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SUBMISSION TO THE PRODUCTIVITY COMMISSION INQUIRY INTO INTELLECTUAL PROPERTY
ARRANGEMENTS

RESPONSE TO THE ISSUES PAPER PUBLISHED OCTOBER 2015

Introduction

The Design Institute of Australia (DIA) thanks the Productivity Commission for the opportunity to respond to its Issues Paper, released to the public in October 2015.

The DIA is the peak professional association for designers and design businesses in Australia, representing design professionals in all manner of design disciplines for over sixty years.

As a professional body, the DIA is run and funded by designers for designers. The DIA champions design and design thinking as an imperative element of the flourishing digital economy and of the creation of Australia's commercial and cultural wealth. The DIA is uniquely placed as a professional body to both educate and promote the use of the *Designs Act 2003* in the community of professional designers.

Background

The DIA has previously submitted to the Advisory Council on Intellectual Property (ACIP) review of the designs system in 2014.

This previous review of the designs system considered the market for design and the economic contribution of the design industry itself. The DIA believes the current holistic review of Australia's IP arrangements presents an opportunity to examine how the Design industry contributes to the commercialisation of IP across all sectors of the economy, and how the design rights system can maximise the benefit of this contribution.

In the DIA's submission to ACIP, the DIA supported:-

- increasing the term of protection for registered designs from ten years to fifteen years, in line with the term of protection stipulated in the *Hague System for the International Registration of Industrial Designs (Hague)*;
- clarifying the definition, purpose and utility of Statements of Newness and Distinctiveness (SoNDs) and making the SoNDs mandatory;
- harmonising Australia's designs system with *Hague*, in relation to grace periods and deferral of publication;
- adopting elements of the UK and European Community Unregistered Design Right systems;
- Customs border protection measures for designs equivalent to the existing systems for copyright and trade marks;
- reforming the copyright/designs overlap provisions to anticipate the increasing use of 3D printing and scanning, and digital blueprint files;
- clarifying the multi-step registration process;
- introducing an opposition process similar to that available in the trade marks system; and
- allowing new technologies and forms of design, such as graphical user interfaces (GUIs), to be registrable under the *Designs Act 2003*.

The DIA registered its concerns in relation to:-

- the danger to designers registering designs abroad if Australia introduced grace and publication deferral periods where foreign jurisdictions had not;
- the confusion and vague references to SoNDs in the *Designs Act 2003*;
- unintended consequences that could arise from implementing a system of Unregistered Design Rights (UDRs);
- the narrow protection of registered designs despite the changes to the threshold for registrability;
- confusing, unclear and misleading classifications of designs progressing through the multi-step registration process; and
- the loopholes inherent in the copyright/designs overlap provisions which are vulnerable to the arrival of new technologies such as 3D printing and scanning.

The DIA expressly rejected any proposed restrictions on registering registered designs as trade marks under the *Trade Marks Act 1995*.

The full submission to ACIP is appended to this document.

Since that submission, the Federal Government has negotiated the Trans-Pacific Partnership treaty. This treaty contemplates the following changes which may impact Australia's designs system:

- signatories must consider accession to the Geneva Act of the Hague Agreement on Industrial Designs and more broadly comply with the principles of the World Intellectual Property Organisation (WIPO);
- the highly detailed and specific protections for copyright and patent rights may complicate the designs systems interaction with these rights, and give rise to unintended consequences where rights exist at the boundary of these systems; and
- rights enforcement and border protection measures are detailed in the TPP, but it is unclear how this would apply to the designs registration system.

Overall, the DIA supports a strong, flexible designs protection system in Australia that benefits the important and valuable creative contributions which designers make to the Australian economy, and in particular the design industry's contribution to the commercialisation of intellectual property.

The DIA also supports this initiative to consider Australia's intellectual property system holistically, as it provides an opportunity to properly consider the interaction of the various rights systems and the societal benefits of their combined operation.

Focus of this submission

For this document the DIA will focus on the operation and scope of the designs system and its interaction with other Intellectual Property rights.

Statement in response to the Terms of Reference and the Issues Paper

The DIA does not believe that current design protections afforded by the Designs Act 2003 are effective in encouraging and rewarding investment in research and innovation, nor are they effectively increasing public access to goods and services.

From the point of view of a designer, years of effort developing and marketing a product is not sufficiently rewarded by a short term of protection. Due to the small size of the Australian market, a short term of protection may not allow a moderately successful design to recover its development costs.

