FEDERAL COURT OF AUSTRALIA

Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority [2014] FCA 1019

Citation:	Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority [2014] FCA 1019
Parties:	**ESSENDON FOOTBALL CLUB (ACN 004 286 373) v CHIEF EXECUTIVE OFFICER OF THE AUSTRALIAN SPORTS ANTI-DOPING AUTHORITY** **JAMES ALBERT HIRD v CHIEF EXECUTIVE OFFICER OF THE AUSTRALIAN SPORTS ANTI-DOPING AUTHORITY**
File number(s):	VID 327 of 2014 VID 328 of 2014
Judge:	**MIDDLETON J**
Date of judgment:	19 September 2014
Catchwords:	**STATUTORY INTERPRETATION** – general principles – principle of legality – identification of statutory purpose – approach when statute based upon international conventions and agreements – modern approach to statutory interpretation – express statutory powers and incidental powers. **ADMINISTRATIVE LAW** – whether power used for improper purpose – test to apply when multiple purposes. **JUDICIAL REVIEW** – nature of judicial review – whether relief is discretionary – delay – acquiescence – utility – inevitable outcome – impropriety of applicant – public policy. **PRIVILEGE** – nature of privilege against self-incrimination – contractual abrogation or curtailment – statutory abrogation or curtailment – need to invoke privilege against self-incrimination – limitations on extent of protection given by privilege against self-incrimination. **WORDS AND PHRASES** – "in connection with" – "for the purposes of".

Legislation:

Australian Postal Corporation Act 1989 (Cth)
Australian Sports Anti-Doping Authority Act 2006 (Cth)
Australian Sports Anti-Doping Authority Amendment Act 2013 (Cth)
Australian Sports Anti-Doping Authority Regulations 2006 (Cth)
Criminal Code Act 1995 (Cth)
Customs Administration Act 1985 (Cth)
Judiciary Act 1903 (Cth)
Privacy Act 1988 (Cth)
Public Service Act 1999 (Cth)

Cases cited:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41
Anti-Doping Rule Violation Panel v XZTT (2013) 214 FCR 40; [2013] FCAFC 95
Attorney-General (NSW) v Quin (1990) 170 CLR 1
Attorney-General v Directors of the Great Eastern Railway Co (1880) 5 App Cas 473
Baini v The Queen (2012) 246 CLR 469; [2012] HCA 59
Bropho v Western Australia (1990) 171 CLR 1
Cabal v United Mexican States (No 3) (2000) 186 ALR 188; [2000] FCA 1204
Clough v Leahy (1904) 2 CLR 139
Coco v The Queen (1994) 179 CLR 427
Commissioner of Taxation v Consolidated Media Holdings Ltd (ACN 009 071 167) (2012) 293 ALR 257; [2012] HCA 55
Comptroller-General of Customs v Disciplinary Appeal Committee (1992) 35 FCR 466
Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs (1985) 156 CLR 385
Day v Commissioner, Australian Federal Police (2000) 101 FCR 66; [2000] FCA 1272
Environment Protection Authority v Caltex Refining Co Pty Ltd (1993) 178 CLR 477
Flanagan v Australian Federal Police (1996) 60 FCR 149
Kazar v Duss (1998) 88 FCR 218
Kirk v Industrial Court of New South Wales (2010) 239 CLR 531; [2010] HCA 1
Lacey v Attorney-General (Qld) (2011) 242 CLR 573
Lansen v Minister for Environment and Heritage (2008) 174 FCR 14
Lee v New South Wales Crime Commission (2013) 87 ALJR 1082; [2013] HCA 39
Lee v The Queen (2014) 308 ALR 252; [2014] HCA 20
Lu v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 141 FCR 346
McGuinness v Attorney-General (Vic) (1940) 63 CLR 73

Meyers v Casey (1913) 17 CLR 90
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597
Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004 [2006] HCA 53; (2006) 231 CLR 1
NBGM v Minister for Immigration and Multicultural Affairs [2006] HCA 54; (2006) 231 CLR 52
New South Wales v Kable (2013) 298 ALR 144
Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (1998) 195 CLR 1
Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476
Potter v Minahan (1908) 7 CLR 277
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28
Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328
Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82
Rich v Australian Securities and Investments Commission (2004) 220 CLR 129; [2004] HCA 42
Samsung Electronics Company Ltd v Apple Inc (2011) 217 FCR 238
Taylor v The Owners – Strata Plan No 11564 (2014) 306 ALR 547; [2014] HCA 9
United State v Fisher 6 US 358 (1805)
Ward v Commissioner of Police of the Metropolis [2006] 1 AC 23
Williams v Commonwealth (2012) 248 CLR 156; [2012] HCA 23
Williams v Keelty (2001) 111 FCR 175

Date of hearing:	11, 12, 13 August 2014
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	500
Counsel for the Applicant in VID 327 of 2014:	Mr N J Young QC with Dr C Button and Ms E Murphy
Solicitor for the Applicant in VID 327 of 2014:	Maurice Blackburn

Counsel for the Applicant in VID 328 of 2014:	Mr P J Hanks QC with Mr N Harrington and Ms R Walsh
Solicitor for the Applicant in VID 328 of 2014:	Ashurst Australia
Counsel for the Respondent:	Mr T Howe QC with Dr S B McNicol QC and Mr D Star
Solicitor for the Respondent:	Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 327 of 2014**

BETWEEN:	**ESSENDON FOOTBALL CLUB (ACN 004 286 373)** **Applicant**
AND:	**CHIEF EXECUTIVE OFFICER OF THE AUSTRALIAN SPORTS ANTI-DOPING AUTHORITY** **Respondent**

JUDGE:	**MIDDLETON J**
DATE OF ORDER:	**19 SEPTEMBER 2014**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The application is dismissed.
2. Unless a party notifies in writing the Court by 4.00 pm on Wednesday 1 October 2014, indicating opposition to this order as to costs, the Applicant pay the Respondent's costs of and in connection with the proceeding to be taxed in default of agreement.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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REASONS FOR JUDGMENT

INTRODUCTION

1 In early February 2013, the Chief Executive Officer ('CEO') of the Australian Sports Anti-Doping Authority ('ASADA') and the Australian Football League ('the AFL') agreed to conduct what was referred to by them as a "joint investigation" into the Essendon Football Club ('Essendon') players and personnel involved in a supplements program implemented by Essendon in 2011 and 2012. The investigation may be referred to as a "joint investigation", but whatever label is given to the investigation is of little relevance. The important enquiry is to consider the nature, purpose and conduct of the investigation itself.

2 The investigation, from ASADA's point of view, was part of a wider investigation by ASADA under the *Australian Sports Anti-Doping Authority Act 2006* (Cth) ('the Act') and Sch 1 ('the

NAD Scheme') of the *Australian Sports Anti-Doping Authority Regulations 2006* (Cth) ('the Regulations').

3 In these proceedings (which were heard together), Essendon and Mr James Hird essentially allege that the CEO and ASADA had no power to conduct the investigation in the way it was conducted (involving the use by ASADA of AFL "compulsory powers" and unauthorised disclosure of information), that the investigation was undertaken for improper purposes, and that ASADA breached its confidentiality obligations during the course of the investigation and in the provision to the AFL of an interim report.

4 ASADA has very important national and international functions to perform. The fight against doping requires constant vigilance, upgrading of investigatory techniques, and well-resourced and co-ordinated authorised bodies to educate, monitor, investigate and prosecute in appropriate situations. The adoption of innovative processes and methods of investigation is to be strongly supported. ASADA and a "sporting administration" or "sporting administration body" (such as the AFL) may need to co-operate with each other for the purposes of implementing their own responsibilities. However, all statutory authorities (including ASADA) must comply with the rule of law and proceed only in a manner (expressly or impliedly) authorised by law. The essential question in these proceedings is whether ASADA has so complied with the rule of law in conducting, in the manner and for the purposes it did, the investigation.

5 These proceedings were issued the day after the issuing of notices ('the Notices') to 34 then current and former players at Essendon ('the 34 Players') under cl 4.07A of the NAD Scheme. Putting aside disciplinary action taken by the AFL against Essendon and Mr Hird, the first action relevantly taken by ASADA in connection with possible contraventions of the anti-doping rules was by the issuing of the Notices, following upon the investigatory work undertaken by ASADA in the course of the investigation. The decision to issue the Notices was based substantially upon information that was obtained through "the compulsory powers" of the AFL and gathered in the course of the investigation. However, the Notices were issued by the CEO and not the AFL, nor in conjunction with the AFL. It was solely the decision of the CEO to issue the Notices. Similarly in relation to the disciplinary action taken by the AFL, such action was taken by the AFL itself, not in conjunction with the CEO or ASADA.

6 The focus of these proceedings is upon ASADA, and its conduct and purpose in carrying out the investigation, and in receiving the co-operation of the AFL.

THE RELIEF SOUGHT AND THE GROUNDS OF THE APPLICATIONS

7 Essendon seek declarations and injunctive relief, but primarily seek to have the Notices set aside. Mr Hird also seeks declarations and injunctive relief, seeking to prevent any similar notice being issued under cl 4.07A of the NAD Scheme in future.

8 More particularly, Essendon and Mr Hird (to the extent relevant to their own specific claims), seek the following relief:

(a) A declaration that the investigation conducted by ASADA into Essendon and players who were on the Essendon playing list during the 2012 football season and which was referred to by ASADA as part of "Operation Cobia" was *ultra vires* the Act, the Regulations and the NAD Scheme.

(b) A declaration that ASADA, by providing the document it called an "interim report" ('the Interim Report') including any versions or drafts thereof, to the AFL:

(i) acted in breach of the confidentiality obligations imposed on ASADA by the Act (ss 13(1)(f) and (g) and s 71) and the NAD Scheme (cl 4.21): and

(ii) acted for purposes extraneous to those of ASADA in furthering its own investigation into possible violations of the anti-doping rules.

(c) An injunction restraining the CEO from issuing to Mr Hird a notice under cl 4.07A(2) of the NAD Scheme arising from or relying on information obtained in the investigation.

(d) An injunction restraining the CEO from issuing any further notice under cl 4.07A(2) of the NAD Scheme arising from or relying on information obtained in the investigation to any Essendon player.

(e) A permanent injunction restraining the CEO from using any information obtained in the investigation for any purpose under the Act, the Regulations and the NAD Scheme.

(f) An order setting aside all notices issued by ASADA to the 34 Players purportedly pursuant to cl 4.07A(2) of the NAD Scheme.

(g) Further or alternatively:

(i) an order permanently staying the operation of the Notices; or

(ii) an injunction restraining the CEO from requiring a response to, or otherwise taking any action in reliance upon, the Notices.

9 The grounds of the applications are as follows:

(a) At all relevant times up to and including 31 July 2013, cl 3.27(1) of the NAD Scheme, as contemplated by s 13(1)(f) of the Act, empowered ASADA to conduct investigations of possible anti-doping rule violations that may have been committed by athletes or support persons.

(b) Neither the Act, the Regulations nor the NAD Scheme authorised ASADA to conduct a "joint investigation" with any other entity, including a sporting administration body.

(c) At all relevant times up to and including 31 July 2013, the conducting of a "joint investigation" by ASADA was inconsistent with:

(i) the constraints imposed on "entrusted persons" (including members of ASADA staff) by s 71 of the Act relating to the disclosure of NAD Scheme personal information; and

(ii) the limited circumstances in which cl 4.21 of the NAD Scheme, read with s 13(1)(g) of the Act, permitted disclosure of that information to a sporting administration body — namely, where:

(a) the information was information of the kind described in cl 4.21(1) of the NAD Scheme; and

(b) the disclosure was for the purpose of or in connection with an investigation into possible violations of the anti-doping rules within s 13(1)(g) of the Act;

and therefore ASADA's conduct was *ultra vires* the Act, the Regulations and the NAD Scheme.

(d) In about February 2013, ASADA and the AFL entered into an agreement whereby ASADA and the AFL would conduct, each with the aid of the other, what both ASADA and the AFL thereafter described as a "joint investigation".

(e) From February 2013, despite the absence of any power in ASADA to conduct a joint investigation and the constraints on the disclosure of information by members of ASADA staff, ASADA purported to conduct with the AFL a joint investigation into Essendon, its players and officials in respect of allegations of anti-doping rule violations under the Act.

(f) In the course of the joint investigation and before 1 August 2013, members of ASADA staff and employees of the AFL jointly interviewed Mr Hird and the Essendon players, and represented the investigation as:

(i) a joint investigation between the AFL and ASADA; and

(ii) an investigation to which Essendon, Mr Hird and the Essendon players were compelled to provide information in answer to questions asked by members of ASADA staff and employees of the AFL.

(g) Further, in the course of the joint investigation:

(i) ASADA provided the AFL with immediate access to confidential information provided by Mr Hird, Essendon and the Essendon players at interviews by permitting AFL personnel to attend, jointly conduct, and tape record those interviews for purposes extraneous to ASADA's investigation; and

(ii) ASADA provided the AFL with access to documents and records obtained by ASADA in the course of its investigation and permitted the AFL to use this information for purposes extraneous to ASADA's investigation.

(h) In August 2013, ASADA prepared and published the Interim Report based on information obtained during the joint investigation. The Interim Report was provided to a number of persons and entities who were neither athletes nor persons otherwise permitted by the Act or the Regulations to receive the information contained in the Interim Report.

(i) By providing the Interim Report, including any versions or drafts thereof, to the AFL, ASADA:

(i) acted in breach of the confidentiality obligations imposed on ASADA by the Act (ss 13(1)(f) and (g) and s 71) and the NAD Scheme (cl 4.21); and

(ii) acted for extraneous purposes to those of ASADA.

(j) Because:

(i) ASADA lacked any power to conduct the joint investigation;

(ii) the joint investigation contravened the constraints on disclosure of NAD Scheme personal information; and

(iii) the Interim Report was divulged and communicated by ASADA in breach of its obligations of confidentiality and for purposes extraneous to the furthering of ASADA's own investigation,

the information collected during the joint investigation (being the information on which the Interim Report was based) cannot qualify as evidence or information received by

the CEO for the purposes of cl 4.07A(1) of the NAD Scheme, as it has stood since 1 August 2013.

(k) In the absence of such evidence or information, the CEO has no power, under cll 4.07A(1) and (2) of the NAD Scheme, to:

(i) determine that there is a possible non-presence anti-doping rule violation that warrants action by the CEO; or

(ii) give a notice to Mr Hird or any Essendon player of that possible non-presence anti-doping rule violation.

(l) All notices purportedly issued by ASADA to Essendon players under cl 4.07A of the NAD Scheme are invalid.

(m) Mr Hird is and was at all relevant times employed as coach of Essendon, a club registered with the AFL and subject to the AFL Regulations and the Player Rules.

(n) The issuing by the CEO of any notices to Mr Hird or to any Essendon player arising from or relying on information obtained in the joint investigation is likely to cause damage to Mr Hird's and to Essendon's reputation and business interests.

10 There is no dispute that in carrying out the investigation with the co-operation of the AFL, the CEO and ASADA obtained a benefit they did not otherwise have under the Act or the NAD Scheme. Whilst the CEO and ASADA had no power to compel and sanction, it obtained the benefit of what the AFL had, namely the contractual power of the AFL:

(a) to compel Essendon players and personnel to participate in an AFL investigation and to attend an interrogative interview; and

(b) to direct, under threat of AFL sanction, that an Essendon player or personnel respond and answer every question asked of him or her.

11 In the course of the investigation, ASADA and the AFL agreed to use the powers of compulsion available to the AFL under the AFL Player Rules ('the Player Rules') and AFL Anti-Doping Code ('the AFL Code'), in order to compel Essendon players and personnel to attend interviews and answer questions, and effectively disclose (to the extent lawful) information collected in the course of the investigation.

12 The CEO admitted that the AFL's compulsory powers enabled the AFL to compel Essendon players and personnel to provide information as directed by the AFL, including by attending interviews (at which ASADA and the AFL were present), in circumstances where interviewees

were not then able to claim the privileges against self-incrimination or self-exposure to a penalty.

13 The CEO denies any unlawful conduct, and contends the decision to issue the Notices was valid.

14 Further, the CEO says that the following factors warrant refusal of any relief even if the CEO's decision to issue the Notices was based substantially upon information obtained *ultra vires* the Act, the Regulations and the NAD Scheme or otherwise unlawfully obtained:

(a) Even if the CEO or ASADA obtained information unlawfully in the course of the investigation, that is a factor which the law recognises can be taken into account (and should be left to be taken into account) by decision-makers who have responsibility for making downstream decisions under the Act and NAD Scheme.

(b) Even if the CEO or ASADA obtained information unlawfully in the course of the investigation, the grant of relief should be refused on discretionary grounds because the information in question, having been obtained by the AFL (as to which there is no alleged illegality), would have to be provided (or re-provided) by the AFL to ASADA in any event by virtue of requirements contained in the NAD Scheme (see cl 2.04) and the AFL Code.

(c) Even if the CEO or ASADA obtained information unlawfully in the course of the investigation, the grant of relief should be refused on discretionary grounds because Essendon and Mr Hird agreed, by their adoption of the Player Rules (which incorporate the AFL Code and which form part of the contractual arrangements between the AFL, Mr Hird and Essendon), that information obtained by the AFL in relation to possible anti-doping rule violations may be provided by the AFL to ASADA.

(d) Even if the CEO or ASADA obtained information unlawfully in the course of the investigation, the grant of relief should be refused on discretionary grounds because ASADA could lawfully obtain all of the exact same information (again) by the issue of disclosure notices under Div 3.4B of the NAD Scheme, and then issue fresh show-cause notices to the 34 Players.

(e) Even if the CEO or ASADA obtained information unlawfully in the course of the investigation, the grant of relief should be refused on discretionary grounds because:

(i) Both Essendon and Mr Hird requested that the AFL and ASADA conduct an investigation in early February 2013 and thereafter expressed support for the conduct of the investigation;

(ii) Both Essendon and Mr Hird knew from early 2013 that the AFL and ASADA proposed to conduct, and did conduct, an investigation which would involve ASADA being provided with information obtained as a result of the AFL's exercise of its compulsory powers;

(iii) Both Essendon and Mr Hird were legally represented at all material times and advertently declined to take action to vindicate the rights they now assert;

(iv) Both Essendon's and Mr Hird's failure and delay in taking steps to vindicate the rights they now assert led to the ongoing conduct of the investigation over many months and to the acquisition by ASADA of a vast amount of information, all of which information Essendon and Mr Hird now seek to permanently enjoin the use of or reliance on (in circumstances where, had Essendon and Mr Hird taken timely action to enforce the rights they now assert, alternative steps could have been taken by ASADA to acquire the same information lawfully); and

(v) Both Essendon and Mr Hird, the AFL, followers of the AFL competition, and the public at large are all aware of the existence of very serious issues surrounding adherence to anti-doping rules by Essendon and Mr Hird, in circumstances where Essendon and Mr Hird brought the game into disrepute by failing to implement proper governance and accountability mechanisms with respect to enforcement of those rules. There is, therefore, a compelling public interest against the grant of relief.

THE ISSUES

15 Putting aside the question of whether relief ought to be granted to either Mr Hird or Essendon in light of their conduct and the utility of any relief, the issues in the proceedings are as follows:

(a) Did ASADA have the power to conduct the "joint investigation" with the AFL, as alleged?

(b) Did ASADA conduct the investigation for improper purposes, in particular:

(i) in order to circumvent the limitations on its own powers by obtaining the benefit of the AFL's "compulsory powers" in aid of its own investigation; or

(ii) in order to assist the AFL to investigate and take action for the AFL's own purposes?

(c) Did ASADA breach the obligations of confidentiality or restrictions on disclosure imposed on it under its governing legislation in the conduct of the investigation and in the provision of information from the investigation, including the Interim Report, to the AFL and Essendon?

(d) Did ASADA act for improper purposes in providing information from the investigation, including the Interim Report, to the AFL and others?

16 Most of the essential facts to determine these issues are not in dispute, and the chronology of events and circumstances giving rise to the dispute between the parties can be ascertained primarily from the documentation before the Court.

17 However, before I go to that material and other evidence before the Court, I will first proceed to introduce the parties and other interested participants, and to make some preliminary observations.

PARTIES AND OTHER INTERESTED PARTICIPANTS

18 Turning first to the parties. There is no dispute that both Essendon and Mr Hird, as the Applicants, have standing to bring their respective proceedings.

Mr Hird

19 Mr Hird is the Senior Coach of Essendon, a club licensed by the AFL and he is subject to the AFL Rules, the AFL Regulations, the Player Rules and the AFL Code.

20 In his capacity as Senior Coach of Essendon, Mr Hird has supervised the preparation, training and performance of personnel who participated as players for Essendon in the Australian Rules Football competition in the 2012 season.

21 On 13 August 2013, Mr Hird was notified that the AFL had charged him under r 1.6 of the Player Rules. The Notice of Charge stated:

> *Contrary to Rule 1.6 of the Rules, in the period from about August 2011 to about July 2012, you engaged in conduct unbecoming or likely to prejudice the interests or reputation of the Australian Football League or to bring the game of football into disrepute.*

22 At the same time that Mr Hird received the Notice of Charge, he was provided with a Statement of Grounds. It appears the Statement of Grounds was revised but the revisions are irrelevant

for the purposes of these proceedings. It suffices to say that the conduct complained of included failure by Mr Hird to take adequate action to ensure the players were not exposed to significant risks to their health and safety as well as the risk of using substances that were prohibited by the AFL Code and the World Anti-Doping Code ('the World Code'). It was alleged that players were administered substances that were prohibited by the AFL Code and the World Code.

23 On 27 August 2013, Mr Hird entered into a deed of settlement ('the Deed') with the AFL. Recital B of the Deed provided as follows:

> *Between February 2013 and August 2013, the AFL and the Australian Sports Anti-Doping Authority (**ASADA**) conducted a joint investigation (the **Investigation**) into EFC's program relating to the administration of supplements to its players in preparation for, and during, the 2012 AFL premiership season (the **Program**).*

24 In the Deed it was agreed by the AFL and Mr Hird, amongst other things, that he did not take sufficient steps to avoid there being a risk that players may have been administered substances that were prohibited by the AFL Code and the World Code.

25 Mr Hird said in the course of cross-examination that he entered into the Deed "under great duress, threats and inducement" and in the best interests of Essendon and its players. However, the Deed remains a valid agreement between the AFL and Mr Hird and has been implemented by the AFL imposing upon Mr Hird a 12-month suspension, which Mr Hird accepted.

Essendon

26 Essendon is a club licensed to field a team in the Australian Rules Football competition conducted by the AFL, and is also subject to the AFL Regulations, the AFL Rules and the AFL Code.

27 Essendon is the employer of the 34 Players who have participated in the AFL competition in the 2012 season, many of whom remain employed as players for Essendon in the 2014 season. Essendon is also the employer of other personnel engaged in connection with Essendon's participation in the AFL.

28 On 21 August 2013, charges were laid against Essendon for a breach of r 1.6 of the Player Rules. The charge and the Statement of Grounds were in similar terms to those laid against Mr Hird.

29 On 27 August 2013, the Essendon and the AFL entered into a similar settlement to that which Mr Hird entered into with the AFL.

The CEO

30 The CEO (the Respondent to both proceedings) was appointed pursuant to s 20D of the Act, and has the functions set out in s 21 of the Act, which functions include such functions as are conferred by the NAD Scheme (s 21(1)(b)).

31 The CEO has the power, conferred by s 22 of the Act, "to do all things necessary or convenient to be done for or in connection with the performance of his or her functions", and is authorised under s 13(1)(f) of the Act and cl 3.27(1) of the NAD Scheme to "investigate possible anti-doping rule violations" (as defined in the NAD Scheme).

32 The CEO is also authorised by s 13(1)(g) of the Act and cl 4.21 of the NAD Scheme to disclose "non-entry information" obtained during such an investigation to, amongst others, "a sporting administration body", subject to certain conditions (to which I will return). The CEO is — subject to exceptions (see relevantly ss 71(2)(a), (b) and (c)) — prohibited by s 71 of the Act from disclosing "NAD scheme personal information" (as defined in s 4 of the Act) to any other person.

33 I now mention other interested participants in the events relevant to these proceedings.

ASADA

34 ASADA is not itself a party to these proceedings. ASADA was established under s 20 of the Act, consisting of the CEO and ASADA staff (s 20A), and has the function of "assist[ing] the CEO with the performance of his or her functions" (s 20B).

The AFL

35 The AFL is also not a party to these proceedings. No relief is sought against the AFL. No Commissioner of the AFL, nor any agent or employee of the AFL has given evidence. No contention has been made that the contractual "compulsory powers" relied upon by the AFL were unenforceable at common law or because of any legislative provision. For instance, it has not been suggested or pleaded by any party that the "compulsory powers" in the contractual arrangements between the AFL, Mr Hird and the 34 Players are unenforceable on the basis they are contrary to public policy or that they are unconscionable. In fact, the parties, ASADA, the AFL and the 34 Players all regarded the "compulsory powers" of the AFL as being valid and enforceable, and each acted accordingly.

The 34 Players

36 The 34 Players are not parties to these proceedings. No party sought to join any of the 34 Players.

37 The 34 Players did not seek to be joined. The 34 Players did give an undertaking to the Court in the following terms:

> *The 34 current and former players of the Essendon Football Club who received notices under clause 4.07A of the National Anti-Doping Scheme (the 34 Players) undertake to the Court and the Respondent not to institute proceedings against the Respondent in any court of competent jurisdiction to claim that the investigation was ultra vires the* Australian Sports and Anti-Doping Authority Act 2006 *or the regulations thereto including the NAD Scheme, or was otherwise unlawful, or that the Respondent acted in breach of confidentiality obligations and for extraneous purposes, and otherwise agree to be bound by this Court's judgment in relation to the aforesaid claims made by the Applicant in the substantive proceeding including in any appeals therefrom.*

38 The Court granted leave to the 34 Players to file and serve any evidence or submissions they may seek to rely upon at the hearing of these proceedings. The 34 Players did not seek to be heard on the substantive issues in these proceedings. They only sought to be heard on the question and nature of the relief to be granted by the Court, should Essendon or Mr Hird succeed on the substantive issues in dispute.

39 The 34 Players did not file any evidence.

40 The 34 Players have a significant interest in these proceedings and the relief sought, particularly in setting aside the Notices which directly impact upon them. The circumstances in which the 34 Players find themselves is worthwhile to detail at this stage, by reference to the NAD Scheme.

41 At all relevant times:

(a) clause 4.07A of the NAD Scheme authorised the CEO to notify the 34 Players in writing of a possible non-presence anti-doping rule violation where the CEO received evidence or information showing such a possible violation and determines, after a review, that there is such a possible violation that warrants action;

(b) clause 4.09 of the NAD Scheme then authorised the Anti-Doping Rule Violation Panel ('the ADRVP') to consider any submissions by a recipient of a notice under cl 4.07A and to decide whether to make an entry on the Register of Findings ('the Register') maintained by ASADA;

(c) clause 4.17 of the NAD Scheme directed the CEO to give written notice of an entry on the Register to specified organisations and to the World Anti-Doping Agency ('WADA'); and

(d) clause 4.12 of the NAD Scheme allows an athlete or support person to whom an entry on the Register relates to apply to the Administrative Appeals Tribunal for review of the ADRVP's decision to make the entry.

42 Pursuant to the NAD Scheme, the issuing of the Notices to the 34 Players triggered the commencement of a "response period". It is within this period that the recipient of a show cause notice has the right to make a submission to the CEO as to why that person's name ought not be entered onto the Register (see cl 4.07A(3)(b)).

43 Upon the conclusion of the response period, the ADRVP "must, as soon as practicable, consider any submission made by the [recipient of the notice] and decide whether or not to make an entry on the Register". In the ordinary course, entry onto the Register is made if the ADRVP make a "finding".

44 The NAD Scheme definition of a "finding" sets a low threshold to be met, namely that "it is possible that an athlete … has committed a non-presence anti-doping rule violation" (see cl 1.05A(b)).

