Law Council
OF AUSTRALIA

28 April 2026

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Customs Legislation Amendment (False Trade Marks Infringement Notices) Bill 2026

1. The Law Council of Australia welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee on the Customs Legislation Amendment (False Trade Marks Infringement Notices) Bill 2026.

2. The Law Council is grateful for the input of its Business Law Section's Intellectual Property Committee (the **IP Committee**) and its National Criminal Law Committee (the **NCLC**) in responding to the Bill.

3. The IP Committee commends the Government's commitment to protecting Australians from counterfeit goods (some of which can be dangerous) and to safeguarding legitimate businesses from fraud and intellectual property theft. The Committee supports the introduction of a strict liability offence for importing goods with false trade marks under the *Commerce (Trade Descriptions) Act 1905* (Cth) (the **CTD Act**), and the extension of the infringement notice scheme in Part XIII Division 5 of the *Customs Act 1901* (Cth) to the importation of goods bearing infringing trade marks.

4. The Law Council notes that there may be concerns as to whether there is evidence justifying the policy for the Bill at this time. We recognise that the illicit trade in counterfeit goods remains a significant global issue, as noted by the OECD and the EUIPO in their 2025 report *Mapping Global Trade in Fakes 2025 Global Trends and Enforcement Challenges*. Australia's proximity to China, which, as the report notes, continues to be the primary source of counterfeit goods, means that importation of counterfeit goods into Australia remains a significant issue. The Assistant Minister for Citizenship, Customs and Multicultural Affairs and Assistant Minister for International Education has observed that over 700,000 individual counterfeit items were seized at the border in the 2024–25 financial year. Accordingly, the IP Committee considers that there is sufficient evidence to justify the Bill at this time and that the proposed new measures will create additional disincentives to the importation of counterfeit goods into Australia.

5. A further concern has been raised as to whether the introduction of a strict liability offence is proportionate and fair as drafted. The Law Council understands that the availability of the defences in subsections (2) and (3) of the proposed new section 10AB of the CTD Act, and the defence of honest and reasonable mistake of fact under section 9.2 of the Criminal Code, are intended to provide appropriate safeguards. The IP Committee also emphasises that those importers of trade marked goods who avoid infringement by virtue of section 122A of the *Trade Marks Act 1995* (Cth) are not caught by the new offence.

6. The Law Council's Rule of Law Policy Principles[1] relevantly state that:

> *The intended scope and operation of offence provisions should be unambiguous and key terms should be defined. Offence provisions should not be so broadly drafted that they inadvertently capture a wide range of benign conduct and are thus overly dependent on police and prosecutorial discretion to determine, in practice, what type of conduct.*
>
> *… The state should be required to prove that a person intended, or at the very least was reckless about, each physical element of an offence in order for a person to be found guilty of that offence. Strict and absolute liability should only be applied to less serious offences and where such an approach is necessary for the success of the relevant regulatory regime.*

7. The Law Council recognises that the maximum penalty for the offence is 60 penalty points rather than imprisonment, and the above arguments regarding its necessity. However, the offence as drafted appears to be overly broad in scope. While the Explanatory Memorandum states that it is tailored to an appropriate cohort of persons and not the public at large,[2] proposed section 10AB does not contain a requirement that the import of goods be for commercial purposes.

8. This contrasts with the existing strict liability offence under section 132AH(5) of the *Copyright Act 1968,* for importing articles that infringe copyright. This requires that the person importing an article into Australia does so in preparation, or in the course of, for example, selling it or distributing it for trade, etc.

9. Proposed section 10AB appears to capture low-level conduct by members of the public who are importing small quantities of goods for personal use. While this does not appear to be the intent of the Bill, offences should not be so broadly drafted that they are left to the discretion of law enforcement to apply in practice. Consideration should be given to requiring a commercial purpose.

10. One option might be to consider either an exception, or a very much lower maximum penalty, for an individual importing an item for a non-commercial purpose (other than a repeat offender).

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[1] Law Council of Australia, Policy Statement, Rule of Law Principles, 2011, paragraphs 1(b) and 3(f).
[2] Explanatory Memorandum, [33].

11. While it is supportive of the Bill overall, the IP Committee wishes to raise one matter for the consideration of the Committee.

Timing of infringement notices

12. The Explanatory Memorandum to the Bill states that the new offence provision "is designed to complement the existing Notice of Objection scheme" and indicates that the Infringement Notice Scheme will only commence "[a]t the point when the importer forfeits the goods, and the Notice of Objection process concludes". The Committee refers to the submission it made in 2020 to the Department of Home Affairs, and remains concerned that the timing at which infringement notices are issued could have the unintended consequence of encouraging importers to make a claim for the release of goods, thus putting the burden on trade mark owners to commence civil infringement proceedings.

13. In response to the IP Committee's 2020 submission, the Australian Border Force noted that, once an infringement notice had been issued, the goods were "detained" (ie, held under Customs authority), whereas under the Notice of Objection scheme, goods are "seized" effectively on behalf of an IP rights holder, and that if the goods are "detained" then they are not available for the rights owner to take through legal proceedings, as the Commonwealth has primary right of proceedings through the Infringement Notice Scheme.

14. If it is not possible for infringement notices to be issued at the time a seizure notice is issued under section 134 of the Trade Marks Act, the Committee wonders whether, as a practical solution, Customs could offer trade mark owners the option of having imported goods dealt with under the Infringement Notice scheme at the outset, rather than through the Notice of Objection scheme. This may be appealing to a trade mark owner in circumstances where they have formed a view that they would not commence infringement proceedings were the importer to make a claim for the release of goods seized under a Notice of Objection, because (for example) the cost of infringement proceedings would be prohibitive. If the designated owner pays the penalty under the infringement notice, the goods would be forfeited, which is in most cases the primary objective of the trade mark owner. If not, the importer would face prosecution.

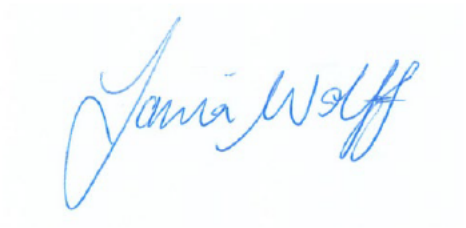
15. The IP Committee would encourage Customs to publish, as part of its existing guides, policy guidelines on the implementation of this practical solution to help trade mark owners make decisions as to their preferred course of action in a way that aids Customs officers in their administration of these important provisions.

Conclusion

16. In summary, while the Law Council supports the Bill, it encourages the Senate Committee to tighten the scope of proposed section 10AB as recommended above, and to reconsider the timing of infringement notices.

17. The Law Council would be pleased to discuss any aspect of this submission. Please contact Leonie Campbell, General Manager of Policy, [redacted] or the chair of the IP Committee, Miriam Stiel, on [redacted], if you would like to do so.

Yours sincerely



Tania Wolff
President