

**THE RESALE ROYALTY AND AUSTRALIAN VISUAL ARTISTS: PAINTING THE FULL
PICTURE**

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ABSTRACT

[306] In July 2001 the Federal Government appointed Rupert Myer to chair an independent Inquiry into the contemporary visual arts and craft sector. Among other issues, the Inquiry attempted to assess the potential benefits for visual artists of introducing a resale royalty, and the likely impact such a measure would have on the contemporary art market in Australia. Of the submissions that the Inquiry received addressing the issue, the majority supported the introduction of a resale royalty scheme.² The *Report of the Contemporary Visual Arts and Crafts Inquiry* was released on 6 September 2002. Recommendation 5.1 proposes that an artists' resale royalty scheme be introduced as an amendment to the *Copyright Act 1968* (Cth) or as part of resale royalty legislation.³

This article explores the history of artists' resale royalties, considers the structure of resale royalty schemes and examines and discusses the arguments for and against the introduction of such a scheme in Australia. The article concludes by arguing that the implementation of a resale royalty scheme in Australia will not satisfy the scheme's underlying objectives and will detrimentally encumber the art market.

Meaning and History of the Resale Royalty

An artist's resale royalty 'is the right of artists to receive a royalty payment from subsequent sales of their original work'.⁴ The resale royalty is also known as *droit de suite* (literally, 'follow-up right') which was the name given to the first such scheme in France in 1920.⁵

There are three historical anecdotes which all claim to have been the catalyst for the emergence of the [307] French *droit de suite* legislation. Firstly, in the early 1900s,

¹ Solicitor, Mallesons Stephen Jaques, Melbourne. Note that the views expressed in this article are the views of the author and do not necessarily reflect the views of Mallesons Stephen Jaques.

² *Report of the Contemporary Visual Arts and Crafts Inquiry*, September 2002, 192 (Myer Report).

³ *Ibid* 209.

⁴ Simon Hughes, 'Droit de Suite: A Critical Analysis of the Approved Directive' (1997) 12 *European Intellectual Property Review* 694, 694.

⁵ Simon Stokes, *Art & Copyright* (2001) 77.

the widow of impressionist painter Jean-Francois Millet (1814–75) was found living in poverty just as the resale price of her husband's work was spiralling to new heights.⁶ Consequently, the *droit de suite* was introduced in France to ensure such a situation would never recur.⁷ Secondly, at a time when no welfare or social security systems were in place, the *droit de suite* was established to assist the widows of French artists killed in World War I.⁸

The final, and perhaps most compelling theory⁹ sees the *droit de suite* legislation resulting from the benevolent deed of a group of art speculators. In 1904, thirteen art enthusiasts formed a group called 'La Peau de l'Ours' (the bears skin). Each of the members contributed 250 francs per year over a period of 10 years. During the term the group purchased contemporary works from emerging artists. The contract that bound the group members stated that at the end of the 10 year term, all the works purchased were to be sold.

At an auction on 2 March 1914, the collection which included works of Picasso, van Gogh, Gauguin and Matisse, more than quadrupled the group's original investment.¹⁰ Article 10 of the group's 1904 contract specified the obligation to distribute 20 percent of the profits from the final auction to the represented artists on a proportional basis.¹¹ This profit sharing with the artists was acclaimed by artists and art critics at the time, and caused much discussion of the *droit de suite* principle. The French National Assembly embraced the principle and on 20 May 1920 enacted a visual artist's right to share in the profits from subsequent sales of their work.¹²

⁶ Ibid. For example, in 1849 Millet sold *Les captives de l'amour* for FF225; in 1889, 14 years after his death, Millet's *L'Angelus* sold for 553,000 francs (E Benezit, *Dictionnaire Critique et Documentaire des Peintres, Sculpteurs, Dessinateurs et Graveurs* (1976, new edition), Librairie Grund, vol 7, 422–3).

⁷ Stokes, above n 5, 77; Dr Bunny Smedley, 'How the EU Will Destroy Britain's Art Market' (2001) 8 (7) *European Journal* 22, 22.

⁸ 'Background on *Droit de Suite*' (2001) *Analysphere* at <<http://www.analysphere.com/18Jun01/droitnote.htm>>. See also Aisha Labi, 'The Art of the Deal' (2000) 155 (13) *Time Europe* at <<http://time.com/time/europe/magazine/2000/0403/auction.html>>. For example, the French sculptor Henri Gaudier-Brzeska (1891–1915), died in action in the French army in 1915 (Harold Osborne, *The Oxford Companion to Art* (1970) 459).

