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

Senate Standing Committees on Legal and Constitutional Affairs

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Introduction

I make this submission in relation to the Customs Legislation Amendment (False Trade Marks Infringement Notices) Bill 2026.

The bill would amend the Commerce (Trade Descriptions) Act 1905 to create a new strict liability offence for importing goods bearing false trade marks and would prescribe that new offence within the Customs Infringement Notice Scheme, thereby allowing infringement notices to be issued as an alternative to prosecution. The proposed framework is intended to complement the existing Notice of Objection scheme under the Trade Marks Act 1995.

This submission does not deny that counterfeit imports can cause real harm. The Parliamentary Library Digest records that counterfeit trade can threaten public health, safety, consumer trust, economic activity, innovation, and the rule of law, and can fuel organised crime. It also refers to increasing concern about dangerous counterfeit goods such as automotive parts and pharmaceuticals. Those are legitimate matters of public concern and Parliament is entitled to respond to them.

But Parliament should be careful not to mistake symptom management for structural reform. This bill appears to respond not only to counterfeit imports, but also to a deeper access to justice failure in civil enforcement. The present legal architecture places heavy reliance on private rights holders to pursue costly legal action after seizure, and the Digest records that full legal proceedings may cost between $200,000 and $500,000, which can be prohibitively expensive for small and medium business owners.

That point matters. If a new administrative penalty pathway is thought necessary because ordinary civil enforcement has become too expensive, too slow, and too unrealistic for many rights holders, Parliament should say so plainly. Otherwise, the bill may be presented as though it solves the problem when in reality it legislates around part of the consequences.

Good public purpose

This submission applies a good public purpose filter. In this context, good public purpose asks whether the bill strengthens public safety, consumer confidence, lawful trade, institutional coherence, access to justice, and proportionality, while avoiding unnecessary overreach and the transfer of structural cost onto parties least able to bear it.

On that test, the bill has a mixed character.

Its strongest feature is that it seeks to strengthen enforcement against counterfeit goods in circumstances where the present regime can end with little more than seizure and forfeiture. The Digest records that where goods are seized the importer often forfeits or abandons them, and in those circumstances the Commonwealth is unable to pursue the importer through fines or prosecution. The only consequence may be the loss of the value of the seized goods. That gap is real. A system that allows counterfeit goods to be forfeited without any meaningful further consequence may be too weak to deter organised or commercial misconduct. To that extent, the bill can be defended as an attempt to improve the integrity of border enforcement.

But good public purpose is not served merely because a measure is more convenient for the regulator. It must also be fair, proportionate, and properly targeted. That is where the bill becomes much more contestable.

The bill addresses a symptom more than a cause

The deeper problem appears to be that lawful civil enforcement has become too expensive for many of the people the law is supposed to protect.

Under the existing Notice of Objection structure, once the Australian Border Force refers the matter, the rights holder remains responsible for later civil action. The importer has ten working days to claim release of the goods, and if that occurs the objector then has ten working days to commence legal action or consent to release. The Digest records that full legal proceedings may cost between $200,000 and $500,000. That is not a minor design detail. It is a central structural reason why this bill has emerged in its present form. The proposed infringement notice regime is being used as a workaround because ordinary civil enforcement is too expensive for many rights holders, especially smaller businesses. The Digest itself says the financial deterrent is

expected to reduce the burden that small and medium businesses must bear to bring expensive civil litigation.

That should be stated directly in any parliamentary analysis. Parliament should not let the creation of a quicker notice mechanism obscure the deeper problem that lawful enforcement has become too expensive for many of the very people the law is supposed to protect.

