

Defining design



Australian Government

IP Australia



Design's role in the
Australian economy

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Executive summary

Design doesn't happen at the touch of a button; it requires the right motivations, drivers and conditions. In Australia design rights protect the visual appearance of products to create incentives for Australians to invest in design. In reviewing policy to encourage design, we need to understand what design is, who uses it, how it's practised and for what reasons.

Given the growing importance of intangible assets and changes in where, how and why design is practised, we need to understand what design is. For this review, we adopt a definition that designs are defined by form and function: designs are the form characteristics of products which shape the sensory experience of a product and may provide functional or symbolic benefits to the user. This definition extends beyond what is currently the focus for design rights.

This report outlines two competing views on why designs should receive intellectual property (IP) protection. The 'incentive view', currently the basis for designs law in Australia, is that design rights exist to provide an incentive for designers to invest in original design. The alternative 'informational view' proposes that design rights exist to help consumers to distinguish between products and need not be considered as a direct investment incentive.

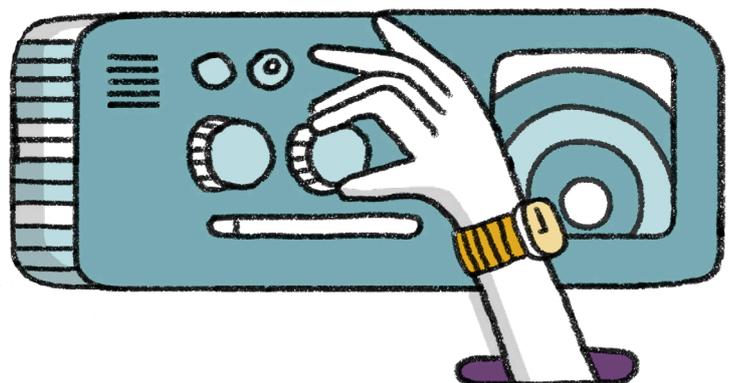
Understanding how the IP system can enable design innovation matters because design is a significant contributor to the Australian economy.

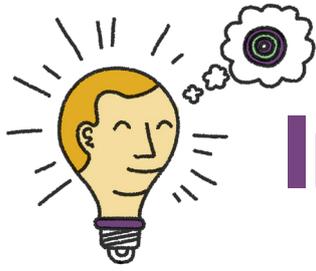
But this report does not conclude which approach is optimal going forward, as the economic evidence is mixed. A focus on design can lead to higher market share, and financial performance, but this could be driven by both the role of design in innovation and the informational value of designs.

Case studies suggest that clever design helps products be accepted in the marketplace and provide information to consumers. Further work shows that, when design is built into a portfolio of products, the value of a design is in the information it conveys about a brand. Other studies suggest there is a firm performance boost from design activity, so the incentive to undertake design is valuable, but those studies do not establish the link back to the design right as the driver of design activity.

The report puts the existing evidence forward, and it appears that there is not currently a strong evidence base to favour either view of the design system.

By our estimate, the contribution to Australia's GDP of design-related industries and workers was approximately AU\$67.5 billion per annum by 2018, or more than 3.5% of GDP – equivalent to the size of the construction industry.





Introduction

Intangible assets¹ are now a major source of value in the global economy. As intangible assets have grown in economic importance, design rights — legal IP rights that protect the visual appearance of products — have continued to grow: between 2007 and 2018 the number of applications for these rights has doubled worldwide.

Research commissioned by IP Australia (Falk et al., 2019) suggests that Australia lags behind its international peers in both the size of our design workforce and our growth rate in generating registered designs, although the total number of design rights used by Australian designers is close to the expected level given the size of the design labour force.

The Designs Review Project is a holistic review of what drives design innovation, the role of the IP system, and what changes to the existing design rights system could benefit Australia.

