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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**OLYMPIC INSIGNIA PROTECTION AMENDMENT BILL 2001**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Industry, Science and Resources, Senator the  
Hon Nick Minchin)

## **OLYMPIC INSIGNIA PROTECTION AMENDMENT BILL 2001**

### **OUTLINE**

This Bill amends the *Olympic Insignia Protection Act 1987* to provide the Australian Olympic Committee (AOC) with ongoing protection for the words 'Olympic', 'Olympiad', their plurals and 'Olympic Games' ('Olympic expressions'). It protects the expressions against unauthorised commercial use for advertising or promotional purposes that suggests a sponsorship or sponsorship-like association with Olympic bodies, athletes, teams and events.

The overall objective of this Bill is to protect, and to further the position of Australia as a leading participant in, and supporter of, the world Olympic movement. It reflects the Government's commitment in the *Backing Australia's Sporting Ability - A More Active Australia* sports policy to encourage sporting organisations to deliver sporting excellence through self-sustaining, innovative funding arrangements. This will be achieved by giving the AOC a more certain environment in which to generate greater levels of sponsorship revenue from the private sector to fund its Olympic programs through the licensing of the Olympic expressions for commercial use in advertising and promotions.

Providing this protection for the Olympic expressions will strengthen the AOC's fundraising abilities and help achieve the Government's elite sports objectives, such as maintaining Australia's high level of performance at the Olympic Games. This level of protection should not unreasonably encroach on the rights of others who wish to promote their own association with an Olympic Games. In today's sophisticated marketing environment there are many words (including 'Olympian') and images available to enable Olympians and others who have been involved in an Olympic Games to promote their association with the Olympics. Moreover, the protection will only prohibit commercial uses of the Olympic expressions where that use suggests a sponsorship or other like arrangement with the Olympic movement.

Further, the Bill contains provisions aimed at balancing the rights given to the AOC with the interests of third parties with a legitimate claim to the use of the Olympic expressions. It ensures that unreasonable constraints will not be placed on the fundraising activities of Olympic athletes, teams and support organisations as they (and their sponsors) will be able to use the Olympic expressions to make factual statements about their previous Olympic involvement. Other third parties, such as coaches and suppliers of goods or services to Olympic teams and Olympic games organising committees, can also use the expressions to make factual statements about their previous Olympic involvement. The Bill also allows the use of the protected Olympic expressions for the provision of information and for the purposes of criticism or review by the media and makes it clear that certain existing legal rights to use the Olympic expressions are not affected.

### **FINANCIAL IMPACT STATEMENT**

No additional cost to the Government or any significant cost to any other person is expected to result directly from these amendments.

**REGULATION IMPACT STATEMENT  
OLYMPIC INSIGNIA PROTECTION AMENDMENT BILL 2001**

**1. BACKGROUND**

On 24 March 2001 the Government announced its intention to grant the Australian Olympic Committee (AOC) ongoing legislative protection for certain commercial uses of the expressions 'Olympic', 'Olympiad' and 'Olympic Games' (Olympic expressions). This will be achieved by amendment of the *Olympic Insignia Protection Act 1987* (OIP Act). The main objective of this protection is to assist in the protection and furtherance of Australia's participation in, and support of, the world Olympic movement. This will be achieved by facilitating the raising of licensing revenue by the AOC through the regulation of certain commercial uses of the Olympic expressions. This will increase the AOC's fundraising capabilities and will also help protect AOC sponsorships from ambush marketing.

The OIP Act was enacted in 1987 to prevent the unauthorised and deceptive use of Olympic insignia, namely the Olympic rings symbol, the Olympic motto and up to ten registered designs, which may change from Games to Games. It vests ownership of the symbol, motto and design registrations in the AOC and enables it to derive income by licensing the use of these indicia. The AOC has stated that the OIP Act has enabled it to raise its own funding and be independent of government financial assistance since 1992.

The AOC is recognised by the International Olympic Committee (IOC) as the National Olympic Committee in Australia and it is responsible for the protection and development of the Olympic Movement in this country, as well as the promotion of its goals and principles. The AOC is comprised of 41 member organisations consisting of the National Sporting Organisations (NSOs) of each sport included on the Olympic program for the Summer and Winter Olympic Games. State Olympic Councils represent the AOC in each State and Territory.

The IOC's Olympic Charter and the AOC's Constitution set out in some detail the roles and responsibilities of National Olympic Committees (the AOC in Australia). They include organising educational programs for the training of sports administrators, encouraging the development of sport at all levels and ensuring the observance of the Olympic Charter. Most importantly in the context of this proposal, rule 31 of the Olympic Charter gives the NOCs of each country the sole responsibility for selecting the Olympic team to represent their country and clause 3.8 of the AOC's Constitution sets out its objective in this regard.

The AOC is a non-profit association incorporated under the *Associations Incorporation Act 1981* of Victoria. It is independent of Government and Government funding other than contributions by State Governments to the Olympic Team Appeal. The funds required for the AOC's activities are generated by income distributions from the Australian Olympic Foundation, grants from the IOC, fundraising by the AOC, State Olympic Councils and their Corporate Appeal Committees and by the licensing and sponsorship activities of the AOC.

The proposed protection will increase the AOC's ability to maximise its fundraising by extending the scope of its exclusive licensing rights and assisting in the prevention of ambush marketing. Ambush marketing is the unauthorised association of businesses with the marketing of high profile events without paying for the marketing rights. Because it is targeted at preventing ambush marketing the proposed protection will add value to the AOC's licensing rights by increasing the confidence of sponsors that any sponsorship arrangement they enter into with the AOC will not be ambushed by others who may wish to 'free ride' by suggesting that they have a sponsorship-like association with the AOC they do not.

Although general protections already exist, such as under the Trade Practices Act, against misleading or deceptive conduct, these are not sufficiently targeted to deal adequately with the type of ambush marketing that Olympic events attract due to their extremely high profile and the value an association with them can bring to a business. The proposed protection will provide a high level of certainty about the AOC's rights and this factor will also decrease the AOC's enforcement costs.

The protection will support the AOC's ability to meet fundraising targets that will enable it to support Australian Olympic Teams to a level that will continue to deliver excellent achievements in Olympic competition. Examples of such achievements include the AOC plan for the Athens Olympics to field a complete team, achieve a medal tally in the top 5 medal nations and to extend the number of sports in which Australia wins medals beyond the 20 achieved at the Sydney Games.

In making its decision, the Government considered three options:

- not implementing any extra protection for Olympic insignia under the OIP Act;
- implementing extensive protection of Olympic related expressions under that Act; and
- implementing a modest level of further protection under that Act.

The Government chose the third option. This option will institute an extension of the AOC's current protection while at the same time protecting the interests of third parties, such as athletes, coaches and other people involved in the preparation of athletes for Olympic competition and in the supply of goods and services to an Olympic Games. As the decision to grant the AOC extra protection has already been made, this Regulation Impact Statement will not analyse options considered in making that decision—it will be restricted to evaluating implementation options for this protection.

The Government made the decision to extend the AOC's current protection in tandem with its decision to refocus the Government's sports policy objectives, as detailed in *Backing Australia's Sporting Ability — A More Active Australia*, to, in part, encourage greater levels of self-sufficiency within sporting organisations generally. The protection to be afforded the AOC will increase its fundraising capacity and is designed to result in less call on Government resources for sport, particularly at the elite level. The AOC's programs support and complement those delivered by the Government through, eg, the Australian Sports Commission.

They also support and complement the activities of the NSOs. The Government is confident that the benefits received by the AOC through increasing its fundraising abilities will flow through to the NSOs as the AOC is major source of NSO funds. It is also notable that the AOC provides funding to the full range of NSOs for Olympic sports including those with a lesser following in the community and who therefore have, inherently, lower fundraising capabilities in their own right. The amount that the AOC is able to provide to NSOs does, however, depend on the amounts it can raise through its licensing and sponsorship revenue raising.

The Government recognised that, in order to assist the AOC's important fundraising activities it needed to provide an extension of its licensing capacity which would also help prevent ambush marketing of the AOC's activities. This will, in itself, help to strengthen the AOC's fundraising capacity by giving AOC sponsors more assurance that their support for the AOC will not be ambushed. While it was decided to give the AOC protection for certain commercial uses of the three expressions 'Olympic', 'Olympic Games' and 'Olympiad', the proposal, taken as a whole, will not unreasonably constrain others from promoting their own association with an Olympic Games. Importantly, the protection will only prohibit certain commercial uses of the Olympic expressions, that is, uses for advertising or promotional purposes where that use suggests a sponsorship or other like arrangement with the AOC, the IOC, any Summer or Winter Olympic Games, the organising committee of any such Games, or any Australian Olympic team or individual.

