IN THE AFL ANTI-DOPING TRIBUNAL

IN THE MATTER OF ALLEGED VIOLATIONS OF THE AFL ANTI-DOPING CODE BY 34 PLAYERS AND A FORMER EMPLOYEE OF THE ESSENDON FOOTBALL CLUB

RULING BY TRIBUNAL CHAIRMAN DAVID JONES

DELIVERED 8 DECEMBER 2014

INTRODUCTION

1. The Australian Football League (AFL), at all material times, conducted and continues to conduct the elite Australian Football Competition (the AFL Competition).

2. At all material times the Essendon Football Club (Essendon) was and continues to be a participating football club in the AFL Competition.

3. Matches in the AFL Competition are played in accordance with the Laws of Australian Football (the Laws).

4. Section 21 of the Laws sets out the Anti-Doping Policy in relation to Australian Football. Consequently, the AFL Anti-Doping Code adopted by the AFL (the AFL Code) applies to the AFL Competition.

5. The AFL Code in force in 2012 was the AFL Anti-Doping Code of 1 January 2010. However, the AFL Code was amended on 7 March 2013 and some amendments apply to these proceedings.

6. Infraction notices under the AFL Code have been issued by the AFL against 34 persons, who were players with Essendon in 2012, alleging violation of the AFL Code in 2012. An infraction notice has also been issued by the AFL against a person who was employed by Essendon in 2012 (the former employee), alleging violations of the Code in 2012. Prior to the issue of the infraction notices show cause notices had been issued to the players and the former employee by the Australian Sports Anti-Doping Authority

(ASADA), a statutory authority, and their details entered on the Register of Findings by the Anti-Doping Rule Violation Panel (ADRVP), pursuant to clauses of the National Anti-Doping Scheme (NAD).

7. By virtue of the operation of the AFL Code and the AFL Rules (October 2013), the Disciplinary Tribunal, the AFL Anti-Doping Tribunal, has jurisdiction to deal with any alleged violation of the AFL Code. Consequently, the AFL Anti-Doping Tribunal (the Tribunal), as constituted by David Jones, Chairman, and John Nixon and Wayne Henwood, Members, has jurisdiction to deal with the violations alleged in the infraction notices.

8. At a Directions Hearing held on 18 November 2014, an issue was raised as to whether hearings of the Tribunal in this matter should be in private or in public. Submissions were made as to the decision that should be made. Under the AFL Rules and Code, the decision is to be made by the Tribunal Chairman.

THE AFL RULES

9. These Rules govern the operation of the Tribunal and therefore some reference needs to be made to them.

10. Rule 42.3 gives the Chairman broad powers as to the procedures to be followed and the conduct of the hearing, including form of evidence and who are entitled to attend.

11. The Tribunal is not bound by the rules of evidence or by practices and procedures applicable to Courts of record but may inform itself as to any matter in such manner as it thinks fit (Rule 42.3(c)). Rule 42.4(a) imposes natural justice and other obligations on the Tribunal.

12. Rule 42.14(d) provides: "Subject to any contrary direction of the Chairman in any case, proceedings before the Disciplinary Tribunal shall be open to members of the media accredited by the AFL". However, Rule 42.3(f) provides that Rule 42, in the case of an anti-doping matter, shall be read in conjunction with the AFL Code "provided that to the extent of any inconsistency, the provisions and guidelines contained in the AFL Code... shall... prevail". This is an important qualification of the operation of the Rule.

THE AFL CODE

13. Clause 16(d) of the AFL Code as amended on 7 March 2013 provides: "All hearings before the Tribunal in relation to this Code will be conducted in private unless otherwise authorised by the Tribunal Chairman". The 2010 version of the Code provided for authorisation by the General Manager Football-Operations of the AFL. However, it is accepted that the decision in this case is to be made by the Chairman.

14. Thus the critical question is whether the Chairman, should authorise otherwise in the circumstances of this matter.

15. Clause 18(a) of the AFL Code (Clause 18.1 in the 2010 version) provides:

> "The identity of any Player or other person who is asserted to have committed an Anti-Doping Rule violation may only be Publicly Disclosed by the AFL or ASADA in accordance with this Code, the WADA Code, the ASADA Act, the NAD scheme, the Tribunal rules or the terms of the Confidentiality Undertaking signed between the AFL and ASADA".

