

Guide to the artists' resale royalty scheme

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1. About this guide

This guide is primarily for art market professionals, who include art dealers, commercial galleries and auction houses. It is also for other people affected by the artists' resale royalty scheme: artists and their beneficiaries, and people who buy and sell art.

When the artists' resale royalty scheme was introduced in June 2010, we received lots of questions from art market professionals about how the scheme worked and how it would affect them and their clients.

We answered all those questions at the time, and kept a record of them so that the answers could be provided to a wider audience. Those questions form the basis of this guide.

The information in this guide is based on our understanding of the law and how it applies in practice. It is not legal advice. While we can't give legal advice to art market professionals, we can provide information about applicable laws to art market professionals' advisers.

2. About the artists' resale royalty scheme

The artists' resale royalty scheme started on 9 June 2010. Under the scheme:

- resales of artworks over \$1,000 (including GST) must be reported; and
- a 5% royalty is payable on some resales.

Key features of the scheme are:

- it applies to resales of works created both before and after 9 June 2010;
- it applies to a range of original artworks;
- all resales over \$1,000 (including GST) since 9 June 2010 must be reported, whether or not a royalty is payable;
- a royalty is not payable on the first transfer of title since 9 June 2010;
- a royalty is not payable on resales for under \$1,000 (including GST); and
- the scheme will be extended to works by artists from countries that have similar schemes.

The Australian government has appointed Copyright Agency Limited to manage the scheme.

Who is affected?

The scheme affects:

- people in the business of dealing in art, such as art dealers, commercial galleries and auction houses;
- people who buy and sell art; and
- artists and their beneficiaries.

People in the business of dealing in art

There are legal obligations under the scheme for 'art market professionals', who are:

- auctioneers;
- owners and operators of art galleries and museums;
- art dealers; and
- anyone else otherwise involved in the business of dealing in artworks.

Art market professionals need to:

- make sure that your sellers know that they need to report certain information about resales of artworks to us, or report that information yourself; and
- if a royalty is payable, make sure that it is paid.

People who buy and sell art

People who sell artworks must make sure that:

- each sale is reported to us (unless it is a private sale from one individual to another): you can do this through your agent; and
- any royalty due is paid.

A buyer can be responsible for payment of a resale royalty if there is no seller's agent and no buyer's agent involved. A buyer can also be required to provide information about a resale on request from us.

Artists and their beneficiaries

The scheme applies to the works of living artists, and artists who have died in the last 70 years. Royalties are payable to artists and to their beneficiaries. The entitlement to a royalty could pass to more than one beneficiary during that 70 year period. For example, it could pass initially to the artist's widower, and then to the artist's children.

If we collect a royalty, we have to use our best efforts to identify, find and pay the artist or beneficiaries. We encourage artists and beneficiaries to register their contact and payment details with us, so that we can easily find and pay them if we collect a royalty. They can register their details online at www.resaleroyalty.org.au, or provide the information in other ways (for example, by email).

Which artworks?

Artworks covered include artists' books, batiks, carvings, ceramics, collages, digital artworks, drawings, engravings, fine art jewellery, glassware, installations, lithographs, multimedia artworks, paintings, photographs, pictures, prints, sculptures, tapestries, video artworks and weavings.

An 'artist's book' can be covered by the scheme if it is, as a whole, an artwork. A book that is machine-made would not be covered; there must be some artisanship involved.

Other works covered include giclee prints.

Manuscripts, architectural drawings and plans are excluded.

Artworks produced in multiples

Works produced in multiples can be covered provided each is:

- original; and
- created by the artist, or under the artist's authority.

Examples are works produced by printmaking, or the use of a template or mould.

Each work need not necessarily be numbered, but probably needs to be distinguishable (for example, each print in a series is slightly different to the others).

Mass produced items, utilitarian items and souvenirs

The scheme does not apply to:

- items that are mass-produced using a mechanical process, such as posters;
- items that have a predominantly utilitarian function, such as furniture, tableware and musical instruments; or
- souvenir items that are not original artworks, such as 'memory stones' with a couple of brushstrokes of paint.

Which transactions are 'commercial resales'?

Under the scheme, all 'commercial resales' of \$1,000 (including GST) or more need to be reported.

A transaction is a commercial resale if:

- a person transfers ownership of an artwork to someone else in exchange for money;
- that person is not the first owner of the work (this will nearly always be the artist or the artist's estate); and

- it is not a private sale from one individual to another (that is, there is no agent involved).

It can be helpful to remember that a sale can be a 'commercial resale' even if:

- there hasn't been a previous sale (because the seller received the work by gift or inheritance rather than by purchasing it); or
- the previous change of ownership was before 9 June 2010.

