

Submission on the

# **Proposed Introduction of a Resale Royalty Arrangement In Australia**

With particular reference to Indigenous  
artists and their communities

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### **The Australian Indigenous Art Trade Association (Art.Trade)**

The Australian Indigenous Art Trade Association is the ethical body for those people experienced in the sale and presentation of Australian Indigenous arts.

Its constitution includes the following purposes for which the association was established and continues to operate which are relevant to this submission on the introduction of a Resale Royalty system in Australia.

- (h) to provide support for contemporary Indigenous artists;
  
- (n) to promote, support or oppose legislative or other measures affecting the business interests of Members and the welfare of aboriginal artists and the Art Centres that represent them;
  
- (o) to promote the role of artists and community organisations in the preservation and maintenance of the cultural life of Indigenous communities;
  
- (r) to subscribe or guarantee money for charitable or benevolent objects, or for any public, general or useful object but in particular those relevant to the Indigenous arts;
  
- (t) to instigate a program that provides a resale royalty of 1% of the sale price (of all paintings and artworks sold on the secondary market with a value exceeding \$500), to be paid to the Artist or the Artist's family, via Viscopy.

## **The Case for a Resale Royalty for Indigenous Artists**

The discussion paper makes it clear that any attempt “to analyse the economics of the Indigenous arts industry today is hampered by one major shortcoming: an absence of reliable industry statistics’ The estimate that by the late 1990s the value of the Indigenous art market was approaching \$200 million a year is often bandied about with little evidence to support it. What we do know is that about 80 percent of the total figure is comprised of manufactured or ‘tourist art’, rather than the ‘fine art’ product that would could potentially enter the resale market.

In 1997, researcher Colin Mercer estimated that there were about five to six thousand Indigenous visual artists in Australia that would include artists practicing in remote communities, semi-urban and urban, artists and artefact makers, weavers and artisans. The vast majority of these have a relatively small output and earn less than \$10,000/year from the production of their art and craft.

The problem with estimating the size of the Indigenous fine art market is that items are sold and sold and re-sold several times over throughout the marketing chain of the primary market alone, and any individual item may in fact be counted several times over, in error.

The example below is a quote from the discussion paper anyone intimately involved in the primary commercial Indigenous art market will find it absurd. It does however underline the difficulty of working with the available statistics.

*In 1996–97, commercial art galleries have been said to have sold \$14.6 million worth of Indigenous artworks. Of the 457 identified galleries, 72 were involved in first sales (totalling \$4.4 million) and 57 in secondary sales (\$10.2 million). In terms of total art sales, this accounted for 7 percent of total first sales of Australian art and 15.5 percent of secondary sales.*

The figures quoted could be accounted for amongst only a small handful of the major primary galleries, a number of which have annual turnover’s exceeding \$1.5M.

The auction saleroom figures are more likely to be closer to \$15M pa than the \$10M estimated by the SMH yet the vast majority of these sales are generated by works of deceased artists who may not be covered by any legislated resale royalty Arrangement, should it eventuate. This is likely to become increasingly significant over time.

## Addressing Aboriginal Disadvantage

The Indigenous Art Trade Association is sympathetic to calls for returns to the families of deceased artists whose works have increased in value exponentially since they were original produced. However, the case for a resale royalty on Indigenous art rests on its ability to return sufficient income to a wide array of artists and their heirs in order to go some way toward addressing the economic and social disadvantage within their communities.

The principal argument advanced for the application of a resale royalty is that the majority of artists live and work in a low socio-economic environment and do not benefit from any increase in value of their works as they resell over time. It is argued that this is especially the case for Indigenous artists most of whom live in remote communities.

Proponents of a resale royalty arrangement argue that it would increase the income of contemporary visual artists yet, as is pointed out in the discussion paper

*‘in terms of income supplementation, resale royalty schemes bring most benefit to successful, late-career artists with strong reputations, whose work is regularly traded, and brings limited benefits for emerging and less successful artists.’*

It is also clear from the modelling that only a very small section of Australia’s Indigenous population would benefit from such a scheme and this would do nothing to address the issues of exploitation of artists in the field, inequities in the market, and unethical dealer behaviour toward artists.

