COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

COMMUNITY AFFAIRS LEGISLATION COMMITTEE

Estimates

THURSDAY, 3 MARCH 2016

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SENATE

COMMUNITY AFFAIRS LEGISLATION COMMITTEE

Thursday, 3 March 2016

Members in attendance: Senators Back, Di Natale, Gallagher, Madigan, Moore, Peris, Seselja, Siewert, Urquhart.

HEALTH PORTFOLIO

In Attendance

Senator Nash, Minister for Regional Development, Minister for Regional Communications, Minister for Rural Health

Department of Health

Whole of Portfolio

Mr Martin Bowles PSM, Secretary

Mr Mark Cormack, Deputy Secretary, Strategic Policy and Innovation Group

Dr Wendy Southern PSM, Deputy Secretary, National Program Delivery Group

Ms Liz Cosson, Deputy Secretary, Chief Operating Officer Group

Mr Matt Yannopoulos, First Assistant Secretary, Portfolio Investment Division

Ms Kate Pope PSM, First Assistant Secretary, Grant Services Division

Mr Craig Rayner, Assistant Secretary, Capital Grants Management Branch, Grant Services Division

Mr Robert Wright, Assistant Secretary, Ministerial, Parliamentary, Executive Support and Governance Branch

Outcome 4

Ms Alanna Foster, First Assistant Secretary, Research, Data and Evaluation Division

Mr Shannon White, Assistant Secretary, Health System Financing, Research, Data and Evaluation Division

Ms Natasha Cole, First Assistant Secretary, Health Services Division

Adjunct Professor Debra Thoms, Chief Nurse and Midwifery Officer

Mr Charles Maskell-Knight, Principal Adviser

Dr Andrew Singer, Principal Medical Adviser

Outcome 10

Dr Lisa Studdert, First Assistant Secretary, Population Health and Sport Division

Mr Andrew Godkin, Sport Integrity Adviser, Population Health and Sport Division

Mr Simon Hollingsworth, Chief Executive Officer, Australian Sports Commission

Mr Matt Favier, Director, Australian Institute of Sport

Ms Fiona Johnstone, Chief Financial Officer, Australian Sports Commission

Mr Michael Thomson, General Manager, Participation and Sustainable Sport, Australian Sports Commission

Mr Steve Jones, General Manager, Corporate Operations Australian Sports Commission

Mr Ben McDevitt AM APM, Chief Executive Officer, Australian Sports Anti-Doping Authority

Mr Trevor Burgess, National Manager, Operations, Australian Sports Anti-Doping Authority

Ms Elen Perdikogiannis, National Manager, Legal and Support Services, Australian Sports Anti-Doping Authority

Mr Darren Mullaly, Director, Legal Services, Australian Sports Anti-Doping Authority

Mr Aaron Walker, Principal Investigator, Australian Sports Anti-Doping Authority

Committee met at 15:30

CHAIR (Senator Seselja): I now declare open this meeting of the Senate Community Affairs Legislation Committee. The Senate has referred to the committee the particulars of proposed additional expenditure for 2015-16 for the portfolios of health and social services, including Human Services. The committee may also examine the annual reports of the departments and agencies appearing before it. The committee is due to report to the Senate on 6 April 2016 and has fixed 14 April 2016 as the date for the return of answers to questions taken on notice for this hearing. Senators are reminded that any written questions on notice should be provided to the committee secretariat by close of business 4 March 2016.

The committee's proceedings today will begin with its examination of the Department of Health in relation to outcome 4, acute care, followed by outcome 10, sport and recreation. On 16 March the committee will then continue with Food Standards Australia New Zealand.

Under standing order 26, the committee must take all evidence in public session. This includes answers to questions on notice. I remind all witnesses that in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

The Senate, by resolution in 1999, endorsed the following test of relevance of questions at estimates hearings: any questions going to the operations or financial positions of the departments and agencies that are seeking funds in the estimates are relevant questions for the purpose of estimates hearings. I remind officers that the Senate has resolved that there are no areas in connection with public spending expenditure of public funds where any person has a discretion to withhold details or explanations from the parliament or its committees, unless the parliament has expressly provided otherwise.

The Senate has resolved also that an officer of a department of the Commonwealth should not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. I particularly draw the attention of witnesses to an order of the Senate of 13 May 2009 specifying the process by which a claim of public interest immunity should be raised.

The extract read as follows—

- **Public interest immunity claims**
- That the Senate—
- (a) notes that ministers and officers have continued to refuse to provide information to Senate committees without properly raising claims of public interest immunity as required by past resolutions of the Senate;

- (b) reaffirms the principles of past resolutions of the Senate by this order, to provide ministers and officers with guidance as to the proper process for raising public interest immunity claims and to consolidate those past resolutions of the Senate;
- (c) orders that the following operate as an order of continuing effect:
  - (1) If:
  - (a) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and
  - (b) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee, the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.
  - (2) If, after receiving the officer's statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.
  - (3) If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.
  - (4) A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.
  - (5) If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.
  - (6) A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.
  - (7) A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).
  - (8) If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3).
- (d) requires the Procedure Committee to review the operation of this order and report to the Senate by 20 August 2009.
- (*13 May 2009 J.1941*)
- (Extract, Senate Standing Orders)

Witnesses are specifically reminded that a statement that information or a document is confidential or consists of advice to government is not a statement that meets the requirements

of the 2009 order. Instead, witnesses are required to provide some specific indication of the harm to the public interest that could result from the disclosure of the information or the document.

[15:32]

CHAIR: We are on outcome 4 and I welcome Senator Fiona Nash, Minister for Rural Health, representing the Minister for Health, and officers of the Department of Health. Minister, would you like to make an opening statement?

Senator Nash: No, thank you.

Senator URQUHART: I have a few questions on the Mersey Community Hospital in Latrobe in Tassie. Can you provide me with an update on the status of work on the funding arrangements for the Mersey hospital that go beyond the current agreement?

Mr Cormack: Yes. The Commonwealth provided $148.5 million to the Tasmanian government over two years, to 30 June 2017, for the continued management and operation of the hospital. The current agreement commenced in September 2015; it will expire on 30 June 2017. Running alongside this, the Tasmanian government has undertaken a statewide planning process. It has produced a white paper; *One state, one health system, better outcomes* is its title.

Senator URQUHART: Yes, I am aware of that.

Mr Cormack: I think that provides an opportunity for the Commonwealth and the Tasmanian governments to agree to changes to the current role of the Mersey Community Hospital, to align it with and progress the Tasmanian health reform agenda. The white paper, for example, proposes that the—

Senator URQUHART: Mr Cormack, I am aware of the white paper. I am aware of what has happened in relation to the Tasmanian government. My question was: can you provide an update on the status of funding arrangements beyond the current agreement?

Mr Cormack: I have given you the funding arrangements for the current agreement.

Senator URQUHART: Beyond the current agreement.

Mr Cormack: We have not commenced any formal discussions on the funding arrangements past the current agreement. So we have an agreement; it runs for two years. We now have the opportunity—the state government has now clarified its strategic direction, which does focus on a potential role change for the Mersey hospital, and we look forward to having conversations with the Tasmanian government as it implements its policy.

Senator URQUHART: So the current agreement is to June 2017.

Mr Cormack: That is right. It has roughly 18 months left—

Senator URQUHART: You have not commenced any discussions beyond that for the next agreement that is going to run after that?

Mr Cormack: No.

Senator URQUHART: Given that it took the Commonwealth and state governments three months to ratify the current agreement, after reaching an in-principle agreement in May last year, that means that the previous heads of agreement expired before the current agreement was in place—that is correct, isn't it?

Mr Cormack: I will need to check the chronology, but continue the line of your questioning.

Senator URQUHART: I guess it is reasonable, given past experiences, that people on the north-west coast, not to mention the staff at the hospital, who are certainly concerned about what it means for their future, want some certainty about the process of the negotiations and the future of the services at the hospital. However, it seems that little has progressed since we asked questions at the estimates of last October.

Mr Cormack: We have an agreement in place, as I described.

Senator URQUHART: So what has happened since estimates in October last year?

Mr Cormack: We are implementing the agreement. The hospital is being run by the Tasmanian government according to the agreement. They are operating it under a contract arrangement with us. That will remain in place until June 2017. The Tasmanian government has outlined its strategic directions for the state, including Mersey, and we will begin conversations with the Tasmanian government about how to align their strategic directions for their hospital system with a funding agreement that expires in June 2017. We will be commencing those conversations in due course.

Senator URQUHART: Okay. In terms of the planned amalgamation of the maternity services from the Mersey Community Hospital to a site at the North West Regional Hospital, or in fact the North West Private Hospital, will that have effect on the existing heads of agreement?

Mr Cormack: We have an agreement in place, as I mentioned, for a range of services and a range of conditions. If there is any material change requested to that agreement as a result of the planning work that you refer to, then we are very happy to have conversations with the Tasmanian government to—

Senator URQUHART: So it is possible that that could have to be renegotiated?

Mr Cormack: With any funding agreement, there is always the capacity for the parties to seek to open up discussions or look at different variations that make sense to both parties. We would be very happy to work with the Tasmanian government to assist with the implementation of their plan—obviously consistent with the funding envelope that we are operating under.

Senator URQUHART: Given the time frame the state government has put on this transition, to the amalgamated model by 1 July 2016, have you not progressed at all in terms of any renegotiation of the clause of that agreement?

Mr Cormack: The agreement permits us to have those conversations, but the Tasmanian government, if it wishes to make that kind of adjustment it will need to formally commence discussions with us.

Senator URQUHART: So they have not done that at this stage?

Mr Cormack: We have had some informal discussions with officials on a whole range of matters to do with the—

Senator URQUHART: But nothing formal.

Mr Cormack: We have not agreed on any position. Obviously the future beyond the current agreement will be a matter for active government consideration at the appropriate time.

Senator URQUHART: Does the Commonwealth have an expectation that the removal of maternity and the birthing services at Mersey hospital to another site at Burnie would meet the state government's deadline of 1 July 2016?

Mr Cormack: We have not been formally given a deadline about what services the Tasmanian government would like to see changed, upgraded, modified or moved. When they come to us with a formal proposal to progress that, then we will give it due consideration within the parameters of the agreement.

Senator URQUHART: I understand that the Mersey Hospital has requested $8 million from the Commonwealth for an additional endoscopy suite. Is that correct?

Mr Cormack: I am not aware of that. We are happy to take that on notice.

Senator URQUHART: Okay. If that is correct, can you provide details on the status of that?

Mr Cormack: We will certainly take that on notice.

Senator URQUHART: There are 10 rehab beds at the North West Regional Hospitals, which are funded under the Commonwealth National Partnerships Program, which I think has now ceased. I understand that the bids are due to close at the end of this financial year. Can you give me an update on the future funding arrangements for these beds?

Mr Cormack: I will double-check the detail on that, but the extent to which funding agreements expire with the states—and they do from time to time—

Senator GALLAGHER: Especially when they are terminated by the Commonwealth.

Mr Cormack: However agreements come to an end, then it will be a matter for the Tasmanian government to determine how it wishes to continue to provide whatever services it has already been providing there, if it wishes to do so.

Senator URQUHART: Does that mean that they may come back to you for further funding, or that they will be required to fund it through their own budgetary—

Mr Cormack: We are not requiring them to deliver any activities that are included in the agreement that has expired.

Senator GALLAGHER: It is the end of the beds, unless the state funds it.

Senator URQUHART: Yes, even if they are required. Given the Tasmanian government's service redesign of the Mersey Hospital includes an upgrade of rehab services—I am sure you are aware of that through the white paper—will some of these beds at the Mersey be funded by the Commonwealth?

Mr Cormack: We have a funding agreement, as I have outlined before—

Senator URQUHART: Yes, up until June 2017.

Mr Cormack: If there is a material change to the services provided under that agreement, as requested by the Tasmanian government, which is operating that facility, then we will take that on board. We will have a look at that. If there is capacity for the Commonwealth to accommodate the change within the existing policy and funding authority that we have, then

we will certainly progress that. However, if it exceeds the current agreement and the policy authority and funding parameters that we have, then that will require further consideration by government, if it wishes to substantially modified the authority.

Senator URQUHART: Obviously, that National Partnerships Program has ceased and we understand that the beds are to close at the end of the financial year. Are you aware of what might happen to the dedicated rehabilitation staff who are available under that program through that funding?

Mr Cormack: I have not got to that level of detail. Indeed, the Tasmanian government has yet to formally advise us of any consequential service changes that it wishes to put in place. But I will just repeat my earlier comment that we do not hold people, parties and jurisdictions to the conditions of lapsed agreements. So, if that agreement lapses it then becomes a matter really for the Tasmanian government to make the necessary adjustments to its service profile, consistent with its other policy priorities and, of course, the other broader overarching hospital funding agreements that we have with Tasmania.

Senator URQUHART: So these staff really have no security and no understanding of where their future lies?

Mr Cormack: The state government employees, so we do not manage—

Senator URQUHART: You have ceased the program that employs them, so the issue is—

Mr Cormack: The Commonwealth has taken a decision not to continue with the agreement. The state and territory governments are the system operators under the agreements—

Senator URQUHART: So, flick it back to the states—

Mr Cormack: and it is their responsibility to make the necessary arrangements for service continuity, staffing and other matters consequential to any service changes that may be put in place.

Senator URQUHART: If the funding were picked up and those beds were replaced at the Mersey, would those staff have the opportunity of being transferred to the Mersey?

Mr Cormack: As I said, we have a specific agreement in place for the Mersey. If there are any changes requested that agreement then the Tasmanian government will approach us and we will give it due consideration within the policy and funding authority that we have for that agreement. If it can be accommodated within that we will accommodate it. If it cannot and it is worthy of further consideration, we would need to seek additional authority and consideration by the Commonwealth government to make any necessary consideration of the request.

