A response to the:

Proposed Resale Royalty Arrangement Discussion Paper

Department of Communications, Information Technology and the Arts

Date: 19 August 2004

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INTRODUCTION

This submission has been prepared in a short time and draws on our combined research and years of experience in the arts industry as well as on work done by the University of Queensland economist and collector, Dr Jon Stanford and a number of other important Australian and international expert references.

"The pressing question about art royalty statues is why they are advocated at all since both economic theory and common sense predict that the offer price for new art will simply be reduced in a way which is disadvantageous to the artist when the rational buyer takes into account the resale royalty."[1]

Bill Gregory is the owner/director of Annandale Galleries since 1990 and ACGA National President from 1996-2000. Prior to that he co-owned Milburn + Arte Gallery in Sydney and Brisbane from 1987 – 1989 and has worked as a private dealer based in Paris and New York with extensive experience in the secondary market. He is a dual Australian and USA citizen.

Christopher Hodges is a practising, exhibiting artist of 25 years, owner/director of Utopia Art Sydney established more than 16 years ago and also Chairman of Melbourne Art Fair. He is a member of the Australian Commercial Galleries Association.

Anne Sanders has worked as a senior arts administrator in the visual arts sector in Australia for the past fifteen years in both the public and private sectors. Organisations include the Australia Council, Fine Arts Press (publishers of *Art and Australia* and *Art Asia Pacific*), Australian Commercial Galleries Association and most recently General Manager, Sherman Galleries. She has worked as a consultant to National Association for the Visual Arts, National Art School, Craft Arts International and has conducted television interviews with artists for the Ovation Channel of Optusnet (now Foxtel). She is currently completing a MA in Art History at Australian National University.

John R Walker is a significant mid-career artist who has been exhibiting in Australia and the USA for 25 years. His primary representing gallery is Utopia Art Sydney and this artist/gallery relationship goes back almost sixteen years. He has in the past also exhibited with Tolarno Galleries in Melbourne , Mori Gallery in Sydney and Austral Gallery, St Louis, USA. He is regularly selected for the Archibald and Wynne Prizes at the Art Gallery of New South Wales. His sole income is derived from the sales of his work through Utopia Art Sydney, that is, the primary market.

William Wright since 1992 has been curatorial director, Sherman Galleries. Prior to this, he was Assistant Director (Professional) at the Art Gallery of New South Wales, Sydney, for nine years, following two years as Director of the highly successful 1982 Biennale of Sydney: Vision in Disbelief. Prior to 1980, he spent twenty-three years abroad. Between 1970 and 1981, he lectured in over thirty institutions in the UK, the USA and Australia, and held a number of senior positions in art education: in England, Head of Painting at Winchester School of Art; in the USA, Associate Dean of the New York Studio School; and Dean of Visual Arts at the State University of New York at Purchase. He is also a distinguished curator. In 2002, Wright was awarded the Australia Council Emeritus Medal. In 2003, he was awarded an AM and was appointed President, AICA, (International Association of Art Critics) Australia.

[1] Ben W Bolch,, William W Damon, and C Elton Hinshaw, 'Visual Artists' Rights Act of 1987: A Case of Misguided Legislation,' Cato Journal, Vol.8 no.1 (Spring/Summer) 1988, p.76

Our key points, which will be elaborated in our responses to the Appendix C questions are as follows:

1. serious, adverse impact on artists incomes;

2. serious misrepresentation of the true nature of the artist/gallery relationship and the nature of the artists' bargaining position;

3. false and unsupported claims concerning superannuation and revenue neutrality;

4. possible effects of a compulsory, legislative model on the spirit and intent of Copyright, and particularly artists' common law economic rights to waive or transfer a property;

5. our recommendation for an alternative model that will benefit living, Australian artists of merit and need, especially indigenous artists.

Question 1: Should Australia introduce a resale royalty arrangement? What are your primary reasons for your support or lack of support for such an arrangement?

