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A Right of Resale? Indigenous Art Under the Hammer

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Opinion

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A right of resale? Indigenous art under the hammer

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This week, Sotheby's sold the late Clifford Possum Tjapaltjarri's painting, *Warlugulong*. The auction-house's spokesman, Tim Klingender, was enthusiastic about the high price commanded by the art work: "The painting was a really great painting and it deserved to make a really fantastic price, and it made that price."

The painting has undergone significant appreciation over the last few decades. The significant art work was bought by the Commonwealth Bank for a mere \$1,200 in 1977, and spent 20 years hanging in the canteen of the bank's Mornington Peninsula training centre. In 1996, Melbourne art dealer Hank Ebes acquired the painting for \$36,000. It has been revealed that the National Gallery of Australia acquired the painting at the Sotheby's auction for a princely sum of \$2.4 million.

In light of Sotheby's auction of Indigenous art, it is surely time to re-open the policy debate in Australia as to whether Australian artists - especially Indigenous artists and their families - deserve a right of resale. It seems somewhat unfair that visual artists have no legal entitlement to any direct benefit from financial speculation on the value of their work.

Right of resale

A right of resale, or *droit de suite* (a right to follow), is a legislative instrument under copyright law, which enables artists to receive a percentage of the sale price whenever artistic works are resold. Such a right lasts for the usual term of copyright protection for artistic works (which is life plus 70 years in a country like Australia).

A French legal scholar, Albert Vaunois, first articulated the need for a 'droit de suite' in connection with fine art back in 1893. The French Government introduced a scheme to protect the right of resale in 1920, after controversy over artists living in poverty, while public auction houses were profiting from the resale of their artistic creations.

A number of other European countries have established a right of resale. In 2001, the European Council adopted the Artists' Resale directive and recognised that the "artist's resale right forms an integral part of copyright and is an essential prerogative for authors." In 2006, the United Kingdom promulgated regulations, giving effect to a right of resale in that jurisdiction.

In the United States, there has been less support for a right of resale amongst legislatures. After lobbying from artists such as the king of pop art, Robert Rauschenberg, the state of California passed the Resale Royalties Act in 1977. At a Federal level, the United States Congress has shown some reluctance in providing national recognition for a right of resale in the United States.

However, a number of Latin American and African countries have established a right of resale.

Policy debate

There has been a long and inconclusive policy debate in Australia about the desirability of a right of resale.

In September 2003, the art collector and philanthropist, Rupert Myer, released a government-commissioned report on contemporary visual arts and craft in Australia. He recommended that the Commonwealth Government should introduce a resale royalty arrangement.

Supporting such a proposal, Senator Aden Ridgeway of the Democrats argued: "The establishment of a scheme for resale royalty rights for artists is particularly important in the context of the rapidly booming international market for Indigenous artworks as compared to the desperate economic conditions within which many Indigenous artists live and work."

Curator, Brenda Croft, has observed: "In my own mind I've had problems with seeing Indigenous works sometimes seemingly traded like stock and bonds, particularly when I know there's no right of resale to the artists."

In May 2006, Attorney-General Philip Ruddock and Minister for the Arts and Sport, Senator Rod Kemp, announced that the Federal Government had decided against a right of resale for Australian artists: "The Government carefully considered the issue of a possible resale royalty scheme and concluded that a resale royalty right would not provide a meaningful source of income for the majority of Australia's artists." The Ministers instead announced \$6 million over four years in the 2006-07 Budget to support visual artists as an alternative to a resale royalty scheme.

In 2007, the Senate Standing Committee on Environment, Communications, Information Technology and the Arts released a report on Indigenous art. The Government majority of the committee recommended that a resale royalty scheme not be introduced at this time, because of the lack of benefit to most artists, and in particular Indigenous artists, and the lack of new evidence to the contrary.

By contrast, the Australian Labor Party have been strong advocates of a right of resale. Senator Bob McMullan and Senator Kate Lundy have supported private members' bills to introduce a right of resale. The party's spokesman for the arts, Peter Garrett, has complained:

"Those most opposed to a resale royalty scheme are the major art auction houses. They have lobbied against a resale royalty on a number of grounds including extra administration costs, no guarantees that artists will get a tangible benefit, that the scheme would only benefit a small proportion of artists and that the existing art market would be distorted."

The politician notes: "While the legal evolution that has occurred to recognise an expanded framework of artists' rights is extremely important, it is also important that those artists who have hitherto not been sufficiently recognised or rewarded for their work should be provided for."

No doubt the right of resale will be an important issue in the upcoming Federal election in the visual arts community.

Conclusion

In the meantime, there is a need for creative artists, auction-house, and galleries to make arrangements to ensure that artists and their families benefit from the resale of artistic works.

The auction-house, Sotheby's, has been defensive about the introduction of a resale royalty scheme, suggesting that such an arrangement would not benefit the vast majority of Australian artists. The auction-house has argued that resale royalty would discourage Australian art collectors from buying contemporary art and resale royalty would discriminate against auction houses.

Tim Klingender of Sotheby's has equivocated about a right of resale, supporting it in theory, but expressing reservations about its practical consequences. He observed to the ABC's *Background Briefing*:

"Well personally I endorse the concept of it, wholeheartedly. As an auction house, and across the board there's a lot of mixed reactions but personally I endorse it and have done on the public record for many years. But what I have to say about it is it has to be sensibly instigated or put in place. My theory is that it should be works that have appreciated in value, and it should be works above a certain level."

He does not think, though, that a scheme should be limited to Indigenous artists: "Certainly there's a strong argument for Indigenous artists, but I think the law probably should be brought in to cover both Indigenous and non-Indigenous, otherwise it would be racist."

The former National Gallery of Australia director, Brian Kennedy, was a great champion of a right of resale: "We cannot with clear conscience buy Aboriginal art without being concerned about the circumstances of the people who make it." He observed: "I support the introduction of a right of resale... even if it has to be in the first instance, for Indigenous artists only." Hopefully, his successor, Ron Radford, will follow his stance, especially when it comes to adding new Indigenous works to the collection of the National Gallery of Australia.

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