45 The ADRVP's function in respect of "findings" is limited. It is only required to "satisfy itself as to the immediate statutory prerequisites referred to in cl 4.[0]9 of the NAD Scheme before exercising its function": *Anti-Doping Rule Violation Panel v XZTT* (2013) 214 FCR 40; [2013] FCAFC 95 at [84]. The Panel is not permitted nor empowered to consider the validity of the notice; it is only to determine whether or not on the material before it there was a possible violation as asserted to it. The ADRVP is not the decision-maker who can relevantly take into account the lawfulness of the investigation that yielded material placed before it in discharging its own separate function.

46 In addition to the ADRVP's making of a "finding" and determining to place a person onto the Register, under the NAD Scheme, it is the CEO or ASADA that have the power to make recommendations to sporting organisations as to the consequences of the possible violation, and to determine to make public an entry on the Register.

47 If the Notices are left to stand, and the information upon which the decision to issue the Notices was unlawfully obtained the following consequences could occur.

48 First, upon consideration of any material provided to the ADRVP, it may determine to make an entry in relation to the 34 Players on the Register (see cl 4.07A(3)(d)), and ASADA may publicly disclose details of that entry (see cl 4.07A(3)(g)).

49 Secondly, the making of a finding and the entry of any one player onto the Register would likely result in the AFL issuing an infraction notice to that player pursuant to the Player Rules and the AFL Code. Such infraction notice could be issued with respect to the alleged substance Thymosin Beta 4 (the substance to which attention has been focussed), which for the purposes of the AFL Code, is a "non-specified substance".

50 Finally, the issuing of such an infraction notice could have consequences for a player, including immediate suspension.

PRELIMINARY OBSERVATIONS ON THE CONTRACTUAL REGIME

51 It must be recalled that the 34 Players, Essendon and Mr Hird are only obliged to adhere to the "compulsory powers" of the AFL because they have each agreed to do so by voluntarily and consensually being bound by a contractual regime. This all occurred well before the start of the investigation. No party sought to resile from their agreement to abide by the contractual regime at the commencement of, or during, the investigation.

52 Under the contractual regime, Essendon, its players and its personnel were all bound to observe the terms of the Player Rules and the AFL Code. The terms of the AFL Code provide that it forms part of the Player Rules and the AFL Regulations (cl 2.4).

The Player Rules

53 Essendon, its players and personnel were each bound to the Player Rules because:

(a) Essendon was bound to comply with the Player Rules pursuant to the terms of the licence under which it participates in the AFL competition;

(b) players entered into a Standard Playing Contract, which is a tripartite contract between the player, Essendon and the AFL, which provides that the player and Essendon agree to comply with and observe (among others) the Player Rules;

(c) players were required to be registered with the AFL pursuant to the Player Rules, and the relevant registration form also binds each player to observe the Player Rules; and

(d) Essendon's personnel were also bound to observe the Player Rules pursuant to the terms of their registration forms.

54 It is a stated objective of the Player Rules to "supplement provisions of contracts of service between Players and their Clubs".

55 Under r 1.5A of the Player Rules, the AFL Commission and the General Manager - Football Operations have a power (among other things):

(a) to inquire into, investigate and deal with any matter in connection with the AFL or the Player Rules and AFL Regulations or appoint any other person to do so; and

(b) to require and obtain production and take possession of all documents, records, articles or things in the possession of control or a person that are relevant to any inquiry or investigation in connection with (among other things) integrity or fairness of the AFL Competition or conduct which may be unbecoming or likely to prejudice the reputation or interests of the AFL or to bring the game into disrepute.

56 Under r 1.8, Essendon players and personnel must not (among other things):

> *(f) refuse or fail to attend or give evidence as directed at any inquiry, meeting hearing or appeal when requested to do so;*
>
> *(g) refuse or fail to fully co-operate with any investigation conducted by the AFL under the AFL Rules & Regulations; or*
>
> *(h) refuse or fail to produce any document, record, article or thing in the Person's possession or control that are required to be produced in accordance with these Rules.*

57 Although not directly relevant to the position of Mr Hird and the 34 Players, r 1.9 interestingly provided:

> ***Privilege***
>
> *Notwithstanding Rule 1.8(f), 1.8(g) and 1.8(h), a Person interviewed as a suspect, charged or arrested by a law enforcement agency in respect of a criminal offence shall not be required to produce any information, give any evidence or make any statement to the AFL if they establish that to do so would breach any privilege against self-incrimination, or legal professional privilege. This Rule does not limit any other AFL Rule & Regulation.*

58 The AFL has the power to issue sanctions for breaches of the Player Rules: see Pt 16 of the Player Rules.

The AFL Code

59 The AFL Code applies to Essendon, the Essendon players and personnel: see cl 3.1 of the AFL Code.

60 Under cl 12.6 of the AFL Code, the AFL General Manager - Football Operations and the AFL Medical Officer have the power to investigate anti-doping rule violations or breaches of the AFL Code. Clause 12.6 provides:

> *The AFL General Manager - Football Operations and/or the AFL Medical Officer shall investigate the facts and/or circumstances surrounding any actual or alleged Anti Doping Rule Violation, or any actual or alleged other breach of this Code. Where ASADA does not already have knowledge of the alleged Anti-Doping Rule Violation, the AFL will immediately advise ASADA of the matter.*

61 Clause 12.7 of the AFL Code requires players, clubs and officers (among others), upon the request of the AFL General Manager - Football Operations or AFL Medical Officer, to:

> *(a) fully co-operate with any investigation;*
>
> *(b) fully and truthfully answer any question asked for the purpose of such investigation; and*
>
> *(c) provide any document in their possession or control relevant to such investigation.*

62 Under the contractual regime, Essendon, Mr Hird and the 34 Players agreed to the information sharing arrangements set out in cl 4 of the AFL Code.

63 They also agreed to be bound by cl 20.1 of the AFL Code which provides:

> *Each Player, Club, Officer and Official acknowledges that ASADA may perform functions under this Code, including without limitation:*
>
> *(a) the provision of drug awareness or education lectures; and*
>
> *(b) the functions specified under the ASADA Act.*

64 By signing player registration forms the players acknowledged that the Player Rules (including the AFL Code) "are necessary and reasonable for the purpose of protecting and promoting the game of Australian football".

65 The registration forms signed by Essendon personnel also contained the following:

> *The AFL will obtain and use personal information about you for the following purposes:*
> – *…*
>
> – *Promoting and protecting the integrity and reputation of the AFL Competition and ensuring compliance with all AFL rules and regulations including but not limited to the AFL Regulations, AFL Anti-Doping Code and AFL Player Rules.*
>
> *For these purposes or otherwise as required or authorised by law, the AFL may share personal information about you with third parties, such as law enforcement bodies,*

government authorities, the Australian Sports Anti-Doping Authority (ASADA) …
…

APPLICANT'S CONSENT AND ACKNOWLEDGMENT

In making my application to be registered as a Club Football Official, I hereby:

– *…*

– *Acknowledge and agree that I am subject to and bound by the AFL's rules and regulations, including without limitation the AFL Regulations, the AFL Player Rules and the AFL Anti-Doping Code …*

– ***Specifically consent to the AFL disclosing personal information about me to the following third parties and the following third parties disclosing personal information about me to the AFL for the purpose of preventing, detecting, deterring and investigating Anti-Doping Rule Violations … in the AFL competition:***

– ***ASADA***

(emphasis added)

66 A person who breaches the AFL Code is subject to sanctions provided by the AFL Code: see cll 3.2 and 14.

67 Pursuant to the combined effect of the Player Rules and the AFL Code, the 34 Players and Mr Hird were obliged to attend interviews and answer questions fully and truthfully, or face possible sanction by the AFL. Again, this was only because they had voluntarily accepted these obligations upon becoming a player or official.

68 The 34 Players and Mr Hird had agreed to subject themselves to compulsory interviews (the only reservation in respect of exercising any privilege against self-incrimination was in r 1.9). I will return later in more detail to this aspect of these proceedings.

WITNESSES

69 I should briefly refer to the witnesses. Mr Hird relied upon his own affidavits and was cross-examined. Essendon relied upon an affidavit filed by Mr Xavier Campbell (the current CEO of Essendon), who was cross-examined. The CEO relied upon the affidavits of Ms Aurora Andruska (the former CEO of ASADA), and Messrs Trevor Burgess (National Manager – Operations at ASADA) and Aaron Walker (an investigator at ASADA), who were cross-examined and an affidavit of Christopher McDermott (a lawyer on behalf of ASADA), who was not cross-examined.

70 The only witness whose credit was impugned was Ms Andruska. It was submitted by Essendon and Mr Hird that Ms Andruska was non-responsive, evasive and partisan. It was observed, as was the fact, that there were long pauses between the questioning of Ms Andruska and her responses.

71 I do not consider these criticisms, to the extent they impact on her veracity, can be sustained. Ms Andruska was a truthful witness. Ms Andruska was careful in all her responses, and in my view wanted to consider properly each question, seeking to provide a truthful answer. Ms Andruska provided convincing and credible explanations for the steps she or her investigators took in undertaking the co-operative arrangement between ASADA and the AFL for the purposes she outlined in her affidavit evidence. Ms Andruska was a very experienced public servant, and explained during the course of detailed cross-examination the approach undertaken by herself and investigators of ASADA and the AFL. The cross-examination traversed many areas of detail relating to various meetings and decisions made in the course of the investigation. I would have expected Ms Andruska to be careful in responding to the interrogation made of her on these matters, as indeed she was.

72 In some instances, Ms Andruska did take the opportunity to explain her position as to the propriety and purpose of ASADA's conduct in the investigation, and her characterisation of the events which occurred. Having regard to the issues in these proceedings, and the challenge to the lawfulness of her own actions as CEO of ASADA, this was to be expected. In many instances, her evidence gave context to her file notes that were in evidence before the Court. Where necessary Ms Andruska took time to refer to her notes, which again was only to be expected. It was apparent from her evidence that she relied upon her staff, including legally qualified staff, and her investigators, in effectively guiding and conducting the investigation. As CEO, Ms Andruska was entitled to delegate certain administrative tasks to her staff, within the limits provided for by the Act, and the NAD Scheme. Obviously, during the course of the investigation, many decisions were properly left to the investigators within ASADA.

73 External or objective circumstances may raise doubt or put into question the reliability or credibility of the testimony of a witness. There is nothing in the evidence in these proceedings, properly characterised and put in context, that suggests Ms Andruska's evidence was incorrect in relation to the salient facts which I find determinative of these proceedings.

74 There is no pleaded case alleged by either Essendon or Mr Hird that Ms Andruska as CEO improperly delegated any of her functions or powers, or in any other way abrogated her responsibilities.

75 There is no pleaded case that the CEO, as the repository of statutory powers, did not turn her own mind to the exercise of her powers or that in making her decisions did so on the bidding of others, being a separate ground entitling Essendon or Mr Hird to relief.

76 It has been suggested in submissions by Mr Hird and Essendon, based upon the cross-examination of Ms Andruska, that she did not make *any* decision to approve the conduct of the interviews, nor turn her mind to whether the establishment of the investigation met the requirements of the Act.

77 Whilst no formal decision was made to this effect, it is apparent from the evidence that the CEO and her lawfully appointed delegates within ASADA made various decisions as to the setting up of the investigation and its conduct.

78 It is important to recall that these proceedings do not involve a broad and general inquiry (outside the pleaded case) as to the general conduct of the investigation, nor the day to day activities of Ms Andruska or her investigators during the course of the investigation. I have come to the view that Ms Andruska was under some pressure from the then Federal Government and the AFL to bring the investigation to an end as soon as possible, and to assist the AFL so that the AFL could take disciplinary proceedings against Mr Hird and Essendon prior to the 2013 AFL finals season. However, I do not regard such pressure as giving rise to any dereliction by Ms Andruska in respect of her responsibilities, under the Act or the NAD Scheme.

FEDERAL GOVERNMENT INVOLVEMENT

79 For the purposes of these proceedings, I do not need to consider or comment on the propriety of the intervention made by the then Federal Government during the course of the investigation. Section 24 of the Act provides that the relevant minister may, by legislative instrument, give directions to the CEO in relation to the performance of his or her functions and the exercise of his or her powers. However, such a direction must not relate to a particular athlete, or a particular support person, who is subject to the NAD Scheme, or relate to the testing of a particular athlete under an anti-doping testing service, or safety checking service, being provided by the CEO under contract on behalf of the Commonwealth.

80 ASADA is to be independent from the influence of government, save for the power of the relevant Minister to give directions, by legislative instrument, as contemplated by s 24 of the Act. The Act does not empower the Minister to override the exercise of the CEO's statutory powers in relation to a specific athlete, and requires any direction to be made by legislative instrument. Ministerial direction outside the specific permission given by the Act would normally be treated as impliedly forbidden.

81 This is not to say that the CEO may not discuss matters with the relevant Federal Government department, for instance in relation to financial resources and the general operation of ASADA. Further, one of the functions of the CEO is to advise the relevant minister about matters relating to any of his or her other functions referred to in s 21 of the Act: see s 21(1)(n).

FACTS

82 I now turn to a chronology of the relevant facts.

Background and establishment of the "joint investigation"

83 Prior to 2013, the Australian Crime Commission ('the ACC') had conducted an investigation known as "Project Aperio", which examined the use of performance and image enhancing drugs, including the nature, extent and resulting harms of the involvement of organised crime in sport. Project Aperio primarily considered two major sporting codes in Australia — the AFL and the National Rugby League. In February 2013, the ACC published its report, titled "Organised Crime and Drugs in Sport".

84 On 31 January 2013, ASADA and the AFL discussed certain matters arising from the ACC "Project Aperio". Mr Paul Jevtovic of the ACC was in attendance. A briefing document was prepared, naming, amongst others, Essendon. Ms Andruska attended the meeting and took notes (as was her practice). The AFL attendees were Mr Andrew Demetriou (CEO), Mr Gillon McLachlan (Deputy CEO), and Mr Brett Clothier (Manager – Integrity Services).

85 Mr McLachlan asked: "Is it Essendon?" Mr Jevtovic replied: "say no more". After that exchange, and by the display of body language, there was no doubt to those in the room that Essendon was the AFL club under suspicion. From here on, Essendon remained the focus of ASADA during the course of the investigation.

86 In this 31 January 2013 meeting, the AFL expressed its desire to "share" and "co-operate" with ASADA. There was a general discussion about an investigation, although the details as to the conduct of any investigation were not discussed.

87 As at this date, Ms Andruska had determined that ASADA (with or without the co-operation of the AFL) was going to investigate Essendon. As Ms Andruska explained, the investigation (called "Operation Cobia") had been underway since 2011, and involved any club involved in using performance enhancing drugs.

88 On 1 February 2013, Mr Clothier telephoned Ms Andruska in order to discuss a strategy for an investigation. Mr Clothier adverted to the Player Rules and the powers therein. Ms Andruska responded with words to the effect of "we can use the AFL's powers until we get our own powers".

89 In early February 2013, ASADA commenced drafting what became known as a "plan" for the investigation.

90 At 9:00am on 5 February 2013, there was a second ACC briefing to the AFL and ASADA personnel.

91 At 11:50am on 5 February 2013, Mr Clothier attended a meeting with Mr McLachlan, Mr Evans (Chairman of Essendon), Mr Hird, and Mr Robson (then CEO of Essendon). Mr Clothier said that the AFL had received information from ASADA about Essendon. The information was about the high performance area of Essendon and the alleged dubious practices concerning supplements during 2012. At that meeting Mr Clothier said that "there will be a joint investigation".

92 Later on 5 February 2013, at about 1.30 pm, Mr Robson telephoned Ms Andruska of ASADA. He said that he had briefed the players approximately two hours ago, and that he wanted a full and complete investigation. To that end, he told Ms Andruska that an Essendon press conference would take place later that day.

93 On 5 February 2013, Mr Clothier met with Mr John Nolan (an investigator at ASADA) and Mr Paul Simonsson (Director – Intelligence and Investigations at ASADA). Mr Clothier said the media were "onto Essendon" and that a press conference would occur later that day.

94 Later that day, Essendon announced, by way of press statement, that it requested an immediate investigation. In the statement, Essendon asked ASADA for its assistance in an investigation,

and Essendon said it would co-operate. There is no evidence that Mr Hird played any role in the decision to invite ASADA and the AFL to investigate Essendon, or in the decision of Essendon to self-report to ASADA and the AFL. He publicly supported the investigation as announced, but said in evidence that he privately did not support Essendon self-reporting.

95 No doubt Mr Robson contacted the CEO of ASADA with the knowledge of Mr Evans and Mr Hird, which is consistent with Essendon's public statements on 5 February 2013. On this day, Essendon held its first press conference on this matter ('the Essendon Press Conference'). There were three persons present at the Essendon Press Conference; Mr Evans, Mr Robson and Mr Hird. Mr Evans made the following statements:

> *Over the last 48 hours, the Essendon Football Club has received information about supplements that have been given to our players as part of the fitness program in 2012.*
>
> *Given the information we received and the questions it has raised, we have taken the following action:*
>
> *Firstly we, consulted with our staff, briefed our Board and all our players.*
>
> *Secondly, we contacted the AFL and early today we met with Gillon McLachlan and Brett Clothier to brief them, and to seek advice. Following that discussion we requested that the AFL commence an immediate investigation.*
>
> *Thirdly, today the Essendon Football Club contacted ASADA, the Australian Sports Anti-Doping Authority and requested their assistance in an investigation, and we offered the full co-operation of everyone at the club. ASADA has informed us that they will commence the investigation immediately.*
>
> *Of course, this is very distressing for our club, our Executive, our players and our board. We believe as a club that we have done everything to be compliant with the rules and regulations of the AFL and ASADA.*
>
> *But, the integrity of the club is critical for the people sitting at this table - and of course for the broader Essendon family, and that is why we have moved quickly today to call the AFL and ASADA to seek a clean bill of health.*
>
> *I appreciate that there is a lot of questions and many that we will not be able to answer today.*
>
> *We want this investigation to go where it will, and our club at every level will co-operate. We believe that we have acted today in a sensible and responsible way, and we now want the investigation to take its course.*

96 Clearly, Mr Evans was not only speaking for himself. The statements by Mr Evans were made for and on behalf of each of the individuals "sitting at th[e] table" with him, including Mr Hird, as representatives of Essendon. Mr Hird, although subject to the control of his employer, was publicly supporting the position taken by Mr Evans. The assurances given ("we offered the

full co-operation of everyone at the club …"; "we want this investigation to go where it will …") were assurances which would be taken to be given by Essendon and each of Mr Evans, Mr Robson and Mr Hird. There was no action taken by Mr Hird, verbally or otherwise, to suggest other than that he was in complete agreement with the statements by Mr Evans. Mr Hird publicly acquiesced in, and adopted, the request for an investigation by ASADA. I accept that Mr Hird had private misgivings about the extent of the co-operation indicated at the Essendon Press Conference. However, as he said in his evidence, he was aware that he had to co-operate with the investigation, having regard to the Player Rules and under instruction from his employer, Essendon. Mr Hird also considered he had nothing to hide, and was motivated to co-operate because he considered (taking into account advice he received), co-operating would benefit the Essendon players.

97 By the time of the Essendon Press Conference it would appear that ASADA had already determined to investigate Essendon (as part of a larger investigation), and that the investigation into Essendon would be an investigation calling upon the co-operation of the AFL.

98 There was an issue about whether the agreement to conduct the investigation was in response to a request from Mr Evans or whether ASADA had determined to conduct the investigation before Essendon made any overtures. Whether this was in fact so or not seems to me to have little relevance to the issues I need to determine. One thing is clear: Mr Hird and Essendon publicly spoke and acted in a way demonstrating their full co-operation with the investigation from its very early stages.

99 Shortly thereafter but before 8 February 2013, Deloitte Touche Tohmatsu ('Deloitte') was retained by the AFL to collect and analyse data obtained from Essendon.

100 On 9 February 2013, Ms Andruska and others met with Messrs Clothier, McLachlan, Evans and Robson. According to Ms Andruska, she understood there to be an "understanding" that there would be a "joint investigation" between the AFL and ASADA, and that ASADA would obtain information through the exercise by the AFL of its "compulsory powers". Mr Richard Eccles, then Deputy Secretary of the Department of Regional Australia, Local Government, Arts and Sport was also present at the meeting.

101 At that meeting, Mr McLachlan of the AFL raised the possibility of AFL sanctions against Essendon and its personnel if any wrongdoing was found as a result of the investigation.

Assurances to the players

102 I will now deal with ASADA's communications with the players prior to their interviews.

103 As the investigation was getting underway in early February 2013, the AFL was concerned about the interests of the Essendon players. Those concerns led to a period of negotiations, following which ASADA issued a statement and presented to the players on 20 February 2013. The presentation and statement were designed to give a level of comfort to players in co-operating with the investigation. The background to that statement and presentation is as follows.

104 On 10 February 2013, Mr Clothier of the AFL wrote to Mr Simonsson and raised an impasse in the approach to the investigation. Mr Clothier asserted that:

> *ASADA and the AFL agrees that any player that comes forward in this matter and makes full disclosure will not be prosecuted if he unknowingly used a prohibited substance and was in the opinion of ASADA and the AFL, not culpable in relation to the use of the substance.*

105 On 11 February 2013, this concept of non-culpability was developed further in an email conversation between Mr Clothier and Mr Simonsson where the notion of "exoneration" for a player was discussed.

106 On 13 February 2013, Mr Simonsson emailed Mr Clothier and suggested that, where a player came forward and admitted anti-doping conduct in a sworn statement, "ASADA and the AFL will fully explore all avenues in an attempt to provide substantial assistance or a no fault or negligence defence".

107 Later that day, Ms Elen Perdikogiannis, a lawyer from ASADA, became involved in the negotiation as to what outcome might be made available to players who offered "substantial assistance".

108 Mr Eccles, also got involved and wrote to Ms Perdikogiannis:

> *Spoke with Gillon - not sure he was fully in the loop. But I think he is now.*
>
> *Anyway, I took him through the fact that the para,*
>
> > where ASADA forms the view that the defence of *no fault or negligence* is available in relation to a particular player, ASADA and the AFL agree that they will support the application of that defence to that player in proceedings before relevant sports tribunals.
>
> *was as far as possible and a really good thing - and all he then needed was an*

assurance that the AFL Tribunal would view things in a certain light, and it is as locked in as it can be.

109 On 18 February 2013, Ms Perdikogiannis involved herself further in the negotiations between ASADA and the AFL over the words that ASADA would communicate to the Essendon players.

110 Following these negotiations, ASADA and the AFL reached an agreement concerning how the players would be treated if they offered substantial assistance. On 20 February 2013, Mr Simonsson and Mr Darren Mullaly of ASADA attended a meeting with Essendon and spoke to the players and other Essendon personnel en masse. Mr Simonsson read from a prepared statement and handed out a document. The document referred to "our agreement with the Australian Football League about how the investigation is going to proceed", and spoke of the assurance to be proffered to the Essendon players if they provide substantial assistance.

111 The final version of the statement was delivered to players by ASADA on 20 February 2013.

112 However, after the statement had been delivered, ASADA issued a new statement on 7 March 2013. The new wording was provided by Ms Perdikogiannis of ASADA to Mr McLachlan and Mr Clothier in a letter on 7 March 2013. This new wording spoke of "substantial consideration" being given to not opposing the defence of substantial assistance but affirmed that now the players carried the onus of establishing substantial assistance.

113 On 7 March 2013, Mr McLachlan wrote back to ASADA and took issue with the changed wording proposed by Ms Perdikogiannis. The AFL asserted that Essendon players and personnel had relied upon the original statement (from 20 February) and that the investigation had commenced and was ongoing on the basis of that reliance.

114 Ms Perdikogiannis was apparently concerned by this turn of events. She also received a call from Mr Eccles, whom Mr McLachlan had called to express his concern. Ms Perdikogiannis conveyed this to Ms Andruska and others in an email dated 7 March 2013.

115 On 8 March 2013, Ms Perdikogiannis replied to Mr McLachlan's letter and affirmed the revised ASADA position. She thanked him for the AFL co-operation to that date.

116 Mr Simonsson made a further presentation to players on 6 May 2013. It would appear that Mr Simonsson gave certain representations to the Essendon players that they would receive favourable treatment if they co-operated with the investigation. The Essendon players were

encouraged by Mr Simonsson's comments to answer the questions put to them during the course of the investigation.

117 Shortly after the presentation to players on 6 May 2013, player interviews commenced.

118 By all the assurances (both the original and revised versions) the Essendon players were encouraged, and perhaps guided, by various people in authority who made the assurances, to attend the interviews and answer questions. The revised assurances were made before the player interviews commenced.

119 Whilst I consider that the Essendon players would have taken into account all the presentations given to them, including by Mr Simonsson on 6 May 2013, it is clear that the Essendon players attended the interviews on the basis of those contractual obligations, set out in the Player Rules and the AFL Code.

Interview process

120 I now turn to the interview process.

121 On 10 February 2013, Mr Nolan emailed Mr Clothier and requested that a template letter be produced by the AFL, so that persons could be directed to attend interviews as part of the investigation.

122 Having agreed to co-operate, ASADA made many requests of the AFL throughout the investigation. Ms Andruska asked the AFL to use its "compulsory powers" to issue a standing demand to AFL clubs for any investigative material they may collate of their own initiative. Ms Andruska provided a draft notice for the AFL to issue to the clubs. In her covering email, Ms Andruska stated:

> *As this obligation to cooperate is ongoing the Clubs should also be reminded that they are to continually provide such material to ASADA as and when it is obtained. For example, ASADA is to be provided with an electronic and/or hard copy of any interview immediately following its conclusion - in its complete and unedited form.*
>
> *If you agree with this position, I propose that the AFL send Clubs a copy of the Notice attached to this email, which has been settled by Senior Counsel. It is obviously a matter for you which Clubs are provided with this Notice but I would urge you to send it to the Club already identified as being under investigation. Accordingly, if ASADA or the AFL become aware that Clubs are not complying with the terms of the Notice, the AFL would be empowered to act upon such non-compliance as a breach of the Anti-Doping Code.*

123 On 5 March 2013, Ms Sharon Kerrison of ASADA sent emails to Mr Haddad at the AFL, in effect agreeing to the terms of the draft AFL notice to Essendon players and officials to attend interviews.

124 On 14 March 2013, there was a meeting between ASADA investigators and the AFL investigators to discuss an investigation strategy and division of workload between the AFL and ASADA. Later that day, ASADA provided to the AFL a "searchable PDF file of all relevant documents provided by Deloitte" to the AFL. Although the AFL had retained Deloitte for forensic investigative purposes, ASADA was closely involved in the management of the Deloitte processes. ASADA had direct contact with Deloitte, albeit with the permission of the AFL. From time to time during this period, and later at the request of ASADA investigators, the AFL used its "compulsory powers" to require production of physical evidence, documents, computers and phones. That material was subsequently provided to ASADA. ASADA was to record each interview, and provide the AFL with transcripts of the recordings of interviews, which it did. No express conditions were placed on the use of this material in the hands of the AFL, but on the basis of the way in which the "joint investigation" was conducted, such restriction on use would not be expected. As Mr Walker in his affidavit said, the "joint investigation" was to "fulfil separate, but overlapping, objectives", and that:

> *ASADA and the AFL had different, but complementary, roles which were underpinned by shared objectives – preventing and detecting doping violations and thereby ensuring the integrity of sports.*

125 On 15 February 2013, ASADA prepared the interview plans to be used in the investigation. Mr Walker of ASADA deposed that there was no input from the AFL into those interview plans.

126 As the investigation progressed, interviews were conducted on the basis that:

- as agreed, ASADA asked the AFL to contact Essendon personnel and players, both past and present, and direct those personnel to attend interviews;
- the AFL summoned the interviewee using its compulsory powers;
- the AFL interviewer delivered an introduction; and
- the ASADA investigators then effectively took over the interview.

