

Chapter 12

Resale royalty

12.1 This chapter discusses the feasibility of the introduction of a resale royalty scheme in Australia.

12.2 A resale royalty, also called a *droit de suite*, entitles an artist or their heirs to royalties when a work of art is resold on the contemporary art market. In essence the resale royalty right is a form of copyright entitlement held by the original artist. Resale royalty-type arrangements are well established for films, video and audio-recording artists, and some broadcast performances, but are less well established in the visual arts sector.

Myer Report

12.3 In 2002 the Myer Report on contemporary visual arts and crafts in Australia recommended that the Commonwealth introduce a resale royalty arrangement in Australia and that it establish a working group, comprising representatives from government and the visual arts and craft sector, to analyse the options for introducing such an arrangement.¹ The inquiry assessed the potential benefits for visual artists, the particular issues for Indigenous artists, and the likely impact the measure would have upon the market for contemporary art and craft in Australia.²

12.4 Resale royalties may benefit artists in the following ways:

- providing artists with a contingent income stream which is currently not available;
- empowering artists by receiving a direct economic benefit from the success of their work; and
- recognising the ongoing relationship between the artist and their work, and the extent to which an artist's reputation is linked to the physical product of their creative labour.³

12.5 The Myer Report found that:

- If resale royalties were introduced, a substantial amount of benefit would accrue to artists. Estimates indicate that resale royalties calculated on 1999-2000 sales would amount to approximately \$6.75 million. This would be

1 R. Myer, *Report of the Contemporary Visual Arts and Craft Inquiry* (Myer Report), June 2002, p. 170.

2 Myer Report, pp 158–170.

3 Myer Report, p. 161.

supplemented by resale royalties payable under reciprocal arrangements with other countries.

- As demand in the art market is highly volatile, it is unlikely that resale royalties would have an impact on the art market over time.
- Resale royalty schemes vary greatly between countries. A number of models could be adopted. A suitable model for Australia would need to consider a number of factors, including which artworks would attract a resale royalty; the statutory form of resale royalties; the appropriate royalty rate; how remuneration under the scheme would be collected; and duration and succession issues.
- The inquiry, while not recommending a particular model, stated that the proceeds of resale royalties should be paid directly to the individual artists, rather than to a communal fund.⁴

12.6 The report found that the case for a resale royalties scheme was particularly strong for Indigenous artists. The benefits that would flow to Indigenous artists included:

- providing additional income to some artists;
- empowering and nurturing artists;
- recognising the ongoing relationship between the artist and the artist's community with the work and the owner;
- providing means for artists to meet community obligations;
- minimising exploitation; and
- reducing profiteering and promoting transparency in the sector.⁵

12.7 The report cited some concerns regarding perceived risks to the Indigenous art market, collectors and artists. These included:

- potential negative impact on the Indigenous market;
- possibility of sales in Indigenous art moving off-shore;
- possibility that a resale royalty would constitute a disincentive to collectors;
- risk of sales becoming more private to avoid payment of the royalty;
- possible impact of the measure on galleries and collectors;
- potential disadvantages to emerging artists; and
- possibility that only successful artists will benefit; and possible creation of an elite market.⁶

4 Myer Report, pp 162–170; 382–385.

5 Myer Report, p. 165.

12.8 Despite these concerns the inquiry found that the introduction of a resale royalty scheme would provide benefits to Indigenous artists.

Overseas resale royalty arrangements

12.9 Resale royalty schemes have been in place in several European Union (EU) countries, including France, Germany, Italy, Greece, Belgium and Denmark, for many years.⁷ While many EU countries had introduced resale royalty schemes by 2000, some including the United Kingdom, Ireland, Austria and the Netherlands had not. In 2001 the EU passed a Directive creating an obligation on member countries to adopt resale royalty legislation by 2006, with full implementation by 2012. The harmonisation is aimed at ensuring a uniform level of protection and a 'level playing field' in the European art market.

12.10 The United States does not have a national resale royalty scheme, but a scheme operates in California. Several Latin American and African countries also operate resale royalty schemes.

12.11 Overseas 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. The EU Directive specifies that royalties will be applicable to all professional secondary sales and operates for 70 years after the artist's death.⁸ Most overseas jurisdictions specify a minimum sale amount before the resale royalty will come into effect. In the EU Directive, a minimum sale amount of €3000 applies. Generally, resale royalties apply to public sales involving art professionals through auction houses and commercial galleries. Private sales are excluded.