There is little doubt that the issues above are being used to drive the push toward a resale royalty. It is however the contention of the Indigenous Art Trade Association that these issues are not as serious as is made out by Indigenous bureaucrats and other concerned non-industry observers, and, as a result, have been overblown in the press.

Apart from the dramatic increases in sale prices of early Papunya boards due to their importance in the history of Australian art and the emergence of desert painting, only works by Rover Thomas, Emily Kngwarreye and a handful of others have experienced truly rapid rises since the artist’s original payment. Yet when Rover and Emily were alive they were amongst the most highly paid individuals in the country and paying little, if any, tax on their earnings.\*

\* these two artists alone would have earned in excess of \$500,000 pa during the last 3-4 years of their lives. In fact many Aboriginal artists currently producing art, who are often characterised as being exploited earn comparative sums of money as dealers and field operatives vie for their work. Yet they appear, to uninformed observers, to be penniless as they disburse their income rapidly and widely.

There is, notwithstanding the above comments and the resale royalty debate, a real need to examine issues of exploitation and unethical practice as well as the need and desire for contractual arrangements between artists and dealers in Indigenous art. While the Art.Trade association is opposed to exclusive contracts between Indigenous artists and art

centres/dealers/exhibiting galleries due to restrictive trade practice, it does recognise that there have been exceptional and exemplary examples. Its position has been that should parties wish to enter into a contract the following conditions should apply:

- Contracts should be renegotiated after a maximum term of 2 years
- An appropriate language speaker should be present during the negotiations to ensure the artist understands the contract fully
- No artist should be placed under any legal duress should they break the terms or conditions of the contract

Never the less Art.Trade is aware of a number of galleries that have contracts with artists who exhibit with them, in relation to receiving benefits from the resale of their work. The association believes these to be excellent examples of fair dealing and ethical behaviour on the part of the galleries concerned and a model for a non-legislated approach to droit de suite.

### **Potential Negative Effects of a Fully Legislated Universal Scheme**

For younger artists, as well as emerging and ‘journeyman’ artists the statistics clearly indicate at almost every rate level the amount of money received from a resale royalty, after administration fees are deducted, will do no more than provide small change. It will not, and cannot, make any appreciable difference to the quality of life of the beneficiaries. In fact it could have quite the opposite effect. In Indigenous communities for example it could potentially add to the welfare mentality and become just another ‘cargo cult’ thereby further fuelling individual dependency on alcohol, tobacco and gambling.

The criticism of a resale royalty scheme by the British lobbying group Artists Against Droit de Suite, including established artists such as David Hockney, Karen Appel and Emma Sargeant, was particularly interesting when assessing the likely impact on Indigenous artists. In their opinion a scheme

*“designed to benefit artists, actually creates a shameful inequality between famous artists on the one hand and struggling artists on the other”.*

In the Indigenous context this inequality could exist between the ‘descendents of famous artists’ and other possibly more deserving community members.

Within Indigenous communities authority and prestige are both inherited and acquired through attaining knowledge as part of an elaborate system of initiation and ritual. The potential exists, in a several cases, of payment of potentially large sums of money on a regular basis to the undeserving heirs of famous artists whilst their contemporaries, many of whom may actually be more deserving, would receive nothing. This carries with it the

potential to create quite socially and culturally inappropriate patterns of behaviour that would be potentially destructive of their culture.

The Myer Report indicated that: The proceeds of resale royalties should be paid directly to the individual artists, rather than to a communal fund, as this scheme is a type of taxation on secondary art sales, rather than a legitimate royalty for artists. The Indigenous Art Trade Association strongly disagrees with this opinion and advocates a communal fund dedicated to the support of targeted programs in the areas of health, education, community development, and crisis management.

## **Non-Legislated Alternatives to a Universal Scheme**

While the payment of resale royalties to individual recipients ultimately fails to address almost all of the criteria for which it has been advocated, the Art Trade Association believes there is a simpler, less administratively taxing, and fairer method of assisting artists with income generated from secondary market sales.

It believes that the Norwegian example, of a communal fund underpinned by a tax on secondary sales benefiting professional artists and their families in need is the most interesting and applicable of the models cited in the discussion paper.

In Australia Aboriginal artists may be community based (the majority), transient between communities and urban centres, or urban based. They range from people raised in traditional societies to transitional semi-urban dwellers, to those living and working in amongst the dominant western mainstream.

