THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

AUSTRALIAN SPORTS COMMISSION AMENDMENT BILL 2004

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator the Hon. Rod Kemp, Minister for the Arts and Sport)
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OUTLINE

The Australian Sports Commission Amendment Bill 2004 (the Bill) amends the Australian Sports Commission Act 1989 (the Act) to provide a new permissible purpose for the disclosure of protected personal information under the Customs Administration Act 1985 to the Executive Director of the Australian Sports Commission (ASC). It also facilitates the more effective use of this information by the ASC and sporting organisations in anti-doing processes.

The objective of the amendments is to continue to position Australia as a world-leader in the fight against drugs in sport by:

- allowing the ASC to use and disclose protected information for certain purposes;
- enabling the Executive Director of the ASC to authorise the disclosure of protected information to a sporting organisation under certain specified circumstances; and
- providing for the protected information given to a sporting organisation to be used or disclosed for permitted anti-doping purposes.

Since the World Anti-Doping Agency (WADA) released the World Anti-Doping Code (the Code) in March 2003, the Australian Government has been working to ensure that Australia is well positioned to support the Code and meet the continuing challenges in the fight against doping in sport. The Code defines as the National Anti-Doping Organisations (NADOs) for a country the organisations, which have the primary authority and responsibility to adopt and implement anti-doping rules, direct the collection of samples, and manage test results. The ASC has been recognised as one of Australia’s NADOs. As a NADO for Australia, the ASC has become a signatory to the Code and is required to align its policies and procedures with the Code.

The proposed amendments will enable the ASC and sporting organisations to implement their anti-doping policies to the fullest extent in accordance with the Code. This will be achieved by facilitating the disclosure and use of information about banned substances in sport, and those who import, or are the intended recipients of, such substances.

FINANCIAL IMPACT STATEMENT

The Bill is not expected to have any financial impact on Commonwealth expenditure or revenue.
ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

AIS: Australian Institute of Sport

ASC: Australian Sports Commission

Customs: Australian Customs Service

Bill: Australian Sports Commission Amendment Bill 2004

Code: World Anti Doping Code

NADO: National Anti-Doping Organisation

WADA: World Anti Doping Agency
NOTES ON CLAUSES

Clause 1 – Short title

Clause 1 provides that the Bill, when enacted, may be cited as the Australian Sports Commission Amendment Act 2004.

Clause 2 – Commencement

Clause 2 provides that the Act will commence on the day it receives Royal Assent.

Clause 3 – Schedule(s)

Clause 3 provides that each Act specified in a Schedule to the Act is amended or repealed as provided for in the Schedule. There is one Schedule to the Bill. Schedule 1 provides for amendments to the Australian Sports Commission Act 1989.

Schedule 1 – Amendments

Australian Sports Commission Act 1989

Item 1 – Section 51A
Item 2 – After section 51A
Item 3 – Section 51C

These items all deal with ‘permitted anti-doping purposes’ and are explained together.

Item 3 – Section 51C

Item 3 amends section 51C of the Act by omitting the permissible purpose in current section 51C and inserting a new proposed permissible purpose for the purpose of subsection 16(9) of the Customs Administration Act 1985 (Customs Administration Act). The permissible purpose is that for which protected information can be disclosed to the ASC. The new proposed permissible purpose is that of the Executive Director of the ASC determining if information should be used or disclosed for permitted anti-doping purposes of the ASC or of a sporting organisation.

Section 16 of the Customs Administration Act prohibits the unauthorised disclosure of protected information (information that directly or indirectly comes to the knowledge of, or into the possession of, a person while he or she is performing his or her duties in the Australian Customs Service (Customs)), provides for exceptions in relation to the prohibition and makes particular provision in relation to the unauthorised disclosure of personal information.

Protected information can be disclosed under section 16 of the Customs Administration Act in accordance with an authorisation from the Chief Executive Officer (CEO) of Customs, if the CEO is satisfied that the information held by Customs will be used by a Commonwealth agency for the purposes of the agency’s functions. Further, the Commonwealth agency must undertake not to use or further
disclose the information, except for the purpose specified by the CEO and in the manner, and on the conditions, specified. Additionally, if the information contains personal information, disclosure can only be authorised if the CEO is satisfied that the disclosure is necessary for a permissible purpose referred to in subsection 16(9) of the Customs Administration Act.

Protected information disclosed to the ASC will normally be information about the importation or attempted importation of a banned substance and will contain personal information about the person who imported, or attempted to import, the substance. The person will usually be an athlete or an athlete support person, such as a coach.