⁹ See James Fenton, 'Becoming Picasso', a review of: John Richardson, *A Life of Picasso: Volume II, 1907–1917* (6 February 1997); and Michael Cowan Fitzgerald, 'Skin Games', *Art in America*, February 1992, 70.

¹⁰ Fitzgerald, *ibid* 79.

¹¹ *Ibid* 82.

¹² Art 42 of *Loi du mai 1920* (1957 JO 2723). J Lambert, 'Suites for Artists: Resale Rights Directive' (2002) 1(1) *Copyright Update* 2, 2.

International Developments

Currently *droit de suite* schemes operate in over 30 jurisdictions across the globe.¹³ Article 14^{ter} of the *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention) establishes the international framework for resale royalties and provides its members, which include Australia, with model provisions.¹⁴ Article 14^{ter} does not compel the Member Countries to introduce *droit de suite* legislation — the decision to enact legislation based on the model provisions is optional. Article 14^{ter} of the Berne Convention states as follows:

[308] *Article 14ter*

[‘Droit de suite’ in Works of Art and Manuscripts: 1. Right to an interest in resales; 2. Applicable law; 3. Procedure]

- (1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.
- (2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.
- (3) The procedure for collection and the amounts shall be matters for determination by national legislation.¹⁵

European Harmonisation

While most European Union (EU) Member States have enacted legislative provisions giving a resale right to authors of original works of art, the United Kingdom, Ireland, Austria and Holland are yet to do so.¹⁶ The possible trade distortions caused by an absence of *droit de suite* legislation in these four countries, and a desire to equalise the disparity between the economic situation of creators of original works of visual

¹³ Jurisdictions that have resale royalty schemes include: Chile, Czech Republic, Denmark, Ecuador, France, Germany, Greece, Hungary, Iceland, Italy, Ivory Coast, Luxemborg, Mali, Morocco, Peru, Philippines, Portugal, Senegal, Spain, Tunisia, Turkey, the United Sates (California Only), Uruaguay and Yugoslavia: Myer, above n 2, 194.

¹⁴ *Ibid* 193–4.

¹⁵ Article 14^{ter}, ‘*Droit de suite* works in works of art and manuscripts’, *Berne Convention for the Protection of Literary and Artistic Works*, Paris Act of 24 July 1971, as amended on 28 September 1979.

¹⁶ Stokes, above n 5, 79.

artists and that of other creators who benefit from successive exploitation of their work (for example, writers), led to the recent EU harmonisation directive.¹⁷

After a lengthy and passionate debate, the European Parliament finally reached an agreement on 2 July 2001. The 'Directive on the Resale Right for the Benefit of the Author of an Original Work of Art' compels all EU Member States to implement legislation to give an inalienable resale royalty right to authors of original works of art.¹⁸ The harmonisation directive removes from the United Kingdom, Ireland, Austria and Holland, the freedom of choice offered under Art 14*ter* of the Berne Convention.

The General Structure of Resale Royalty Schemes

While the specifics of a *droit de suite* scheme vary from jurisdiction to jurisdiction, the general structure, outlined below, is common to all schemes.

Which artworks attract a resale royalty

The artwork must be original to attract a resale royalty. Where an artwork is produced in limited multiples, these also may be included.¹⁹ Generally, paintings, drawings and sculptures qualify as original artworks in all jurisdictions that have a *droit de suite* scheme. Some jurisdictions may also include all or some of the following: lithographs, engravings, original photographs, tapestries, ceramics and glassware.²⁰

The applicable sale types

For most schemes, a resale royalty will only arise where an artwork is resold in a public and commercial [309] context, and not where the sale is private. For example, a resale royalty would arise where the subsequent sale involved art market professionals, such as salesrooms, art galleries and art dealers. If resale royalties were imposed on private sales it is suggested that enforcement would 'lead to a detective-like enquiry practice and infringement of personal privacy'.²¹

¹⁷ Roland Kirstein and Dieter Schmidtchen, 'Do Artists Benefit from Resale Royalties? An Economic Analysis of a New EU Directive', Centre for the Study of Law and Economics, Discussion Paper No 2000-07 at <www.uni-saarland.de/fak1/fr12/csle/publications/2000-07.htm> 3.