16. Clause 19 of the AFL Code is headed Notification and Public Disclosure. It requires the AFL upon the imposition of a sanction for a Code violation to send details of the violation and sanction to a number of persons or bodies including ASADA. In addition, it requires the AFL no later than twenty (20) days after the time to appeal has expired to publicly disclose at least: the disposition of the anti-doping matter including the sport, the anti-doping rule violated, the name of the player or other person committing the violation, the Prohibited Substance or Method involved and the consequences imposed. The AFL is also required to publicly disclose within 20 days any appeal decision concerning violations. The AFL or ASADA are required within the time for publication to send all hearing and appeal decisions to the World Anti-Doping Authority (WADA).

17. "Publicly Disclose" is defined in clause 2 of the AFL Code to mean "disseminate or distribute information to the general public or Persons beyond those Persons entitled to earlier notification in accordance with Article 14 of the WADA Code".

18. Clause 4 of the AFL Code is headed Powers of AFL and ASADA. It refers to the legislative authority of ASADA under

its Act and the NAD Scheme to investigate possible violations of the anti-doping rules for Players and Officials under the jurisdiction of the AFL. ASADA has authority to make findings in relation to such investigations and notify the Player, Official and the AFL of its findings and recommendations as to the consequences of such findings. Further, ASADA has legislative authority to present its findings and its recommendations as to consequences at hearings of the AFL Tribunal either at the AFL's request or on its own initiative. ASADA is exercising that authority in appearing in these proceedings. ASADA agrees that the AFL retains all powers and functions relating to the AFL Code including, inter alia, the presentation of allegations of violations at a hearing and all matters incidental thereto. The AFL is exercising this function through Disciplinary Tribunal Counsel appointed by the AFL General Counsel under AFL Rule 42.10, which also sets out their obligations.

THE ASADA ACT

19. In view of issues that have been raised, particularly by ASADA and which will be referred to later, some reference needs to be made to provisions in this legislation, which came into effect in 2006.

20. The Second Reading Speech provides guidance on the purpose of the Act. The Minister states:

> "In framing the proposed ASADA legislation, the issue of safeguarding athletes' rights was a prime consideration.... Further, the bill contains appropriate privacy safeguards for athletes and sporting support personnel - the Privacy Act 1988 will apply to ASADA's advocacy, education, drug testing, investigative and reporting functions, and any other operations where ASADA is required to collect and deal with sensitive information. Taken together, these provisions will continue to ensure that athletes' rights are protected under the new anti-doping regime".

21. Section 13(1)(k) of the Act concerns the authorisation of the ASADA CEO to present findings on the register and additional information at any AFL Disciplinary Tribunal hearing. Such legislative authority has already been referred to in relation to clause 4 of the AFL Code.

22. Section 13(1)(m) concerns the authorisation of the ASADA CEO to publish information on and relating to the Register

if any of three criteria are established. The three criteria are: the CEO considers the publication to be in the public interest; or, the publication is required by the WADA Code; or, the athlete consents and the other conditions (if any) specified in the NAD Scheme for the purposes of the paragraph are satisfied.

23. Clauses 14.2.1 and 14.2.2 of the WADA Code are essentially replicated in clauses 18(a) and 19 of the AFL Code which have already been referred to. Clause 14.2.3 of the WADA Code is not replicated in the AFL Code and gives the player power to redact parts of the decision if he chooses to have it publicly disclosed after there is no finding of guilt.

24. The Explanatory Memorandum to the ASADA Act refers to s.13(1)(m). After referring to the conditions relating to publication it states:

> "These conditions are intended to balance athletes' and support persons' rights against the need to ensure a level of transparency for ASADA's operations and the importance of publicly naming athletes and support persons who ASADA finds have committed doping violations. Examples of situations where publication might be considered by ASADA to be in the public interest include: findings of doping violations, negative test results and circumstances in which a finding of "no case to answer" could be publicised to clear an athlete's name if that athlete had been the subject of public allegations that were subsequently found to be baseless".

25. With respect to s.13(1)(m), clause 4.22 of the NAD Scheme contained in Schedule 1 of the *ASADA Regulations 2006* (Cth) provides that the CEO is only authorised to publish information if a decision has been handed down for a hearing process conducted in relation to the finding concerning the information, by a sporting tribunal, or the athlete or support person has waived his or her right to a hearing.

THE PRIVACY ACT (COMMONWEALTH)

26. In view of issues raised by parties, it is necessary to make some reference to this legislation. Mr Ihle submits on behalf of the 32 players that he represents that the AFL is an organisation which is bound to apply the privacy principles under this legislation.

