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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**MELBOURNE 2006 COMMONWEALTH GAMES (INDICIA AND IMAGES)  
PROTECTION BILL 2005**

**EXPLANATORY MEMORANDUM**

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

## MELBOURNE 2006 COMMONWEALTH GAMES (INDICIA AND IMAGES) PROTECTION BILL 2005

### OUTLINE

The *Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Bill 2005* (the Bill) is designed to prevent the unauthorised commercial use of certain indicia and images associated with the Melbourne 2006 Commonwealth Games, in order to provide a more secure environment in which the Melbourne 2006 Commonwealth Games Corporation (the Corporation) can raise revenue through sponsorship and can prevent ambush marketing.

Ambush marketing is a term used to describe conduct which gives rise to a perceived association between an entity and a major event, for commercial advantage, but where the commercial entity has not paid for the right to claim the association. Ambush marketing can confuse the public as to the identity of the real sponsors.

The Government is committed to supporting the staging of the Melbourne 2006 Commonwealth Games (Melbourne Games). The Bill seeks to provide support to the Melbourne Games that is similar to the support provided to the New South Wales Government, at the time of the Sydney 2000 Olympic Games, through the *Sydney 2000 Games (Indicia and Images) Protection Act 1996*.

The Melbourne Games will be held in Melbourne from 15 to 26 March 2006. The Bill will provide protection for Melbourne Games indicia and images in the lead up, during, and in the immediate aftermath of the Games. The protection of indicia and images during this period will enable the Melbourne 2006 Commonwealth Games Corporation to protect existing sponsors, attract additional sponsors, and achieve its sponsorship revenue targets. In turn, this will reduce the drain on the public purse.

The Bill will provide the Australian Customs Service with the authority to seize unauthorised goods in the same manner it was able to perform this function at the time of the Sydney 2000 Games.

Key features of the Bill include:

- an authorisation scheme to restrict the use of key words, phrases and images associated with the Melbourne 2006 Commonwealth Games. The scheme refers to and incorporates elements of the authorisation scheme established by the *Commonwealth Games Arrangements Act 2001 (Vic)*;
- a range of potential remedies including injunctions, damages, accounts of profit, corrective advertisements and seizure of goods by the Australian Customs Service; and

- a sunset clause such that the Bill will cease to have effect from the end of 30 June 2006.

### **FINANCIAL IMPACT STATEMENT**

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

## REGULATION IMPACT STATEMENT

### Problem or Issue Identification

The Melbourne 2006 Commonwealth Games (M2006 Games) will be a significant international sporting event. The Victorian Government is aiming to raise \$130.0 million in sponsorship revenue from the Games. In return for their Games sponsorship, sponsors can publicise their support by using M2006 Games indicia and images. However, businesses that do not sponsor the M2006 Games may seek to capitalise on the Games by using M2006 Games indicia or images, suggesting a sponsorship arrangement with the Melbourne 2006 Commonwealth Games Corporation (M2006 Corporation). This is called 'ambush marketing'.

If sponsors do not have certainty that they are the only businesses that can capitalise on support for the M2006 Games, they may withdraw their sponsorship. A decrease in sponsorship revenue could increase the need for Games-related expenditure by the Victorian Government, which may lead to a further approach to the Australian Government for additional financial assistance.

The problem of ambush marketing has previously been recognised in relation to the Olympic movement. Legislative mechanisms such as the *Trade Marks Act 1995*, *Copyright Act 1968*, *Trade Practices Act 1974*, and the *Designs Act 1906* were deemed inadequate to prevent incidents of obvious ambush marketing relating to the Olympic movement. For this reason, the *Olympic Insignia Protection Act 1987 (OIPA 1987)* and the *Olympic Insignia Protection Amendment Act 2001* were enacted to provide legislative protection to the Australian Olympic Committee of certain Olympic insignia.

The Sydney Organising Committee for the Olympic Games (SOCOG) and the Sydney Paralympic Organising Committee (SPOC) were beneficiaries of Commonwealth legislative protection of certain Olympic and Paralympic insignia for the Sydney 2000 Olympic Games and Paralympic Games under the *Sydney 2000 Games (Indicia and Images) Protection Act 1996*. This protection ended on 31 December 2000.

The proposed M2006 Games indicia protection legislation seeks to give the M2006 Corporation the same style of event-specific protection as was afforded to SOCOG and SPOC, providing a legal defence for the M2006 Corporation and its sponsors against ambush marketing. Without such protection, the M2006 Corporation will have to rely on the *Trade Marks Act 1995*, *Copyright Act 1968*, *Trade Practices Act 1974*, and *Designs Act 1906* to protect its indicia and images. In addition to existing Commonwealth intellectual property legislation, the Victorian Government enacted its own *Commonwealth Games Arrangements Act 2001* to provide M2006 indicia and images with further protection.

### **Specification of the Desired Objectives**

The primary objective of the proposed M2006 Games indicia protection legislation is to support the M2006 Games.

The secondary objectives are to:

- provide a more secure environment in which the M2006 Corporation can raise sponsorship revenue;
- minimise ambush marketing of M2006 Games sponsors; and
- balance the interests of the M2006 Corporation with the commercial interests of third parties.

### **Identification of Options**

In response to the request by the Victorian Government to provide M2006 Games indicia and images protection, three options for the Australian Government have been identified.

#### Option 1: No Legislative Action

The Australian Government would take no specific action and would rely on the market, in conjunction with existing intellectual property legislation, to address the problem of ambush marketing.

#### Option 2: Legislative Action with Exemptions

The proposed M2006 Games indicia protection legislation would provide certain limited exemptions for some third parties from prohibitions against the use of M2006 Games indicia and images. It would include some provisions expected to clarify the scope of the legislation where the scope might otherwise be in doubt. It would also include a sunset clause such that it would cease to have effect from 1 July 2006.

