Major Sporting Events (Indicia and Images) Protection Amendment Bill 2018

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Law and Bills Digest Section

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Date introduced: 5 December 2018
House: Senate
Portfolio: Regional Services, Sport, Local Government and Decentralisation
Commencement: The day after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website. All hyperlinks in this Bills Digest are correct as at February 2019.
Purpose and structure of the Bill

The purpose of the Major Sporting Events (Indicia and Images) Protection Amendment Bill 2018 (the Bill) is to amend the Major Sporting Events (Indicia and Images) Protection Act 2014 (the MSE Act) to:

- provide protection against ambush marketing by association for the International Cricket Council (ICC) T20 World Cup 2020 and
- remove historical schedules related to the Asian Football Confederation Asian Cup 2015 and the ICC Cricket World Cup 2015.

The proposed amendments to the MSE Act are contained in Schedule 1 of the Bill.

Background

Sponsorships are a valuable means of generating revenue and resources for major sporting events. In return for financial or other support, sponsors can benefit from displaying indicia (words and phrases) or images in connection with the event. However, other businesses can attempt to commercially benefit by associating their products and services with major sporting events despite not being official sponsors or supporters. This practice is referred to as ‘ambush marketing’.

The MSE Act was passed in 2014 to protect major sporting event sponsorship and licensing revenue from being undermined by unauthorised commercial use of event indicia and images for three specific events. It followed previous legislation which protected the sponsors of the Sydney 2000 Olympic Games and the Melbourne 2006 Commonwealth Games by preventing the unauthorised commercial use of certain indicia and images associated with these events.

On 25 November 2018, the Minister for Sport, Senator Bridget McKenzie announced that Australia would host the ICC T20 World Cup 2020. This followed an earlier measure in the Budget 2018–19 to grant tax exemptions over five years to a subsidiary of the International Cricket Council as part of the Australian Government’s ‘commitment to support the International Cricket Council to stage the World Twenty20 in Australia’. The Bill is a further measure intended to assist the running of this event. The Explanatory Memorandum to the Bill states:

The Government is committed to supporting the staging of T20 World Cup in Australia ...

The Bill seeks to provide protection for T20 World Cup indicia and images in the lead up to, during, and in the immediate aftermath of the T20 World Cup. The protection of T20 World Cup indicia and images during this period will enable T20 World Cup organisers to protect existing sponsors, attract additional sponsors, and achieve its sponsorship revenue targets. In turn, this will reduce the financial impact on government.

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1. For example, S Favotto and J Cox, ‘Sport sponsorships and ambush marketing: how to avoid the ambush’, Communications Law Bulletin, 35(4), December 2016, p. 4.
Committee consideration

**Senate Selection of Bills Committee**
The Senate Selection of Bills Committee recommended that the Bill not be referred to a committee for inquiry.7

**Senate Standing Committee for the Scrutiny of Bills**
The Senate Standing Committee for the Scrutiny of Bills had no comment on the Bill.8

**Policy position of non-government parties**
At the time of writing, non-government parties have not expressed policy positions on the Bill. However, the Opposition supported the passage of the MSE Act in 2014.9 In this context, bipartisan support for the Bill can be considered likely.

**Position of major interest groups**
At the time of writing, no major interest groups have commented on the Bill.

**Financial implications**
The Explanatory Memorandum indicates the Government expects that the Bill will not have any financial impact on Commonwealth expenditure or revenue.10

**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. The Government considers that the Bill is compatible.11

**Parliamentary Joint Committee on Human Rights**
At the time of writing, the Parliamentary Joint Committee on Human Rights has not considered the Bill.12

**Key issues and provisions**

**Clarification of consequences for unauthorised use**
Subsection 16(1) of the MSE Act provides that a person must not use a major sporting event’s protected indicia or images for commercial purposes during the event’s protection period (except where otherwise provided in section 16).

Items 1 and 2 of the Bill make amendments to insert a second note under subsection 16(1). The proposed note clarifies the consequences of unauthorised use which exist in the other parts of the MSE Act. In particular, under Part 4, imported goods can be seized if an event’s protected indicia

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11. The Statement of Compatibility with Human Rights can be found at page 2 of the Explanatory Memorandum to the Bill.
or images have been applied to goods in contravention of section 16. Further remedies for contraventions of section 16 are set out in Part 5. These include injunctions, damages or an account of profits.

**Repeal of references to previous major sporting events**

In the MSE Act, the details of each protected major sporting event is listed as a separate schedule. **Item 3** of the Bill repeals Schedules 1 and 2 of the MSE Act which relate to the Asian Football Confederation (AFC) Asian Cup 2015 and the ICC Cricket World Cup 2015. The protection period of the indicia and images of these events under the MSE Act has already expired.\(^\text{13}\)

**Item 3** also inserts proposed Schedule 1 — ICC T20 World Cup which largely follows the content and format of the repealed schedules above.

**Authorising body and event bodies**

**Proposed clauses** 1–3 of **Schedule 1** provides that the ICC T20 World Cup 2020 is a major sporting event and outlines the relevant authorising body and the event bodies.