Senator URQUHART: But in reality it all lies back on the Tasmanian government?

Mr Cormack: The Tasmanian government runs the public hospital system—

Senator URQUHART: I understand that—

Mr Cormack: and it is their responsibility to make those necessary adjustments.

Senator URQUHART: Except the Mersey is a Commonwealth funded hospital.

Mr Cormack: But it is contracted to be operated and run by the Tasmanian government.

Senator URQUHART: I understand that. Under the terms of the current agreement, did the Tasmanian government provide the Commonwealth with a draft strategic plan for 2015-16, by 30 November 2015?

Mr Cormack: We have an official here who may be able to assist us with some answer to that question. We will just check it for you.

Senator URQUHART: Has the Commonwealth approved the draft strategic plan? Is there someone in the room who can check that now?

Mr Cormack: We will make the necessary inquiries and we will attempt to deal with that within this session. If not, we will take that on notice.

Senator URQUHART: I have a couple of questions that relate to that, so I will give them to you now. I will not be here, because I am on chamber duty shortly, so if you could pass it on to my colleagues I am sure they will pass it on to me. The issue is that if the Commonwealth has not approved that draft strategic plan—because it was set out in the heads of agreement to be approved by 30 November 2015—why not? If it has, was it approved without amendment? Also, were further details or information required by the Commonwealth? So, if that is the case did you need to go back?

Mr Cormack: We will take that on notice and attempt to deal with that in this session.

Senator GALLAGHER: When you say that there is an agreement over two years for $148 million, is provision made across the forward estimates in the budget papers for that funding to continue?

Mr Cormack: We will check the budget papers, but there is provision for ongoing funding past the conclusion of the current agreement.

Senator GALLAGHER: I think I saw it in one of the budget statements. Because that $148 million is provided over two years, it raises the question about what happens.

Mr Cormack: There is a funding provision in the forward estimates, after that two years, but I will need to check—

Senator GALLAGHER: At the level that it is currently?

Mr Cormack: That is what I will need to check.

Senator GALLAGHER: Following on from Senator Urquhart's questions, obviously the clinical service planning has happened for the region?

Mr Cormack: Yes.

Senator GALLAGHER: It is not easy to just shift on 1 July next year to delivering different services, so it does seem to me that there is quite a short time frame to resolve either what the Mersey is going to be asked to deliver, and the lining up of the clinical skills set and the information for people to change to staff who would have to accompany that. As the purchaser of those services, it does seem that you have an interest in resolving those questions.

Mr Cormack: We certainly do. We are very keen to engage with the Tasmanian government, as we always do, on aligning the arrangement we have with the Mersey with their state-wide strategy. So, while the agreement concludes in June 2017, between now and then there is the capacity to do a number of things. As I mentioned in previous answers, we

can look at sensible adjustments within the existing policy and funding parameters. We can look at other changes that may require additional policy authority. We can look to extend the existing agreement before it expires. So there is a range of options that are available to the Commonwealth and indeed to the Tasmanian government to minimise any potential changes that may be required to align the Mersey with the Tasmanian government's overall state-wide strategy. We remain ready, as we do with all the agreements, to make sensible changes and accommodations.

Senator GALLAGHER: Changing its focus from what it does now to a more sub-acute and rehabilitation focus, though, would change the cost of delivery of services at that hospital, and save the Commonwealth money.

Mr Cormack: That is right. It could work that way. One would logically think that if you are doing less-acute activity, less high-dependency intensive care emergency type activities, then there would be a good case for the funding to change to reflect that. They are all sorts of conversations that we need to have.

Senator GALLAGHER: Presumably then, if that were the change the Tasmanian government would be seeking continuity of funding at the existing level. So there may be agreements being sought outside of what the Mersey does.

Mr Cormack: The Tasmanian government has been pretty consistent about the deal that it has. They will certainly act within the interests of their own jurisdiction, and consistently with the agreement that we have with them. But we also need to acknowledge that, as is the right, they have imposed a new kind of blueprint for the state. The Mersey cannot really continue to operate as if that did not occur. We will need to align that, while ever we have the kind of ownership—

Senator GALLAGHER: It could. It could operate like Calvary Health Care operates in the ACT, outside of the system.

Mr Cormack: You might care to say that—I could not possibly comment.

Senator GALLAGHER: But you can have hospitals acting alongside but in isolation—it is not efficient.

Mr Cormack: You certainly could, but that is not the way that we would wish to do that. We wish to be able to have the Mersey be an integral part of the Tasmanian public hospital and health care system, consistent with its role as determined by the Tasmanian government, which is the responsibility as system operators.

Mr Bowles: I will just add to that. Those sort of operations operate in the state or Territory context. They do not always necessarily operate in the Commonwealth context. Calvary is one, the New South Wales has a range—Queensland and so on and so forth.

Senator GALLAGHER: From the Commonwealth's point of view what you are saying is that you do not have a fixed view on what the Mersey provides as a hospital. You are the purchaser of services at that hospital, but if the Tasmanian government decides to change it to a sub-acute rehab focus then would you be comfortable?

Mr Cormack: We would certainly do that. I will just repeat that we have a policy authority for a two-year agreement and the funding allocation that is associated with it. There is a provision in the forward estimates. They are the financial and policy parameters that we

operate under. But if the Tasmanian government wants a more appropriate, responsive role for that hospital that is different to its current role, then we are very keen to have those conversations with them. If we can accommodate that within the existing policy from the arrangements that we have then we would certainly want to do that. If they potentially exceed the policy authority, that is a matter for government then to consider.

Senator GALLAGHER: Moving on from Tasmania, a matter in the *Australian Financial Review* caught my eye today. Last time we spoke, Mr Bowles, you said that you do not read the newspaper—I think you made a comment about it! It is about the functional and efficiency reviews that were announced in either the 2014-15 budget or the mid-year update. It says that Health's one, along with several others, is now completed. What role did Health have in that, and when will we understand what that means for Health?

Mr Bowles: I did read that article this morning, luckily! We have gone over the functional efficiency review a few times since that time. We were one of two pilot functional efficiency reviews—us and Education. I am trying to refresh my memory.

Senator GALLAGHER: You do not have to go too far back. I can look at what was said in the past. But you had a role in—

Mr Bowles: Yes, absolutely. We engaged a consultant to undertake activities around the functional and efficiency review. It looked at the activities of the department. It helped me in aligning some of the structural issues that we were dealing with in a strategic policy sense. It delivered savings. It also realigned some of the work we are doing around data and analytics and said that we would use some of those savings to develop our data and analytics capacity a little bit. The number, off the top of my head, was a bit over $100 million over the forward estimates from 2014-15. That will be on record somewhere.

Senator GALLAGHER: There have been two reports—one in *The Guardian* and another on the ABC today—about a proposal to try to resolve the issue of ongoing health costs and the money that was removed from the agreements in the Abbott budget. As we understand the stories, they say that there are plans to restore some or all of the $7 billion for the three fiscal years up to 2019-20. Is there any comment or information that you can provide on that?

Mr Bowles: No. It is a newspaper article speculating on what might happen at the next COAG meeting, which is next month, I think.

Senator GALLAGHER: Has Health been involved in discussions around providing advice on the way forward for this disagreement?

Mr Bowles: Yes.

Senator GALLAGHER: From Health to PM&C?

Mr Bowles: This is a PM&C and PM-led issue under COAG. As the health department, clearly I talk to the states and territories regularly about the broader issues, but, as far as negotiating the agreements that seem to be alluded to in the paper, that is not an issue for us. That is something that is led by first ministers through the COAG process.

Senator GALLAGHER: The money that was removed from the previously signed agreements in the 2014-15 budget, over the 2017-18, 2018-19 and 2019-20 years, adds up to $7 billion.

Mr Bowles: I do not know the specific figures. If you are referring to a broader 10-year figure, that might extrapolate past the $7 billion figure.

Senator GALLAGHER: It does. That is the $57 billion. The reason that it seems a bit more than a story in a paper is that those financial years are the immediately difficult years for the states and territories. They are the ones that are looming and appearing in their forward estimates. Under the original agreements, there was a stepped-up arrangement of the Commonwealth coming to invest in public hospitals. Is the advice that you have provided basically around a short-term proposal to address the upcoming fiscal problem that is being faced by the states and territories?

Mr Bowles: Let me touch on a couple of points here. The $57 billion is not a budget projection and never has been. It was an answer by Treasury to a question on notice around some fiscal parameters that were in place at a point in time which do not exist today.

Senator GALLAGHER: I think it was in the budget papers at some—

Mr Bowles: It was in the budget papers after the event, in the context of the 2014-15 budget, but it related back to a question on notice initially. As you would be aware from your previous role, the whole national hospitals reform program, the introduction of activity based funding, the national efficient price, the national efficient cost all came in around that time, which has changed the dynamic quite significantly over time. As for the newspaper article, I have no knowledge of it whatsoever. I have not heard a figure like that anywhere—

Senator GALLAGHER: Seven billion?

Mr Bowles: This is speculation in a media article, which really I cannot comment on. I do not know where they got their answers from. This is an issue that is the responsibility of first ministers and, from a Commonwealth perspective, is being managed by Prime Minister and Cabinet and, obviously, the PM as part of COAG.

Senator GALLAGHER: You are not aware at all of a $7 billion figure?

Mr Bowles: I do not want to put figures on anything. Obviously, we have looked at many options for what can happen as we are the Department Of Health. The current position of the government is that the arrangements finish at the end of 2016-17 and we move to a population CPI base; but there have been conversations that you would be aware of, both by the former Prime Minister and the current Prime Minister, around the federation issues relating to health, and looking for what are the reform activities in the context of the future of health care and payments to hospitals and the like. No figure has been put on that anywhere. The figure that keeps coming up is the mythical figure that was established a while ago based on a premise that does not exist today.

Senator GALLAGHER: The $57 billion. It is not a mythical figure—

Mr Bowles: It is mythical today I am afraid.

Senator GALLAGHER: It is a figure that appears in the Commonwealth's own budget papers. I understand that they are estimates and that estimates change, but I do not think it is fair to call it a mythical figure. In terms of the advice that you are providing in a general sense, and I am not asking for the specifics of the advice, what role does health have in advising first ministers on the way forward.

Mr Bowles: We meet with Prime Minister and Cabinet, Finance and Treasury on a regular basis. I have a range of conversations with the secretaries of those departments. We look at the broader implications of health expenditure. They do their bit; I do my bit.

Senator GALLAGHER: Which is around?

Mr Bowles: Trying to give an understanding of what is actually happening in the healthcare space. What are the implications if we go down certain pathways. Then it is ultimately up to the Prime Minister to decide how he wants to approach COAG and the negotiations with the states and territories.

Senator GALLAGHER: As part of the advice that you would provide, you would be providing information about what is going to happen if additional Commonwealth funding is not provided to hospitals, is that part of your brief as well?

Mr Bowles: Obviously the states and territories are responsible for how their funding operates. They can make decisions to fund things and not fund things and they do that on a regular basis. It gets back to what their service plan is for their state and they will make decisions around that. The issue for us is historically we are funded on one basis; that shifted with the introduction of ABF and NEP. The 2014-15 budget changed that context.

The Prime Minister has been quite open in saying he has been having conversations with the states and territories. I am not privy to that. I do not go to those sorts of meetings. But, as has always been the case, hospital funding is always negotiated in the context of COAG, and what the broader issues are in that space, and that is the same process that we are going through at the moment.

Senator GALLAGHER: But health has a central role to play in those, in my experience.

Mr Bowles: That is correct.

Senator GALLAGHER: In terms of the activity based funding in the National Efficient Price, is that being considered as something to return to?

Mr Bowles: I cannot comment on what is being considered by the Prime Minister in that context.

Senator GALLAGHER: Have you provided advice around activity based funding and having an efficient price?

Mr Bowles: Yes.

Senator GALLAGHER: As the health minister at the time that that decision was taken, it was a surprise that the 2014-15 budget was to get rid of things that had just been put in place, particularly as the whole reform agenda up to that point had been about driving efficiencies in the hospital.

Mr Bowles: Senator, maybe I answer this in a different way and talk about organisations like the Independent Hospital Pricing Authority, I think that is what it is called.

Senator GALLAGHER: Does that still exist?

Mr Bowles: Yes. An earlier decision was that it would be folded into a broader organisation. Subsequent to that it was a decision of MYEFO that the Independent Hospital Pricing Authority would continue to exist in a slightly different way, but it would continue to

exist as an independent voice, if you like, in the pricing of activity between the states, territories and the Commonwealth.

Senator GALLAGHER: Well, central to the decision by states and territories to get on board in the first place was that it was independent.

Mr Bowles: That is right. The fact that we have done that might give you an indication about my view on a whole range of issues in relation to mass and efficient price.

Senator GALLAGHER: So it is back to the future in health reform?

Mr Bowles: I would not say that.

Senator GALLAGHER: I do not mean that in a negative way.

Mr Bowles: In providing my advice I am interested in what is the best thing for the health system.

Senator GALLAGHER: Yes, good.

Mr Bowles: I have publicly said this everywhere, that my focus is on what is best for the health system. I am not particularly interested in everyone trying to get it down to having a fight over public hospitals, because about 33 per cent of the funding that goes into health care goes into public hospitals. Thirty-two per cent of the funding that goes into hospitals across this country is actually in the private sector. I am interested in how all of that comes together. I do think—and I am on the record as saying this in other forums as well this one—the Nationally Efficient Price is a very good mechanism, but it is ultimately a policy decision of government about the funding arrangements post 2016-17 for hospitals, which will be done in the context of COAG.

Senator GALLAGHER: That is good to hear, but it was good in 2014 before it got chopped. All of the states and territories are pretty vocal about how difficult it is going to be for them and their budgets. Health care occupies, at a minimum, 30 per cent of most state and territory budgets, if not more, and this is growing rapidly. They are all facing this funding cliff that is looming large on 30 June 2017. Surely the Commonwealth has an interest in the outcomes of those hospitals, as you were just referring to, and how the system operates and what it is able to deliver. The Commonwealth has an interest in resolving this matter with the states and territories as soon as possible because of the long lead-in time.