The majority of Aboriginal artists live and work in remote communities and are serviced by a variety of community organizations. Many artists are assisted by a funded or self-supporting art centre. Others produce art with assistance from a women's centre, adult education facility or a variety of other resource organizations. Almost all of these artists would be unable to practice their art, and earn income from it, without the presence and on-going support provided by these forms of community assistance. In fact, for the majority of these communities, there is no real commercial enterprise outside of the art centre and the local general store. In this context it is interesting to note that Noel Pearson of Cape York Enterprises has passionately advocated greater opportunity for the development of meaningful business partnerships between Indigenous and non-Indigenous groups in order to foster greater economic development and rid Aboriginal communities of their welfare mentality and dependence. This begs the question 'Can the payment of resale royalties to individual artists (or their heirs and successors) be seen as yet another, albeit disguised, form of welfare payment? Could this become another a misguided form of paternalism, further dis-empowering Indigenous people and reinforcing the currently over-prevalent welfare mentality?

Furthermore, for or every artist who is fortunate enough to live in a community which has some sort of facility which enables them to engage in the arts industry, there are hundreds who do not, and are denied this opportunity. Thousands of Indigenous people are completely disenfranchised from the growing, and currently buoyant, Aboriginal arts Industry. At the present time there seems to be little desire or financial assistance to extend opportunities to artists in disenfranchised communities.

Those community based artists that are able to participate can do so only because:

- They are provided with the materials and marketing support provided by a communal resource centre or
- They are provided with materials and support by a field operative functioning outside of the art centre and often in competition with it.

It is commonly argued that it is both unjustifiable and inequitable that Indigenous artists, and their families, do not benefit directly from secondary sales of their, or their predecessor's original creative works. Evidence is often cited that artworks are purchased at the point of sale for considerably less than open market value. This however fails to take in to consideration a number of very important factors operating in the market, all of which impact on the notion of establishing a resale royalty scheme. Principal amongst these is the multifaceted marketing role of art centres.

## **Issues Affecting Commercial Indigenous Art Galleries**

Since the mid 1990's art centres have engaged more and more in direct selling to the public. This has increasingly become a larger and larger aspect of the way in which community art centres operate under ATSIC's control. With ATSIC's demise the pressure for art centres to be viable and independent of outside funding can only increase. The advent of the internet, and the provision of funds to develop direct web-site sales, has been driven by a number of government agencies during the last decade. In addition direct Indigenous cultural tourism has been delivering ever increasing numbers of visitors to community art centres with a consequent exponential increase in direct retail sales. This has created major dis-functions in the art centre/dealer relationship and blurs the lines of distinction between the various players in the marketing chain. When business is done this way by art centres there is a perception that the artists get more money. While this may not always be the case, the net result is that fewer galleries are prepared to, or get the opportunity to, exhibit artist's work and play a traditional role in nurturing artist's careers. It is likely that this practice actually has a negative impact, stunting the artist's long-term career, profile, and eventual market price.

Certainly a small, but growing, number of artists have been abandoning the art centre system and many of these now earn far more than they did when one of dozens, perhaps hundreds working for a financially strapped, often understaffed community organization.

As art centres operate more like retailers there is a very real negative impact on the viability of retail galleries and other primary market players, who it is assumed, along with the final purchasers of the artworks, will bear the brunt of the financial burden of any resale royalty scheme. Bricks and mortar galleries have always been vulnerable to even the slightest fluctuations in the economy. As rents and other overheads increase they must be ever vigilant about their margins and financial viability. The art market has not always been as buoyant as it is currently and will inevitably go through cycles of economic difficulty. With more and more direct selling from communities it is understandable that many galleries, dealers and wholesalers feel that the artists are getting more of the retail price due to this practice and therefore should not be additionally compensated by resale royalties.

The Indigenous Art Trade Association agrees with the authors of the discussion paper in regard to the fragile nature of the market and the dangers of an imposed and legislated resale royalty scheme upon it especially at the rates canvassed. It would be counterproductive for all concerned should a resale royalty suppress the market for Australian contemporary art. Due to the costs of specialist staff and the high rentals of desirable city property galleries operate in a high-risk environment. It would have quite the opposite effect to that desired should the imposition of a resale royalty in any way harm the primary market by depressing first sale prices or adversely affect gallery margins as was demonstrably the case with the introduction of the GST.