27. Section 6 of the Act defines an "APP Entity" as an agency or "organisation". Section 6C relevantly defines "organisation" as a body corporate that is not a " small business operator". By virtue of s.6D(1), the AFL is not a small business operator and consequently subject to the Act.

28. Section 15 of the Act provides that: "an APP entity must not do an act, or engage in a practice, that breaches an Australian Privacy Principle". These principles are contained in Schedule 1 of the Act. Australian Privacy Principle (APP 6) in Part 3 of Schedule 1 of the Act deals with use or disclosure of personal information.

29. Section 6 defines personal information to mean:

> "information or an opinion about an identified individual or an individual who is reasonably identifiable: (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not".

30. Clause 6.1 of APP 6 provides that if an entity holds personal information about an individual that was collected for a particular purpose (the primary purpose), the entity must not use or disclose the information for another purpose (the secondary purpose) unless: (a) the person has consented to the use or disclosure of the information; or (b) sub-clause 6.2 applies in relation to the use or disclosure of the information. APP 6 of the Act says nothing about the restrictions on using the information for a primary purpose.

31. Section 16A of the Act provides for a "permitted general situation" where the collection, use or disclosure of personal information is permitted. Under item 2 of the table set out in s.16A, an entity is entitled to disclose personal information if:

> "(a) the entity has reason to suspect that unlawful activity, or misconduct of a serious nature, that relates to the entity's functions or activities has been, is being or may be engaged in; and
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> (b) the entity reasonably believes that the collection, use or disclosure is necessary in order for the entity to take appropriate action in relation to the matter".

SUBMISSIONS

32. The Tribunal received a number of submissions relating to whether the hearings should be in private or otherwise. A brief summary of them follows.

MEDIA ORGANISATIONS

33. Leave was given for Mr Quill to appear and make a submission on behalf of a number of media organisations being: the Herald and Weekly Times, Nationwide News, the ABC and the Nine Network.

34. He submits that it is in the interests of the AFL, the game of AFL football, ASADA and the players to have an open hearing. There has been an enormous amount of speculation, rumour and innuendo about this matter, much of which has been ill informed, but giving rise to a perception in the public that the process generally has been flawed.

35. In his submission, a closed door hearing will only perpetuate the speculation, rumour and innuendo and ill informed discussion of the matter. On the other hand, an open hearing will dispel the myths and untruths. The public will be able to better understand the independence of the process generally, and specifically and importantly the process at this hearing. Through the information and understanding, it will restore and build the public's confidence in the process.

36. Consequently, there will be a better acceptance of the findings whereas the opposite will occur if the hearing is closed. There will be less acceptance of the independence of the process and a perception that it is a pre-determined outcome.

37. Mr Quill acknowledges the difficulty of full public access to the hearing. If media are present, public access is not necessary as the media are the eyes and ears of the public. Further, the Tribunal can control media reporting to safeguard sensitive matters, such as identification of participants, by having accredited media permitted to be present sign a protocol setting out the conditions upon which they are permitted to be present at the hearing. He provided a draft protocol for the Tribunal's assistance.

38. In summary, he submits that with proper reporting of the matter, there will be understanding and acceptance of the Tribunal's findings.

THE AFL

39. Counsel for the AFL, Mr Gleeson, made some submissions on their behalf. He submits that there is a profound public interest in this matter and a concern by the AFL that there be transparency. This interest has been over an extended period of time.

40. This proceeding is important for the game of AFL football. The great concern is that there be a full understanding by the football public and the broader community of the manner in which this hearing is being conducted.

41. Mr Gleeson acknowledges that a final determination by the Tribunal will no doubt on a careful reading reveal the fairness of the process and the sound evidentiary basis for any findings and the reasoning underpinning those findings. However, it is desirable for the process itself to be observed, not just its conclusion.

42. In summary, Mr Gleeson submits that the AFL is very keen for the proceedings to be open if there are no insurmountable practical impediments. One way in which they could be addressed could be to impose conditions on the circumstances in which accredited media representatives are permitted to attend, including conditions as to reporting the identity of participants.

ASADA

43. Counsel for the CEO of ASADA, Mr Knowles, made submissions on his behalf. He stated that the CEO of ASADA opposes any order allowing for the hearing to be in public. He points out that all anti-doping hearings in Australia have been conducted in camera and not in public.

