



Australian Government
Department of Health

MS17-000325 Version (0)
Date sent to MO: 23/02/17

To: Minister Hunt

Subject: ESSENDON FOOTBALL CLUB - DOPING INVESTIGATION

Critical Date: Urgent brief requested by your Office

Reason: To provide advice as to whether Ministerial Correspondence MC17-001270 and MC17-001460 regarding the Australian Sports Anti-Doping Authority (ASADA) investigation into doping at the Essendon Football Club contains new or substantive information.

Recommendations: That you:			
1. Note the Ministerial Correspondence does not provide new or substantial information regarding the ASADA investigation into doping at the Essendon Football Club.		1. Noted	
Signature:/...../2017	
Comments:			
Contact Officer:	s47F	s47F	Ph: s47F Mobile: s47F
Clearance Officer:	s47F	Deputy Secretary, National Program Delivery	Ph: s47F Mobile: s47F

Issues:

- Your office has requested advice as to whether the correspondence referred to above contains any new or substantive information in relation to the ASADA investigation of doping violations at the Essendon Football Club (Operation COBIA).
- Consistent with Australia's anti-doping legislation, the Department was not a party to the original ASADA investigation. Accordingly, this assessment is based on a developed knowledge of the national and international anti-doping processes, reviews to which COBIA has been subjected, the extensive material related to the Essendon matter now in the public domain, and the content of the correspondence.
- Ministerial Correspondence MC17-001270 relates to a 17-page email from s47F to sports journalist s47F, regarding an article authored by s47F in The Australian newspaper on 16 January 2017 relating to former Essendon Football Club coach Mr James Hird. The email was forwarded to you on 21 January 2017 with a covering note which, amongst other things, alleges the Australian Football League (AFL), ASADA, Essendon

Football Club, World Anti-Doping Agency (WADA), the Court of Arbitration for Sport (CAS), the Commonwealth Ombudsman, the media and the Victorian Worksafe Authority 'have all either acted corruptly or been involved in a massive cover-up'. s47F also suggests the material contained in his response to s47F should motivate you to insist the Prime Minister order a Royal Commission into the Essendon matter.

4. s47F has been a frequent correspondent on anti-doping matters to a wide audience, particularly ASADA's investigations into doping in the AFL. In his correspondence of 21 January, s47F provides an itemised response to comments made by s47F in his article, outlining his views and making allegations regarding many aspects of the Essendon matter.
5. Notwithstanding that the Department has had no direct role in the Essendon investigation and the correspondence is aimed at addressing specific elements of s47F article, s47F remarks are redolent of his longstanding narrative on the Essendon matter and, on our knowledge of the relevant processes and levels of review applied to the investigation, appear to provide no new or substantive material to support the commissioning of any specific inquiry or which would be of any probative value to such an inquiry.
6. It should also be noted that some of the allegations levied by s47F in this and previous correspondence could potentially be defamatory, and care should be exercised such that any response to s47F should not allow for an interpretation that any credence is being given to those allegations.
7. Ministerial correspondence MC17-001460 is from s47F s47F expressed concerns regarding the joint investigation between the AFL and ASADA into doping activities at the Essendon Football Club, specifically that the joint investigation was conducted to deliberately and knowingly circumvent the protections provided to athletes under the *Australian Sports Anti-Doping Authority Act 2006* (ASADA Act), and as a consequence of this, the confidentiality of those under investigation was continually breached. s47F also expressed concern regarding use of an interim report provided by ASADA to the AFL, insofar as by doing so ASADA allowed the AFL to improperly charge Essendon and Essendon support staff. s47F has also been a long standing correspondent on the Essendon Football Club doping matter.
8. In mid-2014, the Essendon Football Club and Mr James Hird filed an application to the Federal Court challenging the legality of the ASADA-AFL joint investigation and the disclosure of information by ASADA to the AFL. It was alleged ASADA had no power to conduct the investigation in the way it was conducted, that the investigation was undertaken for improper purposes, and that ASADA breached its confidentiality obligations.
9. The validity of the joint investigation was confirmed in the Federal Court ruling in September 2014. In his ruling Justice Middleton concluded:
 - ASADA complied with the rule of law in establishing and conducting, in the manner and for the purposes it did, the investigation.
 - 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 (for breaches of governance).
10. Justice Middleton's findings were affirmed by the Full Bench of the Federal Court in a decision handed down in January 2015.
11. On this basis, it is the Department's view the concerns raised by s47F have had due consideration in the courts and that no new or substantive matters are raised in the correspondence.