The proposed legislation would provide protection for a range of M2006 Games indicia and images including the following expressions:

- Melbourne 2006 Commonwealth Games;
- Melbourne 2006 Games;
- Melbourne Games;
- Melbourne Commonwealth Games;
- Melbourne 2006;
- M2006;
- M06;
- Australian Commonwealth Games;
- Commonwealth Games;
- Friendly Games;
- any other combination of the words “Commonwealth Games” or “Games” and the numbers “2006”, “18th”, “Eighteenth” or “XVIIIth”;

- Australian Commonwealth Games Team when linked with expressions specific to the Melbourne 2006 Commonwealth Games;
- Commonwealth Games Cultural Program;
- Melbourne 2006 Cultural Program;
- M06 Cultural Program;
- Queen's Baton Relay;
- "bronze", "silver" or "gold" when linked with "Commonwealth Games" or "Commonwealth Games Athlete"; and
- any words, expressions or figures that are prescribed to be Commonwealth Games references.

Exemptions would apply to:

- parties providing information (including factual reporting by the media), criticism and/or review, which did not fall within the meaning of 'use for commercial purposes'.

### Option 3: Legislative Action with No Exemptions

The Australian Government could provide strict indicia protection legislation to the M2006 Corporation in respect of certain indicia and images, without exemptions for any third parties. The indicia and images protected would be the same as under option two.

## **Assessment of Impacts (Costs and Benefits) of Each Option**

### Impacted Group Identification

The same groups would be affected by the implementation of any one of the three options. These groups are:

- third parties, including but not limited to M2006 Games athletes, coaches and other professionals associated with M2006 Games team members; sporting organisations associated with M2006 Games team members; institutes of sport; businesses providing goods or services for past, present and future Commonwealth Games; and consumers purchasing goods or services associated with the M2006 Games;
- the M2006 Corporation; and
- the Australian Government.

The following qualitative analysis considers the impact of costs and benefits for the identified groups for each of these three options.

### Option 1: No Legislative Action

#### *Costs*

Third parties:

- consumers may find it difficult to identify goods and services that are officially authorised by the M2006 Corporation; and

- M2006 Corporation sponsors would have limited protection from ambush marketing.

M2006 Corporation:

- the M2006 Corporation may be vulnerable to ambush marketing;
- the M2006 Corporation's ability to gain increased levels of sponsorship may be constrained because it could not provide assurances to sponsors that they will not be subject to ambush marketing; and
- by narrowing the range of remedies to those contained in existing intellectual property legislation, the M2006 Corporation would have difficulty replacing any loss of revenue from ambush marketing activities.

Australian Government:

- if the ability of the M2006 Corporation to raise non-government revenue was constrained, there may be greater pressure on the Government to provide additional financial assistance to the Victorian Government.

*Benefits*

Third parties:

- subject to the limitations imposed by the current legal framework (*Trade Marks Act 1995, Copyright Act 1968, Trade Practices Act 1974, Designs Act 1906 and Commonwealth Games Arrangement Act 2001*), third parties would be free to use M2006 Games indicia and images to indicate their association or involvement with the M2006 Corporation and the M2006 Games generally.

M2006 Corporation:

- there would be no benefits to the M2006 Corporation in adopting this option.

Australian Government:

- the Government would not need to dedicate time and human resources to the legislative process.

## Option 2: Legislative Action with Exemptions

*Costs*

Third parties:

- third parties including M2006 Games athletes and coaches, sporting organisations and institutes of sport associated with M2006 Games team members (and their third party sponsors) would be restricted, to a certain extent, in their use of the M2006 Games indicia and images. They would not be able to use the specified M2006 Games expressions in ways that would suggest the existence of a sponsorship arrangement with the M2006 Games without the authorisation of the M2006 Corporation or an authorised user; and
- third parties and their sponsors may become confused about increased regulatory requirements.

M2006 Corporation:

- the M2006 Corporation may incur additional costs, as it would be required to monitor compliance of its authorised users; monitor advertising in the media for ambush marketing of its sponsors; administer the register for the authorisation of insignia to sponsors; and enforce any breaches; and
- the M2006 Corporation may still face some level of ambush marketing as some options may remain available to third parties to promote their own activities, including their involvement with the Commonwealth Games movement, without using the M2006 Games expressions.

Australian Government:

- providing legislative protection to a particular organisation might increase the likelihood of the Government receiving similar requests for legislative protection in the future; and
- the Government would need to dedicate time and human resources to the legislative process.

*Benefits*

Third parties:

- in accordance with the proposed exemptions, third parties would be able to use the M2006 Games expressions to indicate or publicise their factual and historical association or involvement with the Commonwealth Games. This would be subject to the limitations imposed by the current legal framework (*Trade Marks Act 1995*, *Copyright Act 1968*, *Trade Practices Act 1974*, and *Designs Act 1906*), and should not convey the impression of an ongoing sponsorship for or by the M2006 Corporation if that is incorrect;
- the providers of information (including factual reporting by the media), criticism and/or review, would be free to use the M2006 Games expressions for legitimate non-commercial purposes. The proposed M2006 Games indicia protection legislation would not seek to restrict the news information flow within the public arena; and
- there would be more certainty for consumers purchasing officially licensed M2006 Games goods and services.

M2006 Corporation:

- the M2006 Corporation would be able to provide greater security for its sponsors by protecting against ambush marketeers, giving it a greater capacity to maintain its current sponsors and increase its sponsorship revenue over time; and
- the M2006 Corporation would have access to an expanded range of remedies to assist it in protecting its intellectual property. This is important given that the M2006 Games will be held in March 2006.

