

Institutional Arrangements for Enforcement

- 6.1 Arrangements between government agencies, including law enforcement agencies, both amongst themselves and with copyright owners, are crucial to the effective enforcement of copyright in Australia. This chapter will explore the nature of the existing arrangements, investigate their adequacy and consider suggestions for their improvement. The chapter will commence by examining the operation of the border interception provisions in Division 7 of Part V of the *Copyright Act 1968* (the Copyright Act).

Border interception

Legislative provisions

- 6.2 The Copyright Act contains in Division 7 of Part V provisions that allow goods that allegedly infringe copyright to be intercepted at the border. The interception process is initiated by the copyright owner giving the Australian Customs Service (Customs) a notice of objection together with security for its costs. If Customs discovers any goods answering the description given in the notice of objection, it will detain the goods. The importer and the copyright owner alleging infringement may then approach the court to determine the goods' legitimacy. The goods are then dealt with according to court order. The diagram in Appendix F, which is a flow chart taken from the Attorney-General's Department (AGD's) submission, explains the process in more detail.
- 6.3 The border interception provisions were grafted onto an existing regime of measures in the Act relating to the seizure of books. They are closely modelled on the requirements of the *World Trade Organisation Agreement*

on *Trade Related Aspects of Intellectual Property Rights* (TRIPS), to which they are intended to conform.¹ AGD submitted that the provisions are in fact more extensive than those required by TRIPS.² AGD further stated that in relation to border enforcement, TRIPS does not require prohibition controls on counterfeit or pirated goods.³

Prohibition control

- 6.4 Some groups representing copyright owners called for the introduction of prohibition controls on counterfeited goods. Prohibition control is the seizure of goods at the border, as prohibited imports. The Business Software Association of Australia (BSAA) argued that the existing provisions are a long-winded response to the problem and that some copyright owners cannot afford to take advantage of them.⁴ The Anti-Counterfeiting Action Group (ACAG) agreed that counterfeited goods should be treated as prohibited imports, so that they can be seized by Customs without the trouble of the present procedure.⁵ AGD submitted that the existing provisions are generous to copyright owners in regard to the requirements for lodging a notice of objection.⁶ In contrast to other jurisdictions such as Hong Kong, copyright need not be proven to any degree before customs authorities are empowered to act.⁷
- 6.5 In the course of public hearings the Committee expressed concern that a prohibition on counterfeited goods may catch tourists entering Australia with goods for personal use.⁸ For this reason, any proposed prohibition control should be limited to the importation of commercial quantities. Yet it is in respect of commercial quantities that use of the existing interception provisions becomes worthwhile. For this reason, and because the existing provisions already go beyond Australia's international obligations, the Committee considers prohibition control unnecessary.

Operation

- 6.6 Two main issues emerge from the evidence concerning the operation of the border interception provisions. The first is the adequacy of Customs'

1 Attorney-General's Department (AGD), *Submissions*, p. S416.

2 AGD, *Submissions*, pp. S444-445.

3 AGD, *Submissions*, p. S445.

4 Mr Gonsalves, Business Software Association of Australia (BSAA), *Transcript*, p. 185.

5 Mr Taylor, Trade Mark Investigation Services (TMIS), *Transcript*, p. 370.

6 AGD, *Submissions*, p. S445.

7 AGD, *Submissions*, pp. S445-446 and S472.

8 Hon Duncan Kerr, MP, *Transcript*, p. 383.

resources for intercepting infringing goods. The second and related issue is the nature of Customs' role in carrying out this function. Each issue will be examined in turn.

Customs' operational resources

- 6.7 Mattel Pty Ltd, Hasbro Australia Ltd and the Australian Toy Association Ltd (Mattel et al) stated—as no criticism of Customs—that due to under-resourcing, the interception of infringing goods was not one of its high priorities.⁹ Mattel submitted that Customs checks less than one per cent of parallel import entries.¹⁰ Customs explained that while no operational staff are specifically dedicated to enforcement of intellectual property rights, all staff are required to check for intellectual property infringements whenever they are undertaking cargo examinations.¹¹ Customs further explained that cargo examinations are targeted on the basis of intelligence.¹²
- 6.8 The Committee fully appreciates that in carrying out examinations, Customs is required to give priority to prohibited imports such as narcotics. Yet notwithstanding its limited resources, Customs reported that it retains 70% of the goods that it intercepts for allegedly infringing copyright.¹³ Thus it appears to the Committee that, to the extent they can be enforced, the border interception provisions are effective.