Donations under the Cultural Gifts Program

The Commonwealth government's Cultural Gifts Program, administered by the Commonwealth Office of the Arts, provides tax incentives intended to encourage people to donate items of cultural significance from private collections to public art galleries, museums, libraries and archives. There is more information on the Office of the Arts website at www.arts.gov.au/tax_incentives/cgp.

Donations under the Cultural Gifts Program are not 'commercial resales', and thus do not need to be reported.

Artwork sold by a self-managed superannuation fund

An artwork sold by a self-managed superannuation fund is a commercial resale, even if the sale is to a person who contributes to the fund. Private sales are excluded only when both buyer and seller are individuals.

Estates and beneficiaries

After a person dies, there is no transfer of ownership until their estate is distributed. The estate is regarded as standing in the shoes of the deceased person.

If the estate is of an artist who has died, and the estate sells a work created by the artist, the sale is regarded as if it were a sale by the artist, and is thus not a commercial resale. On the other hand, if the estate includes a work that was acquired by the deceased person (including by gift or inheritance), the estate's sale of that work would be a commercial resale. The estate's report of that resale needs to indicate whether the deceased person owned the work on 8 June 2010 or acquired it later.

If a person inherits an artwork from a person who has died, there is effectively a transfer of ownership from the artist (via the estate) to the beneficiary. That transfer is not a 'commercial resale'. But the beneficiary's sale of the work would be a commercial resale. A beneficiary's report of a resale needs to indicate whether they were the owner of the work on 8 June 2010 or became the owner later.

Purchase of a work overseas

Our understanding is that a purchase of a work overseas is a transfer of ownership for the purposes of the Australian resale royalty scheme. It is not a commercial resale, but is relevant if it is the first transfer of ownership (from the artist), or the first transfer of ownership since 9 June 2010.

For example, if a person purchased a painting overseas in August 2010 and resold it in Australia in June 2011, the report of the 2011 Australian sale would indicate that the seller did not own the work on 8 June 2010, and a royalty may be payable.

Once reciprocity arrangements are in place, a royalty may also be payable on the overseas sale under the resale royalty legislation of the country in which the sale occurred.

Arrangements between AMPs, artists and clients

Document your arrangements

We encourage AMPs to document their arrangements with their clients, and clearly specify when and how ownership of a work passes from one person to another. AMPs should also make sure that there is consistency between:

- their arrangements and documentation with sellers;
- their documentation (such as invoices) to purchasers;
- their financial reporting; and
- their clients' financial reporting.

AMP sells work for client

Sample agreements between galleries and artists are available from the Arts Law Centre of Australia for \$55 (www.artslaw.com.au).

If there is one transfer of title from the AMP's client (the seller) to the purchaser, supporting documentation will usually include:

- the AMP's invoice to the buyer will indicate that the AMP is acting as the seller's agent;
- the AMP will invoice the seller for the AMP's commission, and report the commission as income in its financial reporting;
- the AMP will inform the seller of the sale price of the work; and
- the seller will report the sale price as income, and the AMP's commission as an expense, in his or her financial reporting.

Reference to resale royalty in agent/seller agreement

We suggest that an AMP's agreement with a seller include provisions whereby the seller:

- acknowledges that they may have to pay a 5% royalty on the sale price;
- acknowledges that they must provide information to Copyright Agency, directly or via the AMP, to enable Copyright Agency to work out if a royalty is payable, including whether the seller acquired the artwork before or since 9 June 2010;
- undertakes to comply with all requirements of the Resale Royalty for Visual Artists Act 2009 (the Act) applying to them;
- undertakes to indemnify the AMP for any loss incurred by the AMP as a result of the seller's failure to comply with any of their obligations under the Act; and
- acknowledges that if they fail to comply with any of their obligations under the Act, then the AMP may provide the seller's contact details to Copyright Agency.

An AMP could include the seller's declaration about whether they acquired the work before or since 9 June 2010 in the agreement or in a separate document.

The AMP may also want to provide a copy of Copyright Agency's information sheet for sellers.

AMP purchases work for client

We understand that dealers who purchase works for clients nearly always operate as agents, and do not own the work at any stage.

Factors which indicate that the dealer is acting as the client's agent include:

- the invoice for the sale indicates that the dealer is acting as agent for the client;

- the amount paid for the work is not treated as an expense by the dealer (for example, there is no input tax credit); and
- if there is an agent's fee, there is an invoice for that amount from the dealer to the client.

Seller represented by two agents

If a seller is represented by two agents who share the commission from the sale, there may be one or more transfers of title, depending on the arrangements between them. We recommend that AMPs clearly document when title is transferred.

AMP pays artist advance against a future sale, then sells work

Some AMPs give artists an advance against an expected sale in order to provide cash flow to the artist.

Provided the artist still owns the work when the AMP sells it, and the sale transfers ownership of the work from the artist directly to the buyer, that is not a commercial resale. Your documentation should reflect this arrangement.

