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IP Australia's response:

Public consultation on the Hague Agreement: A cost-benefit analysis for Australia

December 2018

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Introduction

From 29 March to 31 May 2018, IP Australia consulted on an economic analysis that explores the economic costs and benefits to Australia of joining the Hague Agreement Concerning the International Registration of Industrial Designs (Hague Agreement).[1] In particular, we sought feedback on the methodology and assumptions of the analysis, as well as any unquantified impacts, case studies and experiences that users of the Hague system, or applicants for designs in other countries, have had.

Six non-confidential submissions were received during the consultation on the economic analysis. IP Australia has considered all of the submissions, and thanks stakeholders who took the time to consider the economic analysis and respond to us. The following is a list of stakeholders that provided non-confidential submissions:

- Australian Federation of Intellectual Property Attorneys (FICPI Australia)
- Griffith Hack (GH)
- International Trade Mark Association (INTA)
- Institute of Patent and Trade Mark Attorneys of Australia (IPTA)
- Law Council of Australia (LCA)
- New Zealand Institute of Patent Attorneys, Inc (NZIPA)

The report below summarises stakeholders' submissions and IP Australia's response. The report also presents revised estimates of the costs and benefits and outlines the next steps.

The revised economic analysis is only one piece of evidence informing whether Australia should join the Hague agreement, the analysis does not preclude further policy considerations as to whether Australia should join the Hague Agreement.

Stakeholders who would like further information or to discuss further may contact Brett Massey on (03) 9935 9666 or at Brett.Massey@ipaustralia.gov.au, or Andrew Wilkinson on (02) 6225 6199 or at Andrew.Wilkinson@ipaustralia.gov.au.

IP Australia always wants to hear from you. If you have any input on issues not covered by this consultation, please let us know via our policy register, which details the issues we are considering or working on for policy or legislative action. You can also contact us at consultation@ipaustralia.gov.au.

[1] IP Australia, *The Hague Agreement Concerning the International Registration of Industrial Designs: A cost-benefit analysis for Australia*, March 2018 available at: https://www.ipaustralia.gov.au/sites/g/files/net856/f/2018-03-27_hague_agreement_economic_analysis_report_-_for_consultation_v3.pdf

2.1 Australians can already access the Hague System

The economic analysis noted on page 9 that Australians can already access the Hague system in some circumstances. While this pathway is currently available to Australian applicants that have a residence or an establishment in a member country, very few Australian businesses use this pathway. The economic analysis noted that it is unclear why so few Australians used the Hague system via this route.

Submissions

There were mixed views as to why so few Australians use the Hague system already. All submissions that addressed this issue considered that complying with the requirements to file via this route would be impractical for most Australian designers. In summary:

- FICPI Australia believes that little or no weight should be given to the fact that Australians can already access the Hague system (since establishing an extra corporate presence overseas would be costly). Very few local Australian clients meet the requirements to file through the Hague system, and the "current shortfalls in the system increase filing preparation costs which offset the potential cost savings of using the system". The perception that Australian companies can easily circumvent the national restrictions associated with filing a Hague application, by establishing a foreign corporate presence, are quite misplaced when the costs are factored in.
- IPTA does not believe this is a viable option for Australian applicants, nor does it agree with the report's suggestion that low usage levels are due to a lack of awareness. IPTA suggests that the majority of Australian applicants do not have subsidiaries domiciled in Hague countries and even if they did, "many Australian companies have overarching IP strategies in which their IP will be held by specific companies for tax and other business purposes and a 'back door' Hague application using an overseas subsidiary is unlikely to satisfy that strategy". IPTA also believes that if Australia were to join Hague, both the use of the Hague system and its awareness, would increase.
- GH suggests that there is a lack of knowledge of this option, and very few Australian businesses that file designs can meet the residency requirement.

IP Australia response

IP Australia notes that stakeholders provide a range of reasons for why so few Australians currently use the Hague system. However, it appears that most Australian businesses will not meet the requirements, at least not without incurring some expense in establishing an overseas corporate structure. If the establishment cost was very low and with little administrative burden then it might be viable, but absent that IP Australia agrees that little weight should be placed on the low current usage of the Hague system by Australians.

5.1 Saving on fees via Hague System

The economic analysis estimated the cost savings to existing Australian design applicants who file overseas directly. These costs savings include reduced official fees and red tape costs at filing, examination, renewal and translation. For example, the economic analysis estimated red tape savings of between $675 and $1150 per filing, mostly due to savings in professional fees.

Submissions

Most submissions considered that there would be substantial savings to Australians if they were to file overseas via the Hague system. One submission attempted to quantify these savings. While another submission considered that filing via the Hague system will increase costs. In summary:

- FICPI Australia considered that "an application filed using the Hague system is likely to offer cost savings when compared to the filing of separate national applications". They also considered that streamlined and harmonious filing requirements would make it more likely that an application as filed would be in order and result in fewer foreign agent fees to correct such errors. However, FICPI Australia also appears to note that there is a lack of harmonization of filing requirements under the Hague system, which "inherently increases costs." FICPI Australia considers that Hague members' filing requirements will become more harmonised in future as usage increases. FICPI Australia also considers that the Hague Agreement offers centralised ownership transfer and payment of annuities through the World Intellectual Property Organization (WIPO), which provides cost savings for Australian applicants.
- GH estimates that an international design application filed via the Hague system will be "considerably cheaper than the current need to file directly via agents". Cost savings will also occur if formality-type objections can be reduced or eliminated, or if design registration can be achieved without requiring the use of foreign agents. GH states that "including local (AU) and overseas attorney's charges, typical filing costs are United States ($2.5-3K); Europe -RCD ($4-5K); China ($3+K); New Zealand ($1.5K), Canada ($2.5-3K)". This includes both Australian and overseas attorney professional fees and official fees (which may not be differentiated from professional fees in the overseas associate's invoice) for a single design per application.
- NZIPA considers that for many international design applications the cost will not be cheaper than filing directly into other jurisdictions since examination of the design is conducted separately under national laws. NZIPA considers that "lack of standardisation will increase the complexity and cost of the registration system".

IP Australia response

Noting that stakeholders presented a range of views as to whether there would be savings to Australian designers, IP Australia considers there is insufficient evidence to adjust the estimated benefits in the economic analysis, with two exceptions (see below). IP Australia notes that there may be some reduced business to Australian attorneys servicing Australian designers filing via the Hague system. However, this is considered a transfer cost between Australians not affecting the net cost or benefit to Australia.