If the proof of the effectiveness of a registration system is its rate of utilisation, clearly Australia's designs registration scheme is a failure. Indeed:

The effectiveness and efficiency of the new Act in stimulating innovation and its impacts on economic growth were examined by the Advisory Council on Intellectual Property (ACIP) in the Review of the Designs System, which was completed in March 2015. In making its recommendations, ACIP noted that the current system 'is expensive for what it offers, and is, as a result, neglected by designers who find it does not offer the rights they need' (ACIP 2015a, p. 41). This was consistent with the survey findings of Lim et al. (2014) that applying for IP rights on designs was not seen as a valuable use of time compared with efforts to get to market first. Moreover, they found IP rights were not actively considered during the design process.

Anecdotally, DIA Industrial Design members do not generally avail themselves of the existing design registrations system.

Strengthening the Designs System for Producers

The DIA supports the strengthening of the Australian designs system and also supports offering intellectual property protection to designers that is more consistent with the designs systems of foreign jurisdictions. These changes would benefit all Australian industries from creative to manufacturing in the following ways:

- encouraging the creation of new designs, rather than copying existing designs, will increase the diversity of product in the market;
- a more diverse market, and more discerning consumers with higher design and quality expectations, will help Australian industries to compete based on design and product quality, rather than simply on price – essential for a high cost economy such as Australia;
- greater certainty provided by a well-supported registration scheme could enable greater collaboration and cross licensing, rather than the keeping of trade secrets. In this way, products can be created by various combinations of technologies and designs which increases the chances that one or more of these products will find success in the market; and
- harmonisation with Hague should allow easier registration and protection of Australian products in foreign jurisdictions, which will provide more certainty for Australian exporters and potentially increased recognition of quality Australian products.

Strengthening the Designs System for Consumers

A designs registration system strengthened and internationally harmonised in the above manner, and in combination with an education campaign, would provide the following benefits for consumers:

- consumers would have certainty they are buying a genuine product when buying a product with the Registered Design label;
- greater design literacy amongst the public will help consumers to make more informed choices about the products they buy; and
- encouraging producers to create new designs rather than copying existing designs will increase the diversity of products available.

Designing a System for Efficiency and International Competitiveness

The DIA supports an Australian designs system that is:

- clearer, and more consistent and coherent both internally and in relation to other limbs of Australia's intellectual property rights regime;
- harmonised with international designs systems through the World Intellectual Property Organisation (WIPO); and
- easier, simpler, more stream-lined and cost-effective to use.

A Designs System for the future

In particular, it is necessary for today's design system to reflect the advances in copying technologies, such as 3D scanning and printing, as well as the ways in which they are used. The designs system should also reflect a broader understanding of contemporary design by including protection for virtual, non-physical and partial designs.

The increasing importance of design in the IT and technology sectors has become apparent especially in light of products whose dominant visual features are interactive light displays on portable screens. Differentiation and investment in the design of GUIs is an important source of competitive advantage. In addition, User Interface Design is an important emerging design discipline in software engineering and website design.

For the designs system to reflect a broader understanding of design, the designs system should anticipate and accommodate the digital uses and distribution of Designs before new technologies become more widely available to members of the public. The Designs Act 2003 should protect designs embodied in products in both their active and resting states, to take into account designs that are embodied in digital technologies.

Public and Industry knowledge of the Designs System

Arguably, there is little point in significantly expanding the legal options for designers without simultaneously ensuring that designers have the legal knowledge and resources to take advantages of new rights. The DIA agrees that designers and their clients should have, or have access to, legal knowledge of intellectual property rights that protect the products of their practice.

To this end, the DIA advocates for the Commonwealth Government to:-

- consult with the DIA in association with IP Australia;
- create an education program about the Designs Act and its provisions; and
- roll out the education program to Australian designers in a collaboration between the DIA and IP Australia.

This education program would seek to provide the legal knowledge and practice protocols to Australian designers about the design registration rights available to them. Designers, as well as all stakeholders in the design process, having greater and practical knowledge and awareness of the revised designs system will be more likely to use and adopt the designs registration system with better expectations of what the system will deliver for them.

Further, the DIA advocates for a programme to educate the public on the meaning of a Registered Design label, and the value of buying Design Registered products. A more educated and discerning Australian market will better prepare Australian producers for competition in international markets, and enable our high-cost industries to achieve high prices for quality Australian products.

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