Wholesaler pays artist to paint artwork, then sells to gallery

We understand that if a wholesaler pays an artist to paint an artwork for them, there is a transfer of ownership from the artist to the wholesaler. Thus, when the wholesaler sells the work, that is a commercial resale.

Returned artworks for exchange or refund

If a gallery accepts a return of an artwork it has sold to a client, there may be a transfer of ownership from the client to the gallery. This will depend if ownership had passed to the client. Ownership may not have passed, for example, if the gallery and client had an arrangement that ownership would pass after a trial period, and the client had possession but not ownership during that period.

If ownership did pass to the client, and thus passes back to the gallery when the work is returned, there is a commercial resale if the sale price is refunded (because the gallery has effectively purchased the work back) but not, in our view, if the client takes another work in exchange (because a commercial resale involves money).

AMP purchases work itself

A purchase of a work by an auction house (for example, of a work that fails to sell at auction) is a commercial resale unless the seller was the artist or artist's estate.

If a gallery buys a work from the artist (for example, from work it is holding for the artist in stock), this will be the first transfer of ownership, not a commercial resale. On the other hand, if the purchase is from someone other than the artist, then it is a commercial resale.

Meaning of 'sale price'

The sale price is relevant to three aspects of the scheme:

- a resale must be reported if the sale price is \$1,000 or more;
- a royalty not payable if the sale price is less than \$1,000; and
- the royalty is 5% of the sale price.

According to the legislation for the scheme, 'sale price' means:

The amount paid for the artwork by the buyer on the commercial resale including GST, but does not include any buyer's premium or other tax payable on the sale.

Are costs for framing and freight included in the sale price?

If a gallery frames a previously unframed work for sale, we regard the sale price as the price of the unframed work, provided the gallery invoices the buyer separately for the artwork and the frame, and the invoiced price for the frame does not exceed the cost of framing incurred by the AMP. Similarly, we regard reimbursement for costs such as stretching and freight as excluded from the sale price, provided those amounts are separately invoiced and do not exceed the costs incurred by the AMP.

Can a gallery deduct a buyer's premium from the sale price?

We understand that the exclusion of buyer's premium in the Australian legislation was based on the approach in the UK legislation.

The Government's explanatory guide to the legislation says:

The resale royalty is to be calculated on the amount that most closely reflects the value of the artwork. Inclusion of other amounts such as buyer's premium (a fee for service) or other taxes added to the hammer price would weaken the connection between the resale royalty payment and the value of the artist's work.¹

We understand that 'buyer's premium' is a term used to describe a practice associated with auction sales, and that the term 'buyer's premium' in the legislation is intended to refer to the fee charged to buyers by auction houses.

We are aware that this is a controversial aspect of the legislation for AMPs other than auction houses, and for right holders. This is therefore an issue that may be included in the government's review of the legislation.

¹ Revised Explanatory Memorandum to Resale Royalty for Visual Artists Bill 2008 at p 7.

3. Reporting resales

All commercial resales of artworks for \$1,000 (including GST) or more since 9 June 2010 must be reported to us, whether or not a royalty is payable.

Who must report resales?

The obligation to report applies to any seller who has a connection to Australia – that is, if the seller is a citizen, resident, incorporated in Australia, carries on business in Australia, or a trustee for a beneficiary with an Australian connection.

The seller may report through an agent. To date, all reports to us have been made by AMPs as agents for their clients.

If there is more than one seller, a report by one seller is sufficient.

AMP's legal obligation to ensure that sellers provide accurate information

An AMP is legally obliged, together with the seller, to ensure the payment of any royalty that may be due. AMPs thus have an interest in ensuring that we receive accurate information.

For any commercial resale for \$1,000 (including GST) or more, a seller is required to provide us with sufficient information to work out if a royalty is payable. A seller report via an agent, but must make sure the agent has accurate information, particularly about whether the seller owned the work on 8 June 2010 or not.

We conduct independent research to check that resales are being reported. Where appropriate, we will take legal action against sellers who fail to notify us of commercial resales, or provide inaccurate or incomplete information. An AMP is required to provide us with a seller's contact details if that is necessary for us to determine whether or not a royalty is payable on a resale.

AMP's agreements sellers regarding resale royalties

We suggest that an AMP's agreement with a seller include the following:

- an acknowledgement by the seller that they understand their obligations under the legislation;
- an undertaking by the seller to comply with all the seller's obligations under the legislation, including provision of accurate and complete information;
- an undertaking by the seller to indemnify the AMP for any loss incurred by the AMP as a result of the seller's failure to comply with any of the seller's obligations under the legislation; and
- an acknowledgement by the seller that if the seller fails to comply with any of its obligations under the legislation, the AMP may provide the seller's contact details to Copyright Agency.

What if gallery has contractual obligation to not disclose the sale price?