NO we do not support a legislative, compulsory resale royalty arrangement. We do support a voluntary, self-regulated industry based model (see recommendation in Q.13 & Q.14

Serious negative impacts upon artists' sales in the primary market

The signatories of this submission have real experience of the commercial realities of the primary market and, of the relationships between artists and representing galleries, both in Australia and overseas. In light of our experience, the proponents of the legislative model for a Resale Royalty are profoundly ignorant of the commercial realities of the primary market and many of their claims with regard to this market are simply wrong. Unfortunately, the primary market sector's views have not been represented and in many cases have not been sought. This has meant that many artists, galleries and collectors have little or no knowledge of what is being proposed let alone its import. We believe that this lack of knowledge and feedback to those of us in the primary market has allowed a proposal based in gross ignorance to gain undeserved credibility. We emphasise that it is our passionate belief that the proposal for a resale royalty is based on complete ignorance of, and malice towards, the primary market; which is living, professionally practising, Australian artists' main or sole source of income.

Our submission is a serious attempt to remedy this situation and put forward a recommendation that we believe addresses the real concerns of the Myer Report, that is, the support of living, Australian artists of merit and need, particularly Indigenous artists.

The first principle in considering the merits of a Resale Royalty is whether it will economically benefit artists.

To quote Dr Jon Stanford:
"(the current proponents' submissions) *is based on the unsubstantiated belief that there have been few, if any, objections to the principle to Droit de Suite, (Stanford, 2003)….collectors would adjust their demand in the primary market downwards so that there would be fewer sales in this market at lower prices.*"[2]

Artists incomes in the primary market will be adversely affected; even more so than in the secondary market. This is a critical point that is not addressed in any way in many of the proponents' submissions and has been repeatedly ignored in Resale Royalty discussions for many years. As it is eloquently stated:
"…it is not only the resale market which will be affected by ARR but also that the initial price will adjust itself to a lower level. The rationale behind this can be seen in terms of property-right analysis. Rather than the full bundle of property rights passing over to the new owner at the first sale, the artist still retains certain rights, which can be realised at each subsequent sale in the form of a percentage levy. It is logical that the initial buyer, knowing his willingness to pay for the painting in full, would lower this value if certain rights were not included. The decrease in the price is merely a compensation mechanism which will not be restricted to secondary markets involving the artist and the dealer. The decrease will obviously depend on the amount of the resale right, on the expectations the artist and his client have about future resale values, on the way they both value risk, and on their time preference, but there will be a decrease and the artist will be paid less: under competitive markets, the rebate on the price of the new artwork will exactly represent the discounted value of the future resale right."[3]

Dr Jon Stanford elaborates further:
"It is important to understand the difference in buyers in the primary and secondary markets. Buyers in the primary market buy with incomplete information about the ultimate reputation of artists. They are exposed to risks that the artist will not continue to paint, will not develop their early reputation, will suffer from changes in fashion or appreciation and other uncertainties about the future. In addition collectors will not derive any income from the paintings during their ownership, unlike the case in financial investment.[4] It is certain that not all paintings acquired by collectors (will increase in value) so that their actual investment return is determined by a few paintings. I have shown this in my portfolio study of the return to Australian contemporary visual art, Stanford 1993a and 1993b. Collectors will buy paintings only if there is a prospect that that they will be compensated for this risk. Large returns to collectors in the secondary markets are simply a normal market return to holding risky assets for a long time. To give some numerical expression to this, I have assumed that a return of 15 per cent per annum is a measure of the riskiness of holding paintings. To be compensated for this risk a collector who purchased a painting for $1,000 would need to receive a price on resale in 20 years of $16, 367 or $66,212 in 30 years. Hence, what may appear to be a large increase in prices over a long period is simply the return necessary to compensate collectors for buying early and assuming the risks of holding paintings for long periods. Put in this way it is easy to see why investment in art is inferior to investment in financial assets. Clearly collectors value the consumption service of paintings. The effect of the introduction of a Droit de Suite will reduce the expected future returns of the sale of a painting on the secondary market to collectors whose rational response will be to reduce the amount they are willing to pay in the primary market by the present worth of the future loss due to a Droit de Suite. In this case, the artist will lose income at a

