

Case number: NST – E20 – 157605

Case Title: Ashcroft v Powerlifting Australia and Sport Integrity Australia

DETERMINATION

NATIONAL SPORTS TRIBUNAL

Anti-Doping Division

Sitting in the following composition:

Panel Member/s	Mr. David Grace AM QC (Presiding Member)
	Dr. Peter Harcourt OAM
	Ms. Sarah Cook OLY GAICD

in the arbitration between

Cristine Ashcroft *(Applicant)*

Represented by Michael Bosscher, Solicitor

And

Sport Integrity Australia CEO *(Respondent – Sport Integrity Australia CEO)*

Represented by Patrick Knowles, Barrister

And

Powerlifting Australia *(Respondent – Sporting Body)*

Represented by Robert Wilks, CEO

Parties

1. The Applicant, Ms. Cristine Ashcroft (“the Athlete”) competes in the sport of para-powerlifting. The governing body of her sport, of which the Applicant is a member (pursuant to a membership agreement), is Powerlifting Australia (“PA”). Sport Integrity Australia (“SIA”) is the independent National Anti-Doping Organisation for Australia.

Introduction

2. SIA is authorised under the PA Anti-Doping Policy 2015 (“the Policy”) to institute proceedings against an athlete who it asserts has engaged in Anti-Doping Rule Violations (“ADRVs”) contrary to Article 2 of the Policy. In these proceedings both SIA and PA assert that the Athlete has engaged in the following ADRVs, which were the subject of an Infraction Notice dated 25 June 2020 issued to the Athlete:
 - (a) *Presence of a Prohibited Substance/s or its Metabolites or Markers, namely Exogenous Testosterone, Androsterone, Etiocholanolone and 5 β -androstane-3 α , 17 β -diol on 21 October 2017;*
 - (b) *Presence of a Prohibited Substance/s or its Metabolites or Markers, namely Exogeneous Androsterone, Etiocholanolone and 5 β - androstane-3 α , 17 β -diol on 21 February 2018;*
 - (c) *Use of a Prohibited Substance, namely Testosterone, on or about 3 August 2017 to on or about 21 February 2018;*
 - (d) *Possession of a Prohibited Substance, namely Testosterone, on or about 3 August 2017 to on or about 19 December 2017;*
 - (e) *Use and/or Attempted Use of a Prohibited Substance, namely Growth Hormone, on or about 23 September 2016 to on or about 30 September 2017; and*
 - (f) *Possession of a Prohibited Substance, namely Growth Hormone, on or about 23 September 2016 to on or about 30 September 2017 (collectively, “the asserted ADRVs”).*

3. ASADA advised the Athlete in the Infraction Notice that it had determined that a period of four (4) years' ineligibility be imposed, pursuant to Article 10.2.1 of the Policy (PA previously had imposed a mandatory Provisional Suspension on the Athlete on 21 March 2018). The Athlete was advised that she could accept the sanction or challenge it before the Court of Arbitration for Sport or the National Sports Tribunal ("NST"). The Athlete elected to challenge the sanction before the NST.

National Sports Tribunal Jurisdiction

4. The NST has jurisdiction under Section 22 of the National Sports Tribunal Act, 2019 (Commonwealth) to determine this dispute. The jurisdiction arises because pursuant to Section 22(2)(a) of the Act, PA has a Policy that has been approved by the Chief Executive Officer of SIA (previously ASADA) and pursuant to Section 22(2)(b) of the Act, the Athlete is bound by the Policy. Further, Article 1.3.1 of the Policy provides that the Athlete is bound by it.
5. Further bases of jurisdiction are to be found in Section 22(2)(c) and (d) of the Act as the dispute arises in relation to the Athlete and is of a kind which the World Anti-Doping Code provides for a form of hearing (Article 8.1 of the World Anti-Doping Code, 2015). Although the Policy does not provide for disputes to be heard in the Anti-Doping Division of this Tribunal (see Article 8.4.1) the Parties have agreed in writing for the dispute to be heard by the Anti-Doping Division of this Tribunal. This is evidenced by the agreement signed by the Athlete's legal representative on 8 July 2020 and the written approvals given by the CEO of PA and SIA on 9 July 2020.
6. All parties have therefore consented to the jurisdiction of the NST and no objection has been made to the jurisdiction of the NST to deliver a Determination.