12.12 In most jurisdictions, resale royalty rates are between two and five per cent. The EU Directive specifies a sliding scale for calculating the royalty, and the resale royalty applies only to the net price – that is, the sale price less the cost of sale. Some other jurisdictions 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 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 where works have been gifted or

6 Myer Report, p. 166.

7 Clare McAndrew and Lorna Dallas-Conte, *Implementing Droit de Suite (artists' resale right) in England*, The Arts Council of England, <http://www.artscouncil.org.uk/documents/publications/325.pdf>, accessed March 2007.

8 DCITA, *Proposed Resale Royalty Arrangement: Discussion Paper*, 2004, pp 7–8, http://www.dcita.gov.au/_data/assets/pdf_file/12024/Proposed_Resale_Royalty_Arrangement_Discussion_Paper.pdf, accessed March 2007. Hereafter 'DCITA Discussion Paper'.

bequeathed; where original documents are inconclusive or missing; and where works have undergone value-enhancing, such as conservation treatments.⁹

12.13 A UK study reported that if a resale royalty scheme had been in place in the UK in 1996 it would have applied to £242.8 million of auction house sales, resulting in payments to artists of £6.5 million. Art dealers would have incurred payments of £3.4 on the same basis.¹⁰ It has been estimated that approximately 250 000 artists will benefit from the introduction of the resale royalty in EU member countries.¹¹

12.14 The cost of administering schemes in Europe is generally in the range of 10-40 per cent of the royalty. In most schemes, administration expenses are subtracted from the royalty itself.¹²

12.15 DCITA stated that there are pressures within the EU to reduce both the rate and the duration of the resale right due to a range of factors, including concerns that the implementation of a resale royalty would lead to the movement of art sales to other jurisdictions where resale royalties do not apply.¹³ In the United Kingdom, some art dealers had strongly resisted the introduction of a resale royalty arguing that increasing the cost of works sold in galleries or at auction would cripple the local market and drive buyers offshore, particularly to New York.¹⁴

12.16 During the inquiry several witnesses argued that overseas schemes, especially in Europe, operate effectively:

It works in France. It has worked for many years. It is not just the top artists. You can go to any auction that comes up and there are so many now each year of Indigenous art and you have got every age range, every kind of region of the country, artists working in all the different media and their work is sometimes a couple of years old, if that, and the work is going out to auction houses. I do not buy into that. I think it is too hard for the bureaucrats to deal with, but it certainly is of benefit to individual artists.¹⁵

9 DCITA Discussion Paper, pp 7–8, 24–25.

10 Caslon Analytics web site, www.caslon.com.au, Accessed 29 May 2007.

11 R. Kirstein and D. Schmidtchen, *Do Artists Benefit from Resale Royalties?*, 2000, p. 3.

12 DCITA Discussion Paper, pp 22–23. See also Henry Lydiate, *Artists' Resale Right: First Year Report*, ArtLaw, 2007, <http://www.artquest.org.uk/artlaw/resaleroyaltyright/30971.htm>, accessed March 2007.

13 DCITA Discussion Paper, p. 8.

14 Caslon Analytics web site, www.caslon.com.au/droitprofile, Accessed 29 May 2007.

15 Ms Brenda Croft, Senior Curator, ATSI Art, NGA, *Committee Hansard*, 9 February 2007, p. 61. See also Ms Tamara Winikoff, Executive Director, NAVA, *Committee Hansard*, 23 February 2007, p. 23.

12.17 However, there are other views. Michael Reid has noted that the scheme's operation in France is being reviewed and scaled back.¹⁶ The French culture minister has indicated France now favours removing the application of resale royalty to the estates of deceased artists, and there remains concern that the scheme discourages art sales in Europe.¹⁷ These concerns about negative impacts on art sales led Christie's auction house in the UK to impose the resale royalty costs on the buyer rather than the seller of the work, after losing a fight against the introduction of the scheme.¹⁸

12.18 One evaluation of the UK system at the end of its first year dismissed concerns about the impact of resale royalty on prices:

The number and price levels of modern and contemporary art resales by art market professionals in the UK since February 14, 2006 appear to have been impressive, with record resale prices being reported both at public auction and in private treaty sales. The UK art market does not therefore appear to have been damaged by the introduction of ARR.¹⁹

DCITA discussion paper

12.19 As part of the Commonwealth's consideration of a resale royalty scheme, a discussion paper was prepared by DCITA in 2004.²⁰ DCITA called for submissions from interested parties and the Attorney-General's Department subsequently administered the project. The paper presented research intended to stimulate broad discussion on the desirability of some form of resale royalty arrangement in Australia.

