

RESALE ROYALTY SUBMISSION

The National Association for the Visual Arts (NAVA) is pleased to respond to the Proposed Resale Royalty Arrangement discussion paper prepared for the Government by the Department for Communications, Information Technology and the Arts (DCITA). It is hoped that the DCITA paper will contribute further to the process of soliciting evidence from the sector which will encourage the government to proceed with legislating this long awaited artists' right.

NAVA is the peak body representing and advancing the professional interests of the Australian visual arts and craft sector. Since its establishment in 1983, NAVA has been a powerful force in bringing about policy and legislative change to encourage the growth and development of the visual arts and craft sector and to increase professionalism within the industry. It has also provided direct service to the sector and its members (approximately 3000) through offering expert advice, representation, resources and a range of other services.

For about fifteen years, NAVA has been advocating for the introduction of the artists' resale right in Australia and in the recent past has joined with the Australian Copyright Council, the Arts Law Centre of Australia and Viscopy to provide expert advice and prepare submissions on the issue for all political parties, most recently in November 2003. NAVA continues to support the position put forward in the latest submission but with some further elaboration in the answers provided below.

NAVA was gratified that the report of the government's Myer Inquiry into the Contemporary Visual Arts and Craft Sector (2002) recommended the introduction of the resale right, and has been encouraged by the government's evident interest. NAVA believes that it is now time to take action.

What is Resale Royalty

As described by Silke Radde¹ the resale royalty is an economic right, which takes the form of a collection of a sum of money on each resale of art works, to be paid to the artist giving them the right to participate in the future economic exploitation of their work. It also has some of the characteristics of a moral right, " a derivative of ...the inalienable right of

¹ Radde S. (May 2001) "droit de suite: the artist's right to a resale royalty and the implications for New Zealand" pg 354 - 364, Intellectual Property Journal

paternity", positing a personal relationship between the artist and his or her creation, which acknowledges that art is a continuing projection of the artist's personality.

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

The National Association for the Visual Arts (NAVA) strongly supports the introduction of artists' resale royalty legislation in Australia and has been increasingly pressing the federal government to make a commitment through legislating the right and supporting the implementation of administrative arrangements to see it take effect. This recommendation formed part of NAVA's submission to the Myer Inquiry into the Contemporary Visual Arts and Craft Sector.

NAVA supports it for all the reasons canvassed in the DCITA discussion paper.

In Australia, artists gradually are being granted the rights enjoyed by artists in many other countries, particularly in the UK and Europe. In this case the introduction of resale royalty would follow in the footsteps of its adoption by the whole of the European Union to be implemented by 2006 (though later in the UK). This will fulfil Australia's obligations as a signatory to the Berne Convention.

Comparable right to other artforms

It is similar in significance and intention to the royalties regime in operation for creators in other disciplines like writing and music. However there are differences between the economies of the various art mediums to the extent that, in the other disciplines small levies can be imposed on the sale of multiple copies of literary or musical works, while visual and craft artists have only one opportunity to earn income from sale of the original. By means of the resale royalty, artists can benefit from the successive uses of their artworks as they are passed from one owner to another, taking a small percentage contribution at each point of exchange. Gradually over the life of the artist and his/her descendants, the incremental amounts could be regarded as a repayment to the artist for the enjoyment of his or her work by purchasers, and recognition of the artist's growing reputation. (This of course is separate from, but in some ways similar to the income all copyright owners can earn from licensing the reproduction of their work).

Recognition of professional status

As a group, artists are better educated than the general community and could be better remunerated by choosing different professional career paths. However, their commitment to their artistic practice is usually greater than their desire for wealth. This does not mean that they do not wish to be well paid for their artwork. On the contrary, most greatly desire the recognition that high prices for their artwork would imply. Over their lifetimes, artists dedicate themselves to the building of their artistic reputations. The payment of resale royalties would be one much valued form of recognition of their professional status.

Long term financial viability

Since the earnings of most artists from first sale of their works are relatively small, particularly in their early establishment years, they are often not in a position to contribute to superannuation schemes. Resale royalty earnings paid later in their lives are one way in which they can gain value from their earlier efforts and financial sacrifices.