It is also clear that the prohibition on such use of three words, in today's sophisticated marketing environment, will leave many options available to enable Olympic athletes, teams, support organisations and others who have been involved in an Olympic Games to promote their association with the Olympics without using the Olympic expressions. Other Olympic related terms such as 'Olympian', 'medallist', 'Games', 'gold medal winner', 'Athens 2004' etc. will remain unaffected by the proposed legislation and will remain available in all contexts, including for sponsorship and promotional purposes, within the constraints of the current legal framework including the Trade Practices Act and the Trade Marks Act. The level of protection proposed by the Government will be, despite the availability of these other terms, sufficient to strengthen the AOC's fundraising abilities and help to achieve the Government's elite sports objectives, such as maintaining Australia's high level of performance at the Olympic Games. It will not, however, constrain the general use of 'Olympic expressions' or in any way interfere with the use of other, non-protected, Olympic-related expressions.

To ensure this, certain balancing and clarification provisions have been included so that the legitimate interests of third parties in the use of the Olympic expressions themselves are not unreasonably compromised and that the scope of the legislation is clear. For example, certain pre-existing legal rights to use the expressions will continue unaffected and the legislation will clarify that the right to use the expressions in the provision of factual information, such as reporting in the media, will also remain unaffected.

The Government noted that other legislation is available to the AOC to protect its interest in the Olympic expressions, such as the *Trade Practices Act 1974* and the *Trade Marks Act 1995* and those provisions will remain available to the AOC under this proposal. However, the particular requirements that must be met in order to take a successful action under either of these Acts have meant that the AOC has had difficulty in protecting its interest in these expressions. For example, a trade mark will only infringe another person's mark if the marks are for similar or closely related goods or services. Also, if the AOC wants to oppose a trade mark registration in respect of, for example, 'footwear' it has to demonstrate that it has a reputation for similar goods or services. Trade marks law is more effective in dealing with situations of more blatant deceptive conduct than ambush marketing.

Similarly, the 'misleading and deceptive conduct' and 'false representation' tests in sections 52 and 53 of the Trade Practices Act are more stringent than the proposed protection will be and do not usually encompass the more subtle ambush marketing techniques. The test that there is a 'suggestion' of a sponsorship or other like support for the Olympic movement will better enable the AOC to target the more subtle conduct involved in ambush marketing and the resulting increase in the certainty of its rights will reduce the cost of enforcing those rights. As is the case under the Trade Practices Act, the AOC will have to seek redress by civil action in a court if it cannot settle any dispute it may have about unauthorised use of Olympic expressions in an alternative manner.

The inability of existing measures to protect against ambush marketing is demonstrated by the need to enact the *Sydney 2000 Games (Indicia and Images) Protection Act 1996* (Sydney Games Act) to preserve sponsorship revenue from ambush marketing and protect the financial integrity of the Sydney Games. The proposed protection will be in similar terms to that provided in the Sydney Games Act. That Act provided fairly broad protection against ambush marketing for Olympic and Paralympic indicia and images, however, the proposed protection will be in respect of a small subset of the expressions and images protected under that Act, which ceased operation on 31 December 2000. In the course of consultations on this proposal, the Sydney Games Act was praised as being very effective in combating ambush marketing.

The Government also noted that similar legislative protection is available for various Olympic expressions in the United States, Canada, New Zealand and the United Kingdom.

In their *Review of Intellectual Property Legislation Under the Competition Principles Agreement*, the Intellectual Property and Competition Review Committee generally concluded that poorly defined monopoly rights are anti-competitive because they create uncertainty in the marketplace. Overall, the proposed protection, which could be viewed as analogous to an intellectual property right, is expected to have a positive effect on competition because it will define the scope of the AOC's rights in the areas of promotion and advertising where use is made of the Olympic expressions much more clearly than at present.

It will make the circumstances under which the expressions can be used in these contexts clear to third parties who wish to use them. At present, third parties may be unclear as to what rights the AOC has in the expressions in these circumstances and may avoid using them in what may be legitimate circumstances because of the fear of infringing the AOC's rights.

As stated above, the proposed protection is only in relation to the Olympic expressions and this will leave scope for many other expressions to be employed to refer to the Olympics and a person's participation in, or support for, the Olympics. For example, the expression 'Athlete X, Sydney gold medallist' would not be affected by the legislation. It will also be clear that the prohibition is limited to commercial use for advertising or promotional purposes where that use suggests a sponsorship or other like arrangement with the AOC, the IOC, any Summer or Winter Olympic Games, the organising committee of any such Games, or any Australian Olympic team or individual athlete. Where it claims to have rights in respect of other words or expressions the AOC will continue to rely, to the extent it is able, on currently available protections.

The remedies available to the AOC will be civil remedies for which it must apply to a court. A balancing provision will apply whereby groundless threats of legal action by the AOC will be actionable and, at the discretion of the court, damages will be payable by the AOC where a loss is incurred because of the AOC's actions.

As stated above the decision to grant the AOC improved protection has already been made so this Regulation Impact Statement will not analyse options considered in making that decision—it will only evaluate implementation options for this protection. Specifically, it is concerned with how third parties will be affected by the proposal and will examine the need for specific clarifications of the extent of the protection or the need for any uses to be specifically exempted from the operation of the legislation. It is noted, however, that once a decision is made to support an increase in a body's fundraising ability by granting it licensing privileges over certain expressions or images, the granting of that right can only be achieved through specific enabling legislation.

## **2. PROBLEM OR ISSUE IDENTIFICATION**

The AOC occupies a unique position in Australian sport, being the peak Olympic body in this country. It has the sole responsibility for nominating competitors to compete as members of an Australian Olympic Team in Summer and Winter Olympic Games and funds the participation of those Teams at each Summer and Winter Olympic Games. Because of this unique position the AOC is able to raise significant funds on behalf of all Olympic sports. The AOC's fundraising efforts complement the Government's own funding of sport, particularly in the area of elite sport and Olympics participation. Without the AOC's efforts in this regard it is likely that the call on Government funds to support elite sporting objectives, especially for Olympic Games participation, would be significantly greater than is currently the case.

Previous experience has shown that ambush marketing in relation to the Olympics is a common occurrence. The Senate Committee report of 1994 entitled *Cashing in on the Sydney Olympics* recognised the adverse impact that such occurrences could have on the AOC's fundraising ability and recommended that the OIP Act be amended to give added protection to the AOC along the lines proposed in these amendments. Although that recommendation was not implemented at the time, the Sydney Games Act was enacted to preserve the revenue raising capacity of the Sydney organising bodies by granting them licensing rights and minimising the possibility of ambush marketing for the Sydney Games.

The philosophy underpinning the Government's sports policy, *Backing Australia's Sporting Ability — A More Active Australia*, is to provide incentives for sporting organisations to deliver sporting excellence through self-sustaining, innovative funding arrangements. By extending the proposed protection the Government would be supporting the AOC's capacity to raise revenue to support the Australian Olympic team's efforts in all future Olympic events. The public's response to the Sydney Olympic Games illustrates that the attainment of excellence in sport is a national priority. The Government is committed to a sports policy that continues to deliver world class sporting performance. The AOC's efforts directly complement the activities of the Government in achieving such outcomes. The proposed protection will strengthen the AOC's ability to support high level sporting achievements through the resulting increased revenue raising ability.

The Government finalised the details of the proposed protection after consultation with relevant interest groups, including athletes, sporting associations and business. This consultation process has been undertaken and certain key issues for the implementation of the proposal have been identified. These issues relate specifically to whether clarifying provisions or exemptions from the prohibition against the use of the Olympic expressions should be included for: athletes; coaches and other professionals associated with Olympic team members; businesses providing goods or services for past, present and future Olympic Games; and Olympic venue owners or managers.

As ambush marketing is a difficult concept to protect against the success of the proposed protection largely depends on the extent to which use of the expressions by third parties is allowed. It would be very difficult to achieve a useful level of protection for the AOC while at the same time allowing third parties free use the Olympic expressions. However, the Government is mindful of the interests of parties other than the AOC and the need to ensure that their interests are not unreasonably compromised.

The main issue, therefore, is the achievement of a proposal that delivers the AOC meaningful protection while protecting the ability of Olympic athletes, support organisations and other third parties to capitalise on their own legitimate association with the Olympic Games without unreasonable constraint.



### **3. OBJECTIVE**

The overall objective of the proposal is to protect, and to further, the position of Australia as a participant in, and supporter of, the world Olympic movement. This will be achieved by facilitating the raising of revenue through regulating the use of the Olympic expressions for commercial use in advertising and promotions. This must be done by implementing a proposal that strikes an appropriate balance between the interests of the AOC in being able to combat ambush marketing of its sponsorships and increase its fundraising through licensing the Olympic expressions, and the interests of affected third parties.

