

**Submission: An Australian Resale Royalty**  
**from: Watters Gallery, Sydney**

We are wholeheartedly in favour of a Resale Royalty Scheme and our commitment to it rests entirely on our belief that:

*'The resale right is an unassignable and inalienable right enjoyed by the author of the original work of graphic or plastic art, to an economic interest in successive sales of the work'* (Myer Report bottom of page 159 quoting its European Parliament)

This inalienable right is, in our view, just that. It should not be subverted to direct the benefits of resale royalty to other persons or other ends, but be solely for the benefit of those whose inalienable right it is.

The only legitimate reason for opposing living Australian artists' rights to resale royalties would be that recognition of that right might be to the general disadvantage of living Australian artists.

No case can be made that it would be to their disadvantage.

The discussion paper fails to understand that the interests of living Australian Artists as a whole are very minimally dependent on the secondary market. The converting of ART into INVESTMENT, the particular skill of its secondary market, has economically enriched a small section of Australian artists to the disadvantage of most artists - many of them of very great merit indeed.

This said, we will present our submission as answers to the list of Possible Questions that make up appendix C of the discussion paper..

Question 1: Should Australia introduce a resale royalty arrangement?

Yes, because it is the right of the artists.

Through the author of an original work the resale right extends to his or her heirs for a period after his or her death.

We feel this inalienable right should be acknowledged and that legislation should be put in place.

We do not believe resale royalties will cause any real hardship to any party.

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

The primary, and sole objective, should be to recognise the inalienable right of all artists and their heirs to an economic interest in successive sales of this work.

The right to resale royalties should not be subverted to benefit particular artists over others (except in so far as a sliding scale does). The right does not distinguish between age, sex, colour, fame or wealth.

The right to resale royalties is nothing to do with "investors". Thus, whether the "market value" of a work has gone up or down is immaterial, the artist's right in it is unaffected.

If the straight forward recognition of all artists' right to resale royalties is the primary objective, others benefits will accrue:

- i) benefits to the heirs of very substantial artists under recognised and under rewarded in their own life time. (Dobell's heirs would by now have received from royalties more than his entire life's earnings from his work).
- ii) benefits to Indigenous artists (and their heirs) who have been poorly rewarded under marketing systems exploitive of them.
- iii) some benefits to artists who have reached old age and incapacity and whose work is gaining recognition.
- iv) we have no doubt that the significant symbolic value of a resale royalty scheme mentioned in the discussion paper (first paragraph page 21) will be important to many artists.

Question 3: Who should be the Principal targets of a resale royalty arrangement?

As indicated above, no group or groups should be the target of a resale royalty arrangement, it is the inalienable right of all artists and all artists and their heirs should be its concern.

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

The actual arrangement is obviously a complex issue. We do believe that certain long term overriding principles should carry great weight. So we believe a fully legislated scheme closely in accordance with the Directive of the European Parliament (EU Directive) should be introduced because:

1. we are signatories to the Berne convention.
2. we would benefit from the thinking and experience of persons and countries that framed the EU directive, including France with 84 years experience of Droite de Suite.
3. it is sensible to be in line with other countries unless very real differences in the market determine otherwise. No such differences are apparent to us.
4. we believe the 'harmonisation' clause will not harm Australia and is quite likely to benefit Australian art. (Please see comments under question 13b)

We believe a sliding scale is imperative because - as the Discussion Paper stresses - resale royalties are very top heavy. The fact that leading artists (Hockney, Appel and Sargeant in the UK - page 17 Discussion Paper ) are aware of this - and are worried about it - makes a sliding scale and the method of pricing for the scheme which we outline below quite uncontroversial.

Paying for the Cost of the Scheme

Our suggestion would be along the lines as follows. Models we don't have and probably fine tuning once the scheme is in operation would be required. Nevertheless the system could be along the following lines.

Suppose sales \$ 250 - \$ 5000 attracted a 4% royalty and suppose that sales over \$ 5,000 - \$ 15,000 attract 3% royalty and so on down a sliding scale. Suppose then a reseller making a sale up to \$ 5,000 sends 4% to the administrating body but the dealer making any sale over \$ 5,000 sends 3%. The difference between this 3% and the sliding scale would pay for the scheme. ie sales up to some level, \$ 15,000 in this case, would not contribute to costs. All the resale royalty of 4% or 3% would go to the beneficiary.

