

Mr Mark Taylor  
General Manager  
Arts and Regional  
Department of Communications, Information, Technology and the Arts  
GPO Box 2154  
Canberra  
ACT 2601

20 August 2004

Dear Mr Taylor,

**Resale Royalty Submission**  
**Response to the Department of Communications, Information, Technology and the Arts' Discussion Paper *Proposed Resale Royalty Arrangement***

Jumbunna Indigenous House of Learning (Jumbunna IHL) is pleased to provide the Department of Communications, Information, Technology and the Arts with our submission on the *Proposed Resale Royalty Arrangement Discussion Paper*.

Jumbunna IHL is part of the University of Technology, Sydney and has an important role contributing to Australia's educational and social development. Jumbunna is committed to improving the quality of teaching and research at UTS by facilitating active links with the Indigenous community, higher education institutions and other professions with particular emphasis on Australia's growth as a multi-cultural nation.

The Research Unit of Jumbunna IHL regularly contributes to inquiries which are relevant to Indigenous Australians. Our key focus areas are:

- Indigenous Land and Culture
- Indigenous Governance
- Economic Development
- Indigenous Policy

We have a strong commitment to contributing to research and policy development on issues affecting the arts, and particularly the Indigenous arts sector. Our submission comments on issues relevant to all artists, making specific reference to the concerns of Indigenous artists. Please contact me if we can assist further in your inquiry.

Yours sincerely,

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## Question 1: Should Australia introduce a resale royalty and why?

Jumbunna Indigenous House of Learning supports the introduction of a resale royalty arrangement in Australia for the following reasons:

1. A resale royalty would provide additional income for some artists, their families and heirs.
2. Adoption of a resale royalty is an option under the Berne Convention to which Australia is a signatory.
3. The structure of financial returns for visual artists provides fewer opportunities for income than other artforms. For example, while writers and composers may receive royalties from sales of their work, artists' main source of income is the payment from the first sale of their work. They receive little if any benefit from an increase in the value of their work. A resale royalty would provide an additional source of income where a work is resold.
4. Indigenous and non-Indigenous artists make a significant contribution to the Australian economy.

In contrast to their contribution, individual Indigenous and non-Indigenous artists generally live on very low incomes. Throsby and Hollister's report *Don't Give Up Your Day Job* confirms the widely held belief that most artists live on low incomes.<sup>1</sup> The profile of visual artists includes Indigenous artists living in urban areas, but does not include Indigenous visual artists living in remote areas.<sup>2</sup> Over one quarter of the Indigenous population live in remote areas<sup>3</sup> and live on significantly reduced incomes.

Australian Bureau of Statistics, based on the 2001 census data found:

In 2001, the mean (average) equivalised gross household income for Indigenous persons was \$364 per week, or 62% of the corresponding income for non-Indigenous persons (\$585 per week). This disparity reflects the lower household incomes received by households with Indigenous person(s), and the tendency for such households to be larger than Other households.

For Indigenous persons, income levels generally declined with increasing geographic remoteness, although the average equivalised income in outer regional areas was slightly lower than that in remote areas. In major cities, the average equivalised income

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<sup>1</sup> D. Throsby and V Hollister, *Don't Give Up Your Day Job; and economic study of the professional artists in Australia*, Australia Council, Sydney 2003 cited in DCITA, *Proposed Resale Royalty Arrangement Discussion Paper*, page 16.

<sup>2</sup> DCITA, *Proposed Resale Royalty Arrangement Discussion Paper*, page 13.

<sup>3</sup> Australian Bureau of Statistics, 4713.0 Population Characteristics, Aboriginal and Torres Strait Islander Australians, <http://www.abs.gov.au/ausstats/abs@.nsf/b0462a212839e1e5ca256820000fe0de/2b3d3a062ff56bc1ca256dce007fbffa!OpenDocument>, accessed 19 August 2004.

for Indigenous persons was one and a half times higher than the corresponding income in very remote areas.<sup>4</sup>

The *Discussion Paper* notes the growing contribution of Indigenous art to the Australian art market, including the secondary art market. Table 4 notes increasing sales through auction houses of \$8,627,000 over 15 years, and a doubling of dollar value of sales from 1999 to 2003. Clearly Indigenous art has a valuable role in the market. And equally clearly, Indigenous artists are not receiving proportionate benefits from the contribution their artistic works and the cultural material embodied in their artistic works to the secondary art market.

“No recent demographic data appears to exist on visual art purchasers in Australia.”<sup>5</sup> Auction houses and dealers are reluctant to provide specific information on buyers, but the Discussion Paper reviews available statistical data and concludes that “there is anecdotal evidence suggesting that the buyer population comprises a varied cross section of generally wealthy people.”<sup>6</sup>

A resale royalty is a recognised, established means of providing a financial contribution by the beneficiary of the work which supports the works’ creator.

