

Table of Contents

Australia’s resale Part 2 - Arts Industry tells Arts Minister Garrett - "Take a cold shower, Pete!!" . 1

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Federal Arts Minister Peter Garrett's proposed resale royalty for visual artworks has been labelled a disaster for Australian artists by the body that administers visual arts copyright and licenses.

As The Northern Myth reported two weeks ago, many on the Aboriginal arts side of the visual arts industry considered his resale royalty proposal a dud.

Garrett's defense of his scheme was a sort of "something is better than nothing" argument. A spokesman for Minister Garrett told Crikey that:

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.

Now Viscopy, which represents more than 7,000 Australian artists, has commissioned research that it says shows that the modeling used to support Garrett's proposal was based on "flawed and uninformed assumptions".

Viscopy's report "Implications of the Australian Government's Proposed Resale Royalty Scheme" concludes that the Garrett scheme as currently proposed:

...will not deliver significant income to the current generation of Australian artists, will not be recognised by other countries' resale schemes and will be extremely complex and costly to administer.

Viscopy is a member of the Coalition for an Australian Resale Royalty (CARR) and wants a "fair and straightforward scheme where all resales generate a royalty". Viscopy's analysis notes that the Garrett model will only apply to works purchased after the scheme is proposed to start on 1 July 2009.

Viscopy's analysis provides results based upon an assessment of art auction figures over the ten-year period from 1997 to 2008 and found that Garrett's resale royalty proposal would have provided only 13% of the income generated by the CARR-preferred model that would include all works in copyright and that this diminished income would only be received by 25% of the artists that would receive it under the CARR model.

Viscopy notes that this would mean that:

...for a long time, the Government's proposed resale scheme will deliver a fraction of the income to far fewer artists than the all resale model.

In March this year Garrett's Department of the Environment, Water, Heritage and the Arts (DEWHA) spent \$66,000 on a report from Access Economics for "Economic Modeling of a Resale Royalty Scheme".

Crikey has obtained a copy of the Access Economics report. It is an excellent piece of economic analysis that was, unfortunately, asked to provide answers to the wrong questions and to operate on wrong assumptions.

It also reveals a fundamental failure by DEWHA to understand how the Australian art market operates.

Viscopy's report notes:

To understand [the effect of the proposed scheme] for Australian artists, it is important to look at the way the art market operates.

Only 6% of works sold at auction in 1998 were resold before 2008. This suggests that the average time between sales of a work on the secondary market by Australian artists is much longer than 10 years.

As Viscopy's chairperson Michael Keighery told Crikey:

DEWHA asked Access Economics to model 2, 5 & 10 years average turn around times for an artwork. On top of this Access Economics then chose to model resales as if art was a commodity such as electronic goods or cars...anyone with knowledge of the art market can tell you that this is not the case and that the average resale time is much longer.

The Government then uses the report to develop their resale model in the false belief that the proposed scheme will capture all or nearly all resales after 20 years; i.e. all works owned prior to the legislation coming in will have been resold once.

This is simply not the case.

Other flaws that Viscopy identifies with the Garrett proposal include that the scheme will not link with similar schemes in other countries - largely because, unlike most other similar schemes, it will fail to capture all works in copyright as they pass through the market.

As Viscopy's report notes:

The unique nature of the Government's scheme also makes it likely that reciprocal arrangements under the Berne Convention may not be recognised by other countries operating resale schemes. This could very well mean that Australian artists will not receive any resale income when their work is sold in these countries. This is unlikely to be the case if the Government adopts the (CARR) model as it is very similar to many of the schemes operating around the world.

Viscopy and others have told Crikey that the decision not to include all works in copyright in the scheme was because DEWHA considered that to do so would offend Australian laws on the acquisition of property and retrospectivity.

Crikey has seen legal advice provided to Arts Law from senior counsel. In relation to whether a scheme that caught all works in the market would constitute a retrospective acquisition of property contrary to the Australian Constitution, Arts Law's legal advice states:

...17. In my view it is clear that the proposed scheme does not involve an acquisition of property within s. 51(xxxi) of the Constitution.

18. Even in the days when s. 51(xxxi) had a wider ambit than it now does, the contrary contention was rejected in *Nintendo Company Limited v. Centronics Systems Pty Limited* (above) at pages 160-161.

19. Their Honours said that it was of the nature of such laws under s. 51(xviii) that they confer intellectual property rights on authors, inventors and designers, other originators and assignees and that they conversely limit and detract from the proprietary rights which would otherwise be enjoyed by the owners of affected property. Their Honours also said that, inevitably, such laws may, at their commencement, impact upon existing proprietary rights. To the extent that such laws involve an acquisition of property from those adversely affected by the intellectual property rights which they create and confer, the grant of legislative power contained in s. 51(xviii) manifests a contrary intention which precludes the operation of s. 51(xxxi).

20. Implicit in the contrary argument is that, to some extent, the proposed scheme would be retrospective. In my view this is to misunderstand the nature of retrospective laws.

21. As explained by McHugh and Gummow JJ. in *Commonwealth v. SCI Operations* (1998) 192 CLR 285 at 303, there is an important distinction between a statute which provides that as at a past date the law shall be taken to have been that which it was not, and the creation by statute of further particular rights or liabilities with respect to past matters or transactions. Their Honours referred with approval to the judgment of Jordan CJ in *Coleman v. Shell Company of Australia* (1943) 45 SR (NSW) 27 at 31.

22. In my view the proposed law would not be retrospective but would do no more than create a fresh right or...further particular rights or liabilities...with respect to the artist's copyright. The matter is also discussed in Pearce and Geddes, *Statutory Interpretation in Australia*, 6th Ed. at para. 10.4.

