Chapter 7. Art Auction Practices and Innovations

Robert Bleakley said in 1993 that ‘The role of the auction house is to create the situation where everyone is offered the chance to set a price. The auctioneer is adjudicator. He’s there for the buyer and seller’.[1] The auction house acting as buyer, vendor, dealer, even curator — an all-encompassing agent — has been attributed to initiatives by Peter Wilson three decades ago.

Christie's and Sotheby's introduced numerous innovations or modifications in the local marketplace which reflect, to some degree, the institutional *personae* of the two firms. These innovations included buying-in, bidding numbers and referrals, reserve and estimate setting procedures, setting the rhythm of the sale, a five-year guarantee of authenticity, and commissions, such as the buyer’s premium. The international firms also made a substantial revision to accepted standards for art auction catalogues and placed greater emphasis on educating their clients. Sotheby's prioritized marketing and added a veneer of glamour to auctions through the introduction of a black-tie dress code. These initiatives resulted in the greater sophistication of standard auction practices and the marketplace as a whole.

Over the past decade, some auction houses — in Australia and internationally — have once more ventured into selling contemporary art. Many believe that only well established artists can successfully compete in the auction arena and that contemporary artists with little exposure can have their careers irrevocably damaged by poor public sales. Furthermore, auction houses have traditionally not developed sustainable reputations for artists as art dealers do. However, Stuart Purves, then President of the Australian Commercial Galleries Association and National Director of Australian Galleries, noted in 2002 that ‘The immensely high profile the auction houses have given Australian art has done more than the galleries could do on their own in 100 years. They are responsible for tripling prices and bringing them up to the reality that enables new, living artists to make a living’.[2]

Sotheby's was the first major art auction house in Australia to attempt to create a market for contemporary art at auction, holding specialized contemporary art auctions in the early-mid 1990s, mainly as a result of the economic recession. Its mixed-vendor stand-alone contemporary art sales were not particularly profitable and were discontinued in the mid-1990s, as works by modern artists were preferred by collectors and were still reasonably affordable in this period. Christie's had usually included contemporary art at the beginning of its general paintings sales and established a contemporary art department in 2000 to hold stand-alone contemporary art auctions, mostly focussing on works by artists who had already achieved a certain level of recognition. Art auction houses will continue to respond to changing circumstances and collecting tastes, while also influencing or creating new markets.

This chapter does not, therefore, attempt to provide a complete and current picture of all auction practices, but an overview and background to some of the more common practices; i.e. where they started and why, if known. Many questionable or unethical practices and forms of art crime are mentioned only briefly, because they warrant detailed and concentrated investigation in their own right. This is particularly so for art fraud as the establishment of Australia's first course in art authentication at Melbourne University Private in 2005 is testament to the growing concern about counterfeit works, purportedly by artists who have recently died or whose prices are increasing, including Aboriginal and Torres Strait Islander artists.

Buying-in

In the early 1970s, Christie's was fairly open about methods it used to ensure that sales achieved good results. The company had developed, through its network and access to expert advice, means to lessen the chances of bargains or 'sleepers' appearing. Imaginary bidders might be also used to assist a work to reach its reserve. This practice was known as bidding 'off the wall' or 'puffing the bid' and resulted in works being 'bought-in' or withdrawn discreetly if their reserves were not reached. John Henshaw maintained that the practice of buying-in was employed by both Christie's and Sotheby's during the late 1960s and early 1970s. According to Henshaw, buying-in maintained realistic market values for works and avoided the bad press associated with a work publicly failing to sell.[3] Christie's claimed that it did not, however, give permission for the vendor of a work to bid it up at auction and denied running up bids after the reserve had been reached. A concerned buyer was entitled to be given, upon application, the name of their underbidder to ensure that they were not bidding against a fake buyer.[4] This was referred to in the popular press in October 1974 as Christie's 'buying-in charade', as the practice had the effect of creating uncertainty as to whether works had actually sold.[5]

Indeed, from the prices supplied in *Christie's Australian Art Sales Index 1969–1974*, bought-in works were indistinguishable from works which really did sell. Edward D. Craig, compiler of *Australian Art Auction Records*, noted in his first edition in 1973 that the practice of buying-in a work when the reserve was not reached was common. The bought-in work was included in the published price list as a true sale price. However, Craig believed that as the bought-in price 'is usually only one bid above the last genuine offer, it does constitute a fair indication of the value of the particular work'.[6]

Fake buyers' names were most notably used by Spowers, who was inventive in his choice of names when he introduced this practice to the Australian salerooms in the late 1960s/early 1970s. In those days, the auctioneer was expected to know who the major buyers were and a successful bidder would announce his/her name. This was the precursor of the registration/paddle system at auctions, where fake bidding numbers were often employed. Bidding numbers were introduced because of a growing desire for anonymity.[7]

Sotheby's employed the registration (paddle/numbered) system from its foundation in Australia for 'accuracy' and 'clarity'.[8] Telephone and commission bidding were also employed from the beginning and were used extensively by bidders. The international firms were convinced to stop buying-in, partly from pressure brought to bear by lobby groups in New York. They began to declare a work was unsold by calling out 'thank you', without mentioning a bidding number. In 1991, legislation was introduced in New York making it obligatory to declare whether a lot was indeed unsold at the time of the auction. It was not until April 1998 that Christie's and Sotheby's main offices in both London and New York made it compulsory for their auctioneers to state at the time of sale if a lot went unsold. The practice of buying-in was thus outlawed.

Setting the Rhythm

Sotheby's, like other auction houses, has consistently paid attention to the minutiae of the mechanics of art auctions. It has also devoted much time to organizing the structure and order of the sale to maximize the possibility of an exceptional outcome by controlling the auction rhythm, thus capitalizing on the psychology of the event.

Lots are arranged so that some items are placed in key positions where they will create peaks of bidding excitement, leading to escalating prices. The structure of the sale — the orchestration of 'crescendos' — is principally responsible for an auction's success or failure.[9] Before each auction conducted by Bleakley, for example, he would sketch a floor plan from the rostrum in order to gauge where most of the bids were likely to come from, allowing him to concentrate on certain areas of the saleroom and encourage reticent bidders.