This report is part of a series of four:

1. Defining design

This report, which sets the context by defining design as a concept, discusses the economic rationales for protecting designs and reviews evidence about design's role in and contribution to the economy

2. Talking design

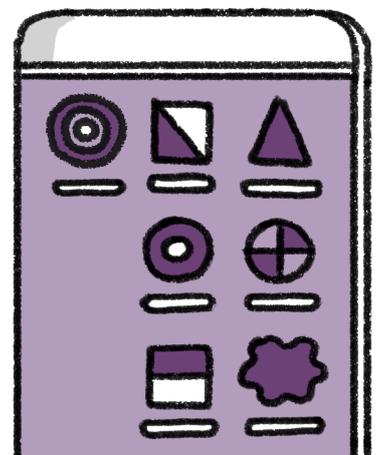
A summary of experiences and roles in the design process, motivations to invest in visual design, and barriers and challenges faced by those who were interviewed for a qualitative study

3. Valuing designs

An economic evaluation of the benefits to Australian firms from having design rights

4. Protecting designs

A survey of Australians' methods and motivations for protecting designs, harms from copying, and how people enforce design rights



¹ Intangible assets are non-physical assets, such as (but not limited to) intellectual property, customer databases, leasing or licensing agreements, and trade secrets.



Part 1: What is design?

In our review, we use the following definition, adapted from management and marketing research, for ‘a design’.

Designs are the form characteristics of products which shape the sensory experience of a product and may provide functional or symbolic benefits to the user.²

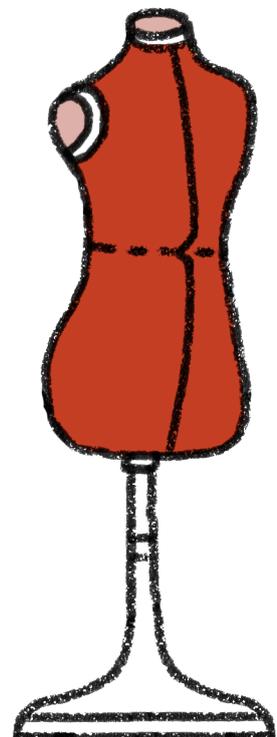
Referring to the ‘sensory experience’, the definition emphasises the visual aesthetic elements of design, which is consistent with the legal definition of design in the context of design rights.³

While the definition is consistent, it does allow us to take a broader view. In our research we have considered designs more broadly than the existing legal definition, noting that the appeal of products can lie in sensory elements other than visual aesthetics, such as touch. It is common for a product’s aesthetics to work together with functional benefits to create satisfaction among users. We also note that a design can be the form of an entire product or of a component of a complex product.

New designs are the result of *design activity*. Historically and most commonly for physical products, *design* refers to industrial design: the process of creating, inventing and specifying three-dimensional forms capable of mass-production (Heskett, 1980: 10).

Design innovation is the broader concept of creating and deploying designs that are new to the market or to the business, including those aimed at improving the performance of a product, the aesthetics of a product or a user’s relationship with a brand (Moultrie and Livesey, 2014).

In our research we use the term *designs* to refer to the characteristics of form that result from design activity.



² Adapted from Bloch (2011).

³ In Australia, since 2004, design rights have protected the visual features of products such as their shape, configuration, pattern and ornamentation. ‘[D]esign, in relation to a product, means the overall appearance of the product resulting from one or more visual features of the product.’ (*Designs Act 2003* (Cth)).

Part 2: Rationales for protecting designs

This report reviews evidence about design's role and contribution so that we can understand the unique place design protection has in the IP system. There are several reasons why IP in general and designs specifically are given legal protection.

There is an ethical debate about the role of IP in achieving a just and attractive culture, distinct from any economic rationale (Hughes, 1988).

For example, there is an argument that people have a natural personal relationship with their creative output to the extent that their interest in their creative work rises to the level of a moral right (Himma, 2008). Under Australian copyright law, moral rights protect a creator's work from derogatory treatment and ensure that they are properly attributed and credited.

Here we explore the two main *economic* rationales for legal design protection: the incentive view and informational view of IP. Both of these views recognise the IP system should balance the interests of different users – the creators of ideas, those who want to develop ideas further, and consumers – and increase market efficiency. This balance is central to IP policy in Australia (Australian Government, 2017: 3).

The incentive view of IP

In Australia the rationale to provide protection for designs is to encourage innovation. Creating and commercialising designs involves investment and risk. For instance, in industries such as fashion, furniture and video games, success depends not only on the originality and usefulness of products but also on how critics and consumers subjectively evaluate them (Godart et al., 2015). Choosing which designs are likely to succeed can be a risky business.

When design concepts are made public, they can often be reused freely. It can be very difficult to exclude others from reproducing a design concept. However, imitators take on less risk than those who produce an original design. When a design is copied and replicated, the original producers may not financially benefit from their work as much as they otherwise could have.

