



Australian Government

**Department of Immigration
and Border Protection**

Submission to the Inquiry into Intellectual Property Arrangements

Productivity Commission

Table of Contents

Introduction	3
Portfolio Submission	3
The institutional landscape of intellectual property in Australia	3
Role of the Department.....	3
Legislative powers	3
Australia’s Notice of Objection Scheme.....	4
The process where suspected infringing goods are seized.....	4
Targeting infringing goods at the border.....	4
Challenges for border enforcement of IP rights	5
Appendix I: Seizure Process Flowchart.....	6

Introduction

The Department of Immigration and Border Protection (the Department) is responsible for immigration and customs border policy. The Department's mission is to protect Australia's border and manage the movement of people and goods across it.

The Department plays an important role in enforcing intellectual property rights in respect of imported goods.

This submission provides an outline of the role of the Department in relation to the enforcement of intellectual property rights at the border.

Portfolio Submission

The institutional landscape of intellectual property in Australia

Australian Intellectual Property (IP) law is jointly developed and enforced by a number of Commonwealth agencies and State and Territory police forces. The Department notes that the Productivity Commission's Issues paper makes no reference to enforcement activities to address the importation of goods that infringe IP rights such as counterfeit and pirated goods. The institutional landscape is incomplete without reference to the Department's role in enforcing IP rights at the Australian border.

Role of the Department

The primary role of the Department and its operational arm, the Australian Border Force (ABF), in relation to IP rights, is to administer border enforcement measures for trade marks and copyright. In addition to this role, the Department provides:

- advice to policy agencies in developing and implementing IP reforms; and
- technical advice to the Department of Foreign Affairs and Trade during negotiation of IP provisions in Australia's free trade agreements

Legitimate businesses look to the border enforcement agencies to defend their IP investments against the importation of goods that infringe their IP rights. Infringing goods disrupt markets by subjecting legitimate goods to unfair competition. Further, infringing goods can damage authentic brands when inferior quality or unsafe goods are unknowingly consumed.

Legislative powers

The Department and ABF enforce IP rights at the border under provisions in the *Copyright Act 1968*, *Trade Marks Act 1995*, *Olympic Insignia Protection Act 1987*, and *Major Sporting Events (Indicia and Images) Protection Act 2014*. The import provisions in these Acts establish Australia's Notice of Objection ('Notice') Scheme, which allows the ABF to seize goods that infringe trade marks, copyright, protected Olympic expressions, and protected indicia and images, under certain circumstances. This Scheme is consistent with Australia's international obligations under the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), to which Australia is a party.

Australia's Notice of Objection Scheme

The ABF may only seize goods suspected of infringing intellectual property rights if the IP owner or their authorised representative has a valid Notice in place with the Department. The suspect goods must be intended for commercial gain or be of a quantity that could prejudicially affect the market position of the IP right holder. There are currently over 650 Notices of Objection in place (up from 456 as at 30 June 2010), covering thousands of brands.

A Notice is valid for four years and can be re-lodged to ensure ongoing protection as long as the IP right is held. If the Notice is no longer required, the owner may withdraw it at any time. A Notice under the legislation for major sporting events is valid only for the period of protection specified for any given event. Separate Notices are required to protect trade marks, copyright, protected Olympic expressions, and protected indicia and images. There are no costs imposed on IP rights holders to lodge a Notice with the Department.

The process where suspected infringing goods are seized

When goods are seized, the importer or designated owner is notified by the ABF in writing. The importer has ten business days to lodge a claim for release of the seized goods. The ABF also notifies the IP rights holder of the seizure, and provides relevant information to the IP rights holder so they may pursue legal action against the importer to enforce their IP rights. The rights holder has ten business days to commence legal action. If legal action is not taken the goods will be released to the importer. The goods may be voluntarily forfeited by the importer, or the rights holder may consent to their release to the importer, at any time.

When legal action is taken, a court will determine if the goods have infringed protected IP rights, and will either order the release of the goods or will prevent them from being released to the importer. In Australia, only a court can make a determination regarding the legitimacy of the imported goods suspected of infringing IP rights. See *Appendix I: Seizure Process Flowchart*, for more detailed information.

Targeting infringing goods at the border

The ABF employs a risk-based, intelligence-led approach to border enforcement of IP rights. In particular, infringing products that pose a health and safety risk to the community and large consignments that could have significant economic impact are targeted.

Rights holders often have the best knowledge of when counterfeits of their own products are in circulation in the Australian market. The Department receives information from IP rights holders and industry about potentially infringing products, known offenders involved in the importation of counterfeit or pirated goods and international suppliers of these products. This market intelligence greatly assists in the detection of non-genuine products.

The Department is developing a training program for officers involved in IP enforcement to support effective detection of infringing goods. The program will commence in 2016 and will complement previous Departmental and external training programs delivered by industry stakeholders that the Department regularly participates in, such as the REACT Anti-Counterfeiting Seminar and Identification Workshop, held in October 2015.

The training will deliver information on developments in IP enforcement, including intelligence relating to suppliers, supply routes, authorised importers and product security features. A practical component of the training will allow IP rights owners to exhibit physical examples of

counterfeit and genuine goods allowing officers to gain a first-hand appreciation of product differences to facilitate detection.

Challenges for border enforcement of IP rights

The volume of goods crossing the border each day has been rapidly increasing. Since 2010-11, incoming air cargo has increased by 140 per cent, from approximately 14.0 million to 33.6 million consignments, and the number of imported sea cargo reports grew by 20 per cent from approximately 2.5 million to 3.0 million [Source: Australian Customs and Border Protection Annual Report 2014-15].