[2] Jon Stanford, Submission by Dr Jon Stanford FSIA to the Department of Communications, Information Technology and the Arts Discussion Paper on the Proposed Resale Royalty Arrangement, 2004, p.3
[3]Victor Ginsbergh and Catherine Bogle, Introducing Droit de Suite into the EU: An Economic Viewpoint, Université Libre de Bruxelles, August 1998, p.6
4. In financial market terms, buying a painting can be compared with buying a zero-coupon bond of uncertain capital value and maturity. (A zero-coupon bond is one which has one payment at maturity so that its market price during its life is always much less than its final value.)

time when it is likely to be important to him. The best that has been achieved is an inter-temporal re-allocation of income representing a welfare loss to the artist." [5]

It is self-evident that a levy, particularly one applied irrespective of loss or gain at resale, placed upon the resale of a product as risky as the purchase of art in the primary market will reduce demand for that product. Obviously, purchases in the secondary market where the risks of buying an unproven artwork are much less applicable, will be less affected by this levy. **While it is possible to legislate to make resale royalty compulsory on a work of art, it is not possible to legislate to prevent demand from adjusting downwards to the reduced value of owning a work of art in the primary market.** Alternatively, demand may shift to another set of commodities not affected by resale royalty.

In its submission, NAVA claims:

> "It seems grossly unfair that everyone else involved in trading and exhibiting the work of artists gains benefits while the creators of the work stay at the bottom of the food-chain".[6]

This misrepresents the nature of the bargaining position of the artist. The artist is not bargaining with "everyone else involved in trading and exhibiting the work", they are bargaining with the purchaser. Artists and their agents/representative galleries are in partnership. They jointly bargain with potential purchasers to obtain the maximum price for a work. The artist and agent are acting as one party in this bargaining with, the purchaser. The artists' and galleries' bargaining position is relatively weak in relation to the purchaser. This is because there are many more artworks for sale than buyers (refer Stanford Submission 2004). While it is possible to legislate to make the resale royalty compulsory on a work of art, it is not possible to legislate to make purchasing art compulsory. For an artist the key determinant is demand for their work. This determines the strength of their bargaining position with the buyer. The proposed legislation will not strengthen this position and the proponents repeatedly misrepresent the artists' bargaining position as exemplified in the use of the term 'bottom of the food-chain'. **This misrepresentation lies at the heart of advocacy for compulsion**.

The principle of marginal utility

"My kingdom for a horse". Shakespeare

The overwhelming majority of artists whose works never appear in the secondary market will simply be losers in the proposed compulsory, legislative system. However, even for those artists who late in life receive some resale royalty payments, the principle of marginal utility reduces this to a negative. The Discussion Paper fails to fully consider the economic concept of utility, that the value of money available now is higher, compared with the same amount in the future.

When one has relatively little and is in great need of money, a sum no matter how small, will have much greater utility than the same sum when one has more than enough. For example, a few thousands dollars invested now in the purchase of income-generating capital equipment such as computers, studios, paint or welding gear would have far more utility than any proposed Resale Royalty payments coming much later to individual artists. This utility factor is critical for emerging artists, especially if this loss of income at a vulnerable period of an artist's career was to prevent the artist continuing to make art.

As it is clearly stated in a detailed European economic report, *Do Artists Benefit from Resale Royalties? An Economic Analysis of a New EU Directive* :

> "…utility loss at a young age due to the introduction of a droit de suite *exceeds* (my italics) the utility gain from the resale royalty" and later in the same section, "…a droit de suite

[5] Stanford, 2004, p.8
[6] NAVA Submission, 2004, n.p.

> increases the volatility of their lifetime income….focussing only on the distribution of a given expected return on the resale market, the droit de suite clearly places the artist in a worse position."[7]

"In the long run, we are all dead." J M Kyenes

Impact on galleries and their ability to continue to provide essential services to artists.

The commercial gallery sector is important to artists not just simply as shops to sell works in. As the quotes below elaborate, artists have long term, often intensely personal relationships with galleries who provide them with many important services, additional to exhibiting and selling their work. Obviously, any further addition to the already onerous burden of regulatory compliance costs for micro to small businesses will reduce the ability of this sector to provide their core responsibility to artists. This would be the case particularly for those galleries that close as a result.