¹⁸ The Member Countries have to apply a *droit de suite* to the work of living artists from 2006, and to all artistic works of deceased artists, from 2012.

¹⁹ Myer, above n 2, 348.

²⁰ See the definition of 'Work of Art' in Intergovernmental Copyright Committee, Twelfth session of the Committee of the Universal Convention as revised in 1971, Paris 18-22 June 2001, 2.

²¹ *Ibid* 4.

Amount of resale royalty

In most jurisdictions the resale royalty rate is between 2 and 5 per cent of the resale price. Some jurisdictions only permit a resale royalty where the artwork increases in value, which ensures that the artist does not benefit where the seller has suffered a loss.

The royalty rate in most jurisdictions is also subject to a minimum sale amount. For example, in Europe a work of art must resell for a minimum of EUR\$3000 before a resale royalty is available. This ensures that the royalty exceeds the administrative costs involved in a *droit de suite* scheme. In some schemes a maximum payment limit is also stipulated.

Collection procedure

Individual artists, a government agency or an organisation acting on behalf of the artists could collect the resale royalty. Most *droit de suite* schemes favour collection through an artists' collecting agency as it is generally accepted that such an agency is best positioned to collect the royalty and to enforce the associated rights.²² This is because an artists' collecting agency is known in the art market and consequently commands more influence.²³

Inalienable royalty right

In most circumstances, art dealers and galleries hold a stronger bargaining position than artists due to the limited number of art galleries and the large number of artists seeking to sell and exhibit their work.²⁴ Accordingly, it is likely that the gallery or dealer will persuade the artist to contractually forego their resale right, in order to make the work more attractive and easier to sell. To protect the artist's weaker position, it is common in most schemes to find that the artist's right to the royalty is inalienable — the right cannot be assigned or waived.²⁵

²² Myer, above n 2, 350.

²³ *Ibid.*

²⁴ *Ibid* 351.

²⁵ This is in compliance with Art 14ter of the *Berne Convention for the Protection of Literary and Artistic Works*.

Duration and succession of the right

Generally the resale royalty right is aligned with normal copyright terms. This means that in Europe, the royalty right remains with the artist during his or her life, and for 70 years after the artist's death the right subsists with the artist's legal heirs. In Australia, if a *droit de suite* scheme is introduced, the resale royalty right would subsist for the life of the artist plus 50 years.

One commentator criticises the preservation of the resale royalty right for artists' heirs. In essence he argues that division, distribution and enforcement of the surviving royalty is complicating and consequently an unnecessary burden on the contemporary art market.²⁶

Right to information

The royalty is usually payable by the seller. In order to effectively enforce a *droit de suite* claim, the [310] entitled party must be aware of the art sale. Accordingly, a legally enforceable right to information is common to most *droit de suite* schemes.

Arguments Supporting the Introduction of a Resale Royalty Scheme in Australia
Provides artists with a contingent income stream

The perception of the struggling artist is generally true. The Myer Report found that the incomes of contemporary visual arts and craft practitioners in Australia are lower than that of the general workforce, and of artists in other fields.²⁷ Tamara Winikoo, Executive Director of the National Association of Visual Arts claims that artists' incomes have declined by 16 per cent over 10 years.²⁸ Further, artists are generally alienated from our 'increasingly privatised health system'²⁹ and rarely make superannuation contributions.

Currently, artists receive income only from the initial sale of an original work. The profits of any subsequent resale go to dealers, buyers and sellers in the secondary

²⁶ Peter Karlen, 'The Californian *Droit de Suite*' (1996) 65 *Copyright World* 23, 27.

²⁷ Myer, above n 2, 54.

²⁸ Transcript of 'Stretching the Canvas: Investing in Art in Australia', produced by Gerald Tooth, *ABC Radio National*, 11 August 2002; Tamara Winikoo, Executive Director of the National Association of Visual Arts.

²⁹ Jane Rankin-Reid, 'The Politesse of Current Arts Funding Muffles Artists' Voices', *On Line Opinion*, 28 October 2002 at <<http://www.onlineopinion.com.au/2002/Oct02/Rankin-Reid1.htm>>.

market. If visual artists were to receive a resale royalty for subsequent sales of their original work, then their financial status would be improved. The contingent income stream would also provide some sort of security for the artist in the absence of superannuation.