C*entralised ownership transfer and annuities*

FICPI Australia noted that a centralised means to transfer ownership and pay annuities would have benefits. In principle, IP Australia agrees that the savings due to centralised ownership transfer are an additional benefit. However, it is difficult to estimate the savings due to centralised ownership transfer:

- we do not know exactly how many design owners will transfer ownership, and

- design owners may choose to transfer their design rights in certain countries but not in all countries.

The potential saving from centralised ownership transfer is likely to be relatively small compared to the net cost estimation. IP Australia considers that it is appropriate to note this as an unquantified benefit.

IP Australia considers that a change to the economic analysis should be made to quantify the benefits of centralised annuity payments. The original analysis calculated red tape savings including the savings on renewals in 5.1.4 of the analysis. However, the savings in official fees only accounted for the first five years and did not capture any benefits in reduced official fees for subsequent renewals. Accordingly, the revised results below include savings in official fees due to centralised renewals.

Post-filing translation costs

While the original economic analysis noted at there would be some negligible translation cost savings at filing, the economic analysis did not account for any post-filing translation savings costs. Under the Hague Agreement an applicant who has filed in English is entitled to have all communications (eg notification of refusal, renewals, transfer of ownership and change of representation) provided in English.[2] Of the five jurisdictions considered in a typical Hague application, two (Japan and Republic of Korea) do not typically communicate in English when filing directly. For these jurisdictions there would be additional savings in that those communications would not need to be translated into English by the applicant's foreign attorney or representative.

As the translations for a direct filing would be conducted by the Japanese or Korean attorney, IP Australia does not think it is appropriate to use the translation costs in 5.1.5 (footnote 89) of the original economic analysis as these represent Australian translation costs and foreign attorneys are likely to charge a different rate. However, IP Australia notes that the costs in 5.1.5 were negligible and that many of the communications will either not occur for every application (eg refusals), or will be for a relatively short and simple communication (eg a renewal notice). IP Australia considers that it is unlikely that these costs would substantially change the net quantified impacts of the economic analysis. IP Australia acknowledges these post-filing translation savings as an unquantified benefit.

[2] *Common Regulations Under the 1999 Act and the 1960 Act of the Hague Agreement*, Rule 6 (3) (iii).

5.2 Benefits for new applicants

The economic analysis made the assumption that the benefits extracted by new entrants to foreign markets equals the additional expected profit. The best proxy for this profit is the difference between the combined costs of filing via the Hague system and that of filing directly into each foreign country.

Submissions

One submission considered that the difference between costs was not a good proxy for the expected profits for an Australian applicant enticed to file overseas for the first time via Hague. Another considered that the ability to defer publication and centralise renewals would attract more applicants. Other submissions provided mixed views on whether the Hague system would reduce post-filing procedural costs and entice more new applicants or increase the likelihood of a notice of refusal (equivalent to an adverse examination report under the Australian system) resulting in greater post-filing costs and deterring new applicants. In summary:

- IPTA disagrees with the assumption that applicants know how much profit is likely to be made on selling a product overseas. IPTA argues that since applicants decide on whether to file overseas (or not) within six months of the initial Australian filing, it is too early to gauge whether the product will sell overseas. According to IPTA, filing decisions are “typically made on the basis of where the Australian manufacturer makes sales or has existing distributors, where the Australian manufacturer wishes to expand sales to, and on the basis of budget, ease of enforcement of IP, location of competitors’ manufacturing facilities and other factors”. IPTA believes that if Australia joins the Hague Agreement, and the filing costs are reduced, and the addition of extra countries is an incremental additional cost, then IPTA’s experience (from Australia’s joining of the Patent Cooperation Treaty and Madrid Protocol) is that overseas designs filings by Australian applicants will increase.
- FICPI Australia believes that the possible deferment of publication up to 30 months (depending on the designated countries) will likely allow Australian applicants to file overseas more widely and with more confidence compared with current options. The Hague Agreement also offers centralised ownership transfer and payment of annuities through WIPO which provides cost savings for Australian applicants.
- GH suggests that “Hague has the potential to avoid post-filing procedural costs, in that formality-type objections from many offshore jurisdictions can likely be reduced or eliminated”. Where offshore registrations can be achieved without requiring the intervention of an offshore agent, the fee, time and procedural savings will be significant. This may entice new applicants.
- NZIPA predicts a high probability that an application filed through the Hague system will be objected to by countries that carry out substantive examination. This will mean that there is a high probability that local representation will need to be engaged in foreign countries. Therefore, there is “no benefit to Australian applicants filing design applications under the Hague Agreement compared to filing directly into each jurisdiction”. Particularly if a desired outcome of using the Hague system is to avoid engaging local representation in foreign countries.

IP Australia response

IP Australia is satisfied that the broad methodology used for calculating the expected additional profits is valid, and acknowledges that there are additional savings to applicants (see above under 5.1 regarding savings from centralised renewal payments), which would add to the estimated benefit.

Using fee and red tape savings as a proxy for additional expected profits

Regarding the proxy used, IP Australia acknowledges that designers will be uncertain about how much profit they will make. Nonetheless, designers operating as a business are expected to have some estimate of what they are likely to make. While *individual* designers may not correctly estimate the profits from obtaining protection overseas, as an *aggregate* we could expect designers to be the people best placed to make this estimation.

Deferment of publication

IP Australia acknowledges that the ability to keep a design secret by deferring publication can have advantages for applicants. However the same deferment period is available whether designers file directly or via the Hague system.[3] It is therefore unlikely that joining the Hague Agreement offers a significant advantage in being able to defer publication across the five Hague countries that account for the vast majority of Australia's outgoing design filings. Consequently, deferment is not considered a benefit of joining the Hague Agreement.

Other comments

As explained above, given the range of views as to whether Hague applications would be more likely to run into problems at a later stage (NZIPA) or less likely to run into such problems (FICPI Australia and GH), IP Australia considers that there is insufficient reason to depart from the approach taken in 5.1.3 of the economic analysis regarding the savings post-filing (which is a component of the expected profit in 5.2).

IP Australia also notes that submissions did not identify any alternative mechanisms to estimate the benefits to Australian designers enticed to go overseas via the Hague Agreement. IP Australia considers that the current methodology is the most appropriate at this time.

However, as noted above at 5.1, the savings differential for the fee and red tape costs of existing applicants has been underestimated (that is, it does not account for the benefits of centralised renewals), so the benefit where existing applicant costs is used as a proxy for new applicant expected profits here has been increased. IP Australia also notes that the unquantified benefits of centralised ownership transfer and post-filing translation savings would also apply here.