The recently published Throsby and Hollister² report has revealed that many artists live below the poverty line. While it is probable that there would be great variation in the level of income support received by artists from this source, for people on limited incomes, even relatively small amounts of money can make a very welcome contribution to their wellbeing and that of their families.

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. This resale right would give artists some small proportion of these benefits.

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

The primary objective is to provide a new income stream for artists which is a direct product of their creative output, and respect for and acknowledgement of artists' continuing interest in their work.

NAVA asserts that this scheme alone does not provide the sole answer to artists need for professional respect and income, but it is both a powerful symbolic form of recognition and provides a valuable income stream. It is

² Throsby D. and Hollister V. (2003) Don't Give Up Your Day Job: an Economic Study of Professional Artists in Australia

one of several forms of support and acknowledgement, which together can give artists the means and incentive to conduct their practice.

The Throsby and Hollister report³ provides the extremely worrying evidence that over at least the fifteen year period of the surveys, visual artists' incomes have been steadily dropping, and comparatively more than the average wage earner. While this was also true for other creators until the early 90s, the incomes of professionals in other artform areas began to rise again. Sadly this is not the case for visual and craft artists.

In 2000/1, the most recent period surveyed, 22% of visual artists and 19% of craft practitioners earned less than \$10,000 income from all sources. The median income of visual artist was \$22,900 with \$3,100 coming from their art practice, and \$22,600 for craft practitioners with \$8,200 coming from their craft practice. With median expenditure on visual arts practice of \$4,400 and \$7,000 for craft, many creators are making very small profits, if any. When artists' incomes are compared with those of other full time employed professional people earning a median income of \$48,900, the difference becomes starkly clear. Artists are earning less than half the income of the average professional.

Alongside this, the auction market has significantly increased its profits over the last 10 years (as detailed in the DCITA discussion paper) indicating that the improving art economy can well afford to make a contribution to artists' financial viability.

3. Who do you consider should be the principal targets of a resale royalty arrangement and why?

The principal targets of the resale royalty arrangement would be all Australian artists whose artistic works are resold and their heirs. Just as any one else's heirs have the right to benefit from their benefactors' ability to build their estates, so too should the heirs of artists who have managed to achieve financial success.

NAVA is of the view that the royalty right should not be based on need alone, but is a right similar to moral rights and should be viewed as an entitlement for all visual artists and craft practitioners regardless of their chosen medium of expression. Some suggest that the right should only apply to Aboriginal artists, however this is not a view shared by NAVA,

³ ibid

not the least because it is discriminatory and would be extremely problematic to administer.

The Lawson Menzies auction house has established a resale scheme for Indigenous artists based on a 2% royalty with the collected payments pooled and distributed to Indigenous communities for welfare purposes. NAVA regards this as patronising and inappropriate. The decision to share the benefits of payment with the community should be made by the artist. In detaching the royalty from individual artists, it no longer recognises the on-going connection between the artist and his or her work.

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

- **a fully legislated scheme;**
- **industry self-regulation; or**
- **contract-based resale royalty?**

4.1 Fully legislated

NAVA submits that a fully legislated scheme is the only reliable way to deliver these benefits to Australian artists, given the power differentials between visual arts and craft practitioners and the principle intermediary bodies reselling their work. NAVA's proposal is for a fully legislated inalienable right for all sales of Australian artists' work to be administered by a declared collecting society. This should go to tender and 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.

We also note that signatories to the Berne Convention which have introduced resale royalties have incorporated the legislative scheme within their Copyright legislation. This means that Australian artists would be able to receive resale royalties from those countries that have equivalent schemes where their work is resold.

Similarly consistent with Berne Convention, where a foreign artist is a national of a country with an equivalent scheme, they too can receive a resale royalty when their work is sold in Australia.

Resale royalty is an economic right similar to copyright. Just as copyright owners receive royalties in return for licensing or assigning copyright in their works, the resale royalty is paid to the artist on the resale of his or her original artwork. Both rights are based on the principles of reward and incentive.

