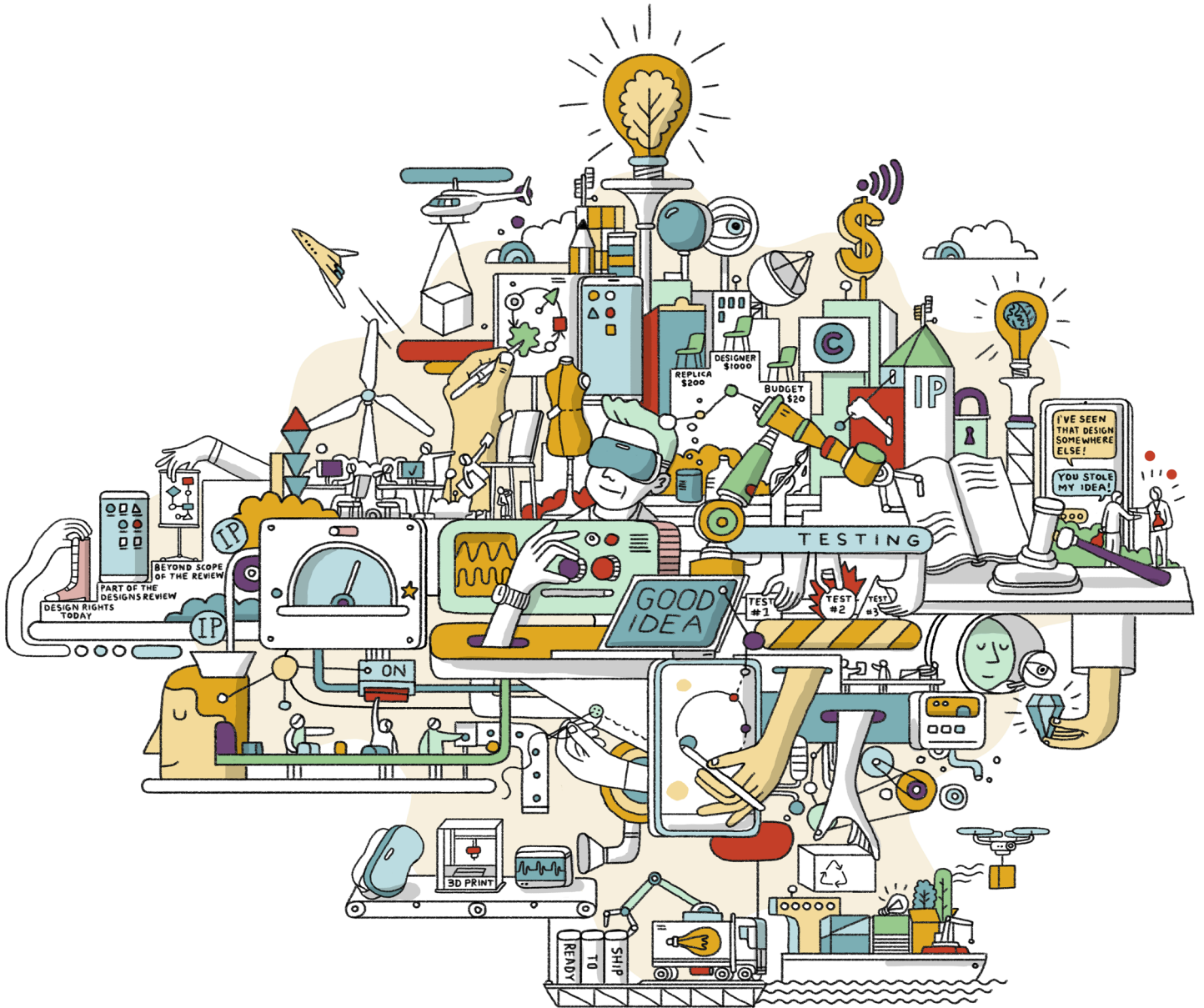


Talking design



Australian Government

IP Australia



Views from Australia's
visual design ecosystem

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Executive summary

IP Australia's Designs Review Project is a holistic review of Australia's design ecosystem. As part of the review, in 2019 we carried out different types of research to better understand what drives visual design innovation and what changes (if any) to design rights (a type of intellectual property administered by IP Australia) would benefit Australia.

As part of our exploratory research phase, we conducted over 80 interviews with people from design-related professions and industries around Australia.

This report summarises what we heard and invites readers to reflect on the issues raised. It does not reflect IP Australia's views or our conclusions on how well the design ecosystem operated at the time the research was conducted (between June and September 2019).

This report takes the reader on a journey through the design ecosystem in 2019 – from someone's motivation to design something new, their interactions with the design rights system and getting their design to market through to potentially experiencing and trying to combat copying.

The experiences and attitudes of those interviewed were diverse. Despite this diversity, there were some key themes that emerged through the interviews about the state of the design ecosystem in 2019, including its interaction with design rights:

- Most individual designers and small businesses we spoke to had limited knowledge of IP generally and even less knowledge of design rights.
- For most businesses we spoke to, the ability to get a design right was not the main reason or incentive to invest in new visual design.
- Many said registering a design right for a product required a significant compromise to the design of that product. The design registration process was seen as linear and not supporting prototyping, testing and refinement of the design.
- Individual designers and small businesses told us they often struggled with commercialisation.

- Almost every person had a different view of what counted as copying, the role of copying in visual design and the impacts of being copied. Some saw copying as a major business threat or a moral wrong, while others were less concerned about copying.
- Most saw the cost of taking copiers to court as prohibitive and ineffective.

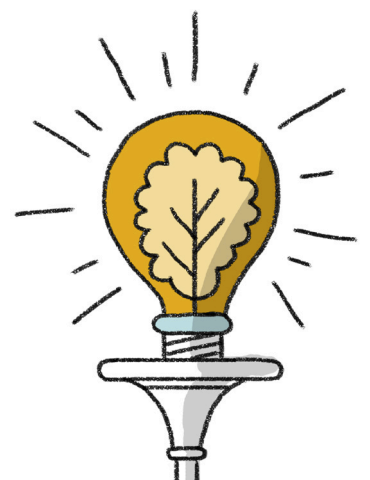
This report shares insights from these conversations about the future directions of Australia's design ecosystem:

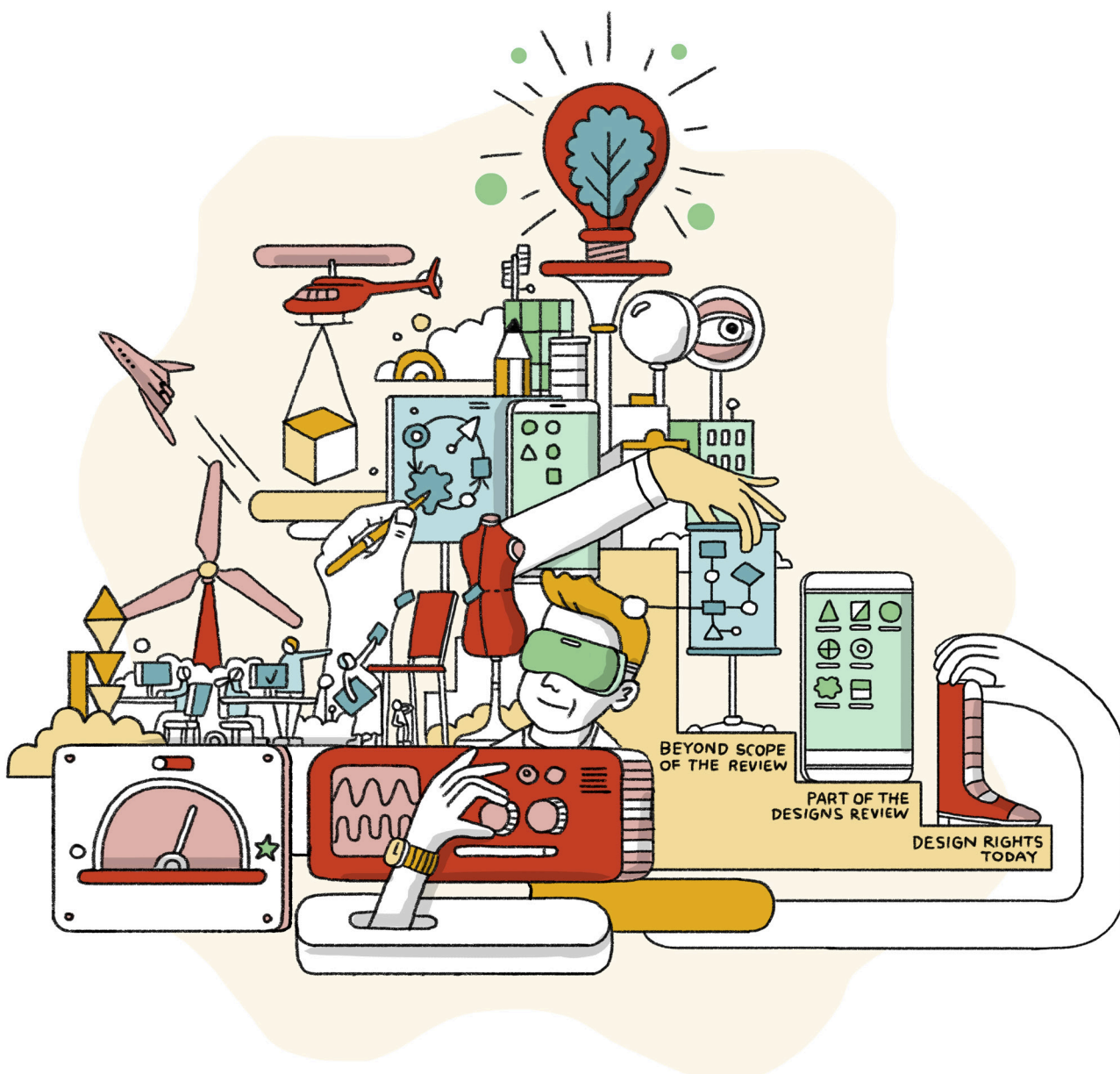
- At the time the research was done, there were tensions between the design community and Australian consumers about the value of original design.
- Newer, disruptive industries and those with a focus on cutting-edge technology typically told us that visual design was critically important, but they placed less or no emphasis on the design rights system.
- Many expected that 3D printing would soon reshape the way design was done.
- There was tension between faster innovation and designing for environmental sustainability.