Famous Australian artist Margaret Olley said of the resale royalty: 'Its long overdue: some artists have no paintings to sell and nothing left.'³⁰ Bronwyn Bancroft, artist and Viscopy Board Member maintains that '[r]esale royalties are an intrinsic link to the improvement of the inherent rights of Australian artists to a fair income'.³¹

Equalises the copyright status of visual artists with authors, musicians and performers

Some commentators argue that it is anomalous that visual artists cannot benefit from successive exploitation of their work the way authors, musicians and performers can.

For instance, American pop artist Jasper Johns' quintessential 1956 *Green Target* painting sold in the late 50s for as little as \$4000 US. It was the same year that Marlon Brando gave his brilliantly studied performance in *On the Waterfront*. The painting, like Brando's characterisation, is widely recognised for ushering important new movements into the American contemporary cultural experience. ... The difference is that Brando's breakthrough performance still pays the actor royalties, whereas *Green Target's* resale for several million dollars in the early 1990's did not.³²

Similarly, the European Commission in debating the decision to effect the EU Harmonisation Directive, said 'Why should David Hockney, Damien Hirst or Tracey Emin be differently treated from the Spice Girls or Elton John?'³³ Accordingly, the introduction of a *droit de suite* scheme in Australia would provide visual artists with an economic return equivalent to that received by authors, musicians and performers.

³⁰ Viscopy's response to the Myer Inquiry (9 September 2002) at <<http://www.europeanvisualartist.org/page2.html>>.

³¹ *Ibid.*

³² Rankin-Reid, above n 29.

³³ European Union Commission, cited in J Lambert, 'Suites for Artists: Resale Rights Directive' (2002) 1(1) *Copyright Update* 2, 2.

[311] *Intrinsic value theory*

In Germany the resale royalty is premised on the belief that the increased value of a work existed in the work at the time of its original sale, albeit in latent form. As the latent value of the work is due largely to the efforts of the artist (for example, as a result of the artist's continuing body of work), then the increase over time in value of a particular work is what the artist should have received originally. Accordingly, the artist should participate in resale profits when the greater value is given material form by a subsequent sale.³⁴

One commentator argues that any latent or increased value of an artwork cannot be attributed simply to the artist. She argues that, 'dealers, auction houses, curators and connoisseurs all 'invest' in artistic reputations, while overall economic conditions and an infinity of other circumstances also play a crucial part'.³⁵

International harmonisation and the notion of reciprocity

The resale royalty scheme is based on a notion of reciprocity. If Australia introduced a *droit de suite* scheme, then Australian artists whose works were resold in a jurisdiction that also had a resale royalty scheme would be entitled to a royalty. Similarly, an artist from France or the United Kingdom whose work was sold in Australia, would be entitled to a resale royalty if such a scheme existed in Australia.

Relieve government funding to the arts

It has been suggested that the introduction of a resale royalty scheme in Australia 'would relieve pressure on government funding'.³⁶ It is unlikely that a royalty scheme would have this effect, because, as discussed below, the majority of resale royalties benefit established and successful artists and not the artists that would be in need of government funding.

³⁴ See S Simpson, 'Droit de Suite: The Artist's Royalty', Simpsons Solicitors, at <<http://www.simpsons.com.au/library/documents/visarts/visarts89/9Artists.pdf>>

³⁵ Smedley, above n 7, 22.

Arguments Against the Introduction of *droit de suite* in Australia

Circumvention of legislation

It is a popular view among commentators that the introduction of a resale royalty scheme will encourage the exodus of art transactions to jurisdictions where the royalty is not paid, or that alternatively, art resales will become private and underground in order to avoid the resale imposition.³⁷

The UK Government bitterly fought the introduction of the *droit de suite* scheme, arguing that the levy would cost up to 5000 industry jobs and would divert trade to the US and Switzerland to avoid it.³⁸ Commentators concurred stating, ‘There can be little doubt that EU-mandated changes will now tear the heart from [the UK] market, driving buyers and sellers away’.³⁹

The effect on the French market since the introduction of *droit de suite* supports the concerns of commentators.