Referrals, Reserves and Estimates

The system of 'referrals', whereby the auctioneer states that he will consult the vendor when the reserve has not been met to ascertain whether he/she is willing to sell, has been utilized extensively by Sotheby's Australia. Christie's, on the other hand:

> Tends to adopt the more gentlemanly posture of suggesting that the unsuccessful bidder visit the auctioneer afterwards to 'see what can be done'. At all the multinational auctions, a price called above the lower

> estimate should mean the lot has found a buyer as the auctioneer insists reserves are set below the lower estimate.[10]

This is indicative of, firstly, the differing styles of Christie's and Sotheby's, and secondly the fact that in the past reserves were not always set below or equal to the low estimate.

In 1976, although art auctions were a popular means of buying and selling art in Australia, buyers were becoming disenchanted with 'referrals'. Since late 1974 auction costs had risen while turnover had declined, effectively inhibiting the auctioneers' ability to haggle with the vendor prior to sale on reserves. Auction houses were also charging buying-in fees — 'commissions on works which do not meet reserve and go unsold' — and catalogue fees.[11] Christie's started charging the buying-in fee in its Australian office and Associated Auctioneers began to charge buyers a one per cent handling fee.

Christie's difficulties with setting reserves and estimates were considered in the mid-1970s to be owing to the fact that it only held two paintings auctions each year, meaning that paintings for sale would be gathered up to six months prior to a sale. This long lead-time made it extremely difficult when estimating market value, as market and economic fluctuations could have a deleterious effect by the time of the auction, and related to Christie's printing the catalogues in London.

Christie's introduced the practice of printing estimates in catalogues in 1983. Estimates, a key factor in art auction practices, were originally in the hands of staff and potential buyers were required to ask for the estimate on the lots that interested them, thus enabling 'the auctioneers to get a rough indication of the sort of interest that would be generated in the work by the number of inquiries'.[12] Access to auction estimates evolved from the mid 1970s to the early 1980s from asking staff to view estimates; to looking at printed estimates pinned on the wall; to their being made available at auction viewings (a practice similar to that used by art dealers); to finding them included in the rear of the catalogue (from the late 1970s); and finally, to reading them alongside each lot in the catalogue in 1983. Once Christie's introduced publicly available estimates, the clientele began to demand this initiative of other auction houses. It represented a huge change in the collective psyche of the art market, making the public increasingly educated about market values and practices and demanding certain inclusions or standards.

In the early 1970s, there was a perception that Christie's reserve prices were unrealistic and generated by the desire to attract quality works to its sales in order to boost the firm's prestige. Henshaw claimed that 'the greatest difficulty is getting a realistic reserve in relation to the market – and unless it is realistic it just doesn't sell'.[13] Christie's also said that it insisted on vendors putting up ‘realistic’ reserves so that the works would sell and that it was placing greater emphasis on accepting only quality lots for sale.[14] Generally, buyers would accept paying the true market value for works at auction, having some idea of what that value might be. This held especially true for art dealers. Astronomically high prices were the exception rather than the rule and usually the result of a couple of bidders desperately wanting the work and willing to acquire it at any cost.

Sotheby's introduced printed estimates in its art auction catalogues internationally in 1986. Bleakley said that Sotheby's differed from other auction houses in Australia in that it did not permit the reserve prices to be above the low estimates, aiming for its estimates to be 20 to 30 per cent lower than what it believed to be the market value.[15] This ensured that it acted ‘ethically’ and could ‘establish market credibility’.[16] Many dealers and collectors had found that, although their bids had exceeded the low estimate, they still could not purchase the work because it had not reached the reserve. This was naturally a point of contention and resulted in a bad reputation for auction houses. Some reports have suggested that Sotheby’s purposely gave works low estimates so that the sale prices would far exceed the estimates.[17] Sotheby's reserve policy worked as a positive marketing mechanism, increasing confidence in the professional standards of the new firm.

Art Auction Catalogues

The cachet of being included in a professional publication increases the monetary value of the work. Nonetheless, Christie's catalogues were becoming more anonymous, with many vendors concerned about the possible tax implications of publicly announcing that they were selling or buying art.[18] Only one vendor’s name was included in Christie's October 1975 catalogue, that of James O. Fairfax, a desirable provenance.

Justin Miller, then Managing Director of Sotheby's Australia, said in the mid-1990s that the art auction catalogue is ‘the most important marketing tool we have’.[19] An auction house, like Sotheby's, utilizes the quality and distribution of its catalogues to lure prospective clients, stressing not only the pedagogic nature of the presentation, but also the academic qualifications of its staff. Auction houses project an ‘atmosphere of reliability’.[20] Their catalogues are thus presented as — and can be — reliable sources of information; they ‘possess an aura of authority’ through their very packaging.[21]

Roger Dedman confirmed that ‘One conclusion worth repeating is the unquestionable value of an illustration in a catalogue’.[22] One can ascertain whether a work that seems to be appearing repeatedly at auction is indeed the same work and whether it is possibly the victim of ‘ramping’ — where prices are artificially boosted at auction by those who have a vested interest in increasing the value of an artist's works — or warehousing — where works are purchased with a view to storing them until they are resold for a profit. Even more significant is the fact that an illustrated work invariably demonstrates a substantial increase in sales price over an unillustrated one. Moreover, a work illustrated in a catalogue can claim a desirable provenance. The majority of lots are now illustrated in colour, accompanied by a detailed description, provenance, exhibition history, bibliographic references and estimates.

In the early years of Sotheby's Australia, the firm projected images of lots as they were sold onto a large screen next to the rostrum. This worked well and permitted everyone in the saleroom to see each lot clearly. The advent of new technologies and the decrease of printing costs which enabled auction catalogues to be more lavishly illustrated, revolutionized the Australian art auction market, enabling catalogues to be taken to a new level of professionalism, thus transmogrifying what had become a practical tool — a checklist — into an opulent vehicle for self-promotion. According to Cochrane, 'The art of cataloguing is a relatively recent development, mirroring the surge in painting values'.[23] Moreover, art auction catalogues are so well-illustrated that people do not have to attend viewings of the works or even the auction itself, relying on commission or telephone bidding. This is more labour-intensive and expensive for auction houses.