Customs' role

- 6.9 AGD and Customs pointed out that the legislative provisions reflect the view that copyright owners should play a significant role in, and bear the major cost of, intercepting infringing goods at the border.¹⁴ This is to be contrasted with the apparent view of some copyright owners that their responsibility to pursue a matter ends with lodgment of the notice of objection.¹⁵ Customs stressed the need for objectors to provide sufficient technical advice and assistance to ensure that officers undertaking examinations will recognise possible infringements.¹⁶

9 Mr McDonald, Mattel Pty Ltd, Hasbro Australia Ltd and the Australian Toy Association Ltd (Mattel et al), *Transcript*, pp. 3 and 359.

10 Mr Anderson, Mattel, *Transcript*, p. 9.

11 Australian Customs Service (Customs), *Submissions*, p. S158.

12 Customs, *Submissions*, p. S149.

13 Mr Burns, Customs, *Transcript*, p. 96.

14 AGD, *Submissions*, p. S445.

15 Customs, *Submissions*, p. S150.

16 Customs, *Submissions*, p. S151.

- 6.10 Customs reported that it receives the most favourable feedback from those who actively assist by providing them with industry intelligence.¹⁷ In their evidence, both the BSAA and the Australian Visual Software Distributors Association (AVSDA) stated that they work closely with Customs.¹⁸ AVSDA expressed admiration for the work done by Customs. AGD also commented that Customs appears to have a good working relationship with copyright owners.¹⁹

Committee's conclusion

- 6.11 The Committee does not propose to recommend any alteration to Customs' role in border enforcement operations, which in its opinion ought to remain owner-initiated. AGD validly pointed out that if Customs were to have a greater (or lesser) role in the enforcement of copyright, more rigorous proof of ownership may be required by the person lodging a notice of objection.²⁰ However, in keeping with the view it formed regarding responsibility for the enforcement of copyright (expressed in Chapter 3), the Committee seeks to facilitate greater co-operation between copyright owners and Customs officers in intercepting infringing goods at the border.
- 6.12 In relation to financing interception operations, the Committee considers that as the government provides the infrastructure for the detention of infringing goods, it is appropriate that copyright owners continue to bear the cost of detention. The Committee considers it desirable, however, that Customs dedicate staff to the detection of imports that infringe intellectual property rights. It is envisaged that such staff would work closely with copyright owners and suggest any improvements to Customs' procedures that may arise from such consultation.
- 6.13 The Committee also recognises the need for copyright owners to provide Customs with intelligence so that it can make as effective as possible use of its resources. The Committee considers that the strategic relationships between copyright owners and Customs officers would benefit from publicity aimed at clarifying their respective roles in relation to border interception. The publicity should explain exactly what copyright owners can expect from Customs and how they can best assist Customs in the enforcement of copyright. Such publicity could be the responsibility of the dedicated staff, suggested above.

17 Mr Burns, Customs, *Transcript*, p. 95.

18 Mr Gonsalves, BSAA, *Transcript*, p. 186; Mr Dwyer, Australian Visual Software Distributors Association (AVSDA), *Transcript*, p. 308.

19 Mr Fox, AGD, *Transcript*, p. 67.

20 AGD, *Submissions*, p. S446.

Recommendation 20A

- 6.14 **The Committee recommends that the Australian Customs Service dedicate staff to work on the enforcement of intellectual property rights. The Committee further recommends that the Australian Customs Service also provide publicity about the nature of its role in copyright enforcement and how copyright owners can assist it in intercepting infringing goods at the border.**

Small consignments

- 6.15 A number of witnesses drew attention to the problem in the operation of the existing border interception provisions presented by consignments which are small in size or value. For example, VISCOPY submitted that the services provided by Customs do not readily assist in the enforcement of copyright in individual artistic works.²¹ In part this is because the amount of information required by Customs is seen as impractical. It is also due to the prohibitive cost of engaging Customs' services (in terms of providing the necessary security) and contesting importation in the Federal Court. AGD acknowledged that there may be a role for greater involvement by Customs in determining the status of lower-value goods.²²
- 6.16 Customs agreed that the enforcement provisions would be more effective if a less costly mechanism could be found for determining infringement when small and medium consignments are involved.²³ Customs suggested that mediation would be a cheaper alternative to litigation for settling importation infringement disputes.²⁴
- 6.17 The Committee is concerned to make the border enforcement provisions effective in respect of small and medium consignments. In Chapter 5 the Committee recommended that the Federal Magistrates Court be given a small claims jurisdiction in civil matters arising under the Copyright Act. It is the Committee's intention that the jurisdiction include matters arising under Division 7 of Part V. The Committee hopes that this will help to remove the impediments preventing copyright right owners from becoming involved in border interception operations. The Committee also encourages copyright owners to make use of the facility for arbitration

21 VISCOPY, *Submissions*, p. S71.

22 AGD, *Submissions*, p. S446.

23 Customs, *Submissions*, p. S152.

24 Mr Burns, Customs, *Transcript*, p. 97.

and mediation that already exists in the Federal Court and the Federal Magistrates Court.

