a work of art to the artist or his or her estate. This is the approach favoured by a number of organisations such as NAVA, the Arts Law Centre of Australia and Viscopy. Of the approaches discussed, a fully legislated scheme would be the most likely to entitle Australian artists to similar benefits in other jurisdictions in which a comparable resale royalty right exists (potentially including many European Union countries) through the principle of reciprocity—whereby an artist may be entitled to resale rights in a foreign country where comparable rights also exist in their own country. However, reciprocity only applies to the extent that the rights in each jurisdiction are consistent, and consistently enforced. Given the variety of resale royalty schemes currently in place around the world, if a legislated scheme were to be introduced, determination of reciprocal obligations with other jurisdictions would still involve complex issues and consideration of a range of factors, including the types of works covered in each jurisdiction, the threshold level at which the right applies, and practical issues such as whether the royalties are actually collected.

There are also a number of issues that the Government would need to consider before introducing a legislated scheme:

- whether the scheme should be enacted through stand-alone legislation or amendments to the *Copyright Act 1968*; and

- constitutional and tax issues—for instance, it may be necessary for the legislation establishing the scheme to make provision to provide 'just terms' for anyone whose existing property rights are adversely affected by the resale royalty scheme. There is also some risk that the scheme could be characterised as imposing a tax for constitutional purposes, although this issue would need to be further examined.

Developing legislation for such a scheme is likely to be a lengthy process involving substantial consultation both with the sector and the broader community.

## Industry self-regulation

Resale royalty arrangements could be achieved through broad adoption of an industry code of practice by businesses involved in the art resale market. The Government could monitor the progress and operation of the scheme through the introduction of compulsory reporting requirements to ensure that it operated in a transparent manner. This would entail minor legislative amendments.

The Government could facilitate an industry working group to develop a code of practice for a resale royalty scheme to be implemented by the industry. Working group members could include representatives from the commercial sector (galleries and auction houses), sector organisations such as NAVA and Indigenous arts sector representatives.

The code of practice would define the form of the resale royalty arrangement—such as the rate of the royalty, the minimum sale price threshold, the term of the royalty right and reporting requirements. It could also set out the administration arrangements for the scheme.

Galleries and auction houses could be required to provide information to the relevant Government agency, indicating the sales to which a royalty was applicable and the level of related royalties transferred for distribution. Provisions for reporting sales could be included in the legislation, along with penalties for false reporting.

A clear advantage of this proposal is that it would involve those organisations that would implement the resale royalty directly in designing the parameters of a scheme. This could help to limit any negative effect a resale royalty scheme could have on the sustainability of those businesses and the buoyancy of the art market in Australia.

Another advantage of this proposal is that it would enable the Government to assess fully the workability of a resale royalty scheme and its potential impact on the art market. A three or four year timetable for monitoring such a scheme, with a review towards the end of this period, would allow an assessment of the operation of the scheme.

An industry-initiated response to resale royalty is being introduced by the auction house Lawson-Menzies. Lawson-Menzies is proposing to pay 2 percent of its normal commission on sales of Indigenous works into a new foundation that will donate funds to improve health and living conditions in Aboriginal communities.[61] The foundation hopes to raise $200,000 in its first year.

In some respects, an industry code of practice-based resale royalty scheme could operate along the lines of the national voluntary system of advertising self-regulation administered by the Advertising Standards Bureau. The Australian Association of National Advertisers adopted the Advertiser Code of Ethics in 1996 to ensure that advertisements have been prepared with a sense of obligation to the consumer and society and fair sense of responsibility to competitors. The system has operated successfully since that time, fulfilling a commitment to developing a more effective system of self-regulation for the advertising industry.

## Contract-based resale royalties

Some commercial galleries currently enter into voluntary arrangements with artists, in which the purchaser of an artwork is contracted to pay a resale royalty whenever a work is resold.

A number of Australian artists (including Imants Tillers, Juan Davila and Ian Abdulla) already require buyers of their artwork to contract a resale royalty agreement.

While the contract-based model would potentially have the least impact on commercial gallery businesses, it nevertheless relies on the goodwill of commercial gallery owners and may not deliver the level of consistent outcomes which many would expect of a resale royalty arrangement. Further, as stated in the Myer Report, “only in rare cases would an artist possess the requisite bargaining power to ensure a resale royalty-like clause was included in a contract of sale.”[62]

It is worth noting that a number of Indigenous art centres have explored the possibility of introducing a resale royalty as part of their contract of sale. A recent development in the Indigenous art market is the Art Trade Collectors Pledge introduced by Viscopy and the Australian Indigenous Art Trade Association. The pledge places the owner of a work under moral obligation to remit to the artist a minimum of 1 percent of the sale price every time the artwork is sold. The Department of Communications, Information Technology and the Arts understands that the pledge model is working effectively for a number of Indigenous art and craft centres.

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[61] Hutak, M. (2004), p 54.
[62] *Myer Report* (2002), p 168.

### No resale royalty arrangement—but interventions to support Indigenous artists

This option acknowledges that much of the debate on the issue of resale royalty has revolved around the situation of Indigenous artists. The Indigenous arts sector of the market has experienced rapid growth in recent years—which has in turn created some discrepancies between low (some suggest underpriced) original sale prices and high secondary sale prices.

There has been significant media interest in this issue, with many proponents of a resale royalty considering it unjust that Indigenous artists, their families and communities are unable to share in these profits. However, modelling suggests that a maximum of around 240 Indigenous artists would qualify to receive a resale royalty under the models presented at **Appendix B**. This represents only a very small section of Australia's Indigenous artist population, which has been estimated at around 6,000.[63]

The problems facing the Indigenous arts sector, including the exploitation of Indigenous artists at the point of sale and inequities in the art market, are of concern to the Government. To the extent that this issue is driving concern about a resale royalty for Australia, it may be that alternative measures would achieve considerably more for Indigenous artists than the introduction of a resale royalty.

One option would be for the Government to continue to work with the Indigenous arts sector to develop a package of interventions aimed at improving the situation of contemporary Indigenous artists. This package could include the facilitation of voluntary (contractual) arrangements between artists and dealers. Other measures are outlined in the Government's recently announced Indigenous Art Centres Strategy and Action Plan. An Indigenous Intellectual Property Toolkit is also being developed through the Cultural Ministers' Council to address issues specific to Indigenous communities, consumers and commercial operators.

[63] Mercer, C. (1997).

## APPENDIX A: INTERNATIONAL MODELS COMPARISON

Table 7: Summary of some resale royalty schemes

| Country | Rate | Coverage | Other features (where available) |
|---|---|---|---|
| Algeria | 5% of resale value | Works of graphic or plastic art | Not available |
| Belgium | 100 to 10000 FB – 2%<br>10000 to 20000 – 3%<br>20000 to 50000 – 4%<br>50000 + – 6% | Paintings, sculptures, drawings and engravings sold at public auctions | ▪ Inalienable right, extended to heirs and successors of the artist<br>▪ The Ministry of Culture collects the royalty<br>▪ The right is granted to foreign authors on the basis of reciprocity |
| Benin | 5% per cent of resale value | Graphic and plastic works of art | |
| Brazil | 20% of the increase in price, relative to the immediately preceding sale | Art or manuscripts, either original or reproductions signed by the author | ▪ Inalienable right<br>▪ The National Copyright Council collects the royalty |
| Burkina Faso | Not available | Graphic and plastic works of art | |
| Cameroon | Not available | Graphic and plastic works of art sold by dealer or public auction | |
| Chile | 5% of any increase in the price of the work | Paintings, sculptures, drawings, sketches | |
| Congo | Not available | Graphic and plastic works of art sold by dealer or public auction | |
| Costa Rica | 5% of resale price | Graphic and plastic works of art sold by dealer or public auction | |
| Denmark | 5% of the resale price, over a specified minimum | Work of art, or authorised copies thereof | |
| Ecuador | 5% of resale price | Works of art sold by dealers or public auction | |

| Country | Rate | Coverage | Other features (where available) |
|---|---|---|---|
| France | 3% on works sold for more than 100 Francs | "Fine art' – drawings, paintings, sculptures etc | ▪ Inalienable. Currently, inheritable for 70 years after the artist's death<br>▪ Most often collected by private collection societies |
| Germany | 5% on works sold for more than DM500 | Visual arts | ▪ Collected by the "Bild Kunst" society |
| Greece | 5% of the resale price | Original works of art, sold by art dealers or public auction | ▪ Inalienable right |
| Guinea | 5% of resale price | Graphic and plastic works of art sold by dealer or public auction | |
| Hungary | 5% per cent of the purchase price | Paintings, drawings, reproduced pictorial graphic works, sculptures, tapestries etc sold publicly | ▪ The "Art Fund" collects the royalty<br>▪ If the buyer is a museum, the royalty only applies if the author is still alive |
| Iceland | 10% of resale value | Original works of art | ▪ Inalienable right<br>▪ Payable to the author, the author's heirs, or the "Artists' Copyright Fund" |
| Italy | A percentage of the amount by which the first public resale exceeds the original sale (percentage varies between 2 and 10%) | Paintings, sculpture, drawings, prints and original manuscripts sold publicly | ▪ Unclear whether the royalty is collected. |
| Ivory Coast | Not available | Graphic and plastic works of art sold by dealer or public auction | |
| Luxembourg | 3% of resale price over a specified minimum | Visual or plastic art sold by a dealer or public auction | ▪ Inalienable, and inheritable for 50 years after the authors' death |
| Mali | Not available | Graphic and plastic works of art sold by dealer or public auction | |
| Morocco | 5% of resale value | Graphic and plastic works of art sold by dealer or public auction | |
| Norway | 3% of all public resales | Painting, sculpture, graphic art and drawing, original and signed by the artist | ▪ Returns to public fund for all artists |

| Country | Rate | Coverage | Other features (where available) |
|---|---|---|---|
| Peru | A percentage of any increase in value of the work fixed by mutual accord between the parties | Painting, sculpture, sketches and drawings sold publicly | |
| Philippines | 5% of resale price or lease | Paintings, sculptures, and manuscripts of a writer or composer | |
| Portugal | 6% of resale value | Original works of art | |
| Rwanda | Not available | Not available | |
| Senegal | 5% of resale value | Graphic and plastic works of art sold by dealer or public auction | |
| Spain | 3% of works sold for more than 300,000 pesetas | Plastic art sold at public auction, in a commercial establishment or through a dealer or agent | ▪ The party responsible for the sale is obliged to inform the author within 2 months<br>▪ Inalienable, and inheritable for 60 years after the artist's death |
| Turkey | An appropriate portion of the increase in value, not exceeding 10% | Artistic works and manuscripts | |
| Tunisia | | Not available | |
| United States (California only) | 5% of the resale price over $1000 | Original painting, sculpture or work in glass | ▪ The United States does not have a national *Droit de suite*<br>▪ The Californian right extends beyond California only when the work is sold by a Californian vendor |
| Uruguay | 25% of the increase in the value of the work | All categories of intellectual works | |

Table 8 compares both the parameters and outcomes across six countries with resale royalty schemes in place. It gives some indication of how the different markets compare in terms of their overall size, the rate for calculating the royalty, the proportion of works that attract a royalty and the amounts collected.

**Table 8: Resale royalty comparison across six countries**[64]

| *Country* | **Belgium** | **Denmark** | **Finland** | **France** | **Germany** | **California** |
|---|---|---|---|---|---|---|
| **Size of the art market (Euro)** | 77 million | 50.3 million | 12.3 million | 2,843 million | 485 million | 5,540.1 million (Total USA) |
| **Proportion of EU sales** | 0.8 percent | 0.5 percent | 0.1 percent | 31 percent | 5 percent | Not applicable |
| **Nature and duration of resale royalty** | Inalienable, life + 70 years | Inalienable, life + 70 years | Inalienable, life + 70 years | Inalienable, life + 70 years | Inalienable, life + 70 years | Inalienable, life + 20 years |
| **Heirs** | All heirs | Family only | Family only | Family only | All heirs | All heirs |
| **Works of art covered** | Original paintings, sculpture drawings and engravings | Original works of fine art, photos, lithographs, prints, applied art | Works of fine art | Original works of graphic and plastic arts | Original works of fine art | Original paintings, sculpture, drawings, glass art |
| **Sales in scope** | Auction sales | Dealer and auction sales | Dealer and auction sales | Auction sales | Dealer and auction sales | All public and private sales by Californian residents |
| **Base** | Gross price – no deductions | Price including auction fee minus VAT | Price less VAT | Gross price – no deductions | Gross price – no deductions | Gross price |
| **Percent** | 4 percent | 5 percent | 5 percent | 3 percent | 5 percent | 5 percent |
| **Minimum (Euro)** | 1,240 | 268 | 252 | 15 | 51 | 2,181 |

[64] Presented in McAndrew, C. and Dallas-Conte, L. (2002), p 27.

## APPENDIX B: OUTCOMES FOR ARTISTS

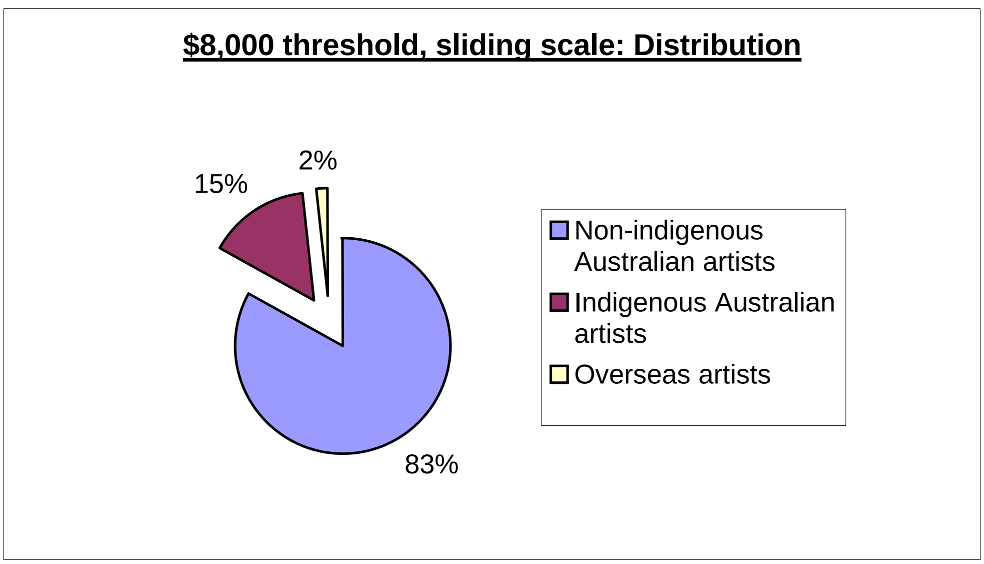
This appendix presents ten models representing the actual outcomes for artists in terms of the economic benefit they might expect to receive from a resale royalty.