Visit our project's webpage for more information, including where the project is currently up to and how to get in contact with us:

ipaustralia.gov.au/beta/designs-review

On our website you'll also find results of other research. This research formed the evidence base for potential changes that we began to explore in early 2020.





BEYOND SCOPE OF THE REVIEW

PART OF THE DESIGNS REVIEW

DESIGN RIGHTS TODAY

Introduction

Great design is a vital part of innovation. Australia's design rights system¹ historically has recognised the intangible value of visual design and aimed to encourage innovation in industry. IP Australia noted growing anecdotal evidence that design rights protections under the legislation introduced in 2004 may not have been fit for purpose for the Australian design ecosystem.

Economic analysis also suggested that our design rights system may not have been performing as well as those of other countries. In March 2019 we began the Designs Review Project – a holistic review of the design economy to give a better understanding of what drives innovation and what changes (if any) to design rights would benefit Australia.

The Designs Review Project was established to consider broad, longer-term reforms. However, we were also aware of some critical issues related to design rights that could be addressed sooner. We didn't wait for the Designs Review Project to be completed before we consulted on and progressed these 'quick wins':

ipaustralia.gov.au/about-us/public-consultations/implementing-accepted-recommendations-acips-review-designs-system

While the progression of these 'quick wins' helped in the shorter term, there was still a clear need for further research exploring the current design landscape before turning to solutions for longer-term reform.

To begin this research, between June and September 2019 we conducted over 80 interviews with people from design-related professions and industries around Australia. We asked about their experiences and roles in the design process, what motivates businesses to invest in visual design, and what barriers and challenges they face.²

This report summarises what the interviewees told us. Its purpose is to give a voice to their varied perspectives and concerns and invite readers to reflect on the issues raised. It does not represent IP Australia's views or conclusions about how well the design rights system operated at the time the research was conducted (between June and September 2019).

The Designs Review Project's first phase was about exploring the broader design ecosystem. Where interviewees advocated solutions or changes, we kept those aside and they do not form part of this report. However, that information was carried forward and used in subsequent phases of the project.

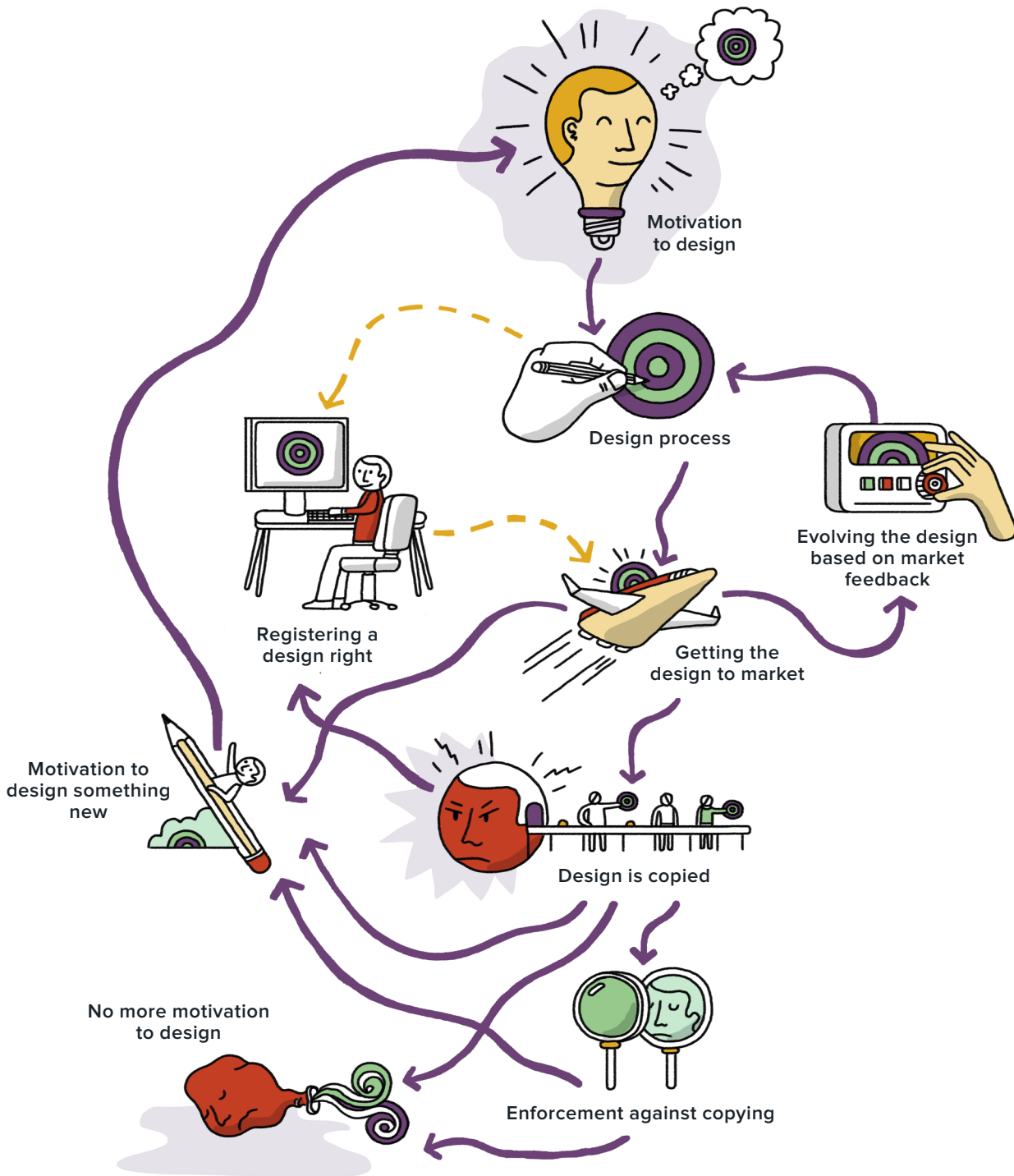
Visit our project's webpage for more information, including how to get in contact with us:

ipaustralia.gov.au/beta/designs-review

¹ Design rights are a type of intellectual property administered by IP Australia. Design rights can be registered with IP Australia to protect the overall visual appearance of a product.

² See 'Methodology' in Appendix A for more information.

The design ecosystem in 2019



“Consumers don’t know, don’t care or don’t care to know about original design.”

– Designer

Design culture

Appreciation of design in Australia

Some designers and commentators told us Australian consumers didn’t seem to value design.

“Consumers don’t know, don’t care or don’t care to know about original design.”

– Designer

They found more appreciation for their work overseas than at home and felt that Australians didn’t understand or respect how much work, time and money goes into design.

Others said local residential consumers valued design, but commercial developers didn’t. In particular, the use of cheaper imports and replicas in commercial projects (e.g. hotel or office fit-outs) reduced opportunities for local designers and makers.

“If it’s residential, people will invest ... there is a preference for Australian furniture if all others are equal ... if you’re in a commercial environment, they don’t care.”

