



Australian Government

Department of Communications and the Arts

# Post-Implementation Review — *Resale Royalty Right for Visual Artists Act 2009* and the Resale Royalty Scheme

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## List of abbreviations

AASD.....	Australian Art Sales Digest
(the) Act (or Resale Act).....	<i>Resale Royalty Right for Visual Artists Act 2009</i> (Cth)
AMP.....	Art market professionals (such as an auction house, art dealer, gallery owner, agent and others in the business of dealing in artworks)
Berne Convention.....	<i>Berne Convention for the Protection of Literary and Artistic Works</i>
Copyright Act.....	<i>Copyright Act 1968</i> (Cth)
Copyright Agency.....	Copyright Agency Limited
Cth.....	Commonwealth of Australia
DAE.....	Deloitte Access Economics
DEWHA.....	(former) Department of the Environment, Water, Heritage and the Arts
Discussion Paper.....	<i>2013 Review of the Resale Royalty Scheme, Discussion Paper</i>
EEA.....	European Economic Area
EU.....	European Union
GFC.....	Global Financial Crisis
Government.....	Australian Commonwealth Government
GST.....	Goods and Services Tax
Minister.....	Minister for the Arts
Myer Report.....	<i>2002 Report of the Contemporary Visual Arts and Craft Inquiry</i>
OBPR.....	Office of Best Practice Regulation, Department of the Prime Minister and Cabinet
PIR.....	Post-implementation Review
Resale Act (or the Act).....	<i>Resale Royalty Right for Visual Artists Act 2009</i> (Cth)
Review.....	Combined PIR and Australian Government Review of the Scheme
Scheme.....	Resale Royalty Scheme
SMSF.....	Self-managed superannuation funds
WIPO.....	World Intellectual Property Organization



## 2019 update on the Resale Royalty Act and Scheme

This is the Report for the Post-implementation Review of the *Resale Royalty Right for Visual Artists Act 2009* (the Resale Act) and accompanying Scheme that commenced on 5 June 2013. The Review was required by the Australian Government's Office of Best Practice Regulation. There was also commitment by the Government to review the Scheme within five years of its 9 June 2010 commencement.

The Review Report examines the first three years and four months of the Scheme's operation, and uses the data generated in this period to assess any early impacts from the Act and Scheme, analyse the effectiveness of the Scheme in meeting its original objectives and provide forecasts on the future scale of the Scheme.

While some of the forecasting in the Report has been superseded, it provides a comprehensive overview of feedback received from the full range of affected arts stakeholders. It also provides a valuable snapshot of the establishment phase of the Scheme that can be used for future comparative analysis.

Following the 2013 release of the Review Discussion Paper and Terms of Reference, as well as targeted public consultations, 75 public submissions were received from visual artists, peak organisations, public institutions, auction houses, art dealers, art collectors and other interested stakeholders.

At the time of the Review, the Scheme had generated \$2.008 million in royalties from 7,700 resales, with royalties for 780 artists or right holders. Living artists have received 95 per cent and Indigenous artists 65 per cent of royalties by volume.

By comparison, at 30 September 2019, the Scheme has generated \$7.5 million in royalties from 19,964 resales of work by 1,879 artists or right holders. Living artists have received 86 per cent and Indigenous artists 63 per cent of royalties by volume.

The Australian art market and Scheme have now co-existed for nearly ten years. Although art market professionals expressed concern during the Review about the impact of the Scheme, the art market appears to be adjusting. For example, in 2017, Australian auction houses achieved \$141.6 million in sales, and this saw Australia break into the top ten international art markets for the first time.

The Review Report predicts the break-even point of the Scheme, defined as generating as much in royalties as the Government has invested (\$2.2 million). The Review forecasts this to occur by April 2014, and it occurred two months earlier.

The Review forecasts income generated from royalties by 30 June 2017 at approximately \$5.7 million against actual income of \$5.3 million from 14,897 resales, with royalties for 1,440 artists or right holders.

A key variant from the Review Report is the point at which the Scheme is expected to be self-funding. Deloitte Access Economics estimated that this would be in 2025 with a 15 per cent administration fee. However, the collecting society, Copyright Agency, expects that this will occur by 2020, five years earlier.





## Executive summary

### Key findings from the 2013 Review

#### Performance (see [chapter 1](#))

- From 9 June 2010 to 31 October 2013, \$2.008 million in royalties was generated from more than 7,700 resales, with benefits being returned to over 780 artists.
- By 31 October 2013, 95 per cent of the artists who received a royalty payment are living and received 74 per cent of the royalties paid. Of these, 65 per cent are Aboriginal or Torres Strait Islander and they received 49 per cent of the royalties paid.
- The top 10 resale royalty earning artists received 28 per cent of the royalties paid.
- The Review modelling suggests that the Scheme will generate cumulative royalties of approximately \$10.5 million by 2020 and \$39 million by 2030.
- There were 30,219 reported resales of \$1,000 and over valued at a total of \$330 million, with \$35 million or 10.6 per cent by value eligible under the Scheme.
- By volume, 7,765 resales were eligible and comprised 25.7 per cent of all resales reported.
- There were 17 instances for 7 artists in which the collecting society was not used to collect royalties valued at \$210,320, and 104 instances valued at \$44,992 where the royalty right was not enforced by 77 artists.
- The Scheme is not retrospective and this has meant that 25.7 per cent of resales by volume and 10 per cent by value occurring in the Australian secondary art market were eligible.

#### Impacts (see [Chapter 2](#))

- Stakeholder views on the impacts of the Scheme are polarised. After three years of operation in a difficult art market, it is generally considered positively by artists and visual arts peak organisations and negatively by art market professionals (AMP) and art investors, with some exceptions in all stakeholder groups.
- Some AMP noted that the timing for the introduction of the Scheme was unfortunate as there has been a marked downturn in art sales since the record market highs of 2006–07.
- AMP primarily attributed this to the global financial crisis (GFC) and changes to the rules governing artworks held in self-managed super funds (SMSF). Resale royalty was mentioned by many stakeholders as a significant third factor that is negatively impacting on the market.

#### Administration Cost (see [Chapter 3](#))

- In the three years to 30 June 2013, the Scheme cost \$1.99 million to establish and administer. This includes \$1.85 million from the Australian Government and \$142,000 in administration fees deducted by the collecting society from royalties it has collected.
- In 2013-14, the Australian Government invested a further \$300,000 for the Scheme's administration and \$50,000 for independent data analysis and modelling as part of the Review, bringing total Government funding to 30 June 2014 to \$2.2 million.
- Modelling shows that the cost to administer the Scheme will be up to \$350,000 per annum.

#### Breakeven Point (see [Chapter 3](#))

- The Scheme is expected to break-even by April 2014 when it generates more in royalties than the Australian Government invested to 30 June 2014 (\$2.2 million).

#### Resourcing the Scheme (See [Chapter 3](#))

- Australian Government funding for the Scheme ceased on 30 June 2014.



- The capacity for the Scheme to be self-funding is highly sensitive to the parameters that are set for the Scheme's operation, such as the eligibility criteria for resales and the size of the administration fee deducted by the collecting society.
- If Scheme parameters remain unchanged, including the 10 per cent administration fee deducted by the collecting society, the Scheme may not be self-funding until after 2050.

### Conclusion (See [Chapter 3](#))

- The Review found that the Scheme and its legislation remain appropriate and that it is achieving its key objective of providing financial returns to individual artists. However it is recognised that the Scheme was introduced at a very difficult time for the art market and stakeholder views are polarised.



## Introduction

### Australian artists

Research shows that, in 2009, there were around 12,800 professional visual arts practitioners in Australia, with 9,000 'visual artists' (such as painters, sculptors or installation artists) and 3,800 'craft practitioners' (such as ceramic artists, metal workers or glass artists) meeting the criteria of a practising professional artist. These two categories made up almost one-third of Australia's total estimated artist population. The research found that all types of artists face challenges meeting their minimum income requirements, but visual artists earn amongst the lowest incomes of any artists, despite being one of the most highly educated groups in the workforce. In 2009, the average visual artist spent 42 hours a week across arts and non-arts work, and earned \$34,900 from all sources.<sup>1</sup> This is the equivalent of the national minimum wage, with many earning less than this.

### Australian art market

The art market is comprised of two parts, the primary market, where new art comes to market for the first time, and the secondary market, when existing art that has been sold at least once before comes to market. Resale royalty applies only to the latter, and only when it is a commercial rather than private resale. In Australia, the majority of primary sales are through galleries and the majority of secondary sales through auction houses, with exceptions in each category.

It is not possible to estimate the overall size of Australia's art market as comprehensive data is not gathered in relation to sales through commercial galleries. The most recent commercial gallery data from the Australian Bureau of Statistics dates back to 2000 when there were 483 commercial art gallery businesses operating in Australia with combined income of \$132 million.

However, comprehensive data is gathered by the Australian Art Sales Digest on auction house sales and this shows that, over the last 25 years, the value of sales by Australia's art auction houses (approximately 20 in total) has grown from \$40 million in 1988 to nearly \$104 million 2013. There was, however, a significant acceleration in 2007, with the total value of auction sales jumping nearly 70 per cent to \$176 million (seen by many as an aberration in the market). Research shows that Australian art auction house turnover is 0.005 per cent of Australia's gross domestic product.<sup>2</sup>

### What is Resale Royalty?

A resale royalty right entitles visual artists and beneficiaries to a payment equivalent to a percentage of the sale price each time the artist's original work of art is resold through the commercial art market. It is also known in French as *droit de suite* (literally 'follow-up right').<sup>3</sup> A resale royalty scheme allows for enforcement of such a right through collection and distribution of royalties.

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<sup>1</sup> D Throsby and A Zednik, *Do you really expect to get paid? An economic study of professional artists in Australia, 2010* [https://www.australiacouncil.gov.au/workspace/uploads/files/research/do\\_you\\_really\\_expect\\_to\\_get\\_paid\\_54325a3748d81.pdf](https://www.australiacouncil.gov.au/workspace/uploads/files/research/do_you_really_expect_to_get_paid_54325a3748d81.pdf) accessed on 9 October 2019.

<sup>2</sup> 2013 *Canvas: a springboard for consultation on a new strategic plan for visual arts*).

<sup>3</sup> See, Lewis, P, 'The Resale Royalty and Australian Visual Artists: Painting the Full Picture' (2003) *Media & Arts Law Review* 306.



## International context

The resale royalty right is recognised in the *Berne Convention for the Protection of Literary and Artistic Works* (the Berne Convention)<sup>4</sup>, a multilateral copyright treaty administered by the World Intellectual Property Organization (WIPO). Australia acceded to the Berne Convention (as at Paris, 1971) on 28 November 1977, with entry into force on 1 March 1978. Over sixty countries out of 167 contracting parties to the Berne Convention have introduced a resale royalty right, including the United Kingdom and all other European Union (EU) or European Economic Area (EEA) Member States.<sup>5</sup> However, in some jurisdictions, resale royalty schemes are not operational as no administration or enforcement provisions are in place. As at June 2014, the United States of America, China, Canada and Switzerland are considering the introduction of a resale royalty right.

On 13 December 2013, the United States Copyright Office released a new report<sup>6</sup>, updating its analysis of resale royalties for the first time since 1992. The Report concluded that certain visual artists operate at a disadvantage compared with authors of other types of creative works and recommended to the United States Congress that it ‘consider a resale royalty, as well as a number of possible alternative or complementary options for supporting visual artists, within the broader context of industry norms, market practices, and other pertinent data’.

## Australian Resale Royalty Scheme

The Australian Scheme, enacted through the *Resale Royalty Right for Visual Artists Act 2009* (Cth) (Resale Act or the Act), commenced on 9 June 2010. The Act received Royal Assent on 9 December 2009, and on 27 May 2010 Copyright Agency was appointed as the collecting society to administer the Scheme for five years.

The Resale Act entitles visual artists (or their beneficiaries) to five per cent of the resale price of eligible artworks when they are resold commercially for \$1,000 or more. It is not retrospective and, therefore, if an artwork was acquired before the Scheme began, no royalty is payable on the first change of ownership. The right applies to works by living artists, and continues for 70 years after an artist's death. It applies to Australian citizens or permanent residents, with the potential to include foreign nationals on a reciprocal basis. For definitions of royalty terminologies refer to [Appendix E](#).

## Review

The Review of the Resale Act and Scheme was undertaken by the Ministry for the Arts, Attorney-General's Department. It covers the period from 9 June 2010 to 31 October 2013 and assesses the efficiency and effectiveness of the Resale Act and Scheme, the impact of the Scheme on artists, the art market, AMP and consumers, and the likely future scale of the Scheme.

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<sup>4</sup> *Berne Convention for the Protection of Literary and Artistic Works*, Paris Act of 24 July 1971, as amended on 28 September 1979. See [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html) accessed on 9 October 2013.

<sup>5</sup> EEA schemes include Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom.

<sup>6</sup> <http://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf>, accessed on 9 October 2019.



## Methodology

Quantitative and qualitative analysis in the Review is based on visual art sector consultation, submissions, research, data and reporting from the Scheme's collecting society, Copyright Agency, independent data analysis and modelling conducted by Deloitte Access Economics (DAE)<sup>7</sup> and internal evaluation.

## Objectives

The objectives of the Scheme are to provide visual artists with recognition of their ongoing rights in their work and a potential source of income when their art is resold on the secondary art market. It was intended that the Scheme would complement existing copyright and moral rights legislation and address the disparity between the economic benefits enjoyed by the creator (through the primary sale) and the benefits enjoyed by investors and art market professionals engaged in reselling an artwork.

Further, the Scheme would bring Australia into line with similar resale royalty arrangements operating in other parts of the world such as the United Kingdom and other European Union States.

## Issues the Resale Royalty Act and Scheme were intended to address

As announced on 13 May 2008<sup>8</sup>, a resale royalty scheme was introduced to provide further recognition of the contribution artists make to Australia's identity, community and economy by providing artists with:

1. proper recognition of their ongoing rights in their art, and
2. additional income through royalties derived from commercial resales of their art.

Noting that many of Australia's visual artists have annual income at or below the minimum wage level, the Australian Scheme's parameters 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.

The issue and possible introduction of an Australian resale royalty scheme had been considered, debated and advocated for since the late 1980s, including investigation by successive governments into the possible design aspects of an Australian scheme. For further detail, refer to [Appendix B](#).

## Scope of the Review

This is a combined post implementation review (PIR) and Australian Government review of the Resale Act and accompanying statutory Resale Royalty Scheme. It incorporates data and analysis of the Scheme's performance and impacts for a period of just over 40 months, from 9 June 2010 to 31 October 2013. More information on the Review requirements is at [Appendix A](#).

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<sup>7</sup> AusTender reference: CN1574071

<sup>8</sup> *Resale Royalty Rights For Australia's Visual Artists*, The Hon Peter Garrett AM, Media Release, 13 May 2008.



## Terms of reference

The Review's Terms of Reference are to provide:

1. an outline of the issues that the Resale Act was intended to address
2. an assessment of the efficiency and effectiveness of the Resale Act and associated Scheme in achieving the original objectives
3. an analysis of the likely impacts had the legislation not been introduced
4. an assessment of the impact of the Scheme on artists, the art market, art market professionals and consumers, including costs and benefits
5. projections that show the likely scale of the Scheme in future years
6. an assessment of any changes to the Resale Act or regulations that could enhance the operation of the Scheme<sup>9</sup>.

## Consultation

The 2013 *Review of the Resale Royalty Scheme Discussion Paper*<sup>10</sup>, released on 5 June 2013, called for public submissions and feedback on the operation of the Scheme and any impacts on industry and consumers. This included visual artists, art market professionals, Aboriginal and Torres Strait Islander owned art centres, visual arts groups and peak organisations, educational institutions, collecting institutions, state and territory art offices, and consumers. Submissions were invited over a period of 5 weeks and 2 days, closing on 12 July 2013. In total, 82 submissions were received, comprised of 74 public submissions and eight submissions that were requested by the authors to be kept confidential.

A list of public submissions is at [Appendix D](#). The Department conducted two consultation sessions with AMP and attended the Copyright Agency's AMP Advisory panel meeting in June 2013. Attendees included representatives from Australian Commercial Galleries Association, Australian Indigenous Art Trade Association, Desert (the Association of Central Australian Aboriginal Art and Craft Centres), Australian Antique and Art Market Federation, arts accounting firms and major art auction houses.

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<sup>9</sup> If progressed, this item would form part of a Regulation Impact Statement.

<sup>10</sup> <https://webarchive.nla.gov.au/awa/20130725172349/http://pandora.nla.gov.au/pan/110004/20130726-0001/arts.gov.au/visual-arts/resale-royalty-scheme/review.html>, accessed on 9 October 2019.



## Chapter 1: Efficiency and effectiveness of the legislation

- An assessment of the efficiency and effectiveness of the legislation and associated Scheme in achieving the original objectives

### Key findings

The Resale Act and Scheme have been effective in facilitating the collection and delivery of royalty payments to artists.

- From 9 June 2010 to 31 October 2013, \$2,008,300 in royalties has been generated from more than 7,800 resales, with benefits being returned to over 780 artists.
- There has been significant take-up of the Scheme by artists, with information on over 14,000 artists held in the collecting society's database.
- The highest proportion of eligible resales is occurring among Indigenous art wholesalers, and the lowest is among auction houses.
- Copyright Agency's Scheme administration is positively regarded by most stakeholders.

This chapter examines and assesses the efficiency and effectiveness of the legislation and associated Scheme in achieving the original objectives to provide visual artists with:

1. recognition of their ongoing rights in their art, and
2. an additional source of income through royalties derived from commercial resales of their art.

Refer to [Appendix E](#) for definition of terminologies.

### Objective 1: Recognition of visual artists' ongoing rights in their original art works

In developing the resale royalty right, various options were considered, taking into account the views of a wide range of stakeholders across the visual arts and art market sectors, research of overseas schemes and analysis of the Australian art market.

The resale royalty right was enacted through stand-alone legislation rather than through an amendment to the *Copyright Act 1968* (Cth) (Copyright Act). While a resale royalty right is related to copyright, separate legislation avoided the confusion of employing terms, such as 'artistic work', which could have significantly different meanings in resale royalty and copyright contexts.

