



## AVAA NEWSLETTER JUNE 2010

### *Contents*

|                                    |   |
|------------------------------------|---|
| Artists Resale Royalty Scheme      | 1 |
| A Legal Perspective on Disclaimers | 2 |
| Annual General Meeting Results     | 5 |
| New Member Profile                 | 5 |

### *Artists Resale Royalty Scheme*

The AVAA has received the following information from Copyright Agency Ltd (CAL) regarding the Artists Resale Royalty Scheme:

*The government has engaged Copyright Agency Ltd (CAL) to manage the artists' resale royalty scheme. The scheme will provide artists with a 5% royalty on certain commercial resales of \$1,000 or more that occur after 8 June 2010. The royalty will apply to existing as well as new works, but will not apply to the first change of ownership after 8 June, even if that is a resale.*

*From 9 June, sellers, buyers and art market professionals (such as auction houses, commercial galleries and art dealers) will need to provide information to CAL about all commercial resales, including those that do not generate a royalty. CAL is developing a resale royalty website ([www.resaleroyalty.org.au](http://www.resaleroyalty.org.au)) for launch before 9 June. The website will include facilities to provide information about resales using online forms and/or by uploading files such as spreadsheets.*

Contact CAL directly for more information.



# *A Legal Perspective on Disclaimers*

By Kevin Gibbons, Indemnity Legal Pty Limited

Based on an address to members of the Surveying and Spatial Sciences Institute 25 March 2010  
Part of Indemnity Corporation

A disclaimer of legal force and effect is a set of words usually found in a document issued to a customer or client, the intention of which is to limit the liability of one party to a contract arising from their performance of the subject matter of the contract.

Disclaimers are to be contrasted with words which are intended to:

1. warn;
2. explain; or
3. qualify,

something which, but for the warning, explanation or qualification, the recipient of the document may otherwise infer from the document or plan.

Even though warnings, explanations and qualifications are not disclaimers, their existence may have the effect of limiting liability but not in the way a disclaimer operates.

Warnings can also exist in a non-contractual environment. Warnings can sometimes be pictorial. Locations of pictorial warnings are swimming pools, waterways, bridges and public parks.

Warnings, explanations or qualifications are intended to affect the behaviour of another person. In the case of such things in documents or plans, they are intended to discourage casual or complacent reliance on what appears in the document or plan.

Warnings, explanations or qualifications while being different in purpose to a disclaimer, can be legally effective in relation to people, not clients, who come into possession of someone's written work and use it as if they are the client.

A document or plan can use both disclaimers and warnings/explanations/qualifications. It is not an either/or situation.

Disclaimers applicable to surveying documents are not intended to alter the conduct of another party in relation to the content of the underlying document or plan.

Understanding the difference between disclaimers and warnings/explanations/qualifications is important in one's attempt to maximise the effect from using disclaimers in the one hand and warnings/explanations/qualifications on the other.

However, for a disclaimer to have an effective contractual purpose, it first must come to be incorporated into the contract.

Therefore, the timing of the negotiation of a disclaimer is critically important.

On the other hand, a warning/explanation/qualification may arise after the terms of the contract have been agreed. They may come into existence at the time of performance when one is creating the document or plan which is the underlying purpose of the contract.

Accordingly, a disclaimer must be negotiated at the start of the arrangement and in truth is part of the retainer itself.

If a disclaimer is not incorporated into the contract, a court will be most unlikely to permit a disclaimer to be relied upon at a later time on the simple basis that its content was not part of the contract which was agreed.

If a disclaimer is not part of the contract, then it will instantly lose its effect and force.

Even if the words of a disclaimer are properly incorporated into a contract, it does not follow that they will be interpreted or applied in the manner intended by the party who would benefit from their terms.

