

# Lowensteins

ARTS MANAGEMENT

TL:CJ

6 September, 2011

Mr. Brian Johns  
Chair  
Copyright Agency Limited,  
Level 15, 233 Castlereagh St  
Sydney, N.S.W. 2000

Dear Brian,

As a member of the advisory Panel for CAL, I have attended a number of meetings and hopefully have been able to make a contribution.

Regrettably, due to other commitments, I have not been able to attend the last few meetings, although I understand I was capably represented by Partners of our firm.

On the 10 August, 2010, I wrote to the Board of CAL, highlighting a number of issues, which were of concern to the arts industry and I had requested the Board to make representations to the Government for changes to the Legislation.

Not surprisingly, the issues set out in my letter have not gone away and there is still a great deal of confusion, amongst art market professionals and to my knowledge there are a number of art dealers, who have not registered and have ignored the Legislation.

In relation to the matters raised in my letter, with the exception of the Reporting requirements, [where I believe that commercial resales under \$1,000 do not have to be reported], I am not aware of any reference or discussion in relation to the other concerns, as detailed in my letter.

Let me summarise the current concerns with which I am frequently confronted and expand on the points raised in my original letter :

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under Professional  
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## 1. LIABILITY FOR PAYMENT

There is a great deal of confusion in the Legislation by making three or possibly four parties, all jointly and severally liable and leaving it to the parties to decide amongst themselves, as to who will be responsible for payment.

As an illustration, the major auction houses reveal different approaches to this liability, with some passing the liability onto the purchaser, others to the vendor, whilst others refer to the Resale Royalty Legislation in their catalogue but are silent on the liability.

As I have previously mentioned, the Legislation could be changed very simply to state

“that the vendor is responsible for the payment, unless there is a written agreement to the contrary.”

This would remove all doubt as to the responsibility and make it much easier for the art market professionals to ensure that payment is made.

## 2. AGENCY ARRANGEMENTS

The people involved in drafting the Legislation have quite clearly not understood the way the art market operates.

There are effectively two types of dealers :

- a. The dealers who operate through their galleries, who purchase and own the stock that they sell. These are reasonably easy to deal with.

AND

- b. Dealers who will take works on consignment from individuals and/or other galleries and then try to resell them often through other Art Market Professionals.

It is the latter class of Art Market Professional who, in most instances, will not own the goods and only act as a conduit between other parties

e.g., if collectors wish to sell a painting, they will contact an Art Market Professional, who, if he has a buyer for the work, will act purely as an Agent.

However, if he has no buyer for the work, he will contact other Art Market Professionals, who may have, a buyer for that particular work.

Very often, because they do not want to reveal their sources or contacts, money can change hands two or three times for a single transaction between the original seller and an eventual buyer.

When these matters have been raised with CAL, to ensure that there is no doubling up of Resale Royalty payment, they were advised to seek their own Legal advice.

I think it is imperative that recognition is given to such agency transactions.

**In fact, it is my view that art market professionals and indigenous arts communities,, provided they register as "art dealers" should be exempt from the Resale Royalty Legislation, as in effect they are purely a conduit between the vendor and an eventual purchaser.**

### 3. BUYER'S PREMIUM

A number of Art Market Professionals have complained that Auction Houses have an advantage, in that the Buyer's Premium is not included when calculating the Resale Royalty payment, whilst any profit or commission which is built into the final selling price of dealers/galleries would be subject to Resale Royalty payment.

They consider that the art market should be a level playing field and not a situation where, people because of their superior lobbying ability have been able to achieve a better result for themselves.

### 4. TRANSFER OF OWNERSHIP

The Resale Royalty Legislation provides for royalties to be paid on the second sale, or the first resale, after the introduction of the Legislation ie., after the 8 June, 2010.

However, as a consequence of the deemed transfer of ownership by death or a reorganization of a person's affairs [where the legal ownership has changed but the beneficial ownership may not have passed to another individual] results in the first sale, after such a transfer of ownership, to be subject to Resale Royalty.

The inheritance provisions effectively make Resale Royalty, a death tax, and beneficiaries may be forced to retain the Estates of the Deceased for many years in order to avoid paying the Resale Royalty.

Similarly, a reorganization of a person's affairs, where e.g., works are transferred from a Superannuation fund to the individual upon the winding up of Superannuation fund or putting the Fund into pension mode, or Divorce proceedings, would again trigger a Resale Royalty on the sale of the work.

### 5. CAP ON RE SALE ROYALTIES

Concerns have also been raised by auction houses art dealers and collectors that valuable artworks will not be sold in Australia but sold in Hong Kong or Singapore where Resale Royalties do not exist, or even in the United Kingdom where there is a cap on the maximum threshold payable for Resale Royalties.

It is suggested that a reasonable maximum cap of say \$25,000 per artwork.

6. DURATION OF RESALE ROYALTIES

Concern has also been expressed about the fact that Resale Royalty rights continue for 70 year after the death of an artist. it is considered that this period is quite unrealistic, as the Legislation intended to assist artists or the families, especially young families of deceased artists. 70 years after the death of an artist, could effectively cover three generations.

**SUMMARY**

It is important to realize that all of the above concerns are being felt much more acutely, due to the depressed state of the art market, where Galleries are closing or at least tightening their belts, as buyers are reluctant to invest in art, especially with the uncertainty hanging over Superannuation Funds investment in art and the Global Financial Crisis.

I consider that these matters should be openly aired and discussed by the Board of CAL and representatives of interested parties, and that the Government is made aware of these issues.

Yours sincerely,



Tom Lowenstein