

SENSITIVE

MINISTERIAL SUBMISSION – STANDARD



Australian Government

Australian Sports  
Anti-Doping Authority

MINISTER LEY

CC:

**Critical Date:** 16 November 2015

**Reason:** This is the date on which the Court of Arbitration for Sport will commence hearing the World Anti-Doping Agency's appeal.

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**World Anti-Doping Agency v 34 Current and former players of the Essendon Football Club**

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**RECOMMENDATION:**

R1. That you NOTE the briefing about the appeal, and the potential implications of it for the Australian anti-doping framework generally.

**Noted**

R2. That you APPROVE ASADA developing, in consultation with your office, a communication strategy addressing possible Government responses to the outcome of the appeal.

**Approved/Not Approved**

\_\_\_\_\_  
<MINISTER'S NAME>

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**MINISTER'S COMMENTS:**

**ISSUE:**

To provide briefing on the implications of potential outcomes of the World Anti-Doping Agency's (WADA) appeal to the Court of Arbitration for Sport (CAS), and to seek your approval to the development of a communication strategy addressing possible Government responses for the outcome of the appeal.

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On 12 May 2015, WADA announced its appeal to the CAS against the decision of the AFL Anti-Doping Tribunal (AFL Tribunal) that found 34 current and former Essendon players had not used the prohibited substance Thymosin Beta 4. WADA appealed on the basis that:

- The AFL Tribunal imposed an inappropriately high burden of proof and overly restrictive standards for establishing use of a prohibited substance;
- If the AFL Tribunal decision was allowed to stand without modification and used as precedent in future anti-doping cases, it would make it nearly impossible for an anti-doping organisation to establish a violation for Use of a Prohibited Substance, and would undermine the World Anti-Doping Code's principle of strict liability for the Use violation.

The matter has been set down for hearing by CAS over five days, commencing on 16 November 2015. The CAS Panel comprises Mr Michael Beloff QC (the Panel Chair) who is also Chair of the IAAF Ethics Panel, Mr Romano Subiotto QC (who practises in London and Brussels), and the Hon James Spigelman AC QC, former Chief Justice of the NSW Supreme Court and Chairman of the Australian Broadcasting Corporation. At this stage, it is likely that CAS will hand down its findings before the end of 2015.

ASADA and the AFL have intervened in the appeal as interested parties. The purpose of ASADA's intervention is to assist WADA in the appeal, and to be available to put submissions in response to matters raised by other parties in the appeal, and the Panel.

### **RELEVANCE TO ELECTION COMMITMENTS: Nil**

### **COMMENT:**

1. The outcome of WADA's appeal, whatever it is, is likely to raise questions about the operation of the anti-doping framework in Australia. The key issue that will be the subject of attention include the length of time it took for the Essendon case to be finally resolved, and in that context:
  - (i) whether ASADA was properly resourced (in a legislative and financial sense) to carry out the Essendon investigation and support the subsequent litigation, particularly given the financial resources of the Essendon Football Club;
  - (ii) whether features of the current anti-doping framework hinder the timely resolution of cases (for example: the requirement to submit matters to the Anti-Doping Rule Violation Panel, and the ability of athletes and support personnel to challenge the ADRVP's decisions in the Administrative Appeals Tribunal).
2. In the event that WADA's appeal is unsuccessful, we anticipate that there will be the additional question of whether the World Anti-Doping Code requires amendment to make clear the basis on which anti-doping rule violations may be established.

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3. Should WADA's appeal be successful, we anticipate that the focus will also be on the question of consistency of sport tribunal decision-making, and the independence of sport-specific tribunals such as the AFL Tribunal.
4. ASADA and WADA will be working together on a media strategy to address the potential outcomes of the appeal. However, given the likelihood for the outcome to raise broader policy questions about the operation of the anti-doping framework in Australia, we propose the development of a communication strategy addressing possible Government responses to the outcome of the appeal. We recommend that this strategy be developed in consultation with your office.

**Sensitivity:** This matter has been, and will continue to be, the subject of extensive media coverage.

**Financial Implications:** There are no financial implications related to this submission.

**Timing/Handling (including legislative changes):** At present, CAS is expected to hand down its ruling before the end of 2015.

**Consultations:**

The Office for Sport has been consulted in the preparation of this Submission.

**COMMUNICATION ACTIVITIES:**

Should you agree to the recommendation, the proposed communications strategy for this issue will be discussed between ASADA and your advisers.

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**ATTACHMENTS:** N/A