The sale price does not need to be reported to us if a resale is the first transfer of ownership since 9 June 2010.

Otherwise, we need the sale price to work out if a royalty is payable and, if so, how much. The seller is thus obliged to include the sale price in the information provided to us.

The legislation also obliges buyers, sellers and AMPs to provide information to us on request, such as the sale price. There is a penalty for non-compliance.

Galleries need to take these legal obligations into account when reviewing their contracts with their clients.

We do not publish the sale price for a work on the publicly accessible part of the website, and would not disclose a sale price without the consent of the people to whom that information relates.

What information must be reported?

Sellers must provide sufficient information about a resale to enable us to work out:

- if a royalty is payable; and
- if it is, who will pay it.

To work out whether the royalty is payable, we need information about some, and in some cases all, of the following:

1. the sale date;
2. whether the seller owned the work on 8 June 2010 (or acquired it later);
3. the sale price;
4. a description and/or image of the work;
5. the title of the work;
6. the name of the artist;
7. whether the artist is living or dead and, if dead, the year of death; and
8. the artist's nationality or residency.

In some cases, the AMP or the seller may not have complete information about the last four matters. Where we receive insufficient information, there is a presumption that a royalty is payable.

If we receive sufficient information from the agent, and any royalty is paid, then we do not need information about the seller or buyer. If necessary, however, we can seek additional information from sellers, buyers and art market professionals to help us work out if a royalty is payable and, if it is, by whom.

Did the seller own the work on 8 June 2010?

We will presume that a seller did not own a work on 8 June 2010 unless we receive information to the contrary.

If an AMP is reporting a resale for a client, the client needs to tell the AMP whether or not they owned the work on 8 June 2010.

Seller's details

We do not need the seller's details provided the AMP:

- provides us with the information available to it, and the information available to its client, relevant to determining whether a royalty is payable on a resale; and
- if a royalty is payable, pays that royalty in accordance with the requirements of the legislation.

Seller provides inaccurate information

We will seek a seller's contact details from the AMP and will seek payment of a royalty from the seller if we:

- makes an initial determination that a royalty is not payable, based on information from the seller that is misleading or inaccurate; and

- subsequently make a revised determination that a royalty is payable based on accurate information.

We may in some cases seek to recover the royalty from the AMP if recovery from the seller is impracticable.

AMP provides information that includes an unintentional error

The AMP can notify us of the error and our staff can amend our records.

Images of works sold

It is not necessary to provide an image for each work reported. We may contact the AMP for an image if the information we have does not enable us to accurately identify the artist.

Sale price for the first resale since 9 June

We do not need the sale price if the seller owned the work on 8 June 2010. But in some cases the first *resale* since 9 June may be the second transfer of ownership – for example, if a person inherited a work in July 2010 then sold it.

Who checks if artist died more than 70 years ago?

The legislation includes a presumption that there is a right holder for a royalty – for example, that the artist is Australian and is alive or died fewer than 70 years ago. We will therefore presume that a royalty is payable unless we have information that there is no right holder (for example, because the artist died more than 70 years ago).

Our researchers have access to a variety of sources to check when an artist died.

Request for additional information

In addition to the obligation to report resales within 90 days, the legislation gives us powers to request information from sellers, buyers and AMPs to determine the amount of any royalty payable and who is liable to pay.

The person must comply with the request within 90 days.

The penalties for failure to comply are up to 100 penalty units (\$11,000) for an individual and up to 500 penalty units (\$55,000) for a corporation.

Will we check agreements between galleries and artists?

If we had a reasonable belief that a sale by a gallery was a resale rather than a primary sale, we could request a copy of the agreement between the gallery and the artist to determine whether there was a transfer of ownership to the gallery from the artist.

Which sales must be reported?

A sale does *not* need to be reported if:

- the seller is the artist or the artist's estate (that is, a 'primary' sale);
- the price is less than \$1,000;
- it was before 9 June 2010;
- it is a private sale from one individual to another; or

- it took place overseas.

Whilst there is no obligation regarding these sales, we encourage the voluntary reporting of them (particularly primary sales), because it can help us to work out whether subsequent resales require payment of a royalty.

The following also do *not* need to be reported:

- an advertised work that doesn't sell;
- a cancelled sale, provided there is no transfer of ownership (for example, because transfer of ownership does not occur until the sale price has been paid in full);
- a work sold by an Indigenous art centre as agent for an artist;
- a sale in Australia by a seller who has no connection with Australia (although a royalty may nonetheless be payable, and we can seek information from the AMP and buyer).