127 ASADA continued to control the conduct of the investigation as it progressed. For example:

- ASADA provided an interview plan to the AFL (Mr Haddad) for Essendon employee Mr Robinson;
- ASADA requested that the AFL locate and compile all player registration forms;
- ASADA asked the AFL to obtain medical information from Essendon;
- ASADA requested that the AFL provide game and injury statistics; and
- ASADA requested that the AFL provide the Deloitte analysis of the Essendon accounts system.

128 As I have said, ASADA recorded each interview and then prepared transcripts of the interviews. ASADA engaged Auscript to transcribe the interviews. Those interview transcripts were fed back to the AFL, commencing as early as 26 March 2013. This process of providing transcripts of interviews continued from March to late July 2013. The AFL was asked by ASADA to prepare summaries of the transcripts of interview, and to provide those summaries to ASADA.

129 I mention at this juncture that around this time and thereafter there was some doubt expressed, both to the AFL and to ASADA, as to the legality of the investigation and disclosure of information to the AFL by ASADA. I will return to this aspect later.

130 The investigation continued. On 10 April 2013 Mr Hird received a letter from Mr Clothier ('the AFL letter'), headed "Notice for Interview: James Hird".

131 The AFL letter included statements to the following effect:

- The AFL and ASADA were undertaking an investigation into the production, distribution and use of prohibited substances in the AFL (defined in the AFL letter as the "Investigation").
- Clause 12.7 of the AFL Code placed obligations on relevant persons to:
  (a) fully co-operate with any investigation;
  (b) fully and truthfully answer any question asked for the purpose of such investigation; and
  (c) provide any document in their possession or control relevant to such investigation.
- Rule 1.8 of the Player Rules obliged relevant persons, amongst other obligations, not to:

(d) give any false or misleading evidence to any hearing or investigation conducted under the Player Rules and AFL Regulations;

(e) refuse or fail to attend or give evidence as directed at any inquiry when requested to do so: and

(f) refuse or fail to co-operate with any investigation conducted by the AFL under the AFL Rules and Regulations.

- Mr Hird was required under the Player Rules and cl 12.7 of the AFL Code to attend, on 16 April 2013, an interview with the AFL and ASADA in relation to the investigation.
- Failure to comply with the requirements of the Notice may be acted upon by the AFL as a breach of the Player Rules and/or a breach of the AFL Code.

132 Also on 10 April 2013, Mr Hird's legal representative received an email communication from Mr Nolan, attaching an "explanatory document".

133 The "explanatory document" included statements to the following effect:

- The ASADA and the AFL investigation involved an allegation that AFL athletes and support persons may have used prohibited substances and may have engaged in prohibited methods.
- Rule 12.7 of the AFL Code provided that each player, club, officer and official, must upon the request of the AFL General Manager – Football Operations or the AFL Medical Officer:

  (a) fully co-operate with any investigation;

  (b) fully and truthfully answer any question asked for the purpose of such investigation; and

  (c) provide any document in their possession or control relevant to such investigation.

- Failure to comply with the requirements of the interview notice may be acted upon by the AFL as a breach of the AFL Code which if pursued by the AFL could be sanctioned at the discretion of the AFL Tribunal, pursuant to cl 14.11 of the AFL Code.

134 Pages 6–8 of the "explanatory document" contained, without accompanying explanation, a copy of Div 137 of the Schedule to the *Criminal Code Act 1995* (Cth) ('Commonwealth

Criminal Code'). Division 137 contains offences relating to the provision of false or misleading information or documents to a Commonwealth agency, which includes ASADA.

135 On 16 April 2013, Mr Hird attended an interview with ASADA and AFL representatives ('the Interview').

136 The Interview was introduced by Mr Haddad, an employee of the AFL, and then principally conducted by ASADA investigators John Nolan and Aaron Walker. Mr Haddad and the two ASADA investigators were present throughout the Interview. At the commencement of the Interview, the AFL employee said to Mr Hird, in the presence of the two ASADA investigators, words to the following effect: "This is a joint investigation between AFL and ASADA — the Australian Sports Anti-Doping Agency — and it's run under the rules of the AFL".

137 Mr Haddad informed Mr Hird, also at the commencement of the Interview, that if Mr Hird refused to answer any of the questions put to him, Mr Hird's refusal could result in sanctions under the AFL Rules.

138 Neither of the two ASADA investigators:

- Specifically then asked Mr Hird whether he consented to the disclosure to the AFL of the information that Mr Hird supplied in the course of the Interview; or
- informed Mr Hird that he had a right to refuse to consent, or a right to withhold consent, to the disclosure to the AFL of that information; or
- stated to Mr Hird that the ASADA legislative regime did not abrogate the common law right against self-incrimination; or
- stated to Mr Hird that he had the right to refuse any question on the ground that it might incriminate him; or
- stated to Mr Hird that, pursuant to the ASADA legislative regime, Mr Hird, upon being interviewed, had the right to remain silent without penalty or censure.

139 However, it is important to recall that Mr Hird was legally represented at the time, had by contractual arrangement with the AFL fully agreed to the procedures to which he would be subject, did not claim any privilege or right against self-incrimination, and raised no objection to the presence or role played by ASADA or the AFL or to the provision of information to ASADA or the AFL. Regardless of any claims or objections which Mr Hird could have raised, by the time he was interviewed, he had already voluntarily accepted the potential exercise of

"compulsory powers" by the AFL by agreeing to become subject to the Player Rules and the AFL Code upon registering as a coach with Essendon.

140 At the commencement of the Interview, counsel for Mr Hird and Mr Haddad engaged in a discussion to the following effect:

Mr Nolan SC:	*Now, gentlemen, we don't want to enter into any debate as to the legal arguments today as to the nature of the joint investigation as distinct from two separate investigations. We'll put that debate to the side for a later time, if necessary.*
Mr Haddad:	*Okay. That's good*
Mr Nolan SC:	*We understand that's what you say---*
AFL Employee:	*Yeah*
Mr Nolan SC:	*---and he understands what you say.*
Mr Haddad:	*Okay. All right. We'll just continue on.*

141 I regard the position reached by the participants at the interview at this time as being one of putting to one side the legal arguments, relating to the validity of the "joint investigation", with the participants agreeing to proceed with the interview. No one expressly or impliedly reserved their position — it was just a matter of getting on with the interview, which Mr Hird wished to proceed in accordance with his publicly proclaimed position.

142 After the Interview, Mr Hird was requested by the AFL to produce his mobile phone for forensic examination, and Mr Hird complied with that request.

143 As the investigation moved into late April, plans were made for the interviews of players to commence. On 24 April, Mr Haddad emailed Mr Robson and informed him of the impending interview process to be conducted by ASADA:

> *…ASADA and the AFL intend to start scheduling the interviews of the players starting, tentatively the 6th of May 2013.*
>
> *ASADA has been in some discussion with the AFLPA surrounding this request, so it shouldn't be a surprise from their point of view.*
>
> *The following players will be required in the first instance.*
> *…*
>
> *ASADA would like to interview these players in this order.*

144 By May 2013, ASADA requested the AFL to have Deloitte conduct specified searches of the Essendon material obtained by the AFL and then provided to Deloitte.

145 ASADA also requested the AFL to compel production of personnel records from Essendon. On 2 May 2013, Ms Kerrison asked Mr Haddad to produce player supplement spreadsheets in preparation for the player interviews.

146 From May 2013, the AFL and ASADA interviewed many Essendon players and personnel as part of the investigation.

147 Each Essendon player was given a notice to attend the applicable Player Interview in substantially the same terms as the AFL letter given to Mr Hird.

148 Each interview was conducted by at least one AFL employee and at least one ASADA employee.

149 At the commencement of each Player Interview, an AFL employee made statements to the Essendon Player, in the presence of at least one ASADA employee, to the same effect as those made to Mr Hird.

150 The same observations made in relation to Mr Hird as set out above apply to the 34 Players. Significantly, each of the 34 Players were legally represented at the time, had by contractual arrangement with the AFL fully agreed to the procedures to which they would be subject, did not claim any privilege or right against self-incrimination, and raised no objection to the presence or role played by ASADA or the AFL or the provision of information to ASADA or the AFL.

Legal concerns

151 As I mentioned before, concerns over the legality of the investigation and the provision of confidential material to the AFL were raised. I have already referred to the exchange at the interview of Mr Hird.

152 On 1 March 2013, the AFL was placed on notice by lawyer Chris Pollard, acting for several Essendon personnel, that the power to conduct a "joint investigation" was challenged. Mr Pollard wrote to Mr Haddad and stated:

> *The Code neither contemplates a 'joint' investigation nor the use of information obtained by ASADA being used by the AFL for any other purpose, save the procedures authorised under the Code. This much is clear* [upon] *a consideration of the Code in its entirety and, in particular, the terms of clauses 4 and 12.*

153 The AFL rejected any assertion that it did not have jurisdiction to compel an AFL registered official to attend and compel such persons to answer questions.

154 The AFL wrote back to Mr Pollard. Significantly, it made clear what it intended to do with the information it obtained from the investigation:

> *As a result, the AFL will be playing an active role in the Investigation and using all such information obtained in determining if there has been any breach of the AFL Player Rules and/or the Code.*

155 On 8 March 2013, Mr Ragu Appudurai, lawyer from Russell Kennedy, acting for various Essendon personnel, emailed Mr Walker of ASADA questioning the legality of the "joint investigation". Mr Appudurai stated, inter alia:

> *While the Australian Government Investigations Standards contemplates joint investigations by (government) agencies … there appears to be no provision for collaboration with non-government bodies.*

156 On 15 April 2013, Ms Andruska provided this response to Mr Appudurai:

> *As to the issue of whether ASADA and the AFL can conduct a joint investigation. ASADA is aware that the AFL provided you with advice in letters dated 1 March 2013 and 26 March 2013. We agree with the matters outlined in those letters. ASADA does not believe that there is anything preventing us from conducting a joint investigation with the AFL.*

157 On 23 March 2013, Mr Nolan of ASADA wrote an email to his colleagues recording this exchange:

> *Yesterday, Aaron and I interviewed* [redacted] *at the Players Association. During that interview, a couple of issues were raised:*
>
> *Issue 1:*
>
> [Redacted] *asked whether Brett Clothier or Abraham Haddad would be present during any of the player interviews.*
>
> *Answer: Yes. This is a joint investigation.*
>
> [Redacted] *said that he would object to either Brett Clothier or Abraham Haddad asking questions during the interviews based on his interpretation of the relevant legislation/contracts.*
>
> *Answer: That issue should be addressed with the AFL before the player interviews commence. ASADA understands that a similar challenge was raised by another legal counsel and was resolved by the AFL.*

158 The approach of ASADA, consistent with its conduct of the investigation, was that the interviewee had on obligation to co-operate under the Player Rules and the AFL Code.

The Interim Report

159 I now turn to the facts surrounding the Interim Report, the nature and scope of which developed over time until it was formally first released to the AFL on 2 August 2013.

160 On 18 April 2013 at 10.09 pm, Mr Clothier asked Mr Mullaly to produce a report containing information arising out of the investigation which could be used by the AFL for its purposes. He stated:

> *As you know AFL and ASADA are investigating Essendon FC jointly. In accordance with the NAD Scheme and our service agreement ASADA is sharing information with the AFL arising from the investigation such as interview transcripts, etc as the investigation progresses (excluding ACC information of course).*
>
> *We understand that it is possible that interviews of coaches and administrators will be completed in the coming weeks, prior to the player interviews commencing. In this case, the AFL would request that the ASADA investigators provide us with an interim investigation report… It is likely we would provide this interim report along with interview transcripts and other relevant documents to Essendon FC for similar reasons. Furthermore, we think it may be important to put Essendon FC on notice regarding any potential disciplinary action against the Club in order to give it an opportunity to respond.*

161 Mr Mullaly wrote back that night at 10.39 pm and said he would take that request to the ASADA CEO. He said that he considered that ASADA could share information under cl 4.21 of the NAD Scheme:

> *I do not see any problem with ASADA sharing investigation information with the AFL. We are authorised to do so under clause 4.21 of the National Anti-Doping scheme in addition to our contractual agreement in the user-pays contract. One issue that will most likely come up at our end is issues surrounding confidentiality of the information …*
>
> *As raised above, it may be of assistance to us in our considerations to outline what the AFL proposes in terms of matters of confidentiality surrounding any interim report (and associated documents) after it is released. What things would the AFL do to ensure the integrity of the information is protected whilst trying to pursue disciplinary matters?*

162 On that same night, Mr Mullaly of ASADA forwarded the email chain internally to ASADA persons, including Ms Andruska, and stated:

> *E-mail chain from the AFL re preparing and disclosing an interim report. Something everyone may wish to discuss. I will send on any further information that I get.*

163 Mr Nolan of ASADA emailed Mr Mullaly on 18 April 2013 and provided his opinion on the possibility of disclosing the Interim Report and how it might be done:

> *Aaron Walker is currently working on both a full and interim investigation report. Some of the above questions will only be answered once we see the draft interim report.*

In that regard, I am happy for Brett to read a draft sooner rather than later.

I am not adverse to the idea of an interim report, but that decision needs to be carefully considered from a legal perspective.

164 On 19 April 2013, Mr Nolan emailed various ASADA colleagues about "the release of an interim investigation report". He had spoken to Mr Clothier a week earlier and said it was "doable, but it would require clearance from [Ms Andruska] and our Legal Unit". He then raised at least 10 questions for consideration by ASADA.

165 On 26 April 2013, Mr Clothier of the AFL replied to Mr Mullaly's 18 April 2013 request for comment on what use the AFL would make of any Interim Report. Mr Clothier stated, in bullet point fashion:

- *AFL interim disciplinary actions (eg stand down orders) would require natural justice and disclosure of relevant matters to individuals. They would also require some reasonable public comment.*
- *Essendon FC chairman may use interim report for purpose of disciplinary action with his employees if any and same would apply to him;*
- *We can manage the process working closely with you …*
- *As a general comment, it is clear ASADA are entitled to disclose information to AFL and AFL is entitled to use/disclose information in the proper administration of the AFL so I think we can work through this and any issues.*

166 Mr Mullaly of ASADA expressed his support for the provision of an interim report by ASADA to the AFL.

167 On 6 May 2013, Mr Evans of Essendon released a public version of what he called "the Switkowski Report".

168 The Switkowski Report was an internal report commissioned by Essendon. Its conclusions dealt with governance issues at Essendon, relating to possible doping activities. I will return briefly to the Switkowski Report when dealing with the connection between the purpose of the ASADA enquiry and the AFL enquiry.

169 On 24 May 2013, the AFL and the then Minister for Sport, the Honourable Senator Kate Lundy, and a government media advisor (Mr Chris Owens) met with ASADA and discussed the terms of the proposed Interim Report. Mr Demetriou was not happy with at least two things:

- apparently he wanted the Interim Report to be provided openly; and

- he considered the timeline for the release of the Interim Report to be completely unacceptable.

170 Ms Andruska accepted that it was unusual to have a head of a sporting organisation and a Minister with her in one room discussing specific investigations.

171 Some pressure had already come from the then Federal Government. For instance, at a meeting in Canberra on 9 February 2013 between Ms Andruska, Messrs Clothier, McLachlan, Evans and Robson, it was noted that the "PM wants it to end" and there was a reference to "criticism of gov".

172 By June 2013, ASADA was coming under pressure from Senator Kate Lundy, to reach some form of conclusion, or "an outcome" from the investigation.

173 At 9:00am on 4 June 2013, Ms Andruska and Ms Perdikogiannis of ASADA had a conversation with Ms Glenys Beauchamp, the Secretary of the Department of Regional Australia, Local Government, Arts and Sport. The handwritten notes recorded by Ms Perdikogiannis record the following:

> *9am conversation with Glenys Beauchamp* [with] *AA. Clear instructions from Min.*
>
> - *Min - her colleagues at her, or accusing her of hampering chances of re-election - you need an outcome.*
> - *heightened levels of anxiety by AA, "and Elen gets emotional as well"*
> - *big business sponsors, Australia's reputation, etc.*
> - *Min has put it on Glenys, etc.*

174 Ms Andruska also took a note of the meeting. Her note recorded:

> *Lundy - needs something*
>
> - *Deal with AFL - support staff sacked, points off, players - off*
>
> *Know can't do without ASADA agreeing*

175 Another meeting took place on 4 June 2014 between Ms Andruska, Mr McLachlan, Mr Evans and Mr Eccles. Ms Andruska's note records an AFL comment:

> *…do all at once and get it right*
>
> *…1 million tickets - first 2 weeks of finals*
>
> *…Ziggy - CEO Done…*
>
> *Richard E - Chris Owens*

Max. opportunity for best outcome for players

176 Ms Perdikogiannis' notes of this meeting record as follows:

> *Mr McLachlan wanted the matter dealt with this season. He said the AFL brand and competition feeds into the punter's view of the integrity of the 2013 season. The players were ok. The brand could not get any worse. The integrity of the 2013 season was the driver. He was not interested in the support staff being done first;*
>
> - [Ms Andruska] *offered transcripts to* [Mr McLachlan]
> - [Ms Andruska] *don't want Ziggy report actions and ASADA actions separate in time;*
> - *It was quite a complicated conversation*
> - *WADA say 'AOD9604 is banned'.*
> - *A secondary question is whether a case can be made*
> - *If it's banned* [and] *a case cannot be made against there's no way that could be a violation;*
>
> [Mr McLachlan] – *his preference is we do it all at once* [and] *get it right…*
>
> *If it is going to push up in late August, then maybe in October (b/c has to sell 1 million tickets in finals)…*
>
> [Ms Andruska]… *Have finished player* [interviews] - *doing some further enquiries, transcripts - stuff ... happy to push back to October, if that* [would] *help.*

177 Undoubtedly, there was some pressure to get things moving.

178 On 29 May 2013, Mr Nolan at ASADA had already completed a synopsis for part of the proposed Interim Report and emailed that to various persons at the AFL. He advised them:

> *We will need to extract <u>just enough</u> information from the transcripts….*
>
> *headings should be generally consistent…*
>
> *…broader issues…do not need to be covered in the synopsis - they will be covered by Aaron in the main report.*
>
> *The main impost on your time will be formatting and footnoting.*

179 On 13 June 2013, Mr Burgess recorded a conversation he had with Mr Eccles. Mr Eccles had been told of a proposed AFL Board Meeting and was given information about what was going to occur at that meeting. Mr Eccles was told by a representative of the AFL that the AFL would keep the pressure on ASADA to be the "bad guy". It was reported that the AFL had stated in respect of the player support staff, such as Mr Hird, that the "AFL will go them". It was also noted by Mr Burgess that if the "evidence stacks up, take points off them" (namely Essendon).

180 On 14 June 2013, ASADA commenced consideration of giving access to the draft Interim Report to Mr Clothier. ASADA forwarded a chain of internal emails to the AFL concerning the issue.

181 On 14 June 2013, Mr Nolan of ASADA told Mr Clothier of the AFL that he will be given access to the draft report. Mr Nolan stated:

> *I understand there will be a meeting with the AFL and ASADA when Aurora gets back next week. I have been given permission for you to view the DRAFT final report, even though we still have much work to do. This will give you a better understanding of how we see things panning out.*
>
> *The report is presently about 170 pages, so it will take a bit of time to get through.*

182 On 19 June 2013, Ms Andruska met with the following people (among others):

- Malcolm Holmes QC;
- Mr Burgess;
- Ms Perdikogiannis;
- Mr Dillon of the AFL;
- Mr Clothier; and
- Mr McLachlan.

183 Mr McLachlan on behalf of the AFL again asked for a report and disclosed that such report was required to "resolve matters" and preserve the integrity of the 2013 season. There was also the issue of governance failure issues as well. The outcome of the meeting was recorded as follows:

> ***ASADA/AFL Meetings - Table of Outcomes***
>
> [In a column titled 'Outcome']
>
> *Purpose: Understand what AFL required from ASADA and to reach agreement on what could be provided by when.*
>
> *Agreed*
> 1. *ASADA would provide an Investigators Report drawing together the outcome of the interviews of the Essendon players…*
>
> [In a column titled 'Follow up']
> *ASADA worked up content page of report to discuss at weekly catch up call on Tuesday 25 June.*

184 The AFL wanted to use any report supplied by ASADA "as a basis for its decision-making". It would present it to the AFL Commission. Mr McLachlan made it clear to ASADA, as Ms Andruska's notes record:

> *Final series*
> - *players in it – Essendon*
> - *can't have this*
> - *corrupted 2013*
> - *undermine the comp for 10 years*

185 Ms Andruska summarised:

> - *use as basis of decision making*
> - *table to commission*
> - *prosecution on AOD-6904*

186 On 25 June 2013, solicitor Tony Hargreaves wrote to ASADA on behalf of Essendon and raised various issues. He commented:

> *You have advised that the draft report is nearly complete. We assume the reason a report is being prepared is because this is a 'hybrid' investigation being conducted jointly by ASADA and the AFL. Accordingly, there are other possible breaches of the AFL Anti-Doping Code which extend beyond the issues of Anti-Doping Rule violations. These other possible breaches do not give rise to any subsequent powers under the ASADA Act or the NAD Scheme. However, they do give rise to the exercise of powers by the AFL under its Anti-Doping Code.*

187 Later that same day, there was a telephone conference between Ms Andruska of ASADA and Mr McLachlan of the AFL and others. A table of contents from the proposed draft Interim Report was circulated and discussed.

188 On 26 June 2013, Ms Andruska spoke to Mr McLachlan of the AFL. She noted Mr McLachlan's comments as follows:

> *Take points off Essendon - if high court*
>
> *we need all the detail to get through that*
>
> *…*
>
> *problematic if not full report*
>
> *…*
>
> *Get outcome we need*
>
> *Take out bits that might compromise what we need*

189 From other correspondence relating to the drafting of the Interim Report, it is clear that ASADA at this time was taking the prime responsibility for drafting the report, with input from the AFL.

190 On or about 28 June 2013, Ms Andruska went on leave, with Mr Burgess becoming acting CEO.

191 On 2 July 2013, a further phone conference occurred between ASADA and the AFL concerning the contents of the Interim Report. ASADA recorded the outcomes of the conference as follows:

> ***ASADA/AFL Meetings - Table of Outcomes***
>
> [In a column titled 'Outcome']
>
> *Agreed:*
>
> 1. *ASADA will provide a report to the AFL with as much information as is lawfully possible and which does not prejudice ongoing investigations.*
>
> 2. *The report to the AFL will include:*
>
>   a. *Conclusions on the environment at Essendon that goes to the behaviour of its support personnel.*
>
>   b. *ASADA's position on whether it intends to prosecute any cases on AOD9604*
>
>   c. *Conclusions on whether there is sufficient evidence for ASADA to further investigate individual players (as required by its statutory obligations) with respect to other prohibited substances (incl hexarlin and thymosin beta 4)*

192 On 9 July 2013, a teleconference took place between ASADA and the AFL. The AFL expressed concern about any limitation on the contents of the report ASADA was to provide. The AFL wanted the report for its own decision-making purposes.

193 On 16 July 2013, ASADA and the AFL discussed the impending Interim Report. Mr Clothier of the AFL made clear what the AFL wanted included in the report and the uses to which it would put such information:

> ***ASADA/AFL Meetings - Table of Outcomes***
>
> [In a column titled 'Outcome']
>
> ***Uncontrolled Environment at Essendon***
>
> *The AFL is not looking for conclusions or commentary on the uncontrolled environment …*
>
> *…*
>
> *The AFL required the information/evidence collected through the interview process to*

be assembled in a way that paints a picture of the uncontrolled EFC environment - to a large extent provide information (evidence to support) the Ziggy Report which is all conclusions.

The AFL also wants the Report to include any evidence that the EFC was duped - notwithstanding its incompetence to protect themselves and the EFC against such threats.

The AFL considers the Report to be one of a number of items that the AFL will be considering in determining appropriate action against the EFC.

194 On 18 or 19 July 2013, Mr Clothier was granted access to, and inspected, a redacted version of the draft Interim Report.

195 Mr Clothier subsequently spoke with Mr Burgess on 19 July 2013 and provided commentary on the draft Interim Report. Mr Clothier was keen to emphasise the AFL requirements:

Brett Clothier believes that the full content of the Investigator's Report ("Environment, How was it allowed to continue, Essendon culture") are all ultimately relevant, for the AFL to form a view that there was an unacceptable risk of the player group taking/be administered prohibited substances (conduct prejudicial to interests of the game).

…

Brett Clothier suggest that there be a section included in the Investigator's Report outlining the volume/scale of investigation/background, for example:

- 10000 documents reviewed

- Number of interviews held.

196 Ms Andruska returned from leave on 20 July 2013.

197 Ms Andruska attended a meeting with the AFL (Mr Demetriou, Mr Dillon and Mr Clothier) on the morning of 24 July 2013. Mr Demetriou did not want any redactions in the report, although he said that "2 or 3 things can't afford to be made public". Ms Andruska noted:

[Ms Andruska was] *On track for 1August*

AFL have issues re integrity of competition to consider before the finals

Allows 1 month to deal with Club

Charge Essendon — 2 - 3 weeks — AFL Commission know the matter — decision can't be appealed…

198 On 24 July 2013, Mr Clothier of the AFL emailed Ms Andruska, Mr Dillon and Mr Demetriou. He referred to a meeting that morning and noted the confirmation that the "investigator's report" (ie the Interim Report) would be provided to the AFL by 1 August 2013. It was agreed

at that meeting that ASADA would contact the ACC and that ASADA would send a draft version of the Interim Report with redactions to the AFL "as soon as possible".

199 By the end of July 2013, Mr Nolan of ASADA thought the Interim Report would be shared with the AFL.

200 On 30 July 2013, Mr Nolan sent an email to a number of ASADA personnel including Mr Simonsson, Ms Perdikogiannis, Mr Mullaly and Ms Andruska, copying in Mr Walker, Ms Kerrison, Matt Sheens and Mark Nichols. He wrote:

> *The investigation into Essendon has been conducted jointly with the AFL*
>
> *…*
>
> *I have never been led to believe that this was anything other than a joint investigation. Indeed, the AFL and ASADA has been challenged regarding the decision to conduct a joint investigation and have declared the arrangement to be both appropriate and lawful.*
>
> *On the basis that this was a joint investigation I applied principles consistent with other law enforcement and regulatory bodies including:*
>
> - *open sharing of information (within legal boundaries);*
> - *strategic exercise of powers; and*
> - *agreed division of labour.*
>
> *ASADA does not have statutory power to compel persons to attend interviews, or to compel the production of information, documents or things. However, those difficulties have been largely overcome (with the concurrence of ASADA) by the AFL's application of Rule 12.7.*
>
> *…*
>
> *The investigators always believed that the interim report would be shared with the AFL. For that reason, a conscious decision was made not to include any evidence received from the ACC. That remains the case (with the exception of the SMSs).*
>
> *…*
>
> *The AFL employed 3 solicitors (temporary contracts) to review all player transcripts and provide synopses of their evidence for inclusion in the Interim Investigation Report. The fruit of that labour includes Appendix A & C of the interim report.*
>
> *…*
>
> *Aside from a few ACC sourced SMSs, there is nothing in the report that is not already with the AFL.*
>
> *…*

> *Given all these matters, I am struggling to understand the basis upon which ASADA is asserting ownership or control of the Interim Investigation Report. Surely this is not about lawful 'dissemination' - how can you be bound by legal constraints regarding 'dissemination' when the other party is a co-owner?*

201 By 31 July 2013, Ms Andruska records in her notes that Mr Clothier was concerned about confidentiality and privacy matters. Her notes relating to the release of the Interim Report by ASADA to the AFL state:

> *Brett*
> - *report does not disclose anything we don't already know.*
> - *Is this disclosure of information?*
>
> *…*
>
> *What's being provided:*
>
> *…*
>
> *Brett – providing a summary of the investigation*
>
> *Brett Clothier… Only provided in connection with investigation*

202 On 31 July 2013, Mr Hargreaves, lawyer for Essendon, wrote to ASADA and expressed strong opposition to any communication of the Interim Report to the AFL. He said:

> *The Club does not believe that ASADA can legally provide the report to the AFL.*
>
> *In your letter dated 8 July 2013, you stated that the ASADA report will be provided to the AFL pursuant to article 4.07 of the* AFL Anti-doping Code *and clause 4.21 of the* NAD Scheme*. Neither basis … permits the ASADA report to be provided to the AFL."*

203 On 2 August 2013, Minter Ellison Lawyers, on behalf of the AFL, wrote to Mr Hargreaves denying that the release of the Interim Report was illegal or improper. Significantly, Minter Ellison Lawyers confirmed the Interim Report was itself merely a step in the continuing process of investigation.