At present, although roughly a third of the fine art sold in the world is French in origin, only 7 per cent of all French art sales take place in France. Relatively low taxed, deregulated markets in London, Geneva and New York [312] have profited from the decline of Paris as a national — let alone international — art market.⁴⁰

However, it is unlikely that sellers of Australian art will take works to resale royalty free jurisdictions. This is because popular Australian artists are likely to achieve the highest prices for their works in Australia. For example, works of Brett Whiteley and Arthur Boyd are likely to achieve a higher price in Australia, even after factoring in the resale levy, than would be achieved when selling in a royalty free jurisdiction that is less familiar with their work.⁴¹

³⁶ Heather Winter, Artist, cited in ‘Royalties for Art’s Sake’, *Sydney Morning Herald*, 6 September 2002 at <<http://www.smh.com.au/cgi-bin/common/popupPrintArticle.pl?path=/articles/2002/09/05/1031115911326.html>>.

³⁷ Shirine Tiwari, ‘Artists Resale Rights’, *Law Clinic* at <http://www.axa-nordstern-art.co.uk/cw/law/law2002/resale_rights.html>.

³⁸ The United Kingdom Parliament, Select Committee on European Legislation Twenty-Sixth Report, *Artists Resale Rights* at <<http://www.parliament.the-stationery-office.co.uk/pa/cm199798/cmselect/cmeuleg/155xxvi/15506.htm>>.

³⁹ Smedley, above n 7, 24.

⁴⁰ *Ibid* 22.

⁴¹ Myer, above n 2, 201.

Further, concerns about taking trade off-shore to avoid the levy would disappear if the *droit de suite* were to become obligatory at an international level.

Antithetical to Australian common law property notions

The *droit de suite* was founded on and is consistent with a civil law notion of property. Such a notion sees the artist joining his or her individual will to the work, and as a result the work comes to embody the owner's personality.⁴² The relationship between the artist and the work is ongoing and inseparable.

In common law systems such as Australia, an artist's work is treated as a commodity and generally⁴³ no continuing connection between the artist and their work subsists. Accordingly, a purchaser of an artwork who pays the market price,⁴⁴ and who assumes the considerable risk that the work may decline in value,⁴⁵ should receive absolute unfettered ownership.⁴⁶ Arguing by analogy, it would be unreasonable if a person who speculated on shares should have to share any profits with the company or its management when he or she sells their shares.⁴⁷

Unlike authors and musicians, who are able to distribute identical copies of their works, artists create unique or a limited number of objects.⁴⁸ Accordingly, it seems incongruous to apply a resale royalty to a unique artwork that is not subsequently copied or reproduced.

⁴² Notion developed by Immanuel Kant and George Wilhelm Friedrich Hegel. See Thomas F Cotter, 'Pragmatism, Economics and Droit Moral' (1997) 76 *North Carolina Law Review* 1, 1.

⁴³ Although this is now tempered by the moral rights regime which was recently introduced into Australian copyright law by the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

⁴⁴ A value of a commodity is what a willing buyer will pay a willing seller at a given time.

⁴⁵ Geoff Cassidy, Southeby's Sydney director, estimated that 'about 98 per cent of paintings people have ever bought from a gallery probably went down in value' (Transcript of 'Stretching the Canvas: Investing in Art in Australia', produced by Gerald Tooth, *ABC Radio National*, 11 August 2002). Similarly, art commentator Terry Ingram said 'work by unproven artists tend to drop in value more often than they rise. Possibly nine out of 10 artists who obtain a gallery exhibition are not heard of again' (Terry Ingram, 'Artists Get More of Pie as Fickle Market Booms', *Australian Financial Review*, May 29 2002, at <<http://afr.com/specialreports/report2/2002/05/29/FFXZNF3TN1D.html>>).

⁴⁶ Bernhard Beger, 'Why Resale Rights for Artists Are a Bad Idea' (2001) at <http://www.law.harvard.edu/faculty/martin/art_law/why_resale_rights_for_artists.htm>.

⁴⁷ *Ibid.*

⁴⁸ Elliot Alderman, 'Resale Royalties in the United States for Fine Visual Artists' at <<http://www.aldermanlawoffice.com/art-resale.htm>>.

Depression of the art market

German artist George Baselitz decries the resale royalty on the grounds that it harms the primary market for artists' work.⁴⁹ For example, if galleries are forced to pay artists a percentage of the resale value of the work, the gallery may not unreasonably demand a lower price when purchasing the painting from the artist in the first place.

[313] Similarly, in the secondary market, collectors may hesitate to buy the works of contemporary artists, because as soon as they purchase the work, it immediately drops in value, as any subsequent sale is subject to a resale levy.