[3] In some cases, a reservation to the Hague Agreement exists, as in the case of the United States, overriding the 30 month deferral period (as stated on WIPO's website). In the case of Singapore, the deferral of a publication of a design is for a period of less than 30 months (currently 18 months) regardless of Singapore being a member of the Hague Agreement. In the case of the European Union, a search on the European Union's IP Office, references the 30 month deferral period, indicating that direct filing to EU's IP Office already has this option available. Japan and the Republic of Korea have a three year deferral period available through their local filing offices.

5.4.1 Additional local innovation and designs

The economic analysis considered filing changes in the years before and after the introduction of the new *Designs Act 2003* (which reduced the maximum term of protection from 16 to 10 years), and found no evidence that the longer term incentivised more design innovation. Similarly, other comparable countries with a longer term of protection do not appear to have more resident design filings than Australia on a per capita or Gross Domestic Product basis.

Submissions

There were mixed views in the submissions on whether the increase of the term of protection from 10 to at least 15 years would incentivise local innovation and designs. In summary:

- GH believes that moving from 10 to 15 years, "in and of itself, is unlikely to incentivise more design filings by local designers". However, the ability to participate in Hague will almost certainly incentivise more Australian design filings by Australian companies (citing the Australian experience with trade marks filings through the Madrid System Concerning the International Registration of Marks).
- LCA points out that the "clearing of obstacles in the path of Australian designers is consistent with the Government's National Innovation and Science Agenda". Joining the Hague Agreement would encourage Australian designers to be more innovative and also to monetise their innovation including by obtaining design protection in export markets.
- According to NZIPA, a longer term would not incentivise additional designs. As pointed out by the Productivity Commission (PC), only a low proportion of designs are renewed at the 5 year mark in Australia. It is likely the low renewal rate is because the visual appearance of products changes relatively quickly, so the visual appearance of a design is no longer relevant 5 years after filing. Accordingly, the increase to a 15 year term is unlikely to incentivise local innovation and designs. And, allowing up to 100 designs is unlikely to incentivise more design filings by Australian designers.

IP Australia response

Neither the PC nor the former Advisory Council on Intellectual Property (ACIP) found any reliable evidence that a longer term of protection was necessary to foster additional design innovation. IP Australia further compared the Australian experience under the *Designs Act 1906* (which had a 16 year term) with the experience of other similar countries that currently have a 15 year term of protection. The comparison in both cases supported ACIP's and the PC's findings. In the absence of robust evidence, IP Australia is not yet satisfied that a 15 year term for designs would incentivise more design innovation and filings by Australian designers.

6.1 Australian consumers will pay more to foreign designers

The economic analysis forecasted that Australian consumers will pay more to foreign designers due to the increase of term from 10 to a minimum of 15 years. The additional cost is estimated to range from about $1.1m to $3.4m in the first year, with the final year estimated to cost between $6m and $22m, with a best estimate of $13.2m. The cost estimate is based on the assumption that 32% of designers would renew at the 10 year mark, and that the renewed designs would result in between $755 and $2265 in additional annual profit for products embodying the design.

Submissions

Most submissions considered that the estimates of the costs of the extended term were too high. These submissions fell into five broad arguments:

1. The scope or strength of design rights is not as strong as other registered IP rights and does not result in the monopoly profits assumed in the economic analysis.
2. Designs rights often coexist with other, stronger and longer rights such as patents and trade marks, meaning that the expiry of a design term will not affect the price charged by a designer who can rely on the monopoly provided by other IP rights.
3. The product lifecycle for most designs is short, meaning that they are unlikely to renew to 15 years.
4. The longer term is a benefit as it will increase local design filings.
5. Additional flow-on benefits from increased foreign design filings have not been accounted for.

These arguments are addressed below.

1. *Design rights are weak and do not result in increased profit*

The overarching theme of these submissions was that design rights were narrow, only protecting the visual features of the product (not functional ones). Submissions claimed that competitors can often provide a product with the same functionality but a sufficiently different visual appearance to avoid design infringement. They also claimed that designs are rarely enforced. Submissions consider that these factors make it likely that the additional profit derived from a registered design right in the extra 5 years of the term is likely to be less than is estimated in the economic analysis. In summary:

- FICPI Australia states that a “design right is primarily used to dissuade exploitation of the direct copying of the visual appearance of a product”, enabling the owner to maintain a premium price for the product associated with a *particular* design, but “unless the design is primarily functional, it will not prevent competitors offering alternatives that look different”. It is incorrect to assume that an increase in the term of a design right implies an increase in cost to local consumers, according to FICPI Australia. The ultimate state of play will depend, for example, on “how much product competition is present in the market, the pricing of the competing products and the degree to which consumers elect to choose an alternative product, none of which can be predicted or modelled in any meaningful way”.

- GH states that design rights are "far less 'monopolistic' than patents", and easier to avoid infringement without compromising functionality. Consequently, GH says an increase in design litigation is unlikely should Australia join the Hague Agreement. This is in part because the enforcement of designs is often conducted as part of a related patent litigation. Whilst almost certainly there will be increased filings into Australia, many of these will be speculative, and unlikely to be enforced unless there is an actual and growing market for the product in Australia that can be attributed to the design. A minuscule amount of design litigation has occurred in Australia.

- IPTA claims that a registered design is "not a monopoly on the product *per se*" as it just protects the appearance of a product ("monopoly does not in fact provide a "*certain monopoly power*"). IPTA notes that the vast majority of products on the market in Australia are not protected by a registered design. Therefore, the pricing power is clearly limited, according to IPTA, and in "almost all cases it will be possible for a customer to purchase a competing product which is not subject to a Registered Design". The economic analysis fails to take account of this "substitution effect".
- IPTA considers that the net profit rate of 20% due to the monopoly market power of designs is overestimated due to the fact that designs only cover products, not services. The more reasonable estimate of 13.8%, which represents an industry average for products, should be adopted. IPTA believes "that the report then assumes that the 20% profit margin is some form of super profit resulting from the monopoly provided by the Registered Design". IPTA considers that this logic is flawed.
- LCA raised the point that design rights in Australia are limited in scope, and only protect the appearance of a product. LCA cites recent Australian cases that demonstrate design infringement is difficult to prove. A registered design does not provide protection in relation to functional aspects. The forecast costs to Australian consumers in the analysis need to be seen in this context: an extended term of protection for a registered design does not inhibit (or impose a cost on) consumers purchasing a product which performs the same function as the design owner's commercial product, provided it is different in appearance. In that regard, it is also "worth observing that recent Australian case law demonstrates that design infringement is difficult to prove".

2. *Design rights coexist with other stronger and longer rights*

- FICPI Australia considers that, in many instances the appearance and/or the product of the design will be protected not only by a design right, but "likely also a trade mark and possibly also a longer term patent right". For FICPI Australia, it would "make sense to attribute more of the estimated cost in the report as arising from the broad patent monopoly than the design right". FICPI Australia suggests IP Australia conducts a detailed analysis of patent and design applications filed by "the same applicant having the same or close priority dates, allowing for potential delays in filing patent applications in Australia via the PCT route for those design rights within the past 31 months". This may not be an accurate predictor of future ratios either.

