Major Sporting Events (Indicia and Images) Protection Bill 2014

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Law and Bills Digest Section

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Date introduced: 26 March 2014
House: House of Representatives
Portfolio: Sport

Commencement: Sections 1 and 2 commence on Royal Assent. Sections 3 to 58 and the three Schedules commence either on the day after Royal Assent or 1 July 2014, whichever is the later day.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.
Purpose of the Bill
The purpose of the Major Sporting Events (Indicia and Images) Protection Bill 2014 (the Bill) is to protect major sporting event sponsorship and licensing revenue from being undermined by unauthorised commercial use of event indicia (words and phrases) and images for the following events:

- Asian Football Confederation (AFC) Asian Cup 2015 with matches to be held from 9–31 January 2015
- International Cricket Council (ICC) Cricket World Cup 2015 to be jointly hosted with New Zealand from 14 February – 29 March 2015 and
- Gold Coast 2018 Commonwealth Games to be held from 4–15 April 2018.

Structure of the Bill
The Bill consists of seven Parts with three Schedules to be attached to the proposed Act.

In summary the Parts are divided as follows:

- Part 1—Preliminary matters: includes commencement details, an objects clause and application details
- Part 2—Interpretation: includes a dictionary of terms used in the Bill and other interpretation provisions. It also includes exemption provisions that will apply to some third parties
- Part 3—Regulation of use of protected indicia and images for commercial purposes: contains the primary provision dealing with regulation of use of protected indicia and images for commercial purposes. It also provides for the establishment of a register of authorised persons for the relevant sporting events covered by the Act
- Part 4—Importation of goods: provides various powers to the Australian Customs and Border Protection Service (Customs) and procedures for authorised sporting bodies and persons to give Customs notices of objection to the importation of goods that have protected indicia or images applied to them
- Part 5—Remedies: sets out the possible remedies that may be granted by a court, including injunctions, damages, corrective advertisement and the seizure of goods
- Part 6—Groundless threats: contains provisions covering the making of groundless threats by the official users of the protected indicia and images and
- Part 7—Miscellaneous: contains amongst other things provisions dealing with interaction between the Act and other Commonwealth state and territory laws, the making of rules by the Minister and constitutional safety net clauses.

The three Schedules cover:

- the AFC Asian Cup 2015 (Schedule 1)
- the ICC Cricket World Cup 2015 (Schedule 2) and
- the Gold Coast 2018 Commonwealth Games (Schedule 3).

Each Schedule sets out the name of the relevant authorising body for the sporting event, a list of event bodies, a list of protected words and phrases (indicia) and the dates of protection for the relevant sporting event. Each Schedule will cease to have effect within one year after the completion of the relevant sporting event as prescribed in the Schedule.

Background
Australia has secured the rights to host three major international sporting events over the next four years, these events being the AFC Asian Cup 2015, the ICC Cricket World Cup 2015 and the Gold Coast 2018 Commonwealth Games.

Both the Coalition and previous Labor Governments have spoken of the positive benefits of holding such events in Australia, noting the advantages they provide to the Australian public and Australian sportspeople as well as the benefits they will bring to tourism and trade opportunities.

The Government’s enthusiasm is evident in the Minister’s second reading speech to the Bill which states:
The three events that are the focus of this Bill will, between them, see over 60 countries participating on Australian shores with a much broader global reach due to their profile and nature. They represent the pinnacle of competition and include some of the world’s best football players, cricketers and athletes.

For Australia, the profiles of these events present a great opportunity to showcase our country from a tourism, trade and event delivery perspective.¹

Similarly, the previous Labor Government’s Sports Minister Kate Lundy, speaking on 9 January 2013, the day marking a two year countdown until the Asian World Cup stated:

The spin-off from the Cup will be enormous for Australia with a global audience of more than 2.5 billion people expected, an estimated 45,000 international visitors set to visit our shores, and up to 1,000 new jobs created.

