



Arbitration CAS 2015/A/4059 World Anti-Doping Agency (WADA) v. Thomas Bellchambers et al., Australian Football League (AFL) & Australian Sports Anti-Doping Authority (ASADA), award of 11 January 2016

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Mr Romano Subiotto QC (United Kingdom); The Hon. James Spigelman AC QC (Australia)

Australian Football

Doping (Thymosin Beta-4)

Distinction between presence and use of a prohibited substance cases

Appeal and answer complete

CAS de novo review

CAS scope of review

Return to training

1. There is a distinction to be made between two forms of anti-doping rule violation. The first form is the presence of a prohibited substance in an athlete's sample; the second form is use by an athlete of a prohibited substance. Unlike the proof required to establish presence of a prohibited substance, use may also be established by other reliable means such as admissions by the athlete, witness statements, documentary evidence or other analytical information which does not otherwise satisfy all the requirements to establish presence. In a use of a prohibited substance case therefore, the absence of any adverse analytical finding does not prevent the adjudicating body from relying on any other reliable mean to establish the anti-doping rule violation.
2. The provision in Article R56 of the CAS Code purposively construed draws a distinction between reformulating an existing argument and advancing a new and distinctive argument. It is inherent in the forensic process that sometimes a party's argument is developed and at other times discarded. There is nothing unfair to the other party in such process and to restrict a party to advancing argument in the precise way in which it was pleaded would be inimical to a just disposition of the case.
3. The *de novo* appeal to CAS is a cornerstone in CAS's review of appeals, which is enunciated at Article 13.1.1 of the 2015 World Anti-Doping Code (WADC), and also complying with the obligation set forth in Article 23.2.2 of the 2015 WADC that the provisions of the WADC, subject to certain exceptions, must be implemented by the signatories of the WADC "*without substantive change*". The review is *de novo* even if the applicable national anti-doping regulations do not so provide, as national regulations that do not reflect the provisions of the WADC, in violation of a signatory's obligation to implement them "*without substantive change*", are inapplicable. The rationale underlying CAS's *de novo* review is that the issue to be determined (in a doping case) is not whether the appealed decision was justifiable, but whether an

athlete has committed an anti-doping violation. In short, and as is well established in CAS jurisprudence, the right of appeal to CAS by reason of Article R57 of the CAS Code necessarily carries with it subordination to the *de novo* principle irrespective of any purported restrictions in the regulations of the body from which such an appeal is brought, as is vouched for by Article 182 paragraphs 1 and 2 of Swiss Private International Law Act.

4. In reviewing a case in full, a CAS panel is of course limited to the issues arising from the challenged decision, and cannot go beyond the scope of the previous litigation. However, its scope of review is not limited to consideration of the evidence that was adduced before the body that issued the challenged decision. Rather, it can extend to all evidence submitted to the CAS panel.
5. A professional player needs to train with his/her team and keep his/her fitness in order to be prepared to play once his/her suspension expires. Without the ability to train, such suspension would have an even longer impact on the player's ability to exercise his/her profession.

I. INTRODUCTION

1. This is an appeal by the World Anti-Doping Agency ("WADA") against the decision of the Australian Football League Anti-Doping Tribunal ("AFL Tribunal") dated 31 March 2015 (the "Decision"), which dismissed the charges of breach of the AFL Anti-Doping Code brought by the Australian Sports Anti-Doping Authority ("ASADA") resulting from the alleged use, by means of injections, of Thymosin Beta-4 ("TB-4") against certain Australian Football League ("AFL") players (the "Players"), who played for the Essendon Football Club ("Essendon") in the AFL competition of 2012.

II. PARTIES

2. WADA is a Swiss private law foundation with its seat in Lausanne, Switzerland, and its headquarters in Montréal, Canada. It is an international independent organization created in 1999 to promote, coordinate and monitor the fight against doping in all its forms. It is the author of the World Anti-Doping Code ("WADC").
3. The Players are Thomas Bellchambers, Alex Browne, Jake Carlisle, Travis Colyer, Alwyn Davey, Luke Davis, Cory Dell'Olio, Ricky Dyson, Dustin Fletcher, Scott Gumbleton, Kyle Hardingham, Dyson Heppell, Michael Hibberd, David Hille, Heath Hocking, Cale Hooker, Ben Howlett, Michael Hurley, Leroy Jetta, Brendan Lee, Sam Lonergan, Nathan Lovett-Murray, Mark McVeigh, Jake Melksham, Angus Monfries, David Myers, Tayte Pears, Patrick Ryder, Henry Slattery, Brent Stanton, Ariel Steinberg, Jobe Watson, Stewart Crameri, and

Brent Prismall. Where appropriate, Mr. Cramer and Mr. Prismall will be referred to as “Cramer & Prismall” and the other Player Respondents will be referred to as the “32 Players”.

4. The AFL is the governing body of Australian Rules Football in Australia, and is responsible for controlling the rules of the game, including compliance with its anti-doping code.
5. ASADA is Australia’s national anti-doping organisation tasked with protecting sports integrity in Australia through the elimination of doping.

III. FACTUAL BACKGROUND

A. Background Facts

6. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
7. The Panel had before it all the material that was available to the AFL Tribunal (as well as additional material produced in writing or orally for the purposes of the appeal). The Panel gratefully acknowledges the benefit that it received from the AFL Tribunal’s clear and comprehensive exposition of the undisputed background facts, which in large part informs the following narrative.
8. Stephen Dank, while working at the Manly Warringah Sea Eagles (“Manly”) National Rugby League (“NRL”) club as director of physiology and sports science, met Dean Robinson, who worked as a consultant to that club between 2007 and 2008. Mr. Dank began working at Manly in 2004.
9. Mr. Robinson moved to the Geelong Football Club (“Geelong”) in 2007 as its high performance manager. He used the services of Mr. Dank while at Geelong.
10. Mr. Robinson then moved to the Gold Coast Football Club (commonly known as the Gold Coast Suns) on 1 October 2010 where he commenced work as a high performance manager. At about the same time, Mr. Dank began working with that club as a ‘sports science consultant’. That consultancy ended in 2011.
11. Around July/August 2011, Mr. Dank met Maged Sedrak, a compounding chemist in Kogarah, Sydney. Subsequent to their meeting, Mr. Sedrak began supplying peptides to Mr. Dank.
12. In August and September 2011, Mr. Dank – who had now left Gold Coast and was working with the Penrith Panthers (“Penrith”) – connected with Dr. Ijaz Khan and began treating a Penrith NRL player named Sandor Earl.

13. In early August 2011, Shane Charter, a biochemist, met Nima Alavi, a compounding chemist at the Como Compounding Pharmacy (“Como”), and discussed with Mr. Alavi the prospect of becoming the potential supplier of pharmacy products to Mr. Charter’s ‘Dr. Ageless’ business. It appears that Mr. Dank first came into contact with Mr. Charter around this same time (i.e. August 2011).
14. From August 2011, Mr. Alavi used Mr. Charter to source equipment from China for his pharmacy compounding business.
15. Mr. Robinson was appointed high performance coach at Essendon for the period 1 September 2011 until 31 October 2014. He was to report to Paul Hamilton, the general manager of football and James Hird, head coach.
16. Around this time, Mr. Robinson introduced Mr. Dank to Mr. Hird, sending Mr. Hird a paper co-authored by Mr. Dank promoting the effectiveness of the product Lactaway. Indeed, when applying for the job at Essendon, reference was made by Mr. Robinson’s agent to Mr. Dank’s expertise in “pharmacology/supplementation”.
17. On 29 August 2011, Mr. Robinson arranged for Mr. Dank to meet with Dr. Bruce Reid, the Essendon club doctor. Dr. Reid stated, when interviewed by investigators, that Mr. Robinson had insisted that Mr. Dank come with him. Mr. Robinson described Mr. Dank as a “*biochemist, a pharmacist, a nutritional expert ... the best in Australia*”. Mr. Dank arranged with Mr. Charter to send some boxes of B-dose forte injections to Dr. Reid.
18. On 28 September 2011, Mr. Dank was interviewed for the position of sports scientist at Essendon by Mr. Hird, Mr. Robinson, Mark Thompson (Essendon senior assistant coach) and Daniel Corcoran (then Essendon people and development manager). At the interview, Mr. Robinson recalled Mr. Dank saying that he would never cross the WADA Code by using illegal substances. After the meeting, Mr. Hird invited Mr. Robinson and Mr. Dank to his home to discuss what they were going to do to “*turn this club around*”. It was agreed that Mr. Dank was to introduce and run a supplements program complying with the WADA Code and the AFL Anti-Doping Code.
19. Subsequently, Mr. Dank’s offer of employment as sports scientist was confirmed, commencing on 1 November 2011. His responsibilities included “*the design of supplementation protocols and recovery procedures and their implementation*”.
20. In late 2011, Mr. Dank was referred to Mr. Alavi by Mr. Charter.
21. In November 2011, Mr. Dank introduced himself to Mr. Alavi and approached him about his business being the official pharmacy to supply Essendon. They developed a working relationship until about September 2013 when contact ceased.
22. By early January 2012, it was apparent that Essendon players were being given substances without the approval of Dr. Reid, who in consequence approached Mr. Hird. As a result, a meeting was convened in about the middle of January 2012 involving Mr. Dank, Mr.

Robinson, Mr. Thompson, Dr. Reid, Mr. Hird, and Mr. Hamilton. At the meeting, Mr. Dank and Mr. Robinson were asked about the unauthorised injection of players. It was decided, Mr. Hird stated, that no more supplements would be administered without the prior approval of Dr. Reid.

23. At the end of the meeting, Mr. Robinson was asked to re-affirm the supplementation protocols. He did so in an email of 15 January 2012. It set out matters that Mr. Dank had agreed with Dr. Reid, including the provision of informed consent by the players. In response, Mr. Hird confirmed his position on supplements that they must be legal, not harm the players, and that there must be player consent. Subject to these guidelines, Mr. Hird's position was: *"As long as we stick to those three guidelines and you and Steve think it will help us then let's go for it"*.
24. On 16 January 2012, concerns about supplements being offered were raised by players at a leadership meeting. Mr. McVeigh, one of the team leaders, raised concerns with the coach and others in early 2012 about the supplement program. The leadership group were Messrs. Watson, Hille and McVeigh.
25. On 17 January 2012, Dr. Reid wrote to Mr. Hird and Mr. Hamilton about players being given subcutaneous injections including AOD-9604. He pointed out his concerns as club doctor. After referring to a substance he stated:

"I think we are playing at the edge and this will read extremely badly in the press for our club and for the benefits and also for side effects that are not known in the long term. I have trouble with all these drugs".
26. On 30 January 2012, Mr. Hird exchanged text messages with Mr. Corcoran, who was overseas. Reference was made to lay people injecting players with Mr. Hird stating:

"Understand about the injecting and don't want to push the boundaries. Just need to make sure we are doing everything we can within the rules as the other clubs are a long way ahead of Reidy and us at the moment".

Mr. Hird had referred to *"Reidy ... stopping everything"*.
27. On 12 February 2012, the Essendon players attended a meeting at the club auditorium. The meeting was addressed by Mr. Hird, Mr. Robinson and Mr. Dank and related to the new supplement protocols. Either at the meeting or shortly thereafter, the vast majority of players signed 'patient information/informed consent' forms in which they consented to the administration of four substances including AOD-9604 and 'Thymosin' by way of injections. It was asserted in the form that the proposed treatment was WADA compliant. Dr. Reid was not present at that meeting.
28. Sometime prior to 12 March 2012, Mr. Charter introduced Mr. Dank to Sergio Del Vecchio, a businessman. They met and Mr. Dank spoke about peptides. Mr. Del Vecchio has stated that he questioned Mr. Dank about whether he was allowed to use peptides on professional athletes. Mr. Del Vecchio did his own investigations regarding whether peptides mentioned by Mr. Dank were banned and found that they were. He communicated this information to Mr. Dank.

29. The injection regime of Essendon players continued. For example, Mr. Dank informed Mr. Hird by text message on 12 April 2012: “*All IV and injections completed*”. On 19 April 2012, Mr. Dank texted Mr. Hird: “*This afternoon’s group went very well on hyperbaric. All injections completed for the week*”, to which Mr. Hird replied, “*Good news. Now let’s take it up to the Blues*”.
30. In May 2012, Mr. Dank and Mr. Alavi exchanged messages about setting up a business venture in Qatar. This was pursued by Mr. Dank who visited the Middle East but the venture did not come to fruition. Before the AFL Tribunal, Dr. Peter Fricker gave evidence about his contact with Mr. Dank in relation to this venture. At the time he met Mr. Dank, Dr. Fricker was working at the Aspire Zone Foundation as Chief Sports Medicine Advisor.
31. In mid-May 2012, a meeting occurred at Essendon between Mr. Hird, Dr. Reid, Mr. Thompson, Mr. Dank, and Jonah Oliver, a performance psychologist at Essendon. Mr. Dank was told to cease injections but there is no evidence any player was told to refuse any injections from Mr. Dank. The players in their interviews with ASADA accepted that injections continued, although not every player admitted to the receipt of the same number of injections.
32. By September 2012, Essendon self-reported its concerns over an alleged supplements program being used by its players to the AFL and ASADA. Commencing February 2013, ASADA conducted its investigation into the program and by 14 November 2014, ASADA issued infraction notices to the Players.
33. On 15 December 2014, the underlying proceedings against the Players commenced. It continued on a sporadic basis until 17 February 2015. On 31 March 2015, the Tribunal rendered the Decision finding that “*The Tribunal is not comfortably satisfied that any Player violated clause 11.2 of the AFL Anti-Doping Code*”.
34. It is from the Decision that WADA now appeals to the Court of Arbitration for Sport (the “CAS”).