– Furniture/homewares designer

Some thought Australia had weak intellectual property (IP) laws and that this reflected or reinforced the lack of appreciation for design here.

Distinction between ‘art’ and ‘design’

Historically, Australian law has drawn boundaries between design rights, which are for ‘industrial’ designs, and copyright, which is for ‘artistic’ works. But we were told that the boundaries between art and design can blur in areas like high-end furniture and lighting, jewellery and some fashion design. This may be due to the creator’s intent or because over time an object’s design may become iconic and therefore comparable to art.

“It’s tricky. Look at the Eames lounge. At the time, that was designed as a very commercial product ... But ... it changed over time ... People would think of [my chair] as a commercial product with a bit of flair, but in 20 years it might be in a museum.”

– Furniture/homewares designer

Some designers believed that some designs should have the same protections as artworks.

“Visual art is seen as ‘worthy’ and has philanthropy. From a government perspective, there is a lot of support. The product industrial design sector? Not so much ... perhaps [government should] think of it as a sector of the Australian arts more generally.”

– Design commentator

Some were frustrated that the legal distinctions don’t reflect the work they do, particularly where design rights and copyright overlap – e.g. Indigenous cultural expressions often don’t fit neatly into Western categories of ‘design’ and ‘art’.

Awareness and the role of design rights

Designers' knowledge about design rights

Most individual designers and small businesses we spoke to knew little about IP generally and even less about design rights in particular. This was confirmed by many advisers.

"It is so rare that anyone actually asks to register designs, most aren't even initially aware that designs exist."

– Legal adviser

"Start-ups typically don't know that designs registration exists, even if the visual design is very important to them. Bigger and more experienced [businesses] tend to know more but can often confuse design registrations and patents."

– Design consultant

Stronger awareness of and a preference for patents seemed to be common.

"They come to us and say 'I want a patent' but when we look at it, it's most often a trade mark or sometimes a design."

– Legal adviser

For smaller and newer businesses, design rights didn't always rate as a concern.

"Local entrepreneurs typically don't know about [designs] ... there is mass confusion ... it's very esoteric and is not accessible to the general public."

– Legal adviser

Some larger and more established businesses had developed a good understanding of design rights over time, but even they were often unclear about important details of the design rights system.

How designers learned about design rights

In 2019, students didn't generally learn about design rights during their study.

"[Students are] more interested in 'making apps' or 'saving the world' than understanding what IP applies to their work or protecting their IP."

– Business academic

Often designers would not become aware of the design rights system until they found out one of their designs had been copied, at which point they would seek advice. This was the case with many fashion, furniture and homewares designers we spoke to and was confirmed by advisers to these businesses.

"95% of the time [the issue] comes to [us] after they've been copied and haven't even thought of IP."

– Legal adviser

Many of the interviewees in industries that focus on patents (e.g. medical technologies) told us that they were first introduced to design rights when they sought patent advice before going to market.

Even courses on IP law spent little time on design rights, so graduating lawyers and attorneys lacked in-depth knowledge of design rights as opposed to patents and trade marks.

Design rights as an incentive to invest in design

The design rights system is intended to incentivise and encourage design innovation, but many people said design rights weren't an incentive.

"[The] system does not itself stimulate design ... By improving design [rights], [you are] not necessarily going to encourage or discourage [design innovation]."

– Legal adviser

For most people we spoke to, the ability to secure design rights wasn't the main incentive to invest in new visual design.

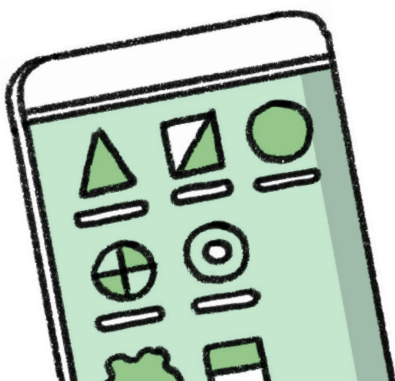
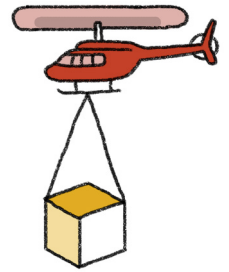
"IP protection is not a deciding factor about whether to proceed with design and production."

– Design consultant

Some interviewees talked about their design work mainly in terms of expressing their creativity or solving social or environmental problems.

“There's this creative loop which is incredibly addictive when it works. It's empowering and meaningful.”

– Furniture/homewares designer



Others told us that they invested in good design across the board – transcending any single product – to build their brand’s reputation for quality or innovation. They were motivated to design better products so they could maintain their brand value and stay ahead of competitors. Most of these businesses either didn’t register any designs or registered only a small portion of what they designed.

“If you get to that point where you are so ahead on your own insight-led innovation that everyone is going to be playing catch up ... your brand gets such a reputation for that particular expertise, it becomes a juggernaut.”

– Footwear company

Value of design rights

The extent to which design rights were valued and used varied widely.

Some businesses didn’t use design rights and didn’t value the system. Many of these were in industries where copying was considered less of a threat or their designs were protected by other factors, such as practical barriers to copying.

A common theme in these interviews was that businesses and investors saw design rights as less valuable than patents.

“When raising capital, a ‘patent pending’ has more pulling power than the power of a registered design.”

– Legal adviser

Many told us that speed to market had been their alternative to registered IP protection. Some used design rights in combination with speed to market, while others did not.

“Get out there first and then people will associate ‘original’ with your product and choose not to buy [the] knock-off.”

– Design consultant

Smaller businesses in faster moving industries, such as fashion, strongly valued design rights but often didn’t use them. Larger companies in faster moving industries tended to say that design rights had some value to them but also notable disadvantages. They mentioned the cost of enforcement, the narrow scope of protection and the risk of alerting competitors about new ideas.

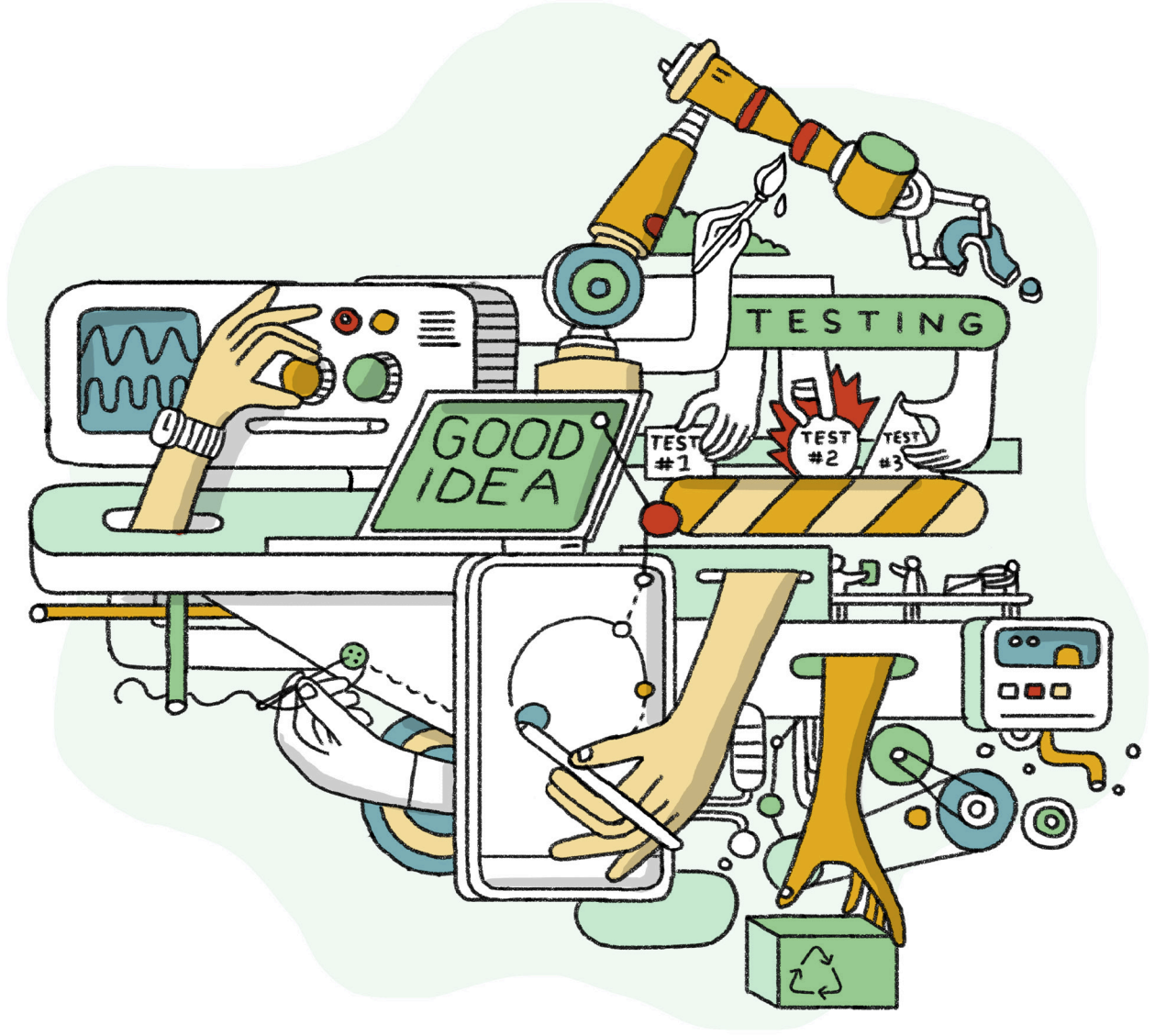
“[T]he trouble of registering a design is not worth it.”

