In this case, Mr McLean (the **Applicant**) sought to appeal a decision of the Supreme Court of Victoria. The Applicant sought a determination on whether Racing Victoria Limited (the **First Respondent**) and the State of Victoria, namely Victoria Police, (the **Second Respondent**) owed him a duty of confidentiality in respect of items seized under warrant; whether there was any limitation on the use of information derived from the items seized by the Second Respondent; and what relief, if any, should follow.

On 10 September 2020, the Victorian Supreme Court of Appeal (**the Court**) affirmed that the Second Respondent’s duty of confidentiality did not extend to the use of information derived from the seized items. The Court also found that the disclosure of this information to the First Respondent was authorised under Information Privacy Principle (**IPPs**) 2.1(e) and 2.1(g) of Schedule 1 of the *Privacy and Data Protection Act 2014* (Vic) (the **PDP Act**). [Read this decision](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2020/234.html?context=1;query=%22privacy%20and%20data%20protection%20act%22;mask_path=au/cases/vic/VSC+au/cases/vic/VicSC+au/cases/vic/VSCA+au/cases/vic/VicCorC+au/cases/vic/VCC+au/cases/vic/VMC+au/cases/vic/VicRp+au/cases/vic/VicLawRp+au/cases/vic/VicLawTLegO+au/cases/vic/VicWABWRp+au/cases/vic/VicWWABRp+au/cases/vic/VicWWRp+au/cases/vic/VicAATRp+au/cases/vic/VBAB+au/cases/vic/VDPB+au/cases/vic/VHerCl+au/cases/vic/VMPB+au/cases/vic/VMPBPSP+au/cases/vic/VPrivCmr+au/cases/vic/VPYRB+au/cases/vic/VicPABRp+au/cases/vic/PPV+au/cases/vic/VPSRB+au/cases/vic/VCAT+au/cases/vic/aat+au/cases/vic/VADT+au/cases/vic/VCGLR+au/cases/vic/VDBT+au/cases/vic/VICmr+au/cases/vic/VLSC+au/cases/vic/VLPT+au/cases/vic/VMHRB+au/cases/vic/VMHT+au/cases/vic/VicPRp+au/cases/vic/VRAT+au/legis/vic/consol_act+au/legis/vic/num_act+au/legis/vic/hist_act+au/legis/vic/reprint_act+au/legis/vic/anglican+au/legis/vic/repealed_act+au/legis/vic/consol_reg+au/legis/vic/consol_reg+au/legis/vic/num_reg+au/legis/vic/reprint_reg+au/legis/vic/repealed_reg+au/legis/vic/bill+au/legis/vic/bill_em+au/other/VicBillsRR+au/other/vic_gazette+au/other/VicOmbPRp+au/other/VicSARCAD+au/other/rulings/vicsro/VICSROBF+au/other/rulings/vicsro/VICSRODT+au/other/rulings/vicsro/VICSRODA+au/other/rulings/vicsro/VICSROFHOG+au/other/rulings/vicsro/VICSROFID+au/other/rulings/vicsro/VICSROGEN+au/other/rulings/vicsro/VICSROLT+au/other/rulings/vicsro/VICSROLTA+au/other/rulings/vicsro/VICSROPT+au/other/rulings/vicsro/VICSROPTA+au/other/rulings/vicsro/VICSROSD+au/other/rulings/vicsro/VICSROTAA).

## Lessons

This is a noteworthy decision for Victorian public sector agencies subject to Part 3 of the PDP Act for the following reasons:

1. The Court affirmed that the meaning of ‘unlawful activity’ in IPP 2.1(e) is not limited to criminal activity and encompasses activity contrary to rules and laws whether criminal or civil.
2. The Court affirmed that the definition of law enforcement agency in section 3 of the PDP Act is broad and encompasses any organisation to which the PDP Act applies that may impose penalties and sanctions.
3. The Court highlighted that the PDP Act does not create any cause of action other than those set out in the PDP Act.

## Background

The Applicant is a licenced racehorse trainer and is subject to the Rules of Racing of the First Respondent.

On 30 January 2019, the Second Respondent executed a search warrant under section 465 of the *Crimes Act 1958* (Vic) (the **Crimes Act**) at the Applicant’s premises and seized 6 syringes labelled ‘Eprex 10,000’, among other items. On return of the warrant, a Magistrate authorised the forensic analysis of the syringes. The syringes were found to contain traces of equine blood and recombinant human erythropoietin (**EPO**). It is an offence to possess EPO without a prescription, and EPO is a prohibited substance under the Rules of Racing.

By letter, the Second Respondent informed the First Respondent that they had executed the search and found the syringes, and provided documents recording the results of the analysis. The Second Respondent did not provide the seized items. The Second Respondent noted that it referred the information to First Respondent ‘as offences may have been committed against the Rules of Racing’.

Based on the information received from the Second Respondent, the First Respondent formed the view that there were reasonable grounds to suspect the Applicant had committed breaches of the Rules of Racing and notified the Applicant of its intention to lay charges for breach of those rules. The First Respondent asked the Applicant to show cause why he ought not be suspended pending a hearing and determination of the charges. Later that day, the Applicant sought an order restraining the First Respondent from acting on the information received from the Second Respondent.