Example: sale \$ 100,000 sliding scale allows 2% resale royalty. \$ 3,000 to administrating body, of which \$ 2,000 goes to the artist or artist's heirs, \$ 1,000 to administration (33<sup>1</sup>/<sub>3</sub>% of the royalty)

The advantages of this are:

1. the secondary dealer or auction house has no complicated calculations to make, these are made easily by the organising authority's computer.
2. The work of the most highly rewarded artists pay more than proportionally for the scheme but nevertheless the artist or the artists heirs receive a published % royalty with no deductions.
3. The poorer artists pay nothing towards administration. Though this is heavy on the more successful artists most will come from deceased artists and the right of heirs to royalty, though very real, must be seen as less strong than the right of the actual author of the work.

It is important to note that the greatest reservations about the scheme come from a not unjustified feeling that it will be so incompetently organised that most of the resale royalties will go to support a bureaucracy and only the rich artists will benefit.

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

We are not experts in the way indigenous art is marketed. We do not know what proportion of what appear to be first sales are actually resales. We do not know if it is possible or fair to subject these 'resales' to resale royalty.

That must be an area of concern, perhaps.

We do know that when we represented Freddie Timms on the same basis as all our artists - handling work on consignment - he did much better than when galleries purchased his work for resale.

The Discussion Paper seems to feel resale royalties can be used for particular ends. This is dangerous ground in our opinion. However, resale royalties may eventually effect the marketing of art, perhaps especially Indigenous art, by making artists aware of what happens to their work on the resale market.

Secondary Market Some comments made in the Discussion Paper suggest that concern for the secondary market should affect decisions for introducing a resale royalty scheme.

We believe that international comparison would show that the art auction market in Australia is greater per head of population than in any other country. We suggest, at any rate, that such comparisons be made.

In any case the secondary market is so strong it can sustain the small impost of resale royalties. It must be born in mind that the 10% GST helped resales vis-a-vis first sales and the small resale royalties would only minutely redress this harm to living Australian artists.

The interests of the secondary market should not be allowed to stand in the way of artists inalienable rights.

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

As we stressed under question 4 the most important principle : honouring the right of all artists and their heirs to resale royalties, without compromise.

Within what is practical, as many living artists as possible should benefit. It does seem that a threshold is necessary to curb costs.

Without proper modelling we would say the threshold should be as low as possible.

It would undermine the principle of the scheme if no royalty were paid on prices that fell. In the 1990's the prices of some of our greatest artists slumped a little at auction . It would be absurd to say no retail royalty should be paid on a sale of \$ 1,000,000 because in buoyant conditions a year earlier the work had fetched \$ 1,100,000.

The more utterly straight forward the scheme is the more it will achieve, in our view.

Variations on the EU Directive such as our suggested system of paying for the scheme outlined under Question 4 should be as limited as possible.

*Question 7: What works should be covered?*

All works sold as works of art.

At no stage should discussion be entered into over what constitutes a work of art.

The 'artwork', whatever its nature must presuppose an artist or there will be no one to benefit from resale royalties and the 'artwork' will be of no concern to the scheme .

Thus, the scheme covers anything resold purporting to be the artwork of an artist. (A urinal with 'R.Mutt" on it is not an artwork unless an artist, Duchamp in this case, claims it as such)

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

As stated under Question 4 we support a scheme modelled closely on the EU Directive. The Directive stipulates life + 70 years. If there is no evidence suggesting our current life + 50 years - or some other duration - is much better we would follow the EU Directive.

Experience from other art forms within Australia where copyright has applied for some time may inform the discussion.

(The possibility that we may have no say in this matter due to the U.S Free Trade Agreement is too humiliating to contemplate)

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

It seems to us that the administering body, subject to the principle of an artist's inalienable right to resale royalties, cannot, under any circumstances, pay money to anyone but the artist or the artist's heirs.

The artist having received the money can redirect it as he or she sees fit, but the scheme should not recognise the assigning or selling of resale royalties (Could the government recognise a young person as a senior citizen through assignment or purchase?)

As for 'waiving', we feel that artists could be pushed into an agreement to waive to the detriment of their old age and their heirs.

We do not believe the administering body should recognise the waiving of resale royalties.

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

It does seem that too low a threshold may entail much cost for too little benefit to the recipient. If this is the case, then a threshold is necessary.

We believe that a resale royalty of \$ 150 - \$ 200 is worth receiving and that the threshold should not be higher than one that would result in a resale royalty of this order.

For someone not closely involved it is hard to appreciate the importance to many struggling and under recognised artists of any sale of their work. First sales are the life blood but resales are also positive feedback. A cheque that alerts an artist to the fact that a work was for sale and that someone bought it may often be reward indeed irrespective of the smallness of the cheque.

*Question 11*: What rate of royalty should apply and why? Flat rate or sliding scale?