"The abiding characteristic of the primary market is the general level of excess supply: there are more paintings for sale than there are willing purchasers….There are more artists than the number that can be represented by galleries; galleries exhibit more paintings than anyone is willing to buy and galleries operate at lower than normal profit levels. Consequently there is a high turnover of artists and galleries. Collectors are drawn from a variety of walks of life but, unlike most people, have a sympathy for, and an interest in, contemporary visual art. Many are not wealthy; I have previously indicated that an important role for the gallery is to finance purchase sales on deferred terms (i.e. lay-buys). The important player in the primary market is the collector or buyer of works of art. Collectors have a genuine intrinsic interest in contemporary works and seek new and innovative works.
The galleries play an important role in screening artists and hence reducing the search and transactions costs of collectors. As stated above there are more artists seeking galleries than galleries can accept. Galleries select artists who are considered to have special talents and whose works may appeal to collectors. Collectors will be attracted to galleries which share their tastes and spend less time in seeking out and finding artists whose paintings appeal to their preferences and tastes…. The paintings sold in the secondary market are, almost without exception, by artists with some reputation. It is uncommon even for paintings of artists relatively well established in the primary market to have secondary market sales. Indeed, premature offers in the secondary market can destroy sales in the primary market (for this reason, galleries will seek to facilitate secondary markets sales in-house; galleries do not want to see their efforts to advance the reputation of one of their artists destroyed in this way.)"[8]

It is in the gallery owner's long-term interest to assist the artists they represent with their long term careers by providing artists with advice as well as the physical facilities of the gallery premise. This advice to the artists may range from advice about current marketing strategies including advertising and promotions to personal finances including banking, taxes, investment strategies and loans.

"As many galleries have found through their experience with GST, compliance costs involved in the administration of the Resale Royalty Scheme will be onerous and add to the further burden being carried by members of the commercial sector. The commercial sector is particularly fragile with loss of galleries through financial failure being common. The additional costs being incurred through

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[7] Roland Kirstein, and Dieter Schmidtchen, Do Artists Benefit from Resale Royalties? An Economic Analysis of a New EU Directive, Center for the Study of Law and Economics, Universitat des Saarlandes, Germany, 24 April 2000, p 16
8. Stanford, 2004, p.5-6. Please note our change from the use of 'demand' to 'supply' in first paragraph as we believe this is the correct intention.

compliance with a Resale Royalty will add to the financial burden and cause an increase in the failure of commercial galleries who provide a major source of income for artists."[9]

Appendix J of the Myer Report looks at whether a resale royalty should be waivable or compulsory. Concerns are expressed about the inequality of position between artist and gallery, the balance of power favouring the gallery and likening the relationship to one between a wholesaler and a semi-monopolistic retailer. *This is one of the critical underlying faults in the argument by proponents for a compulsory scheme.* In reality, the relationship between an artist and gallery is much closer to a business partnership, with works sold on a commission basis. It is a bond empowered by the fact that a reduction in sales hurts both parties. Galleries invest a great deal of time and money into this partnership. There is, therefore, a strong mutual self-interest in its success.

Negation of claim of superannuation for artists

Analogies to superannuation funds are risible. What sort of superannuation fund charges 20% or more administration fees and delivers benefits to a tiny number of its members, often when they are dead?

A resale royalty must be paid to the legitimate holder of that royalty. It cannot be given to anyone else. NAVA in its submission claims that the resale royalty is a superannuation scheme and then later in their submission states "either they (resale royalties below threshold) could be accumulated over time until they reach a certain minimum and then be distributed, or *could be pooled and after six years be applied for a closely related purpose like an artists' superannuation scheme or benevolent artists' fund*."[10] We thank NAVA for agreeing with us in this statement, that resale royalties are neither an artists' superannuation scheme nor benevolent fund.