The GST had a particularly profound effect on the commercial segment of the visual arts in Australia as was demonstrated in the UK with their own VAT. The additional financial burden of administration and book keeping in order to comply with this form of taxation has seen gallery commissions rise both here and overseas. In the 1980's and early 1990's galleries almost universally sold paintings on a 33% commission in Australia. In the UK after the introduction of the VAT commissions jumped from 30% to 50% and are now commonly set at 60% with a range of charges being passed on the artist (gallery opening expenses etc). In Europe and the USA 50-60% gallery commissions are the norm. Most Indigenous art galleries now operate on a minimum of 40% commission and more and more are seeking to purchase paintings outright. Galleries that do so mark them up by as much as 150% in order to help them meet their operating overheads and compensate for the paintings which they purchase but cannot sell. Most Indigenous art galleries have storerooms full of paintings that they can not sell for which artists have been paid. This is particularly important when considering the complexity of the marketing chain and the likelihood that primary galleries may get caught in the resale royalty web. (see section below).

Never the less there is a discernable degree of good will amongst many primary galleries, secondary market operators, and collectors of Indigenous artworks towards the artists and communities that produce material cultural product. The Indigenous Art Trade Association has, since its inception, recognised the desire by many to contribute towards the well being of artists and has encouraged voluntarily participation in any process that

can make tangible improvements in the health and welfare of these artists and communities.

## The Realities of the Indigenous Marketing Chain

While a work of art can be sold directly from the community to the end client at a full retail price, thereby maximising the artist return, it is possible at the other extreme for a far longer and more tortuous process to occur.

As an example:

A painting sold by an artist to an art centre may then be on-sold to a dealer over the internet. The dealer may then sell it to an Australian gallery that may discount their usual retail price and sell it to an overseas gallery. This gallery may then sell it to a client. In this particular case the painting has passed through 4 sets of hands after the artist relinquished it. This is actually an extremely common process and, in fact may have many other varied scenarios in between.

	To	To	To	To	To
Artist	Art centre	Institution	Overseas Gallery	Overseas gallery	Overseas client
	Field operative	Exhibiting gallery	Exhibiting Gallery		
	Gallery/Retailer	Wholesaler	Auction house		
		Internet trader	Collector		
		Collector	Institution		

When the marketing chain at this extreme exists when exactly does the secondary market begin and where do resale royalties actually potentially cut in??

## Individual Gain vs Collective Responsibility

The concept that a work of art is often only produced by virtue of the existence, and assistance from, a community resource organization is an important one to consider in view of the notion of individual gain from a resale royalty. In addition the subject matter of the majority of paintings is collectively owned.

It is the point of view of the Indigenous Art Trade Association, that:

all members of a community, whether municipal, sporting, educational or artistic have a collective and civic responsibility toward that community.

Having gained from the amenities, skills and knowledge provided by that community there is a responsibility to give something back for the maintenance, health, safety and longevity of the community that has nurtured and sustained them. Nowhere can this be argued more effectively than within Indigenous cultures because it is, in fact, their

lifeblood and informs and underpins all of their cultural practice. All individuals are required, by Aboriginal law, to share their material and spiritual assets with a complex array of relatives and clan members. (the complexity of which could never adequately be determined or understood by a resale royalty collecting and distribution agency) \*

How best then to ensure that the assets accrued through some form of resale royalty payment be used communally to the greatest effect?

The Indigenous Art Trade Association advocates strongly that any resale income be used for community, not individual benefit.

Its preferred model is that of an Artist's Benevolent Fund. It believes that such a fund should be independent of government, self sustaining and able to assist artists in the areas of

- Crisis management
- Health
- Education
- Community development

\* this is why it is argued that distributing the royalty payment to the lone determined next of kin is culturally inappropriate and destructive of Indigenous tradition.

## **Aboriginal Benefits Foundation**

Despite the statement in the discussion paper (pp12-13) that with respect to Indigenous visual art and craft, philanthropy is virtually non-existent, Art.Trade believes that there is a strong movement within the collecting community in favour of actions that assist and enable the advancement of Aboriginal aspirations.