The Cup offers a unique opportunity to showcase Australia as a world-class host for major sporting events and as an attractive tourist destination to visit.²

Despite these benefits, the costs of staging and promoting major sporting events such as these are high, involving big business with large commercial interests at stake. Some of the funding for these events comes from government and the Explanatory Memorandum notes, without giving any detail, both Commonwealth and state and territory governments have provided significant financial input for the events.³ Traditionally however, authorising bodies of such sporting events also rely very heavily on sponsorship funding to stage their events, with that revenue amounting to millions of dollars.⁴ In return for their event sponsorship, sponsors are able to publicise their support by using event indicia and images and expect to receive significant financial benefit and positive values associated with the recognition of being a sponsor. However, the exclusivity of that sponsorship can be undermined and diminished by other businesses engaging in so called ‘ambush marketing’.⁵

Ambush marketing has been defined as:

... the unauthorised association by businesses of their names, brands, products or services with a sports event or competition through any one or more of a wide range of marketing activities: ‘unauthorised’ in the sense that neither the controller of the commercial rights of such events ... nor its commercial agents, has sanctioned or licensed the association.⁶

Laws protecting sponsors’ rights already exist through consumer protection and intellectual property laws (especially trade mark, designs and copyright laws). However while some forms of ambush marketing would contravene these existing laws there is also an argument that the more sophisticated and subtle forms of

³ Explanatory Memorandum, Major Sporting Events (Indicia and Images) Protection Bill 2014, p. 1, accessed 29 April 2014. Commonwealth funding for these major sporting event is complex and not easily interpreted from the Budget papers. This was evident at Senate Estimates hearings on 30 May 2013. Mr Richard Eccles, Deputy Secretary from the Department of Regional Australia, Local Government, Arts and Sport, explained to the Committee that the Commonwealth contribution to the local organising committee of the AFC Asian Cup 2015 is $30.5 million with an equivalent contribution coming from the state governments (Queensland, New South Wales, ACT and Victoria). In contrast there is no Commonwealth funding for Cricket Australia, the organising committee of the the ICC Cricket World Cup 2015. There is also additional funding provided to the various agencies within the Commonwealth to assist in hosting both events. Again, the contribution for the AFC World Cup 2015 ($55.7 million) seems higher than for the ICC Cricket World Cup 2015 ($14.5 million). For further explanation see: Senate Rural and Regional Affairs and Transport Legislation Committee, Committee Hansard, 30 May 2013, pp. 34–44, accessed 12 May 2014.
⁴ The Explanatory Memorandum states that sponsorship revenue for the three events is difficult to quantify as the event owners traditionally establish commercial-in-confidence multi-year agreements with corporate sponsors that cover several events in their respective annual calendars. It does however state that the Commonwealth Games sponsorship target for 2018 is $95 million, excluding any licensing and merchandise revenue, Explanatory Memorandum, p. 3. By way of comparison, sponsorship revenue for the Melbourne 2006 Commonwealth Games was approximately $95.1 million. This accounted for 8.3 per cent of the total funding. Commonwealth Government grants and funding accounted for 9.9 per cent and Victorian Government funding, 60.4 per cent. See: Frontier Economics and the Intellectual Property Research Institute of Australia, Ambush marketing legislation review, prepared for IP Australia and the Department of Communications, Information Technology and the Arts, October 2007, p. 70, accessed 28 April 2014.
⁵ Past instances of ambush marketing are set out in Frontier Economics, op. cit., p. 15.
ambush marketing would not.\textsuperscript{7} The 2007 Review (referred to below) states that the breadth of conduct that falls into this second category demonstrates the creativity of marketers in finding ways to leverage off an event, either without infringing any law, or where legal uncertainty (combined with the time and cost of litigation) dissuades any enforcement action by the event organiser.\textsuperscript{8}

The Explanatory Memorandum to the Bill states that as a condition of being awarded the right to host these three major sporting events, the Australian Government provided written undertakings to protect the unauthorised commercial use of certain indicia and images associated with each of the events, commensurate with the support provided to the Melbourne 2006 Commonwealth Games, and enact any required legislation by early 2014.\textsuperscript{9}

Specific federal legislation to protect sponsorship rights and ownership of indicia and images was provided for both the Sydney 2000 Olympic Games and the Melbourne 2006 Commonwealth Games. The Sydney 2000 Games (Indicia and Images) Protection Act 1996 (the Sydney 2000 Games Act)\textsuperscript{10} and the Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Act 2005 (the Melbourne 2006 Act)\textsuperscript{11} were enacted to provide legislative protection to event owners for certain event insignia. The aim of that legislation was to facilitate the raising of revenue by the relevant organising bodies by granting them exclusive rights to use protected expressions and indicia for commercial purposes. These exclusive rights were said to increase certainty about the scope of the organising bodies’ rights, promote confidence among sponsors, and reduce enforcement costs.\textsuperscript{12} Both these Acts had sunset clauses and have either been repealed or have ceased to have effect.\textsuperscript{13}