The models are as follows:

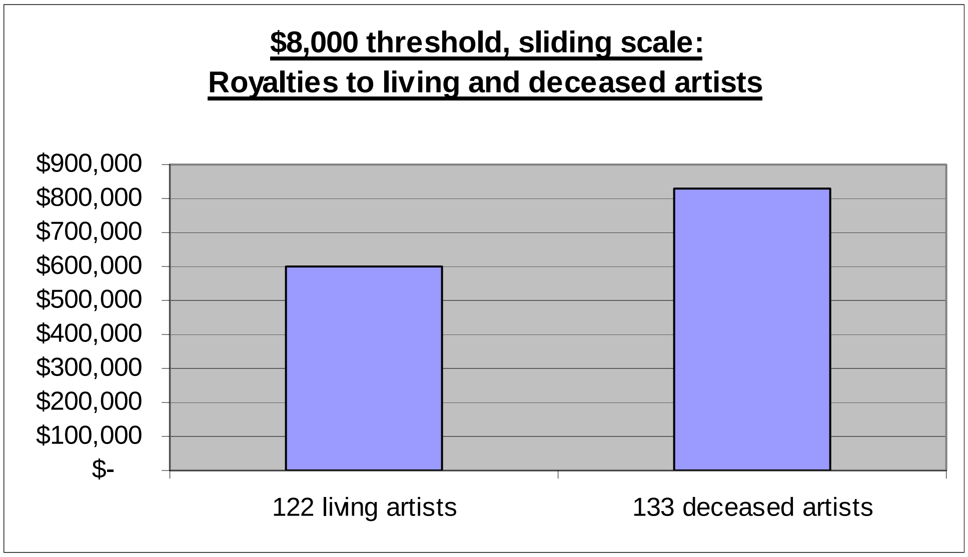
1. Sliding scale on sales from $8,000;
2. Sliding scale on sales from $5,000;
3. Sliding scale on sales from $1,000;
4. Sliding scale on all resales
5. Five percent on sales from $8,000;
6. Five percent on sales from $5,000;
7. Five percent on sales from $1,000;
8. Five percent on all resales;
9. Portion-based sliding scale on sales from $5,000;
10. Living artists only – sliding scale on sales from $5,000.

### 1. Sliding scale on sales from $8,000: Overview of benefits

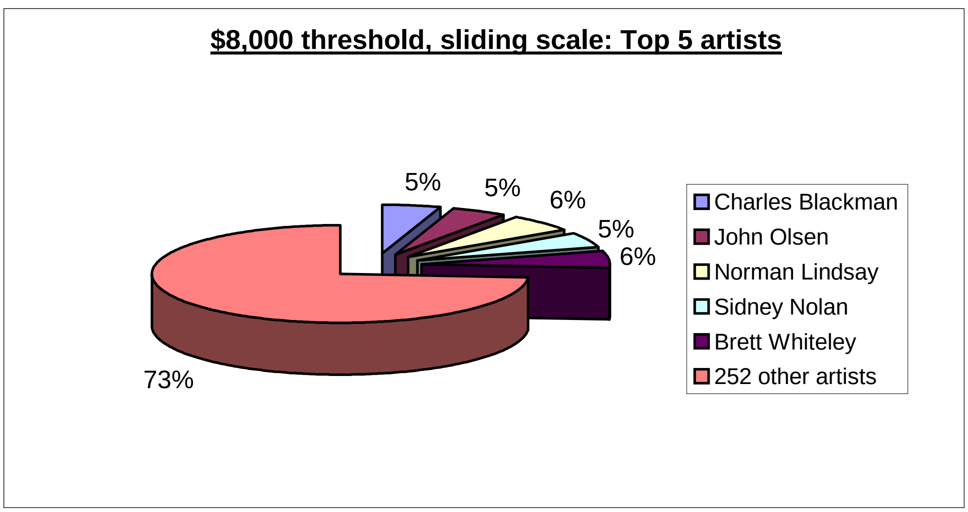
This model captures 63% of the art auction sales in 2003—or $57.56 million—and distributes $1.43 million between 255 artists (following deduction of an 18% administration fee). The following chart shows the distribution in the categories of Non-Indigenous Australian artists, Indigenous Australian artists and overseas artists.




**Royalties to living and deceased artists**
Of the 255 artists captured under this model, 48% are living and 52% are deceased, with the deceased artists' estates eligible to receive 58% of total royalties payable.




**Top 5 artists**
Under this model, the top five highest grossing artists (or their estates) would together receive around $377,070, or 27% of the total royalties payable. Two of these artists are living, but they would receive less individually than each of the estates of the three deceased artists would. None of the five top-grossing artists are Indigenous.




**Second tier artists**
While benefits to this first tier range from around $67,000 to $83,000, a second tier of six artists would each receive between $35,000 and $67,000. These artists (or their estates) would together receive a total of $229,423, or 16% of the total royalties payable under this model. This tier comprises two living artists and four deceased artists, and includes the deceased Indigenous artist, Rover Thomas.

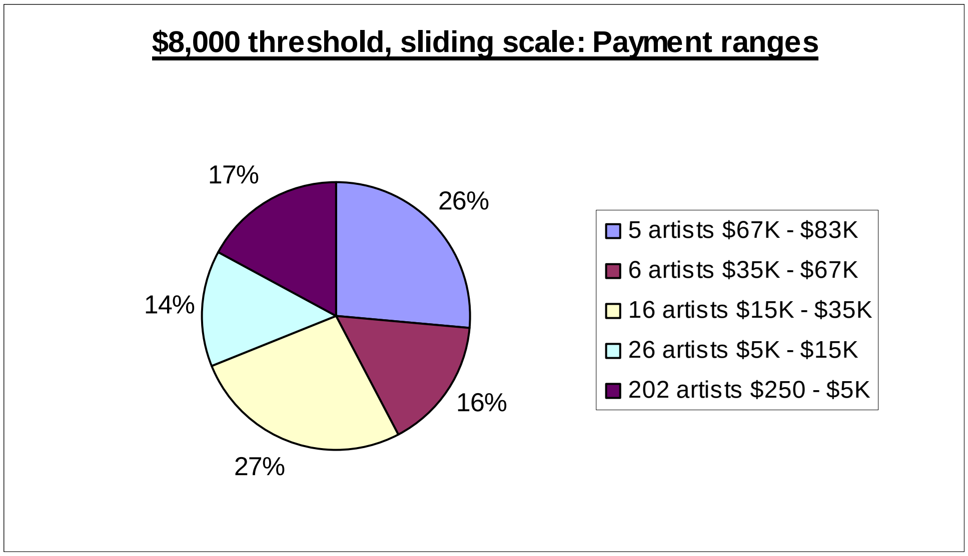
This means that the 11 highest-selling artists (or their estates) would receive 43% of the total royalties payable under this model, with individual payments ranging from $35,000 to $83,000.

**Other artists**
A third tier may be identified as those artists that would receive between $15,000 and $35,000 under this model. This tier captures 16 artists sharing in $382,000, or 27% of the total royalties payable.

Notably, under this model no living Indigenous artists would qualify to receive royalties under the first, second or third tier—based on the results of 2003 auction sales.

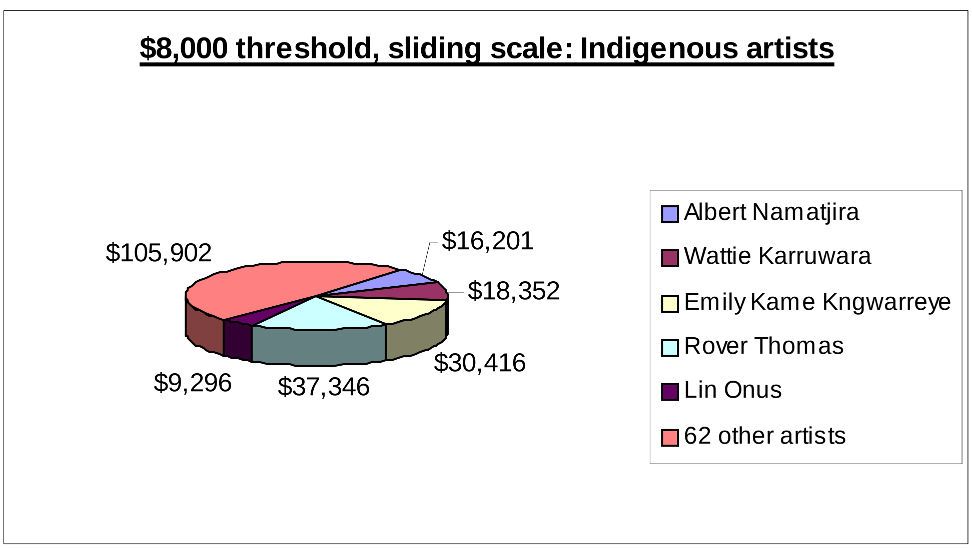
Payments to a fourth tier of 26 artists would range from between $5,000 and $15,000 and comprise $204,000, or 14% of the total royalties payable under this model.

A bottom tier of 202 artists would receive payments ranging from between around $250 to $5,000—with an average royalty payment of $1,190—and comprising $241,000, or 17% of total royalties payable.



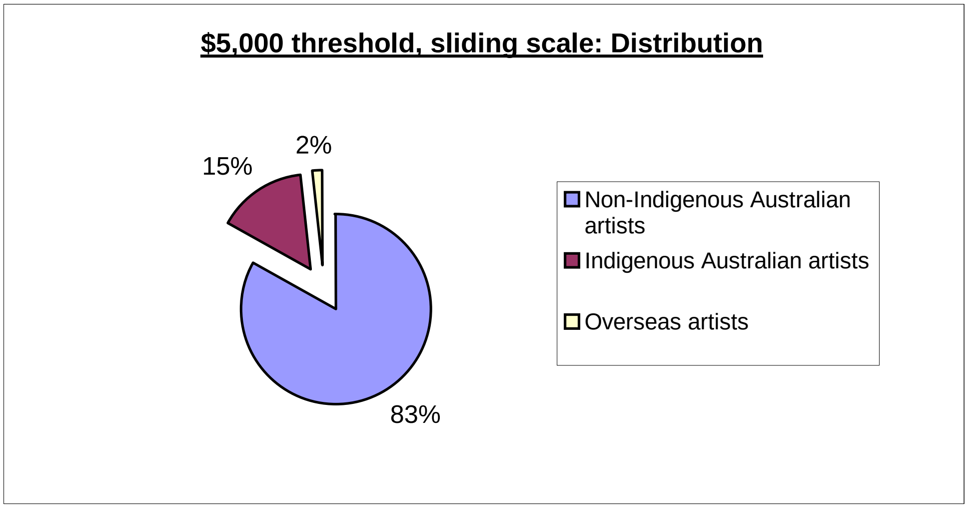

**Indigenous artists**

In terms of benefits to Indigenous artists, their families and communities, of 67 artists sharing in royalties of $217,500 in the 2003 art auction sales, $112,000 (or 51%) would go to the estates of five deceased artists. The remaining $106,000 would be divided amongst 62 artists, with an average royalty payment of $1,700.

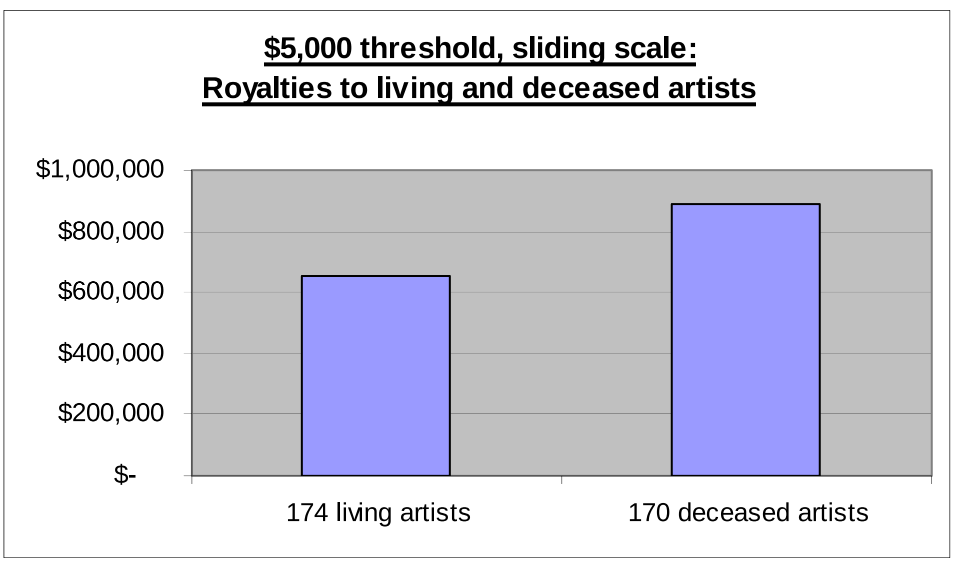


## 2. Sliding scale on sales from $5,000: Overview of benefits

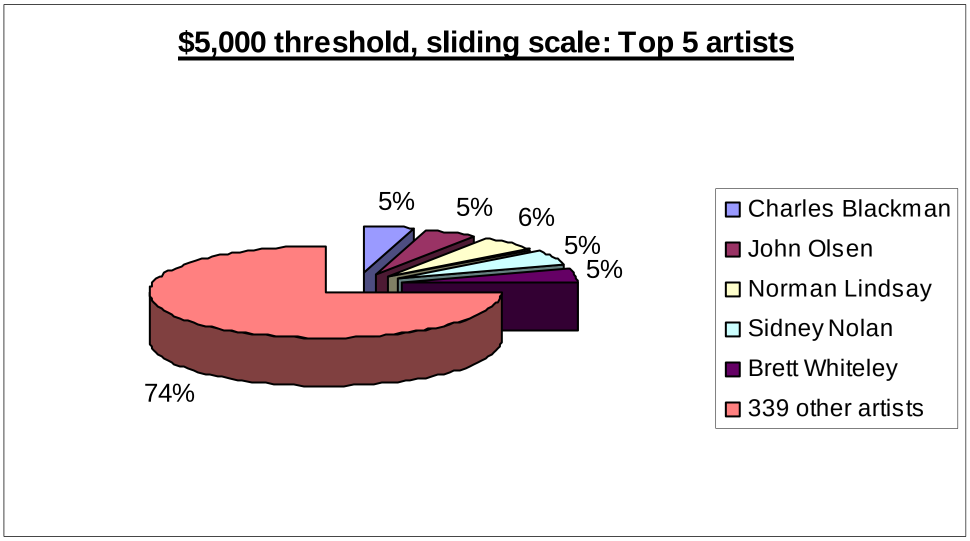
This model captures 66% of the art auction sales in 2003—or $60.96 million—and distributes $1.54 million between 344 artists (following deduction of an 18% administration fee).