### **4. IDENTIFICATION OF OPTIONS**

The Government has identified the following three options:

#### **Option 1**

Provide exemptions for a wide range of affected third parties from the prohibitions against the commercial use, for advertising or promotional purposes, of the expressions 'Olympic', 'Olympic Games' and 'Olympiad'. Implementation of this option would result in the preservation of the status quo as those not affected by the prohibitions would be unlikely to want to use the Olympic expressions for commercial purposes.

#### **Option 2**

Provide no exemptions for any affected third parties from the prohibitions against the commercial use, for advertising or promotional purposes, of the expressions 'Olympic', 'Olympic Games' and 'Olympiad'. Implementation of this option would result in restrictions on the ability of affected parties, such as athletes, to gain financial advantage from their involvement with Olympic competition where they might legitimately expect to do so, eg, by their ability to bring positive associations to a particular company or by their endorsement of a particular product or service.

#### **Option 3**

Provide certain limited exemptions for some third parties from the prohibitions against the use of the expressions 'Olympic', 'Olympic Games' and 'Olympiad' and include some provisions that will clarify the scope of the legislation where that might otherwise be in doubt.

Olympic athletes, teams, NSOs and institutes of sport would be able to use the Olympic expressions as part of factual historical statements, including in a commercial context with third party sponsors. However, they (and their third party sponsors) would not be able to use the Olympic expressions in a way that would suggest a sponsorship arrangement as outlined above.

Coaches and others who have personally assisted Olympians or Olympic teams at an Olympic Games would be the subject of an exemption to enable them to use the Olympic expressions in referring to that assistance when promoting their own similar services.

There would be a specific exemption for those who have supplied goods and services to a past Olympic Games for the promotion of their similar goods and services. This would be provided that their use of the Olympic expressions is limited to factual historical statements of supply. The exemption would not apply to businesses providing goods or services for future Olympic events because of the significant potential for confusion as to who is an official AOC sponsor during the crucial lead up to each Summer and Winter Olympics.

In any event, based on the experience of previous Olympic Games it is unlikely that suppliers to a future Olympic Games Organising Committee would be able to promote their supply to an Olympic Games because they will be required to agree, under supply contracts, to strict limitations on their ability to associate themselves with the Olympic movement in advertising and promotion of their own goods and/or services. Importantly, the legislation will not override any contractual obligations to an Organising Committee for an Olympic Games or the AOC, for example, that are, or will be, put in place under supply agreements that would limit what suppliers can say about their supply to an Olympic Games.

It should be noted that not all promotional-type uses of the Olympic expressions would come within the proposed protection which, essentially, is intended to prohibit use of the Olympic expressions in advertising or promotion or in situations likely to enhance the demand for goods and services, where that use, to a reasonable person, would suggest a sponsorship or other sponsorship like support of the Olympic movement. For example, a potential supplier may want to promote its involvement in bidding for supply to an Olympic Games, prior to actually winning a contract.

A specific exemption will not apply to venues that have hosted an official Olympic event. It has never been the intended that the proposed legislation would prevent the use of the Olympic words in place names or addresses in promotions of commercial activity—as long as that use does not suggest an on-going association with the Olympic movement. This means that Olympic venues will continue to be able to market themselves as they seek to utilise their world class facilities in hosting other events in the post-Olympics environment. However, if venue managements wish to use an Olympic word to suggest an on-going Olympic involvement then it would be appropriate that they reach an agreement with the AOC on the matter.

It is also noted that use of the Olympic expressions for the purposes of the provision of information (including factual reporting by the media), criticism and review, which would not necessarily come within the definition of ‘use for commercial purposes’ will be the subject of a clarifying provision to this effect, irrespective of which of these options is implemented. This clarification was also included in the Sydney Games Act.

## **5. IMPACT ANALYSIS**

### **Impact group identification**

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

- i. affected third parties comprised of Olympic athletes, coaches and other professionals associated with Olympic team members, sporting organisations, Olympic venue owners and businesses providing goods or services for past, present and future Olympic Games
- ii. the AOC
- iii. the Government

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

### **Impacts on consumers**

The impact on consumers would vary under the different options. Option 1 would virtually maintain the status quo and therefore have no effect on consumers compared to the current situation. Option 2, while providing the most certainty to consumers about the products they buy, would also be likely to have the most negative effects in terms of price and choice. Option 3 would provide a level of certainty to consumers that would be lower than option 2 and, to the extent it allows more use of the Olympic expressions, would provide more scope for competition in goods and services that use the Olympic expressions. It should be noted that, on balance, the impacts of options 1 and 2 are balanced in favour of consumers.

Because options 2 and 3 would decrease the number of people who could supply goods and services where that supply would suggest a sponsorship relationship with the Olympic movement, events or athletes it would lead to decreased competition and, to that extent, may result in increases in prices and reduced choices. The Government considers that the possibility of such negative impacts will be outweighed by the advantages to consumers. A major reason for buying AOC licensed goods or services is because of their 'official' connection with the AOC and the flow-on effects such purchases have in supporting the Olympic movement. The proposed protection will decrease the possibility of consumers buying goods or services where there is an incorrect suggestion they have been licensed by the AOC. This will reduce transaction costs, and increase certainty, to consumers who wish to buy authentic goods and services and, in that way, provide support the Olympic movement.

## **Impact on small business compliance costs and paperwork burden**

The impact on small business, in terms of compliance costs and paperwork burden, would be similar under any of the options. The factor that will impose such burdens on small business is the proposed protection itself and this burden would not be altered irrespective of which option is implemented. However, the costs of compliance would be analogous to the costs involved in avoiding infringement of any trade mark or avoiding misleading or deceptive conduct that would contravene the Trade Practices Act which all traders and businesses are currently faced with. Because the legislation will give the AOC clear and visible rights for use of the Olympic expressions for certain types of promotion or advertising, the costs of compliance with Trade Practices Act in respect of such uses would be decreased.

### ***Option 1: Provide exemptions for all affected third parties***

#### **COSTS**

##### **Affected third parties**

- There should be no costs to most affected third parties in adopting this option, however, there may be some costs to NSOs (who obtain significant funding from the AOC) and athletes who benefit directly from AOC funded programs. This would arise from the fact that this option would not provide sufficient protection to the AOC that it could use to effectively increase its funding base. The AOC's funding of NSOs and athletes is directly related to its ability to raise funds and therefore the funding available to NSOs and such athletes may not be as generous as it would be if an option giving the AOC more extensive protection was to be implemented. The lower expected funding levels would have differential affects across the individual NSOs as the more high profile NSOs, such as Athletics Australia, would be expected to have more inherent fundraising capacity, because of their attraction to a wider audience, than some of the lower profile or newly emerging sports.

#### **AOC**

- If all of the affected third parties were able to use the Olympic expressions as they can currently then the proposal would not provide any meaningful protection for the AOC.
- It would be more expensive to enforce this option because the legislation would probably provide less clarity as to who had rights to use the expressions.

- The proposed protection is intended to extend the Olympic indicia that can be licensed, to help prevent ambush marketing of Olympic events and to increase the returns available from sponsorship. Adopting this option would not help to achieve this objective because ambush marketing of the Olympic Games is commonly accomplished by sponsoring an individual athlete or team and thereby inferring an association with the Olympic Games. If there is no limitation on the use of the Olympic expressions by athletes, particularly in conjunction with their sponsors, then the proposal will not have any impact on this type of ambush marketing.
- There is opportunity for conflicting sponsorships at the crucial time leading up to an Olympic Games if NSOs and athletes are free to contract with sponsors who would be able to use the Olympic expressions in their promotions. The NSOs and athletes may, for example, have sponsors who are competitors of the AOC's official team sponsors. This would lead to sponsors being wary of taking on sponsorships with the AOC or reduce the amount they are prepared to pay for sponsorship arrangements.
- Consumers would remain open to confusion as to what goods and services are officially licensed by the AOC.

### **Government**

- The extra protection the Government is aiming to give the AOC would run a high risk of being undermined if this option were adopted and the efficacy of the protection would be brought into serious question.
- If the ability of the AOC to earn sponsorship revenue is undermined its capacity to fund elite sports will be reduced, placing pressure on the Government to increase funding.