- GH stated that design litigation typically accompanies patent litigation, with the main monopoly enforced being the patent rights, rather than the design rights. Enforcement solely of designs rights is comparatively rare.
- IPTA explains how design rights are used in conjunction with other IP rights, where longer periods of protection are afforded to the rights holder; thus, refuting "the suggestion that the price may drop when the Registered Design expires". When the design for e.g. the shape of a particular smart phone expires, it is very likely that the product would still be protected by

patents and trade marks so any suggestion that the price may drop when the Registered Design expires is questionable.

- According to IPTA, shape trade marks are not useful in protecting new designs, since the "shape of the product is not usually functioning as a trade mark so the analysis unsurprisingly notes that few designers are relying on (3D) trade mark protection".

3. *Design product lifecycles are short*

- FICPI Australia points out that a low percentage of registered designs are renewed beyond the initial 5 year term. Increasing the term from 10 to 15 years, FICPI Australia expects that an even lower proportion of designs would actually be renewed for the full 15 year term, and this "would only occur for a limited subset of design registrations which turn out to be commercially successful over an extended period of time".
- Further, FICPI Australia points out that the report fails to give consideration to the increasing rate of design change and the resulting decreasing rate in renewal. According to FICPI Australia, a review of the consumer product markets (e.g. mobile phones, household devices and fashion items) indicates that average design life as it pertains to consumer influence, is clearly decreasing. As manufacturers continuously seek to maximise profits by releasing new and improved versions of the same product, the earlier versions are less valuable or desirable. As such it is clearly possible that this trend will result in a decrease in the number of designs that are extended to full term.

4. *A longer term would increase local Australian filings*

- LCA considers the increase of the term of protection a benefit as it "could reasonably be expected to increase local filings", like the introduction of a grace period.

5. *Increased non-resident design registrations has positive flow on effects*

- INTA believes that encouraging international filers to protect their designs in Australia can potentially lead to increased economic benefits to Australians. INTA considers that the Report "does not consider the flow-on effects of having that product sold in Australia". This includes the sales tax collected on the design's product, the marketing and advertising money sums spent in Australia to promote that product, the employees employed in Australia to sell that product, the distribution of the product in Australia, etc., all of which lead to more money being invested into the Australian economy from non-resident businesses to create more jobs and more economic growth.

IP Australia response

As an initial observation, IP Australia notes that no submissions provided robust quantifiable data to support claims that the costs of the extra term are overestimated in the economic analysis. IPTA provided alternative figures for calculating the impact, but no change to the method to estimate the quantitative impact was suggested. IP Australia considers that the arguments presented provide some basis for revising the costs of the extended term down. However, IP Australia considers that the arguments made for no or little cost to an extended term are not persuasive for the reasons below.

1. *Design rights are weak and do not result in increased profit*

IP Australia considers that designs rights are at least moderately strong and will enable the owner to charge at least a reasonable amount of addition profit for three broad reasons:

A. A monopoly over an attractive visual design is likely to be a commercial advantage

B. Evidence suggests that designs are being enforced at a reasonable rate in practice
C. Design owners' renewal behaviour suggests that those design rights are sufficiently valuable

However, IP Australia acknowledges that the profit rate should be revised down:
D. The average industry profit rate should be used instead of the professional services rate

This is set out in more detail below.

A. A monopoly over attractive visual design is likely to be a commercial advantage

A registered industrial design allows its owner to prevent third parties from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes. Even though an industrial design right protects only the appearance or aesthetic features of a product in Australia, without covering the technical or functional features, it still adds value to the products.

For all the products containing a design right, such as furniture, garments, packages and containers, the appearance or aesthetic features protected by their design rights is one of the key factors in that they can charge higher prices than alternative products. As recognised in FICPI Australia's submission, "A design right ... enables the owner to maintain a premium price of the product associated with a particular design", a design right does give its owner certain market power to charge a premium price. Consumers will benefit if such designs can be obtained at a lower price when they come into public domain. The premium price comes from the legal protection given to the design to prevent others from copying or imitating the design. If the design owner does not renew the design or the design expires due to reaching its maximum protection period, the design owner loses such protection, and anyone can use their design for free. Therefore, IP Australia disagrees that costs to local consumers will not increase if the maximum design protection term is extended from the current 10 to 15 years. This is supported by evidence of enforcement and owners' renewal rates.

B. Evidence suggests that designs are being enforced at a reasonable rate in practice

Evidence suggests that registered designs are enforced by their owners at a reasonable rate. This is supported by both survey data and infringement case data.

Survey results from page 56 of ACIP's *Review of the Designs System*[4] supports the view that competitors will want to copy the visual features of a product and that registered designs are at least moderately effective in preventing such copying. The survey found that 38.8% of respondents were aware of their design being copied. This goes against the argument that competitors would simply just change the aesthetic features of the design to avoid infringing: clearly a reasonable number of competitors see enough commercial value in the aesthetic aspects of the design to attempt to directly copy the visual features. Of that 38.8% who were aware of copying, a majority (23.1% of the total) sent a letter of demand to the alleged copier. Of those who sent letters, about half (16.5% of the total) resulted in either the competitor stopping copying (9.1%) or temporarily stopping copying (7.4%). Clearly design rights ward off at least some competitors who would otherwise copy a registered design, enabling the registered design owner to presumably continue charging a monopoly premium.

Similarly, the volume of design infringement cases – viewed properly in the context of the smaller volume of designs on the register – also supports the view that design rights are meaningful and enforceable.

[4] https://www.ipaustralia.gov.au/sites/g/files/net856/f/acip_designs_final_report.pdf

Submissions are correct that there are very few design infringement cases. However, this would be expected, as the designs system is not used that frequently compared to some other IP rights. A more meaningful indicator is the *rate* of infringement cases per registration, which can be compared to the rate of infringement cases for the more numerous IP rights (patents and trade marks). The tables below compare the rates based on both registered designs and certified designs.

Infringement case rates of designs, granted patents and registered trade marks

Table	No. of infringement cases since 2008[5]	No. of rights registered, certified or granted 2008 -2017[6]	No. of infringement cases per 1000 rights
Designs (registered)	31	62 942	0.49
Designs (certified)	31	10 672	2.90
Patents	297	180 431	1.65
Trade Marks	251	466 232	0.53

On a conservative estimate (using registered designs), designs are being enforced at about the same rate of trade marks, but one third of the rate of patents. However, if enforceable certified designs are considered then designs are enforced at about five times the rate of trade marks and almost twice the rate of patents. This provides evidence that designs are enforced at a comparable rate to other IP rights when the smaller volume of rights on the register is taken into account.