**Royalties to living and deceased artists**
Of the 344 artists captured under this model, there is a fairly equal proportion of living to deceased artists. However, the deceased artists' estates would be eligible to receive 58% of total royalties payable.




**Top 5 artists**
As under the $8,000 threshold model, the same top five highest grossing artists (or their estates) would together receive around $392,000, or 26% of the total royalties payable—although each would receive marginally more total royalties than under the previous model. Benefits to this first tier range from around $70,000 to $85,000.



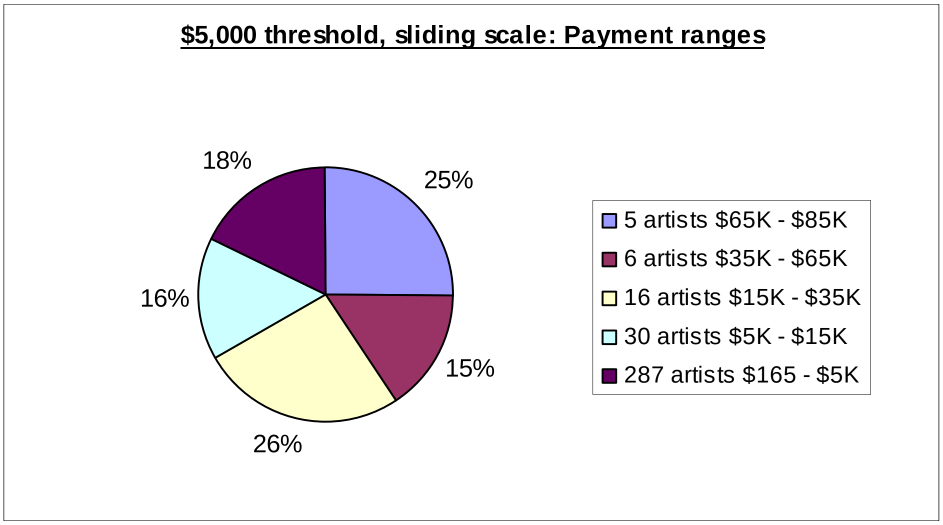

**Second tier artists**
Payments to six artists under a second tier would range from $35,000–$45,000. These artists (or their estates) would together receive a total of $235,000, or 15% of the total royalties payable under this model. This tier comprises two living artists and four deceased artists.

The 11 highest-selling artists (or their estates) would receive 41% of the total royalties payable under this model, with individual payments ranging from $35,000 to $85,000.

**Other artists**
A third tier may be identified as those artists that would receive between $15,000 and $35,000 under this model. This tier captures 16 artists sharing in around $400,000, or 26% of the total royalties payable. Again, no living Indigenous artists would qualify to receive royalties under the first, second or third tier. However this third tier captures three deceased Indigenous artists.

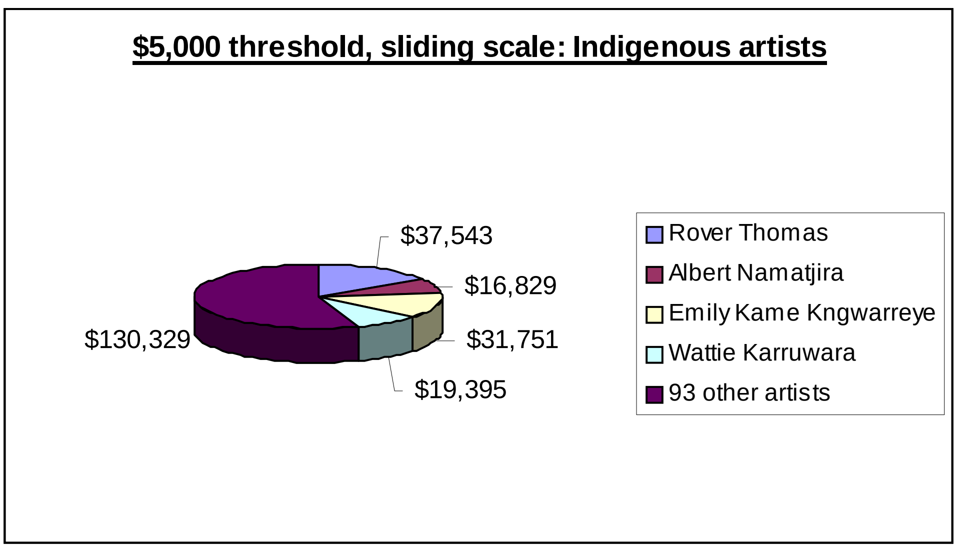
The $5,000–$15,000 next payment tier encompasses 30 artists sharing in $240,000, or 16% of total royalties. This tier includes three Indigenous artists.

Payments to a bottom tier of 287 artists would range from between around $165 to $5,000—with an average royalty payment of $970—and comprising $276,000, or 18% of total royalties payable.



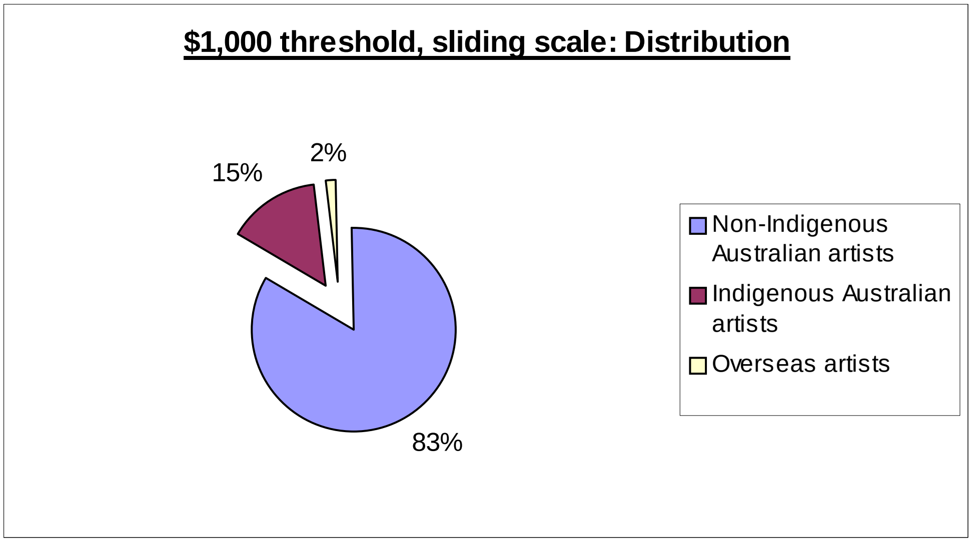

### Indigenous artists

Also under this model, of 97 Indigenous artists sharing in royalties of $236,000 in the 2003 art auction sales, $106,000 (or 45%) would go to the estates of four deceased artists.  The remaining $130,000 would be divided amongst 93 artists, with an average royalty payment of $1,400.

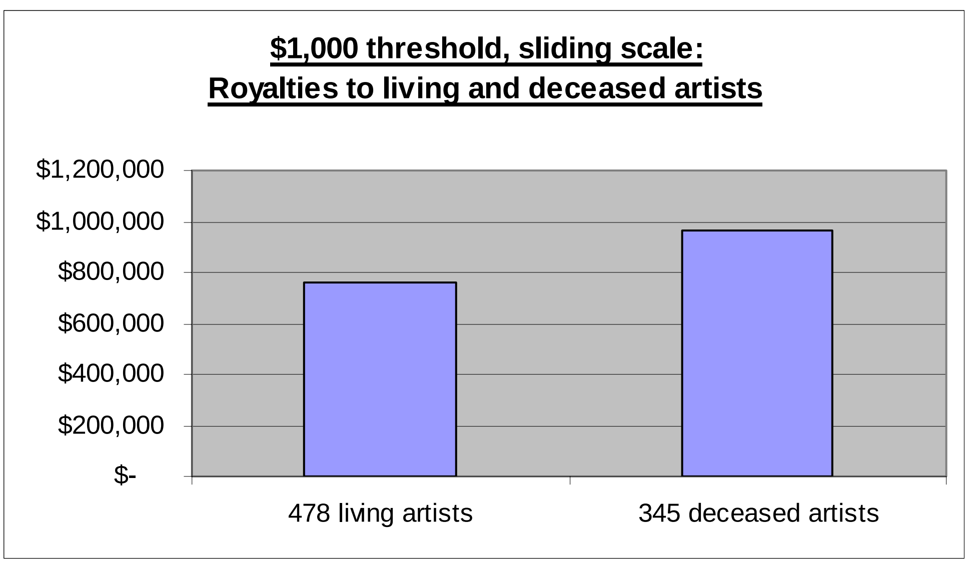


## 3. Sliding scale on sales from $1,000: Overview of benefits

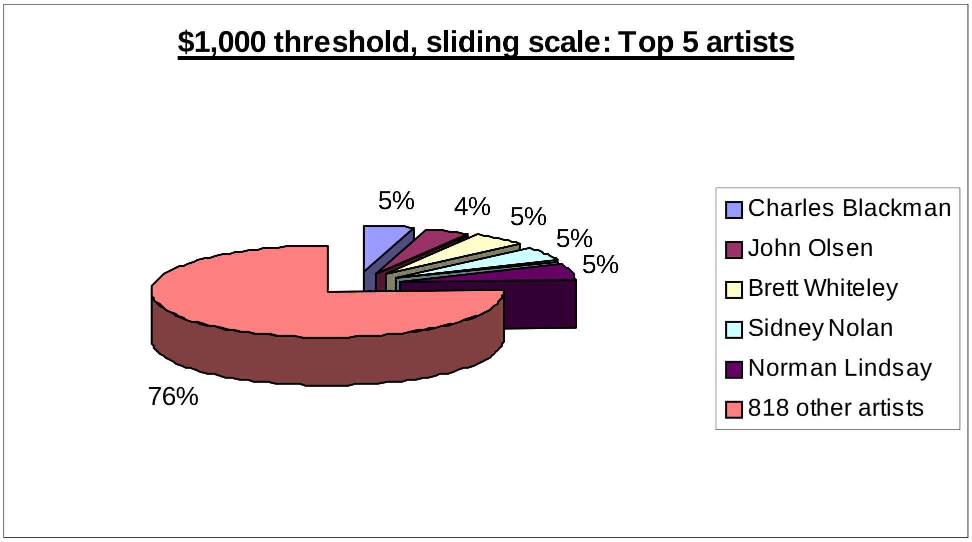
This model captures a significantly higher number of artists than either of the previous models—823—and distributes $1.72 million between these artists (following deduction of an 18% administration fee). The proportion of 2003 art auction sales captured is $65.89 million or 72% of total sales.




**Royalties to living and deceased artists**
Of the 823 artists captured under this model, 58% are living and 42% are deceased, with the deceased artists' estates eligible to receive 56% of total royalties payable.




**Top 5 artists**
In terms of the top five highest grossing artists (or their estates), this model continues the theme of the previous models, with the same five artists securing the top positions. With the lower threshold the payment levels to the top five increase, with payments ranging from $73,000–$91,000. These artists would together receive around $418,000, or 24% of total royalties payable.




**Second tier artists**

Payments to seven artists under a second tier would range from $37,000–$47,000. These artists (or their estates) would together receive a total of $279,000, or 16% of the total royalties payable under this model. This tier comprises three living artists and four deceased artists. Sales by Rover Thomas contribute to this deceased Indigenous artist once again making the second tier.

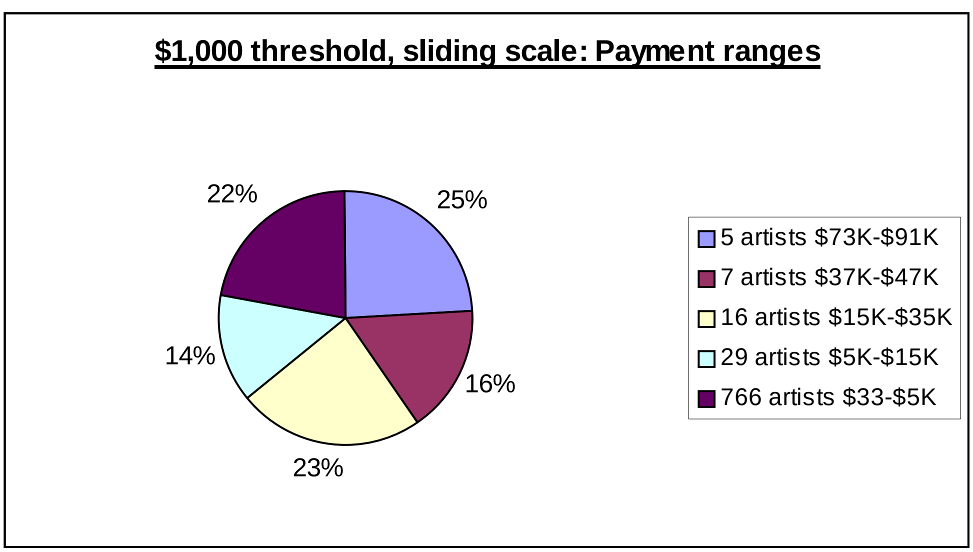
The top two payment tiers acquire 40% of the total royalties payable, with 12 artists receiving payments ranging from $37,000–$91,000.

**Other artists**

With payments ranging from $15,000–$35,000, the third tier captures 16 artists sharing in around $405,000, or 23% of the total royalties payable. However, the lower threshold does not mean that any living Indigenous artists would be included in the third tier.