204 On 2 August 2013, ASADA wrote to Mr Hargreaves and stated as follows:

> *The ASADA CEO is able under clause 4.21 to disclose information to the AFL, where she is satisfied that to do so is for the purpose of, or in connection with, the CEO's investigation into activities at the Essendon Football Club.*

205 ASADA also brought to the attention of Mr Hargreaves that the National Privacy Principles in the *Privacy Act 1988* (Cth) apply to the AFL, and noted that there was nothing in those principles that would authorise the AFL to make the Interim Report public.

206 On 2 August 2013, ASADA sent the Interim Report to the AFL. I note that the main text of the Interim Report was drafted by ASADA personnel, although information was provided by the AFL and reviewed by both AFL and ASADA personnel. The attached cover letter to the Interim Report (dated 2 August 2013) set out the basis of the provision of the Interim Report to the AFL. It was in the following terms:

> *Please find attached a copy of ASADA's interim report into the investigation at the Essendon Football Club.*
>
> *The interim report contains information uncovered by the investigation as at 1 August 2013. It is important to note that ASADA's investigation is continuing- in that context, it is possible that further material may come to light that will change the nature of the evidence, or the findings in the interim report.*
>
> ***Basis on which this Interim report is being provided***
>
> *Although ASADA's investigation of possible anti-doping rule violations is continuing, I am able to disclose information to the Australian Football League (AFL) under Article 4. 7 of the AFL Anti-Doping Code and clause 4.21 of the National Anti-Doping (NAD) Scheme (Schedule 1 to the* Australian Sports Anti-Doping Authority Regulations 2006*).*
>
> *Under Article 4.7 of the AFL Anti-Doping Code, ASADA has an obligation to report to the AFL on the exercise of its anti-doping functions, including its investigative functions.*
>
> *The interim report contains information that is 'NAD scheme personal information' within the meaning of the* Australian Sports Anti-Doping Authority Act 2006*, and that is therefore subject to section 71 of that Act.*
>
> *This Information will generally also be information that does not arise out of any entry on the Register maintained under the NAD Scheme and relates to persons in connection with a possible anti-doping rule violation by athletes and support persons, and that is therefore covered by clause 4.21 of the NAD Scheme. Some of the information was collected by the AFL or has already been disclosed to the AFL.*
>
> *To the extent that the interim report contains NAD Scheme personal information that the AFL did not collect and has not already been disclosed to the AFL, it cannot be disclosed to the AFL except for the purposes of the NAD scheme (section 71(1), (2)(b)). Disclosure of information under clause 4:21 of the NAD Scheme is disclosure for the purposes of the NAD Scheme and falls within the exception to the prohibition on disclosure in section 71(2)(b).*
>
> *The relevant information can be disclosed to the AFL under clause 4.21 of the NAD Scheme for the purposes of, or in connection with, the administration of the NAD Scheme. The NAD Scheme would prevent the relevant information (the interim report) being made public.*
>
> *I am providing the AFL with the Interim report in connection with my investigation under the NAD Scheme, noting that the interim report is the culmination of our joint investigation to date and the starting point for further investigation.*

Please provide me with your comments on the interim report. For example, I am particularly interested in receiving the AFL's views on the necessity for me to use my new powers to gain further information about specific substances provided to players and their contents.

I note that use and disclosure by the AFL of the information in the interim report is subject to the operation of the National Privacy Principles in the Privacy Act 1988. *The Principles would preclude making the interim report public.*

Having said that, the interim report has been redacted in a number of places. The following categories of information have been redacted from the interim report:

• Material from other Australian Government agencies that ASADA is unable to lawfully provide to the AFL;

• Internal ASADA communications that are not relevant to the investigation and all references in the footnotes to internal ASADA file references;

• Text describing conduct that appears to be a possible anti-doping rule violation not relevant to Essendon;

• Material that is relevant to other ASADA investigations; and

• Sensitive medical information.

Area of further investigation - possible use of other prohibited substances by Essendon players

The Investigation has established that WADA prohibited substances such as Hexarelin, Thymosin Beta 4 and SARM S-22 were stored on the Essendon Football Club premises.

It has also been established that an Essendon support person administered Hexarelin to other Essendon personnel. At this stage, ASADA has not been able to establish that Essendon players were administered with this substance. This is also the case for SARM S-22.

During the investigation, players in interviews expressed their knowledge or their belief that they were injected with Thymosin. Based on the material uncovered during the course of the investigation, there is strong circumstantial evidence that the Thymosin that Essendon players were injected with was Thymosin Beta 4. ·

However, at this stage ASADA does not consider that it has sufficient evidence to establish to the comfortable satisfaction of a hearing panel that specific players were in fact administered Thymosin Beta 4.

ASADA's investigation into these matters is continuing - the commencement of the Australian Sports Anti-Doping Authority Amendment Act 2013 *will enable other lines of Inquiry to be pursued with a view to establishing the substances that were in fact administered to Essendon players.*

Should ASADA take the view that anti-doping rule violations can be established against one or more players in relation to the use of these substances, ASADA intends to proceed with these violations. While the availability of any defences will depend on the circumstances of each player, the evidence so far suggests that the defence of no fault, no negligence *is unlikely to be able to established by any player.*

AOD-9604

In relation to the issue of AOD-9604, ASADA will make a public statement about its proposed approach in all sports to the enforcement of possible anti-doping rule violations involving this substance that occurred prior to the World Anti-Doping Agency's media release of 22 April 2013.

Conclusion and next steps

Should ASADA, following the conclusion of its investigation, make an assessment that it is possible that an individual or individuals have committed anti-doping rule violations, those persons will be given the opportunity to respond to those allegations at that point In time, in accordance with the scheme provided for in the Australian Sports Anti-Doping Authority Act 2006.

Following that process, ASADA will make recommendations to the AFL for the issuing of infraction notices to relevant persons, at which point those persons will be able to elect whether or not to exercise their right to a hearing before the AFL Anti-Doping Tribunal.

As I stated earlier in my letter, I look forward to your comments on the interim report, and will take these into account in the continuation of my investigation.

(emphasis added)

207 That letter made a number of things clear:

- the ASADA investigation was continuing, and new material could come to light that may influence the ultimate findings or outcome of the investigation;
- disclosure was expressly given on the basis of cl 4.7 and cl 4.21 of the NAD Scheme;
- specific protected information was excluded from the Interim Report;
- information already disclosed to the AFL (such as through the interview process) or otherwise obtained by the AFL was included in the Interim Report;
- the Interim Report was the culmination of ASADA's investigation (with the AFL's co-operation) and the starting point for further investigation; and
- AFL's comments were expressly sought on the Interim Report.

208 By the time the Interim Report was given to the AFL, the basis of giving the report to the AFL was as explained in the letter to the AFL dated 2 August 2013 and by the evidence of Ms Andruska. Disputation later arose as to the extent of the use of the Interim Report, and the extent it could be made public by the AFL (to which I will come).

209 ASADA provided the Interim Report to the AFL for two reasons. From ASADA's point of view, the reason for providing the Interim Report on 2 August 2013 was to seek feedback from

the AFL for ASADA's *continuing* investigation. The fact that the ASADA investigation was continuing is significant. ASADA had a legitimate purpose in providing the Interim Report to the AFL for the purposes of its own continuing investigation. There were still tasks to be performed, and ASADA continued its considerations, culminating in a report to the CEO being made on 30 May 2014 in the form of a recommendation. However, the Interim Report was used by the AFL for its own investigation and the laying of disciplinary charges, which in fact occurred. If not the purpose, this was certainly a reason the Interim Report was provided to the AFL. It was undoubtedly in the mind of the CEO that the Interim Report would be used for the AFL's own investigation. After all, the CEO was of the view that the AFL's interest in Essendon's internal governance concerning anti-doping matters was closely connected to the ASADA investigation. The fact is that by 2 August 2013, the CEO was committed to providing an interim report to the AFL for the AFL's purposes, and true to that commitment the CEO provided the Interim Report.

210 The difference in "purposes" or "objectives" of the AFL and ASADA is not to be overstated. Both had a similar aim, directed to detecting and preventing drug violations. ASADA was seeking to investigate specific allegations against Essendon players and personnel; the AFL was directing its attention to club governance and the environment in which the violations occurred.

211 On 2 August 2013 (on the same day the Interim Report was formally given to the AFL), Ms Andruska provided a copy of the Interim Report to Essendon.

212 After the publishing of the Interim Report, as I have already indicated, the CEO and the AFL continued their investigation into Essendon, its players and personnel.

213 On 7 August 2013, Ashurst Australia wrote to Minter Ellison Lawyers and sought information relating to the AFL's contribution to the Interim Report. The letter states:

> *We understand the AFL's position to be that the Interim Report was produced by ASADA, independently of the AFL. However, against the backdrop of an investigation that has been conducted jointly by the AFL and ASADA, and with specific regard being had to the fact that the scope of the Interim Report extends well beyond the subject of possible anti-doping rule violations under the NAD Scheme, we consider it important that the AFL provide clarification regarding its level of involvement in the preparation of the Interim Report.*

214 Mr Hargreaves wrote again to Minter Ellison Lawyers on 12 August 2013 and stated that the Interim Report was unlawful.

215 On about 13 August 2013, Mr Demetriou, CEO of the AFL, stated publicly that he was considering releasing the Interim Report to the public.

216 Notwithstanding that ASADA was aware that the AFL was looking to lay disciplinary charges, after it provided the Interim Report to the AFL on 2 August 2013, ASADA became concerned by the AFL's use of that report. On 16 August 2013, ASADA wrote to the AFL of the use of the Interim Report for a purpose other than an anti-doping violation purpose. The communication stated:

> *In ASADA's view, there is a distinction between providing the Interim Report to Essendon to get its comments for the purpose of the ongoing investigation into possible anti-doping rule violations and providing it as a basis for bringing disciplinary proceedings against Essendon and its personnel for breaching AFL Rules.*
>
> *ASADA is concerned about the suggestion … that the AFL has, and proposes, to use 'evidence and findings' contained in the Interim Report in its Statement of Grounds and the AFL's disciplinary hearing of the charges. ASADA is concerned that such evidence and findings from the Interim Report may include NAD Scheme personal information that the AFL did not collect and has not already been disclosed to the AFL, for the purpose of initiating and prosecuting charges under the AFL Rules. Such use would not be consistent with the purpose for which ASADA expressly provided the Interim Report to the AFL and may not be consistent with the National Privacy Principles.*
>
> *ASADA would object to the use by the AFL for its disciplinary purposes, the evaluations, opinions and conclusions expressed by ASADA's investigators contained in the interim report. Obviously, ASADA does not object to the AFL using material which the AFL itself has sourced such as the Deloitte material.*

217 A fair reading of this letter indicates that the main concern of ASADA was not the use of the Interim Report (in itself) for disciplinary charges being brought by the AFL, but the use by the AFL of protected information in the initiating and prosecuting charges under the AFL Rules. ASADA contended that it was permissible for the AFL to use the facts which ASADA and the AFL had either jointly obtained, or information which the AFL had obtained separately. The main concern of ASADA was that the AFL not use personal information contained in the Interim Report, which may include NAD Scheme personal information that the AFL had not already collected or that had not already been disclosed to the AFL.

218 On 16 August 2013, Ms Perdikogiannis responded to the complaints made by Ashurst Lawyers in these terms:

> *The Australian Sports Anti-Doping Authority has done its best to review the Statement of Grounds served on your client by the AFL against the Interim Report in the timeframe demanded in your letter, having regard to the 29 specific matters set out in the schedule to your letter.*

In the limited time available it appears to us that each of statements in the Statement of Grounds that you have drawn our attention to appears to come from one of the following:

- *Statements or emails of Brett Clothier (an AFL employee)*
- *Data retrieved by Deloitte on behalf of the AFL*
- *Evidence given in interview jointly to ASADA and the AFL, including in several respects evidence given by Mr Hird himself. ·*

Self evidently each of these sources of information were held by the AFL, and were not the subject of any 'disclosure' by ASADA to the AFL

As your client is aware, his interview was part of a joint investigation by the AFL and ASADA. His formal notification dated 12 April 2013 to attend was, as you acknowledged in your letter dated 15 April 2013, a request to attend 'an interview with AFL and ASADA Investigators'. The personal information provided by your client in the interview was disclosed to the AFL by him, and not by ASADA in its Interim report.

Moreover In at least two instances the proposition in the Statement of Grounds exceeds anything found in the interim report, which suggests that the person who wrote that proposition did not base it on the interim report but on other material.

In these circumstances, and noting that the Statement of Grounds makes no reference at all to the Interim Report it does not presently appear to ASADA that the Statement of Grounds uses any documents or evidence which have been provided to the AFL by ASADA under cl 4.21 of the NAD Scheme.

219 Without going into confidential evidence, it would appear that the AFL did use the Interim Report as a basis for laying disciplinary charges against certain personnel, but only by Senior Counsel for the AFL "cutting and pasting" from the Interim Report various summaries of the evidence given in the interviews. This is probably something ASADA did not know at the time of writing the letter on 16 August 2013. However, the basic thrust of that letter from ASADA was simply to confirm that the AFL (through its participation in the "joint investigation") was directly given the evidence at the interviews, and that evidence was not evidence provided by ASADA to the AFL by cl 4.21 of the NAD Scheme. It was on this basis Ms Perdikogiannis concluded that it did not presently appear to ASADA that "the Statement of Grounds uses any documents or evidence which had been provided to the AFL by ASADA under cl 4.21 of the NAD Scheme".

220 On 21 August 2013, the AFL wrote a letter to ASADA in which it replied to the ASADA letter dated 15 August 2013. The AFL disputed that it was not permitted to use the Interim Report for a purpose other than an anti-doping violation purpose. The letter stated:

Subject to the clarifications below, I confirm that the AFL has accepted from ASADA,

and is using, its Interim Report (including subsequent versions with redactions) on the basis set out in ASADA's letter of 2 August 2013.

It is relevant to note the following matters:

- *ASADA's letter records that the Interim Report is a culmination of a joint investigation by ASADA and the AFL.*

- *ASADA's purpose and the AFL's purpose for conducting the investigation was to determine whether any person had committed an anti-doping rule violation. The AFL's purpose for conducting the investigation was also to determine whether the Essendon Football Club or any other persons otherwise engaged in conduct that contravenes the AFL Rules, the AFL Anti Doping Code or the AFL Regulations.*

- *The disclosure of the Interim Report (including any personal information or other information which forms part of it) is authorised by the* Australian Sports Anti-Doping Authority Act 2006 *(Cth)) and regulations made thereunder for, inter alia, 'the purposes of' or 'in connection with' ASADA's investigation.*

- *These are cumulative bases for disclosure of the Interim Report to the AFL. The report may be disclosed either 'for the purposes of' the ASADA investigation or 'in connection with' the ASADA investigation. The phrase 'in connection with' is of wide import and is to be contrasted with the narrower term, 'for the purposes of'.*

- *Your letter of 15 August confirms that the Interim Report was provided to the AFL 'in connection with' ASADA's investigation, but purports to constrain the AFL from using the report other than 'for the purposes of' the investigation. With respect, this position is incorrect as a matter of law;*

- *While ASADA's purpose for conducting the investigation was to determine whether any person had committed an anti-doping rule violation, in the course of the investigation, evidence has been uncovered that relates to possible misconduct that is outside of the scope of the WADA Code. The misconduct pertains to possible doping in the AFL and sports science practices that may be a serious risk to health and welfare of AFL athletes.*

- *The CEO's functions set out in section 21 of the Act fundamentally relate to 'sports doping and safety matters' and includes the specific functions to 'disseminate information about sports doping and safety matters'.*

- *It is totally appropriate for ASADA, having investigated possible anti-doping rule violations and uncovered evidence of serious issues relating to 'sports doping and safety matters' that are not covered by the WADA Code to disclose such evidence to the sports administration body in question – in this case, the AFL.*

- *This would properly be done 'in connection with' an ASADA investigation and particularly so in the context of a joint investigation having been conducted with the AFL. Use of this information for AFL disciplinary proceedings would clearly be 'in connection with' the ASADA investigation even if it might not be "for the purposes of' the ASADA investigation.*

- *It would be incongruous, given ASADA's crucial role with respect to 'sports*

doping and safety matters' in Australian sport for ASADA to keep such information confidential or to restrict the AFL from responsibly acting on such information now that it is disclosed. Our responsibility to act would include providing access to the report under suitable confidentiality arrangements to athletes whose health may be at risk.

- *As noted above, the words 'in connection with' are of wide import and on their plain meaning are not intended to be interpreted so restrictively or artificially as set out in your letter of 15 August. The AFL here does not propose to use the information in the report for an ulterior or improper purpose, but in connection with a matter intrinsically linked to ASADA's functions.*

- *The Statement of Grounds for the laying of charges highlights the close connection between ASADA's investigation and the AFL's disciplinary proceedings.*

- *I note that we forwarded you the joint memorandum from counsel dated 1 August 2013 which addresses this very issue, on a common interest privilege basis, prior to you providing the AFL with the Interim Report. That memorandum expressly referred to the Interim Report being used for the AFL's purposes of possible disciplinary proceedings.*

- *I also note that at our meeting with ASADA on 31 August 2011, it was agreed that the Interim Report would be provided to the AFL 'in connection with' the ASADA investigation and that it was a matter for the AFL to ensure it complied with its obligations with respect to the use of the Interim Report.*

- *While the AFL is not an 'entrusted person' within the meaning of s 69 of the Act for the purposes of s 71 of the Act, it nonetheless recognises that it is subject to the privacy laws referred to in clause 4.21(4) of the NAD Scheme.*

- *The AFL has not used, and has no intention of using, the Interim Report otherwise than in accordance with its obligations as set out above.*

The AFL understands and respects ASADA's preference for the Interim Report to remain confidential and not be publicly disclosed. Where practicable, the AFL will use information already in its possession as the basis for its disciplinary proceedings or related matters. However, this may not always be possible. In the event that the AFL uses the Interim Report for any purpose in connection with its disciplinary proceedings it will notify ASADA of how it intends to do so.

(emphasis added)

221 I now turn to the evidence Ms Andruska gave in her affidavit concerning the factors she took into account in or about June 2013 in making the decision to provide the Interim Report to the AFL.

222 Ms Andruska was cross-examined about this evidence, but no attack was made upon each of the factors she took into account being in fact considered by her, nor was any attack made that the correspondence from ASADA did not reflect the views she held at that time. The correspondence speaks for itself as to the position of ASADA, the AFL, Mr Hird and the

Essendon Club. The affidavit evidence of Ms Andruska needs to be set out in full to explain the development, the contents and disclosure of the Interim Report.

223 At to the early stages of the consideration of a "summary report" being given to the AFL (May and June 2013), Ms Andruska gave evidence as follows:

> *46. There were a number of factors that I took into account in making the decision to provide the high level summary report to the AFL. One of these was that the AFL had the raw material they needed to produce the report they wanted. The AFL had been closely involved in the ASADA investigation to date and to my understanding had been present at all the interviews of Essendon players and support staff. I also understood that the AFL had provided a large amount of other investigative material to ASADA (obtained on their behalf by Deloitte, who had extracted material from Essendon's servers). However on balance, in agreeing to provide a high level summary report to the AFL, the following considerations prevailed in my mind:*
>
> *46.1. I felt that ASADA was better positioned to produce the kind of report that the AFL was seeking because it was already familiar with the status of the investigation and had expert in-house counsel who could produce such a high level summary report. In addition, any report on ASADA's investigation that was to be produced was one that I wished to maintain control over. I did not want any report prejudicing the ongoing investigation.*
>
> *46.2. I wanted to maintain a good cooperative relationship with the AFL in relation to anti-doping matters (both in connection with this particular investigation and more generally). ASADA and the AFL had been working together to identify and deal with anti-doping issues within the AFL. At this time ASADA had no compulsory powers of its own and was generally reliant on the cooperation of sports bodies in order to be an effective regulator. I considered the AFL to be a partner in addressing anti-doping matters within the AFL. The AFL was pressing for us to provide a report that could be given to the AFL Commission.*
>
> *46.3. I understood that the AFL's own consideration of the issues under investigation was likely to support ASADA's objectives in preventing, detecting and taking action against doping in the AFL. I understood from my discussions with AFL officials such as Mr Demetriou, Mr Mclachlan and Mr Clothier up to this point that the AFL had a particular interest in examining whether the governance structure within Essendon was an element in fostering or allowing conduct that might ultimately be found to breach WADA guidelines or the AFL's Anti-Doping Code. While the ASADA investigation was ultimately focused on possible antidoping rule violations by players or officials, I saw the AFL's interest in Essendon's internal governance, as it concerned anti-doping matters, as closely related to the ASADA investigation. I also saw this as a broader issue of interest to ASADA- namely, the ways in which governance arrangements could present weak points or vulnerabilities in sports administration that created opportunities for anti-doping violations to go undetected.*

224 Significantly, Ms Andruska then re-considered the position of ASADA, and between 22 July 2013 and 2 August 2013 gave further consideration to the basis of the Interim Report being given to the AFL.

225 In Ms Andruska's affidavit evidence, which I accept, she said:

> ***Finalising the report and the terms of its provision***
>
> *58. Accordingly in the last 10 days of July 2013 ASADA was preparing a version of the investigators' report that could be provided to the AFL. I had a number of concerns about the content of that report being provided to the AFL. One issue of real concern to me was that the investigators' report contained reference to material obtained from the ACC. I took the view that ASADA should not disclose that material to the AFL. I was also concerned about material obtained from third parties (outside the AFL) and material of a personal medical nature about an Essendon employee which was peripheral to the investigation. A lot of internal discussion and work by legal officers in ASADA went into preparing a redacted version of the investigators' report that removed material which was inappropriate to provide to the AFL. I reviewed a number of versions of the investigators' report between 22 July 2013 and 2 August 2013 to satisfy myself that appropriate redactions were being applied.*
>
> *59. In the period between 22 July 2013 and 2 August 2013 I gave further consideration to the basis on which ASADA would provide the report to the AFL. I was aware from the meeting of 19 June 2013 that the AFL planned to use the report to brief the AFL Commission, with a view to possible disciplinary action against Essendon or Essendon personnel for any governance failures connected with the environment that contributed to the doping-related allegations under investigation by ASADA. I sought, and received, advice including written legal advice from the Australian Government Solicitor (AGS). I do not intend by this affidavit to expressly or impliedly waive ASADA's legal professional privilege in that advice.*
>
> *60. Following advice provided to me (including legal advice) I formed the view that the safest course was that ASADA should only provide the report to the AFL in connection with ASADA's investigation. I decided to take this course. I asked Ms Perdikogiannis to prepare a cover letter for me to sign which made clear that ASADA was providing the report to the AFL on this specific basis. That was done, and the report (described as an 'interim report') went out under a letter, signed by me, on 2 August 2013 to the then CEO of the AFL, Mr Demetriou. ...*
>
> *61. Over the next few days and weeks ASADA's legal officers continued to review the contents of the interim report, focussing on what had been redacted to mask material understood to have come from the ACC. Those officers progressively vetted the release of various portions of the interim report, as redacted, with the ACC. As that occurred, I provided to the then CEO of the AFL further copies of the interim report with fewer redactions on 7, 8 and 12 August 2013. On each occasion I signed a cover letter that reinforced that each version of the interim report was being provided on the same basis as the first version, namely, in connection with ASADA's investigation. ...*

226 Whilst Ms Andruska did accept in cross-examination that she was committed to providing an interim report to the AFL, and based on legal advice provided the Interim Report on the basis of the letter dated 2 August 2013, Ms Andruska did know and had known for some time that the Interim Report would be used by the AFL for its own disciplinary purposes.

Support of, and co-operation with, the "joint investigation" by Essendon, Mr Hird and the 34 Players

227 I now turn to one other factual matter, namely the attitude of Essendon, Mr Hird and the 34 Players to the so-called "joint investigation".

228 Throughout 2013, Essendon, Mr Hird and the 34 Players co-operated with the "joint investigation". I have already referred to some evidence as to the attitude of Essendon and Mr Hird.

229 Essendon proactively engaged with the AFL and ASADA regarding the arrangements for the interviews. On 28 February 2013, Mr Robson emailed Mr Clothier about the "batting order" for the interviews and stated:

> *As discussed, whilst I am both mindful and respectful of the integrity of the investigation process as it determines the priority of interviewees, I also remain keen to work with you and your colleagues at ASADA to collaborate and ensure that we get through the significant number of interviews to be conducted in a timely manner.*

230 In a similar vein, Mr Robson emailed Mr Clothier on 15 March 2013:

> *. . . I remain keen to work with you and the ASADA Investigation team to ensure a smooth and efficient process in locking in all the remaining interviews with players and staff. ...*

231 Essendon's assistance with progressing the investigation extended to contacting persons who worked at the club in 2012 but who were now employed elsewhere to inform such persons of Essendon's co-operative approach to the investigation. For example, on 26 February 2013, Mr Robson emailed an individual who was now in a support position at a different AFL club, noting it was "safe to assume" that that individual will be "interviewed by the ASADA/AFL Investigation team". Mr Robson passed on the contact details for Mr Simonsson of ASADA and solicited co-operation by stating:

> *As you are aware the Club is currently working with both the AFL and ASADA as they conduct an investigation into activities at the Club, and specifically within the Football Program during the 2012 season.*

232 It is again to be noted that each of the 34 Players and Mr Hird were legally represented during the course of each of the interviews. No player or personnel refused to answer any question or

made any claim of privilege against self-incrimination or privilege against self-exposure to a penalty in respect of any question sought to be put by either an ASADA or AFL investigator. Essendon's lawyers as at 6 August 2013 wrote to ASADA stating that:

> *…the players were actively encouraged by ASADA, the AFL and the Club to fully cooperate with the investigation and to answer all questions put to them. My understanding is that each player of the Club did so, without reservation.*

233 There was also no claim of privilege raised (nor any other legal objection made) by Mr Hird at his interview on 16 April 2013. Mr Hird was legally represented at the interview by Senior Counsel and a solicitor. During the course of Mr Hird's interview, after acknowledging (amongst other things) that he had received a letter to attend the interview, Mr Hird said that:

- he had read AFL Player Rule 1.8; and
- he understood he had to fully co-operate with any investigation, truthfully answer any questions and provide any documentation in his possession for the investigation, and that there were sanctions if he did not do so.

234 Mr Hird and his legal representatives allowed the interview to proceed. The evidence shows that Mr Hird:

- did not claim any privilege or right against self-incrimination or penalty and raised no objection to the presence of ASADA investigators or the role played by ASADA or the provision of information to ASADA;
- co-operated with the AFL and ASADA throughout the investigation;
- accepted that there were sanctions under the AFL rules in respect of matters ascertained during the conduct of the "joint investigation";
- made public statements signalling his co-operation and support for the "joint investigation";
- declined to take any steps by way of legal action or otherwise to restrain the ongoing conduct of the "joint investigation" and the ongoing conduct of ASADA's investigation subsequent thereto; and
- stated on multiple occasions (directly or through his Counsel) that he intended to co-operate with the investigation.