Domestic enforcement

- 6.18 Several witnesses argued that in order for Australia to comply with its international obligations, some improvement in the mechanisms for the enforcement of copyright law is required. ACAG stated that:

It is not sufficient for the Government to create legislation alone.
... The Government must make the criminal process work.²⁵

In particular, ACAG suggested that Australia is failing to comply with article 61 of TRIPS. Article 61 provides in part:

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trade mark counterfeiting or copyright piracy on a commercial scale.

- 6.19 The BSAA agreed, stating that in order to comply with article 61 of TRIPS, criminal procedures and penalties must be applied in practice.²⁶ The Committee refrains from expressing an opinion as to whether or not Australia meets its obligations under TRIPS. However, it does recognise that comprehensive, co-ordinated, well-resourced and appropriate enforcement measures are vital to the effective enforcement of copyright in Australia.
- 6.20 In its submission AGD drew a comparison between the enforcement practices of various Asia-Pacific Economic Co-operation forum countries.²⁷ It concluded that there is no consistent pattern of approach: jurisdictions with more established intellectual property regimes tend to rely on existing enforcement mechanisms, whereas jurisdictions where intellectual property is a newer concept, or where infringement is a problem, tend to have centralised enforcement mechanisms. AGD commented that Canada, which belongs to the former category of jurisdiction, has recently implemented an enforcement policy that targets manufacturers and distributors of infringing goods, rather than retailers.²⁸

25 Anti-Counterfeiting Action Group (ACAG), *Submissions*, p. S370.

26 BSAA, *Submissions*, p. S341.

27 AGD, *Submissions*, p. S448.

28 AGD, *Submissions*, pp. S449 and S473.

6.21 The Committee notes that responsibility for copyright enforcement in Australia is diffused between various state and federal law enforcement agencies. AGD stated that the enforcement priorities for each agency depend on a range of matters including ministerial directions, internal policies and resources.²⁹ It is necessary, therefore, to examine each agency separately. However, it is appropriate at this point to indicate that the Committee recognises that there is a real need for a centralised approach, a subject that is elaborated on below.

Police

6.22 Clearly, the police have an instrumental role to play in the enforcement of copyright. The police force that has prime legal responsibility for enforcement of copyright law is the Australian Federal Police (AFP).³⁰ In practice, state and territory police forces are also involved in enforcement. Before considering the operations of the AFP in more detail, the Committee is keen to understand the relationship between the AFP and state and territory police forces. The Committee also examines the relationship between copyright owners and police generally.

6.23 The Commercial Crime Agency of the NSW Police Service (NSW Police) stated that it regards the AFP as the natural leaders in the enforcement of copyright, and that copyright enforcement does not form part of its core operations.³¹ Tress Cocks & Maddocks (TCM) and Music Industry Piracy Investigations (MIPI) both reported that state police around Australia refuse to become involved in copyright matters.³² They also stated that the AFP encourages state and territory police to become more involved in copyright enforcement, yet state and territory police are not equipped to deal with intellectual property matters.³³

6.24 NSW Police pointed out that Commonwealth procedures concerning arrest and prosecution differ significantly from state and territory procedures, so that it would be very expensive for state and territory police to include copyright offences in their standard operating procedures.³⁴ NSW Police also stated that state and territory police do not receive any federal funding for copyright enforcement, although there are

29 AGD, *Submissions*, p. S447.

30 Australian Federal Police (AFP), *Submissions*, p. S358. See also section 8 of the *Australian Federal Police Act 1979*.

