ARTS MANAGEMENT

12 July 2013

Resale Royalty Team
Office for the Arts
Department of Regional Australia, Local Government, Arts and Sport
GPO Box 803
CANBERRA ACT 2601

**By Email – VisualArts@pmc.gov.au**

Dear Sirs / Mesdames

**2013 REVIEW OF THE RESALE ROYALTY SCHEME**
**JOINT SUBMISSION BY LOWENSTEINS ARTS MANAGEMENT, CERTIFIED PRACTISING ACCOUNTANTS, AND BANKI HADDOCK FIORA, LAWYERS**

Thank you for the opportunity to make these submissions as part of the 2013 of the Resale Royalty Scheme operating under the *Resale Royalty Right for Visual Artists Act 2009* **Introduction**

Lowensteins Arts Management Pty Ltd is a firm of Certified Practising Accountants and acts for approximately 3,000 visual artists and numerous commercial galleries, dealers and art consultants throughout Australia. We believe that we have a very good understanding of the way the Australian art market operates and the factors that affect it. Principals Tom Lowenstein and Evan Lowenstein have had a long and prominent standing in the Australian arts industry and are the firm's authors of these submissions.

Over many years we have been involved in promoting the visual arts generally in Australia, and lobbying the Australian Taxation Office and the Commonwealth Government on specific issues which affect Australian artists.

Our submissions have been prepared in conjunction with Mr Daren Armstrong, a partner of Sydney commercial law firm, Banki Haddock Fiora, particularly as to legal matters. Banki Haddock Fiora specialises in intellectual property and media law.

**Background**

Over the past four years the Australian art market generally, but more specifically the primary and indigenous art markets, has been severely depressed. At least 20 Australian commercial galleries of note have closed, and most others have reported a drop in sales in the order of 30% to 40%. The level of confidence in the market has dropped considerably, and there appears to be little sign of improvement.

The principal factors that contributed to the depressed Australian art market are, in our view:

1. the Global Financial Crisis
2. the introduction of new regulations that restrict the ability of self managed superannuation funds to purchase artworks and which require self managed superannuation funds owning artworks to dispose of them by 2016


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3. the introduction of the PPSA legislation, jeopardising artists' exercise of pre-PPSA ownership and other proprietary rights, including for the recovery of artworks left on consignment with galleries and dealers, and
4. the general malaise and negativity in the retail sector of the economy.

Unfortunately, it was with this background that the Resale Royalty Scheme was introduced on 9 June 2010.

It is of course difficult to isolate the effect that the Resale Royalty Scheme has had on this downturn, especially when combined with the other factors above.

Anecdotally, we are aware of a number of Australian art market professionals who are unhappy with the whole concept of the Resale Royalty Scheme; however, our primary concern is to ensure that the artists themselves and their families are the principal beneficiaries of any new legislation.

On the other hand, we also wish to ensure that what appear to be benefits do not in future adversely impact the Australian art market as a whole.

It is for these reasons that we submit the following changes that we wish to see introduced.

In doing so, we wish to acknowledge that Copyright Agency Limited (**CAL**) has been very co-operative and receptive in discussing issues and concerns we have raised with them. However, we wish to record that the bulk of the issues and concerns raised have been legislative in origin and therefore beyond its power to address.

**Discussion**

***1. Who pays? – uncertainty from multiple liability***

There is still too much uncertainty as to who is responsible for the actual payment of the royalty.

The legislation[1], makes possibly four parties, namely:

- the seller,
- the seller's agent,
- if no seller's agent, the buyer, and
- if no seller's agent and no buyer's agent, the buyer,

jointly and severally liable to pay resale royalty on the commercial resale of an artwork and leaves it to the relevant two or more of those parties to decide amongst themselves who will actually pay the royalty to CAL as the collecting society.

An illustration of the resultant market uncertainty is the inconsistency between the major Australian auction houses in their allocation of who will actually pay resale royalty to CAL: some will require or arrange for the buyer to pay; others, the seller. Ready market comparison of overall buying and selling prices and costs is diminished as a result.

This lack of consistency and confusion in approach can practically lead to non-payment of the royalty, with different parties (the buyer, the seller and their respective agents) believing that the responsibility to remit the resale royalty payable lies with one of the others of them, and notwithstanding the partial cascading liability language of section 20 of the Act.

[1] Section 20 of the Act.

Alternatively, any of the four parties, where relevant, can be contractually called upon to pay the resale royalty if the original payment is not made to CAL by the designated or agreed payer. Thus, for example, if the contractually or statutorily designated payer(s) were to become bankrupt or, if the contractually or statutorily designated payer were a company, were to become subject to external administration or be wound up. Until the resale royalty is actually paid, the joint and several liability continues, where relevant, for each of the buyer, the seller and their respective agents, with uncertainty as to the liabilities to record in their financial statements and the timing and extent of rights of contribution.