5. Indigenous and non-Indigenous artists make a significant contribution to the cultural life of Australia, domestically and internationally. A legislated resale royalty would provide recognition by government of that contribution and support artists, their families and heirs.
6. Opposition to the resale royalty are often based on concerns about the potential damage to the art market. Table 1 (1993-2003) in the Discussion Paper shows the recent figures indicate a strong market. The picture is of a “clear and quite remarkable overall increase in the volume of sales during this period.”<sup>7</sup>

While it is acknowledged that the market is subject to change, each downturn in sales was followed by an increase in sales which more than compensated for the preceding decline. So, while there is evidence of change, there is also evidence of strong and rapid recovery.

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<sup>4</sup> Australian Bureau of Statistics, 4713.0 Population Characteristics, Aboriginal and Torres Strait Islander Australians, <http://www.abs.gov.au/ausstats/abs@.nsf/b0462a212839e1e5ca25682000fe0de/2b3d3a062ff56bc1ca256dce007fbffa!OpenDocument>, accessed 19 August 2004.

<sup>5</sup> Department of Communications, Information Technology and the Arts, *Proposed Resale Royalty Arrangement Discussion Paper*, page 11.

<sup>6</sup> Department of Communications, Information Technology and the Arts. *Proposed Resale Royalty Arrangement Discussion Paper*, page 12

<sup>6</sup> Department of Communications, Information Technology and the Arts, *Proposed Resale Royalty Arrangement Discussion Paper*, Table 1 page 10.

<sup>7</sup> Department of Communications, Information Technology and the Arts, *Proposed Resale Royalty Arrangement Discussion Paper*, Table 1 page 10.

7. There is no evidence to directly support or refute concerns that buyers would be deterred by the resale royalty or that the market would be damaged. In the absence of compelling non-anecdotal Australian evidence, there is no robust reason to reject a resale royalty arrangement, particularly as any of the proposed regimes could be withdrawn if it were found to be detrimental.
8. There is no evidence for another of the assertion the resale royalty damages opportunities for emerging artists. The assertion appears to be based on an idea that a benefit to established artists is automatically detrimental to emerging artists. Benefits to established artists do not automatically impact adversely on newer artists. The argument that newer artists are disadvantaged by payments to established artists on the secondary sale of their work have no known basis in evidence.
9. The *Discussion Paper* asserts that proposals to implement a resale royalty as a return on an artists investment, privileges artists and ignores the risk of purchase assumed by purchasers. Jumbunna IHL suggests that this underestimates the proportion of risk borne by artists and their families through commitment to arts practice.

While an artists' reputation is built in many ways, it is also influenced by prices achieved through sales in the secondary market. This can impact on both the artist and their heirs.

Artists already share a proportion of the risk to their reputation where prices in the secondary market are not high. The resale royalty distributes the risk between the artist and the buyer.

10. The resale royalty can provide the following benefits to Indigenous artists and the community:
  - provide economic benefit to artists;
  - empower and nurture artists;
  - recognise the ongoing relationship between the artist and the artist's community with the work and the owner;<sup>8</sup>
  - inspire new works;
  - provide means for artists to meet community obligations;
  - reduce profiteering and promote transparency in the sector;
  - minimise exploitation;
  - limit problems relating to authenticity and provenance.<sup>9</sup>

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<sup>8</sup> See also Hetti Perkins 2001, Confidential Submission to the Contemporary Visual Arts and Craft Inquiry cited in the *Discussion Paper* page 19.

## **Question 2: What Should Be the Primary Objectives of a Resale Royalty Arrangement in the Australian Environment?**

1. Provide financial recognition of the contribution of artists to cultural and economic life of Australia;
2. Provide a financial return to artists, their families and heirs;
3. Encourage new works by supporting artists who qualify for the resale royalty.

Pursuit of these primary objectives would result in a number of other benefits such as improved provenance, increased acknowledgement of the relationship between artists, their work and reputation, and the owners of the work especially where the work embodies Indigenous cultural material.

## **Question 3: Who Do You Consider Should Be the Principal Targets of a Resale Royalty Arrangement and Why?**

The primary target of the resale royalty should be artists and their heirs where the artists' work is resold.

Jumbunna IHL supports the introduction of a resale royalty in Australia in part, because of the inequity of the low prices paid to Indigenous artists at the first sale of works compared to often higher prices earned at secondary sales for the same works where there is no obligation for returns to the artist or their heirs.

The situation of many Indigenous artists highlights the issues relevant to all artists.

Jumbunna Indigenous House of Learning advocates a resale royalty for all artists. We acknowledge that a proportion of Indigenous artists, non-Indigenous artists and their heirs would benefit from this arrangement but this is not a sound reason to oppose implementation of a legislative resale royalty arrangement.