The Law Council material gives that argument a broader and more principled foundation. It states that access to justice is not merely abstract availability of law, but the practical capacity to understand the law, obtain advice, secure assistance and representation, and use legal institutions. It also cites the observation that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians, and that in practice access is often limited to substantial business enterprises, the very wealthy, and those with some form of assistance. The same material identifies a justice gap affecting the missing middle, namely people too well off for legal aid but not well enough off to fund private legal services, and records that even many relatively affluent Australians cannot afford a lawyer if they face a serious legal issue. That analysis is highly relevant here. Small and medium businesses can plainly sit in that same gap. They may be asset owning or trading entities on paper, yet still be unable to carry ruinous litigation costs in real terms. On that view, this bill is not merely a counterfeit enforcement measure. It is also an implicit acknowledgment that ordinary civil enforcement has become too weak, too costly, and too fragmented to do the job.

Burden shifting and practical guilt by process

A deeper defect in the bill is that it may not reduce unjustified legal burden at all. It may simply move that burden to a different point in the process and onto a different party. The question for Parliament is whether the bill cures the underlying injustice or merely redistributes it.

On the material before Parliament, the risk is redistribution, not cure. The proposed offence is one of strict liability. The state need not prove intention, knowledge, recklessness, or negligence. Further, for key defences such as permission or legal authority, the evidential burden falls on the recipient because those matters are said to lie within that person's knowledge. That is not a neutral procedural choice. It materially lightens the burden on the state and increases the practical burden on the accused party.

The result is a regime that can operate less as a disciplined search for culpability and more as a mechanism of administrative accusation. This is not quite a regime of formal guilt first and innocence later, but it moves in that direction as a matter of practical effect. By removing any need to prove fault and placing the evidential burden for key

defences on the recipient, the scheme risks operating less as a search for culpability and more as a mechanism for administrative accusation unless the accused can afford to resist.

That practical effect matters most where the shifted burden is borne by an entity that is not knowingly culpable and lacks the financial capacity to defend itself. If the cost and complexity that once sat with the rights holder are transferred to the recipient of the notice, the underlying problem has not been solved. It has been displaced. The recipient may now have to obtain legal advice, reconstruct supply chains, gather documents, explain sourcing, and establish a defence, all under the shadow of a strict liability framework and the commercial pressure to capitulate rather than contest. Where that entity cannot afford the disproportionate and unjustified legal cost of resistance, compliance may be produced not by proof of wrongdoing, but by financial exhaustion.

That is where the Law Council material becomes especially relevant. It explains that unaffordable legal assistance drives people to self-represent or give up altogether, and that unmet legal need can spiral into broader harm. Read in that light, the bill risks replacing one access to justice failure with another. It may spare one class of party from ruinous enforcement cost only by exposing another class of party to a different form of coercive pressure.

That is not fairness. It is burden transfer dressed up as efficiency. A legal system does not become more just merely because it becomes quicker or administratively easier. If speed is achieved by shifting disproportionate cost and evidential pressure onto parties who may lack fault and lack the means to defend themselves, then the reform does not resolve the injustice. It simply ensures that the cost is borne later, by a weaker party, under harsher procedural conditions.

Access to justice consequences

The access to justice case for the bill is therefore mixed.

For trade mark owners, especially smaller legitimate businesses, the bill may improve practical access to justice by providing a cheaper and quicker enforcement consequence that does not require full scale litigation in every matter. That is its strongest justification.

But for recipients of notices, including individuals and smaller traders, the bill may dilute procedural justice. The prosecution need only establish the physical elements and not fault elements such as intention, knowledge, recklessness, or negligence. Although the defence of honest and reasonable mistake of fact remains available, and although there are statutory defences where permission or legal authority exists, the

defendant bears the evidential burden on those matters. That architecture may be attractive from an enforcement perspective, but it is harsher from a rule of law perspective. It reduces the state's burden while increasing pressure on the recipient to explain or resist. For a smaller importer with limited legal capacity, the practical result may be to pay rather than contest, irrespective of the underlying merits.

The Parliamentary Library Digest refers to Law Council material on the design of the proposed infringement notice regime, including the Council's concern about timing. That reference makes it appropriate to also consider the Law Council's broader access to justice analysis. Against that background, a strict liability notice regime layered onto an already costly and complex legal landscape risks improving access to justice for one side by weakening it for the other.