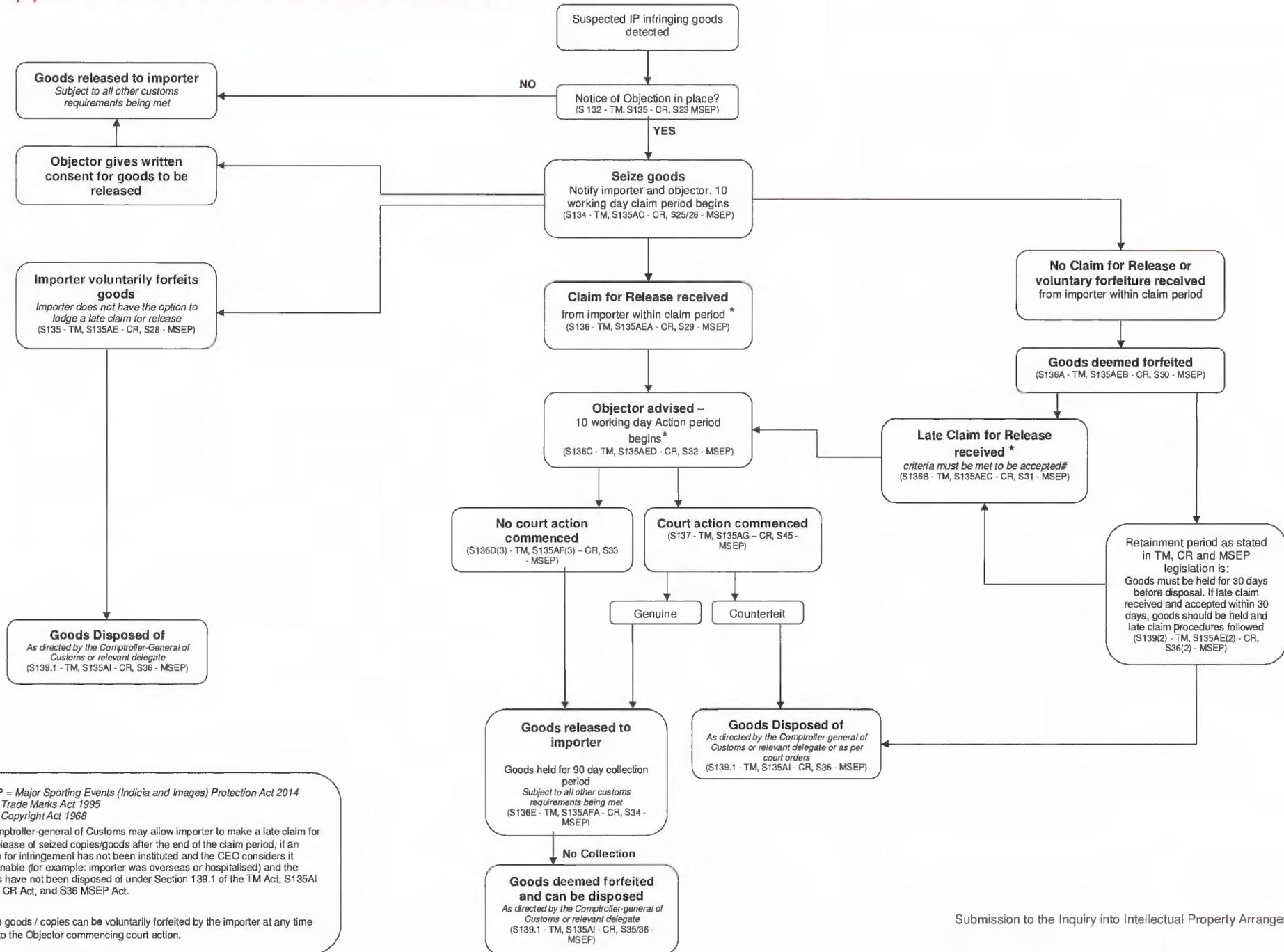
In this rapidly expanding trade environment, the ABF protects the safety, security and economic interests of Australians through border measures designed to support legitimate trade and travel. Counterfeiters are becoming more organised and sophisticated with an array of counterfeiting techniques employed and a broad range of goods now subject to infringement.

IP infringements represent a threat to business investment, tax revenue, and consumer safety. Internationally, the trade in counterfeit goods and piracy has been connected to wider criminal activity, including organised crime and terrorism, as the trade in counterfeit goods can be considered to be low risk for high return.

The Department and ABF are required enforce IP rights across a complex border continuum stretching offshore and onshore. Counterfeiters may exploit increasingly complex supply chains where counterfeit components can feed into final products without the knowledge of the final manufacturer or the consumer. The continuum includes, but is not limited to: legislators, police, border enforcement officials, rights holders, manufacturers and distributors, and consumers.

The Department and ABF strive to address the challenges associated with mitigating the trade in counterfeit goods by maintaining cooperative partnerships with IP rights holders and the broader business community, and effective collaboration with other relevant regulatory authorities. These relationships are fundamental to an effective border regime now and into the future.

Appendix I: Seizure Process Flowchart



MSEP = Major Sporting Events (Indicia and Images) Protection Act 2014
 TM = Trade Marks Act 1995
 CR = Copyright Act 1968

#Comptroller-general of Customs may allow importer to make a late claim for the release of seized copies/goods after the end of the claim period, if an action for infringement has not been instituted and the CEO considers it reasonable (for example: importer was overseas or hospitalised) and the goods have not been disposed of under Section 139.1 of the TM Act, S135AI of the CR Act, and S36 MSEP Act.

* The goods / copies can be voluntarily forfeited by the importer at any time prior to the Objector commencing court action.