7. The Chief Executive Officer of the NST appointed David Grace AM QC as the Presiding Member and Dr. Peter Harcourt OAM and Ms. Sarah Cook OLY GAICD to be Panel Members for the purposes of this hearing. No party objected to the composition of the Panel.

Factual Background

8. The Athlete, who is aged 54 years, has previously been a member of the Australian Army. In 2010 she was deployed to Afghanistan and was wounded. She suffered a traumatic brain injury, hearing loss and spinal damage. She suffers from severe nerve pain, loss of leg strength and function in her left leg and foot. She has had a complete shoulder reconstruction and bicep re-attachment. She also has mental health issues and suffers from post-traumatic stress disorder, depression and anxiety.
9. In 2014 she was diagnosed with breast cancer and underwent a bi-lateral mastectomy. She underwent hormone replacement therapy and was administered medications for cancer prevention, iron, estrogen, tibolone, thyroxine and testosterone following and during surgery conducted under the jurisdiction of Military Health.
10. After a considerable period of rehabilitation, she was medically discharged from the Australian Army in October 2016 and is now under the care of the Department of Veteran Affairs. In February 2017 she had a partial thyroidectomy due to a dysfunctional thyroid and cancer cells being present. She has had chemotherapy and hormone replacement therapy, amongst other therapies, and continues to suffer from a myriad of health complications. She has had medical care from general practitioners, a psychiatrist, endocrinologists and various surgeons.
11. From approximately 2014, the Athlete has been involved in the sport of Powerlifting and at all material times has been a member of PA. She was proficient in the sport

and competed successfully. On 21 October 2017, she competed at the qualifying event, the Australian National Para-Powerlifting Championships, for selection to the Australian team to compete at the 2018 Commonwealth Games. At that qualifying event, she was subject to an in-competition doping control test. There is no dispute that the Doping Control Notification and Sample Collection were conducted in accordance with the appropriate procedural requirements. The Athlete's sample returned an Adverse Analytical Finding to the substances identified in the first ADRV set out at paragraph 2(a) above.

12. During 2017 the Athlete applied to the Australian Sports Drug Medical Advisory Committee ("ASDMAC") for the approval for therapeutic use of a number of medications, namely Targin (oxycodone) and tibolone. The approvals (commonly referred to as therapeutic use exemptions or TUEs – see Clause 4.4 of the PA policy) were granted for specified periods of time; (Targin (oxycodone) from 3 August 2017 to 2 August 2018 and Tibolone from 3 August 2017 to 2 November 2017). An application for approval for human growth hormone (somatropin) was refused at the same time. At all relevant times the Athlete did not have a TUE approval for growth hormone, testosterone or any other substances other than Targin (oxycodone) and tibolone. A retroactive application for a TUE to allow the Athlete to be able to use somatropin and testosterone from 4 September 2017 was made on 23 March 2018 and refused.
13. On 21 February 2018 during an out-of-competition test by ASADA, the Athlete's sample returned an Adverse Analytical Finding to the substances identified in the second ADRV set out at paragraph 2(b) above.
14. On 10 April 2018 the Athlete participated in an interview with ASADA investigators. During the course of the interview, she made admissions relating to the alleged Use and Possession of testosterone including admissions that she had obtained a referral from her General Practitioner ("GP") Dr. Sinclair to Dr. Hayes, an Endocrinologist, who prescribed testosterone to her on or about September 2017.

She admitted that she purchased the substance from the Seaforth Pharmacy and had received an injection about 2 ½ weeks prior to the sample being taken from her on 21 October 2017. Importantly, she stated that this was the only time she had used testosterone. In the same interview, she made admissions relating to the alleged Use, Attempted Use and Possession of growth hormone including admissions that she had trialled growth hormone for 7 days, with Dr. Sinclair administering the first dose and the Athlete administering the remaining 6 doses to herself at home, and that the growth hormone had come from Dr. Sinclair who had it with him in his rooms.