– Clothing designer

Some larger businesses that spoke of the disadvantages of the design rights system still used the design rights system very heavily (i.e. they were among the highest filers in Australia), but they expressed frustration at its expense and inflexibility.

Businesses that both highly valued and used design rights were typically in industries with longer design processes and product life cycles, such as hardware, vehicle parts and some types of furniture. Their main motivation was to create better or more innovative products, and the ability to register their designs gave them confidence to continue investing in expensive design innovation. Some said they would value design rights more if they were ‘improved’ or strengthened.





Experiences of using the design rights system

Many designers told us the design rights system didn't fit with how they worked in practice. They saw it as linear, inflexible and not conducive to a good design process – to the point where registering a design right required significant compromise to the design process and potentially to the final product.

Knowing when to register

Designers told us that good design is iterative, with rounds of ideation and prototyping based on different inputs. It is non-linear and complex, balancing customer insights, form, function and manufacturing constraints.

However, they found that the design registration process was linear and did not support ongoing iterations. Designers had to register a design before disclosing it publicly (limiting their ability to test the market) and in most cases they couldn't change the design after applying to register it.

“To get interest in a design, you need to give it a bit of groundswell and exposure, which means you can't get design registration ... it's the sequencing ... you need to go out before you know which product will be protected.”

– Furniture/homewares designer

We heard how hard it was to determine the right time to file an application.

“It's a balancing act. [They are] delaying their filings until they are ready, which jeopardises their rights in the meantime. The systems don't really accommodate flexibility and commercial realities of iterations.”

– Legal adviser

Many established larger businesses had developed strategies to include design registration in their workflows and had the funds to invest in more speculative design rights. At the other end of the spectrum, a small fashion design house would often work on garments until the last possible moment before a runway show, where the design is photographed and shared on social media instantly, leaving no opportunity to file a design right application.

How do you register something? What if it's not a 'thing'?

– Design academic

Knowing what to register

Many businesses said highly valuable design work seemed to 'fall between the cracks' of the different systems for design rights, patents and copyright.

“[Something] that's not quite a patent, but not purely visual, but leads to an improved, practical customer experience.”

– Medical technology company

Products whose form and function are deeply interrelated (e.g. wearable technologies) may not have been patentable or visually new and distinctive enough to protect as a design.

Another example is design where the innovation lies in how the user interacts with a product.

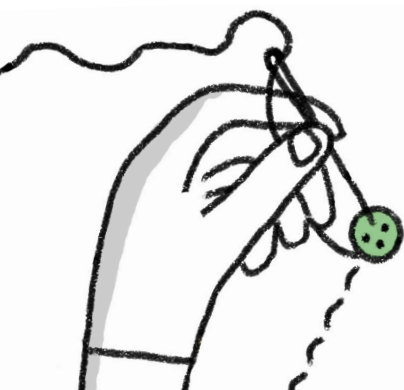
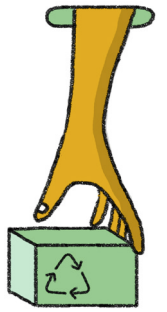
At that time, businesses were increasingly investing in advanced virtual tools (e.g. 3D simulation experiences), yet design right protection for graphical user interfaces was uncertain and limited.

“It's a lot of time, effort and money that we spend in these things but there is no mechanism to prevent people from copying them. It's beyond just the screen, it's about the user experience: how the feedback is presented, why it's presented, why they interact with the machine.”

– Appliance company

For creative works that blur the boundaries between art and design, even legal academics and advisers expressed frustration about how to interpret the legal overlaps between design rights and copyright for their students and clients.

However, most businesses said they would continue investing in design work that doesn't neatly fall into specific IP categories, because it creates better products that customers prefer.



However, we heard from advisers (who often introduce designers to the rights system) that the problem went beyond lack of awareness.

“ [It’s] not just an education piece. Sometimes the system doesn’t work for their business. ”

– Legal adviser

Small business and design rights

Most smaller businesses assumed that registering a design right would be complex, time consuming and expensive. Only a few new businesses had explored design rights in any depth, despite saying how important the visual design of their products was to their success.

Some small businesses had found IP Australia’s website by chance or through their own research, had registered designs themselves and reported that the process was satisfactory.

Some advisers said that acquiring a design right was not the solution for most small businesses and that any IP right is worth little without a good business strategy underpinning it.

“A lot of people are blinded by the design registration process ... But [the small businesses] don’t have capacity to get return on investment.”

– Commercialisation adviser

Whether they register design rights or not, smaller businesses often faced bigger challenges when it came to commercialising their product.

Design rights administrative issues

Legal advisers and businesses that frequently filed design right applications raised some specific process issues:

- the cost of filing multiple design applications, noting overseas jurisdictions have systems to scale fees down for these
- the IT systems involved in the filing process – e.g. accepted file formats, trouble uploading images, and systems timing out or changing what was filed
- unclear or incorrect system-generated correspondence from IP Australia.

Several spoke of their strategies to ‘work around’ issues and asked why IP Australia hadn’t accommodated the needs of design customers directly.

“Designs are the hardest IP to file. Lowest value for the applicant and it’s harder and more expensive [time-wise] to file.”

– Legal adviser

Getting a design to market

After designing a product (and possibly getting a design right), businesses then need to commercialise – get that product manufactured and to the customer. Smaller and larger businesses reported vastly different experiences.

Knowledge gaps for small business

Individual designers and small businesses often struggled with commercialisation. Usually they were doing the design work as well as running the business, and commercialisation wasn’t part of their design training. Several had successfully registered a design but then found it difficult to get it manufactured and sold.

“The big issue is what happens next [after registering a design] ... I couldn’t find info on how to bring the design to market.”

– Furniture/homewares designer

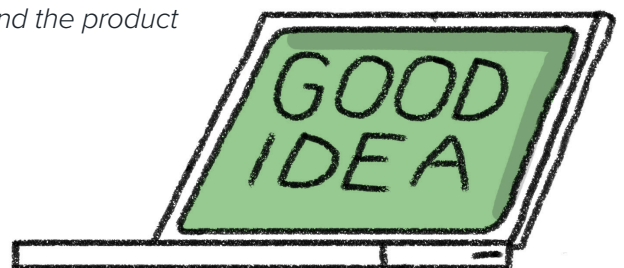
Small businesses often had trouble finding advice on manufacturing, selling and IP strategies. Many ended up asking for this advice from product design consultants (who are not experts in these areas) because they didn’t know who else to ask.

Most product design consultants spoke of smaller clients who had spent money on IP protection (usually patents focused) and advice before they had designed the product. They say these smaller businesses didn’t always understand the difficulties they’d face in designing, manufacturing and selling the product, and they struggled to do so with their limited remaining resources.

They spoke of clients who thought:

“The first ‘golden ticket’ is the patent and the second ‘golden ticket’ is to press the button and the product pops out.”

– Design consultant



In contrast, larger businesses typically had a clear pathway to commercialisation. This point was reiterated by advisers.

“The ‘good’ ones have it all lined up – they know their customer base, volume, marketing etc.”

– Design consultant

We were told bigger players typically saw design rights (and other IP rights) as merely one among many tools to be deployed. They layered IP protection into their broader commercial strategies, citing relationships, brand reputation and speed to market as higher priorities.

Supply chain issues for small business

Two specific supply chain issues tended to trip up smaller businesses.

Firstly, some found or feared that companies in China that manufactured their products would copy the products and then sell them. Legal action is expensive and assumed to be mostly unsuccessful (whether or not that’s true in practice). Others said they comfortably managed the risk by using their bargaining position as the manufacturer’s client and monitoring the market.

“The best defence is that factory needing your business.”