Negation of claims of revenue neutrality and issues of equity

A number of submissions to the Myer Report have promoted the Resale Royalty as being revenue neutral. Most art purchases above $20,000 are actually purchased by companies eg. private superannuation funds. Copyright fees are a legitimate cost of business. As the Resale Royalty is proposed to be enacted within the Copyright Law, and it is not a tax, then it would appear entirely consistent that Resale Royalties would be treated as legitimate costs of business and therefore, it is highly questionable that this proposal could be considered to be revenue neutral. The legislative, compulsory model proposes to use the coersive powers of the state not to benefit the common good. Rather it proposes to benefit a few wealthy and mostly dead individuals. It is certainly not concerned with its effects on living artists' incomes and the consequent result of impairing their continued practice in their lifetime. *A Resale Royalty as proposed is a tax-payer funded subsidy to the wealthiest and most successful Australian artists and their descendents*.

Viscopy's recent claim that by increasing the transaction costs of buying and selling art and reducing the value of the title to a work of art, through the introduction of a legislative, compulsory resale royalty, they will somehow be 'expanding the market' for artists, and increase demand is utterly spurious and worthy of Lewis Carroll's Red Queen.

Costs and queries regarding compulsory Copyright

A legislative, compulsory resale royalty can only distribute money to the holder of the royalty. It cannot be legally transferred or distributed to anyone else. This is particularly problematic if the aim

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[9] Lance Blundell, Response to The Myer Report- Resale Royalty, Queensland Chapter of Australian Commercial Galleries Association, 2002,n.p

[10] NAVA Submission to DCITA's Discussion Paper, 2004, n.p. Our italics.

of a proposed scheme is to help communities such as the indigenous communities, rather than individuals within those communities.

We dispute the claim by NAVA, the Australian Copyright Council and other proponents of a resale royalty, that visual artists are disadvantaged because unlike authors and musicians they do not receive royalties for future reprints and performances. With the exception of editions of prints and etchings, visual artists make unique works of art and for this they do not need the assistance of a third party in manufacture such as a book publisher or record producer. In other words, 'The concept of royalties for works of fine art is derived from a false analogy with the royalties paid to writers and composers whose work is expandable through further production.'[11]

Implementation of this scheme is likely to messy and costly to the State as well as to industry. Section 252 (2) of the Private Members Bill presented by Senator Lundy (Labor):
"(2) For the purpose of the right to a resale royalty, an artist **must not** transfer or waive his or her copyright in an artistic work."[12]

If resale royalty is to be an amendment to the copyright held over an artwork and is inalienable, then this could invalidate the normal economic rights of copyright, that is, the rights to transfer, waive or sell one's copyright. A major concern is that this will involve a curtailment in the exercise of artists' normal economic rights of copyright. The consequences of this could be expensive and it appears to be in contravention of the Berne Convention. This would amount to a compulsory confiscation of what is potentially a significant property right. Surely this loss of economic rights would require compensation to artists. It assumes that one class of Australian citizens, in this case artists, like the insane and children, will be denied the right to dispose of their property as they see fit.

In the case of works already sold there could be claims based on 'unjust enrichment' by existing owners who would see the value of their title to an artwork reduced.[13] The proposed legislation appears to be highly discriminatory and for it to be implemented could well involve serious issues regarding privacy laws. We believe that it is worth noting that a legislative, compulsory resale royalty system is yet to be enacted within a common law country. Lastly, the use of the power of the State simply to enrich a few wealthy individuals and estates without justification by reference to the common good is unlikely to ever enjoy willing compliance in Australia.

Disclosure of Confidential Commercial Material

"The institution of a Resale Royalty scheme would involve the disclosure of sensitive commercial information to a yet unnamed collecting organization. The extent of this disclosure is much deeper than that required by the Australian Taxation Department which only requires aggregated financial information in order to comply with taxation laws. The Resale Royalty scheme will involve the feeding of particular information to the overseeing authority so that royalty on particular sales can be distributed to a very few artists."[14] Again, the legislative, compulsory model proposes to use the coercive powers of the state on micro to small businesses to enforce a legislative regime that will benefit so few artists.

Question 2: **What should be the primary objectives of a resale royalty arrangement in the Australian environment**?