Mr Bowles: Again, it is in the context of COAG, which is next month, I believe. That will be about 15 or 16 months out from when the current arrangements that are in place will change. I think we have to wait to see what the further arrangements are around hospital funding post 2016-17, once COAG has met and deliberated and come up with an answer.

Senator GALLAGHER: Despite some of those national partnerships ending and the reward funding being taken away, issues like the elective surgery times and impact on emergency departments are all going to become very real very quickly. Does the Commonwealth maintain an interest in keeping those operating as efficiently as possible and getting the best treatment times and outcomes for patients?

Mr Bowles: I think the Commonwealth will always have a policy interest in the health system. That is our job. We also need to look to the states to deliver their services in the most efficient and effective way, which deals with not only the cost perspectives but also, clearly, how they want to manage their activity. They have been doing a lot of work in this space. We

have been working with them around integrated care and chronic disease management. The Prime Minister has mentioned that, my minister has mentioned that and Minister Ley has mentioned that on a number of occasions around how you actually start to look at the interfaces between primary care and the acute care sectors and, clearly, around things like chronic and complex disease management, which is soaking up a lot of hospital time, if you like.

That has always been the conversation between the Commonwealth and states, at least over the last little while while we have been talking about how we actually look at the system going forward. That continues today. I think Queensland recently announced some funding for some innovative ways of looking at these issues. I think the figure was $85 million. We have been working with all of the states around how we might actually look at some of those issues over time. I think we need to wait, though, until we actually see the outcomes of COAG in the context of the broader conversation before we can really elaborate any further on some of the conversations that might be had between states and territories.

Senator GALLAGHER: If a short-term agreement is reached, for example, presumably Health, if you have not been advising on funding a particular figure—have you provided advice on potential reforms that you would like to see as part of any new agreement?

Mr Bowles: We have been talking about reforms for the last 12 months around the medical benefits system, particularly chronic and complex disease, the primary healthcare system, mental health—

Senator GALLAGHER: But within hospitals. The Commonwealth is not going to shove, say, for argument's sake, $7 billion on the table for the states and territories without asking for something back.

Mr Bowles: No, I would suggest that be true. But that is a policy decision of the government and first it will be for ministers to decide where they go with some of these things. Clearly we have been talking with the states and territories about reform activities. They have been talking to us about reform activities that they want to undertake, particularly around integrated care, chronic and complex disease management and the interface between primary and acute care, because they are the issues that are driving some of the activity problems that they face every day. We are particularly keen to address those issues. A lot of them do not actually relate to money. They relate to how we work together to actually understand the interfaces and change the dynamics around admission to hospital for things that could be better treated in a different way. Part of the work of the Primary Health Care Advisory Group, which is before the minister and government, is also talking about how do we look at chronic and complex disease differently, even in a primary care setting, as opposed to anything else.

Senator GALLAGHER: Does aged care fit in there somewhere?

Mr Bowles: Aged care is now back in the portfolio. Aged care is much, much bigger and a different type of issue. Of course, there are interfaces between the aged-care sector and hospitals. Most of that intersection happens between the residential aged care and the hospitals, which only accounts for about five per cent of the people. Aged care is obviously much bigger than that, particularly around consumer direct care now and the home care type of activities. If you look at chronic and complex disease and you look at the people who are

most at risk in some of these areas, obviously people who are ageing do fit into some of those categories. It comes into things in a range of different ways.

Senator GALLAGHER: What financial year does the move to population and CPI funding start in as it currently stands?

Mr Bowles: In 2017-18.

Senator GALLAGHER: What modelling has been done on what that looks like for jurisdictions? What is the logic behind population and CPI based funding for a health agreement?

Mr Bowles: It largely goes back to the way it was done before, I suppose. Again, this predates me—and Mr Cormack and Ms Foster, to be honest. I would have to take on notice any specifics around what might have happened at that particular point in time.

Senator GALLAGHER: Where the modelling was done and what it showed?

Mr Bowles: What it might have shown. The government made policy decisions in the 2014-15 budget—that is a government's right and responsibility—and we implemented those decisions. And while we also provide advice around the implications of those decisions, clearly we will not get into what a state should and should not fund. States make decisions every day about what they are going to fund and not fund and where they want to shift their money. We are not going to get into X beds, X hospitals and X whatever. If you want to get into some of the media activity, there is enough of that from others. That is not our responsibility. Our responsibility is to implement government policy and provide advice around government policy and how we best look at the health system in that context, and that is what we have been doing.

Senator GALLAGHER: As I understood it, the shift from the original indexation that had been agreed under the Health Reform Agreement to CPI population base went from something like indexation at nine per cent to indexation at 4.5 per cent.

Mr Bowles: The long-term average has probably been about 6.5 per cent and with CPI population it went to about 4.1 per cent. I think that would be about right.

Senator GALLAGHER: Maybe it was that factoring in the projection ahead for the Commonwealth share of the growth that made it higher than six. I can understand. It was a better deal going forward than it was in the past.

Mr Bowles: That is correct. Also, there are no incentives to look at activity growth either. A good policy outcome here is getting an appropriate growth in funding to deal with the broader population, price and volume increases, but understanding how we can actually look at the activity that is happen, particularly inappropriate activity. As you would know from previous roles, there is still inappropriate activity happening in hospitals and that could be done better in a primary healthcare setting. We want to get to settings around those sorts of things. That is no secret and that is something that has been going on for 20 or 30 years probably. How do we get our strategic policy frameworks in place to allow us to provide appropriate advice at appropriate times to get the best outcome for the health system and the Australian population? That is where we are. We cannot go into what is the outcome of something that has not happened yet, which is the COAG meeting. Ultimately, the decisions around these things are with first ministers.

Senator GALLAGHER: I understand that. What I am picking up from what you are saying is that—you can correct me if I am wrong—health has been providing advice to PM&C about looking at how to resolve the funding impasse in the short term.

Mr Bowles: I would characterise it differently. We work with central agencies more broadly in working out what is best for the health system in the long term.

Senator GALLAGHER: Is that population CPI based indexation?

Mr Bowles: That is a policy question and ultimately governments make policy decisions on those sorts of issues. I cannot make any further comment than that.

Senator GALLAGHER: Again, from what you are saying to me about activity based funding, efficient pricing and interaction between the primary system and the acute, that it is not just business as usual from your point of view in terms of accepting what has been written in the forward estimates.

Mr Bowles: If I were to be quoted I would say there is nothing 'business as usual' about this game. It is constantly changing. The dynamics are shifting quite regularly. Technology is driving us all crazy and costing us money. But we have to look at new, different ways of actually dealing with the problems and we have to really start to address the big-ticket items in the system. Some of those do revolve around public hospital funding, yes, but a significant part of that issue is also: how do we look at the interface between primary and acute-care, particularly around chronic and complex disease?

Senator GALLAGHER: It is a good answer.

Mr Bowles: Thank you, Senator.

Senator GALLAGHER: My questions are going to have to get better, I think, because every which way I ask them I get a similar response. I will keep going, though I am not sure I am going to get much further than I have already. Has the department done any work on the impact on public hospitals, from 1 July, of not reversing the cuts?

Mr Bowles: It is the same question.

Senator GALLAGHER: It is a different question.

Mr Bowles: Reversed maybe.

Senator GALLAGHER: It is a more direct question. I am trying that angle.

Mr Bowles: Again, we do not manage the systems; therefore we are not going to get into understanding where states and territories will put their money.

Senator GALLAGHER: But you would have an idea of what, for example, New South Wales is going to get—that they are going to get a certain amount of money compared to the direction in which health growth is going. You would have an idea of what that means.

Mr Bowles: That is correct and, as I said, the long-term average is around that 6.5 per cent. The ongoing funding, with CPI and population, if that continues in that sort of vein, is around 4.1 per cent or 4.2 per cent.

Senator GALLAGHER: That sounds easy, but—

Mr Bowles: Yes, it is a gap.

Senator GALLAGHER: finding 2.7 per cent in health expenditure means finding hundreds of millions of dollars.

Mr Bowles: It is two-point-whatever per cent of growth. We are not talking about the entire system. There is a lot of mystery—I use that word again—that comes into this because we are talking about growth rates. The Commonwealth contribution to the growth is going up year on year. So it is not as though we are saying—

Senator GALLAGHER: I know. This is how you get out of saying you are cutting.

Mr Bowles: We are not cutting—clearly we are not cutting. We are putting in less money in that context—that is correct—but states also need to work out how they actually deal with the issues in the system that we all talk about on a regular basis, which is that interface between primary and acute care around inappropriate admissions and trying to keep people in the right stream of care for as long as possible. Ultimately, some people with chronic disease will always end up in hospital, but some we might be able to manage in a different way. That is the conversation that I have been having with the states and territories; that is the conversation that the minister has been having in the broader domain around the Primary Health Care Advisory Group and some of the other activities. There needs to be that robust conversation about what the right answer is, because where we were going with an uncapped activity is not an efficient or effective system.

Senator GALLAGHER: But there was all of that effort going in, particularly at the primary health care end. What you are saying to me I agree with completely. But they are exactly the reforms that were being led under the Gillard-Rudd government as well. There was an emphasis on Medicare Locals and better delineation in areas of responsibility between governments. Sure, it will change to some degree, but I cannot see, in a macro sense, a lot that is different to the reform discussions that were happening five years ago that really did not even get the chance to get going before they were stalled, stopped or abolished and then restarted.

Mr Bowles: I am not going to comment on the former government versus this government and their policy decisions, but—

Senator GALLAGHER: I am not asking you to, but, from what I am hearing, I do not think you are telling me anything different.

Mr Bowles: I spent 12 or 13 years running hospitals and health services in Queensland and in New South Wales about 12 years ago. I have come back, and now I am trying to understand it from a Commonwealth perspective. There were a whole lot of activities in this space happening 20 years ago that went nowhere. We have to come up with different answers. That is what we are looking at at the moment. There have been little improvements in the management of chronic and complex disease. We need to get better at it. Everyone is trying things, and I think that is a great thing, but, ultimately—

Senator GALLAGHER: It is a bigger problem now than it was 20 years ago.

Mr Bowles: It is a much bigger problem.

Senator GALLAGHER: And there is a great financial imperative to deal with it. No wonder the central agencies are interested in it.

Mr Bowles: I am probably more interested in the health outcomes of the population because, if we get it right, we do both things. We get much better health outcomes—

Senator GALLAGHER: But the cost of doing nothing is huge, for individuals and for the community.

Mr Bowles: It is—absolutely. We are very focused on a conversation around chronic and complex disease and the whole primary-acute interface issues.

Senator GALLAGHER: Going back to this indexation—are the figures 6.5 and 4.1?

Mr Bowles: Yes. The exact figures over the years will be in the previous budget paper—

Senator GALLAGHER: It fluctuates.

Mr Bowles: but, largely, the long-term average is about 6.5 and it moves to 4.1 or 4.2.

Senator GALLAGHER: So it is 2.4 per cent difference in the growth factor. I understand, in a technical budgeting sense, people are getting less than they expected, but is still more than what they had the previous year because of the growth factor; I get that. But, translating that to a state or territory budget, that growth factor as outlined in the Commonwealth budget papers gets written in as expected. When that changes, it is a hit on their budget—that is, they have to find the money that they were expecting to come from the Commonwealth but now no longer is, even though it is a growth on the Commonwealth's contribution from the previous year. At the end of the day, for a state or territory running a hospital system, the gap between the 2.4 per cent is real in a financial sense and in a service delivery sense. They still have to front up the next year. That is my point: what is the Commonwealth's understanding on just continuing as was determined in the 2014-15 budget?

Mr Bowles: I do not think we have ever shied away from saying there is an impact. But there also must be something in the system that allows us to understand what the activity growth is and, if it is inappropriate, how we start to manage that. I think we will have to wait until the outcome of COAG and the first ministers' conversations around where we might go in the longer term. This is not something that has just happened in the last five minutes and that the states and territories have to do next year. They have had notice of the current government's policy position since 2014-15.

Senator GALLAGHER: It came as a bit of a shock; but, yes, it is certainly known.

Mr Bowles: I get the implications of that in the context of states, having been in one of those systems for a period of time. But, equally, we must actually manage the activity better and deal with this interface issue better. We have been talking quite widely about this, and we will continue to talk widely about this. Ultimately, I am assuming a whole lot of advice will go to the Prime Minister from a whole lot of people, and the Prime Minister will make the decision in the context of COAG.

Senator GALLAGHER: It sounds to me, in relation to the COAG meeting on 1 April—or in early April—that this work is quite progressed in terms of advice to the government about what to do in the forward estimates on this funding gap that has been created.

Mr Bowles: I think that is a question best put to Prime Minister and Cabinet about where they are in their process, because it is their process.

Senator GALLAGHER: But in terms of the information that you have provided?

Mr Bowles: I have provided advice to them—yes. As I said, I meet with the secretaries of Finance, Treasury and PM&C regularly on this issue.

Senator GALLAGHER: From your point of view, is that well developed—from the advice that you have presented? Are we at the beginning of that?

Mr Bowles: My advice is definitely well developed.

Senator GALLAGHER: Okay. I think maybe that is a small win for me in my question there. In terms of the changes that you are talking about, what are the big things that are going to happen in primary care that are going to save hospitals from the fiscal cliff?

Mr Bowles: They are decisions of government, because they will largely be policy decisions.

Senator GALLAGHER: In a general sense, can you tell me—

Mr Bowles: In a general sense, we have talked about—

Senator GALLAGHER: Not too general. A bit less general than what you have been talking about this afternoon, but not disclosing government policy.