A review of the Sydney 2000 Games Act and the Melbourne 2006 Act was carried out in 2007 by IP Australia and the Department of Communications, Information Technology and the Arts (the 2007 Review). The Review concluded the legislation was effective, due in large part to the deterrence and signaling effect, and the ‘enhanced ability of the organisers to enforce their rights by threatening to take action [under the legislation] against unauthorised users of their rights’.\textsuperscript{14}

The Bill under consideration in this Digest is consistent with the approach in the Sydney 2000 Games Act and the Melbourne 2006 Act. All three have a similar purpose and all three contain:

- a prescribed list of words and phrases (‘protected indicia’) for the relevant sporting event
- a similar definition of ‘protected images’
- similar definitions of the circumstances in which protected indicia and images are used for a commercial purpose
- a primary provision regulating the use of protected indicia and images so that persons (other than the event body and other authorised persons) must not use a major sporting body’s protected indicia and images for commercial purposes during the event’s protected period
- an exemption for certain uses of protected indicia and images in relation to criticism or review (such as in a newspaper, magazine or broadcast), or in relation to the provision of information, such as the reporting of news and current affairs
- provisions covering the importation of goods which have protected indicia and images for major sporting events applied to them, including allowing for the seizure and inspection of such goods by Customs and
- provisions containing remedies for contravention including injunctions, corrective advertisements and damages.

\textsuperscript{7} Frontier Economics, op. cit., p. 8.
\textsuperscript{8} Ibid, p. 17. The 2007 Review at pp. 15–21 also provides case studies of past instances of ambush marketing and how the law has applied.
\textsuperscript{9} Explanatory Memorandum, p. 3.
\textsuperscript{12} Frontier Economics, op. cit., p. 9.
\textsuperscript{13} The Sydney 2000 Games Act has been repealed. The Melbourne 2006 Act has ceased to have effect and will be repealed by item 12 of Schedule 10 of the Statute Law Revision Bill (No. 1) 2014, which is still before the Senate.
\textsuperscript{14} Ibid., p. 97.
The key difference between the Bill and the previous legislation is that the Bill applies to multiple events and has been drafted as a generic piece of legislation which can be amended to apply to future sporting events by insertion of new Schedules if and when required. The body of the Bill sets out the restrictions in general terms. Each of the three Schedules in the Bill has limited dates of application so that they will cease to have effect within one year of the relevant sporting event. In contrast, the *Sydney 2000 Games Act* and the *Melbourne 2006 Act* were drafted to apply to just one event with a sunset clause providing that the legislation ceased to have effect twelve months after the respective Games.

**Committee consideration**

On 27 March 2014, the Selection of Bills Committee reported that it had resolved not to recommend the Bill for inquiry and report.15

**Policy position of non-government parties**

At the time of writing this Bills Digest, the Opposition has not publicly commented on the Bill. However as noted above, as a condition of being awarded the right to host these three major sporting events, previous Governments gave written undertakings to pass appropriate ambush marketing laws. It could be expected the Bill will have bipartisan support.

**Position of major interest groups**

To date there is no reported public comment on the Bill. However two of the 2015 event organisers, Cricket Australia and the Football Federation Australia both made submissions to the 2007 Review suggesting that this type of legislation protecting against ambush marketing should also apply to them.

Cricket Australia in its submission stated:

> Cricket Australia does not see why this type of ambush marketing legislation should not apply to Cricket Australia or other significant sporting organisations.

> [...] Attracting international events to your country is now, more commonly than not, contingent on adequate ambush marketing legislation being in place. ... As an example of where it’s become essential for us, in bidding for the cricket World Cup in 2011 and 2015, we had to turn to the federal government and seek express undertakings from them [that] some sort of ambush marketing legislation would be put in place. ... At the end of the day, the revenue that we generate, in terms of tourism, and importance to the Australian public of having major sporting events take place in Australia, is such that ... this type of legislation has to be enacted by the Federal government.16

Similarly the Football Federation Australia argued that ‘it does not seem too fair’ that the Olympic movements were given special protection, but not football:

> They [the Olympic Games] were the first event to get ambushed, so therefore they were the first to get protected. But why the protection just stopped, and didn’t go to anything else that has developed since then ... In 1987, rugby wasn’t even professional, AFL was in its early stages ... there certainly wasn’t the same incidence of ambush marketing, but there probably wasn’t any events. So it’s like, [legislation] was a good reaction to that particular problem for the Olympics [...] but why stop? All the reasons it was introduced for the Olympics hold true for every other non-Olympic sport.17

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17. Ibid., p. 90.
Financial implications

The Explanatory Memorandum states that there is no identified regulatory burden impact for business and no compliance cost associated with the Bill.\textsuperscript{18}

However the Regulation Impact Statement, contained within the Explanatory Memorandum states that there are administrative costs for Customs and IP Australia:

It is worth noting that funding has been provided in the 2012-13 Portfolio Additional Estimates Statements (PAES) for the Australian Customs and Border Protection Service ($0.5 million) and IP Australia ($0.2 million) to help offset the identified administration costs for government to implement the new legislation for the Asian Cup 2015 and the Cricket World Cup 2015. This amount should therefore meet any additional resource costs over and above business as usual activities.\textsuperscript{19}

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.\textsuperscript{20} The Government considers that the Bill is compatible.