Although provenance is often included in auction catalogues in order to imbue the work with integrity and historical merit, there are occasions when an auction house may choose not to publicize the origin of a lot. It may be owing to the vendor's desire for anonymity; a lack of time in which to conduct research; because the auction house does not wish to advertise the source of stock; or perhaps because the work had a past best forgotten.[24] When works are described as belonging to a 'Private Collection' — a useful and all-embracing expression — it could in fact mean that it belonged to a dealer. Very recent provenances may be deliberately overlooked, as selling soon after purchasing does not enhance the saleability of a work, especially if it has recently sold for a sum considerably less than the current asking price. However, if the work sold on a previous occasion for a breathtaking amount, accompanied by fanfare, the auction house can capitalize on this in the hope of attracting a similarly spectacular bid.

Since Sotheby's arrival in Australia, art auction catalogues have placed less emphasis on a small selection of quality lots and a greater emphasis on quantity, owing to the need for a high turnover. Reitlinger prophesied in 1970 that 'As the good things vanish, sales get skimpier and catalogues bigger and more luxuriously illustrated. Non-art, the collector's substitute and second line of defence, is promoted with greater and greater assiduity. Everything portends the day when all that has been collected must become institutionalised.'[25]

In the late 1980s, at the height of the art boom, the number of lots on offer at auction ballooned from 100 to 200, to almost 600, including a number of lesser works. Sotheby's first catalogue from March 1983 contained only 54 paintings, with the Cook portrait as the highlight. Chris Deutscher, when he was still an art dealer, commented that auction houses, such as Sotheby's, should concentrate on quality rather than on high turnover and that 'Sotheby's should not be promoting the market but letting it find its own level'.[26] However, his opinion presumably changed once he was an auction house principal, as Deutscher-Menzies' catalogues often contained a couple of hundred lots, with the Australian + International Fine Art Sale in March 2006, for example, containing 325 lots.

In the 1990s, the multinational firms placed more weight on attracting expert staff to improve the quality of their research and catalogues. Jane Clark joined Sotheby's in April 1994 as Director of Paintings in Melbourne, leaving her twelve-year position as Curator of Australian Painting at the National Gallery of Victoria and taking with her a reputation for high academic ability. Patricia R. McDonald (no relation to Patricia McDonald, formerly of Christie's), was the research coordinator of the Arthur Boyd retrospective which toured Australia in 1994, and joined Sotheby's at the same time as Clark. McDonald was appointed to the position of Manager of Sotheby's paintings department in Sydney.

Bleakley commented at the time that 'The curatorial experience of both Jane and Patricia will bring new dimensions to fine art auctioneering in Australia'.[27] These appointments were part of a strategic plan to transform Sotheby's auction catalogues into something comparable to exhibition catalogues produced by major public institutions, in quality of research and presentation (although it should be noted that the depth of research completed is restricted by more stringent timeframes than in public galleries).

Since Christie's was established in Australia in 1969, business affiliations, commercial prowess and celebrity status have grown in importance. This is reflected in the appointment of 'opinion formers' as auction house staff.[28] Directors, too, were initially recognized experts in their arts-related field and intimately involved in the art market. Looking at Christie's catalogues from the 1960s onwards, one can see the augmentation of the list of Directors from three in 1969 to nine (including Associate Directors) at the time of the last auction in 2006, with an Advisory Board of eight. Over time, as each department of an auction house, such as Christie's, 'expanded and divided and specialized, you had a proliferation of directors'.[29] However, directors today are often engaged for their business kudos or social standing; prestige has become of paramount importance.

Art Education

The advent of publicly available art auction records, as well as serious attention given to art auctions by journals and the wider press, had repercussions for the market as a whole, not least the ability of the collector to do his/her own research. *Australian Art Auction Records* was, as noted, first published from 1973 and Christie's published its own art index from about 1974, covering sales held by Christie's and Sotheby's in Australia, as well as sales of Australian art in London. Before the readily available records it was much easier for people — dealers or collectors — to buy at auction, perhaps interstate, and sell again within a short timeframe in order to make a quick profit. Art auction records provided objective information, including whether works were passed-in. Although the transparency of the auction system is extremely important, there is no denying that any work which has been passed-in publicly is stigmatized to some extent.

The *Australian Financial Review* began a regular saleroom column on 4 July 1969, with Terry Ingram as its saleroom correspondent providing a consistent voice for almost four decades. The saleroom column began after Christie's and Sotheby's established a presence in Australia, implying that the finance newspaper did not take art auctions seriously when they were being conducted by local firms, but an increasing awareness of the investment potential of art and the interest of international firms turned art auctions into a more important and newsworthy enterprise. Geoff Maslen and Michael Reid have also made a substantial contribution to art market analysis in more recent years, with Maslen writing for *The Age* in Melbourne and latterly for the *Sydney Morning Herald,* and Reid the art market analyst for *The Australian*. The art market has also been assimilated into art history and curatorship, with most art journals today including regular reports on art auctions. *Australian Art Collector*, a specialised art magazine which has been providing coverage of the Australian art market since it was first published in 1997, exists in response to a market which has been substantially created by the auction houses.