Australian Government:

- there may be less risk that the Government will be asked to provide further financial assistance to the M2006 Corporation due to the likely increased ability of the M2006 Corporation to raise revenue through sponsorship.

### Option 3: Legislative Action with no Exemptions

#### *Costs*

##### Third parties:

- legislation would be standardised and inflexible and would not deal with the diverse conditions in which the M2006 Games expressions are used; and
- all third parties would be prevented from using the M2006 Games expressions for criticism, review and when making factual statements about their past involvement in, or association with, the M2006 Corporation and the Commonwealth Games movement or events.

##### M2006 Corporation:

- the M2006 Corporation may incur additional costs, as it would be required to monitor compliance of its authorised users; monitor advertising in the media for ambush marketing of its sponsors; administer the register for authorisation of insignia to sponsors; and enforce any breaches; and
- the M2006 Corporation may still be vulnerable to some level of ambush marketing as some options may remain available to third parties to promote their own activities, including their involvement with the Commonwealth Games movement, without using the M2006 Games expressions.

##### Australian Government:

- the Government would not be providing balanced legislation as the rights of the M2006 Corporation to protect against ambush marketing would outweigh the rights of third parties to use M2006 Games expressions in a factual and historical context; and
- the Government would need to dedicate time and human resources to the legislative process.

#### *Benefits*

##### Third parties:

- sponsors of the M2006 Games would receive a higher level protection against ambush marketing.

##### M2006 Corporation:

- this option would provide the most comprehensive level of protection for the M2006 Corporation against ambush marketing of the three options;
- this option would maximise the M2006 Corporation's ability to raise non-government revenue; and
- the M2006 Corporation would have certainty over the protection of its sponsors from ambush marketing as provided by the legal sanctions.

##### Australian Government:

- by minimising the risk of ambush marketing and thus maximising the M2006 Corporation's ability to raise sponsorship revenue, the likelihood of the Government being asked to provide further financial assistance for the Commonwealth Games would be reduced relative to Option 2.

### **Consultation**

Consultation was undertaken on the issue of protection of M2006 Games indicia and images with the following Australian Government departments and agencies:

- Attorney-General's Department;
- Australian Customs Service;
- Australian Sports Commission;
- Department of Communications, Information Technology and the Arts (Creators' Rights and Access Branch);
- Department of Finance and Administration;
- Department of the Prime Minister and Cabinet;
- IP Australia; and
- The Treasury

Consultation was also undertaken on the issue of protection of M2006 Games indicia and images with the following:

- Victorian Office of Commonwealth Games Coordination;
- Melbourne 2006 Commonwealth Games Corporation; and
- Australian Commonwealth Games Association

### Australian Government agencies

While all parties were supportive of the objectives of the proposed legislation, in the course of discussions between Australian Government agencies with responsibility for intellectual property issues the following points were made:

#### *Constitutional Power*

The Australian Government must be satisfied that any proposed legislation is supported by a constitutional head of power before it is introduced to Parliament.

The Australian Government Solicitor confirmed the Australian Government has constitutional power to enact the proposed legislation.

#### *Complementarity of Victorian and Commonwealth Legislation*

An important consideration for the Australian Government will be the complementarity of any Commonwealth legislation with the Victorian Government's *Commonwealth Games*

*Arrangements Act 2001* (CGA Act). The CGA Act establishes the framework for the authorised use of M2006 Games expressions and for the imposition of penalties for offences. It appears to be broader in its application than the Commonwealth legislation enacted for the Sydney 2000 Olympic and Paralympic Games (S2000 Games).

The Australian Government would need to consider the potential for overlap between Commonwealth and State legislation. It is worth noting that the New South Wales Government did not enact specific legislation for the S2000 Games, but rather relied exclusively on the *Sydney 2000 Games (Indicia and Images) Protection Act 1996*. In contrast the Victorian Government has enacted its own legislation for the M2006 Games.

The proposed M2006 Games indicia protection legislation has been drafted in a manner that complements the CGA Act.

### Third parties

While the Australian Government did not undertake a formal consultation process regarding the impact on affected third parties, it circulated the proposal to all relevant Australian Government agencies on 4 February 2005. Through this mechanism agencies provided comments in relation to the impact on affected third parties.

### **Conclusion and Recommended Option**

Option two is the recommended option as it strikes the most appropriate balance between the interests of the M2006 Corporation and any affected third parties. The clarifying provisions and exemptions would define the acceptable use of M2006 Games indicia and images, decreasing any confusion that might otherwise occur.

Third parties covered by the exemptions and clarifying provisions would be able to use the M2006 Games indicia and images for criticism and review and for the purposes of providing information without needing to obtain authorisation from the M2006 Corporation, and as such would not be unreasonably constrained by the proposed protection. However, third parties not covered by the exemptions and clarifying provisions would not be able to use M2006 Games indicia and images without first obtaining authorisation from the M2006 Corporation.

The costs to the M2006 Corporation of allowing the limited group of third parties to use the M2006 Games expressions for criticism or review and to provide information without its authorisation is clearly outweighed by the benefits to those parties. The M2006 Corporation would still derive significant benefit through a greater ability to raise sponsorship revenue.

### **Implementation and Review**

The proposal would be implemented when the proposed M2006 Games indicia protection legislation receives Royal Assent. An evaluation of its effectiveness and impacts would be undertaken immediately after the expiration of the Act which ceases to have effect from 1 July 2006.

### **Summary Regulation Impact Statement for the Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Bill**

The proposed M2006 Games indicia protection legislation is expected to have a positive impact on business and no significant impact on families.

