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Productivity Commission
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CANBERRA ACT 2601

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Aboriginal and Torres Strait Islander Visual arts and crafts

About the Copyright Agency

The Copyright Agency is a private not-for-profit company, known as a copyright management organisation or collecting society. We collect fees and distribute royalties to creator members for the copyright and sharing of their text and images. We currently have over 38,000 members who include authors, artists, cartoonists, illustrators, journalists, photographers, playwrights, poets, publishers and surveyors.

We are appointed by the Australian Government to manage the statutory licence schemes for the education and government sectors, and the Resale Royalty scheme for artists.

Our visual arts team specialise in licensing artworks for a wide range of uses including publishing, merchandise, fashion, architectural uses and more. Many of the 13,500 visual arts we represent are Aboriginal and Torres Strait Islanders, some directly and others via art centres.

Businesses with best practice governance, seek commercial licences from us for improved compliance and seamless workflow.

We have agreements with International Affiliates to license the use of foreign content here, and collect licence fees for Australian content used overseas.

Copyright Agency provides philanthropic support to Australia's cultural community through our grants program, the Cultural Fund.

We acknowledge the Traditional custodians on whose land our office stands: the Gadigal of the Eora nation, and their Elders past present and emerging. We pay our respects to the First Australians, the traditional custodians of this continent, whose cultures are among the oldest living cultures in human history.

Our vision for reconciliation is to connect and engage with Aboriginal and Torres Strait Islander creators, organisations and communities to develop strong, mutually beneficial relationships that will increase cultural education, knowledge of rights and respect for creators. We do this, particularly, through the licensing of words, artworks and images, and the payment of the resale royalty right to artists.

Our response to the Productivity Commission study

This response to the Productivity Commission Issues Paper is provided in addition to our joint submission with the Indigenous Art Code and Arts Law Centre of Australia. Our shared observations of the market, the authentic/inauthentic product, and the fair/unfair deal is covered in the joint response. In this document we provide additional information in relation to the royalty and licensing schemes we manage.

In this submission, we respectfully use the terms 'Aboriginal and Torres Strait Islander', 'First Nations' and 'Indigenous' interchangeably to reference the Aboriginal and Torres Strait Islander people belonging to this country.

The Resale Royalty Right

The Resale Royalty Right for Visual Artists Act 2009 (Cth) enables the people who created the work to share in its value when it is resold. Commencing on 9 June 2010, the objectives of the Resale Royalty Right are to:

- provide visual artists with recognition of their ongoing rights in their art; and
- an additional source of income through royalties derived from commercial resales of their art.

Since commencement to the end of June 2021, the Resale Royalty Right for visual artists had generated over \$10 million in royalties for more than 2,200 artists from nearly 24,000 resales. At the end of December 2021, that has grown to \$10.6 million in royalties.

The number of artists benefitting from the scheme steadily increases, with over 210 artists having their first eligible resale in 20/21 and from June to December 2021, an additional 130. The spectrum of artists receiving royalties is diverse and includes Aboriginal, Torres Strait Island and non-Indigenous; artists at all stages of their careers - emerging to senior; and those living in urban, regional and remote locations.

The scheme design allowed for a slow build and the market to adapt, as only artworks acquired by the seller after the start of the scheme (9 June 2010) are eligible for royalty.

The scheme is also seen as one of the elements that can assist in strengthening the integrity of the art market and building provenance.

More information on the scheme can be found at: www.resaleroyalty.org.au

Indigenous artists, the art market and the Resale Royalty Right

From the outset, Aboriginal and Torres Strait Islander artists have benefitted greatly from the scheme, representing 65% of the artists receiving royalties, and receiving 38% of the royalties. Of all the artists receiving royalties, over 35% reside in the Northern Territory and central Australia. This participation is strong as Indigenous art works are often bought outright from the artist, much more frequently than is the case for non-Indigenous artists. Indigenous artists' works feature across the breadth of sales values reported to the resale royalty scheme and of the 50 artists who have received most money under the scheme, 18

are Aboriginal or Torres Strait Islander. Indigenous artists are more strongly represented in the lower sales values and any upward shift of the entry level threshold would remove many Indigenous artists from the scheme entirely or greatly reduce the income some earn.