15. ASADA investigators served a Disclosure Notice on Seaforth Pharmacy and discovered that two prescriptions for testosterone had been dispensed to the Athlete, one on 3 August 2017 and one on 18 December 2017. It was also discovered that ten prescriptions of growth hormone had been dispensed to the Athlete, namely one on 28 September 2016, two on 24 October 2016, one on 21 November 2016, one on 29 November 2016, one on 6 January 2017, one on 18 January 2017, two on 12 February 2017 and one on 12 July 2017.
16. Pursuant to a Disclosure Notice served on the Athlete, she produced two mobile phones and an iPad. The phones revealed text messages relating to what appeared to be the Athlete's use of growth hormone between 5 November 2016 and 6 August 2017. In a letter to the ASDMAC dated 1 April 2018, the Athlete stated that in March 2017 her GP had administered a 7-day trial using somatropin to assist her chronic pain "*as I had experienced some relief before*" (earlier in 2017 at Royal North Shore Radiology). She further stated that in September 2017, her GP, in an attempt to help her chronic nerve pain including the pain following thyroid cancer, had prescribed a testosterone injection as he felt that may assist. The Athlete further stated that the medication was primarily used to treat her chronic nerve pain along with thyroid and menopausal symptoms.

17. On 3 April 2018, Dr. Sinclair wrote a further letter to the ASDMAC in support of the Athlete's retroactive TUE application. He stated, inter alia, that:

"In March and September of 2017 in desperation of managing Chris's chronic nerve pain and symptoms of the previously stated in my letter dated 21 March 2017 conditions, I prescribed and administered a course of somatropin and a small dose of testosterone after extensive research on how this treatment can assist pain management post cancer in older patients and for Chris's symptoms, I firmly believe this will improve her quality of life... I applied to have this treatment remunerated by the Department of Veterans Affairs, as it is costly, however as it was only a trial it has not been successful. At this stage I would like to prescribe this course of action again for Chris as I have used it before in older patients and had great success..."

18. On 11 April 2018, Dr. Sinclair wrote to Dr. Susan White in relation to the Athlete, in which he stated, inter alia, the following:

"In an attempt to wean her from this medicine, but still control this medicine [narcotic analgesia], but still control the pain, we decided to institute injections of HGH in a small physiological dose rather than a pharmacological dose. Interestingly this did seem to control her pain and we were able to decrease her use of narcotic analgesia. I did make overtures to the Department of Veterans Affairs to recover the expenses involved in this medicine, unfortunately no permission was forthcoming so, even though the medicine was actually working, we were forced to abandon the treatment because of the expense...she has also used testosterone in very small doses (in fact one dose only) to control her menopausal symptoms and an attempt also to help with the pain. This medicine was prescribed by a colleague and I administered the 1 ml injection in the prescribed amount. While there was an initial response the effect only lasted for 2 weeks and she has abandoned this treatment as well."

19. On 27 May 2018, by email to ASADA, the Athlete made admissions to purchasing growth hormone on eight occasions, purchasing testosterone on or about 18 December 2017 and being in possession of an auto-injecting device for injecting herself with growth hormone.
20. As referred to above, the Athlete participated in an interview with ASADA investigators on 10 April 2018. In that interview the Athlete accepted that she knew that testosterone and growth hormone were prohibited substances but said that she was using them to alleviate pain rather than to cheat and that she only realised later that she should apply for a TUE. She also stated that she knew the substances were used (in big doses) to cheat in sport but qualified that by saying

she was using the substances “*just to alleviate pain*”. She accepted in the interview that she had an obligation to “*be up front with everything you’re taking, like, you know, all your medication. If you are unsure, ring – ring the ASADA phone and ask them.*” She accepted that she had not applied for a TUE prior to using testosterone and growth hormone. She accepted that she had undertaken ASADA anti-doping education. In the interview she indicated that when she was participating at a powerlifting event in Dubai she undertook a face-to-face education session, presumably with WADA. Further, she completed the ASADA Level 1 Anti-Doping Course on 16 November 2017 and the Level 2 Anti-Doping Course on 7 February 2018. She made admissions in this regard in her interview. The Athlete at all material times was an international level athlete having competed at the World Para-Powerlifting World Cup in Dubai in early 2017, the Australian National Para-Powerlifting Championships in Queensland on 21 October 2017 and the World Para-Powerlifting Championships in Mexico City on 2 December 2017. She was selected in the Australian Para-Powerlifting team to compete at the 2018 Commonwealth Games following her results in the qualifying event on 21 October 2017 at the Australian National Para-Powerlifting Championships.