235 Essendon similarly showed its support of and co-operation with the "joint investigation".

236 An "Open Letter" from Mr Evans published on Essendon's website on 5 February 2013 stated:

> *... the club has asked the AFL and* [ASADA] *to conduct an investigation into supplements given to our players during the 2012 season.*
>
> *... the club received concerning information that we felt required swift action. As a result, the club contacted the AFL and ASADA to request an independent investigation.*
>
> *The club is now fully cooperating with ASADA and the AFL in its investigation.*
>
> *...*
>
> *It is important the investigation is given the opportunity to take its course.*

237 In an "Investigation Statement" made on 10 February 2013, Essendon stated:

> *Essendon Football Club is fully cooperating with the AFL and ASADA investigation and is not in a position to make any further comment.*

238 On 20 February 2013, Essendon (through Mr Evans) said:

> *... the club was still subject to, and fully cooperating with the ASADA investigation.*

239 In an Essendon press release dated 27 February 2013, Evans relevantly said:

> *Three weeks ago, I asked for the AFL and ASADA's assistance in reviewing the 2012 supplements program of the Essendon Football Club.*
>
> *... we must ensure continued cooperation with the ASADA and AFL investigation.*
>
> *... The Board and I are now aware of irregular practices by the club that are being investigated by ASADA and the AFL, and that is why we have decided to call an independent and external review into the governance and processes that have led to us being in the position we are today.*
>
> *... We expect it to be completed before the ASADA investigation.*
>
> *The report will be sent to the AFL Commission and to ASADA, and I expect that the recommendations will be made public ...*

240 On 11 April 2013, a statement by Mr Evans was publicly released on Essendon's website as follows:

> *... the Essendon Football Club is the subject of an ASADA and AFL investigation.*
>
> *I want to remind people that it was the Essendon Football Club who called for this investigation, and that we have opened our club to the full weight of that process.*
>
> *... I as Chairman ... And the Essendon Football Club under my leadership have and will support ASADA and the AFL in their investigations.*
>
> *Furthermore anyone who truly cares about our football club, our great game and the people who play it, support it and work in it will back ASADA too.*

> *This investigation will take time, and that is taking a toll on our club, but I repeat we must give them the time and space that they need to come to conclusions about what happened, and how. …*

241 Following receipt of the Switkowski Report on 6 May 2013, there was an Essendon statement in which Mr Evans stated:

> *…I want to remind everyone that our players have not yet been interviewed, and we are still in the hands of ASADA…*
>
> *And as I have said previously, and I repeat today - anyone who cares about sport or our game, and anyone who cares about our club must let ASADA do its job.*
>
> *… on behalf of the Board, and with the help of ASADA, I will continue the process of talking to all our players and their families about the range of supplements and substances that may be have used at our club.*

242 At his resignation press conference on 23 May 2013, Mr Robson stated:

> *I attended the meeting at the AFL to ask for the investigation, made contact with ASADA to self-report, and subsequently accompanied David Evans to Canberra to meet with ASADA.*
>
> *…*
>
> *A lot of criticism has been levelled at the Australian Crime Commission, ASADA and the now infamous "blackest day in sport" press conference. I want to make it really clear, from my point of view, knowing what I now know, that we must use these events as a turning point in sport. As David Evans has said, if you care about sport, then respect the people that are trying to investigate what happened. If there is a line in the sand, I want to be on the side of those who put first the health and safety of players and the underlying fairness of the game.*

243 At this press conference on 23 May 2013, Mr Evans said:

> [Mr Robson] *was part of the decision-making that led us to self-report to the AFL and to ASADA, and he not only supported the Board's decision to conduct the external review, he assisted in opening the club up to Dr Switkowski to ensure that he and all that was required to prepare for the report was done into the Club's governance.*
>
> *… we set this process up back on the 5th of February, inviting the AFL and ASADA to look at our football club, that process has probably taken a bit longer than what we first thought back then, but we've cooperated, we've been incredibly transparent. There will be some change as a result not only from Ziggy's report but also the investigation, which hopefully is nearing its completion. So, that's the timeframe and I feel that we're now starting to, at least, sight the end, whereas back on the 5th of February there were a lot of unknowns…*

244 On 25 June 2013, Essendon released a statement:

> *There is still an ongoing investigation by the AFL and ASADA initiated by the Essendon Football Club.*

The Club and our players are fully cooperating with the investigation…

245 Mr Paul Little, as the new Chairman, made a club statement on 13 August 2013 which included:

> *Since the club first raised its concerns with the AFL and proactively invited ASADA to investigate these matters, we have cooperated fully with all enquiries.*

246 The Essendon captain (Mr Jobe Watson) also made a statement that day that stated:

> *We've fully co-operated with every part of the ASADA investigation and we've always said we've got nothing to hide.*

247 As late as 2 October 2013, Chairman Little said in a public speech at the 2013 Crighton Medal Presentation:

> *In 2013 it was unanimously agreed by the Board that the Club had a problem and that we should self report our concerns to the AFL and ASADA immediately.*

248 The last two statements of Paul Little were after the Interim Report was provided by ASADA to the AFL. Further, after the Interim Report had been provided by ASADA to the AFL, the club was briefing its employees about the "need to respect the ongoing ASADA investigation". Indeed, in September 2013 Essendon was using its public stance of co-operation with ASADA and the AFL in its promotional material to sponsors.

"The Show Cause Pack" leading to the issue of the Notices

249 On 30 May 2014, Ms Perdikogiannis provided to the CEO a recommendation in the form of a 97 page report. It addressed what was said to be an anti-doping rule violation — the use of a prohibited substance, namely Thymosin Beta 4. The alleged use is said to have occurred between about January 2012 and September 2012. The document was called a "Show Cause Pack".

250 The purpose of the Show Cause Pack given to the CEO was said to:

> *(a) provide you with the evidence or information showing possible non-presence anti-doping rule violations (non-presence ADVRs) committed by the abovementioned Essendon players during the 2012 AFL season; and*
>
> *(b) allow you to make a determination that the possible non-presence ADRVs warrant action in the form of notification by ASADA in accordance with clause 4.07A of the National Anti-Doping scheme (NAD Scheme), which is Schedule 1 to the Australian Sports Anti-Doping Authority Regulations 2006.*

251 The CEO was urged to give consideration to the material summarised in the Show Cause Pack so that he "could make a positive determination and give approval for the issue of a notification to one or more of the Essendon players that are specified in Appendix A …".

252 Paragraph 6 noted that:

> [m]*ost of the Essendon players were interviewed during the months of May and June 2013 by ASADA and AFL investigators.*

253 Attached to the Show Cause Pack at Appendix A were documents provided by ASADA investigators to each player and his legal representative. The transcripts of interview were also provided as part of the Show Cause Pack.

254 The Show Cause Pack was based substantially on material obtained by ASADA during the investigation. The bulk of its contents consists of interviews conducted by ASADA and the AFL with players and Essendon personnel. The interviews formed a significant and material basis for the recommendations made to the CEO.

FINDING OF SALIENT FACTS RELEVANT TO THE SUBSTANTIVE ISSUES

255 The determination of these proceedings primarily depends upon the correct characterisation of the events which occurred, and the purpose and nature of the investigation by ASADA with the co-operation of the AFL.

256 Based upon the evidence as presented to the Court and from the admissions made by the parties, I conclude as follows:

(a) By 1 February 2013, both ASADA and the AFL had agreed (in general terms) to investigate Essendon.

(b) By 1 February 2013, ASADA agreed (in general terms) with the AFL, that as ASADA lacked compulsory powers, ASADA would gain the benefit of the AFL's compulsory powers in conducting its investigation.

(c) ASADA would have commenced an investigation into Essendon, its players and personnel without the invitation of Essendon or Mr Hird, and without their public display of support and co-operation.

(d) In light of ASADA's statutory responsibilities, upon becoming aware of possible anti-doping violations, ASADA would have investigated Essendon, its players and personnel (and probably other clubs) with or without the co-operation of the AFL.

(e) ASADA would have decided to investigate Essendon, its players and personnel (and probably other clubs) without recourse to the AFL's contractual powers to compel Mr Hird and the 34 Players to answer questions and provide information as requested by the AFL.

(f) Although Mr Hird publicly supported for the "joint investigation", privately he did not, but was motivated to co-operate with ASADA and the AFL in the best interests of Essendon and its players.

(g) Nevertheless, Essendon, Mr Hird and the 34 Players all co-operated because of their contractual obligations to do so, which required them to attend interviews, answer questions and provide information to the AFL, and to co-operate with ASADA.

(h) Mr Hird and the 34 Players, under their contractual obligations were required to answer questions of, and provide information to, the AFL subject to a limited right to claim the privilege against self-incrimination.

(i) Mr Hird and the 34 Players were legally represented at all relevant times, co-operated with the investigation, did not claim to exercise the privilege against self-incrimination, and provided information:

(i) in respect of the interviews directly to the AFL and ASADA; and

(ii) in respect of other information provided at the request of the AFL, directly to the AFL which was then passed on to ASADA.

(j) The information provided at the interviews by Mr Hird and the 34 Players was simultaneously divulged and communicated to the personnel of both the AFL and ASADA, who were present in the interview room.

(k) The investigation involved the AFL working co-operatively with ASADA, as the AFL was obliged to do under the NAD Scheme.

(l) The investigation involved the co-operation of ASADA and the AFL in terms of strategy, the sharing of financial and personnel resources, and in the conduct of interviews. Their co-operation was evident in the day to day conduct of the investigation as it progressed.

(m) The investigation required co-ordination between ASADA and the AFL as to the conduct of the investigation, including the arrangement of interviews, the collection of physical evidence, and the preparation of documents. These were matters of procedure and machinery, upon which various investigators (either within ASADA or the AFL) took responsibility in the course of the investigation. The fact that either ASADA or the AFL personnel took responsibility for one or other of these matters does not impact upon the conclusion that the investigation was undertaken by ASADA with the co-operation of the AFL.

(n) ASADA benefited from the co-operation of the AFL in two main ways:

(i) First, it benefited from the AFL's use of its compulsory powers (whether formally or not) to require production of physical evidence, documents, computers and phones, which were provided to ASADA.

(ii) Secondly, it benefited from the AFL's use of its compulsory powers to arrange for Mr Hird and the 34 Players to attend interviews and answer questions truthfully.

(o) ASADA and the AFL had different but related, purposes:

(i) ASADA's purpose was to investigate allegations of anti-doping violations;

(ii) The AFL, concerned with anti-doping violations, was interested in the governance of its clubs, such as Essendon, so as to ensure the AFL anti-doping policy was being properly implemented at the club level.

(p) The investigation undertaken by ASADA in co-operation with the AFL in fact resulted in both ASADA and the AFL each making two separate and distinct decisions within their own areas of responsibility;

(i) in the case of the CEO of ASADA, to issue the Notices; and

(ii) in the case of the AFL, to bring disciplinary charges against Essendon and Mr Hird.

(q) The Interim Report given to the AFL was prepared for, and divulged or communicated to, the AFL for the purposes of ASADA's continuing investigation, as set out in the covering letter dated 2 August 2013, but also in the knowledge that it would also be used by the AFL for the purpose of the AFL considering whether to bring disciplinary action against Essendon and Mr Hird.

SOME LEGAL PRINCIPLES

257 It is convenient here to mention some of the legal principles relevant to the determination of these proceedings.

Judicial Review

258 These proceedings are brought under s 39B of the *Judiciary Act 1903* (Cth), involving the judicial review of administrative action.

259 Judicial review can be described broadly as the function of courts to provide remedies to people adversely affected by unlawful government action. Importantly, the purpose of judicial review is to ensure the legality of government action, rather than its correctness: see *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.

260 As the High Court put it in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, ('*Plaintiff S157/2002*') at [104], judicial review:

> *… is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. … Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction.*

Remedy and discretion

261 In *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 ('*Ex parte Aala*') at [55]-[56], Gaudron and Gummow JJ said in relation to public law remedies that:

> *[55] No doubt the discretion with respect to all remedies in s 75(v) is not to be exercised lightly against the grant of a final remedy, particularly where the officers of the Commonwealth in question do not constitute a federal court and there is no avenue of appeal to this court under s 73 of the Constitution. The discretion is to be exercised against the background of the animating principle described by Gaudron J in* Enfield City Corporation v Development Assessment Commission. *Her Honour said:*
>
> > Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less. [footnote omitted]
>
> *[56] Some guidance, though it cannot be exhaustive, as to the circumstances which may attract an exercise of discretion adverse to an applicant is indicated in the following passage from the judgment of Latham CJ, Rich, Dixon, McTiernan and Webb JJ in a mandamus case,* R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd. *Their Honours said:*
>
> > For example the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. The court's discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld.

Statutory construction

262 In these proceedings, in addition to determining the nature, conduct and purpose of the investigation, the answer to whether the CEO or ASADA exceeded its lawful authority will depend upon the proper interpretation of the Act and the NAD Scheme.

263 The task of the Court is to interpret the Act and the NAD Scheme, seeking to ascertain the legislative intention.

264 In *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 591-592 [43] and [44] French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ provided a useful summary of the correct approach to statutory construction including the principle of legality (which principle is relevant to these proceedings):

> *[43] The objective of statutory construction was defined in* Project Blue Sky Inc v Australian Broadcasting Authority *as giving to the words of a statutory provision the meaning which the legislature is taken to have intended them to have. An example of a canon of construction directed to that objective and given in* Project Blue Sky *is "the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities". That is frequently called the principle of legality. The legislative intention there referred to is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts. As this Court said recently in* Zheng v Cai*:*
>
> > It has been said that to attribute an intention to the legislature is to apply something of a fiction. However, what is involved here is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor. Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. As explained in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*, the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.
>
> *[44] The application of the rules will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.*

265 Recently in *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082; [2013] HCA 39, Gageler and Keane JJ dealt with the principle of legality in detail, tracing its history from statements by Marshall CJ in *United State v Fisher* 6 US 358 (1805) at 390 to its adoption by

the High Court in *Potter v Minahan* (1908) 7 CLR 277 at 304 and then into modern authority culminating in *Bropho v Western Australia* (1990) 171 CLR 1 and *Coco v The Queen* (1994) 179 CLR 427.

266 Their Honours then stated at [313] – [314]:

> *[313] Application of the principle of construction is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law. The principle extends to the protection of fundamental principles and systemic values. The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.*
>
> *[314] The principle of construction is fulfilled in accordance with its rationale where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity in question and has made a legislative determination that the right, freedom or immunity is to be abrogated or curtailed. The principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked. The simple reason is that "[i]t is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve".*

267 Their Honours warned at [317] that:

> *… The interpretative strictures of the legality principle should not be applied so rigidly as to have a sclerotic effect on legitimate innovation by the legislature to meet new challenges to the integrity of the system of justice.*

268 As these proceedings relate to legislation that gives effect to international conventions and agreements, I make mention of the correct principle to apply in interpreting the Act in this circumstance. It seems clear that the Australian principles of statutory construction apply, this not being a situation where the whole text of an international convention or agreement has been incorporated into the domestic law.

269 In *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53; (2006) 231 CLR 1 which was heard at the same time as *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54; (2006) 231 CLR 52, the High Court considered the relationship of the Convention relating to the Status of Refugees (1951),

together with the Protocol relating to the Status of Refugees (1967) ('the Convention') to Australian law. At [34] Gummow ACJ, Callinan, Heydon and Crennan JJ explained:

> *[34] The relevant law of Australia is found in the Act and in the Regulations under it. It is Australian principles of statutory interpretation which must be applied to the Act and the Regulations. One of those principles is s 15AA(1) of the* Acts Interpretation Act 1901 *(Cth). Another is s 15AB(2)(d) of that Act. The Convention has not been enacted as part of the law of Australia ... Section 36 of the Act is the only section (apart from the interpretation section, s 5) which refers in terms to the Convention. That does not mean that thereby the whole of it is enacted into Australian law …*
>
> *… by reason of s 15AB(2)(d) of the* Acts Interpretation Act*, the Convention may be considered for the purposes described in s 15AB(1). Further, Australian courts will endeavour to adopt a construction of the Act and the Regulations, if that construction is available, which conforms to the Convention. And this Court would seek to adopt, if it were available, a construction of the definition in Art 1A of the Convention that conformed with any generally accepted construction in other countries subscribing to the Convention, as it would with any provision of an international instrument to which Australia is a party and which has been received into its domestic law. The Convention will also be construed by reference to the principles stated in the Vienna Convention on the Law of Treaties (the 'Vienna Convention'). … But despite these respects in which the Convention may be used in construing the Act, it is the words of the Act which govern.*

270 In undertaking the exercise of construction, relying upon various principles in aid, the Court must give primacy to the text of the legislation, although context and purpose are important (see *Commissioner of Taxation v Consolidated Media Holdings Ltd (ACN 009 071 167)* (2012) 293 ALR 257; [2012] HCA 55 at 269 [39] and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 at 46-47 [47] and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 ('*Project Blue Sky*') at [69] and *Taylor v The Owners – Strata Plan No 11564* (2014) 306 ALR 547; [2014] HCA 9). The context to be considered in these proceedings includes the international context. It may in some instances be necessary and appropriate to consider legislation in its historical context.

271 The modern approach to statutory interpretation requires that the context be considered in the first instance, not merely at some later stage, uses "context" to include such things as the existing state of the law and the mischief which, by legitimate means the court may discern the statute was intended to remedy.

272 In addition, as we are reminded in *Project Blue Sky*, a statute must not only be interpreted by reference to the legislation viewed as a whole but also to give effect to "harmonious goals" (see 381-382 [69]-[70]). The "essential features of [the] legislative design" should also be

considered: see Gageler J in *Baini v The Queen* (2012) 246 CLR 469; [2012] HCA 59 at 485 [45].

Authority of ASADA

273 No statutory power is required enabling a statutory authority merely to request that a person provide information voluntarily. ASADA had the power to request Essendon, Mr Hird and the 34 Players to provide information and answer questions voluntarily as part of its investigation: see *Clough v Leahy* (1904) 2 CLR 139 at 155-157 per Griffith CJ (Barton and O'Connor JJ concurring).

274 However, express or implied statutory power is required to compel the provision of information, or the answering of questions: see, eg, *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 101-102, *Day v Commissioner, Australian Federal Police* (2000) 101 FCR 66; [2000] FCA 1272 at [11] and *Williams v Commonwealth* (2012) 248 CLR 156; [2012] HCA 23 at [63].

275 The executive government can procure the enactment of laws requiring the attendance of persons before those persons it designates to conduct an inquiry and requiring them to produce documents and to answer questions. If the requirements to attend, give evidence and produce documents are disobeyed, a sanction can be imposed. It is this element of *power* which distinguishes the governmental investigation from investigations by other entities. The element of power comes from the ability to compel the giving of evidence, with the imposition of a sanction.

276 Express powers also confer other ancillary powers. In these proceedings, the CEO has the power to do all things not only "necessary" but also "convenient" to be done for and in connection with the performance of his or her powers. The CEO also has the function to do anything incidental to or conducive to the performance of the functions set out in s 21(1) of the Act (see s 21(1)(o)). These concepts should be applied liberally and not narrowly.

277 It is to be noted that under the common law, where a statutory function is conferred upon a person there will be implied a power to do what is necessary for the performance of that function: *Attorney-General v Directors of the Great Eastern Railway Co* (1880) 5 App Cas 473. At common law, it is not sufficient for the power to be desirable or convenient. The power must be necessary in the sense that without it the statutory function will not achieve its purpose: *Ward v Commissioner of Police of the Metropolis* [2006] 1 AC 23 at 40.

278 However, no incidental power could be given if that power would violate common law rights, such as the privilege against self-incrimination, where the legislation has not already abrogated or curtailed that right: see, eg, *Coco v The Queen* (1994) 179 CLR 427.

Privilege against self-incrimination

279 It is necessary to make some observations on the privilege against self-incrimination, which it is said in these proceedings has been affectively abrogated by the procedure adopted by the investigation.

280 The common law privilege against self-incrimination entitles a person to refuse to answer any question, or to produce any document, if the answer or the document would tend to incriminate that person: see *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 ('*Pyneboard*'). Although broadly referred to as the privilege against self-incrimination, the concept encompasses distinct privileges relating to criminal matters, and self-exposure to a civil or administrative penalty and self-exposure to the forfeiture of an existing right.

281 In *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129; [2004] HCA 42 at [26]-[29] the High Court (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) discussed the nature of penalties and forfeitures which attract the privileges:

> ***Penalties and forfeitures***
>
> *[26] The penalties and forfeitures which attract the privileges include, but are not confined to, monetary exactions. The privilege against exposure to penalties has been applied in common informer proceedings and actions for monetary penalties or treble damages. But:*
>
> > [t]he term 'penalty' was not used in courts of equity merely in the sense of an exaction pursuant to statute as a punishment for contravention thereof. It embraced the wider concept of penalty as understood in the law of relief in equity against the exaction of penal payments in contractual disputes and the forfeiture of property interests.
>
> *That is why the privileges against exposure to penalties or forfeiture have been allowed in cases as diverse as those already mentioned and to cases of forfeiture of estate, as for simony, for infringing the* Pluralities Act *(1 & 2 Vict c 10), for breaches of covenants in leases, by marriage without consent, or by having acted as agent for the Confederate States of America. Moreover, the privilege against exposure to penalties has been held applicable to preclude an order for discovery by the debtor in a petition for bankruptcy on the basis that the loss of civil status consequent on bankruptcy is penal.*
>
> *[27] These considerations respecting the scope of the privileges against exposure to penalties or forfeiture, necessarily drawn from experience in the legal tradition inherited in this country, do more than shed vague illumination upon the central issue*

> *on this appeal. They explain, why, for example, to conclude that the legislation has the character of a regulatory law to be applied in accordance with civil procedures, including those respecting discovery, would be to stop well short of resolving the issue whether the proceedings expose the appellants to penalties or forfeitures.*
>
> *[28] In several cases it has been held that exposure to loss of office is exposure to a penalty or forfeiture. And in* Police Service Board v Morris *it was at least assumed that exposure to dismissal from a police force was a form of penalty. By contrast, however, orders for compensation have been held not to be penalties.*
>
> *[29] That stream of authority would suggest that for the Commission to seek an order disqualifying a person from acting in the management of a corporation on the ground that the person has contravened the law is to seek a penalty or forfeiture. The order is sought by a regulatory authority; its grant would be founded on demonstration of a contravention of the law; it is an order which leads to the vacation of existing offices in a corporation and imposition of a continuing disability for the duration of the order. What is it that would deny that conclusion?*

282 The privilege has been described by the High Court as a human right which protects personal freedom, privacy and dignity: see *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 498.

283 Rationales for the privilege include preventing the abuse of power and convictions based on false confessions, protecting the quality of evidence and the requirement that the prosecution prove the offence, and avoiding putting a person in a position where the person will be exposed to punishment whether they tell the truth, lie, or refuse to provide the information.

284 Some protections, such as the competency of an accused person to give evidence as a witness for the prosecution, cannot be waived: see, eg, *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1 at 565 [51]-[52] and *Lee v The Queen* (2014) 308 ALR 252; [2014] HCA 20 (‘*Lee v The Queen*’) at [33].

285 There seems little doubt that the privilege against self-incrimination, although a “human right”, can be waived.

286 The privilege applies in non-judicial proceedings, such as inquiries, unless it is expressly or impliedly abrogated by a governing statute: *Pyneboard*, 340-341, 344.

287 One of the problems with the recognition of the privilege against self-incrimination outside a court exercising judicial power is that there is the practical problem of how the decision maker is to properly consider the claim for privilege, and the consequences that may follow from a refusal to answer. I need not go into that issue for the purposes of these proceedings as no claim for privilege against self-incrimination was in fact made by Mr Hird or the 34 Players.

288 However, any abrogation of the privilege against self-incrimination must be clear and unmistakable.

289 In *Plaintiff S157/2002* at [30] Gleeson CJ said:

> *[C]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. As Lord Hoffmann recently pointed out in the United Kingdom, for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be "subject to the basic rights of the individual".*

290 The abrogation or curtailment is not, however, found only where express words deal with the subject.

291 In *Pyneboard* at 341, Mason ACJ, Wilson and Dawson JJ said the following:

> *In deciding whether a statute impliedly excludes the privilege much depends on the language and character of the provision and the purpose which it is designed to achieve. The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification. This is so when the object of imposing the obligations is to ensure the full investigation in the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation. In such cases it will be so, notwithstanding that the answers given may be used in subsequent legal proceedings.*

292 It was also observed in *Pyneboard* at 342-343 that the conclusion that the privilege may be impliedly excluded may be more readily drawn where the obligation to answer questions do not form part of an examination on oath.

293 There are limitations on the extent of protection given by the privilege against self-incrimination. It protects only against self-incrimination and cannot be invoked to shield others from incrimination: see *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385. It does not protect physical evidence that may be obtained from a person, such as fingerprints, and does not prevent the document being otherwise obtained (for example, by a search warrant).

294 Assuming a claim for privilege must be made, no particular form of words is required, but there must at least be an attempt to claim or invoke the privilege by suitable language or conduct:

see *Comptroller-General of Customs v Disciplinary Appeal Committee* (1992) 35 FCR 466 at 480-481 per Gummow J.

THE LEGISLATIVE REGIME

295 Before going any further, it is necessary to set out the legal framework governing ASADA and the relevant provisions of the Act and the NAD Scheme. I will need to consider in some detail the relevant international instruments and the statutory scheme. As the Full Court observed in *Anti-Doping Rule Violation Panel v XZTT* (2013) 214 FCR 40; [2013] FCAFC 95 at [42]:

> *… The complexity of the statutory scheme which imports concepts agreed internationally under the WADA Code does not assist in simplifying the legislative framework.*

International Conventions and Instruments

296 The Act and Regulations implement the General Anti-Doping Convention 1994 (the 1994 Convention), the UNESCO International Convention Against Doping in Sport 2005 (the 2005 Convention), and the World Code: see s 9 of the Act.

297 The 2005 Convention and the AFL Code each contemplate co-operative arrangements between ASADA and sporting administration bodies in order to detect, prevent, and eliminate sports doping.

The General Anti-Doping Convention 1994

298 The General Anti-Doping Convention 1994 ('the 1994 Convention') was entered into at Strasbourg on 16 November 1989, and entered into force for Australia on 1 December 1994 (having been acceded to on 24 April 1994). It is referred to in the Act in ss 4 and 9(a). It is also referred to in reg 4 and Sch 2 to the Regulations, and cl 1.01(1) of the NAD Scheme. It is one of the Conventions underpinning the NAD Scheme.

299 The Preamble to the 1994 Convention includes statements reflecting the following:

(1) concern about the growing use of doping agents, and the consequences for the health of participants and the future of sport;

(2) mindfulness that this problem puts at risk the ethical principles and educational values embodied in the Olympic Charter; in the International Charter for Sport and Physical Education of UNESCO and in Resolution (76) 41 of the Committee of Ministers of the Council of Europe, known as the 'European Sport for All Charter';

(3) cognisance of anti-doping regulations, policies and declarations already adopted by various member States and international sports organisations (such as the IOC);

(4) awareness that public authorities and sports organisations have complementary responsibilities to combat doping in sport, notably to ensure the proper conduct, on the basis of the principle of fair play, of sports events and to protect the health of those that take part in them;

(5) recognition that these authorities and organisations must work together for these purposes at all appropriate levels;

(6) an acknowledgment of earlier international initiatives such as Recommendation No R(88)12 - wherein it was noted that, as at 1988 (the year of that Recommendation), organisers of most major national and international competitions had already instituted mandatory doping controls (in-competition) as a condition of participation in sports events. That same Recommendation welcomed the decisions taken by several member States, and by some international sports federations, to institute mandatory out-of-competition doping controls, and called for adoption of those initiatives more generally; and

(7) a determination to take further and stronger co-operative action aimed at the reduction and eventual elimination of doping.

300 Article 4 of the 1994 Convention states that parties shall adopt legislative, regulatory or administrative measures to restrict the availability and use in sport of banned doping substances and methods, including by:

(1) making it a criterion for the grant of public subsidies to sports organisations that they effectively apply anti-doping regulations;

(2) assisting sports organisations to finance doping controls and analyses;

(3) withholding the grant of subsidies from public funds to persons who have been suspended following a doping offence;

(4) encouraging and:

where appropriate facilitat[ing] the carrying out by their sports organisations of the doping controls required by the competent international sports organisations whether during or outside competitions;

(5) encourag[ing] and facilitat[ing] the negotiation by sports organisations of agreements permitting their members to be tested by duly authorised doping control teams in other countries.