– Design consultant

Secondly, smaller furniture and interior designers told us they lacked market power when tendering for fit-outs of large commercial properties. As part of the tendering process they often had to hand over IP ownership even if they didn’t know if they would win the tender. Also, developers and builders might source cheap imitations of their designs instead.

Indigenous designers and artists spoke of particular difficulties with standard contracts for commercial projects.

We were told that the Western legal sense of ‘owning’ Indigenous cultural motifs is incompatible with Indigenous cultural values, and the ‘ownership’ of the work cannot be given up as part of a commercial tender. They said large tenderers, especially governments, often didn’t want to discuss amendments to their standard contract.

“If we are given the cultural rights, we must use it with permission, but we don’t ‘own’ the imagery. We are just the facilitator as a means of communication ... The challenge with government is that they scoop up IP rights instead of licensing ... It’s because most people don’t engage with indigenous culture ... If we start to hand over cultural imagery, we are diluting down our knowledge.”

– Designer

“The big issue is what happens next [after registering a design] ... I couldn’t find info on how to bring the design to market.”

– Furniture/homewares designer

Reaching overseas markets

Most of the businesses we spoke to or heard about were exporting to overseas markets or planning to do so. Advisers confirmed this.

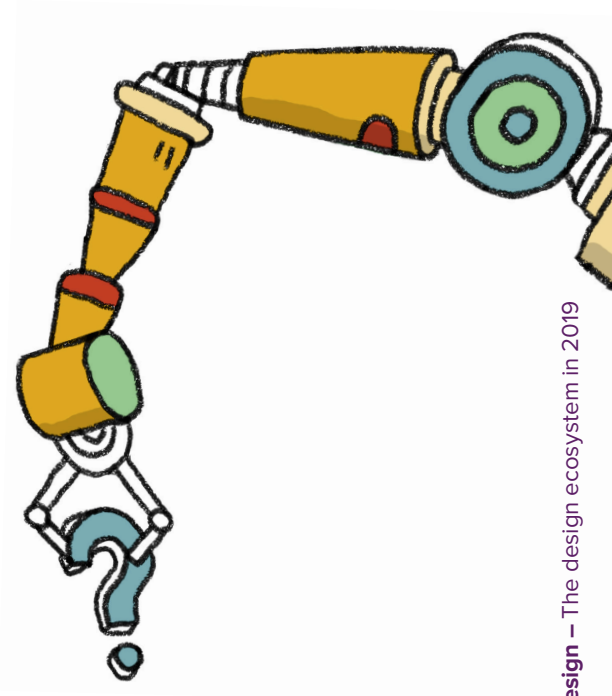
“Most of them think globally from day one. They see Australia as their beach head – where they can test their product.”

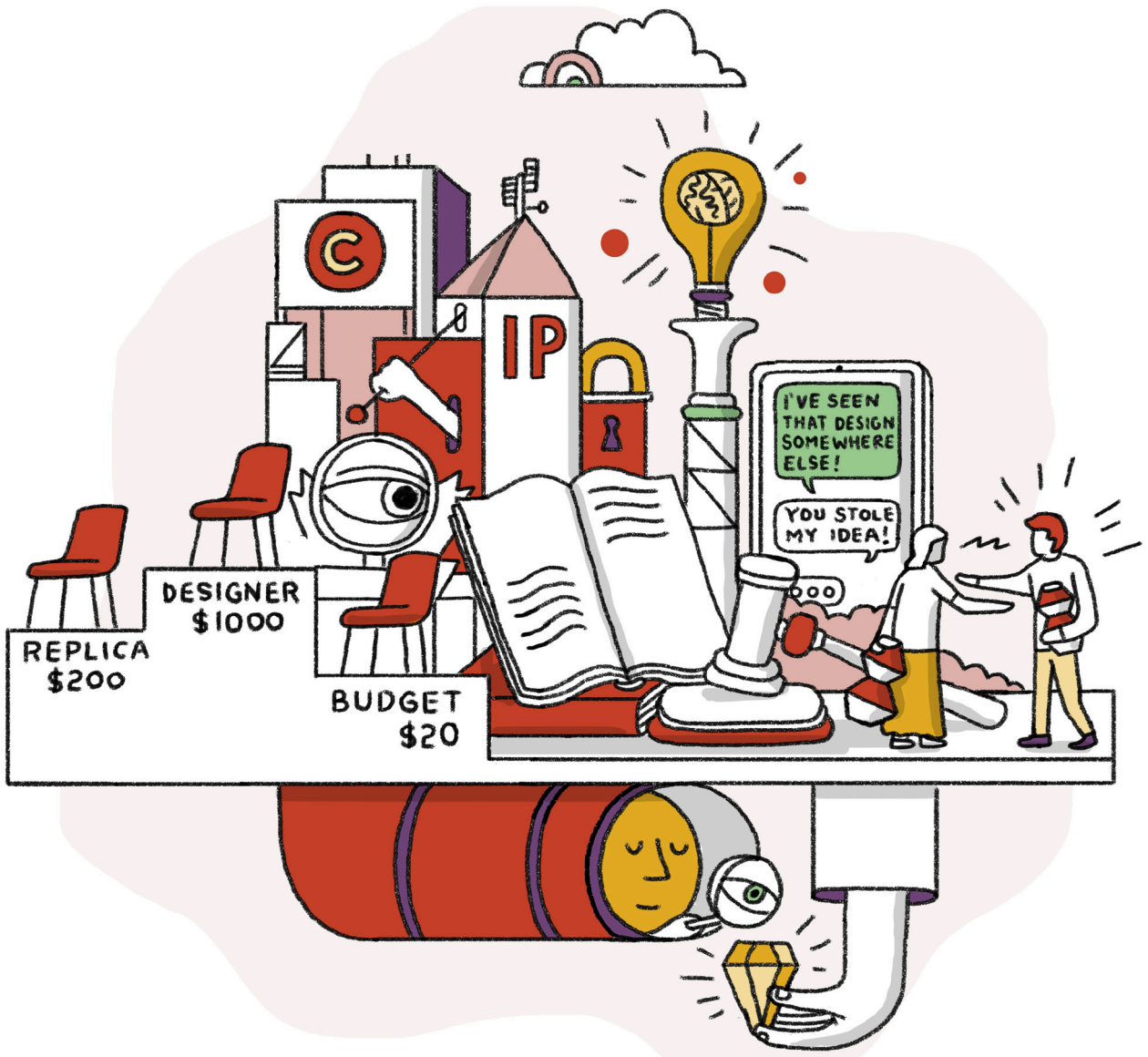
– Design consultant

“[Going overseas is] very important, it surpasses the importance of filing here in Australia.”

– Legal adviser

Design registration in Australia only provides rights in Australia. Some felt it was too expensive and complex to register design rights overseas as well. A few businesses and attorneys mentioned they would hope to see costs to get IP protection overseas reduced. Some believed that paths to making it easier or cheaper to file overseas would have limited benefits if filing requirements in different countries remained inconsistent.





Copying and enforcement

The discussion about copying brought out the strongest and most divided opinions. Almost everyone had a different view of what counts as copying, the role of copying in visual design, the impacts of being copied, what is acceptable and what is unacceptable. Some thought copying was just part of business, but others felt copying was morally wrong and unjust – a question of ethics. Enforcing design rights to stop copying was seen as ineffective and expensive.

Impacts of copying

Some businesses told us that others copying their visual designs was a major business threat. In some established industries (e.g. hardware, car parts and some furniture), it could be easier and quicker to reverse-engineer and copy a finished product than design it from scratch. People in these industries who reported that copying was a major threat to them also tended to be most interested in registering design rights.

“[It took] very high investment to develop this – now it’s a key selling point. Competitors would watch and copy. Competitors are half the price! Usually [a competitor] would see it at one trade show and it would then be copied at the next trade show.”

– Automotive part designer and manufacturer

“Four months after we designed a piece [that took 12 months to design], a ‘bad version’ of that product popped up ... it was built overseas and sold here locally for one tenth of the price.”

– Furniture/homewares designer

In faster-moving industries, we were told about designs or parts of designs being copied every development cycle. Several said this meant they had to make their development cycles even more rapid and release more designs more frequently (even described as ‘chaotically’) to stay ahead of copiers.

Copying as a moral issue was raised most often in the context of ‘iconic’ furniture, and whether those designs should ever be available for others to replicate. The view against replica furniture was most commonly (but not exclusively) raised by those working in furniture design.

“Replica furniture is such a bastardisation of the designer’s intent ... it stops them from being special objects.”

– Furniture/homewares designer

Tolerance of copying

The businesses that were least concerned about copying were those that were protected by natural or self-created barriers to successful copying. For example, they:

- sold products that are technically complex and difficult to reverse-engineer
- operated in markets where safety/medical regulations prevent ‘just anyone’ from entering
- had a recognised and dominant brand or reputation (where that factor is the primary driver of purchasing decisions).