On the other hand, the following *do* need to be reported:

- a sale of a work whose artist died more than 70 years ago (e.g. Conrad Martens);
- a sale by an Indigenous art centre of work it has purchased from the artist;
- a sale where the buyer's agent is based overseas (if the seller has a connection with Australia); and
- a sale in Australia by a seller who has no connection with Australia (although a royalty may nonetheless be payable, and we can seek information from the AMP and buyer);
- sales on eBay need if:
 - an AMP, such as a gallery or dealer, is involved; and/or
 - the seller and/or the buyer is not an individual.

Monitoring reporting of resales

We are monitoring resales in a variety of ways and we are contacting AMPs to remind them of their obligations under the legislation, and assist them to comply with their obligations.

Consequences if information not provided

If a seller fails to ensure that we receive sufficient information about a resale within 90 days, there is a penalty of up to \$22,000 for an individual, or up to \$110,000 for a company.

If a seller, buyer or AMP fails to provide information about a resale within 90 days of a request by us, there is a penalty of up to \$11,000 for an individual or up to \$55,000 for a company.

The penalties are the same even if a royalty is not payable.

How must resales be reported?

There are three steps:

1. go to www.resaleroyalty.org.au;
2. login to your online account; and
3. report the resales.

If you do not already have an online account:

- click the "Register now" button on the left hand side; and
- complete the details on the Registration page, and click "Register" to create a secure login (you'll receive an email with your login details).

To login to your account:

- enter your login details on left hand side of screen; and
- you'll see a dashboard screen.

To report resales:

- under "My dashboard", click the "Report resales" button;
- you'll see instructions for the three options for reporting resales:
 - complete the online form;
 - download our template for multiple sales, enter the information, and upload to the website from your computer using the "Import data" field; or
 - upload your own datafile with the required information, using the "Attach own file" field.

Auction houses that report to Australian Art Sales Digest (AASD) can report by completing and uploading the form prepared by AASD based on the auction house's data and other data held by AASD. The auction house will need to insert information about whether the seller owned the work on 8 June 2010.

When must resales be reported?

A resale must be reported, in writing, within 90 days.

Aligning with reporting to AASD

Auction houses can report resales to us at the same time as to Australian Art Sales Digest (AASD), provided it is within the 90 day period.

Buyer negotiates to pay in 30 days time

The resale occurs when ownership is transferred. This will be determined by the terms of sale, and when the buyer gets title to the work (before or on payment for the work).

The transaction must be reported within 90 days of the transfer of ownership.

Reporting resales in a batch on a periodic basis

AMPS can reporting resales in a batch on a periodic basis (e.g. quarterly) provided each resale in the batch report occurred within the previous 90 days.

What we do with information about resales

We can only use the information we receive from AMPs for the purposes of administering the resale royalty scheme. We must get the consent of the people to whom the information relates to use or disclose the information for any other purpose.

We also adhere to a privacy policy, which complies with the National Privacy Principles under the Privacy Act 1988.

Information published on resale royalty website

We are required by the legislation to publish, on the resale royalty website, certain information about resales for which we believes a royalty is payable. We publish the title and/or description of the work, the artist's name and date by which the artist must instruct us not to collect the royalty, if that is the artist's choice. We do not publish the sale price, nor the names of the AMP, the buyer or seller.

We understand that the purpose of publishing the information is to enable right holders who do not want us to collect a royalty for them to instruct us accordingly. Such an instruction must be given in writing within 21 days of the information being published.

Are resales that are not subject to the royalty published on the website?

No. We are only required to publish information about resales if we believe, on reasonable grounds, that a royalty is payable.

How long do we leave information about a resale on the website?

We leave information about a resale on the website for 21 days, which is the period during which a right holder can instruct us to not collect a royalty.

Apart from this, we may publish on the website from time to time:

- the names of artists we have been unable to locate; and
- the titles and descriptions of works for which the artist has not been identified.

Are images of artworks published on the website?

If we have an image of an artwork, and permission from the copyright owner to publish it, we may publish it on the website.

How do we ensure the security of the information provided by AMPs?

The information is stored in secure systems and is only accessible to those with authority to view it. Apart from the AMP who provides the information, information may be viewed by authorised Copyright Agency staff for the purposes of administering the scheme – for example, to conduct research on previous sales of an artwork, or to identify a right holder.

Can galleries get access to information provided by other galleries?

Not without the consent of the gallery to which the information relates.

4. When is a royalty payable?

A royalty is payable if:

- the seller did not own the artwork on 8 June 2010 (i.e. the seller acquired the artwork after that date);
- 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; and
- if the artist has died:
 - they died in the last 70 years; and
 - there is a beneficiary or estate with a connection to Australia.

A royalty can be payable on a sale:

- at a loss;
- by a gallery of a work it bought from the artist within the last three years ago;
- of a work by a non-Australian artist who is a resident in Australia;
- of a work by an Australian artist who is resident overseas;
- at a charity auction.

Artists' opt out

The legislation allows a right holder to instruct us not to collect a royalty on a particular resale, by giving us written notice within 21 days of our publishing information about the resale on the resale royalty website.

