

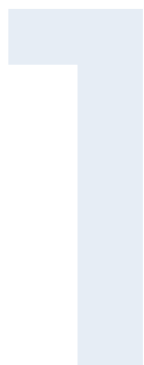
COMPREHENSIVE GUIDE TO THE

Artists' resale royalty scheme

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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.

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.

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About the artists' resale royalty scheme

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

- resales of artworks of or 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 of or over \$1,000 (including GST) since 9 June 2010 must be reported, whether or not a royalty is payable;
- if a work was in existence on 9 June 2010 a royalty is not payable on the first transfer of title even if it is a resale;
- a royalty is not payable on resales for under \$1,000 (including GST); and
- the scheme applies to artworks created by artists from prescribed reciprocating countries (refer to resaleroyalty.org.au for the full list of countries and the date they were prescribed in legislation).

The Australian Government has appointed the Copyright Agency to manage the scheme.

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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 (AMPs), 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.

AMPs 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.

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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, if it is less than 70 years from the end of the year in which the artist died. 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. The artist and their beneficiary or estate (successor in title) must have the required connection to Australia or a prescribed country.

If we collect a resale royalty, we use our best efforts to identify, find and pay the artist or beneficiary. 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?

Examples of artworks listed in the legislation are 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.

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An 'artist's book' can be covered by the scheme if it is, as a whole, an artwork. A book that is machine-made is not likely to 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.

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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 art market professional 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).

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 <https://www.arts.gov.au/funding-and-support/cultural-gifts-program>.

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

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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 to the beneficiaries. The estate is regarded as being the same as the deceased person, as if that person were still alive.

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 9 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 9 June 2010 or became the owner later.

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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 9 June 2010, and a royalty may be payable.

If reciprocal arrangements are in place with the country where a work is purchased, a royalty may also be payable on the overseas sale under the resale royalty legislation of the country in which the sale occurred. The reporting and royalty payment will be arranged by the manager of the resale royalty scheme in that country.

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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 buyers;
- 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 (www.artslaw.com.au).

If there is one transfer of title from the AMP's client (the seller) to the buyer, 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.

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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 the Copyright Agency, directly or via the AMP, to enable the 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 the 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 the 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.

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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.

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

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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.

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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.

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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.

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

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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 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 Copyright Agency receives accurate information.

For any commercial resale of \$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 may report via an agent, but must make sure the agent has accurate information, particularly about whether the seller owned the work on 9 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.

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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 with sellers regarding resale royalties

We suggest that an AMP's agreement with a seller includes 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 the Copyright Agency.

What if a gallery has a 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, including the sale price. There is a penalty for non-compliance.

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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 resale royalty website.

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 9 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 deceased and, if deceased, 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.

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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 9 June 2010?

We will presume that a seller did not own a work on 9 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 9 June 2010.

Seller's details

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

- supplies us with relevant information about the resale available to it and/or the seller (such as the sale price and whether the seller owned the work on 9 June 2010); and
- pays any royalty that is due.

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:

- make 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.

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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.

Sale price for the first resale since 9 June

We do not need the sale price if the seller owned the work on 9 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. In that case, we do need the sale price.

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 (calculated from the end of the year of death). 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

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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 fines for failure to comply are up to 100 penalty units (\$31,300) for an individual and up to 500 penalty units (\$156,500) for a corporation (as at the time of writing).

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 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.

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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;

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 a work it has purchased from the artist; and
- sales on eBay 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 to 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 \$62,600 for an individual, or up to \$313,000 for a company (as at the time of writing).

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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 \$31,300 for an individual or up to \$156,500 for a company.

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

How must resales be reported?

- Log in to your resale royalty online account and report the sale.

If you do not already have an online account:

- go to resaleroyalty.org.au and click on 'Register'
- complete the details to create a secure login

Once you've registered, to report resales:

- log in to your account
- on the left-hand side of your dashboard, click on 'Report new resale'
- you'll see instructions for two options for reporting resales:
 - » upload an excel sheet (recommended for more than 10 resale reports); or
 - » use the simple online reporting form

Auction houses that have an Australian Art Sales Digest (AASD) account can report by downloading the resale report on their AASD dashboard, completing the spreadsheet by adding the information about whether the seller owned the work on 9 June 2010, and uploading the completed spreadsheet to their resale royalty online account.

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When must resales be reported?

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

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

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What we do with information about resales

We can only use the information we receive from AMPs and other parties 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 believe a royalty is payable. We publish the title and/or description of the work, the artist's name and date by which the right holder must instruct us not to collect the royalty, if that is the right holder's choice. We do not publish the sale price, nor the names of the AMP, the buyer or seller.

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.

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

We are required to publish information about a resale on the website for 21 days, during which a right holder can instruct us to not collect a royalty. The information remains online longer and is a useful resource for many artists.

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.

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.

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When is a royalty payable?

A royalty is payable if:

- the seller acquired the artwork on 9 June 2010 or after
- 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 a citizen or resident of Australia or a prescribed country; and
- if the artist died, it is less than 70 years ago (calculated from the end of the year in which the artist died; and there is a beneficiary or estate with the required connection to Australia or a prescribed country.