21. A number of the text messages discovered on her phones revealed communications between the Athlete and Dr. Sinclair and between the Athlete and her previous coach David Sheehan. Of significance were a number of SMS exchanges on 28 July 2017 with David Sheehan in which the Athlete told Mr. Sheehan that she had “HGH” to which Mr. Sheehan responded by stating “*lets start HGH together and push it big time*”. Also revealed in the investigation of the Athlete’s devices were a number of letters to and from Dr. Sinclair and Dr. Hayes, the contents of which will be detailed below.
22. The investigations by ASADA referred to above resulted in the further asserted ADRVs in relation to testosterone and growth hormone set out at paragraphs 2(c), (d), (e) and (f) above.

23. Testosterone is classified as a Non-Specified Substance and is prohibited at all times under the 2017 and 2018 Prohibited Lists. Growth Hormone is classified as a Non-Specified Substance and is listed under Class S2.5 of the 2016 and 2017 Prohibited List and is prohibited at all times under both Lists.
24. On 23 March 2018, the Athlete submitted an application for a retroactive TUE. In her application she stated that she had injected testosterone on only one occasion in September 2017 and that she had injected growth hormone daily commencing in March/September 2017 pursuant to courses prescribed for her by Dr. Sinclair, and that the growth hormone and testosterone were administered to her. In a subsequent email to ASADA dated 1 May 2018, the Athlete provided a letter from Dr. Sinclair dated 26 April 2018 which stated that the Athlete used growth hormone daily for the month of March 2017 and that in September 2017 she had obtained a prescription for testosterone that Dr. Sinclair administered by deep intramuscular injection into her buttock.
25. The letters to and from the Athlete's medical practitioners are important and are detailed hereunder.
26. On 11 October 2017, Dr. Stuart Saker, Consultant Psychiatrist, wrote to the Athlete's GP Dr. Michael Sinclair. That letter briefly outlined the history of the Athlete's mental health issues and detailed the medications she was then taking. In that letter, Dr. Saker stated that the Athlete "*has had Testosterone 1.2 mg with Semotropin for Dysfunctional Thyroid and Cancer recovery in 2017*".
27. Earlier on 3 August 2017 Dr. Sinclair had written to Dr. John Hayes, Endocrinologist, referring the Athlete to him. In that letter of referral, Dr. Sinclair stated, inter alia: "*I have discussed with her many times starting Testosterone and would appreciate your assistance in commencing and monitoring this as we move forward.*"

28. On 6 September 2017, Dr. Hayes, after conferring with the Athlete, wrote back to Dr. Sinclair and stated, inter alia: ***“I have not started her on Testosterone after discussions in length about the side effects and impact on her family and sport”*** (emphasis added). Dr. Hayes further stated that he had prescribed one dose of 0.2 ml testosterone and B12 in the hope *“this may assist, elevate her mood, pain and address her low Iron after Thyroid surgery early this year.”*
29. In support of the Athlete’s application for a retroactive TUE, Dr. Sinclair provided a letter dated 21 March 2018, which, after outlining the Athlete’s medical conditions, stated:
- “In March and September of 2017 in desperation of managing her discomfort and symptoms of the above, I have prescribed and administered a course of Semotropin with a small dose of Testosterone to elevate her Thyroid function and help with her fatigue and loss of libido. Chris has been admitted to several Army based hospitals due to Depression and suicidal thoughts due to her injuries and I had exhausted all therapies and medication to date...these medications were not administered for performance enhancement; they were in an attempt to help a decorated Veteran who has battled psychological and physical injuries since 2010 and improve her quality of life...At times due to Chris’s brain Injury and hearing loss, she struggles to make sense of matters that the “normal” person would find easy. I believe Chris declared the use of Semotropin but by no fault of her own may not have disclosed the Testosterone treatment last year that would have remained in her system...”*
30. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties, it refers in its Determination only to the submissions and evidence it considers necessary to explain its reasoning.