Many of these did not see others copying the visual design of their products as a significant business threat. For some it was because speed to market – being first to market with products that are the first of their kind – made copiers irrelevant. Some said that anyone who was copying them was already too far behind them to be a true threat.

“The best form of IP is to flog the [...] out of it. Then it’s ‘why bother copy, they’ve sold hundreds of thousands, I’m only a follower’. [You] need to move at speed.”

– Commercialisation adviser

“Unique innovation is very difficult to copy because [the copier] didn’t have the insights that led to that point ... you don’t need to worry about competitors.”

– Footwear company



“A chair has four legs and a back and there is only a finite number of variations that can be made ... I don't think there is a clear line ... a designer is influenced by others such as, for example, painters with Picasso. Furniture is no different.”

– Retailer



Several interviewees (clothing designers, software/app developers and some in furniture and homewares) said that designs in their industry largely built on existing designs, making the line between ‘original’ and ‘copied’ blurry or irrelevant.

“Copying things? I think it's part of the industry ... UX is easy to copy ... some companies, their Plan A is ‘I want to get bought by Apple’, so they'll design consistent with Apple's look and feel to make them more attractive to Apple.”

– App developer

Several referred to what appeared to be urban legend ‘rules of thumb’ in their industries (whose origins and legal validity are not clear) that designs ‘just need’ to be 5%, 10% or 20% different from another to be ‘okay’.

“The pants I designed are parts of four other pants that are currently out there! 20% rule ... as long as you change it over 20% then it's okay ... we have never been pulled up on it, so we don't think about it much.”

– Clothing designer

Some (especially start-ups, academics, and those in high-tech industries) believed that too much registered IP hampers the freedom to operate and the ability of their industry to innovate. These concerns often outweighed any concern about others copying their visual designs.

“Far less IP would lead to far more innovation ... in our experience, IP has been detrimental to many of our clients.”

– Design consultant

“[Our] mindset of IP is defensive – freedom to operate. We don't want to sue people to prevent them from doing stuff ... we don't hunt around and see if anyone is copying us”.

– Defence technology company

Sending letters of demand and taking copiers to court

Businesses reported mixed results from their efforts to stop others copying them once they identified copies in the marketplace.

A few had success sending letters of demand. Usually these were businesses that were market leaders and larger than the recipients of the letters. Others felt that letters of demand did not work, and this could be due to the size/power differences between the players.

Most people said that when letters failed the only option would be to go to court.

“Not many options between registrations and the courts. Either register and do nothing or go all out and fight to the death.”

– Gaming and entertainment company

For most, the cost of enforcing a design right in court was prohibitive, with estimates from advisers ranging from \$100,000 to \$300,000 as a ‘starting point’.

Small and medium-sized businesses simply couldn't afford to take a matter to court. They told us that copiers knew this, so they would typically ignore their letters of demand.

“In terms of protecting our design – it's very difficult to do. We don't have the resources to chase them over it.”

– Furniture/homewares designer

“It's like poker, you need to have a certain bankroll to bluff or call during enforcement.”

– Commercialisation adviser

Even very large companies struggled to justify the expense of enforcement. There was rarely a clear business case, so even the best resourced let infringements go.

“It's not worth a 3-year court case.”

– Appliance company



We were also told that most expected a low likelihood of success in court as they believed design rights were treated quite narrowly.

“We say ‘we believe you’ve infringed’. They say ‘we don’t think that’s an issue because there’s variations [in the design]’. It’s quite grey ... There’s no real protection. Why even register?”

– Fashion company

Even if a business won in court against someone copying them, the damages received wouldn’t justify the expense.

“Sue them, spend \$250k. What can you actually recoup in the end? Account of profits is grey. Cost order isn’t [for] everything.”

– Fashion company

Some interviewees questioned the point of registering their designs at all given the difficulty of stopping copiers or making them pay compensation.

“Sure, we can register, but it takes a fortune to enforce it, we’re at the bottom end of market power and legal rights, so what’s the point?”

– Furniture/homewares designer

Enforcement through social media

People in some industries (e.g. fashion and homewares) told us they relied on public relations (e.g. social media callouts) to combat copying, especially when faced with a power imbalance.

“This is the way that small businesses handle it ... maybe [we] cannot win in court, but [we] can win in the media.”

– Start-up founder

Others noted that these strategies could have unintended consequences, like defamation actions or damaged relationships and brands.

Being accused of copying

Many people we spoke to had been accused of copying or were concerned they would design something that was perceived to be copied.

“[With the] volume of information you’re exposed to, you forget where you saw something ... I’m not sure I’d be able to prove that my design was unique to me.”

– Fashion designer

“[We] might accidentally come up with the same idea as someone else ... the design world is so small.”

– Furniture/homewares designer

“Sure, we can register, but it takes a fortune to enforce it, we’re at the bottom end of market power and legal rights, so what’s the point?”

– Furniture/homewares designer

Many companies, typically larger retailers, took conscious steps to search what was protected at that time and had strict processes to demonstrate that their products did not infringe certified design rights.

“[We] stopped selling it when they supplied their design registration number ... [if] we are not breaking laws, we are not going to stop selling it.”

– Retailer

“They don’t understand that they can’t send us letters and tell us we are infringing when they don’t have a certified right. [We] adopt best [design] practice, we do everything from scratch. The letters we get are quite aggressive and threatening ... people get on social media and blame us for copying. It’s reputational damage.”

– Retailer

Businesses of various sizes told us of the legal and internal staff costs they incurred through receiving letters of demand and the reputational damage that could result from accusations via social media.

Smaller businesses that received a letter of demand accusing them of copying, even if there were limited or no grounds, said they were often advised to yield if the letter was from a larger, better-resourced company. ‘It’s too expensive’ to not settle.

Most businesses we spoke to that had access to in-house or external legal advisers received advice that most letters they received had no legal basis. It appeared that letters of demand were often sent about products that were never registered as a design right or about registered designs that had not been certified by IP Australia. We were told some businesses did this very intentionally, relying on the lack of knowledge of others. Others sending letters may not have known the difference.



Future design ecosystem

“Look at the industries that are registering designs today – is that the future?”

– Business academic

Building a design culture

We heard mixed views on the future direction of Australia’s design culture. Several spoke of Australia’s younger design ecosystem or design culture.

“Australia does not understand the value of design and protecting design. We are a ‘down to earth’ culture and this is reflected [in] our law. Australian designers are very good at design, but we have a history of cultural cringe and a lack of belief or appreciation of our own local abilities.”

– Legal academic

However, many said there had been a shift in the last decade.

“[Historically] in the mindset of furniture, ‘if it’s quality it must be coming from Europe’ ... we’re now on the same playing field.”

– Furniture/homewares designer

Some believed that Australian consumers need more education to become more design literate – in particular, when it relates to purchasing cheaper or replica products to furnish or decorate their homes.

“Designers already get it, it’s the people who are buying it don’t get it.”

– Furniture/homewares designer

Others believed that Australians are increasingly appreciating good design; however, most Australians can’t afford or aren’t willing to prioritise the expense of locally designed or authentic licensed products.

“The people who are saying replicas are ‘bad’ cannot ignore that the majority of people can’t afford to buy their stuff. People don’t always have the budget.”

– Design commentator

Several said that local designers/makers who try to pursue design as a viable career often end up producing smaller quantities of products that must be sold at higher prices and that this affects their commercial viability.

Some suggested that Australia has been behind other countries in meeting the market’s need for original, local design in the middle ground.

“[Consumers] would jump on it if [retailer] did something with [Australian designer]. Maybe it’s so ‘us vs them’ that no one is prepared to collaborate ... it would be great if someone came in and found that middle ground.”

– Design commentator

Disruptive technologies

“Look at the industries that are registering designs today – is that the future?”

– Business academic

Newer, disruptive industries and those with a focus on cutting-edge technology typically told us that visual design is critically important, but they placed less or no emphasis on the design rights system. Businesses we talked to fell into two broad groups: mature, well-established physical product industries with a lower reliance on new technology; and newer, technology-focused industries.

The first group of industries – furniture, lighting, homewares, fashion, hardware etc. – may have used advanced technology to design or manufacture, but their products were not fundamentally new or first of their kind. Some relied heavily on design rights and were relatively happy with the current system. Others wanted design right protection to be strengthened so they could rely on it with more confidence.



The second group – medical devices, biotech, wearable technology, defence technologies, virtual technology etc. – operated in a world of rapid major technological advances. These businesses told us that visual design is crucial to product acceptance, but they typically placed less or no emphasis on the design rights system. Design rights, at best, existed in parallel with what they were doing or helped to define who owns what with their business partners. At worst, design rights were irrelevant and would hamper the freedom to innovate rapidly.