12.20 The discussion paper considered a wide range of arrangements for a resale royalty scheme, centred on two key questions: what model would underpin a resale royalty scheme; and how would the design of the scheme affect outcomes for artists, including Indigenous artists.

Options for a resale royalty arrangement

12.21 The DCITA paper outlined three possible models for an Australian resale royalty scheme and presented information on the possible impact of a resale royalty on Australia's visual arts sector. The three options included:

- amending the *Copyright Act 1968* to fully legislate a resale royalty;

16 Michael Reid, '2007 Art Market Trends', *Michael Reid* [newsletter], Feb-Mar 2007, p. 6.

17 Georgina Adam, 'French Government's €100m plan to boost failing art scene', *The Art Newspaper*, 14 December 2006, <http://www.theartnewspaper.com/article01.asp?id=535>, accessed March 2007.

18 Georgina Adam, 'Christie's will charge new levy to buyer, not seller', *The Art Newspaper*, 2 March 2006, <http://www.theartnewspaper.com/article01.asp?id=194>, accessed March 2007.

19 Henry Lydiate, *Artists' Resale Right: First Year Report*, ArtLaw, 2007, <http://www.artquest.org.uk/artlaw/resaleroyaltyright/30971.htm>, accessed March 2007.

20 DCITA, *Proposed Resale Royalty Arrangement: Discussion Paper*, 2004.

- requiring industry to introduce a self-regulated resale royalty scheme, through amendments to the Copyright Act or other legislation specifying reporting requirements; or
- working with the sector to encourage contract-based resale royalty arrangements between artists and dealers.

A fully legislated scheme

12.22 A legislated scheme would impose a legal requirement to pay a percentage of the resale price of a work of art to the artist or their estate. A number of organisations such as NAVA, the Arts Law Centre of Australia and Viscopy favour this approach. This type of scheme would entitle Australian artists to similar benefits in other jurisdictions in which a comparable resale royalty right exists 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.²¹

12.23 DCITA noted, however, that there would be limitations to the application of reciprocity arrangements, and that there could be complexities associated with factors such as different types of art works being covered in different jurisdictions.

12.24 The discussion paper noted that 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; 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'.²²

Industry self-regulation

12.25 Resale royalty arrangements could also be achieved through the adoption of an industry code of practice by businesses involved in the art resale market. An industry working group, comprising key stakeholders, could be formed to develop a code of practice. The Government could monitor the operation of the scheme through the introduction of compulsory reporting requirements.

12.26 This option has the advantage of involving those organisations that would implement the resale royalty directly in the design of the scheme. This would limit

21 DCITA Discussion Paper, p. 37.

22 DCITA Discussion Paper, p. 37.

any negative effect that a resale royalty scheme would have on the sustainability of those businesses and the buoyancy of the Australian art market.²³

Contract-based resale royalties

12.27 Another option would be for Government to work with the sector to implement contract-based resale arrangements between artists and dealers. Some commercial galleries currently enter into voluntary arrangements with artists, in which the purchaser of an artwork pays a resale royalty whenever a work is resold.

12.28 The discussion paper noted that while this model could have the least impact on commercial gallery businesses, it nevertheless relies on the 'goodwill' of their owners. In addition, many artists would not possess the bargaining power to ensure a resale royalty-like clause was included in a contract of sale.²⁴ This could be to the disadvantage of Indigenous artists given their generally lower levels of education.

Outcomes for Artists

12.29 The discussion paper considered the actual outcomes for artists from a range of alternative models for a resale royalty scheme.²⁵ Ten models were tested, using actual auction sales (see table 12.1). The three key variables in the models tested were:

- the minimum threshold at which a resale royalty would take effect – an \$8000 sale price threshold; a \$5000 threshold; a \$1000 threshold; and no threshold;
- the rate of royalty – the different threshold levels were applied using a flat rate of 5 per cent; or with a sliding scale; and
- the duration of the royalty – the full term of copyright is applied – that is, the life of the artist plus 70 years; or life of the artist.