Mr Bowles: Not disclosing—I will see how I go.

Senator GALLAGHER: It is a bit in between.

Mr Bowles: I will see how I go. The big reform activities that the minister has been very open about are things like the Medicare Benefits Schedule review looking at the appropriateness of certain procedures, working with clinicians. There are a range of clinician-led activities going through every item of the MBS schedule, which is about 5,700 items. Some of those are easy; some of those are not easy. That will look at the long-term structure, if you like, of what the Medicare Benefits Schedule looks like. The work of the Primary Health Care Advisory Group is looking at a range of activities. A discussion paper, which will be on our website somewhere, goes through a range of things from looking at the health care home concepts to a whole range of chronic and complex disease models where you can reduce the interface issues, if you like. So that document is actually a very good place to start to look at a whole range of things that we are talking about. Ultimately, those two things in particular feed into the minister's decision making.

The other two big issues are: (1) the rollout of the mental health changes; (2) the rollout of the primary health care networks.

Senator GALLAGHER: When that—

Mr Bowles: They are out there now. We are already seeing quite significant progress—not necessarily with everyone yet, because everyone is at a slightly different place. Their ability to work with their population to understand that burden of disease to help in reducing those problems between the primary care sector and the acute care sector is, I think, going to be quite profound over time. The fact is we now have a network which builds on the work of the past, as well. I think we have had this iteration of GP divisions to Medicare Locals to primary health care. I think we have been building quite an effective model that has learnt from past experience. I would not classify them as mistakes. I think we are getting to a point now where things like the primary health care network and their commissioning role give us a unique opportunity to do things a bit differently. So public hospitals will not be the only way we deal with issues. Primary health care networks will be, and how we look at the health care home concepts, how we look at the MBS going forward and what we are going to do about

things like the transactional nature of our healthcare system sometimes. All those sorts of things are in the public domain.

Senator GALLAGHER: In terms of an MBS-style hospital benefit that has been flagged, has the department been involved in that work?

Mr Bowles: Yes.

Senator GALLAGHER: And your view of that?

Mr Bowles: Ultimately, it is a policy decision of government.

Senator GALLAGHER: But you must have a view.

Mr Bowles: I have a lot of views, but I am not the one responsible for making policy around the country. We have to look at what the structural way is that we want to look at health into the long term. I do not think we are there yet. The former Prime Minister talked about that in his meeting with the states and territory late in the second half of last year—June, July or August—I cannot remember when it was.

Senator GALLAGHER: Before it got knocked off, it was.

Mr Bowles: And he mentioned that. That work that has been continued with states and territories. Victoria and Tasmania actually took the lead on having further conversations about that. We have, obviously, been participating in those conversations, but, ultimately, they will be decisions for first ministers rather than health officials about how we look at the long-term structural changes in the health system that would be something like a Commonwealth hospital benefit model.

Senator GALLAGHER: Was Health involved in the discussion paper on reform of federation, which outlined the idea of the hospital benefit?

Mr Bowles: Yes.

Senator GALLAGHER: So you had fed into that.

Mr Bowles: Yes.

Senator GALLAGHER: Some of the risks that were outlined in that paper on rewarding activity rather than outcomes, and not dealing with the fragmentation that you have just been outlining,—those kinds of issues—was that advice that you supported or had come from Health in terms of feeding into that paper?

Mr Bowles: I can not remember the specifics, but we were comfortable with that view.

Senator GALLAGHER: But they were all identified. So they are things that would have to be managed if the idea of a hospital benefit was pursued.

Mr Bowles: Yes. Again, that was something that was going to be explored about long-term change in the health system. That is not something you are going to turn on or off with a switch tomorrow or the next day.

Senator GALLAGHER: So that is not going to be at COAG?

Mr Bowles: I am not going to talk about what is in COAG, obviously, because I do not know because I am not the secretary of Prime Minister and Cabinet.

Senator GALLAGHER: Oh, come on.

Mr Bowles: But, we do need to think about these sorts of things. We are thinking about them. I have orientated the department to think in a strategic policy sense, and will continue to have a lot of conversations about different ways of looking at the system. Ultimately, that goes back to government, and in this context it has got linked with all of the federation reforms and funding issues that go past 2017-18. They are ongoing conversations. Health reform is something that takes time. I think that is where we are: we are making sure we get those conversations happening and we get the answers right.

Senator GALLAGHER: It never stops, does it?

Mr Bowles: That is very true.

Senator GALLAGHER: Except, it got stopped for a couple of years, but now it seems like it is starting up again. In terms of the idea of a hospital benefit, I think in the material that I have read it talks about rolling in existing funding streams in order to finance that. That would be the only way that something like that could work, wouldn't it, if you had to pull in other funding streams other than just the hospital?

Mr Bowles: In that discussion paper, where it talks about those, it talked at a higher level with a lot more work needing to happen. That said, you have to have funding opportunities to do that. I cannot remember exactly how the paper couched that, but clearly you would have to roll some funding backers together to get an outcome.

Senator GALLAGHER: I think it talks about re-purposing funding streams.

Mr Bowles: I cannot remember. I have not looked at it for quite a while, I have to say.

Senator GALLAGHER: I was fortunate enough to be sitting at the COAG table when the decisions around the Independent Hospital Pricing Authority were made. A part of the reason behind that was to encourage a bit of trust between the states, territories and the Commonwealth that someone independent was involved in setting prices. I am pleased to hear that it is remaining independent, despite that little attempt to curtail it. If you move back to activity-based funding and efficient pricing, presumably that would be the vehicle that continued to set the best prices.

Mr Bowles: That would be my view.

Senator GALLAGHER: That was originally, if I recall—did the Commonwealth completely fund the IPA?

Mr Bowles: Yes. The IPA, the NIPA, the performance one, the funding body and the funding administrator are all Commonwealth funded but independent in their interactions with the state and territories and the Commonwealth.

Senator GALLAGHER: They were. I think there was at one time a request to have it co-funded.

Mr Bowles: You are possibly right.

Senator GALLAGHER: In terms of the AMA Public Hospital Report Card, does it help? It pulls data from the AIHW, I think, and other data sets. Does this sort of help to inform or tell you about some of the pressures that are being experienced in the public hospitals across the country?

Mr Bowles: A range of publications inform us about what is actually happening. I looked at that when it came out. It is not an official document of ours, obviously. We have access to all that information through the AIHW.

Senator GALLAGHER: It pulls a lot of your data as well.

Mr Bowles: Yes. We have made a pretty big effort in trying to get the data into a different space than it has been in traditionally. We have actually given PBS and MBS to the states and territories now. That is a deliberate attempt to give them the access to this data so that they can start to understand it and we can start to work with them to understand it so that we can actually look at these models of care I have been talking about. I think that has been quite successful so far. It has allowed us to make some different decision and allowed them to actually make some different decisions. It is deidentified, so it is not a privacy issue; it is about understanding groups of patients who travel different pathways and what the best outcomes are. Once the states and territories come to understand that data a lot better, I think we will have some really good opportunities going forward. We are actively working in this space at the moment to better understand how we can link deidentified data to actually inform that policy making. That is not easy, sometimes, but I think it is actually fundamental.

Senator GALLAGHER: There has been an obsession from the Commonwealth in the past around ED timeliness and elective surgery outcomes. Is what I am hearing from you a shift away from monitoring that and moving to using data to be less proscriptive of how the states deliver and the timeliness with which they deliver, and a shift towards using data as a means of planning services or informing role delineation?

Mr Bowles: The short answer is no. We are not moving away from understanding what performance issues are out there. The AIHW is involved—

Senator GALLAGHER: Sorry, I should put it another way. The Commonwealth rewarded improvements in performance in this area. You have stopped rewarding it. I guess my question is: does that mean you are not as worried or not as focused on driving improvements in those areas as you have been in the past?

Mr Bowles: We are still making sure that we understand that. We still have the performance accountability framework which deals with all of these sorts of issues. We have a whole range of different activities where we do this, but our role is largely a policy role in this context. Governments make decisions about whether they want to fund different activities from time to time. That is a decision of governments whenever they make those decisions. But that does not mean we do not work with the states and territories in the context of the performance accountability framework and their activity indicators in any form.

Senator GALLAGHER: Can I ask a quick question on mental health, as you are here, Mr Cormack?

Mr Bowles: It is not an outcome that is really here tonight.

Senator GALLAGHER: Is that a no?

CHAIR: Yes, we are done with mental health.

Senator GALLAGHER: The officer is here.

Senator MOORE: Can I ask a question that is also not particularly from this area, but Mr Bowles gave me his answer personally at the last hearing, so—

CHAIR: You can have a go, and we will see what Mr Bowles—

Mr Bowles: Have a go and see how I am going.

Senator MOORE: I asked you at the last hearing about your policy on breastfeeding, and you gave me an answer. Can you just confirm the answer you gave me—whether it is in your enterprise agreement or in your policy?

Mr Bowles: I think it is in both, from memory.

Senator MOORE: You can take it on notice, but—

Mr Bowles: I will take it on notice.

Senator MOORE: it is just that you gave me the answer personally last time.

Mr Bowles: Yes. I can confirm it is in the enterprise agreement and it is effectively our policy position.

Senator MOORE: Thank you. I just wanted to clarify that.

CHAIR: It looks like we are finished there. Mr Cormack, do you have something?

Mr Cormack: Could I just clarify questions that we took on notice for Senator Urquhart. The strategic plan that the senator is referring to was received by the department on 30 November 2015. We provided our comments back on 4 December. There was another exchange. Tasmania got back to us on 15 December. The Commonwealth replied on 18 December, providing final comments. There was a further exchange, and the plan was approved by the Commonwealth on 8 January 2016.

In relation to Senator Gallagher's questions around the provision of funding for the Mersey, in the out years it is $62.7 million per annum.

CHAIR: Thank you. We will briefly suspend to have a private meeting and then we will talk to officials from ASADA and Sport.

Australian Sports Commission

[16:52]

CHAIR: We might start with a few questions from Senator Peris for the Sports Commission. There are a number of senators who have questions for ASADA, so we might them do them as a block once we have done with the Sports Commission.

Senator PERIS: I want to go to sports betting and the O'Farrell review. What input did the Australian Sports Commission have into the O'Farrell review into illegal offshore wagering?

Mr Hollingsworth: The Australian Sports Commission provided a submission to the O'Farrell review, which is a matter of public record. Our comment does not relate to the actual policy terms of the decisions the government may make around platform neutrality in relation to in-play betting. Our submission really relates to, and should be read in conjunction with, the National Integrity of Sport Unit's submission relating to the integrity implications of any change as well as some of the broader financial challenges facing the sports sector, and it makes commentary on those things.

Senator PERIS: Have you seen the O'Farrell report?

Mr Hollingsworth: No, I have not.

Senator PERIS: So the Sports Commission have not helped the government develop a response to the report at all? You have had no input into it at all?

Mr Hollingsworth: That question is probably best put to the department, I think.

Mr Bowles: It is being run out of the Department of Social Services. We are not responsible for the O'Farrell report into that issue. It is a Social Services issue in that context. Both the Sports Commission and the department, through the Sports Integrity Unit, put in submissions to that review by Mr O'Farrell, but that is where it is at the moment.

Senator PERIS: Those are the only questions I had on that. Thank you for that. I want to go now to the Sporting Schools program. How many schools have registered to participate in the Sporting Schools program to date?

Mr Hollingsworth: The number of schools we now have registered has just ticked over 5,000. The number of funding grants that have been provided has just ticked over 4,000.

Senator PERIS: So you have funded 4,000?

Mr Hollingsworth: So far. As we transition the program, the ultimate aim is to hit 5,700 schools. The target for this financial year is around 4,100. We have currently reached the 4,000 mark, so we are very confident that the target the Sports Commission and the government have set is going to be reached.

Senator PERIS: How many students are participating in the Sporting Schools program at the moment?

Mr Hollingsworth: I do not have that number in front of me. It is in the hundreds of thousands, but I do not have the exact number in front of me. I might have to take that on notice. Because we are halfway through the first term in the school year, it is difficult to give an exact number of how many children are participating. It would be in the hundreds of thousands. I will take that on notice.

Senator PERIS: This might be a broad question, but how does this compare to the number of schools and students that participated in the former Labor government's active after-school program?

Mr Hollingsworth: Again, I can do a comparison of direct numbers. I will take that one on notice. As a general proposition, there will be a significant increase in the number of students participating because, under the old Active After-school Communities program, the total number of schools that were engaged in that program was 3,000. The total number of sites for that program was 3,700, but of those about 2,300 were schools and the remainder were after-school care centres. The number of primary schools involved in this current program has nearly more than doubled, so the total number of participants, by the time we get to the end of the school year, will be significantly in excess of the Active After-school Communities program. The total number of participants in the program once it is fully running will be around 850,000. That is the target.

Senator PERIS: I have read some articles on this. Are you aware of any primary schools that have raised concerns about the cost of Sporting Schools programs quoted to them by various sporting organisations?

Mr Hollingsworth: Yes, I am aware of some issues that have been raised in relation to those localised issues. This is one of the challenges as you roll out a new program. Part of our

objective, just to remind you of the change between Sporting Schools and AASC, is that a significantly higher proportion of funding is going out the door. The 30 sports engaged in the program have taken on a much greater role in connecting with their local schools. In the past under the Active After-school Communities program there was a large number of private providers that had no connection directly to a sport. They would simply provide a sport service. Schools were often happy with that provider. As we have moved to Sporting Schools, there have been some situations where schools have preferred to remain with that provider even though it has no connection with a sport. We are managing that transition with the local schools and the local sports to try to ensure that the people who are providing the instruction to children are accredited by the sport. That is our preference. But there is a transition phase. That issue has come up on a number of occasions. In some cases, the provision of the service can be more expensive, but the counter to that is that it is being delivered by a coach who is accredited by the sport. That is the trade-off. We need to manage that to make sure that it is affordable for schools but, on the same basis, that students are getting the proper tuition.