We submit that the current legislation should be changed to clearly state that it is the seller alone who is responsible for the payment. This change would, we submit, remove all doubt as to the responsibility and make it much easier for the all parties to organise and ensure that payment is made. The seller has been chosen as it ordinarily will be the seller who will have received the proceeds of sale and the person most likely to have available cash from which to pay the royalty.

***2. Monetary threshold, sliding scale and cap***

The identification of an appropriate monetary threshold has been and still is of much concern to many participants in the Australian art market. It is the cause of much confusion and has, we believe, significant potential for non-compliance.

Despite announcing an increased threshold some 12 months ago, the current requirement to report and remit resale royalty in respect of all commercial resales over $1,000 is submitted still to be a very low threshold and creates substantial administrative burdens, disproportionate to the benefits sought to be derived. More clarity too should be provided on whether the threshold is to be determined with reference to the GST inclusive or the GST exclusive price.

We believe that a more realistic threshold amount would be $5,000 (excluding GST). An increase in the threshold to this amount would, we believe, reduce the compliance burden on Australian art market professionals and better target the benefits and heighten the credibility of the scheme.

We also believe that the total royalty payable on the sale of an individual artwork should be capped.

Other countries with similar legislation have a "sliding scale" of royalty and/or a maximum cap. That cap could under the Act be, say, $25,000 with a facility to alter the cap by regulations made under the Act.

Both a sliding sale and a cap on royalty would, we believe, act as an incentive for major artworks to be sold in Australia rather than offshore in an attempt to avoid any Australian resale royalty liability.

***Agency arrangements***

In Australia, there are predominantly two classes of art dealer:

a. dealers who operate through their own commercial art galleries, who purchase and own the artworks that they sell. These dealers are relatively straightforward in their operations; and
b. dealers who take artworks on consignment from individuals and/or other galleries and then seek to sell them directly or through placement with other art market professionals.

This second class of art dealer will ordinarily not at any stage own the artwork sought to be sold and will only act as a conduit for other parties. This situation is best illustrated by an example. If a collector wishes to sell an artwork, he or she will contact an art market professional, who, if he or she has a buyer for the work, will act purely as an agent. However, if they have no buyer for the work, the art dealer will contact other art market professionals, who may have a buyer for the work.

Very often however and because the art dealers does not want to reveal their sources or contacts, money can change hands two or three times through a series of sales, commencing with the original seller and ending with the eventual buyer, with that series of sales concluded within a short time frame.

We believe that in these circumstances there should be an exemption for art market professionals or art dealers from liability for resale royalty, or credit given for royalty payable, within a connected series of commercial resales that occur within a specified time frame. In such an instance, there should be an ability to aggregate or look through the connected series of resale and properly treat the art market professional or art dealer as the true intermediary that they are. A parallel system of intermediary recognition may be found for registered motor vehicle dealers under the *Duties Act 1997* (NSW) and corresponding legislation in the other Australian States and Territories.

This change may require art dealers and other art market professionals who wish to take advantage of exemptions within a connected series of resales to be registered. A system of registration may also enhance compliance and increase the amount of resale royalty ultimately collected for Australian artists and their descendants.

### 3. *Should an auction house's buyer's premium be taken into account?*

A number of Australian art market professionals have complained to us that Australian auction houses have an advantage: namely, that the buyer's premium charged by auction houses is not taken into account when calculating the resale royalty payable, whilst any profit or commission payable on or part of the final selling price of artworks handled by art dealers and commercial galleries is taken into account when calculating, and is effectively subject to, resale royalty.

Those who have complained to us consider that the Australian art market should be a level playing field between auction houses on the one hand, and art dealers and commercial galleries on the other, and that there not be a situation where auction houses, because of their superior lobbying powers and ability, have been able to achieve a better result for themselves. This difference in treatment can adversely impact with artists and their descendants in lessening the amount of resale royalty otherwise collected.

### 4. *Transfers of ownership within families and their associated and controlled entities*

Generally, the Scheme provides for resale royalty to be on the first commercial resale of an artwork after the first transfer of its ownership after the commencement of the Scheme on 8 June 2010.

A transfer of ownership of an artwork can occur on the death of an individual or on a reorganisation of a person's or a family's (including controlled or associated entities') affairs. A transfer of ownership can also occur without any change of beneficial interests in (as opposed to the legal title to) the artwork.