23 DCITA Discussion Paper, pp 37–38.

24 DCITA Discussion Paper, p. 38.

25 DCITA Discussion Paper, pp 28–35.

Table 12.1: Summary of outcomes under different resale royalty models ²⁶

| 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%) |
|-------|-----------|------------------------------|----------------|---|-----------------------------------|---------------------------------|----------------------|----------------------------|--------------------|-------------------------------------|-------------------------------------|--------------------------------------|
| 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 |
| | \$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 |

Indigenous artists

12.30 Introduction of a resale royalty scheme would not, for the majority of Indigenous artists, provide significant financial benefits. Under all models, non-Indigenous Australian artists dominate the royalty payments. Indigenous artists do not feature in the top royalty payment tier and the top-grossing Indigenous artists receive less than the top-grossing non-Indigenous Australian artists. Up to 29 per cent of artists benefiting from the scheme would be Indigenous, depending on the structure adopted. Benefits that would flow to Indigenous artists differ significantly under the models presented, with average royalty payments ranging from \$1000 (sliding scale, no threshold) to \$5000 (5 percent rate, \$8000 threshold).²⁷

12.31 The discussion paper noted that 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:

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 [above] using 2003 auction sales data.²⁸

12.32 Outcomes for Indigenous artists from a range of models are outlined in Appendix 5.

Administration costs

12.33 While the 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, due to the increased number of payments to artists.

DCITA discussion paper – issues raised in submissions

12.34 Following the release of the discussion paper, DCITA called for submissions on the possible design of a resale royalty arrangement, including what form an Australian scheme should take and how it would operate. Thirty-four submissions were received.

12.35 Submissions on the discussion paper noted that there are unique features of the Australian art market which need to be considered in designing a workable resale royalty scheme. Some of these factors include:

- the Australian art market is small compared with larger overseas art markets;

27 DCITA Discussion Paper, p. 33.

28 DCITA Discussion Paper, p. 17.

- the prices of artworks in Australia are lower than prices in larger art markets;
- the Australian art market is very elastic and volatile and resale prices fluctuate considerably depending on temporary values in the marketplace; and
- online art sales are increasing.²⁹

12.36 Given the small size of the Australian art market, a relatively high minimum sale amount (threshold) before a resale royalty comes into effect may need to be considered in the design of such a scheme. Access Economics, in a commentary on DCITA's discussion paper, noted that the observed volatility of the Australian market may pose problems in implementing a resale royalty. From an economic efficiency perspective, 'imposing institutional changes (especially affecting price) on volatile markets is very likely to generate very large behavioural changes'.³⁰ The growth of Internet sales may also impose complications for copyright enforcement of such a scheme between different countries and may lead to shifts in transactions away from resale royalty regimes to non-resale royalty regimes. These factors suggest that an important element when creating a model for resale royalty is to examine the potential impact on all stakeholders.

12.37 Submissions also suggested that there are aspects of the Indigenous art market which may be unique to Australia, and which may need to be considered in connection with an Australian scheme, such as the greater likelihood that royalties will be shared amongst members of the artist's community.³¹ One submission noted that it may be useful to consider if the terminology 'resale royalties' might be misinterpreted by Indigenous artists and communities, in view of the association with large royalty payments linked to mining. It may be better to term the payments as 'resale rights' to avoid confusion and unrealistic expectations.³²

12.38 Submissions commented on the appropriateness or otherwise of a resale royalty arrangement in Australia. Submissions representing the visual arts sector and arts organisations generally supported the introduction of a resale royalty scheme. These submissions overwhelmingly supported the introduction of a fully legislated scheme. There were variations between models regarding royalty thresholds and ceilings and the administering authority. Some of the major proposals are summarised in Appendix 6.

12.39 In contrast, submissions from auction houses and galleries generally opposed the introduction of a resale royalty scheme in Australia or supported the adoption of an industry based model.