Proceedings before the NST

31. Upon the parties agreeing to the NST hearing the dispute, the NST conducted a preliminary conference and issued directions as to the provision of submissions by the Applicant and Respondents. Further, the Parties agreed to the Terms of the Arbitration and accepted that the matter would be conducted in accordance with the Policy and that it would be governed by the NST Act 2019, the NST Rule 2020 and the NST (Practice and Procedure) Determination 2020 as provided for by

Section 29 of the NST Act. It was also agreed that the law applicable to the merits of the Arbitration would be the law of the Australian Capital Territory. The Applicant's submissions were filed and served on 17 August 2020 and submissions on behalf of SIA were filed and served on 14 September 2020. The CEO of the NST determined that the hearing be conducted by video-conferencing media on 22 October 2020. The Panel convened the hearing on that date and all parties were represented by legal practitioners. At the conclusion of the hearing on 22 October 2020, the Panel adjourned the hearing for a short period of time and then reconvened to announce its findings, in short form, and advised that the Panel would publish its detailed Determination in due course. The findings announced on 22 October 2020 are reflected in this Determination.

Applicable Rules

32. Article 2.1 of the Policy creates an ADRV of "Presence of a prohibited substance or its metabolites or Markers in an Athlete's sample". Article 2.1.1 of the Policy provides:

"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1."

33. Article 2.2 sets out that Use or Attempted Use of a Prohibited Substance is an ADRV. Article 2.2.1 states:

"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method."

34. Article 2.6 provides that Possession of a Prohibited Substance or Prohibited Method is an ADRV. Article 2.6.1 states that an ADRV is constituted by:

“Possession by an Athlete In-Competition of any Prohibited Substance or any Prohibited Method, or Possession by an Athlete Out-of-Competition of any Prohibited Substance or any Prohibited Method which is prohibited Out-of-Competition unless the Athlete establishes that the Possession is consistent with Therapeutic Use Exemption (TUE) granted in accordance with Article 4.4 or other acceptable justification.”

35. Pursuant to Articles 10.2.1 and 10.2.1.1 the period of ineligibility for each of the ADRVs is four years, subject to the Athlete establishing that the ADRV was not intentional. Article 10.2.3 provides that:

“the term ‘intentional’ is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not ‘intentional’ if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered ‘intentional’ if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.”

36. Pursuant to Article 10.7.4.1, in the circumstances of this case, where the second and subsequent ADRVs occurred prior to notice being given of the first ADRV, *“the violations shall be considered together as a one single first violation and the sanction imposed shall be based on the violation that carries the more severe sanction”*.

37. Pursuant to Article 10.4 of the Policy, where an athlete establishes *“No Fault or Negligence”* the period of ineligibility *“shall be eliminated”*.

38. *“No Fault or Negligence”* is defined in Appendix 1 of the Policy as:

“The Athlete or other Person’s establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system (emphasis added).

39. *“Fault”*, is also defined in Appendix 1 as follows:

“Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person’s degree of Fault include, for example, the Athlete’s or other Person’s experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree or risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete’s or other Person’s degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete’s or other Person’s departure from the expected standard of behaviour....”

40. The footnote to Article 10.4 of the Policy provides useful guidance to the establishing of “No Fault or Negligence”, and “No Significant Fault or Negligence”. It relevantly states:

“This Article and Article 10.5.2 apply only to the imposition of sanctions; they are not applicable to determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault, or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete’s Personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical Personnel and for advising medical Personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete’s food or drink by a spouse, coach or other Person within the Athlete’s circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.5 based on No Significant Fault or Negligence.” (emphasis added).

41. Article 10.5.2 provides:

“If an Athlete or other Person establishes in an individual case where Article 10.5.1 is not applicable, that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person’s degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable.”

42. “No Significant Fault or Negligence” is defined in Appendix 1 to the Policy as:

“The Athlete or other Person’s establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in

the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.”

43. The footnote to Article 10.5.2 states:

“Article 10.5.2 may be applied to any anti-doping rule violation except those Articles where intent is an element of the anti-doping rule violation (for example Article 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (for example Article 10.2.1) or a range of Ineligibility is already provided in an Article based on the Athlete or other Person’s degree of Fault.”