By the 1960s, state galleries were increasingly interested in education and scholarship and talented young art curators like Bernard Smith, Ursula Hoff and Daniel Thomas were employed. Educating collectors about art has also been on the agenda of auction houses. Robert Lacey maintains that the forerunner of Sotheby's Works of Art Course, later known as Sotheby's Education, was conducted in 1969 and the actual course began in the early 1970s. He refers to it as 'the world's most prestigious finishing school'.[30] In the late 1990s, the major auction houses, Christie's, Lawson's, Phillips and Sotheby's, offered educational courses in order to expand and educate their client base, developing 'market awareness' and 'brand loyalty'.[31]

From 1990, Sotheby's introduced art history courses run by Lloyd Pollak, first in Melbourne, then Sydney and based on those taught in London. Sotheby's ran a full-time education course focusing on antiques with designated full-time staff from around 1990-93. McIlroy also introduced art education courses at Christie's and these courses have been renowned for their calibre. McIlroy discovered that, although there were more people buying at Christie's in the 1990s, they were not knowledgeable. People who completed Christie's art education courses would not only be more aware of works and artists in the comparatively narrow domain of the art market, but would also effectively be 'walking ambassadors for Christie's'.[32] Christie's Education, established in 1978, provides courses in art history, connoisseurship and the art market, offering degrees at University College in London and the University of Glasgow. Sotheby's Institute of Art in London, New York and Singapore also offers courses, degrees and various public programmes in art history, the business of art and connoisseurship.

Guarantees of Authenticity

In the early 1970s, most Australian art auction houses still offered little, if any, guarantee that the works they were selling were indeed executed by the professed artist or offered any recourse if found to be otherwise. Christie's and Sotheby's introduced guarantees that if works were proved to be forgeries they could be returned. Dealers had offered a similar money-back guarantee for some time. However, these guarantees differed in that they placed a time limit on returns. Sotheby Parke Bernet had first introduced a three-week guarantee in 1962 for its *Impressionist and Modern* and *Modern British* sales, in order to persuade private buyers to purchase art at auction themselves, rather than relying on art professionals.[33] The firm introduced the five-year guarantee of authenticity in September 1973.

In Australia, Sotheby's provided a guarantee of authenticity from its first auction in 1983. Although Sotheby's guaranteed the authorship of a work for five years from the date of the purchase, the provenance and exhibition history were not guaranteed, merely included to supplement the catalogue entry.[34] Although Christie's included a three-week guarantee (against 'deliberate forgery') in its auction in 1969, according to Bleakley Sotheby's generally 'made it very apparent that…[it] guaranteed authenticity'.[35]

Geoff K. Gray and Christie's, the latter under orders from its London headquarters, offered to rescind a sale and refund the money within twenty-one days of the sale if the work was found to be a forgery. Leonard Joel, Lawson's and Hamilton & Miller all refused to provide any refunds or guarantees of authenticity except in the most extraordinary of cases. Relatively few fakes and forgeries existed in the 1970s' Australian art market. In the absence of guarantees of authenticity, cheated buyers could rely on the threat of negative publicity to obtain a refund or they could take the vendor to court.

With the possible exception of Aboriginal art (the authorship of which is a sometimes complex issue), fakes and forgeries are thought to be less problematic now than in the past (for example the 1980s), owing to expert staff and consultants, a more aware and educated buying public, and the standard set by the multinationals of accepting culpability for incorrect attributions and a money-back guarantee. According to Ingram, 'The fantastic success of auctions as a medium for selling and marketing fine art was cited as the factor making the introduction of the guarantee possible'.[36] The auction houses were not only willing to claim that they were professional organizations, but to act in a professional manner.

Commissions/Buyer's Premium

In 1972 Christie's generally charged 15 per cent commissions. These paid for any catalogues printed or publicity and associated costs. Catalogue illustrations were usually paid for by the vendor. The commission could be negotiable, depending on the volume offered (a large estate for example), and out of that 15 per cent, 3 per cent might be given to a dealer who introduced a client who then made a purchase at auction. This implies that Christie's, at least initially, was working in tandem with the local art dealers, relying on their goodwill to attract clientèle.

For a substantial period of time, charging a buyer's premium had been illegal in New South Wales, but permitted in Victoria, accounting for both international houses conducting most of their auctions in Melbourne. The relevant New South Wales legislation, clause 30 in schedule 22 of the *Auctioneers and Agents Act 1941*, made it illegal for licensed auctioneers to obtain commissions from any party other than the vendor. This was to ensure that the auctioneer always acted in the best interests of the client (the vendor). Charging both buyer and vendor a commission would mean that the auctioneer would be acting on behalf of two principals.

Although Christie's also wanted the laws repealed, it was Bleakley at Sotheby's who was instrumental in having the New South Wales legislation amended, petitioning the Government for around nine years to enact changes allowing them to charge a buyer's premium and hence increase the number of auctions in Sydney. Other advocates for repealing the regulation included the Auctioneers and Valuers Association of Australia, also arguing that Sydney was disadvantaged because auction houses could not charge a premium and hence refrained from holding sales there.

As part of his campaign, Bleakley argued that buyer's premiums had been charged at art auctions in both London and New York since 1975 and in Melbourne from 1983, when Sotheby's held its inaugural Australian auction.[37] The ancient Roman buyer's premium, described in Chapter One, was reinvented in 1975 by both Sotheby's and Christie's in the same week. Allegations of collusion were made and then dropped, at the end of 1981, owing to costs.

Brian Learmount believes that the reinvention of the buyer's premium changed the complexion of international auctioneering.[38] It enabled Sotheby's and Christie's to lure vendors with their attractive rates and this resulted in the expansion and pre-eminence of the two auction houses. Ingram claimed that the introduction of the buyer's premium in Australia 'reflected the difficulties in obtaining consignments' when Sotheby's was first founded in late 1982.[39] Sotheby's claimed that it simply was not viable to conduct art auctions in Sydney unless it could charge a buyer's premium.[40]

The *Auctioneers and Agents Act 1941* was finally amended, allowing the auction houses to levy a buyer's premium in New South Wales from 1 March 1993. The Act became the *Properties, Stock and Business Agents Act* and was backdated to 1941. Ted Craig from Australian Art Auctions was the first of the Sydney auctioneers to charge a buyer's premium on 8 March 1993, with Goodmans and Lawson's following suit. What amounted to a deregulation of the Australian market was considered by some to have a positive effect on the trade, not only of the large international firms, but of the small, local ones.[41] Others could argue that a deregulated market enables auction houses, such as Sotheby's and Christie's, to operate unchecked.