Without the exclusive right to control their work through a registered IP right, designers may be less motivated to invest in original design. Future designers could be deterred from entering the field. Consumers could be left worse off, which would negatively affect the national economy (Fabbio, 2018).

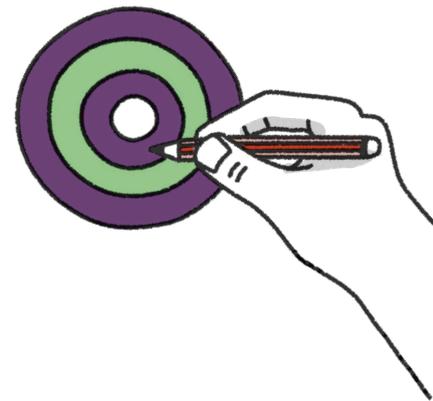
The incentive view of IP is that the ability to protect designs provides an incentive for businesses to invest more heavily in original design, as they may be able to rely on this protection to reap returns from their design investment.

What incentive-based rights protect and for how long

In the incentive view of IP, the level of protection, which is up to 10 years in Australia for a whole design, reflects social welfare considerations.

One can compare this protection to patents (which protect novel inventions) or copyright (which protects original literary, dramatic, musical or artistic works), both of which are provided based on the incentive view of IP:

- Patents give strong legal rights. In exchange for this strong protection, they have a shorter (20-year) term than copyright and the invention has to be disclosed to the public in full. This balance aims to ensure open access to the technological building blocks necessary for future innovation by others.



- Rights under copyright are less restrictive in that they relate only to a specific expression of an idea. For example, while the words of the Harry Potter books are protected by copyright, anyone is free to write a story about a boy wizard with a scar. As copyright does not prevent others from using the same idea to create their own works, the term of copyright protection is much longer – up to life plus 70 or more years for some types of content (Dogan, 2018).

Design lives at the intersection of invention and creativity, and so there are different perspectives on where design protection fits in the incentive view of IP. Incentivising design means encouraging innovation in many different occupations and industries, each of which may be best served by different strengths and terms of protection.

The design process is often unconstrained and non-linear, so designs can often share more in common with the kinds of artistic works afforded protection under copyright.

Products with minimal scope for technical innovation can be reinterpreted in new and inventive ways. In some instances, a design like the Eames chair becomes iconic, reaching the cultural status of an artistic work.

The incremental process of technological development that many patentable products follow, on the other hand, is often constrained by functionality and therefore more linear. Compared to works that are purely artistic, design is generally more directly associated with industrial production, and changes in a product's form often flow from changes in function or provide the framework for technological advancement (e.g. Apple's iPad, which defined the form in which tablets have developed).

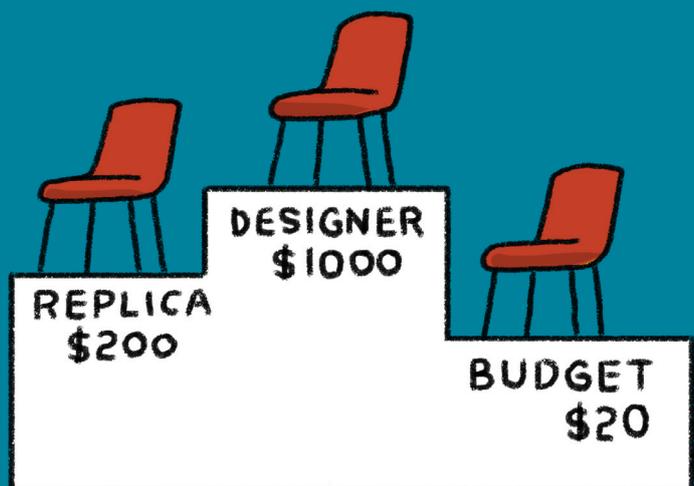
There is arguably a public interest in laws that, like patents, make designs available for the public to use and build upon after a limited time period to enable competition and cumulative innovation by others. If design rights are too broad or last for too long, there is a risk that access to the building blocks for ongoing innovation will be restricted (Buccafusco et al., 2018).

The informational view of IP

Design also has a communication role in creating differences between products to assist consumers to recognise the different origin or quality. The bevelled corners of the Apple iPad are protected by design rights and separate the tablet from others in the market. In some instances where designs are copied without the authorisation of the original designer, consumers may not be able to determine, at the point of purchase in particular, the difference between the quality of the products or where they came from. IP protection for designs may help to reduce this type of confusion, in a rationale that may be more similar to registering trade marks for brands than patents for inventions or having protection under copyright for artistic works.