A resale royalty could therefore have the effect of discouraging investment and consequently, depressing the art market.

Benefits only successful artists

Perhaps the strongest criticism of the *droit de suite* is that it is 'not an instrument that would considerably or widely improve the economic situation of a country's artistic population'.⁵⁰ Effectively, resale royalty payments benefit only a small number of successful artists, as these are the artists whose works attract large prices and typically resell frequently. Less successful artists fail to benefit, as their works are less likely to be resold at a high price.

In the UK, the *droit de suite* scheme has been condemned by the people it is designed to benefit. The pressure group 'Artists Against *Droit de Suite*' which includes such established artists as David Hockney, Karel Appel and Emma Sergeant stated that '[t]he directive was designed to benefit artists, but instead creates a shameful inequality between famous artists on the one hand and struggling artists on the other'.⁵¹

⁴⁹ 'Fifteen-year reprieve for the UK', *The Art Newspaper*, April 2001, 1. See also Smedley, above n 7, 23.

⁵⁰ Above n 20, 16.

⁵¹ 'Artists Criticise Royalties Deal', *CNN.com* <<http://europe.cnn.com/2001/WORLD/europe/07/03/artists.royalties>>.

Seventy percent of the 50 million francs levied under the *droit de suite* in France in 1996 went to families of only seven artists, including heirs of Picasso and Matisse.⁵² In Germany in 1998, resale royalties were collected for 480 German artists and estates.⁵³ Measured against the number of about 12,000 artists organised in artists' associations, it represents a low percentage.⁵⁴ Similarly, in Australia in 1999, the works of prominent deceased artists Arthur Boyd, Sidney Nolan and Brett Whiteley made up to \$A12.1 million, or 18 per cent of auction sales.⁵⁵

The Myer Report attempts to justify the inevitable inequitable distribution of the resale royalty, and states:

... the fact that the majority of resale royalties would be distributed to more successful artists, or their heirs, does not undermine the stated object of resale royalties in the Australian context: to allow creators to benefit economically from the appreciation of their works of art.⁵⁶

Clearly, a *droit de suite* scheme benefits a small percentage of deceased or well established artists who generally are not in need of a resale royalty. It is a convincing argument that a scheme with such elitist effects should not be implemented. It is my view that a *droit de suite* system should only be employed if it benefits the majority of artists, or at the very least, benefits the struggling and emerging artists, who are most in need of financial encouragement.

Cost of administering the scheme

The cost of administering a resale royalty system is subtracted from the royalty itself. Evidence from successful collecting societies in Europe suggests that the cost of administering resale schemes range [314] from 9–20 per cent.⁵⁷ In its submission to the Myer Inquiry, Viscopy, the Australian copyright collecting society for the visual

⁵² Smedley, above n 7, 22. Similarly, '[i]n France, between 1993 and 1995, of the 2000 artists and their heirs who benefited from *droit de suite*, a mere 2–3 per cent received 43 per cent of the sum collected': 'Fifteen-year reprieve for the UK', *The Art Newspaper*, 1 April 2001.

⁵³ Above n 20, 15.

⁵⁴ *Ibid.*

⁵⁵ Myer, above n 2, 196, citing J Furphy, *The Australian Art Sales Digest*, Acorn Media, Victoria, 2000.

⁵⁶ Myer, *ibid* 196.

⁵⁷ *Ibid* 198.

arts, indicated that its current administration fee is around 25 per cent, but this could be reduced to compete with comparable European rates.⁵⁸

If a resale royalty is levied on a low threshold resale price, then it is likely that the cost of administering the scheme will outweigh the benefit of the royalty. For example, in the Californian *droit de suite* system, an artist receives a resale royalty when a work is resold for a minimum of US\$1000. In this situation, the artist will receive the 5 per cent royalty of US\$50, but from that royalty a basic 15 per cent collection administration fee will be subtracted. This means that the artist will receive just US\$42.50. However, if there is difficulty in tracking the artwork or with extracting the royalty from the vendor, then the administration costs could exceed the \$50 royalty amount.⁵⁹

Accordingly, a high minimum resale threshold is required to enable the benefit to outweigh the administration cost. An unfortunate corollary of a high minimum resale threshold is that fewer artists are able to benefit from a royalty.