44. He refers to clauses 18 and 19 of the AFL Code and submits that they support the hearing being in private. Those provisions are referred to earlier. He also refers to s.13(k) and s.13(m) of the ASADA legislation, which he submits raise a serious issue as to whether the CEO has the power to present at an open Tribunal, findings and recommendations, unless the players consented to that course. Further, he submits that clauses 14.2.1 and 14.2.2 (which are replicated in the AFL Code and have already been referred to) and clause 14.2.3 of the WADA Code protect the interests of the athlete. To allow day by day

media reporting would impermissibly infringe the right of the athlete under the WADA Code in the event that he is found not to have infringed the AFL Code.

45. Mr Knowles submits that there is a real risk of participants in an open hearing being the subject of a claim in defamation. The risk is particularly significant for witnesses in this situation and may result in their being reluctant to attend and give evidence when the hearing is not being held in private. As the Tribunal has no power to compel witnesses to attend and give evidence, he submits this is a very relevant factor.

46. There are also practical considerations to take into account, Mr Knowles submits. Evidence led will involve conduct by third parties who may wish to be heard on whether the evidence relating to them should be heard in the presence of the media. Resolving these issues in running could unduly prolong and complicate the proceedings. Further, if media representatives were to be subject to conditions limiting their ability to report the proceedings there is a real question as to the enforceability of such conditions.

THE PLAYERS

47. Mr Ihle made submissions on behalf of the 32 players he represents. He stated that they were in agreement with ASADA on this issue and are strongly of the view the hearing should be conducted in private. Mr Ihle states that as far as he is aware there has only been one anti-doping case world wide that has been conducted in open hearing and that was because the athlete sought such a hearing.

48. Mr Ihle submits that the exercise of the discretion as to the form of hearing has to be in accordance with all the provisions of the AFL Code. There is a presumption of privacy for the players. He refers to the Privacy Act, which he submits applies to the AFL and the Tribunal, and submits that the discretion has to be exercised consistent with the information privacy principles contained in that legislation, which has been referred to earlier.

49. There is a real risk of defamation proceedings as a result of an open hearing. That risk could deter witnesses from attending the hearing to give evidence and be cross-examined which would compromise the fairness of the hearing as their evidence, which may be in written form, could not be tested. The ability of the Tribunal to obtain the

best evidence would be undermined. The ability of advocates to be fearless in representing their clients could also be affected by the risk of defamation proceedings if the hearing was not in private.

50. Mr Hallowes stated on behalf of the player he represents that his client seeks to have his anonymity protected during the course of the proceedings. However, subject to that he does not oppose an open hearing.

51. Mr Norton, on behalf of the player he represents, stated that his client was in the same position. It is accepted that there is a public interest in the matter and an interest in accurate reporting.

52. Mr Stanton appeared by telephone link on behalf of the former employee, the subject of an infraction notice. He stated it was his tentative view that his client's case should be heard with the others. They took the view presently that for various reasons the case demanded a public hearing, with no restriction on the attendance of media representatives.

FURTHER MEDIA SUBMISSION

53. Mr Quill was given an opportunity to respond to the other submissions that have been made. He submits that the privacy and confidentiality concerns raised could be met by appropriate restrictions. With respect to defamation, the defence of qualified privilege would apply. In answer to the fact that there had not previously been an open hearing, Mr Quill submits that this case is unprecedented and exceptional. If it does not attract the exercise of the discretion to open the hearing no case, in his submission, will.

FURTHER PLAYERS SUBMISSION

54. At the Directions Hearing Mr Ihle indicated that a further submission might be made on behalf of the players he represents, relating to confidential matters.

55. A written submission marked confidential and a confidential affidavit have been submitted to the Tribunal on behalf of the 32 players.

56. It was stated that the confidential material was submitted on the basis of certain conditions and undertakings relating to its provision to other parties. However, I have decided

not to rely upon this material in reaching a decision due to procedural fairness issues that could arise if I did so. However, in light of the conclusions I have reached without relying upon the material, I do not consider the players' interests have been prejudiced by my adopting this course.

CONCLUSIONS

57. I turn to my conclusions in this matter. The determination of the issue as to whether the hearing of this matter should be other than private is difficult. Comprehensive submissions have been made which are helpful. Consideration of the exercise of a discretion is involved. The discretion cannot be exercised arbitrarily. It must be exercised judicially having regard to what is relevant. Thus, all relevant circumstances have to be considered and weighed in the balance. There are competing considerations to be weighed, the advantages and disadvantages of a hearing that is other than private.