The key areas of the impact are:

- the M2006 Corporation will have a greater capacity to raise sponsorship revenue;
- Sponsors of the M2006 Corporation will have legislative protection against ambush marketing;
- non-sponsors of the M2006 Corporation will have a very limited capacity to associate themselves with the Commonwealth Games movement;
- third parties covered by the exemptions and clarifying provisions will be able to use the M2006 Games indicia and images for criticism or review and for the purposes of providing information;
- the M2006 Corporation will receive indicia and images protection legislation consistent with that afforded to SOCOG and SPOC under the *Sydney 2000 Games (Indicia and Images) Protection Act 1996* as amended; and
- the proposed M2006 Games indicia protection legislation would include a sunset clause and cease to have effect from 1 July 2006.

**ABBREVIATIONS**

The following abbreviations are used in this explanatory memorandum:

ACGA	Australian Commonwealth Games Association
Bill	Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Bill 2005
CGF	Commonwealth Games Federation
Corporation	Melbourne 2006 Commonwealth Games Corporation
Customs	Australian Customs Service
Melbourne Games	Melbourne 2006 Commonwealth Games

## NOTES ON CLAUSES

### PART 1 - PRELIMINARY

#### Clause 1 – Short Title

This clause provides that the Bill, when enacted, may be cited as the *Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Act 2005*.

#### Clause 2 – Commencement

This clause provides that the Act will commence on the day it receives the Royal Assent.

#### Clause 3 – Objects of Act

This clause sets out the objects of the Bill. The Bill is intended to protect Australia's position as a participant in and supporter of the Commonwealth of Nations in relation to the holding of the Melbourne Games.

The Bill is also intended to help protect the relations of, and ensure performance of the obligations of, Melbourne Games bodies and the Victorian Government with the Commonwealth of Nations.

These objects are to be achieved through regulation of the use for commercial purposes of Melbourne Games indicia and/or images, which will facilitate the raising of revenue in relation to the Games.

#### Clause 4 – Act binds the Crown

This clause provides that the Act will bind the Crown in all its capacities.

#### Clause 5 – Application of Act

This clause sets out the application of the Bill, which extends to Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands.

#### Clause 6 - Additional operation of Act

This clause sets out the additional operation of the Bill. It extends the operation of the Bill, to the extent it is possible to do so, by invoking certain Commonwealth constitutional heads of power.

## PART 2 – DEFINITIONS AND OTHER INTERPRETATION PROVISIONS

### Clause 7 – Definitions and other interpretation provisions

Clause 7 defines certain words and phrases that are used in the Bill. It also confirms that the Act will apply to Melbourne 2006 Commonwealth Games indicia that are represented in a language other than English, and confirms that the use of “indicia” and “images” for the purposes of the proposed legislation are not intended to express a contrary intention for the purposes of section 23 of the *Acts Interpretation Act 1901*.

Some of the more significant definitions include:

- “*authorised user*”, which is broadly defined through reference to section 56D of the *Commonwealth Games Arrangements Act 2001* (Vic), but which also specifically includes the ACGA and the CGF. Section 56D of the *Commonwealth Games Arrangements Act 2001* (Vic) provides the Corporation with power to authorise people to use Games related indicia or images (within the meaning of that Act). The Bill provides that a person authorised to use Melbourne Games indicia or images under section 56D is an “authorised user” for the purposes of the Bill;
- “*Melbourne 2006 Commonwealth Games images*”, which does not refer to a prescribed list of images, but rather incorporates the broader meaning of any visual or aural representations that, to a reasonable person in the circumstances of the presentation, would suggest a connection with the Melbourne 2006 Commonwealth Games; and
- “*Melbourne 2006 Commonwealth Games indicia*”, which is defined in subclause 7(2) through reference to a prescribed list of words and phrases. Paragraphs 7(2)(a) and 7(2)(b) prescribe individual words and phrases that, by themselves, fall within the definition. In contrast, paragraph 7(2)(c) sets out two lists of indicium, and provides that the definition of “Melbourne 2006 Commonwealth Games indicia” includes any combination of an indicium in an item in List A with an indicium in that item in List B.

### Clause 8 – Application of Melbourne 2006 Commonwealth Games indicia and images

This clause describes ways in which Melbourne 2006 Commonwealth Games indicia or images could be “applied to” goods or services. The clause is not intended to exclude the general meaning of the term “applied”.

Four specific examples are set out, which are where Melbourne Games indicia or images are:

- woven in, impressed on, worked into, affixed or annexed to the goods; or

- applied to any covering, document, label, reel or thing in or with which the goods are intended to be “dealt with or provided in the course of trade” (this reference has been included to make clear that Customs will not seize such goods that have had indicia or images applied to them for personal use); or
- used on a signboard or in an advertisement that promotes the goods or services; or
- used in an invoice, price list, catalogue, brochure, business letter, business paper or other commercial document that relates to the goods or services.

All four of the above examples apply in the case of goods, but only the bottom two examples apply in the case of services.

Subclause 8(2) refers to Division 2 (“Importation of goods”) and Division 3 (“Remedies”) of Part 4. It states that, for the purposes of those Divisions, Melbourne Games indicia or images are “applied” to goods by a person if the goods (which already have indicia or images applied to them) are imported into Australia for the purpose of sale or distribution by the person.

Subclause 8(3) clarifies the meaning of “covering” and “label” as used in subparagraph 8(1)(a)(ii).

### **Clause 9 – Meaning of commercial purposes**

This clause explains what it means to use indicia or images for commercial purposes in the context of the Bill, and sets out the two general situations in which a person will be said to have done so.