This is consistent with overseas reports. In the Economic Review of Industrial Design in Europe by Europe Economics in 2015 (pages 32-36), more than 80% of the firm respondents believe that design rights add value to their products, create a competitive niche, strengthen product marketing, and differentiate product from competitors.[7] IP Australia is not convinced that designs are never or rarely enforced.

C. Designs owner's renewal behaviour suggests that those design rights are sufficiently valuable

If design owners are prepared to keep paying to maintain their design rights, then the rights must be at least as valuable as the cost of maintaining the right. If a registered design did not enable an owner to charge additional profit then design owners would not pay the costs of renewal. It follows that design rights that are extended from 10 to 15 years must be at least as valuable as the costs of renewal and maintenance of those rights. The minimum Hague designation and renewal fees that Australia would need to charge for a registration with the typical five designs is 293 Swiss Francs,[8] which at an exchange rate of 1.35 CHF to 1 AUD, would be a cost of $397 in Australian dollars. Add to this that a typical attorney charge for a renewal would be approximately $200,[9] and the total cost of renewal from 10 to 15 years is approximately $600 or

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[5] Searches of Australian cases in Lexis database for design, patent and trade mark infringement cases from 1 January 2008.

[6] The statistics from 2008 to 2016 are from the WIPO IP Statistics Data Centre, while the statistics in 2017 are from Australian IP Report 2018 and IPGOD 2018.

[7] https://ec.europa.eu/growth/content/economic-review-industrial-design-europe-0_en

[8] http://www.wipo.int/hague/en/fees/sched.htm

[9] KPMG, *Regulatory Costing Project (IP Australia)*, 23 July 2014. See also https://www.wadesonip.com.au/patent-attorney-services/design-registration/costs/ which estimates renewal costs of $570 + GST for a current Australian designs registration renewal: given that office fees are $320 or $370 the cost of attorney fees in this instance is at least $200.

$120 per year. Design owners would need to expect to make at least $120 additional profit per year from the design, otherwise it would not be rational to pay the renewal fees. In reality, it is likely that the additional profits from design protected products would be much higher in many cases. For comparison, the economic analysis estimated $755 and $2,265 in additional annual profit for products embodying the design. IP Australia considers that (subject to the other revisions) these additional profit figures are more plausible.

For the economic analysis to return a net benefit as a whole under the most optimistic scenario, a design owner would have to expect to make only $73 on average annually for the extended five years in additional profit from products embodying the design. IP Australia considers this to be implausible. If design rights were so weak that even the most successful and long lasting products embodying a registered design only generated $73 in additional annual profit due to the design registration then no one would be paying the annual cost of $120 to renew their design term from 10 to 15 years. Thirty two percent of registrations were renewed to 16 years under the old Act. Data from WIPO suggests that similar numbers of Hague registrations are being renewed to 15 years, with 38% of designs registered between 2003 and 2007 being renewed three times or more.[10] This suggests that design rights do provide meaningful rights that allow owners to charge significantly higher prices than they would otherwise.

D. The average industry profit rate should be used instead of the professional services rate

The question remains whether the profit rate used in the economic analysis is appropriate. Some submissions appear to misunderstand the analysis and assume that the profit figure quoted is the *total* profit for products embodying the design. This is not the case. The analysis proposed that the profit figures were *additional* profits due to the design right – i.e. they did not include the ordinary profits that a product could be expected to make in the absence of a design registration.

IP Australia notes that there are examples (particularly in the design intensive furniture industry) where replica products often sell for between one fifth and one tenth of the price of the original.[11] While IP Australia acknowledges that this is only one industry and that there may be other factors (such as the brand reputation of famous designs) that also influence the mark up, these mark ups are well above the 13.8% average industry profit (and indeed the professional services firm profit margin of 25.7%) used as the basis for estimating the additional profit attributable to the design. Additionally, apart from IPTA's suggestion to use the average industry profit figure (which IP Australia agrees with see below), no submissions provided any alternative data or methodology to support a different estimate of additional profit.

However, IPTA noted that the professional services profit margin used in calculating the profit may not be appropriate as designs are embodied products, not services. IPTA suggested that the more appropriate profit rate would be the 13.8% average industry profit margin. IP Australia agrees with this and will revise the figures using 13.8% profit as the best estimate of additional profit. To calculate the high and low estimates, IP Australia will allow for 50% upward and downward margin for a reasonable range, which gives a low profit of 6.8% and a high of 20.8%.

[10] Correspondence from WIPO Hague registry to IP Australia of 11 July 2018.
[11] https://www.dezeen.com/2016/08/04/10-popular-furniture-replicas-outlawed-uk-copyright-eames-hans-wegner-arne-jacobsen/

For the various reasons given above, IP Australia is not persuaded that design rights do not provide a meaningful and enforceable right. IP Australia remains satisfied that design owners would be expected to charge higher mark-up premium prices to Australian consumers in the extended term.

IP Australia agrees that the average industry profit margin should be used as the estimate for the additional profit due to the design registration and that the average professional services profit margin should be ignored. However, IP Australia is not persuaded that any other changes to this section of the economic analysis are required.

2. *Design rights coexist with other stronger and longer rights*

Not all design rights exist as an adjunct to related longer term and broader patent rights or trade marks. About 37% of design applicants also filed for patents, about 40% filed for trade marks, and about 20% filed for both patents and trade marks.[12] We do not know exactly whether or how their designs, patents and trade marks are related with each other for the same applicants, which means the actual ratio of design rights exist as a possible adjunct to patent rights or trade marks will be smaller than the above ratios.

The coexistence of a trade mark right should not impact on the ability of competitors to legitimately copy the visual features of product where the design right has expired. Paragraph 122(1)(d) of the *Trade Marks Act 1995* provides that use of a trade mark for comparative advertising does not infringe. So for example, though 'Eames' is a registered trade mark (TM 547301), if there is no corresponding design right a competitor can copy an Eames design and then advertise it as an "Eames replica" or "Eames-style chair" for the purposes of comparative advertising. So overlapping trade mark protection should not stop generic manufacturers from competing once the design expires.

The recent Apple case in the United States provides a clear example of the commercial value associated with the aesthetic appeal of a product, quite separate from the functionality of that product.[13] Where two different forms of IP right protect the same product, it would be expected that there is an additional profit component for each type of IP right. While a patent may protect the functional features of a product and thus allow additional profit, the existence of a design protecting the commercially desirable features will permit the charging of an additional profit margin. Put more simply a product that both performs better *and* looks better than its competitors is likely to be more commercially attractive than a product that only performs better than its competitors but looks no better. As such the coexistence of a patent would not detract from the additional commercial appeal of a product with desirable and protected design features. Accordingly, there is likely to be a design premium on top of any patent or trade mark premium.

