Resale right: the major legislative issues

In this document, we set out our position on issues to be covered in legislation granting a resale right. Many of these issues were raised in the report of the Inquiry into the Contemporary Visual Arts and Crafts (Myer Inquiry), which recommended the introduction of the right. Our starting point has been the European Union Directive on Resale Right, although there are some aspects of that Directive which we think are inappropriate and/or unnecessary for Australia. Our position takes into account existing resale right legislation in other countries, particularly that in France and Germany. Information about legislation in other countries has previously been provided to the Government.

Which works would be covered?

We propose that the right apply to the original embodiment of an artistic work, as defined in the Copyright Act (except if it is a building, or if it forms a permanent non removable part of a building). The right would also apply to reproductions made by or under the direction of the artist in limited numbers (for example, numbered prints or craftworks).

Article 2.1 of the EU Directive provides:

> 1. For the purposes of this Directive, "original work of art" means works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art.

“Artistic work” is defined by s10(1) of the Australian Copyright Act as follows:

> ***artistic work*** means:
>
> (a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;
>
> (b) a building or a model of a building, whether the building or model is of artistic quality or not; or
>
> (c) a work of artistic craftsmanship to which neither of the last two preceding paragraphs applies;
>
> but does not include a circuit layout within the meaning of the *Circuit Layouts Act 1989*.

The definition covers a wide range of artistic works, including craft works which are “works of artistic craftsmanship”, but may not cover some “non-traditional” forms of expression such as installations and multimedia works. We think that non-traditional forms of artistic expression which are not currently covered by the definition of “artistic work” but are resold by intermediaries should be covered by the resale right, and we will be proposing options for achieving that outcome. We note Recommendation 3.8 of the Myer report that the practical application and case law developments with respect to the definition of artistic work be monitored.

The phrase “work of artistic craftsmanship” has been considered by the courts on a number of occasions; the courts have held that such works must be the result of both artistic intent and craft. The phrase is also used in the provisions in the Copyright Act which limit copyright protection for artistic works which are also designs for the purposes of the Designs Act. One of the amendments in the Designs (Consequential Amendments) Bill 2002 currently before Parliament would clarify that an artistic work may be both a work of artistic craftsmanship and an artistic work referred to in paragraphs (a) or (b) of the definition (for example, a painting or a sculpture).

In relation to limited reproductions, one option for identifying those eligible for the resale right, after the amendment referred to above comes into effect, may be to require such reproductions to be works of artistic craftsmanship.

There is a reference to artistic works affixed to or forming part of a building in s195AT(2). It allows, subject to certain conditions, the relocation, destruction or demolition of a building without infringing the right of integrity in that work. We would propose that the resale right should apply to a work which has been affixed to a building but is subsequently detached.

There are some existing references in the Copyright Act to the original embodiment of an artistic work:

> sections 195AK and 195AT relate to the moral rights implication of destroying or relocating an original embodiment of an artistic work;
>
> section 51A allows libraries and archives to make a preservation copy of “an original artistic work”; and
>
> sections 198 and 240 provide that a bequest of an artistic work is presumed to include the copyright in it.

Sales covered

We propose that the legislation cover all sales involving a professional intermediary, including auction houses, private galleries and agents and online auctions, where there is a connecting factor between the sale and the Australian resale right legislation.

Under Article 1.2, the EU Directive covers:

> …all acts of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art.

There may need to be more than one connecting factor between a sale and the application of the resale right under Australian law. One connecting factor would be a contract of sale governed by Australian law, and another would be that the seller is a national or resident of Australia or if the seller is a business, that it is owned or run by Australian interests or the artwork being sold was purchased by the Australian branch of a business. The legislation should address the concern expressed in the Myer report about the possibility of attempts to avoid the resale right, for example by stating that the contract of sale is governed by a foreign law. Consideration will also need to be given to appropriate connecting factors to ensure that online sales involving intermediaries are included under the resale rights regime.

Rates payable

The EU Directive has a sliding scale for payments for the resale right. Member States may set a minimum price, below which the royalty need not be paid, but that price must not exceed 3,000 euros.

euros	%
0 to 3,000	0-5%
3,000 to 50,000	4-5%
50,000 to 200,000	3%
200,000 to 350,000	1%
350,000 to 500,000	0.5%
500,000 to 5000,000	0.25%
>5000,000	12,500euros

Pending the full implementation of the EU Directive, most countries have a flat rate of 3–5%, subject to a minimum price.

Given that the dangers of Australian arts sales going offshore are low, and the lower prices for sales in Australia, we propose a rate of 5% on all resales.

The rationale for a minimum threshold is that the administration costs of collecting and distributing the fee may account for most or all of the fee. However, since these costs are diminishing over time, particularly as a result of technological developments such as common electronic coding systems and online recording and communication of information, we are researching and would wish to make recommendations to the government on what if any minimum threshold would be practicable and appropriate for Australian circumstances.