The first situation is where a person (the first person) causes indicia or images to be applied to their goods or services. The application will constitute use for commercial purposes where the application:

- is for the primary purpose of advertising or promotion or enhancing the demand for the goods or services; and
- would suggest to a reasonable person that the person is or was a sponsor of the Melbourne Games or an event arranged by a Melbourne Games body in connection with the Games.

The second situation may apply where a second person deals in particular ways with the goods or services described in the situation above. Where these circumstances exist in relation to the first person, then a second person will be taken to have used the indicia/images for commercial purposes if they:

- supply or offer to supply the goods or services; or
- expose the goods (not services) for supply by themselves; or
- keep the goods (not services) for supply by themselves or by another person.

The second situation will not apply where the first person is the Corporation or an authorised user, as these parties are excluded under paragraph 9(3)(a). The rationale

behind this is that where the first person is properly authorised to use the relevant indicia or images for commercial purposes, it should not be necessary for a second person, such as a retailer or distributor, to independently obtain their own authorisation to deal with the goods or services.

The meaning of “supply” for the purposes of the section is set out in subclause 9(4).

### **Clause 10 – Presumption relating to advertising or promotion etc**

This clause sets out a presumption relating to paragraphs 9(2)(c) and (3)(c) and informs the interpretation to be given to those paragraphs. The clause provides that the application of Melbourne Games indicia or images for the primary purpose of advertising, promotion or enhancing the demand for the goods or services, is prima facie sufficient to suggest:

- a sponsorship; or
- the provision of other support

for the purposes of paragraphs 9(2)(c) or (3)(c).

Clause 9 sets out the two situations in which a person uses Melbourne Games indicia or images for commercial purposes. Paragraph 9(2)(c) sets out that to establish use for commercial purposes it is necessary that the application of Melbourne Games indicia or images would suggest, to a reasonable person, that the person who caused the application is or was a sponsor or provider of other support of the Melbourne Games (or an event arranged by a Melbourne Games body in connection with the Games). Paragraph 3(c) sets out the same test in relation to the second example.

The presumption set out in clause 10 is intended to be rebuttable. It is intended to prevent a non-authorised user from using Melbourne Games indicia or images for the primary purpose of advertising, promotion or enhancing demand, but circumventing the intent of the legislation by including some type of disclaimer (that they are not a sponsor of the Games).

### **Clause 11 – Criticism, review and provision of information**

This clause clarifies the meaning to be given to the use of Melbourne 2006 Commonwealth Games indicia or images.

Use of indicia or images for the primary purpose of criticism, review, or the provision of information, is not alone sufficient to suggest a sponsorship or the provision of support for the purposes of paragraphs 9(2)(c) or (3)(c).

Subclause 11(2) provides a non exhaustive list of examples of criticism or review, and examples of provision of information, for the purposes of subclause 11(1).

## **PART 3 - PROTECTION**

### **Clause 12 – Regulation of use of Melbourne 2006 Commonwealth Games indicia and images**

This clause establishes who would be permitted under the proposed legislation to use Melbourne 2006 Commonwealth Games indicia and images for commercial purposes. Use for commercial purposes would be restricted to the Corporation and to authorised users (who, other than the ACGA or CGF, would only be able to use the indicia or images in accordance with the authorisation).

Subclause 12(4) deems that the use of an indicium that so closely resembles a Melbourne Games indicium that a reasonable person is likely to mistake it as such shall be taken for the purposes of subclause 12(1) to be use of that Melbourne Games indicium.

### **Clause 13 – Persons involved in contravening section 12**

This clause broadens the application of section 12 so that it will include people who are indirectly involved in a contravention of section 12. It sets out a number of instances where a person will be taken to have contravened section 12, being where that person:

- attempts to contravene section 12;
- aids, abets, counsels or procures a person to contravene section 12;
- induces or attempts to induce a person to contravene section 12;
- is in any way knowingly concerned in, or party to, a contravention of section 12; or
- conspires to contravene section 12.

## **PART 4 – IMPORTATION OF GOODS, REMEDIES AND GROUNDLESS THREATS**

### **Division 1 – Standing of authorised users to give notices and pursue remedies**

#### **Clause 14 – Consent of Corporation to giving of notices etc**

This clause provides that the written consent of the Corporation is required before a person may:

- give a notice of objection to importation under section 20; or
- make an application for an injunction under section 31; or
- bring an action for damages or an account of profits under section 34.

#### **Clause 15 – Request for consent**

This clause provides that if an authorised user (as defined in clause 7) gives the Corporation a written request for consent under section 14, and the Corporation does not

give consent or refuse to consent before the end of the third working day following the day on which the request was given, then the Corporation will be taken to have provided consent.

This clause is intended to provide authorised users with clarity, within an acceptable timeframe, as to their rights under the Act.

Due to the operation of subclause 34(4), this deeming provision would be ineffective if the request were to be given later than four days before the last working day before the cessation of the Act.

### **Clause 16 – Consent must not be unreasonable refused**

This section provides that the Corporation’s consent under section 14 must not be unreasonably refused.

## **Division 2 – Importation of goods**

### **Clause 17 – Determinations about owners of goods**

This clause provides a mechanism by which the Customs CEO or an officer of Customs (within the meaning of subsection 4(1) of the *Customs Act 1901*) may determine a person to be the owner of goods for the purposes of paragraph (b) of the definition of “designated owner” set out in clause 7 of the Bill.

The CEO or officer of Customs will only be able to make such a determination where the person is an owner (within the meaning of subsection 4(1) of the *Customs Act 1901*) of the goods. The term “owner” has two meanings in subsection 4(1). In respect of goods it includes:

“any person (other than an officer of Customs) being or holding himself out to be the owner, importer, exporter, consignee, agent, or person possessed of, or beneficially interested in, or having any control of, or power of disposition over the goods”.