This informational view of IP focuses on the problem of uneven information being available for consumers. In some markets, consumers cannot easily observe the quality of products when they buy them.

Consumers may rely on the reputation and brand of a product to identify its source and distinguish its quality, signalled through trade marks. If products are not uniquely identified by their brands or associated features, consumers would have to spend a lot of time researching different offerings (Ramello, 2006).



In addition to trade marks, product design can create differences between competing products and uniformity across a brand's product line. Design can also convey information about the quality of a product or lifestyle of its users. Design copying can add to consumer confusion and effort or cost required to research different products on the market. Copying can also lead to a product becoming more commonplace, diminishing its prestige value for early adopters (Appel et al., 2018).

Given these effects, some experts have argued that design protection could be rationalised on the same basis as trade marks and other rights for distinctive signs (e.g. Ohly, 2018).

What information-based rights protect and for how long

The incentive view and informational view call for different protection. As the primary right addressing the informational view, trade marks provide legal protection for an unlimited time. This is because:

- the need to prevent consumer confusion does not lessen over time after a product enters the market
- after a producer registers a trade mark for a product, competitors remain free to offer products that are identical to the product but under a different mark (Ohly, 2018).

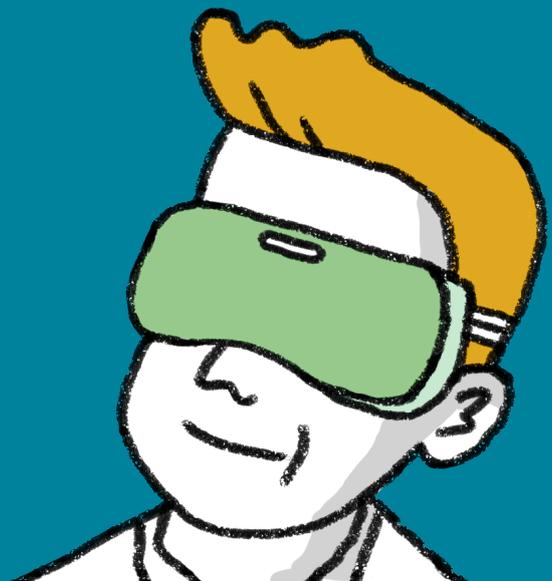
Trade-offs between the incentive and informational views

In Australia in 2020, the main goal of design protection is to incentivise innovation.

In principle, it is possible that design protection could increase market transparency under the informational view, while creating incentives for innovation at the same time: giving producers exclusive control over the signals that identify their brands or products helps them to build their reputations.

Design protection that performs this role may therefore create incentives for them to deliver higher quality products (Shapiro, 1983).

Even though the incentive and informational views are aligned in certain ways, there are trade-offs between them when it comes to the conditions of protection. For instance, under the informational view, if the term of protection for design were lengthened, we could create more informed markets. But under the incentive view, a longer term of protection could also restrict access to the resources necessary for innovation.



Part 3: Design's economic role and contribution

To inform discussions about the place of design in Australia's IP system, this report assesses how, and how much, design contributes to the economy.

We review evidence for three ideas that have been proposed by academics:

- 1. Design builds market acceptance for new technologies** – in which case design protection could give important incentives for businesses to invest in design and design protection. But more design protection could impede cumulative technical innovation in new technology areas.
- 2. Design creates differences between functionally similar products** – meaning that longer terms of protection may not be an issue, as the design provides information but does not block innovation.
- 3. Design can link brands to products and communicate their quality characteristics** – meaning a design might link a whole suite of products or ideas to a single brand and its quality, meaning the scope of what constitutes imitation matters.

The balance between these different ideas is important to understand when considering the social welfare benefits and consequences of providing design protection.

The economic contribution of design

In 2018 the Bureau of Communications and Arts Research provided estimates of the value added by a range of cultural and creative industries, many of which can be considered design-related (i.e. industries where design is a central process). Value added is the total value of goods and services produced by an industry, less the cost of goods and services used in production.

This economic contribution is calculated for the full supply chain of each design-related industry.