4.2 Industry self-regulation

An industry code of practice is unlikely to work. There have been earlier efforts to implement a contractual royalty scheme but have been strongly resisted by dealer galleries and other intermediaries that resell art works.

We think it is highly unlikely that Australian galleries and similar intermediaries will enter into an Industry Code of Conduct. NAVA's experience may be salutary in this regard. With five other research partners, NAVA was responsible for researching and publishing *the Code of Practice for the Australian Visual Arts and Craft Sector*. Since its release in 2001, NAVA has been advocating for its application across the sector. While it has been endorsed by many of the main arts industry protagonists, it is not possible to ensure that its best practice principles are universally applied.

Equally the sector has not been able to persuade commercial galleries to adopt the use of trust accounts though this is standard business practice. Nor have artists' fees necessarily been paid by public galleries once this was no longer mandated as a condition of grant by the Australia Council.

4.3 Contract-based

There have been many attempts to implement the contractual royalty scheme. We know of none that have worked internationally. Similar issues arise in relation to contract based royalty scheme as with self-regulation. Artists would rarely have enough bargaining power to insist on the contractual provision of resale royalty when the sale is made of the original artwork.

Artists would have to rely on the honesty of the purchaser paying the resale royalty. Policing the resales would be impossible. In the event that a resale was not been paid, the artist would be unlikely to have the financial resources to enforce the contract in court.

In addition, written contracts are rarely used in the visual arts. Most galleries simply provide an invoice or a receipt of sale rather than enter into a formal agreements. Most galleries operate on verbal contracts with their artists, even where they are the exclusive gallery/agent for that artist in a particular city or state.

Lastly, the contract can only bind those parties to the contract: the artist and the purchaser. The contract would have to provide that the purchaser obtains a similar promise from third parties. Again this may be viewed as too restrictive on subsequent purchasers of the arts work. Few purchasers understand resale royalties and as with copyright, are likely to view it as a tax.

In the end , the poor bargaining position of most artists would mean that the inclusion of a resale royalty clause will be extremely rare. It would only benefit the few extremely successful artists. They usually only have this authority later in life and thus it would only be applied in relation to their later works.

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

One obviously unique element in Australia is the burgeoning of Indigenous art production and consumption. Though Indigenous artists are selling their work at comparatively low prices, the rapid gain in value of their work as it is resold, with no benefit flowing through to them, is one of the most pressing reasons for the introduction of resale royalty in Australia. The fact that the DCITA discussion paper does not include figures for resale through dealers and commercial galleries gives a very distorted picture, particularly of Indigenous art sales which mostly take place through these outlets. This pattern has only started changing this year with several of the major auction houses trying to secure a foothold in the Indigenous market, indicative in itself that there are reasonable profits to be made.

The fact that Australia is an island has some bearing on the case for resale royalty, in that any suggestion that the imposition of the royalty would lead to a drain of works to be sold overseas is to be regarded with scepticism. Firstly the prices for work in Australia are lower than those in Europe and the idea that to save 5%, sellers would incur the effort and cost of packing and transport works overseas is highly unlikely. With Europe introducing a resale royalty, the only other viable option would be

the US where the imposts imposed by sellers are higher than those in Australia. It is also the case that the statistics indicate that the market for most Australian work is in Australia.

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 excludes works that decrease in value, etc).

The prevailing principle is one of the right of any artist to earn a royalty each time any of his or her artworks is resold. As a matter of practicality NAVA accepts that at present it will only be possible for this right to be exercised for sales made through "public" intermediaries like auction houses, commercial galleries and agents/dealers. NAVA also accepts that the administration costs need to balance collection and distribution costs and this may result in the application of a threshold below which distributions may not be made. The funds collected below this limit could be dealt with in one of two ways. Either they could be accumulated over time until they reach a certain minimum and then be distributed, or could be pooled and after six years applied for a closely related purpose like an artists' superannuation scheme or benevolent fund.

A royalty scheme which provides the highest viable payment to the greatest number of living artists and their heirs at the lowest administrative cost is the most desirable, but NAVA recognises that this has to be tempered by the need not to endanger the market for art by imposing too high a percentage of royalty. The scheme proposed both here and in NAVA's previous joint submission with Arts Law, the Australian Copyright Council and Viscopy is regarded as balancing the best value for artists against a projection of what is realistic in terms of the art market and the businesses on which it relies.