In respect of a ship or aircraft it includes:

“a charterer of the ship or aircraft or a slot charterer or freight forwarder responsible for the transportation of goods on the ship or aircraft”.

### **Clause 18 – Copy of register to be supplied by the Corporation to the Customs CEO**

This clause is intended to ensure that Customs receives sufficiently detailed information about the register, and amendments to the register, within an acceptable timeframe. The register referred to is that maintained under section 56J of the *Commonwealth Games*

*Arrangements Act 2001* (Vic), which lists authorisations that are given by the Corporation (ie authorisations to use Melbourne Games indicia and images) and certain information relating to each authorisation.

To ensure that Customs has sufficient information to administer the Bill, clause 18(1) provides that the Corporation must give the Customs CEO a copy of the register as soon as practicable after the commencement of clause 18. Subclause 18(2) provides that the Corporation must give the Customs CEO a copy of any entry, or note in an entry, subsequently made in the register. This must be done as soon as practicable after the entry or note is made.

A copy of the register, entry or note must be given to the Customs CEO by electronic means.

### **Clause 19 – Notice to Customs CEO of imports by the Corporation, the ACGA or the CGF**

This clause is designed to avoid unnecessary delay in the importation of goods by (or for) the Corporation and/or authorised users, by ensuring that the Customs CEO has advance knowledge of such importation.

The clause provides that where goods with Melbourne Games indicia or images applied to them are proposed to be imported by or for the Corporation, the ACGA, or the CGF, then the Corporation, ACGA or CGF (as the case requires) must provide a written notice to the Customs CEO specifying the indicia or images so applied. The notice must contain sufficient detail to allow the CEO to identify the goods.

### **Clause 20 – Notice of objection to importation**

This clause provides that the Corporation or an authorised user may give the Customs CEO a written notice objecting to the importation of goods that have Melbourne 2006 Games indicia or images applied to them, where the designated owner of the goods is not authorised under the Act to use the goods for commercial purposes. Such a notice must be given prior to the day of the importation.

An authorised user, other than the ACGA or CGF, will only be entitled to give a notice in relation to particular Melbourne Games indicia or images that the user is in fact authorised to use under section 56D of the *Commonwealth Games Arrangements Act 2001* (Vic). The ACGA and CGF are excluded here because their authorisation will not be limited to particular indicia or images.

A notice under this clause will cease to have effect either when one of the following occurs:

- it is revoked via written notice from the objector to the Customs CEO;
- the Act ceases to have effect; or

- when an authorisation ceases to be in force (for an authorised user other than the ACGA or the CGF).

For the purposes of clause 20, a reference to the use of indicia or images for commercial purposes does not include a reference to use covered by subclause 9(3).

### **Clause 21 – Customs CEO may seize goods**

This clause provides for the seizure of certain goods by the Customs CEO. The goods must be manufactured outside Australia, imported into Australia, subject to the control of Customs, and have had Melbourne Games indicia or images applied to them.

The clause provides for the seizure of such goods where there is a notice of objection in force and it appears that the designated owner is not authorised for the purposes of the Act to use the indicia or images in relation to the goods. In these circumstances the Customs CEO must seize the goods, unless he or she has reasonable grounds for believing that the use of the indicia or images would not breach clause 12. If the objector has not given sufficient security to reimburse the Commonwealth for reasonable expenses incurred in the seizure of goods, then the CEO has the discretion to seize the goods and is not required to do so (see subclause 21(4) and clause 28).

Any goods that are seized under this section must be kept in a secure place.

For the purposes of clause 21, a reference to the use of indicia or images for commercial purposes does not include a reference to use covered by subclause 9(3), which sets out the example of use for commercial purposes by a second person.

### **Clause 22 - Notice of seizure**

This clause requires that where goods are seized under clause 21 the Customs CEO must notify the designated owner of goods, and each objector, of the seizure. The notice must:

- be in writing;
- identify the goods;
- state that they have been seized; and
- be given as soon as practicable after the seizure.

Some additional requirements apply to notices given to objectors, which must give the full name and address of the designated owner of the goods and any information that is reasonably likely to help the objector to identify the designated owner. Such notices must also state that the goods will be released to the designated owner unless the objector, or one of the objectors, makes an application for an injunction under section 31 and provides the Customs CEO with written notice of the application within ten working days from the date specified in the notice of seizure (or within such further period, not exceeding ten working days as the CEO allows).

Subclause 22(7) states that a notice given under subsection (1) (which includes notices given to both owners and objectors) are not legislative instruments. This subclause is included to assist readers, and to make clear that the notices are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*.

### **Clause 23 – Forfeiture of goods - by consent**

This clause provides that the designated owner of goods may, at any time before an objector makes an application for an injunction under clause 31, consent to the goods being forfeited to the Commonwealth.

Such consent must be given through written notice to the Customs CEO. Once such consent is given, the goods must be disposed of as the CEO directs.

### **Clause 24 – Release of goods – no application for injunction**

This clause provides for the release of seized goods to their designated owner in certain circumstances.

The Customs CEO must release goods if an objector consents, by written notice to the CEO, at any time before the end of the application period.

The CEO has the discretion to release the goods to their designated owner at any time before the end of the application period if information has come to light, after the goods were seized, and the CEO does not have reasonable grounds for believing that clause 12 would be contravened by the importation.

Subclause 24(3) provides that the CEO must release the goods if, at any time before the end of the application period, there is no notice of objection to importation under clause 20 in force, and no objector has applied for an injunction under clause 31. There would be no notice of objection in force in relation to the goods if the notice had ceased to have effect (see clause 20(6)).