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

Jumbunna Indigenous House of Learning favours a fully legislated, mandatory, enforceable resale royalty scheme for the following reasons:

1. Mandatory and enforceable provisions are necessary to overcome resistance from sectors of gallery owners, auction houses and dealers;
2. A legislative regime has capacity to be transparent;

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<sup>9</sup> Adapted from T. Janke and R. Quiggin, *Getting from Principle to Practice: An Australian Dialogue on Resale Royalty Rights*, Consultations with the Indigenous Arts Sector, Completed by Terri Janke and Company for the Aboriginal and Torres Strait Islander Arts Board of the Australia Council, 2001, page 4 in Myer, Rupert, *Report of the Contemporary Visual Arts and Craft Inquiry*, Canberra 2002, page 165.

3. A legislative regime has capacity to enforce uniformity;
4. The arrangements could be legislated as amendments to the *Copyright Act* 1968 (Cth).

#### The Industry Self Regulation Model

5. Voluntary methods such as industry self regulation are inadequate for the following reasons:
  - a. There is sufficient resistance to the resale royalty from gallery owners, auction houses and other industry participants to endanger comprehensive compliance with a voluntary mechanism.
  - b. This opposition raises the potential for artists to be pressured to waive any rights to a royalty payment.
  - c. The Industry Self-Regulation model proposed in the *Discussion Paper* requires substantial monitoring which implies high administration costs. For instance, pursuit of false reporting would increase administration costs.
  - d. The purpose of the proposed legislative provisions for reporting on sales presumably provides a mechanism to circumvent the reluctance of the secondary market declined to report on sales.<sup>10</sup> This atmosphere of non-compliance suggests a real weakness in any voluntary code.
  - e. The *Discussion Paper* proposes that an industry code of practice developed by an industry working group would have any capacity to “limit any negative effect a resale royalty scheme could have on the sustainability of those businesses and the buoyancy of the art market in Australia.”<sup>11</sup> No reasons are provided to support this suggestion.

Direct participation in an unenforceable code may alleviate some fears of participants, but this is not the same as achieving a real limiting effect. Further, it is unclear why a satisfactory level of participation and information cannot be achieved by this consultation process and translated into legislative provisions.

6. It is suggested in the *Discussion Paper*, that one advantage of the industry self regulation model is that it could be reviewed in three to four years. But this not supported by any reasons. It is not clear why a self-regulatory model is any

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<sup>10</sup> The *Discussion Paper* notes that the secondary art market does not make statistical information publicly available (page 12). The proposed industry self regulation model requires reporting to government departments and anticipates penalties for false reporting. This absence of openness or frank disclosure is not an environment conducive to voluntary compliance.

<sup>11</sup> <sup>11</sup> Department of Communications, Information Technology and the Arts , *Proposed Resale Royalty Arrangement Discussion Paper*, page 38.

more suitable for review than a legislative model. In fact the self-regulatory model may be less suitable for review. Its voluntary foundation encompasses so many possible variations in implementation of the regime that few conclusions could reliably be drawn from a review.

### Contracts

7. A system based on contracts would be subject to similar difficulties as the self-regulation model. Contracts are essentially agreements entered into voluntarily by the parties. No voluntary system will ensure that benefits are delivered to artists. Further, disputes over contracts require legal advice which can be expensive for all parties, and out of the reach of artists.

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

#### Geographical distance from other markets

One of the potential problems which is often raised in opposition to the resale royalty is the potential for a resale royalty to push the art market off shore. The distance of Australia from the major art centres makes movement away from Australia less likely than movement between London and New York. Therefore we believe that the potential for this damage to the market is minimal and ought not deter the Government from legislating.

#### Indigenous Art Market

A significant feature of the Australian art market is the growing value of the Indigenous art market. This raises a number of issues:

As a major contributor to the market Indigenous artists ought to be supported in their practice. The provision by government of structural support to the contributors to a nations' economy is common and sound economic practice.

For many Indigenous artists English is their second, third or fourth language. A resale royalty system should avoid legal complexities and voluntary arrangements which are vulnerable to evasion by unscrupulous dealers.

Indigenous artists should have the same rights as non-Indigenous artists to determine where resale royalty payments are made. These may include personal bank accounts, trust funds, organisations, heirs or any other arrangements each individual artists choses.

### **Question 6: What are the most important principles underpinning the choice of model or the form of resale royalty arrangement?**

1. The principle that artists are entitled to benefit from the resale of their work;
2. The principle of minimising administration costs;

3. The principle that markets benefit from rewarding successful contributors to the market.

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

1. All artistic works including new media works and installations which are resold through an intermediary;
2. Artistic work as defined under the *Copyright Act 1968* (Cth) except buildings or permanent non-removable parts of buildings;
3. Reproductions made by the artist in limited numbers such as numbered prints, photographs or craftworks.
4. New forms of expression such as multi media works and installations not currently included in the *Copyright Act 1968* (Cth) definition of artistic works.