The legislation does not allow an artist to waive their entitlements entirely. It provides that:

- a waiver of a resale royalty right is of no effect; and
- an agreement to share or repay a resale royalty is void.

The government's explanatory guide says:

The purpose of this clause is to prevent artists being exploited and pressured into waiving or otherwise dealing detrimentally in their right to receive resale royalty.

Is a royalty payable if an artist opts out?

We do not send an invoice until the 21-day opt-out period has expired, and do not collect a royalty if a right holder has instructed us not to.

A right holder can collect a royalty themselves if they have all the relevant information, including the sale price and the identity of the AMP. We do not provide information about the sale price or the identity of an AMP without the AMP's consent.

AMP has collected royalty from client, then artist opts out

An artist may seek to recover the royalty directly, though this will depend on their having sufficient information to do so.

If the artist wants to forgo the royalty, the AMP's obligation to refund the client will depend on the AMP's arrangement with the client.

Can we provide contact information for artists?

For privacy and other reasons, we can't provide contact details for artists without the artists' consent. In certain situations, we may be able to forward a communication to an artist.

Is there an eligible right holder?

Presumption that there is a right holder

In the legislation, there is a presumption that there is a right holder for the resale royalty right. We therefore presume that there is a right holder entitled to a royalty, unless we have information to the contrary.

For example, we will presume that an artist who was born in Australia and is now living overseas is an Australian citizen unless we receive evidence to the contrary.

Is there a database of artists that are eligible for royalties?

We maintain a database of information about artists whose works have generated, or may generate, resale royalties. The database assists us to work out whether or not the royalty is payable, but additional information will usually be required, such as the artist's nationality and, if the artist has died, whether they died in the last 70 years.

These factors may change over time. For example, beneficiaries of an Australian artist who died in 1941 will be eligible to receive resale royalties in 2010 and 2011, but the entitlement will expire at the end of 2011. On the other hand, a French artist would not be entitled to any royalties on resales occurring before France is listed in the regulations to the legislation, but may be entitled to royalties on resales that occur after that.

We will, however, assist AMPs to work out, in advance of a sale, whether or not the royalty will be payable if the sale price is over the \$1,000 threshold.

Sources of information about artists, such as year of death

Sources of information about Australian artists, such as year of death, include:

- Design & Art Australia Online (www.daa.org.au); and
- Australian Art Sales Digest (www.aasd.com.au).

There is information about foreign artists covered by other countries' resale royalty schemes at:

- Bild-Kunst (www.bildkunst.de/html/index_e.html), the German visual artists' collecting society; and
- Design and Artists Copyright Society (www.dacs.co.uk), the British visual artists' collecting society.

Relevance of artist's nationality

Information about an artist's nationality or country of origin may not, of itself, indicate whether or not a royalty is payable. An artist may be a national of a country other than Australia, but entitled to royalties because their normal place of residence is Australia. On the other hand, an Australian artist who lives overseas is entitled to royalties, provided they have not renounced their Australian citizenship. They can be entitled to royalties even though they hold a foreign passport and/or are a foreign resident for taxation purposes

Requirements for a beneficiary to claim royalties

An artist's beneficiary is entitled to a resale royalty if:

- the artist, immediately before their death, was an Australian citizen *or* an Australian resident; and
- the beneficiary is:
 - an individual who is an Australian citizen *or* resident;
 - a charity or community body that is incorporated in Australia and/or carries on business in Australia; or
 - a trustee for one of the above.

Artist has died with no living relatives

There can be a right holder even if the beneficiaries under an artist's will have died. For example, if an artist left her estate to her daughter, and the daughter subsequently died and left her estate to her son, the son would be the right holder provided he is an Australian citizen or resident.

If there is no right holder to claim the royalty, we will inform the person who notified the AMP that no royalty is payable.

Works that are difficult to attribute

If an artist has not been conclusively identified when a resale is reported, we will presume that there is a right holder entitled to the royalty, and use our best endeavours to identify that right holder, unless we have information indicating that there is no right holder who meets the residency test. Currently, the residency test requires a connection with Australia.

If we are unable to identify the right holder after six years, we must refund the royalty to the person who paid it or, if that person cannot be found, use it for the administration of the scheme.

Since the scheme commenced, there have not been any royalties for unidentified right holders.

Forgeries and fakes

The application of the resale royalty scheme to a work identified as a forgery or fake may be affected by other areas of law that could apply, such as criminal law and laws relating to misleading and deceptive conduct. We would need to take these into account in determining our response if this situation arose.

Copyright in the work has expired

The resale right lasts for the artist's life plus 70 years from the year of the artist's death. This is similar to the period of copyright, but in some cases the resale royalty right can apply even if copyright has expired.