Background

Australia's anti-doping legislation provides for the Minister for Sport to give directions, by legislative instrument, to the ASADA Chief Executive Officer (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 National Anti-Doping (NAD) Scheme, or the testing of a particular athlete under an anti-doping testing service being provided by the CEO under contract on behalf of the Commonwealth (Section 24, ASADA Act).

These provisions ensure the independence of ASADA's operations and prevent any prospect of undue political influence in the conduct of anti-doping matters relating to athletes and athlete support persons.

In light of these provisions successive Ministers for Sport have remained distanced from the conduct of ASADA investigations and associated legal processes.

Australia is a state party to the UNESCO *International Convention against Doping in Sport* (Convention). A requirement of the Convention is that State Parties must abide by the principles of the World Anti-Doping Code (The Code). The Code is the overarching document which provides for harmonised anti-doping rules and processes to be observed by sports and governments alike to ensure a level playing field in world sport.

The Code recognises the CAS as the appropriate resolution body for disputes in relation to anti-doping matters.

Australia's obligations under the Convention are given effect through the operation of the ASADA Act and NAD Scheme. Amongst other provisions, these require Australian National Sporting Organisations to operate anti-doping programs that are compliant with the Code and approved by ASADA.

The rights of individuals alleged to have committed a possible anti-doping rule violation are central to Australia's anti-doping arrangements, and include:

- the opportunity to address allegations of a possible anti-doping violation through a submission to the independent Anti-Doping Rule Violation Panel (Panel). The Panel reviews the evidence collected by ASADA to determine whether an alleged violation should progress to a sport for adjudication;
- the right to a fair hearing;
- the protection of personal information, with penalties for unauthorised disclosure;
- the right to be notified of the possible consequences if an individual fails to comply with a request from the CEO; and
- the right to appeal a decision by ASADA or Panel to the Administrative Appeals Tribunal and/or the Federal Court, and appeal options in relation to the decisions of a sports tribunal.

The ASADA investigation into doping at the Essendon Football Club has followed due process, and has been subject to extensive review including by the Australian Federal Court and Full Bench of the Federal Court. The finding by CAS that the Essendon players committed doping violations was also appealed by the players to the Swiss Federal Tribunal, and was dismissed in October 2016.

The right of WADA to appeal the decision by the AFL Tribunal to the CAS is enshrined in Article 13 of the Code, and replicated in the AFL's Anti-Doping Code.

CAS decisions over the last several decades have significantly contributed to the formation of a body of distinct sports law. CAS has dealt with numerous cases covering a wide range of legal issues across sports.

It is also relevant to note:

- the injections program was described in an internal review commissioned by the Essendon Football Club and conducted by Dr Ziggy Switkowski AO as a ‘pharmacologically experimental environment never adequately controlled or challenged or documented’.
- Essendon pleaded guilty to two breaches of the Victorian Occupational Health and Safety Act 2004 in the Melbourne Magistrates Court.

A detailed time line of the investigation and subsequent events is at Attachment A.

Relevance to Election Commitments / Budget Measures:

Not applicable

State / Territory / Stakeholder Engagement:

Not applicable

Financial Implications:

Nil

Sensitivity:

The Essendon anti-doping matter has now been in the public eye for over four years. The dismissal of the Essendon player’s appeal of the CAS decision by the Swiss Federal Court in October 2016 effectively ended the formal anti-doping process. Notwithstanding, public interest in this matter continues and we understand legal processes have recently been initiated by an individual in the Victorian Supreme Court against AFL officials in relation to the Essendon matter.

Your response to the concerns expressed in the correspondence is also likely to attract media attention in the context of any possible inquiry into the Essendon matter.

Rural and Regional Considerations:

Not applicable

Regulatory Burden Implications and/or Deregulation Opportunities:

Not applicable

Timing/Handling (including legislative changes):

Your views on this matter will affect the handling of future correspondence relating to the ASADA investigation into doping at the Essendon Football Club.

Consultations:

Not applicable

Communication/Media Activities:

Not applicable

Attachments:

A – ASADA Investigation Timelines

ASADA Investigation Timeline

November 2011

Australian Crime Commission (ACC) releases *Threats to the Integrity of Professional Sport in Australia Report* highlighting threats to the integrity of professional sport and potential for organised crime to infiltrate sport in Australia.

April 2012

Data from an ACC 2010–11 *Illicit Drug Data Report* indicates the market for Performance and Image Enhancing Drugs (PIEDs) is expanding.

Mid 2012

ACC initiates an investigation (Project APERIO) in conjunction with the Australian Sports Anti-Doping Authority (ASADA) and Therapeutic Goods Administration to consider the extent of PIEDs use by professional athletes, market size and extent of organised criminal involvement.