3D printing

Interviewees told us that, as 3D printing continues to improve in quality and becomes cheaper, they expected it could become easier to copy products, making design rights much more difficult to enforce.

“[The c]apability of 3D printing is enormous ... [but] there is no design regulation around it. The belief out there is ‘If I scan it – I own it.’”

– Motor vehicle peak body

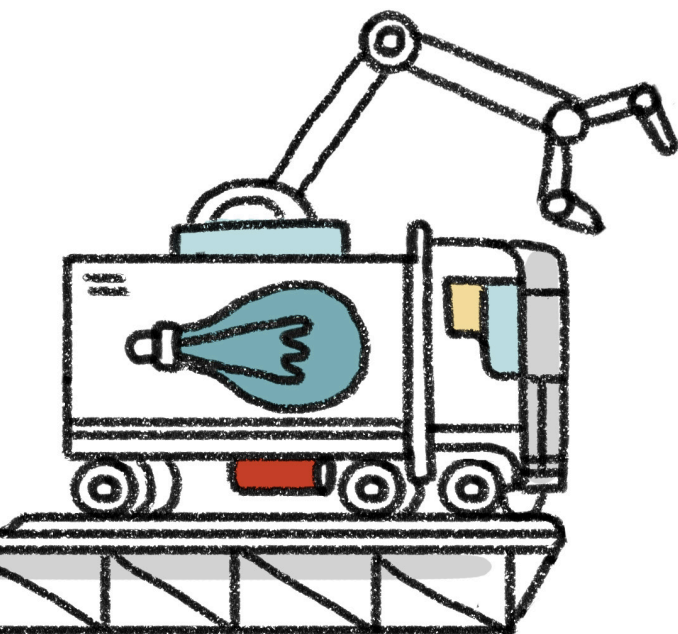
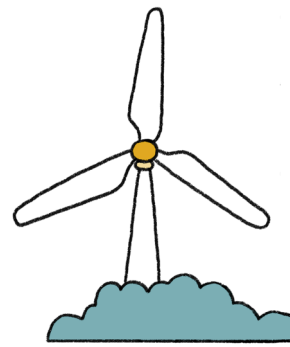
Some also noted that 3D printed products are more customisable and queried how this would fit with the scope of a design registration, which did not accommodate variations.

Environmental sustainability

The interviews highlighted tension between innovation and environmental sustainability. Designers and businesses were responding to increasing demand for sustainable products, but they saw media and other forces encouraging consumers to keep buying new products and discarding existing ones.

In some cases, some designers saw stronger protection, especially against replica furniture, as a way to combat the issue of consumers purchasing products and discarding them more quickly, contributing to unnecessary waste.

In other cases, designers told us about a desire for greater collaboration and less defined ownership to promote sustainability e.g. sharing and using ‘dead stock’ fabric leftovers in fashion design to prevent them from being sent to landfill.



Steps following this research

Visit our project's webpage for more information, including where the project is currently up to and how to get in contact with us:

ipaaustralia.gov.au/beta/designs-review

On our website you'll also find results of other forms of research. This research formed the evidence base for exploration of potential changes – a process that began in early 2020.

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IP Australia acknowledges the Aboriginal and Torres Strait Islander peoples of Australia. We acknowledge the traditional custodians of the lands on which our agency is located and where we conduct our business. We pay our respects to ancestors and Elders, past, present and emerging. IP Australia is committed to honouring Australian Aboriginal and Torres Strait Islander peoples' unique cultural and spiritual relationships to the land, waters and seas and their rich contribution to society.

IP Australia acknowledges that the cultural expressions of Aboriginal and Torres Strait Islander people such as art, crafts, stories, symbols and icons can inspire, or be used in, designs.

Where these cultural expressions are used inappropriately, it can cause great offense and hurt to the custodians of that knowledge. IP Australia is looking at the protection and management of the Indigenous Knowledge (IK) in the IP system and what we can do to support new economic opportunities and promote cultural integrity. Information about our IK work is available on the IP Australia website at ipaustralia.gov.au/indigenous-knowledge

You can also register to our mailing list if you would like to be updated on our IK work, including future consultations.

Appendix A – Methodology

We started this qualitative research by identifying the categories of interviewees that would give us insight into the design ecosystem from different perspectives:

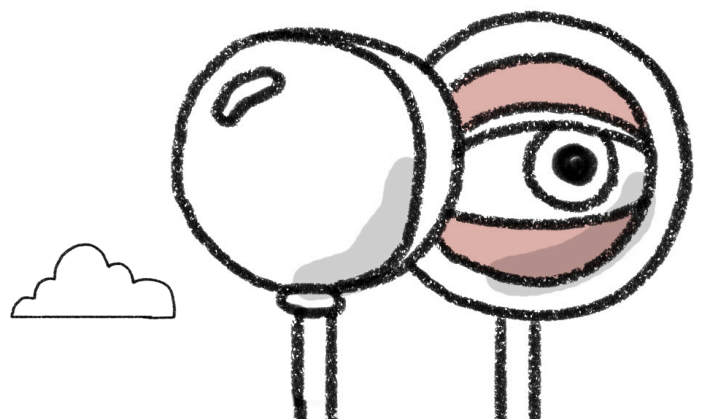
- Market actors, including designers and design-intensive businesses who did or didn't use the design rights system, industrial or product design consultants, manufacturers, retailers, and input suppliers
- Consumer representatives
- Legal and business advisers, including patent attorneys, IP lawyers and commercialisation advisers
- Design peak bodies
- Design and business academics
- Legal academics
- Design media influencers and commentators.

We contacted potential interviewees, inviting them to participate in a conversation with members of the project team. Some interviewees had previously been in contact with IP Australia or publicly vocal about matters related to designs; others were selected via internet search or on the recommendation of other interviewees.

For categories with few responses or with limited representation, we actively sought out further participants. We recognise that there were some categories with few interviewees: a formal representation of consumer perspectives, Indigenous designers, and women who work as product or industrial designers.

Discussion guides were prepared, which broadly asked interviewees to explain what they do, their interactions with or views on the design ecosystem, and the opportunities and challenges they faced. We gathered evidence via an approximately one-hour (in most cases) semi-structured interview. Interviews were broadly guided by the discussion guides, but interviewees were also given the freedom to tell us what they considered important. All interview notes were de-identified to protect privacy and ensure interviewees felt able to speak freely. Interview participants will remain de-identified.

While we sought a broad cross-section of potential interviewees and industries across the design ecosystem, the set of interviewees was not designed to be a statistically representative sample. This report represents the experiences and views provided in the interviews, but it makes no claims as to whether these experiences and views are or are not representative of the broader design ecosystem to a statistically significant degree. Our quantitative research provides statistically representative data to give a complete picture in conjunction with this report.



Appendix B – Categories of who we spoke to

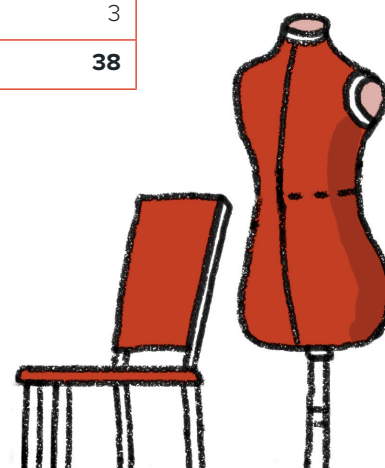
Stakeholder categories	No. of interviews
Designers, manufacturers, retailers (i.e. market actors) (See further breakdowns of this category in tables below)	38
Input suppliers (i.e. product and industrial design consultants)	9
Legal, IP and commercialisation advisers	14
Academics (design, business and legal)	11
Design commentators, journalists, influencers	4
Peak bodies and other	6

Market actors by usage of the design rights system

Category	No. of interviews
Market actors who file design rights for products they are developing or selling currently	19
Market actors who have never filed design rights	14
Market actors who have filed design rights in the past, but no longer do	5
Market actors (Total)	38

Market actors by industry/profession

Category	No. of interviews
Clothing/fashion	6
Furniture, homewares, lighting (includes residential, commercial, indoor and outdoor)	10
Games, digital and other	6
Kitchen gadgets and appliances	2
Mass retailer	4
Medical products and devices	3
Sole operator developing a product	4
Tools, hardware and automotive	3
Market actors (Total)	38



Appendix C – In their own words: What should the government better understand about design?

Wherever possible, each interview concluded with the question ***What should the government better understand about design?***

We left this question open to the interviewees' interpretation, and it was often an opportunity for them to share with us a key issue on their minds.