A resale royalty right can be understood as an intellectual property right of visual artists to an economic interest in successive sales, or commercialisation, of their creative work. To ensure that this right is available to all visual artists regardless of media or discipline, the Resale Act includes a broad definition of 'artwork' which focusses on the originality of a work of art (and allows for multiple originals such as limited edition prints). Refer to subsection 7(2)(v) of the Resale Act.

The Resale Act allows artists to pass on their economic rights to their heirs. An artist holds a resale royalty right for their entire life after which time the royalty right is passed to one or more of their beneficiaries for a period of 70 years. This is consistent with the current term of copyright duration for an artistic work. It is also consistent with the 2001 EU Directive on resale royalty (see [Appendix C](#)).

Sections 12 and 15 of the Resale Act describe how the resale royalty right is passed from an artist to their beneficiaries. It aims to deal with instances where an artist has not created a will, or created a will but has not specified who holds the royalty right.



The resale right is, except to the extent permitted under the succession test in section 15, inalienable, whether by way of, or in consequence of, sale, assignment, charge, execution, bankruptcy, insolvency or otherwise. The intent of this provision was to prevent artists being pressured into assigning their right. For example, it would be unlawful for an artist to give their right to a buyer in order to secure a slightly higher primary sale price. It also renders void any attempt by the right holder to use the royalty right as security for a loan, and means that any income from the rights not be available for distribution amongst the right holder's creditors in cases of bankruptcy, or insolvency, or other cases.<sup>11</sup>

The Act allows a right holder to notify the collecting society that they do not want the collecting society to collect the resale royalty owing on a particular commercial resale, or not have the right enforced at all. This does not amount to a waiver of the right, but allows a right holder a degree of choice in how to exercise the right in relation to particular commercial resales. The right holder can pursue the royalty on that particular transaction.

The Act provides for international reciprocity through the operation of the Berne Convention, under which an artist may claim the protection of a resale royalty right in a country that is party to the Convention, provided the country to which the artist belongs recognises the resale royalty right. This means that a French artist, for example, could be entitled to a resale royalty if their artwork is resold in Australia. Similarly, works by Australian artists sold in countries with a resale royalty scheme may also be eligible for royalty payments.

## 2011 enhancements to the Resale Act

The *Resale Royalty Right for Visual Artists Regulations 2011*<sup>12</sup> came into effect on 13 December 2011 and removed the requirement for resales under \$1,000 to be reported, defined a format for the reporting of resales and explained the term 'sufficient detail' (under Section 28 of the Act) for the reporting of resales. These changes were implemented in response to stakeholder feedback after two years of the Scheme's operation, and were aimed at streamlining and simplifying the administration requirements for art market professionals.

## Artists' take-up of the Scheme

The Scheme's collecting society, Copyright Agency, holds details for over 14,000 artists and other right holders. Artist registrations have settled to approximately 35 per month after an initial uptake following the Scheme's commencement. Research from 2009 indicates that, at that time, there were around 12,800 visual arts practitioners in Australia. The artists whose work is sold on the secondary market in any given year varies, but would include a proportion of the artists on Copyright Agency's database, as well as deceased artists.

Data from Copyright Agency shows that, between years 1 and 3 of the Scheme, there has been a significant increase in the number of artists for whom it has details, thereby streamlining the royalty payment process:

- In year 1 of the Scheme, over 90 per cent of resales were assigned as needing research in the first instance, which included finding the artist's contact and payment details.
- By year 3 of the Scheme, over 85 per cent of resales were confirmed as eligible with no further research necessary, which included knowing the artist's contact and payment details.

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<sup>11</sup> *Resale Royalty Right for Visual Artists Bill 2008 Explanatory Memorandum*, 2008, p.18.

<sup>12</sup> <http://www.comlaw.gov.au/Details/F2011L02635> accessed 9 October 2019.





In addition, as at 31 October 2013, 321 AMP, 51 art buyers and 150 art sellers were registered. This is increasing at a rate of approximately two per month, comprised of AMP who handle resales infrequently and are registering as first resales occur.

As part of the establishment of the Scheme, Copyright Agency undertook an intensive promotion and education campaign aimed at achieving a high level of awareness of the resale royalty right to artists, the Scheme, and generating registrations from artists and AMP.

Copyright Agency also convened an Artist's Advisory Group and an Art Market Professional Advisory Panel to canvas industry views and provide feedback on the performance of the Scheme. The collecting society also employs an Indigenous Communications Coordinator who travels to metropolitan, regional and remote areas to provide information about the Scheme to Aboriginal and Torres Strait Islander artists, art centres and organisations.

Copyright Agency's engagement activities show that there is a high level of awareness and understanding of the Scheme amongst AMP, which has resulted in high compliance.

Following early feedback, Copyright Agency and Australian Art Sales Digest (AASD), were able to reduce the reporting burden on auction houses. From 2011, any auction houses that already report to AASD could utilise the information provided to AASD for their resale report.

## Objective 2: An additional source of income through royalties derived from commercial resales of their art

There is no resale royalty right on the commercial resale of an artwork less than \$1,000 (AUD), or a higher amount if prescribed by the regulations (section 10 of the Act). The threshold of \$1,000 below which no royalty is payable represents a compromise between the objective of ensuring as many artists as possible benefit from the Scheme (particularly low-earning artists), the administrative efficiency of the Scheme and the concerns of art market businesses over compliance costs.

Resale royalty is payable at the rate of 5 per cent of the sale price on the commercial resale of an artwork (section 18). This flat rate (as opposed to a sliding-scale as used in EU schemes) is intended to ensure that the administration of the Scheme is not complex and can easily be applied by the industry. A flat rate is also in accord with the establishment of the resale royalty right as an ongoing economic right that, like copyright, rewards the creators of commercially successful works of art.

The Scheme is not retrospective. This has meant that 25.7 per cent of resales occurring in the Australian secondary art market have been eligible since the commencement of the Scheme, and this has allowed businesses time to adjust to this change in their operating environment.

To ensure the collecting society is held accountable and operates transparently, the Act contains provisions referring to the collecting society's appointment, reporting obligations and rules. The collecting society is required to report publicly each year on its operations and finances, including tabling its annual report in the Australian Parliament. The Act also provides that the organisation be a company limited by guarantee and incorporated under the *Corporations Act 2001*, and that it be appointed for a fixed period.<sup>13</sup> These provisions coincide with the EU Directive's statement that member states should ensure that collecting societies operate in a transparent and efficient manner.

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<sup>13</sup> Section 35, *Resale Act 2009*



## When is a royalty payable?

A royalty is payable if:

- the seller acquired the artwork after 8 June 2010
- the work resells for \$1,000 (including Goods and Services Tax—GST) or more
- the resale was not a private sale from one individual to another
- the artist is an Australian citizen or resident
- the artist has died less than 70 years ago
- there is a beneficiary or estate with a connection to Australia.

## How does the Scheme work?

A number of resale scenarios are provided below to demonstrate how the Scheme works.

The assumptions for these scenarios are that:

- the primary sale is through a gallery or dealer taking a 50 per cent commission
- subsequent resales are through an auction house with a 20 per cent buyer's premium (no sellers commission has been included due to the variability of these charges)<sup>14</sup>
- gallery commission is included, buyer's premium is **not** included when calculating the royalty
- sales prices are for demonstration purposes only
- the collecting society collects the royalty and the seller (mostly) pays the royalty (otherwise the AMP or buyer pays the royalty).

Table 1: Deceased non-Indigenous artist at top end of the market

Income	Sales income	Gallery 50% / auction house 20%	Vendor (owner)	Artist / right holder	Collecting society
1971 – gallery	\$10,000	\$5,000	n/a	\$5,000	n/a
1st resale* 2013	\$3,000,000	\$600,000	\$2,400,000	\$0	\$0
2nd resale**	\$3,300,000	\$660,000	\$2,508,000	\$ 118,800	\$13,200
3rd resale	\$2,805,000	\$561,000	\$2,131,800	\$ 100,980	\$11,220
<b>Total income</b>	<b>\$9,115,000</b>	<b>\$1,826,000</b>	<b>\$7,039,800</b>	<b>\$224,780</b>	<b>\$24,420</b>

\* First sale since the Scheme commenced and therefore not eligible for a royalty

\*\* Second sale since the Scheme commenced so will be eligible

<sup>14</sup> A buyer's premium is an additional fee paid by the buyer on the hammer price (winning bid) for works sold through auction houses. The premium is calculated as a percentage of the hammer price (usually ranging from 17 to 25 per cent) with the auction house imposing the charge to cover administrative expenses for the sale. This is an auction house levy. A seller's commission is a cost often charged to the consignor by auction houses that covers such costs a marketing, restoration, handling and freighting of the consigned art works.



Table 2: Mid-career non-Indigenous artist at middle of the market

Income	Sales income	Gallery 50% / auction house 20%	Vendor (owner)	Artist / right holder	Collecting society
2005—gallery	\$20,000	\$10,000	n/a	\$10,000	
1st resale* 2012	\$35,000	\$7,000	\$28,000	\$0	\$0
2nd resale**	\$35,000	\$7,000	\$26,600	\$1,260	\$140
<b>Total income</b>	<b>\$90,000</b>	<b>\$24,000</b>	<b>\$54,600</b>	<b>\$11,260</b>	<b>\$140</b>

\* First sale since the Scheme commenced and therefore not eligible for a royalty

\*\* Second resale since the Scheme commenced so will be eligible

Table 3: Emerging remote area Aboriginal artist at low end of the market (Artist to Dealer to Gallery)

	Sales income	Gallery / dealer / auction house	Vendor (owner)	Artist / right holder	Collecting society
2012*	\$150		n/a	\$150	n/a
1st resale **	\$850	\$850	n/a	\$0	n/a
2nd resale	\$2500	\$2,375	n/a	\$112	\$13
<b>Total income</b>	<b>\$3500</b>	<b>\$3,225</b>	<b>n/a</b>	<b>\$262</b>	<b>\$13</b>

\* Sold directly to dealer or agent

\*\* Dealer sells to a commercial gallery. Resale is under the \$1000 threshold so is not eligible

Table 4: Emerging remote area Aboriginal artist at low end of the market (art centre to gallery)

	Sales income	Gallery 50% / auction house 20%	Vendor (art centre)	Artist / right holder	Collecting society
2012*- gallery	\$3025	\$1,512	\$605**	\$908	n/a
1st resale 2013***	\$10,000	\$2,000	\$7,600	\$360	\$40
<b>Total income</b>	<b>\$13,025</b>	<b>\$3,512</b>	<b>\$8,205</b>	<b>\$1,268</b>	<b>\$40</b>

\* Art on consignment from an Indigenous art centre and sold by a commercial gallery

\*\* Income to the Indigenous art centre

\*\*\* Second sale since the Scheme commenced so will be eligible

## How much has the Scheme generated?

From 9 June 2010 to 31 October 2013, \$2,008,300 in royalties has been generated from more than 7,800 resales, with benefits being returned to over 780 artists\*. To 31 October 2013, the lowest royalty received has been \$50 and the highest \$55,000.

In 2012-13, \$758,000 in royalties were invoiced. This represents a 70 per cent increase from the 2011-2012 financial year as a result of more eligible artworks entering the market.



In summary:

- 95 per cent of the artists who have received a royalty were living and received 74 per cent of the royalties paid.
- 99 beneficiaries of 63 artists received \$339,907 in royalties from 623 resales.
- The top 10 resale royalty earning artists received 28 per cent of the royalties paid.
- 46 per cent of eligible resales were for artworks sold between \$1,000 and \$2,000\*.
- 39 per cent of eligible resales were for artworks sold between \$2,001 and \$5,000\*.
- 11 per cent of eligible resales were for artworks sold between \$5,001 and \$10,000\*<sup>15</sup>.

## Who has the Scheme benefitted?

To 31 October 2013 over 780 artists or their beneficiaries have benefitted from the receipt of royalties. Given that the average visual artist earns the equivalent of the national minimum wage, it is likely that even modest royalty payments are having a disproportionately positive impact for the artists that have received them.

Although the Scheme is not retrospective and is currently only capturing 25 per cent of all resales, it has exceeded expectations in relation to Aboriginal and Torres Strait Islander artists. By 31 October 2013, 65 per cent of the artists who have received a royalty payment are Aboriginal or Torres Strait Islander and they have received 49 per cent of the royalties paid.

Over time, a higher percentage of resales will be eligible for royalty payments. The rate at which this will increase is difficult to predict as it is contingent upon the rate at which artworks are divested by owners. However, it is likely to increase slowly as the average turnover time for artworks is from 10 to 15 years.

Examples of benefits the Scheme has delivered for artists and other right holders include:

- A beneficiary of a notable deceased Australian artist has donated their royalty payments to a not-for-profit organisation which supports people working in Indigenous health and welfare. The beneficiary said that they had used the royalties from the resale of their father's paintings to assist the Aboriginal people and communities that inspired much of his work.
- A successful young artist from Alice Springs who was taught by his father, a renowned Aboriginal artist, is a supporter of the Scheme and has been featured in a number of resale royalty advertisements. He has said that he uses his resale royalties to support his family.
- Copyright in the work of one of Australia's most renowned and commercially successful Aboriginal artists has been held by a third party for many years. This has meant that his family has not received any copyright fees from the reproduction of his art. The artist's descendants now receive royalties from the resale of his art in the secondary market.

The table and graph below illustrate the cumulative increase of eligible resales generated over the initial 40 month period of the Scheme. Although seasonal trends are difficult to identify this early in the Scheme's operation, Copyright Agency has noted that, to date, there has been a higher volume of reporting in the last six months of each calendar year.

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<sup>15</sup> \*includes resales where the right has not been enforced or not collected through the collecting society at the request of the right holder.



Table 5: Eligible resales by month over the life of the scheme

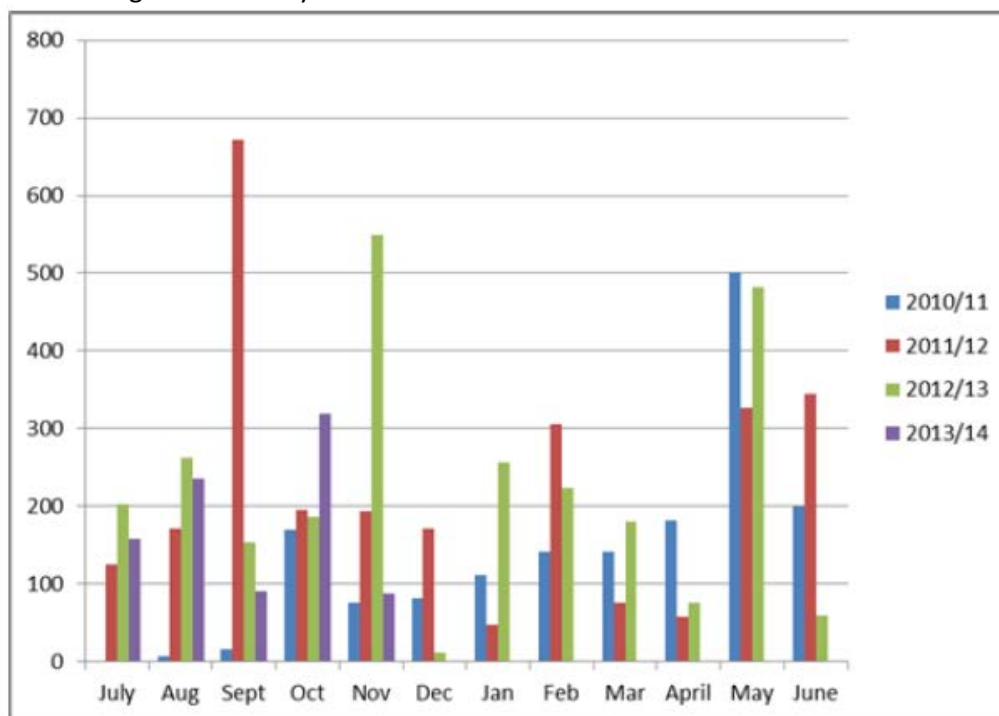


Table 6: Cumulative value and number of royalties generated to 31 October 2013

Reporting period	Cumulative royalties to 31 October 2013	Cumulative number of royalties generated for artist
To 31 July 2010	\$55.00	1
To 31 December 2010	\$76,468	403
To 30 June 2011	\$286,604	1,729
To 31 December 2011	\$570,008	3,196
To 30 June 2012	\$829,882	4,366
To 31 December 2012	\$1,241,978	5,742
To 30 June 2013	\$1,705,265	7,070
<b>To 31 October 2013</b>	<b>\$2,008,300</b>	<b>7,886</b>



Table 7: Cumulative Total of Royalties six-monthly from July 2010 up to 31 October 2013

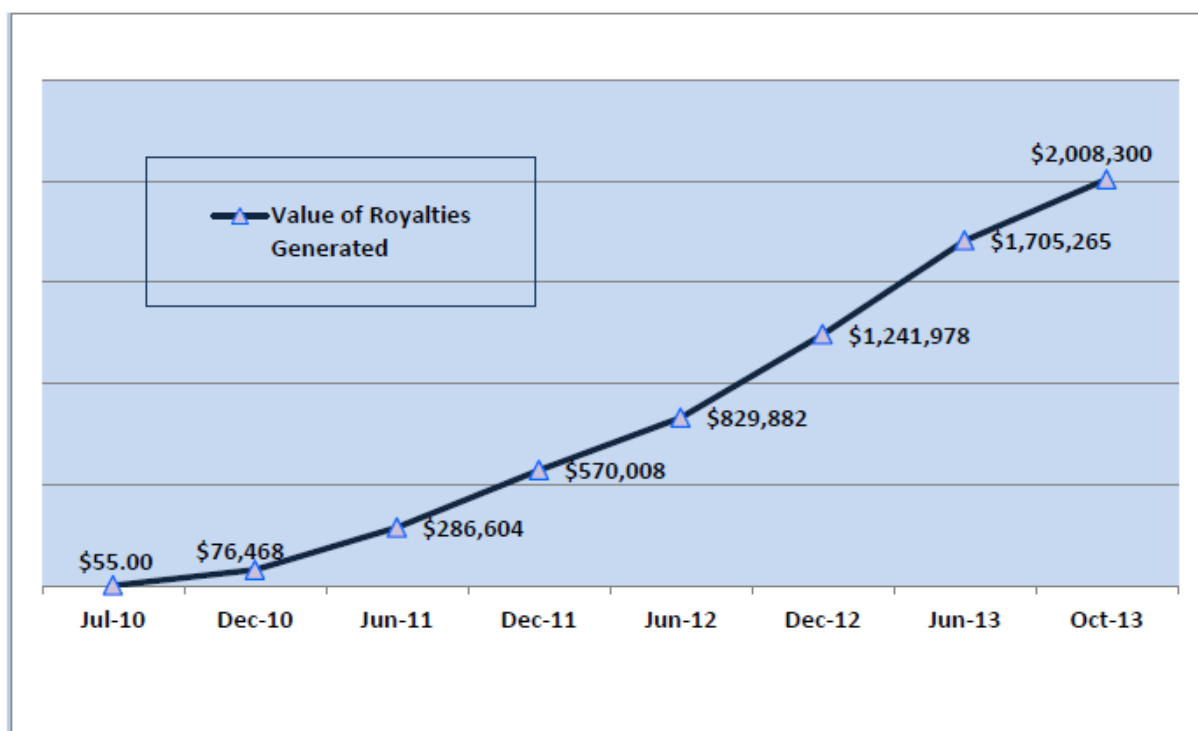


Table 8: Number and value of eligible royalties to 31 October 2013

Value of reported royalties	Number of eligible royalties*	Value of royalties for each value range*
\$50	120	\$6,000
Between \$51 and \$100	3509	\$265,832
Between \$101 and \$200	2539	\$362,138
Between \$201 and \$500	1350	\$408,916
Between \$501 and \$1000	228	\$156,000
Between \$1001 and \$2,500	86	\$135,352
Between \$2,501 and \$5,000	24	\$85,900
Between \$5001 and \$7,000	6	\$36,250
Between \$7,501 and \$10,000	3	\$26,750
Between \$10,001 and \$20,000	10	\$141,000
Between \$20,001 and \$50,000	10	\$329,250
Over \$50,001	1	\$55,000
<b>TOTAL to 31 October 2013</b>	<b>7,886</b>	<b>\$2,008,388</b>

\* includes resales where the right has not been enforced or not collected through the collecting society at the request of the right holder.