Senator PERIS: Are you happy with how you are able to manage those issues that have been raised?

Mr Hollingsworth: Yes.

Senator PERIS: I am jumping around a bit here, but I wanted to go to the Paralympic funding. Can you tell us the total investment for Paralympic sports in each of the specialist sporting organisation investment allocations going back to 2013-14, 2014-15 and 2015-16.

Mr Hollingsworth: The Australian Paralympic Committee?

Senator PERIS: Yes.

Mr Hollingsworth: It might be easier, Senator, if I compare the four-year Rio cycle to the London cycle. For the four-year Rio cycle coming into the Rio Paralympics the total funding provided to the Paralympic sports including the Paralympic Committee totals $62.5 million. The funding for the equivalent period, the London Paralympic cycle, was $47 million. The increase in funding over the quadrennial is up by $15.5 million or 33 per cent and that is funding to sports and athletes.

Senator PERIS: Has there been any funding decrease from last year, 2014-15, to where it is now, if you look at annual funding cycles just for the Paralympics?

Mr Hollingsworth: No.

Senator PERIS: Thank you.

CHAIR: Are there any other questions for the Sports Commission? There being no other questions we now move to ASADA.

Australian Sports Anti-Doping Authority

[17:02]

CHAIR: I am going to start with Senator Madigan and then go to Senator Back.

Senator MADIGAN: Mr McDevitt, my questions pertain to the AFL Anti-Doping Tribunal and the 34 Essendon footballers. Is it correct that the AFL Anti-Doping Tribunal cleared the 34 Essendon footballers of an alleged violation of the AFL doping code?

Mr McDevitt: Yes, Senator, that is correct.

Senator MADIGAN: Was the AFL Anti-Doping Tribunal chaired by two retired Victorian County Court judges and an eminent barrister?

Mr McDevitt: That is correct, Senator.

Senator MADIGAN: Mr McDevitt, did ASADA believe there was something fundamentally wrong with that decision of those two retired Victorian County Court judges and eminent barrister, who actually convicted and sent people to jail in their professions previously?

Mr McDevitt: Senator, I might make some opening comments. The first one is to say that at no time have I questioned the integrity of the individuals who sit on the AFL Anti-Doping Tribunal. These are people with great integrity and great experience. As you yourself pointed out, their experience basically emanates from the criminal jurisdiction, which is a jurisdiction that looks at issues generally through the lens of beyond a reasonable doubt. I believe and WADA believed that in this case the AFL Anti-Doping Tribunal simply got it wrong, and I believe that for several reasons.

Firstly, I do not believe that due weighting was given to pieces of evidence that were presented to that tribunal. Secondly, I believe that they held the bar of 'comfortable satisfaction' so high that, if allowed to remain, it would have set a precedent which would have made it extremely difficult if not impossible, not only for ASADA, but for any anti-doping organisation in the world to successfully prosecute a matter which did not, as in this case, involve a positive test.

Senator, let me just give you a couple of examples. As you know, I fully supported the WADA appeal and I supported it in kind and financially. The decision to appeal was totally WADA's. Do not overestimate my influence on WADA. They actually undertook their own reviews and made their own decisions to appeal. Let me just give you a couple of examples.

The tribunal itself accepted that Steven Dank made plans to use thymosin beta-4 as part of Essendon's injection program. They also accepted that the players had consented to being injected with thymosin and that injections had occurred. Despite this, they were not comfortably concerned or satisfied that the injections actually contained thymosin beta-4 because there were no adequate records kept and because Essendon failed to carry out lab analysis of the substances. Then you look at a couple of these issues. The CAS panel openly disagreed with the tribunal on several things. Let us talk about the records.

Senator MADIGAN: Just for clarity, Mr McDevitt, CAS is not an Australian body, is it? Just so everybody can be crystal clear.

Mr McDevitt: CAS is the ultimate sports—

Senator MADIGAN: It is not an Australian court, Mr McDevitt, is it? It is not Australian law.

Mr McDevitt: It has an office—

Senator MADIGAN: It is not Australian law, is it, Mr McDevitt? It is not subject to review by the Australian parliament or by Australian politicians, which most Australians expect and, more importantly, deserve, Mr McDevitt, is it? It is not an Australian court. It is a foreign body. It is not an Australian court.

Mr McDevitt: I disagree with you, Senator.

Senator MADIGAN: Let us be crystal clear, Mr McDevitt.

Mr McDevitt: Senator, we have a legislative framework.

Senator MADIGAN: It is not an Australian court, is it, Mr McDevitt? Is not to Australian law.

CHAIR: Senator Madigan, you have put that a number of times.

Senator MADIGAN: Well, he will not answer the question.

CHAIR: Senator Madigan, just one moment. I am giving you a fair go. You have put that several times. Mr McDevitt can come back and answer, and if you are not satisfied with the answer you can ask him further questions, but I will not have you badgering him. I will go to Mr McDevitt.

Mr McDevitt: Senator, can I finish the original question which was about the fact that the decision was so fundamentally flawed. I was talking about the lack of records and the Court of Arbitration for Sport said:

No record was kept within Essendon; indeed, the absence of such record was the subject of forceful criticism by the AFL Tribunal and relied upon by it as a reason to find ASADA's case to be insufficiently substantiated.

CAS, in looking at the lack of records actually said:

However, the very fact that no record was kept is in the Panel's view suggestive again of a desire to shroud the regime in a veil of secrecy.

Secondly, talking about the source of the substance itself, again the CAS panel found in their view that the AFL tribunal had got it wrong and said:

It is not an essential link (or indeed strand) in a case of a violation of Article 2.2 of the WADC that the source of the product used can be identified. It has never been so stated in any of the relevant case law, is not required on the face of the article itself or the commentary, and would be a significant bar to the fight against doping.

Senator, that is why I forgo my opportunity to appeal within the AFL framework. I was extremely confident that WADA would appeal this finding because it was simply untenable.

Senator MADIGAN: You earlier said in your evidence, Mr McDevitt, that WADA appealed, WADA did not appeal. You were not happy with the decision, you have said that the decision was flawed, why did ASADA not avail itself of the appeal process afforded to it under the AFL Anti-Doping Tribunal, which is an Australian body, not a foreign body?

Mr McDevitt: There were a couple of reasons for that. You may recall that, on the day after the tribunal released its decision, I did a press conference, and one of the very first things I said was, 'An appeal option is a very, very live option.' The appeal option had two possible routes for me. One was to appeal to the AFL antidoping appeals tribunal, which would mean that the matters would remain under the umbrella of the AFL's framework, and the second option, which was the one I took, was to forgo my appeal option, refer the matters to WADA and allow them then, if they saw fit, to initiate an appeal to CAS. I did not have a direct opportunity to appeal to CAS.

Quite frankly, this matter was going to end up in CAS anyway. It would have cost the Australian taxpayer approximately a million dollars for me to have fully run an appeal, because the appeals tribunal would have wanted a full de novo hearing, which would have

meant that we would have run the whole case again before that appeals tribunal. I can almost guarantee you that, if the result of that appeals tribunal had been the players being found guilty, they would have almost certainly themselves exercised their appeal option, which was open to them, to then go to the CAS. I can tell you also that, if the appeals tribunal had found in favour of the players and applied and accepted the same logic of the lower tribunal in the original decision, then, for the exact same reasons I have just outlined to you, I would have then initiated my right of appeal to CAS. I believe we saved almost a million dollars and we also saved almost 12 months in this process by opting for the option which I did, and that is why I decided not to appeal within the AFL framework.

Senator MADIGAN: Mr McDevitt, given that the Commonwealth through ASADA contributed more than $100,000—I think it is—towards the cost of a WADA case against Essendon, and you are saying in your evidence there that it would have cost somewhere in the vicinity of a million dollars, you are saying there is a price on justice for people—for these 34 individuals, their wives or partners and their children. Is that what you are putting to us?

Mr McDevitt: No, I am not, Senator.

Senator MADIGAN: You have just said we could have spent a million dollars, or we could have spent $100,000. The money is the consideration, not justice for people. We put a price on justice. Is that right?

Mr McDevitt: I think you are putting words in my mouth, with all due respect. I said there was a saving in funding, in taxpayers' money, which I think is a reasonable and fair consideration. I think there was a significant saving in time. We would be before CAS now if we had gone the route that you are saying we probably should have gone.

Senator MADIGAN: A foreign body, not an Australian one.

Mr McDevitt: So we saved money; we saved a hell of a lot of time. I am aware of the stress that these matters have caused for all stakeholders involved here, not just the players, and I think it was a considerable saving there. What we needed was resolution of these matters, and we needed the truth to be revealed.

Senator MADIGAN: Do you believe that ASADA, as a Commonwealth agency, has an obligation to act as a model litigant?

Mr McDevitt: Absolutely, and we do at all times act as a model litigant.

Senator MADIGAN: In section 2(d) of 'The Commonwealth's obligation to act as a model litigant', it says:

> … endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate

I go back to the fact that you did have an ability, there was an opportunity there, for ASADA to appeal the decision under the AFL doping tribunal procedures, but you did not take it. That is on Australian soil under Australian law, not a foreign body. You have said that the 34 players can appeal the decision to CAS, but it is on the other side of the world, and these people's livelihood has been taken from them. Do you think it is fair that they have to go to the other side of the world? I think the hearings are in French, aren't they, Mr McDevitt, in CAS?

Mr McDevitt: There are multiple questions there.

Senator MADIGAN: Do you think that is fair?

Mr McDevitt: Absolutely. I think the main thing we have got to do with these matters is get to the truth. We need to expose the facts. I do not think you should be talking about the Court of Arbitration for Sport as if it is some foreign entity that is unknown to us. The Court of Arbitration for Sport hears about 300 matters a year. It has three officers, one in Lausanne, one in New York and one right here in Sydney. It is the most eminent body. It is recognised. For all 85 sports that we deal with in this country, an appeal option to the Court of Arbitration for Sport is built in, in fairness to athletes, to have an appeal option beyond their own tribunals. Are you saying, Senator, in terms of fairness, that you think that that appeal option should be taken away from athletes? They exercise it quite regularly.

Senator MADIGAN: I want them to have an appeal, Mr McDevitt. I want them to have an appeal under Australian law, which Australians expect and, most importantly, deserve, not to be tried by some foreign body. The game of AFL is not an international sport; it is an indigenous sport to Australia. Australians expect and—I repeat again—deserve to be tried under Australian law. I think that there are people quite capable of trying people for alleged breaches of codes in this country—and not for it to be outsourced to a foreign body. ASADA did have an opportunity to avail themselves of an appeals process, and they did not do it. You then outsourced it, and some might say you went verdict shopping, shopping for a verdict, to a foreign body.

Mr McDevitt: Senator, I totally disagree with what you are saying there.

Senator MADIGAN: I am sure you would.

Mr McDevitt: We acted entirely as a model litigant would act, and we took the option of going to the Court of Arbitration for Sport. In the last couple of years, we have had 11 matters before the Court of Arbitration for Sport, not just this one. As I said, it adjudicates in over 300 matters a year, including multiple Australian matters. There are 23 Australians who are arbitrators on the Court of Arbitration for Sport. It is a body which is totally independent of sports, which I think is absolutely critical and is the way that we should globally be. In fact, as you will see today, the International Olympic Committee has now said that any antidoping matters which come out of this year's Olympics or any further Olympics will be immediately referred to the Court of Arbitration for Sport, a totally independent body of eminent experts in sports law.

Senator MADIGAN: Is there a distinct difference, in ASADA's view, between an amateur sportsperson and professional sportsperson? Do you see any difference there?

Mr McDevitt: No, I believe they all should have the rights to appeal any matters that are against them, and one of those critical rights for them is to have an appeal option to the Court of Arbitration for Sport. There is the fallacy out there that it does not apply, for example, to team sports. Of the 85 sports that we have here in Australia, 30 plus of them have a team element, and 18 of them are pure team sports. That includes rugby union, hockey, ice hockey, AFL, soccer—there are 18 sports that are just pure team sports. It is good enough for the English Premier League, Senator, but it is not good enough for the AFL to have an option to go to the Court of Arbitration for Sport?

Senator MADIGAN: Do Australians have a right to be tried, examined, for whatever they may or may not have done, under Australian law?

Mr McDevitt: Let me put it another way. What was conducted here and the processes that were followed here were under the AFL's antidoping policy. So, under the AFL's own rules, we exercised the options to appeal to CAS—under their rules. Does that help you?

Senator MADIGAN: Mr McDevitt, earlier in your evidence you said that, for want of better words, the burden of proof to those two retired Victorian County Court judges and an eminent barrister was here, that ASADA—for want of better words—could not get a conviction at that level, and that the level of CAS was here. There are two different levels there. This is the Australian level that Australians all expect and deserve, and this is the CAS level, in a court. That is what you said.

Mr McDevitt: Senator, this is consistent with your remark that the AFL Essendon players were treated the same as rapists. With all due respect, we are talking about totally, totally different situations. I have worked most of my life in the criminal jurisdiction. I have arrested and charged rapists, multiple times. And I can tell you it is totally, totally different. What we are dealing with here is sports law. The sports law requires a bar, which is called 'comfortable satisfaction', which is movable between 'balance of probabilities' and 'beyond a reasonable doubt'. Both I and WADA believe that in this case the AFL Tribunal held that bar far too close to 'beyond a reasonable doubt'.

Senator MADIGAN: But wasn't the AFL Tribunal WADA compliant? When they set up the AFL doping tribunal, WADA were involved in the setting up of that process, were they not?

Mr McDevitt: Not to my knowledge.

Senator MADIGAN: You are saying that the AFL doping tribunal was not WADA compliant?

Mr McDevitt: No, I am not saying that.