The Aboriginal Benefits Foundation provides a working model for the establishment of a scheme designed to create a form of Artist benevolent fund that would have the following criteria:

- sponsored and strongly advocated by government but not legislated
- voluntarily supported by the primary and secondary markets
- capable of generating sufficient yearly income to enable it to accrue financial assets over time which will enable it to become increasingly income generating and support more and more effective programs of assistance
- provide funds on a regional, community and/or project basis for projects which underpin and advance the health and welfare of artists and their families.

The discussion paper alluded to two programs that have been advocated and established by the Indigenous Art.Trade association.

These are the Art.Trade stamp that is applied to the back of paintings morally obliging the owner to repatriate 1% of resale income to Viscopy to be given to the artist or his/her heirs and successors. This particular program has met with limited success due mainly to the difficulty of stamping /stencilling the wording on the back of each and every painting handled by willing participants. Unfortunately this has mitigated against its successful adoption amongst many dealers.

The Art Trade Association was however very successful in persuading Lawson Menzies and Deutscher Menzies auction houses to give 2% of the hammer price on all Indigenous artworks sold to the Aboriginal Benefits Fund which has been set up with the income generated from their first specialist Indigenous art sale in May 2004. This sale generated \$25,000 for the fund and has enabled the establishment of its legal framework. It is now a company with limited guarantee and has applied to the ATO for tax-deductible status on all donations. The initial directors of the Foundation are

Dawn Casey , Former Director of the National Museum of Australia  
Bob Edwards OA, Emeritus Director of Art Exhibitions Australia  
Jennifer Isaacs AM, Prominent author and consultant in Indigenous arts  
Margo Neale, Director of Aboriginal Programs, National Museum of Australia  
Adrian Newstead, President Australian Indigenous Art Trade Association

While the fund has been strongly supported by Lawson Menzies and Art.Trade , it is a completely independent body, able to solicit and accept donations from any other auction house or secondary market player as well as collectors and primary galleries.

In addition to the \$60-80,000 per year estimated to be generated from the two LM Aboriginal art sales per year the foundation will benefit initially from a number of fund raising events to be held by the Art.Trade association. ( e.g. a fund raising auction will be held to coincide with the National Aboriginal Art Awards on the 14<sup>th</sup> of August in Darwin)

Once the ATO has approved fully tax deductible donations to the fund the trustees intend to encourage collectors to give works of art which can be sold at auction and thereby generate further income from willing donors who want to make a positive contribution to the foundation's programs of assistance.

The Foundation trustees intend initially, given their limited resources, to support organizations and projects that are cost effective and demonstrably beneficial programs in the field of Indigenous health, education and community welfare.

The association believes that the foundation is a model that can be extended or applied to a wider resale royalty scheme for all artists and that a voluntary scheme promoted by government could generate up to \$1.5M per annum with additional income generated from a range of further fund raising events and donations.

## **Some Issues covered by the Discussion Paper (in relation to a fully legislated approach)**

### **Administrative Costs**

The high cost of administering a scheme based on individual royalties has been adequately covered in the discussion paper. It was noted that in some cases, Italy for example, royalties are not collected due to prohibitive administrative costs.

Viscopy, estimated that it could administer a scheme for around 20 percent or less. It is however likely that Viscopy, in positioning itself to be the collecting agency, is underplaying the expense of administering a resale royalty arrangement in Australia, which must be considered very carefully in weighing its potential benefits. There is no doubt that small returns are likely to be the most significantly affected and bear the highest administrative costs.

Collecting individual payments and determining who they should be paid to, is likely to be both time consuming and expensive as well as engendering the potential of litigation.

As an alternative, a government supported independent Artist's Benevolent Scheme, based on support for community based projects, enables a single payment to organizations thereby minimising administration overheads. It is envisioned that community organizations would apply for assistance with projects, which fit the criteria of the foundation or fund. This is thought to be far more cost effective and beneficial to Indigenous living standards than individual payments.

### **Minimum Threshold and Royalty Rate**

While many works of art do increase greatly in value over time the majority do not. Many increase in value only slightly and the majority actually lose value. This has particular impact when considering whether resale royalties should be applied universally to all works of art, whether it should be applied only to the increase in value over the purchase price rather than the actual sale price, as well as the important issue of the minimum threshold which should be applied.