- The 800 top-value royalties generated by the Scheme have a total value of \$1,138,298.
- 368 royalties have a value of more than \$500 each, with a total value of \$965,502. Of this, 16 per cent by value has gone to Aboriginal and Torres Strait Islander artists.
- The highest volume of royalties (46 per cent) have been for eligible resales valued at between \$1,000 and \$2,000.
- More than half the artists that have received a royalty have received only one payment to date, nearly one third have received two to five, and one per cent have received over 100 payments.
- 56 per cent of eligible resales are by female artists who received 36% of royalties generated.

Table 9: Artists receiving multiple royalty payments

Number of royalties per artist	To 31 October 2013
1	55%
2 to 5	28%
6 to 24	12%
25 to 99	4%
100 plus	1%

Table 10: Breakdown of royalty payments by gender

	Female number	Female \$ value	Male number	Male \$ value
Total generated	56%	36%	44%	64%
Aboriginal and Torres Strait Islander generated	78%	72%	22%	28%

Table 11: Value and volume of eligible reported resales as at 31 October 2013

Value of resale	Scheme total
Reported resales \$1,000 and over (whole market)	\$329,700,000*
Eligible resales under the Resale Act	\$35,000,000
As percentage of all resales reported	10.60%
Volume of resales	Scheme Total
Reported resales \$1,000 and over (whole market)	30,219
Eligible resales under the Resale Act	7,765
As percentage of all resales reported	25.7%

\* The full sales value is marginally under-represented as some AMP report \$0 as the sale price if the artwork is ineligible based on failure to meet certain criteria.

While the Scheme is currently capturing approximately 25 per cent by volume, this represents approximately 10 per cent by value of all resales reported to Copyright Agency. The business model



used by an organisation will determine its percentage of eligible resales, as demonstrated by **Table AA12** below.

The quantum of eligible sales for individual premium auction houses may be as low as one to five per cent (the sector result being two per cent). For Indigenous art wholesalers that buy art outright then re-sell, approximately 37 per cent of resales are eligible. For galleries that focus on reselling Indigenous art, 34 per cent are eligible. For galleries that focus on reselling non-Indigenous art, 15 per cent are eligible.

**Table 12: Eligible resales from various parts of the art market**

Art market sector	Sector average (percent of sales)	Lowest	Highest
Auction Houses	2%	0.1%	5%
Indigenous art wholesalers*	37%	31%	94%
Indigenous galleries	34%	11%	80%
Commercial galleries reselling non-Indigenous artwork	15%	0%	18%

\*the wholesalers also have their own retail outlet.

### Payments to artists or their beneficiaries

Statistics are provided here on the amount and distribution of royalties to artists and other right holders. By 31 October 2013, the total payments in royalties were \$1.297 million from 6,989 eligible resales, with 662 right holders (artists/ beneficiaries) having received a payment.

NB: In the following charts, Western Australia and South Australia figures are marginally under-represented and Northern Territory is over-represented as many payments for central desert artists are made via Alice Springs, and show on the records as Northern Territory.

**Table 13: Number and distribution of resale payments to 31 October 2013**

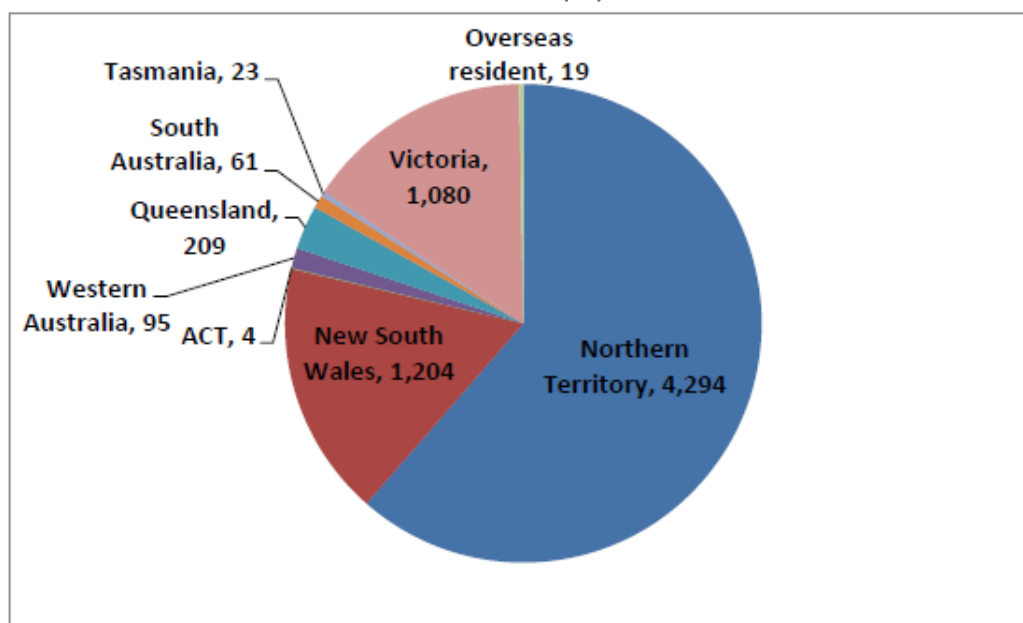
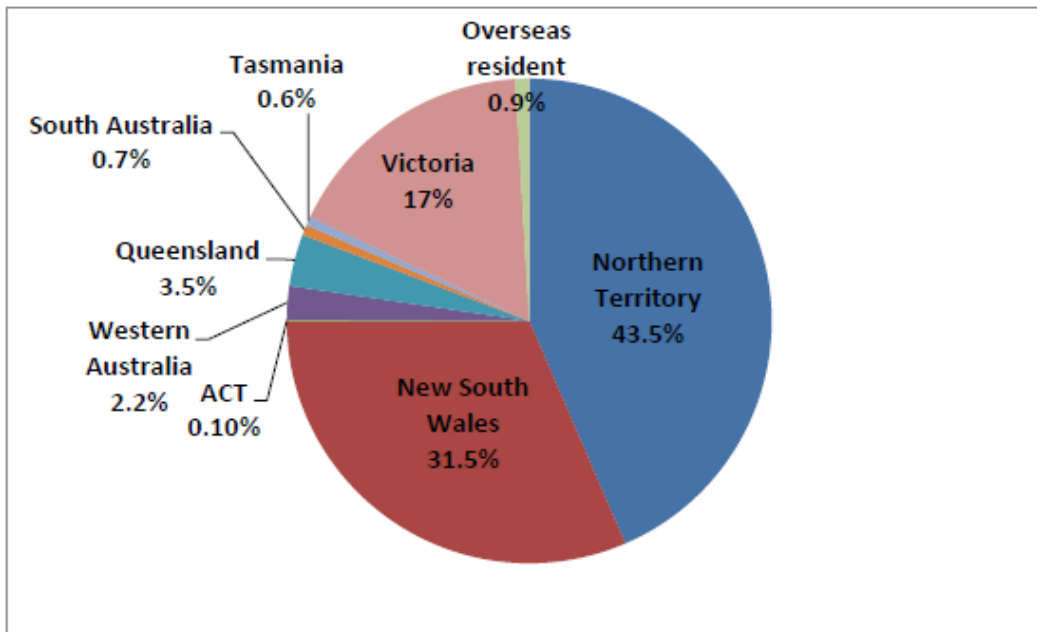




Table 14: Distribution of dollar value of resale payments to 31 October 2013



### Payments to Aboriginal and Torres Strait Islander artists or their beneficiaries

As at 31 October 2013, the total payments made to Aboriginal and Torres Strait Islander artists or their beneficiaries was \$698,238 from 4,653 eligible resales, with 428 right holders having received a payment.

Table 15: Number of payments to Aboriginal and Torres Strait Islander artists or their beneficiaries by State and Territory to 31 October 2013

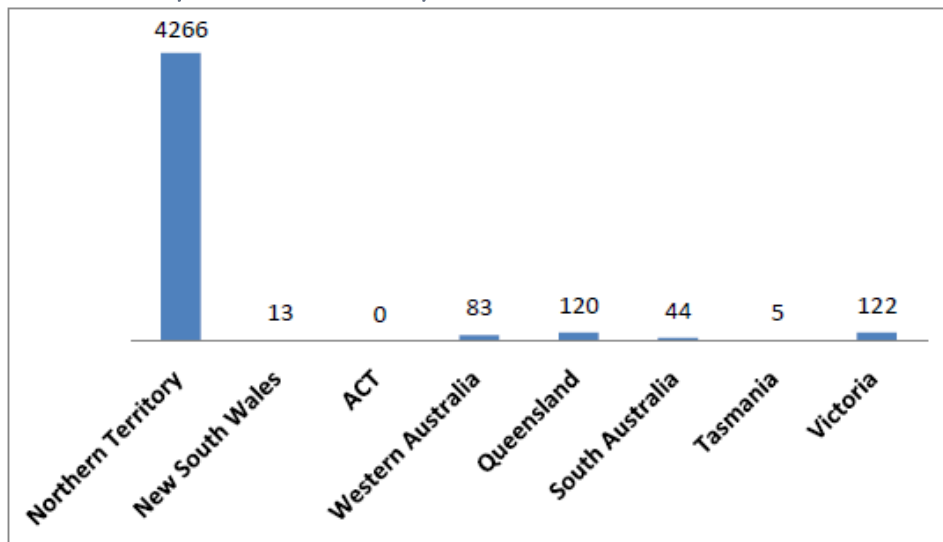


Table 16: Distribution of value of payments to Aboriginal and Torres Strait Islander artists or their beneficiaries by State and Territory to 31 October 2013

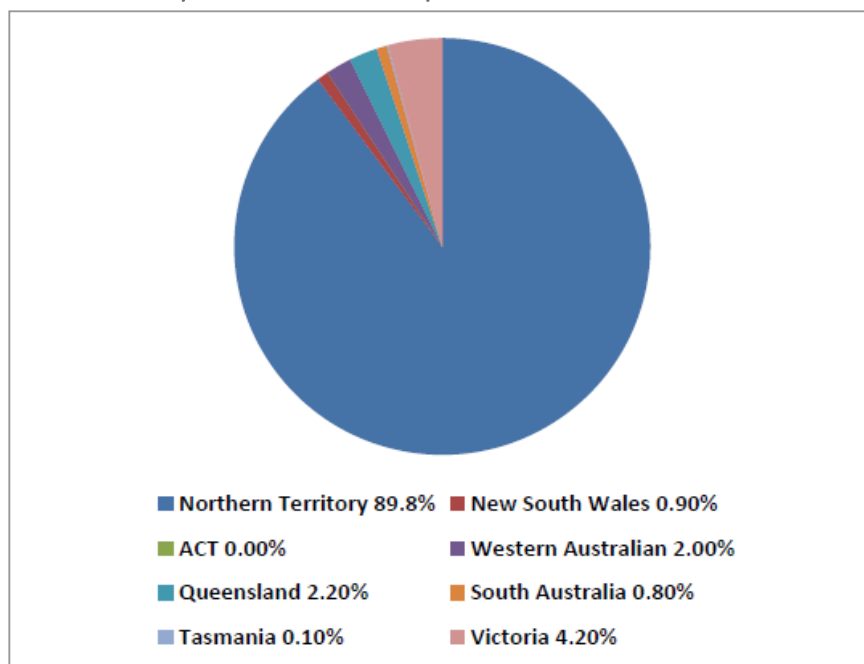


Table 17: Quantum of reported and eligible resales

	2012–13	To 31 October 2013
Resales reported	10,205	26,741
Eligible resales subject to royalty	2,642	6,961

## Unpaid royalties

To 31 October 2013 the total number of unpaid royalties is 561. This includes royalties that have not yet been collected by Copyright Agency from the seller following invoicing and royalties collected which Copyright Agency has not yet paid to the artist, including artists in research required. The value of these royalties is \$245,230.

Table 18: Breakdown of unpaid royalties to 31 October 2013

	No. of resales	No. of artists	\$ value
<b>Total Unpaid:</b> includes all royalties that have been invoiced and not yet paid to the right holder/s i.e. those that have been invoiced but not yet collected and payments in the categories below.	561	271	\$245,230
<b>Collected and Unpaid:</b> Includes payments in process and those that are held whilst the artist is in research required.	261	128	\$50,549
<b>Unpaid as the artist is in research required:</b> The artist or right holder/s are either unknown to the collecting society, or payment or will issues are being resolved.	199	104	\$44,961



## Delivery of payments

In one instance an AMP incorrectly reported that the seller had acquired the artwork after the Scheme commenced, and the royalty was incorrectly collected and paid to the artist. The particular artist quite frequently receives royalties through other resales of their work and agreed to offset the return of this royalty to the seller against future royalties.

## Provision to not have the right enforced or royalty not collected by the collecting society

The Resale Act provides for right holders to collect royalty outside of the collecting society or to instruct the collecting society not to enforce the right (i.e. no royalty is enforced on the commercial resale). However, the right holder must instruct Copyright Agency not to collect the royalty within 21 days of it displaying the resale information on its website. Provided the right holder knows who is responsible for paying the royalty (that is, the seller, buyer or the AMP), they can approach them for payment of the royalty. This must be undertaken each time the right holder does not want the collecting society to collect a royalty on their behalf.

Table 19: Collecting Society not used to collect royalties to 31 October 2013

Number and Value	Totals
Number of instances	17
Artists/ right holders	7
Royalty value	\$210,320

Table 20: Royalty right not enforced to 31 October 2013

Number and Value	Totals
Number of instances	104
Artists/ right holders	77
Royalty value	\$44,992

## Collecting society

The Resale Act (s35) provides that the Scheme will be administered by a collecting society appointed by the Minister. As a result of limited room for competition in Australia's small art market, the Act provides for a single collecting society, rather than multiple competing societies. A scheme with multiple collecting societies would create increased complexity for businesses, artists and consumers, and is not likely to ever become self-funding. It is also likely that any benefit from competition would be offset by loss of economies of scale.

As part of its agreement with the Australian Government, Copyright Agency:

- collects and pays royalties to artists and beneficiaries
- supports the reporting and payment process (website, information technology support)
- maintains a database of all Scheme transactions
- provides information and support to artists and art market professionals
- enforces the legislation
- meets government reporting requirements
- promotes the Scheme.



## Cost to establish and administer the Scheme

The cost to establish and administer the Scheme has been supported through a combination of Australian Government funding, the 10 per cent administration fee that Copyright Agency is permitted to deduct from each royalty it collects and an in-kind contribution from Copyright Agency that covers office overheads and some education and information technology costs.

In its original tender to undertake collecting services, Copyright Agency proposed an administration fee rate of ten per cent, and the administration fee was subsequently set at this rate by the Minister.

To date, the Australian Government has allocated \$2.2 million to the Scheme, of which \$1.5 million was provided to Copyright Agency over three years from 2009-10 to be used as required to support establishing, implementing and administering the Scheme. A further \$0.65 million over two years was provided in 2012-13 for the continuation of the Scheme and the Review (\$0.050 million). As at 31 October 2013, Copyright Agency had collected \$167,535 in administration fees, excluding royalties still to be invoiced.

Table 21: Budget to establish and administer the Scheme to 30 June 2014

Year	Income (ex GST) Australian Government	Income (ex GST) Administration fee	Expenditure	Balance
2009-10	\$750,000	Nil	\$205,000*	\$545,000
2010-11	\$500,000	\$25,000	\$423,000	\$102,000
2011-12	\$250,000	\$44,000	\$632,000	-\$338,000
2012-13	\$350,000	\$73,000	\$433,000	-10,000
2013-14	\$300,000	\$78,000**	588,000***	-210,000****
<b>Sub-totals</b>	<b>\$2,150,000</b>	<b>\$220,000</b>	<b>2,281,000</b>	<b>\$89,000</b>
<b>TOTALS</b>	<b>\$2,370,000</b>	<b>2,370,000</b>		

\*Expenditure in 2009-10 was for three months only \*\*Estimated revenue

\*\*\*Budgeted expenditure \*\*\*\*Estimated balance

## Administration fee structure

The administration fee is comparatively low because of the Government subsidy of the Scheme in its early years. However, the Scheme is designed to be self-funding over time and there is capacity to raise the administration fee to achieve this when necessary. If the administration fee is raised, then right holders will pay more for the administration of the Scheme from which they are benefitting.