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

35. On 8 May 2015, WADA filed its statement of appeal with the CAS against the Players in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the “Code”) with respect to the Decision. Within its statement of appeal, WADA nominated Mr. Romano Subiotto QC as arbitrator and moreover, sought a 45-day extension of time to file its appeal brief. In addition, WADA named both the AFL and ASADA as interested parties in accordance with Article R54 of the Code.
36. On 12 May 2015, the CAS Court Office notified WADA’s appeal to both the AFL and ASADA, and invited them to participate in this appeal in accordance with Article R41.3 of the Code.

37. On 22 and 26 May 2015, the AFL and ASADA, respectively, filed requests to intervene in this appeal in accordance with Article R41.3 of the Code.
38. On 27 May 2015, the CAS Court Office, upon the agreement of the parties, confirmed WADA's request for a 45-day extension of time to file its appeal brief.
39. On 28 May 2015, the CAS Court Office confirmed the Players' joint nomination of the Hon. James Spigelman AC QC as arbitrator in accordance with Article R53 of the Code.
40. On 1 June 2015, WADA confirmed its agreement that ASADA and AFL join this appeal. On that same day, the 32 Players confirmed their agreement that the AFL be permitted to join the proceedings, but objected to the participation of ASADA.
41. On 2 June 2015, Crameri & Prismall also confirmed their agreement that the AFL be permitted to join the proceedings, but took no position as to the involvement of ASADA.
42. On 9 June 2015, the President of the Appeals Arbitration Division granted the request for intervention filed by the AFL and ASADA, and therefore confirmed their participation in this appeal.
43. On 6 July 2015, the parties were advised on behalf of the President of the Appeals Arbitration Division that the Panel appointed to decide this case was as follows:

President: The Hon. Michael J. Beloff QC, Barrister in London, United Kingdom
Arbitrators: Mr. Romano Subiotto QC, Solicitor-Advocate in Brussels, Belgium and London, United Kingdom
The Hon. James Spigelman AC QC, Arbitrator in Sydney, Australia
44. On 8 July 2015, WADA filed its appeal brief in accordance with Article R51 of the Code.
45. On 8 July 2015, ASADA also confirmed that it endorsed and adopted the appeal brief and associated documents as filed by WADA as its answer in accordance with Article R55 of the Code.
46. On 28 July 2015, the AFL filed its answer in accordance with Article R55 of the Code.
47. On 31 July 2015, the 32 Players filed an initial objection to the content and jurisdiction/scope of WADA's appeal brief, including WADA's indication that it intended to seek further evidence to support its position in this appeal.
48. On 6 August 2015, WADA responded to the 32 Players' various objections to its appeal brief.
49. On 12 August 2015, the 32 Players submitted a reply to WADA's response.
50. On 14 August 2015, the Panel, upon consideration of the parties' written exchanges, directed the parties to exchange both expert and lay witness statements no later than 11 September 2015, following which the parties would be given an opportunity to file responsive reports.

The Panel also informed the parties that it would deal with any questions as to jurisdiction/scope of appeal or admissibility of evidence following receipt of the Players' answer, but suggested that, in the meantime, the parties consider certain CAS jurisprudence on the issues raised by the Players.

51. On 28 August 2015, the Players submitted a submission on jurisdiction and scope of the appeal.
52. On 2 and 3 September 2015, the AFL, WADA, and ASADA filed their responses to the Players' submissions on jurisdiction/scope of appeal.
53. On 9 September 2015, the 32 Players filed a reply in support of their submission on jurisdiction/scope of the appeal.
54. On 10 September 2015, the Panel issued its decision confirming that the appeal would be heard on a *de novo* basis in accordance with Article R57 of the Code. Additionally, the Panel reaffirmed that it had discretion, as set forth in Article R57 para. 3 of the Code, to exclude any new evidence if such evidence was available to the parties or could have reasonably been discovered by them before the challenged decision was rendered. The Panel informed the parties that the reasoning of such decision on jurisdiction and scope of appeal would be set forth in this final Award.
55. On 11 September 2015, the Players filed their answers in accordance with Article R55 of the Code.
56. On 11 September 2015, WADA also filed its Supplemental Submission Regarding Witnesses and Exhibits (the "Supplemental Submission"), which included expert reports and lay witness statements, as directed by the Panel in its 14 August 2015 letter to the parties. In the former category were the experts reports of Prof. David J. Handelsman dated 11 September 2015; Prof. Mario Thevis, dated 10 September 2015; Dr. James Cox (undated); and Mr. Steve Northey, dated 11 September 2015.
57. On 18 September 2015, the Players wrote to the CAS Court Office objecting *inter alia* to the accuracy and reliability of WADA's lay witness statements and questioned the admissibility of the proposed expert reports on the basis that such evidence relied upon was available or could have reasonable been relied upon by WADA before the Decision was rendered.
58. The 32 Players:
 - (i) further requested that ASADA be directed to produce the unredacted Doping Control Notification and Doping Control Test Forms for certain research urine samples identified in the expert report of Prof. Thevis and relied upon by WADA in its Supplemental Submission;
 - (ii) sought information about the relationship between WADA/Richard Young/Brent Rychener and/or ASADA said to bear on the hearing before the AFL Tribunal, as well as the admissibility of the WADA expert evidence before the Panel.

59. On 18 September 2015, under a separate letter, the Players further requested supporting information and data concerning the test for TB-4, which was recently devised by Prof. Thevis.
60. On 22 September 2015, in light of the Players' objections to WADA's Supplemental Submission, the Panel directed WADA to file a submission as to whether all or part of the evidence relied upon in its Supplemental Submission was available or could reasonably have been discovered before the Decision was rendered. The Players were then invited to respond by 2 October 2015, with WADA then having a right to reply on this admissibility issue by 9 October 2015. The Players were also invited to file any expert evidence no later than 23 October 2015.
61. On 23 September 2015, WADA, the AFL, and ASADA filed objections to the Players' request for the unredacted doping control forms concerning the research urine samples. Later that same day, WADA and ASADA filed their comments in response to the Players' objections concerning the accuracy, reliability, and admissibility of WADA's lay and expert witnesses and evidence. In addition, under separate cover, WADA submitted its responses to the Players request for information and data concerning the TB-4 test. WADA further supplemented its response in later letters dated 29 and 30 September 2015, and 6 October 2015.
62. On 28 September 2015, WADA filed its submission with respect to whether all or part of the evidence relied upon in its Supplemental Submission was available or could reasonably have been discovered before the Decision was rendered.
63. On 1 October 2015, the 32 Players filed their response to WADA's 28 September 2015 submission on the admissibility of its evidence. In addition, the 32 Players sought further information from WADA on the involvement of its counsel with ASADA, WADA, and the Cologne laboratory during the proceedings before the AFL Tribunal. Later, on 5 October 2015, the 32 Players, along with Cramer & Prisma, filed further submissions in response to WADA's submission on the admissibility of evidence contained in WADA's Supplemental Submission.
64. On 9 October 2015, the Panel, upon consideration of the parties' submissions, determined as follows: (1) the 32 Players request for further information concerning the interaction and role of WADA's counsel with ASADA, WADA, and the Cologne laboratory during the underlying proceedings was denied; (2) the witness statements/reports of interviews of Dean Robinson, Shane Charter, Nimi Alvia, Vincent Xu, and Stephen Dank were admitted to the file and if and insofar as WADA did not intend to call such persons at the hearing, the weight afforded to their evidence would be a matter for determination by the Panel; and (3) the Doping Control Notification and Doping Control Test Forms should remain redacted so as to preserve the confidentiality of the identity of any athlete not a party to this proceeding.
65. On 12 October 2015, the 32 Players requested further information and data from WADA concerning Prof. Thevis's TB-4 test.

66. On 12 October 2015, the Panel also instructed WADA to provide full and complete responses to the 32 Players' requests no later than 16 October 2015.
67. On 15 October 2015, the Panel informed the parties that it did not intend to explore any relationship between WADA/Richard Young/Brent Rychener and/or ASADA said to bear on the hearing before the AFL Tribunal.
68. On 16 October 2015, in response to the Panel's direction, WADA produced further information and data concerning Prof. Thevis's TB-4 test.
69. On 21 October 2015, the 32 Players filed a renewed request for additional documents and information from the Cologne laboratory.
70. On 23 October 2015, Crameri & Prismall filed expert reports from Dr. David Madigan, dated 18 October 2015, and Dr. Robyn Langham (undated).
71. On 23 October 2015, the 32 Players also filed expert reports from Prof. Brynn Hibbert, dated 19 October 2015, Prof. Richard Boyd, dated 23 October 2015; and Reports 2, 3, and 4 from Dr. John Vine, dated 23 October 2015 (Report 1 of Dr. Vine having already been tendered during the AFL Tribunal Hearing).
72. On 24 October 2015, WADA responded to the 32 Players' letter dated 21 October 2015 and addressed some of their inquiries. However, WADA objected to the production of certain diagnostic ion chromatograms, as well as to the standard operating procedure for the Cologne laboratory (the "SOP").
73. On 26 October 2015, the CAS Court Office, on behalf of the Panel, directed WADA to produce the remaining outstanding Cologne documents, as well as the SOP.
74. On 28 October 2015, WADA produced, on a confidential basis, a copy of the SOP, as well as its extension, for the detection of TB-4.
75. On 9 November 2015, WADA filed its Expert Reply Submissions.
76. On 9 November 2015, the parties filed skeleton arguments.
77. On 13 November 2015, WADA, Stewart & Crameri, and ASADA signed the Order of Procedure. The 32 Players and the AFL signed the Order of Procedure on 18 November 2015.
78. On 16 – 20 November 2015, a hearing was held at the CAS Oceania Offices in Sydney, Australia. The Panel was assisted by Mr. Brent J. Nowicki, Counsel to the CAS, as well as an *ad hoc* clerk, Mr. Alistair L. Oakes, Solicitor in Sydney, Australia, and joined by the following:

For WADA

- Mr. Richard Young
- Mr. Brent Rychener

For the 32 Players

- Mr. Anthony Hargreaves
- Mr. Neil Clelland QC
- Mr. Ben Ihle
- Mr. Brett Murphy

For Crameri & Prismall

- Mr. Patrick Gordon
- Mr. David Hallowes
- Mr. Sam Norton

For the AFL

- Mr. Simon Clarke
- Mr. Jeff Gleeson QC
- Ms. Renee Enbom
- Mr. Andrew Dillon
- Ms. Camille Davis
- Mr. Ali Gronow

For ASADA

- Ms. Elen Perdikogiannis
- Mr. Patrick Knowles
- Mr. Darren Mullaly
- Ms. Melissa Gangemi
- Mr. Aaron Walker

79. The following witnesses gave evidence before the Panel:

For WADA

- Prof. David Handelsman
- Dr. James Cox
- Prof. Mario Thevis
- Mr. Sergio Del Vecchio (by video)
- Dr. Bruce Reid (by video)
- Mr. Steve Northey

For the 32 Players

- Prof. Brynn Hibbert
- Prof. Richard Boyd
- Dr. John Vine

For Crameri & Prismall

- Dr. David Madigan (by video)
- Dr. Robyn Langham

80. The following Players also gave evidence before the Panel:

- Mr. Mark McVeigh
- Mr. David Hille
- Mr. Jobe Watson
- Mr. Cory Dell'Olio
- Mr. Scott Gumbleton (by video)
- Mr. Brent Prismall
- Mr. Ricky Dyson

81. At the start of the hearing, the Parties confirmed that they had no objection to the composition of the Panel. At the conclusion of the hearing, the Parties confirmed that their right to be heard had been fully respected.

V. SUBMISSIONS OF THE PARTIES

82. WADA's submissions, in essence, may be summarized as follows:

- In 2012, each of the Players used TB-4.
- The Panel can be comfortably satisfied of this fact because *inter alia*:
 - Mr. Dank has a history of use of TB-4 in athlete doping programs.
 - In the second half of 2011, Mr. Dank was employed by Essendon as a Sports Scientist.
 - Between about January 2012 and September 2012, Mr. Dank devised and implemented a team-wide program in which the Players received injections.
 - The cornerstone of Mr. Dank's supplementation program at Essendon was the administration of 'Thymosin' to improve players' recovery from intense workouts

and thereby allow them to become bigger and stronger. The ‘Thymosin’ referred to was TB-4 rather than any other form of Thymosin.