The reasons why disclaimers are sometimes ineffective include the following:

1. some statutes do not permit disclaimers to operate to limit their operation;
2. some statutes do not permit documents to which they apply to contain any words which are extraneous to or additional to the statutory words;
3. the meaning of the words in the disclaimer do not have the intended effect because:
  - (a) the words are too vague;
  - (b) the words based on their ordinary meaning have a narrower meaning than was expected;
  - (c) the words do not cover the type of loss which has occurred;
  - (d) the words do not cover the type of liability which has occurred. Courts will never permit a disclaimer expressed to disclaim liability for breach of contract to excuse liability or negligence. To exclude liability for negligence the Courts insist that those words be inserted in the disclaimer;
  - (e) the words give rise to ambiguity of meaning which reduces their intended effect.

Because disclaimers are intended to curtail rights which but for the disclaimer would otherwise exist, the courts have imposed enormous practical hurdles for authors of disclaimer clauses.

The courts are guided by overarching principles which are antagonistic to interpreting disclaimer clauses in a manner which squashes another person's legal rights.

Accordingly, the effective drafting of a disclaimer clause is not something which can be accomplished accidentally or casually. The drafting of an effective disclaimer clause involves the same degree of care as the drafting of the retainer itself.

However, just because effective disclaimers are hard to draft it is no reason for assuming that when one is confronted with one, the recipient should assume it will be found to be ineffective.

Many disclaimers are found to be effective and many people drafting disclaimer clauses have unlocked the key to using effective words. But, as is indicated above, getting the words right is not the total secret.

Professional people, however, are often cautious about the extensive use of disclaimers for a variety of reasons:

1. it seems unprofessional;
2. it seeks to disclaim liability for services as a professional;
3. it may be bad for business;
4. professionals usually carry PI insurance for error in the discharge of their professional duties.

The overall lesson being that unless there is a real and fair purpose for negotiating the incorporation of a disclaimer, the better way to proceed is to:

1. be forceful and direct in describing the retainer;
2. be descriptive in what the retainer includes by way of performance and what it does not include;
3. ensure that the other party understands the scope and ambit of the actual services to be provided. The better way to compel that understanding is to have things recorded in writing;
4. incorporate into documents and plans words which reinforce scope, ambit and purpose of things underlying the retainer. Those words may be warnings, descriptions and qualifications but are not expressed to be what the law would recognise as a disclaimer.

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# Annual General Meeting Results

The AGM was held in Sydney on 28.5.10. An election was held for 4 positions of Directors of the AVAA. The positions of President, Vice-President and Treasurer were not contested and no election was held for their positions.

Nominations for the position of Directors in order of the draw for ballot were as follows:

Geoff Eaton  
James Bruce  
Richard Cameron  
Ashley Grant  
Amanda Addams  
David Harvey

The current Board of Directors is:

|                    |                |
|--------------------|----------------|
| Phillip Thomas     | President      |
| Bradley Ballantine | Vice President |
| Andrew Nock        | Treasurer      |
| James Bruce        | Director       |
| Richard Cameron    | Director       |
| Geoff Eaton        | Director       |
| David Harvey       | Director       |

We thank Amanda Addams and Ashley Grant for their interest in the positions.



## New Member Profile



### **Christian Vickers**

Christian has been working in his family business Vickers and Hoard since his parents started in 2003. He has been associated with Antiques and Auctions all his life, although he fought against pursuing a career in the Auction industry as he had other plans for his own future.

After leaving school in Year 11, he has worked permanently for Vickers and Hoard. He has worked from the ground up as Colin and Colleen wanted him to realize that because he was their son, there was no special treatment. After the unforeseeable circumstances his father had faced in 2008, Christian decided it was time to follow in his father's footsteps. At the mere age of 19,

Christian conducted his first joint Auction in November 2009, and since then has taken the role as Vickers & Hoads practicing Auctioneer. Even though Christian is still young and has a lot to learn, he is able to conduct Auctions of 800+ lots in one day.

In the near future Christian hopes to apply for his certified practicing Valuer certificate.

Christian can be contacted on 02 9663 2889, Mobile 0402 017 124  
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All enquiries and submissions should be directed to The National Secretary at [aucval@atu.com.au](mailto:aucval@atu.com.au).