There may be a threshold in practice if works are not resold by intermediaries below a certain amount. We are also seeking further information about this.

How long would the right last?

We propose that the right last for the same period as the copyright: usually the life of the artist plus 50 years. This principle is consistent with the EU Directive and

international practice, although the period of protection in the EU (life of the artist plus 70 years) is currently longer than in Australia.

Who would "own" the right?

We propose that the right vest with the artist, and not be transferable or waivable. On the artist's death, the right would pass (in a similar way to moral rights) to the artist's legal personal representative.

The EU Directive provides it is an inalienable right, not transferable even in advance.

To whom would the payment be made?

We propose that payments be made to the organisation which has been declared by the Attorney-General to be the collecting society for the resale right. The requirements for declaration would be similar to those which currently apply under the following Parts of the Copyright Act: VA and VB (educational institutions and institutions assisting people with disabilities), VC (retransmission) and VII (government use). Those requirements include: that the society is a company limited by guarantee; that all relevant rights owners are entitled to become members; that the society's rules prevent the payment of dividends to members; and that the society's rules contain provisions to ensure that the interests of the society's members are protected in relation to collection, distribution, administrative costs, holding on trust for non-members and access to records by members.

We note that the artists' collecting society, Viscopy, intends to apply to be the declared the collecting society for the resale right. All the organisations which are signatories to this document would support that application. Viscopy was established in 1995 with direct Commonwealth government funding to collect and distribute copyright fees for visual artists and craft practitioners. It currently licenses uses of artistic works and distributes the proceeds of voluntary and statutory licences from Australia and overseas to its members.

Who would be liable to pay?

We propose that the seller of the artistic work be liable for payment, as the beneficiary of the resale. There would be an obligation on the intermediary to collect the payment from the seller and pay it to the copyright collecting society. The collecting society would be entitled to take legal action to recover unpaid fees. It may be appropriate for the legislation to provide that a proportion of the payment be retained by the intermediary as payment for performing this role.

Article 1.4 of the EU Directive provides:

> 4. The royalty shall be payable by the seller. Member States may provide that one of the natural or legal persons referred to in paragraph 2 other than the seller shall alone be liable or shall share liability with the seller for payment of the royalty.

In our view, legislation based on an obligation for the seller to pay the royalty can overcome any concerns that the legislation may be characterised as a tax, or as an

acquisition of property on other than just terms, and thus be held to be unconstitutional.

We note that concerns have been raised about the possible application of the High Court's decision in the *Australian Tape Manufacturers Association v Commonwealth of Australia* (1993) 25 IPR 1 to a resale right scheme. That decision concerned legislation requiring payment of a levy on blank audio tapes. It turned on the fact that the levy was payable by the wholesalers of the blank tapes rather than the consumers who were given the benefit of a private copying exemption under the legislation. The vendor who was obliged to pay the levy received no right or licence.

Our proposed scheme is different to the blank tape scheme considered by the High Court because the person benefiting from the resale (the vendor) is the person obliged to pay the royalty. We think our position is supported by *Nintendo v Centronics* (1993) 28 IPR 431, in which the High Court held that the introduction of the Circuit Layouts Act 1989 was not an acquisition of property on other than just terms.

We note also the legal opinion of former Solicitor General Dennis Rose for Screenrights and AMCOS that private copying legislation can be drafted in a way which would avoid the outcome in the *Australian Tape Manufacturers Association* case. The opinion and draft legislation relating to private copying is available from www.screen.org.

Access to information about sales

We propose an obligation on intermediaries to report certain information about resales to the collecting society. The collecting society would be entitled to information from intermediaries about sale prices of artists' works, but not generally to information about sellers or purchasers. Information about a seller may be required, however, if the royalty is not paid. We think that these provisions can be drafted consistently with privacy principles.

Viscopy's existing arrangements with auction houses have already established reporting requirements of this nature.

We point out that the existing art market arrangements already provide, as a matter of course, that the proceeds of sale are not released to the vendor until all costs, taxes, commissions and charges have been paid. We would favour an obligation of this kind to protect the artist's right to payment.

Application to foreign works

We propose that the resale right would apply to foreign works sold in Australia, where the artist is a national of a country with an equivalent scheme, under which Australian artists are entitled to benefit. This position is consistent with the requirements of the Berne Convention.

Education and awareness

The introduction of a resale right will more quickly bring benefits to artists if its existence and requirements are clearly explained, at the outset, to all those who will be affected, including artists, vendors and purchasers of artworks, and intermediaries. We therefore strongly support the recommendation in the Myer report for Government funding for implementation of the right. To be effective, we would encourage the Commonwealth government to commit these resources to a concerted education campaign to be conducted concurrently with the introduction of the resale right.

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