As discussed above, apart from IPTA (who IP Australia partially agrees with) no submission provided any alternative data or methodology that provides a convincing case that the design component of any mark-up premium is less than calculated. Furthermore, when we use the annual cost of renewal to 15 years ($120) as the minimum additional profit expected from non-resident design owners (which can be viewed as the minimum cost for Australian consumers and is larger than the potential benefit that Australian design applicants can obtain from joining the Hague) it indicates a net cost for Australians as a whole. Even under this extreme situation, there will be a net cost of at least $2.5 million.

3. *Design product lifecycles are short*

The economic analysis estimates that only 32% of registered designs are renewed to 15 years. This is based on data from the previous *Designs Act 1906*. So there is already the assumption that more than two thirds

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[12] Based on IP Government Open Data (IPGOD 2018): https://data.gov.au/dataset/intellectual-property-government-open-data-2018

[13] https://www.shelstonip.com/news/apple-showcases-value-of-registered-design-protection/

of all initial filings should not be counted. FICPI Australia claims that product life cycles are likely to shorten in the future. This is not currently reflected in the data. Recent internal data from WIPO on Hague renewals suggests that the rate of renewals is not decreasing.[14] IP Australia sees no reason to change the estimated renewal rate in the analysis.

4. *A longer term would increase local Australian filings*

Increased local filings are only a net benefit to Australia if they are the result of additional design innovation created due to the incentive of the longer term. As discussed above, IP Australia has been unable to find robust evidence that a longer term would provide this incentive. In this case if there were greater filings in relation to designs that would have been created without the extra incentive then this is a social welfare cost (see below). Any additional profits derived from new resident Australian filers must be extracted from Australian consumers: this is a transfer payment, meaning that there is no net benefit to Australia as a whole.

5. *Increased non-resident design registrations have positive flow on effects*

IP Australia considered the flow on effects of more international designers protecting their designs in Australia and bringing products embodying those designs to the Australian market. The profit rate used is a net profit excluding all the costs such as sales tax collected on the product with a design right, the marketing and advertising money sums spent in Australia to promote the product, and the employees employed in Australia to sell that product. We use this net profit to calculate the extra cost for Australian consumers to pay after we extend the design maximum protection term from 10 to 15 years, which is the net benefit for foreign design owners who have an extended design right in Australia. As such, IP Australia considers that these benefits have been accounted for in the economic analysis. However, IP Australia acknowledges that the positive flow on effects are difficult to quantify and some flow on effects may benefit the Australian economy.

[14] Correspondence from WIPO Hague registry to IP Australia of 11 July 2018.

6.2 Social welfare impacts of the extended maximum protection term of designs in Australia

While acknowledging a significant social welfare loss may exist, the economic analysis concluded that the net social welfare impacts of extending the maximum protection term of designs remain unquantified in this analysis, due to the lack of reliable costings or costing methodologies identified in the economics literature. However, the economic analysis does not preclude further work, such as quantifying the social welfare impact, in the future.

Submission

Most submissions doubted any adverse social welfare impacts will occur. Some commented on other considerations. No submissions provided reliable ways to quantify social welfare impacts. In summary:

- FICPI Australia reiterates that applicants file in parallel to designs, where other IP rights such as patents and trade marks are used to protect their products. Therefore, in this case, a potential increase in the term of protection from 10 to 15 years is "clearly insignificant" given the length of protection provided by the other IP rights.
- GH is doubtful that any adverse social welfare impacts will occur given the considerably lesser scope of design rights. In any case, this could easily be dealt with by requiring a much higher renewal fee (e.g. for the 3rd five-year term) and/or by requiring substantive examination to be undertaken as part of applying for the 3rd five-year term.
- INTA suggests that the report does not consider the economic uplift for domestic filers within Australia. For Australian businesses relying on design innovation, the longer monopoly and higher profits may enable the business to grow larger for longer, with more potential to grow further abroad especially with the Hague System facilitating easier international filing. Both domestic and international growth for Australian businesses would benefit Australia's economy.

IP Australia response

The PC noted that the effect of an IP monopoly right "can impose a cost to the community in the form of higher prices and restricted access." Where rights are strengthened beyond the point needed to generate additional ideas result in "windfall gains to the IP rights holder, and windfall 'losses' to the rest of society."[15] ACIP similarly noted that "[e]xtended exclusivity has costs for Australian consumers (in the form of higher prices from reduced competition) and for Australian businesses prevented from offering similar products for a longer period."[16] As such, as long as designs provide a meaningful and enforceable monopoly that allows owners to charge higher prices there will be social costs associated with that monopoly.

For the reasons given above at 6.1, IP Australia broadly disagrees with the submissions that design rights are substantially weaker and therefore less enforceable than other rights. IP Australia is satisfied that

[15] PC, *Intellectual Property Arrangements*, 2018 p 64 and 66, available at: https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf

[16] ACIP, *Review of the Designs System*, March 2015, p 18, available at: https://www.ipaustralia.gov.au/sites/g/files/net856/f/acip_designs_final_report.pdf

design owners will be able to charge a premium in the additional five year term, meaning that the inherent economic inefficiencies of any monopoly or market power (social welfare costs) will be experienced. While the cost of this inefficiency remains unquantifiable, IP Australia does not agree with submissions that there will be no or insignificant social welfare costs.

Regarding the benefits from domestic uplift, more design applications and registrations does not equate to a benefit to Australia as a whole, unless it incentivises greater design innovation. For the reasons given at 5.4.1 above, IP Australia is not satisfied there is sufficient evidence that a 15 year term will lead to more design innovation.

6.3 Cost to Australian IP professionals

The economic analysis calculated the potential cost of lost business to Australian IP professionals under three scenarios with different splits between existing applicants and new entrants. The analysis concluded that, even in the best scenario (50/50 split), the potential cost in year one is estimated to be from about $0.1m to $0.4m (with a best estimate of $0.2m), and by the final (9th) year, the potentially lost business to attorneys is estimated to be between about $0.2m and $1m (best estimate of $0.5m).

