

John R Walker



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Dr Ian Holland
Committee Secretary
Senate Enquiry into Australian Indigenous visual arts and craft sector
Email: ecita.sen@aph.gov.au

Dear Dr Holland

I seek to make a late submission in response to the above Senate Inquiry, specifically with regard to any consideration of resurrecting the proposed Artists Resale Royalty. I note that so far the Senate has granted the Inquiry two extensions.

I am a professional practising Australian artist who supports a mortgage and a partner solely upon the sale of my work in the primary market. Although I am not an indigenous artist, I am nonetheless a full-time practitioner and the proposed implementation of Artists Resale Royalties (hereafter referred to as ARR) will affect *all* artists in Australia, indigenous and non-indigenous alike. I strongly believe that the proposed scheme's economic impacts upon *all* Australian artists is likely to be negative.

Before I detail my concerns about ARR, I would like to point out that Access Economics was commissioned by the collecting societies, Viscopy Ltd. and Copyright Agency Limited (both strong advocates of, and likely beneficiaries of, any ARR scheme) to report upon the impact of ARR. As it states in the Executive Summary: "Viscopy has engaged Access Economics to undertake an independent analysis attempting to model the impact of a resale royalty right (RRR) on eligible visual artists". This report makes very interesting reading in the light of it being commissioned by bodies that are strong advocates of ARR.

To quote from the Access Economics' report, the claim of *net* benefit to artists is "based upon extremely unrealistic assumptions, in particular the assumption that seller and buyer behaviour would be completely unaffected by the introduction of RRR [ARR]" and that "Access Economics considers that the results of this analysis are both unhelpful and potentially misleading". Further, my intention within this submission is to detail, from the perspective of a professionally, practising artist why the introduction of an ARR is likely to have either a negative impact on artists' incomes or in net terms, a zero gain. I agree completely with Access Economics that the assumptions required to make an ARR implementable are "both unhelpful and potentially misleading".

Access Economics in its report essentially identifies three scenarios for the impact of ARR upon the behaviour of buyers of art. At the 'panglossian' end, the introduction of the royalty would have no impact on buyer behaviour at all. At the opposite end would be the scenario that the introduction of an ARR would have significant impact on buyer behaviour. The third scenario is that the impact would fall somewhere between these two extremes. In other words, there is a two out of three chance that the impact of this scheme would either be negative or of no benefit.

Access Economics repeatedly pointed to the lack of empirical data on which to base the modelling of the likely impact of the introduction of an ARR on buyer behaviour. It is important to point out that, ultimately, it is the buyer who pays the artist. Any negative impact on buyer behaviour means less income for artists.

The report states: “the final answer to the question - is an RRR [ARR] a worthwhile *practical* proposition? - depends crucially upon these empirical questions on which more research is needed”. The recent adoption by the UK of legislation for an ARR means that there should be such empirical data available within three to five years time. Given that even in the most optimistic evaluations of the impact of this scheme, the benefits are overwhelmingly restricted to those very few artists who are very successful and most often dead, there is no urgency about its adoption and that common sense would suggest that we wait until there is sufficient empirical data available from the UK for an organisation such as Access Economics to use in its modelling.

I acknowledge that I am not an indigenous artist. However, I am convinced that the impact of ARR on the economic position of indigenous artists would be negative for the very same reasons that it is likely to be negative for non-indigenous artists in Australia. If one is trying to derive income from the sale of one's artworks, the key question in evaluating the impact of an ARR is its potential impact on the buyer of these works, and I cannot see why this would differ much between indigenous and non-indigenous artists.

Some important facts about the incomes of exhibiting artists need to be emphasised. The following is based upon my own experience. I am aware that there may be differences with regard to indigenous artists, one of which I will attempt to address later in this submission. However, the introduction of any ARR arrangement would apply equally to indigenous and non-indigenous artists and I wish to emphasise that the key criteria for evaluating the likely impact of this scheme, is not the impact upon the artists rather *its potential impact upon the buyers of art*.

Although some of the following may seem 'obvious', I ask you to bear with me.

- Artworks when first exhibited for sale, by the artist or by their agent, are not cheap, typically ranging in price from \$5,000 to \$50,000 and are unique (as compared with a mass-produced music C.D at \$30).
- For obvious commercial reasons, artists cannot easily drop their asking prices.
- Most artists have more works available for sale than they have buyers; a lost buyer is a lost sale.
- Most artists derive their income from the sale of maybe 20 to 30 works per year.

When I, like many artists, sell a work, I keep 60% of the sale price and pay the remainder as the costs involved in marketing and selling the work. For each \$10 of a new sale, I earn \$6 in income. Under an ARR scheme, if a work of mine was to be resold, I would collect between 3-5% of the resale price (less the commission charged by a collection agency of say 20%) as a royalty. Thus for each \$10 of resale, I would earn less than 50 cents in income. (I am not a member of any collecting society and do not wish to be forced to become one).

This disparity – 60% earnings on a new sale and 3-5% earnings on a resale – is important in understanding the potential of ARR to actually *cost* living artists' income. To put it simply, 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.

