

Understanding Intellectual Property

Intellectual property (IP) refers to the application of the mind to develop something new or original. IP can be many things, such as an invention, a brand, a design, an artistic creation or the practical application of an idea.

IP is a valuable business asset and it is important that you understand and know how to protect it, as this can often be the difference between an organisations success or failure.

As IP rights can exist in many forms, some require a formal process of application, examination and registration, while others come into existence without the need for registration.

IP Australia administers patents, trade marks, designs and plant breeders rights in Australia, while automatic rights for copyright and circuit layout rights are looked after by the Attorney-General's department.

Key Concepts about IP Protection

- IP has many of the same ownership rights as physical property.
- Effective management of IP is important to ensure you get the best protection and the most out of your idea/invention.
- The creator of IP is not necessarily the owner – it is important that ownership is addressed through appropriate contractual arrangements.

IP Reforms

As of 15 April 2013, the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* has implemented some key changes to the *Australian Patents Act 1990*, *Trade Marks Act 1995*, *Designs Act 2003* and *Plant Breeder's Rights Act 1994*.

The *Raising the Bar Act* addresses six key areas:

- Raising the quality of granted patents to be more closely aligned with international standards;
- Free access to patented inventions for regulatory approvals and research allowing researchers and manufactures to work without the risk of patent litigation;
- Reducing delays in resolution of patent and trade mark applications;
- Assisting the operations of the IP profession;
- **Improving mechanisms for trade mark and copyright infringement: the Act increases the penalties for trade mark infringement, bringing them into line with penalties for copyright infringement. Other changes will make it harder for counterfeiters, by improving the system for confiscating goods at the border;**
- Simplifying the IP system by removing unnecessary hurdles and simplifying the application process.

Trade Mark Protection

Reducing delays in resolution of patent and trade mark applications

Notice of Opposition:

- The reforms remove the requirement that the opponent services a Notice of Opposition on the trade mark applicant. The opponent instead files the Notice of Opposition with the Trade Marks Office, which will send a copy of the notice to the applicant.

- The Registrar now has the power to dismiss an opposition proceeding where an opponent does not comply with their obligation to file a Statement of Grounds and Particulars.
- The general amendment power will not apply to Notices of Opposition, Notice of Intention to Oppose and Statement of Grounds and Particulars – amendments to these documents will only be permitted under tightly controlled circumstances.

Notice of Intention to Defend and the lapsing of trade marks applications:

- New requirement for trade mark applicants to file a notice stating their intention to defend their application in the opposition proceedings. The penalty for not filing a notice will be the application lapsing. This allows an uncontested opposition to be resolved sooner.
- Lapsed applications will be treated in the same way as discontinued or dismissed applications.
- Registrar is obliged to register a trade mark application if the opposition has been dismissed.

Non-use and removal of a trade mark from a Register

- Registrar has the power to dismiss an opposition to a non-use application where an opponent does not comply with their obligation to file a statement of grounds and particulars.
- As a result, the Registrar must remove the trade mark from the Register or Trade Marks.

Improving mechanisms for trade mark and copyright infringement

Notice of Seizure and Claim for Release of Goods

- Allows Customs to give a trade mark owner (objector), who lodges a Notice of Objection about imported goods, contact and other relevant information about the Australian importer (designated owner) and foreign supplier or exporter about the goods.
- A designated owner who wants the seized goods back must make a 'claim for return' to Customs. The claim for return will include information which would enable an objector to contact the designated owner and instigate legal proceedings for infringement. The seized goods will only be released to the designated owner if the objector consents, or does not institute legal proceedings, or a court finds that the seized goods are not infringing.

Inspection of Seized Goods

- Customs can now permit the objector to inspect or remove multiple samples of the seized goods, in order to make a more accurate determination as to whether the goods are infringing.

Forfeit and Disposal of Seized Goods

- If no claim for release is made by the designated owner of the seized goods, then the goods are forfeited to the Commonwealth.
- If the designated owner makes a claim but fails to collect the goods within 90 days, then the goods are forfeited to the Commonwealth.
- There is a 30 days holding period before forfeited goods can be disposed of.
- Designated owners of non-infringing goods can be compensated if their goods are disposed of by Customs.

Trade Mark Offences and Additional Damages for Trade Mark Infringement

- Increase the penalties for existing indictable offences.
- Re-structures the existing offence provisions to make them clearer, including new corresponding summary offences. Summary offences have lower fault elements and lower penalties.
- Court has the discretion to award additional damages in infringement proceedings.