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[11] Bolch, Ben W, Damon, William W, and Hinshaw, C Elton, 'Visual Artists' Rights Act of 1987: A Case of Misguided Legislation,' Cato Journal, Vol.8 no.1 (Spring/Summer) 1988.
[12] Senator Lundy, Resale Royalty Bill 2004, The Parliament of the Commonwealth of Australia. The full title states, "A Bill for an Act to amend the *Copyright Act 1968* to introduce a Resale Royalty Scheme for the visual arts, and for related purposes."
[13] Ginsburgh and Bogle, p.4
[14] Blundell, n.p

The primary objective of any scheme should be to provide assistance to artists of merit and in need, particularly indigenous artists. It must not inflict harm on the majority for the benefit of a very few. Precisely because it is not legislated, the industry self-regulatory model can address concerns as to equity, fairness and benefit to the greater good. NAVA's connecting of the desperate position of many Australian artists with a scheme whose benefits will exclusively flow to the most successful artists is nonsense.
Please refer to Questions 12 and 13 regarding our proposed alternative model.

Question 3: Who do you consider should be the principal targets of a resale royalty arrangements and why?

The principal targets should be artists of merit in need, particularly indigenous artists and their communities. Please refer to Questions 12 and 13 regarding our proposed alternative model.

Question 4: What kind of resale royalty arrangement would best deliver benefits to the intended beneficiaries and why?

A self-regulated industry model.

We do agree that a contract based system without active support by the industry is unlikely to succeed. A contract based system, like the legislated system, lacks the moral force that an self-regulated industry system, based on needs and merit as criteria, can have. Representative galleries, curators and most other participants in the primary market, are motivated by a passionate commitment to art and artists, manifest by their willingness to pay artists for their works. Our proposal, which would benefit artists of merit in need, would enjoy active, enthusiastic and freely given support. Some legislative proponents' views are frankly paranoid and their insistence on compulsion is troubling.

Our proposal would enjoy widespread support because it serves the greater common good, is just and equitable and, will do little or no harm to artists, the businesses and collectors who actually support artists in their work. Its costs would be minimal and the industry is prepared to go some way towards meeting them. The compulsory, legislative model will involve considerable and *unknowable* future costs.

Please refer to question 13 as to details of the proposed industry body.

Question 5: Are there any unique features of the Australian art market which need to be considered in designing a workable resale royalty scheme?

The use of the power of the State to enrich a few wealthy individuals and estates without justification by reference to the common good is unlikely to ever enjoy willing compliance in Australia.

Transfer of Aboriginal Secondary Art market overseas

NAVA in its submission disputes the figures used in DCITA's modeling which clearly show that the proponents' proposals will not benefit indigenous artists. These same figures when used in the Myer Report in support of the proponents' proposals were unquestioningly accepted. You can't have it both ways.

Of all Australian contemporary art, it is indigenous art that has a truly international market. As most upper-end indigenous works in the primary market are sold to American and European buyers, there is already a risk that the auction of these works will be sent, along with the upper end of the indigenous market to New York or other major international jurisdictions that do not have a resale royalty. Paintings and barks are easily transportable and it is easy to move the location of the sale. This would lead to a potentially serious cultural and economic loss for Australia.

"At a time when many states in Europe are promoting a "romantic nationalism" around works of art, it is slightly perplexing to see that these same states are encouraging a system which would lead to incentives to sell their cultural heritage in countries such as Switzerland and the US.[15] This would increase the risk of the works to remain there, as EU collectors who would be interested in purchasing may be discouraged as they would have to pay customs in order to reimport them. If it is the ambition of these countries to encourage their national works to be kept within their own territory, it would make more sense to give incentives for the sales to take place at their national locations."[16]

Bogle and Ginsburgh (1998) discuss how this is done in Belgium,

> "In December 1994, *At the Brussels Conservatory* by James Ensor (who died in 1949) came up for sale at the Hotel des Ventes Mosan in Liège, Belgium, where ARR is levied. Since this was not the case in Luxemburg, the painting was stored there during the sale, but the auction proceeded in Belgium, where the painting appeared on a TV-screen. The painting fetched 8 million BF (£156,800), was bought by a Frenchman who avoided an ARR of some £6,000."[17]

"Ginsburgh (1997) shows that New York has become the centre of the global art market trade (secondary market) with the majority of important paintings (the most highly valued ones) being sold in New York and that very few high priced works are sold in European centres which levy a Droit de Suite." [18] We see this concrete example applying to Australian indigenous art, should a compulsory, legislative resale royalty be introduced.

