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By Bob Gosford, The Northern Myth - a Crikey.com blog

This is a reprint of a post on The Northern Myth, Bob Gosford's blog - <http://blogs.crikey.com.au/northern/>

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When Big Pete Garrett got to his feet in Parliament last month and announced that he would implement Labor's long-held commitment to a resale royalty scheme for all Australian visual artists, he told the House that:

"This is a landmark and genuinely historic moment for the more than 20,000 Australian visual artists. The decision to introduce a resale royalty right for visual artists has been a long time coming."

And he noted that the idea of a resale royalty, particularly for the benefit of Australia's Indigenous artists, had been around for over a decade, ATSIC having proposed it in 1997 and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) endorsing the proposal in a 1998 Report - *Our Culture: Our Future*.

Garrett was finally delivering on a proposal that had been Labor's policy for some years, with private members' bills by Kate Lundy in 2004 and Bob McMullen in 2005 being lost on the numbers. And he noted that while the resale royalty would apply to all Australian visual artists:

"I make no secret of the fact that one of the government's motives in introducing this scheme was the very real benefits it will bring to Indigenous artists and their communities."

The introduction of a resale royalty was considered at some length by the Australian Senate Standing Committee on Environment, Communications, Information Technology and the Arts in its June 2007 Report *Indigenous Art - Securing the Future. Australia's Indigenous visual arts and craft sector*. Labor was in the minority on that committee and the non-government members made the following comments:

"Non-government members of the committee recognise that a resale royalty scheme must be carefully designed, they believe that options exist for a scheme that merit introduction. Accordingly, non-government members of the committee take the view that there should be introduced a resale royalty scheme that is designed to ensure appropriate resale rights accrue to artists, particularly Indigenous artists."

Again Labor was rolled on the numbers. Government members of the Committee noted:

"The majority of the committee recommends that a resale royalty scheme not be introduced at this time, because of the lack of benefit to most artists, and in particular Indigenous artists, and the lack of new evidence to the contrary."

Garrett's model for the resale royalty scheme has been the subject of particularly bitter opposition from the big end of town - the large auction houses and art dealers. They don't like the prospect of daylight shining on the shady dealings of the nether regions of their industry, they don't like the extra

administrative load it will place on their businesses and they don't like the idea of their clients having to shell out more money.

And the indigenous artists the subject of Garrett's unashamed motives? Well, they, and the dozens of small arts centres scattered across remote Australia that most of them work through, reckon they've been sold a pup and that Garrett's model is seriously flawed and needs fixing.

The flaws include that Garrett's scheme will do nothing to stop the shamefully unscrupulous rump of the market that sees artists pumping out rubbish-art from sweatshops in Alice Springs and other large centres in the Territory and it will be an administrative nightmare for arts centres and their close commercial relatives, the small art galleries and dealers that sell the bulk of their work.

More serious concerns centre on what has been identified as an unashamed nod to the big end of town - namely that Garrett's scheme, by only applying to new works created and sold for a second time after 31 June 2009, rather than all works that are sold for more than \$1,000, will reduce benefits to artists to a slow and delayed trickle.

Related to this is that Garrett's scheme will need a substantial and complex administrative back-end that will be expensive to run and will provide relatively meagre returns to the small number of potential tender bidders to operate the scheme.

And of particular concern to many of the small Aboriginal arts centres is that, because they must pay their artists up-front, the second resale trigger point will move, not from the first commercial sale in the broader market-place, but at the time the arts centre sells it to a dealer or it is sold by a gallery on exhibition.

Despite Garrett's touting of resale royalties as providing real benefits to Aboriginal artists and their heirs and successors, his scheme may end up as the cause of interminable disputes and litigation over the royalties. Either that, or as a boon for the various Public Trustees that administer the deceased estates of people who die without wills.

Robyn Ayres is the Executive Director of the Arts Law Centre, the national community legal centre for artists. She told Crikey that Arts Law has a number of concerns about Garrett's scheme:

"...our priority, and that of the organisations we've been working with, has been to get a resale royalty scheme in place - for Aboriginal and non-Aboriginal artists - that provides a fair reward for artists. The scheme that has been proposed will take a long time, a long time, to deliver benefits to artists and their families."

"This scheme is going to be an administrative nightmare because of the complexity of trying to work out the second resale after the scheme comes in."

"Being able to track that is quite problematic because so many artists will call their work the same thing (Budgerigar Dreaming, etc). Where every work will be called the same name we will need to find a new way of recording the identity of each individual work - the way it is being recorded at the moment through the auction houses does not properly capture each distinct work."

And Arts Law believes that the Garrett scheme should have a broader application and should apply not just to resales of work created after June 2009:

"If the resale scheme applied to all resales of works in copyright, as is the system in the UK where it has been so successful then there isn't a potential loophole for the auction houses to get out of it. One of the key issues of the scheme only applying to second resales is how much less money will flow to artists as there will be far fewer works where resale royalty will have to be paid. Viscopy did the figures from this year's auction sales based on 5% royalty for resales of all works in copyright with a \$500 threshold and they came to about \$6m for the year and that money would have gone back to 800 artists, if we looked at the a system that (notionally) started in 2008. Under the system that (Minister) Garrett is proposing it will only be less than 10% of that amount of money paid to the artists. Also, because the threshold is at \$1,000 rather than the \$500 that Arts Law recommended, it means that a great number of artists will miss out. And I think it is hard for people to understand that even \$50 makes a real difference for artists who are trying to eke out an existence through their arts practice."