For example, if just one sale of \$10,000 was to fall through because of a buyer getting cold feet, then the artist has lost \$6,000 in the hand. This \$6,000 is equivalent to the royalty payable at say 5% upon more than \$120,000 worth of future resales. If an artist were to lose only three sales of this order in their career of say 30 years, he or she would need the royalties payable upon resales, later in life, of more than \$360,000 to simply recover those three lost primary market

sales. I hope you would agree that these are very unattractive odds. In the first twenty or so years of an artist's career, \$6,000 now can make all the difference between success and failure.

Resale royalties are a benefit to a handful of the most successful of artists, many of whom are no longer living and thus not producing any new works. 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.¹ Of much more direct concern to me as an artist is primary sales.

It is instructive to quote from a strong advocate of ARR. In its own submission to DCITA, Viscopy states:

"Droit de suite does involve the artist in exchanging a certain present price for a *lower present price* plus the possibility of a future pay-off....There are possible efficiency gains from a droit de suite that are not mentioned in DCITA's paper. It has been suggested, for example, that a droit de suite could act as an efficient screening device in artistic labour markets, by attracting artists confident of their future success and deterring the potentially less talented. It could also be that a droit de suite would provide further efficiency gains by encouraging existing artists to work harder to enhance their reputations."²

It is true that culling the least competitive artists in Australia would improve the outlook for the survivors and, making life more competitive for artists would 'encourage' them to work harder. I am sure that you would find these words and their sentiment as chilling as I did. And, I hope that this is not a view that this committee of enquiry would endorse.

As stated in a report commissioned by the Department for Communications, Information Technology and the Arts, "If the aim of a droit de suite is to improve the welfare of artists in general, it is a relatively untargeted tool.....In general terms, the 'best' policy option will depend on the definition of the problem, and determining the most efficient, effective and socially acceptable means of addressing the problem".³ Or, as summed up by Access Economics, "The various manifestations of the 'struggling artist' rationale are not good bases for RRRs [ARRs] – especially in developed economies with extensive and well-established 'social safety net' welfare systems. Moreover, operational RRRs [ARRs] perform very poorly against such welfare-based criteria anyway."

Advocates of ARR have often used the example of indigenous artists occasionally selling works directly to unscrupulous buyers for a fraction of their real market value. The buyer then on-sells the work in a short time for a considerable profit. The introduction of an ARR has been advocated as a way of ameliorating this distasteful reality. However, a royalty which would apply to these transactions would also impact upon many other artists. Since the introduction of the GST, sales of artworks in the primary market under a commission model by artists who are not registered for GST (that is, their turnover is less than \$50,000pa) have, to avoid nightmarish complications, used a work-around. When the work is sold, it briefly (for a few seconds) is transferred to the ownership of the dealer who then transfers ownership to the buyer. This is done purely to avoid

¹ The small number of actual beneficiaries as compared to the larger artist population is borne out in the Myer Report where it states on page 163: "A study conducted by the French Government calculated in 1995, of the 2,500 beneficiaries of droit de suite, 288 (or just over 10 per cent) received 60 per cent of the royalties, while the remaining 90 per cent received just 40 per cent of the royalties." When you consider that the French population is 60million, then the minuteness of 2,500 is very apparent. As the Intellectual Property Research Institute of Australia in its submission to DCITA's discussion paper pointed out in section 4.3: "Economic modelling and empirical research from countries with resale royalties demonstrate that royalties are invariably skewed towards a very small group of famous artists and their heirs...with some estimates that less than 1% of artists will ever enjoy a resale market."

² Viscopy submission, *Section 5.5 Economic Efficiencies* in response to DCITA's Proposed Resale Royalty Arrangement Discussion Paper, 2004, np.

³ Department of Communications, Information Technology and the Arts paper, 2001, p. 20

problems that the GST creates for selling on commission, of works by artists who are not registered for GST. A scheme intended to levy the unscrupulous who buy and then on-sell would also adversely affect very many innocent artists in legitimate dealings with their galleries.

I note in passing that the UK legislation states that, "The sale of a work is not to be regarded as a resale if—(a) the seller previously acquired the work directly from the author less than three years before the sale; and (b) the sale price does not exceed 10,000 euro." Obviously, if the same measures were adopted here, some of the more distasteful practices that are of concern to indigenous artists would be exempt. Equally, if we take a different path, the lives of many innocent artists would be made even harder. I cannot see how the introduction of an ARR could be used to address the problem of indigenous artists selling their work for a fraction of its real market value to unscrupulous people. As the DCITA report implies, ARR is a very blunt instrument.

The key to judging as to whether the introduction of an ARR is likely to result in a net gain to artists, is the likely response of buyers. As I have made clear, even a very tiny negative impact upon a few buyers is likely to wipe out any potential gain for any artist active at the time of the introduction of this levy. I repeat my agreement with Access Economics that the claims that this scheme would benefit artists are based on assumptions which are "both unhelpful and potentially misleading". I'll let Access Economics have the last word: "Only if it can be demonstrated that such artists receive *more* in terms of net income from the introduction of an RRR [ARR] scheme, than would otherwise be the case, is the case *in principle* for such a scheme also justifiable *in practice*."

Yours sincerely

John R Walker

Attachments:

1. Access Economics, *Evaluating the Impact of an Australian Resale Royalty on Eligible Visual Artists*, a report commissioned by Viscopy, October 2004 (pdf). Located at: http://www.dcita.gov.au/data/assets/pdf_file/16026/Viscopy_Access_Economics.pdf