The flat-rate administration fee ensures that the scheme can be self-funding by using the higher value royalty payments to cross-subsidise lower value payments. In this way, high earning artists cross-subsidise emerging artists, who will in turn subsidise emerging artists if they reach the higher price points later in their career.

The fee is drawn from eligible resales that generate revenue but is also used to cover the cost of work undertaken by Copyright Agency that does not generate revenue, yet is essential in terms of the integrity of the Scheme, such as assessing all resales over \$1,000 to determine their eligibility, Scheme promotion, stakeholder education, compliance and enforcement.



In these early years, the collecting society is processing a high number of ineligible resales – currently three out of four resales—due to the Scheme not being retrospective. Over time this number is expected to reduce, so that more work will be for eligible resales that do generate administration revenue.

The Scheme parameters allow artists to opt out of using the collecting society if they do not wish to contribute to the cross-subsidy of the Scheme.

Copyright Agency reports that the average cost of each individual royalty payment is \$36. This includes only the costs that are unique to an eligible resale such as staff costs for data entry, checking reports and confirming eligibility, posting resales to the website, communication with right holders, invoicing resales, collecting payment and following up on overdue payments, confirming payment details for right holders, locating and paying right holders. It also includes managing the resale royalty website and database costs.

Based on \$36 per payment, resales of less than \$7,200 do not cover the administration of the payment to the right holder. The shortfall from low-value resales is being subsidised by the Government, as well as by artists that are receiving higher value royalties.

In 2001, to minimise auction house reporting, Copyright Agency worked with AASD to incorporate the resale royalty reporting template on their website. This means auction houses can use the information reported to AASD for resale royalty requirements, thereby minimising resales compliance time and cost. In addition, Copyright Agency's data base can now split a royalty into as many proportions as required to meet the requirements of artists or other right holders. For example, Copyright Agency have one artist with 16 beneficiaries who receive equal proportions; another with eight but of unequal portions.



## Chapter 2: Impact analysis

An assessment of the impact of the Scheme on artists, AMP, consumers and the art market, including the costs and benefits and any unintended consequences of the Scheme.

An analysis of the likely impacts had the legislation not been introduced.

### Key findings

- Stakeholder views on the Scheme are polarised.
- After three years of operating in a difficult market, it is generally considered positively by artists and visual arts peak organisations and negatively by art market professionals and art investors, with some exceptions in all stakeholder groups.

Beneficial impacts of the Scheme include:

- recognition of artists' rights in their work
- additional income for some artists
- a new level of transparency in the secondary art market arising from the Scheme's reporting framework.

Negative impacts of the Scheme include:

- further dampening of demand for art in an already low market, as reported by AMP
- compliance costs for galleries and auction houses that deal in the secondary market.

### Impacts of the Scheme

An analysis is provided here of the impacts, including the costs and benefits, of the Scheme on artists, Indigenous art centres, gallery owners, auction houses, dealers, art collectors, investors, consumers and the Australian Government. The analysis is drawn from:

- submissions from stakeholders
- meetings with stakeholders
- collecting society data on the Scheme's performance to date
- external data and analysis regarding the art market.

### Artists and peak organisations

**Submissions:** 6, 9, 12, 13, 15, 19, 21, 26, 30, 34, 36, 42, 56, 65, 68, *art centres* 73, 72, 70, 60, 61, 62, 63, 66, 57a

Submissions were received from 15 individual artists, with a further 415 artists responding via a resale royalty survey undertaken by the National Association for the Visual Arts (NAVA). The Arts Law Centre of Australia, Indigenous visual arts peak organisations and Indigenous art centres (representing Aboriginal and Torres Strait Islander artists) also provided submissions.

### Benefits

Nearly all artists and all visual arts peak organisations were in favour of continuation of the Scheme. Some noted that economic survival is precarious for most visual artists and, although many had not yet personally benefitted, they supported a scheme that provides greater financial security, recognition and support to artists.



Generally the objective of providing the resale right to visual artists was viewed positively:

*'The Resale Royalty Scheme (RRS) has introduced an additional right which stands alongside other intellectual property rights. The right granted by the RRS to receive 5 per cent of the resale price of an artwork sold by an AMP places visual artists in a similar position to musicians and other artists who have long held the right to receive a benefit when their work is used for a financial return to others in a commercial setting'.<sup>16</sup>*

The objective of the Scheme to provide an additional source of income for artists was also appreciated:

*'Copyright and resale royalty payments appear in my account periodically, often during periods where there have been no primary sales, and are very welcome'.<sup>17</sup>*

Artists also recognised that, because of the prospective design of the Scheme, they will receive more royalties in the future when more of their art is resold and becomes eligible.

There was recognition of other benefits from the Scheme for the industry such as a database which establishes the provenance and authenticity of artworks, more transparency regarding commercial transactions, and an increased understanding by artists of the commercial aspects of their industry.<sup>18</sup>

Copyright Agency noted that:

*'The Scheme provides greater clarity and documentation of arrangements which is of benefit for both artists and AMPs. The information provided to artists about resales of their works enables them to make more informed decisions about sales of their artworks'.*

Artists and peak organisations reported the following additional benefits provided by the Scheme:

- an inalienable resale right in the artwork—90 per cent of the 415 artists who responded to the NAVA survey thought this was an important benefit of the Scheme
- a right for visual artists, similar to other artists such as authors and musicians, to gain extended benefits in their work
- a financial benefit, acknowledging how an artist's reputation and the value of their work increases between when they first exhibit and later secondary sales of their work
- more financial security as they age, given it is often not until later years that an artist's contribution is fully recognised
- the ability to pass the royalty right on to heirs.

## Aboriginal and Torres Strait Islander artists

Benefits specific to Aboriginal and Torres Strait Islander artists were reported, including that royalty payments were particularly important for artists and their beneficiaries in small and very remote communities where revenue from art production is often the only form of non-Government income. It was noted that the Scheme has contributed to a greater level of professionalism for some Aboriginal and Torres Strait Islander artists. An industry expert provided an example of this:

*'An old Indigenous man who paints for a variety of dealers in Alice Springs is one of the largest recipients of resale royalty. The volume and regularity of resale royalty payments has provided an obvious financial benefit. But perhaps more telling is his and his family's*

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<sup>16</sup> Submission 70

<sup>17</sup> Submission 15

<sup>18</sup> Submission 50



*increased knowledge about bank accounts, fair distribution of benefits, planning for his retirement and his will. This process has not come without its difficulties, but it has brought this artist and those around him better understandings about who should and who should not have access to their electronic banking and also knowledge about the volume of their sales and value of their artwork in the retail market. This...is helping place Indigenous artists on a similar footing with non-Indigenous artists'.<sup>19</sup>*

The Arts Law Centre of Australia commented that:

*'We have seen and continue to see the benefits of the Scheme flowing back to all visual artists, especially from the Indigenous sector and remote parts of the country. In particular, we have seen the Scheme benefit elderly artists at the end of their career who can no longer create new artworks for commercial sale and the families of deceased artists who were previously financially dependent on that artist's creative output and are now receiving royalty income after their family member has passed'.<sup>20</sup>*

The Scheme delivers artists an 'inalienable right' which provides a safeguard for artists from being pressured into giving up their ongoing right to obtain a royalty on the resale of their artwork. This protection has been particularly welcomed by Aboriginal and Torres Strait Islander artists.

It was also noted that, as the Scheme has made secondary transactions transparent, there has been a reduction in instances where dealers pay the artists considerably less than market value when they purchase the work out-right, and then re-sell the work soon-after for an exponentially greater price. The Scheme means that artists now receive a financial return from any second and subsequent commercial sales.

One artist noted the benefits delivered to Aboriginal and Torres Strait Islander artists, while also noting that they applied to all artists:

*'..it is often not until an artist is in their later years that the value of their contribution is fully recognised and reflected in the prices they fetch at auction. And it is in their senior years that artists often experience real financial strain, so this Scheme has the potential to offer such practitioners a little more financial security as they age'.<sup>21</sup>*

One example noted that very minimal or no income was derived from the sale of art when the Mowanjum people, located near Derby, Western Australia, began making bark paintings for sale in the 1950s. Those same paintings now re-sell at auction for \$50,000 to \$250,000<sup>22</sup> and the artists or their beneficiaries are now eligible for royalty payments.

## Costs

A small number of artists suggested that the Scheme be abolished, arguing that the resale royalty right, along with the Government's changes to the rules governing art in SMSF, has added unreasonably to the cost of investing in art. They suggest that this has contributed to a loss of investor confidence in the market, lower prices, fewer primary and secondary sales, and gallery closures. This in turn has meant fewer opportunities for artists to exhibit and sell their work.

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<sup>19</sup> Submission 70

<sup>20</sup> Submission 57

<sup>21</sup> Submission 12

<sup>22</sup> Submission 46





*'The affects (sic) of the changes to art in superannuation and compulsory associated costs have had a devastating impact already. Sales to super funds have simply stopped. All art has been devalued by this process, and a sector of the market has vanished. The Resale Royalty has further compounded the view that art is a high cost investment, and it is an argument that it impossible to refute. Ultimately, the worst thing is the flow on effect to living artists as the compounding bad news on art as an investment has led to many buyers giving up on art altogether'.<sup>23</sup>*

A number of artists argued that the requirement for artists to notify the collecting society in writing, within 21 days after notice of the commercial resale, if they did not wish for the right to be enforced or collected by the collecting society, for each and every resale was a restriction of their terms of trade that was impacting on sale prices. One describes the Scheme as:

*'...intrinsically a restriction on artists' terms of trade that raises real and harmful market distortions and substitution issues for many artists affected by the Scheme. It is definitely not an encouragement to buying art in the first instance'.<sup>24</sup>*

Another reported impact of the Scheme is that galleries that specialise in Indigenous art are now more frequently taking art on consignment from artists rather than buying it outright. It was noted that, as a result, Aboriginal and Torres Strait Islander artists were taking on more of the risk if the consigned work did not sell, and were receiving less income upfront.

However, a number of galleries specialising in Indigenous art continue to purchase art outright and these galleries are contributing to a high volume of resale reporting at the lower to middle sections of the market.

Although cited as an impact for galleries specialising in the sale of Indigenous art, the majority of other commercial galleries have, for many years, worked on a consignment model whereby artists are only paid for artworks that are sold, and generally not until the end of the exhibition.

Two submissions noted that there were cases of dealers using the Scheme to negotiate a lower purchase price from the artist. Desart (the peak organisation for Aboriginal art centres in the central desert area) noted that:

*'...in very rare instances private dealers are using the resale royalty scheme in negotiating first sale payments to the detriment of artists getting a fair price for their work. Whilst rare, it is an issue Desart believes needs to be monitored closely'.<sup>25</sup>*

Two artists expressed a view that was common among non-artists, but not generally held by artists, about the possibility that artists who least needed assistance benefitted the most from the Scheme.<sup>26</sup> However, this is in contrast to the pattern of reported resales to Copyright Agency for 2011 and 2012 (20,509 resales), with the largest single component of resales (9,977) being for artworks at the lower end of the market sold for between \$1,000 and \$3,000, compared with 1,417 sales for artworks over \$20,000.

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<sup>23</sup> Submission 56

<sup>24</sup> Submission 6

<sup>25</sup> Submission 73

<sup>26</sup> Submission 26



Artists and peak organisations reported the following additional concerns regarding the Scheme:

- More information on the Scheme is needed for Aboriginal and Torres Strait Islander artists to explain the distinction from mining royalties and to ensure they are aware of their right to royalties, particularly the decision to not have the right enforced or not collected through the collecting society.
- Successful artists, who least need the Scheme, are likely to benefit the most
- There needs to be better ways to monitor instances where it appears the resale royalty payment may have been avoided.
- As some art centres member artists receive a high volume of royalties per annum, the collecting society needs to issue right holders with an annual statement to assist them in relation to annual income tax returns. The statement would only include information on the royalties that are collected and paid by the collecting society. This could act as an incentive for artists to use the collecting society particularly as the volume of resales increases over time and is consistent with the broader objectives of streamlining the administration and sustainability of the Scheme.

## Changes to the Scheme proposed by artists and peak organisations

Parameter changes proposed by peak organisations included that royalties should be charged on the 17–25 per cent buyer's premium charged by auction houses (an additional fee paid by the buyer on top of the hammer price/winning bid) and that the scheme should be retrospective (so that all resales would be eligible) in order to increase returns to artists.

NAVA stated that, due to the design of the Scheme, a longer timeframe than three years would be required for a reliable evaluation, given that the interval between resales of any artwork is unpredictable and sensitive to market conditions. NAVA cited an example of auction house sales from 1998. By 2008, ten years later, only 6 per cent of these artworks had resold. Some submissions noted that, in the current flat market, some investors will hold onto artworks until the market lifts.

One Indigenous peak organisation requested some refinements to assist Aboriginal and Torres Strait Islander artists and art centres to manage royalty payments, including provision by the collecting society of an annual tax statement of royalties for each artist and more education regarding the Scheme.

Some artists asked that the \$1,000 threshold be lowered and that the Scheme be made retrospective so that more artists would receive royalty payments, particularly emerging artists.

A number of artists noted that while the Scheme informs them that their artwork has been resold if they receive a resale royalty, they are not informed of the new owner due to privacy laws. The artists are seeking this information in order to accurately provenance their art and to keep track of ownership for their resumes and future exhibitions. Scheme reporting currently collects information on the artist, artwork, sale price and date of sale, and does not seek information about the buyer.



## Art market (dealers, auction houses, commercial gallery owners, art consultants)

*Submissions: 1, 2, 3, 5, 8, 10, 14, 16, 18, 22, 25, 27, 32, 33, 35, 38, 41, 45, 46, 48, 49, 50, 51, 52, 53, 58, 59, 71, 75*

AMP were represented with 29 submissions, the highest number received from any stakeholder group. In addition, meetings were held with AMP in Sydney and Melbourne. Submissions were received from auction houses, gallery owners, and an art consultant. Peak organisations included the Australian Antique and Art Market Federation, Auctioneers Society, Indigenous Art Trade Association, and the Australian Commercial Galleries Association.

### Benefits

Few benefits were cited by AMP, however, a small number noted the following benefits:

- additional income to artists.
- it acts as a deterrent to unethical dealing because it requires tracking and monitoring of the provenance regarding the sale and price of artworks by an external agency.
- it discourages ‘ramping up’ of prices by dealers trying to artificially inflate the market for their own benefit.

### Costs to the art market

In relation to the cost to the art market, many AMP noted that the timing of the introduction of the Scheme was unfortunate and most asserted that it had impacted negatively. Many asked for the abolition of the Scheme, and nearly all proposed parameter adjustments that would reduce the cost for the art market.

In discussion and submissions, AMP identified two types of costs and these were the cost to the art market and compliance costs.

It is clear from discussions and submissions that it is a very difficult time for the art market. There has been a marked downturn in art sales since the 2006–07 market boom and AMP attributed this primarily to the GFC, followed closely by changes to the rules governing artworks held in SMSF.

The introduction of the Scheme was often named by these stakeholders as a significant third factor acting as an additional cost, and therefore a disincentive to buying artwork. Difficult trading conditions have meant that many commercial galleries have closed, artists’ primary sales have fallen and changes to SMSF have seen a glut of high-quality artworks in the secondary market as super funds divest their holdings of art.



An art accountant described the sequence of factors as:

*'Certainly the GFC had an effect on the art market but that effect was magnified by the introduction of the Royalty as buyers' perceptions were that it was another cost and just all too much. The biggest elephant in this particular room though was the decision to change the rules covering the investment in art and collectibles by superannuation funds<sup>27</sup>...'.<sup>28</sup>*

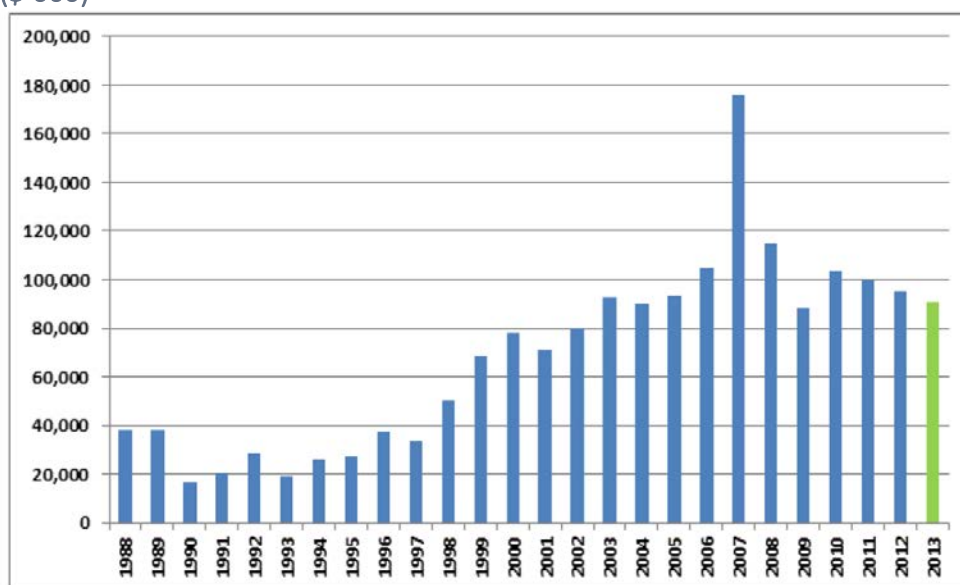
During the Sydney stakeholder discussion, an art market professional noted:

*'Going back to your question about the negative factors, apart from the general malaise in the economy the number one factor is the changes to superannuation. Number two is resale royalty – yes it's psychological but it's also seen as a tax...'.<sup>29</sup>*

In terms of the GFC, Art Market Insight 2009 observed:

*'The GFC ended the long bull market in Australian artworks. Between January to June 2008, auction revenue in fine arts had reached a record high but by the end of 2008 art sales in terms of a global price index had presented a severe downturn of 30 per cent from this record high level'.*

Table 22: Total auction house art sales in Australia—1 January 1989 to 19 November 2013 (\$'000)\*



Source: AASD accessed on 19 November 2013.\* Data for 2013 is up to November 2013.