Discussion

The success (or lack thereof) of droit de suite schemes in other jurisdictions

While it is difficult to precisely ascertain the success of *droit de suite* schemes in other jurisdictions, there is much that indicates that the schemes fail to satisfy their intentions.

The Californian *droit de suite* statute has been described as having ‘teeth like a gummy bear’.⁶⁰ It is rarely enforced.⁶¹ Commentator Peter Karlen said ‘[t]he disadvantages of the Californian *droit de suite* overwhelm the advantages, both numerically and qualitatively’.⁶²

The principal aim of the EU Directive is to let artists participate in the economic success of their work. Yet, one analysis ‘shows that the new directive is most likely to

⁵⁸ Ibid 351.

⁵⁹ Karlen, above n 26, 25.

⁶⁰ Carla Shapreau, ‘The Statute with Teeth Like a Gummy Bear: *Droit de suite* in the US’ (April 1998) 80 *Art Newspaper*, Art and Law Supplement VII, VII.

⁶¹ Ibid.

place the artists in a worse economic position'.⁶³ Further, of the eleven EU Member States that currently have *droit de suite* legislation, seven do not enforce it,⁶⁴ or at the very least, do not enforce it on a regular basis.⁶⁵ Strangely, against a backdrop of such findings, Rachel Duffield, Vice-President of European Visual Artists, said at an international conference, 'the resale right is administered very successfully in many countries within the European Union'.⁶⁶

Despite Rachel Duffield's seemingly ill-fitting comment, it would be fair to say that the *droit de suite* schemes in the various jurisdictions have not been perceived as having been successful. There is no reason to believe that a similar style scheme would have better success in an Australian context.

Likelihood of its introduction

In the wake of European harmonisation, and considering Australia's recent acceptance of moral rights [315] legislation, it appears likely that such a scheme may be implemented.⁶⁷ Its introduction, a key recommendation of the Myer Report, has been endorsed by political and artistic factions.

Brian Kennedy, Director of the National Gallery of Australia said, 'I believe that resale rights of royalty, so called *droit de suite*, is in principle, a good way to ensure continuing acknowledgment of the importance of faith of art practice'.⁶⁸

Dr Carmen Lawrence, the then Shadow Minister for Reconciliation, Aboriginal & Torres Strait Islander Affairs; The Arts and the Status of Women, released a press statement after the release of the Myer Report. She said:

⁶² Karlen, above n 26, 28.

⁶³ Kirstein and Schmidtchen, above n 17, 1.

⁶⁴ Smedley, above n 7, 22.

⁶⁵ Kirstein and Schmidtchen, above n 17, 3.

⁶⁶ Rachel Duffield, 'The Artist's Resale Right at the International Level' (Paper presented at the Management and Legitimate Use of Intellectual Property International Conference, 9–11 July 2000).

⁶⁷ The concept of a *droit de suite* scheme in Australia is not new. In 1989, the Australian Copyright Council Report, *Droit de Suite: The Art Resale Royalty and its Implications for Australia*, suggested the introduction of such a scheme via the Copyright Act. Nothing developed from that suggestion.

⁶⁸ 8 August 2001, Launch of A Fairer Deal for Visual Artists in the Craft Sector at <<http://www.nga.gov.au/press/fairerdeal.htm>>

The report canvasses most of the issues raised in the submissions and makes a number of sensible recommendations to support the struggling visual arts sector. It also highlights the shameful neglect of the sector by the Government.

The endorsement of a resale royalty arrangement will provide a fairer outcome, particularly for indigenous artists, and should be implemented as a matter of priority.⁶⁹

It is also likely that Australia will face international pressure to conform as the European Commission plans to actively campaign for a *droit de suite* to be adopted internationally by making Art 14^{ter} of the Berne Convention compulsory.⁷⁰

Alternative approaches

Contract

An alternative to resale royalties is the inclusion of specific provisions in contracts granting the artist a resale royalty-like payment on subsequent sales.⁷¹ The contractual approach has been trialled both domestically and internationally, and evidence suggests that few purchasers have signed the agreement.⁷²

The contract approach is frustrated by the fragile bargaining position of artists. As discussed above, commercial art galleries and commercial auction houses tend to have a great deal more bargaining power than artists. If art dealers dictate terms, then almost certainly they will decline to contractually impose a resale levy on a work of art.