Table 1 shows the value added of different areas of design activity. Our analysis includes value added by (1) design industries; and (2) embedded designers – that is, people in design-related occupations employed outside the design industries (e.g. industrial designers employed in household appliance industries). We used an experimental methodology to work out the estimates for embedded designers, so these estimates should be viewed cautiously (see Appendix).

Table 1. Contribution to GDP by design industries and embedded designers (millions, constant AU\$, 2019)

\$m	Total value added of design industries (annual average, 2008–2016)	Value added by embedded designers (average, 2011 and 2016)
Design services, architecture, software and interactive content	39,978	4,556
Fashion	14,930	524
Furniture	3,792	1,071
Visual arts and crafts	2,436	220
Total	61,136	6,371

Source: BCAR (2018), IBISWorld (2019), Australian Census of Population and Housing (2011, 2016). Values cited from BCAR are translated from nominal to real terms.



Based on these data, design industries contributed an annual average of \$61.1 billion (constant prices, 2019) in value added between 2008–09 and 2016–17, representing, on average, 3.4% of Australia’s GDP. Embedded designers generated an extra \$6.4 billion, averaging data from 2011 and 2016. The combined total was around \$67.5 billion per annum.

Design’s role in business performance

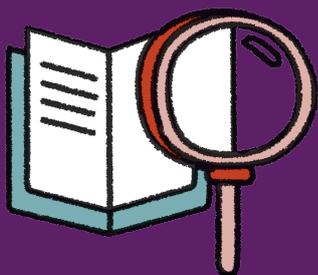
Evidence is mixed regarding whether design is a driver of better business performance. We found no studies that demonstrate a clear causal performance link. However, results from numerous studies suggest that a focus on design can lead to higher market share (Jindal et al., 2016) and stronger financial performance under certain conditions (Gemser and Leenders, 2001; Hartenstein et al., 2005; Montresor and Vezzani, 2019).

The role of design in innovation

Some academics have argued that design has a role in building market acceptance for new technologies and also in creating differences between functionally mature products (Eisenman, 2013; Chan et al., 2018).

Design has a visual language that can help communicate what a product or feature does – a flat panel on a door signals that you should push the door to open it, for example.

Case study research supports the idea that, when new product technologies are introduced, clever design can help the public to accept those technologies (Hargadon and Douglas, 2001). However, this idea has not been substantiated by many large-sample studies.⁴



Design can also excite users and encourage them to form stronger attachments to products. In this way, design may create differences between products with the same or similar functions (Eisenman, 2013; Kur et al., 2018).

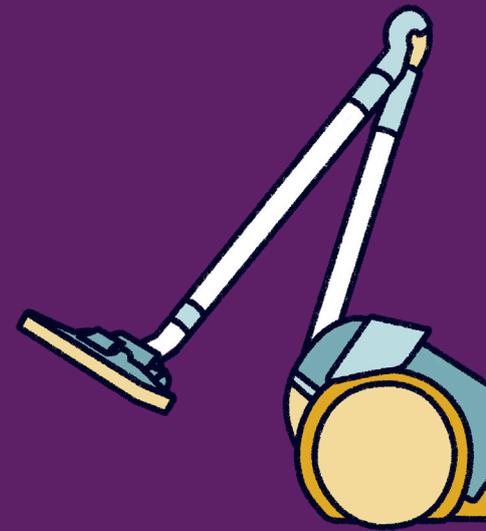
Some studies suggest that design has a pronounced effect on performance for firms in mature industries (Jindal et al., 2016). These are industries where products are largely interchangeable in their functional aspects. However, other studies suggest that different industry conditions matter (Gemser and Leenders, 2001).

The role of design as an informational device

There is evidence from research on marketing that design can play an informational role for consumers.

When consumers develop beliefs about the superiority of a brand, their willingness to buy products marketed under the brand increases (Liu-Thompkins and Tam, 2013). When consumers interpret a brand to signal quality, they see less risk in trialling products from the brand even when those brands are in different categories (Swaminathan et al., 2001). For example, Dyson established its reputation producing vacuum cleaners known for their innovative design. Later they expanded into new product categories such as fans and heaters, hair care products and lighting. Studies show that consumers have more favourable reactions to brand extensions (products under an existing brand introduced into a new category) when they have similar design features to other products marketed under the same brand (Park et al., 1991).

The evidence suggests that design can link products to brands and convey their quality characteristics. However, beyond the context of specific marketing strategies, it is unclear how widely design functions as an informational device.



