John R Walker
Contemporary artist

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Aboriginal and Torres Strait Islander Visual Arts and Crafts
Productivity Commission
GPO Box 1428
Canberra City ACT 2601
By email: indigenous.arts@pc.gov.au

Dear Administrator

I feel a need to start my submission by emphasising that *productive Australian artists are mostly sole traders*. While artists at times do provide goods and services to organisations, very few artists *are* organisations. The needs and interests of arts organisations and the needs and interests of productive artists do not always neatly align. In my professional life I have repeatedly witnessed in enquires an assumption that the interests of arts organisations and the interests of artists are the same. This is not necessarily so.

Regarding the draft report's recommendations

Under the heading ICIP the report states that**:**

> "The new legal framework would encourage and support collaborations consistent with the principles of free, prior and informed consent. It would do so by identifying the boundaries around the use of Aboriginal and Torres Strait Islander cultural assets in visual arts and crafts and giving artists and designers greater clarity around rights and responsibilities." [my emphasis]

I submit that the 'boundaries' i.e. *what* falls inside or *just* outside the definition in practice will be blurred, contested even controversial and therefore it could well result in the opposite of "greater clarity around rights" for artists.

In the *wider* Australian artist community, the old fences separating indigenous artists and non-indigenous artists have largely fallen. I sincerely hope that any new ICIP laws defining what *is* or *is not* indigenous art and motifs does not, for the wider Australian artist community, inadvertently re-instate fences, the bringing down of which took decades of work by so many to achieve.

A possible model for cultural rights legislation

During the resale royalty consultation period, it became clear to me from discussions with senior IP lawyers, that combining inalienable, i.e moral rights with economic rights in Common Law, is an intrinsically questionable and risky process. One senior lawyer told me that the resale royalty was closer to goods and chattel law, a restraint of trade. Such concerns should be taken into consideration when drafting any legislation in this area.

Law Council of Australia submission

In the Law Council of Australia's submission to this enquiry, the Council suggests that the "continuing application of s.11" [of the Resale Royalty Act] warrants "considered investigation". The then Minister for the Arts, Simon Crean, in a letter to me dated 20 December 2010 stated:

> "As you know, the Act was designed to work within the requirements of the Australian constitutional and legal frameworks…Ultimately, the Act was supported as noncontroversial legislation during its passage through both Houses of Parliament."

My understanding at that time was that the drafting of the Resale Royalty Right for Visual Artists Act 2009 was done with considerable care and consideration regarding constitutional/legislative concerns and therefore revisiting important sections of the Act such as s.11 could be an unproductive waste of time.[1]

Yours sincerely

John R Walker

[1] In fact, if viewed through the window of opportunity cost, the Resale Royalty, which is in total dollar terms mainly of benefit to successful and dead artists, is a classic example of twenty years of time , energy and money wasted in the pursuit of something that was intrinsically not worth the candle. This article co-authored by me and economist Nicholas Gruen outlines this issue: https://www.themandarin.com.au/73166-artists-resale-royalty-seemed-like-good-idea/