### **BENEFITS**

#### **Affected third parties**

- Subject to the limitations imposed by the current legal framework such as the Trade Practices Act and trade mark and passing off law, this impact group would be free to use the Olympic expressions to indicate their association or involvement with the Olympic Games.
- People who have provided goods or services in relation to past Olympic events would be able to promote their goods or services on that basis. This would include people such as the engineers involved in building the stadium, the caterers who provided the food in the Olympic village and the organisers of the opening and closing ceremonies. In most cases the goods and services provided would have been state-of-the-art and the success of the Games themselves would be an excellent selling point for gaining further contracts both in Australia and overseas. However, in real terms, this ability would be constrained because of the practice of limiting by contract what the suppliers to a Games can say about that supply. For example, suppliers to the Sydney 2000 Games are under contractual arrangements constraining them from referring, without prior consent, to their involvement with those Games in any promotion of their own services.

- Subject to the current legal framework, coaches and other professionals who have provided personal assistance to Olympic athletes at an Olympic Games would be able to use the Olympic expressions freely to promote their own services. Particularly in cases where the athletes were successful at the Olympic Games, this promotional opportunity could be extremely valuable.
- Olympic athletes would not be restricted in the use of the Olympic expressions in their promotional and sponsorship activities.
- Promoters, owners and managers of Olympic venues will be free to use the Olympic expressions to capitalise on the connection with the Olympic Games.

#### **AOC**

- There would be no benefits to the AOC in adopting this option.

#### **Government**

- There would be no benefits to the Government in adopting this option.

**Option 2:** *Provide no exemptions for any affected third parties.*

#### **COSTS**

##### **Affected third parties**

- Adopting this option would negatively impact on all the third parties in this impact group by preventing them from using the Olympic expressions when promoting themselves or their business on the basis of their involvement in, or association with, the Olympic movement or events.
- The proposed legislation is in respect of a very limited number of expressions where they are used in a very limited context. The ability to use terms outside the prohibitions, such as 'Olympian', 'medallist', 'Sydney 2000 Games' etc., means that athletes and third parties would still be able to promote their association with the Olympic movement, teams or athletes in an effective manner.
- The costs of adopting this option would also include the loss of the benefits outlined in option 1.

#### **AOC**

- There would be no costs to the AOC in adopting this option.

## **Government**

- It could be expected that this option could have some negative impact on competition because it would restrict the ability of third parties to promote themselves by using the Olympic expressions. It would therefore make it more difficult to incorporate references to Olympic involvement in promotional undertakings.

## **BENEFITS**

### **Affected third parties**

- These parties would benefit to the extent that the AOC made any increased revenue available for use by the affected third parties such as NSOs and athletes directly assisted by AOC-funded programs.

### **AOC**

- Adopting this option would maximise the AOC's fundraising capabilities under this proposal.
- This option would also provide the most meaningful level of protection for the AOC, including reducing the cost of enforcing its rights.

## **Government**

- By maximising the AOC's fundraising capabilities the reliance on Government funding for elite sports should be reduced.
- Adopting this option would most effectively achieve the two main objectives of the proposal — to reduce the incidence of ambush marketing and increase the AOC's fundraising capabilities.

***Option 3: Provide certain clarifications and exemptions for affected third parties.***

## **COSTS**

### **Affected third parties**

- Third parties will be restricted, to a certain extent, in their use of the Olympic expressions.
- The most significant restrictions would relate to athletes, NSOs, and Institutes and providers of goods or services for past and future Olympic events.

- Athletes, NSOs and Institutes will be able to use the Olympic expressions as part of factual, historical statements in a commercial context with third party sponsors. They (and their third party sponsors) will not be able to use the Olympic expressions in ways that would suggest a sponsorship like arrangement with the Olympic movement. It should be noted that the legislation is granting limited rights to the AOC for licensing purposes and many options remain available to Olympic athletes, teams and support organisations to promote their own activities, including their involvement with the Olympic movement, without using the Olympic expressions. The terms of this exemption have been welcomed by sports management firms as providing a fair and workable balance that will not overly restrict athletes but will deliver reasonable advantages to the AOC.
- An exemption will be provided for people who have provided goods and services to a past Olympic Games for the promotion of their similar goods and services. This will include coaches and others who have assisted Olympians in their sporting achievements at an Olympic Games.
- Allowing providers of goods and services to future Olympic Games to freely use the Olympic expressions would, however, run the risk of undermining the efficacy of the AOC's protection. As stated above in the discussion of option 3 this is because of the potential for conflicts in promotions that would have the capacity to seriously undercut AOC sponsorships at a crucial time in the Olympics sponsorship cycle. In the four years leading up to the next closing ceremony of an Olympic Games a person who will supply goods and/or services to a Winter or Summer Olympic Games will, therefore, not be able to use the Olympic expressions in a promotional context that meets the 'use for commercial purposes test' without authorisation from the AOC. As discussed above it is likely that such suppliers will, in any case, be subject to contractual limitations restricting their ability to promote their own involvement with the Games, including the use of the Olympic expressions.
- It is also likely that any use of the expressions by a person involved in promoting their involvement with a coming Olympic Games will not breach the prohibition on 'commercial use' of the Olympic expressions if they use the words in a factual way to describe their involvement with the Olympic Games and there is no suggestion created that the person is a sponsor of, or has a like arrangement with, the Olympic movement, teams or events.
- It is not considered appropriate to include an exemption for venues that have hosted an Olympic event. It has never been the intention that the proposal would apply to prevent the use of the Olympic words in place names or addresses in promotions of commercial activity—as long as that use does not suggest an association with the Olympic movement. This means that Olympic venues can market themselves as they seek to utilise their world class facilities in hosting other events in the post-Olympics environment. However, if venue managements wish to use an Olympic word to suggest an on-going Olympic involvement then it would be appropriate that they reach an agreement with the AOC on the matter. Such venues may incur a small cost in ensuring that their promotions comply with the requirements of the legislation.



## **AOC**

- There would be some reduction relative to option 2 in the extent of protection the AOC receives under the proposal if this option is adopted, but the impact on the AOC's fundraising abilities would not be as extensive as under option 1.
- The AOC will face extra costs as a result of the proposal as they will need to monitor compliance and administer the extra licensing provisions. The AOC is fully aware of these costs and is willing to bear them because of the increase in revenue raising capacity the proposal will bring.

## **Government**

- There should be no significant costs to the Government in adopting this option. Any reduction in the AOC's fundraising abilities should be minimal with little impact on the Government funding of elite sports.

## **BENEFITS**

### **Affected third parties**

- The benefits to the third parties covered by the exemption would be very similar to those under option 1.
- There would be no benefits to the third parties not covered by the exemption.

## **AOC**

- Although this option does not give the AOC total control of the use of the Olympic expressions for commercial purposes, the AOC would obtain substantial benefit from its adoption, including that the rights would be easier and cheaper to enforce than would be the case under the existing legal framework, to the extent that that framework would supply any remedy.

## **Government**

- This option represents a reasonable compromise between the interests of the AOC and the affected third parties. Most of the affected third parties would be able to use the Olympic expressions to promote and capitalise on their association with the Olympics while the fundraising capacity of the AOC will be substantially increased. It will therefore reduce the likelihood of demands for further Government funding of Olympic sport.

## 6. CONSULTATIONS

Consultations were undertaken on the issue of the protection of the Olympic expressions with representatives of the following bodies:

- Australian Olympic Committee
- Australian Olympic Committee Athletes Commission
- Australian Sports Commission (including the Australian Coaching Council)
- Australian Basketball
- Australian Canoeing
- Rowing Australia
- Australian Yachting
- Australian Sailing Association
- Australian Cycling Association
- Australian Commonwealth Games Association
- NSW Institute of Sport
- Athletics Australia
- Athletics Australia Athletes Commission
- Victorian Institute of Sport
- Small Business Association of Australia
- Pacific Dunlop Ltd (owner of ‘Olympic’ trade marks)
- Rigby Cooke (law firm represented by Mr Ian Fullager, a sports lawyer representing approximately 20 National Sporting Organisations)
- Institute of Patent and Trade Marks Attorneys (IPTA)
- Law Council of Australia (Intellectual Property Sub-Committee), and
- International Federation of Intellectual Property Attorneys (FICPI).

Comments on the proposed protection have also been received from the NSW Government (the Hon Mr Michael Egan MP, NSW Treasurer, and Mr Michael Eyers, Olympic Co-ordination Authority), Sports Medicine Australia, Sport Industry Australia, Australian Sport International, Triathlon Australia, the Retail Traders Association (New South Wales Division), the Tourism Taskforce, the Australian Paralympic Committee (APC), the Chair of the Advisory Council on Intellectual Property and managers of Olympic athletes comprising Mr Rob Woodhouse of Elite Sports Properties, Mr David Flaskas of Grand Slam International Pty Ltd, Mr Harry M Miller of Harry M Miller & Co. Management and Mr Max Markson of Markson Sparks Pty Ltd.