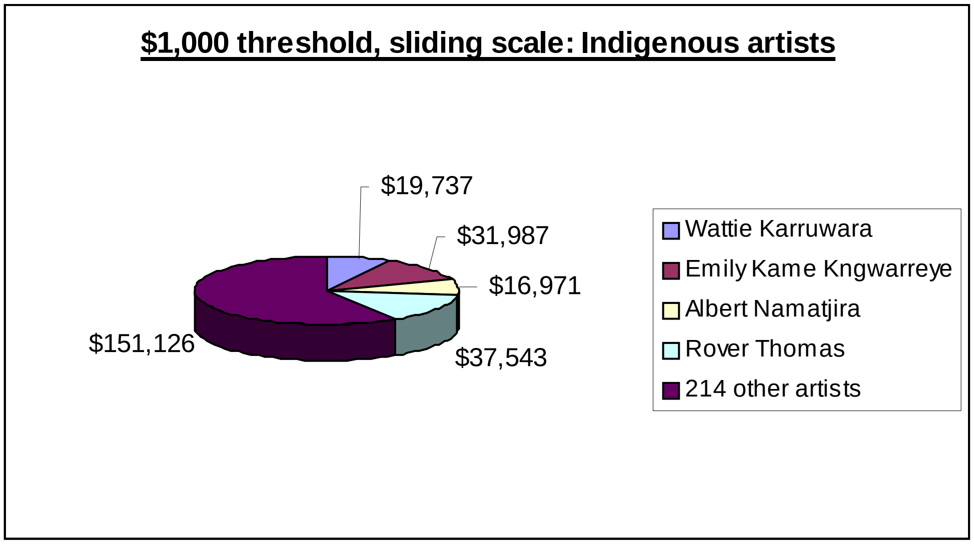
The $5,000–$15,000 next payment tier encompasses 29 artists sharing in $239,000, or 14% of total royalties. This tier includes six Indigenous artists.

Payments to a bottom tier of 766 artists would range from between around $33 to $5,000—with an average royalty payment of $500—and comprising $384,000, or 22% of total royalties payable.



**Indigenous artists**

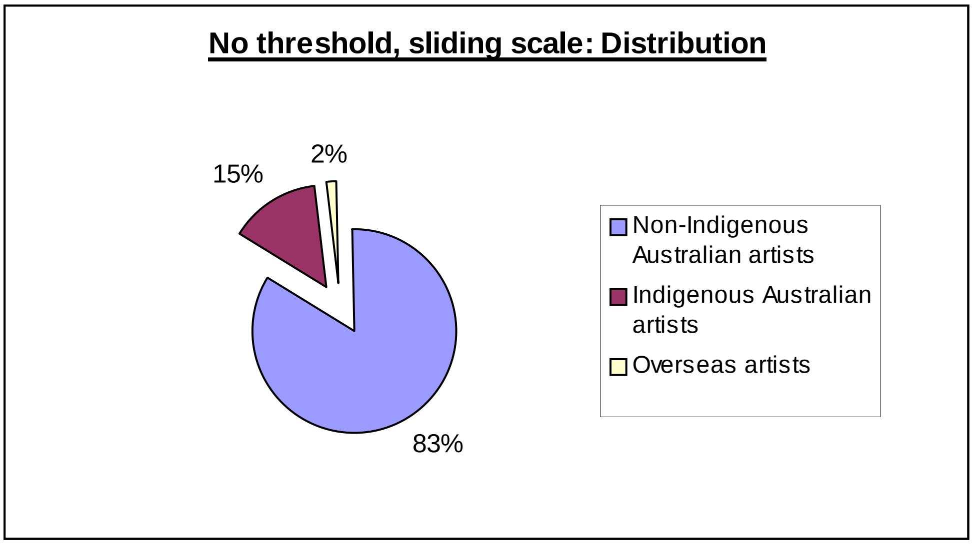
This model captures sales by more Indigenous artists than the previous models—218. These artists would share in $257,000, or 15% of total royalties payable. Interestingly, the majority of these artists (or their estates)—72%—would receive payments of less than $500.



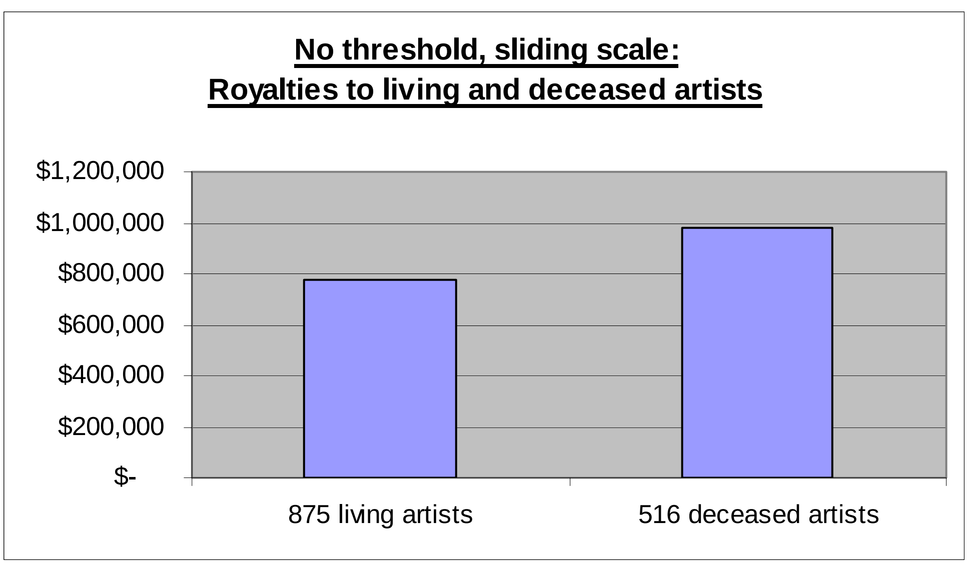
## 4. Sliding scale on all resales: Overview of benefits

In applying a resale royalty to all secondary sales, this model encompasses the largest number of artists and also makes the most insignificant payments to artists—many payments are under $10 and a notable proportion of these are as low as $3.

Based on 2003 art auction sales, this model captures 73% of sales, or $67.35 million worth of sales. 1391 artists are eligible to receive royalties totalling $1.75 million under this model.

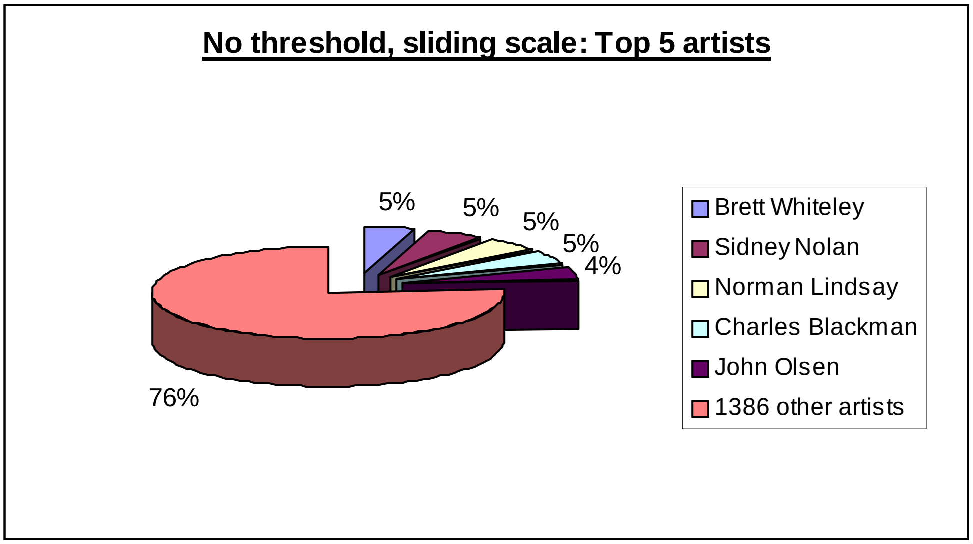



**Royalties to living and deceased artists**
Of the 1391 artists captured under this model, 63% are living and 37% are deceased. Despite the increased number of living artists eligible to receive royalties, deceased artists' estates account for 56% of total royalties payable.



**Top 5 artists**

The same five artists receive the lion's share of royalties under this model, with payments ranging from $73,000–$91,000. These artists would together receive around $420,000, or 24% of total royalties payable. These results are the same as the outcomes for these artists under the $1,000 threshold model, which indicates that these artists do not tend to sell works for less than $1,000.




**Second tier artists**

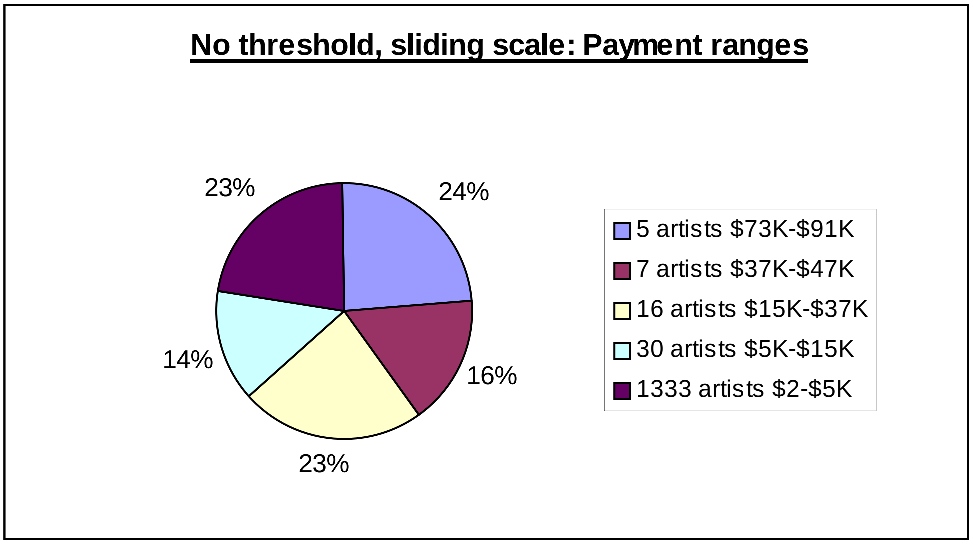
A second group of seven artists would share in $279,000—16% of total royalties—with payments ranging from $37,000–$47,000. This group comprises the same three living artists and four deceased artists as under the $1,000 threshold model.

This means that the 12 artists in the top two payment ranges are again eligible to receive 40% of total royalties.

**Other artists**

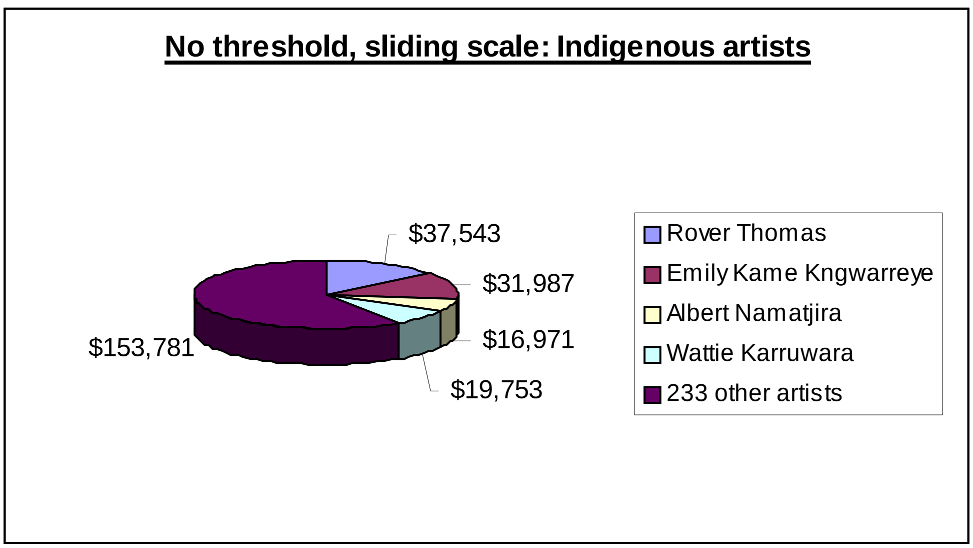
The third payment range includes the same 16 artists as under the $1,000 threshold, again receiving 23% of total royalties payable, with payments ranging from $15,000–$37,000. There are 1333 artists in the under $5,000 payment range, accounting for 23% of royalties payable.

It is also interesting to note that there are many artists whose work resold at auction in 2003 attracting a minimal resale royalty. For instance, 52 works by Max Mannix were resold in 2003 with a combined potential royalty value of only $1,180. The payments to Mr Mannix would range from just $4–$75.



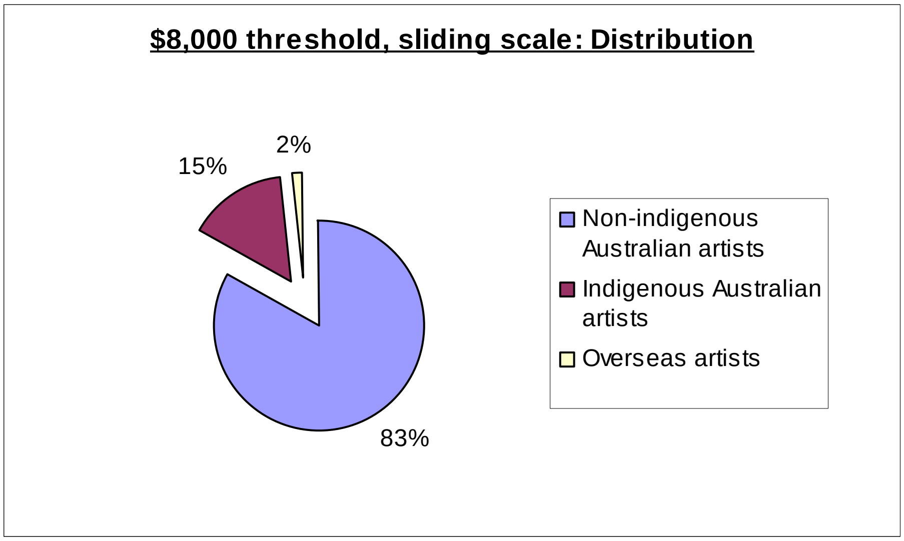

**Indigenous artists**

237 Indigenous artists would be eligible to receive royalties under this model—19 more than under the $1,000 threshold model. The families/communities of four deceased artists would receive 41% of the total royalties available for Indigenous artists under this model.