The permissible purpose which the amendment proposes omitting from the Act has proven difficult from a practical point of view. Protected information can only be disclosed by Customs for the purpose of the Executive Director of the ASC determining whether an anti-doping policy is likely to have been breached.

Further, current section 51E of the Act places constraints on the use of the information because the Executive Director can only authorise disclosure if satisfied that an anti-doing policy of a sporting organisation is likely to have been breached and the protected information is likely to assist the organisation in determining whether to take action in accordance with its anti-doping policy. This requires the undertaking of extensive enquiries that should be more appropriately undertaken as part of a formal investigation into the doping allegation. The proposed amendment should facilitate the disclosure and use of information that relates to anti-doping policies.

**Item 1 – Section 51A**

Item 1 inserts a new definition of “permitted anti-doping purposes” into section 51A of the Act. It provides that this expression has the meaning to be given by new proposed section 51AA.

**Item 2- After section 51A**

**Proposed section 51AA – Meaning of permitted anti-doping purposes**

This item inserts new proposed section 51AA which sets out the meaning of “permitted anti-doping purposes”. These permitted anti-doing purposes are the crux of the proposed amendments because they govern the purposes for which the protected information is disclosed to the ASC by Customs, the purposes for which the ASC can use the information and disclose the information to sporting organisations and the purposes for which the sporting organisations can use the information.

Currently, the Act restricts so narrowly the use and disclosure of protected information by the ASC and sporting organisations that information disclosed by Customs cannot be used effectively to ensure adherence to anti-doping policies. It is imperative that the information disclosed by Customs to the ASC can be used for a range of purposes including investigations and as evidence.
A permitted anti-doping purpose of the ASC or a sporting organisation is any of the following purposes:

(a) investigating whether an anti-doping policy of the ASC or a sporting organisation has been breached;
(b) determining whether to take action under an anti-doping policy of the ASC or a sporting organisation;
(c) determining what action to take under an anti-doping policy of the ASC or a sporting organisation;
(d) taking action under an anti-doping policy of the ASC or a sporting organisation;
(e) taking, or participating in, any proceedings relating to action that has been taken under an anti-doping policy of the ASC or a sporting organisation.

For the purposes of the definition, taking action under the ASC’s anti-doping policy includes taking action under an agreement in relation to a person who is bound by the ASC’s anti-doping policy. This is intended to ensure that the ASC can use the protected information to take action, not only in relation to breaches of its anti-doping policy, but action consequential to that which might be governed by an agreement. This includes, for example, action to terminate an AIS scholarship agreement or a contract with athlete support personnel.

**Item 4 – Paragraph 51D(1)(a)**

This item inserts a reference to section 51DA into paragraph 51D(1)(a) of the Act because new proposed section 51DA provides for disclosure of protected information by the Executive Director of the ASC to a person who is not an ASC official, for the ASC’s own anti-doping purposes. Therefore, section 51DA must be included with the other exceptions to disclosure set out in section 51D.

**Item 5 – At the end of subsection 51D(1)**

This item amends subsection 51D(1) by adding new proposed paragraph (c) which provides a third exception to the prohibition on disclosure of protected information to persons who are not ASC officials.

If the ASC holds protected information and needs to use and/or disclose that information as authorised by the Act, it is important that the person to whom that information relates is informed. The relevant person would normally be an athlete but could also be an athlete support person or a person operating in a similar capacity. The proposed amendment clarifies that the ASC can disclose information to a person to whom the information relates or to someone acting on behalf of such a person.

**Item 6 – Section 51E**

This item repeals section 51E, which has proven too restrictive in operation and substitutes new proposed sections 51DA and 51E.
Proposed section 51DA – Disclosure for certain permitted anti-doping purposes of the Commission

New proposed subsection 51DA(1) allows the Executive Director of the ASC to authorise the disclosure of protected information to a person who is not an ASC official, if the Executive Director is satisfied that the information should be disclosed to the person in the course of taking action under an anti-doping policy of the ASC or in the course of taking, or participating in, any proceedings relating to action that has been taken under an anti-doping policy of the ASC. The Executive Director must be satisfied that the disclosure of the information will not contravene any terms of the authorisation under which the protected information was disclosed to the ASC by Customs.

New proposed subsection 51DA(2) allows the Executive Director to specify the manner in which, and the conditions under which, the disclosure is to be made. This includes specifying the form in which the information is to be presented and the mode of transmitting the information.