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

The resale royalty right should be of the same duration as copyright. It should be extended in accordance with any amendment to the *Copyright Act 1968* (Cth) in conformity with the Australia – US Free Trade Agreement.

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

Jumbunna IHL proposes that the resale royalty be inalienable, subject to the advice of Aboriginal Art Centres, for two reasons. Firstly, this position is consistent with international practice including the Berne Convention, the EU Directive and importantly, the Australia – US Free Trade Agreement expressly allows the introduction of an inalienable resale royalty right.

Secondly, we propose an inalienable resale royalty right in recognition of the unequal bargaining power of Indigenous artists and the market's clients and dealers. While many enjoy good relationships, there is a history of unscrupulous dealings with Indigenous artists, and we support an inalienable right in recognition of these facts.

However, we would favour an exception to this principle for Indigenous artists if this were advised by the Indigenous arts sector.

**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?**

Jumbunna IHL supports the principle of a resale royalty applying to all works with no threshold. However, in view of administrative costs this may not be practical. We note on this issue that technological advances have decreased administrative costs and should they can be expected to decrease rather than increase.

On the basis of research to date, Jumbunna IHL supports a threshold between \$1000 and \$3,000 subject to the advice of the Indigenous arts sector and the findings of Viscopy's research.

**Question 11: What rate of royalty should apply and why? Also should the royalty be set at a flat rate or on a sliding scale?**

At present Jumbunna IHL supports a 5% flat rate royalty because it is simpler than a sliding scale and may facilitate lower administrative costs.

However, we acknowledge the inter-relationship of the issue of threshold and percentage arrangements and would support a sliding scale if this were preferred by the Indigenous arts sector.

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

Jumbunna IHL supports declaration by the Attorney-General of a not for profit collecting society as the administration body. We support this structure because collecting societies have the infrastructure for administration and not for profit organisations maximise returns to artists. Criteria for a declared collecting society could be similar to those set out in the *Copyright Act 1968 (Cth)* including safeguarding the interests of members, and the collecting societies Code of Conduct.

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

Jumbunna Indigenous House of Learning supports the resale royalty.

However, we do not view it as the only measure necessary to achieve equity for Indigenous artists or to support the Indigenous and non-Indigenous art market. We believe that the resale royalty is one achievable measure that can be legislated to support artists and support the pursuit of additional measures such as the Indigenous Intellectual Property Tool Kit.

**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?**

We believe that artists, Indigenous artists, their families and heirs will benefit from our preferred position. We believe that this support will provide benefits to the Australian art market because it will improve provenance of works, reduce opportunities for unscrupulous dealers and thereby improve the reputation of the market,

We are not convinced that claims of damage to the market proffered by gallery owners, dealers and auction houses are justified, in view firstly of the lack of evidence of the claims and secondly because the market showed no downturn when imposts such as the buyers premium, capital gains tax and the GST were introduced to the market.

We accept that the creation of the resale royalty scheme would have a *theoretical* impact on current owners of works as a small percentage of potentially achievable sales would revert to the original maker.(our emphasis)<sup>12</sup> The reality of this loss to current owners is not plain.

We acknowledge that there is serious disagreement about the impact of a resale royalty on the Australian art market. Myer states:

On balance it can probably be concluded that, ‘given the state of the empirical evidence in hand, intelligent, well meaning persons, equally well informed about economic theory, may well disagree about the efficiency of artists’ resale rights’.<sup>13</sup>

Jumbunna IHL submit that the market has withstood the imposition of the buyers’ premium, capital gains tax and the GST without detriment and will withstand introduction of a measure which enjoys wide support in many sectors and can provide one means of support to the nations’ visual artists.

**Question 15: Do you have any other issues?**

Jumbunna IHL confirms our strong support for the recommendation in the Myer Report for Government funding for the implementation of the resale royalty.

We would encourage the Government to support introduction of the arrangement with an effective education campaign for all Indigenous and non-Indigenous sectors of the market.

Robynne Quiggin  
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<sup>12</sup> Myer, Rupert, *Report of the Contemporary Visual Arts and Craft Inquiry*, Canberra 2002, page 164.

<sup>13</sup> R. McCain, “Artists’ Resale Dividends: Some Economic-Theoretic Considerations’ *Journal of Cultural Economics*, vol 13 (1) 1989 pp 35-52, cited in Myer, Rupert, *Report of the Contemporary Visual Arts and Craft Inquiry*, Canberra 2002, page 162.