And Arts Law reckons that it will be a long time before any real returns flow to artists from Garrett's scheme and that reciprocal arrangements with similar schemes in other countries would be unlikely:

"There will be at least a 20 year lag - probably more, before it even starts to generate any real income.

"So when Sotheby's in London has a sale of contemporary Aboriginal art, which they did last year and sold something like 3 million pounds, if we had a system in place where Australian artists had reciprocal rights then the 5% would flow back to Australian artists from overseas. If they introduce the scheme as proposed by Garrett I think it is very unlikely that we will get those reciprocal rights because (his scheme) has nowhere near the coverage as, say, the UK scheme which applies to all copyright work."

While Arts Law applauds the bravery of the government in introducing the scheme, Ms Ayres urges caution, particularly in regard to the government's stated intention to introduce the legislation into the current session of Parliament:

"I see the resale rights as being a recognition of the financial rights that artists should have when so much money is being made out of their work. And they should just get a much fairer deal than they have at present and what is being proposed in this scheme put up by Minister Garrett.

"Nobody has seen this legislation yet and we were concerned as we were getting a sense that we weren't going to see a fair model for artists and it wasn't going to apply to all works in copyright. We wanted Government to address that. And of course we were very disappointed when the announcement was made and we realised the limitations of the model. I don't know if we are going to see any legislation before it is going to be introduced into parliament. I would urge the government to draw a breath, have a look at the model and consider the disproportionately negative impact it is going to have on Australian artists and think about rewarding them properly and fairly for the contribution that they make."

One of the key issues in Australian Indigenous art circles is the issue of handling the estates of deceased artists. Arts Law has recently been working with Aboriginal artists in the Kimberley and the NT to assist artists with the preparation of wills:

Under the intestacy laws, which vary from state to state, in most cases the order in which the estates of an Aboriginal artist is distributed is not in accordance with Aboriginal customary law or the probable wishes of the Aboriginal person who had passed away."

John Oster is Executive Officer of Desart, that represents 43 central Australian Aboriginal arts centres and the more than 3,000 artists that work through those centres. He sees some positives in the model proposed by Garrett:

"The biggest positive is that there is some recognition for artists of all races and persuasion to get a greater recognition in the cultural life of this country and that visual artists are now treated somewhat equally with musicians and writers and that's an important moral position that the nation takes with this. The second thing is obviously money. The third thing we see is that there is some kind of regulatory influence in the market. There will be now be a database that will be able to track the flow of works through the market, we'll be able to see who is buying what and what they are paying for it. It's not going to solve every problem that exists but the fact that there is more information in the market is going to help."

On the issue of the succession of an artist's rights and intellectual property after death, Oster says that:

"...there isn't a lot of understanding amongst artists about the need for wills, what they involve at whitefella law and there are a whole lot of perceptions about who owns the painting, who owns the cultural values behind the painting or work of art and therefore who should be the beneficiary for that."

In relation to Garrett's scheme, the issue of the ownership of and responsibility for the cultural values in an artwork are particularly relevant because the proposal envisages that for 70 years after an artist's death resale royalties will flow only to his or her identified heirs and successors at Australian law.

As a series of cases in the 1990s, including the landmark case of *John Bulun Bulun & Anor v R & T Textiles Pty Ltd*, illustrate, Aboriginal rights and responsibilities in visual art, particularly where they concern sacred and/or secret images or knowledge, can be recognised at Australian, i.e. non-Aboriginal, law, but are substantially more complex and different to those that apply to non-Aboriginal artists.

Martin Hardie, now a law lecturer at Deakin University, ran those cases in the Federal Court in Darwin and is concerned that Garrett's scheme will be a huge step backward - not only for the importance of Aboriginal art but for the lost opportunity to properly recognise the different ways in which responsibility for it is shared:

"Garrett's scheme is problematic and doesn't take into account the realities and complexities of the artist's society. It seems to forget those artists, particularly across the Top End of Australia, who fought so hard for so long for the merest recognition of their traditional law by the Australian legal system. For them this scheme might well end up being tantamount to the theft of their birthrights and will, in many cases, see benefits flowing to people who have no entitlements at traditional law.

"It worries me that Government policy seems to be denying or even actively undermining Aboriginal forms of organisation. We have seen that in the intervention and now I fear we might see it in this reform of Intellectual Property law. Garrett's scheme is a recipe not for economic benefits to Aboriginal artists but for the continued failure of Australian governments to recognise the fact that Aboriginal law still runs in many parts of Australia. And it is worrying that my old mate Peter Garrett, of all Australian politicians, may fail to grab this opportunity."

And the small arts centres don't see much benefit in the scheme either.

Cecilia Alfonso is the manager of the Aboriginal-owned Warlukurlangu Arts Centre at Yuendumu. She sees little benefit for the Warlukurlangu artists in Garrett's model:

"Peter Garrett's proposed resale royalty, as it is at the moment, will hinder the vibrancy of the market this is the worst time to be doing this. I think it is unworkable. The people who drafted this don't understand business and how the art market works."

Minister Garrett's spokesperson told Crikey this morning:

"At the moment Aboriginal artists receive no benefits from the resale of their work. With the introduction of the (resale royalty) scheme they will. The government has every confidence in the ability of the market to absorb and manage the introduction of a resale royalty and it has, for example, with the introduction of a buyers premium."

As is apparent from the discussion above, there are many different views about the government's proposed resale royalty - if you have a comment on any of the views expressed above, or some suggestions of your own - please jump in and leave a comment so that we can broaden the discussion about this important proposal.

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