44. Article 10.6.3 states that:

“An Athlete or other Person potentially subject to a four-year sanction under Article 10.2.1 or 10.3.1 (for evading or refusing Sample Collection or Tampering with Sample Collection), by promptly admitting the asserted anti-doping rule violation after being confronted by ASADA (or another Anti-Doping Organisation), and also upon the approval and at the discretion of both WADA and the Anti-Doping Organisation with results management responsibility, may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete or other Person’s degree of Fault (emphasis added).”

The Main Submissions of the Parties

The Athlete’s Submissions

45. The Athlete did not dispute that she had committed the asserted ADRVs. However, the Athlete’s Application raised disputes in relation to the following matters:

- (a) whether SIA’s interpretation and application of Articles 10.4 and 10.5.2 of the Policy were incorrect at law; and
- (b) whether SIA had improperly not allowed the Athlete a reduced period of ineligibility under Article 10.6.3 of the Policy despite her prompt admissions to the violations, the Athlete’s degree of fault and the seriousness of the violations.

46. Although in the Athlete's written submissions reliance was placed upon a submission that the Athlete had established "*No Fault or Negligence*", that submission was abandoned by the Athlete at the hearing. However, the Athlete sought to establish that she bore "*No Significant Fault or Negligence*".
47. Relying upon the definition of *Fault* (see paragraph 39 above) it was submitted that all circumstances surrounding the admitted facts that the Athlete departed from the expected standards of behaviour were to be considered. The circumstances relied upon were the fact that testosterone and growth hormone were obtained by prescription, that there was a therapeutic purpose for the prescriptions together with the Athlete's impairment and health issues. The circumstances of the Athlete's referral by Dr. Sinclair to Dr. Hayes in relation to her physical and mental health issues, the prescription by Dr. Hayes of one dose of testosterone in an attempt to elevate her mood, reduce her pain and address her complications following thyroid surgery earlier in 2017, and the referral to the Psychiatrist Dr. Saker and the noting by him of the use by her of testosterone and Somatropin were relied upon.
48. The Athlete accepted that in WADA v Bellchambers and Others (CAS 2015/A/4059), the Court of Arbitration for Sport had made it clear that an Athlete must do more than simply rely upon their doctor, however, it was emphasised on behalf of the Athlete that she suffers from a number of issues of impairment, including but not limited to depression, post-traumatic stress disorder, brain injury, deafness and gender dysphoria. Further, at the relevant time she was recovering from a lengthy battle with Thyroid cancer, had cervical spine injuries and injuries to her right shoulder. It was submitted that her circumstances can be distinguished because the substances were being taken for a legitimate and prescribed medical purpose and Dr. Sinclair had said in his correspondence that both the growth hormone and testosterone were administered only in circumstances where they were medically necessary. Reliance was placed by Dr. Sinclair upon Monash

University research which was said to support the administration of testosterone in these circumstances.

49. Taking all the above factors into account, it was submitted that the proper finding of SIA should have been that the Athlete exhibited “*No Significant Fault or Negligence*”. Further, there was no doubt pursuant to the Athlete’s admissions, as to how the prohibited substances entered the Athlete’s body.
50. The Athlete placed reliance upon Article 10.2.3 of the Policy in relation to the proposition that she had no intent to cheat. In Article 10.2.3 the term “intentional” requires that the Athlete engaged in conduct which she knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk. It was contended that because the Athlete’s primary motivation was not done with an intention to cheat, her use of the substances were unrelated to sports performance and were therefore not intentional within the meaning of that phrase. If accepted, that would have the result of reducing the period of ineligibility to 2 years pursuant to Article 10.2.2.
51. In respect of the second challenge to the determined sanction of 4 years, the Athlete relied upon Article 10.6.3 of the Policy (see above) which provides that the Athlete may receive a reduction in the period of ineligibility down to a minimum of 2 years depending on the seriousness of the violation and the Athlete’s degree of Fault if a prompt admission is made. It was contended that during her interview on 10 April 2018 with ASADA that, when confronted with the allegations, the Athlete made admissions to the use of testosterone and growth hormone and then in May 2018 made further admissions in an email to ASADA. The Athlete had also, on 23 March, 2018, submitted retroactive TUE applications in relation to both growth hormone and testosterone, thus admitting use of those substances in the past, as far back as March 2017. It was emphasised that she had made admissions to the violations by emails subsequent to the interview and that she

had been compliant with all requests made of her by ASADA investigators and had cooperated. Reliance was also placed upon the fact that the substances had been prescribed for her and there was a legitimate medical purpose for them in relation her physical and mental impairments. It was further submitted that the seriousness of the violations should be categorised as low and it could not be said that she had obtained any significant advantage or benefit. Based upon these arguments, it was contended that her period of ineligibility should have been reduced from 4 years to 2 years.