As mentioned under the 'Problem or Issue Identification' heading, the main issue to come out of the consultations was the impact on affected third parties and what exemptions might be appropriate. All affected parties were supportive of the objectives of the legislation as long as the proposal did not unreasonably interfere with their ability to be involved in promotions that refer to their own Olympic involvement. Athletes, NSOs and Institutes were particularly mindful of this issue. It is believed that the exemptions proposed will meet the requirements of those who expressed concerns about the impact on them while still decreasing the likelihood of ambush marketing of AOC sponsorships, delivering an increased capacity to raise revenue to the AOC and thereby meeting the overall objective of the proposal—to protect, and to further, the position of Australia as a participant in, and supporter of, the world Olympic movement.

## **7. CONCLUSION AND RECOMMENDED OPTION**

Option 3 is the recommended option because it strikes the most appropriate balance between the interests of the AOC and the affected third parties. The clarifying provisions and exemptions will delimit the use of the Olympic expressions and therefore decrease confusion that might otherwise occur. Those third parties covered by the exemptions and clarifying provisions will be able to use the Olympic expressions to promote and capitalise on their own association with the Olympics without needing to obtain a licence from the AOC. In this way the fundraising abilities of Olympic athletes, support organisations other affected parties will not be unreasonably constrained by the proposed protection.

The costs to the AOC of allowing the limited group of third parties to use the Olympic expressions without its authorisation is clearly outweighed by the benefits to those parties of being able to use the Olympic expressions in promotional contexts to refer to their participation in the Olympic movement. The AOC will still derive significant benefit from the proposal, enabling it to adequately fund its Olympic responsibilities and objectives.

## **8. IMPLEMENTATION AND REVIEW**

The proposal will be implemented by amending the OIP Act. An evaluation of its effectiveness and impacts will be undertaken immediately after the 2004 Athens Olympic Games.

## NOTES ON INDIVIDUAL CLAUSES

### Clause 1 <sup>3</sup>/<sub>4</sub> Short title

1. This clause provides for the Act to be cited as the *Olympic Insignia Protection Amendment Act 2001*.

### Clause 2 <sup>3</sup>/<sub>4</sub> Commencement

2. This clause provides that the Act will commence on the 28<sup>th</sup> day after it receives the Royal Assent.

### Clause 3 <sup>3</sup>/<sub>4</sub> Schedule(s)

3. This clause provides that each Act specified in a Schedule is to be amended or repealed according to the relevant provisions of that Schedule. Any item in a Schedule has effect according to its terms.

## Schedule 1 — Amendment of the Olympic Insignia Protection Act 1987

### Item 1 <sup>3</sup>/<sub>4</sub> Title

4. This item amends the title of the Olympic Insignia Protection Act to accurately reflect the new functions of that Act.

### Item 2 <sup>3</sup>/<sub>4</sub> Before the heading to Part I

5. This item inserts a heading for new Chapter 1, as a consequence of dividing the Olympic Insignia Protection Act into 4 separate chapters.

### Item 3 <sup>3</sup>/<sub>4</sub> Part I (heading)

6. This item replaces the heading for Part 1 of new Chapter 1.

### Item 4 <sup>3</sup>/<sub>4</sub> After section 1

7. This item inserts new section 1A, which provides a simplified outline of the Olympic Insignia Protection Act. This item also inserts headings for Chapter 2 and Part 2.1 of Chapter 2. Chapter 2 relates to the copyright and design protection granted to the AOC under the Olympic Insignia Protection Act.

### Item 5 <sup>3</sup>/<sub>4</sub> Subsection 2(1)

8. This item replaces a reference to ‘this Act’ with a reference to ‘this Chapter’ as the definitions in subsection 2(1) apply only to references in Chapter 2.

**Item 6 <sup>3</sup>/<sub>4</sub> Subsection 2(1) (before the definition of *Australia*)**

9. In the Olympic Insignia Protection Act, as amended by this Act, the AOC will be referred to as the 'AOC' or the 'Australian Olympic Committee', instead of as the 'Committee'. This item inserts a definition for 'AOC' or 'Australian Olympic Committee'.

**Item 7 <sup>3</sup>/<sub>4</sub> Subsection 2(1) (definition of *Committee*)**

10. This item repeals the definition of 'Committee' as a consequence of changing references to the 'Committee' in the Olympic Insignia Protection Act with references to the 'AOC' or the 'Australian Olympic Committee'.

**Item 8 <sup>3</sup>/<sub>4</sub> Subsections 2(2) and (3)**

11. This item replaces references to 'this Act' with references to 'this Chapter' to make it clear that the expressions referred to in subsections 2(2) and (3) are defined for the purposes of Chapter 2 only.

**Item 9 <sup>3</sup>/<sub>4</sub> Paragraph 2A(2)(b)**

12. This item replaces a reference to the 'Committee' with a reference to the 'AOC'.

**Item 10 <sup>3</sup>/<sub>4</sub> Section 3**

13. This item replaces a reference to 'this Act' with a reference to 'this Chapter' because section 3 relates to copyright matters, which are dealt with in Chapter 2 only.

**Item 11 <sup>3</sup>/<sub>4</sub> Section 4**

14. This item replaces a reference to 'This Act' with a reference to 'This Chapter'.

**Item 12 <sup>3</sup>/<sub>4</sub> Part II (heading)**

15. This item amends the heading of Part II of new Chapter 2.

**Item 13 <sup>3</sup>/<sub>4</sub> Section 5**

16. This item replaces references to the 'Committee' with references to the 'AOC'.

**Item 14 <sup>3</sup>/<sub>4</sub> Part III (heading)**

17. This item amends the heading of Part III of new Chapter 2.

**Item 15 <sup>3</sup>/<sub>4</sub> Section 6**

18. This item replaces a reference to the 'Committee' with a reference to the 'AOC'.

**Item 16 <sup>3</sup>/<sub>4</sub> Section 7**

19. This item replaces references to the 'Committee' with references to the 'AOC'.

**Item 17 <sup>3</sup>/<sub>4</sub> Subsection 7(2)**

20. This item replaces a reference to 'this Act' with a reference to 'this Chapter' because section 7 relates to design matters, which are dealt with in Chapter 2 only.

**Item 18 <sup>3</sup>/<sub>4</sub> Section 8**

21. This item replaces references to the 'Committee' with references to the 'AOC'.

**Item 19 <sup>3</sup>/<sub>4</sub> Section 9A**

22. This item replaces references to 'this Act' with references to 'this Chapter' because section 9A relates to design matters, which are dealt with in Chapter 2 only.

**Item 20 <sup>3</sup>/<sub>4</sub> Section 10**

23. This item replaces references to the 'Committee' with references to the 'AOC'.

**Item 21 <sup>3</sup>/<sub>4</sub> Section 11**

24. This item replaces references to the 'Committee' with references to the 'AOC'.

**Item 22 <sup>3</sup>/<sub>4</sub> Subsection 11A(1)**

25. This item replaces a reference to the 'Committee' with a reference to the 'AOC'.

**Item 23 <sup>3</sup>/<sub>4</sub> Part IV (heading)**

26. This item amends the heading of Part IV.

**Item 24 <sup>3</sup>/<sub>4</sub> Section 15**

27. This item replaces references to the 'Committee' with references to the 'AOC'.

**Item 25 <sup>3</sup>/<sub>4</sub> Section 16**

28. This item replaces a reference to the 'Committee' with a reference to the 'AOC'.

**Item 26 <sup>3</sup>/<sub>4</sub> After section 18**

29. This item inserts new section 18A, which requires the AOC to maintain a Register of licences it has granted in relation to the copyright in the olympic symbol and the protected designs. The Register is to include prescribed details of licences the AOC has granted in relation to copyright in the olympic symbol. The Register can be kept electronically and must be published on the Internet.

**Item 27 <sup>3</sup>/<sub>4</sub> Section 19**

30. This item replaces a reference to the *Trade Marks Act 1955*, which has been repealed, with a reference to the *Trade Marks Act 1995*.

**Item 28 <sup>3</sup>/<sub>4</sub> Paragraph 19(ba)**

31. This item replaces the phrase ‘under this Act’ with the phrase ‘for the purposes of section 2A’ because the design of the olympic torch is prescribed under section 2A.

**Item 29 <sup>3</sup>/<sub>4</sub> Subsection 20(1)**

32. This item replaces a reference to ‘this Act’ with a reference to ‘this Chapter’ to restrict the operation of subsection 20(1) to Chapter 2.