Under the MSE Act, an authorising body (in this case, a corporation which is a wholly-owned subsidiary of International Cricket Council Ltd) has key obligations and rights. In particular, this includes creating and maintaining a register of authorised persons and relevant authorisations relating to the use of protected indicia or images.\(^\text{14}\) A number of ‘event bodies’ for the ICC T20 World Cup 2020 are also listed, such as Cricket Australia (which has been granted the rights to host the event in Australia). Event bodies are defined as ‘official users’ in the MSE Act which allows them to seek certain remedies under the legislation where persons use the event’s protected indicia or images for commercial purposes with authorisation.\(^\text{15}\)

**Protected indicia for the ICC T20 World Cup 2020**

**Proposed clause 4** of **Schedule 1** lists the protected indicia for the ICC T20 World Cup 2020. Like the schedules for earlier major sporting events in the MSE Act, **proposed clause 4** lists a number of specific expressions, such as ‘WT20’, which will be protected indicia for the ICC T20 World Cup 2020. The expressions in the list will be protected regardless of whether they are used alone or they are accompanied by ‘any other expressions, letters, numbers or symbols’.

Also in accordance with previous lists, the list of protected indicia for the ICC T20 World Cup 2020 can be expanded to ‘any expression that is prescribed by the rules’. The Explanatory Memorandum states:

> The rules may prescribe additional words, phrases or expressions to be added to the schedule.

Previous experience indicates that between the Bill receiving Royal Assent and the commencement of the event, there may be additional protections required which need to be added promptly or when Parliament is not sitting. For example the AFC Asian Cup 2015 was held in January 2015 and immediately prior to the event, the event organisers requested additional protections for new phrasings including a newly created mascot. As Parliament was not sitting, these protections were only able to be added to the existing schedule for the event through use of the rules.

\(^\text{13}\) The protection period for the Asian Football Confederation Asian Cup 2015 under the MSE Act ended on 30 June 2015 (item 6 of Schedule 1) and the protection period for the Cricket World Cup 2015 ended on 31 March 2016 (item 6 of Schedule 2). The Explanatory Memorandum does not address why Schedule 3 relating to the Gold Coast 2018 Commonwealth Games is not also being repealed. The protection period for this event ended on 31 December 2018 (item 7 of Schedule 3). This could be because at the time of introduction of the Bill (5 December 2018) the protection period for Schedule 3 had not ended.

\(^\text{14}\) Section 18 of the MSE Act.

\(^\text{15}\) See, sections 4 and 9 of the MSE Act.
The rules will not be used to remove or limit the rights of the community to freedom of expression, particularly in relation to words that have passed into common usage. There is an inherent tension between adequately protecting the interests of major sporting events sponsors from ambush marketing by association while not unduly interfering with the rights of others. This issue is evident in Minister Anne Ruston’s second reading speech for the Bill. She stated:

While it is important to protect T20 World Cup sponsors from ambush marketing, the rights of the community to freedom of expression must also be respected, particularly in relation to words that have passed into common usage. A pragmatic approach has been taken with generic words and references excluded from the list of protected expressions. It must also be emphasised that restrictions on the usage of T20 World Cup indicia and images will apply only to their unlicensed commercial use.

The Bill will protect the use of a range of expressions associated with the T20 World Cup from ambush marketing and unlicensed commercial use in the lead up to, during and in the immediate aftermath of the T20 World Cup.

In addition to protecting specific event-related terminology, the Bill also provides protection to certain images that in the circumstances of their presentation suggest, or are likely to suggest, a connection with the T20 World Cup. These images may be either visual or aural representations.

A number of exceptions will exist in relation to the T20 World Cup allowing for:

- the continued operation of rights and liabilities under the Trade Marks Act 1995, Design Act 2003 and the Copyright Act 1968;
- the provision of information, criticism and review of the T20 World Cup, such as in newspapers, magazines and broadcasts;
- use of the protected indicia and images for the reasonable needs of sporting bodies in relation to fundraising and promotion; and
- communities and businesses to engage in city dressing and festival promotions supporting the T20 World Cup in non-commercial ways.

In line with the Australian Government’s deregulation agenda, the Bill is not intended to increase the burden on business or affect their everyday operations. The Bill fully protects the rights of the existing holders to use T20 World Cup indicia and images to carry out their business functions.

In this context, it is of note that the protected indicia listed in clause 4 of proposed Schedule 1 to the MSE Act differ in one respect to the lists for the earlier sporting events protected under the MSE Act. Unlike the protected indicia for earlier events, proposed clause 4 of Schedule 1 includes:

(k) any expression that, to a reasonable person, would suggest a connection with the ICC T20 World Cup 2020.

