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Dear Ms Thomas

ACIP Review of the Designs System: Submission on Options Paper

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Thank you for the opportunity to make a further written submission on behalf of the Federal Chamber of Automotive Industries (FCAI) in respect of the Review of the Designs System (Review), in response to the Options Paper released on 3 December 2014.

As previously indicated, the FCAI represents the interests of over 40 member companies within the Australian automotive industry. This submission follows on from the submission made by the FCAI on 8 November 2013 (**Original Submission**) in response to the Issues Paper released by ACIP.

The FCAI considers that the "right of repair" entitlement which currently exists in section 72 of the *Designs Act 2003* (Cth) (*Designs Act*), is a measure which is unintentionally harming the local automotive authorised distributors and therefore proposes that it be removed from the *Designs Act*.

1. Summary of the FCAI's position on the "right of repair" entitlement / repair defence

- 1.1 For the reasons set out in the FCAI's Original Submission, the right of repair entitlement (described in the Options Paper as the "repair defence") is currently harming Authorised OEM parts suppliers, and risking or compromising the safety and quality of spare parts available to consumers. While the FCAI appreciates that assessing the competitive impact of registered designs for component parts of complex products is difficult, it considers that ten years of experience now shows that:
- (a) section 72 has had a detrimental effect on Authorised OEM parts suppliers, and is operating in a way which exposes consumers to risk (because it is likely certain Unauthorised OEM Parts have not been built to OEM specifications) - see sections 2.2-2.3 below;
 - (b) the most serious detrimental competition issues which might arise in respect of spare parts are adequately protected by way of other provisions in the *Designs Act* (in particular, the compulsory licensing provisions in section 90) – see sections 2.4-2.5 below;

- (c) section 72 is standing in the way of parallel importation law as it has evolved under the equivalent provision of the *Trade Marks Act 1995* (Cth) (*Trade Marks Act*) applying to the *Designs Act* – see sections 2.6-2.8 below.
- 1.2 Accordingly, this issue falls squarely within ACIP's terms of reference to, among other things, have regard to "any deficiencies and unintended consequences arising from the Act's implementation".
 - 1.3 Section 4.6 of the Options Paper addressed the right of repair entitlement. Section 4.6 concluded with the proposition that section 72 should not be repealed or amended at this time, on the basis that:
 - (a) the evidence does not suggest, on the whole, section 72 is operating in an unsatisfactory way; and
 - (b) the FCAI has not suggested that incentives for design are impacted by section 72.
 - 1.4 The FCAI respectfully submits that these conclusions are incorrect and appear to be based on consideration of irrelevant issues, as explained below. The FCAI also wishes to respond to matters raised in the Options Paper which are not supported by any evidence, or do not relate to the operation of section 72.
- 2. Section 72 is operating in an unsatisfactory manner**
- 2.1 There are three key reasons why section 72 is operating in an unsatisfactory manner, and thus having a detrimental effect on Authorised OEM parts suppliers and exposing consumers to risk. The FCAI seeks to re-emphasise the significance of these problems, and urges ACIP to carefully reconsider the conclusion that section 72 should not be repealed or amended at this time.
 - 2.2 Firstly, section 72 has had a detrimental effect on Authorised OEM parts suppliers, and is operating in a way which exposes consumers to risk. As previously submitted, for the industry, local manufacturers and distributors are often left with large inventories of unsold Authorised OEM Parts as a result of the trend towards Unauthorised OEM Parts being sourced from overseas, which is made possible by reliance on the right of repair entitlement under section 72. This is not a complaint about the requirement that manufacturers retain adequate supplies of parts, but rather an example of the unintended detrimental consequences arising from the Act's implementation by the operation of section 72.
 - 2.3 The risk to consumers arises because section 72 allows Unauthorised OEM Parts to be imported and used without control over whether the parts have been:
 - (a) manufactured in a manner appropriate for local Australian requirements, and/or
 - (b) shipped and stored in accordance with the manufacturer's recommendations.This risk to consumers should not be understated.
 - 2.4 Secondly, the most serious detrimental competition issues which might be said to arise in respect of spare parts (although there is no empirical evidence to support this) are adequately protected by way of other provisions in the *Designs Act*. In particular, consumers are protected against the risk that products embodying a registered design might become unavailable in the Australian market by way of section 90 of the *Designs Act*, which allows for compulsory licensing in such a scenario.