Senator MADIGAN: I am just trying to understand, Mr McDevitt.

Mr McDevitt: There is a framework which starts with the UNESCO convention, as you are aware, of which there are hundreds of countries which are signatories. We then had, as you are aware, the World Anti-Doping Code. WADA does not own the code, and WADA does not impose the code. All that WADA does is monitor compliance with the code. The code itself is developed by countries and sports.

Senator MADIGAN: I understand that. I am just saying: was the AFL doping tribunal, in the way it was set up, compliant with WADA, or was it not? Do you know; yes or no? It is fair enough if you do not know.

Mr McDevitt: It was established under the AFL's antidoping policy, and, yes, the establishment of that tribunal is consistent with the requirements of the World Anti-Doping Code.

Senator MADIGAN: So it was consistent. This is my last question. Australia is a signatory to the International Labour Organization convention on the rights of workers and their conditions of work. This specific treaty was ratified by the Australian government decades before anything was signed against doping in sport. The fact of the matter—what concerns me—is that we have a code that you say the Australian government signed up to under which now a foreign body or entity has affected people's right to work, their ability to

work. Can you see my concern here, Mr McDevitt? A foreign body has taken away people's livelihoods.

I might also add that some of these people have business interests outside football, so they are looking to the future, when they retire. I know for a fact that some of these people have interests in business that is involved in other areas, sports promotion for one, where that business has been told, as a result of this foreign body that is not subject to scrutiny by the Australian public and parliament, 'Don't bother applying for work with us to promote our sports thing if you've got such-and-such'—who is one of the 34 Essendon players in that. Can you see the wide-ranging ramifications for individuals, Mr McDevitt, and how this is a very slippery slope to be going on? I have no truck with people who are drug cheats or cheat, but they should be trialled under Australian law, where it is able to be scrutinised by this parliament. Our job here is to protect the right of Australians to a fair and transparent trial.

Mr McDevitt: Let me try to answer this as quickly as I can. Let me read this too you: 'An ineligible player cannot participate in a training camp exhibitional practice. The term activity also includes for example administrative activities such as serving as an official, director, officer, employee or volunteer of the organisation described. Ineligibility imposed in one sport shall also be recognised by other sports.' You probably think I am reading something from Switzerland. I am reading the AFL's rules. What you are seeing in place is the AFL applying its own rules. If people are found to be in breach of the AFL anti-doping policies, there are very strict consequences. It is not forbidding employment in a whole range of other areas but what you are seeing now is that there are very specific AFL rules about where and when somebody who is undertaking a ban can be employed. Those are the AFL's rules.

Senator MADIGAN: The AFL Anti-Doping Tribunal did not find them guilty, did it?

CHAIR: We are going to leave it there. There might be time to come back but I have others waiting to ask questions.

Senator BACK: I also want to ask some questions about Essendon and the Thymosin Beta-4. Were the players advised by the Essendon club of the supplement they were to be given?

Mr McDevitt: I was not there and I cannot put words in anybody's mouth. Suffice to say that 34 players have given statements and evidence to say they attended briefings about the program that they were to enter into and 34 players signed consent forms to be administered a number of substances, one of which was Thymosin.

Senator BACK: Do you know if they were told that that particular product was legal to be used?

Mr McDevitt: There have been various accounts about exactly what players were or were not told. Whilst I appreciate this is a very important point about what information they were given by, for example, support personal, ultimately the onus rests always on the individual. If they were unsure then they should have sought advice from their doctor. Their doctor gave evidence to say that none of them did. They should have gone to the website where you can look up the substances that are banned but we have no evidence that any of them did. They did not make the inquiries.

Senator DI NATALE: That is not true. Sorry. One of the players went and did some research on the product, that is well-documented.

Senator BACK: Can I continue?

Senator DI NATALE: Sorry.

Senator BACK: Thank you, Senator Di Natale, that is fine. The advice to me was that they did receive assurance in writing from the Essendon Football Club that the product they were to be given was legal. Can you respond to that or can you take that on notice and advise the committee whether or not my assumption is accurate?

Mr McDevitt: I am not aware of that. I will take it on notice.

Senator BACK: Again, the advice to me is that not all players were actually given the supplement—that a number were not given the supplement. Is that consistent with your understanding?

Mr McDevitt: That is correct.

Senator BACK: But they are amongst the 34 who have been found guilty although they never were given the supplement.

Mr McDevitt: Sorry, let me just correct that. There are other players beyond the 34 who were not given the injections. Our evidence is that there were two threshold issues applying to the 34 that were quite critical. All 34 said they did receive injections—of the players who we proceeded against—and all 34 did a sign consent form for various substances including thymosin.

Senator BACK: Were they tested?

Mr McDevitt: Yes, I think there were 30 testing missions across the 2012 season.

Senator BACK: Of all 34?

Mr McDevitt: No, the 30 tested missions covered a total of 21 players, and on all 30 testing missions none of those 21 players ever declared receiving an injection from Mr Dank.

Senator BACK: There were 13 then who were never tested—21 out of 34 were, 13 were not?

Mr McDevitt: I am not sure what the double-up was. What I am saying is 21 of the 34 were tested.

Senator BACK: At what point did they identify to somebody that they had been given this supplement? Was it at the point of testing? Was this the scenario: they went in for a test, the person about to test them said, 'Have you been given any supplements?' Is that how it happened?

Mr McDevitt: That is how it happened. They were asked questions around what have you been given in terms of medication, supplements, any substances, vitamins, anything? What have you been given in the previous seven days? What we had is that not one of them declare these injections. As I said earlier, their own doctor gave evidence to say that none of them approached him in relation to these particular injections.

Senator BACK: We know the 21 were tested. We know the 13 were not tested. Is that correct? Am I right in that summary? You mentioned 21 out of 34.

Mr McDevitt: You are arriving at a number of 13, but your number may actually be higher than that. I am not sure exactly how many times players might have doubled up.

Senator BACK: Perhaps you could take it on notice. The point I want to get to is, if there are numbers of players who were never tested and therefore were never asked, then the question to me is: how are they now found guilty in the court when they were not tested? You just mentioned the last seven days. The information available to me is that amongst those who were tested there were people who had not in fact taken the supplement or been given the supplement within that last seven days and yet they are in the 34. My assumption is that we have three groups. Group 1 is those who were tested within the seven days who said they had not been and they are guilty. Group 2 had not been given a supplement within seven days and, therefore, were absolutely honest when they said, 'We haven't been tested in the last seven days,' but they are in the guilty group. Group 3 have not been tested yet and they are in the guilty group. I need to understand where you can have the guilt of 34 people, some of whom have not been tested?

Mr McDevitt: The premise of your question is that the offence itself is failing to declare the test. That is not the case.

Senator BACK: Right, tell me where the offence was then.

Mr McDevitt: The violation was established through numerous pieces of circumstantial evidence, and if we have the time I will step you through that. What the failure to declare was evidence of was not the offence in its own right, but what the CAS found was that the failure to declare on 30 separate missions to 21 players was indicative of the course of conduct and the culture of secrecy around this particular program. To be frank, it was not a supplements program. This is not supplements; this is banned substances. This was an injections regime, not a supplements program.

Senator BACK: I want to get to that. You have again confirmed 21 players, so 13 at the moment who in my mind have been found guilty without having been the subject of testing. How many, if any, positive swabs—I will call them swabs from my experience as an equine veterinarian—were found to be positive?

Mr McDevitt: At this point in time there is no test to detect artificially administered thymosin beta-4. It occurs naturally in all of us.

Senator BACK: That was going to be my next question: what are the blood levels naturally occurring so we can know the levels of artificial injection?

Mr McDevitt: It occurs naturally in all of us to various extents.

Senator BACK: Exactly.

Mr McDevitt: So, much as there are efforts underway, as with a whole range of substances, to develop tests, in 2012 there wasn't a test for detecting artificially administered or exogenous thymosin beta-4—and, to date, there still isn't. So the fact that there was not a positive test is not, of itself, really taking us anywhere. This is why, in this case, the case was established via other circumstantial evidence—because there weren't positive tests.

Senator BACK: Do we know what effect this or other supplements have? Do they have a stimulatory effect on the central nervous system? Is there a metabolic stimulation? Does it enhance the oxygenation of the blood? What do these supplements do? How do we know they were not placebos? How do we know they were not just coloured lolly water?

Mr McDevitt: The question you ask is important. This is why it is so dangerous—because we do not know the effect of these substances. We know that people use TB-4 for things like accelerated recovery, and that is why we find athletes utilising substances like this. But you have hit the point: the scariest thing about all this is that we actually do not know. There have not been human trials on the substances, and that is why it is banned.

Senator BACK: We do not know the naturally occurring level in the blood. Therefore, we do not know the impact on the blood levels of artificially injected materials. As you said, it may have a recovery effect—and I can understand that—

Mr McDevitt: That is what it is touted as having.

Senator BACK: but it does not seem to have any effect on performance on the day. I agree with you about the abuse of drugs, pharmaceuticals, in the body—whether it is an animal or a human being. But the concern I have is this. You mentioned in your response to Senator Madigan that the Court of Arbitration for Sport found that no records had been kept by Essendon. I have no difficulty at all in a circumstance where somebody finds Essendon guilty of a whole range of activities, but I think we have learnt from you that there is not a court of appeal within Australia to which these people can appeal. I understand that there is a Court of Arbitration for Sport in Sydney, but am I correct in that assumption?

Mr McDevitt: All parties would have had an appeal to the AFL anti-doping tribunal.

Senator BACK: Which they did.

Mr McDevitt: Beyond that, the appeal option is to the Court of Arbitration for Sport. Can I just add that that is not unique to the AFL; it is the case for all 85 sports in Australia.

Senator BACK: Presumably the Australian parliament or the government made a decision to allow the circumstance in which an Australian court ceased to be the highest court of appeal and passed it over to Court of Arbitration for Sport? When did that happen and what was the process that allowed it to happen?

Mr McDevitt: I cannot give you the exact date off the top of my head. What I can say to you is that that decision was made in the Australian parliament when Australia committed to becoming one of the hundreds of countries who were signatories to the UNESCO convention on anti-doping. Underneath that, you had a whole series of articles, legislation and regulations to give effect to that commitment by the Australian parliament. So I guess it was when the ASADA Act 2006 was passed through the parliament. That is when this all blew out.

Senator BACK: Team sports in the United States—football, basketball and baseball—are not signatories to this particular contract.

Mr McDevitt: That is correct.

Senator BACK: Do you understand why those team sport codes in the United States are not signatories and do you think that is of any relevance to this country?

Mr McDevitt: That is a really good question. Let me talk about the National Football League for a second. The National Football League, as you said, is not technically a WADA-compliant organisation. The NFL works out its rules between players association and the NFL players themselves. Let me give you an example. Human growth hormone, which has been on the World Anti-Doping Code banned list for multiple years, was not actually banned in the NFL until the end of 2014. Why? Because the NFL players decided that they did not want it

to be on the banned list. And when they did actually accept that it was on the banned list they determined their own penalties. The penalty for the use of human growth hormone in the NFL is a four-week ban. The penalty under the World Anti-Doping Code is a four-year ban. So what you have got there is frameworks the sports organise on their own. What you have got is a Clayton's framework when you do not want to sign up to the World Anti-Doping Code.

Senator BACK: I think your advice to be—and I would not want to dispute it—is that there are circumstances not applicable here. But I do want to sum it up this way if I can. It seems to me that there are 34 people who are now found guilty, and the implication of that is that they have been banned from sports promotions et cetera. A number of them—I think it was 13—were never tested. Another group were tested, as I understand it, but outside a seven-day preclusion period and they have been found guilty. A third group would appear to be within the seven days and they are guilty. But we have a circumstance in which the tests are inconclusive because nobody knows the baseline for the chemical occurring naturally in the body. We do not know whether this particular chemicals have a direct effect on performance on the football field. And we are in a circumstance in which, as you said, a football club had no records. It would appear that at least one of the players did avail himself of the opportunity to learn about the pharmacology. But if 18- or 19-year-old kids were told by the club that the product was safe and they were advised by the club in writing that the product was legal to use with or without the consent of their parents or other guardians, then I am at a loss to understand how 34 players are now guilty. I am also at a loss in terms of proportionality. Even if the case can be made—and I do not believe it can—I am concerned about the proportionality. We had a group that said it had been taking it within a seven-day period. We had another group who did not take it within the seven day period and would therefore have been quite honest in saying that they did not take it. And we had a third group who never took it—or were never tested, so we really do not know whether they took it. All three groups have been found equally guilty. As an Australian, I find that unacceptable. I would appreciate it if you could comment.

Mr McDevitt: The members of the club implemented a program to make Essendon players bigger, stronger and able to recover more quickly to gain an advantage over their opposition. In the words of Stephen Dank, thymosin was the vital cornerstone of that team based program. Essendon sports scientist Stephen Dank was shown to have used thymosin beta-4 on other athletes prior to him getting to Essendon. There were over 100 text messages that unveiled a plan to source thymosin beta-4 for the purpose of doping the Essendon team. The 34 players signed consent forms agreeing to thymosin beta-4 injections and each of them admitted to receiving a number of injections. Six players reported being told they were being injected with thymosin. Two players reported seeing vials marked with the word 'thymosin' in the sports scientist's fridge. Two players sent text messages discussing their thymosin injections with Stephen Dank. Analysis of the substance compounded by the pharmacist showed that the substance was no other kind of thymosin—with a 97 to 99 per cent probability—than thymosin beta-4. Frankly, this stuff about thymomodulin—the 'good' thymosin—was shown to be absolute rubbish. That is a very short synopsis of some of the evidence that was presented.

I know you are very focused on the test. Again, I just need to say to you that the CAS did not convicted or find guilty these players purely because they had not declared something on

a test. They looked at that aspect simply to say that that was consistent with the other facts that led them to believe that this was a program that the players had agreed to keep secret; a program that the players, as a collective group, agreed was taking them right to the edge.