29 Australia Council, *Submission 9* to DCITA inquiry, Attachment A; Viscopy, *Submission 32* to DCITA inquiry, p. 6.

30 Access Economics, *Discussion Paper on Proposed Resale Royalty Arrangements*, July 2004, p. 8.

31 Australian Copyright Council, *Submission 10* to DCITA inquiry, p. 3.

32 Arts Law Centre of Australia, *Submission 4* to DCITA inquiry, p. 3.

12.40 Sotheby's Australia, in arguing against a resale royalty scheme, suggested that such an arrangement would not benefit the vast majority of Australian artists. Of around 9250 Australian artists, they estimated that only 15 per cent at most would have received any resale royalty in 2003. Sotheby's also argued that resale royalty would discourage Australian art collectors from buying contemporary art and resale royalty would discriminate against auction houses. Sotheby's supported increased Commonwealth funding for the arts and artists as an alternative approach.³³

12.41 Some galleries supported the establishment of a voluntary, self-regulated industry based model (the second option in the DCITA paper). The galleries argued that under a compulsory, legislated scheme the costs of the scheme would be borne largely by the primary market – that is, the artists and galleries. Benefits would flow to a few well-off artists and their heirs. Further, a compulsory, legislated model would be subject to costly litigation, disputes and high administrative costs. It would reduce the primary market for artists' works and consequently their incomes.³⁴

Access Economics report

12.42 A report by Access Economics for Viscopy Ltd evaluated the impact of an Australian resale royalty on eligible visual artists. The report modelled the impact of such a system if it was introduced in the Australian market as a copyright payment. The report did not specifically assess the impact on Indigenous artists.

12.43 The report argued that the impact of a resale royalty on the Australian art market is difficult to determine because of the paucity of empirical data about relevant behavioural responses to its introduction. While the size and distribution of resale royalty payments can be estimated, 'the critical question of who bears the actual economic cost of the royalty, and, more importantly whether eligible artists would be net beneficiaries of such an arrangement is not at all clear'.³⁵

12.44 Access Economics' modelling assumed that any resale royalty scheme would apply to all visual art as defined in the Copyright Act, and would be a fully legislated scheme. The modelling assumed the resale royalty applies at a flat rate (5 per cent) on the sale price in the secondary market. Various minimum thresholds were modelled, ranging from \$0 to \$5000. The report found that average royalties per artist ranged from \$3872 (5 per cent rate and no threshold) to \$11 128 (5 per cent rate and \$5000 threshold).³⁶

33 Sotheby's Australia, *Submission 30* to DCITA inquiry, pp 1–2.

34 Mr B. Gregory *et. al.*, *Submission 20* to DCITA inquiry, pp 12–13. The submission represented Annandale Galleries, Utopia Art Sydney and Sherman Galleries. See also Brenda May Gallery, *Submission 12* to DCITA inquiry, pp 12–13.

35 Access Economics, *Evaluating the Impact of an Australian Resale Royalty on Eligible Visual Artists* (hereafter *Evaluating the Impact*), October 2004, p. 1.

36 Access Economics, *Evaluating the Impact*, pp 17–34.

12.45 The report considered two market responses to determine the economic cost of the resale royalty:

- The situation where final purchasers of art are very price sensitive, greatly reducing their demand for art in response to any price increase. This is a scenario advanced by those arguing that a resale royalty is impractical and unlikely to be of net benefit to artists.
- The situation where final purchasers of art are very price-insensitive, not changing their demand for art in response to any price increase. This scenario is implicitly assumed in the DCITA discussion Paper.

12.46 The modelling results of these cases and intermediate scenarios were summarised as follows:

In the case of perfectly price-sensitive (elastic) final purchaser demand... in theory a large proportion of the RRR [resale royalty payment] is likely to be offset by reduced income in the primary market, particularly if artists are in a weak position compared to dealers. In this case, and allowing also for the costs of administering any RRR...it is unlikely that artists will benefit from introduction of a resale royalty scheme.

Alternatively, a RRR system is likely to produce a significant net benefit for artists in the case of perfectly inelastic final purchaser demand...In this case, even allowing for the cost of administering the RRR, artists would be likely to receive a net benefit from any resale royalty scheme.