For example, copyright in all photographs taken before 1955 has expired, but the sale of a limited edition of a photograph taken before 1955 could be subject to payment of a resale royalty if the photographer has been dead for fewer than 70 years. To give another example, copyright in a painting whose artist died in 1954 has expired, but resale royalties will be payable on the painting until 2024.

Artworks by artists from other countries

Other countries with resale royalty schemes, such as members of the European Union, have reciprocal arrangements. This means that their schemes apply to foreign artists from countries with a resale royalty scheme.

At the moment, there are no reciprocal arrangements between Australia and other countries. This means that royalties are not collected for Australian artists in other countries, and the Australian scheme only applies to Australian citizens and residents.

We are in the process of establishing reciprocal arrangements with other countries. When the Australian government is satisfied that Australian artists are entitled to resale royalties from another country, it will list that country in the regulations to the Australian legislation, which will mean that artists from that country are entitled to royalties for artworks sold in Australia.

What will happen when a country is listed as a reciprocating country?

We will notify AMPs when a country is listed in the regulations.

There will be no change in the reporting obligations: all resales for \$1,000 must currently be reported, even if the artist is not Australia.

There will be a change for royalty eligibility: artists and beneficiaries from the listed country will become eligible for royalties from resales *after* the country is listed. There will be no change for resales that occurred before.

How is the royalty calculated?

What price is the resale royalty payable on?

The resale royalty is payable on the sale price, which means the amount paid for the artwork by the buyer including GST. It does not include any buyer's premium or any taxes other than GST.

How much is the royalty and does it include GST?

The royalty is 5% on the sale price (including GST), but the 5% royalty itself does not attract GST.

What if the work is by an artist from another country?

The Australian scheme will be extended to works by artists from other countries with resale royalty schemes. When that occurs, the royalty will be the same as for works by Australian artists: a flat, uncapped royalty of 5% of the sale price.

Sales of artworks overseas

The Australian resale royalty scheme does not require reporting, or payment of a royalty, if a resale has no connection with Australian law.

We are in the process of establishing reciprocal arrangements with other countries, so that royalties can be collected for overseas sales of Australian artists' works. If an Australian work is resold in another country, the royalty is calculated according to the law of that country.

When those arrangements are in place, we will distribute royalties collected overseas for Australian artists, similarly to the way we distribute copyright fees collected overseas to Australian rightsholders.

If an Australian work is sold in another country, such as the UK, then that country's resale royalty scheme applies.

Our administrative fee for distribution of a royalty collected overseas will be 10% of the royalty. GST is payable to the Government on our administrative, but can be claimed as an expense by recipients registered for GST.

Who has to pay a royalty?

The seller is jointly responsible, with the AMP acting as the seller's agent, to pay the royalty. If there is no seller's agent, then the buyer's agent is jointly liable with the seller, and if there is no buyer's agent, the buyer is jointly responsible with the seller.

AMP is connected with Australia but the seller isn't

There is no express requirement in the legislation that the people who are liable to pay the royalty have a connection with Australia. In practice, we would usually seek to recover the royalty from the AMP at first instance, as we will not usually have information about the identity of the seller. The legislation does enable us, however, to request information about the identity of the seller.

More than one seller's agent

The seller is liable to pay the royalty, together with the seller's agent. In some cases, there could be more than one seller's agent, in which case each would be jointly liable with the seller. For example, if a dealer is operating from antique centre, and buyers pay the centre for purchases, both the dealer and the antique centre could be acting as agents for the seller. If so, then both would be liable for payment of a royalty, together with the seller.

Liability of a valuer

A valuer will be responsible for payment of a royalty only if they act as agent for the seller or, if there is no seller's agent, the buyer.

Payment of royalties to us

We send an invoice by email, about 25 days after a resale is reported. Payment is due within 30 days from the date of the invoice. You can make payment by cheque or EFT. You can check that we have received your payment by logging into your online account at www.resaleroyalty.org.au and clicking the 'progress of payments' button.

Advance payment pending determination of whether royalty is payable

For a number of reasons, including that artists have a 21 day "opt-out" period following publication of information about a resale, there will usually be a delay, following a resale, before a final determination can be made about whether a royalty is payable.

If an AMP wanted to pay the royalty amount in advance of that determination, we could hold that payment on trust and refund it if the royalty was not, in the end, payable.

Can an AMP find out in advance whether the royalty is payable?

If an AMP has all the relevant information, the AMP will be able to work out if a royalty will be payable. The information that is not available in advance is the sale price, but if the AMP is confident the sale price will be \$1,000 or more they will be able to work out if a royalty is payable.

There is a page on the resale royalty website to help people work out if a royalty is payable; click the 'Determine eligibility' button on the left hand side.

Can an AMP include the amount of a resale royalty in the sale price?