- 2.5 Accordingly, the repeal of section 72 would not, as has been suggested, leave consumers unprotected against the risk that they might be unable to obtain spare parts, while it would reinstate the legitimate ability for registered design holders to enforce their rights in a similar manner to other IP rights. Reinstating this level of protection would better support incentives for innovation in an industry where imitations are rife and there is presently little prospect of a registered design holder or their authorised stockist/importer fully recouping their long term investment costs from parts sales.
- 2.6 Thirdly, section 72 is standing in the way of parallel importation law as it has evolved under the equivalent provision of the *Trade Marks Act* applying to the *Designs Act*. Through a series of decisions, Australian Courts have carefully considered the way in which parallel importation of genuine products operates within the exception under the *Trade Marks Act*, and the law presently strikes a balance between giving effect to licensing arrangements and protecting the ability of consumers to import products.
- 2.7 Given the similarity between the parallel importation regimes under the two Acts, there is no substantive reason why manufacturers ought not be able to enforce contractual mechanisms in reliance on design rights in the same that trade mark owners are able to, if appropriate contractual arrangements have been put in place.
- 2.8 Critically for both the industry and consumers, the lack of any ability to do so because of the operation of section 72 raises significant quality control and safety issues (as discussed above). These are not properly described as consumer law issues regarding quality of goods and fitness for purpose, but are a further example of unintended detrimental consequences arising from the Design Act's implementation.

3. The importance of distinguishing between spare parts and aftermarket services

- 3.1 The 2012 Report of the Commonwealth Consumer Affairs Advisory Council (CCAAC) on "Sharing of Repair Information in the Automotive Industry", which it appears has informed ACIP's position in concluding that section 72 should not be repealed:
- (a) relates to a wholly different issue, being the availability, quality and cost of services supplied by the automotive industry, not goods such as parts; and
 - (b) in any event, concluded that the market for repairs is competitive, and did not find any evidence of consumer detriment
- 3.2 The Options Paper records that a submission to the ACIP inquiry pointed to "current, suboptimal competitive arrangements within the Australian automotive aftermarket". There is no evidence for this assertion which ACIP have clearly relied upon, and it is clearly contradicted by the findings of the CCAAC. Further, references to dealership arrangements linking car sales and after sales service are wholly irrelevant to the operation of the right of repair entitlement.
- 3.3 With respect, the question of design protection for automotive spare parts is not accurately described as being "one small element of a wider and more complex set of interrelated industries" (see page 37 of the Options Paper). Undoubtedly if there were any competition issues arising from automotive aftermarket services, contrary to the unambiguous findings of the CCAAC report, they would be beyond the scope of this review, as are separate legal requirements relating to retaining supply of parts, and consumer guarantees regarding quality of goods. However, the issues raised by the FCAI specifically arise from the operation of section 72 of the *Designs Act*, and ought to be properly considered by ACIP in this review.

4. Conclusion

- 4.1 Ultimately, any element of designs law which is unsatisfactory for registered design holders and their authorised distributors has a detrimental impact on incentives for design. The operation of the right of repair entitlement is one such example.
- 4.2 The effective removal of design protection for spare parts upon the introduction of the *Designs Act* in 2003 is particularly stark when contrasted to the expansion of copyright protection to cover new rights and extend in length of life of the author plus 70 years, and the expansion of subject matter for trade marks (sounds, shapes etc), in recent years.
- 4.3 The FCAI submits that the fact that no submissions were received from any other industry does not itself support the retention of the right of repair entitlement; given that the automotive spare parts industry is the most directly affected by this issue.
- 4.4 For the reasons set out above, and those in its original submission, the FCAI maintains that the right of repair entitlement ought be repealed.
- 4.5 In order to further substantiate these submissions in respect of the unsatisfactory operation of section 72 on both industry and consumers, as indicated in the FCAI's Original Submission, the FCAI would appreciate the opportunity to arrange discussions with individual member manufacturers and distributors, so as to submit further verbal information and evidence for ACIP's consideration.

Yours sincerely

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