The initial buyer's premium was 10 per cent and enabled the vendor's commission to be lowered in Melbourne to 10 per cent, as it was offset by the premium. Vendors in Sydney were generally charged a commission of 17.5 per cent. The net profit for Sotheby's (and most auction houses) is very slim, therefore it is essential for them to attract quality works for sale in order to increase their turnover. This is why they are willing to negotiate on vendors' commissions, choosing sometimes to rely on the buyer's premium. The buyer's premium was primarily responsible for Melbourne first becoming the centre of Australia's art auctions. According to Sotheby's Justin Miller, a side-effect of the buyer's premium is that it essentially buys a guarantee of authenticity for five years.[42]

From 1993, shortly after the introduction of the buyer's premium to the Sydney market, Sotheby's planned to increase it from 10 to 15 per cent, based on a head office directive and following a global rise. Dealers claimed that an increase would be disastrous, as it had taken a long time for clients to adjust to paying a commission at all.[43] Despite many of Christie's offices in other countries increasing their premium to 15 per cent, Christie's Australia was given an exemption so that it could gain ground on its international rival, Sotheby's. In response to Christie's refusing to increase the premium, Sotheby's was also granted an exemption from its reporting superiors. However, Sotheby's was forced to increase the buyer's premium on the first $50,000 to 15 per cent with

10 per cent thereafter in November 1993 because business had not been particularly profitable.

At the same time, Sotheby's continued to pursue the retail market by 'wooing' the private buyers, worrying dealers.[44] This having been said, dealers would not wish art auction sales to be unsuccessful, as the public failure of art sales 'would reflect on their own market' and they obtained much stock from auctions.[45] Owing to their public nature, and aggressive marketing campaigns, Sotheby's, and to a lesser extent Christie's, had increased confidence in their ability to source and sell major pieces of art and attract new and major clients, while diminishing confidence in the ability of dealers to do so. By March/April 2006, Christie's buyer's premium in Australia had jumped to 19.5 per cent on the first $200,000 with 12 per cent on the amount above $200,000. Sotheby's and Deutscher-Menzies both charged 20 per cent. GST is payable in addition to this.

The Bath of Diana Sale

The buyer's premium has facilitated auction houses offering competitive vendor's commissions, in conjunction with beguiling estimates, thus attracting valuable, high profile stock. This was the case in Melbourne in 1989, when Leonard Joel and Sotheby's competed for the honour — and commission — of auctioning John Glover's *The bath of Diana, Van Diemen's Land* (1837). Sotheby's was the successful contender, with the Glover attaining $1.76 million at its 17 April 1989 sale, demonstrating the quite phenomenal increase of 300 per cent in just four years. It was rumoured that Bleakley won the right to auction the work after offering a low vendor's commission and estimating that it would achieve more than $1.5 million at auction.[46]

However, both the work and its auction at Sotheby's were steeped in controversy. *The bath of Diana* had been purchased by David Waterhouse, of the horse racing dynasty, from Sir Andrew Grimwade in 1985 for $580,000 and Waterhouse had loaned it to the Art Gallery of Western Australia from 1986. The Art Gallery of Western Australia had been interested in acquiring the work permanently after it became apparent that it was not possible for Waterhouse to obtain any tax benefits from donating the work.

An American, Christopher Condon, who was acting on behalf of an unspecified client, placed the winning bid at the 1989 auction. The Australian Government, in an unprecedented decision, banned the export of the work under the *Protection of Movable Cultural Heritage Act 1986* on 4 October 1989. An export permit was again applied for on 11 July 1991 and refused on 4 February 1992. A review of the decision by the Administrative Appeals Tribunal was sought and referred to the Full Federal Court because constitutional concerns were raised.

The purpose of the Act is to protect movable objects of cultural significance and to 'see that those objects the export of which would constitute an irreparable loss to our cultural heritage remain in Australia'.[47] The National Heritage Control List separates 'cultural heritage' into either Class A (Indigenous heritage) or Class B (including objects of fine art and objects of social history). Under Section 8, Class B objects are assessed on a case-by-case basis against criteria such as age, rarity, quality and monetary value.[48] Class B objects, of which the Glover was one, could only be exported if a permit or certificate were awarded.

Condon had apparently said after the sale that his purchase of the painting depended on the granting of an export permit; however, Bleakley said that the sale was unconditional and that Sotheby's would take legal action to obtain the funds.[49] Condon was unknown to the Australian art auction world and had not consulted with Sotheby's regarding the conditions of sale prior to placing the successful bid.

Condon refused to pay for the painting, denying Sotheby's its $160,000 commission. The auction house retained the work and did take legal action resulting in Sotheby's agreeing to release *The bath of Diana* only after Waterhouse consigned Arthur Streeton's *Bathers, Killarney* to its April 1991 auction. Waterhouse eventually sold his Glover to the National Gallery of Australia in October 1993 for a mere $780,000. The art auction record set by the sale of this work was thus dwarfed by events surrounding the auction. Almost certainly as a result of this affair, Sotheby's amended its conditions of business so that a buyer would receive a refund if an export permit were declined.

This case also raised questions about how committed the Government really was to making such objects accessible to the Australian public. The National Cultural Heritage Fund did not have any funds at its disposal to provide assistance (perhaps to cultural institutions) to purchase culturally-significant items that had been denied an export permit. In *Waterhouse v Minister for the Arts and Territories* 119 ALR 89, 1993, Waterhouse argued that refusing to grant an export permit for *The bath of Diana* constituted an acquisition of property under the Constitution (Section 51 xxxi). The Court disagreed.[50]

The painting is undoubtedly significant. It is atypical of Glover's *oeuvre* because it depicted the Tasmanian landscape and Indigenous Australians within the context of classical mythology. Previous works by the artist were usually landscapes, populated by the occasional kangaroo or solitary traveller. The painting makes reference to the ancient Roman myth of Diana who, observed bathing by Actaeon, transformed him into a stag who was then devoured by his own hunting dogs. It depicts an idealised scene imbued with symbolism of the Fall and the descent into violence from an idyllic life which eventuated from colonization by European settlers.