**Item 30 <sup>3</sup>/<sub>4</sub> Paragraph 20(1)(a)**

33. This item replaces a reference to the *Trade Marks Act 1955*, which has been repealed, with a reference to the *Trade Marks Act 1995*.

**Item 31 <sup>3</sup>/<sub>4</sub> Subsection 20(2)**

34. This item replaces a reference to ‘this Act’ with a reference to ‘this Chapter’ to restrict the operation of subsection 20(2) to Chapter 2.

**Item 32 <sup>3</sup>/<sub>4</sub> Subsection 20(3)**

35. This item replaces references to the ‘Committee’ with references to the ‘AOC’.

**Item 33 <sup>3</sup>/<sub>4</sub> Paragraph 20(3)(c)**

36. This item replaces a reference to the *Trade Marks Act 1955*, which has been repealed, with a reference to the *Trade Marks Act 1995*.

**Item 34 <sup>3</sup>/<sub>4</sub> Section 21**

37. This item replaces references to ‘this Act’ with references to ‘this Chapter’ to restrict the operation of section 21 to Chapter 2.

**Item 35 <sup>3</sup>/<sub>4</sub> After section 21**

38. This item inserts new Chapter 3, which deals with protected olympic expressions in the *Olympic Insignia Protection Act 1987*. Chapter 3 is divided into 6 Parts.

Part 3.1 — Introduction*Division 1 <sup>3</sup>/<sub>4</sub> General Provisions*

39. Section 22 provides the object of Chapter 3 and how this object is to be achieved.

40. Section 23 defines certain terms and expressions used in Chapter 3.

41. Subsection 24(1) defines the terms ‘Olympic’, ‘Olympics’, ‘Olympic Games’, ‘Olympiad’ and ‘Olympiads’ as ‘protected olympic expressions’. Subsection 24(2) provides that expressions that so closely resemble a protected olympic expression in subsection 24(1) as to be likely to be mistaken for it by a reasonable person are also to be taken to be protected olympic expressions. Subsection 24(2) is only intended to extend the definition of protected olympic expressions to trivial variations of those expressions such as misspellings, phonetic spellings and the running together of letters, that would be likely to be taken, by a reasonable person, to be a protected olympic expression mentioned in subsection 24(1). Stylised representations of a protected olympic expression would come within the ambit of the definition. Subsection 24(3) clarifies that the expressions ‘Olympian’ and ‘Olympians’ are not to be treated as resembling protected olympic expressions mentioned in subsection 24(1).

42. Section 25 provides that Chapter 3 binds the Crown in all its capacities.

43. Section 26 provides that Chapter 3 extends throughout the Commonwealth and its territories including Christmas Island, Cocos (Keeling) Island and Norfolk Island. The operation of the Chapter also extends to the waters above the Australian continental shelf and to the airspace above Australia and the Australian continental shelf.

44. Section 27 provides for additional operation of Chapter 3.

*Division 2 <sup>3</sup>/<sub>4</sub> Use for commercial purposes etc.*

45. Subsection 28(1) defines the actions that constitute application of expressions and statements to goods or services. It includes the application of expressions and statements to goods themselves as well as the application to advertisements that promote goods or services. The provision includes oral and aural uses of the protected olympic expressions.

46. Subsection 28(2) expands the notion of an application of an expression or statement to deem within the scope of advertisements that promote goods or services, advertisements that promote a particular person. This would, for example, include advertisements where a reasonable person would conclude that the commercial image of a sponsor is enhanced by means of the advertisement, even where there is no express reference to the sponsor’s goods or services in the advertisement.



47. Subsection 28(3) provides further information about the meanings of ‘covering’ and ‘label’.

48. Section 29 defines what is meant by ‘sponsorship-like support’. Subsection 29(1) provides that a person provides sponsorship-like support for the AOC, the IOC, any Summer or Winter Olympic Games, the organising committee for those games or any Australian Olympic team, section or member of that team if there is an express or implied understanding that the support is provided in exchange for a right to associate the person, or the person’s goods or services, with the relevant committee, event, team, section or individual.

49. Subsection 29(2) clarifies that it does not matter, for the purposes of defining ‘sponsorship-like support’, whether the right mentioned in subsection 29(1) is legally enforceable or not. Subsection 29(3) clarifies that it does not matter whether the exchange mentioned in subsection 29(1) is in whole or just in part for that right. The right to associate can be given on an exclusive or non-exclusive basis.

50. Section 30 defines the two situations where a person is said to use the protected olympic expressions for commercial purposes. The first situation, defined in subsection 30(2), consists of where a protected olympic expression is applied to goods or services for the purposes of advertising, promoting or enhancing the demand for those goods or services in a manner that would suggest that the person who applied the expression was a sponsor or provider of sponsorship-like support of the committees, events, teams, sections or individuals listed at subparagraphs 30(2)(c)(i) to (vii). Paragraphs 30(2)(d) and (e) specify who is considered to have used the expression for commercial purposes. If the application of the expression is made within Australia then the person who applied the expression is taken to have used it for commercial purposes. If the expression is applied to goods that are imported into Australia for sale or distribution then the designated owner of those goods is taken to have used the expression for commercial purposes.

51. The second situation is defined in subsection 30(3). It is fundamentally the same as the first situation, in that it relates to the application of a protected olympic expression to goods or services for advertising or promotional purposes that would suggest a sponsorship of, or sponsorship-like support for, the same committees, events, teams or sections and members of teams. However, it deems use by certain persons, other than the person who applied the protected olympic expressions to the goods or services (the first person), to be ‘use for commercial purposes’. It provides that a person (the second person) uses a protected olympic expression for commercial purposes if, in regard to goods and services to which, without authorisation, the first person has applied the protected olympic expressions, the second person supplies or offers to supply goods or services, or, in the case of goods, exposes or keeps them for supply by themselves or another person. This provision means that persons who deal in goods or services for the purposes of supply, to which another person has applied, without the authorisation of the AOC or a licensee, a protected olympic expression, the person dealing in the goods or services will be deemed to have used the protected olympic expression for commercial purposes. For example if a retailer sells goods bearing a protected olympic expression, where the retailer did not itself apply the expression, and the application of that expression was not authorised, the retailer will be deemed to have used the protected olympic expression for commercial purposes.

52. Subsection 30(4) further explains the meaning of ‘supply’ for the purposes of section 30.

53. Section 31 provides an exemption from the operation of Chapter 3 for Olympians who have been involved in a previous Summer or Winter Olympic Games. The exemption allows such athletes, and others authorised by the athletes, including sponsors, to use the protected olympic expressions in statements that consist of, or contain, factual, truthful references to their past Olympic involvement, including in circumstances where the statement is applied to goods or services in a manner that advertises, promotes or enhances the demand for the goods or services. The factual references contained in the statements are restricted to past Olympic involvement where the application of the statement would not suggest, to a reasonable person, that any person was a sponsor of, or is or was the provider of sponsorship-like support for, the bodies and individuals as described in subparagraphs 31(g)(i) to (vii). The exemption only applies after the relevant Olympic Games have ended.

54. Component teams of an Australian Olympic Team, such as a particular rowing team, are not specifically exempted. However, they will be able to take advantage of the exemption in section 31. For example, if a rowing team wishes to make a statement about its performance at a previous Olympic Games then each member of the team will be able to authorise the team statement in their capacity as an individual Olympian.

55. Section 32 provides an exemption from the operation of Chapter 3 for national sporting organisations, the Australian Sports Commission and State and Territory institutes or academies of sport involved with the preparation or training of Olympians who have participated in previous Summer or Winter Olympic Games. Section 32 will apply to bodies in subsection 32(1) who were involved in preparing and training persons who were Olympians at the time of that involvement or who subsequently became Olympians. Subparagraph 32(1)(a)(iii) encompasses the New South Wales Institute of Sport, the Victorian Institute of Sport Ltd, the South Australian Sports Institute, the Western Australian Institute of Sport, the Queensland Academy of Sport, the Tasmanian Institute of Sport, the Australian Capital Territory Academy of Sport and the Northern Territory Institute of Sport.

56. The exemption allows a national sporting organisation, the Australian Sports Commission or the various State and Territory institutes and academies of sport to use the protected olympic expressions in statements that consist of, or contain, factual, truthful references to their involvement with past Olympians. The factual references contained in the statements are restricted to past Olympic involvement where the application of the statement would not suggest, to a reasonable person, that any person was a sponsor of, or is or was the provider of sponsorship-like support for, the bodies and individuals as described in subparagraphs 32(g)(i) to (vii). This includes circumstances where the statement is applied to goods or services in a manner that advertises, promotes or enhances the demand for the goods or services. The exemption also allows other people, such as sponsors, to make such statements with the authority of the bodies concerned. The exemption only applies after the relevant Olympic Games have ended.

