

AUSTRALIAN VISUAL ARTISTS: JOINING THE RESELL RIGHTS ARENA

by Erin Mackay

In the 2008 Federal Budget, delivered on 13 May 2008, the ALP Government committed to the provision of \$1.5 million for the establishment of a resale right scheme for visual artists.¹ At the time of writing in May 2008, a Resale Right for Visual Artists Bill is listed under legislation proposed for introduction into the Australian Parliament, but it is unlikely that the Bill will be introduced before the Parliamentary Spring Sittings (late August – early November 2008).

This short article explains what is meant by a 'resale right', the background to the 2008 Budget announcement, and the relevance of resale rights to Indigenous artists. More information will be provided about the specific scheme once it comes to hand.

WHAT IS A RESELL RIGHT?

The basic premise of any resale right scheme is that an artist, or his or her estate, receives a small percentage of the value of their artwork every time it is resold, roughly for the duration of copyright protection. As this is payable to the artist upon the sale of the physical artwork, rather than upon the reproduction or communication of that artwork, a resale right is not correctly characterised as a 'copyright', although many resale right schemes are introduced as amendments to copyright legislation.

Is Australia out of Step with other Jurisdictions?

Resale right schemes exist in several jurisdictions. In the 1920s, the *droit de suite* ('right of continuation') was developed in France's civil law tradition, and resale rights are currently being phased in across Europe and the United Kingdom following a directive issued by the European Council in 2001.² Article 14^{ter} of the *Berne Convention for the Protection of Literary and Artistic Works*³ contains an optional protocol that relates to resale rights. Other models operate in Turkey, California and some Latin American and North African countries.⁴

On the same day as the 2008 Budget announcement, a Copyright (Artists' Resale Right) Amendment Bill was introduced into the New Zealand Parliament. If passed,

this Bill will establish a resale right for visual artists in New Zealand by inserting a new part into the *Copyright Act 1994* (NZ). Currently, the Bill is before the New Zealand Government Administration Committee and public submissions on the Bill are invited until 4 July 2008.⁵

BACKGROUND TO THE RESELL RIGHT FOR VISUAL ARTISTS BILL

Since the 1980s, there have been calls for the establishment of a resale rights scheme in Australia.⁶ Commentators have noted the injustice of preventing an artist from sharing in the increased value of their artwork, even if that artist owns the copyright in that work.⁷ In particular, the burgeoning international market in Australian Indigenous art⁸ has resulted in numerous examples of dramatic disparity between original and secondary sale prices of Indigenous artworks, notwithstanding the marketing costs involved in achieving blockbuster auction prices. For example, in 1977, Clifford Possum Tjapaltjarri's painting, *Warlugulong*, was sold for \$1,200; in July 2007, it sold at a Sotheby's auction for A\$2.4 million.⁹ A resale right scheme would have ensured that a small percentage of that price would have been payable to the estate of the artist.

Over the past decade, Australian Government and non-government consultation papers,¹⁰ reports¹¹ and Parliamentary Committee inquiries¹² have considered the introduction of a resale right scheme, generally noting the particular benefits that would be experienced by Indigenous artists under such a scheme. Private member bills for the establishment of a federal resale right scheme were introduced in 2004 by Senator Kate Lundy and in 2006 by Bob McMullen MP. Both bills failed.

Most recently, a resale right scheme was the subject of several submissions to the 2007 Senate Environment Communications, Information Technology and the Arts Committee Inquiry into Australia's Indigenous Visual Arts and Craft Sector ('Senate Committee Inquiry').¹³ Several stakeholders advised the Senate Committee Inquiry that many Indigenous artists were in a weak bargaining position relative to art dealers, and many Indigenous artists,

particularly those living in remote areas, faced significant economic and social disadvantages, including poverty and serious medical conditions.¹⁴ The Senate Committee did not recommend the establishment of a resale right scheme for the reason that it would not provide benefits to most artists, and in particular, Indigenous artists. However, with reference to the evidence presented to the Inquiry together with updated research, the non-Coalition senators on the Committee reached the opposite conclusion.¹⁵

ISSUES SURROUNDING THE PROPOSED RE SALE RIGHTS SCHEME

Arguments against the introduction of resale rights tend to focus on:

- the potential disincentive to invest in art in Australia, and the detriment for Australian artists as well as secondary art dealers, galleries and auction houses;
- administrative costs and operational difficulties associated with such a scheme, and whether these would render the scheme inefficient or ineffective;
- the benefits of a resale right for established and successful artists and their estates rather than lesser-known and emerging artists; and
- whether there are other, more appropriate, methods to improve the position of Australian artists, and in particular Indigenous artists.¹⁶