301 The Preamble and AA 4 of the 1994 Convention do contemplate institution of world-wide anti-doping regimes which would impose obligations on sports participants to provide samples (and other information) to sports organisations as a condition of their participation in sports.

UNESCO International Convention Against Doping in Sport 2005

302 The UNESCO International Convention Against Doping in Sport 2005 ('the 2005 Convention') was ratified by Australia on 17 January 2006, shortly before commencement of the Act. It is referred to in the Act in ss 4 and 9(a). It is also referred to in reg 4 and Sch 2 to the Regulations, and cl 1.01(1) of the NAD Scheme. It is another of the Conventions underpinning the NAD Scheme. It gives binding force to the World Code.

303 The Preamble to the 2005 Convention refers to:

(1) an awareness that:

- public authorities and the organisations responsible for sport have complementary responsibilities to prevent and combat doping in sport, notably to ensure the proper conduct, on the basis of the principle of fair play, of sports events and to protect the health of those that take part in them.

(2) a recognition that:

- these authorities and organisations must work together for these purposes, ensuring the highest degree of independence and transparency at all appropriate levels;

(3) a determination to take further and stronger co-operative action aimed at the elimination of doping in sport; and

(4) a recognition that the elimination of doping in sport is dependent in part upon progressive harmonisation of anti-doping standards and practices and co-operation at the national and global levels.

304 The purpose of the Convention was stated to be:

> *to promote the prevention of and the fight against doping in sport, with a view to its elimination.*

305 Article 7 is titled "Domestic coordination" and states that:

> *States Parties shall ensure the application of the present Convention, notably through domestic coordination. To meet their obligations under this Convention, States Parties may rely on … sports authorities and organizations.*

306 Article 9 provides that:

> *States Parties shall themselves take measures or encourage sports organisations and anti-doping organisations to adopt measures, including sanctions or penalties, aimed at athlete support personnel who commit an anti-doping rule violation or other offence ...*

307 Article 11 provides that Parties shall where appropriate:

(1) provide funding to support a national testing program across all sports or assist sports organisations and anti-doping organisations in financing doping controls;

(2) take steps to withhold financial support from athletes or athlete support personnel who have been suspended following an anti-doping violation;

(3) withhold financial or other sport related support from any sports organisation or anti-doping organisation not Code compliant.

308 Article 12 deals with implementing a testing regime, providing that Parties shall, where appropriate:

(1) encourage and facilitate the implementation by sports organisations and anti-doping organisations of doping controls;

(2) encourage and facilitate negotiation by sports organisations and anti-doping organisations of agreements permitting their members to be tested by duly authorised doping control teams from other countries;

(3) undertake to assist sports organisations and anti-doping organisations to gain access to accredited doping control laboratories.

309 Article 13 provides that:

> *States Parties shall encourage cooperation between anti-doping organisations, public authorities and sports organisations within their jurisdiction and those within the jurisdiction of other States Parties in order to achieve at the international level the purpose of this Convention.*

310 Article 14 provides an undertaking to support the WADA.

311 Article 19 deals with education and training programs, and Art 19(2)(b) provides that athletes and athlete support personnel should be provided with updated and accurate information on athletes' rights and responsibilities in regard to anti-doping, including information about the AFL Code and the anti-doping policies of the relevant sports and anti-doping organisations.

312 Article 23 provides that:

> *States Parties shall cooperate mutually and with the relevant organisations to share, where appropriate, information, expertise and experience on effective anti-doping programs.*

313 There is a similar undertaking by States Parties in Art 24 to encourage and promote anti-doping research in co-operation with sports and other relevant organisations.

The World Anti-Doping Code 2009

314 The World Code was adopted by WADA and, in its current form, took effect on 1 January 2009. The purpose of the World Code is said to be to:

(1) protect athletes' right to participate in doping-free sport and thus promote health, fairness and equality for athletes worldwide; and

(2) to ensure harmonised, coordinated and effective anti-doping programs at the international and national levels with regard to detection, deterrence and prevention of doping.

315 The World Code is also said to be:

> *the fundamental and universal document upon which the World Anti-Doping Program in sport is based.*

316 The Introduction says that:

> *Anti-doping rules, like Competition rules, are sport rules governing the conditions under which sport is played. Athletes or other Persons accept these rules as a condition of participation and shall be bound by these rules.*

317 Article 2 of the World Code contains the ADRVs which are reflected in cl 2.01 of the NAD Scheme.

318 Significantly, however, the World Code is not confined to specification of the ADRVs and sanctions applicable thereto. It also deals with the management/governance of anti-doping issues. The World Code also refers at pp 99-100 to:

> *establish[ing] an environment that is strongly conducive to doping-free sport and [which] will have a positive and long-term influence on the choices made by Athletes and other Persons.*
> *…*
>
> *Athlete Support Personnel should educate and counsel Athletes regarding anti-doping policies and rules adopted pursuant to the Code.*
> *…*
>
> *18.3 Professional Codes of Conduct*

> *All Signatories shall cooperate with each other and governments to encourage relevant competent professional associations and institutions to develop and implement appropriate Codes of Conduct, good practice and ethics related to sport practice regarding anti-doping, as well as sanctions, which are consistent with the Code.*

319 Article 20.5 specifies various roles and responsibilities of National Anti-Doping Organisations (such as ASADA), one of which is to "co-operate with other relevant national organisations and agencies" (such as the AFL). The role of WADA itself is described in Art 20.7.8 as:

> *To conduct* Doping Controls *as authorised by other* Anti-Doping Organisations *and to cooperate with relevant national and international organisations and agencies, including but not limited to facilitating inquiries and investigations.*

320 Article 21 then sets out "additional roles and responsibilities" of athletes and other persons. The reference to "additional" clearly contemplates that athletes and other persons have roles and responsibilities going beyond non-commission of ADRVs. It provides:

> *21.1 Roles and Responsibilities of Athletes*
>
> *21.1.1 To be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the* Code.
> *…*
>
> *21.1.3 To take responsibility, in the context of anti-doping, for what they ingest and use.*
>
> *21.1.4 … to take responsibility to make sure that any medical treatment received does not violate anti-doping policies and rules adopted pursuant to the* Code.
>
> *21.2 Roles and Responsibilities of Athlete Support Personnel*
>
> *21.2.1 To be knowledgeable of and comply with all anti-doping policies and rules adopted pursuant to the Code and which are applicable to them or the Athletes whom they support.*
> *…*
>
> *21.2.3 To use their influence on Athlete values and behaviour to foster anti-doping attitudes.*

321 The World Code requires national sporting organisations such as the AFL to have anti-doping policies and rules directed to the promotion of anti-doping values, behaviours, and attitudes. The World Code also contemplates very close co-operation between the AFL and ASADA.

322 I just pause here to observe that these references (relied upon by the CEO) indicate general support of the legal validity investigation by ASADA which involves the co-operation of a sporting administration body such as the AFL. These references also support the legality of the disclosure of information by ASADA to the AFL in order to facilitate enforcement of the

AFL's disciplinary standards relating to management and governance of anti-doping issues, or the conduct of the investigation in reliance on the AFL's contractual powers of compulsion. The references may also support an approach to the interpretation of the Act and the NAD Scheme following the observations of French J (as he then was) in *Cabal v United Mexican States (No 3)* (2000) 186 ALR 188; [2000] FCA 1204 at [127]:

> *There is a general principle of the common law that legislation will be construed, so far as is possible, in accordance with the provisions of international agreements to which it gives effect:* Queensland v Commonwealth *(1989) 167 CLR 232 at 238-40; 86 ALR 519;* Koowarta v Bjelke-Petersen *(1982) 153 CLR 168 at 204; 39 ALR 417;* Yager v R *(1977) 139 CLR 28 at 43-4; 13 ALR 247;* Polites v Commonwealth *(1945) 70 CLR 60 at 69.*

323 However, it can be immediately observed that the references referred to in the above instruments are general in nature and do not direct themselves to the issue in these proceedings. The issues in these proceedings, as I have already mentioned, must be determined by recourse to the Australian principles of statutory construction.

The International Anti-Doping Arrangement 2011 - 2014

324 Clauses 1.03 and 1.03B of the NAD Scheme make reference to the International Anti-Doping Arrangement 2011-2014. It is a "relevant international anti-doping instrument" as defined in s 4 of the Act — noting that it is prescribed by the Regulations (see Sch 2 thereof).

325 Clause 1.03(1) provides as follows:

> *The CEO is authorised to exercise powers under the NAD scheme in order to cooperate with a request from a sporting administration body if the request is reasonably necessary to enforce or give effect to the World Anti-Doping Code and other relevant international anti-doping instruments.*

326 Clause 1.03B (inserted in 2012) of the NAD Scheme provides:

> *In exercising powers for the NAD scheme and making recommendations, the CEO … must have regard to:*
>
> *(a) the World Anti-Doping Code ...; and*
> *(b) other relevant international anti-doping instruments.*

327 The Arrangement includes the following statements:

> ***Philosophy***
>
> *This Arrangement is based on the conviction of the Participating Parties that* ***international cooperation in the field of anti-doping*** *and high quality standards in anti-doping programmes will contribute to ensuring an ethical and healthy sports environment which provides for mutual trust and shared values where athletes can compete without the use of prohibited doping substances or methods.*

Principles

> *The participating Parties are dedicated to doping-free sport. They firmly believe that anti-doping policies and programmes must be periodically reviewed and revised accordingly* ***to serve the sport community. The Participating Parties recognise the sport community as a crucial ally in anti-doping work and thus develop policies and programmes in a cooperative manner with the sport community****. (emphasis added)*

328 Again, this is a general reference to the obvious need for co-operation in combating illegal drugs in sport, but does not direct itself to the primary issues in these proceedings, again, dependent upon an examination of the Act and the NAD Scheme.

329 Nevertheless, it can be observed that the functions, powers, roles and responsibilities of the CEO and ASADA under the Act and NAD Scheme are built upon, and were intended to complement, existing disciplinary standards in organised sports. The Act and the NAD Scheme place upon the CEO, ASADA, the ADRVP and sporting administration bodies (such as the AFL) different functions and powers, which are deliberately delineated according to the responsibility of each person or body. However, each of these entities share a common overall purpose to co-operate (as far as the law permits) to prevent the use of prohibited substances in sport.

Second Reading Speech for the ASADA Amendment Bill 2013

330 Mr Hird and Essendon rely heavily upon the *Australian Sports Anti-Doping Authority Amendment Act 2013* (Cth) ('the 2013 Amendment Act'), which made provision for the CEO to issue disclosure notices, and which displaced the privileges against (i) self-incrimination and (ii) self-exposure to a penalty in respect of production of 'documents and things' at compulsory interviews — but preserved those privileges in respect of the giving of answers and information at compulsory interviews.

331 It was submitted that the enactment of the 2013 Amendment Act reflected a legislative intention that ASADA should not be permitted to have access to answers and information compulsorily acquired from interviewees, including through the use of a sporting administration body's compulsory powers.

332 ASADA contended the reverse was true. ASADA relied upon the following matters.

333 In the Minister's Second Reading Speech she stated:

> *The recent Review of Cycling Australia conducted by the Hon James Wood AO QC has demonstrated that there is still plenty of work to be done in the ongoing effort to*

address the challenges of doping in sport.

This Bill I introduce today responds to the recommendations contained in Mr Wood's Report …

Intense media speculation around recent revelations of systemic doping in international cycling have unfortunately highlighted that public confidence in sport can be easily undermined by actions that bring into question the integrity of sport.

334 The Minister then stated:

I have also asked ASADA and the National Integrity in Sport Unit within the Office for Sport to work with our national sporting organisations to amend their Codes of Conduct and/or anti-doping policies so that all athletes and their support personnel are required to cooperate with an ASADA investigation. National sporting organisations will be required to apply an appropriately strong sanction (such as significant periods of ineligibility) for those who fail to do so.

335 Thus, it was contended by ASADA that the Minister unambiguously recognised that it was an intended feature of the scheme that ASADA's investigations could "leverage off" contractual arrangements between sporting organisations and their participants requiring those participants, through the exercise of compulsory powers by the sporting organisations, to provide information to ASADA.

336 ASADA then contended that if there is any doubt whatsoever about this being an intended feature of the entire legislative scheme, that doubt is dispelled when one has regard to:

(1) the hearings of the Rural and Regional Affairs and Transport Legislation Committee, which inquired into and reported on the Amendment Bill (the date of hearings being 1 March 2013); and

(2) the content of the report of James Wood AO QC into Cycling Australia which the Minister referred to in her Second Reading Speech as the genesis of the Bill for the 2013 Amendment Act.

337 In the Senate Committee hearings held on 1 March 2013:

(1) The then Shadow Attorney-General stated:

As all of the players and support personnel and club officials have contractual obligations, and the sanction for not complying is disciplinary action under the code of the sport or termination of their contract, why does ASADA need these powers to issue a disclosure notice, to require the interview, to provide information, to provide substances, with no privilege against self-incrimination? If your own sports codes are being enforced, then the athletes and support personnel and officials at pain of being excluded from the sport are already under these obligations.

… why do we need to impose additional liability on the players when under their

existing contracts they already have that obligation and the sanction that enforces compliance with the obligation is to lose their contract.

…

Looking at the Australian Olympic Committee agreement with athletes - given how extensive and thorough the contractual obligations are on athletes - you do not need the additional force of these amendments to police and enforce anti-doping rules, because you already have them in your team agreement and they are very extensive and they carry very heavy sanctions. Your interests are fully protected by your team agreement.

(2) Matthew Finnis, Board Member, Australian Athletes' Alliance and Chief Executive Officer, AFL Players' Association, told the Committee:

The primary motivator would be the fact that it is a privilege to play the game and as part of that the athletes have signed up to the contractual arrangement whereby they forego certain liberties which we would ordinarily expect, and they do so because of the value in curbing any threats to the integrity of the sport. But there needs to be proportionality, and the athletes are in the best place to ensure proportionality through contractual negotiations …

(3) At the time of the Committee's consideration of the amending Bill it excluded the privileges in respect of interview answers and information, but this aspect of the Bill was removed prior to its enactment. It was submitted that the inference to be drawn is that the legislature took the view that ASADA should have access to compulsorily acquired information, not through the exercise of its own powers, but pursuant to the compulsory powers able to be exerted by sporting organisations under their contractual arrangements with sports' participants.

338 ASADA then made reference to the report of Mr Wood, and made the following submissions.

(1) In that report Mr Wood made recommendations for the revision and expansion of Cycling Australia's Code of Conduct for members and for securing athletes' co-operation with ASADA investigations.

(2) One such recommendation was that Cycling Australia establish a policy that would provide sanctions for an athlete, coach or support person who refused to co-operate with an ASADA investigation.

(3) These recommendations were made because the contractual arrangements which existed between Cycling Australia and cyclists at the time of Mr Wood's inquiry did not oblige cyclists to disclose information against their interests to ASADA.

(4) Mr Wood specifically recommended that Cycling Australia should prepare a more comprehensive Code of Conduct. He recommended that the requirement for compliance with that Code should then be incorporated into contractual arrangements.

(5) Mr Wood then stated:

> *In completing this Review, it became apparent that an essential element of doping detection is the ability of relevant authorities to investigate alleged incidents of doping involving athletes, support personnel or team staff. In the Australian context, critical to ASADA's role is the cooperation of these groups with its investigation efforts. Elsewhere in this Report I discussed the possible strengthening of the ASADA Act and other relevant legislation in relation to investigations, but I consider it of the upmost importance that Cycling Australia [CA] make provision in its policies to sanction those who fail to cooperate with ASADA investigations.*
> *…*
>
> *I am aware that some sports have put in place arrangements to facilitate cooperation between athletes, clubs and support personnel and ASADA in relation to investigations. The National Rugby League (NRL) and Australian Football League (AFL), as part of their anti-doping arrangements, have a requirement that certain classes of people, which are defined by the respective policies, must cooperate with investigations associated with doping. For example, the AFL's anti-doping code requires each player, club, officer and official to fully cooperate with any investigation and includes a sanction for a breach of this requirement. CA should develop similar arrangements, appropriate to its circumstances, to enable greater cooperation with ASADA investigations.*
> *…*

339 In light of the above, ASADA submitted that although ASADA was not authorised to exercise its own compulsory powers to compel sports' participants to provide answers at interviews, an important feature of the legislative scheme was that ASADA is able to rely on the exercise of compulsory powers by sporting organisations. After the amendments, that state of affairs would continue as a feature of the scheme, and more national sporting organisations would be required to amend their codes of conduct and anti-doping policies to oblige participants to co-operate with ASADA.

340 In my view, there is a real danger in accepting the analysis of ASADA in this regard in an endeavour to determine the purpose of the amending legislation. I cannot be sure that the comments made by various persons, other than by the Minister introducing the amending Bill, reflected the reason for the amendment or the alteration to the original amendment as proposed. There may be many reasons for the limited powers being given to ASADA. As to the Minister's comments, all they amount to in context is a recognition that the athletes must co-operate with ASADA, and sporting bodies should amend their codes of conduct to ensure this happens. It does not in itself support the submissions of ASADA, although they give some context to the overall scheme of the Act and the NAD Scheme.

Legislative history

341 All parties relied upon the legislative history of the Act. I make this brief observation.

342 The legislative history does show, including the Minister's Second Reading Speech on the Australian Sports Anti-Doping Authority Bill 2005 (Cth), an aim to establish an investigative body making decisions independently from sporting bodies, and to avoid allegations of conflict of interest and the promotion of self-interest. A new and dedicated agency was established.

343 However, the Second Reading Speech also made specific reference to sporting bodies ensuring that athletes and support personnel co-operate with ASADA and to obligations being imposed upon sporting organisations in the area of assisting ASADA in the course of its investigations. Certain rights of athletes were specifically identified as being protected (eg privacy, disclosure of sensitive information). However, no mention was made of the right of self-incrimination.

344 Whilst the legislative history is relevant as part of context, I have gained little assistance from the legislative history to the task I need to undertake.

The Act

345 I now turn to the Act. As I have already mentioned, the Act was relevantly amended in 2013, with those amendments taking force from 1 August 2013. I will return to these amendments.

Functions and powers of the CEO (and ASADA)

346 Sections 13 and 15 of the Act inform some of the functions and powers of the CEO. Before amendment, s 13 provided:

> *(1) The NAD scheme must:*
>
> *(a) provide that one or more specified classes of athletes and support persons are subject to the NAD scheme; and*
>
> *(b) contain rules (the anti-doping rules) applicable to athletes and support persons; and*
>
> *(c) authorise the CEO to request an athlete to keep the ASADA informed of where the athlete can be found; and*
>
> *(d) authorise the CEO to request an athlete to provide a sample; and*
>
> *(e) authorise the CEO to test, or arrange the testing of, samples so provided; and*
>
> *(f) authorise the CEO to investigate possible violations of the anti-doping rules; and*
>
> *(g) authorise the CEO to disclose information obtained during such investigations for the purposes of, or in connection with, such investigations; and*

(h) authorise the ADRVP to make findings relating to such investigations; and

(ha) authorise the ADRVP to make recommendations as to the consequences of such findings; and

(i) require the ADRVP to establish and maintain a register of such findings; and

(j) authorise the CEO to notify athletes, support persons and sporting administration bodies of:

(i) findings on the register mentioned in paragraph (i); and

(ii) the ADRVP's recommendations as to the consequences of such findings; and

(k) authorise the CEO to present:

(i) findings on the register mentioned in paragraph (i); and

(ii) the ADRVP's recommendations as to the consequences of such findings;

at hearings of the Court of Arbitration for Sport and other sporting tribunals, either:

(iii) at the request of a sporting administration body; or

(iv) on the CEO's own initiative; and

(l) authorise the ADRVP to make entries on, or remove entries from, the register mentioned in paragraph (i); and

(m) authorise the CEO to publish information on and relating to the register mentioned in paragraph (i) if:

(i) the CEO considers the publication to be in the public interest; or

(ia) the publication is required by the World Anti-Doping Code; or

(ii) the athlete or support person to whom the information relates has consented to the publication;

and the other conditions (if any) specified in the NAD scheme for the purposes of this paragraph are satisfied.

(2) The anti-doping rules may deal with matters arising before or after the commencement of this section.

347 Section 15 further provides:

(1) The NAD scheme must:

(a) contain rules (the sporting administration body rules) that:

(i) are applicable to one or more specified sporting administration bodies; and

(ii) relate to the anti-doping rules; and

(b) authorise the CEO to monitor the compliance by sporting administration bodies with the sporting administration body rules; and

(c) authorise the CEO to notify the ASC about the extent of such compliance by sporting administration bodies other than the ASC; and

(d) authorise the CEO to publish reports about the extent of compliance by sporting administration bodies with the sporting administration body rules.

Note: The NAD scheme may make different provision with respect to different matters or different classes of matters (see subsection 33(3A) of the Acts Interpretation Act 1901).

(2) The following are examples of sporting administration body rules:

(a) rules about promoting compliance with the anti doping rules by athletes and support persons;

(b) rules about referring possible violations of the anti doping rules to the ASADA;

(c) rules about assisting, and giving information to, the ASADA in relation to investigations of possible violations of the anti doping rules;

(d) rules about taking action in response to the ADRVP's findings relating to such investigations;

(e) rules about hearings and appeals arising from such findings.

348 It is evident that the Act envisages two separate although related sets of rules: the anti-doping rules, and the sporting administration body rules.

349 The Act (by s 15) authorises the CEO and ASADA to monitor the compliance by sporting administration bodies with sporting administration body rules (s 15(1)(b)), but the examples of the sporting administration body rules given in s 15(2) show that they are directed to (relevantly) the AFL's obligations.

350 At a general level, the Act envisages that sporting administration bodies would assist, and give information to, ASADA in relation to certain matters. These matters would include the extent of compliance with their sporting administration body rules (ss 15(1)(b) and 15(2)(a)) and investigations into possible violations of the anti-doping rules (s 15(2)(c)).

351 Section 17 provides that Div 2 (which contains ss 13 and 15) "does not limit the matters in relation to which the NAD Scheme may make provision".

352 The Act confers a very wide range of functions upon the CEO in relation to anti-doping issues, which extend beyond investigation of possible violations of the anti-doping rules.

353 Under s 21(1) of the Act, the functions of the CEO include:

(a) functions conferred by Pt 2 of the Act and the NAD Scheme being Sch 1 of the Regulations (see ss 21(1)(a)-(b) of the Act);

(b) to support, encourage, develop and implement initiatives that increase the skills and knowledge of people involved in sporting activities about sports doping and safety matters (see s 21(1)(e) of the Act);

(c) to support and encourage the sporting community to develop and implement comprehensive programs, and education initiatives, about sports doping and safety matters (see s 21(1)(f) of the Act);

(d) to collect, analyse, interpret and disseminate information about sports doping and safety matters (see s 21(1)(h) of the Act);

(e) to encourage the development of ways for sporting organisations to carry out initiatives about sports doping and safety matters (see s 21(1)(i) of the Act);

(f) to co-operate with sporting organisations, to carry out initiatives about sports doping and safety matters (see s 21(1)(j) of the Act);

(j) to provide the following services under contract on behalf of the Commonwealth:

(i) anti-doping testing services;

(ii) safety checking services;

(iii) other services (including educational services) relating to sports doping and safety matters (see s 21(1)(k) of the Act);

(m) such other functions as are conferred on the CEO by this Act or any other law of the Commonwealth (see s 21(1)(m) of the Act);

(n) to advise the Minister about matters relating to any of the above functions (see s 21(1)(n) of the Act); and

(o) to do anything incidental to or conducive to the performance of any of the above functions (see s 21(1)(o) of the Act).

354 The term "sports doping and safety matters" used in s 21 is defined in s 4 of the Act as:

> *(a) a matter relating to drugs and/or doping methods in one or more sporting activities; or*
>
> *(b) a matter relating to the safety of athletes.*

355 Additionally, the term "sporting organisations" used in ss 21(1)(i) and (j) is defined in s 4 to include an organisation that:

> *(a) has control in Australia, a foreign country or internationally of one or more sports or sporting events; or*
>
> *(b) organises or administers one or more sports or sporting events; or*
>
> *(c) accredits people to take part in sporting competition; or*
>
> *(d) provides teams to compete in sporting competition; or*
>
> *(e) trains, or provides finance for, people to take part in sporting competition.*

356 A "sporting organisation" is also a "sporting administration body" for the purposes of the Act and NAD Scheme. It is not in contention that the AFL is either a "sporting organisation" or "sporting administration body".

357 The functions and powers conferred upon the CEO and ASADA under the Act are supplemented by cl 1.02(1)(c) of the NAD Scheme. I will return to cl 1.02(1)(c), and the NAD Scheme.

358 It is to be noted that (with some exceptions, to which I will return) the CEO is not required to perform his or her functions alone. For example:

(a) Section 24M provides that the CEO may be assisted by officers and employees of Agencies (within the meaning of the *Public Service Act 1999* (Cth)), or by officers and employees of authorities of the Commonwealth, whose services are made available to the CEO in connection with the performance of any of his or her functions; and

(b) Section 24N provides that the CEO may, subject to certain constraints, delegate any or all of his or her functions and powers (other than the power to give a disclosure notice) to a member of the ASADA staff, an individual whose services are made available to the CEO under s 24M, or an individual appointed as a chaperone, or as a drug testing official, under the NAD Scheme.

Relevant provisions of the amended Act: new powers

359 As I mentioned earlier, certain amended provisions of the Act came into operation from 1 August 2013. The relevant amendments were as follows:

360 The 2013 Amendment Act repealed and replaced s 13(1)(g) of the Act on and from 1 August 2013, and inserted a new subs 13(1)(ea). Under the amended Act, s 13(1) now provides that the NAD Scheme must:

> *...*
> *(ea) authorise the CEO to request a specified person to do one or more of the following within a specified period:*
>
> *(i) attend an interview and answer questions;*
>
> *(ii) give information of a specified kind;*
>
> *(iii) produce documents or things of a specified kind;*
>
> *if the CEO reasonably believes that the person has information, documents or things that may be relevant to the administration of the NAD scheme; and*
>
> ...
>
> *(g) authorise the CEO to disclose information, documents or things obtained in relation to the administration of the NAD scheme (including information obtained during investigations of possible violations of the anti-doping rules) for the purposes of or in connection with, that administration;*
> *...*

361 Prior to 1 August 2013, neither ASADA nor the CEO had any power to compel a person to attend an interview or provide information. Section 13A(1) of the Act now makes specific provision, for the first time, for the issuing of a compulsory request and disclosure notice.

> *The NAD scheme must authorise the CEO to give a person a written notice (a disclosure notice) requiring the person to do one or more of the following within the period specified in the notice:*
>
> *(a) attend an interview to answer questions;*
>
> *(b) give information of the kind specified in the notice;*
>
> *(c) produce documents or things of the kind specified in the notice.*

362 As required by s 13(1)(ea) of the amended Act, cl 3.26A of the NAD Scheme empowers the CEO to "request" a specified person to:

> *(i) attend an interview and answer questions;*
>
> *(ii) give information of a specified kind;*

(iii) produce documents or things of a specified kind;

if the CEO reasonably believes that the person has information, documents or things that may be relevant to the administration of the NAD scheme

363 As required by s 13A(1) of the amended Act, cl 3.26B(1) of the NAD Scheme empowers the CEO to give a person a disclosure notice "requiring" that person to:

(a) attend an interview to answer questions;

(b) give information of the kind specified in the notice;

(c) produce documents or things of the kind specified in the notice.