- Mr. Dank engaged Mr. Charter to source TB-4 from a Chinese peptides supplier called GL Biochem.
 - The order of TB-4 placed with GL Biochem was collected and delivered to Como, a company owned by Mr. Alavi. Mr. Alavi arranged for the TB-4 to be compounded and dispensed to Mr. Dank.
 - In early 2012, the Players attending a meeting with Mr. Dank at which they signed forms consenting to the administration of four substances, including a specific regimen of ‘Thymosin’ injections, which matched a prescribed regimen for TB-4 described in an email between Mr. Charter and Mr. Dank.
 - Each Player received subcutaneous injections administered by Mr. Dank during the period from January to September 2012. The majority of the Players stated they received injections once or week or every couple of weeks. At least six Players specifically recalled that Mr. Dank told them the injections they received were ‘Thymosin’ and two Players recalled seeing ‘Thymosin’ labels on vials in Mr. Dank’s fridge.
 - An analysis of urine samples collected from the Players in 2012 also confirmed that the Players were injected with TB-4.
- TB-4 is a prohibited substance, the use of which was in violation of Clause 11.2 of the applicable AFL Anti-Doping Code (1 January 2010) (the “2010 AFL Anti-Doping Code”)
 - The Players have therefore committed anti-doping rule violations.
 - As to sanction, the Players cannot show lack of significant fault or negligence in committing the anti-doping rule violations because, *inter alia*, they signed the consent forms to receive the prohibited substance, received the injections and failed to disclose the injections on doping control forms.

83. In its Appeal Brief, WADA made the following requests for relief:

“WADA requests the CAS Panel, pursuant to Article R57, issue a new decision finding that the evidence is sufficient to conclude each Respondent used a prohibited substance, Thymosin Beta-4, in violation of the AFL Code, and impose an appropriate sanction on each Respondent, with Respondents to bear the costs and other expenses related to the arbitration.

With respect to the appropriate sanction to be imposed on each Player, Clause 14.1 of the 2010 version of the AFL Anti-Doping Code provides for a two-year period of ineligibility for a first anti-doping rule violation. This period must be reduced by the period the Player served under provisional suspension, and can be further reduced in certain circumstances under Clause 14.4. The commencement date of a period of ineligibility is

contained in Clause 14.7, under which the period of ineligibility may be ordered to commence at an earlier date in certain circumstances”.

84. ASADA adopted WADA’s submissions. It accepted that it had advanced a submission before the AFL Tribunal based on an analysis of links in a chain (see further below) but no longer adhered to such analysis especially in the light of the new evidence that TB-4 was compounded at Como, which confirmed the irrelevance of the original source of the substance. It also defended its position as to any delays in the process of investigation and consequent proceedings relying on a written statement from Aaron Walker, an ASADA investigator.
85. The 32 Players’ submissions, in essence, may be summarized as follows:
- The Panel should, notwithstanding that this arbitration would be conducted on a *de novo* basis, give weight to the judgment of the experienced AFL Tribunal. The decision of the AFL Tribunal was open to it, on the grounds that it had not received proof of certain indispensable limbs of ASADA’s case to the level of comfortable satisfaction, and the Panel should reach the same conclusion on the same or similar grounds.
 - The evidence relied upon by WADA does not allow the Panel to be comfortably satisfied that:
 - TB-4 was actually sourced from GL Biochem;
 - TB-4 was actually compounded by Mr. Alavi;
 - The substance injected by Mr. Dank in his capacity as a sports scientist at the Essendon was actually TB-4 even if it purported to be so; or
 - Any substance obtained by Mr. Dank from Mr. Alavi purporting to be TB-4 was administered to any identified player on any particular occasion, each of which facts had to be proved before any player could be inculpated of the use of a prohibited substance,

because:

- In so far as WADA’s case is based on circumstantial evidence:
 - There are substantial evidentiary gaps in WADA’s case;
 - Most of the evidence that is relied upon by WADA is uncorroborated hearsay from Messrs. Xu, Charter, Alavi, and Dank;
 - Messrs. Charter, Alavi, and Dank are persons of doubtful creditworthiness;

- Material aspects of statements made to investigators and others by Messrs. Charter, Alavi, and Dank are inconsistent with other statements or with the objectively provable facts or are otherwise inherently improbable;
 - Certain documents upon which WADA relies are either incomplete, misconstrued and/or falsified and/or their provenance is uncertain;
 - Evidence of testing or analyses of any substances is incapable of proving that GL Biochem, in fact, supplied TB-4 to Mr. Charter, or that, even if it did, TB-4 was administered to the Players by Mr. Dank.
- In so far as WADA's case is based on the findings of the Cologne laboratory, it was insufficient to establish that any Player A was injected with TB-4.
- Therefore, the Panel cannot be satisfied to the requisite standard that any of the Players used TB-4 at any relevant time.
 - Even if (contrary to the Players' primary submissions) any of the Players did use TB-4 they should, as to sanction, not be made subject to any period of ineligibility substantially for the reasons advanced by the AFL (*infra*).
 - Accordingly, the 32 Players submit that the decision of the AFL Tribunal was correct and WADA's requests for relief ought not be acceded to (though they make no formal request in this regard).
86. The submissions of Crameri & Prismall adopted the submissions of the 32 Players but made discrete points based on circumstances particular to each in respect of the issues of use and sanction. Their request for relief, however, was as follows:
- "...the Tribunal should determine that it is NOT satisfied to the requisite standard that the players used a prohibited substance Thymosin Beta 4 during the relevant period".*
87. The AFL's submissions, in essence, may be summarized as follows:
- The standard of proof to be applied by the Panel is comfortable satisfaction bearing in mind the seriousness of the allegation which is made.
 - Having regard to that standard, it was open to the AFL Tribunal on the basis of the evidence before it to reach the decision that it did.
 - Should the Panel uphold the appeal, it should note the following matters germane to the appropriate sanction:
 - There is no suggestion that any Player intended to use a prohibited substance.

- If the Panel finds that any Player did use a prohibited substance, it was because he was the unwilling and unwitting victim of the gross negligence of others.
 - As such, each Player should receive a one year discount for no significant fault or negligence pursuant to clause 14.4(b) of the 2010 AFL Anti-Doping Code.
- Furthermore, taking into account:
- substantial delays in the AFL Tribunal hearing process;
 - credit for time served; and
 - the additional delay brought about by the appeal and clause 14.7 of the 2010 AFL Anti-Doping Code,
- the appropriate sanction is that no period of ineligibility be served.

88. Apart from its submissions regarding sanction, the AFL made no formal requests for relief. It acted throughout as if an *amicus curiae*.

VI. JURISDICTION

89. Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.

90. WADA submits that jurisdiction before the CAS is proper in accordance with Clause 20 of the AFL Anti-Doping Code (Amended 1 January 2015) (the “2015 AFL Anti-Doping Code”) and Article 13.2.3 of the WADC (effective 1 January 2015) (the “2015 WADC”). In the alternative, WADA submits that, to the extent its right to appeal is governed by a prior version of the AFL Anti-Doping Code, WADA would have the right to appeal in accordance with Clause 17 of the 2010 AFL Anti-Doping Code and Clause 17 of the 2014 AFL Anti-Doping.

91. The Panel notes that no party has objected to the jurisdiction of the CAS to hear this appeal or made special submissions as to whether the 2010, 2014, or the 2015 AFL Anti-Doping Code applies to this appeal. Since the issue of jurisdiction is procedural, the Panel considers that Clause 20 of the 2015 AFL Anti-Doping Code and Article 13.2.3 of the 2015 WADC accord CAS jurisdiction to hear this appeal as these versions were in full force and effect at the time of WADA’s appeal.

92. Therefore, the Panel considers that it has jurisdiction to hear this appeal. The Panel’s position is supported by the Order of Procedure, which was executed by the parties without objection.

VII. ADMISSIBILITY

93. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against...

94. Clause 20.4(b) of the 2015 AFL Anti-Doping Code provides:

(b) The filing deadline for an appeal or intervention filed by WADA shall be twenty-one (21) days after the last day on which any other party in the case could have appealed.

95. The Decision was issued on 31 March 2015. WADA submits that the Players, the AFL, and/or ASADA had until 21 April 2015 to file an appeal. Accordingly, WADA had until 12 May 2015 to file its own appeal. WADA filed its appeal on 8 May 2015 (i.e. within the deadline set forth in Clause 20.4(b) of the 2015 AFL Anti-Doping Code). Therefore, the Panel considers that this appeal is admissible.

VIII. APPLICABLE LAW

96. Article R58 of the Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

97. The Panel notes that, in accordance with the CAS jurisprudence and the principle of *tempus regit actum*, the substantive issues in this case are governed by the rules in effect at the time of the alleged anti-doping rule violation relied on by WADA, namely the 2010 AFL Anti-Doping Code and the WADC (effective 1 January 2009) (the “2009 WADC”), subject to the principle of *lex mitior* (see CAS 2000/A/274, paras. 72 *et seq.*; CAS 2008/A/1563, para. 56; CAS 2008/A/1545, para. 73).

98. The applicable regulations concerning the substance of this case are the 2010 rules of the AFL in force at the time of the alleged doping violation, which themselves are based on the 2009 WADC. The AFL is domiciled in Australia and, accordingly, Australian law applies to any substantive issue in the appeal which is not covered by the regulations, of which, however there is none. Insofar as the Panel is sitting in Sydney, nonetheless, it is deemed to be sitting in Lausanne and Swiss procedural law applies. None of these propositions is controversial and all are agreed upon by the parties.

IX. MERITS

A. Approach

99. Article 2 of the 2009 WADC distinguishes between two forms of anti-doping rule violation. The first form in Article 2.1 (replicated in the 2010 AFL Anti-Doping Code, Clause 11.1) upon which WADA does not rely is the presence of a prohibited substance in an athlete's sample. Under Article 2.1, an athlete can only be inculpated if a prohibited substance is found in the athlete's A sample and, unless the athlete waives analysis of the B sample, in the B sample as well.

100. The second form in Article 2.2 (replicated in the 2010 AFL Anti-Doping Code, Clause 11.2), upon which WADA does rely, is use by an athlete of a prohibited substance. Under Article 2.2.1: "*It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or Prohibited Method*". Article 2.2.2 provides: "*The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed*".

101. The commentary to the WADC (which is an admissible aid to its interpretation, *see* Article 23.2.2) provides:

It has always been the case that Use ... of a Prohibited Substance ... may be established by any reliable means. As noted in the Comment to Article 3.2 (Methods of Establishing Facts and Presumptions), unlike the proof required to establish an anti-doping rule violation under Article 2.1. Use ... may also be established by other reliable means such as admissions by the Athlete, witness statements, documentary evidence ... or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1.

(emphasis added).

102. The difference between the two types of violation and the evidence needed to prove each is well exemplified by the case CAS 2004/O/645 where the former world record holder for the 100m ("M.") was found to have violated the provisions of IAAF Anti-Doping Rule 55.2, which distinguished, as does the 2009 WADC and the 2010 AFL Anti-Doping Code, between presence and use cases. M. was not charged with a presence case – he did not test positive in any in- or out-of-competition test. USADA identified no less than seven types of evidence said to inculpate M. The Panel's decision, adverse to him, was reached on the basis of one only – the admission made by M. to another athlete that he had taken a prohibited substance, although the Panel expressly said that this omission to consider the other six types "*is not to be taken as an indication that such other evidence could not demonstrate that the Respondent is guilty of doping*" (para. 45). It also said expressly:

Doping offences can be proved by a variety of means and this is nowhere more true than that "in non-analytical positive" cases such as the present (ditto).

103. M. was not, of course, able to identify, in the absence of any analysis, exactly what he had taken or whether it was indeed prohibited. This did not, however, prevent the Panel from relying exclusively upon his admission. This – as well as the distinction drawn between a presence case and a use case in the 2009 WADC and the 2010 AFL Anti-Doping Code – undermines the thrust of the Players’ submissions in opening that the inability to establish the content of the injection by scientific means was fatal to WADA’s case. Insofar as any submission on behalf of the Players suggested that the absence of such an adverse analytical finding was critical, it conflated and confused a use case with a presence case.
104. The burden of proving such use by an athlete of a prohibited substance lies upon WADA. The standard of proof is comfortable satisfaction, a term of art, in so far as deployed in sports law derived from the decision of a CAS *ad hoc* panel at the Atlanta Games in 1996, at a time when the WADC did not exist, and is being regularly applied by CAS panels since then (see CAS 2009/A/1912). Article 3.1 of the 2009 WADC (and Clause 15.1 of the 2010 AFL Anti-Doping Code) provides: “*This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt*”.
105. The Panel does not accept that:
- (i) there is no material difference between proof beyond a reasonable doubt and proof of comfortable satisfaction. The dictum in CAS 2004/O/645 relied upon by the AFL was manifestly and expressly case specific. It referred to “*strong evidence*” commensurate with “*the serious claims it makes*” (para. 56) being “*participating in a wide-ranging doping conspiracy*” (para. 3); and
 - (ii) WADA is obliged to “*eliminate all possibilities*” which could point to the Players’ innocence. This would be inconsistent with the analysis in CAS 98/211, paras. 39-40.
106. WADA’s case has two pillars. The first, which was relied on by ASADA before the AFL Tribunal, was circumstantial evidence. The second, which was additionally relied on by WADA before the Panel, was analytical information.
107. In *Attorney General for Jersey v Edmond-O’Brien*, in a decision of the Privy Council (2006 1 WLR 1485), Lord Hoffman, said this in criticism of the Jersey Court of Appeal’s judgment, which the Board overturned (para. 25):
- Although they said that they had reviewed the evidence “separately and together”, there is little indication that they had regard to the cumulative weight of the various items of evidence, to each of which they had, sometimes not altogether plausibly, assigned a possible innocent explanation. It is in the nature of circumstantial evidence that single items of evidence may each be capable of an innocent explanation but, taken together, establish guilt beyond reasonable doubt.*
108. Although that statement was articulated in the context of a criminal case, in the Panel’s view, Lord Hoffmann’s reasoning applies, *mutatis mutandis*, to the situation where a Tribunal is mandated to have ‘comfortable satisfaction’ before it can inculcate a sportsperson of a disciplinary offence, *a fortiori* where certain pieces of evidence are themselves suspicious.