Question 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 exclude works that decrease in value, etc)?**

1. no adverse impact or harm to artists, their incomes and the industry they make a living in;
2. equity – being able to help living, Australian artists on a needs/merit basis;
3. efficiency of a voluntary scheme - costs of implementing this scheme would be relatively small, with little loss of funds to administration and maximum funds granted to artists;
4. does not impact on the ability of representing galleries, which are usually micro to small businesses, to fully represent their artists and provide all necessary services (and certainly does not encourage more galleries to go out of business);
5. does not cause any perceptual or actual damage to the art market; does not increase volatility in the market through fear, uncertainty or panic;
6. it does not devalue ownership on a title of a work of art.

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[15] See Merryman (1991).
[16] Ginsbergh, p.14
[17] Stanford, 2004, p.10
[18] ibid. p.10

Question 7: **What works should be covered by the arrangement and why**?

Subject to negotiation and consultation within the industry.

Question 8: **What duration should apply and why**?

This issue would be subject to consultation and negotiation within the industry. However, given that the French are seeking to reduce the period for their droit de suite scheme, we would be unlikely to agree to any term longer than the artist's life. In France it is the case that the majority of the benefits paid go to the estates of just 7 artists. France has also been forced to acknowledge that their market for art has moved off shore to the United States.[19] Thus, if introduced the only arrangement that could be morally justifiable would be a scheme to assist artists of merit in need during their lifetime.

Proponents of the legislative, compulsory model continually point to the examples of France and Germany as working regimes. Yet there has been real dissention and concern expressed by artists and the industry in both these countries and, as reported in *The Art Newspaper*, the French Government has openly acknowledged the serious adverse impacts that this scheme has had on their art market.

Question 9: **Should artists be able to assign, waive or sell the resale royalty in their works and why**?

We are advocating a non-legislative, self-regulated industry system.

Question 10: **Should there be a threshold level for the resale of works and, if so, at what level should that be set and why**?

Subject to negotiation and consultation within the industry.

Question 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**?

Subject to negotiation and consultation within the industry for application in the voluntary, non-legislative model we are proposing.

Question 12: **What type of organization should administer any arrangement and what factors should be used to assess and ensure the performance of such a body**?

Senator Lundy's Private Members Bill clearly intends the collecting society Viscopy Ltd to be declared as the collecting agency for an Australian resale royalty scheme and would gives this company wide powers to access to private, commercial-in-confidence information about the purchases of artistic works in this country. This is the worst possible option for visual artists because it is already the case that in order for artists to collect any benefit from Viscopy they are forced to become members of the collecting society but if they elect not to do so their money is held

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[19] Georgina Adam, 'Radical shift in French position on tax and resale rights', also 'Report shows how art market has moved from Europe to the US', The Art Newspaper, 2002.

in Viscopy's trust fund where it eventually becomes Viscopy's money. This is outrageous!

As already stated, many commercial galleries lend their artists money that is secured only by the promise of future production. In addition, many galleries already pay a royalty, voluntarily, every time a work by one of their artists is sold by their company. The cost of distributing these benefits directly to the artists concerned is nil. These beneficial arrangements should not be lost or changed in any way owing to enforced government legislation.

Please refer to question 13.

Question 13: If you do not support a resale royalty, do you consider that alternative support arrangements are more appropriate. If so, what kind?

As can be seen from the evidence presented, under a compulsory, legislative model, the costs of the scheme would be disproportionately borne by the primary market, ie. artists and the galleries that represent them. As is clearly demonstrated from the figures available for the French system, benefits would flow to a few well-off individuals and mostly, to their heirs. Further, the compulsory, legislative model is certainly going to be subject to costly litigation, disputes and high administrative costs, resulting in enormous waste. It is plain that it will reduce the primary market for artists' works and consequently their incomes. Therefore, we propose a model based on the DCITA Discussion Paper's second option, one of industry self-regulation.