The bath of Diana had first been purchased by Henry Bridges in Melbourne in 1869. He loaned it to the important *Art and Art Treasures Exhibition* that same year at the Melbourne Public Library and Museum. By 1991 the Tasmanian Aboriginal Centre thought that the painting was so significant it asked the Australian Government to buy it when it became available once more. The ensuing legal story of *The bath of Diana* is fascinating and raises a number of issues about the roles of individuals and organisations in the custodianship of culturally-significant objects. It is fortunate that in this case the public was the eventual beneficiary with the work at the nation's major art gallery (Figure 13).

Marketing and Glamorizing Art Auctions

Sotheby's was probably the first auction house in Australia to employ a full-time public relations person. Bleakley had been 'convinced of the importance of having a full-time PR person through…[his] time in London'.[51] The Australian media greatly assisted Sotheby's success, as it embraced the arrival of the illustrious firm and was pleased to provide extensive coverage. Bleakley, in turn, embraced the advantages of the media, saying in 1989 that 'We entered the market with the aim of promoting ourselves and our sales in a way that had not previously been done, putting a great deal of emphasis into marketing'.[52]

Sotheby's was fortunate in its timing, as news coverage of art sales had begun to increase in the late 1970s, just prior to the company's arrival in Australia. Rae Price was its first publicist, followed by her protégée, Jan Batten, who later became the publicist at the Art Gallery of New South Wales. Batten was viewed — universally — as being exceptional at her job. She operated on a *quid pro quo* principle and used the media brilliantly to give Sotheby's consistent and glowing press coverage. Batten's personal ability to obtain press coverage of particular works and sales helped to turn the art auction into a celebrity event, as well as increasing public awareness of and confidence in Sotheby's.

Bleakley has always denied that Sotheby's used hype to promote auctions. He maintained that selling paintings for absurdly high prices at auction represented 'distasteful elitism' and compared auctions to lotteries where you had to attempt to 'stack the odds in your favour'.[53] However, he was also quoted as saying that people like to buy at auction because it is 'conspicuous consumption' and that Sotheby's was openly selling 'snobbism'.[54]

Figure 13: John Glover (England 1767-1849 Australia), *The bath of Diana, Van Diemen's Land, 1837*, 1837, oil on canvas, 96.5 x 134.5 cm, National Gallery of Australia, Canberra. Purchased with the assistance of the National Gallery of Australia Foundation 1993.

Sotheby's reinforced its reputation by promoting star artists. Bleakley said in August 1987 that he never planned to hold a sale that would not realise more than $1 million and that this meant ‘concentrating on art stars’, such as Fred Williams, Arthur Boyd, Sidney Nolan and Brett Whiteley.[55] In July 1987, Sotheby’s reputation as Australia’s premier art auction house had been cemented with the $3.85 million sale at Melbourne’s Southern Cross Hotel, attended by around 1000 people. The firm had held eight out of the ten most financially successful Australian art auctions. Sotheby’s Australia had become the most profitable firm in the Sotheby’s group, owing in the main to its potent formula of hype and marketing. Bleakley responded:

> we’ve…gone for an aggressive marketing strategy, and we’ve attempted to develop new buyers and collectors. That’s probably the biggest difference between us and the rest of the group. In Europe and North America, there is such a well-established group of buyers that the main push is getting material to sell, rather than getting people to buy it.[56]

Auction houses have long sought to develop new markets. Bleakley prophesied in 1988 that by 1993 Sotheby's would have grown fivefold and diversified into such fields as publishing and real estate, claiming also that art auctions would comprise only half of its income.[57] In this vein, Sotheby’s began a prestige realty company in 1992, which provides a reasonable proportion of its total revenue. As with its art sales, only the top end of the real estate market (properties over $750,000) has been targeted. The realty company enables Sotheby’s to increase its annual sales figures when art sales are flat; offers clients a more complete service, with the one firm able to sell both house and contents as was common in the colonial era; and provides publicity for Sotheby’s, in this case paid for by the vendors.

The idea of marrying dazzling social events with art has been a consistent historical thread. The *conversazione* held in Australia from the 1850s combining ballad singing, ‘picture-gazing’, conversation and good food, was the precursor of today’s exhibition openings.[58] They were held by fashionable society and received extensive coverage in the newspapers; they were an early and effective marketing technique. The Victorian Artists’ Society in Melbourne, for example, held regular *conversaziones,* ‘artists’ smoke nights’, dinners, and ‘gentlemen’s evenings’.[59]

Sotheby's has always held select previews or viewings before sales and often travelled them to other major cities, such as Perth. Auction previews were invitation-only and became exclusive social occasions, frequented by the *crème* of Australian high society and business; ‘The wives and girlfriends of the entrepreneurs, merchant bankers and corporate lawyers came kitted out in Armani, Ferragamo and Fendi to be photographed against a backdrop of expensive paintings’.[60] The auction attendees also contributed to both Sotheby’s and Australian art making headlines, thus creating the reputations of the auction firm, as well as certain Australian artists.

Bleakley introduced the wearing of black-tie evening clothes at auctions, infusing Australian art auctions with an 'element of panache'.[61] Sotheby's entertained regular and prospective clients on a grand scale and often asked celebrities to introduce auctions. The glamorous environments of new hotels were utilized to stage sales. This use of an appropriate stage setting contributed greatly to creating a certain mystique and flair surrounding the Sotheby's name. The black-tie dress code was discontinued around 1989, when the decade of outrageous wealth and the art boom were drawing to a close, and at the same time the auction venues were moved from the ballrooms of large inner city hotels to on-site or more low-key locations. However, in 1993, dealers were bemoaning the ordinariness of sales, wishing for a return to the glitzy hotel venues.[62] Interestingly, in 1997 national General Manager Paul Sumner commented that 'We have what the new generation wants, but our tradition of aiming for the best, our strength, is also a hindrance. It means too many people are a bit intimidated by us.'[63] Sotheby's thus wanted to demystify art auctions when it became necessary to develop new markets and new collectors.

