

Strengthening Resale Royalties Rights for Artists



The Australian Greens support the rights of artists to benefit from their creative work throughout their lifetime.. Resale royalties enable artists to receive a percentage of the sale price whenever their artistic works are resold up to 70 years after their death. Such a scheme was first introduced in France in the early 20th century and was long over due in Australia.

The Australian Greens welcomed the commitment of the government to introduce a Resale Royalty scheme announced in their 2007 election promises. The Greens supported the establishment of a resale royalty scheme when the legislation was introduced in Parliament in 2009; however we shared the concerns of many in the visual arts sector that the government's proposed Resale Royalty scheme has fundamental flaws. Consequently, in the course of debate, the Greens moved a series of amendments to address the most detrimental flaws. Although none of our amendments were supported by either the ALP or the Coalition, the Greens are committed to pursuing the changes necessary to strengthen the legislation and protect the rights of artists.

The Greens proposal will amend the legislation to:

1. allow resale royalties to be payable on any resale of existing art work
2. ensure Australian artists can access Resale Royalty schemes in other countries
3. remove the 'opt out clause' to protect the guaranteed resale royalty rights of artists and the integrity of the scheme
4. recognise Indigenous communal ownership.
5. establish a \$5 million grants fund to assist small galleries to administer the scheme.

How the Greens will strengthen Resale Royalties for artists

1. Resale royalty should apply to all resale of existing works

The major flaw in the scheme is that the resale royalty right is payable only on the second resale of artwork in existence at the time the scheme commences. This provision severely and unnecessarily restricts the operation of the scheme with many artists not benefiting for many years.

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An analysis of auction sales by Viscopy found that of works sold in 1998 only 6 percent had been sold again by 2008. That represents a very small number of artists to benefit from the scheme over a ten year period. The viability of the scheme is also called into question as there are so few resale royalties being collected. The collecting agency may face difficulties functioning and there is a risk of higher administration fees.

The government's primary reason for the restriction on existing artworks was that it prevented the occurrence of 'an acquisition of property on other than just terms' which would be unconstitutional. However, there is substantial legal advice to the contrary. Indeed, if there is doubt, the Parliament can deal with that constitutional issue with a compensation provision – a "historic shipwrecks clause". The Australian government has used these types of clauses in the past in relation to intellectual property legislation.

The Greens' amendment introduced such a clause and allowed resale royalties to be payable on any resale of existing art work thereby preserving the constitutionality of the legislation and the functionality of the scheme.

2. Addressing international obligations and reciprocity

The right to a resale royalty is recognised in the Berne Convention for the Protection of Literary and Artistic Works of which Australia is a signatory. Resale Royalty schemes exist in about 49 countries around the world. The introduction of a resale royalty scheme under Australian legislation should enable Australian artists to access such schemes in other nations.

There is however some doubt as to whether the minimalist regime provided for in the Australian resale royalty scheme meets the necessary international standards. The issue of the second resale for existing art works is one factor that may count against reciprocity with schemes internationally. The Greens are very concerned that the Government may have limited the access of Australian artists to resale royalty rights in other countries by the limitations in their scheme.

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3. The risks of the opt-out clause in the scheme

The scheme provides for a collecting society to be primary means of collecting and distributing the resale royalties and holds that the resale royalty right is inalienable. However, the legislation also allows artists to notify the collecting society that they do not want the collecting society to enforce the resale royalty right. Artists could then collect the royalty themselves or not collect it at all. This amounts to an opt-out clause.

There is concern that this ability to opt out leaves artists vulnerable to exploitation - allowing for artists to be coerced or bullied into giving up their right to a resale royalty. It also raises the question of whether an opt-out clause undermines to inalienability of the resale royalty right provided for in clause 21 of the Act.

The ability for artists to essentially "opt out" of the scheme also raises concerns for the viability of the scheme. If large numbers of artists or certain artists choose to collect the royalties themselves or enter arrangements with auction houses over the payment of royalties outside the collection agency, the collection agency is missing out on the administration fees necessary to function.

This "opt out" clause undermines the intention of the government to provide a transparent and accountable process for the fair distribution of royalty payments. The Greens' amendment removed this provision.

4. Indigenous artists and communal rights

A vital issue is the impact of the resale royalty scheme on Indigenous artists. Overall, the scheme potentially will have great benefit to Indigenous artists who will continue to receive financial benefits from their art work well into the future. However, importantly the scheme fails to recognise Indigenous communal ownership of the royalty right.

Historically, both Liberal and ALP governments have failed to adequately provide for communal rights for Indigenous artists. Communal rights recognise when a work of art is produced by members of a community using the community's cultural expressions and practice. The resale royalty right legislation allows the resale royalty to be held jointly by more than one artist but this provision is not broad enough to recognise Indigenous communal ownership. The Greens' amendment recognised communal ownership of the resale royalty rights.

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In addition to the resale royalty issue, the Greens have developed a policy to better support and protect the work of Australia's Indigenous artists. Indigenous Australians have been calling for Indigenous cultural and intellectual property rights for at least the last 20 years and now is the time for the government to act to comprehensively protect Indigenous intellectual property. Such protection is more urgent now that Australia has adopted the United Nations Declaration on the Rights of Indigenous People which specifically provides for the rights of Indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.

5. Establish a \$5 million grant fund for administration assistance

The Greens proposal also provides funds to assist small galleries, in particular Aboriginal arts centres, in administering the resale royalty scheme. The administration of the scheme may place an additional burden on galleries with only a few staff. Galleries should be able to access support, including IT support, to set up appropriate administrative mechanisms to work within the scheme. We propose a \$5m fund that galleries can access for such support. We would also provide an outreach program to make sure galleries are aware of the fund and assist with the making of applications.