109. Wigmore in his classic treatise on the Law of Evidence distinguished between two analytical methods in an engineering metaphor: links in a chain and strands in a cable. ASADA, before the AFL Tribunal, relied exclusively on an analysis of links in a chain, which was accordingly reflected in the AFL Tribunal's approach and indeed was adhered to by WADA in the appendices to their appeal brief at paragraph 14 as follows:

14. That said, WADA accepts that there are certain "intermediate" facts which must [sic] be established to the standard of comfortable satisfaction in order for the infractions to be established. This is because these facts are part of the basis upon which the case against the Players rests. In this case, these elements of the case are that:

14.1 Thymosin Beta-4 was requested by Dank and procured on his behalf;

14.2 Thymosin Beta-4 was obtained by Mr. Alavi, compounded, and provided to Mr. Dank; and

14.3 Mr. Dank administered Thymosin Beta-4 to the players; and

14.4 Thymosin Beta-4 is a prohibited substance.

110. By the time of the hearing (as foreshadowed in their skeleton argument), WADA preferred the strands in a cable analysis. For their part, in their opening statement, the Players made no objection to this change of direction because their position was that the case against them, given its nature, could only be advanced on the basis of the links in a chain analysis, and that, on such basis, the appeal was destined to fail. However, in their closing statement, the 32 Players drew attention to Article R56 of the Code, which provides *inter alia* "[u]nless ... the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument ... after the submission of the appeal brief and of the answer". The Players contended that WADA should not be permitted to change its argument in this way.
111. The Panel considers that the provision in Article R56 of the Code purposively construed draws a distinction between reformulating an existing argument and advancing a new and distinctive argument. It is inherent in the forensic process that sometimes a party's argument is developed and at other times discarded. There is nothing unfair to the other party in such process and to restrict a party to advancing argument in the precise way in which it was pleaded would be inimical to a just disposition of the case. On analysis, WADA's argument remained the same from start to finish: it did no more than present the same arguments in a different way. The authoritative commentary on the Code by REEB/MAVROMATI states, "*From the very wording of Article R56 one can infer that parties may supplement their evidence or submit further evidence or submissions*" (p. 496).
112. The Panel, therefore, rejects the 32 Players submission on this point because (1) it was unsound; (2) since such submission was inconsistent with its own initial position and raised only after WADA had all but closed its case, they were estopped from advancing it; and (3) in any event, no analytical method can constrain the Panel's ability to review a case *de novo*, based on all the evidence available before it.

113. Yet further analogies (jigsaws; Danish arthouse films) were thrown into the forensic mix. However, metaphor is ultimately no substitute, in the Panel's view, for evaluating all relevant and credible items of evidence and asking itself whether, considered cumulatively, they satisfied the test of comfortable satisfaction.
114. The Players also contended that weight should be given to the AFL Tribunal's decision because of the distinction of the Tribunal's members. They contended that under the 2010 AFL Anti-Doping Code, applicable at the time of the alleged infractions, an appeal was restricted and could not be a hearing *de novo*. The Panel observes that the contractual undertaking of each Player encompassed changes to the AFL rules. Accordingly, the 2015 AFL Anti-Doping Code applies to the procedural aspects of this appeal. Clause 20.1 thereof, which has no equivalent in the 2010 AFL Anti-Doping Code, provides that an appeal to CAS under the AFL Code is *de novo*, thereby implementing a cornerstone in CAS's review of appeals, which is enunciated at Article 13.1.1 of the 2015 WADC, and also complying with the obligation set forth in Article 23.2.2 of the 2015 WADC that the provisions of the WADC, subject to certain exceptions, must be implemented by the signatories of the WADC "*without substantive change*". For the avoidance of doubt, the Panel notes that the review would be *de novo* even if the applicable AFL Anti-Doping Code did not so provide because CAS has held that national regulations that do not reflect the provisions of the WADC, in violation of a signatory's obligation to implement them "*without substantive change*", are inapplicable (see CAS 2011/A/2658, paras. 8.34-8.41). The rationale underlying CAS's *de novo* review is that, as was stated in CAS 2008/A/1528 and CAS 2008/A/1546, the issue to be determined (in a doping case) is not whether the appealed decision was justifiable, but whether an athlete has committed an anti-doping violation. As was stated in CAS 2007/A/1396 & 1402, para. 4.9, "*It is the duty of a Panel to make an independent determination and not limit itself to assessing the correctness of the appeal decision*". In short, and as is well established in CAS jurisprudence, the right of appeal to CAS by reason of Article R57 of the Code necessarily carries with it subordination to the *de novo* principle irrespective of any purported restrictions in the regulations of the body from which such an appeal is brought (see e.g., CAS 2008/A/1564, para. 79), as is vouched for by Article 182 paragraphs 1 and 2 of Swiss PILA (see generally REEB/MAVROMATI, *op. cit.*, pp. 505-508). For completeness, the Panel adds that, in reviewing the case in full, a Panel is of course limited to the issues arising from the challenged decision, and cannot go beyond the scope of the previous litigation (see e.g., CAS 2007/A/1396 & 1402), but its scope of review is not limited to consideration of the evidence that was adduced before the body that issued the challenged decision. Rather, it can extend to all evidence submitted to the Panel (see CAS 2009/A/1817 & 1844, para. 121).
115. It follows inexorably that this Panel is not obliged to follow the AFL Tribunal's reasoning although it is, of course, free to adopt it if it were found to be persuasive. In this particular appeal, both because of (1) the reformulation of the prosecution's case as a strands, not a links case; (2) the fact that the Tribunal, having found the first two links –TB4 procured for Dank and TB4 compounded for Dank – insufficiently proven, did not even consider the third link –TB4 administered by Dank to the players – which has been the Panel's preferred starting point; and (3) the introduction of analytical evidence which was not provided below, the Panel could derive, other than from its summary of the uncontroversial facts, limited benefit from the careful and elaborate judgment of the AFL Tribunal.

116. It was also argued on behalf of the Players that the Panel should not admit the scientific evidence on the basis that it was or could have been available to ASADA below. Article R57 of the Code allows the Panel to decline to admit otherwise relevant evidence on those grounds. However, it should be noted that WADA was not a party to the proceedings below. More importantly, an exception to the admissibility of otherwise relevant evidence should in principle be narrowly construed. As was said in REEB/MAVROMATI, *op. cit.*, “*The rationale of Article R57 paragraph 3 is to avoid evidence submitted in an abusive way and/or retained by the parties in bad faith in order to bring it for the first time before CAS*” (p. 520). The Panel could detect no abuse or bad faith on WADA’s part. Indeed, since WADA had not been a party to the hearing before the AFL Tribunal, it had itself no opportunity to advance any evidence until the occasion of the present hearing. Moreover, the Panel considers that presumptively it itself should have access to all relevant evidence in order that the decision it reaches should be soundly based and reflect the justice of the case, since, as stated, the heart of a CAS appeal is whether an athlete has committed an anti-doping violation (see para. 114 above). No unfairness to the Players’ results since they had adequate time to respond to the scientific evidence and indeed did so with a range of expert evidence of their own.
117. It was powerfully argued for the 32 Players that given WADA’s failure to accede to the Players’ requests to produce key witnesses such as (1) Mr. Xu, the biochemist who allegedly sold the TB-4 to Mr. Charter; (2) Mr. Charter himself, who was alleged to have purchased the TB-4; (3) Mr. Alavi, who was alleged to have compounded it; and (4) Mr. Dank, who was alleged to have administered it to the Players, deprived the Players of the opportunity of testing their evidence in the usual way by cross-examination and the Panel of the opportunity to observe their demeanour. Therefore, little if any weight should be given to their testimony in so far as adverse to the Players. It was not, however, submitted that in point of law the Panel could not admit hearsay evidence and it was accepted that WADA could not compel such persons to attend the hearing and had not been able to persuade them to attend the hearing before the AFL Tribunal. The Panel noted that WADA argued that it could also have been disabled by those persons’ absence insofar as WADA’s case relied on their testimony, since in written form it lacked the impact that oral evidence might have had.
118. Setting on one side for present purposes the scientific evidence said to support WADA’s case that the Players used TB-4, a prohibited substance, the Panel recognizes the force of the Players’ arguments summarised in the preceding paragraphs. The Panel therefore approached the evidence of WADA’s witnesses, especially those who were tainted with criminality, with appropriate caution, where their statements were self-serving as distinct from admissions against interest and, in its analysis of the factual basis for the infraction notices served on the Players, placed greater weight on material evidence, including electronic communications, contemporary to the events to which they related. However, the Panel was not prepared to rule out any consideration of the hearsay evidence.
119. The Panel also accepts that, although the charges relate to the Players as members of a team, each Player is entitled to individual consideration of his case, while noting that it does not follow that any evidence relied upon might not apply to all of them. It was an odd feature of the case that – it may be for perceptible tactical reasons – no party actually sought to call any of the Players to give oral testimony, and those who in the event did appear did so on the

initiative of the Panel. However, their statements to ASADA were all made available to and considered by the Panel. Separate reference is made to specific Players when required to explain the Panel's general reasoning on liability and sanction. An omission to refer to the cases of others not so specified should not be taken as indicating an omission to consider those cases, but only as indicating that no separate conclusion was required in relation to them.

B. The Strands in the Cable

120. The Panel identified the following strands in the cable supporting WADA's case:

- (i) The Australian Administrative Appeals Tribunal in a decision dated 31 December 2014 (*Earl and Anti-Doping Rule Violation Panel and Chief Executive Officer, Australian Sports Anti-Doping Authority (Joined Party)*) [2014] AATA 968), found expressly that Mr. Dank, before he joined Essendon, had used TB-4 on a Mr. Earl. As that Tribunal concluded (at para. 106): *"Thymosin alpha is not a prohibited substance, being used ... as an immune system stimulant, but Thymosin Beta 4 is, because of its regenerative capacity. Even though the applicant [i.e. Mr. Earl] said he was unsure about the identity of the product, Dr. Khan was sure it was Beta-4 – he was just unsure whether it had actually been used. On the other hand, the applicant said he had "definitely" used a form of Thymosin. Given that Mr. Dank's text message referred to the product as being "so effective in soft tissue maintenance", it is implausible that the applicant was being administered Thymosin alpha. The likelihood is the substance being used by the Applicant was Thymosin Beta 4"*. The Panel respectfully endorses that analysis and conclusion, while acknowledging that the decision is under appeal.
- (ii) Prior to his employment with Essendon, Mr. Dank discussed 'Thymosin' with Mr. Robinson. On 2 August 2011, Mr. Dank, in a text message to Mr. Robinson, referred to his use of 'Thymosin' for Mr. Earl, adding, *"Thymosin is so effective in soft tissue maintenance"*. On 23 August 2011, Mr. Dank texted Mr. Robinson: *"Don't forget how important Thymosin is. This is going to be a vital cornerstone next year. It is the ultimate assembly regulatory protein and biological modifier"*. Mr. Charter, in a supplementary statement to ASADA dated 26 July 2013, said that on or about 13 September 2011, Mr. Dank told him that he needed TB-4. This statement was corroborated by a contemporaneous note of that conversation. On 9 November 2011, Mr. Dank texted Mr. Alavi, asking for *"Thymosin. 2mg/ml"* (and also asking for another prohibited substance).
- (iii) All Players had blood tests before the administration of the injections commenced, an exercise recommended for peptides like TB-4, and for which no purpose other than a "sinister" one (the epithet of Dr. de Morton, a former club doctor) could be identified. The tests were carried out by Dr. Khan, the very same doctor who had participated in the therapy administered to Mr. Earl.
- (iv) All Players admitted to receiving injections by Mr. Dank.
- (v) All Players signed a consent form for the injection of 'Thymosin'.
- (vi) The consent forms said, *inter alia*:

Nature of the Recommended Intervention: Thymosin Injection - .5ml – 3,000 mg per ml.

The recommendation for the following intervention for you:

1 Thymosin injection once a week for six weeks and then 1 injection per month.

...

The intervention is recommended because enhance the rate of recovery [sic]. The benefits of this treatment are an expected reduction of time required for performance recovery.

All components of the intervention/s are in compliance with current WADA anti-doping policy and guidelines ...