31 Sgt Shepherd, Commercial Crime Agency NSW Police Service (NSW Police), *Transcript*, p. 173.

32 Mr Little, Tress Cocks & Maddox, *Transcript*, p. 213; Music Industry Piracy Investigations, *Submissions*, p. S187.

33 Mr Little, Tress Cocks & Maddox, *Transcript*, p. 213; see also AFP, *Submissions*, p. S363.

34 Det Insp Dyson, NSW Police, *Transcript*, p. 173.

other instances in which the Commonwealth government has reimbursed state police for their operations.³⁵

- 6.25 The Committee considers that the operational and funding relationship between the AFP and state and territory police forces in the area of copyright enforcement needs clarification. As has been foreshadowed, the Committee proposes that a centralised body be established, one of whose functions will be to co-ordinate the activities of state and federal police. More details about the proposed body are found under the heading 'Enforcement task force', below.
- 6.26 Some witnesses observed that their relationship with police is poor. MIPI submitted that the AFP has not been able to enter into any effective dialogue with copyright industries concerning solutions to the need for increased police investigation.³⁶ Trademark Investigation Services commented that its relationship with police is poor due to the constant failure on the part of the police to respond.³⁷ For its part, the AFP stated that it endeavours to maintain an effective, co-operative relationship with individual copyright owners and industry groups where investigations are undertaken.³⁸

Australian Federal Police

- 6.27 Several witnesses, including Stephens Lawyers & Consultants, ACAG and Copyright Agency Limited (CAL), argued that the funding available to the AFP for copyright enforcement is insufficient.³⁹ The BSAA reasoned that with active involvement from industry, vast resources are not required to enforce copyright.⁴⁰ Mattel et al suggested that copyright enforcement was not a big priority for the AFP.⁴¹ The BSAA agreed, stating that copyright enforcement has 'moved so far down the priority scale as to have basically moved off it'.⁴²
- 6.28 The AFP explained that the following factors influence whether a matter is accepted for investigation and the priority that is afforded to it:
- the availability of limited resources and competing priorities;

35 Sgt Shepherd, NSW Police, *Transcript*, p. 170.

36 MIPI, *Submissions*, p. S186.

37 Trade Mark Investigation Services, *Submissions*, p. S22.

38 Mr Hughes, AFP, *Transcript*, p. 120.

39 Mr Stephens, Stephens Lawyers & Consultants, *Transcript*, p. 52; Anti-Counterfeiting Action Group, *Submissions*, p. S373; Copyright Agency Limited, *Submissions*, p. S600.

40 Mr Gonsalves, BSAA, *Transcript*, p. 188.

41 Mr McDonald, Mattel et al, *Transcript*, p. 359.

42 Ms Lenaburg, BSAA, *Transcript*, p. 189.

- the level and extent of criminality involved;
 - the prospects of an investigation leading to a successful prosecution;
 - the likely impact and outcome of police involvement; and
 - the availability of alternative means of resolving the matter.
- 6.29 The AFP further explained that a case categorisation and prioritisation model is applied to all matters at both national and regional levels in order to determine objectively the priority they should receive.⁴³ The result is that the AFP usually only accepts copyright matters where there are clear indications of a high incidence of direct or associated criminality. In other words, the AFP concentrates on large scale and organised copyright infringements, in an attempt to make an example of those infringers.⁴⁴
- 6.30 The BSAA submitted that this focus effectively rules out enforcement for the vast majority of intellectual property offences.⁴⁵ This is because a substantial proportion of infringement is carried out by a very large number of small to medium, rather than large scale, infringers. For this reason the BSAA endorsed a recommendation made by the Office of Strategic Crime Assessments in its 1996 report, *Law Enforcement and Intellectual Property Rights Protection*,⁴⁶ that the AFP consider prosecuting selected smaller cases of infringement.
- 6.31 The Committee considers that the ‘exemplary’ approach taken by the AFP is a good one in circumstances of scant resources. In the Committee’s view, it is appropriate that the AFP target large scale infringement. The selective prosecution of small scale infringement is likely to have a limited deterrent effect. TCM submitted that the AFP lacks expertise in issues arising under the Copyright Act. They argued that substantially more time and money ought to be spent on training the AFP on copyright law and its enforcement.⁴⁷ The Committee agrees with this view, and as will be seen below, proposes to make such training one of the functions of a centralised enforcement task force.

Director of Public Prosecutions

- 6.32 The decision as to whether or not to lay charges under the Copyright Act in cases of criminal infringement lies with the Office of the

43 AFP, *Submissions*, p. S360.

44 AFP, *Submissions*, pp S362–363.

45 BSAA, *Submissions*, p. S354.

46 Office of Strategic Crime Assessment, *Assessment Series*, No 1/96, p. 15.

47 Tress Cocks & Maddox, *Submissions*, p. S52.

Commonwealth Director of Public Prosecutions (DPP).⁴⁸ The DPP acts on referrals from federal, state and territory police, although most cases appear to be initiated by industry bodies such as the Australian Film and Video Security Office and MIPI. The DPP submitted that, subject to AFP investigative priorities, industry bodies have a large influence on where law enforcement resources are expended.⁴⁹ The DPP also submitted that it has general, as well as case specific, discussions with industry bodies, and that it works closely with the AFP.⁵⁰