Also noted are all of the issues in regards to ambiguous sale documents, gifts and bequests which are subsequently resold, value enhancing such as conservation and reframing, and the statutory duration of the application of the resale royalty.

The benevolent fund model overcomes the need to set a higher minimum threshold, thereby forgoing income from many lower priced works of art, in order to overcome administrative overheads in paying very small amounts to artists scattered widely geographically.

Without exception, the Benefits Foundation (Artists Benevolent Scheme) model circumvents all of these issues. It allows for a simple flat rate of all sales paid in to one central fund for all time on each and every sale and resale. The flat rate is set at a scale that is judged to have minimal impact on the market. The Indigenous Art Trade Association believes that this should be a rate of 2% flat.

As the major thrust and focus of the work of the Australian Indigenous Art Trade Association has been the advocacy of forms of industry self-regulation and the promotion of an industry code of conduct, it is noted, with regret, that the Myer Report did not address these issues at all. While Art.Trade has forged meaningful working relationships with NAVA, Viscopy and other peak arts advocacy bodies, its greatest failure has been its inability to achieve the same relationships with the Indigenous advocacy bodies. The Art.Trade board believes strongly that it will only be when all of the sectors that comprise the commercial Aboriginal visual art industry are able to work effectively together will the difficult ethical and social issues be addressed in an informed and enlightened way.

### **The duration of a resale royalty**

The discussion paper suggested that in order to avoid the French experience with statutory limits on the duration of deceased artists royalty rights, the payment of a resale royalty should be limited in Australia to living Australian artists.

In terms of Australian Indigenous art this would render any scheme virtually ineffective. Almost without exception, the highest income that could benefit living artists and their communities has been produced by artists who are now dead. In terms of the payment of royalties to deceased artists and/or their heirs this begs the question:

Can a deceased artist be given a right?

Once again the 2% flat rate voluntary payment to an Artist Benevolent Fund on all secondary market sales regardless of their value, or the status of the artist overcomes all of these problems. It is a simple cheque drawn on total sales of all secondary market material; an extremely simple operation for an auction house and only very slightly more complex for a gallery or institution. With the added encouragement from government by way of tax deductibility for donated artworks and royalty contributions and a scheme for retailers backed by a code of ethics all of the issues in regard to artists dead or living and the duration of the royalty become irrelevant.

## **Benefits to Indigenous artists under the discussion paper models**

It is noted that outcomes for Indigenous artists do not seem to support introduction of a resale royalty scheme. Non-Indigenous Australian artists dominate the royalty payments under all models. Across all of the models, Indigenous artists do not feature in the top royalty payment tier and the top-grossing Indigenous artists receive significantly less than the top-grossing non-Indigenous Australian artists. Benefits that would flow to Indigenous artists differ significantly under the models presented, with average royalty payments ranging from \$1,000 (sliding scale, no threshold) to \$5,000 (5 percent rate, \$8,000 threshold).

Models without a minimum threshold capture a far greater number of individual Indigenous artists than other models. However no threshold also means that a significant proportion of these artists would receive very minor benefits—with up to 25 percent of Indigenous artists receiving payments of less than \$100.

## **Summery**

The Australian Indigenous Art Trade Association has advocated since its establishment for non-legislated voluntary support of indigenous artists and communities through funds generated by secondary market sales. Having studied the ‘Proposed Resale Royalty Arrangement’ discussion paper thoroughly, the association reconfirms its opposition to a legislative approach with a fixed scale of royalty payments at any of the levels discussed. It believes that, on any objective assessment, a legislated resale royalty arrangement for Indigenous artists fails to meet the most basic criteria used to justify its existence:

That is:

That it would have a significant impact on Indigenous disadvantage without adversely affecting the health and viability of the commercial art sector.

The association does however strongly believe in a non-legislated approach that would encourage philanthropy and reward collectors and secondary market dealers who participate in a scheme, or schemes, that return funds to artists in the form of community, rather than individual, benefits. It is believed that these benefits are likely to have a positive impact on the long-term health and welfare of indigenous artists and their communities. Conversely, individual payments could potentially have a negative impact on communal cultural and social life.