- (vii) In the 32 ASADA interviews, six Players said that Mr. Dank had identified what he was injecting as ‘Thymosin’.
- (viii) Two Players, including Mr. Cramer, saw the word ‘Thymosin’ on the vials which contained the substance with which they were injected.
- (ix) TB-4 is accepted to aid recovery and repair tissue (whereas Thymosin Alpha is used to boost immune system).
- (x) Mr. Dank’s job with Essendon and his reputation as a ‘sports guru’ depended upon improvement in the team’s results. It would have been inconsistent for him to seek to access TB-4 but then use it entirely for other purposes. On 9 March 2012, Mr. Dank sent a text message to Mr. Hird saying, “*I.V. start next week. And Thymosin with Ubiquinone. We will start to see some real effects*”.
- (xi) In 2011, Mr. Del Vecchio, who was involved in a business called Australian Medical Solutions, which was considering the purchase of Mr. Charter’s “Doctor Ageless” company, had a conversation with Mr. Dank in which Mr. Dank said he was giving the Essendon players peptides and Mr. Del Vecchio advised him that they were prohibited.
- (xii) In an interview with Mr. Nick McKenzie of *The Age* newspaper in April 2013, Mr. Dank admitted the use of TB-4 on the Players, although he sought to retract sometime thereafter once it had been pointed out to him that TB-4 was a prohibited substance.
- (xiii) Mr. Dank had been anxious from the start to divert attention away from the substances he was proposing to use and to downplay their true nature. In a text message exchange on 4 October 2011, Mr. Dank discussed with Mr. Robinson the use of peptides including (expressly) ‘Thymosin’. He said, “*GLBC and Thymosin are just peptides. No worries there*”. Mr. Robinson said, “*Can we just call them amino acids? or something of the kind?*” Mr. Dank responded, “*Yes. That is all they are. An amino acid blend*”, adding that they should “*leave peptides out*” in the description of what was being used.

- (xiv) The closed circle of officials within the club privy to Mr. Dank's regime were careful to ensure that even the club doctor was not made aware of it. It was surely by design, not through accident, that the regime was not disclosed outside the closed circle during the season. In the letter dated 17 January 2012 to the Essendon coach and Essendon football manager, referred to at paragraph 25 above, Dr. Reid said:

"I have some fundamental problems being the club doctor at present.

This particularly applies to the administration of supplements.

Although we have been using supplements for approximately three months, despite repeated requests as to exactly what we are giving our players in literature related to this I have at no time been given that until last Sunday.

Last week the players were given subcutaneous injections not by myself and I had no idea that this was happening and also the drug that was involved".

The letter makes no reference to Thymosin but says in relation to AOD-9604, *"I think we are playing at the edge"*.

On 15 January 2012, Dr. Reid framed his protocol to the effect that any substance administered must be proven to be legal, safe, explained to the players and in receipt of their informed consent.

The Panel were not prepared to accept that, because Dr. Reid was privy to the player Mr. Lovett-Murray to being injected with muscle relaxant by another professional practitioner, Dr. Hartmann, doubt should be cast upon his ignorance of the injections of Thymosin by Mr. Dank. That was a submission too far. Nor can the Panel construe the letter of complaint written by Dr. Reid to the head coach and team manager on 17 January 2012 as indicative in any way of a knowledge (even then) that Dr. Reid knew about the injections, still less thereafter when he clearly did not, in particular about injections with Thymosin.

- (xv) The Players, during the season, were instructed to keep it secret. One of the Players, Mr. Davis, in his statement to ASADA said, *"they wanted to be confidential within the playing group, because they didn't want other teams to ... find out"*. In the same interview, Mr. Davis also said, *"I remember them saying that only a couple of the coaches were aware of what the supplement program was going to be"*. Though several of the players disputed that they received such instructions, their behaviour, keeping the club doctor out of the loop, and failing to record the injections on the doping control forms, clearly justifies such inference being drawn. This was, at its lowest, consistent with an appreciation of its controversial nature.
- (xvi) Several players insisted that Mr. Dank was not present at away matches until confronted with a text message exchange that proved he was. This also undermines their credibility.

121. There is a particularly illuminating sidelight on the degree of ignorance of Dr. Reid about the Dank program and indeed of the reticence of the Players to disclose it, not only to persons

outside the club, but to the club doctor himself. One of the Players to give evidence before the Panel suffered from cardiac arrhythmia. Dr. Reid appears to have been his personal doctor since 1999 when he referred such player to a Dr. A.C. Dortimer. Dr. Dortimer in a letter to Mr. Brett Murphy of the AFL Players Association dated 23 July 2013, wrote:

After discussing the matter with [Player], while I don't recall discussing any supplements with him he reminded me that he was advised to take some vitamin supplements and I believe I phoned Dr. Bruce Reid to check whether the vitamin supplements would react with the Flecainide that I had prescribed for [Player] for his cardiac arrhythmia.

122. Not only does it appear from that passage that Dr. Reid was still unaware of the injections program, but that the Player was himself only prepared to disclose he had been advised to take some vitamin supplements.
123. While concern was expressed as to whether a competitor club was outstripping Essendon in use of supplements and recovery modes, Mr. Dank also mentioned in a text message to Mr. Hird dated 11 April 2012 the need for a “free run from media and club” and that he was “especially worried about the Hanger [an AFL website] trying to get too close”. This supports the inference of the desire of those inside the club in the know from keeping what was being done secret from any outsider. No record was kept within Essendon; indeed, the absence of such record was the subject of forceful criticism by the AFL Tribunal and relied upon by it as a reason to find ASADA’s case to be insufficiently substantiated. However, the very fact that no record was kept is in the Panel’s view suggestive again of a desire to shroud the regime in a veil of secrecy.
124. While no Player who gave evidence before the Panel accepted that the substances administered by Mr. Dank had any beneficial effect, Essendon had conspicuous success at the start of the 2012 season, winning eight of the first nine games of the season before being destabilized by a series of injuries. While there could of course be many other factors for such team success, it could be argued on that basis that the proof of the substance was in the taking. While the Panel is content to treat this as a barely visible thread rather than a strand, the factor is at least not inconsistent with their overall conclusion.

C. All Players or Some?

125. It was next argued that, even if the Panel was entitled to conclude that Mr. Dank may have injected some of the Essendon players with TB-4, the evidence of use of Thymosin by any particular Player was not established. Indeed, the AFL did not shrink from suggesting that for that reason the Panel might be obliged to reject the appeal in its entirety.
126. The Panel rejects the argument. It is obvious that Mr. Dank’s regime was not designed or marketed for any particular player; it was designed and marketed for the whole team and Thymosin was touted as the jewel in the crown of the regime (see Mr. Dank’s text message to Mr. Robinson of 28 August 2011 quoted in para. 120(ii)). No such encomium was written in respect of other aspects of the regime such as AOD, which the Panel accepts some Players at least may also have administered. There is every reason to conclude that, given the purpose of the injection of Thymosin was to heal damaged tissue and to speed recovery, Mr. Dank

would have applied it to any particular player, fit or injured, as long as playing in the first team or reserves or even simply undergoing the heavy training to which everyone testified, since all would be seen as its beneficiaries. For Mr. Dank to have arbitrarily omitted to give any player injection of Thymosin would have made no sense. His own reputation and future were at stake; he would not have abandoned what he thought (rightly or wrongly) was the most potent element in his regime. He may have been a rogue but there is no evidence that he was a fool. In a text message on 12 April 2012, Mr. Dank told Mr. Hird, “*all ... injections completed*”, and a week later on 19 April 2012 wrote, “*all injections completed for the week*”. This supports the inference that this was a program in operation for all the players certainly in the early part of the season. It was Mr. Hille’s understanding that all Players were in the same supplementation program even if the dosage might be altered for particular Players. It is interesting that the recommendation for use of Thymosin in the consent form is said to be based on Mr. Dank’s knowledge of the Players’ medical and physiological history and is the intervention that “*best suits [the Players] needs*”. There is no evidence that would justify that statement.

127. It was suggested that Mr. Dank’s *modus operandi* was haphazard and the Panel is prepared to accept that not all of the Players appear to have received the same number of injections of the same substance at the same time. However, there is much contemporary evidence that Mr. Dank kept tabs on the Players to ensure that they did not miss their dose.

On 20 April 2012 Mr. Melksham sent a text message to Mr. Dank asking, “*Do I need to have a drip? Haven’t had one this week*”. Mr. Dank replied, “*No. Did I inject you this week?*” Mr. Melksham said, “*Two thymols*”.

On the same date, Mr. Dank sent a text message to Mr. Lonergan, another player, asking, “*Have I given you anything this week?*” Mr. Lonergan replied, “*... Had recovery jab two days ago*”.

On 19 July 2012 Mr. Dank sent a text message to Mr. Hardingham, another player, stating, “*You forgot your Thymosin*”. Mr. Hardingham replied, “*Na, I came in and got one with Dyso*”, and Mr. Dank responded, “*Sorry, mate. I hadn’t marked you off. My mistake*”.

On 4 July 2012 Mr. Dank told Mr. Watson that he had forgotten his shot and Mr. Watson responded, “*we’ll do it tomorrow*”, but according to Mr. Watson, he did not. Mr. Watson’s explanation as to why, if he had lost faith in the program, he did not simply say that he did not intend to receive further injections, was that it was easier to just to say “*yeah, okay*”, was not wholly convincing, but, without prejudice to that and more importantly, the interchange illustrates that Mr. Dank was concerned to ensure that, if possible, the Players kept to the program, and that in any event up to well into the season (which ran from March to September), Mr. Watson was still receiving injections.

128. On 5 August 2012, Mr. Dank sent a text message to Mr. Alavi asking for “*some help with this football team*” and expressed concern about the number of soft tissue injuries. He asked Mr. Alavi, “*Can the AOD and the Thymosin be mixed?*” Mr. Alavi referred to “*a new polymer which will provide a slow release system, while repairing damaged cell walls*”. Mr. Alavi added that, “*It’s amazing and being used in the USA for elite horse-racing [sic]. I can even put the thymosin and AOD in it*”. From the balance of the conversation, it appeared that there had been virtually no experiment on

humans with the new substance, so Mr. Dank said, “*Let us test a couple of players*”. This interchange suggests that “the” Thymosin was an established part of the program, to which Mr. Dank wished to add new elements, but without any detailed research into its properties.

129. The Panel notes that the Players’ interviews with ASADA and the evidence that those who were called gave to the Panel, if taken at face value, did suggest that Mr. Dank was patchy in his commitment to the program. However, the Panel is disinclined to accept their statements as undermining the Panel’s comfortable satisfaction that all the Players, on at least one occasion, were injected with TB-4 (which is all that is required to allow WADA’s appeal) for a number of reasons:
- (i) the Players kept themselves no record;
 - (ii) by the time they came to be interviewed by ASADA in May-July 2013, and asked for the first time to recollect events which occurred several months after the end of the season, their recollection could not have been precise;
 - (iii) in their interviews, the Players indeed accepted an inability to be exact about the number or timing of injections. Their statements were replete with qualification;
 - (iv) the same was apparent in the evidence that the Players gave at the hearing. The imperfections in the Players’ recollection of how frequently they had injections is illustrated, amongst other matters, by Mr. Dell’Olio’s reference to his receipt of more than one injection in a week as occurring “*one time*”, “*a couple of times*” and “*a few times*” in the same sequence of his oral testimony;
 - (v) in the interviews, the ASADA interviewer made clear to each interviewee that he was being asked questions in connection with a potential anti-doping violation;
 - (vi) more particularly, certain media outlets had already reported that ASADA’s investigation was into alleged use of TB-4, a prohibited substance. In a broadcast dated 2 May 2013 by the Australian Broadcasting Corporation (which preceded any interview), the reporter stated, “*it is not clear from the text which form of Thymosin was used but at least one form Thymosin-Beta 4 is currently banned by ASADA*”. Mr. Hille accepted that, at the time of his interview, there had been media reporting about substances that might have been used by the Players. Therefore, it would be quite unrealistic not to recognise that the Players were likely to have been appraised of the target of the investigation, either through having seen the relevant program itself or by discussing what it said with others. A natural tendency of Players in such circumstances, even if not able to predict with precision whether, and for use of what substances, infraction notices might be issued in due course would be, if not positively to mislead, at any rate, to be somewhat economical with the truth.
 - (vii) The complete failure of the vast majority of Players who had to fill in a doping control form (“DCF”) during the season to reveal the receipt of injections does not encourage

confidence in their statements as to the limited or sporadic nature of what they were injected with.

- (viii) Players such as Mr. McVeigh, who said that he was told he was receiving Melatonin did not, on his own vehement admission, experience any tanning effect from it, although that is one of its well-known properties. The Players after signature of their consent form did not know with what they were being injected and would never have been able to say what it was, other than from what they were told by Mr. Dank, who, once he had their consent, had no particular interest in giving them an accurate account.
130. As to Messrs. Cramer and Prissall, the Panel cannot identify any fact in their cases which would justify the conclusion that they were themselves not subjects of the Thymosin regime. The former was one of those who actually saw vials of Thymosin in the refrigerator in Mr. Dank's office where the injections were ordinarily administered to him and, although the latter only played in the second or reserve team on 21 and 28 July 2012, he accepted that he was training throughout. Furthermore, their injuries made them arguably even more suited to TB-4 treatment. There is, accordingly, no reason to believe why he should have been omitted from the programme.