In most cases, a buyer will not be liable for payment of a royalty, but sellers and AMPs can choose to recover the amount of a royalty from a buyer.

What happens if a royalty is not paid?

We are monitoring resales to ensure that they are being reported in accordance with the legislation, and that any royalties are paid. There are penalties for failing to report.

The legislation gives us powers to take legal proceedings to recover royalties for artists. Before taking such action, we would, of course, provide an opportunity for those liable to pay to meet their obligations under the legislation.

Our payments to right holders

Identifying right holders

We maintain a database of information about artists, including their contact details and payment details. If we collect a royalty for an artist who is not in the database, we use similar research techniques to the ones we use to identify and locate people who are entitled to copyright fees.

We have successfully made many payments to Indigenous artists in remote areas, in many cases with the assistance of Indigenous art centres.

We have also successfully made a number of payments to artists' beneficiaries, building on our experience identifying copyright holders.

We are obliged to continue looking for a right holder for six years. If we can't find a right holder for a royalty in that time, we must refund the money to the person who paid it or, if that person can't be found, use it for administration of the scheme.

We can notify an AMP that a royalty has been paid to the right holder.

How do we make sure a royalty is paid to the correct right holder?

If there is doubt about a person's entitlement to claim a royalty, we seek a written warranty from that person that they are entitled to claim the royalty and the basis of that claim, and an undertaking to indemnify us if that warranty is false. If the person is claiming as a successor in title to an artist who has died, we can request evidence of that (for example, the probate documents).

Can a right holder direct a royalty payment to a charity?

Our legal obligation is to pay a royalty to the right holder. The right holder may choose to on-pay their royalty to a charity of their choice.

An artist may bequeath their right to a charity, charitable institution or a community body after their death. This means that, where a bequest has been made to one of these organisations, royalties could be directly paid to that organisation.

Our administrative fee

By arrangement with the government, our administrative fee is 10% of the royalty collected.

We have to pay the government GST on our administrative fee. Until 31 December 2011, we are paying GST out of the 10% deduction. From 1 January 2012, we will add the GST to the deduction, so that the total deduction is 11%.

Recipients who are registered for GST may be entitled to claim the GST on the administrative fee as an input tax credit in their tax return.

Withholding tax on payments made to Australians living overseas

In some cases, there may be withholding tax on payments made to Australians living overseas. This will be affected by whether or not there is a tax treaty between Australia and the country where the person lives.

5. More information

Legislation and other government materials

The artists' resale royalty scheme was established by the *Resale Royalty for Visual Artists Act 2009* (the legislation).

There is a link to the legislation from the Commonwealth Office of the Arts website, at www.arts.gov.au/resale_royalty. The Revised Explanatory Memorandum for the Resale Royalty for Visual Artists Bill 2008, which can assist with interpretation of the legislation, is available from www.comlaw.gov.au. In this guide, we have referred to these as the 'government's explanatory guide'.

The *Report of the House Standing Committee on Climate Change, Water, Environment and the Arts into the Resale Royalty for Visual Artists Bill 2008*, and the submissions to the Committee's inquiry, can be downloaded at <http://www.aph.gov.au/house/committee/ccwea/resaleroyalty/report.htm>.

Resale royalty schemes in other countries

European Union

Because of a European Union (EU) Directive, all members of the EU have a resale royalty scheme. There is a summary of the directive, and a link to the directive, here:

http://europa.eu/legislation_summaries/internal_market/businesses/intellectual_property/l26049_en.htm

The European Commission has recently undertaken a review of the Directive:
http://ec.europa.eu/internal_market/consultations/2011/resale_right_en.htm.

United Kingdom

The main collecting society for resale royalty in the UK is Design and Artists Copyright Society (DACS). Its website is <http://www.dacs.org.uk>.

United States

There is a resale royalty scheme in California, but not in other parts of the US. The scheme is administered by the Californian Arts Council, which has information about the scheme on its website:
<http://www.cac.ca.gov/resaleroyaltyact/resaleroyaltyact.php>.

There have been recent reports in the media that a national resale royalty scheme for the United States is under consideration.

Review of the scheme

The Australian Government has committed to reviewing the resale royalty scheme.

If you have concerns about the scheme's operation, and would like these to be taken into account as part of the review, you can provide this information in writing to us (resale@copyright.com.au) or to the Office for the Arts, Department of Prime Minister and Cabinet, GPO Box 787, Canberra ACT 2601.

Information on website and e-alerts

Information on the resale royalty website (www.resaleroyalty.org.au), include:

- information sheets for artists, Indigenous art centres, AMPs, and buyers and sellers;
- Code of Practice for Artists' Resale Royalty Scheme;
- information about royalties collected since the scheme commenced

We regularly update the information on the resale royalty website and we send e-alerts about the scheme to more than 2,300 subscribers. If you would like to subscribe, email resale@copyright.com.au.