<sup>27</sup> The Super System Review report (Cooper Review), released in July 2010, recommended that the acquisition of collectables (including artworks) and personal use assets through SMSF should be prohibited, and that SMSFs containing collectables or personal use assets should be required to dispose of those assets within five years. On 30 July 2010, in response to concerns expressed by the visual arts industry in relation to investment in artworks, the Government announced that SMSFs will continue to be allowed to invest in collectables and personal use assets, provided that the assets are held in accordance with legislative standards (relating to the storage, display and insurance etc.). Transitional provisions have been included in the legislation until 1 July 2016 for SMSF investments in collectables and personal use assets that were already held by an SMSF on 30 June 2011.

<sup>28</sup> Submission 31

<sup>29</sup> Sydney consultation, 25 June 2013



There is evidence to suggest that the changes to SMSF rules resulted in some SMSF divesting artworks and a sharp decline of art sales. Current data shows that while SMSF hold \$281,289 million in investments overall, only \$580 million of this is in collectables as a category (which includes artwork) – representing just 0.2 percent of total SMSF assets. This has reduced from 0.3 percent prior to the introduction of the tighter regulations restricting the capacity for SMSF to display artwork in June 2011 – a drop of over 30 percent for this asset class.<sup>30</sup>

An Indigenous art centre in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands in South Australia reported that:

*'...while primary sales from local artists are booming, collectors are holding onto their works for the time being as there is very little action on the secondary market for their works.'*

The difficulty in assessing the impact of the Scheme is that there is no easy way to separate its impact from these other factors that stakeholders identified as concurrently affecting the art market – an issue raised at the Sydney and Melbourne discussions.

Through the consultations and submissions it was widely acknowledged that most artwork – estimates of more than 90 per cent were offered – is sold at a loss. One AMP expressed:

*'A fundamental flaw of the Resale Royalty Scheme is the premise that all art increases in value'.<sup>31</sup>*

It was suggested that the resale royalty should only apply to artworks sold at a profit<sup>32</sup>. An opposing view was that the resale royalty should apply irrespective of profit because someone has placed a value on the creative work of an artist, otherwise all art would sell for the price of materials alone.<sup>33</sup>

A persistent theme in the face to face discussions was that it was impossible for businesses to measure how many artworks had not sold as a result of the 5 per cent royalty. A number of AMP noted that they had buyers that had steered away from artworks that would incur a royalty on resale, instead choosing those that would not be eligible for a royalty. One noted:

*'Working as a gallerist today in the primary market, I see it as the hardest meanest time in my 25 years of involvement. If commentators think that a 5 per cent levy doesn't make much of a difference, then they are sadly mistaken. It's a buyer's market at the moment and any extra or invisible costs and levy's [sic] etc. are always absorbed by the vendor'.<sup>34</sup>*

At the time of the consultation in July 2013, the Scheme had generated \$1.6 million over three years. This was from 25.7 per cent of resales by volume and 10 per cent by value. During the same period, the value of combined art sales from auction houses alone totalled approximately \$290 million. Factoring in the unknown value of art sales by galleries and wholesalers, the amount generated by the Scheme is small in relation to the scale of Australia's art market. However, among AMP there is general agreement that, simply by its presence, the Scheme is influencing buyers' behaviour and that this has had a negative (but difficult to quantify) impact on sales.

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<sup>30</sup> Australian Taxation Office Self-managed super fund statistical report – December 2013

<sup>31</sup> Submission 49

<sup>32</sup> Submission 54, 59

<sup>33</sup> Submission 70

<sup>34</sup> Submission 46



The assertion by AMP that the 5 per cent royalty is impacting consumer confidence and sales is notable in the context of the 17–25 per cent buyer’s premium charged by auction houses. AMPs did not suggest that this significantly higher cost had had any impact on the market.<sup>35</sup> In addition, the 2008 review of the United Kingdom’s resale royalty scheme found there was no evidence that its Scheme had diverted business away from the United Kingdom where its Scheme had grown as fast, if not faster, than the art market in jurisdictions where a royalty is currently not payable.<sup>36</sup>

This experience has been similar in the European Union. The European Commission released a *Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC)*.<sup>37</sup> Although prior to full harmonisation by all member states, the report concluded that:

*‘No clear patterns can be established to link the loss of the EU’s share in the global market for modern and contemporary art with the harmonisation of provisions relating to the application of the resale right in the EU on 1 January 2006. Neither can any clear patterns currently be established that would indicate systematic trade diversion within the EU away from those Member States which introduced the right for living artists in 2006.38...the Commission considers that market developments should be kept under review. The Commission will undertake a further reporting exercise and deliver its results in 2014’.*<sup>39</sup>

This was echoed by the Australia Council for the Arts when referring in their submission to qualitative research they commissioned in 2013 that found, *‘it’s the hardest it’s ever been in the commercial gallery sector’*.<sup>40</sup> In that research, commercial galleries cited dissatisfaction with the recent changes to the SMSF legislation and the Scheme. However, in its Review submission, the Australia Council for the Arts noted:

*‘...there is no direct evidence to suggest that the Resale Royalty Scheme has impacted negatively on sales and activity but there is growing concern amongst art market professionals that it could affect buyers’ behaviour and market confidence’.*

### Inclusion of the gallery commission and not the buyer's premium

The resale royalty is currently calculated on the amount paid for the artwork by the buyer, including GST. Royalties are charged on gallery commissions (generally 40 to 60 per cent of the sale price), however the 17 to 25 per cent buyer’s premium charged by auction houses is not included when calculating royalties. A number of stakeholders noted that this creates a disparity by giving auction houses a commercial advantage over galleries, and argued for the inclusion of the buyer's premium when calculating royalties.

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<sup>35</sup> Journal of Art in Society, ‘Should Artists get royalties?’, [www.artinsociety.com/should-artists-get-royalties.html](http://www.artinsociety.com/should-artists-get-royalties.html) p.3, accessed 9 October 2019.

<sup>36</sup> Graddy, K Horowitz, N and Szymanski, S (2008) A Study into the Effect on the UK art Market of the introduction of the Artist’s Resale Right, IP Institute, UK.

<sup>37</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2012-0326+0+DOC+XML+V0//EN&language=EN> accessed on 9 October 2019.

<sup>38</sup> Ibid. p.10 accessed on 9 October 2019.

<sup>39</sup> Ibid. p.11 accessed on 9 October 2019.

<sup>40</sup> Visual Arts Facts 2013, Australia Council for the Arts, Submission 74



## Compliance cost

In submissions and discussions, the compliance cost to business of the Scheme was rarely included and, when provided, varied considerably because each business is experiencing a different volume of eligible resales depending on their business model.

For example, one large auction house reported that, by June 2013, it had only had 13 eligible resales for 11 artists. By contrast, the commercial galleries that purchase art outright to re-sell are experiencing a much higher volume of resale activity, with an average of 43 per cent, and in one case as high as 90 per cent. This is particularly the case for some galleries specialising in Indigenous art that buy outright for convenience when dealing with artists in very remote communities.

One submission asserted that the Scheme had cost the small gallery an estimated \$600,000 per year in lost revenue (due to avoiding resales because of the reporting burden, the confusion of GST applying to the royalty and that it was no longer possible to purchase artworks outright because of the costs involved).<sup>41</sup>

At least 12 submissions commented that the reporting requirements for resales are a burden for small to medium businesses and some of these galleries are no longer doing resales as a result.

One auction house expressed that there is a range of costs for AMP:

*'For dealers, galleries and auctioneers, it is an unfair burden to have to charge it, account for it, be legally accountable for it and then have to send it [the resale royalty] off'.<sup>42</sup>*

Two submissions noted that businesses had to cover the costs for ensuring their computer systems were compliant with reporting requirements and that this could be a significant establishment cost. An Indigenous art gallery estimated they spend two hours each quarter reporting resales to Copyright Agency.<sup>43</sup> Another non-Indigenous gallery estimated one hour per month.<sup>44</sup>

The move towards buying artwork on consignment rather than purchasing outright was reported in many submissions, particularly those from Indigenous galleries. In one case, a gallery incurred a \$10,000 liability due to its business model and lack of understanding of the legislation, resulting in primary sales which were actually re-sales not being identified at the time of sale.<sup>45</sup>

Reporting and compliance were not generally mentioned as issues by auction houses and it is likely that this is because the collecting society has aligned resale reporting with the electronic reporting that these businesses already provide to the AASD. Therefore, a second set of reporting is not required for the Scheme.

In addition, no evidence has emerged, or been provided by stakeholders, that people were electing to conduct private sales solely to avoid having to pay a royalty. This may be because most sellers prefer to sell in the commercial context in order to maximise their selling price.

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<sup>41</sup> Submission 3

<sup>42</sup> Submission 52a

<sup>43</sup> Submission 38

<sup>44</sup> Submission 58

<sup>45</sup> Submission 8



## Impact on the art market

Other costs reported by AMPs include:

- Resale royalty represents another cost for an artwork (in addition to GST and the buyer's premium) which discourages investment and impacts on art sales
- The Scheme does not benefit artists who don't have many secondary sales
- AMP are not compensated for collecting and reporting resales or for the risks incurred when it collects a royalty on behalf of a right holder
- The Scheme is a disincentive to purchase emerging and contemporary artworks where risk is high and profit margins are generally lower and it is more difficult to cover the 5% royalty
- Reporting burden and compliance costs are too high for small business
- Too expensive for AMP to purchase artworks out-right so more works are purchased on consignment and this delays payment to the artist
- The resale royalty is distorting art prices
- Many artists are not aware or engaged with Scheme and do not expect to benefit from it.

## Changes to the Scheme proposed by Art Market Professionals (AMP)

A number of changes to the Scheme were proposed by AMP in order to reduce the cost to the market. Recurring themes were:

- Raising the threshold from \$1,000 so that fewer artworks would be captured by the Scheme, and reporting requirements, costs and impact on consumers would be reduced. However, it was also noted that this would result in fewer lower end or emerging artists receiving royalties, with particularly impact on Aboriginal and Torres Strait Islander artists. A number of AMP suggested raising the threshold to \$5,000, while some suggested raising it as high as \$25,000.
- Installing a cap on royalty payments was favoured at approximately \$18,000-\$25,000 – similar to the United Kingdom's system – which would limit the royalties received by artists at the high end of the market and ensure the Scheme continued to support artists at the middle to low end of the market. However, one AMP warned that a under a capped system, top end collectors will pay far lower percentages than modest collectors.<sup>46</sup>
- Implementing arrangements that would require artists or beneficiaries to register their details should they want to receive a royalty.<sup>47</sup> It was argued that this would provide greater certainty to AMPs that they were paying the correct rights-holder. AMP contended that they are not compensated to administer royalties to artists or their beneficiaries and need to have certainty when verifying the rights-holder to avoid any liabilities. An alternative to address this was that artists and beneficiaries should be required to use the collecting society to collect a royalty on their behalf.<sup>48</sup>
- There should be consistent treatment regarding royalties payable on gallery commissions and auction house buyer's premium (currently not payable on the latter).
- Artworks sold from dealer to dealer should be an excluded class of transfer until they are resold to a consumer.
- GST should not be included when calculating royalties.
- Reducing the collecting society's administration requirements, including reducing the 6 year holding period in cases where a right-holder cannot be located.

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<sup>46</sup> Submission 58

<sup>47</sup> Submission 6, 28, 40, 58

<sup>48</sup> Submission 18, 57





## Consumers, collecting institutions, individual art collectors, and investors

*Submissions: 29, 39*

### Costs

Two art collectors submitted to the Review and had strong views on the costs of the Scheme, primarily that it was distorting the price of artworks and the art market. One commented:

*'An artist is entirely at liberty to be upset when a piece of their art later delivers a substantial profit to the person who bought it from them. Likewise, a purchaser is at liberty to be upset when the work of art he or she purchased in the hope of achieving a profit can only be sold for a fraction of its purchase price. Neither party is entitled to claim greater upset or hurt. As in every other commercial transaction, they must base their decisions to sell and to buy on the market circumstances in effect at that time; they cannot seek to protect themselves against future trends. The distortion associated with resale royalty is not evident in other areas of commerce and should never have been applied to the sale of art'.<sup>49</sup>*

Both individual art collectors' submissions noted a deflation in market prices for artwork due in part to the Scheme, called for the removal of the legislation and suggested that artists would do better if there was market freedom.

One AMP, who identified also as an art collector, noted that they deliberately purchase art outside of the Scheme, such as work by artists who have been dead for more than 70 years<sup>50</sup>. An auction house also reported that it has had customers saying that they are only interested in artworks where the royalty does not apply.<sup>51</sup>

The legislation does not prescribe who pays the royalty. Most AMP reported that the cost was usually being borne by the seller rather than the buyer in order to reduce uncertainty and costs for buyers and to stimulate sales.

### Changes to the Scheme proposed by collectors

A number of submissions supported capping the royalty payment artists could receive. A popular reason was that at the higher end, resale payments were perceived as being 'too high' and in the extreme, in the vicinity of average annual yearly income rate. An example provided was that for an artwork that sells for \$800,000 a royalty payment of \$40,000 is incurred – however, it is important to note only ten royalty payments out of 7886 eligible resales were between \$20,000 to \$50,000 for the period examined).

In its submission to the review, the National Gallery of Australia suggested that consideration should be given to implementing a royalty cap in Australia for sales over \$500,000 to ensure that:

*'...from an international market perspective, Australia is not seen by prospective buyers as being noticeably disadvantaging, in terms of resale royalties, in comparison to other countries'.*

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<sup>49</sup> Submission 29

<sup>50</sup> Submission 71

<sup>51</sup> Submission 52



## Likely impacts in Australia had the Scheme not been introduced

### Income opportunities limited

Visual artists' opportunities to earn income from their art would be limited to primary sales and to copyright fees for any images that are reproduced. Artists would not gain from future resales and any increases in sale prices brought about because of the greater commercial recognition of their work over the course of their careers. Artists' beneficiaries would not gain from future resales.

### Visual artists' rights not aligned with other artists

Visual artists would not have ongoing rights in their original creative works and this would be inconsistent with the rights afforded other artists in Australia, such as writers and musicians, and with the rights afforded to visual artists in other countries with resale royalty schemes.

### Contribution of visual artists not adequately valued

The important contribution of visual artists to the art market and to the culture of Australia would not be adequately recognised and valued.

Reduced administration and costs for art market professionals. Administrative costs from the reporting requirements and the payment of royalties to an artist (when an artist elects to collect their own royalty) would be removed.

### Art market

There may have been additional sales and less uncertainty amongst buyers.

### Less transparency regarding secondary sales

The legislation requires all resales over \$1,000 to be reported to the collecting society and a database now exists which contains this information. This has increased market transparency and this would not have occurred without the Scheme.

### Less uncertainty amongst buyers

There may have been additional purchases and less uncertainty amongst buyers. There may also have been more purchases of higher risk work by emerging artists.

### Resales eligible under the Scheme would have a sale price less 5 per cent

The resale royalty has added 5 per cent to the cost of selling an artwork as this cost has generally been passed onto the seller.

## Unintended impacts of the Scheme

The Scheme was acknowledged by many stakeholders in submissions and consultations as a significant third factor negatively impacting on the art market. As noted, it is difficult to isolate exactly how much of the two key reported impacts (lower art sales and lower art prices) can be attributed to the GFC, the changes to SMSF or the Scheme.

## Artists

- Improved market transparency, provenancing of artworks and sales information.
- Increased knowledge and professionalism of the arts industry, particularly for Aboriginal and Torres Strait Islander artists.
- Fewer primary sales for some artists due to the 5 per cent extra cost at resale deterring buyers.



- Increased financial risk to artists with more work being provided to AMP on consignment.
- Artists who have traded their rights under the Copyright Act now have new rights and a new source of income.

## Market

- Coincided with the GFC and SMSF, exacerbating difficult trading conditions.
- Reduced financial risk to AMP with more work being taken on consignment, rather than purchased outright.
- Improved transparency in the market regarding secondary sales (provenancing and recordkeeping).

## Consumers

- Increased cost for consumers during a time when trading conditions are difficult and profit margins are low.

## Compliance costs to 31 October 2013

Actual compliance costs outlined below are for a three year and four month period and include one-off set up and ongoing costs.<sup>52</sup> To allow for a contingency when calculating costs over 10 years, the total of \$412,555 for the three year and four month period has been divided by 3.3 to establish the estimated average **annual** compliance costs of \$125,000 shown in the table below. Non-wage labour on-costs of 75 per cent have been included in addition to basic hourly salary costs to account for supplementary costs such as superannuation, workers' compensation, leave loading and payroll tax as well as overhead costs such as rent and information technology equipment expenses.

Table 23 Regulatory Burden Estimate Table  
Average Annual Compliance Costs (from Business as usual)

Costs	Business—art market	Community organisations	Individuals	Total cost
Total by Sector	\$117,120	N/A	\$7,880	\$125,000

### One-off costs

1. Training and registration.
2. Software upgrades and reporting format changes.

### Ongoing costs

1. Collecting information from the vendor.
2. Reporting.
3. Transaction costs—remitting royalty payments to the collecting society.
4. Businesses collecting and remitting royalty payments.

<sup>52</sup> The direct costs incurred by a regulated entity to comply with regulation. Compliance costs can be further categorised into administrative, substantive, or financial compliance costs.



### Training and registration

**Cost:** 323 registered businesses x 6 hours x \$37.40 per hour = \$72,481 x 1.75 for non-wage costs = \$126,842 or \$38,437 per annum.

**Assumptions:** It is estimated that each art market business spends on average 6 hours learning about the regulatory requirements and the Scheme, and creating an online resale account. Creating an online account takes 3 to 5 minutes. Copyright Agency has developed work sheets to assist businesses and individuals to learn about requirements under the Act, how to register and complete an online reporting tool.

### Software upgrades and reporting format changes

**Cost:** 20% x 260 businesses (52) x \$1,000 per business = \$52,000 or \$15,757 per annum.

**Assumptions:** Although no specific software is required, an estimated 20 per cent of the 260 businesses that have reported resales may have needed to upgrade their software or reporting formats to include the required resale information.

### Collecting the information from the vendor

**Cost:** 53,807 reported resales x 5 seconds per report = 75 hours x \$37.40 per hour = \$2,805 x 1.75 for non-wage costs = \$4,908 or \$1,487 per annum.

**Cost:** 53,807 reported resales x 1 minute per query for vendor to provide acquisition date (usually provided as part of provenance information to auction houses) = 896 hours x \$29.00 per hour = \$26,006 or \$7,880 per annum.

**Assumptions:** A resale royalty report contains information about an artwork that the business would collect as part of their business-as-usual, such as artist name, artwork title, medium and sale price.

