RESALE ROYALTY SCHEME FOR VISUAL ARTISTS IN AUSTRALIA

RESPONSE TO REQUEST FOR SUBMISSIONS

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I am a Public Accountant and conduct an arts-based practice providing accounting, audit and taxation services to arts practitioners generally, and visual artists particularly, in the context of this proposal.

THE PROPOSED FRAMEWORK

…the rationale of artists' right to share in the returns of the resale of their original artistic output.

The secondary art market traditionally existed mainly for the works of well known deceased artists and a Resale Royalty scheme would have had little effect on the lives and fortunes of living artists although the beneficiaries of the estates of deceased artists would have benefited from an addition to the distribution of royalties.

However, as the works of living artists are seen with increasing frequency on the secondary market, the value of a Resale Royalty scheme is more obvious and its introduction more desirable. As I have commented elsewhere, a seller's profit will arise principally from the increasing stature of the creator of the work. A Resale Royalty scheme would mirror the payment of, for example, royalties to musicians for the continuing use of their original works. Unlike the creators of other artistic works; writers and playwrights, filmmakers, choreographers, musicians and others, visual artists stand as an exception to the rule that the creator of an artistic work should enjoy a continuing income stream from that work.

A legislated scheme created through stand-alone legislation.

Such a scheme could not exist without the backbone of legislation, no more than could copyright or taxation law generally.

Only through legislation will it be possible to enforce collection and payment, and establish the rules necessary to establish collection (including rates) and payment processes. However, it will likely transpire that such law, like Income Tax law, will require amendment from time to time to accommodate unintended and unforeseen consequences.

Royalty will be payable on all resales…in the course of a business...regardless of whether the work is sold at a profit or loss.

It is appropriate that the proposed scheme excludes private sales between individuals (in the same way that the ABN withholding tax does not apply to non-business dealings). A sale through an intermediary would be classified as a business sale, even though the buyer and seller might both be private individuals. However, this would appear to exclude sales by a business other than a business dealing in art and I am not sure that is desirable. For example, what about works acquired by a Superannuation Fund? It will not (and cannot) be a dealer but I can see no reason why works sold by a Superannuation Fund on EBay should not be subject to the Royalty. Perhaps, where the buyer is in business and has acquired and sold the work in the context of that business (such as an accountant purchasing works for the office), or has demonstrably acquired the work for investment purpose, the Royalty should be applicable.

The scheme should also not differentiate between works sold at a profit or loss. If works sold at a loss were to be excluded, avenues and schemes for avoidance of the royalty would soon be found, and the rationale would shift from being a royalty on the sale, to a form of tax on profits. Government ownership, at all levels, should be considered subject to the Resale Royalty.

Royalty payable will be calculated on the price obtained for the sale, net of tax payable on sale.

Does "tax" refer to Income Tax (for those trading in art); Capital Gains Tax (for long term investors) or the Goods and Services Tax? The Royalty should be payable on the price, net of GST only. To include Income Tax and Capital Gains Tax would require knowledge of the seller's tax position, and would be contrary to the basis on which other royalties are paid.

Duration of right will be consistent with the *Copyright Act 1968* (life plus 70 years).

This is sensible and consistent with existing provisions. It will however, require that artists generally, and Indigenous artists particularly, are aware of the need to make provision for this potential income stream in their Will.

Where the artist has not made such provisions, or where the artist has passed away, intestate, thought might be given to rights which have no identifiable recipient being directed to a pool for distribution to the arts community, generally or specifically, for purposes, general or specific.

The right will be unassignable…

Again, as with Moral Rights, it is important, for the integrity of the scheme, that the right to Resale Royalty cannot be waived. However, I believe that, were a fund established to provide, for example, pension benefits to artists; or education/professional development assistance to artists in disadvantageous circumstances; or to assist artists working in remote communities, then artists should have the power to assign their right to Resale Royalties to such a fund. That assignment might be for a limited period, or commence on their death, or it might include a direction that the funds are to be used for a particular purpose.

An artist could also make such provision/s in their Will although a separately established fund might encourage artists to think of that a natural repository for "unwanted" funds.

Having said that, I also believe that, subject to the foregoing proposed exception, the Royalty should be unassignable during an artist's lifetime. Particularly in Indigenous communities I would be very concerned that an unfettered ability to assign a Resale Royalty would expose older artists to family and community pressure, and open to manipulation by unscrupulous buyers..

In should also be noted that, while not common, an artist working in an employment situation will be deemed to have assigned their intellectual property to the employer. Will the Resale Royalty right exist, and be dealt with, separately?

Joint authorship of creative works will be acknowledged.

In the first instance, the recipient of the right to receive the Resale Royalty should accord with the holder of the existing copyright – as already happens with royalty payments to musicians and others.