For intermediate scenarios, where there is *some* price sensitivity of demand on the part of final purchasers, the situation is not clear. However, in such cases (other things being equal):

- the more price sensitive final demand is to art prices; and
- the higher the administrative cost of the RRR as a proportion of gross revenue collected
- the lower the gross RRR benefit to artists, and the higher the chances that the *net benefits* to artists will be small, zero, or even negative.³⁷

12.47 The report stated that determining the merits of a resale royalty scheme requires empirical evidence of the price-sensitivity of purchaser demand to changes in art prices:

It is quite possible that, for established artists in demand, purchasers are relatively price-insensitive. If so such artists might be net beneficiaries of an RRR [resale royalty right]. In such cases, this would suggest that artists, especially established artists, are able to exercise a degree of market power.

However, for artists not yet established – probably the vast majority – purchaser demand may be much more price-sensitive. If so, these artists may end up with little or no net benefit from an RRR.³⁸

37 Access Economics, *Evaluating the Impact*, p. 2.

Similar conclusions were drawn in the DCITA discussion paper on the likely impact of a resale royalty scheme.

Government rejection of resale royalty scheme

12.48 In 2006 the Commonwealth announced its rejection of the introduction of a resale royalty scheme, arguing that a resale royalty right 'would not provide a meaningful source of income for the majority of Australia's artists'.³⁹

12.49 The Government argued that research showed that resale royalty schemes afford most benefit to successful late career artists and the estates of deceased artists:

It would bring little advantage to the majority of Australian artists whose works rarely reaches the secondary art market and would also adversely affect commercial galleries, art dealers, auction houses and investors.⁴⁰

12.50 While it was noted that one of the main arguments put forward in support of resale royalty was that Indigenous artists are particularly disadvantaged by the secondary sales market, 'research shows, however, that a resale royalty scheme would not end disadvantage for Indigenous artists'. The Commonwealth announced \$6 million over four years in the 2006-07 Budget to support visual arts as an alternative to a resale royalty scheme, including through increased funding to the existing NACIS program. Such an approach, and its advantages, had been raised by the Government in the DCITA discussion paper.⁴¹

Evidence to this inquiry

12.51 Evidence to this inquiry – in those submissions and other evidence that commented on the issue – indicated general support for the introduction of a resale royalty scheme for Australian artists.

12.52 Submissions particularly emphasised the economic benefits that would flow to Indigenous artists from resale royalties. The Australia Council stated that:

The degree of economic and social disadvantage experienced by indigenous artists is very significant. The disparity between the high prices paid on the secondary market, and the low initial fees paid on the primary market is perpetuating this long-term disadvantage. A resale royalty scheme would do much to redress this.⁴²

38 Access Economics, *Evaluating the Impact*, pp 2–3.

39 Attorney-General, the Hon Philip Ruddock MP, and Minister for the Arts and Sport, Senator the Hon Rod Kemp, 'New Support for Australia's Visual Artists', *News Release*, 9 May 2006.

40 Attorney-General, the Hon Philip Ruddock MP, and Minister for the Arts and Sport, Senator the Hon Rod Kemp, 'New Support for Australia's Visual Artists', *News Release*, 9 May 2006.

41 DCITA Discussion paper, p. 39.

42 The Australia Council, *Submission 38*, p. 3.

12.53 Similarly, the WA Department of Culture and the Arts noted that a resale royalty scheme would be especially advantageous to Indigenous artists – 'with works being sold in the secondary market at a much higher value than initially bought for, Indigenous artists stand to benefit greatly from any arrangement put in place'.⁴³

12.54 NAVA noted that a legislated resale royalty scheme can be a viable industry mechanism to provide much needed economic returns to artists – 'further, the strong evidence presented in the past has shown that Indigenous artists in particular could benefit from such legislation'.⁴⁴ The Arts Law Centre of Australia pointed to the Myer Report which argued that a resale royalty scheme would provide significant economic returns for artists and their families, especially Indigenous artists.⁴⁵ Caruana Fine Art argued that there was also a 'moral imperative' in implementing a resale royalty scheme given the rapid escalation in the value of many Indigenous artists' work.⁴⁶

12.55 A study by Janke and Quiggin for the Australia Council noted that generally Indigenous artists, even those at the high end of the market, are not financially well off and often have financial commitments to extended families. The study argued that the case for a resale royalty scheme is even stronger for Indigenous people as the arts industry provides a source of income to people who, in many cases have severely limited capacity to engage in the general labour market.⁴⁷

12.56 A voluntary resale royalty scheme was generally not supported. NAVA pointed to the example of the Indigenous Art Trade Association which has brokered a model whereby Lawson Menzies and Deutscher Menzies auction houses voluntarily pay a percentage of the resale price into the Aboriginal Benefits Foundation, a company limited by guarantee and run by trustees.