The regulation requires reporting only one piece of additional information: the date of the acquisition of the artwork by the vendor. All art market businesses that are reporting resales have amended their pre-sale information forms to capture this. Therefore, the time taken to collect this has been reduced to completing one extra date field on the form, estimated at 5 seconds per record. Individuals selling art are required to provide the date of acquisition of artwork to art market professionals for resale and this has been calculated at 1 minute per item noting, that this information is required as part of the provenance of the artwork being sold through auction.

### Reporting—completing and submitting each resale royalty report

**Cost:** 53,807 reported resales at an average 2 minutes per record at \$37.40 per hour = \$67,079 x 1.75 for non-wage costs = \$117,388 or \$35,572 per annum.

**Assumptions:** Reports are submitted in various formats and the average time per record is estimated at one and a half minutes. An analysis of all reports received, including for resales with a sales value of less than \$1,000 (as required by the legislation prior to December 2011), shows that more than half of the reports were provided in the businesses' own report format. Auction houses who subscribe to AASD use the AASD reporting tool which enables them to use the information they have already prepared for AASD for resale royalty. Reporting using a resale excel report, a web-form report or in hard copy including a cover letter, is estimated to take between two to three minutes per record.



Table 24: Reporting of Resales Table

Report format	% of resales reported	Number of resales reported
Businesses own excel report	65%	35,173
Australian Art Sales Digest report	19%	10,281
Resale excel report	8%	4,050
Web-form	5%	2,782
Hard copy	3%	1,521
<b>All formats</b>	<b>100%</b>	<b>53,807</b>

### Transaction costs – remitting royalties to the collecting society

**Cost:** 8,000 x 10 minutes per transaction x \$37.40 per hour = \$49,866 x 1.75 for non-wage costs = \$87,266 or \$26,444 per annum.

**Assumptions:** 8,000 eligible resales resulting in the remittance of royalties by the business to the collecting society which then distributes the royalty to the rights holder. The average time per transaction is estimated at 10 minutes.

### Businesses collecting and remitting royalty payments

**Cost:** Cost to business of 123 x 3 hours x \$37.40 per hour = \$13,800 x 1.75 for non-wage costs = \$24,151 or \$7,318 per annum.

**Assumptions:** During the first three years and three months of the Scheme there were 123 instances of artists or beneficiaries opting out from having the collecting society collect the royalties. It is estimated that there are two to three hours work for businesses to undertake the necessary research to identify and pay the correct rights holders. As the resale right is in place for up to 70 years after an artist's death, the instances of businesses requested to collect royalties and pay these to rights holders is likely to increase as beneficiaries for each artist increase and are across multiple generations.



## Chapter 3: Scale of the Scheme in future years

- Projections that show the likely scale of the Scheme in future years

### Key findings

- In just over three years the Scheme has generated over \$2 million in royalties for visual artists.
- By 2020, cumulative royalties generated by the Scheme are estimated to be approximately \$10.5 million and by 2030 approximately \$39 million.
- The Scheme will break-even when it generates as much in royalties as the Government has invested. It is expected that by April 2014, the break-even point will be reached with artist royalties exceeding Government investment.
- The point at which the Scheme becomes self-funding is highly sensitive to the parameters that are set by the Government for the Scheme's operation, in particular the volume of eligible resales and the size of the administration fee deducted by the collecting society.
- Under its current parameters, the Scheme is expected to be self-funding after 2050.

This Chapter measures the likely future scale of the Scheme on the basis that its current parameters remain unchanged. This includes a 5 per cent royalty, a \$1,000 threshold, a 10 per cent administration fee for the collecting society, and beneficiaries retaining the resale royalty right for 70 years after an artist has died.

It provides estimates and analysis of the:

1. future growth of the Scheme
2. point at which the Scheme will be break-even in relation to Government funding
3. point at which the Scheme will be self-funding
4. resourcing needed to sustain the Scheme.

This chapter is based on modelling conducted by Deloitte Access Economics (DAE).

All tables reproduced in this chapter are part of the DAE modelling.

### Expected future growth of the Scheme

DAE provided modelling to identify the likely future volume, income, costs and point at which the Scheme could be self-funding. To provide this, DAE used the parameters of the current Scheme with the following assumptions:

- A 'base year' that is an equally weighted average of 2011 and 2012 calendar year data from all sales reported to Copyright Agency.
- The Scheme conforms to DAE's model of the expected interval between resales.

The Scheme is still in its establishment phase and the future modelling is based on sales data from two years only (2011 and 2012) and that during consultations, a number of stakeholders suggested that it is still too early to accurately measure and assess the Scheme's impact and performance.



## Expected interval between sales

Accurately modelling a prospectively applied Scheme – that is, where the royalty only applies to resales of works purchased after the Scheme is introduced – is necessarily imprecise. In the absence of a long, detailed time-series of data, it requires assumptions regarding the average time between resales as well the distribution governing the interval of sales.<sup>53</sup>

Summarising DAE’s model, underlying forecasts for the number of eligible resales are generated using a gamma distribution which models the interval between art sales given the probability of a resale ever occurring in a fixed interval of time. To demonstrate how eligible resales accumulate over years, DAE noted that, for each forecast year, there is a given stock of potentially eligible artworks sold (based on Copyright Agency data). Of that stock, only a defined portion will be resold in the next year, alternatively, the resale event will occur with a given likelihood at one (or more) of each of the following years.

The DAE model separates the art sales into four groups, and provides modelling parameters to each group individually. The artist may be either Aboriginal and Torres Strait Islander or non-Indigenous and the artwork is divided into expensive or not, using \$100,000 as the lower bound for an ‘expensive’ artwork (e.g. an artwork that might be considered more of an investment piece, or where the artist or beneficiaries may be more likely to choose to not utilise Copyright Agency’s collection service and associated administration fee). It was also noted that there is a higher likelihood of Indigenous art being resold in its first year compared to non-Indigenous art.

These criteria allow the sales to be divided into the four groups, allowing the model to apply unique forecasting rules on characteristically different groups of artwork. For example, ‘expensive’ artworks are typically resold more frequently than less-expensive artworks (15 years on average, versus 20 years), so the model apportions different mean resale times depending on the most recent price of the artwork. Furthermore, after consulting with some art market professionals, the model places an additional weighting on the likelihood of Indigenous art being resold in its first year, compared to non-Indigenous (this has the effect of reducing the average time for Indigenous from 15 to 20 years for expensive/less expensive, to around 14 to 19 years).

Table 25: Mean resale intervals by artwork group

Art Group	Mean selling time (years)	Chance of Resale in Year 1
Non-Indigenous Expensive	15	6.4%
Indigenous Expensive	15	15.0%
Non-Indigenous Less- Expensive	20	4.9%
Indigenous Less-Expensive	20	15.0%

For example, ‘expensive’ artworks are typically resold more frequently than less-expensive artworks (15 years on average, versus 20 years), so the model apportions different mean resale times depending on the most recent price of the artwork. Furthermore, after consulting with some art market professionals, the model places an additional weighting on the likelihood of Indigenous art being resold in its first year, compared to non-Indigenous (this has the effect of reducing the average time for Indigenous from 15 to 20 years for expensive/less expensive, to around 14 to 19 years).

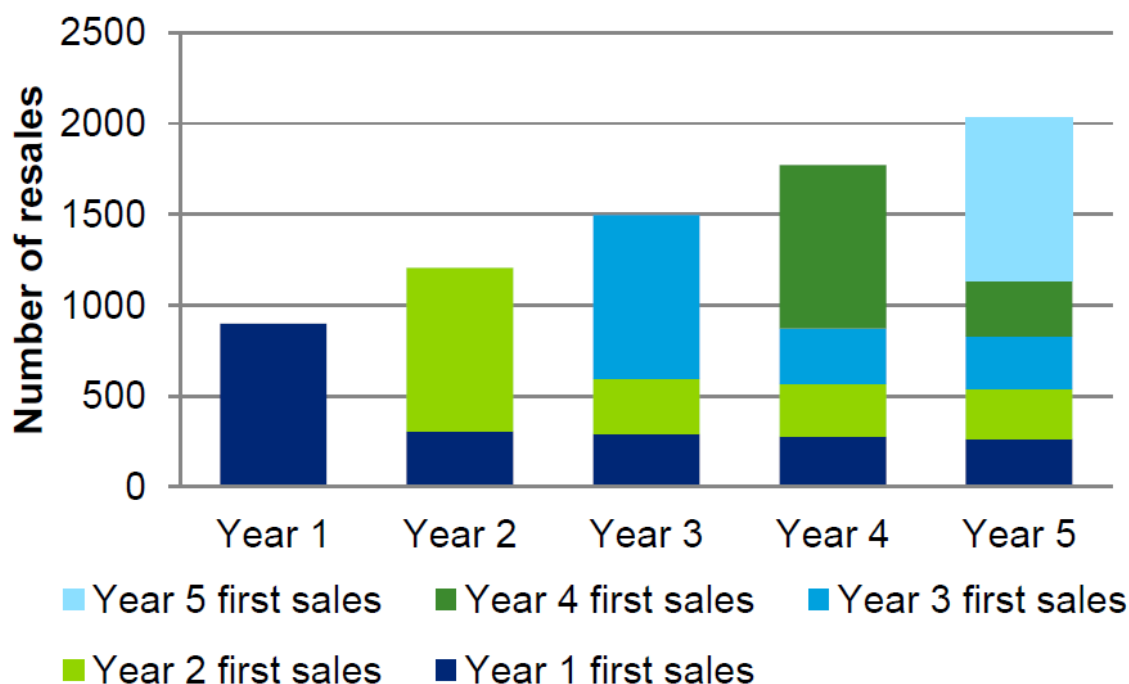
<sup>53</sup>‘Design aspects of an Australian resale royalties scheme’, Access Economics’, Department of the Environment, Water, Heritage and the Arts, 7 April 2008, p.v.



## Cumulative royalties

DAE has developed a rolling cumulative model that shows the estimated proportion of artworks on the market each year that have either previously generated a royalty and are eligible for another royalty, or that are generating their first royalty. The graph below demonstrates this.

Table 26: Rolling cumulative model



DAE estimated that, based on its rolling cumulative model and the Scheme’s performance to date, cumulative royalties will be approximately \$10.5 million by 2020 and approximately \$39 million by 2030.

To illustrate the impact that the market will have on the performance of the Scheme, DAE modelled cumulative royalties for the first ten years of the Scheme using three scenarios:

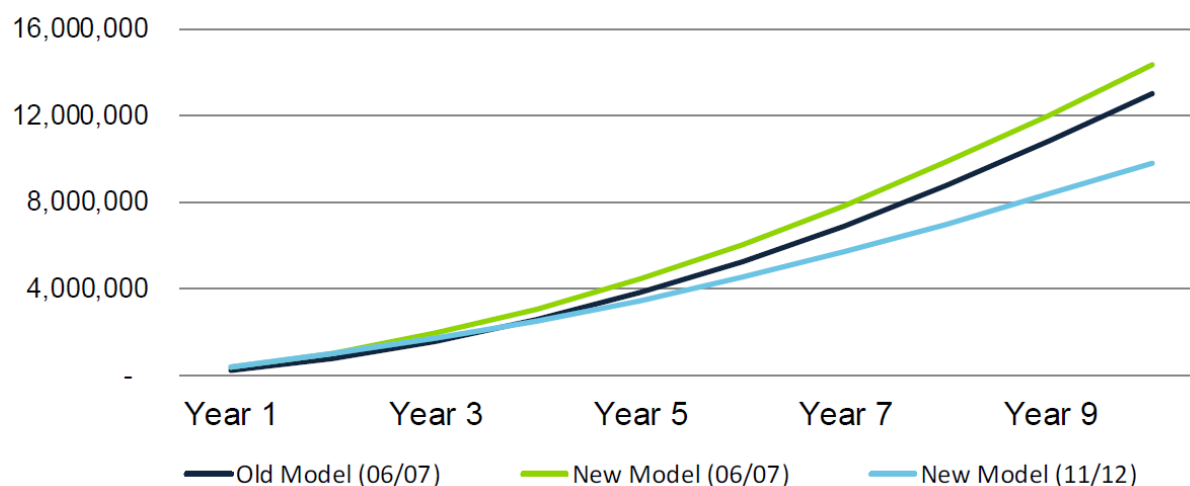
1. *2006–07 Old Model*—original DAE model using 2006 and 2007 auction house sales data
2. *2006–07 New Model*—based on the Scheme’s current parameters using 2006 and 2007 auction house sales data
3. *2011-12 New Model*—based on the Scheme’s current parameters using 2011 and 2012 auction house sales data

Within the parameters of the DAE modelling, the two sets of years are described as an **upper bound** and a **lower bound**, because future sales are expected to increase from 2011 and 2012 sales, but not from the 2006 and 2007 sales.





Table 27: Cumulative royalties in first 10 years, 06/07 versus 11/12 Data (\$)



DAE noted that, using 2006 and 2007 sales data from years where the art market was exceptionally strong results in significantly higher forecasts by year 10 of the Scheme. For the first five years, predicted royalties are similar for both the old and new model, and the two different base years. Over time, the gap in total value increases exponentially between the modelling on the high-selling 2006 and 2007 years and the modelling on the lower selling 2011 and 2012 years. The chart demonstrates that modelling the future growth of the Scheme accurately is difficult given market fluctuations, the intervals between resales, and the variable number and value of eligible sales.

#### Point at which the Scheme will break-even

The point at which the Scheme will break-even is the point at which it has generated as much in royalties for artists as the Government has invested in the establishment and administration of the Scheme. At December 2013, it is estimated that Government investment will be matched in April 2014, late in the third year of the Scheme.

#### Collecting society costs

DAE estimates that the total cost to administer the Scheme is expected to be around \$350,000 per annum. DAE assessed Copyright Agency's cost to administer the Scheme for the purpose of estimating the future self-funding point of the Scheme. It did not undertake a detailed assessment of Copyright Agency's cost structure, profitability, business processes, nor a detailed alignment of services provided with costs incurred. DAE further noted that:

*'While there is some difficulty in benchmarking Copyright Agency's operating costs (due to the unique service being provided), and noting that the costs have not been market tested, the costs do not appear excessive for the (4) FTE of staff employed.... If the administration of the RR Scheme were operating as a stand-alone business, it would be likely to have higher operating costs compared to the current structure, where it is an incremental service provided by an existing business'.<sup>54</sup>*

DAE also noted that there are likely to be efficiencies from the overlap between Copyright Agency's existing business and the Scheme and this ensures that the cost of Copyright Agency administering the Scheme is likely to be lower compared with another standalone business delivering the Scheme.

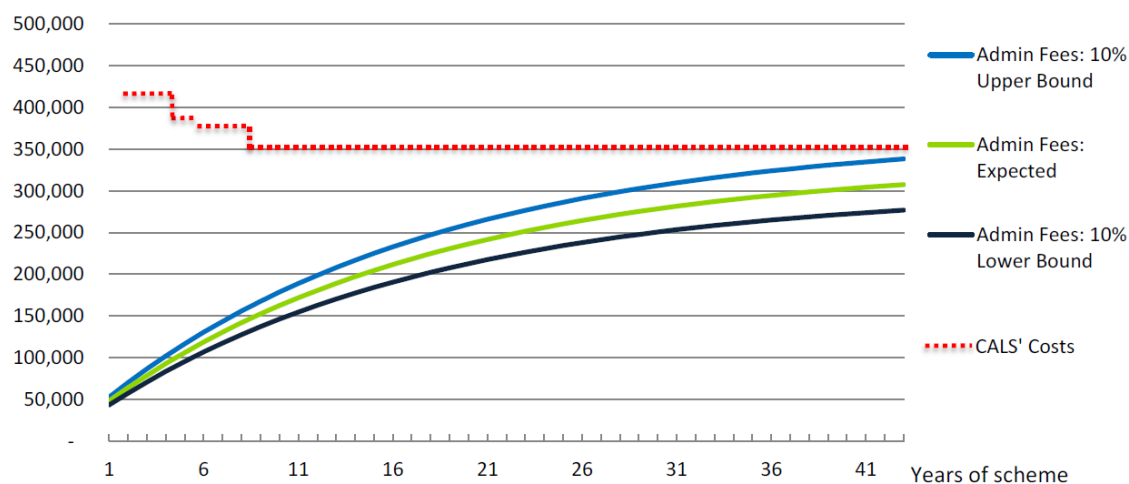
<sup>54</sup> DAE, 2013, p.22



### Expected administration fees

The graph below demonstrates the expected income generated from the current 10 per cent administration fee. The red line shows the annual administration costs. The upper and lower bounds, combined with the rolling cumulative modelling, allow for market fluctuations, the intervals between resales, and the variable number and value of eligible sales.

Table 28: Income generated from administration fees (\$)



### Point at which the Scheme will be self-funding

It is estimated that the Scheme will cost approximately \$350,000 per annum to administer comfortably. At the 10 per cent administration fee rate, this would mean the Scheme would pay for itself at the point at which \$70 million in eligible resales per annum generate \$3.5 million in royalties and \$350,000 in administration fees for the collecting society. DAE modelling shows that this point is unlikely to occur until 2050. It estimates that raising the administration fee to 15 per cent to better cover the real costs of administering the Scheme would see the point reached by 2025. Streamlining efforts, with a potential related reduction in administration costs, could bring this date further forward.

Sales data shows that, 2011 and 2012, an estimated \$65 million worth of artworks were sold each year that meet most of the Scheme's eligibility criteria.

### Collecting society performance

The Australian Government has found Copyright Agency has performed to a high standard in delivering the Scheme as it has:

- exceeded or met most of its key performance indicators over the Scheme's lifespan
- operated within its budget
- continued to be responsive to concerns about the Scheme
- pursued the establishment of international reciprocal arrangements by commencing discussions and scoping arrangements in key priority countries and
- been pro-active in raising concerns from its Art Market Panel with the Government, proposing and implementing enhancements to the Scheme as necessary.

During consultations, artists and AMP were generally positive about Copyright Agency's performance, particularly its level of professionalism, pursuit of improved reporting mechanisms for AMPs and work with regional and remote Aboriginal and Torres Strait Islander artists.