Submissions

One submission considered that IP professionals would definitely lose business if Australia joined the Hague Agreement, while another submission was of the opposite view. In summary:

- GH considered that by joining the Hague Agreement, IP professionals will definitely lose out on designs filings revenue. For some companies, this lost revenue will not be insignificant. The benefit of joining Hague Agreement will be realised by Australian individuals and companies, and this may lead to increased work for IP professionals.
- INTA suggests that Australian IP professionals would "enjoy an increase in work … from substantive examination, advice and infringement work". However, the economic merits will depend heavily on the specifics of the implementation. It is possible that a formal opposition procedure could be introduced; there is an informal opposition procedure at present, but this is based on re-examination. Presumably, "more examination and more opposition will result in more work for IPA examiners and Australian IP professionals".

IP Australia response

IP Australia notes that submissions were divided on whether joining the Hague Agreement would mean more or less work for Australian IP professionals. Given there is no alternative data, IP Australia sees no reason to depart from the estimates in the economic analysis.

6.4 Australian designers will have to avoid more design rights

The economic analysis considered that more incoming design applications mean that Australian designers will have to avoid more design rights. Also, some additional searching costs to determine freedom to operate will be required.

Submission

Two submissions disagreed with the above view. In summary:

- FICPI Australia considers that designers "need not only avoid prior design registrations", they have the much higher hurdle of avoiding prior patents which are both more pervasive/broader in scope than designs and generally more prevalent for products which are not solely aesthetic. Furthermore, the available information indicates that a majority of Hague Agreement applicants pursue optional immediate publication, which occurs shortly after lodgement, because it provides provisional rights, similar to having a published patent application. In contrast, most regular national design applications, such as US design patents, are not published until after grant, which can be several years after lodgement. Therefore, users of the design system will typically have a better idea of infringement risks and competitor behaviour when their competitor uses the Hague system as compared with separate national applications.
- GH considers that there will be more design rights to consider when assessing freedom to operate, but such advice in relation to designs is far more straight-forward than with patents. Having more overseas designs on the designs register may also be of some benefit, where the Australian designer is looking to exploit overseas markets, as the register will provide an early indication of potential offshore rights to avoid.

IP Australia response

IP Australia notes that this cost was not quantified. The submissions consider that, although unquantified, the costs might be small or even provide a benefit. IP Australia agrees that these are reasons for why the cost might not be large, but neither submission provides sufficient evidence to conclude that there will be no cost of avoiding design rights. IP Australia also notes the information above in 6.1 which suggests that design owners are enforcing their rights.

6.5 IP professionals will have to prepare for the Hague Agreement

The economic analysis estimated the total cost for IP professionals to be between $30,000 to $1.5m, with a best estimate of around $443,000.

Submission

One submission attempted to provide an estimate on the one-off preparation costs. GH estimates each firm may spend between $25,000 and $50,000 to fully integrate the changes.

IP Australia response

IP Australia notes that the estimate provided by GH, when scaled up for the whole profession working on designs, is approximately double IP Australia's estimate.

Currently there are 65 attorney firms listed on the Trans-Tasman IP Attorneys Board directory of firms.[17] If all of these firms incurred the cost estimated by GH then the total cost would be between $1,625,000 and $3,250,000 which is above our high estimate.

However, given that designs are less common than patents and trade marks, it would be expected that many of these firms would not have a designs practice, or would not offer Hague filing services if the set up costs involved were that high. As such, the range used in the economic analysis does not seem inappropriate.

[17] https://www.ttipattorney.gov.au/resources/directory-of-firms

8.2 The Hague Agreement landscape will change

The economic analysis predicted that the Hague Agreement landscape will change with a number of countries expected to join the Hague Agreement, including China, Canada and Thailand.

Submissions

Some submissions noted that a number of countries have either recently joined Hague or are likely to do so in the near future. These submissions considered that these additional Hague members would increase usage of the system internationally making it more desirable for Australia to join. Two submissions explicitly called for Australia to join the Hague Agreement now in anticipation of this increased usage. In summary:

- The LCA states “the strong indication that the People's Republic of China and Canada will join the Hague Agreement should be accepted as representing that tipping point”. Given the time it will take to implement the Hague Agreement into domestic law, the LCA is in favour of including the necessary changes to join the Hague Agreement in the upcoming Designs Bill. LCA considers that this “long lead time for the implementation of the Hague Agreement into domestic law, combined with the recent and announced accessions of a number of Australia's significant trading partners, are such that Australia should begin preparations to join the Hague Agreement”.
- IPTA believes that once China and Canada have joined the Hague Agreement, the ‘tipping point’ will have been reached. IPTA also points out that since the process of acceding may take several years to implement, it considers the upcoming Designs Bill should include the necessary changes to join the Hague Agreement in the near future.
- FICPI Australia suggests that Australian designers will further benefit when China and New Zealand join the Hague Agreement given they are Australia’s top filing destinations. Therefore it would be likely that the number of overseas applications filed by Australians would increase and counter the current imbalance to some extent. FICPI Australia encourages IP Australia to reinvigorate discussions concerning the Design Law Treaty, which will provide benefits that flow over to the Hague system.
- NZIPA agrees that a “significant uplift in international usage would support Australia joining the Hague Agreement”, and signals that it may take more time to gauge this effect.

IP Australia response

While IP Australia notes that Canada has recently joined Hague and China is anticipated to join soon, the PC endorsed a “wait and be convinced” approach. On this basis, IP Australia considers it would be prudent to wait until the impact of these countries has been felt.

The high volume of designs originating from China could exacerbate the costs of Australian joining the Hague Agreement, particularly the costs of profits flowing from Australian to China during the extended term.

Using Canada as a comparison (because it is a similar sized economy and will also have to extend its maximum term) will only be possible when there are a few years’ data on Canada’s Hague experience.

IP Australia considers that these benefits are still speculative at present and should not be included until there is robust data to support them (which is unlikely to be available for a number of years).

Issues not raised in the economic analysis

Grace period

A number of submissions supported the introduction of a grace period. In summary:

- LCA supports the proposed introduction of a grace period. LCA asserts that a grace period will result in a "material increase in local filings". Further, "[t]he Economic Analysis is conducted without reference to the likely impact of these changes". In sum, "the practical reality is that designers will often not seek design protection at all if they cannot obtain protection in their local market".
- IPTA also believes that the introduction of a grace period "will significantly increase filings by Australian applicants not only those who inadvertently published their design but also those who successfully launch a product in the Australian market".
- FICPI believes that the disparity between foreign and resident design filings could be mitigated by the introduction of a grace period as a "means to promote more local design applicants to file".
- INTA suggests the introduction of a grace period would allow parties to test the market, and reduce the expense of registering for design protection. INTA strongly welcomes the implementation of a grace period in Australia. INTA supports a harmonized grace period of 12 months, to be consistent with that of patents.