Key issues and provisions

\textbf{Clause 9} contains a dictionary of relevant terms for the Bill. Many of the dictionary terms refer to further definitions contained in other parts of the Bill and Schedules. For example ‘major sporting event’ means an event that is covered by a Schedule to the Bill. The key term ‘protected indicia’ of a major sporting event, is defined by reference to a prescribed list of words and phrases set out in \textbf{clause 4} of each of Schedules 1, 2 and 3.

For the AFC Asian Cup protected indicia include Asian Cup 2015, Asian Cup, and AFC Asian Cup Australia 2015 (\textit{proposed clause 4 of Schedule 1}).

For the ICC Cricket World Cup 2015 protected indicia include Cricket World Cup, Cricket World Cup Champions and CWC 2015 (\textit{proposed clause 4 of Schedule 2}).

For the Gold Coast 2018 Commonwealth Games protected indicia (\textit{proposed clause 4 of Schedule 3}) include Australian Commonwealth Games, Coast 2018 Games, GC2018, and Commonwealth Games Federation.

\textit{Proposed clause 4} in each Schedule also contains tables of words that if combined become protected indicia.

The definition of ‘protected images’ of a major sporting event does not refer to a prescribed list of images but instead is more broadly defined as any visual or aural representations that, to a reasonable person, in the circumstances of the presentation, would suggest a connection with the event (\textit{clause 9} in the Bill).

\textbf{Clause 12} in the Bill defines the two situations in which protected indicia or images are used for a commercial purpose. The first situation (\textbf{subclause 12(1)}) is where a person causes the indicia or images to be applied to goods or services for the primary purpose of advertising, promotion or enhancement of demand, and the application of the indicia or images suggests a sponsorship, or other support arrangement, of the major sporting event or an event connected with the sporting event.

The second situation (\textbf{subclause 12(2)}) has all the same elements as \textbf{clause 12(1)}, and involves a second person who:

* supplies or offers to supply the goods or services
* exposes the goods for supply or
* keeps the goods for supply by themselves or another.

\textbf{Clause 13} sets out a presumption that, where indicia or images are applied to goods or services for the primary purpose of promoting or enhancing demand for those goods or services, this is enough, for the purposes of paragraph 12(1)(c)), to suggest that a sponsorship, or other support, arrangement exists.

\begin{itemize}
  \item \textsuperscript{18} Explanatory Memorandum, p. 2.
  \item \textsuperscript{19} Ibid., p. 12.
  \item \textsuperscript{20} The Statement of Compatibility with Human Rights can be found at pages 21-27 of the Explanatory Memorandum to the Bill.
\end{itemize}
Clause 14 provides an exemption for certain uses of protected indicia and images. It provides that where the indicia and images are used for the primary purpose of:

- criticism or review or
- the provision of information, such as the reporting of news and current affairs

then the application or use of the indicia and images is not sufficient to suggest the existence of a sponsorship or other support arrangement.

The Minister’s second reading speech provides further clarification on how these exemptions would apply, stating the Bill permits:

... the provision of information for the purposes of reporting news and presentation of current affairs, the factual description of goods or services provided by a business (such as stating that accommodation is available at a hotel that is located near an event venue), or factual statements by an athlete to promote their own achievements.  

Clause 16 is the primary provision regulating the use of protected indicia and images. Subclause 16(1) provides that a person other than:

- the event body  
- an authorised person for a major sporting event

must not use a major sporting event’s protected indicia and images for commercial purposes during the event’s protection period.

Subclause 16(6) extends the prohibition in subclause 16(1) to any indicium that ‘so closely resembles a protected indicium for a major sporting event that a reasonable person is likely to mistake it for the protected indicium’.

Subclause 16(5) provides a person does not contravene the prohibition in subclause 16(1) if their use of the protected indicia or images is done in accordance with a state or territory law specified in one of the Schedules to the Bill or as prescribed in the rules made under clause 58 of the Bill.