58. As this is a matter involving the AFL Code, the hearing is to be conducted in private unless otherwise authorised by the Chairman of the Tribunal. In other words, the starting position is that the hearing will be private. This can be contrasted with the position of other disciplinary matters where the starting position is that the hearing shall be open to accredited members of the media. Thus, a different policy position has been taken with respect to anti-doping matters, which is reflected in other provisions in the AFL Code that protect the privacy of players and others who are contractually bound by the Code. Players otherwise would not be bound, for example, to submit to random drug tests, a personally invasive procedure. But if they wish to compete in the AFL Competition they must agree to be bound by the AFL Code. In that way, the public interest in ensuring that football is drug free, particularly of performance enhancing drugs, is advanced. For the same reason, athletes and officials all over the world, in virtually all sports, agree to be bound by the WADA Code which is embodied in the AFL Code.

59. No criteria, or matters to be considered, are stipulated in the AFL Code to be applied in considering whether the hearing should be other than private. In the case of statutory bodies that have power to conduct public inquiries, such as the NSW Independent Commission Against Corruption, criteria are stipulated. In the case of

ICAC, the Commission may conduct a public inquiry if it is satisfied it is in the public interest to do so. A number of matters are to be considered, including whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned. Competing public interests recognised by the legislature have to be weighed in determining whether an inquiry should be public.

60. Courts and statutory Tribunals are subject to legal requirements relating to the conduct of their hearings. The principle of open justice applies and hearings are open to the public, although a court or statutory tribunal has the power to suppress the publication of information and restrict the persons who may be present at a hearing.

61. However, this Tribunal is not a court or statutory tribunal such as the Victorian Civil and Administrative Tribunal. It is not established by statute or the common law. It is a domestic tribunal based in contract and established by the AFL Rules and the AFL Code. It does not have the powers that a court or statutory tribunal has to summons witnesses to attend and give evidence and require that evidence be sworn or affirmed. The open justice requirements applicable to courts and statutory tribunals do not apply to this Tribunal. It is an important distinction.

62. There are infraction notices against 34 players who were players with Essendon in 2012 when their violation is alleged to have occurred. In each case the particulars of the alleged violation are as follows: the Prohibited Substance used was Thymosin Beta 4; the Prohibited Substance was administered by way of a series of injections; the injections were received between about January 2012 and September 2012.

63. The infraction notice against the former employee alleges a number of violations. They include violations relating to the alleged administration of Thymosin Beta 4 to the Essendon players between January and September 2012 when the person was employed by Essendon.

64. Thus there are 35 infraction proceedings before the Tribunal. Lawyers for ASADA state that there is a considerable overlap of the proposed evidence and the factual and legal issues in any proceedings based on the infraction notices served on the players and those based on the infraction notice served on the former employee. Further, the additional evidence in relation to the infraction

notice against the former employee is largely documentary and unlikely to extend the length of the proceedings against the players.

65. This matter has been the subject of discussions at the Directions Hearings. It is intended that the proceedings relating to each infraction notice be heard together at the hearing commencing on 15 December 2014, that is that the matter will proceed as one hearing rather than there being separate hearings. This is appropriate in the circumstances. It avoids the possibility of inconsistent findings and the additional time and cost that would be involved in repeating evidence and submissions and is the most expeditious way to deal with the proceedings. The Tribunal has discussed with the parties how it intends to deal with evidentiary issues that might arise from the matters being heard together.

66. The following matters are common knowledge and do not require evidence to establish them. They provide some background to the issues that have been raised, a context.

67. Australian football is an indigenous football code that is played at a wide range of levels throughout Australia. The AFL Competition is an elite professional Australian Football Competition that has teams in Melbourne, Sydney, Brisbane, Gold Coast, Adelaide and Perth. The 18 teams in the competition have substantial memberships. The attendances at AFL matches are the highest of any sport in Australia, as are the television audiences. The television, radio, newspaper and other media coverage of the AFL Competition is extensive, particularly during the football season. The coverage is the most extensive in Melbourne where most of the teams, including Essendon, are located.

68. Further, it is common knowledge that since early 2013 there has been regular and extensive media coverage of allegations concerning the use of performance enhancing drugs by players at Essendon in 2012. That has included coverage of the investigation arranged by Essendon, action taken by the AFL Commission against Essendon and officials of the club and proceedings in the Federal Court brought by Essendon and the coach, James Hird, concerning the lawfulness of the ASADA investigation. An appeal by Mr Hird against the judgment of Middleton J has been heard and the Full Federal Court has reserved its decision.