23. So far as concerns s. 51(xxxi) of the Constitution I will answer the question: Yes, in my opinion a resale royalty scheme applying to all relevant artistic works protected by copyright at the time it comes into force, and providing for joint and severally liability on the seller, the buyer and their respective agents, could be enacted in such a way that it is not characterised as a law with respect to the acquisition of property within s. 51(xxxi).

DEWHA received the Access Economics report in April this year and sat on until just over a week ago, when it finally released it to Viscopy.

The Access Economics report to DEWHA provides clear warnings to DEWHA that the Garrett scheme was fundamentally flawed in that it would provide poor returns to artists, would be uneconomical to administer, would be unnecessarily complex and may encourage avoidance:

The amount of royalties collected in early years of a prospectively applied Scheme may be very small, possibly too small to cover administrative costs of the scheme.

Furthermore, the costs of administering a prospective Scheme are likely to be greater than administering an equivalent retrospective Scheme as greater information systems would be needed to confirm an artwork's eligibility. As only a proportion of sales would be subject to the royalty under a prospectively applied Scheme (at least in the short to medium term), prospective application may also increase scope for royalty avoidance. That is, a less comprehensive royalty scheme, like a less comprehensive tax, is generally be harder to enforce. (at page 7)

Viscopy's analysis also picks up on these issues:

In the process of analysing the available data it also becomes clear that the organisation administering the scheme will have considerable difficulty in:

- establishing which secondary sales of work constitute a qualifying resale;
- dealing with the huge amount of associated research; and
- ensuring compliance because of the scheme's complexity.

And Access Economics notes the limitations in the data with which it had to work:

Modelling of an Australian resale royalty scheme was undertaken using detailed art sales data sourced from the Australian Art Sales Digest. The data related to art sales through Australian auction houses over 2006 and 2007. Although data are collected on secondary sales through commercial galleries, there is insufficient detail in the data for modelling of this nature, and consequently the analysis is confined to sales through auction houses. (at p. iii)

...

Modelling the implications of a prospectively applied Scheme without estimates informed by a long time series of resale data is necessarily imprecise in nature. While the assumptions adopted here following the typical approach to modelling turnover in goods markets it does not necessarily follow that these assumptions are consistent with knowledge of the operation of art markets. Naturally, differing assumptions about the process that governs resales would alter the projections for a prospective Scheme. (at p. 23)

...

As discussed above in Section 3.1.1, insufficient data were available on commercial gallery art sales to enable the inclusion of these sales in the model. Although a large proportion of commercial gallery (or commercial dealer) sales are primary sales, this still represents a significant source of secondary market sales in Australia. In addition, the sales that take place through commercial galleries are likely to be different in nature to those that occur through auction houses. Commercial galleries tend to sell more artwork from less-recognised artists, with the high profile (high value) works sold predominantly through auction houses. As such, the model both underestimates the total royalties that would be collected under an Australian resale royalty scheme, and potentially - depending on how greatly the distribution of art works sold through commercial galleries differs from that of auction houses - mis-estimates the distribution of royalties among artists. (at p. 24)

A spokesman told Crikey that Minister Garrett wants to introduce the Bill for the resale royalty scheme within the eight sittings days left of the current parliamentary session and to have it up and running by the end of this financial year.

No draft of the Bill has been circulated for comment or consideration by the arts industry, though Minister Garrett's spokesman told Crikey that:

The Minister has provided an assurance to the Shadow Arts Minister that he will have an opportunity to see the draft Bill before it is introduced to Parliament.

Crikey asked Robyn Ayres, the Executive Director of the Arts Law, the arts community legal centre, to comment on the legislative process:

Arts Law hopes that we get to see the legislation very soon if the Government proposes introducing it this year. It certainly does not leave much time for reflection and correction.

And Arts law, which as previously noted has been doing much valuable work with remote indigenous artists by assisting them with the preparation of wills to ensure that their personal and artistic estates are properly protected, notes that:

Arts Law is also concerned about the inadequate support for the vital work that we are doing putting wills in place for indigenous artists. This ensures that their artwork, copyright and resale rights are properly dealt with after their death ie that they go to the right people. Our Artists in the Black service recently visited remote Indigenous communities in WA where some magnificent work is being produced by emerging artists. Artists in the Black has drafted about 300 wills this year for Aboriginal artists but it is just the tip of the iceberg. Despite our great results and development of vital legal infrastructure for the Aboriginal arts community (sample will + artist/art centre agreement), the wills work in 2008 has been funded by the Copyright Agency Limited (not the Government) and every other cent of funding we have had to work very hard to receive. There is no more money left in our coffers for the wills work into the future.

Crikey put a number of questions to Garrett, including one seeking a response to Viscopy's concerns that the current proposal will fail to meet its preferred criteria of providing significant benefits to artists, is straightforward and cost effective to administer and is consistent with international standards.

A spokesman for Garrett provided this response, in part, to a question asked of Garrett at a press conference earlier this week:

I am happy to have a strong debate about what this scheme ultimately should look like, but I do think that where we have set the level [5% resale royalty] but I do think that where we have set the level will work most effectively for all visual artists, including indigenous artists.

And Viscopy's Michael Keighery urged Minister Garrett to:

...proceed cautiously rather than rush ahead and put in place a model that is flawed and is not going to work in the best interests of the whole of the arts industry...it is trying to deliver on an election promise that Minister Garrett made.

There is an opportunity for people to say...our own modeling is not right.

I really have grave reservations and doubts about whether (the Garrett scheme) is viable or it will be possible to put the Government's model in place before 1 July 2009.

I'm hoping that we will throw a bit of cold water on a hasty move by Minister Garrett.