Given the limited space in the main report, we could not convey many of the answers to this question that we heard. Here is a selection of answers which we think gives a sense of the diversity of perspectives and experiences.

Design rights and protection against copying

"We want the government to understand the flexibility needed around design."

– Furniture/homewares designer

"The disconnect between the creative process and registration."

– Design-related peak body

"The tension between all IP right registration and commercial realities clients face."

– Legal adviser

"[Fashion] designers don't engage with [the design rights system]. It's bad policy ... the system doesn't work."

– Legal adviser

"Let's not forget that the design system works very well, [even though] it's not perfect and we should review it."

– Academic

"I like the designs system. It works quite well, but is under-utilised: not well understood by users and the narrow scope is off-putting."

– Legal adviser

"We think we're happy with the registered designs system. [Our] biggest issue is for patents ... no issue with registered designs."

– Medical product designer

"I wish there was a way to protect [designs] without costing so much money. I don't know what that would be. It would require governments being more proactive about protecting designs to keep the costs off the small designers."

– Furniture/homewares designer

“Our industry has quite slow adoption – two years to develop, two years to get momentum ... [the timeframe] eats away at the 10 years of protection. That's our challenge.”

– Hardware designer

"The government isn't doing enough to protect the designs of the smaller Australian maker, or to do something about the big guy who copies them ... if the government won't stop it, who will?"

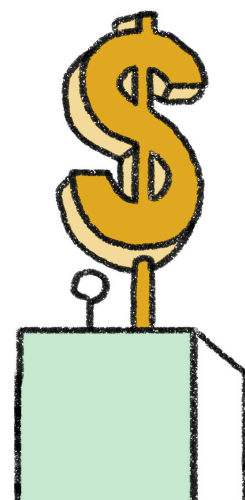
– Design commentator

"Stop thinking about the old laws that were all about relying on raw materials. Australia should be a leader in this challenging area of understanding and defining the complexities of software and get our heads around the legal side of protecting not just the surface level tip of the iceberg [aesthetics of a product] but the 'actual' design."

– Software developer

"Don't be beholden to tinkering with existing legislation. Consult as widely as possible."

– Academic



“You can change the [design rights] system to better suit some, to the detriment of others. We can all keep increasing education and public awareness ... ultimately someone needs to be able to answer the question of ‘Why are you investing in this? What are you trying to protect?’ – if things are worthwhile, they often aren’t as easy as you hope.”

– Legal adviser

Freedom to operate

“Protection against being sued. [We] have seen a couple of clients crushed [when they] end up in legal battles. Someone else comes with a bigger stick (more IP and more resources). [They] can’t fight back, they never try to innovate again.”

– Product design consultant

“What is the impact of the protection regime? Does it stimulate or suppress innovation in the economy?”

– Technology company

“People who don’t register designs are still looking in. Freedom to innovate issues. Just trying to avoid getting sued. Defensive as well as the offensive.”

– Retailer

“The importance of copying within the design production. Designs appropriate and incorporate bits of existing designs. [Designers and their advocates] push for more protection, but in fact they need to be able to keep copying from one another.”

– Academic

Design and culture

“Good design enhances liveability and is essential for our lives.”

– Design commentator

“Recognition of ‘designed in Australia’ to be as big as ‘made in Australia.’”

– Furniture/homewares designer

“In terms of design and creativity, the importance of those in our society. When budgets are tight, creative industries are the first areas to be neglected. The importance of this to society can’t be underestimated.”

– Fashion designer

“The value of design. It’s not just the value from a direct contribution. It’s the sort of non-easily identifiable value that design creates.”

– Design commentator

“Just how important [design’s] role is. It sometimes lacks the respect of film, literature, art, etc.”

– Furniture/homewares designer

“Artists are not motivated by money to create. There are other important factors [and] the distinction between design and art is redundant.”

– Legal adviser

“There doesn’t seem to be a pool of very successful designers in Australia. I don’t come across a lot of successful Australian designers ... a lot of interior decorators, but not a lot of people who actually design furniture.”

– Retailer

“[Design] is very good for the bottom dollar. It’s who we are and what we are. The glasses you wear and the car you drive. Designers are responsible for all that. It’s important for all our lives.”

– Product design consultant



“We respect and value art and music, the government gets that. But it seems to go a bit flat [for design]. There is a lack of value. Think about how rich the design industry is, we have a lot to lose. A lot of creatives are feeling like they’re pushed out ... [previous reviews] didn’t understand our language.”

– Furniture/homewares designer

“Design can be everywhere and [takes] forms that don’t look like designing an object or traditional modes of design. So much of the value of our design graduates seem to realise is that they’re very skilled researchers, and all areas need people who can research and find stuff out. Not traditionally part of what is seen as design.”

– Academic

“It seems unfair that furniture can be replicated after a period of time. Furniture is different to the clothes we make, it’s an artistic creation, whereas for us there is only so many work pants that you can have.”

– Fashion designer

“It would be great if there was more knowledge around product design and authenticity. In general, consumers don’t know about design. They know about handbag copies. There could be more knowledge around IP in the general public.”

– Furniture/homewares designer

Business challenges

“The effort that goes into this stuff is ridiculous ... it’s tougher and tougher to be more individual. There’s thousands of people producing great stuff. You need to keep hitting your head against the brick wall.”

– Furniture/homewares designer

“Understanding the pressures of business and industry ... very intense. So much to keep the whole thing going ... previously [our] business [was] built on reputation, which was competitive advantage when our prices were similar. But cheap imports mean we can’t rely on brand, so have to rely on the design rights system.”

– Automotive part designer and manufacturer

“Recognising that there are two very distinct groups of people that file [designs]: backyard inventors and big companies. I wish [government] could understand how many start-ups are trying to ease their path into the design space ... bigger companies have in-house counsel ... it is difficult if you don’t have an attorney to do this.”

– Legal adviser

“Designers lack knowledge about how best to commercialise their designs: they’re experts in design, not business. [There] needs to be better information for designers on what to do after they’ve registered a design in order to commercialise it ... Australia cares about consumers of design, but not designers or producers of design.”

– Furniture/homewares designer

Grants and funding

“R&D is difficult and expensive to do. Support for R&D is necessary and useful – help is very welcome!”

– Product designer

“Maybe funding opportunities. [There is a] lack of grants or tax incentives. Goods that you’d want to see go forward, but can’t for lack of money.”

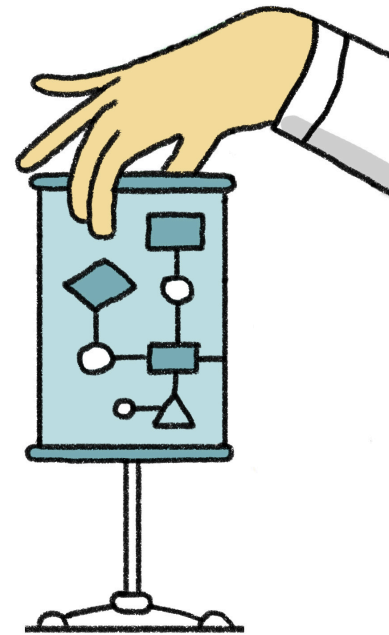
– Product design consultant

“There are loads of grants, [we’re] helping the planet but we cannot get a grant. Funding things like this should be easier ... everything is so hard with sustainable design ... Australia should be the king of sustainable design. [Government should] own it and support it.”

– Start-up founder

“So many times I see grant money going to people being wasted, where we could have done amazing things with that funding.”

– Product design consultant



BB Funding! Funding is an administrative nightmare. The timeframes for grants and approvals means design processes are drawn out, paused and then rushed. [We] have to jump around between projects and stop and start constantly. We are constantly justifying what we're doing and why, more than commercial designers ever do. **BB**

– Product designers for ageing and disability

“Cash flow is the biggest barrier, it’s not cheap getting a product to market ... this is a full time job for me.”

– Product designer

“Just how much money it costs ... it costs so much to design something original. It would be fantastic to have recognition of companies that have designed something original.”

– Furniture/homewares designer

Government's relationship with business

“There is a huge opportunity for the government to acknowledge Indigenous designers as huge contributors to the design industry.”

– Designer

“Government doesn’t understand business, they really don’t. I always feel like government doesn’t like business ... business doesn’t make the rules, the market and the laws make the rules. We don’t decide [if] you’re going to pay \$100 for a cushion ... the commercial realities of running a business are not like running a government department.”

– Retailer

“Understanding where we put most time and effort – [so that government can] better define the protection.”

– Appliance company

“Government should keep listening to the design industry. It feels like we’re on our own.”

– Furniture/homewares designer

“It is so important for public servants to keep talking to businesses directly to understand what is going on.”

– Small business owner