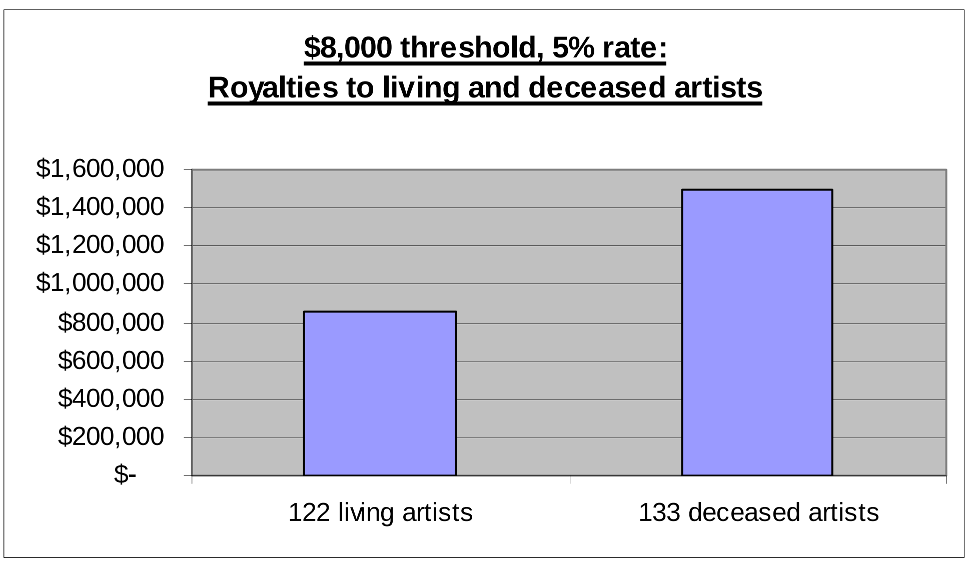


## 5. 5% on sales from $8,000: Overview of benefits

This model captures 63% of the art auction sales in 2003 and distributes $2.36 million between 255 artists—$0.93 million more than the sliding scale model with the same threshold.

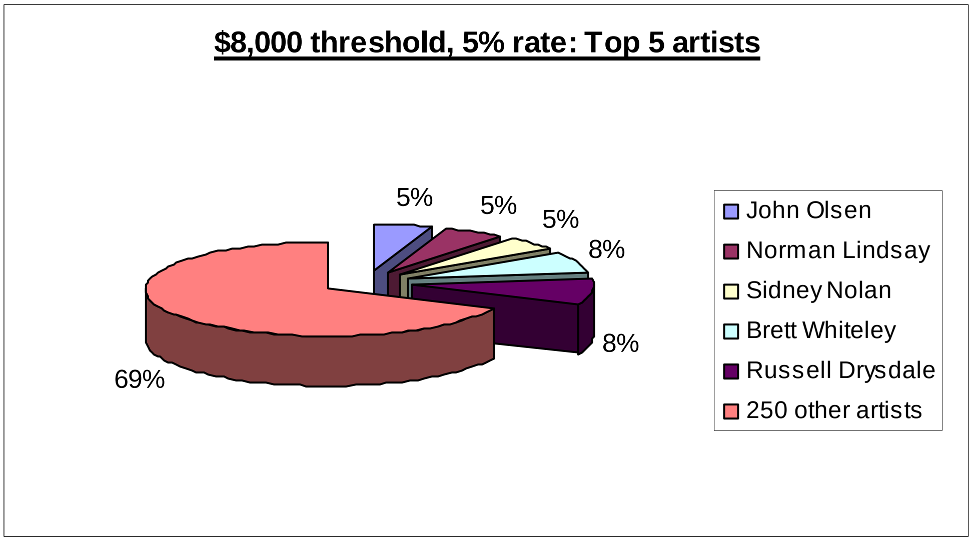



**Royalties to living and deceased artists**
This model reveals a different proportion of royalties to living and deceased artists captured under the 5% rate proposal, compared with the sliding scale proposal with the same threshold. The proportion of royalties to deceased artists' estates rises to 63%—compared with 58% under the sliding scale model.



**Top five artists**

The top five artists would together receive around $746,000, or 32% of the total royalties payable, with payments ranging from $120,000–$200,000. Only one of these artists is living.




**Second tier artists**

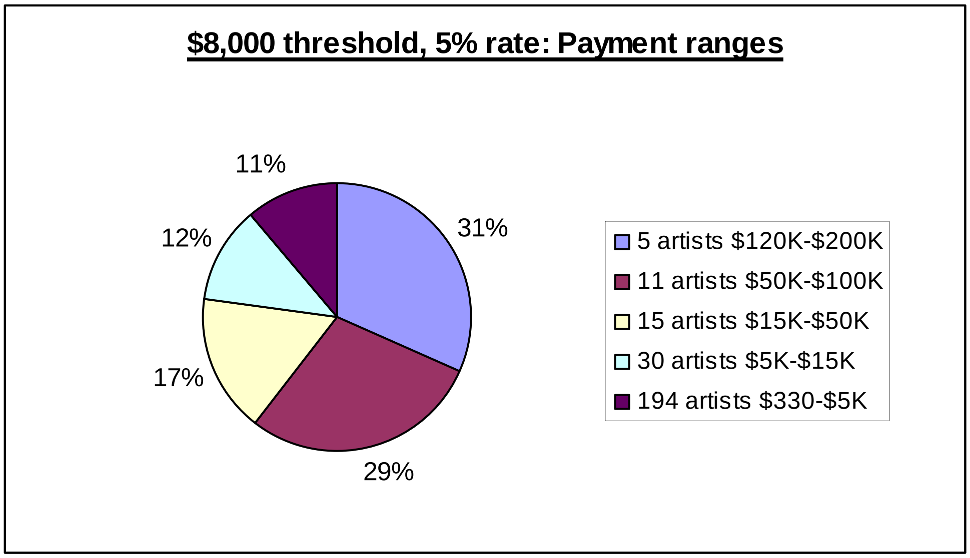
The second tier of 11 artists would each receive between $50,000 and $100,000. These artists (or their estates) would together receive a total of $685,000, or 29% of the total royalties payable under this model. This group comprises five living artists and six deceased artists.

This means that the 16 highest-selling artists (or their estates) would receive over 60% of the total royalties payable under this model, with individual payments ranging from $50,000 to $200,000.

**Other artists**

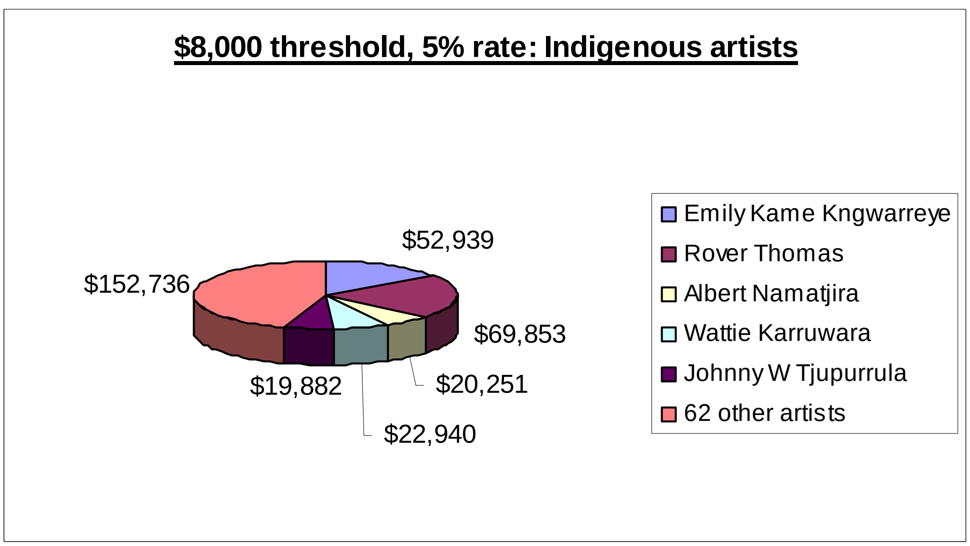
A third tier may be identified as those artists that would receive between $15,000 and $50,000 under this model. This tier captures 15 artists sharing in $394,000, or 17% of the total royalties payable. A fourth tier of 30 artists would share in $273,000, or 12% of total royalties, with payments from $5,000 to $15,000.

Payments to a bottom tier of 194 artists would range from between around $330 to $5,000—with an average royalty payment of $1,354—and comprising $263,000. This means that 76% of total artists would share in only 11% of total royalties.



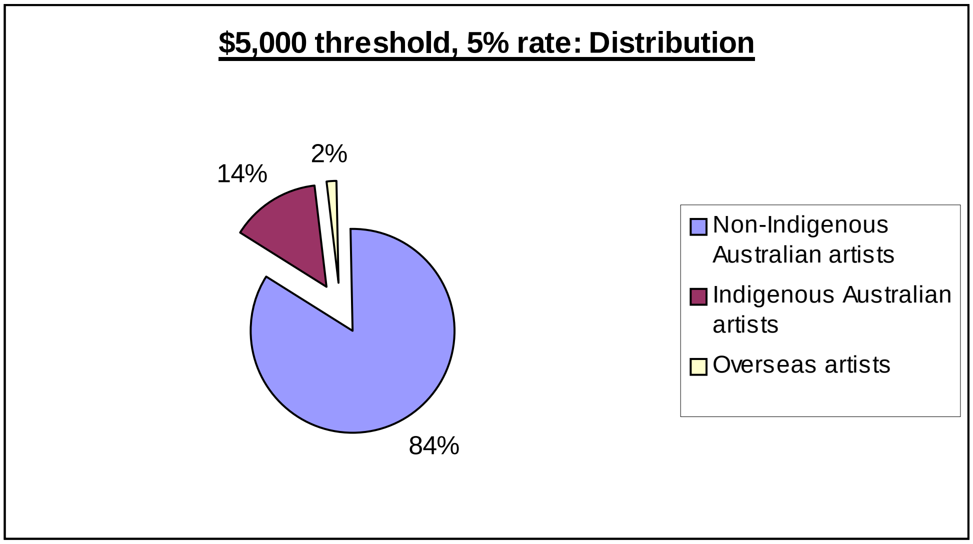

**Indigenous artists**

Of 67 Indigenous artists sharing in royalties of $339,000 from the 2003 art auction sales, 55% would be shared between the families/communities of five deceased artists. The average royalty payment to the remaining 62 Indigenous artists would be $2,460. The highest payment to a living Indigenous artist would be $10,400.

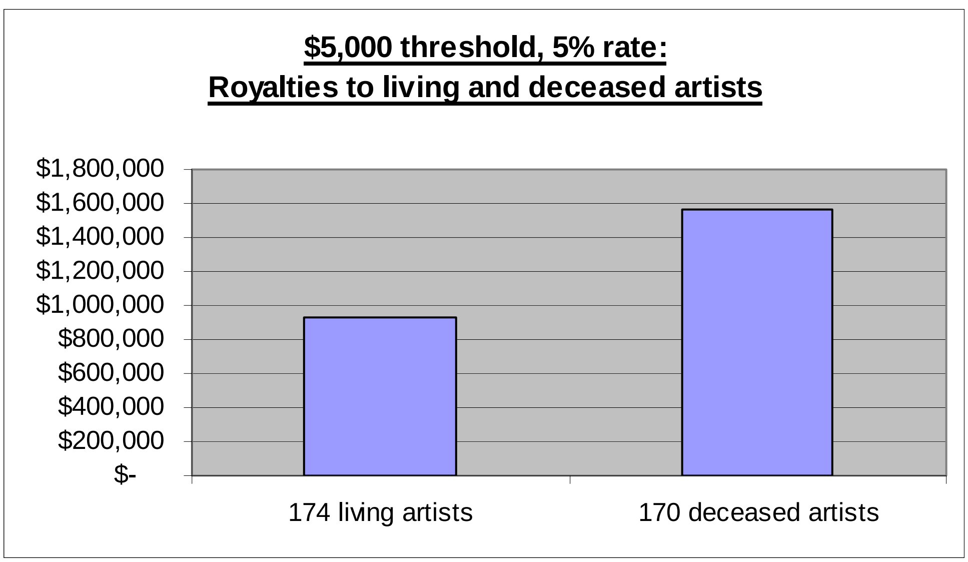


## 6. 5% on sales from $5,000: Overview of benefits

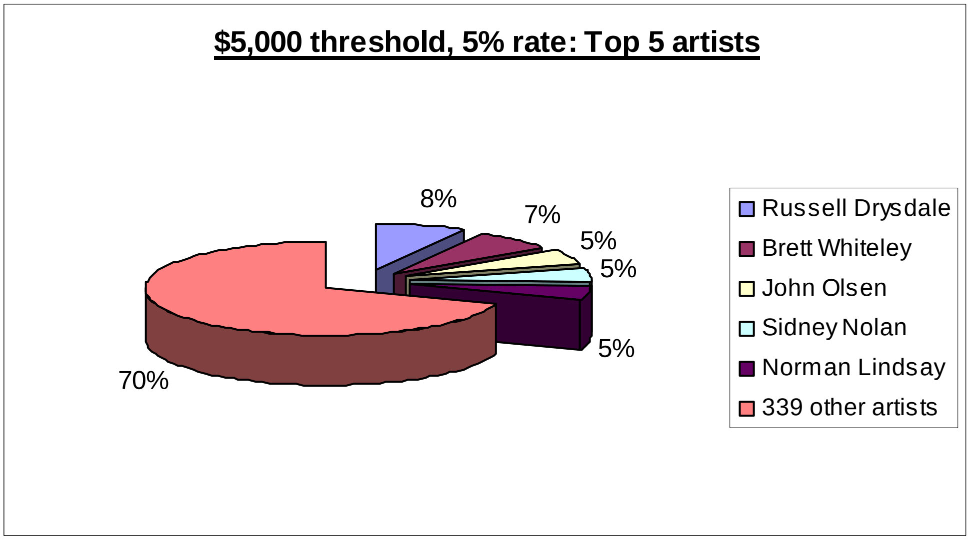
This model captures 66% of the art auction sales in 2003—or $60.96 million—and distributes $2.5 million between 344 artists.




**Royalties to living and deceased artists**
As under the $8,000 threshold model, when the 5% rate is applied to this threshold level, the proportion of payments to deceased artists increases—from 58% to 63%.




**Top 5 artists**
As under the $8,000 threshold model, the same top five highest grossing artists (or their estates) would receive the most benefit from this model, sharing in $767,000, or 30% of the total royalties payable. Payments to these five artists would range from around $124,000 to $204,000.