New proposed subsection 51DA(3) clarifies that new proposed section 51DA does not limit the use of the information by an ASC official or the internal disclosure of the information by one ASC official to another. This provision was included by way of clarification because section 51D prohibits disclosure by an ASC official to a person who is not an ASC official (except as provided in that proposed section).

Proposed section 51E – Disclosure for permitted anti-doping purposes of a sporting organisation

Proposed new section 51E provides when, and on what conditions, the Executive Director may authorise the disclosure of protected information to a sporting organisation.

Currently, section 51E applies if the Executive Director of the ASC is satisfied that an anti-doping policy of a sporting organisation is likely to have been breached and protected information is likely to assist the organisation to determine whether to take action in accordance with its anti-doping policy. The provision restricts too narrowly the ability of the Executive Director to disclose information to sporting organisations. For example, information cannot be disclosed where it is possible that an anti-doping policy has been breached. To satisfy the test imposed by the section, the Executive Director of the ASC would need to undertake extensive inquiries before disclosing information to a sporting organisation, inquiries that may more appropriately be undertaken as part of a formal investigation into a doping allegation.

Further, section 51E currently restricts too narrowly the use sporting organisations can make of the information by requiring restrictive undertakings about use and disclosure to be given by the sporting organisations. The effect of these undertakings is that information can only be used to determine whether action will be taken in accordance with an anti-doping policy but not to actually take action.
In addition, the undertaking required by subparagraph 51E(2)(b) prevents the information from being disclosed to anyone other than a party to the relevant undertaking. This provision basically limits disclosure to the sporting organisation and does not allow disclosure even to the relevant athlete.

Proposed new section 51E allows the Executive Director of the ASC to authorise disclosure of protected information to a sporting organisation if:

a) the Executive Director is satisfied that the information should be disclosed to the organisation for permitted anti-doping purposes of the organisation; and

b) the organisation has given a written undertaking:
   (i) that the information will be used or disclosed only for permitted anti-doping purposes of the organisation; and
   (ii) the organisation will take reasonable steps to satisfy itself that the information will not be used or disclosed by a person to whom the organisation has disclosed the information in a way that is unfairly prejudicial to the interests of the person to whom the information relates; and

a) the Executive Director is satisfied that the disclosure of the information would not contravene any terms of the authorisation under which the protected information was disclosed to the ASC by Customs; and

b) the person to whom the information relates is accorded natural justice, as required by new proposed subsection (2) to (5), before the information is disclosed.

Proposed subsections (2) to (5) contain provisions relating to the giving of notice. The Executive Director will be required to give written notice of the proposed disclosure to the person to whom the information relates and invite that person to make a written submission, within the submission period, to the Executive Director of the ASC about the proposed disclosure. The submission period is fourteen days after the day on which the person receives the notice or, if the Executive Director considers it appropriate in the circumstances to specify a lesser number of days, that lesser number of days. A shorter period may be appropriate where, for example, an important sports competition is imminent and it is necessary to deal with the matter prior to that event.

The information must not be disclosed unless the submission period has ended and the Executive Director has considered any submission that has been made within the submission period. Proposed new subsection 51E(5) allows the Executive Director, if he or she receives a submission from the person before the submission period ends, to take the submission period to have ended immediately after receipt of the submission. This will allow the Executive Director to consider a matter as soon as a submission has been received rather than waiting to the end of the submission period. The written notice of proposed disclosure issued under proposed subsection 51E(2) must advise the person that receipt of a submission before the end of the submission period has the effect of shortening the submission period.
Subsection (6) allows the Executive Director to specify the manner in which, and the conditions under which, the disclosure is to be made (including the form in which the information is to be presented and the mode of transmitting the information).

Item 7 – At the end of Part V11A

Proposed section 51G - Operation of Privacy Act 1988 is not affected

This item inserts new proposed section 51G into the Act. While Part V11 of the Act authorises the disclosure of personal information, and any disclosure under provisions of that Part would be fall within Information Privacy Principle 11(1)(d) of the Privacy Act 1988, new proposed section 51G confirms that the intention is not to affect the operation of the Privacy Act.

Item 8 - Application

The proposed amendments will apply in relation to protected information disclosed to the ASC before or after the amendments commence.

The ASC already holds information which may be relevant to anti-doping policies. If this information cannot be used and disclosed under the proposed amendments, individuals to whom the information relates could gain an unfair advantage in sporting competitions. For example, an athlete who is taking a banned substance in breach of anti-doping policies, and about whom Customs has already disclosed protected information to the ASC, could gain an unfair advantage over other athletes, if the ASC were not able to use and disclose the information, as intended by the proposed amendments.