D. TB-4 versus other Thymosin

131. The Panel is also comfortably satisfied that references to Thymosin in the documents (emails, consent forms or other) discussed above were reference to TB-4. It was common ground that TB-4 – the prohibited substance – is only one form of Thymosin, of which there are apparently more than 27 varieties, such as Thymosin Alpha, as well as TB-5 and TB-10 (the use of which by an athlete would also involve a violation of the WADC). Despite these varying forms of Thymosin, there is no evidence that what Mr. Dank injected into the Players was Thymosin Alpha or, indeed, any other form. Mr. Dank devised a program whose efficacy depended, *inter alia*, on the properties of TB-4. Therefore, the Players consensual use of 'Thymosin' in the context of Mr. Dank's program could have only been TB-4, as no other available form of Thymosin would have provided Mr. Dank's desired results.
132. Whether the TB-4 used by Mr. Dank could be traced to GL Biochem, discussed below, may be disputable. It is, however, indisputable that (1) GL Biochem marketed TB-4 and indicatively, in their price lists and order forms, distinguished between Thymosin and TB-4; and (2) TB-4 was, unlike other Thymosin products to which Dr. Vine referred (Thymosin Alpha apart), available on the market. The substance compounded at Bio21 by Ms. Vania Giordani was, in the clear view of the Panel, TB-4. The Panel was wholly convinced by the impressive evidence of Dr. Cox (which was not available to the AFL Tribunal) to that effect, including his illuminating observation that the other compounds tested at Bio21 corresponded in their molecular structure to what they purported to be. Dr. Cox had relevant and specific expertise. Dr. Vine in the end agreed with Dr. Cox for all practical purposes, since the difference between them was of a miniscule degree, i.e., 99% as distinct from 97% to 98% certainty that the substance compounded at Bio21 was TB-4. *De minimis non curat lex.*

E. The Missing Links?

133. WADA sought to trace and evidence the following sequence of events:
- (i) A visit by Mr. Charter in November 2011 to GL Biochem to source the peptides, including TB-4 received by Mr. Dank;
 - (ii) The placing of an order by Mr. Charter with GL Biochem for, *inter alia*, TB-4;
 - (iii) The collection by Mr. Charter's business associate Mr. Cedric Anthony of TB-4 from GL Biochem;
 - (iv) The delivery of TB-4 by Mr. Anthony to Mr. Alavi at Como;
 - (v) The compounding of TB-4 at Como from January 2012 onwards by Ms. Giordani, the laboratory technician at Como;
 - (vi) The receipt by Mr. Dank at Essendon of 26 vials of TB-4;
 - (vii) The receipt by Como in mid-February 2012 of a further delivery of peptides including TB-4;
 - (viii) The compounding of that further delivery at Como on 9 May 2012 by Ms. Giordani;
 - (ix) The receipt by Mr. Dank thereafter also in May of 15 vials of TB-4;
 - (x) The administration from January 2012 of the TB-4 by way of injection of Players.
134. Among the evidence upon which WADA relied was the following: (1) In a conversation with Mr. Walker (an ASADA investigator) on 5 November 2014, Mr. Xu of GL Biochem confirmed that Mr. Charter purchased a number of peptides including TB-4, but no other form of Thymosin; (2) on 29 December 2011, Mr. Charter asked Mr. Alavi whether he had received the peptides; (3) on 11 January 2012, Mr. Charter asked Mr. Dank what peptide he needed next, to which the response was TB-4, quantity being 20 times 5ml vials, being confirmed the next day; (4) there was further reference to the substance and the quantities required in emails between Mr. Charter and Mr. Alavi between 11 and 15 January 2012; (5) on 9 May 2012, Mr. Dank sent a text message to Mr. Alavi asking, "*Can you organise the Thymosin for the AOD study? I've now started the study*". Mr. Alavi responded, "*I'll let Vania [Giordani] know. She should have it ready for you in a couple of days. Also send me the info/brief on Qatar when you get the chance*"; (6) in a follow up text message the same day Mr. Dank said, "*Great. I think that the Qatad [sic] project will reach maximum production in theory. I will ring Vania this morning to get a time frame for Thymosin. I know she will have 15 vials to do so it will take some time*"; and (7) on 11 May 2012 Ms. Giordani emailed Mr. Dank, "*Just to let you know your 15 vials of thymosin are ready to pick up*".
135. It was WADA's case that there was "*reliable documentary evidence that Dank received at least the 26 vials of Thymosin in January and 15 more vials in May from Como*". It was also WADA's case that the Thymosin compounded at Como was sourced from GL Biochem. Mr. Alavi's email

- exchange in early 2012 with Eagle Services, to whom he sent peptides for testing, refers specifically to TB-4. It appears in the reply email from Eagle Services dated 24 January 2012 asking, “*Would you be able to enlighten us on what ... Thymosin B4 [is]?*”, to which he responded by providing a link to internet information exclusively referable to TB-4. Mr. Alavi’s peptide manual, which discusses all of the peptides that are manufactured at Como, was sent out to several AFL clubs and discusses the properties of TB-4 and not any other form of Thymosin.
136. The Players disputed that the Panel could be satisfied of any of these events. Recognising that the evidence of Dr. Cox might persuade the Panel that what was compounded at Como in May 2012 was TB-4 and not some other substance, they nonetheless contended that it was, in Mr. Clelland’s succinct phrase, of “*indeterminate source and indeterminate destination*”. They contended that the documents relied on by WADA (even when not inherently suspect like the *soi-disant* certificate of analysis of TB-4 said to have been produced by Mr. Anthony to Mr. Alavi) were not unambiguously objective evidence but required the very exposition by their authors, which was lacking. The AFL for its part was content to accept that there was sufficient evidence about the earlier links in the chain (i.e. GL Biochem) in relation to Mr. Charter and compounding of TB-4 by Como, but joined forces with the Players in concentrating on the last link highlighting the questions as to whether, even if Mr. Dank had vials in the refrigerator and injected the players with substances from those vials, the Panel could be comfortably satisfied given his eccentricities and worse, that he actually injected TB-4, as distinct from some other substances, although Mr. Gleeson accepted that “*[i]t’s difficult to resist the inference that he’s been giving it to some players*”.
137. The Players pointed also to contemporary evidence in emails to which Mr. Dank, Mr. Charter and Mr. Alavi were themselves party, that Mr. Dank was engaged in a promotion in Qatar of the value of TB-4 for horses and had his own anti-aging business.
138. WADA for its part disputed that there was a realistic possibility that the TB-4 compounded at Como was used either for the Qatar project or for Mr. Dank and the anti-aging business as distinct from his program at Essendon. Mr. Young for WADA in his closing submissions put it this way: “*So what you have is references to Qatar, you have references to Thymosin, you have the alternative universal something that is planned at Qatar but no evidence of injections, no evidence they used vials anywhere and you have the evidence of a Thymosin AOD study at Essendon, and you have the brown vials and the injections at Essendon*”.
139. The Panel does not find it necessary to resolve this issue. It accepts that there are arguments in favour of each hypothesis. In its view, were WADA’s analysis to be correct, it would do no more than add another strand to a cable which was already sufficiently strong.
140. The Panel is prepared to accept or assume that some of the TB-4 so compounded in Como was not only destined for but actually reached Qatar (although evidence on the latter point appears to be lacking). It is not, however, prepared to accept it is a necessary consequence that none of it reached Mr. Dank and was used at Essendon. There was at any rate a symmetry between the vials in which the substance was contained and those which some of the Players saw in the fridge at Essendon in Mr. Dank’s office. The Panel emphasises that given that (1)

TB-4 was available on the market; and (2) it was compounded in Australia, there is no reason to believe Mr. Dank would not have been able to source it from other outlets.

141. The arguments advanced on this point by the Players reflected their natural desire to treat the links in a chain analysis as indispensable, and then by breaking one of the links at least, to show that WADA's case must fail. If the strands in the cable analysis is (as the Panel considers) to be preferred, the force of the Players' argument evaporates. Precisely when, how and from whom Mr. Dank obtained TB-4 is not the real issue. The issue is whether there is sufficient evidence that he handled TB-4 and administered that substance to the Players. Of that, the Panel is satisfied for reasons already set out. Mr. Dank might have used the TB-4 compounded at Como for all or any of the three purposes canvassed on both sides, or he might have used TB-4 in the Essendon program from some entirely different source.
142. It is not an essential link (or indeed strand) in a case of a violation of Article 2.2 of the WADC that the source of the product used can be identified. It has never been so stated in any of the relevant case law, is not required on the face of the article itself or the commentary, and would be a significant bar to the fight against doping. The Panel recognises that much time was spent on issues relevant to a links in the chain analysis, both because the AFL Tribunal had approached it on that basis and because the Players' submissions invited the Panel to adhere to that as being the only appropriate analysis. In consequence, there is a risk that the Panel's focus would be misaligned – a risk, however, of which the Panel is conscious and of which it has sought scrupulously to avoid.
143. Although the Panel has not found it necessary to determine whether, as WADA contends, the substance Mr. Charter sourced from GL Biochem (Shanghai) Limited was indeed TB-4, the Panel sees no reason to determine that the Chinese company did not manufacture TB-4 even if the certificate of analysis, said to be copied from an original, was itself suspect. The Chinese company responsibly exacted a commitment from Mr. Charter (as the purchaser) that the TB-4 would be used for research purposes, and not administered to any human being without appropriate authorisation. The fact that it was in the event so used cannot be held against the Chinese company and the suggestion that the failure of Mr. Xu to provide evidence at the hearing, either before the AFL Tribunal or the Panel was indicative of GL Biochem's suspect business methods, seemed unrealistic given that the company could not be held responsible for the misuse of its products. The Panel also noted that the company was taken over by an American manufacturer who, presumably, would not have made such purchases unless confident of the quality of the company that it was purchasing.

F. The Science

144. The Panel also recognises that WADA, in order to avoid the Panel being unpersuaded (as was the AFL Tribunal), further built on the circumstantial evidence of its case. Especially when viewed through the lens of a links in a chain analysis, WADA felt compelled to buttress their case by scientific evidence, in particular that which might identify Player A's sample taken in the wake of the match of 14 July 2012 as being clearly indicative of the exogenous administration of TB-4. However, as was indeed accepted, such scientific evidence was not

necessary if the circumstantial evidence sufficed and, in any event, would have required an extrapolation from Player A's sample to the entirety of the Players.

145. WADA advanced the thesis that Prof. Thevis's analysis of the sample of Player A, especially when viewed in the context of the reference groups (i.e. the other Essendon players, 54 AFL Players of the 2012 season and a cohort of 122+ German sports university students) provided support for their proposition that the sample indicated use by Player A of TB-4. The Panel states without hesitation that it entirely accepts Prof. Thevis's evidence that the sample of Player A did contain TB-4. The Cologne laboratory has a deservedly high reputation and the challenge made by Prof. Boyd and Prof. Hibbert to the reach of its accreditation dissolved on their recognition that the method he used would certainly be validated, even if after the event. The issue, however, was whether the TB-4 was endogenous or exogenous.
146. The Players' medical experts, Dr. Langham, Prof. Boyd and Dr. Vine explained that there were alternative possibilities, i.e. enhanced TB-4 levels arising from strenuous physical exercise, various forms of physical injury, or injection of plasma platelets. This was outside Prof. Thevis's area of expertise and accordingly not contradicted by him.
147. The Players' statistical experts, Prof. Hibbert and Dr. Madigan, said that the elevated levels of TB-4 in Player A's sample were not unusual, using the reference groups as a source of comparison, but entirely consistent with the statistical expectation.
148. Prof. Handelsman for his part took up cudgels on behalf of WADA (as he had on behalf of ASADA before the AFL Tribunal) against both sets of experts. He contended that no adequate research had been done to justify any conclusion that the elevated levels of TB-4 in the Player A sample could have been caused by any of the other three possibilities proposed. He also contended that the elevated level was from a statistical perspective aberrant and suspicious. The Panel does not doubt Prof. Handelsman's expertise, but considers that his evidence was coloured by the view that he clearly holds an opinion (but for which there is no concrete evidence) that the use of prohibited substances was endemic in the AFL League during the relevant season.
149. The Panel's conclusion on this contest of experts is simple. None of the Players' experts, whether in the field of medicine or statistics, could rule out the possibility that TB-4 in Player A's sample was the product of exogenous administration. But that falls far short of an acceptance that such possibility could justify the Panel, being comfortably satisfied that it did, and Prof. Handelsman for his part could not rule out the possibility that the elevated levels of TB-4 in Player A's sample was endogenous.
150. Dispositively, although WADA placed reliance on the Cologne evidence in its supplementary appeal brief and indeed in its oral opening, prudently, by the time it advanced its case in closing submissions, it accepted that the Panel could not decide the case adverse to the Players on the basis of that new material. It was the common consensus of the experts on both sides that the research into the causes of elevated TB-4 in urine was premature – for example potentially relevant studies had been done on mice not men – and that the topic would, accordingly,

benefit from further research. Neither the statistics nor the science could, in the Panel's view, inculcate any of the Players.