Respondents' submissions

52. PA made no oral or written submissions and relied upon the submissions of SIA.
53. SIA submitted that the Athlete had not provided any, or any sufficient evidence to discharge her onus on the balance of probabilities of demonstrating that the ADRVs were not intentional. In turn, if the Athlete did not establish that the ADRVs were not intentional she could not rely upon the provisions in the Policy that allowed a reduction of the period of ineligibility for "*No Fault or Negligence*" or "*No Significant Fault or Negligence*". It was submitted that it was clear in the Policy that a lack of intention was the trigger for the reduction of the period of ineligibility.
54. SIA submitted that there was real doubt as to the exact reason for the Athlete's use of testosterone and, in particular, growth hormone. It was contended that neither testosterone nor growth hormone were indicated for any of the therapeutic uses described in the various items of correspondence (referred to above) between the Athlete's medical practitioners and others. The conditions described namely, dysfunctional thyroid and cancer recovery; chronic nerve pain/pain following thyroid cancer/pain management post-cancer; weaning from narcotic analgesia; help with menopausal symptoms causing depression, loss of libido, sleeplessness, nerve pain, low iron, dry skin and mood swings; help with gender dysphoria and related depression; and to assist in mood elevation, pain and low

iron after thyroid surgery; were said to be not appropriate for the therapeutic use of testosterone or growth hormone.

55. Reliance was also placed upon the Athlete engaging in an SMS exchange with her previous coach, David Sheehan (see above), and the statement by her Endocrinologist Dr. Hayes in his letter dated 6 September 2017 to Dr. Sinclair that he had not started her on testosterone after discussions in length about the side effects and the impact on her family and sport (see above). Further, it was contended that the admissions she had made in her interview on 10 April 2018 that she knew testosterone and growth hormone were prohibited substances were indicative of her knowledge and intent.
56. It was submitted that her answer in her record of interview that she knew the substances were used to cheat in sport but “*but that’s not what I was using it for, so I was using it just to alleviate pain*” could not discharge the onus upon her because even if the Athlete was taking the substances for a legitimate medical purpose, this did not mean that the ADVRs were not intentional.
57. SIA relied upon the TUE process where a person who had a legitimate medical need for a particular substance may seek a Use exemption. It was contended that the Athlete was well aware of this process and had received drug education. Further, it was submitted that there was no general permission for Athletes to use prohibited substances merely because the substances had been prescribed by a doctor.
58. Reliance was also placed upon the notion of “*indirect intent*” (see WADA v Indian National Anti-Doping Agency and Another (CAS 2016/A/4609) where it was stated that if an athlete has manifestly disregarded the significant risk that the medication prescribed would result in an ADRV then they have committed the violation with indirect intent.

59. In her interview, the Athlete maintained that the testosterone and growth hormone enabled her to train and compete regardless of pain and despite being aware that people used those substances to cheat in sport, she continued to use them. This was contended to reveal a clear intent. Additionally, her use was frequent.
60. As to the issue of “*No Fault or Negligence*” pursuant to Article 10.4 of the Policy, SIA contended that that provision could not avail the Athlete in circumstances where she knowingly used the prohibited substances even where they may have had a therapeutic purpose. Further, it was contended that the Athlete clearly knew that she had used or been administered the prohibited substances.
61. In relation to the issue of “*No significant Fault or Negligence*”, SIA relied upon the presence of an intention on the part of the Athlete to use the substances to contend that “*No significant Fault or Negligence*” was not available to the Athlete. It was further submitted that in any event, her Fault or Negligence was significant and in that regard five factors were relied upon:
- (a) the fact that the substances were prescribed by a doctor was not sufficient as an Athlete must do more than simply rely upon her doctor, an Athlete has personal responsibility for the substances that enter her body;
 - (b) even if there was a therapeutic purpose this did not mean that there was not also a performance enhancing purpose and effect;
 - (c) there was insufficient evidence to allow the NST to find that the Athlete’s medical conditions resulted in her committing the ADRVs and further there was no evidence from the Athlete herself or any expert medical evidence called;
 - (d) the Athlete is an experienced Powerlifter, aged 54 years, who has completed drug education courses;