If, at the end of the application period, no one has applied for an injunction under clause 31, then the CEO must release any seized goods not forfeited to the Commonwealth.

### **Clause 25 – Application for injunction – additional parties, relief etc**

This clause sets out different action that may be taken by a prescribed court, in the event that an objector in relation to seized goods makes an application for an injunction under clause 31. The list of prescribed courts is set out in clause 38.

Persons demonstrating sufficient interest in the proceedings may be joined as respondents. A prescribed court may order that seized goods be released to their designated owner (with or without conditions), or that they be forfeited to the Commonwealth.

If the court decides that an injunction should not be granted, it may order that the objector compensate the designated owner or other respondent for loss or damage attributable to the period on or after the day the objector made the application for the injunction.

The clause sets a 3 week time limit within which a prescribed court may order that the goods not be released, otherwise the Customs CEO must release the goods to their designated owner.

#### **Clause 26 – Disposal of goods ordered to be forfeited**

This clause provides that any goods that are forfeited to the Commonwealth by a court order are to be disposed of as the Customs CEO directs.

#### **Clause 27 – Power of Customs CEO to retain control of goods**

This clause prohibits the Customs CEO from releasing or disposing of seized goods, or taking action to give effect to a court order under clause 25, if the CEO is required or allowed to retain control of the goods under any other law of the Commonwealth.

#### **Clause 28 – Insufficient security**

This clause provides that if the security given under subsection 21(4) by an objector to the importation of goods is not sufficient to meet the expenses incurred by the Commonwealth as a result of action taken by the Customs CEO under Division 2 of Part 4, then the objector(s) must repay the difference between the expenses incurred and the security given. For the sake of clarity, subclause 21(4) provides that the Customs CEO is not required to seize goods if the objector has not given security that the CEO considers sufficient to reimburse the Commonwealth for reasonable expenses that may be incurred if the goods were seized.

Clause 28 recognises the possibility that an objector might give security that the Customs CEO considers sufficient at the time, but which later proves to be insufficient in light of expenses actually incurred as a result of the CEO's actions. Under paragraph 28(2)(b), the Commonwealth could take action in any court of competent jurisdiction to recover the debt.

#### **Clause 29 – Commonwealth not liable for loss etc suffered because of seizure**

This clause excludes the Commonwealth from liability for any loss or damage resulting from the Customs CEO's seizure or failure to seize goods, or from the release or disposal of any seized goods.

#### **Clause 30 – Modification in relation to Norfolk Island etc**

This clause provides that the application to Norfolk Island, the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands of Division 2 of Part 4 of the Bill may be modified or adapted by regulation. This is intended to recognise that these territories have their own customs regimes which are best placed to administer the importation provisions of this Division.

### **Division 3 – Remedies**

#### **Clause 31 – Injunctions**

This clause provides for a prescribed court to grant an injunction, in certain circumstances, to restrain a person from engaging in conduct that contravenes clause 12.

Such an injunction may only be granted on the application of the Corporation or an authorised user. An injunction granted on the application of a person who is an authorised user, other than the ACGA or CGF, may only relate to the indicia or images to which the person's authorisation relates (the ACGA and CGF are excluded because their authorisation will not be limited).

In this context, use of an indicium sufficiently close to a relevant Melbourne Games indicium is taken to be use of that Melbourne Games indicium.

#### **Clause 32 – Interim injunctions**

This clause provides that a prescribed court may grant an interim injunction pending the determination of an application for injunction under clause 31, and that a contravention of clause 12 is to be taken to have caused immediate and irreparable damage to the applicant. The latter point is intended to guide a court in the exercise of its discretion under this section.

#### **Clause 33 – Corrective advertisements**

This clause provides that a court, upon the application of the Corporation, may make an order requiring a person to publish a corrective advertisement (at that person's expense) if the court is satisfied that the person has contravened clause 12. The order must specify the means and times of the corrective advertisement.

#### **Clause 34 – Damages or accounts of profit**

This clause provides that the Corporation or an authorised user may seek damages or an account of profits to cover loss or damage caused by a person acting in contravention of clause 12, provided that the action is brought within three years of the contravention.

In the case of an authorised user, the relevant consent under clause 14 must not be sought later than the working day preceding the last working day before the proposed Act will cease to have effect.

Subclause 34(6) states that a plaintiff may not bring an action against a person under this clause in relation to the use of Melbourne Games indicia or images if the plaintiff has already brought an action against the person under section 56S or 56T of the *Commonwealth Games Arrangements Act 2001* of Victoria in relation to that use. Subclause 34(7) is a similar provision designed to prevent a plaintiff from continuing an action against a person under clause 34 if they bring an action against the person under section 56S or 56T of the Victorian Act. Subclauses 34(6) and (7) are intended to reduce the likelihood of a plaintiff double dipping by seeking damages or an account of profits under both the Commonwealth and Victorian legislation.

### **Clause 35 – Other remedies**

This clause provides that remedies under other Commonwealth, State or Territory laws are not excluded by this Division. This is subject to subclauses 34(6) and (7), which prevent a person commencing or continuing an action seeking damages or an account of profits under clause 34 if they have previously commenced, or commence, an action against the person under section 56S or 56T of the *Commonwealth Games Arrangements Act 2001* of Victoria.

## **Division 4 – Groundless threats**

### **Clause 36 – Groundless threats of legal proceedings**

This clause is designed to provide a safeguard against groundless threats of legal proceedings. It provides that if the Corporation or an authorised user threatens to make an application or bring an action against a person on certain grounds relating to contravention of clause 12, any person aggrieved by the threat may bring an action against the Corporation or authorised user.