Buyers at Auction

In the early 1970s, Christie's relied upon a small group of knowledgeable collectors and dealers and it was the firm's intention to build this core collecting group. Around 20 per cent of the bidding audience at Australian art auctions in the early years of Christie's Australian presence were dealers, with the remainder mainly private collectors. In the early years, the large proportion of private collectors bidding at auction meant, among other things, Australian auctions took longer to conduct than their London counterparts because non-professional bidders were more indecisive and less familiar with auction practices. This situation was in contrast to Christie's and Sotheby's auctions in London where, as noted earlier, the majority of buyers were art dealers. By 1987, the proportion of art dealers buying from Sotheby's Australia had jumped to 70 per cent.[64] In 1993, Sotheby's claimed that 80 per cent of its business was from dealers, either buying at auction for themselves or on behalf of clients.[65] This would seem to indicate that the international firms increased their client base by expanding the role of the dealer into that of agent at auction for corporate, institutional and private clients.

As early as 1972 speculation was regaining popularity in the art market; there had been a lull in art investment in the wake of the 1962 Schureck sale. Increasingly sophisticated and educated collectors were more aware of what was happening at an international level and of prices fetched. This new attitude was evident at Christie's three-day paintings auction in Sydney in October 1974, where only 50 per cent of lots sold. Careful consideration was displayed for the first time in about eighteen months, during which time vendors had had over-optimistic notions about the market value of their works; dealers had been making considerable profits by buying and reselling at auction with celerity; and collectors had been swept away on a tide of indiscriminate bidding frenzy.[66]

It would be natural to assume that the local auction houses and dealers would not have been pleased at what they probably saw as a foreign intrusion into their domain. However, contemporary newspaper evidence suggests the opposite, that dealers (at least) initially welcomed the arrival of Christie's and that they worked closely with both Christie's and Sotheby's in the early years.

More recently, many dealers have been quite vocal about feeling besieged. For example, Joan McClelland, the early Christie's representative in Melbourne and now herself a dealer, reflected in 1998:

> I don't like to think I helped set up a monster. It would have happened anyway and you have to say it's a much more animated scene than it used to be. But it has affected all our businesses – anything run on that scale would have to affect us – but I think we have all had to learn to adapt to it, and use the situation to our own advantage when we can.[67]

However, facts would seem to indicate the contrary, that dealers, for the most part, became larger players in the art auction market in Australia only after Christie's arrival. One could draw three conclusions — that auction houses were so successful in sourcing stock that dealers preferred to purchase their stock at auction, rather than directly from collectors, that buying at auction was a profitable and convenient enterprise for dealers, with the possibility of reaping large rewards by on-selling to clients at inflated prices, and that there was an increased demand for their services as agents. Despite evidence indicating that in Christie's early auctions in Australia private collectors dominated the saleroom, the general perception still persisted that collectors were introduced to buying art at auction by Christie's and Sotheby's, thus detracting from the trade that was once the sole realm of the dealer.

The *Mount Wellington and Hobart Town* Sale

The arrival of Christie's and Sotheby's not only affected dealers, artists and existing auction houses, but also had an impact on public institutions. Edmund Capon, Director of the Art Gallery of New South Wales, commented in 1988 that the ruthlessness, competitiveness and presence of Christie's and Sotheby's had forced the prices of many works up to such an extent that public galleries had difficulty in acquiring works.[68]

The highest auction price in 2001 was obtained for John Glover's *Mount Wellington and Hobart Town from Kangaroo Point 1831–3*. It was sold by Christie's on 27 November of that year for $1.76 million (including commissions) against an estimate of $1.5–$2.5 million. The Australian Competition and Consumer Commission (ACCC) began investigating claims of 'price-fixing, bid-rigging and exclusionary boycotts in the Australian art market' after allegations of anti-competitive behaviour were printed on the front page of *The Australian* newspaper on 8 December 2001.[69] The allegations concerned the joint sale of the work to the National Gallery of Australia and the Tasmanian Museum and Art Gallery for what was reportedly the painting's reserve price and low estimate of $1.5 million. Greatest furore was caused by the fact that the institutional partnership had no competition for the painting, despite the significance of the work, with no other bidders on the night (Figure 14).

The Australian alleged that at a meeting of the Australian Art Museum Directors Council in Melbourne on 7 November 2001, followed by a number of telephone calls, it was effectively agreed to fix the price of the Glover painting. Two private collectors who had been interested in acquiring the painting, and who had associations with the National Gallery of Australia, were allegedly persuaded that it was in the public interest that the gallery partnership should acquire the work. The National Gallery of Victoria was apparently similarly convinced to refrain from involvement in the auction.[70] It seems that one of the participants in the Council meeting confided to the newspaper that what occurred resembled a Dutch auction, where 'The gallery directors said "well, I can buy it for this much", and someone comes in at a lower price. Then everyone decided that they'd like Tasmania to have it anyway so (they) pulled back'.[71]

Gallery directors had reportedly signed an agreement during the 1980s not to compete with each other at auction if one party were extremely interested in acquiring a particular work.[72] This arrangement would not only reduce the possibility of public institutions competing with each other and forcing prices up in the process, but would also, to all intents and purposes, place a limitation on the price attainable at auction, unless other interested parties entered the bidding. The art auction system has been manipulated by various forces over the centuries, as we have seen. The Glover affair is a prime example of how the auction process can be manipulated by those other than auction house principals, dealers and artists.

Figure 14: John Glover (England 1767-1849 Australia), *Mount Wellington and Hobart Town from Kangaroo Point 1831-3*, 1834, oil on canvas, 76.2 x 152.4 cm, Tasmanian Museum and Art Gallery, Hobart and National Gallery of Australia, Canberra. Purchased with funds from the Nerissa Johnson Bequest 2001.