Senator BACK: One argument could have been it was the code of the team. Another argument has been they are guilty of trying to hide information. Thank you for your information. The proportionality is the thing that really gets to me. The proportionality, I think, is grossly unjust.

Senator DI NATALE: Mr McDevitt, I am not sure which one it is. A moment ago you told us you did not know what this stuff does and now you are saying that it makes the players bigger and stronger. Which one is it?

Mr McDevitt: Don't forget, there were multiple substances here.

Senator DI NATALE: That is irrelevant because they are not found guilty of taking other substances. They are found guilty of Thymosin Beta-4, so what does it do? Does it make people bigger and stronger or do we not know what it does?

Mr McDevitt: As I said earlier, we do not know everything that it does. It is primarily promoted, in my understanding—

Senator DI NATALE: Promoted, yes.

Mr McDevitt: —for recovery. As being an agent for recovery.

Senator DI NATALE: To be clear, you are saying that on one hand it makes the people bigger and stronger, then we are talking about recovery and then we are saying we do not know what it does. Isn't it fair to say there is a good chance this stuff does nothing for performance?

Mr McDevitt: I doubt it. Let me just—

Senator DI NATALE: No. What is the evidence that it does?

Mr McDevitt: If you can recover more quickly you can start pumping iron, you can start running—

Senator DI NATALE: What is the evidence that this improves recovery?

Mr McDevitt: —so the fact that you can train harder and if you recover more quickly then, yes, you can get bigger and stronger.

Senator DI NATALE: What is the evidence that it improves recovery?

Mr McDevitt: I will have to take that on notice. What I can say to you—

Senator DI NATALE: You are making claims about what effect this—

Mr McDevitt: It is promoted globally and it is distributed and trafficked globally because it is believed that it promotes recovery and, as I said to you, if you can recover more quickly you can train harder and you can get bigger and stronger, and that was the aim.

Senator DI NATALE: Go to any health food shop and there are lots of drugs there that are promoted as helping you to lose weight, you lose five kilos in a week. It does not mean that is what they do. I am asking you about the evidence for what this does. The reason I am asking you is that I think you called this the worst case of systematic doping or team doping this country has ever seen. How can you put a substance like this, which some people argue

does absolutely nothing, next to a drug like EPO or testosterone or growth hormone, which are all deliberately designed to help people become bigger and stronger?

Mr McDevitt: It is a banned substance—

Senator DI NATALE: I saw Mr Bowles pass you—I am trying to get you on the facts here and the facts are that you are making claims about the drug that are completely unsubstantiated. I accept that it is a banned substance, so let's move on to that issue. What has been the total cost to date of Operation Cobia?

Mr McDevitt: The total cost of the Cobia investigation has been $5.947 million. External legal costs were $4.329 million. Costs arising from the federal court cases and appeals by Mr Hird and Essendon Football Club total $1.86 million. They are all included in the $5.947 million. And $1.26 million of those costs have been recovered from Essendon and Mr Hird, when they had costs orders against them.

Senator DI NATALE: How much did ASADA contribute to WADA's costs for preparing to make the appeal?

Mr McDevitt: For the wider appeal, the costs were in the order of $130,000, and a $10,000 cost for the CAS arbitration fee. Ultimately, the CAS costs themselves were to be paid by Essendon and the AFL, not by ASADA. I hasten to add that the costs of the CAS appeal and the CAS hearing were significantly less than the costs of the original AFL Tribunal hearing.

Senator DI NATALE: Do you have those numbers?

Mr McDevitt: Approximately $950,000.

Senator DI NATALE: Compared to?

Mr McDevitt: $130,000.

Senator DI NATALE: What I am interested in is there was a clear change in response from you, Mr McDevitt. Back in the middle of 2014, the impression was that the players were not at fault. I think it is best if I quote you. In June 2014, during a radio interview you said:

I think what you are looking at here is a case where there would be good opportunity for a player to say no significant fault.

Then, I think in November, you went on and said, 'Based on the information that ASADA has, the maximum reduction of 50 per cent of the applicable period of ineligibility for no significant fault or negligence would be appropriate.' Clearly, you were of that view and then something changed. Then it became, as I said, the worst case of team based doping in the country and the players had a head-in-the-sand approach. What changed?

Mr McDevitt: A number of things. Let me just say that firstly in terms of penalties, it is very important to point out that ASADA does not determine the penalties.

Senator DI NATALE: No, we accept that.

Mr McDevitt: Penalties are determined by the sport itself or, if it goes to a tribunal, by the tribunal. In relation to the Essendon players, discussions on penalties were had with relevant parties in June 2014 and in November 2014. I engaged in those discussions with a view to trying to get some resolution on these matters. That was what I was trying to do. I tried to do that before infraction notices were issued. The reason I did that is that there were opportunities for players—and it is the same for any athlete—to come forward, for example,

and claim substantial assistance if they come forward and give assistance or if they decide that they want to mount a defence of no significant fault. In this case, and this is where it becomes important, to actually claim no significant fault—and I did put it out there and said, 'Look, you may be able to try to establish this claim and no significant fault—the players said: 'No, we are not going try that. We are going to fight it. And what we are going to do is deny it.' To get no significant fault, you have to firstly admit that, yes, you had the substance. So once they made that critical choice to go to a hearing, the onus was then on them to prove no significant fault. If they had stayed in a state of denial and hence—

Senator DI NATALE: But maybe they believed they were not taking a substance. That is the whole point of no significant fault. It is a non sequitur.

Mr McDevitt: No significant fault means I had the substance, I drank this glass of water and, yes, there was a banned substance in there but I did not know. It was put in there by someone else or whatever. But I have to first say, 'Yes, I took that water and, yes, I accept—

Senator DI NATALE: So you are saying that they rejected having any substance at all?

Mr McDevitt: They rejected it, Senator.

Senator DI NATALE: Right, okay. Once they had acknowledged that they were injected with the substance but had made it clear that they had no knowledge that this was a banned substance, why was no significant fault still not appropriate in those circumstances?

Mr McDevitt: They said that they were injected with Thymosin.

Senator DI NATALE: But they are not chemists; these are kids. They are 19-year-old kids.

Mr McDevitt: They are not kids. They are not minors. They are not children. They are fully-grown adults.

Senator DI NATALE: Yes.

Mr McDevitt: They are fully-grown adults who receive education on multiple occasions—

Senator DI NATALE: Most doctors do not know what Thymosin is. How do you expect a young footballer to know what it is?

Mr McDevitt: Their education is about personal responsibility for what goes into their bodies.

Senator DI NATALE: I get that. But getting back to the no fault significant fault issue, my issue is this—and it is similar to Senator Back's in a way—these are young players. They do not understand pharmacology and, as I said, a lot of this stuff here is hocus pocus. They are given a reassurance. You were saying early on no significant fault and then something changes where you throw the book at them.

Mr McDevitt: Hang on. When you say I said 'no significant fault', I said to them—

Senator DI NATALE: that it would be appropriate—

Mr McDevitt: No, I said to them: 'If that was the case, come forward and tell us. Tell us fully what did happen, and if you can establish no significant fault then that would lead to a reduction in the penalties.' If they had all the questions—

Senator BACK: They would have been better to have said nothing, wouldn't they?

Mr McDevitt: Why didn't they go to a doctor?

Senator BACK: There are others outside the 34 but they are laughing their heads off.

Senator DI NATALE: What do you mean 'Why didn't they go to the doctor'?

Mr McDevitt: Why wouldn't you ask the doctor? You said they do not know about pharmacology, so if they do not know about pharmacology—

Senator DI NATALE: These are young people in a professional sporting environment being given something that they are told is going to help their performance. You quote Stephen Dank as an expert in terms of what this stuff does. They are in a sporting environment with a whole sports science department behind them. They are being given information saying this stuff is legitimate. Why on earth would you go to the doctor? I do not understand. It does not follow.

Mr McDevitt: Sorry, why didn't they go to the doctor?

Senator DI NATALE: You are saying, 'Why didn't they go to the doctor?' Why should they?

Mr McDevitt: Senator, would you let someone come up and give you multiple injections and say, 'Don't worry; it's all good'?

Senator DI NATALE: If I were a 20-year-old getting my dream job, with a sports science department behind me and a coach saying, 'Look, this is absolutely fine. It's all legitimate; it's by the book,' why would I go to the doctor? That is a ridiculous proposition. Most people go to the doctor when they have an injury, when they are unwell. We have the sports science department giving them supplements. That is not a trigger to go to the doctor.

Mr McDevitt: The sports science department—Stephen Dank?

Senator BACK: But we did not know about him at the time.

Senator DI NATALE: This is all well and good in retrospect. I know this sounds like it is a personal attack. I get that you have to implement what is a very rigid code. But, again, I am of a similar view to Senator Back's. You say ultimate liability rests with the players. Do you actually think it is fair?

Mr McDevitt: Yes, I do. And the reason I think it is fair is that it is fair to all of those thousands of athletes in hundreds of sports who run onto the field and expect it to be a level playing field, and do not want to run onto the field with somebody else who has got substances pumping around in their body that are promoted for quick recovery but make them bigger and stronger than the rest of us.

Senator DI NATALE: Substances that they do not know are actually prohibited substances. Let's not forget that small detail.

Mr McDevitt: But it is their job as athletes, as professional athletes, to make it their business to know. That is the cornerstone of the code and it is there for good reason. Yes, it might be seen to be strict, but it is strict and absolute. You ask any professional athlete anywhere on the globe. That is why this is so heavily subscribed across the world. Athletes want to be in a fair, square sport. If the athlete gets injections, the athlete must be asking the question 'What is it that you are injecting into me?'

Senator DI NATALE: Let me ask you just a couple more questions. One thing that has again struck me as a gross inconsistency here is that you have got one tribunal that uses a particular standard of evidence and then you have got another tribunal that uses a totally different standard of evidence. I think it was described as chain versus strand, but basically it is a different standard of evidence and proof. Why do we have that? Isn't that a problem with the process?

Mr McDevitt: No. The standard of evidence was the same for the tribunal and for CAS and is the same for all sporting tribunals. The standard is comfortable satisfaction. As I said, the comfortable satisfaction bar can move from—

Senator DI NATALE: Are you saying that you have got the same—

Mr McDevitt: The same standard, yes, but it is up to the panel adjudicating to apply that bar correctly and appropriately in the case. What has happened here is that they have started with the same standard of proof, but WADA and I both felt that it had not been applied correctly by the AFL tribunal, and the Court of Arbitration for Sport also believed it had been—

Senator DI NATALE: That is different to the analysis I have seen. You are saying that the AFL Tribunal got it wrong, but they are using exactly the same process for determining guilt.

Mr McDevitt: You have brought in a couple of different issues. One is the standard of proof to be applied—the lens that the adjudicator should look through, almost. That is the comfortable satisfaction lens, which was applied by both panels but set differently.

Senator DI NATALE: Hang on—applied by both panels but set differently? That is a different process.

Mr McDevitt: This is where it is slightly complicated. Let me try to explain it a little bit. If you were to say, for example, that something is adjudicated beyond a reasonable doubt, it means that you are saying with 95 to 98 per cent certainty that this is probably what happened. If you are saying 'on the balance of probabilities', you are saying that there is about a 60 per cent possibility that this happened. The difficult thing with comfortable satisfaction is it actually moves in between those, depending on several factors, including likely penalties, severity of the offence and so on. That was the level of accountability that both panels were expected to apply in this case.

The other factor that is slightly confusing is the way the evidence is presented. This is the links-in-the-chain approach versus the strands-in-the-cable approach. I do not want to get too bogged down, but I gave an example earlier. The tribunal used the links-in-the-chain approach, and said, 'You must prove where the Thymosin Beta-4 came from.' The Court of Arbitration for Sport said, 'That is wrong; you don't have to prove that at all.' In fact, if you had to prove that in every anti-doping case, it would be almost impossible.

Senator DI NATALE: Why the difference between the two?

Mr McDevitt: The other way of looking at this is that, as you know, Senator, in every walk of life—whether it is a criminal jurisdiction, commercial courts, international courts—quite often you will get different panels looking at the same evidence through presumably the same lens and coming up with very different conclusions.

Senator DI NATALE: Sure, but we are not describing that. You have already said that there were different thresholds applied. We are not talking about that; we are talking about different thresholds.

Mr McDevitt: No, we are talking about comfortable satisfaction.

Senator DI NATALE: You just said one is 60 per cent; the other is 80 or 90 per cent.

Mr McDevitt: They are two other thresholds—balance of probabilities and beyond a reasonable doubt. The criminal jurisdiction uses beyond a reasonable doubt; sports use comfortable satisfaction. I did not invent it, but it moves in between those two.

Senator DI NATALE: I want to ask about the Cronulla players. Why hasn't the NRL issued infraction to those five former Cronulla players who declined to plead guilty in 2014?

Mr McDevitt: I have asked the NRL the same question.

Senator DI NATALE: Okay, so it is a question for the NRL. Why did you take no action against the four Essendon players who signed the consent forms to be administered with Thymosin Beta-4, but then said they did not receive injections from Dank in 2012.

Mr McDevitt: They were not proceeded against.

Senator DI NATALE: Why not?

Mr McDevitt: This was about gathering sufficient evidence to be able to proceed.

Senator DI NATALE: So they were just smart by saying they did not get the injection?

Ms Perdikogiannis: Those players did not disclose that they had had no injections, and there was no evidence to the contrary.

Senator DI NATALE: So they may have had the injections, you just did not have evidence—

Ms Perdikogiannis: Of that fact.

Senator DI NATALE: —to support that, whereas you had evidence that others did?

Ms Perdikogiannis: That is right.

CHAIR: Are you telling us that the people who were found guilty self-incriminated?. I am at a loss to understand the difference between them and the ones who were let off—I think you said they had received injections?

