

Australian Government Announces Resale Royalty Scheme for Visual Artists

At a glance

A new royalty scheme will be introduced for Australian visual artists as a result of legislation to be enacted by the Federal Government. The legislation has priority status for the first session of Parliament early next year, with the scheme to be implemented by 1 July 2009.

The scheme will grant visual artists a right to a five percent (5%) royalty payment on secondary sales of their works. The right will trigger on resales exceeding \$1,000 for the artist's lifetime plus 70 years following their death. Liability for payment will be shared between the parties to the sale. An agency to be appointed by government tender will collect and distribute the royalty payments.

The scheme has implications for all visual artists, buyers and sellers of art and intermediaries in the art market, including auction houses and commercial galleries.

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Resale royalty

The concept of a resale royalty right “fills a gap” in the income that visual artists derive from their creative works. Under the existing copyright laws in Australia, creators such as musicians and published authors are able to receive secondary income for the exploitation of their works over time in the form of licence payments for use and reproduction. However, visual artists do not have a statutory right to secondary income and are less likely to have any other right to secondary income following the initial sale of their works, given the nature of the secondary art market in Australia.

In many cases the result is that at present visual artists are effectively “locked out” of directly benefitting from increases in the perceived value (and secondary sale prices) of their art works. The situation is particularly evident in the indigenous art sector. Commercial interest in Australian indigenous art has grown significantly over the last ten years as the profiles of artists including Clifford Possum Tjapaltjarri, Emily Kame Kngwarreye, Ginger Riley Munduwalawala and Rover Thomas have been elevated locally and internationally. Canvases that may have been acquired for prices in the low thousands are, twenty to thirty years later, recognised as works of artistic and cultural importance capable of attracting million dollar prices at auction.

The current auction house record for the sale of a work by an Australian indigenous artist is \$2.4 million

for Clifford Possum Tjapaltjarri's 202 cm x 337.5 cm *Warlugulong*, obtained by Sotheby's at their Melbourne Aboriginal art sale in 2007. The work was painted in the late 1970s and first sold for under \$2,000.

Comparative models

The scheme proposed by the current government follows several years of discussion and enquiry, most notably the *Report of the Contemporary Visual Arts and Craft Inquiry* commissioned in 2001 (known as the 'Myer Report'). The Myer Report recommended the introduction of a resale royalty arrangement by way of amendments to the *Copyright Act 1968* (Cth).

The introduction of a royalty scheme in Australia follows the lead of the United Kingdom and other countries in the European Union. The *droit de suite* or “follow-up right” was first implemented as law in France in the 1920s. Subsequently, a voluntary framework for resale royalties was established as part of revisions to the *Berne Convention for the Protection of Literary and Artistic Works* in 1979. Australia has been a signatory to the Berne Convention since 1978.

The Berne Convention article on resale royalties is only prescriptive to the extent that it permits artists an “inalienable right” to an interest in sales of their works subsequent to the first transfer. However, the procedures and rules for collection of royalties, and the amounts, are left as matters for determination by national legislation.



The particulars of schemes differ between jurisdictions. The model currently operating in France is a three percent (3%) royalty on works sold for more than 100 Francs. The right continues for the life of the artist plus 70 years after their death. Private collection societies are involved in the management of the scheme. The resale right operating in the United Kingdom since 2006 entitles artists to a “sliding scale” royalty determined by the sale price for secondary sales. The royalty is capped at 12,500 Euro and continues for the duration of copyright in the work.

Earlier this year, the New Zealand Government introduced a bill to create a similar resale royalty scheme. The bill proposes amendments to the *Copyright Act 1994* (NZ) with a royalty calculated according to the resale price of the relevant artistic work and the royalty rate set by regulation. The bill had its first reading on 20 May 2008 but has not progressed further due to government elections in New Zealand.

Australian model

The features of the Australian resale royalty model are:

- A resale royalty scheme to be introduced through stand-alone legislation (as opposed to amendments to the *Copyright Act 1968* (Cth)).
- A five percent (5%) uncapped royalty will apply on sales exceeding \$1,000.
- The scheme will cover original, visual art works (including “graphic” and “plastic” art).
- The scheme will have prospective application, applying to all resales of original works sold in the secondary art market after the legislation takes effect.
- The resale royalty right will be an inalienable right, incapable of waiver.
- The royalties will be paid to artists who are Australian citizens, permanent residents or their heirs on works resold during the artist’s lifetime and for 70 years after the death of the artist (consistent with the duration of copyright).
- Liability for payment of the royalty will be with the seller and their agent, the agent of the buyer and the buyer being jointly and severally liable (in sequence).

- The right will trigger after the first transfer of ownership.
- Resales involving public institutions or non-profit organisations will not be exempt.
- The scheme will be managed by a collection agency appointed by government tender.
- There is potential for reciprocity with other countries that have in place a resale royalty right under the *Berne Convention for the Protection of Literary and Artistic Works*.

Operation

The Australian scheme is intended to operate prospectively. It will attract all eligible resales of original, visual art works acquired after the legislation is implemented. The scheme does not exclude works created before the legislation commences. It will also potentially cover resales of works by deceased artists.

The royalty right will “trigger” in relation to existing works after the second sale of a work following the commencement of the legislation. This is despite any acquisition history prior to the effective date of the legislation. This “clean slate” approach means that, for the purposes of determining whether the right will apply, only transfers after the effective date will be relevant.

Issues

The introduction of the legislation to Parliament was announced for late this year, but is likely to miss the deadline. Currently, the legislation has priority status for the first session of Parliament early next year, with the scheme to be implemented by 1 July 2009.

The impact of the scheme on the Australian art market and for visual artists will be interesting to measure. As a policy matter, the right has the potential, to “elevate the status of artists”, to “assist artists to assert their interests more effectively in the market place” and to “recognise and reward the contribution visual artists make to the cultural and economic life of Australia”.¹

Other indicators of the performance of the scheme will be the costs of administration (typically deducted from the royalties payable to artists) and any impact on prices and turnover of works in the secondary art market.



Start up costs for the collection agency, to be funded by the Government, will be up to \$1.5 million over three years.

Some critics of resale royalty schemes imply that, by nature, the arrangements benefit only a handful of established artists whose works are in demand and demand high prices. However, whilst the introduction of the scheme is unlikely to halt sales of works by important Australian artists, it may also provide an incentive for some collectors to look more widely to new works by emerging artists.

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FURTHER INFORMATION

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¹ Department of Communications, Information Technology and the Arts (2004) *Proposed Resale Royalty Arrangement Discussion Paper*.

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