In addition to receiving royalty payments, artists benefit from the information of their resales, which is provided on their royalty statements and personal dashboard accessible at www.resaleroyalty.org.au. As noted by an artist:

"We can benefit from the resale of our work and keep track of our artworks moving in the marketplace"

This information provides artists with greater understanding of the value of their work and how it moves through the market, enabling them to make more informed choices about their art practice and sales channels. This benefit is heightened for those Indigenous artists in remote and regional locations who may have had less visibility on these aspects. An industry expert shared with us their observation of artists in Central Australia making different decisions about who they would work with when they had this information¹; and we know through the increasing number of questions we receive from Indigenous artists, they are seeking more information on their sales and the sales arrangements under which they are sold.

Role of Government

Since the introduction of the resale royalty scheme, we have worked closely with Government (Office for the Arts) and found the processes and reporting requirements for the scheme establishment funding appropriately stringent. Similarly close attention is paid to our delivery of services. The Government responded quickly to market feedback and within 18 months of commencing the scheme, the requirement to report all resales was amended, making it necessary to report only those resales with a sales value of \$1000² or over and reducing the administration for AMPs.

Authenticity

As mentioned, the scheme is seen as one of the elements that can assist in strengthening the integrity of the art market and building provenance.

The resale royalty legislation (Clause 17) also deals with authenticity in a pragmatic way, in that it presumes that if a mark or name that purports to identify a person as an artist or an artwork appears on the artwork, this is taken to be prime facie evidence that the person is the artist or one of the artists of the artwork.

Note: our efforts in the Fake Art Harms Culture campaign focussed on products, gifts and souvenirs, not fine art.

¹ Similar comments were provided to the [post-implementation review of the Resale Royalty Right for Visual Artists Act 2009 and associated Scheme](#)

² \$1000 is the sales value at which resale royalty will apply should all other eligibility criteria be met.

Policy settings

The settings of the Resale Royalty Right were designed to maximise financial returns to the greatest number of artists, while balancing the Scheme's efficiency for both AMP and the collecting society. In our view the current parameters are meeting the objectives of the scheme.

Similarly, clause 33 provides that, except to the extent permitted under the succession test in clause 15, the resale royalty right is absolutely inalienable, whether by way of, or in consequence of, sale, assignment, charge, execution, bankruptcy, insolvency or otherwise. This provision is to prevent artists being pressured into assigning their right.

One aspect that we feel does require attention, addresses compliance for the scheme and supporting fair and ethical dealings with artists.

Fair and ethical dealings

For resale royalty, fair and ethical dealings means that artists are clear on the sales arrangement they have with the art market professional (AMP) including when the work is bought outright or consigned and therefore when resale royalty is relevant i.e. does it apply at the next sale or the one after that. Where an AMP is working in collaboration with other AMPs, this too should be made known to the artist. The arrangement between artist and AMP is clearly communicated and documented between the parties.

While our engagement activities show a high level of awareness and understanding of the scheme amongst AMPs, which has in the main converted to compliance, our monitoring of market activity has captured some resales that may not have otherwise been reported and has corrected some inaccurately reported acquisition dates. We are also aware that for Indigenous artists, many seek clarity around their sales arrangement with the dealer/gallery and when resale royalty is applicable. This is particularly the case for independent artists and those where there are multiple AMPs in the supply chain.

As the manager of the scheme, we have no legislative power to inspect the records of sellers, buyers, art market professionals or other agents to determine the amount of any resale payable on a commercial resale or the liability for that royalty. We can require this information from these parties and, if they do not comply, we can apply to the Federal Court for a penalty against the relevant party. We note that the penalty provision does not empower the court to order compliance with a request for information.