The signatories to this paper acknowledge that discussions will be undertaken with other interested parties involved in the primary and secondary market. We also acknowledge that the development of an industry code of conduct, ratified by the ACCC, will be essential and that government would assist in this process with advice and possibly financially. Nevertheless, the costs of proceeding with this program will be far less onerous and complex than under the proposed compulsory, legislative resale royalty scheme (as we have continually outlined in this paper). It would also not have detrimental effects on artists' and galleries' incomes in the primary market.

The authors of this submission are prepared to work with the Department and other key players in the industry to develop, formalise and implement an effective industry code of conduct and establish a national, representative foundation along the lines outlined below.

We advocate an industry based self-regulated model which would work along the following lines:

- industry, with government assistance, would contribute to the set-up costs of an industry secretariat to develop and ratify an ACCC Code of Conduct, specific to the industry;
- once the industry group is formally ratified, then establish Foundation program;
- this Foundation could be structured along the lines of the famous Pollock-Krasner Foundation and a recommended mission statement could be:

'The Foundation's mission is to aid Australian individuals who have worked as artists over a significant period of time. The Foundation's dual criteria for gifts are recognizable artistic merit and financial need, whether professional, personal or both, with a particular emphasis toward Indigenous artists.'

- an invisaged foundation structure would include a governing board made up of gallerists, dealers, collectors/patrons, auction house representatives, leading arts figures (for example, directors or ex-directors of state galleries) and senior artists;
- the industry would promote the adoption of contracts where gifts would be made to the Foundation upon the resale of an artwork of a percentage of any increase in value.

Once a properly constituted industry body with a ratified Code of Conduct is established, this body could then set up and manage a Foundation for the benefit of living, Australian artists of merit and need. The Foundation could provide cost efficient, expedient and beneficial outcomes of the *real* concerns for artists expressed in the Myer Report.

Some may claim that there is nothing to stop the industry supporting an industry self-regulated model as well as contributing to a compulsory, legislated model. This would be beyond the industry's capacity. There is a stark choice to be made. *Do we act for the benefit of the common good or for the benefit of a very few.*

Question 14: What do you consider is the likely impact of your preferred position on the possible groups affected and on the Australian art market?

1. no adverse impact or harm to artists and the industry they make a living in;
2. equity – being able to help artists on a needs/merit basis;
3. efficiency - costs of implementing this scheme would be relatively small, with little loss of funds to administration and maximum funds granted to artists;
4. does not cause any perceptual or actual damage to the art market; does not increase volatility through fear, uncertainty or panic;
5. it does not devalue ownership on a title of a work of art.

Question 15: Do you have any other issues?

If you wish to improve the economic situation of artists, then buy or commission their work. Arts organizations are managerial; their self-interest is in having projects to manage. In this case, there is a diametrical opposition between the interests of artists and the interests of arts organizations. Every dollar spent on management is a dollar not spent on buying artists' works. We accept that some management and related activities are beneficial but all proposals to increase the size, complexity and costs of these organisations should be examined carefully.

NAVA's advocacy for the compulsory, legislative resale royalty in their submission includes the following statements:

> "for the copyright collection society (the resale royalty would be) a new area of responsibility and an appropriate level of income for its administration services" and earlier in the submission,"…we would propose that relevant arts industry bodies like NAVA should be involved in the process of developing the tender criteria and be represented on the selection panel". [20]

If ever there was a case where a hobby-horse should be looked in the mouth, the proposal for a legislative, compulsory model for resale royalty is it.

The criticism has been made that resale royalties in the form advocated by the proponents of the legislative scheme has not been implemented by the industry. This is because the compulsory, legislative scheme brings benefits to very few artists at a great cost to many. It is obvious that the legislative model and the voluntary individual contracts model are, to any rational artist, unattractive. They involve sacrificing income now, when it is desperately needed, to participate in a 'lottery' where very few win. The reasons why the legislative model advocated requires compulsion is because it is both contrary to nearly all artists rational economic self-interest and more importantly a scheme such

[20] NAVA submission to DCITA's Discussion Paper, 2004, n.p.

as this backed, by the full power of the state simply for the benefit of a very lucky few, is morally and ethically offensive.

There is a choice to be made.