A court may, in such an action, declare that the Corporation or authorised user had no grounds for making the threat, and grant an injunction restraining the party from continuing to make the threat. The court may also award damages to the aggrieved person for losses suffered as a result of the threat.

If the person making the threat has in fact made an application or brought an action under Division 3 against a threatened person, the threatened person may not bring or continue an action under this clause.

Subclause 36(6) provides a defence to an action under this clause if the conduct of the threatened person (to which the threat relates) does in fact contravene clause 12 (ie it

constitutes unauthorised use of Melbourne Games indicia or images for commercial purposes).

### **Clause 37 – Counterclaim in action on groundless threats**

This clause provides that if a threatened person brings an action under clause 36, and the Corporation or an authorised user would be entitled to make an application or bring an action against a person for contravening clause 12, then the Corporation or an authorised user may make a counterclaim for any relief that may be available under Division 3 of Part 4.

Subclause 37(2) provides that the provisions of Divisions 1, 2 and 3 of Part 4 of the proposed Act will apply as if a counterclaim was an application or action made or brought under Division 3.

## **Part 5 – Jurisdiction and proceedings of prescribed courts**

### **Clause 38 – Prescribed courts**

This clause declares a number of courts to be prescribed courts for the purposes of the proposed Act. They are the Federal Court, the Federal Magistrates Court and the Supreme Courts of a State, the Australian Capital Territory, the Northern Territory and Norfolk Island.

The Bill does not provide for merits review in the Administrative Appeals Tribunal. This reflects the position under the *Commonwealth Games Arrangements Act 2001* of Victoria and the former position under the *Sydney 2000 Games (Indicia and Images) Protection Act 1996*. Such review might have been provided in the Bill in relation to certain administrative decisions of the Customs CEO, for example, but was not considered appropriate in this case.

The reason for this is that the main purpose of the Bill is the protection of the commercial and intellectual property rights of the Corporation which is a Victorian statutory entity. Any involvement with and decisions of Customs simply flow as a consequence of that purpose. As the rights to the indicia and images currently vest in the Corporation, it would be inappropriate for the Corporation's commercial decisions in relation to its own intellectual property to be 'second guessed' under merits review. In most instances those decisions will be based on negotiations with persons seeking authorisation to use the Melbourne Games indicia and images or on the management of those authorisations. Even if such review was in fact appropriate, it is considered that the appropriate forum would be a Victorian court or tribunal.

### **Clause 39 – Jurisdiction of Federal Court and Federal Magistrates Court**

This clause confers original jurisdiction on the Federal Court and the Federal Magistrates Court in respect of all matters arising under the proposed Act.

#### **Clause 40 – Jurisdiction of other prescribed courts**

This clause confers federal jurisdiction on prescribed courts other than the Federal Court or the Federal Magistrates Court, with the qualification that the jurisdiction conferred on the Supreme Court of a Territory is only conferred to the extent permitted by the Constitution.

#### **Clause 41 – Transfer of proceedings**

This provision would operate to enable an application or action to be transferred from one prescribed court to another (by court order of the first prescribed court).

### **Part 6 – Miscellaneous**

#### **Clause 42 – Requirements for the Register**

This clause sets out certain information that must be kept on the register maintained by the Corporation under section 56J of the *Commonwealth Games Arrangements Act 2001* (Vic). In relation to authorised users (other than the ACGA or CGF) an entry on the register must state whether the authorisation applies generally or in specified circumstances and whether it authorises use of all, or merely specified kinds, of indicia or images.

This clause is intended to ensure that the public is provided with sufficient information to make informed purchasing decisions in relation to goods or services which have had Melbourne Games indicia applied to them.

#### **Clause 43 – Trade mark and design rights**

This clause provides that the proposed Act is not intended to affect the operation of the *Trade Marks Act 1995* or the *Designs Act 2003*, including any rights conferred or liabilities imposed by or under those Acts.

#### **Clause 44 – Concurrent operation of State and Territory laws**

This clause provides that the Parliament intends that the Act would not apply to the exclusion of a State or Territory law to the extent that the law is capable of operating concurrently with the proposed Act.

#### **Clause 45 – Avoiding direct inconsistency between this Act and the Commonwealth Games Arrangements Act 2001 of Victoria**

This clause is intended to address any inconsistency that might otherwise arise between the Bill and sections 56B, 56C, 56E, 56F and/or 56K of the *Commonwealth Games Arrangements Act 2001* (Vic). In particular, it is intended to prevent direct inconsistency for the purposes of section 109 of the Constitution.

The clause provides that where a person is authorised under one of the aforementioned provisions to use (or is not prevented from using) Melbourne Games indicia or images for commercial purposes, then the Bill does not:

- prohibit a person's use of the indicia or images; or
- impose a liability in respect of such use.

#### **Clause 46 – Compensation for acquisition of property**

This clause provides that if the operation of the Act would result in an acquisition of property otherwise than on just terms, and a person has not been compensated, then the Commonwealth is liable to pay a reasonable amount of compensation to the person.

If the Commonwealth and the person do not agree on the amount of such compensation, then the person may institute proceedings in a court of competent jurisdiction for such reasonable compensation as the court determines.

#### **Clause 47 – Cessation of operation of Act**

This clause provides that the proposed Act will cease to have effect at the end of 30 June 2006, unless it is repealed earlier. This date anticipates that the Bill will operate for several months following the conclusion of the Melbourne Games.

#### **Clause 48 – Regulations**

This clause provides that the Governor General may make regulations prescribing matters required or permitted by the proposed Act to be prescribed, or matters necessary or convenient to be prescribed for carrying out or giving effect to the Act.