However, a small number of AMP questioned Copyright Agency's depth of knowledge of the industry and suggested that there may be better ways to align the Scheme's requirements with their business models.<sup>55</sup> There were also requests for further transparency in relation to the payment of artist's cheques.<sup>56</sup>

## Resourcing the Scheme

Australian Government funding for the Scheme ceased on 30 June 2014.

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<sup>55</sup> Submission 3, 38, 8, 71, 72

<sup>56</sup> Submission 38, 71, 72



## Conclusion

### Performance of the Scheme

The Resale Act and Scheme have been effective in facilitating the collection and delivery of royalty payments to artists. From 9 June 2010 to 31 October 2013, \$2,008,000 in royalties has been generated from more than 7,700 resales, with benefits being returned to over 780 artists.

There has been significant take-up of the Scheme by artists, with information on 14,000 artists held in the collecting society's database.

Due to the prospective nature of the Scheme, the highest proportion of eligible resales is occurring amongst Indigenous art wholesalers, and the lowest is amongst auction houses. The Government and other stakeholders nearly all reported positively regarding Copyright Agency's administration of the Scheme.

### Impacts of the Scheme

Stakeholder views on the Scheme are polarised. After three years of operation in a difficult market, it is generally considered positively by artists and visual arts peak organisations and negatively by art market professionals and art investors, with some exceptions in all stakeholder groups.

The Scheme has had positive reported impacts for artists by delivering an 'inalienable right', and the payment of royalties or the possibility of receiving royalties in the future. The exception is whether or not the resale royalty is discouraging art sales and to what degree, a view expressed by some artists yet difficult to quantify.

The Scheme has provided a new level of transparency to the secondary art market through its reporting framework and this has brought benefits to artists, in particular Aboriginal and Torres Strait Islander artists.

The reported impacts for art market professionals have mostly been negative. Although not quantified, they include a loss of art sales and a compliance cost which is hard for small to medium businesses to absorb in a difficult market.

### Scale of the Scheme

In just over three years the Scheme has generated over \$2 million in royalties. In time, the financial returns to artists will be significant. DAE has estimated that by 2020, cumulative royalties generated by the Scheme will be approximately \$10.5 million and by 2030 they will be \$39 million.

The Scheme will break-even when it generates more in royalties than the Government has invested to 30 June 2014 (\$2.15 million). It was expected that it will break-even before April 2014, late in its fourth year. As noted, the point at which the Scheme becomes self-funding is sensitive to the quantity of eligible resales and the parameters set by the Government for the Scheme's operation, including the size of the administration fee deducted by the collecting society. Under its current parameters, the Scheme is expected to be self-funding by 2050.

While it is recognised that the Scheme was introduced at a difficult time for the art market and stakeholder views are polarised, the Review finds that the Scheme and its legislation remain appropriate and that it is achieving its key objective of providing financial returns to individual artists and rights holders.



## Appendix A—Review requirements

The PIR of *the Resale Act and Scheme* has been undertaken on instruction from the Australian Government's Office of Best Practice Regulation (OBPR), Department of the Prime Minister and Cabinet. OBPR determined that, as an adequate Regulatory Impact Statement was not finalised between the September 2007 Election Commitment, November 2007 Election and the May 2008 Budget announcement<sup>57</sup> a PIR of the legislation was required to commence before 9 June 2012 (or within two years of the Scheme's commencement).

In addition, the Australian Government had agreed to review the operation of the Scheme within five years of its commencement in response to Recommendation 9 of the 42nd Parliament, House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts, *Inquiry into Resale Royalty Right for Visual Artists Bill 2008*.<sup>58</sup> In February 2012, OBPR granted a 12 month extension of the Scheme's PIR commencement date to 'by 9 June 2013,' with the understanding that the two reviews would be undertaken as a combined Review, thereby streamlining the Review for all stakeholders. The extension of 12 months for commencement of the PIR also facilitated the evaluation of a higher volume of data for measuring the performance and impact of the Scheme.

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<sup>57</sup> 2008–09 Budget, Budget Measures, Budget Paper No. 2, p. 157

<sup>58</sup> 42nd Parliament, Standing Committee on Climate Change, Water, Environment and the Arts *Inquiry into Resale Royalty Right for Visual Artists Bill 2008*, Parliamentary paper: 36/2009; presented to the Speaker: 20 February 2009; tabled in the House: 23 February 2009, and *Australian Government response to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts Report Resale Royalty Right for Visual Artists Bill 2008*, May 2009.



## Appendix B—Australian context

Several early reports examined the issue and possible introduction of an Australian resale royalty scheme, including the 1989 Australian Copyright Council report, *Art Resale Royalty and Its Implications for Australia*<sup>59</sup> which supported a scheme in principle and recommended an amendment to the *Copyright Act 1968* (Cth). The 1998 report *Our Culture: Our Future Report on Australian Indigenous Cultural and Intellectual Property* recommended a resale royalty for artists particularly from an Indigenous intellectual property perspective<sup>60</sup>. Further to this, a 1999 report by the Copyright Law Review Committee<sup>61</sup> referred to resale royalty in a broader discussion of copyright in Australia.

In 2004, further to the recommendation of the *Report of the Contemporary Visual Arts and Craft Inquiry*<sup>62</sup>, the Howard Government investigated the possible introduction of a resale royalty scheme. This included research into recent international developments and the release of a discussion paper<sup>63</sup>, designed to stimulate discussion about whether it would be desirable to introduce a resale royalty scheme in Australia. In response, 52 submissions were received with widely divergent views on whether an Australian resale scheme would be able to meet its intended objectives.

At that time, copyright collecting agency Viscopy Ltd engaged Access Economics to undertake an analysis and modelling for a resale royalty scheme in Australia.<sup>64</sup> The report concluded that:

*‘The impact of [a resale royalty right] on the Australian art market is difficult to determine because of a paucity of relevant empirical data about relevant behavioural responses to its introduction. While the size and distribution of [resale royalty right] payments can be estimated, the critical question of who bears the actual economic cost of the royalty, and, most importantly whether eligible artists would be net beneficiaries of such an arrangement is not at all clear’.*

Also in 2004, Senator the Hon Kate Lundy (then in Opposition) introduced to Parliament a private member's bill proposing the amendment of Australian copyright law to include an artist's resale royalty involving a resale right of five per cent payable on all public acts of resale of artistic work in Australia.<sup>65</sup> This bill was not passed by the Parliament.

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<sup>59</sup> *Droit de suite: the art resale royalty and its implications for Australia: a report commissioned by the Australia Council and the Department of the Arts, Sport, the Environment, Tourism and Territories / Australian Copyright Council*, February 1989.

<sup>60</sup> *Our Culture: Our Future Report on Australian Indigenous Cultural and Intellectual Property*, prepared for the (former) Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission by Michael Frankel and Company and Terri Janke.

<sup>61</sup> Copyright Law Review Committee (1999) “Simplification of the Copyright Act 1968 Part 2, Categorisation of Subject Matter and Exclusive Rights, and Other Issues”.

<sup>62</sup> <https://trove.nla.gov.au/work/12488719?q&versionId=19244958> accessed on 9 October 2019

<sup>63</sup> (Former) Department of Communications, Information Technology and the Arts, *Proposed Resale Royalty Arrangement: Discussion Paper*, Australian Government, July 2004.

<https://apo.org.au/sites/default/files/resource-files/2004/07/apo-nid140711-1155131.pdf> accessed 9 October 2019

<sup>64</sup> [http://arts.gov.au/sites/default/files/pdfs/Viscopy\\_Access\\_Economics.pdf](http://arts.gov.au/sites/default/files/pdfs/Viscopy_Access_Economics.pdf) accessed on 9 October 2013.

<sup>65</sup>

<https://www.aph.gov.au/en/Parliamentary%20Business/Bills%20Legislation/Bills%20Search%20Results/Result/Second%20Reading%20Speeches?BillId=s418> accessed on 9 October 2018.



## Coalition Government's decision not to support a resale royalty scheme

In May 2006, the Howard Government announced that it would not support the adoption of a resale royalty right. It considered that a resale royalty scheme would not provide a meaningful source of income for the majority of Australia's artists, but would instead provide targeted support to individual artists (in particular, successful late career artists and the estates of successful deceased artists) and would adversely affect commercial galleries, art dealers, auction houses and investors.<sup>66</sup>

As an alternative to resale royalty, \$6.0 million was provided over four years in the 2006–07 Budget for a package of initiatives to assist individual artists to build their commercial, marketplace and business skills. The initiatives were designed to also benefit Aboriginal and Torres Strait Islander artists by strengthening structures supporting the marketing and distribution of their work.

## Implementation of Australia's resale royalty scheme

Following a 2007 Election Commitment, a resale royalty scheme was announced as part of the then Government's 2008–09 Budget (13 May 2008). In February 2008, the Department responsible for drafting the legislation, assisted by a cross-Government working group, considered detailed aspects of the Scheme. This working group, chaired by the (former) Department of the Environment, Water, Heritage and the Arts (DEWHA), included the Department of the Prime Minister and Cabinet, the Treasury, the (then) Department of Finance and Deregulation, the Attorney-General's Department and (the former) Department of Families, Housing, Community Services and Indigenous Affairs.

In early 2008, DEWHA commissioned Access Economics to provide a quantitative discussion and modelling for a resale royalty scheme to be implemented in Australia.

The 2008–09 Budget provided \$1.5 million over three years to support the establishment of a Scheme. The measure was designed to assist a collecting society to set up the necessary infrastructure to collect royalties and return these to right holders, with the collecting society to recover costs from a share of the royalties collected (an administration fee).

The *Resale Royalty Right for Visual Arts Bill 2008* (the Bill)<sup>67</sup> was introduced to Parliament on 27 November 2008 and was referred to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts for consideration, with an advisory report provided in February 2009. The Standing Committee concluded that, subject to the recommendations made in the report, the Bill should proceed.

At the time of the implementation of the resale legislation, the then Government in its response to the *House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts Report: Resale Royalty Right for Visual Artists Bill 2008* noted that:

*'The resale royalty right created in the Bill is intended to allow visual artists to benefit from the commercialisation of their work in the secondary art market. Visual artists derive their main source of income from the first sale of original artworks and do not currently have the same range of opportunities as other creators, such as authors and composers, to earn money through exercising the copyright in their work through reproductions, public performances or broadcasts. Visual artists and their representatives have also advocated for this right,*

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<sup>66</sup> *New Support for Australia's Visual Artists*, The Hon Philip Ruddock MP and the Hon Rod Kemp Press Release, 9 May 2006

<sup>67</sup> See <http://www.comlaw.gov.au/Details/C2008B00267> accessed on 9 October 2013.



*emphasising its important symbolic significance, above and beyond the economic value, as a statement of the esteem in which Australia holds its visual arts culture*.<sup>68</sup>

The *Resale Royalty Right for Visual Artists Act 2009*<sup>69</sup> received Royal Assent on 9 December 2009, the collecting society, Copyright Agency, was appointed from 28 May 2010, and the Scheme commenced on 9 June 2010.

## Related Australian legislation

Other Australian legislation provides for rights and economic benefits to artists whose work is reproduced (*Copyright Act 1968*) and for moral rights for all artists (*Copyright Amendment (Moral Rights) Act 2000*). Under the *Copyright Act 1968*, visual artists and other authors are provided with rights to reproduce, distribute and create adaptations of their work. Under the Resale Act, artists are provided with rights relating to the commercial resale of their original works of art. Unlike copyright, the resale royalty right is inalienable and artists not wishing to participate can waive their right for each resale, not on an ongoing basis.

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<sup>68</sup> Australian Government response to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts Report *Resale Royalty Right for Visual Artists Bill 2008*, March 2009 [http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=report\\_register/bycomlist.asp?id=1028](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=report_register/bycomlist.asp?id=1028) accessed on 9 October 2019.

<sup>69</sup> See <http://www.comlaw.gov.au/Details/C2009A00125> accessed on 9 October 2019.





## Appendix C—International context

### International context

The resale royalty right is recognised in the *Berne Convention for the Protection of Literary and Artistic Works* (the Berne Convention)<sup>70</sup>, a multilateral copyright treaty administered by the World Intellectual Property Organization (WIPO). Australia acceded to the Berne Convention (as at Paris, 1971) on 28 November 1977, with entry into force on 1 March 1978. In 1979 the Convention was revised to establish the following international framework for resale royalties:

**Article 14ter**

**[‘Droit de suite’ in Works of Art and Manuscripts: 1. Right to an interest in resales; 2. Applicable law; 3. Procedure] Article 14ter of the Berne Convention provides:**

**(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.**

The Berne Convention provides that the resale right is available only if legislation in the country to which the author belongs so permits. The right is optional and countries that are party to the Berne Convention are not required to introduce a resale scheme. However, once legislation is enacted, reciprocal entitlements with other countries with resale legislation are required to be implemented.

Over sixty countries out of 167 contracting parties to the Berne Convention have introduced a resale royalty right, including the United Kingdom and all other European Union (EU) / European Economic Area (EEA) Member States.<sup>71</sup> However, in some jurisdictions, resale royalty schemes are operational in name only, with no administration or enforcement provisions in place.

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<sup>70</sup> *Berne Convention for the Protection of Literary and Artistic Works*, Paris Act of 24 July 1971, as amended on 28 September 1979. See [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html) accessed on 9 October 2013.

<sup>71</sup> EEA scheme’s include Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom.



## European economic area jurisdictions

In 2001, the EU issued a Directive<sup>72</sup> in relation to resale royalty rights for visual artists which sets minimum levels and conditions relating to the establishment and administration of a resale royalty scheme for Member States. In July 2001 the European Union passed the Directive creating an obligation on member countries to adopt resale royalty legislation by 2006, with full implementation required by 2012. This harmonisation was aimed at ensuring a uniform level of protection and a level playing field in the European art market with the Directive noting that:

*‘The fact that this international market exists, combined with the lack of a resale right in several Member States and the current disparity as regards national systems which recognise that right, make it essential to lay down transitional provisions as regards both entry into force and the substantive regulation of the right, which will preserve the competitiveness of the European market’.*<sup>73</sup>

### Further international developments

As noted in the submission to this Review by the International Confederation of Societies of Authors and Composers (CISAC)<sup>74</sup>, CISAC’s International Council of Creators of Graphic, Plastic and Photographic Arts (CIAGP) are working towards the global adoption of the resale royalty right. At its meeting in June 2013, CISAC’s Board of Directors adopted CIAGP’s resolution to:

*‘actively promote the resale right internationally with special focus on emerging markets and developing countries, to support the introduction of the right in all Berne Convention countries and to work towards an amendment to the Berne Convention that would see the right made mandatory. To this end, CIAGP is currently working with WIPO on various initiatives’.*<sup>75</sup>

Further to this, European Visual Artists, which has 25 European collecting societies for visual creators as members or observers, have launched an international campaign and petition to make resale right a universal authors right and a mandatory right in article 14ter Berne Convention.<sup>76</sup>

The United States does not have a federal resale royalty scheme, however, in September 2013, the US Copyright Office was asked by the United States Congress to:

*‘review how the current copyright legal system affects and supports visual artists; and how a federal resale royalty right for visual artists would affect current and future practices of groups or individuals involved in the creation, licensing, sale, exhibition, dissemination, and preservation of works of visual art.’*<sup>77</sup>

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<sup>72</sup> Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art

[http://eurlex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!DocNumber&lg=en&type\\_doc=Directive&an\\_doc=2001&nu\\_doc=84](http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=2001&nu_doc=84) accessed on 9 October 2019

<sup>73</sup> *Ibid*, Paragraph 8.

<sup>74</sup> Submission 24.

<sup>75</sup> Submission 24.

<sup>76</sup> <http://www.resale-right.org/> accessed on 9 October 2019.

<sup>77</sup> <http://www.copyright.gov/docs/resaleroyalty/> accessed on 9 October 2019.



A revised *Equity for Visual Artists Act*, first introduced into the United States Congress in 2011, is proposed to be reintroduced to Congress in early 2014.<sup>78</sup> Toni Mione, former Senior Notes Editor, Cardozo Journal of International and Comparative Law, Boston notes that:

*'As internationalisation and harmonisation of the art world continues, intellectual property law in the United States should adapt accordingly to demonstrate federal support for the continuous progress of the arts'.<sup>79</sup>*

Further, on 13 December 2013, the United States Copyright Office released a new report<sup>80</sup>, updating its analysis of resale royalties for the first time since 1992.<sup>81</sup> The Copyright Office concluded that certain visual artists may operate at a disadvantage compared with authors of other types of creative works and that the United States Congress may want to consider a resale royalty, as well as a number of possible alternative or complementary options for supporting visual artists, within the broader context of industry norms, market practices, and other pertinent data.

China, Canada and Switzerland are also considering the introduction of a resale royalty right. New Zealand considered a resale royalty right in 2008, when the New Zealand Labour Government introduced a bill into Parliament. The bill lapsed when a general election was called. The National minority Government, which took office following the election, is not in favour of a resale royalty right and the bill has not been reintroduced.

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<sup>78</sup> <http://www.artfixdaily.com/artwire/release/3861-new-report-released-on-resale-royalties-for-artists> accessed on 9 October 2019.

<sup>79</sup> [http://www.cjicl.com/uploads/2/9/5/9/2959791/21.2\\_mione\\_cjicl.pdf](http://www.cjicl.com/uploads/2/9/5/9/2959791/21.2_mione_cjicl.pdf) accessed on 3 August 2019, site no longer online as of 9 October 2019.

<sup>80</sup> <http://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf>, accessed on 9 October 2019.

<sup>81</sup> <http://www.artfixdaily.com/artwire/release/3861-new-report-released-on-resale-royalties-for-artists> accessed on 9 October 2019.



## Appendix D—Submissions

### Public submissions by reference number

Archived at <http://webarchive.nla.gov.au/gov/20160615103337/http://arts.gov.au/visual-arts/resale-royalty-scheme/review> accessed on 9 October 2019.