In relation to the impact on small businesses, NAVA would propose that the government should take steps to assist both with the costs of establishment of the appropriate implementation systems and with an education campaign to alert all parties to their rights and obligations. Most small businesses now use computers, electronic databases and banking systems which could be extended to encompass this function for a relatively modest cost. As Viscopy has pointed out, the major administration burden will be shouldered by the collecting society and it

will be artists who pay through the imposition of the collection society's administration levy.

NAVA does not support the idea of a scheme that applies only to resales where there is a profit.

7. What works should be covered by the arrangement and why?

As mentioned in 4 above, the works to which the right should apply should be all Australian artistic works which are resold in Australia (with the exclusion of buildings and models of buildings) or overseas in countries with comparable schemes. The resale royalty should also apply to all artistic works sold in Australia made by artists from overseas, where the artist's country of origin has a comparable scheme. NAVA would also propose that works gifted or bequeathed to public galleries should have the same level of royalty paid to the artist.

The current definition in the Copyright Act of "artistic work" has not kept pace with practice. It would be logical and a good opportunity for this definition now to be revised to encompass current forms of practice, including installations and various forms of new media work. The need for a revision of the definition was recognised in recommendation 3.8 of the Myer Inquiry report.

In relation to the comments made by the DCITA paper about the difference between "tourist art" and "fine art", NAVA would propose that there should be no distinction as far as resale royalty payment is concerned, as long as the work was not simply a manufactured product. The principle of multiples as in limited edition prints, photographs and craft works should still be recognised.

8. What duration should apply and why?

The most commonly adopted period in overseas models is that tied to copyright. In Australia this would mean the life of the artist plus 50 years, or 70 years when the terms of copyright duration are changed according to the Australia US Free Trade Agreement. NAVA would support this duration in harmonization with the European Union. The logic is that this is one of the few forms of inheritance which an artist can leave his or her heirs.

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

As was proposed in the previous joint submission, NAVA would strongly advocate for the right being inalienable (not transferable or waivable), on the basis that it protects artists from being persuaded to assign, waive or sell the right under overt or subtle forms of duress. As has been previously pointed out, artists are almost always in a weak bargaining position and subject to pressure not to exercise their rights. It is often argued that they will gain other kinds of career benefits instead.

We are of the view that a resale right is also a moral right as it recognizes the artist's continuing relationship with his or her work and like moral rights should therefore be inalienable. The right to receive a resale royalty is derived from the right of attribution of authorship as it connects artists with their work even after the sale of the physical work. This is similar to the right of paternity, described in Australia as right of attribution.

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

The administration costs of a resale royalty scheme need to be considered when setting a threshold. In order for the scheme to work, the collection and distribution must be cost effective. If, as we advocate, the scheme is incorporated into the Copyright Act and a declared collecting society is appointed by the Attorney General, then we recommend that the level of threshold be set by the declared collecting society, rather than being included in legislation.

Further it is likely that the costs of administration will decrease over time, particularly throughout the use of rapidly changing technology. Since the rationale for the setting of a threshold is the practical constraint of the administration cost, these anticipated changes would require a more flexible mechanism than legislation can provide.

NAVA would recommend as a matter of principle, that any threshold imposed should be kept as low as possible and should be reassessed at least every three years. The collecting society's accountability for its decisions is ensured because it is answerable to its members and has obligations under the collecting societies' Code of Conduct as well as having reporting obligations under the Copyright Act.

If a statement about threshold had to be included in the legislation, NAVA would recommend that it should simply specify an upper limit of no more than \$3,000. However, this recommendation may be influenced by the evidence from the modelling commissioned by Viscopy from Access Economics. NAVA reserves the right to modify its position when this information becomes available.

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?

In NAVA's previous joint submission, we proposed a flat rate of 5% which concurs with the majority of the functional schemes internationally and delivers reasonable returns to artists without being an undue burden on the seller or purchaser. Our preference for the flat rate is based on achieving ease of administration and delivery of a reasonably worthwhile return to artists. Since resale of artists' works in Australia rarely achieves the same dizzy heights as overseas, the concern over large amounts of royalty at the top level are less of an issue in Australia.