57. Section 33 provides an exemption from the operation of Chapter 3 for persons who have provided sports-related personal services to Olympians who have participated in previous Summer or Winter Olympic Games. Section 33 will apply to persons in paragraph 34(1)(a) who provided athlete services to persons who were Olympians at the time of that provision or who subsequently became Olympians. The exemption allows the person to use the protected olympic expressions in factual, truthful statements about their sports-related involvement at a Summer or Winter Olympic Games with those Olympians, including in circumstances where the statement would promote their own services. The exemption also allows other people to make such statements with the authority of the person.

58. The exemption is restricted to statements applied to services that are the same as, or similar to, the services they provided to the athletes. For example, if a person runs a clinic that provides sports counselling and physiotherapy services, but they have only provided the counselling services to Olympic athletes at a previous Summer or Winter Olympic Games, then they may not use the protected olympic expressions in relation to their physiotherapy services. Furthermore, the exemption only applies after the relevant Olympic Games have ended.

59. Subsection 33(2) clarifies what is encompassed by the term ‘sports-related personal services’.

60. Section 34 provides an exemption from the operation of Chapter 3 for a person who has supplied goods or services, other than goods or services referred to in paragraph 33(1)(a), to an Olympic team that has participated in a previous Summer or Winter Olympic Games or to a national organising committee that has organised a previous Summer or Winter Olympic Games. The exemption allows the person to use the protected olympic expressions in factual, truthful statements about that supply, including in circumstances where the statement would promote those goods or services. The statement must indicate the Games the goods or services were supplied for. The exemption also allows other people to make such statements with the authority of the person. The exemption only applies after the relevant Olympic Games have ended. The exemption is restricted to statements applied to the supply of goods or services that are the same as, or similar to, the services referred to in paragraph 34(a).

61. The Chapter 3 exemptions are only applicable where a use of a protected olympic expression would fall within the criteria of use for commercial purposes under section 30. Not all promotional-type uses of the protected olympic expressions would come within that provision which, essentially, prohibits use of the protected olympic expressions in advertising or promotion, or in situations likely to enhance the demand for goods and services, where that use, to a reasonable person, would suggest a sponsorship or other sponsorship-like support of the Olympic movement. For example, a potential supplier may want to promote its involvement in bidding for supply to an Olympic Games, prior to actually winning a contract.

62. Section 34, as with all of Chapter 3, is subject to section 74 which provides that Chapter 3 has effect in addition to any contract that relates to the use of the protected olympic expressions and to which the IOC, the AOC, or an organising committee for a Summer or Winter Olympic Games, is a party.

63. Section 35 clarifies that the mere use of the protected olympic expressions when providing information or for the purposes of criticism or review will not be regarded as suggesting the provision of sponsorship or sponsorship-like support. Examples of such provision of information include the reporting of news, presentation of current affairs and the factual description of goods or services provided by a business. Examples of criticism and review are those which are likely to appear in newspapers, magazines or similar periodicals, in a broadcast, on the Internet or in a video recording or a film.

### Part 3.2 — Protection of protected olympic expressions

64. Section 36 regulates the use of the protected olympic expressions. Subsection 36(1) prohibits any person, other than the AOC, from using a protected olympic expression for commercial purposes. Subsection 36(2) states that the prohibition in subsection 36(1) does not apply to the use of the protected olympic expressions for commercial purposes by licensed users. However, licensed users can only use the protected olympic expressions they are licensed to use and can only use them in accordance with any terms or conditions of their licence.

65. Section 37 further defines the circumstances in which a contravention of section 36 is taken to have occurred, for the purposes of Chapter 3.

### Part 3.3 — Licensing

66. Section 38 allows the AOC to license others to use the protected olympic expressions mentioned in subsection 24(1) for commercial purposes. Paragraphs 38(1)(a) and (b) provide that the AOC can limit the circumstances and duration of the licence, however subsection 38(2) clarifies that the section does not restrict the AOC's capacity to issue the licence on any terms or conditions it sees fit.

67. Section 39 prevents a licence from being granted in respect of the protected olympic expressions for use for commercial purposes that is prohibited by subsection 30(3). It would not be appropriate to allow a licence to authorise a use of a protected olympic expression, by a person dealing in those goods or services, where the application of the protected olympic expression was, itself, unauthorised.

68. Section 40 requires the AOC to maintain a Register of licences to use the protected olympic expressions. The Register is to include prescribed details of licences the AOC has granted in relation to the protected olympic expressions. The Register can be kept electronically and must be published on the Internet.

## Part 3.4 — Enforcement

### *Division 1 ¾ Remedies*

69. Section 41 allows a prescribed court to grant injunctions against conduct that contravenes section 36. Injunctions may be granted on the application of the AOC or a licensed user, but an injunction can only be granted on an application from a licensed user if that person is licensed to use the protected olympic expression to which the application relates. In this regard, the use of an expression so closely resembling the relevant protected olympic expression as to be likely to be taken, by a reasonable person, for that protected olympic expression is taken to be use of that protected olympic expression. The court may discharge or vary an injunction granted under section 41. The powers conferred on the court are in addition to, and not instead of, any other powers of the court, whether conferred by Chapter 3 or otherwise.

70. Section 42 provides that a prescribed court may grant an interim injunction pending the issue of the court's decision under section 41. For the purposes of such an injunction a contravention of section 36 is taken to have caused immediate and irreparable damage to the applicant.

71. Section 43 provides that a court may order a person, by such means as the court thinks fit, including by broadcast or Internet publication, to publish corrective advertisements if it is satisfied that the person has contravened section 36. This order may only be made on the application of the AOC, not a licensed user, and does not limit the relief that the court may grant under section 41 and may be additional to such relief.

72. Section 44 allows for damages to be awarded to compensate for loss or damage suffered by the AOC or a licensed user due to a contravention of section 36, provided the action to recover them is brought within 3 years after the day of the contravention. The recovery of a loss or damages is not affected by the grant of an injunction under section 41, but it cannot be granted in conjunction with an account of profits (section 45) awarded to the same party for the same contravention of section 36.

73. Section 45 allows a prescribed court to grant relief to the AOC or a licensed user by way of an account of profits if it is satisfied that a person has contravened section 36, provided the action to recover them is brought within 3 years after the day of the contravention. An account of profits can only be granted on an application from a licensed user if that person is licensed to use the protected olympic expression to which the application relates. In this regard, the use of an expression so closely resembling the relevant protected olympic expression as to be likely to be taken, by a reasonable person, for that protected olympic expression is taken to be use of that protected olympic expression. The grant of an account of profits is not affected by the grant of an injunction under section 41, but it cannot be granted in conjunction with the recovery of any loss or damages under section 44 by the same party for the same contravention of section 36.

74. Where a contravention of section 36 occurs in relation to goods, section 46 allows a prescribed court to order the destruction or delivery up of those goods. The court may also order that the goods be dealt with in any other manner that it thinks fit. An order under this section can only be granted on an application from a licensed user if that person is licensed to use the protected olympic expression to which the application relates. In this regard, the use of an expression so closely resembling the relevant protected olympic expression as to be likely to be taken, by a reasonable person, for that protected olympic expression is taken to be use of that protected olympic expression. An order under this section is not affected by the grant of an injunction under section 41.

75. Section 47 provides that a licensed user must have the written consent of the AOC to make an application under sections 41, 45 or 46, or to bring an action under section 44. If the licensed user has neither received nor been refused consent within 8 days of giving the AOC a written request, the AOC is taken to have given its consent. The AOC must not unreasonably refuse a request from a licensed user.

76. Section 48 provides that remedies provided under Chapter 3 are additional to any that may be available under other Commonwealth, State or Territory laws; for example, any remedies provided by the *Trade Practices Act 1974* that are relevant to conduct in contravention of section 36 would remain available to the AOC or a licensed user.

#### *Division 2 <sup>3</sup>/<sub>4</sub> Importation of goods*

77. Section 49 defines certain terms and expressions used in this Division.

78. Section 50 clarifies how a 'designated owner', in relation to goods imported into Australia, is determined.

79. Section 51 provides that the AOC may import goods with a protected olympic expression applied to them, as long as the importation does not contravene any other law of the Commonwealth.

80. Section 52 provides that the AOC or a licensed user may give the CEO a notice in writing, objecting to the importation of goods that have a protected olympic expression applied to them, where the designated owner has no authorisation or licence under Chapter 3 to use the expression for commercial purposes. The notice can apply only to importation after the date of the notice and it must be accompanied by any prescribed document and any prescribed fee payable.