19 December 2012

ASADA starts its investigation (Operation COBIA) into alleged use of performance enhancing substances by players and support persons in Australian Sport. While ASADA has access to information collected by ACC it is not legally able to use this information to establish doping violations due to restrictions imposed on information gathered using ACC coercive powers.

31 January 2013

ACC briefed AFL, NRL and COMPPS on the findings from Project Aperiio.

5 February 2013

Essendon announces it has received information about supplements given to players as part of the club's 'fitness program' in 2012 and has contacted ASADA requesting assistance in conducting an investigation.

7 February 2013

ACC announces findings from Project APERIO.

ASADA commences interviews and evidence gathering.

9 February 2013

Essendon is advised of a joint investigation between AFL and ASADA and that ASADA will obtain information through exercise of the AFL 'compulsory powers'.

Mid February 2013

AFL exercises its powers and seizes over 120,000 documents which are searched, copied and analysed.

19 March 2013

ASADA (with AFL present) commences interviews with AFL players and personnel. ASADA conducts 110 initial interviews with AFL players and support personnel between 19 March and 26 July 2013.

21 March 2013

ASADA works with the NRL to have notices of interview issued to NRL players and support staff.

29 April 2013

ASADA commences first interview with an NRL player. Unlike AFL players NRL players are permitted to claim privilege against self-incrimination and not answer ASADA's questions.

ASADA postpones NRL interviews.

1 August 2013

With enactment of amendments to the *Australian Sports Anti-Doping Authority Act 2006* the ASADA CEO is given authority to compel any person to attend an interview and/or produce documents or things.

2 August 2013

ASADA provides the AFL with an 'interim report' of its investigation.

7 August 2013

ASADA recommences interviews with NRL players and support persons. Interviews are conducted between August and October 2013.

28 August 2013

AFL Commission issues penalties against Essendon under the AFL's Code of Conduct for bringing the game into disrepute. Penalties include exclusion from the 2013 AFL final series, club fines of \$2 million, and withholding of future year draft picks.

Several individuals are issued penalties including head coach James Hird (12 month ban), Danny Corcoran (four month ban), and senior assistant coach Mark Thompson (fined \$30,000).

20 November 2013

ASADA commences interviewing third parties using new legislative powers to compel individuals to attend interviews and/or produce documents or things. Third party interviews and/or attempts to continue interviews with third parties continue until the end January 2014.

17 December 2013

NRL identifies seven breaches of the NRL Code of Conduct by Cronulla, resulting in the issuing of a preliminary fine of \$1 million.

Coach Shane Flanagan accepts a 12 month ban, which is reduced to ten months upon the completion of an education and training course focussing on responsibilities as coach. Former Head Trainer Trent Elkin is suspended for two years.

3 February 2014

Former Minister for Sport the Hon Peter Dutton MP announces provision of support for ASADA (\$250,000) to assist in bringing the current investigation to a conclusion. ASADA engages the Hon Garry Downes AM QC to assist in completing the investigations phase.

26 February 2014

ASADA CEO Ms Aurora Andruska PSM advises the Community Affairs Senate Estimates Committee that the investigations phase is completed.

28 April 2014

Mr Downes submits his report to the ASADA CEO.

10 May 2014

Ms Andruska retires as ASADA CEO. Mr Ben McDevitt AM APM is appointed as CEO.

The new ASADA CEO's background in law enforcement and investigations provide a sound basis for ASADA's ongoing development of an investigations and intelligence capability (consistent with the direction of the revised 2015 World Anti-Doping Code).

12 June 2014

ASADA CEO issues show cause notices to 34 current and former Essendon players advising each they are the subject of possible anti-doping rule violations.

13 June 2014

Essendon responds by filing an application to the Federal Court challenging the legality of the joint investigation and other processes including the disclosure of information by ASADA to the AFL. The application seeks to have a permanent injunction on the use of all information collected in the joint investigation. Mr Hird files a similar application.

11-13 August 2014

Federal Court case is heard by Justice James Middleton.

20 August 2014

ASADA issues show cause notices to 17 NRL players. The notices relate to the alleged use of hormone-releasing peptides CJC-1295 and GHRP-6.

23 August 2014

NRL announces 12 current and former players from Cronulla will receive 12 month suspensions (back-dated to 23 November 2013) for the use of the prohibited peptides during the 2011 season. None of these sanctions are appealed.

Matters relating to the other five players remain ongoing.

19 September 2014

Justice Middleton hands down an unequivocal ruling and determines ASADA has complied with the rule of law in its investigation including the conduct of a joint investigation and the supply of an interim report to the AFL.