As a general rule, the creator of an Indigenous work is the artist to whom the creation of the work is attributed, although there are also works – usually large scale canvases – where authorship is acknowledged as belonging to several (but clearly identifiable) artists and in such cases the Royalty should flow to those artists, either in equal, or as otherwise agreed, proportions.

While the notion of community ownership exists in Indigenous communities I do not believe this should be considered a factor in the distribution of Resale Royalties during an artist's lifetime; the Royalty should be payable only to the artist/s identified as the copyright owners, and only to a community if provided for in their Will, on their passing away.

The resale right is only to be exercised through a collecting society…

It would be hard to imagine a Resale Royalty scheme operating other than within a legislative framework, and by an independent body. Let me rephrase that; it would be *nigh on impossible…*

International reciprocity will be a key requirement…

As a signatory to the Berne Convention, that will follow. What will need to be managed will be the potential for transactions to take place offshore to avoid liability for the Royalty.

In one sense the language of the Goods and Services Tax provides a mechanism for the identification of jurisdictional liabilities: does the transaction "have a connection with Australia"? A work identified as being sold by or to a tax resident of Australia (corporate or otherwise) should be subject to the Royalty regardless of where the work is sold. I am not familiar with the ways in which the collection of such Royalties operate in other countries, but would expect that a mechanism similar to the collection of other royalties would apply, with collections in one country being passed to that in which the artist resides.

Nevertheless, there are ways in which the Royalty might be avoided, by shipping the work for sale to a market in which such a Royalty does not exist, in the same way that someone seeking to avoid GST may structure the transaction so as to break the "connection with Australia". I believe that a key to the success of the scheme will be the selling of the "rightness" and equity of the Royalty, in the same way that buyers of Indigenous works are informed of the desirability of dealing with those intermediaries following ethical practices. In this regard the Art Centres and the bodies representing them will have an important educative role.

KEY PARAMETERS

Definition of works covered

Works covered by the legislation should be those which would be identified as works of art for the purposes of the Copyright Act and the EU's definition would, as suggested, be a useful starting point. I find the "Any work of graphic or plastic art…" strange in its inclusion of the words "graphic or plastic". But then, I'm not a lawyer.

Perhaps: "Any work of art including, but not limited to, paintings (in any medium and on any surface not being a fixed structure); drawings; prints and lithographs; photography; sculpture in any material; carvings and artifacts; tapestry, weavings and textile works; ceramics and glassware, digital media and works including more than one of the foregoing"

What will need to be considered is the issue of such borderline items as sculptural furniture.

Threshold

I do not believe that any minimal resale price needs to be established, for the following reasons:

Secondary (that is, subsequent resales) dealings of a business nature (that is, excluding transactions between private individuals) are unlikely to happen in any volume below, say, the proposed threshold of $423, let alone even $1423, so a threshold would be, practically, unnecessary;

computer software will be modified to accommodate the inclusion of the Royalty so administration difficulties will not be an issue;

once a threshold is mooted, interested parties will advance all sorts of arguments as to why the threshold should be raised. Let's not waste time on those arguments;

there is no lower threshold on the collection of GST, and

there is no lower threshold on, for example, on music royalties.

I would, however, suggest that, once collected, accumulated rights below a particular threshold be held in trust until the artist's accumulated funds reach that threshold. Perhaps an artist could access those funds on payment of an additional administration fee. Perhaps the funds could be released after, say, two years of no movement. Further, distributions should not happen more frequently than twice a year.

Practically, I would think that an artist whose works are now appearing on the secondary market would be likely to find that a threshold is irrelevant, and that their receipts should happen on a reasonably regular basis.

Flat Rate or Sliding Scale

I believe a flat rate (a la GST) is preferable to a sliding scale, mainly because it is simple, easy to remember and understand, easy to estimate, and easier to explain to artists. I think it also accords with the principle of equity, remembering that an artist whose works might have sold for $300 when they started out, could find selling prices in six figures when they reach old age. Why should they then be disadvantaged?

Further, there would be the motivation for buyers and sellers to negotiate on price at the threshold. A work sold for $400000 would attract a royalty of $12000 but a work sold for $401000, only $4010 (on the example given in the discussion paper), unless these are marginal rates.

Perhaps very successful artists not dependant on the Royalty for their day-to-day living might consider donating/assigning all or part of the Resale Royalty to the previously mentioned fund?

Cap

Again, in the interests of simplicity, I do not believe that a cap should be applied.

The purpose of a Resale Royalty is to acknowledge the contribution by the artist to the increased value, and to provide a (small) proportion of that value to the artist, not to limit the exposure of a buyer or seller to the Royalty. As with the threshold referred to earlier, the presence of any cap will lead to lobbying for increases to the cap, or for it to be indexed, or anything that might limit the application of payment of the Royalty.

From a practical point of view, caps tend to distort the market at values near the threshold.

