



Australian Sports Commission Amendment Bill 2004

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Law and Bills Digest Section

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Australian Sports Commission Amendment Bill 2004

Date Introduced: 8 December 2004

House: The Senate

Portfolio: Arts and Sport

Commencement: On the day of Royal Assent

Purpose

The Bill proposes to broaden the circumstances in which the Australian Sports Commission, and through it, sporting organisations, can obtain personal information held by the Australian Customs Service.

Background

Basis of policy commitment

Under the *Customs Administration Act 1985*, information obtained or held by the Australian Customs Service (Customs) that relates to an identifiable individual (known as personal information) must not be disclosed to others, except under special circumstances. In 1999, the *Australian Sports Commission Act 1989* was amended to provide that such information could be disclosed by Customs to the Australian Sports Commission (ASC) in relation to investigations of alleged breaches of anti-doping rules.¹ The ASC, in turn, may pass the information on to the sports organisations that administer the sport of the relevant competitor and are responsible for disciplinary action over doping breaches. Under this arrangement, the discovery of drugs and drug paraphernalia by Customs through border screening and postal deliveries can be used in the campaign to stop the use of performance-enhancing drugs in sport.

The Minister for Justice and Customs in his Second Reading Speech, indicated that the impetus for this Bill is a belief that the 1999 amendments were inadequate.² The Minister told Parliament that 'legal opinion obtained earlier this year in the context of doping allegations against a number of cyclists now indicates that the practical use of these provisions is more restrictive than first thought'.³

While the details of that legal advice are not provided, the Minister suggests that the primary issue has been the restrictive rules governing the circumstances in which the Executive Director of the ASC can disclose personal information to sporting organisations.⁴ Currently, before such disclosure, the Executive Director must be satisfied that the sporting organisation's anti-doping policy is *likely* to have been breached and that

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the information is *likely* to assist the organisation in determining whether to take action. The standard of ‘likelihood’ limits the Executive Director’s capacity to disclose information where the information does not suggest a likely breach of itself, but may only give rise to a strong suspicion of a breach. As the Minister suggests, this might occur where Customs has intercepted drugs that have been mailed to a competitor.⁵ In addition, the requirement that the information be given for the purposes of determining what action to take could preclude the organisation using the information to conduct further investigations.

Given these restrictions, it appears that the 1999 amendments were drafted in expectation that the ASC would conduct investigations as to possible breaches and then pass the information to the relevant sporting organisation for disciplinary action. The changes proposed by the current Bill relax these restrictions by broadening the circumstances in which information can be passed from the ASC to sporting organisations. In doing so, it might be expected that sporting organisations will take more direct responsibility for investigation as well as enforcement.

However, the Bill goes further than remedying this perceived problem. It also broadens the circumstances in which Customs can disclose information to the ASC. This change is detailed in the Main Provisions section below. The rationale for this change is not clear and does not seem to have been provided in the Second Reading Speech.

Main Provisions

Schedule 1—Amendments to the *Australian Sports Commission Act 1989*

When can Customs pass personal information on to the ASC?

Current law

Under the Customs Administration Act, personal information held by Customs may only be disclosed in certain circumstances. The circumstances include disclosure to the Executive Director of the ASC, but only for the purpose of ‘determining whether an anti-doping policy is likely to have been breached’.⁶ In the terms of the Customs Administration Act, this is referred to as a ‘permissible purpose’.⁷

Proposed change

Items 1 and 2 propose amendments to alter this test, so that the Executive Director may receive information if the ‘information should be disclosed for *permitted anti-doping purposes*’. Permitted anti-doping purposes would include:

- investigating whether an anti-doping policy has been breached
- determining whether to take action under an anti-doping policy

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- determining what action to take under an anti-doping policy, and
- taking or participating in any proceedings relating to action that has been taken under an anti-doping policy [**proposed section 51AA**].

[Note: An *anti doping policy* is defined in section 51A as any current written policy of the ASC or a sporting organisation in respect of performance-enhancing drugs or doping methods, which include methods to conceal the use of performance-enhancing drugs.]

This change would significantly broaden the purposes for which personal information can be obtained and used by the ASC. Although currently it is not necessary to show that there has been a breach of policy or even that a breach has been likely, the CEO of Customs (or his or her delegate) must be satisfied that the information will be used to determine whether or not a breach may have occurred.

Under the proposed change, the information would not need to be connected to a breach or suspected breach. It would be enough that the information is connected to ‘action’ taken under an anti-doping policy of a sporting organisation.

When can the ASC pass personal information on to sporting organisations?

Current law

After the ASC has received personal information from Customs, the ASC can pass that information on to a sporting organisation to enable that organisation to take action, such as disciplinary action, if a competitor has breached anti-doping rules.