Further, if a contractual clause provided benefits to the artist from subsequent sales, the artist could enforce the provision against the initial purchaser. However, 'it is questionable whether the clause would be enforceable against subsequent purchasers'.⁷³

⁶⁹ Carmen Lawrence, 'Labor Welcomes Long Overdue Myer Report into Visual Arts' (Press Release, 6 September 2002), at <<http://www.carmenlawrence.com/says/press/060902.htm>>

⁷⁰ R Burrell, *Recent Developments in European Copyright Law* (2002) at 6.

⁷¹ Myer, above n 2, 205.

⁷² Ibid 205, citing 1989 Australian Copyright Council Report, *Droit de Suite: The Art Resale Royalty and its Implications for Australia* 31.

⁷³ Myer, *ibid* 207.

Artists' Fund

Another model that allows artists to benefit from subsequent sales is a communal artists' fund. Such a [316] scheme exists in Norway. In essence a tax is imposed on sales of works of art. The revenue resulting from the tax is deposited into a central fund for the benefit of professional artists in need, and their families.⁷⁴

The benefit of an artists' fund is that all artists benefit, particularly emerging and struggling artists. 'The primary focus is welfare, rather than parity with the intellectual property rights of other types of artists'.⁷⁵

However, the artists' fund model sees the artist's connection with their work severed. For example, a successful artist may resell many times but still may not be entitled to benefit from the fund. Accordingly, if such a scheme is thought desirable, it may need to be implemented as a separate tax act, rather than as an amendment to the *Copyright Act*.⁷⁶

Conclusion

In 1989 Australian artist Tracey Moffatt sold a series of photographs entitled *Something More* through the Mori Gallery in Sydney. The series sold for A\$1000 leaving Moffatt with around \$600 after the gallery took its commission. Recently Christies Australia sold the *Something More* series for just under A\$230,000.⁷⁷

Similarly, indigenous artist Johnny Warangkula Tjupurrula sold his painting *Water Dreaming* at Kalipinya in 1973 for \$150.⁷⁸ The painting resold in July 2000 for \$486,500.⁷⁹

⁷⁴ Ibid 207.

⁷⁵ Ibid 208.

⁷⁶ Ibid 208.

⁷⁷ 'Royalties for Art's Sake', *Sydney Morning Herald* (Sydney), 6 September 2002 at <<http://www.smh.com.au/cgi-bin/common/popupPrintArticle.pl?path=/articles/2002/09/05/1031115911326.html>>.

⁷⁸ Alison Davis, 'Artist Resale Royalties' (2000) 3 *Art+Law* at <http://artslaw.com.au/reference/003artist_resale_royalties/>.

⁷⁹ Ibid.

It is rare⁸⁰ situations like these that fuel artists and artists' lobby groups to call for the introduction of a *droit de suite* system. It appears that most artists believe that such a scheme will assist struggling artists. Yet the likely practical effect of the inception of such a scheme is that while Tracey Moffatt and Johnny Warangkula Tjupurrula may deservedly benefit, the majority of the visual arts community will not. In addition, the market may become unwelcoming to less successful artists, and buyers may be deterred.

The principle rationale of the Myer Report *droit de suite* recommendation is 'to allow creators to benefit economically from the appreciation of their works of art'.⁸¹ It is my view that the argument and discussion above sufficiently demonstrate that this objective would not be achieved with parity or fairness to the visual artists' community as a whole.

Visual artists make a valued contribution to the social, cultural and political landscape. Society needs art and craft for 'inspiration and wonder'.⁸² At present the sector is suffering. The Visual Arts community has been described as vulnerable, meek and fragile.⁸³ There is no doubt that the introduction of a scheme that encourages the continuance of artists' important contribution, has great merit. However, a *droit de suite* scheme that rewards commercially successful creators and frequent resellers, is not the correct medium. If the Federal Government is serious and committed in supporting the visual arts community, especially nurturing emerging and struggling artists, then they should pursue alternative concepts such as an artists' fund.

⁸⁰ See above n 44.

⁸¹ Myer, above n 2, 196.

⁸² Max Delaney, Director of Gertrude Contemporary Art Spaces, at 'Melbourne Conversations — The Future of the Myer Report', 13 March 2003, Melbourne Town Hall.

⁸³ Lyndal Jones, Visual Artist, at 'Melbourne Conversations — The Future of the Myer Report', 13 March 2003, Melbourne Town Hall.