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;
- of a work by a non-Australian artist who is a citizen or permanent resident of Australia or a national or citizen of a prescribed country;
- of a work by an Australian artist who is resident overseas (provided they are a citizen or permanent resident of Australia);
- at a charity auction.

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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 the publication on the resale royalty website of information about the resale.

The legislation does not allow an artist to waive their entitlements for all royalties payable. 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.

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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.

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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.

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 meets 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 at:

- Bild-Kunst (<https://www.bildkunst.de/homepage>), 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.

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An artist may be a national of a country other than Australia, but entitled to royalties because they have permanent residency status in 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.

Right holders who are nationals or citizens of a prescribed reciprocating country are entitled to resale royalties under the Australian scheme. Refer to resaleroyalty.org.au for the full list of countries and the date they were prescribed in legislation.

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 permanent resident or a national or citizen of a prescribed country; and
- the beneficiary is:
 - » an individual who is a citizen or permanent resident of Australia or a national or citizen of a prescribed country (the "residency test");
 - » a charity or community body that is incorporated in and/or carries on business in Australia or a reciprocating country; 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

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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 meets the residency test.

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. 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.

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, 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 (calculated from the end of the year of the artist's death).

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This is similar to the period of copyright, but the resale royalty right can apply to the resale of a work even if copyright in that work 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

On 31 March 2024 resale royalty entitlements expanded to include countries that have reciprocal arrangements with Australia. Further countries have since been added. Refer to resaleroyalty.org.au for the full list of countries and the date they were prescribed in legislation.

This means that, from the date that countries were prescribed in legislation, the Australian scheme applies to artists and beneficiaries who are nationals or citizens of those prescribed countries. Likewise, royalties can be collected for resales of Australian artists' works in those countries from the relevant dates.

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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 and over must currently be reported, even if the artist is not Australian.

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.

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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.

Royalties can be collected for overseas sales of Australian artists' works in countries prescribed into the regulations of the Australian legislation. If an Australian work is resold in a prescribed country, the royalty is calculated according to the law of that country.

We will distribute royalties collected overseas for Australian artists, similarly to the way we distribute copyright fees collected overseas to Australian right holders.

If an Australian artist or their beneficiary/estate does not wish us to collect their overseas royalties they should contact us.

Our administrative fee for distribution of a royalty collected overseas will be 15% of the royalty. GST is payable to the Government on our administrative fee, but can be claimed as an expense by recipients registered for GST.

Who has to pay a royalty?

The seller is jointly and severally responsible with any AMP or other agent and the buyer to pay the royalty.

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AMP is connected with Australia but the seller isn't

There is no stated 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 an 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 and the buyer.

Liability of a valuer

A valuer will be responsible for payment of a royalty only if they act as agent for the seller or 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 check if we have received your payment by logging into your online account at resaleroyalty.org.au and clicking on 'Pending payments' in your dashboard.

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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.

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

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.

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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 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

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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 paid directly to that organisation.

Our administrative fee

By arrangement with the government, from 1 July 2015, our administrative fee is 15% of the royalty collected.

This fee is used to support the administration of the Resale Royalty scheme on behalf of right holders and their beneficiaries. A 15% service fee reflects the costs of managing the scheme and is consistent with other resale schemes internationally.

Prior to 1 July 2015, the administration fee was 10% of the royalty collected. During this period the scheme was also supported by Government funding which was provided to implement the scheme.

We are required to collect GST on our administrative fee, payable to the Government. Until 31 December 2011, we

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paid the GST out of the 10% deduction. From 1 January 2012, we added the GST to the deduction, so that the total deduction is 11%. From 1 July 2015, we will add the GST to the deduction, so that the total deduction is 16.5%.

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.

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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/funding-and-support/resale-royalty-scheme. 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.legislation.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 https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ccwea/resaleroyalty/report/frontpages.pdf (PDF, 82.3kb)

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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 undertook a review of the Directive in 2011: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011DC0878>.

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 no resale royalty scheme in the USA although American visual artists have been lobbying for one for many years.

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Review of the scheme

The Australian Government undertook a review of the resale royalty scheme in 2013 and the report can be found at <https://www.arts.gov.au/publications/post-implementation-review-resale-royalty-right-visual-artists-act-2009-and-resale-royalty-scheme>.

If you have concerns about the scheme's operation, you can provide this information in writing to us (resale@copyright.com.au) or to the Office for the Arts, The Department of Infrastructure, Transport, Regional Development, Communications and the Arts, GPO Box 2154, Canberra ACT 2601.

Find more information on resaleroyalty.org.au

- Code of practice for artists' resale royalty scheme
- Quick guide for artists
- Quick guide for art market professionals
- FAQs

We regularly update the information on the resale royalty website and we send quarterly e-newsletters with news about the scheme to subscribers. If you would like to subscribe, email resale@copyright.com.au.

resaleroyalty.org.au