Enforcement task force

- 6.33 Several witnesses, both at the public hearings and in written submissions, called for the establishment of a national enforcement strategy. The Australian Copyright Council supported the development of a national enforcement strategy involving co-operation between the federal and state law enforcement agencies and a national intellectual property training program for law enforcement officers.⁵¹ The Australasian Performing Right Association and the Australasian Mechanical Copyright Owners Society made a submission to like effect.⁵²
- 6.34 MIPI urged for the establishment of a law enforcement/industry co-ordination committee that would report to the Minister for Justice, the Copyright Law Review Committee (CLRC) and the Commissioner(s) of Police.⁵³ A structural model for the committee, showing its interrelationships with other agencies, is included in its submission.⁵⁴ The Motion Picture Association submitted that a similar committee should be located within the Attorney-General's Department.⁵⁵
- 6.35 The AFP acknowledged that there would be a benefit in a clearer mechanism for contact between law enforcement agencies.⁵⁶ AGD stated that it would be helpful, at least so far as the AFP is concerned, to have a nationally co-ordinated response to law enforcement, with the possibility of specialist training.⁵⁷

48 Director of Public Prosecutions (DPP), *Submissions*, p. S499.

49 DPP, *Submissions*, p. S499.

50 DPP, *Submissions*, p. S499; Mr Thornton, DPP, *Transcript*, p. 90.

51 Australian Copyright Council, *Submissions*, p. S483.

52 Australasian Performing Right Association and the Australasian Mechanical Copyright Owners Society, *Submissions*, p. S248.

53 MIPI, *Submissions*, p. S189.

54 MIPI, *Submissions*, p. S207.

55 Motion Picture Association, *Submissions*, p. S284.

56 Mr Hughes, AFP, *Transcript*, p. 124.

57 Mr Fox, AGD, *Transcript*, pp. 66–67.

- 6.36 The Committee agrees that there is a need for a nationally co-ordinated response to copyright enforcement. The response should be the responsibility of a designated task force, involving representatives from state police forces, the AFP, Customs, AGD, CLRC, DPP and industry policing bodies. The specific responsibilities of the task force should include:
- training law enforcement officers (including Customs officers, state and federal police officers) in copyright law issues;
 - gathering, analysing and utilising industry intelligence about copyright infringement;
 - developing a national policy on the investigation and prosecution of copyright infringements;
 - providing copyright owners with information about their rights and how to enforce them; and
 - developing operational benchmarks for the enforcement of copyright law including benchmarks applicable to independently supplied briefs of evidence; and
 - co-ordinating the response of government agencies, including federal, state and territory police, where necessary.
- 6.37 Additional, wider roles for the task force could include:
- co-ordinating the investigation and prosecution of copyright infringement; and
 - conducting the public education campaign recommended in Chapter 3.
- 6.38 While the Committee does not have a concluded view as to the form that the task force should take, the Committee considers it important that a government agency be responsible for the establishment of the task force. Accordingly, the Committee recommends below that the task force be established within the Australian Federal Police. In order to ensure that the responsibility is discharged, the Committee considers that the Commissioner of the AFP should have to account to Parliament through the Minister for Justice for the establishment and activities of the task force.
- 6.39 The Committee sees no reason to limit the purview of the proposed task force to copyright alone. The need identified by the Committee in Chapter 3 for the government to protect copyright adequately extends to other forms of intellectual property as well. Intellectual property is, as has been

stated, an increasingly valuable form of property that requires the recognition and protection of the state.

- 6.40 Thus the Committee proposes that the task force be given responsibilities for all forms of intellectual property. The Committee notes, however, that the other intellectual property regimes provide comparatively few criminal offences, and that the criminal misappropriation of intellectual property is most prolific in the area of copyright. For this reason the Committee envisages that the majority of the task force's efforts will be directed at copyright infringement.

Recommendation 21

- 6.41 **The Committee recommends that the Minister for Justice and Customs, in conjunction with the Commissioner of the Australian Federal Police, establish a task force for the enforcement of intellectual property rights within the Australian Federal Police. The Task Force should seek the involvement of the representatives mentioned in, and have at least the responsibilities outlined in, paragraph 6.36.**

The Committee recommends that section 67 of the *Australian Federal Police Act 1979* be amended so as to require the Commissioner to report specifically on the establishment and activities of the task force in his or her annual report. The amendment should require the Commissioner to report against performance outcomes that relate to the apprehension and prosecution of breaches of intellectual property rights, including copyright.