69. The submissions by Mr Quill and Mr Gleeson have been referred to. It is submitted that the hearing should be open,

not in private, with at least accredited media being able to attend and thereby be the eyes and ears of the public. This will mean that they are accurately informed rather than the matter continuing to be the subject of rumour, speculation and innuendo. There will be transparency and the football and broader community will have a full understanding of how the hearing is being conducted and thereby have confidence in the process and ultimately the result. The public's confidence in the process will be restored. On the other hand, a closed hearing would have the opposite effect of perpetuating the speculation, rumour and innuendo, which would not be in the interests of football or the competition or the players. It would not be in the public interest. Rather the public interest is best served by an open hearing.

70. This is a position supported by the former employee, whose counsel stated that his client was in favour of a public hearing. It is also supported by 2 of the players, the subject of infraction notices, as long as their identities remain private.

71. The public interest and the public disclosure of confidential information relating to AFL players was considered by Justice Kellam of the Supreme Court in *Australian Football League v Age Company Ltd*.[1] The case concerned the AFL illicit drugs scheme whereby players agree to be random tested for illicit drugs. This scheme is independent of the AFL Code but complements it. Thus, like the requirements of the AFL Code it is based in contract, it also provides for the protection of the privacy of the players.

72. Orders were sought to prohibit the defendants from publishing the identity of three AFL players who, it was said, had been the subject of positive drug tests. It was conceded by the defendants that the information was confidential and at the time they received it they were aware that the information was private information which it was desired to keep confidential. It was argued that nevertheless the protection of the confidential information must give way to the public interest in the identity of the players being disclosed to the public at large.

73. Kellam J stated that "it is quite clear that the public interest disclosure must amount to more than public 'curiosity' or public 'prurience'"[2] pointing out that there is a wide

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[1] *Australian Football League v Age Company Ltd* [2006] VSC 308

[2] At [84]

difference between what is interesting to the public and what is in the public interest to make known. His Honour summed up the position as follows:

> "In the end result, it appears to me that there is nothing other than the satisfaction of public curiosity in having the confidentiality of the names of those who have tested positive breached by being released. It may well be a wonderful front page story for the newspapers and a scoop for other sections of the media. No doubt photographs of any players concerned will be published and the issue will be productive of many words of journalistic endeavour. However, I can see nothing that is in the public welfare or in the interests of the community at large which can be served by the identification, and perhaps to a degree the vilification and shaming of those who agreed to be tested randomly pursuant to the terms of the IDP, on the basis that such testing would remain confidential until such time as there were to be three positive tests".[3]

74. Thus, Kellam J was not satisfied that any public interest in disclosure outweighed the public interest in having the information remain confidential. The defendants were restrained from publishing the confidential information.

75. Before turning to the considerations it is said favour the hearing being in private and militate against any form of public hearing it is helpful to make some reference to the Federal Court proceedings referred to earlier and particularly to the judgment of Justice Middleton in *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* [2014] FCA 1019.

76. The proceedings concern the lawfulness of the ASADA investigation that relates to the matters before this Tribunal. The 34 players, the subject of the infraction notices, were not parties to the proceedings and were not identified. However, their involvement in the investigation is referred to in the judgment. His Honour points out that pursuant to the combined effect of the AFL Rules and the AFL Code the 34 Players were obliged to attend interviews and answer questions fully and truthfully, or face possible sanction by the AFL and had agreed to subject themselves

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[3] At [94]

to compulsory interviews[4]. The interviews were conducted on the basis that the AFL used its compulsive powers and after an introduction ASADA investigators effectively took over the interview. ASADA recorded each interview and prepared transcripts of them. ASADA also asked the AFL to obtain medical information from Essendon.[5] Persons being interviewed were informed, inter alia, that the investigation involved an allegation that AFL athletes and support persons may have used prohibited substances and may have engaged in prohibited methods.[6]

77. His Honour notes that the 34 Players were legally represented during the course of the interviews and no player refused to answer questions. Indeed they were actively encouraged by ASADA, the AFL and the Club to fully cooperate with the investigation and to answer all questions put to them.[7] Reference is made by his Honour to the circumstances relating to the provision of ASADA's Interim report of its investigation to the AFL, including the basis upon which it was being provided. An ASADA covering letter pointed out that the report was being provided in connection with its investigation under the NAD Scheme and that the use and disclosure by the AFL of the information in the report is subject to the operation of the National Privacy Principles in the *Privacy Act 1988* (Cth), which preclude making the report public. It is also pointed out that the report has been redacted with one of the categories redacted being "sensitive medical information".