29 September 2014

The World Anti-Doping Agency issues a statement confirming it will not appeal the NRL's decision to impose 12 month sanctions but criticises ASADA and the Australian Government for the delay in finalising the NRL matters.

2 October 2014

Mr Hird lodges an appeal to the Full Bench of the Federal Court but Essendon decides not to appeal Justice Middleton's decision.

17 October 2014

ASADA re-issues amended show cause notices to the 34 current and former Essendon players.

10-11 November 2014

The Full Bench of the Federal Court hears Mr Hird's appeal.

14 November 2014

The AFL issues infraction notices to a former Essendon support person and 34 current and former Essendon players.

15 December 2014

The AFL Anti-doping Tribunal commences hearing (in-camera) the evidence collected by ASADA regarding the Essendon players and support person.

30 January 2015

Justice Sue Kenny announces the Full Bench of the Federal Court has unanimously dismissed the appeal and orders Mr Hird to pay ASADA's legal costs.

18 February 2015

The AFL Tribunal hears final submissions from ASADA and the Essendon players. The Tribunal retires to consider the matter.

The Tribunal's decision is expected to be handed down on 31 March 2015.

The application of sanctions may be subject to a separate announcement and process by the Tribunal and include the hearing of additional evidence (ASADA will be involved in this process).

27 February 2015

Mr Hird announces he will not lodge an application seeking special leave to appeal the decision of the Full Bench of the Federal Court to the High Court of Australia.

31 March 2015

The Tribunal states it was not 'comfortably satisfied' 34 current or former Essendon players had committed an anti-doping rule violation during 2012.

17 April 2015

The Tribunal affirms ten violations of anti-doping rules (of 31 allegations) by Essendon support person Stephen Dank.

20 April 2015

ASADA announces it will not appeal the Tribunal's decision.

12 May 2015

World Anti-Doping Agency (WADA) exercises its right to appeal the Tribunal's decision in relation to possible anti-doping rule violations by 34 current or former Essendon players.

1 June 2015

WADA appeals the Tribunal's decision to clear athlete support person, Mr Stephen Dank, of 21 of 31 doping violation allegations.

25 June 2015

The Tribunal advises it has handed down a lifetime sanction to Mr Dank for the ten anti-doping rule violations he was found to have committed.

20 July 2015

Media reports that Mr Dank has notified the AFL he will appeal the lifetime ban. Appeal confirmed.

6 August 2015

Media reports that the re-testing arranged by WADA of urine samples from Essendon players collected in 2012 reveal abnormally high amounts of Thymosin beta-4 for two players.

10 August 2015

Media reported on a leaked 1294 page transcript from the 17 day AFL Tribunal Hearing including detailed statements from players.

25 August 2015

CAS announces the WADA appeal will be heard in Sydney from 16 November 2015. CAS has set aside 5-7 days for the hearing.

9 November 2015

WorkSafe Victoria charged Essendon with two breaches of the *Victorian Occupational Health and Safety Act 2004*:

- One breach of section 21(1) – failing to provide and maintain for employees a working environment that is, so far as is reasonably practicable, safe and without risks to health.
- One breach of section 21(2)(a) - failing to provide and maintain for employees a system of work that is, so far as is reasonably practicable, safe and without risks to health.

WorkSafe Victoria also completed an investigation into alleged breaches of the Act by the AFL. It could not be established to the requisite standard that the AFL breached the Act.

16 November 2015 (week commencing)

The Court of Arbitration for Sport commenced hearings into the WADA appeal. CAS heard the matter ‘in-camera’.

30 November 2015

Essendon indicated it will plead guilty to breaches of the *Victorian Occupational Health and Safety Act 2004* brought by WorkSafe Victoria in relation to the injections programme.

22 December 2015

Essendon pleaded guilty to two breaches of the *Victorian Occupational Health and Safety Act 2004* in the Melbourne Magistrates Court.

12 January 2016

CAS upholds the WADA appeal and determined the players committed anti-doping rule violations. Players were sanctioned with a period of ineligibility of two years, backdated to 31 March 2015 and taking into account prior provisional suspensions. Players were ineligible to compete in the 2016 AFL season. The finding has also attributed costs against the players and the AFL to WADA and CAS.

10 February 2016

Players appeal the CAS decision to the Swiss Federal Court.

11 October 2016

Swiss Federal Court dismissed the appeal by 34 current and former players from the Essendon Football Club against the CAS determination that the players committed anti-doping rule violations when they were involved in an injections program in 2011-12.

All AFL players have now served their ban and are eligible to play in the 2017 season .