



Painters and Sculptors Association Members' Newsletter – Summer 2005

A recurrent issue:

Over the years, many artists have complained to me about the relationship with their galleries. These complaints have related to such issues as sums payable to galleries for non-gallery sales, commissions or prizes and the reluctance of galleries to disclose the purchasers of artists' works. However, the majority of complaints I receive relate to long delays in payment and the lack of regular accountability and reconciliation of artist's account with the gallery.

Let me say at the outset, quite unequivocally, that I am a great supporter of the gallery system. I believe artists are probably the worst sales people and that commercial galleries provide the best avenue for artists to reach an audience, to promote the artist and to maintain and improve prices of their work.

An art gallery is a unique type of business. It has an advantage compared to most other retail businesses in that it does not buy stock, as most works are left by artists on consignment. In the past, this enabled some people with limited capital to open galleries, relying on income from exhibitions to cover their overhead expenses. However, in the early 1990's the art market became depressed, sales dropped dramatically, and some galleries had to close their doors, owing artists substantial monies.

Fortunately, over the past decade with the general economy becoming more buoyant, most commercial galleries have been able to meet their regular payments to artists, as well as their other commitments. I am, however, concerned that **if** there is a downturn in the economy and with the consequent flow on to commercial galleries, it may be artists who will suffer again.

Artists generally find it distressing and distasteful to request payment from their galleries and many are reluctant to confront them. To help alleviate this impasse, for the past decade, I have been advocating that galleries maintain a Trust Account for their artists' dealings. Some time ago, on behalf of the Painters and Sculptors Association, I made a submission to the Contemporary Visual Arts and Crafts Inquiry in relation to such Trust Accounts. My recommendation received endorsement in the Myer Report.

In October 2003 the Australian Commercial Galleries Association, NAVA and the Australia Council entered into a Code of Practice regarding the relationship between artists and their galleries, which, inter alia, recommended that the proceeds of a sale should be lodged into an account separate from the gallery's funds. The Code also recommended that if a gallery did not maintain separate accounts it should disclose this fact in writing to its artists. Sadly, to date I have seen no evidence of either a separate account or a notification from any gallery.

I still receive complaints about gallery management that, in the main, relate to the following issues:

- Drip feeding of payments over a period of months after an exhibition, with the gallery sometimes citing non payment from purchasers, but at other times giving no reason.
- Payment for works only after request is made for their return by the artist, with a memo in the order of *"you wouldn't believe it, but we sold your work only last week!"*
- No documentation for commissions obtained by the gallery for the artist.
- No regular reconciliation of artists works and accounts
- Galleries giving discounts or extended terms to their clients without consultation with their artists.
- Galleries who prepare statements with incorrect understanding of GST.

To help air some of these issues further I intend to arrange a meeting between representatives of the Commercial Galleries Association and the Painters and Sculptors Association in the near future. With this in mind I would like to hear from our members about their experiences with galleries - as individual anecdotal evidence will enable us to highlight some of the problems faced by artists in general.

Tax Updates

Remember: Membership of organisations such as the PSA supports your tax status as a professional artist!

After 7 years of consultation and negotiation with various arts organisations including NAVA, the Australia Council, the Arts Law Centre and our firm, the Tax Office has finally released its ruling on what constitutes “*carrying on business as a professional artist*”. The ruling, known as TR 2005/1, lists in 44 pages and 151 paragraphs what the Tax Office considers to be the criteria to determine whether an artist is carrying on business or is merely a hobbyist.

This is a significant development because in the past attempts have been made by the ATO to deny tax deductions to some artists who were making losses from their art activities on the grounds that they were not carrying on business.

The ruling sets out a number of indicators which the ATO regards as relevant in determining whether artists are carrying on the *business* of an arts practice or not. These indicators are listed below. Even though an artist may not demonstrate that all the indicators are present, this does not necessarily knock him/her out of the professional category – it is merely an indication and each case will be determined on its merits.

The main indicators are confirmed as follows:

1. **Whether the activity has a significant purpose or character?**

Is there an attempt by the artist to pursue the activity with a commercial intent?

2. **What is the intention of the Taxpayer ?**

Does the artist intend the art practice to be one of a profession which brings some remuneration or merely a hobby?

3. **Profit Motive**

Does the artist have the intention to derive a profit from his/her activity? Is this intention borne out by their activities. It is not enough to merely state the intention, it must be demonstrated that the activities are capable of producing a profit. If this can be proven, then the fact that artists are incurring losses does not deny them the ability to claim that they are carrying on business.

4. **Repetition and Regularity**

In order to confirm the commercial nature of an arts practice it is important to demonstrate regular activity and to show that the artist is creating art in a continuous and businesslike manner. This can be evidenced by the volume of work produced, regular studio hours, systematic approach to the production and exhibition of the work.

5. **Is the Artist carrying on activities in the manner of others who are recognised as professional artists?**

This indicator revolves around peer recognition of the artist, academic qualifications, public recognition and membership of a professional body.

6. Organisation of activity in a businesslike manner.

This indicator highlights the importance of the activity being organised in a systematic way. Books of account should be kept in an organised fashion, slide libraries and professional reference libraries maintained. There should also be an appropriate level of documentation and record keeping to substantiate business transactions.

7. Size or scale of activity.

This criteria recognizes that not all businesses are large scale, and also acknowledges that many artists need to supplement their income from art related activities through full or part time work. Artists will also welcome acknowledgement that an artist can have a period of inactivity and still be considered to be carrying on a business.

The ruling presents numerous case studies which are very relevant to many artists and make interesting reading. For example, one video installation artist, who works in other media has been able to demonstrate enough indicators to prove that a professional business is being carried on, despite a lack of financial success.

Another example is given of a Solicitor (earning a reasonable income) who is also a visual artist (incurring losses) being able to prove a commercial purpose to his arts practice. He had exhibited his works, been reviewed and shown a degree of business organisation consistent with carrying on a business.

While this ruling is welcome and hopefully will lead to a better understanding by the ATO of artists' situations, there are still some concerns which have to be addressed. One of the main issues relates to the Non Commercial Losses Provisions. This denies a claim for losses from art related activities to artists earning over \$40,000 from other sources unless certain stringent tests are passed. This ruling can result in a situation where an artist can be accepted to be carrying on business and yet be precluded from claiming their losses. So, it seems, the dialogue between artists and the ATO is destined to continue.