Inspection powers

In our view it would be useful to have the power to inspect records, rather than having to enforce compliance through the notice and penalty system provided. The power should extend to the right to inspect records related to information which is required to be given in a section 28 notice of commercial resale and not just the limited amount of information that can be requested under a section 29 request. A possible model for our suggested amendment is the inspection provisions that form part of the educational statutory licence in the Copyright

Act administered by Copyright Agency. We have found these provisions to be a useful tool in managing the statutory licence, though rarely used.

More information on inspection rights is found in the joint submission.

Visual Arts Licensing

In 2012 Viscopy, the rights management organisation/collecting society for Australian visual artists, and the Copyright Agency entered into a services agreement whereby Copyright Agency provides the services to Viscopy's artist members and licensing customers. Following the success of this agreement (visual artist membership grew to 13,500; licensing revenue achieved its largest ever in FY17 at \$1.1m; administration fees to artists reduced from 25% to 15%), the two organisations merged on 30 November 2017. Since then, Copyright Agency has continued to grow the licensing income for visual artists, writing over \$2.2million for visual artists in FY21. More information on Copyright Agency's visual arts licensing can be found at: <https://www.copyright.com.au/licences-permission/visual-art-licences/>

Indigenous artist and visual arts licensing

We write licences for both independent artists and art centre artists. Our list of member art centres can be found at: <https://www.copyright.com.au/art-centre-members/>

We have observed in recent years the increased licensing demand for the Aboriginal and Torres Strait Island art. Comparing FY19 to FY21 and the licences written for Indigenous artists, this trend is clearly demonstrated by:

- the numbers of artists we are writing licences for has doubled
- the average income an artist has earned is up by more than half
- and the total income written generated has tripled

We see this demand continuing to grow, making it even more important that the issues that this study sets out to explore and understand are addressed. Please refer to our joint submission with the Arts Law Centre of Australia and the Indigenous Art Code for our detailed response to the questions and issues raised in the study.

In addition to above, one of the authors of this submission (Stephanie Parkin) conducted a thematic analysis of the submissions to the fake art inquiry as part of her Master of Philosophy completed in 2020 at the Queensland University of Technology. Chapter 4 of that thesis is titled "The Issue of Authenticity: an Analysis of the 2017 Inquiry's Terms of Reference and Evidence". Please refer to Chapter 4 of that thesis for further analysis of the issue of authenticity in the context of the Inquiry specifically.

Statutory licence schemes for the education and government sectors

At the Copyright Agency, we also manage statutory licences schemes for the education and government sectors. A statutory licence allows certain uses of material protected by copyright, without the permissions usually required, subject to fair compensation to copyright owners.

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The education statutory licence allows copying and communication for educational purposes by educational institutions, including schools, universities, TAFEs and vocational educational bodies. For example, a teacher could make copies of an artistic work, on its own or as part of other material, to give students in their class. The government statutory licence allows uses for government purposes, and applies to the Commonwealth, States and Territories.

The licence arrangements under each of these statutory licence schemes are what is known as blanket licensing arrangements: they cover all uses by the sector in reliance on the licence. For example, we have agreements with education departments, and with peak bodies for schools in non-government sectors, that cover copying and sharing of text or images for educational purposes that would otherwise require a copyright clearance.

The copyright fees we collect from these schemes provide important support to Australia's creative industries, including visual artists and the industries that support them. In 2020-21, the totalled more than \$63m.

The Government is currently considering potential changes to Australia's copyright legislation. In announcing the consultation process, Minister Fletcher said:

"Australia's copyright system underpins our creative economy and these reforms seek to provide clear and reasonable access to copyright materials, while maintaining the incentives and protections for content creators."

It is very important that any changes do not reduce the support that the copyright system provides to Australia's creative industries. The copyright system is based on recognition of the value of creative endeavour for Australian society as a whole, and that those who create for the benefit of others have opportunities to be rewarded for that benefit, and to continue to create.

Thank for the opportunity to contribute.

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