Treaty obligations

LCA suggests that Australia should be mindful of its treaty obligations in assessing whether to join the Hague Agreement. Specifically, Art 17.1.5 of the *Australia-United States Free Trade Agreement* requires Australia to "make its best efforts to comply with the provisions of the Geneva Act of the *Hague Agreement Concerning the International Registration of Industrial Designs* (1999) … subject to the enactment of laws necessary to apply those provisions in its territory". According to the LCA, "[i]t is unclear how a decision to further delay joining the Hague Agreement could be said to be consistent with that treaty obligation".

Other benefits

INTA believes that given the "relatively small market in Australia, many industries would benefit from growing into overseas markets". In addition, INTA points to the flow-on effects of having new products brought in, and sold, in Australia. For example, the tax collected on sales, the advertising costs to get new products to market, and the new jobs created as a result of non-resident businesses participating in the Australian economy.

INTA supports international harmonization, and states that through the Hague Agreement, Australian designers, particularly individuals and small and medium enterprises will benefit from being able to obtain design rights in multiple jurisdictions in a simplified manner and with reduced costs.

INTA also believes that a number of practical benefits would result from joining the Hague System, including clarity around format of design drawings/representations which will be suitable internationally.

LCA believes that international harmonisation reduces administrative "red tape". Also, it is important to recognise that there are benefits to being "inside the tent" – that is, Australia will have greater influence on the future direction of designs protection. This is a benefit that is recognised in the economic analysis.

IPTA stated that it is "strongly in favour of increasing harmonisation", as it "will reduce [national differences] and any reduction in complexity should reduce costs". IPTA supports the Designs Law Treaty and believes that in joining Hague, "Australia will be better able to participate in and influence harmonisation of Designs law".

GH considers that joining Hague means Australia playing its part in international IP forums/agreements, realising governmental and professional body benefits. Also, it may give rise to increased interest in overseas companies performing some of their design work in Australia.

IP Australia response

Grace period

The Australian Government has already committed to introducing a grace period, regardless of whether Australia joins the Hague Agreement.[18] Accordingly, this is inconsequential to the assessment of costs and benefits of Australia joining the Hague Agreement, since the benefits of the grace period will be realised regardless.

Treaty obligations

IP Australia notes the 'best efforts' obligations in Article 17.1.5 of the *Australia-United States Free Trade Agreement*.[19] It should also be noted that the economic analysis is only one piece of information to be considered by the Australian Government in deciding whether to join the Hague Agreement at this time.

Other benefits

IP Australia is not convinced that there would be increased flow-on benefits, given no quantifiable data has been provided to support this assertion.

IP Australia agrees that there are practical benefits around harmonised requirements. However, these are already captured in 5.1 of the economic analysis. Submissions did not provide any quantifiable data to justify revising these figures other than what is indicated above.

IP Australia notes the unquantifiable international benefits mentioned in submissions, but considers that these are already addressed at 5.6 of the economic analysis.

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[18] Australian Government, *Government response – ACIP Review of the Designs System*, 2015, p 5: https://www.ipaustralia.gov.au/sites/g/files/net856/f/government_response_-_acip_designs_review_-_final_pdf.pdf

[19] Article 17.1.5: Each Party shall make its best efforts to comply with the provisions of the Geneva Act of the *Hague Agreement Concerning the International Registration of Industrial Designs* (1999), and the *Patent Law Treaty* (2000), subject to the enactment of laws necessary to apply those provisions in its territory.

Revisions to the economic analysis

IP Australia agrees that the quantified impacts in the original economic analysis should be revised to account for:

- existing Australian applicants filing overseas – the official fees savings due to a centralised renewal system (5.1 above)
- new Australian applicants who would be enticed to file overseas – the extra expected additional profit component represented by the official fees savings due to a centralised renewal system (5.2 above)
- using the lower average industry profit rate as the estimate for the additional profits for non-resident design owners during the additional five years of the term (6.1 above).

To calculate official fee savings for design renewal via the Hague system, we adopt the same assumption used in Section 5.1.1. That is, we use a typical design application including five designs and designating the United States, the European Union, Japan, Republic of Korea and Singapore. Based on Australian and Hague past average renewal rates, which are very similar, we use 63% and 35% as the estimated first and second renewal rates for Hague applications filed by Australian residents. By comparing the differences in the renewal fees via the Hague system and individually in the above five regions, we calculate the estimated official fee savings on renewals: $ 252 per annum (best), $15 per annum (low), and $609 per annum (high). These numbers are used to calculate additional benefits that were added to 5.1 and 5.2 of the original economic analysis.

To calculate the revised costs of additional profits to non-resident design owners during the extra term, IP Australia used the 13.8% average industry profit figure as the best estimate of additional profit. To calculate the high and low estimates, IP Australia will allow for 50% upward and downward margin for a reasonable range, which gives a low profit of 6.8% and a high of 20.8%. These inputs were then used to recalculate the costs in 6.1 of the original economic analysis.

Revised net cost to Australia of joining the Hague Agreement at present

Accounting for the changes above, the revised net present cost to Australia of the quantified impacts is estimated to be between approximately $17.9 million and $87.3 million over ten years, with $43.1 million being the best estimate. Ten year impacts by stakeholder group are:

- **Australian designers:** a potential net benefit of approximately $0.06 million to $8.7 million, with a best estimate of $3 million. This is due to increased savings on international applications from taking new designs overseas via the Hague system.
- **Australian consumers:** a net cost of approximately $18.4 million to $79.1 million, with a best estimate of $39.7 million. This is due to income flowing overseas from Australian consumers paying additional design mark-up premiums to non-resident designers over a longer term of design protection.
- **Australian IP professionals:** impacts estimated as between a benefit of approximately $0.3 million and a cost of $12 million, with the best estimate being a cost of $2.5 million. Australian IP professionals will receive some extra business from non-residents at the examination stage, but will likely lose more business at the filing stage as non-residents go through the Hague system.

- **Australian Government:** a net cost of approximately $2.3 to $3.4 million, with a best estimate of $2.8 million. This is due to information technology system changes that will be required to process applications filed via the Hague Agreement.

As noted above, there are several areas where IP Australia agrees with submissions that comment on unquantified impacts (for example, 2.1 and 5.1 above). The unquantified impacts in the original economic analysis should be read in light of IP Australia's comments on submissions above.

Next steps

The economic analysis – including the results as revised above – forms part of the evidence base for consideration of whether Australia should join the Hague Agreement. IP Australia will continue to monitor the Hague Agreement landscape, including the impact of recent and future members such as Canada and China. The economic analysis may be revised again, in light of data from these countries' experience under the Hague system. The economic analysis is one piece of evidence informing whether Australia should join the Hague agreement, the analysis does not preclude further policy considerations as to whether Australia should join the Hague Agreement.