⁴ A rare exception is a study by Chan et al. (2016) of product styles indicated in design patents in the United States.

Conclusion

We calculate that the contribution to Australia's GDP of design-related industries and workers was approximately AU\$67.5 billion per annum by 2018: a significant contribution to Australia's economy.

In Australia, the policy surrounding design rights centres on incentivising innovation. However, some experts have suggested an alternative informational rationale for legal protection: to reduce consumer confusion. These two different views on IP may be aligned in some ways, but they can involve trade-offs in determining the appropriate terms for design protection.

For instance, under the informational view, long-term design protection could allow more informed markets to develop over time and help producers build their reputations under the informational view.

However, under the incentive view a longer term would mean that other designers are denied access to resources necessary for cumulative innovation. A longer term of protection may also limit competition and innovation in industries where *form follows function* – where technical innovation and design innovation unfold in tandem.

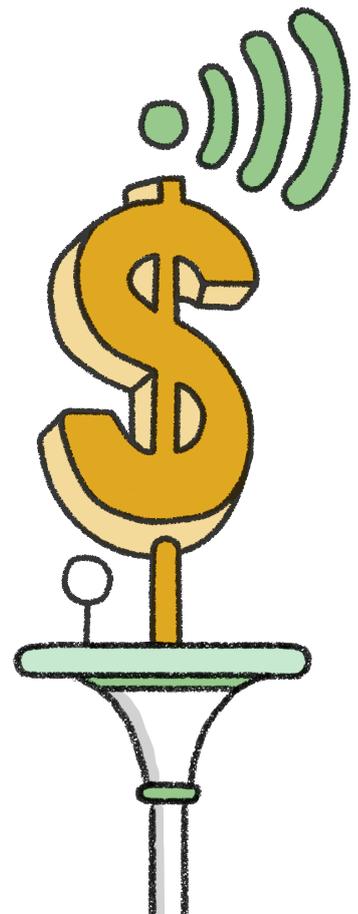
We found some evidence to support the following ideas about design's role in the economy:

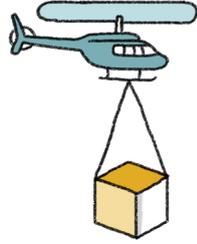
- **First**, design may play a role in building market acceptance for new technologies.
- **Second**, design can play a role in creating differences between functionally similar products.
- **Third**, design can link products to brands and convey their quality.

From available evidence, it was not clear how widely design functions in these roles.

This report identifies important knowledge gaps that are addressed in the other three reports in the Designs Review Project series. *Talking design* investigates Australians' experiences in the design ecosystem, including attitudes to design copying and protection, in a qualitative study. *Valuing designs* presents new economic evidence on the value to Australian firms of obtaining design rights. *Protecting designs* assesses Australians' motivations and methods for protecting designs, including those used across product portfolios or in products featuring functional innovations.

The findings from these reports will contribute to the evidence base being developed by IP Australia's Design Review Project for policy looking forward.



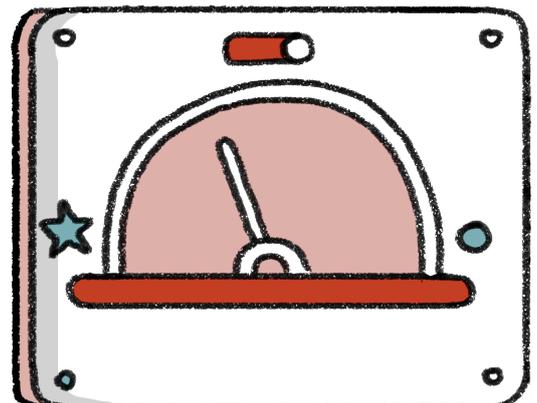


Appendix

Following the method used in previous research (e.g. BCAR, 2018; Design Council, 2018), we calculate the contribution of embedded designers by these steps:

1. Identifying the set of occupations associated with design-related industries
2. Calculating the total number of employees in these occupations for each industry outside the design sector
3. Calculating the share of total industry earnings received by design professionals
4. Apportioning the value added from each industry to its design employees, based on their share of total industry earnings.

Data sources included IBISWorld industry data (2019) and the Australian Population Census (2011, 2016). Occupational categories were defined as in the Australian and New Zealand Standard Occupational Classification 2006.





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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.