- 1 Philips Auctions
- 2 Michael Reid
- 3 Short St Gallery
- 4 Robin Petty Burton Wolstenholme
- 5 Emeritus Professor Peter Pinson
- 6 John R Walker
- 6a John R Walker
- 7 *Removed at the behest of the author*
- 8 KickArts Contemporary Arts
- 9 Warwick Fuller
- 10 John Lagerwey
- 11 Michael Clancy
- 12 Ruth Waller
- 13 Richard Dunlop
- 14 Euan Hills, Art Mob
- 15 Mandy Martin
- 16 Art Offerings
- 17 Tony Antoniou, Australian Dreamtime Creations
- 18 John Keats, Sotheby's Australia
- 19 Chris Huber
- 20 Barbara Long
- 21 Dean Vella
- 22 Craig Hillman—GraysOnline
- 23 Damian Smith
- 24 International Confederation of Societies of Authors and Composers
- 25 Seva Frangos Art
- 26 Ben Quilty
- 27 Fellia Melas Gallery
- 28 Jolyon Warwick James/ Australian Antique and Art Market Federation
- 29 Michael Levitt
- 30 David Croke
- 31 Brian Tucker
- 32 Artitja Fine Art
- 33 Fine Art Auctions
- 34 Ross Tamlin
- 35 Damian Hackett – Deutscher and Hackett
- 36 Dr Manfred Krautschneider
- 37 Evan Lowenstein
- 38 Roslyn Goodchild – Mina Mina Gallery
- 39 Shane Benson
- 40 Adrian Newstead
- 41 Harold Gallasch
- 42 Hillel Weintraub
- 43 Copyright Agency



44	Jon Altman
45	Australian Indigenous Art Trade Association
46	Michael Eather
47	National Association for the Visual Arts (NAVA)
47a	NAVA
47b	NAVA
48	Ryan Renshaw
49	GFL Fine Art
50	King Street Gallery
51	Australian Commercial Galleries Association
52	McKenzies Auctioneers
53	Society of Auctioneers and Appraisers (South Australia) Inc.
54	Ninti One Limited
55	Michael Fox
56	Christopher A Hodges
57	Arts Law Centre of Australia
58	Charles Nodrum Gallery
59	Martin Browne Contemporary
60	Martumili Artists
61	Mowanjum Art and Culture
62	Bana Yirriji Art and Cultural Centre
63	Durrmu Arts
64	National Gallery of Australia
65	Geoffrey Elliott
66	Mardbalk Arts Centre
67	Ngurratjuta Many Hands
68	Lisa Michl Ko-manggén
69	Viscopy
70	John Oster
71	Lauraine Diggins
72	Ananguku Arts and Culture Aboriginal Corporation
73	Desart
74	Australia Council for the Arts
75	ARTKELCH, Germany

## Submissions by sector and location

### Auction houses

- Deutscher and Hackett, New South Wales
- Fine Art Auctions, Victoria
- McKenzie Auctioneers, Western Australia
- Philips Auctions, Victoria
- Sotheby's Australia, Victoria

### Artists/ beneficiaries

- Ben Quilty, New South Wales
- Chris Huber, Queensland
- Christopher A Hodges, New South Wales
- David Croke, son of Ray Croke, location unclear
- Dean Vella, Queensland



- Dr Manfred Krautschneider, Queensland
- Geoffrey Elliott, Queensland
- Hillel Weintraub, Queensland
- John R Walker, New South Wales
- Lisa Michl Ko-manggén, Queensland
- Mandy Martin, New South Wales
- Richard Dunlop, Victoria
- Ross Tamlin, New South Wales
- Ruth Waller, Australian Capital Territory
- Warwick Fuller, New South Wales

### Commercial galleries

- Art Invest, New South Wales
- Art Mob – Aboriginal Fine Art, Tasmania
- Art Offerings, New South Wales
- Artitja Fine Art, Western Australia
- Australian Dreamtime Creations, South Australia
- Charles Nodrum Gallery, Victoria
- Fellia Melas Gallery, New South Wales
- FireWorks Gallery, Queensland
- GFL Fine Art, Western Australia
- GraysOnline, New South Wales
- Kick Arts Contemporary Arts, Queensland
- King Street Gallery, New South Wales
- Lauraine Diggins Fine Art, Victoria
- Martin Browne Contemporary, New South Wales
- Michael Reid Sydney, New South Wales
- Mina Mina Art Gallery, New South Wales
- Peter Pinson Gallery, New South Wales
- Ryan Renshaw Gallery, Queensland
- Seva Frangos Art, Western Australia
- Short St Gallery, Western Australian
- Tineriba Tribal Gallery, South Australia

### Academic/ Researchers

- Professor Jon Altman, Australian Capital Territory
- Ninti One Limited/ Cooperative Research Centre for Remote Economic Participation, South Australia

### Indigenous Art Centres

- Bana Yirriji Art and Cultural Centre, Queensland
- Durrmu Arts, Northern Territory
- Mardbalk Arts Centre, Northern Territory
- Martumili Artists, Western Australia
- Mowanjum Art And Culture, Western Australia
- Ngurratjuta Many Hands, Northern Territory



### Indigenous Peak Industry Support Organisations

- Ananguku Arts and Culture Aboriginal Corporation South Australia
- Desert, Association of Central Australian Aboriginal Art and Crafts Centres, Northern Territory

### Individuals

- Adrian Newstead, New South Wales
- Barbara Long, on behalf of beneficiaries, location unclear
- Damian Smith, Words for Art, location unclear
- John Lagerwey, Victoria
- John Oster, Northern Territory
- Michael Clancy, location unclear
- Michael Levitt, Western Australia
- Robin Petty Burton Wolstenholme, location unclear

### National organisations

- Arts Law Centre of Australia, New South Wales
- Australia Council for the Arts, New South Wales
- Australian Antique and Art Market Federation (AAAMF), New South Wales
- Australian Commercial Galleries Association (ACGA), Victoria
- Australian Indigenous Art Trade Association, New South Wales
- National Association for the Visual Arts (NAVA), New South Wales
- Viscopy, New South Wales

### State based organisations

- Society of Auctioneers and Appraisers (SA), Inc., South Australia

### National collecting institutions

- National Gallery of Australia, Australian Capital Territory

### Collecting societies

- Copyright Agency, New South Wales

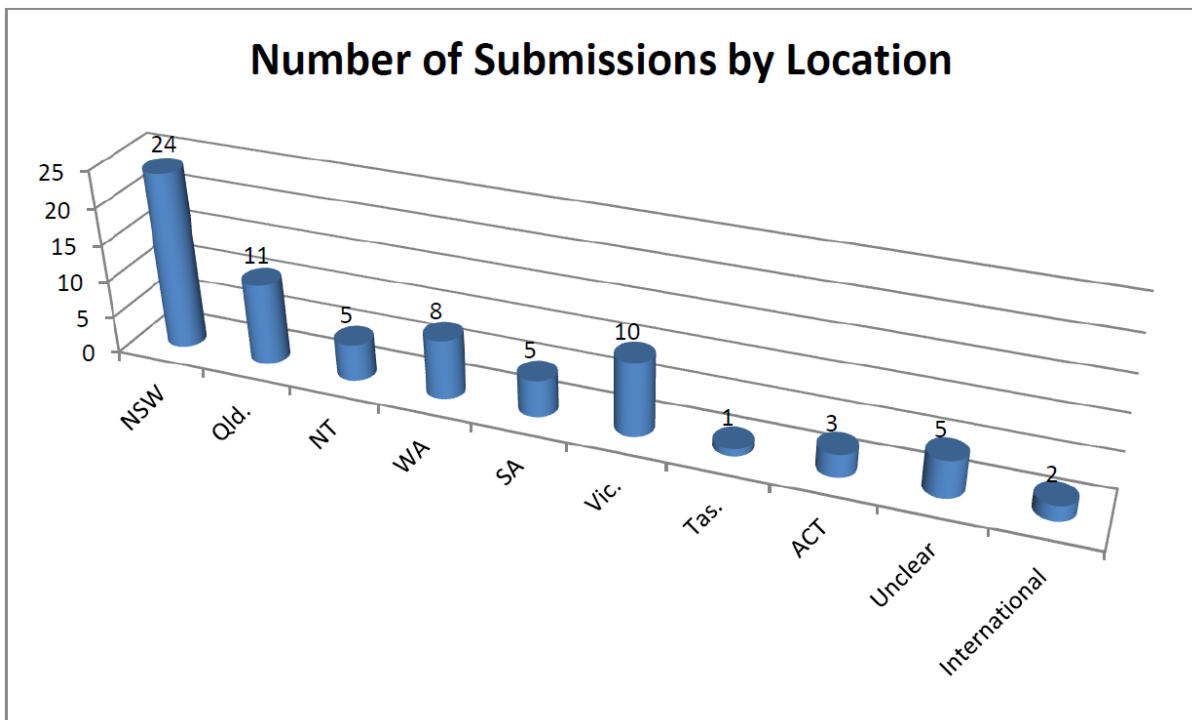
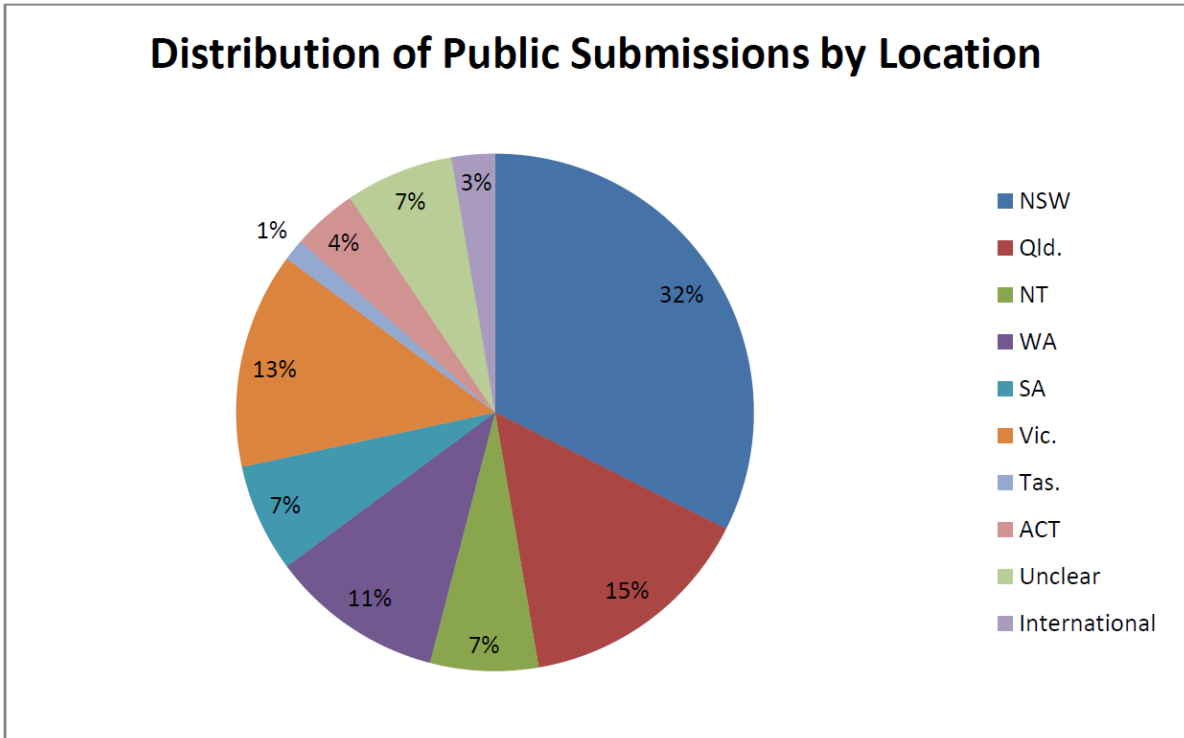
### Arts accountants/ Tax agents

- Brian Tucker, Queensland
- Lowenstein's Arts Management and Banki Haddock Lawyers, Victoria
- Michael Fox, Victoria

### International

- ARTKELCH Gallery, Freiburg, Germany
- International Confederation of Societies of Authors and Composers (CISAC), Paris, France

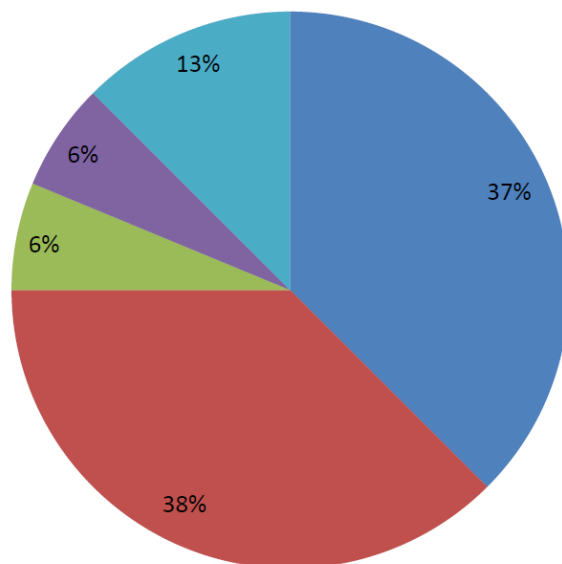




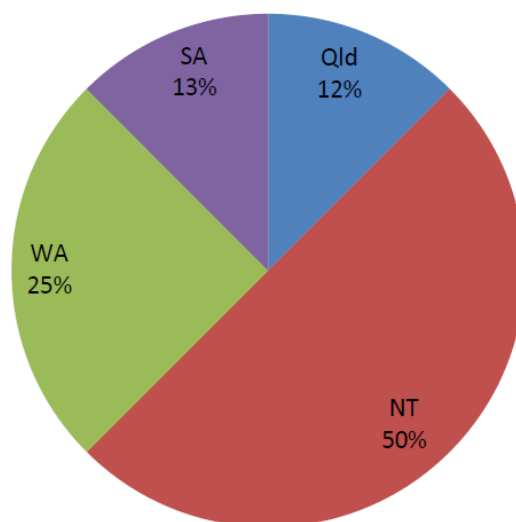


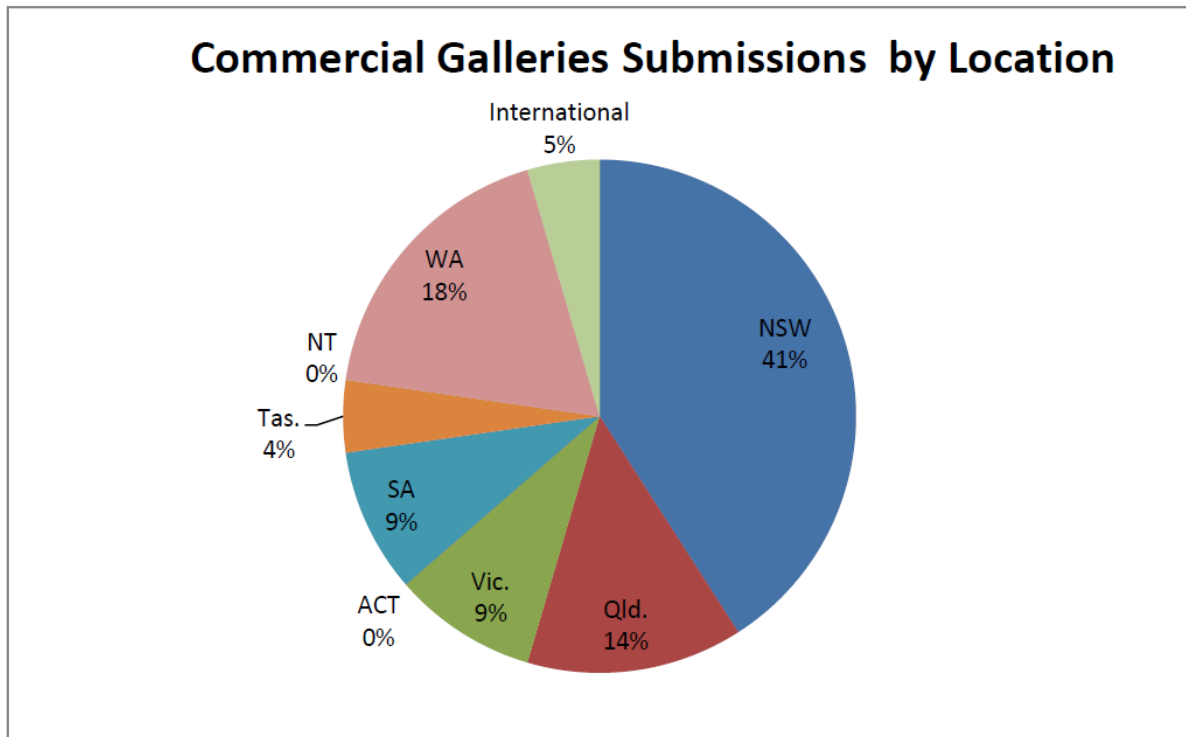
### Distribution of Artist's Submissions by Location

■ NSW ■ Qld ■ Vic ■ ACT ■ Unknown



### Indigenous Art Centre Submissions by Location (including Indigenous Visual Arts Industry Support Organisations )





## Appendix E—Definitions

The collecting society is Copyright Agency in all instances.

**Administration fee:** The collecting society is permitted to retain a percentage (currently 10 per cent) of the value of royalties collected by them to contribute to the costs of administering the Scheme. GST is payable on the administration fee and is deducted prior to the royalty payment to the right holder.

**Artists/ Beneficiaries In research required:**

Contained in the research required category are artists who have had an eligible resale and the collecting society is yet to locate them or their beneficiary, the right holder has been located but has yet to provide details to the collecting society for payment, or beneficiaries have been located and will/ succession issues need to be resolved before payment can occur.

**Collected:** Royalties that have been collected by the collecting society from the art market professional (includes the administration fee at this stage). This does not include royalties collected by right holders.

**Eligible resale:** A resale that meets the criteria of the Scheme with a royalty payable if:

- the seller did not own the artwork on 8 June 2010
- the work resells for \$1,000 (including GST) or more
- the resale was not a private sale from one individual to another
- the artist is an Australian citizen or resident
- if the artist has died, it was less than 70 years ago and there is a beneficiary or estate with a connection to Australia.

**Generated:** Includes all eligible resales and gross royalty dollars generated by the Scheme and reported to the collecting society.

**Invoiced:** Royalty has been invoiced by the collecting society for an eligible resale to the art market professional and includes the administration fee.

**Opt-out period:** The 'opt out period' is the 21 day period following the publication of the notice of resale (available on the collecting society's website), in which the artist/ beneficiary can instruct the collecting society not to enforce the right or collect the royalty.

**Payments or Paid to Artists/ Beneficiaries:**

Royalty payments made to artists and beneficiaries by the collecting society. The collecting society's administration fee has been deducted prior to payment.

**Reported:** See **Generated** above.

**Received:** An artist/ beneficiary has received a royalty payment.