Under the current law, the Executive Director of the ASC may not pass the information on to sporting organisations, unless he or she is satisfied that it is *likely* that an anti-doping policy of the organisation has been breached and that the information would assist the sporting organisation in determining what action it might take (section 51E). The Executive Director must also receive a written undertaking from the organisation that the information will only be used to determine whether to take action in accordance with its anti-doping policy, and that the information will not be disclosed to any other person.

Proposed change

Item 6 repeals and replaces section 51E. **Proposed section 51E** would allow the Executive Director to authorise the disclosure of the information to sporting organisations when he or she is satisfied that the information should be disclosed for a *permitted anti-doping purpose*, as defined above. Accordingly, the test for determining whether the information should be disclosed to the sporting organisation is as broad as that for whether the information should be disclosed to the ASC by Customs.

Although the broader test means that it would be easier for sporting organisations to receive personal information, the Bill also introduces certain protections for the person to whom the information relates. First, **proposed subsection 51E(1)** provides that the

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information can only be disclosed to the sporting organisation once the organisation has provided a written undertaking that the information will only be used for the permitted anti-doping purpose. The undertaking must also include a commitment to take reasonable steps to ensure that the information will not be used in a way that would unfairly prejudice the person to whom it relates.

Second, **proposed subsection 51E(2)** introduces a right for the person to whom the information relates to be given notice of the proposed disclosure. The person would then have a right to make a written submission to the Executive Director within a certain period (14 days by default, unless the Executive Director determines that a shorter period is appropriate). The information could not be disclosed to the sporting organisation until after that period has elapsed or the Executive Director has considered the person's submission.

When can the ASC disclose personal information to others?

Item 6 also inserts **proposed section 51DA**. This section would allow the ASC to disclose personal information to people who are not ASC officials or sporting organisations if the disclosure would assist the ASC in taking action under its anti-doping policy or participating in court proceedings taken under its anti-doping policy. There is no current provision that would allow this.

Concluding Comments

The breadth of the 'permitted anti-doping purposes'

Central to the Bill is the new definition of 'permitted anti-doping purposes' which would govern all anti-doping related uses of personal information from Customs. It could be argued that this definition is broader than necessary to achieve the Bill's stated rationale.

In particular, the use of the term 'action'—in relation to determining whether to take action, determining what action to take and participating in proceedings arising from action taken—would seem to cover a very broad range of circumstances. Certainly, the range of circumstances covered by the Bill is much broader than that covered by the current requirement that the use of the information has to have some connection to a (possible) breach of anti-doping rules. 'Action' could include such things as a decision to ban a substance. That is, under the proposed Bill, the ASC and a sporting organisation could potentially learn from Customs which athletes are importing a certain substance before making a decision as to whether or not it should be banned from the sport.

Further, as anti-doping policies are developed by the ASC and sporting organisations, these organisations could theoretically expand their own 'permitted purposes' for the use of personal information by simply re-writing their policies. Parliament has no oversight of these policies.

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If the goal of the legislation is to enable the ASC to disclose information to sporting organisations for the purposes of investigation, without having to undertake its own preliminary investigation, this could have been achieved with much less breadth. For example, existing paragraph 51E(1)(a) could have been amended to allow the Executive Director to disclose information to sports organisations where there is a reasonable suspicion (rather than a likelihood) that an anti-doping policy has been breached. Along with this, amendments could have been drafted to ensure that investigation of suspected or alleged breaches was a permitted purpose for sports organisations.

Parliament might note that in many cases, the relevant personal information could well relate to the importation of legal substances. The Customs Administration Act recognises a right to privacy in relation to the importing of legal substances. The 1999 amendments created an exception to this right, in recognition of the Government's role in assisting the campaign against drugs in sport. By removing the need to show that the information would be used in connection with investigating or taking action against a possible breach of anti-doping rules, this Bill would significantly expand this exception.

Given the possible loss of reputation to a competitor who is wrongly accused of doping, competitors are likely to value highly the right to privacy in relation to substances and objects that they might import. Accordingly, Parliament might wish to consider whether the proposed Bill strikes the right balance between protecting this right to privacy and helping sports organisations to police their anti-doping rules.

Endnotes

- 1 *Australian Sports Commission Amendment Act 1999.*
- 2 Senator Ellison, Minister for Justice and Customs, 'Second Reading Speech: Australian Sports Commission Amendment Bill 2004', Senate, *Debates*, 8 December 2004, p. 2.
- 3 *ibid.*
- 4 *ibid.*
- 5 *ibid.*
- 6 Section 51C, Australian Sports Commission Act. In addition, the information must relate to the importation or attempted importation of a sports substance into Australia and at least one of the following criteria is satisfied: (i) the importation or attempted importation contravenes a law of the Commonwealth, (ii) there are reasonable grounds to suspect that a competitor is responsible for the importation or (iii) there are reasonable grounds to suspect that the substance is for the use of one or more competitors (section 51B, Australian Sports Commission Act).
- 7 Subsection 16(8).

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