151. For the above reasons:

- (i) the majority of the Panel is comfortably satisfied that all players violated Clause 11.2 of the 2010 AFL Anti-Doping Code and were significantly at fault in so doing; and
- (ii) one member of the Panel agrees with that conclusion save in the case of several players in respect of whom he is not comfortably satisfied that such use is made out.

G. The Sanction

152. Clause 14.1 of the 2010 AFL Anti-Doping Code, substantially reflecting the 2009 WADC Article 10.2, provides so far as material:

The period of Ineligibility imposed for a violation of ... Clause 11.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) ... shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Clauses 14.3 and 14.4 ... are met:

First violation: Two (2) years' Ineligibility

Clause 14.4(b) of the 2010 AFL Anti-Doping Code, substantially reflecting 2009 WADC Article 10.5.2 provides so far as material:

If a Player ... establishes an individual case that he ... bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility may be reduced...

The commentary on Clause 14.4(b) states:

... For purposes of assessing the Player's fault ... the evidence considered must be specific and relevant to explain the Player's ... departure from the expected standard of behaviour. Thus, for example, the fact that a Player would lose the opportunity to earn large sums of money during a period of ineligibility or the fact that the Player only has a short time left in his career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Clause.

153. In CAS 2013/A/3327, the CAS Panel laid down guidelines to assist stakeholders when considering the application of Article 10.4 of the WADC, but which, in so far as they identify the kind of matters to be considered in the context of an athlete's defence of diligence can be equally applied to Article 10.5 of the WADC as well. The Panel there said:

71. In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities.

72. *The Panel suggests that the objective element should be foremost in determining into which of the three relevant categories a particular case falls.*
73. *The subjective element can then be used to move a particular athlete up or down within that category.*
74. *Of course, in exceptional cases, it may be that the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether. That would be the exception to the rule, however.*

aa) The objective element of the level of fault

At the outset, it is important to recognise that, in theory, almost all anti-doping rule violations relating to the taking of a product containing a prohibited substance could be prevented. The athlete could always (i) read the label of the product used (or otherwise ascertain the ingredients), (ii) cross-check all the ingredients on the label with the list of prohibited substances, (iii) make an internet search of the product, (iv) ensure the product is reliably sourced and (v) consult appropriate experts in these matters and instruct them diligently before consuming the product.

75. *However, an athlete cannot be reasonably expected to follow all of the above steps in every and all circumstances. Instead, these steps can only be regarded as reasonable in certain circumstances:*
 - a. *For substances that are prohibited at all times (both in and out-of-competition), the above steps are appropriate, because these products are particularly likely to distort competition. This follows from Article 4.2.1 WADC which states: “The Prohibited List shall identify those Prohibited Substances and Prohibited Methods which are prohibited as doping at all time (both In-Competition and Out-of-Competition) because of their potential to enhance performance in future Competitions ...”. As a result, an athlete must be particularly diligent and, thus, the full scale of duty of care designed to prevent the athlete from ingesting these substances must apply.*

bb) The subjective element of the level of fault

76. *Whilst each case will turn on its own facts, the following examples of matters which can be taken into account in determining the level of subjective fault can be found in CAS jurisprudence (cf. also LA ROCHEFOUCAULD, CAS Jurisprudence related to the elimination or reduction of the period of ineligibility for specific substances, CAS Bulletin 2/2013, p. 18, 24 et seq.):*
 - a. *An athlete’s youth and/or inexperience (see CAS 2011/A/2493, para 42 et seq; CAS 2010/A/2107, para. 9.35 et seq.).*
 - b. *Language or environmental problems encountered by the athlete (see CAS 2012/A/2924, para 62).*
 - c. *The extent of anti-doping education received by the athlete (or the extent of anti-doping education which was reasonably accessible by the athlete) (see CAS 2012/A/2822, paras 8.21, 8.23).*
 - d. *Any other “personal impairments” such as those suffered by:*

- i. an athlete who has taken a certain product over a long period of time without incident. That person may not apply the objective standard of care which would be required or that he would apply if taking the product for the first time (see CAS 2011/A/2515, para 73).*
- ii. an athlete who has previously checked the product's ingredients.*
- iii. an athlete is suffering from a high degree of stress (CAS 2012/A/2756, para. 8.45 seq.).*
- in. an athlete whose level of awareness has been reduced by a careless but understandable mistake (CAS 2012/A/2756, para. 8.37).*

cc) Other factors

77. *Elements other than fault (such as CAS 2012/A/2924, para 62) should – in principle – not be taken into account since it would be contrary to the rules. Only in the event that the outcome would violate the principle of proportionality such that it would constitute a breach of public policy should a tribunal depart from the clear wording of the text.*

154. In CAS 2005/A/872, a CAS Panel said:

5.7 ... It has been said many times by many CAS panels that it is an athlete's responsibility to ensure that what goes into his body does not contain a prohibited substance... It is not open to an athlete simply to say "I took what I was given by my doctor who I trusted" ... At the very least, an athlete who has been given medicines by a doctor should specifically ask to be informed of what are the contents of those medicines. He should ask whether the medicines contain any prohibited substance. He should attempt to obtain written confirmation from the doctor that the medicines do not contain any prohibited substances.

5.8 It will no doubt be objected that to require an athlete to ask such questions and to obtain such confirmation would be to place too heavy a burden on the athlete. The Panel rejects such an objection. It rarely, if ever, is the case that medicines are given to an athlete in circumstances in which it would not be possible for him to ask such questions or to obtain such confirmation.

5.9 If an athlete wants to persuade an anti-doping tribunal, or a CAS Panel, that he has been found to have a prohibited substance in his body, but that he was not at fault or negligent, or that he was not substantially at fault or negligent, he must do more than simply rely on his doctor.

155. Looking at the matter through the lens of the CAS 2013/A/3327 guidelines the following features are notable:

- (i) The Players had all received education in anti-doping. It was common ground that the AFL anti-doping training for the Players included emphasis on individual responsibility for what supplements were used and an obligation to declare use of any supplements. A clear warning to that effect appeared on the cover of the 2010 AFL Anti-Doping Code. Mr. Hille, among others, conceded awareness of the AFL anti-doping education program.
- (ii) No Player appears to have made use of the WADA hotline or indeed any other hotline.

- (iii) No Player appear to have conducted internet searches for Thymosin or to have made any other inquiry as to its elements or properties.
 - (iv) No Player asked the Club doctor – the obvious first port of call – for advice about Thymosin, although all signed a consent form to its administration. Given that it is the primary responsibility of a Player to ensure that he does not make use of a prohibited substance, the Players’ lack of curiosity is fatal to the success of this particular plea. Nor is it relevant that a Player received only a handful of injections as distinct from multiple injections. The appropriate time to make enquiry was when the Player consented to submit to the regime of which he was *ex hypothesi* aware.
156. A number of matters were prayed in relief on behalf of the Players. AFL gave a lead in this aspect. It was said that:
- (i) all reasonably assumed that Dr. Reid had approved the program; hence all necessarily relied on his approval;
 - (ii) the consent form itself indicated that the substance to be injected was not prohibited;
 - (iii) particularly in a team environment, all could take additional comfort from the fact that senior officials of the club, including Mr. Hird, were aware of and approved the program;
 - (iv) in respect of certain players, notably Mr. Dell’Olio, his youth and inexperience could be prayed in aid; and
 - (v) the letter from the Chief Executive Officer of ASADA (dated 12 November 2014 and addressed to the AFL and WADA) which informed of his decision to recommend that the AFL issue infraction notices: “*based on the information that ASADA presently has, a maximum reduction of 50% of the applicable period of ineligibility (i.e. two years) for No Significant Fault or Negligence pursuant to clause 14.4(b) of the AFL Anti-Doping Code 2014 would be appropriate*”.
157. None of these pleas in mitigation come, in the Panel’s view, within measureable distance of providing a platform for the submission that ineligibility should be reduced on account of the display of due care.
158. As to:
- (i) reliance on the ill-founded assumption about the Club doctor’s knowledge of the Dank program: this was wholly inadequate, especially when the Player did not seek – easy though it would have been – to test the validity of the assumption, *a fortiori* if he declined even to inform the club doctor, let alone seek his advice. In the light of the consistent CAS jurisprudence (of which CAS 2005/A/872 is only an example) that reliance on a doctor does not *per se* prove absence of significant fault, it is difficult to conceive of how, where, as in this case even, that elementary step was not taken, such proof was available.

- (ii) the consent form, with its express identification of the substance to be injected, i.e. ‘Thymosin’: this should have been the trigger for enquiry rather than an excuse for not making it. Mr. Prismall did apparently ask Dr. Reid about the immuno-acids and vitamin injections he received prior to Christmas 2011. It was submitted that he had no reason to apprehend that he was signing a consent form for other than that which Dr. Reid had approved. The Panel does not accept that given the circumstances of the February 2012 meeting (e.g. references to specific substances including ‘Thymosin’, the procuring of a signature on consent forms, the elaborate explanation given by Mr. Dank and Mr. Robinson, the concerns already expressed by certain senior Players), he can reasonably have thought, as he claimed, that there was no new aspect to the regime or that it was simply more of the same.
 - (iii) reliance upon senior persons within the club who were not even medically qualified: this was even less impressive than reliance on the club doctor. The explanation falls short of an excuse (The present is not the case to explore whether the team environment can ever justify the failure to take steps obligatory for an athlete in an individual sport).
 - (iv) the fact that no player was a minor: although youth can be considered in the context of the relevant duty of care (see CAS 2013/A/3327), it only has resonance where athlete is an individual with no ready access to instruction about the anti-doping rules, which is not the position of any Player in this team environment.
 - (v) ASADA’s position: this was based on what ASADA knew at the time and cannot bind the Panel with its fuller appreciation of the material facts.
159. Under Clause 7.1 of the 2010 AFL Anti-Doping Code, Players are obliged to comply with that code. There are two particular aspects of that duty relevant to this appeal: first, to ensure that a Player did not use prohibited substance; second, that he should, whenever subject to a test, make full disclosure of any substance which he had used. In respect of TB-4, there was no evidence that any Player complied with either of these duties.
160. As to the first, to repeat, no Player made any enquiry of the nature or properties of the substance with which he was being injected, although all had signed a consent form for injection with ‘Thymosin’. All appeared to have relied upon the assurance of Mr. Dank and Mr. Robinson that they could use the substance without being in breach of AFL anti-doping rules or the WADC. None sought the advice of the club doctor about Thymosin, although he was to many a friend as well as a physician. All said that they assumed that Dr. Reid was aware of the content of the Dank program, although none could provide any specific basis for the assumption which was in fact wholly unfounded. Mr. McVeigh, after ASADA’s investigation had commenced, googled some of the substances which administration Mr. Dank had him consent to and agreed that had he done so earlier, he would have gone straight to Mr. Hird’s office or done something else about it.
161. As to the second, no Player tested during the 2012 season revealed on his doping control form that he was in receipt of Thymosin injections. The explanation of Mr. McVeigh that he had

ceased to have injections at the time he was tested and had, in consequence, to complete his doping control form was particular to his case. But the experience of others who continued to receive injections over the period during which they omitted to make such disclosure on the doping control form was revealing. Mr. McVeigh said that it was common for Players only to report what they had up to seven days or two weeks previously. Mr. Hille said in relation to the DCF, *“you list the things that you feel you need to list”*, and that he didn’t feel he needed to list the injections Mr. Dank gave him. He said, *“it was just something I didn’t think to list”*. Mr. Dell’Olio thought that the doping control form obliged him to refer only to supplements taken within the last three or four days; Mr. Dyson a period of one to two days. Given that, as was by the end of the hearing common ground, the TB-4 injections designed to aid recovery took place usually and for good and sufficient reason at the start of a week after the weekend game, such explanation had no basis in either the WADC or the rules, neither of which expressly set limits to the period in respect of which such use must be made. Such evidence appeared a calculated (but vain) attempt to justify the non-disclosures. Mr. Gumbleton, who never had to complete a DCF at any material time conceded that he would have disclosed injections had he been tested when in receipt of them. That was, in the Panels view, clearly right.

162. Furthermore, the Players accepted that they used to have a couple of supplements before a game and that the pill box provided by Mr. Dank was part of the program. Nonetheless few, if any, provided that information on the DCF. It is indicative of the casual approach (at its best) to the secretive (at its worst) approach of his duty of disclosure that Mr. Dell’Olio, although agreeing that prior to every game in which he played, he was given pills by Mr. Dank, failed to disclose even those on his doping control form.
163. Both these breaches, in the Panel’s view, sprang from a single source, namely a group decision by the Players on the direction of Mr. Dank and Mr. Robinson, to keep secret the nature his new regime.
164. WADA neither did, nor needed to, advance a case against the Players on the basis that they consciously submitted to injections of what they knew to be a prohibited substance and the Panel makes no such finding. Since the Players themselves have sought to rely on the no significant fault or negligence plea in mitigation of the standard two year period, the Panel is entitled, indeed obliged, to consider the basis on which they accepted subjection to the Dank drug regime. Mr. Dyson recollected either Mr. Robinson or Mr. Dank at the February 2012 meeting saying that it was like *“being on a cliff and going right to the end but not going over it”*. In the Panel’s view, however, the Players must have appreciated that the regime to which they were being asked to submit was, if not over the edge, at any rate near to it and being invited to go near the edge and, in the event, went over it. As the Panel has already observed, there would be no reason to cast a veil of secrecy over something that was known positively to be lawful and innocent. The equation that some Players sought to make between disclosure of team tactics and disclosure of the injection regime was not, in the Panel’s view, at all convincing. In a desire, not unique to these Players, to gain every competitive advantage available, they were insufficiently careful as to the nature of the regime to which they were subjected. By way of example, Mr. Prismall in his interview about the consent form said, *“I don’t recall who gave it to me, it was probably just sitting in a pile and I picked it up with the majority of other blokes”*.