The ACCC investigated whether the galleries were employing 'unlawful behaviour' as 'From initial discussions, the Trade Practices Act 1974 appears to apply to the buying and selling of art, including where public galleries owned by government buy or sell.'[73] Anti-competitive behaviour is illegal under the Act, unless prior immunity or exemption was granted. The ACCC further decreed that 'Art markets are as subject to the law as any market. Vendors have the right to get a fair price for their product — in this case art — free from "understandings" between potential bidders.'[74] The art galleries maintain that they are not acting in an illegal manner and are saving the government money, with David Thomas, formerly Director of the Art Gallery of South Australia and later a consultant for Deutscher-Menzies, saying that 'The forming of rings by the trade is illegal, 10 dealers cannot get together, then bid on something and all divvy it up, but when it's public money and it's in the public interest, the expenditure is being wisely controlled.'[75] Many would concur; however, some would possibly argue that anti-competitive behaviour is still unethical, no matter what the reasons and who the offenders.

Such deals between public institutions, although rarely documented, are unlikely to be unusual in the realities of the marketplace. Deutscher, who was probably unaware of the so-called agreement from the 1980s, thought that the practice of public galleries colluding probably resulted from the sale of John Brack's *The Bathroom* (1957) to the National Gallery of Australia in November 1998 at Christie's for $497,500 (estimate $120,000–$150,000).[76] The National Gallery of Australia had been forced to pay a premium price after competing for the work with the Art Gallery of South Australia.

A comparison was also made between the Glover sale and that of John Brack's *Self Portrait* (1955), which the National Gallery of Victoria had acquired for $442,500 (estimate $350,000–$450,000) at Christie's celebrated Mertz auction in June 2000, as no other public institutions placed bids for this work and the only other bidder was a private collector.[77] In order to avoid competing with another gallery, the Art Gallery of New South Wales negotiated with Sotheby's to purchase Grace Cossington Smith's *Centre of a City* (c.1925), which had been on loan to the Gallery since 1996, prior to the Fairfax auction in November 2002. The Gallery purchased the Cossington Smith for the price of $350,000 (including the buyer's premium), against an auction estimate of $250,000–$350,000. It had unsuccessfully bid against the Queensland Art Gallery for Roland Wakelin's *The Bridge Under Construction (In the Botanical Gardens verso)* (1928), which sold at the Sotheby's auction in August 1994 for $160,000, against an estimate of $80,000–$100,000.

Christie's had anticipated that Glover's *Mount Wellington and Hobart Town* would exceed the $2.3 million record price for an Australian painting at auction, which had been set by Frederick McCubbin's *Bush Idyll* (1893) in 1998.[78] It was the perceived failure of the work to make the expected record price that contributed to concern about possible collusions.[79] Nevertheless, it was still the fourth most expensive Australian painting to be sold at auction, as well as a record for the artist himself. The painting had been carefully marketed prior to the sale in the hopes of breaking the record set by McCubbin and was given its own special, glossy, well-illustrated brochure. It was also toured to London, New York, Hobart, Perth and Sydney before being displayed and sold in Melbourne.

Patricia Sabine, then Director of the Tasmanian Museum and Art Gallery, was naturally extremely pleased with the acquisition, saying that not only would it be a key piece in the Museum's collection, but that her Gallery could not possibly have afforded to buy the painting without the assistance of the National Gallery of Australia.[80] It has been suggested that the Tasmanian Museum and Art Gallery had used credit on the expected deaccession of one of its most expensive European paintings, William Adolphe Bouguereau's *Cupid and Psyche* (1899), to assist with finance for the Glover.[81] The sale of the Glover painting also represented a partnership, possibly unprecedented, between two public institutions collaborating to purchase a work jointly. As early as the 1980s, when the directors of major public galleries had reportedly agreed to limit competing with one another, a template was also drawn up for prospective joint purchases.[82] The Glover sale was apparently the first occasion this plan had been successfully used.

Under the *Trade Practices Act 1974*, if found guilty of collusion by the ACCC the galleries could have been fined up to $10 million and individuals involved charged a potential $500,000. On 10 December 2002, a year after it began its investigations, the ACCC announced that although it had completed its current investigation and was not taking any legal action, it did not rule out the possibility of so doing in the future if further evidence surfaced.[83] The ACCC concluded that the *Trade Practices Act* does indeed apply to public institutions when said institutions conduct business; however, the main problem in pursuing the investigation had been 'reticent witnesses' and the fact that, as much discussion had taken place via telephone conversations, it had not been documented.[84]

This case highlights both sides of what has become a major argument about the role of art auctions. That is, have art auction houses been responsible for encouraging prohibitively high prices in their salerooms, placing works out of the reach of individual public institutions? Do the works justify such prices? Who are the victims in such instances? What would a general consensus have been if the agreement had been between private collectors? Furthermore, are the galleries effectively engaging in 'rings' and 'knock-outs'? Vendors might be tempted to retain their treasures, fearful that they would not obtain a fair price, or perhaps convinced to sell privately. What impact does this then have on the public and public access to art?

Both Christie's and Sotheby's have had a marked impact on the Australian art auction market specifically and on the wider art market generally, making a viable and ostentatious alternative to buying from dealers. They have contributed to the greater sophistication and professionalization of the market, most especially with regards to the introduction of new mechanisms for the conduct of auctions and more emphasis placed on exploiting various avenues of marketing. Moreover, Christie's and Sotheby's have substantially and conclusively altered the social status of auctioneers, cementing them within the upper echelons of society.

Don Cornes, a major dealer in the 1980s, said that 'when you couldn't sell a painting Sotheby's created the flagship Australia lacked. It has taken what were regional sales and created a visible, national market.'[85] A writer from 1989 claimed that 'Sotheby's has sourced and flushed out more material than was ever available before and has created the impression that auctions are the only way to buy and sell art' through canny marketing.[86] According to Bruce James, after Sotheby's conducted its first auction in 1983:

> Domestic firms of the longevity and habitualness of Melbourne's Joel's and Sydney's Lawson's were suddenly forced to up the ante on their own auctioneering strategies, and a then-dormant Christie's, which had enjoyed a privileged but desultory presence in Australia since 1969, was thrown a startling antipodean gauntlet by its major international rival.[87]

The response of the major local art auction houses is the subject of the final chapter.

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