We submit that the use of the broad term "transfer of ownership" in section 8(1)(b) of the Act effectively renders the resale royalty a deferred death tax payable by the deceased's descendants.. A potential consequence is that both an executor and the beneficiaries of the estate of a deceased significant art collector may prefer to continue the existence of the estate for many years in order to avoid or delay the incidence or payment of resale royalty.

Similarly, a reorganisation of a person's or family's affairs and their associated or controlled entities, may lead to the transfer of artworks from one family member or entity to another, such as from an individual's self managed superannuation fund to the individual himself or herself, including upon the winding up of the fund or placing the fund into pension mode. Divorce proceedings may also

trigger a transfer of first ownership, accelerating the incidence of resale royalty – it would be payable on the next commercial resale of the artwork.

Issues of this nature will become of increasing importance as regulations relating to their ownership and sale of artworks by self managed superannuation funds come into effect: the introduction of these regulations are in our view likely to result in compliant funds transferring their artworks to fund members by June 2016. A transfer, including a sale in such circumstances, should not, we submit, constitute a transfer of ownership such that the next following commercial resale would attract resale royalty liability.

Again, we suggest that the range of exemptions that are available (for example, for inter-generational and inter-familial (and associated and controlled entity) transfer liability exemptions in both Commonwealth and State direct and indirect tax and duty legislation) be used as a guide to when exemptions from first transfer of ownership shall be taken to occur to accelerate the classification of the next commercial resale as a sale to which resale royalty liability should apply. Thus the *Duties Act 1997* (NSW) contemplates in Chapter 2 (Part 6, Part 7 and Part 8 – Divisions 3 and 4) and in Chapter 9 (Parts 2 and 3) a range of legitimate transfer that will not attract duty under that Act. Divorce proceedings initiated transfers generally should also not constitute first transfers of ownership for paragraph 8(1)(b) of the Act, nor transfers from husband and wife (or *de factos*) jointly to their survivor on their decease.

## 5. *The duration of resale royalty entitlements – 70 years is too long*

Concern has also been expressed to us about the fact that resale royalty rights continue for 70 years after the death of an artist. It is considered that this period is quite unrealistic, as we understand that the legislation was primarily intended to assist Australian artists and their immediate families, and especially young families of deceased Australian artists. 70 years after the death of an artist, could effectively cover three generations with remote connections to and perhaps never having met the artist, leading to the possibility of multiple claimants who are difficult to identify and who may not wish to be actively involved, with attendant increased administrative burdens and inefficiencies.

Further, when an artist's deceased estate has been wound up within a period that would otherwise be appropriate having regard to all other legitimate concerns, a need to determine entitlements under a 70 years post-decease resale royalty could result in the reopening of these estates and substantial accounting and taxation compliance costs.

We believe that the maximum number of years that the resale royalty rights should endure should be 20 years. That is, generally the right to a resale royalty should survive for the benefit of the immediate family, the next generation. Limiting the duration of the entitlement to resale royalty to this period provides, we submit, a better targeting of the benefit when compared to the benefits of the Scheme.

## 6. *Section 8 of the Act*

There is substantial concern and confusion within the Australian art market arising from the wording of section 8 of the Act, and in particular the limited classification of what constitutes an "excluded class of transfer" provided for in subsection 8(2). References to the individuals in that subsection are at odds with the stated objectives of the exclusion in the Explanatory Memorandum to the Bill for the Act. The *Acts Interpretation Act 1901* (Cth) and the definition of "individual" in section 2B of that Act make it clear that "individuals" are a narrower class than the term "person" that appears in subsection 8(1) of the Act.

We submit that "person" be substituted for references to "individual" in subsection 8(2) such that the exemption and the royalty incidence provision, subsection 8(1), use the same language to the better achievement of purpose expressed in the Explanatory Memorandum – see in particular the final three full paragraphs on page 5 of the Explanatory Memorandum.

Such a change would also facilitate the introduction of exemptions as contemplated under heading 5 above.

**Conclusions**

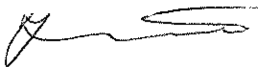
These reforms, should they be implemented, would, we believe, lead to a more credible and more workable system for the collection of resale royalties for Australian artists and their families than the current Scheme. The changes are also submitted to better reflect and cater for current practices and to better address distortions in the current Australian art market. A higher level of compliance and the removal of unnecessary uncertainties and the reduction of administrative inefficiencies that currently exist should also result.

We are happy to amplify these submissions in person and consult and provide any other feedback that you wish.

We thank you for the opportunity to make these submissions.

Yours faithfully
LOWENSTEINS ARTS MANAGEMENT PTY LIMITED

Tom Lowenstein
Director



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Yours faithfully
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