12.57 NAVA argued against this model for several reasons suggesting that it is patronising and that the benefits from resale royalties should be returned to the creators (rather than to communities based on the trustees' decisions on how to distribute the funds). NAVA also noted that most auction houses and commercial galleries who work in the resale sector are not taking up this responsibility.⁴⁸

43 WA Department of Culture and the Arts, *Submission 18*, p. 6.

44 NAVA, *Submission 27*, p. 5. See also Ms Tamara Winikoff, Executive Director, NAVA, *Committee Hansard*, 23 February 2007, p. 19.

45 Arts Law Centre of Australia, *Submission 36*, p. 13. See also Queensland Government, *Submission 58*, p. 20; WA Department of Culture and the Arts, *Submission 18*, p. 6.

46 Caruana Fine Art, *Submission 31*, p. 4. See also Mr Wallace Caruana, *Committee Hansard*, 9 February 2007, p. 27.

47 T. Janke and R. Quiggin, 'Indigenous Cultural and Intellectual Property', May 2006, pp 24–25, Attachment to Australia Council, *Submission 38*.

48 NAVA, *Submission 27*, p. 5.

12.58 Similarly, the option of establishing a trust fund for Indigenous artists was generally not supported. Viscopy Ltd described this approach as 'patronising and paternalistic'.

Resale royalties belong to the artists, according to international standards, and those specific artists whose works have earned them, should have direct control over how their monies are used. It is irrelevant whether a particular stakeholder approves of how Indigenous artists spend their money.⁴⁹

12.59 Similar arguments were advanced by Janke and Quiggin who argued that these schemes treat artists as incapable of determining their own financial futures.⁵⁰ Some witnesses, however, while not arguing for a trust fund *per se*, argued that the dispersal of resale royalties to communities could be one means of addressing socio-economic disadvantage in Indigenous communities.⁵¹

12.60 Submissions also argued that the lack of a resale royalty scheme leaves many Indigenous communities and individual artists with the impression that many engaged in the Indigenous art market are self-serving and largely interested in their own financial gain, at the expense of Indigenous art and culture.⁵²

12.61 Some evidence, however, raised issues with resale royalty arrangements. A submission from Mr Walker, a professional practising artist, argued that a resale royalty scheme has the potential to harm the primary market for Australian art by depressing first sale prices by having a negative effect on buyers. The submission noted that for artists deriving income from the sale of their works, the key question in evaluating the impact of such a scheme is the potential impact on the buyers of these works. Mr Walker also argued that the potential impact would not differ significantly between Indigenous and non-Indigenous artists.⁵³

12.62 The submission argued that the main concern of artists is with primary sales and that a resale royalty scheme is likely to adversely affect these sales and not, in the longer term, provide sufficient compensation for these 'lost' sales. Mr Walker argued that 'the proposed scheme's economic impacts upon *all* Australian artists is likely to be negative'.⁵⁴

49 Viscopy Ltd, *Submission 44A*, p. 13. See also Ms Hetti Perkins, Senior Curator, ATSI Art, NGA, *Committee Hansard*, 9 February 2007, p. 61.

50 Janke and Quiggin, p. 26.

51 Mr Paul Johnstone, Director, Cross Cultural Art Exchange, *Committee Hansard*, 20 February 2007, p. 39; Ms Cathy Cummins, Manager, Waringarri Aboriginal Arts, *Committee Hansard*, 19 February 2007, p. 25.

52 Viscopy Ltd, *Submission 44A*, p. 13.

53 Mr John Walker, *Submission 80*, p. 2.

54 Mr John Walker, *Submission 80*, p. 1.

12.63 Mr Walker noted that artists typically retain 60 per cent of the sale price of an artwork. For each \$10 of a new sale, the artist earns \$6 in income. Under a resale royalty scheme if a work was resold the artist would collect 3-5 per cent of the resale price (less the commission charged by a collection agency of approximately 20 per cent) as a royalty.