78. It is reasonable to expect that the interviews with the players, which Middleton J found occurred in relation to the ASADA investigation, will form part of the evidence at the hearing and to reasonably expect they will contain private and personal information about the players being interviewed, including sensitive medical information. They were being interviewed about being injected with substances during 2012 whilst playing with Essendon. The alleged violation is being injected with a prohibitive substance. It is reasonable to expect that other evidence to the hearing will contain private and personal information relating to the players interviewed, including sensitive medical information.

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[4] *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* [2014] FCA 1019 per Middleton J at [67] – [68]

[5] At [126] – [128]

[6] At [133]

[7] At [232]

79. Relevant provisions of the AFL Code, the ASADA Act, the NAD Scheme and the Privacy Act have already been referred to. There is no need to repeat them. Those provisions protect the privacy of athletes and others who are subject to the AFL Code. Clauses 18 and 19 of the AFL Code support the hearing being in private and are important to weigh in the balance when considering whether the hearing should be other than private. In view of my ultimate conclusions, it is not necessary to determine whether they go so far as to require a private hearing. It is a matter open to argument.

80. With respect to the position under the ASADA Act, reference has been made to the Second Reading Speech of the Minister when the legislation was enacted. Safeguarding athletes' rights was a primary consideration with the inclusion of appropriate privacy safeguards for athletes and support personnel. These policies are reflected in the legislation and also support the hearing being private and are important to weigh in the balance when considering whether the hearing should be other than private.

81. Mr Knowles submissions focused on the limitations on the ASADA CEO's power arising from ss. 13(1)(k) and 13(1)(m) of the ASADA Act. Those provisions have already been referred to. Section 13(1)(k) concerns the authorisation of the CEO to present findings on the register and additional information at any AFL disciplinary hearing. Section 13(1)(m) concerns the authorisation of the CEO to publish information on and relating to the register if one of three criteria are established. The three criteria are: the CEO considers the publication to be in the public interest; or the publication is required by the WADA Code; or the athlete consents and the other conditions (if any) specified in the NAD scheme for the purposes of this paragraph are satisfied.

82. The words "relating to" in s.13(1)(m) are broad and would appear to encompass any allegations made in the course of evidence or submissions arising from information on the register. Significantly, the word "information" is used and not "personal information" which suggests that "information" that is broader than "personal information" is captured. Section 13(1)(m) appears to be the only source of the CEO's power to publish information.

83. Returning to the criteria it does not appear that publication is yet required by the WADA Code and therefore s.13(1)(m)(ia) does not apply. With respect to 32 of the players s.13(1)(m)(ii) would not apply as they have not consented to publication. That leaves s.13(1)(m)(i) which authorises publication where the CEO considers the publication to be in the public interest. The Explanatory Memorandum to the ASADA Act provides some guidance to the operation of this provision. The Memorandum has previously been referred to.

84. The conditions specified in the NAD Scheme also need to be satisfied for publication to be authorised. The Scheme is a schedule to the ASADA Act. As Mr Knowles points out, in determining the CEO's powers to disclose information at a hearing difficult questions of statutory construction are involved, particularly if the hearing is not conducted in private. In such a situation I do not find it would be beyond the power of the CEO, but it is a matter that is not free from doubt and one that the CEO would understandably be concerned about. A private hearing would alleviate any concerns and remove any doubts about the CEO's power to disclose information at the hearing.

85. It is submitted on behalf of the 32 players that the Privacy Act has application to this matter. The relevant provisions have already been referred to. I am of the view that the AFL (and by extension the Tribunal) are APP Entities that are subject to the Act. This means they are bound to act in accordance with the Australian Privacy Principles (APPs) stated in the Act. An act of an APP entity constitutes an interference with the identity of an individual if the act or practice breaches an APP in relation to personal information about the individual.[8] Personal information is defined in s.6 of the Act.

86. The relevant APP is APP 6. Details have already been referred to. As I have already stated, it can reasonably be expected that personal information of the players will be part of the evidence at the hearing. Subject to a qualification, 2 players consent to any personal information about them being made public. The other 32 do not. Whether the Privacy Act prevents disclosure of their personal information, even to a restricted number of media representatives permitted to be present at a hearing, involves the determination of a number of substantial issues that arise and which would be subject to argument.

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[8] *Privacy Act 1988* (Cth), s.13

The matter is arguable either way and in view of the ultimate conclusions I have reached it is not necessary for me to determine. However, a private hearing would remove any doubts about whether the Act applied. It is appropriate to take into account the privacy protection the Act provides and that it might apply if personal information of the players was disclosed to persons not directly involved in the hearing.