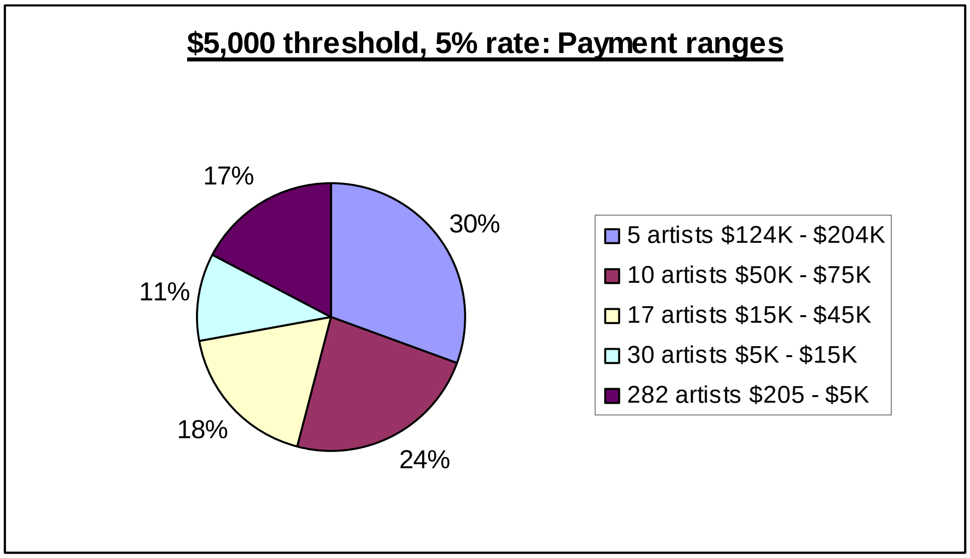



**Second tier artists**
Payments to ten artists under a second tier would range from $50,000–$74,000. These artists (or their estates) would together receive a total of $590,000, or 24% of the total royalties payable under this model. This tier comprises four living artists and six deceased artists—including the two deceased Indigenous artists, Rover Thomas and Emily Kame Kngwarreye.

This means that the 15 highest-selling artists (or their estates) would receive 54% of the total royalties payable under this model, with individual payments ranging from $50,000 to $204,000.

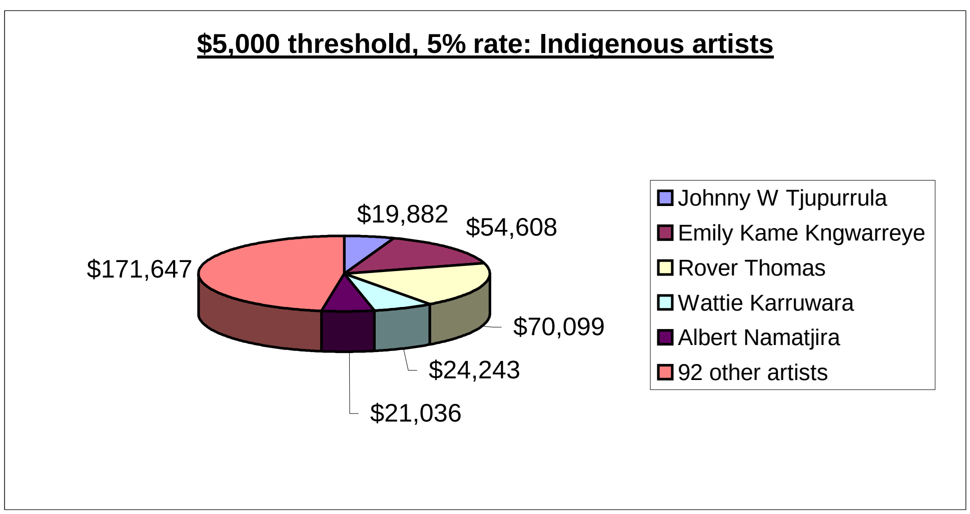
**Other artists**
A third tier may be identified as those artists that would receive between $15,000 and $50,000 under this model. This tier captures 17 artists sharing in around $448,000, or 18% of the total royalties payable. Another 30 artists would receive royalty payments of between $5,000 and $15,000, sharing in around $264,000.

Payments to a bottom tier of 282 artists would range from between around $205 to $5,000—with an average royalty payment of $1,500—and comprising $432,000, or 17% of total royalties payable.



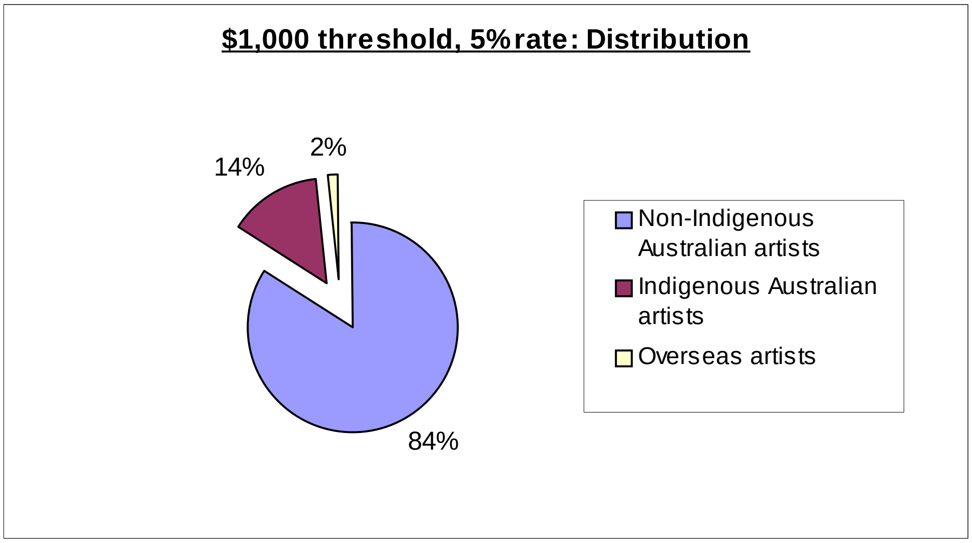

**Indigenous artists**
Also under this model, of 97 Indigenous artists sharing in royalties of $362,000 in the 2003 art auction sales, no living Indigenous artists would receive payments in the first and second payment ranges. The highest-selling living Indigenous artist, Dorothy Napangardi, would receive $10,400.

The estates of five deceased Indigenous artists would qualify to receive 53% of the total royalties to Indigenous artists. The remaining $172,000 would be divided amongst 92 artists, with an average royalty payment of $1,850.



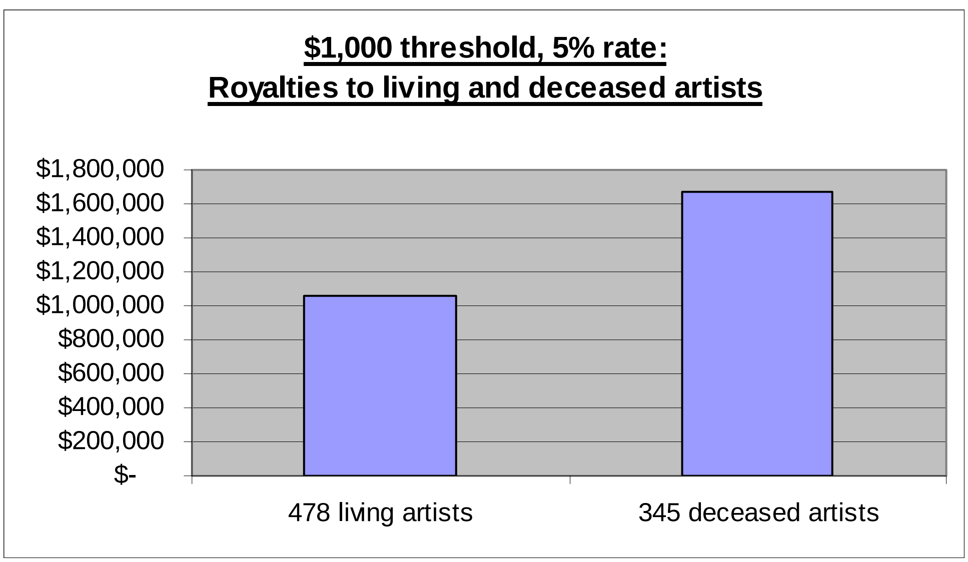
## 7. 5% on sales from $1,000: Overview of benefits

This model captures 72% of the art auction sales in 2003—or $66 million—and distributes $2.7 million between 823 artists (following deduction of an 18%

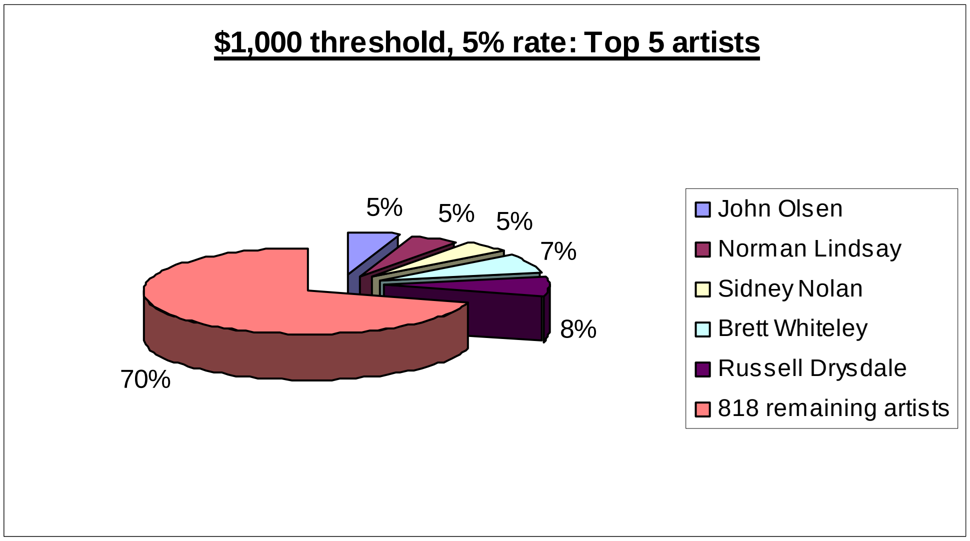



administration fee).

**Royalties to living and deceased artists**
An increased number of living artists are captured under this proposal. However, the proportion of payments to deceased artists accounts for 61% of total royalties when a 5% rate is applied.



**Top 5 artists**
The top five highest grossing artists would together receive around $0.79 million, or 30% of the total royalties payable, with payments ranging from around $130,000–$207,000.

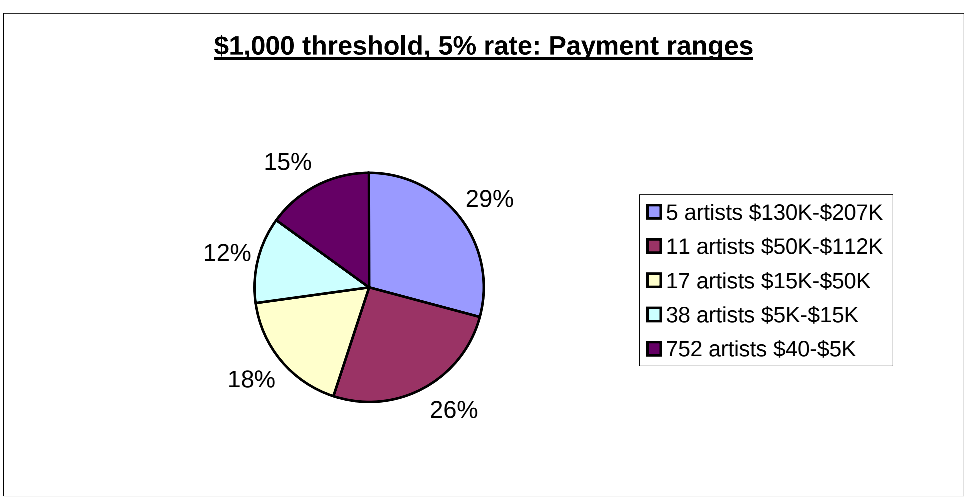



**Second tier artists**
A second tier of 11 artists would share in around $0.7 million, or 26% of the total royalties payable, with payments of between $50,000 and $112,000.

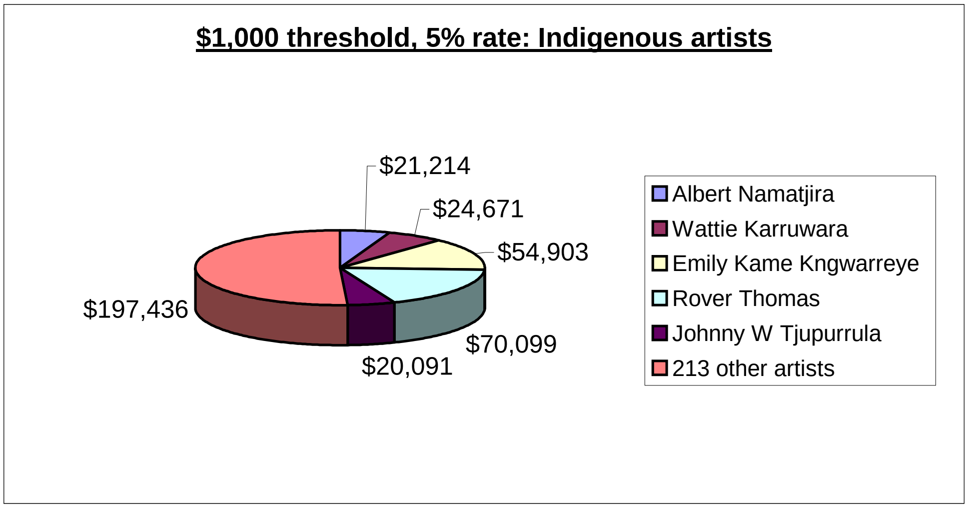
Significantly, under this threshold the 16 artists in the top two payment ranges would account for 56% of the total royalties payable.

**Other artists**
A third tier of 17 artists would each receive between $15,000 and $50,000 from a total of $480,000, or 18% of the total royalties payable. A fourth tier comprises 38 artists sharing in $330,000 or 12% of total royalties payable, with payments ranging from $5,000 to $15,000.

The remaining 752 artists would share in around $410,000, with payments ranging from $40 to $5,000. Of these 752 artists, around 73% would receive $500 or less and, to extrapolate further, 28% would receive $100 or less.