This disparity – 60% earnings on a new sale and 3-5% earnings on a resale – is important in understanding the potential of [Artists Resale Royalties] ARR to actually *cost* living artists' income....if only a molehill of buyers of new works were to get 'cold feet' now about the impact of a resale royalty on the resale price of their 'investment', the artist will need in the future a mountain of resales to recoup that initial loss.⁵⁵

12.64 Mr Walker also noted that resale royalties are likely to benefit a few, more successful artists, many of whom are no longer alive – 'it therefore seems to me that its potential to harm the majority of artists, who are living, should be given far more weight than its potential to benefit a very, very few estates of very successful artists, in any sane assessment of the merits of the scheme'.⁵⁶

12.65 One witness also noted that:

The jury is still out on resale royalties at the moment. I am not quite sure where I sit on that...because I see it from two different levels. But I think the issue of maintaining some sort of market standard, through auction houses in particular, needs to be addressed as well.⁵⁷

12.66 Another witness did not see a problem if an artwork sold at a particular point in time increased in value over time if the buyer paid the market price at the time of sale.⁵⁸ Another witness expressed concern about the high administrative costs associated with some resale royalty schemes overseas.⁵⁹

Conclusion

12.67 The committee notes that resale royalty schemes have been introduced in many European and other countries and provide a number of benefits to artists. The Myer Report recommended the introduction of a resale royalty arrangement in Australia and some form of resale royalty is supported by many stakeholders in the visual arts sector. There is also widespread support for such an arrangement amongst groups representing Indigenous interests in the sector.

55 Mr John Walker, *Submission 80*, p. 2.

56 Mr John Walker, *Submission 80*, p. 3.

57 Mr Paul Johnstone, Director, Cross Cultural Art Exchange, *Committee Hansard*, 20 February 2007, p. 39.

58 Mr Anthony Oliver, CEO, Jirrawun Arts, *Committee Hansard*, 19 February 2007, p. 45.

59 Mr Kevin Kelly, Manager, Red Rock Art, *Committee Hansard*, 19 February 2007, p. 37.

12.68 While the schemes appear to enjoy support amongst many stakeholders, outcomes for artists can be problematic. Modelling conducted by DCITA on the economic benefits of such schemes found that they provide little advantage for the majority of artists whose work rarely reaches the secondary art market. Such schemes bring most benefit to successful late career artists and the estates of deceased artists. The Access Economics report came to similar conclusions, arguing that while a resale royalty scheme may provide economic benefits for established artists in demand, for the vast majority of artists there would be little or no benefit. However, they also noted that the benefits of the scheme are highly sensitive to the behaviour of participants in the market, and that this would require further research.

12.69 The committee considers that the impact on Indigenous artists is telling. It notes that despite the anecdotal evidence presented during the inquiry of the perceived financial benefits, resale royalties appear unlikely to provide significant benefits to Indigenous artists. On the contrary, the DCITA study indicated that most Indigenous artists would not generally benefit financially from the introduction of a resale royalty scheme. DCITA modelling indicated that non-Indigenous Australian artists dominate the royalty payments under all models. Across the models, Indigenous artists did not feature in the top royalty payment tier and the top-grossing Indigenous artists received significantly less than the top-grossing non-Indigenous Australian artists.

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

Recommendation 26

12.71 The majority of the committee recommends that a resale royalty scheme not be introduced at this time, because of the lack of benefit to most artists, and in particular Indigenous artists, and the lack of new evidence to the contrary.

12.72 Non-government members of the committee recognise that a resale royalty scheme must be carefully designed. While noting the modelling of DCITA, they believe that options exist for a scheme that merit introduction. They note the observation of researcher Katrina Gunn who pointed out that Australia is well positioned to learn from schemes in many other countries in order to develop a scheme that best suits Australia's circumstances. They also note her remarks about Australia risking becoming out of step with international practice in this field:

Given the international moves towards implementing resale royalty rights, the absence of such a scheme in Australia runs the risk of disadvantaging Australian artists. Typically, and as is consistent with the Berne Convention, the sale of an Australian work will attract a resale royalty in a

country only if a reciprocal right exists in Australia for artists of that country.⁶⁰

12.73 Accordingly, non-government members of the committee take the view that there should be introduced a resale royalty scheme that is designed to ensure appropriate resale rights accrue to artists, particularly Indigenous artists.

60 Katrina Gunn, 'Resale royalty rights: possible models for Australia', *Research Note* no. 21 2005–06, Parliamentary Library, Canberra.