81. A licensed user is only entitled to give notice in respect of the protected olympic expressions the person is licensed to use. A notice expires at the end of the prescribed period, or it may be revoked earlier if the person who gave the notice notifies the CEO in writing. In the case of a licensed user, the notice ceases to have effect if their licence is revoked or expires.

82. Section 53 provides that a licensed user must have the written consent of the AOC to give a notice under section 52. If the licensed user has neither received nor been refused consent within 8 days of giving the AOC a written request the AOC is taken to have given its consent. The AOC must not unreasonably refuse a request from a licensed user.

83. Section 54 only applies to goods manufactured outside Australia that are imported into Australia and are subject to the control of Customs. It provides that the CEO must seize goods to which protected olympic expressions have been applied if there is a current notice of objection and it appears that the designated owner is not entitled under Chapter 3 to use the expression in relation to the goods. The CEO must seize the goods unless he or she has no reasonable grounds for believing that section 36 would be contravened by the use of the expressions by the designated owner for commercial purposes. If an objector (or objectors) fails to give the CEO security sufficient to reimburse the Commonwealth for reasonable expenses incurred in the seizure of the goods, the CEO may refuse to seize the goods.

84. Section 55 requires the CEO to notify the designated owner of the seized goods that the goods have been seized. The CEO must also provide written notice to each objector that:

- the goods have been seized;
- gives the full name and address of the designated owner of the seized goods and any information the CEO believes is, on reasonable grounds, likely to help the objector or objectors identify the designated owner; and
- states that the goods will be released to the designated owner unless the objector makes an application for an injunction under section 41 and gives the CEO notice of the application within 10 working days after the objector has been given notice of the seizure, or within such further period, not exceeding 10 working days, that the CEO reasonably allows.

85. Section 56 provides that the designated owner of any seized goods may, at any time before an objector makes an application for an injunction, consent to the goods being forfeited to the Commonwealth by giving written notice to the CEO. Such goods must be disposed of as the CEO directs.

86. Section 57 provides that the CEO must release seized goods (other than goods forfeited to the Commonwealth under section 56) to their designated owner at the end of the application period unless, within that period, the objector, or one of the objectors, has made an application for an injunction under section 41 in relation to the goods and has given the CEO a written notice of the application, or has, by written notice to the CEO, consented to the release of the goods. The CEO may release the seized goods to their designated owner before the end of the application period if the CEO, having regard to information that has come to his or her knowledge after the goods were seized, does not have reasonable grounds for believing that section 36 would be contravened by the importation and the objector, or none of the objectors, has made an application for an injunction under section 41 in relation to the goods.

87. Section 58 makes various provisions for the conduct of an application for an injunction under section 41 in relation to seized goods. Persons demonstrating sufficient interest in the proceedings may be joined as respondents. The court may order that the seized goods be released to their designated owner (with or without conditions), or that they be forfeited to the Commonwealth. If the court decides not to grant an injunction, the court may order that the objector compensate the designated owner of the goods, or any other respondent, for any loss or damage caused because the goods were seized. The amount payable, which is determined by the court, is for any part of the loss or damage that is attributable to any period beginning on or after the day on which the application under section 41 was made. A time limit of 20 working days is set within which the court may order that the goods not be released, otherwise the CEO must release them to the designated owner.

88. Section 59 provides that goods forfeited to the Commonwealth by an order of a court under section 58 are to be disposed of as the CEO directs.

89. Section 60 provides that the CEO must not release or dispose of any seized goods, or take any action in relation to the goods to give effect to any order of a court under section 58, if he or she is required or allowed to retain the goods under any other law of the Commonwealth.

90. Section 61 provides that if the security given by an objector or objectors who gave a notice objecting to the importation of goods under section 52 is insufficient to meet the expenses incurred as a result of the action taken by the CEO, the objector or objectors must pay the difference between the expenses the Commonwealth incurred in seizing the goods and the security. The debt is a debt due by the objector, or by the objectors jointly and severally, to the Commonwealth. The Commonwealth may take action in any court of competent jurisdiction to recover the debt.

91. Section 62 provides that the Commonwealth is not liable for any loss or damage suffered by a person because the CEO seized, failed to seize or release seized goods.

92. Section 63 allows this Division to be modified or adapted by regulation in its application to Christmas Island, Cocos (Keeling) Islands or Norfolk Island.

#### *Division 3 $\frac{3}{4}$ Groundless threats*

93. Section 64 provides that if the AOC or a licensed user threatens to make an application, or bring an action, against a person on the ground that the threatened person has engaged in, is engaging in, or is proposing to engage in conduct which contravenes section 36, any person aggrieved may bring an action in a prescribed court against the person threatening the action.

94. In an action brought by an aggrieved person, the court may declare that the AOC or the licensed user had no grounds for making the threat and grant an injunction restraining the person threatening the action from continuing to make the threat. The court may also award damages to the aggrieved person for losses suffered as a result of the making of the threat.



95. If the person making the threat has made an application (or has brought an action) under Division 1 against the threatened person, in relation to the act, or proposed act, to which the threat related, the threatened person may not bring an action or continue an action under this section.

96. It is a defence that the conduct of the threatened person, in relation to which the threat was made, constitutes unlicensed use for commercial purposes of a protected olympic expression.

97. Section 65 provides that if a threatened person brings an action under section 64 and the AOC or a licensed user would be entitled to bring an action for a contravention of section 36 against that person, the AOC or a licensed user may make a counterclaim for any relief that may be available under Division 1. If a counterclaim is made under this section the provisions of Divisions 1 and 2 apply as if the counterclaim were an application or action made or brought under Division 1.

#### Part 3.5 — Jurisdiction of prescribed courts etc.

98. Section 66 specifies that the Federal Court and the Supreme Courts of a State, the Australian Capital Territory, Northern Territory and Norfolk Island are prescribed courts for the purposes of Chapter 3.

99. Section 67 confers jurisdiction on the Federal Court in respect of all matters arising under this Chapter.

100. Section 68 confers jurisdiction on prescribed courts other than the Federal Court, with the exception that the jurisdiction conferred on the Supreme Court of a Territory extends only to the extent that the Constitution allows.

101. Section 69 provides for the transfer of an action or proceeding under Chapter 3 from one prescribed court to another. The court in which action has been brought may order the transfer on the application of a party to the proceeding.

#### Part 3.6 — Miscellaneous

102. Section 70 provides that the Parliament intends that the operation of Chapter 3 is not to affect the operation of a State or Territory law to the extent that the law is capable of operating concurrently with it.

103. Subsection 71(1) makes it clear that existing rights granted under the *Trade Marks Act 1995* or the *Designs Act 1906* in relation to the protected olympic expressions are not affected by the operation of Chapter 3. An existing trade mark right is one which has a date of registration that is immediately before 20 September 2001. An existing design right is one that is in force, or comes into force, as mentioned in subsection 27A(1) of the *Designs Act*, immediately before 20 September 2001.

104. Subsection 71(4) makes it clear that Chapter 3 does not affect the use of a protected olympic expression by a person (the first person) if, immediately before 20 September 2001, the first person would have been entitled to prevent another person from passing off, by means of the use of the expression or a similar expression, goods or services as the goods or services of the first person.

105. Subsection 71(5) makes it clear that Chapter 3 does not apply to the use of a registered business name in connection with a business where the business name was registered in relation to that business immediately before 20 September 2001.

106. Subsection 71(6) makes it clear that Chapter 3 does not affect the use of the name of an incorporated company where the company existed, the name was used in connection with a business the company carried on and the company used the name in connection with that business immediately before 20 September 2001.

107. Section 72 provides that Chapter 3 has no effect to the extent that its operation would result in an acquisition of property from a person other than on just terms and that acquisition would be invalid because of paragraph 51(xxxi) of the Constitution.

108. Section 73 makes it clear that Chapter 3 is not intended to apply to the extent that it would infringe any doctrine of implied freedom of political communication.

109. Section 74 makes it clear that Chapter 3 operates in addition to any contract relating to the use of the protected olympic expressions for commercial purposes and to which the AOC, the IOC or an organising committee for any Summer or Winter Olympic Games is a party.

110. Section 75 validates any licences the AOC purported to grant in relation to a protected olympic expression, for use amounting to use for commercial purposes, for a period ending after the commencement of this Act. Chapter 3 will operate as if the licence had been granted under section 38 for the period of its duration after that commencement date.

**Item 36 <sup>3</sup>/<sub>4</sub> Before section 22**

111. This item inserts headings for new Chapter 4 and Part 4.1 of that Chapter, which relates to authority to make Regulations under the Olympic Insignia Protection Act.

112. This item renumbers old section 22 of the Olympic Insignia Protection Act as a consequence of the insertion of several new sections.