That is not a principled balance unless safeguards are strengthened.

The bill should be narrowed and amended

The right answer is not to force smaller rights holders back into ruinously expensive civil enforcement, but nor is it to accept a blunt strict liability notice regime with limited visible safeguards.

The better course is to narrow and harden the architecture.

The infringement notice pathway should be expressly confined to commercial scale importation and genuinely high-risk categories. The Digest states that the proposed offence is aimed at importers of commercial quantities of high-risk consumer products rather than the general public. If that is the policy justification, it should be embedded more firmly in the legal design and administrative practice.

The Law Council's earlier point about timing should also be taken seriously. The Digest records that the Law Council supported the proposal in principle but recommended that infringement notices issue at the time the seizure notice is issued, to avoid the unintended consequence of encouraging importers to make a claim for release of the goods. That concern goes directly to design integrity. A sound enforcement model should not create procedural incentives for tactical behaviour.

Further, the bill should be accompanied by a clear, accessible, and low-cost review mechanism before any final liability is fixed. If Parliament wants the convenience of a strict liability penalty notice model, it should insist on a corresponding safeguard architecture. Administrative convenience is not a sufficient answer to fairness.

There should also be a clearer due diligence or reasonable sourcing safeguard for low scale and first-time actors who can demonstrate genuine steps to verify authenticity.

That would better distinguish organised counterfeit trade from carelessness, confusion, or small-scale error.

Finally, Parliament should say expressly that this bill is only a partial response and that the underlying access to justice problem requires separate attention. If legal proceedings costing hundreds of thousands of dollars are normalised as the baseline enforcement pathway, Parliament should not be surprised when pressure builds for increasingly administrative and fault light alternatives. The real long-term question is whether Australia's civil enforcement architecture is fit for purpose for small and medium rights holders at all.

Broader structural point

It is entirely proper to say that the bill deals with a symptom of a deeper problem. That is not irrelevant to the bill. It is directly relevant to understanding why the bill has been brought forward, what problem it is trying to solve, and where its limits lie.

Parliament can therefore say, consistently with the material before it, that counterfeit imports are a real harm, but that one reason this legislative response has emerged is because ordinary civil enforcement has become prohibitively expensive for many rights holders. That is not a rhetorical flourish. It is substantially supported by the Digest and by the Law Council material on unmet legal need and the missing middle.

Conclusion

Counterfeit imports can justify a stronger enforcement response. On that point the bill has a legitimate public purpose foundation. But the bill should not be treated as though it resolves the deeper structural problem. It appears in significant part to be a legislative workaround for an access to justice failure in which private rights holders, including small and medium businesses, are expected to carry civil enforcement costs that are often prohibitively high.

Parliament should therefore resist any temptation to present this bill as a complete answer. At best it is a partial answer.

The stronger course is to amend the bill so that the infringement notice regime is tightly confined to commercial scale and genuinely high-risk counterfeit activity, structured to avoid procedural gaming, and balanced by stronger review rights and clearer safeguards. At the same time, Parliament should expressly recognise that the prohibitive and disproportionate cost of legal action is one of the underlying causes of the present enforcement gap and should be addressed as a matter of access to justice and sound institutional design.

In short, Parliament should not merely legislate around the consequences of broken access to justice. It should say clearly that one reason this bill is thought necessary is that ordinary civil enforcement has become too expensive for many rights holders, and it should refuse to let that deeper failure disappear behind the convenience of a new penalty notice scheme.

The single biggest improvement from your current draft is this: remove duplication by making burden shifting do the main work, then shorten the later access to justice section so it applies that earlier analysis rather than restating it.

Reference Source:

Law Council of Australia, 2021, *Access to justice: meeting the need of 'missing middle'*, speech delivered by Dr Jacoba Brasch QC, Annual Gold Coast Legal Conference, Gold Coast, 11 June 2021.