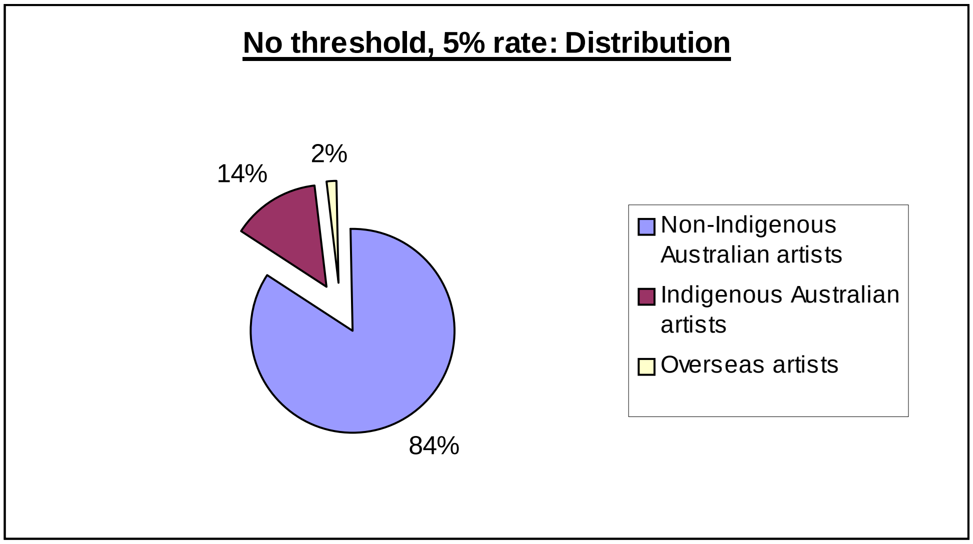


**Indigenous artists**
218 Indigenous artists would be eligible to receive resale royalties under this model, with an average royalty payment of around $1,800. Of these artists, 21% would receive less than $100.

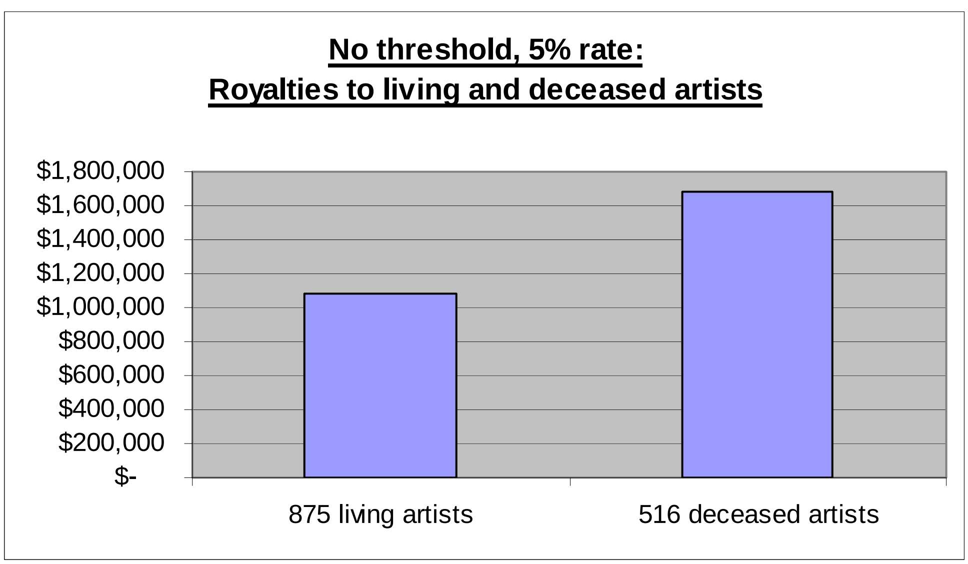


## 8. 5% rate on all resales: Overview of benefits

This model captures 73% of sales, or $67.35 million worth of sales. 1391 artists are eligible to receive royalties totalling $2.76 million under this model—over $1 million more than when the sliding scale model is applied to all resales.

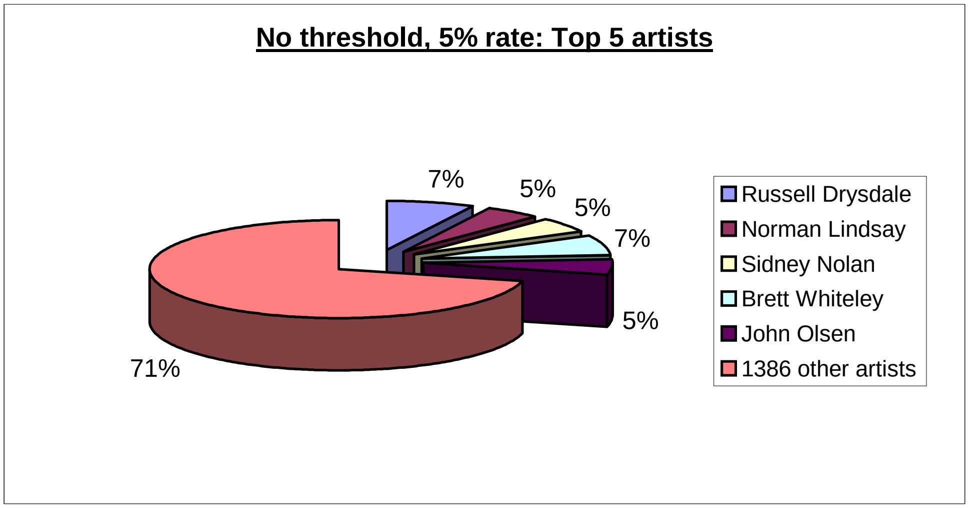



**Royalties to living and deceased artists**
Under this model, the payments to living and deceased artists are fairly similar as the outcomes under the $1,000 threshold proposal—39% to living artists and 61% to deceased artists' estates.




**Top 5 artists**
The top five highest grossing artists would together receive around $0.79 million, or 29% of the total royalties payable, with payments ranging from around $130,000–$207,000. Interestingly, there is a significant difference between the magnitude of royalties that would go to the estate of Russell Drysdale under this model, compared with the sliding

scale model applied to all resales: $207,000 compared with $47,000. This is evidence that the flat 5% rate has the potential to boost payment levels to individual artists considerably, particularly if a few works are resold for very high prices, as was the case for a couple of Drysdale's works in 2003.

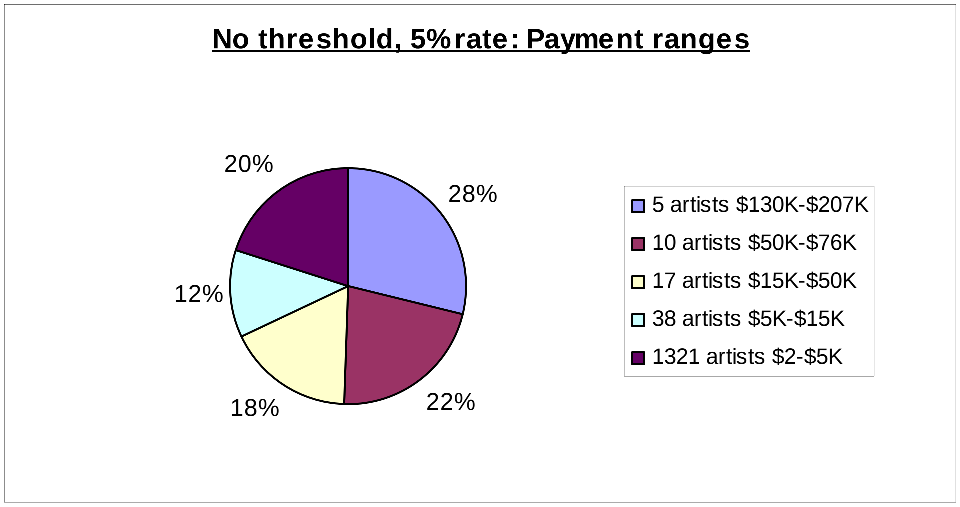



**Second tier artists**
A second tier of 10 artists would each receive between $50,000 and $76,000. These artists (or their estates) would together receive a total of $597,000, or 22% of the total royalties payable under this model. This tier comprises four living artists and six deceased artists.

This means that the 15 highest-selling artists (or their estates) would receive 51% of the total royalties payable under this model, with individual payments ranging from $50,000 to $207,000.

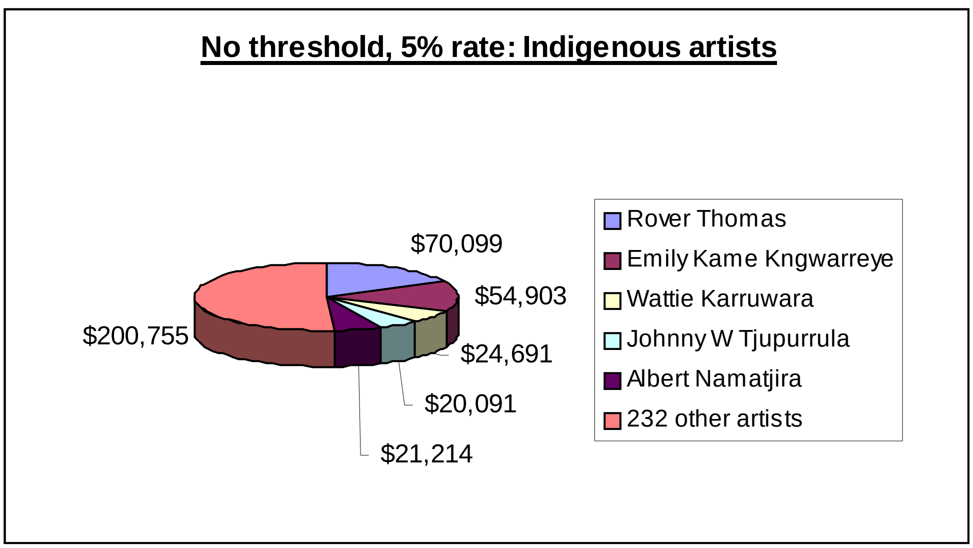
**Other artists**
A third tier may be identified as those artists that would receive between $15,000 and $50,000 under this model. This tier captures 17 artists sharing in $485,000, or 18% of the total royalties payable.

Payments to a fourth tier of 38 artists would range from between around $5,000 to $15,000 and comprise $332,000, or 12% of total royalties payable. A bottom tier of 1321 artists would share in royalties of $552,000, or 20% of the royalties.




**Indigenous artists**
Of 237 Indigenous artists sharing in royalties of $392,000 in the 2003 art auction sales, no living Indigenous artists would receive payments in the first, second and third payment ranges.

The estates of five deceased Indigenous artists would qualify to receive 49% of the total royalties to Indigenous artists. The remaining $200,000 would be divided amongst 232 artists, with an average royalty payment of $865.

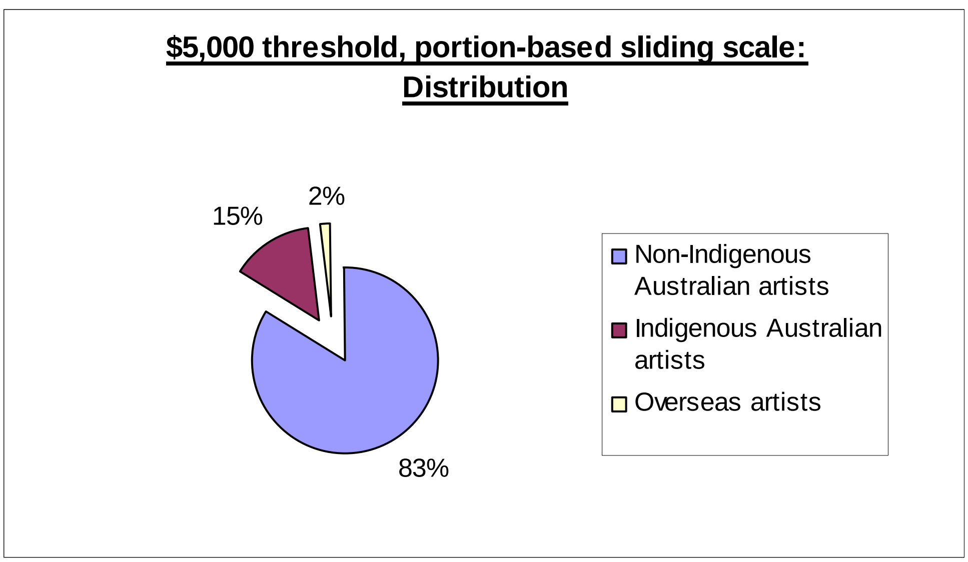


## 9. Portion-based sliding scale on sales from $5,000: Overview of benefits

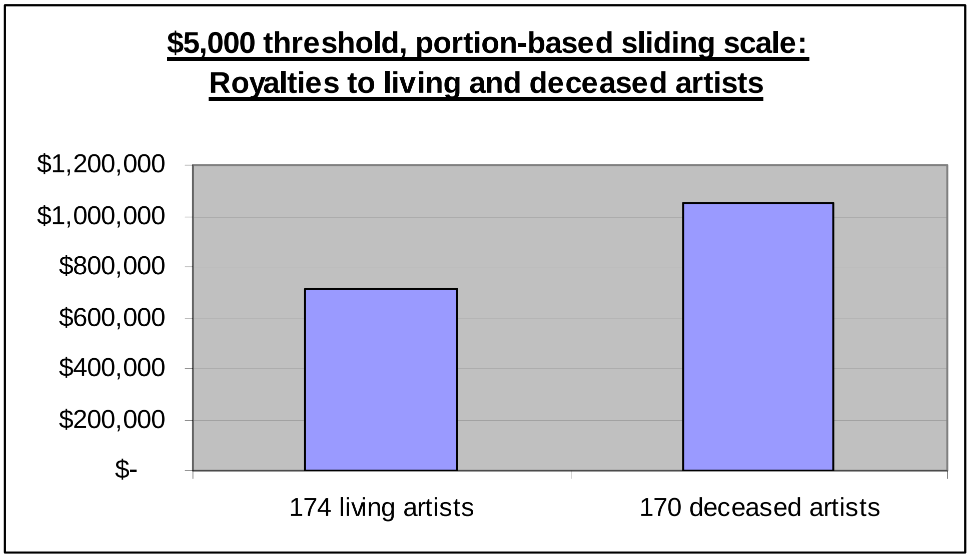
This model, rather than being based on a percentage of the sale price of the artwork, is based on the following sliding scale:

- no resale royalty payable on sales up to the minimum sale price threshold
- 4% for the portion of the sale price up to $100,000
- 2% for the portion of the sale price from $100,000 to $500,000
- 0.5% for the portion of the sale price exceeding $500,000.