However, if the payment was to be considered from a social equity point of view, it would seem fairer for artists selling at the lower end of the range to get a proportionally higher level of royalty. NAVA would be prepared to support a sliding scale if it could be shown to deliver at least the same financial returns to artists and for at least the same number of artists collectively as the 5% rate. It would also need to be proved not to add to the cost of administration thus pushing up the level of the threshold and cutting out the same artists at the lower level of sale price that the sliding scale was designed to assist.

12. What type of organisation should administer any arrangement and what factors should be used to assess and ensure the performance of such a body? (eg. highest rate of return to artists, transparency of process, administrative efficiency, low costs etc).

NAVA believes that the most suitable and ethical type of organisation for administering the royalty arrangements would be a collecting society which has been declared by the Attorney-General. It would be required to lodge an annual report to parliament, adhere to the standards of the Collecting Societies' Code of Conduct and have an annual review conducted by an independent person/s. A set of criteria would be established against which the standards of the collecting society's judgments and performance would be assessed. These accountability

processes would provide a degree of scrutiny which is required to ensure ethical operations. For these accountability reasons, NAVA would not support the management of the royalty scheme either by a government department or by a private sector entity. The collecting society's performance should be judged against the same criteria as those in the collecting societies' code and including all of those elaborated in this question.

While it would be necessary to employ appropriately experienced and qualified staff to administer the scheme, NAVA would recommend that the administration costs be kept as low as possible through the application of the best available administrative and technological systems.

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

NAVA supports a resale royalty scheme as one of a suite of measures which should be in place to support the work of Australia artists and craft practitioners. No one mechanism will be sufficient in itself. NAVA supports additional rather than alternative mechanisms.

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

For artists, this boost to their recognition is likely to be collectively substantial. Each time artists' rights are extended, their professional status and public standing is enhanced.

Financially, for artists and their families, the affect is likely to be uneven depending on the price level of their works in the market place at the time of resale, the frequency with which their works change hands, and the time of life of the artist that the benefit flows through. It would be especially valuable for artists in later life as a form of superannuation. Claims have been made that the resale royalty will have the affect of depressing primary market prices, however there is no evidence to support this contention and it is not borne out by the European (Germany, Belgium and France) or US experience.

For investors it is unlikely to make a lot of difference, because the amount is proportionally small and the volatility of the art market is legendary. Given the capacity of the art market to absorb the much more substantial

auction house buyer and seller imposts which came into force when auction houses were deregulated, the affect will probably be negligible. Initially when the scheme is introduced, it will add to the administrative responsibilities of intermediaries. However, this may be alleviated to a great extent by technological tools which can automate the process to a very great extent. The most suitable and efficient system should be investigated prior to the introduction of the scheme and the intermediaries provided with advice on the best way to add these functions to their existing financial collection and payment systems.

For the copyright collection society it will provide a new area of responsibility and an appropriate level of income for its administration services.

15. Do you have any other issues?

Discussion about artists' resale royalty have dragged on for many years without any real progress being made. Given the different vested interests in the industry, it is hard to imagine that consensus will be reached. It is unfortunate but probably inevitable that the intermediaries whose purpose is profit making will remain resistant to sharing any of their profits with artists (though there are some notable exceptions like Greenaway Gallery which imposes a 10% resale royalty and maintains that there is no demur from its clients). Despite the evidence from European countries where the scheme has been operating successfully, hypothetical arguments will continue to be found for why the scheme may pose a threat to the Australian art market. These arguments would need to be substantiated with real evidence for them to be taken seriously.

NAVA urges the government to progress the issue now and introduce legislation as a long deserved benefit and recognition for Australian artists. Australia lags behind many other countries in supporting the work of its valuable artistic creators. Now more than ever, when Australia needs to benefit from innovative ideas and nurture the growth of its creative industries, is the time to bring about these sorts of measures.



THE VISUAL ARTS AND CRAFT STRATEGY



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