In the hearing at the Supreme Court of Victoria, the Applicant submitted that the information obtained as a consequence of the exercise of a coercive power could only be used for the purpose for which the power was conferred and not otherwise. He also argued that the Second Respondent had a positive duty of confidentiality in relation to the items seized under warrant and that that duty also applied to any information derived from those items. The Applicant submitted that the only use that could lawfully be made of the information derived from the things seized under warrant was for the investigation and prosecution of indictable offences.

On 18 October 2019, the Supreme Court held that evidence of observations made during the execution of a search warrant under section 465 of the Crimes Act, or information derived from things seized under the warrant, are not subject to any limitation or duty of implied confidentiality. The Supreme Court highlighted that that although the Second Respondent was not free to disclose the information to the world at large, it could use and disclose this information for the limited purposes defined by common law and legislation.

The Supreme Court also found that the disclosure of the information by the Second Respondent to the First Respondent was authorised by IPP 2.1(e) because the Second Respondent had reason to suspect that unlawful activity has been, is being or may be engaged in, and used or disclosed the personal information as a necessary part of its investigation of the matter or in reporting its concerns to relevant persons or authorities. It held that ‘unlawful activity’ is not limited to criminal activity and instead encompasses any activity contrary to rules and laws whether criminal or civil, and that any organisation to which the PDP Act applies may investigate the suspected unlawful activity itself or refer its concerns to a relevant person or authority.

As a result, the Supreme Court ordered that the proceeding be dismissed, and the confidentiality orders issued at the commencement of the trial be vacated.

## Issues in appeal

## The Applicant sought leave to appeal on eight proposed grounds, while the Respondents sought to uphold the Supreme Court decision on additional grounds and contended that, even if the Second Respondent’s disclosure to the First respondent was unlawful, no relief should be granted.

## The three fundamental issues for the Court to consider in the application for leave to appeal were:

## Does section 465 of the Crimes Act impose an implied duty of confidentiality on information derived from things seized on the execution of a search warrant?

## Was the disclosure from the Second Respondent to the First Respondent permitted under IPP 2.1(e), (f) or (g) of the PDP Act?

## If the disclosure was unlawful, what relief, if any, should follow?

## The Decision

##### ****Section 465 of the Crimes Act****

##### The Court upheld the Supreme Court’s decision that section 465 of the Crimes Act does not impose a separate and concurrent limitation on the use of information derived from the execution of a warrant. In coming to this conclusion, the Court highlighted that section 465 of the Crimes Act does not deal with information, rather it deals with physical or tangible things. It acknowledged that in respect of some items, there may be no material distinction between the thing and the information.

##### In this case however, the information was obtained by forensic analysis of the syringes which occurred pursuant to a direction of a Magistrate. The Court held that any restriction on the use or disclosure of information from a thing seized in execution of a warrant issued under section 465 of the Crimes Act would arise from the terms upon which a Magistrate makes an order for dealing with the thing, rather than an implied prohibition in that provision. The Court explained that the direction in this case expressly addressed the seized item; there was no requirement that the product of those investigations be produced to the Magistrate or otherwise by dealt with in any particular way; and it was entirely unknown what the analysis would reveal. As a result, the Applicant failed to establish the implied duty which he contended, and the Supreme Court was correct to reject it.

##### ****IPP 2****

##### The Court prefaced its exploration of IPP 2 with an explanation of its view that nothing in the PDP Act gives rise to any civil cause of action or operates to create any legal right enforceable in a court or tribunal otherwise than in accordance with the procedures in the PDP Act, that being the making of a complaint and its determination at VCAT. The Court therefore emphasised that even if there had been a breach of the PDP Act as a result of the disclosure to the First Respondent, it would not support the relief sought by the Applicant.

##### The Court held that the Supreme Court was correct to conclude that a contravention of the Rules of Racing was ‘unlawful activity’ for the purposes of IPP 2.1(e) and that the First Respondent was a relevant authority. This is because the First Respondent regulates the Rules of Racing in the *Racing Act 1958* (Vic) which prescribe standards and obligations and provide for investigation and determination of breaches. The First Respondent can also issue sanctions such as suspension, disqualification, and fines. The Court found that the Rules of Racing are thus directed at identifying norms, the breach of which is unlawful, and confirmed the Supreme Court’s view that unlawful activity extends beyond criminal conduct.

##### The Court accepted the Second Respondent’s submission that the broad definition of ‘law enforcement agency’ in section 3 of the PDP Act captures the First Respondent. This is because the First Respondent regulates the racing industry and can impose penalties and sanctions under the Rules of Racing for possession of EPO. As a result, the Court held that the disclosure was authorised by IPP 2.1(g)(i).

##### The Court also accepted that the Second Respondent had a proper basis for believing that the Applicant was in possession of EPO and had administered it to a horse he trained. The Court found that it was not unreasonable to consider the possession and use of EPO as seriously improper conduct in racing, and therefore held that the disclosure was authorised by IPP 2.1(g)(iv).

##### The Court found that it was unnecessary to determine whether disclosure was also permitted under IPP 2.1(f) or whether the Second Respondent could rely on the law enforcement exemption in section 15 of the PDP Act.

##### ****Relief****

##### The Court held that the Applicant had failed to establish that the disclosure by the Second Respondent to the First Respondent was unlawful and therefore was not entitled to any relief.

##### ****Conclusion****

##### The Court granted leave to appeal, however the appeal was dismissed.

Further Information

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