Because we support adopting, as closely as possible, the EU Directive model we particularly support a sliding scale.

The benefits are too 'top heavy' to entertain having a flat rate. Yet it has to be admitted that a sliding scale whilst taking away from the highest sellers does not add anything to the less well sought artists.

Our suggested method of covering the cost of the scheme where nothing is deducted from sales at the lower end is a suggestion that we believe should be seriously considered.

The advantage of a flat rate is that it does not put an extra bias against handling lower priced work vis-a-vis expensive work. Our suggested system offsets this disadvantage to some extent.

To get a general consensus in favour the scheme must be seen to hold benefits to as wide a range of artists as possible. But art should not be chained to ideas of fairness. What amount of royalties could repay the tangible and intangible benefits of great artists - Matisse, Picasso to France? That our 'greatest' artists in terms of sales do not seem to be our greatest artists in terms of quality is not a problem for the resale royalties to remedy.

*Question 12 : What type of organisation should administer any arrangement?*

This is outside our field but we were impressed by the Public Lending Rights and Educational Lending Rights schemes mentioned in the Discussion Paper and their expertise and that of other existing bodies here and overseas (where they exhibit efficiency) should be consulted. To us the ELR and PLR schemes seem to constitute the best model.

We believe the straightforward adherence to the principle that all Australian artists have the right to resale royalties on a predetermined and published basis should lead to proper returns to artists. The more compatible our scheme is to overseas organisations the more possible it will be to judge administration efficiency.

Auction prices are easily obtainable so it is to be expected that many artists or their heirs will be assessing the effectiveness of the administering body.

Although we are not qualified to make detailed recommendations on this subject we can warn against the likelihood of a large and inefficient bureaucracy rising on income from artists' right to resale royalties. Something along the lines of the P L R and E L R schemes should certainly be considered.

*Question 13a Are other support arguments more appropriate than Resale Royalties?*

Resale royalties are a right and that right should not be side stepped under the pretence or belief that 'other support arguments' are more appropriate. This 'support strategy', resale royalties, properly administered would be self financing and benefit at least 170 living Australian artists.

*Question 13b How will a resale royalty affect the Australian art market?*

We cannot now trace the effects of the imposition of a 10% GST though almost certainly it assisted the secondary market to the detriment of the primary market. Nor can we clearly say what effect the 17% buyers premium had. Resale royalties will have negligible negative effects.

If we adopt a system that makes us liable to the 'Harmonisation' clause in the E U Direction we do not believe the 2% of overseas sales will be affected. Surely, they are not being auctioned here to avoid resale royalties elsewhere? If sales of Australian art work goes off shore to avoid resale royalties, to the US perhaps, this would be great promotion for Australian art; especially, in all likelihood, promotion for Australian Indigenous art.

#### Question 14 Other Issues

Surely, the only legitimate reason for abandoning the right of living Australian artists to an economic interest in successive sales of their work would be if the recognition of that right were to their disadvantage?

The Discussion Paper never seems to understand where the interests of living Australian artists are centred, so that when the Paper refers to 'the market for contemporary art' it means the secondary market. Certainly the auction houses have something to do with 'the market for contemporary art' but they have very little to do with the welfare of living Australian artists as a whole. This unawareness is understandable from one point of view because it is on resales that resale royalties are paid but these are never going to be remotely as significant as first sales from commercial galleries - the sales that benefit the artists. The Paper shows such sales as being \$106m in the year 2000 compared with total sales by the auction houses of \$78.1m, very little of which benefited living Australian artists. This blindness to what is actually important leads to absurd propositions and to red herrings like the preoccupation with indigenous art and the repeated mentioning of "emerging artists". Most dispiriting are sentences like 'From an investor's point of view, purchasing the works of young and unknown artists carries a high degree of risk' (p18) and "When purchasing a work of contemporary art from an emerging artist, the buyer assumes nearly all the risk associated with the transaction" (p18).

There is always a risk when you buy a dress or a lawn mower or anything. It may not subsequently be as becoming or as effective as you hoped, but usually your expectations are met. If, likewise, you buy a painting, usually on undisturbed perusal it more than lives up to your first impression, but sometimes the opposite occurs. If you buy a dress, lawn mower or painting not to wear, cut grass with or obtain aesthetic pleasure from but as an investment no one should worry their heads about your "risk".

The sector that will be most opposed to resale royalties will be the auction houses and their 'investors'. It is worrying that they are held as having an importance in the eyes of the authors of the Discussion Paper far beyond their worth; that they should be seen as positive rather than negative in their effect on living Australian art.