This change appears to extend the scope of protection of indicia for the ICC T20 World Cup 2020 compared to earlier major sporting events covered by the MSE Act. While the second reading speech refers to the Bill providing ‘protection to certain images that in the circumstances of their presentation suggest, or are likely to suggest, a connection with the T20 World Cup’, proposed

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clause 4 appears to be limited to ‘protected indicia’.\(^{18}\) The Explanatory Memorandum does not address the rationale for this expansion of protected indicia, merely stating that the ‘agreed list’ of protected indicia in proposed clause 4 was ‘developed in consultation with the event bodies and IP Australia’. It may therefore be assumed this change derived from this consultation process.\(^{19}\)

The proposed expansion of protected indicia in the Bill for the ICC T20 World Cup 2020 appears to be broader than the legal protection for ‘protected olympic expressions’ under the Olympic Insignia Protection Act 1987. Subsection 24(1) of that legislation provides a list of protected olympic expressions (such as ‘Olympiad’) which are prohibited for commercial use unless the user holds a licence granted by the Australian Olympic Committee. Subsection 24(2) extends this prohibition so that ‘an expression so closely resembling a protected olympic expression mentioned in subsection (1) as to be likely to be mistaken, by a reasonable person, for such a protected olympic expression is taken to be a protected olympic expression’.

The proposed expansion of protected indicia under the MSE Act to ‘any expression that, to a reasonable person, would suggest a connection with the ICC T20 World Cup 2020’ could raise a number of issues. The language of the proposed amendment means it may be difficult to determine whether the commercial use of other expressions will infringe on protected indicia. Terms such as ‘suggest’ and ‘connection’ are undefined in the MSE Act and it is unclear how broadly these terms could be interpreted. In particular, the proposed amendment is not limited to expressions ‘closely resembling’ a limited list of specific expressions (such as in the Olympic Insignia Protection Act) and so could potentially be applied to any expression. A lack of clarity in the possible application of the protected indicia for the ICC T20 World Cup 2020 could cause uncertainty for other persons and businesses undertaking related commercial activities.

The expansion of protected indicia in the Bill for the ICC T20 World Cup 2020 may also have implications for the safeguard in section 52 of the MSE Act relating to groundless legal threats. Under this section, where an official user makes a groundless threat of legal proceeding, any person aggrieved may bring an action in a relevant court seeking a declaration or injunction, or damages for loss that the person has suffered as a result of the threat. This section prevents those whose interests are protected under the legislation from unfairly using this protection to threaten competitors and others. However, if there is a lack of clarity concerning protected indicia under the legislation, this could undermine this safeguard mechanism.

**When protected indicia and images relate to an event body**

Proposed clause 5 clarifies that the protected indicia and images for the ICC T20 World Cup 2020 ‘relate’ to the authorising body, except as prescribed by the rules. Further, protected indicia and images will be taken to relate to any other event body, as prescribed in the rules. This clarification mirrors the content of the schedules for previous events.

In relation to this amendment, the Explanatory Memorandum indicates that changes prescribed in the rules ‘may become necessary should, ahead of the event, the ICC, Cricket Australia or T20 World Cup 2020 Ltd. agree to add further event bodies that the protected indicia and images for the ICC T20 World Cup 2020 relate to’.\(^{20}\)

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18. Ibid [emphasis added]. ‘Protected images’ of a major sporting event are defined at section 9 of the MSE Act as ‘any visual or aural representations that, to a reasonable person, in the circumstances of the presentation, would suggest a connection with the event’.
20. Ibid., p. 8.
**Protection period**

Proposed clause 6 provides the protection period for the ICC T20 World Cup 2020. This period starts on commencement of the Bill (the day after Royal Assent) and ends on 30 November 2021 unless the rules prescribe an earlier day when the protection period will cease. This appears to accord with the protection periods granted to other major sporting events under the MSE Act (approximately one year after the conclusion of the event).

The Explanatory Memorandum notes that prescribing ‘an earlier day’ for the cessation of the protection period under the rules ‘may become necessary should the ICC remove hosting rights for the event from Australia or should unforeseeable date changes to the event occur’.  

**Concluding comments**

The MSE Act establishes a legislative framework in Australia which protects specific major sporting events from ambush marketing by association. In particular, the MSE Act prohibits the unauthorised commercial use of protected indicia and images of events. The Bill will amend the MSE Act to apply this framework to the ICC T20 World Cup 2020 as part of the Government’s support for this event. The Bill will also repeal two historical schedules referring to previous events.

The amendments made by the Bill highlight how this legislative framework established by the MSE Act can be utilised to protect the indicia and images of other major sporting events. If continued, this practice may enhance Australia’s reputation as a jurisdiction with appropriate legal protections regarding ambush marketing when competing to host other international sporting events in the future.

The Bill appears to extend the scope of the protected indicia for the ICC T20 World Cup 2020 compared to previous major sporting events. Unlike the protected indicia for previous events (which were largely limited to listed indicia, or other expressions prescribed in the rules) the protected indicia in the Bill include ‘any expression that, to a reasonable person, would suggest a connection with the ICC T20 World Cup 2020’. A rationale for the expansion of protected indicia for this event does not appear to be provided in the Explanatory Memorandum. Potentially, this expansion of protected indicia could cause uncertainty for persons conducting related commercial activities which would otherwise be legal. A lack of clarity concerning protected indicia could also undermine the safeguard mechanism contained in the MSE Act to deter groundless threats of legal proceedings being made against others.

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