This model captures 66% of sales, or $60.96 million worth of sales. As with the other models based on the $5,000 minimum sale price threshold, 344 artists are eligible to receive royalties. The total royalties distributed to artists would be $1.76 million under this model—indicating that the portion-based model fits between the more straightforward sliding scale model based on the sale price (royalties of $1.54 million) and the flat 5% royalty rate model (royalties of $2.5 million).

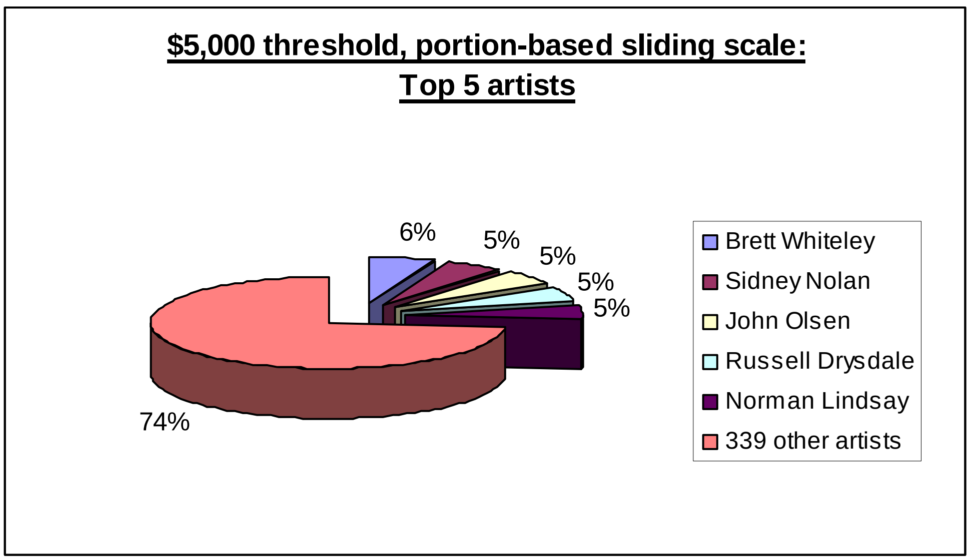



**Royalties to living and deceased artists**
Under this model, the payments to living and deceased artists are fairly similar as the outcomes under the other $5,000 threshold proposal, with 40% to living artists and 60% to deceased artists’ estates.




**Top 5 artists**

The top five highest-grossing artists would together receive around $468,000, or 26% of the total royalties payable under this model, with payments ranging from around $84,000–$106,000. Only one living artist is included in the Top 5.




**Second tier artists**

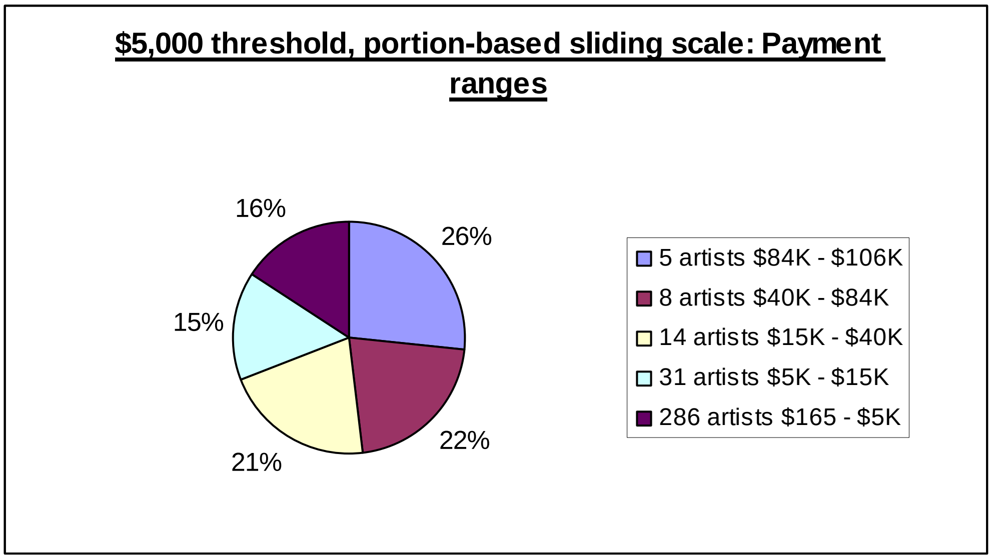
A second tier of eight artists would each receive between $40,000 and $84,000. These artists (or their estates) would together receive a total of $379,000, or 22% of the total royalties payable under this model. This tier comprises four living and four deceased artists.

This means that the 13 highest-selling artists (or their estates) would receive 48% of the total royalties payable under this model.

**Other artists**

A third tier of 14 artists would each receive between $15,000 and $40,000 from a total of $373,000, or 21% of the total royalties payable. The fourth tier comprises 31 artists sharing in $262,000 or 15% of total royalties payable, with payments ranging from $5,000 to $15,000.

The remaining 286 artists would share in around $280,000, with payments ranging from $165 to $5,000. This means that 83% of the total number of artists would share in only 16% of total royalties.

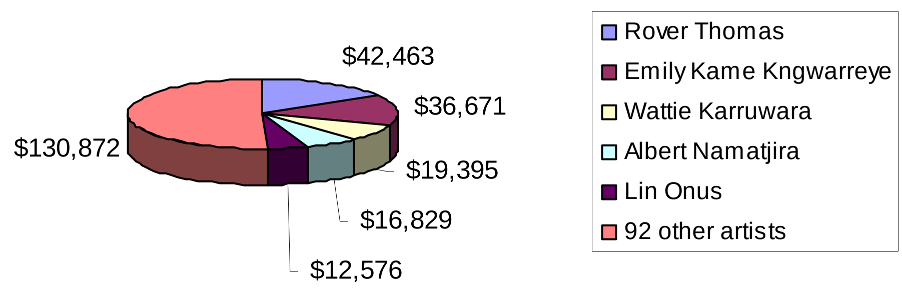



**Indigenous artists**

As with the other models tested, of the 97 Indigenous artists sharing in royalties of $259,000 under this model, no living Indigenous artists would qualify to receive payments in the higher first, second and third payment ranges.

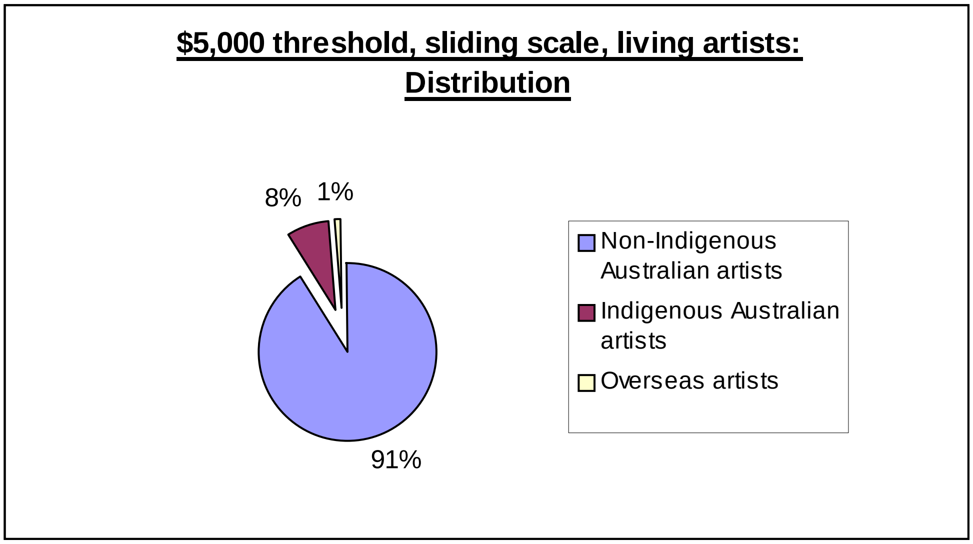
The estates of five Indigenous artists would be eligible to receive 49% of the total royalties to Indigenous artists. The remaining $131,000 would be divided between 92 artists, with an average royalty payment of $1,424.

**$5,000 threshold, portion-based scale: Indigenous artists**



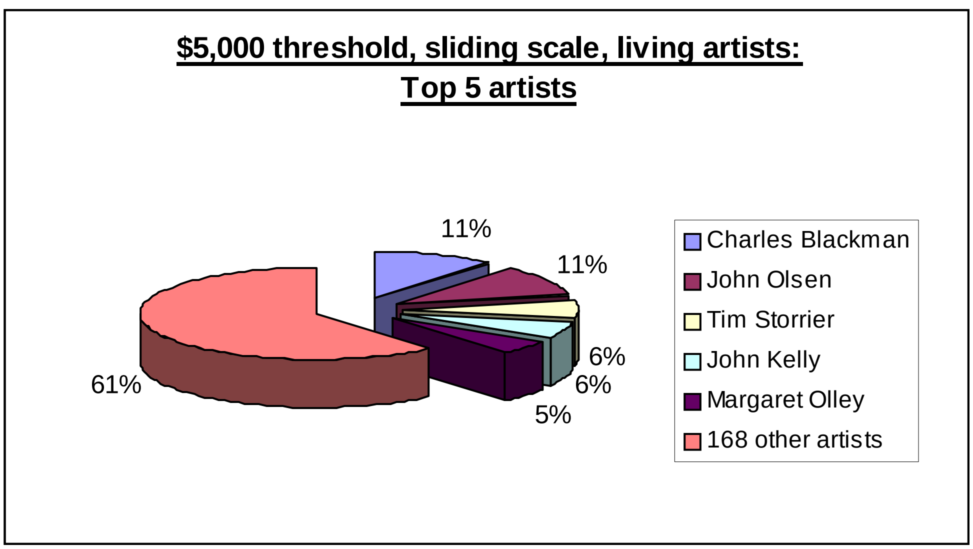
## 10. Living artists only—Sliding scale on sales from $5,000: Overview of benefits

This model captures 25% of the art auction sales in 2003—or $22.7 million—and distributes $0.65 million between 173 living artists (following deduction of an 18% administration fee).



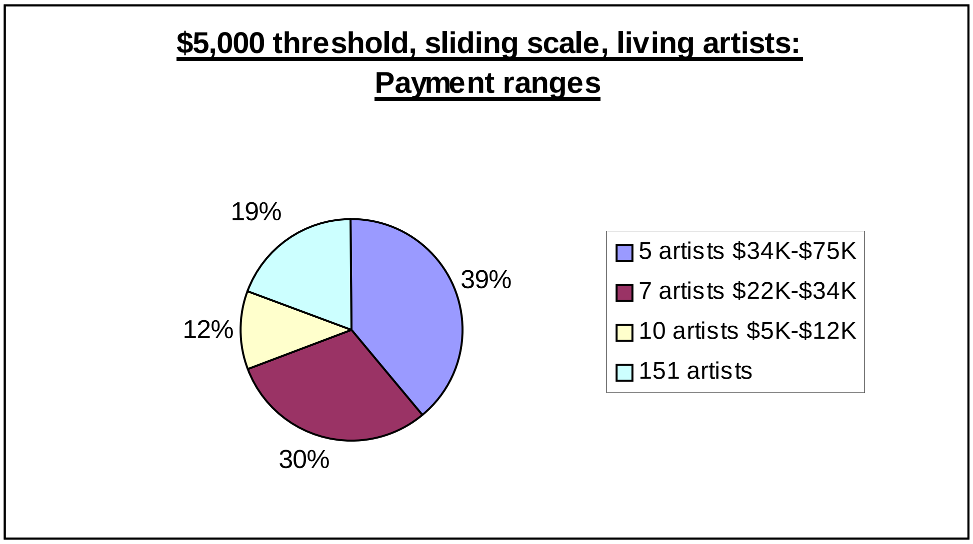

**Top 5 artists**

Under this model, the top five highest grossing artists would together receive around $255,000, or 39% of the total royalties payable, with payments ranging from around $34,000 to $75,000.



**Other artists**
A second tier of seven artists would share in around $198,000, or 30% of the total royalties payable, with payments of between $22,000 and $34,000. A third tier of 10 artists would each receive between $5,000 and $12,000 from a total of $76,000 or 12% of the total royalties payable.

The remaining 151 artists would share in around $127,000, with payments ranging from $165 to $5,000 and an average royalty payment of $839.




**Indigenous artists**
For Indigenous artists specifically, Dorothy Robinson Napangardi is the only living artist who would receive more than $8,000 under this model. The remaining 50 living Indigenous artists whose work resold at auction in 2003 would receive benefits ranging from $165 to $5,000

## APPENDIX C: POSSIBLE QUESTIONS

In preparing your submission you may wish to comment on the questions listed below. The questions are provided as a guide for submitters and are not intended to be exhaustive or to restrict feedback on any other relevant issues.

1. Should Australia introduce a resale royalty arrangement? What are your primary reasons for your support or lack of support for such an arrangement?
2. What should be the primary objectives of a resale royalty arrangement in the Australian environment?
3. Who do you consider should be the principal targets of a resale royalty arrangement and why?
4. What kind of resale royalty arrangement would best deliver benefits to the intended beneficiaries and why?
   - A fully legislated scheme;
   - industry self-regulation; or
   - contract-based resale royalty.
5. Are there any unique features of the Australian art market which need to be considered in designing a workable resale royalty scheme?
6. What are the most important principles underpinning the choice of model or the form of resale royalty arrangement? (eg. a scheme that provides royalty payments to the greatest number of living artists, or limits the impost on small business, or excludes works that decrease in value, etc)
7. What works should be covered by the arrangement and why?
8. What duration should apply and why?
9. Should artists be able to assign, waive or sell the resale royalty in their works, and why?
10. Should there be a threshold level for the resale of works, and if so at what level should that be set and why?
11. What rate of royalty should apply and why? Also, should the royalty be set as a flat rate or on a sliding scale and why?
12. What type of organisation should administer any arrangement and what factors should be used to assess and ensure the performance of such a body? (eg. highest rate of return to artists, transparency of process, administrative efficiency, low costs etc.)
13. If you do not support a resale royalty, do you consider that alternative support arguments are more appropriate? If so, what kind?

13\. What do you consider is the likely impact of your preferred position on the possible groups affected and on the Australian art market?

14\. Do you have any other issues?

## APPENDIX D: BIBLIOGRAPHY

**Books and other publications, published and unpublished articles, legislation, and relevant submissions to the Visual Arts and Craft Inquiry.**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