The counter-arguments are numerous. Forum-shopping is an ever-diminishing prospect as resale rights are introduced in numerous jurisdictions. Also, purchasers invest in artworks for various reasons, and investors did not abandon art auction houses following the introduction of the substantial 'buyer's premium'.¹⁷ Moreover, as Robynne Quiggin has convincingly argued, a resale right scheme – or any other single measure – will not provide a 'panacea' for Indigenous Australians, but this of itself is not a valid argument against the introduction of a scheme that could provide some benefit to some artists.¹⁸

It remains vitally important that a resale right scheme is implemented as one of several measures directed towards enhancing the position of Indigenous artists,¹⁹ and that the designers of the proposed resale right scheme pay careful attention to administrative arrangements to ensure that the maximum benefit is returned to those that need it most.

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- 1 Peter Garrett MP, 'Resale Royalty Rights for Australia's Visual Artists' (Press Release, 13 May 2008) <<http://www.environment.gov.au/minister/garrett/2008/pubs/budmr20080513i.pdf>> at 29 May 2008.
- 2 Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (Official Journal L 272/32, 13.10.2001).
- 3 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 July 1886, 943 UNTS 178, art 14ter (entered into force in Australia 1 March 1978).
- 4 Department of Communications, Information and the Arts, *Report of the Contemporary Visual Arts and Craft Inquiry* (2002), 159.
- 5 New Zealand Parliament, Select Committees, *Submissions Called For Copyright (Artists' Resale Right) Amendment Bill*, <<http://www.parliament.nz/en-NZ/SC/SubmCalled/8/2/3/48SCGCcopyrightartists200807041-Copyright-Artists-Resale-Right-Amendment.htm>> at 29 May 2008.
- 6 See, eg, Australian Copyright Council, *Droit de Suite: The Art Resale Royalty and its Implications for Australia* (1989).
- 7 See, eg, Robynne Quiggin, 'The Resale Royalty and Indigenous Art: An Opportunity for the Recognition of Economic and Cultural Rights?' in Fiona MacMillan and Kathy Bowrey (eds), *New Directions in Copyright Law: Volume 3* (2006); Matthew Rimmer, 'A Right of Resale? Indigenous Art under the Hammer' *ABC News – Opinion* (online), 27 July 2007, <<http://www.abc.net.au/news/stories/2007/07/27/1989699.htm>> at 29 May 2008.
- 8 Indigenous art sales at auction increased from \$181,000 to \$6.1 million from the early 1990s: John Furphy, *Australian Arts Sales Digest* (2001), 556.
- 9 Matthew Rimmer, above n 7.
- 10 See, eg, the Department of Communications, Information Technology and the Arts, *Resale Royalty Discussion Paper* (2004) <http://www.arts.gov.au/_data/assets/pdf_file/12024/Proposed_Resale_Royalty_Arrangement_Discussion_Paper.pdf> at 29 May 2008.
- 11 See, eg, Terri Janke, *Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights* (1999), 209; Department of Communications, Information and the Arts, *Report of the Contemporary Visual Arts and Craft Inquiry* (2002), 166.
- 12 See, eg, Senate Environment, Communications, Information Technology and the Arts Committee, *Indigenous Art: Securing the Future—Inquiry into Australia's Indigenous Visual Arts and Crafts Sector* (2007).
- 13 The Report, Terms of Reference, submissions received and transcripts of public hearings are available at: Senate Environment Communications, Information Technology and the Arts Committee, *Inquiry into Australia's Indigenous Visual Arts and Craft Sector*, <http://www.aph.gov.au/Senate/committee/ecita_ctte/indigenous_arts/index.htm> at 29 May 2008.
- 14 Senate Environment, Communications, Information Technology and the Arts Committee, above n 12, [8.15].
- 15 Ibid [12.72]–[12.73], referring to Katrina Gunn, *Resale Royalty Rights: Possible Models for Australia* (Research Note no 21 2005–06, Parliamentary Library, Canberra).
- 16 See, eg, Submission in response to the Department of Communications, Information Technology and the Arts' *Proposed Resale Royalty Arrangement Discussion Paper*, 10 August 2004, (Sotheby's Australia), <http://www.arts.gov.au/_data/assets/pdf_file/15182/Sothebys.pdf> at 29 May 2008; and 'Update: Government Decision to Abandon Resale Royalty' (2006) 6(18) *Indigenous Law Bulletin* i. See also Attorney-General the Hon Philip Ruddock and Minister for the Arts and Sport the Hon Rod Kemp, 'New Support for Australia's Visual Artists' (Press Release, 9 May 2006) <<http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/>