87. Reference has been made in submissions to the fact that participants in the hearing may be at risk of defamation proceedings if the hearing was not held in private. In the publication *Justice in Tribunals*, John Forbes notes:

> "...domestic tribunals... often have good reasons for sitting in private. When witnesses cannot be compelled to give evidence they may agree to do so only if observers are excluded. Further, a private hearing is highly desirable when a tribunal cannot offer participants the protection against actions for defamation that is enjoyed by judges, witnesses and advocates in the courts, and the threats of defamation actions are not uncommon in 'domestic' cases"[9].

88. This Tribunal cannot offer the protection offered by a court or statutory tribunal. The defence of qualified privilege could be available, but that could be problematic depending on the circumstances. Thus, the defamation risk resulting from a hearing that is not conducted in private is a relevant factor to take into account when considering how the discretion should be exercised. Apart from the defamation risk, it also needs to be taken into account that some witnesses may be less inclined to give evidence if the hearing is not being conducted in private.

89. It is significant that the parties could only refer to one anti-doping case that had not been heard in private and that was where the athlete had specifically requested that the matter be heard in public.

90. To meet privacy concerns, Mr Quill submitted that rather than the hearing being open to the public at large, it could be restricted to accredited media who agreed to certain conditions, such as not identifying persons the subject of infraction notices. Some concern was expressed about the enforceability of such conditions. I do not share that

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[9] Forbes, J, *Justice In Tribunals*, 3rd Ed, p.180

concern. I am confident that any media representative would take seriously any such obligation and act accordingly. There is a Code of Ethics that applies to journalists. Breaches are referred to a Judiciary Committee.

91. The question is what protection of their privacy would such an arrangement provide to the 32 players who seek a private hearing. If it was confined to not disclosing their identity, all other information received at the hearing could be disclosed by the media representatives. This could include private and personal information relating to the 32 players, including sensitive medical information. If it was felt that media representatives should not receive that information in the interests of preserving and protecting the players' privacy and private and personal information, they could be required to leave the hearing while such information was presented to the hearing and thus not receive it. The hearing would go into private session. However, this would be impractical and unworkable, to use Mr Gleeson's expression it would involve "insurmountable practical impediments". It would disrupt the flow of evidence and considerably extend the length of the hearing. It would be frustrating to the media representatives concerned.

92. It would not achieve the public interest objective sought to be achieved by the attendance of the media representatives at the hearing. It would be counter-productive and frustrating to the public, as well as the media, as they would get an incomplete and disjointed account of what was taking place at the hearing. Such a situation would not be in the public interest. Similar considerations would apply if the media remained, but were subject to a suppression condition preventing them from disclosing the information, not just the identity of the person. That would put them in a difficult position and involve practical difficulties in identifying the information that was the subject of suppression. However, this arrangement would mean that the media representatives present would still receive the private and personal information even though they could not publish it. I am satisfied that this arrangement would not preserve and protect the privacy and private and personal information of the 32 players as it involves the disclosure of such information to persons not directly involved in the proceedings.

93. Reference has been made to a lack of transparency and confidence in the process if the hearing is held in private. However, it needs to be borne in mind that the constitution

of the Tribunal is known, comprising two retired judges and a barrister. The procedures under which it operates are public as are the provisions of the AFL Code which is being administered. The Tribunal will provide detailed reasons for its decision, which will involve a review of the evidence and the issues and its conclusions. The Tribunal also intends to publish, during the course of the hearing, regular statements informing the public of progress.

94. I accept there is a public interest in the public receiving information that is presented to the hearing. For this to occur the hearing would need to be open, at least to media representatives who could provide that information to the public. There is a public interest in preserving and protecting the privacy and private and personal information, including sensitive medical information, of the 32 players. After weighing in the balance all the relevant circumstances, considerations and factors, I am satisfied the public interest in preserving and protecting the privacy and private and personal information of the 32 players outweighs the public interest in the public receiving information presented to the hearing. I am satisfied that the only way their privacy and private and personal information can be preserved and protected is by the hearing being conducted in private. A private hearing is required. Further, a private hearing minimises the defamation risk for the participants in the hearing. It facilitates the availability of witnesses to give evidence and eliminates any complications that might otherwise arise under the ASADA Act or the Privacy Act.

95. It follows that I do not authorise the hearing being conducted other than in private. Rather, I direct that the hearing be conducted in private.

DAVID JONES

CHAIRMAN