165. Article 14.7(c) of the 2010 AFL Anti-Doping Code, substantially reflecting the 2009 WADC Article 10.9.3, provides:

If a Provisional Suspension is imposed and respected by the Player, then the Player shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed.

Article 14.7 of the 2010 AFL Anti-Doping Code, substantially reflecting the 2009 WADC Article 10.9, provides as far as material:

Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility ... Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility imposed.

Article 14.7(a) of the 2010 AFL Anti-Doping Code, substantially reflecting the 2009 WADC Article 10.9.1, provides as far as material:

Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Player ... the Tribunal determining the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another Anti-Doping Rule Violation last occurred.

166. Treating two years from the date of this Award as the presumptive position, we examine whether any of the three features identified above justify a reduction.

167. As to delay, ASADA advanced an erudite deconstruction of the WADC provision on delay. The Panel accepts the following propositions:

- (i) The presumption is that the sanction should commence from the date of the decision of this Tribunal; this is established by the introductory words “*except as otherwise provided*”. The delay must be substantial.
- (ii) Delay in context carries (contrary in this instance to ASADA’s submission) no pejorative overtones but is a proxy for the passage of time.
- (iii) Any delay not attributable to the Players can be taken into account, whether or not it otherwise results from factors which are both explicable and reasonable, and impute no blame to any other person.
- (iv) Once delay of the appropriate character is identified, the Panel has a discretion as to the effect it has in any particular case (The footnote in the current version of the WADC suggesting that discretion ought not to be exercised other than in a presence case does not appear in the 2009 WADC or the contemporary AFL Anti-Doping Code).

168. The relevant chronology is as follows:

- (i) On 5 September 2013, Essendon self-reported its concerns over an alleged supplements program being used by its players to the AFL and ASADA.
- (ii) On 15 February 2013, ASADA employed Mr. Aaron Walker to act as Principal Investigator into the Essendon matter.
- (iii) Between 15 February 2013 and 20 July 2014, Mr. Walker and his team interviewed 106 individuals as a part of ASADA investigation.
- (iv) On 2 August 2013, ASADA provided the AFL with a 405-page, interim report of its investigations.
- (v) In January 2014, ASADA engaged the Hon. Garry Downes AM QC to review the investigation. Mr. Downes submitted to his report to ASADA on or about 30 April 2014.
- (vi) On 12 June 2014, ASADA issued the Players with 'Show Cause' Notices.
- (vii) On 13 June 2014, Essendon and its then-head coach, Mr. Hird, commenced proceedings against ASADA (in particular the CEO) alleging that ASADA had conducted its investigation unlawfully.
- (viii) On 18 June 2014, the Players sought a 30-day undertaking from ASADA (i.e. each Player has 30 days from the hearing and determination of legal proceedings including any appeals) before a determination on an anti-doping rule violation is made. Essendon and Mr. Hird advanced the undertaking from ASADA.
- (ix) After back-and-forth agreements between the Players and ASADA, it was agreed between the parties that the Players would have a 14-day response period with respect to notification of a revised Show Cause Notice by ASADA.
- (x) On 19 September 2014, Justice Middleton of the Federal Court of Australia rendered his decision against Essendon and Mr. Hird.
- (xi) On 2 October 2014, the Players requested that ASADA now issue the revised 'Show Cause' Notices on an expedited basis.
- (xii) On 17 October 2014, ASADA provided each player with further material supporting the 'Show Cause' Notices.
- (xiii) On 3 November 2014, the Anti-Doping Rule Violation Panel ("ADRVP") made an entry onto the Register of Findings for the Players for TB-4 (i.e. they confirmed the anti-doping rule violation).
- (xiv) On 12 November 2014, ASADA notified the Players of the ADRVP's findings.

- (xv) On 14 November 2014, the AFL issued infraction notices to the Players.
 - (xvi) On 18 November 2014, 1 December 2014, and 8 December 2014, the Tribunal held a directions hearings with respect to the cases against the Players.
 - (xvii) On 15 December 2014, the Tribunal's hearing commenced. It continued on a sporadic basis until 17 February 2015.
 - (xviii) On 31 March 2015, the Tribunal rendered its decision.
 - (xix) On 8 May 2015, WADA filed its appeal at the CAS.
169. The Panel accepts that there has been objectively (see para. 167(ii) above) substantial delay, such delay caused (1) by the Players' unsuccessful attempt in the Federal Court of Australia to quash the infraction notices is attributable to them; and (2) by the Players' decision to contest the charges as and when, as this Panel has held, they should have exercised that option; is attributable to them. However, even discounting these periods the precondition for exercise of discretion is satisfied.
170. The following factors, relevant to all the Players equally, have to be weighed in the balance: (1) the elaborate process in the AFL Rules required to be traversed before an infraction notice can be served is designed in part at least for the better protection of the Players, and while causing delay, this delay cannot objectively be attributable to them (it is also, however, designed for the protection of the reputation of the AFL and as a shield against potential administrative law challenges in the Federal Court of Australia); (2) the actual legal process, both in connection with the hearing before the AFL Tribunal and this Panel was, given the complexity of the issues, and the need to accommodate the schedules of all parties, their lawyers and indeed of the Tribunal, not a subject of legitimate criticism; (3) for more than three years, each Player has been under intense, if sporadic, media spotlight, and uncertain, until this Award, of their fate – a state of mind aggravated by the success they achieved before the AFL Tribunal; (4) the ASADA letter may have encouraged an expectation that a period of ineligibility of one year was the maximum which the Players would be made liable; and (5) while the Players suspended did not miss any games, Essendon was expelled from the finals, thereby denying the opportunity to the Players to participate in the major event in their sport.
171. Some of these factors tell in favour of the exercise of discretion to backdate, others against it. Giving each what the Panel conceives to be its appropriate weighting, the Panel is prepared to backdate the period of ineligibility to start, not from the date of its award, but from the date of the Decision, namely 31 March 2015 with the result that no Player will be disqualified for the 2017 season (The Panel notes that the rules as currently drafted do not permit it to stagger that period of ineligibility for any period to the greater benefit of the team or to make it other than continuous).
172. The Players did not all have identical periods of provisional suspension starting from identical dates (*see* the schedule setting forth the expiration of the Players' periods of ineligibility which

is attached at the end of this Award)¹. At this juncture, the principled individualization which the Panel has sought to apply throughout indeed has practical effect. In this respect, the Panel recognizes the need of the Players to train with their team and keep their fitness in order to be prepared to play once their respective suspensions expire since without the ability to train, such suspensions would have an even longer impact on the Players' ability to exercise their professions as AFL players (*see* CAS 2014/A/3665, 3666 & 3667). Accordingly, the Panel deems applicable Article 10.12.2 of the 2015 WADC, which provides as follows:

10.12.2 Return to Training

As an exception to Article 10.12.1, an Athlete may return to train with a team or to use the facilities of a club other member organization of a Signatory's member organization during the shorter of: (1) the last two months of the Athlete's period of Ineligibility, or (2) the last one-quarter of the period of Ineligibility.

173. It is for the AFL to work out the consequences of Article 10.12.2 as they relate to each Player's individual period of ineligibility and ability to return to training.
174. Finally, the Panel accepts that there was no power in the 2010 AFL Anti-Doping Code to disqualify results, although this deficiency has been cured in the 2015 AFL Anti-Doping Code. That, however, is as far as the players (and Essendon) are concerned, *res inter alios acta* – a matter between WADA and the AFL.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the World Anti-Doping Agency on 8 May 2015 is upheld.
2. The decision rendered by the Australian Football League Anti-Doping Tribunal 31 March 2015 is set aside.
3. Messrs. Thomas Bellchambers, Alex Browne, Jake Carlisle, Travis Colyer, Alwyn Davey, Luke Davis, Cory Dell'Olio, Ricky Dyson, Dustin Fletcher, Scott Gumbleton, Kyle Hardingham, Dyson Heppell, Michael Hibberd, David Hille, Heath Hocking, Cale Hooker, Ben Howlett, Michael Hurley, Leroy Jetta, Brendan Lee, Sam Lonergan, Nathan Lovett-Murray, Mark McVeigh, Jake Melksham, Angus Monfries, David Myers, Tayte Pears, Patrick Ryder, Henry

¹ The Panel notes that while such sanction is delivered in years, the credit given to each Player is in days, the effect of which matters considering that 2016 is leap year whereby February 2016 has 29 days.

Slattery, Brent Stanton, Ariel Steinberg, Jobe Watson, Stewart Crameri, and Brent Prismall (the “Players”) are sanctioned with a period of ineligibility of two years commencing as of 31 March 2015. Any period of ineligibility, whether imposed on or voluntarily accepted by the Players before the entry into force of this award, shall be credited against the total period of ineligibility to be served.

(...)

4. All other motions or prayers for relief are dismissed.

ANNEX: SCHEDULE OF PERIODS OF INELIGIBILITY

Player	Period of Provisional Suspension	Number of days provisionally suspension	Expiry of Ineligibility
BELLCHAMBERS, Thomas	14 November 2014 - 31 March 2015	138 days	13 November 2016
BROWNE, Alex	14 November 2014 - 31 March 2015	138 days	13 November 2016
CARLISLE, Jake	14 November 2014 - 31 March 2015	138 days	13 November 2016
COLYER, Travis	14 November 2014 - 31 March 2015	138 days	13 November 2016
CRAMERI, Stewart	14 November 2014 - 31 March 2015	138 days	13 November 2016
DAVEY, Alwyn	16 February 2015 -31 March 2015	44 days	15 February 2017
DAVIS, Luke	14 November 2014 - 31 March 2015	138 days	13 November 2016
DELL'OLIO, Cory	15 November 2014 - 31 March 2015	137 days	14 November 2016
DYSON, Ricky	14 November 2014 - 31 March 2015	138 days	13 November 2016
FLETCHER, Dustin	22 November 2014 - 31 March 2015	130 days	21 November 2016
GUMBLETON, Scott	14 November 2014 - 31 March 2015	138 days	13 November 2016
HARDINGHAM, Kyle	14 November 2014 - 31 March 2015	138 days	13 November 2016

Player	Period of Provisional Suspension	Number of days provisionally suspension	Expiry of Ineligibility
HEPPELL, Dyson	14 November 2014 - 31 March 2015	138 days	13 November 2016
HIBBERD, Michael	14 November 2014 - 31 March 2015	138 days	13 November 2016
HILLE, David	14 November 2014 - 31 March 2015	138 days	13 November 2016
HOCKING, Heath	14 November 2014 - 31 March 2015	138 days	13 November 2016
HOOKER, Cale	14 November 2014 - 31 March 2015	138 days	13 November 2016
HOWLETT, Ben	14 November 2014 - 31 March 2015	138 days	13 November 2016
HURLEY, Michael	14 November 2014 - 31 March 2015	138 days	13 November 2016
JETTA, Leroy	16 February 2015 - 31 March 2015	44 days	15 February 2017
LEE, Brendan	14 November 2014 - 31 March 2015	138 days	13 November 2016
LONERGAN, Sam	14 November 2014 - 31 March 2015	138 days	13 November 2016
LOVETT-MURRAY, Nathan	30 November 2014 - 31 March 2015	106 days	15 December 2016
McVEIGH, Mark	14 November 2014 - 31 March 2015	138 days	13 November 2016
MELKSHAM, Jake	14 November 2014 - 31 March 2015	138 days	13 November 2016

Player	Period of Provisional Suspension	Number of days provisionally suspension	Expiry of Ineligibility
MONFRIES, Angus	14 November 2014 - 31 March 2015	138 days	13 November 2016
MYERS, David	14 November 2014 - 31 March 2015	138 days	13 November 2016
PEARS, Tayte	14 November 2014 - 31 March 2015	138 days	13 November 2016
PRISMALL, Brent	14 November 2014 - 31 March 2015	138 days	13 November 2016
RYDER, Patrick	14 November 2014 - 31 March 2015	138 days	13 November 2016
SLATTERY, Henry	14 November 2014 - 31 March 2015	138 days	13 November 2016
STANTON, Brett	14 November 2014 - 31 March 2015	138 days	13 November 2016
STEINBERG, Ariel	14 November 2014 - 31 March 2015	138 days	13 November 2016
WATSON, Jobe	22 November 2014 - 31 March 2015	130 days	21 November 2016