Subclause 16(2) provides that an event body for a major sporting event may use that event’s protected indicia and images for commercial purposes during the protection period. Subclause 16(3) provides similar authority for authorised persons.

The names of the authorising body and the event bodies for each major sporting event are listed in the Schedules. For example the authorising body for the AFC Asian Cup 2015 is known as the Asian Football Confederation (proposed clause 2, Schedule 1). The event bodies are the authorising body (the Asian Football Confederation), the Local Organising Committee (the AFC Asian Cup 2015 Australia) and the body known as Football Federation Australia (proposed clause 3, Schedule 1).

The protection period for each major sporting event is set out in each of the Schedules. The protection periods cease on the following dates (or earlier if prescribed by the rules):

- 2015 Asian Cup – 30 June 2015 (proposed clause 6, Schedule 1)
- Cricket World Cup 2015 – 31 March 2016 (proposed clause 6, Schedule 2) and
- 2018 Commonwealth Games – 31 December 2018 (proposed clause 7, Schedule 3).

Clause 17 broadens the effect of clause 16 to include amongst others those who aid and abet, or induce others to contravene clause 16.

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22. The event bodies for each sporting event are listed in each clause 3 of the relevant Schedule.
23. A person is an authorised person for a major sporting event if the person has written authorisation from either the relevant event body or from another person on behalf of, or as authorised by, such an event body (subclause 16(4)).
24. For example proposed clause 8 of Schedule 3 provides that sections 51 to 56 of the Commonwealth Games Arrangements Act 2011 (Qld) are specified in relation to the Gold Coast 2018 Commonwealth Games.
Clause 18 requires the authorising body for a major sporting event to establish and maintain a register of authorised users of each event’s indicia and images. The register is to include the business name and address of the authorised person and the protected indicia and images that are covered by the authorisation (subclause 18(2)).

Part 4 of the Bill contains provisions covering the importation of goods which have protected indicia or images for major sporting events applied to them. In particular, clause 23 allows an official user for a major sporting event to give a written notice to the Customs Chief Executive Officer objecting to the importation of goods with protected indicia or images applied to them, where the designated owner of those goods is not authorised to use the goods for commercial purposes. Other provisions in Part 4 allow for seizure and inspection of such goods by Customs. The Explanatory Memorandum states that these provisions are modelled on existing provisions within the Trade Marks Act 1995 (sections 131–144) that relate to the importation of goods infringing Australian trade marks. It is argued that using the equivalent trade mark regulatory model will avoid confusion for business, consumers and those administering the measures.

Part 5 of the Bill sets out the remedies available to the authorising bodies and authorised persons to enforce their rights in relation to the protected indicia and images. The remedies for contravention of clause 16, include injunctions, interim injunctions, corrective advertisements, and damages or accounts of profit. Corrective advertisements may only be applied for by the authorising body for a major sporting event (clause 47).

As the Minister’s second reading speech states, these remedies do not detract from or reduce remedies under any other law either state, territory or Commonwealth for example under the Trade Marks Act 1995, the Copyright Act 1968 or the Competition and Consumer Act 2010 in relation to engaging in conduct that is misleading or deceptive.

Part 6 of the Bill contains provisions aimed at safeguarding against groundless threats of legal proceedings by the official users of the protected indicia and images. Subclause 52(1) provides that if an official user threatens to bring an action under this Act against a person for contravention or possible contravention of section 16, then the person aggrieved by the threat may bring a court action against the official user. Remedies the court may provide are: declarations, injunctions and damages (subclause 52(3)).

Concluding comments

The Bill is likely to have bipartisan support in the Parliament, its passage being part of a commitment given when securing the rights to host these prestigious sporting events in Australia.

Based on the earlier legislation enacted for the Commonwealth and Olympic Games it would seem the Bill’s effectiveness will be to provide a deterrence and signalling effect enabling sporting bodies to threaten legal action against unauthorised use of their protected indicia.

A final question that might be asked is what sporting bodies will in the future be given this type of special protection and how will that be determined? For example, why does the legislation apply to the 2015 Asian Cup and not to the 2015 World Netball Championships, also to be hosted by Australia?

As the Football Federation Australia argued some years ago about the special protection for the Olympic movement, all the reasons that legislation was introduced for the Olympics held true for every non-Olympic sport. So too one could ask why does this Bill stop with football and cricket?

25. Official users for a major sporting event are: the authorising body for the event, any other event body for the event, and authorised persons for the event (clause 9).
26. A designated owner is defined in clause 9.
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