364 However, the power of the CEO to issue a disclosure notice is not absolute. Section 13A(1A) of the amended Act constrains the issuing of a disclosure notice:

(1A) The NAD scheme must provide that the CEO must not give a disclosure notice to a person unless:

(a) the CEO declares in writing that the CEO reasonably believes that the person has information, documents or things that may be relevant to the administration of the NAD scheme; and

(b) if:

(i) the person is a registered medical practitioner; and

(ii) the notice is given to the person in his or her capacity as a registered medical practitioner;

the CEO declares in writing that the CEO reasonably believes that the person has been involved, in that capacity, in the commission, or attempted commission, of a possible violation of the anti-doping rules; and

(c) 3 ADRVP members agree in writing that the belief referred to in paragraph (a) (and, if applicable, paragraph (b)) is reasonable.

365 In addition, the privilege of interviewees against self-incrimination has been preserved (with limited exceptions): s 13D of the amended Act.

366 Further, it should be noted that the power of the CEO to issue a disclosure notice cannot be delegated. Section 24N(1) of the amended Act specifically exempts, from the CEO's power to delegate his or her functions, "the power to give a disclosure notice".

367 Clause 3.26B(2) of the NAD Scheme also imposes the constraints on the CEO's power to give a disclosure notice required by s 13A(1A) of the amended Act.

Access to, and use of, information

368 Section 67 of the Act relates to access to, and use of, customs information. It provides for the CEO to be able to use and further disclose customs information for the purpose of the CEO's administration of the NAD Scheme or the performance of his or her functions under s 68: see s 67(1)(d).

369 Section 68 details the circumstances in which the CEO may disclose protected customs information (which is defined as "information given to the CEO, or to a person acting on the CEO's behalf, under s 16 of the *Customs Administration Act 1985*": see s 67(2)) as follows:

> *(1) The functions of the CEO include disclosing protected customs information to a sporting administration body if:*
>
> *(a) the CEO is satisfied that the information should be disclosed to the body for permitted anti-doping purposes of the body; and*
>
> *(b) the body has given a written undertaking that:*
>
> *(i) the body will use or disclose the information only for permitted anti-doping purposes of the body; and*
>
> *(ii) the body will take reasonable steps to satisfy itself that the information will not be used or disclosed, by a person to whom the body has disclosed the information, in a way that would be unfairly prejudicial to the interests of the person to whom the information relates; and*
>
> *(c) the CEO is satisfied that the disclosure of the information would not contravene any terms of the authorisation under which the information was disclosed to the CEO, or to a person acting on the CEO's behalf, under section 16 of the Customs Administration Act 1985; and*
>
> *(d) unless subsection (5A) applies—the requirements of subsections (2) to (5) are satisfied.*
>
> *If the information relates to more than one person, the information cannot be disclosed unless the requirements of subsections (2) to (5), as they apply in relation to each of those persons, are satisfied.*
>
> **Notice to be given to person to whom the information relates**
>
> *(2) Before disclosing the information to the body, the CEO must:*
>
> *(a) give written notice of the proposed disclosure to the person to whom the information relates; and*
>
> *(b) invite the person to make a written submission to the ASADA about the proposed disclosure within a period (the submission period) that is the specified number of days after the day on which the person receives*

the notice.

The notice must also advise the person of the effect of subsection (5).

(3) For the purposes of paragraph (2)(b), the specified number of days must be:

(a) unless paragraph (b) applies—14 days; or
(b) if the CEO considers it appropriate in the circumstances to specify a lesser number of days—that lesser number of days.

(4) The information must not be disclosed under this section unless:

(a) the submission period has ended; and

(b) the ASADA has considered any submission that has been made within the submission period.

(5) If the ASADA receives a submission from the person before the end of the submission period, the ASADA may, for the purposes of subsection (4), take the submission period to have ended immediately after the receipt of the submission.

(5A) The requirements of subsections (2) to (5) do not apply to a disclosure of information if the CEO is satisfied that complying with those requirements is likely to prejudice a current investigation into a possible violation of the anti-doping rules.

CEO may specify other conditions etc.

(6) The CEO may specify the manner in which, or the conditions under which, the disclosure is to be made (including the form in which the information is to be presented and the mode of transmitting the information).

Permitted anti-doping purposes

(7) For the purposes of this Act, each of the following purposes is a permitted anti-doping purpose of a sporting administration body:

(a) investigating possible breaches of a current policy of the body about drugs and/or doping methods;

(b) determining whether to take action under such a policy of the body;
(c) determining what action to take under such a policy of the body;

(d) taking action under such a policy of the body;

(e) taking, or participating in, any proceedings relating to action that has been taken under such a policy of the body.

Other disclosures

(8) This section does not, by implication, limit the disclosures that may be made for the purposes of the administration of the NAD scheme.

370 Division 2 of Part 8 of the Act deals with the protection of personal information. Section 71 provides that:

> *(1) A person commits an offence if:*
>
> *(a) the person is or was an entrusted person; and*
>
> *(b) when the person was an entrusted person, the person obtained NAD scheme personal information; and*
>
> *(c) the person discloses the information to someone else.*
>
> *Penalty: Imprisonment for 2 years.*
>
> *(2) Each of the following is an exception to the prohibition in subsection (1):*
>
> *(a) a disclosure for the purposes of this Act;*
>
> *(b) a disclosure for the purposes of the NAD scheme;*
>
> *...*
>
> *(g) a disclosure prescribed by the regulations.*
>
> *(3) If a disclosure of NAD scheme personal information is covered by subsection (2), the disclosure is authorised by this section.*

371 The term 'entrusted person' as used in ss 71(1)(a) and (b) is defined in s 69 which provides as follows:

> *For the purposes of this Act, an entrusted person is:*
>
> *(a) the CEO; or*
>
> *(aa) an Advisory Group member; or*
>
> *(b) a member of the ASADA staff; or*
>
> *(c) a person engaged by the Commonwealth to perform services for the CEO, the ADRVP or the ASDMAC; or*
>
> *(d) a designated associate of:*
>
> *(i) a person; or*
>
> *(ii) a partnership;*
>
> *engaged by the Commonwealth to perform services for the CEO, the ADRVP or the ASDMAC; or*
>
> *(e) an individual whose services are made available to the CEO under section 24M; or*

(f) an individual appointed as a chaperone, or as a drug testing official, under the NAD scheme; or

(fa) an ADRVP member; or

(g) an ASDMAC member; or

(h) an advisory committee member; or

(i) an individual attending a meeting of:

(i) the Advisory Group; or

(ii) an advisory committee.

The NAD Scheme

372 It is important to now go to the NAD Scheme itself.

373 For the purposes of s 9 of the Act, the NAD Scheme is prescribed in Sch 1 to the Regulations. The Regulations were also amended in 2013, with those amendments taking force from 1 August 2013. Those amendments, in respect of the relevant provisions, have largely involved replacing references to ASADA with references to 'the CEO'. I do not consider this change has any significance for the purposes of this proceeding. I will refer to the scheme as amended.

374 Regulation 5 refers to disclosing information for the purposes of drug testing programs, and was not relied upon by either party as relevant to the current proceedings.

375 Regulation 5A refers to disclosing NAD Scheme personal information, and again was not relied upon by any party, particularly not ASADA, as providing a source of power to disclose NAD Scheme personal information relevant to these proceedings.

376 Nevertheless, it is to be noted that reg 5A (and in addition reg 5B dealing with disclosing contract services personal information) do have provisions which place obligations upon ASADA to take reasonable steps to be satisfied that the information disclosed will not be used beyond the purpose of the disclosure.

Exercising powers under the NAD Scheme

377 As I mentioned earlier, the functions and powers conferred upon the CEO and ASADA under the Act are supplemented by cl 1.02(1)(c) of the NAD Scheme. The functions of ASADA under the NAD Scheme are prescribed in cl 1.02 as follows:

(1) Without limiting the functions conferred on the CEO by specific provisions of the Act and any other provision of the NAD scheme, the CEO is authorised to

exercise the following powers and functions:

(a) planning, implementing, evaluating and monitoring education and information programs for doping-free sport for all participants;

(b) encouraging and promoting research relevant to sports drug and safety matters, including sociological, behavioural, juridical and ethical studies;

(c) having the role and responsibility of a National Anti-Doping Organisation for Australia under the UNESCO Anti-Doping Convention and the World Anti-Doping Code, including performance of functions internationally that relate to that role and responsibility;

(d) providing services relating to sports drug and safety matters to a sporting administration body in accordance with contractual arrangements with the body on behalf of the Commonwealth;

(e) undertaking results management for a sporting administration body regardless of whether or not the CEO has conducted the sample collection;

(f) delegating results management responsibilities to International Federations in accordance with the World Anti-Doping Code;

(g) functions about performance of activities relating to sports drug and safety matters referred to the CEO by a sporting administration body.

378 Clause 1.03B of the NAD Scheme provides as follows:

In exercising powers for the NAD scheme and making recommendations, the CEO and the ADRVP must have regard to:

(a) the World Anti-Doping Code (including the comments annotating various provisions of the World Anti-Doping Code); and

(b) other relevant international anti-doping instruments.

379 Part 2 of the NAD Scheme sets out the anti-doping rules, and is structured as follows:

(a) Division 2.1 sets out the Anti-doping rule violations; and

(b) Division 2.2 sets out the Sporting Administration Body Rules.

380 The powers of the CEO in relation to the sporting administration bodies (defined as "a national sporting organisation for Australia": see cl 2.02) are outlined in cl 2.03 as follows:

(1) For subsection 15 (1) of the Act, the sporting administration body rules mentioned in Schedule 1 apply to all sporting administration bodies.

(2) The CEO is authorised:

(a) to monitor the compliance by sporting administration bodies with the

sporting administration body rules; and

(b) to notify the ASC about the extent of the compliance by sporting administration bodies; and

(c) to publish reports about the extent of compliance by sporting administration bodies with the sporting administration body rules.

381 Importantly, cl 2.04 places a number of obligations on sporting administration bodies:

A sporting administration body must:

(a) at all times have in place, maintain and enforce anti-doping policies and practices that comply with:

(i) the mandatory provisions of the World Anti-Doping Code and International Standards; and

(ii) the NAD Scheme; and

(b) not adopt its anti-doping policy unless it has been approved by ASADA or not substantively amend its anti-doping policy unless the amendment has been approved by the CEO; and

(c) ensure that at all times it has the authority to enforce its anti-doping policy; and

(d) immediately inform the CEO of an alleged breach of its anti-doping policy and cooperate with any investigation into the matter; and

(e) provide to the CEO appropriate details or reports related to investigations, hearings, appeals and sanctions; and

(f) provide the CEO with relevant information in a timely manner, including sporting administration body and International Federation anti-doping policies, policy amendments, policy endorsement and implementation date, athlete whereabouts information, athlete education, information relating to events and camps, lists of athletes subject to anti-doping policies and advice relating to athletes in the CEO's registered testing pool and domestic testing pool; and

(g) ensure that other rules and regulations of the sport do not override the provisions of its anti-doping policy; and

(h) comply with, implement and enforce its anti-doping policy to the satisfaction of the CEO; and

(i) submit to the operations of the CEO; and

(j) refer all instances of possible anti-doping rule violations to the CEO for investigation and cooperate with any investigation, as required; and

(k) allow the CEO to present anti-doping cases at hearings unless the CEO has approved the sporting administration body presenting its own case; and

(l) recognise the CEO as having a right to appeal decisions relating to anti-doping cases, including in cases the CEO has not presented the anti-doping case at the hearing; and

(m) accept findings by the ADRVP, act on findings by the ADRVP, ensure that a notice of an alleged anti-doping rule violation is issued in accordance with a recommendation made by the CEO, and enforce sanctions imposed by a sporting tribunal; and

(n) ensure that its members and staff cooperate with the CEO; and

(o) promote information, education and other anti-doping programs in accordance with the World Anti-Doping Code and as requested by the CEO; and

(p) comply with any other conditions relating to anti-doping and notified to it by the ASC that the ASC is required by legislation or by the CEO to require from sporting organisations to which the ASC provides funding, services and support.

382 Division 3.5 of the NAD Scheme relates to the CEO's investigative powers. Relevantly, cl 3.27 provides:

(1) For paragraph 13 (1) (f) of the Act, the CEO is authorised to investigate possible anti-doping rule violations that may have been committed by athletes or support persons.

(2) An investigation must comply, or substantially comply, with the procedures mentioned in:

(a) the World Anti-Doping Code; and

(b) the International Standards; and

(c) the Australian Government Investigations Standard.

(3) A failure to comply with those procedures does not affect the validity of the investigation.

383 Clause 4.07A deals with notification requirements in relation to possible non-presence anti-doping rule violations:

(1) This clause applies if:

(a) the CEO receives evidence or information showing a possible non-presence anti-doping rule violation; and

(b) following a review of the evidence or information, the CEO determines there is a possible non-presence anti-doping rule violation that warrants action by the CEO.

(2) The CEO must notify the participant in writing of the possible non-presence anti-doping rule violation.

(3) The notice must include:

(a) details of the possible non-presence anti-doping rule violation; and

(b) a statement that the participant (or a person on the participant's behalf) may, within the response period, give the CEO a written submission setting out information or evidence relating to the possible non-presence anti-doping rule violation, or waiving this right to make a submission; and

(c) a statement that if the participant (or a person on the participant's behalf) does not give the CEO a written submission or notice within the response period, the participant is taken to have waived the participant's right to make a submission; and

(d) a statement that, after considering any submission made by the participant (or a person on the participant's behalf), the ADRVP may make an entry on the Register relating to the possible non-presence anti-doping rule violation; and

(f) details of other parties that will be notified of the entry on the Register; and

(g) a statement that the ADRVP may also publicly disclose details of the entry on the Register.

(4) In this clause:

response period means:

(a) the period of 10 days after a participant receives a notice; or

(b) if the CEO considers that a shorter period is reasonably necessary due to the circumstances (for example, because of a forthcoming international event or national event)—a shorter period notified by the CEO in writing to the participant before the end of the original response period; or

(c) a longer period notified by the CEO in writing to the participant.

Recording and disclosure of information under the NAD Scheme

384 Division 4.3 deals with the Register. Clause 4.08 provides for the establishment and maintenance of the Register:

> *For paragraph 13 (1) (i) of the Act, the ADRVP must establish and maintain a Register of Findings for the purpose of recording findings of the ADRVP relating to adverse analytical findings and possible non-presence anti-doping rule violations.*

385 Clause 4.09 further provides:

(1) This clause applies if:

(a) a participant has received notification under clause 4.06 or 4.07A; and

(b) the response period for the notification has ended.

(2) The ADRVP must, as soon as practicable, consider any submissions made by the participant and decide whether or not to make an entry on the Register.

(3) If the ADRVP decides not to make an entry on the Register, the ADRVP must notify:

(a) the participant; and

(b) any other party that has been notified of the adverse analytical finding or possible non-presence anti-doping rule violation.

386 Clause 4.10 provides, in relation to entries on the Register:

As soon as practicable after deciding to make an entry on the Register, the ADRVP must enter the following information on the Register:

(a) the name of the participant;

(b) if the participant is an athlete:

(i) the athlete's date of birth; and

(ii) the athlete's sport;

(c) the nature of the finding relating to the adverse analytical finding or possible non-presence anti-doping rule violation;

(d) the date of the adverse analytical finding or possible non-presence anti-doping rule violation;

(e) any other details relevant to the adverse analytical finding or possible non-presence anti-doping rule violation that the ADRVP considers should be entered on the Register.

387 Clause 4.21 deals with 'non-entry information':

(1) This clause applies to information that:

(a) is not information arising out of an entry on the Register; and

(b) relates, or appears to relate, to a person in connection with a possible anti-doping rule violation by an athlete or support person.

(2) For paragraph 13 (1) (g) of the Act, the CEO may disclose the information to all or any of the following:

(a) a sporting administration body;

(b) the Australian Federal Police;

> *(c) the Australian Customs Service;*
>
> *(d) the Therapeutic Goods Administration;*
>
> *(e) Federal, State or Territory law enforcement bodies.*
>
> *(3) Nothing in this clause limits, or is limited by, any other provision of the NAD scheme under which the CEO is required or authorised to disclose information.*
>
> *(4) If a body mentioned in subclause (2) is not subject to the Information Privacy Principles or the National Privacy Principles contained in the* Privacy Act 1988 *or a law that is substantially similar to the Information Privacy Principles or the National Privacy Principles, before disclosing personal information to the body, the CEO must enter into a legally binding agreement with that body to ensure that any personal information that is disclosed is:*
>
> *(a) not used or disclosed by that body for a purpose other than the purpose for which the information is given to the body; and*
>
> *(b) securely retained and restrictions placed on who can access the information; and*
>
> *(c) destroyed or returned to the CEO once the purpose for which the disclosure is made is completed.*

388 It will be observed that the legislation constrains the information that the CEO may provide to others. Prior to 1 August 2013, s 13(1)(g) of the Act provided that the NAD Scheme must "authorise the CEO to disclose information obtained during such investigations for the purposes of, or in connection with, such investigations".

389 Clause 4.21 of the NAD Scheme reflected this limitation by providing that "non-entry information", which relevantly includes "information that relates, or appears to relate, to a person in connection with a possible anti-doping rule violation by an athlete or support person" (see cl 4.21(1)(b)) - may be disclosed by ASADA to, inter alia, a sporting administration body, but only "[f]or paragraph 13(1)(g) of the Act" (see cl 4.21(2)(a)).

390 Clause 4.21 of the NAD Scheme cannot rise above its enabling legislation, namely s 13(1)(g) of the Act. Accordingly, in order for any disclosure to be authorised by cl 4.21 prior to 1 August 2013, it must have been "for the purposes of, or in connection with, such investigations", with the relevant investigation being the CEO's investigation into possible anti-doping rule violations.

391 From 1 August 2013, s 13(1)(g) provided that the NAD Scheme must "authorise the CEO to disclose information, documents or things obtained in relation to the administration of the NAD Scheme (including information obtained during investigations of possible violations of the anti-

doping rules) for the purposes of, or in connection with, that administration". The terms of cl 4.21 of the NAD Scheme were not amended (other than the replacement of 'ASADA' with 'the CEO'). So, from 1 August 2013, disclosure of information by the CEO had to be "for the purposes of, or in connection with" the administration of the NAD Scheme.

392 The expression "in connection with" is capable of describing a spectrum of relationships ranging from the direct and immediate to something more remote. The word "connection" is both wide and imprecise: see Pearce and Geddes, *"Statutory Interpretation in Australia"* (2014) 8th Edition at pp 462-463.

393 Courts have opined that relevant synonyms are "having to do with", "in the course of", "forming part of" and "bound up with, or involved in".

394 The required connection ultimately depends on the statutory context in which the words are used. However, the expression does not require a causal connection between the matters to be connected.

395 Before making any disclosure under cl 4.21(2) of the NAD Scheme of non-entry information in the period ending on 31 July 2013, ASADA was required to consider the information, and evaluate whether:

(1) the information related, or appeared to relate, to a person in connection with a possible anti-doping rule violation by an athlete or support person: cl 4.21(1)(b); and

(2) the information's disclosure to a particular recipient would be:

  (a) for the purpose of an investigation of an anti-doping rule violation; or

  (b) in connection with an investigation of an anti-doping rule violation: cl 4.21(2), read with s 13(1)(g) of the Act.

396 Similarly, before making any disclosure under cl 4.21(2) of non-entry information in the period that commenced on 1 August 2013, the CEO is required to consider the information, and evaluate whether:

(1) the information relates, or appears to relate, to a person in connection with a possible anti-doping rule violation by an athlete or support person: cl 4.21(1)(b); and

(2) the information's disclosure to a particular recipient would be:

  (a) for the purpose of the administration of the NAD Scheme; or

(b) in connection with the administration of the NAD Scheme: cl 4.21(2), read with s 13(1)(g) of the amended Act.

397 In addition to the constraints on disclosure arising from s 13(1)(g) of the Act and cl 4.21 of the NAD Scheme, s 71 of the Act provided (and, under the amended Act continues to provide) that it is a criminal offence for an "entrusted person" - defined in s 69 to include the CEO and staff of ASADA - to disclose "NAD scheme personal information", other than as permitted by s 71(2). That section permitted disclosure "for the purposes of this Act" and after 1 August 2013 permits disclosure "for the purposes of the NAD scheme". NAD Scheme personal information is information that is "personal information" that "is obtained in relation to the administration of the NAD scheme" or "relates to the administration of the NAD Scheme" (s 4 of the Act and the amended Act), with "personal information" having the meaning prescribed in the *Privacy Act 1988* (Cth).

CONTENTIONS OF ESSENDON AND MR HIRD

398 I now turn to specific contentions of Essendon and Mr Hird.

Power to conduct a "joint investigation"

399 Mr Hird and Essendon contend that the investigation was a "joint" or collaborative investigation between the AFL and ASADA, and that it was not merely a matter of the AFL and ASADA working co-operatively in some ways while each maintained, in other ways, its own investigation. They contend that there was only one investigation, run by ASADA, which relied heavily on the AFL's power to compel attendance, production of documents and answers to questions, and that the AFL supplied those powers as and when requested by ASADA and at ASADA's instigation.

400 So much may be accepted, at a general level, but such a characterisation does not assist in reaching the ultimate determination of these proceedings. The real question to consider is the purpose or objective of ASADA. ASADA was clearly conducting an investigation into possible anti-doping violations. The AFL was undertaking its own enquiries, obtaining information for itself (for instance, through the interview process) for the purposes of enforcing its own Player Rules.

401 The procedural steps taken during the investigation, with ASADA and the AFL working together, do not detract from this characterisation of ASADA's purpose in conducting the investigation.

402 It was submitted that neither the Act, the amended Act nor the NAD Scheme referred to the concept of a "joint investigation", nor an investigation with the collaborative features of the investigation in fact conducted. This is true.

403 In further elaboration of the submissions, it was said that:

(a) The Act expressly limits the range of persons who can be involved in an investigation into possible violations of the anti-doping rules. Only ASADA staff and Commonwealth employees were authorised by the Act to assist in such investigations.

(b) Upon a proper construction of the legislation, and with particular regard to the NAD Scheme, there is no basis in the statutory scheme for concluding that Parliament intended that a "joint investigation" involving ASADA could, or should, take place.

(c) The legislative history identifying the mischief that the Act was designed to address, contradicts any implication that such a "joint investigation" was lawful, as do those provisions limiting the range of persons authorised to conduct or assist in the conduct of an investigation by ASADA.

(d) The substantial protections given to information collected by ASADA in the course of an investigation, and the specific and limited power of disclosure given under cl 4.21 of the NAD Scheme, read with s 13(1)(g) of the Act and the amended Act, reinforce that conclusion.

(e) ASADA or its CEO, as distinct from the AFL, had a statutory function of investigating possible anti-doping rule violations: s 13(1)(f) and s 21(1)(b) of the Act and the amended Act and cl 3.27 of the NAD Scheme (and the amended NAD Scheme).

404 It was also submitted that Parliament did not consider there was any need for a "joint" investigative process:

(a) The NAD Scheme permitted ASADA or the CEO to disclose non-entry information to third parties "for the purpose of, or in connection with" an investigation into possible violations of the anti-doping rules: see ss 13(1)(f) and 13(1)(g) of the Act and cl 4.21 of the NAD Scheme.

(b) To the extent that ASADA or the CEO required the assistance of a third party in its investigation, cl 4.21(2) of the NAD Scheme, read with s 13(1)(g) of the Act, empowered ASADA to disclose non-entry information to that third party for the purpose of, or in connection with, the investigation — provided that the information

related, or appeared to relate, to a person in connection with a possible anti-doping rule violation by an athlete so that the information answered the description in cl 4.21(1) of the NAD Scheme.

(c) A number of specific provisions gave or now give ASADA the ability to obtain information from other bodies:

(i) The combined effect of s 67(1) of the Act and s 16(3A) of the *Customs Administration Act 1985* (Cth) is to authorise the Australian Customs Service to disclose to ASADA information acquired by an officer of that Service while performing duties.

(ii) Section 90J(13) of the *Australian Postal Corporation Act 1989* (Cth) authorises the disclosure of the information to the CEO of ASADA for the purposes of the administration of the NAD Scheme.

405 There is an answer to all these submissions.

406 The foremost response to the contention of Mr Hird and Essendon that Parliament did not authorise a "joint investigation" is that as a general proposition, this is too wide. Whether any investigation is lawful or not will depend upon the characterisation of its purpose, and the conduct and nature of that investigation. The investigation of ASADA, the subject of these proceedings, I have found was for the purpose of investigating anti-doping violations. In addition, as I will indicate, the nature and conduct of the investigation was lawful.

407 Whilst there is no express power to conduct a "joint investigation", as I have said, the CEO has the power to do all things "convenient" to be done "in connection" with the performance of his or her functions. This includes doing anything incidental to, or conducive to, the performance of the elaborated functions in s 21 of the Act.

408 Calling upon the assistance or co-operation of a sporting administration body, such as the AFL, depending on the way it occurred, could be convenient to the performance of an investigatory function into possible violations of anti-doping rules. Likewise, assistance and co-operation of the AFL could also be convenient in monitoring the compliance by the AFL with its own anti-doping policies and practices, and for the purpose of publishing reports about the extent of that compliance.

409 Further, the inquiry is not whether Parliament considered there to be a "need" for a "joint investigation" — the question is whether the Parliament authorised the investigation that in

fact took place. There may be many avenues for ASADA to obtain information, and it should not be assumed that one avenue is not to seek (appropriately) information from a sporting administration body such as the AFL. In fact, cl 4.21(2)(a) and s 13(1)(g) envisage that ASADA may disclose protected information for the purposes of its investigation, which may involve the AFL in return co-operating with ASADA.

410 As to the range of persons who may be involved in an investigation, the provisions of the Act referred to by Essendon and Mr Hird are enabling, and do not confine the scope of persons who may be called upon to co-operate or assist the CEO or ASADA. In any event, ASADA was not assisted by AFL personnel in a capacity of agency, employment, servant or member of the ASADA staff. The arrangement between ASADA and the AFL was one wherein ASADA sought the co-operation of the AFL for the purposes of ASADA's investigation into possible anti-doping violations.

411 It can be accepted that there is a demarcation of the functions of ASADA and the AFL; for instance, sanctions for anti-doping violations are not imposed by ASADA or the ADRVP, but by the AFL. However, this does not preclude the AFL from being able to co-operate with ASADA, provided the processes set forth in the Act and the NAD Scheme are properly adhered to by ASADA and the AFL.

412 Therefore, it cannot be concluded, without first knowing the purpose, nature and conduct of an investigation, whether as a matter of law or principle, the Act or the NAD Scheme authorises a particular investigation, labelled "joint" or otherwise.

Unlawful disclosure of information

413 In respect of the nature and conduct of the "joint investigation", Essendon and Mr Hird contend that it involved unlawful disclosure of information by ASADA. They specifically submit that:

(a) In the "joint investigation", Mr Hird and the Essendon players and personnel disclosed NAD Scheme personal information to ASADA when they attended their interviews. At the same time as ASADA obtained that information, ASADA disclosed the information to the AFL, who were not "entrusted persons", and therefore acted in breach of s 71(1). Further, they contend that even if the exception in s 71(2)(c) had any application to that disclosure, the nature of the consent required to activate that exception would mean that it could not be said that, by participating in the interview,

Mr Hird or the Essendon players or personnel consented to the disclosure of each item of non-entry information to the AFL.

(b) Thus, attending an interview with ASADA, where the AFL was present, necessarily involved the immediate and contemporaneous disclosure by ASADA to the AFL of the non-entry information as identified in cl 4.21(1) of the NAD Scheme. Since cl 4.21(1) of the NAD Scheme cannot be interpreted to permit the uncritical and unregulated disclosure by ASADA of non-entry information, such contemporaneous disclosure was unlawful.

414 I do not accept these contentions.

415 Once it is appreciated that the AFL received the information *directly* from Mr Hird and the 34 Players in the course of the interviews, and not by being given the information by ASADA, then none of the protective provisions referred to by Essendon or Mr Hird applied in their terms to prevent the AFL receiving the information. In other words, in this particular investigation, Mr Hird and the 34 Players voluntarily and directly gave to the AFL the answers to questions and the information without complaint. Based upon my finding that the information provided at the interviews by Mr Hird and the 34 Players was simultaneously divulged and communicated to personnel of the AFL and ASADA, there was no disclosure of any information by ASADA to the AFL in the interviews.