It has been recently commented that an increase in the level of the Luxury Car Tax will lead to a decline in the sales of luxury cars, a similar situation. However, the fact is that luxury car sales continued to increase after the Luxury Car Tax was introduced at the same time as GST, and in the same way that the top rate of sales tax on jewellery did not stop sales of jewellery. While there might be some temporary slowdown, I do not think the introduction of a Resale Royalty would have any permanent effect. The market will simply factor in the Resale Royalty and someone intent on buying or selling a work over the cap value will buy or sell anyway. There might, of course, be some motivation to shift the transaction to a market in which there is no Resale Royalty, but someone seeking to avoid the Royalty is likely to do that whether or not a cap exists.

Philosophically, I don’t think a cap can be sustained as an argument.

Collecting Society

Here I have to declare a tenuous interest; I am a former Director of Viscopy.

That said, I am of the opinion that that Company is the most appropriate vehicle for the collection and administration of a Resale Royalty. It has experience in the collection of visual artists’ rights, has the necessary administrative structure in place, and most of the recipients of a Resale Royalty will already be members of Viscopy. Because of economies of scale, Viscopy will be able to maintain the administrative fees at a level lower than would be the case for a new entity. While there are other collecting societies operating in Australia, only Viscopy has the necessary experience, contacts, credibility and expertise in the visual arts.

I am well aware of the difficulties faced by Viscopy in the formative years until the previously mentioned economies of scale were achieved. To set up a new, or additional entity, to collect Resale Royalties, will only revisit those difficulties and make the system either uneconomic or unworkable. It would be akin to introducing a new general tax and then giving its collection to an entity other than the Australian Taxation Office.

Liability to pay

This is, indeed, an important issue and one that will ultimately determine the success or otherwise of the scheme.

Most sales will take place in the presence of an intermediary; either an auction house, dealer or gallery, because these are the people most capable of bringing together the buyer and seller. Although EBay can perform this function, where the buyer or seller is in business, and an Australian resident, they will still be liable for the Royalty.

In the case of a sale through an intermediary I am inclined to think that the intermediary should be liable for the collection and payment of the Royalty. The intermediary would be free, through negotiation with the buyer and seller, to determine whether the royalty is borne by the buyer, the seller, both, or absorbed by the intermediary.

Where there is no intermediary, the liability, in my opinion, should be vested in the seller since it is the seller who is in control of the sale proceeds. However, where a qualifying work is sold by a non-resident seller, then the liability to pay would shift to the buyer. This is similar to the situation with GST where an importer is required to pay GST at the point of importation.

If, in the absence of an intermediary, the liability is joint and several, I see difficulties for the collecting institution in pursuing two parties instead of one, and argument with the buyer, perhaps, demonstrating that the royalty was paid in good faith to the seller. In the same way that legislation requires that GST be disclosed on the sale invoice, and is payable by the seller, the Resale Royalty should be separately disclosed on the invoice and paid by the seller.

The Resale Royalty should, as a matter of course, be treated for income tax (where applicable) and capital gains tax purposes as tax deductible to the seller of the work. For the buyer it will be a component of the cost base, to be claimed as a tax deduction on any subsequent sale. For an intermediary it will simply be funds collected and disbursed.

As with GST the liability should be clearly established, and the collecting entity must be provided with sufficient powers to obtain details of sales from the seller, buyer or intermediary acting on behalf of the buyer or seller.

Exclusion period

There should not be exclusion periods, per se, but rather, perhaps, excluded transactions. An excluded transaction would be a sale by the creator of the work, or, in the case of Art Centres, a sale by the artist through the Art Centre (on a commission basis), and that work's subsequent sale by the gallery or dealer representing the artist and Art Centre. Works sold on consignment by either the Art Centre (where the Art Centre is the seller in its own right) or the subsequent intermediary (and the Art Centre will be aware of the nature of the buyer in that situation), would also be excluded transactions.

Where, in this context, the artist or the Art Centre (as applicable) sells to an individual, not being an intermediary dealer, a subsequent sale would not be an excluded transaction unless the buyer was also a private non-business individual. This means that, generally speaking, transactions between private individuals would be excluded transactions.

This would mean that all sales (between private individuals excepted) after the sale to the first "practical" owner, would be subject to the Resale Royalty. I am not sure that the application of a time limit is desirable because it will introduce the complication that might arise from difficulties in establishing a precise purchase date, particularly where the seller is a private individual with scant records.

While private dealings would be considered excluded transactions, I would suggest that that exclusion would only apply to sales below a certain threshold, to be set at a fairly high level; say $100000. I would be concerned that if private dealings were excluded completely, and that if such dealings where one entity was in business were also considered private, then a consequence might be for individuals, Superannuation Funds and businesses to bypass the existing sale avenues.

As the discussion progresses there will be further issues that will surface, but for now, thank you for the opportunity to make a contribution.

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