Ms Perdikogiannis: They had signed consent forms, but denied receiving injections. There was no other contemporaneous evidence, either in the text messages or material gathered from Essendon's server, that indicated anything to the contrary.

Senator BACK: So the message for the 34 was, 'They should have gone down the path of their colleagues, shouldn't they?' You would not be here today—and they would not be guilty today—if they had not self-incriminated. Am I correct in that assumption?

Mr McDevitt: I would not assume that, Senator. There are two issues: was there a possible violation and does it warrant action? There was an evidence-gathering exercise which included multiple elements, including player's interviews and also other paths. We proceeded against the 34 where we felt that we had sufficient evidence to proceed. Subsequently, that decision has been confirmed and validated by the Court of Arbitration for Sport.

Senator BACK: I have one last question. I will tell you what I am on. Are you on any pharmaceuticals at all?

Mr McDevitt: No.

Senator BACK: You are not on any?

Mr McDevitt: No.

Senator BACK: I am. I am on ramipril, caduet and cartia. I have to say to you, I am a veterinarian. I am on those pharmaceuticals as a result of advice from my doctor, and the chemist prescribes them. I have never gone to have a look at the pharmacology of those three. I trust the advice of my doctor and my chemist. I am at a loss to understand how you would say that an 18-year-old should. I spoke recently to John Worsfold, who was the Eagles coach—he is now the Essendon coach—and a pharmacist. I put to him the question, 'Would an 18-year-old kid in the Eagles have challenged you, John, if you had said, "This is okay to use" when you are a senior coach and you happen to be a pharmacist?' I am at a loss to understand how you would think that an 18-year-old or 19-year-old would go past the doctor and the pharmacist, having gotten something in writing from his club, presumably signed by the doctor to say it was legal to use. I cannot understand it.

Mr McDevitt: This is the problem, Senator: in your situation those medications were, you just said, given to you by the doctor. That is not the case here. That is not the case at all.

Senator BACK: But the doctor oversaw it, didn't he? The club doctor oversaw it.

Mr McDevitt: No, the club doctor was totally in the dark. That is the difference between your situation and this. Why was the club doctor kept totally in the dark? I know you probably would not take anything that was not given to you, as you just said, by your doctor. In this case, the doctor was kept in the dark. It was not given to them by the doctor.

Senator BACK: So in terms of this particular brew which probably aids to recovery, Gatorade, do you think it shouldn't be used? It helps in recovery or rehydration.

Mr McDevitt: Gatorade is not on the banned list.

Senator BACK: Was this?

Mr McDevitt: This was.

Senator BACK: At the time?

Mr McDevitt: Thymosin beta-4 is on the banned list.

Senator BACK: Was it then?

Mr McDevitt: Yes. You would not believe the level of education that is delivered to these people by the AFL and by us, constantly and regularly, about their personal responsibility. I know people say, 'The club said to do it or someone else said to do it.' You just cannot shift that personal responsibility to anybody, full stop.

Senator BACK: And to finish someone's career is appropriate in terms of a penalty?

Mr McDevitt: That education program tells them very clearly what the penalties are. There are significant consequences for going down this path—and for very good reasons. If you have players running onto the field and playing against 17 other teams, what do you say to the other 17 teams about a team that has embarked on a program designed to make them bigger, stronger and recover more quickly?

Senator BACK: The difference—and you can speak about Olympic sports, et cetera—is that athletes are drug tested and if there is a positive the sample is split to an A and a B sample. If the A sample is found to be positive the due process requires that they are advised. The B sample is either analysed by a separate laboratory or—more likely—they get the chance to nominate someone to oversee it. So in all of those cases you have the due process of the law, haven't you? You have a drug or chemical—call it whatever you like—that is known to have a performance-enhancing effect that has been found to be in the body and nobody can argue the guilt of that person. But this is a totally different circumstance, isn't it?

Mr McDevitt: What you have said—and you have described very well the processes for an adverse analytical finding—

Senator BACK: Correct.

Mr McDevitt: You have described that beautifully; that is exactly what happens when there is a positive test.

Senator BACK: That is right, but we are not dealing with that, anyway.

Mr McDevitt: We have averaged two positive tests per month for roughly the last five years in this country. But what we also have is the fact that in more than 30 per cent of our cases there has not been a positive test. The issue with a lot of these substances now is that there are masking agents. The substances exit the body very, very quickly, and that is why testing needs to be at the forefront.

Senator BACK: We all know the challenges of getting a positive test.

Mr McDevitt: The lack of a positive test in no way shape or form means that an athlete is not cheating. That is what I am saying to you.

Senator BACK: With respect, and I will finish there—I am sounding cynical, but I do have to say it to you—I think the reason you went down the path of WADA rather than an Australian court of appeal, based on many years of experience in this space, is that you realised that an Australian court of appeal would have upheld the AFL decision. You do not have to comment on that. It is just my observation. It might appear cynical, but I think it is the case.

Mr McDevitt: I disagree, but in the interests of time—

CHAIR: Can I ask one quick one? Just for clarification: you said that thymosin beta-4 is on the banned list. Why is it on the banned list? Is it because it has not been tested or because it is known to be performance enhancing and unsafe?

Mr McDevitt: I would have to take it on notice. I suspect it will be a combination of both. I suspect it will be because it has not gone through a clinical trial—so it has not been determined to be fit for human consumption—on the one hand and, on the other, early science has most likely indicated that it does enhance performance. I suspect that for those two reasons it has probably been put on the banned list, but I will come back to you if that is wrong.

CHAIR: What is the tipping point with performance enhancing? There are a lot of things that are performance enhancing, but they are not all on the banned list—natural substances, all sorts of things, which help you perform better and help you recover better. Is it safety or is it how much it helps your performance?

Mr McDevitt: Again, it is a combination of both. My understanding is that the banned list is released annually. It is updated. There is a team of scientific experts who are brought together globally and they assess—because, obviously, hundreds and hundreds of pharmaceuticals and other substances come onto the market each year—and the list is updated. The list is promulgated annually. That is how it works.

Ms Perdikogiannis: If I may elaborate on that: WADA's list committee considers three criteria when deciding whether or not to include a substance on the prohibited list. Those are whether the substance is performance enhancing, whether the substance is dangerous to the health of athletes or whether the substance is against the spirit of sport. If the substance meets two of those three criteria then it is a substance that the list committee might resolve to put on the list. As Mr McDevitt said, substances that have not been approved for human use or veterinary use are prohibited. They are in what is known as the S-0 category. Thymosin beta-4 is a substance that is regarded as being one those peptide hormones and it is said to cause cell regeneration and blood vessel regeneration. But, as Mr McDevitt said, we can give more information on notice.

CHAIR: You said that it needs to meet two of those three criteria. So a substance could be safe, but if it is performance enhancing and it is against the spirit of sport it could be on the banned list. That seems a slightly nebulous term. What does that mean: against the spirit of sport? Gatorade clearly is not against the spirit of sport. It is seen as safe, perhaps slightly performance enhancing. Is it the degree to which it is performance enhancing that determines whether it is against the spirit of sport?

Mr McDevitt: The spirit of sport is about fair play, an equal field, a level playing field, and no athlete having an advantage. To be in breach of the spirit of sport means that somebody has an artificially induced advantage.

Ms Perdikogiannis: Potentially, a masking agent—so a substance that masks the evidence of a performance-enhancing substance in the body—might not of itself be performance enhancing, but it would be against the spirit of sport because it was concealing the use of a performance-enhancing substance.

CHAIR: We are just about out of time. Senator Peris.

Senator PERIS: Mr McDevitt, I want to go back a few steps. On 13 February, was thymosin beta-4 on the ASADA banned list?

Mr McDevitt: It is not the ASADA banned list; it is the WADA banned list.

Senator PERIS: Was it on the ASADA banned list or the WADA banned list?

Mr McDevitt: We do not have our own list. We all use the one list. It is brought together, then experts look at it each year and it is put out each year. All subscribing countries and sports use the one list—other than the NFL, for example, like we discussed before. They make their own list.

Senator PERIS: Did you say that came into play in 2006?

Mr McDevitt: I would have to double-check. The first iteration of the WADA Code came out in 2003. Our legislation was passed in 2006. I would have to take on notice when the list itself was first brought about.

Ms Perdikogiannis: There have been lists around. The IOC, for instance, had a list of prohibited substances and methods. The first WADA list, I believe, was in 2003. We apply the WADA list. That gets published and distributed every year by the World Anti-Doping Agency, and that is the list we apply.

Senator PERIS: A few things have changed. Back in my day as an athlete, I was drug tested by ASADA and WADA, depending on my world ranking. Are you saying that all sports in this country are subject to WADA drug testing?

Mr McDevitt: We have 85 sports. It will not be all sports. I think there are some sports who are not compliant.

Senator PERIS: Who determines the sports that are not compliant to that?

Mr McDevitt: The sports themselves determine whether or not they want to apply to be part of this framework and to have a compliant anti-doping policy. Most sports want their sport to be clean and fair.

Senator PERIS: If it is the World Anti-Doping Agency, do you agree that you should be an international sport to have it apply to you? Or are you saying that we should have a blanket approach for all sports?

Mr McDevitt: I come back to this: it is up to how the sport administrators feel about having a level playing field for their sport.

Senator PERIS: The positive tests that came back—how many of those actually tested positive?

Mr McDevitt: I said earlier that there is no test for detecting artificial thymosin beta-4. There is no test itself at this point in time.

Senator PERIS: But it is a banned substance?

Mr McDevitt: It is on the banned list, yes. Where it gets a little bit confusing is that we all have thymosin beta-4 in our bodies anyway. When I say that there is no test, it is that we cannot at this point in time differentiate between the endogenous TB-4 which we all produce and that additional TB-4 which might be artificially administered. That is the test that is missing at the moment.

Senator PERIS: You are saying that we have that naturally occurring in our body. The point I am making is that there was a lot of commentary about no-one going to the doctor. To me, with my sporting background, I would go to see our team doctor if I was sick, but you have a sports science unit. I know that having ice baths, for example, helps with your recovery. Protein shakes, as we know, can contain amino acids which help with recovery. Athletes are provided protein shakes through their sports science unit. If you are a player excited about playing AFL—it is your dream job—and you are told that to help with your recovery you are going to be taking a substance that occurs naturally in your body anyway, do you not agree that it is a harsh penalty?

Mr McDevitt: Senator, can I ask you: in your career, did you get injections on multiple occasions?

Senator PERIS: We did. When we went to India and we went overseas, we would all have to line up, and the team doctor would come along and give us our flu injections.

Mr McDevitt: It was explained to you that it was a flu injection? Was it administered by a doctor or a trained professional?

Senator PERIS: The flu injection was administered by—yes.

Mr McDevitt: So you would have had the comfort and knowledge, and you would have done the personal research knowing your responsibilities about what was going into your body as a professional athlete. You would have asked the questions. You would have said, 'This is the flu injection?' and presumably it would have said that, and someone would have told you that, and you would have been comfortable that what you were getting was for the flu.

Senator PERIS: That is correct. I guess I am saying they were in an environment where they were told that what they were doing was the right thing to do.

Mr McDevitt: Well, they were told not to tell anybody. When you were an athlete, were you ever told, 'Hey, you know these injections you are going to get; just don't tell anybody about that'? Were you ever told anything like that?

Senator PERIS: No.

Mr McDevitt: Would that have worried you?

Senator PERIS: No.

Mr McDevitt: It would not have worried you?

Senator PERIS: I know who the senator being questioned here is. Does ASADA believe that the current antidoping framework in Australia is working well, enough to cater for the AFL and other team sports?

Mr McDevitt: Absolutely.

Senator MADIGAN: Mr McDevitt, you refer to this WADA list of banned substances. I have been trying to find where this list is. For the benefit of the committee, could you point us to where this list is, because I am having difficulty finding this list that you have referred to tonight.

Mr McDevitt: I will give you the link.

Senator MADIGAN: Also, for the benefit of the committee, is ASADA able to furnish the committee with screen shots of the banned substances over the past five years, between 2010 and the present day?

Mr McDevitt: Essentially that will be copies of the list. Yes, I think we can get that for you.

Senator MADIGAN: And also tell us where we can get those ourselves—

Mr McDevitt: Sorry?

Senator MADIGAN: where the committee can access the lists of the banned substances from 2010 to the present day.

Mr McDevitt: It is on the WADA site, which is all part of the education program that goes to all the athletes. They all get education programs showing them exactly where the list is, but we will make it available to you.

Senator PERIS: Does James Hird have any further appeal rights over the ASADA matter?

Mr McDevitt: James Hird, as you know, initiated action against ASADA to the Federal Court asserting that the investigation was flawed and illegal. The investigation was held by Justice Middleton to be entirely legal, lawful and appropriate. Mr Hird then exercised another appeal opportunity, or right, to go to the full bench of the Federal Court. We then had a unanimous finding by the full bench confirming the earlier finding, so he has exercised a number of appeal rights in this matter already.

Senator PERIS: Does he have any further?

Mr McDevitt: I do not know what you mean. To appeal what? He has not had a violation substantiated—

Senator PERIS: Does he have any further right?

Mr McDevitt: As I say, he has exercised quite a few appeal rights. We talk about how long this thing has gone for. That is one of the contributing factors.

Ms Perdikogiannis: Mr Hird could have sought special leave to appeal to the High Court against the ruling of the full Federal Court, but he elected not to do that.

Senator MADIGAN: Could you show us where TB4 is specifically mentioned on those lists of WADA from 2010 to the present day?

Mr McDevitt: I will take that on notice.

Senator MADIGAN: Thank you.

CHAIR: I just remind senators that written questions on notice should be provided to the secretariat by close of business on Friday, 4 March 2016. Thank you, Minister. Thank you, Mr Bowles, Mr McDevitt and all our officials.

Committee adjourned at 18:24