416 Therefore, characterisation of the events set out by Essendon and Mr Hird is contrary to what in fact occurred. There was disclosure of information directly to the AFL by the process of the interviews and by the AFL directly obtaining other information from Mr Hird and the 34 Players. After all, it was the AFL which had the power to request and obtain this information. Therefore, it cannot be said that ASADA or the CEO communicated or divulged any of this information to the AFL.

417 In any event, by actually being in the interview room, knowing that AFL personnel were present, being aware that the Player Rules were applicable to the interview process, and by responding to each and every question, it can hardly be said that Mr Hird and the Essendon players and personnel did not knowingly consent to any information being disclosed then and there to all in the interview room.

Improper purpose

418 Essendon alleges that the CEO agreed with the AFL to conduct the investigation for improper purposes, namely:

(i) to take advantage of the compulsory powers available to the AFL (but not to ASADA) to compel Essendon players and personnel to participate in the "joint investigation", including by attending recorded interviews, in circumstances where interviewees were not able to claim the privilege against self-incrimination;

(ii) to provide information from the investigation to the AFL; and

(iii) to enable the AFL to use that information for its own purposes and not for the purposes of the Act or the NAD Scheme.

419 In a similar vein, Mr Hird alleges that ASADA agreed with the AFL to conduct a "joint investigation", which was launched in February 2013, and that it was a purpose of the "joint investigation" to:

(a) obtain a benefit not available under the ASADA legislative regime, namely the power to:

(i) compel Essendon players and personnel to attend a recorded interrogative interview;

(ii) direct, under threat of AFL censure and sanction, that Essendon players and personnel answer every question asked of him or her; and

(iii) abrogate or prevent the exercise of the common law right against self-incrimination by Essendon players and personnel; and

(b) provide information to the AFL otherwise than in accordance with cl 4.21 of the NAD Scheme read with s 13(1)(g) of the Act.

420 Mr Hird and Essendon also allege that, by providing the Interim Report to the AFL, ASADA acted for purposes that were extraneous to furthering ASADA's own investigation of possible anti-doping violations. This allegation of improper purpose is dealt with separately below.

421 I have already given reasons for accepting that ASADA did have the power to enter into a form of investigation involving the co-operation of the AFL. Depending on its purpose and the manner of co-operation, seeking the co-operation of the AFL could be "convenient to be done for, or in connection with" the performance of the CEO's functions (see s 22 of the Act). It

will all depend upon particular facts surrounding that co-operation as to whether the co-operation was lawful, including the purpose of the investigation itself.

422 Returning then to the question of improper purpose: it was submitted that the Court should be satisfied that, whatever the range of permissible purposes, they did not extend to ASADA joining forces with an investigative partner in order to benefit from the partner's use of its compulsory powers, particularly in circumstances where:

(a) Parliament invested ASADA with certain functions and powers but did not invest ASADA with the power to compel anyone to attend an interview or provide information to ASADA;

(b) the effect of joining forces with the investigative partner was that those persons brought into ASADA's investigation through the exercise of the AFL's compulsory powers were deprived of the privilege against self-incrimination, a long-standing privilege that can only be abrogated by unambiguous language; and

(c) the basis upon which ASADA accessed those compulsory powers was that ASADA, in return agreed to give, and gave, the AFL access to confidential information from the investigation that the AFL was able to use for its own purposes.

423 It is then submitted that if the Act and the NAD Scheme did confer an implied power to conduct a "joint investigation", the range of conceivable statutory purposes for the exercise of that implied power would not extend to entering into a "joint investigation" for the purpose of providing information to the AFL or otherwise than in accordance with the statutory regime for divulging or communicating information.

424 Mr Hird and Essendon submit that ASADA's decision to proceed to investigate Essendon in the way that it did was driven by ASADA's desire to harness the AFL's compulsory powers in aid of the investigation.

425 In relation to these submissions, I make the following response.

426 The "desire" to use or "harness" the AFL's compulsory powers can immediately be accepted as one consideration that was relevant to ASADA's interest in seeking the co-operation of the AFL. It was not ASADA's *purpose* for conducting of the investigation.

427 ASADA's purpose was as I have already described; that is, to investigate possible anti-doping violations. The "harnessing" of the "compulsory powers" of the AFL needs to be put in

context. ASADA was not using any power of compulsion or any power of sanction under the Act or NAD Scheme. Mr Hird and the 34 Players could refuse to produce documents to, and to answer questions put to them by ASADA or the AFL, but in doing so would breach their contractual obligations with Essendon and the AFL. Whether or not the 34 Players (or even Mr Hird) felt they had no choice to answer questions in front of ASADA and the AFL, is not to the point. The legal consequences of Mr Hird and the 34 Players voluntarily entering into the contractual regime with Essendon and the AFL, and subjecting themselves to the Player Rules and AFL Code, included undertaking certain obligations and relinquishing certain rights. One such right was the right to claim the privilege against self-incrimination before the AFL subject to the carve out in r 1.9 of the Player Rules. Similarly, obligations were imposed on Mr Hird and the 34 Players to co-operate with the AFL and ASADA in investigations. There is no suggestion in these proceedings that Mr Hird or any of the 34 Players did not understand the nature of the contractual obligations undertaken, or the rights they were giving up, in return for the right or privilege to play or coach AFL football for Essendon in the AFL competition.

428 Essendon and Mr Hird then submit that any attempt to characterise the benefits obtained by ASADA as flowing from the AFL sharing with ASADA information which the AFL obtained, rather than vice versa, was both irrelevant and wrong. Essendon and Mr Hird contend that:

(a) it is wrong because the evidence clearly shows that the AFL did not itself conduct an investigation in which it obtained information which it shared with ASADA. Rather, the evidence shows that ASADA was the investigator and the AFL was its assistant, deploying its powers at the behest of ASADA; and

(b) in any event, the contention regarding information flow is not relevant because the fundamental proposition remains that, whatever ASADA was authorised by Parliament to do, it was not authorised to side-step the legislative and common law limits on its powers by harnessing a third party's compulsory powers.

429 In further support of those contentions, Mr Hird and Essendon submit:

(a) in order to avoid the conclusion of improper purpose, it would be necessary for this Court to conclude that Parliament intended that ASADA be able to exercise the power to conduct a joint investigation for the purpose of avoiding the limitations on its own powers, by teaming up with another entity that enjoyed the compulsory powers not conferred on ASADA;

(b) if Parliament intended that ASADA should have the benefit of compulsory powers, Parliament would have conferred those powers on ASADA directly; and

(c) even with the amended Act, Parliament considered, and decided against, depriving those compelled to assist ASADA of the privilege against self-incrimination.

430 Mr Hird and Essendon submit that some of the evidence shows that ASADA was aware that information gained in the investigation would be used by the AFL in its consideration of disciplinary infractions. It is then submitted that ASADA's statutory jurisdiction does not extend to investigating and reporting to the AFL on matters such as governance: governance within a football club falls within the AFL's disciplinary jurisdiction, and does not fall within ASADA's jurisdiction to investigate whether anti-doping violations have occurred.

431 Mr Hird and Essendon then submit that the relevant enquiry is whether the improper purpose was "harmless", "insubstantial" or "insignificant" in the sense that, in its absence, there would have been no possibility of a different outcome. They contend that the CEO has admitted that:

(a) without the benefit of information obtained from interviews conducted in conjunction with the AFL (including of non-Essendon persons), the Notices might not have been issued; and

(b) based only on information obtained by ASADA without the AFL's involvement, the Notices might not have been issued.

432 They submit that this is not a case in which the impugned purpose could be described as merely trivial or insignificant, referring to *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346 at 360 [64] (per Sackville J) and *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14 at 40 [124] (per Moore and Lander JJ). On the contrary, they submit that the Court must be satisfied that the investigative benefits of joining forces with the AFL so as obtain the fruits of its compulsory powers were a "substantial purpose" behind the investigation.

433 I address these contentions by first making some observations on the applicable principles of law where an improper purpose, and possible plurality of purposes, is alleged. However, the determination I make in these proceedings rests upon my factual characterisation of the investigation, particularly by reference to the contractual regime and the fact that the investigation and ASADA's conduct were undertaken by ASADA for its legitimate purpose of investigating possible anti-doping violations.

434 Undoubtedly, as a matter of legal principle, it is an abuse of power to use a power conferred for one purpose, for a different purpose.

435 Problems arise in determining whether a statutory entity has acted outside its powers when a plurality of purposes actuate a particular decision: see H. Woolf, J. Jowell, A. Le Suer, C. Donnelly and I. Hare, De Smith's Judicial Review (7th ed) (2013) at pp 301-305.

436 The Full Court in *Flanagan v Australian Federal Police* (1996) 60 FCR 149 at 203 stated:

> *It is equally well established, and not disputed here, that an administrative act will be invalidated where its "initiating and abiding purpose" is a foreign or ulterior one.*

437 Justice Merkel stated the position in *Kazar v Duus* (1998) 88 FCR 218 ('*Kazar*') at 233:

> *A statutory power must be exercised for the purpose for which it was conferred. If the power is exercised for more than one purpose, where one of those purposes is improper, the exercise of the power will be vitiated if the improper purpose was a substantial purpose in the sense that the decision would not have been made but for the ulterior purpose: see* Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board *(1982) 56 ALJR 678 at 679; and* Thompson v Council of Randwick *(1950) 81 CLR 87 at 106;* cf Knuckey v Commissioner of Taxation *(Cth) (1998) 87 FCR 187 at 196-197.*

438 These statements of principle were cited with approval by Hely J in *Williams v Keelty* (2001) 111 FCR 175 at [234], and they accord with High Court authority as referred to by Merkel J in *Kazar*.

439 However, whatever way the question is asked, in my view ASADA acted within the confines of the Act and the NAD Scheme because ASADA's purpose of the investigation was to investigate anti-doping matters.

440 The use of the compulsory powers by the AFL (and not by ASADA) did not thwart or frustrate the purpose of the Act or the NAD Scheme. ASADA did not use any compulsory power of its own, and Mr Hird and the 34 Players did not answer questions or provide any information arising from any requirement to do so under or pursuant to the Act or NAD Scheme. No power of the State has been utilised by ASADA to compel Mr Hird or the 34 Players to act in the way they did during the investigation.

441 I should indicate that even after the introduction of the 2013 Amendment Act, the position did not change in respect of Mr Hird and the 34 Players, who remained subject to the contractual regime. ASADA may need to rely upon the Act as amended to facilitate obtaining information from persons outside that contractual regime. However, nothing in the amended Act added to or removed the ability of ASADA to request the voluntary provision of information from the

AFL, or from those who voluntarily contracted to provide information to the AFL (and to ASADA).

442 I have already considered the nature of privilege against self-incrimination, and how it was effectively curtailed under the contractual regime entered into by Mr Hird and the 34 Players. At the interviews, no claim to invoke the privilege against self-incrimination was made. Mr Hird and Essendon had the opportunity to refuse to answer questions and provide information, albeit with the consequence of possible contractual sanctions by the AFL. No power of the State would have been involved in the imposition of this sanction — ASADA could take no action to enforce the refusal of any player or of Mr Hird to answer questions or provide information. This would be entirely a matter for the AFL. In essence, there was thus no "compulsion" by ASADA at all, nor any resultant abrogation of privilege against self-incrimination.

443 Further, Mr Hird and the 34 Players provided the information to the AFL and ASADA by, for instance, answering questions in the same room as representatives of both ASADA and the AFL. ASADA was not communicating, nor divulging information to the AFL. The information was directly and simultaneously provided to both the AFL and ASADA by (relevantly) Mr Hird and Essendon.

444 Once these factual conclusions are reached, the contentions of Essendon and Mr Hird in relation to improper purpose have no foundation, and cannot be sustained.

Interim Report

445 I now turn to the contentions relating to the Interim Report.

446 Mr Hird and Essendon contend that ASADA did not provide the Interim Report to the AFL "for the purposes of, or in connection with" the CEO's investigation into "possible violations of the anti-doping rules" or "for the purposes of, or in connection with" the "administration of the NAD Scheme".

447 They contend that the evidence showed that:

(a) ASADA investigators discussed the AFL's capacity to bring disciplinary charges, and the provisions of the Player Rules regarding "bringing the sport into disrepute", with the AFL at the outset of the investigation;

(b) as early as mid-April 2013, the AFL requested that ASADA provide the AFL with an interim report;

(c) ASADA was conscious that the AFL was interested in information on matters of governance that were relevant to charges which the AFL might lay against Essendon and its personnel (other than players) for governance failures;

(d) ASADA and the AFL met (in person or by telephone) on a number of occasions, particularly in June 2013, during which meetings the AFL impressed upon ASADA the AFL's need for a full report that would allow the AFL to bring disciplinary charges against Essendon players and personnel before the finals, and so preserve the integrity of the 2013 AFL season;

(e) against the backdrop of meetings of 19 and 25 June 2013 (at which the AFL's intended use of the report for the laying of disciplinary charges was made clear), ASADA staff provided a detailed table of contents to the AFL for approval on 16 July 2013, which dealt extensively with the "uncontrolled environment" at Essendon; and

(f) ASADA ineffectively sought to address any issues concerning the legality of providing the Interim Report to the AFL by providing the Interim Report under cover of a letter stating that the Report was provided "in connection with my investigation under the NAD Scheme", as though that verbal formula was sufficient.

448 Mr Hird and Essendon contend that AFL clubs, players and officials are bound by the Player Rules and the AFL Code. Charges for doping offences fall to be brought by the AFL under the AFL Code. Charges for offences such as "conduct unbecoming or prejudicial to the interests of the AFL", which relate to matters of governance, fall to be (and were) laid by the AFL under the Player Rules. Accordingly, Mr Hird and Essendon contend that it was not a proper purpose for ASADA to prepare the Interim Report with a view to assisting the AFL to consider whether to bring regulatory charges, or to provide the Interim Report to the AFL knowing the use that the AFL proposed to make of it.

449 Mr Hird and Essendon contend that there was a clear difference between the investigation of, and reporting on, anti-doping offences (which was ASADA's responsibility) and the investigation of, and reporting on, matters of governance (which was the AFL's responsibility). The contention is that in providing the Interim Report to the AFL for the AFL's purpose, ASADA not only breached its duties of confidentiality and the legislative restrictions on

disclosure, but it acted for purposes that were extraneous to the functions of the CEO under the Act.

450 The contention of Mr Hird and Essendon is that ASADA knew that the AFL was using, or planned to use, information from the investigation, including the Interim Report, for the purposes of its own disciplinary proceedings, and not for the purposes of the Act. Moreover, they note that ASADA took no action when the AFL published charge sheets containing protected information that the AFL had drawn from the investigation and the Interim Report.

451 I have found that the Interim Report was provided by the CEO of ASADA on the basis and for the purposes set out in the ASADA letter dated 2 August 2013, and with the knowledge that the Interim Report would be used by the AFL for considering the bringing of disciplinary charges against Mr Hird and Essendon.

452 ASADA provided the Interim Report to the AFL after the commencement of the amended Act. Accordingly, cl 4.21 of the amended NAD Scheme is relevant.

453 The disclosure of non-entry information supplied by Mr Hird, the players and other Essendon personnel had to satisfy the requirements of s 13(1)(g) of the amended Act and cl 4.21 of the NAD Scheme. The limitations found in cl 4.21(1)(b) (as to the nature of the information disclosed) and s 13(1)(g) (as to the circumstances of the disclosure) were applicable.

454 The use of the term "for the purposes of, or in connection with" in s 13(1)(g) of the Act (and, by reference, cl 4.21(2) of the NAD Scheme) enable alternative and different disclosures. That is, cl 4.21 expressly permits disclosures of information "in connection with" matters other than those which are "for the purposes of" ASADA's investigation.

455 Further, an indication of the operation of cl 4.21(2) can be seen from its overall scope and purpose.

456 Looking at some of the other entities referred to in cl 4.21(2), if, for example, an ASADA investigation revealed the possibility of potentially prohibited substances being illegally imported by persons using false identities, ASADA could release that information to the Australian Federal Police or the Australian Customs Service, even if it did not advance or facilitate any particular aspect of an extant ASADA investigation. Clause 4.21(4) then limits the purpose to which that information can be used. In the case of the AFL, the *Privacy Act 1988* (Cth) applied, so no express limitation in this regard upon the use of the information by the AFL needed to be imposed.

457 In my view, the Interim Report was given to the AFL for both "the purposes of" the *continuing* ASADA investigation, and "in connection with" the ASADA investigation.

458 As to being used for "the purposes of" the investigation, as I have already mentioned the ASADA letter of 2 August 2013 made it clear that ASADA was requesting information from the AFL for ASADA's continuing work on its investigation.

459 As to the question of whether the Interim Report was given "in connection with" the ASADA investigation, the following can be concluded.

460 On the evidence before the Court, the investigation disclosed a strong link between deficient governance and management practices at Essendon and the possibility of Essendon players being involved in anti-doping violations. This can be seen from the Statement of Grounds brought by the AFL against Essendon and Mr Hird, and by reference to the Deeds entered into by Essendon and Mr Hird in the settlement of the disciplinary charges brought against them by the AFL.

461 The Interim Report itself identified a connection between deficient governance and management practices on the part of Essendon personnel and the possibility of players being involved in anti-doping violations. The Interim Report did not (as was contended by Mr Hird and Essendon) dwell extensively on matters of governance. Its focus was the suspected anti-doping violations by Essendon players and personnel.

462 Further, in the Switkowski Report it was concluded that:

> *… A number of management processes normally associated with good governance failed during this period, and as a result, suspicions and concerns have arisen about the EFC.*
>
> *In particular, the presence of banned substances on Club premises, rapid diversification into exotic supplements, sharp increase in the frequency of injections, the shift to treatment offsite in alternative medicine clinics, emergency of unfamiliar suppliers, marginalisation of traditional medical staff etc combined to create a disturbing picture of a pharmacologically experimental environment never adequately controlled or challenged or documented within the Club in the period under review.*
>
> *Compliance rules existed but normal controls during an abnormal period were insufficient to check the behaviours of some people who may have contravened accepted procedures, and the CEO and the board were not informed.*

463 Therefore, the poor governance and management practices at Essendon were related to possible anti-doping violations by Essendon players, to the extent that such violations may have been systemic, or may have occurred because proper governance and management practices were

not in place. This seems to have been the very situation that existed at Essendon. The disclosure of investigative information to enable the AFL to consider and, if thought appropriate, take disciplinary action against Essendon and its officials in this way was "in connection with" the ASADA investigation.

464 I should also reiterate that the divulging or communicating of information in the Interim Report did not include all the information and evidence gathered by ASADA in the course of the investigation. ASADA, as is apparent from the covering letter of 2 August 2013 (and other evidence), was careful not to include information that the AFL was not entitled to and which the AFL had itself obtained. The class of information I have in mind which was not divulged or communicated to the AFL included information provided to ASADA by certain Australian Government agencies and sensitive medical information.

465 In light of the above reasons, I will order the dismissal of the applications brought by Essendon and Mr Hird.

DISCRETIONARY CONSIDERATIONS

466 However, if I had found the investigation to be unlawful or the provision of the Interim Report to be unauthorised or done for an improper purpose, issues would have arisen as to the exercise of the Court's discretion in granting relief.

467 As the applications in these proceedings are made under s 79B of the *Judiciary Act 1903* (Cth), in my view all the relief sought in these proceedings is discretionary, including setting aside the Notices. The discretion to refuse relief is an indispensable part of the judicial function. In the High Court's original jurisdiction, judicial review remedies can always be refused on discretionary grounds: see *Ex parte Aala* at 89, 105-8, 136-7, 144. Whether to grant relief in the course of a judicial review, is evaluative and discretionary.

468 Therefore, any applicant for judicial review needs to establish the substantive ground for relief and persuade the Court to grant the appropriate relief. In simple terms, the applicant for judicial review needs to establish what went wrong, and what needs to be done to remedy that wrong (to the extent the wrong is able to be remedied).

469 If beyond power, then the decision of the CEO to issue the Notices would be no decision at all: see *Plaintiff S157/2002* at [76] and *Lee v The Queen* at [36]. At the same time it must be recognised that a purported exercise of a power conferred by law remains a thing actually done.

470 As Gageler J stated in *New South Wales v Kable* (2013) 298 ALR 144 at [52]:

> *Yet a purported but invalid law, like a thing done in the purported but invalid exercise of a power conferred by law, remains at all times a thing in fact. That is so whether or not it has been judicially determined to be invalid. The thing is, as is sometimes said, a "nullity" in the sense that it lacks the legal force it purports to have. But the thing is not a nullity in the sense that it has no existence at all or that it is incapable of having legal consequences. The factual existence of the thing might be the foundation of rights or duties that arise by force of another, valid, law. The factual existence of the thing might have led to the taking of some other action in fact. The action so taken might then have consequences for the creation or extinguishment or alteration of legal rights or legal obligations, which consequences do not depend on the legal force of the thing itself. For example, money might be paid in the purported discharge of an invalid statutory obligation in circumstances which make that money irrecoverable, or the exercise of a statutory power might in some circumstances be authorised by statute, even if the repository of the power acted in the mistaken belief that some other, purported but invalid exercise of power is valid.*
>
> (emphasis added)

471 Following upon a "null decision", other decisions or events may occur. In these proceedings, during the investigation, and based upon it, the Interim Report was provided by ASADA to the AFL, which was acted upon by the AFL in a way adversely affecting Essendon and Mr Hird by the bringing of disciplinary charges.

472 It is to be recalled that the consequences following upon a finding that a decision is unlawful will depend upon the construction of the relevant legislation: see *Project Blue Sky* at [93].

473 The Court needs to determine the appropriate relief to grant, which may involve setting aside the Notices and granting injunctive relief.

474 In these proceedings, apart from the parties, there is also to be considered the interests of third parties, namely the 34 Players: see *Samsung Electronics Company Ltd v Apple Inc* (2011) 217 FCR 238 at [69], and *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at [65] and [66].

475 The question at this stage of the enquiry is whether it would have been just that the remedy be withheld.

476 The courts have a responsibility to vindicate rights and ensure that public bodies act within the law. I do not consider that the discretion to refuse relief should be described as exceptional or rare in circumstances where a public body has acted unlawfully. However, there is a basic presumption that appropriate relief should follow upon a finding of unlawfulness.

477 In these proceedings, I would not have declined to set aside the Notices or grant injunctive orders on the basis of public policy, delay, acquiescence or the conduct of either Essendon or Mr Hird.

478 As to the last aspect, assuming there is an evidentiary basis for impugning the conduct of either Essendon or Mr Hird, I do not regard their conduct as being a basis to preclude the granting of the relief sought by them. I do not consider that the conduct of either Essendon or Mr Hird, relied upon by ASADA, has the "immediate and necessary relation" to the relief sought following upon the unlawful conduct of ASADA as alleged: see, eg, *Meyers v Casey* (1913) 17 CLR 90 at 123.

479 In any event, the interests of the 34 Players need to be considered, and there is no suggestion that any of the 34 Players acted in any way improperly which would be relevant to the relief sought in these proceedings, particularly in relation to the relief sought of setting aside the Notices.

480 As to delay and acquiescence, they do not in themselves result in relief being refused — the question is whether it is just that the remedy sought be withheld.

481 In my view, there was no relevant delay; once the Notices were issued, these proceedings were immediately commenced by Essendon and Mr Hird.

482 During the course of the investigation, Essendon, the 34 Players and Mr Hird hoped (maybe even anticipated) that the CEO would decide not to issue any notices at all. In that event, Essendon and Mr Hird would not have needed to agitate the issue of the legality of the investigation.

483 Whilst there was considerable acquiescence and co-operation with the investigation by Mr Hird and Essendon, ASADA itself continued with the investigation knowing of some legal uncertainty. In any event, ASADA had the ultimate responsibility to act within the law and administer the Act and the NAD Scheme. The public policy consideration of upholding the rule of law would have favoured the granting of the relief sought over any other public policy consideration relevant to these proceedings.

484 I also do not accept the contention of ASADA that no injunctive relief should be granted because subsequent downstream decision-makers will be able to make the appropriate evidentiary rulings, assuming some of the evidence was obtained unlawfully during the investigation.

485 In these proceedings, the Court is only concerned with the lawfulness of the investigation, and the future conduct of ASADA in using information obtained (said to be obtained unlawfully) in the course of the investigation. Any injunctive relief would only be directed to ASADA, and its subsequent use of unlawfully obtained information. This could not affect downstream decision-makers, who will need to consider the position if and when unlawfully obtained evidence is sought to be tendered and relied upon before them.

486 The only grounds in my view which would have precluded relief are the grounds of inevitable outcome and utility.

487 The AFL could itself have separately and lawfully (pursuant to the contractual regime) compelled the 34 Players and Mr Hird to provide the very information in fact provided by them in the course of the investigation.

488 ASADA could then have requested the provision of information from the AFL, or the AFL could have volunteered the information. The privileges against self-incrimination would not have been claimed in relation to the AFL due to the contractual obligations of Mr Hird and the 34 Players. In such a scenario, there would have been no question of unauthorised information being divulged or communicated by ASADA, as the AFL would have divulged or communicated the information to ASADA.

489 As to the future, no useful purpose would be served by setting aside the Notices or the grant of injunctive relief sought by Mr Hird and Essendon, because the process set out above could then be undertaken by the AFL and ASADA. I am not suggesting that this could be done by the simple expedient of obtaining the transcripts of the interviews in the possession and control of the AFL. This may not be permissible if the information contained in such transcripts was obtained unlawfully by ASADA.

490 However, the Court would not frame an order which prevents ASADA from being able to carry out its statutory functions in accordance with the law, even if that involves the derivative use of information sourced from the unlawfully conducted interviews. Nor does the power of the Court extend to removing from the memory of ASADA the material it has gathered in the investigation, some of which was lawfully obtained in any event.

491 If ASADA had made an unlawful decision, itself a nullity as contended for by Mr Hird and Essendon, this would not prevent a decision-maker making another lawful decision: see *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

492 The CEO or ASADA could in the future lawfully obtain effectively the same information by further interviews conducted independently by the AFL, which information would be given to ASADA. Mr Hird and the 34 Players can hardly be heard to contend before this Court in these proceedings that they would break their current contracts with Essendon and the AFL, and fail to provide requested information to the AFL.

493 The CEO would then need to consciously re-consider whether to issue new notices based upon that information and any additional material before him.

494 I make a final observation relating to the declaration sought concerning the Interim Report. If I had come to the view that the provision of the Interim Report to the AFL was unlawful, I would have been disinclined to make the declaration sought.

495 The Interim Report was provided to the AFL on 2 August 2013, with the knowledge of Mr Hird, Essendon and the 34 Players. No proceedings were brought to challenge the provision of the Interim Report to the AFL until the commencement of these proceedings.

496 More significantly, the AFL (not a party to these proceedings) has acted upon that Interim Report, bringing disciplinary charges against Essendon and Mr Hird. Both Essendon and Mr Hird entered into settlements with the AFL in relation to those disciplinary charges.

CONCLUSION

497 In my view, ASADA complied with the rule of law in establishing and conducting, in the manner and for the purposes it did, the investigation.

498 In addition, ASADA lawfully provided the Interim Report to the AFL, which has subsequently been acted upon by the AFL in bringing disciplinary charges against Essendon and Mr Hird.

499 On the basis of the reasons I now publish, the applications of Mr Hird and Essendon are dismissed.

500 In each application the Court orders the following:

(a) The application is dismissed.

(b) Unless a party notifies in writing the Court by 4.00 pm on Wednesday 1 October 2014, indicating opposition to this order as to costs, the Applicant pay the Respondent's costs of and in connection with the proceeding to be taxed in default of agreement.

I certify that the preceding five hundred (500) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Middleton.

Associate:

Dated: 19 September 2014