- (e) The Athlete did not seek a timely TUE for the prohibited substances the subject of the ADRVs, despite being aware of the TUE process; further there was no evidence that the Athlete consulted with any person with experience in anti-doping matters and her answers in her interview indicated that she knew the substances were used by athletes to cheat in sport because of their obvious performance enhancing effect.
62. In relation to the issue of a reduction in sanction pursuant to Article 10.6.3 as a result of *“prompt admission”*, it was submitted that the Athlete was not eligible to receive any benefit, notwithstanding the retroactive applications for the TUE on 23 March 2018, the general admissions made in the interview on 10 April 2018 and the further admissions in her email in May 2018, for the following reasons:
- (a) although the Athlete made some general admissions including the use and possession of prohibited substances she did not admit all the asserted ADRVs;
 - (b) she did not admit the ADRVs in response to the Show Cause Notices issued to her and therefore there were no prompt admissions and further attendance at the interview was no more than the Athlete complying with her legal obligation;
 - (c) the admissions made by the Athlete during her interview were not fulsome and were misleading; she admitted to using testosterone once and having had 7 daily doses of growth hormone during a week long trial when in fact the records from her pharmacy revealed that the Athlete was dispensed with three syringes of testosterone on both 3 August 2018 and 18 December 2017 and dispensed with growth hormone on 10 occasions between 28 September 2016 and 12 July 2017;

- (d) the benefit of Article 10.6.3 is only available with the approval and at the discretion of both WADA and the Anti-Doping Organisation with results management responsibility and neither WADA or SIA has given approval in this case;
 - (e) in any event, the seriousness of the violations were evident; there were multiple violations reflecting the number of times the substances were prescribed and used and the obvious intentional nature of the ADRVs.
63. Based upon the above submissions, it was contended that the NST should find that the Athlete had committed the asserted ADRVs and be sanctions with a period of 4 years' ineligibility.

Merits

64. It was common ground that the Athlete had committed each of the asserted ADRVs. The level of sanction was the only issue.
65. The crucial issues to be determined are whether the ADRVs committed by the Athlete were intentional within the meaning of that term in Article 10.2.3 and whether the Athlete has made prompt admissions in relation to the ADRVs such as to give rise to the jurisdiction to reduce the sanction pursuant to Article 10.6.3.
66. Unless the Athlete can establish that the ADRVs were not intentional, her period of ineligibility is 4 years pursuant to the combined operation of 10.2.1 and 10.7.4.1. Any finding of "*No Fault or Negligence*" or "*No significant Fault or Negligence*" is dependent upon the Panel being satisfied that the ADRVs were not intentional.
67. The Panel is satisfied that in the terms described in Article 10.2.3 that the Athlete engaged in conduct in each instance of the asserted ADRVs which she knew constituted an ADRV or knew that there was a significant risk that the conduct

might constitute or result in an ADRV and manifestly disregarded that risk. The Panel is of that opinion for the following reasons.

68. The Athlete is 54 years of age and is an experienced Para-Powerlifter. She has represented Australia in International Competitions and, through drug education is aware of her responsibilities and of the existence of the Policy. She cannot claim ignorance on the restrictions in the use of prohibited substances if involved in sport. Although post-dating the commencement of her use of prohibited substances, she did apply for TUEs to use otherwise prohibited substances in September 2017 and also applied for a retroactive TUE in March 2018 in respect of both testosterone and human growth hormone. In her September 2017 application she applied for a TUE in respect of growth hormone (but did not apply in respect of testosterone). A TUE was granted in December 2017 for Tibolone and Targin (oxycodone) but refused for growth hormone.

69. The fact of these applications exhibits a knowledge of anti-doping procedures. Furthermore, the letter from Dr. Hayes to Dr. Sinclair dated 6 September 2017 in which Dr. Hayes states that "*I have not started her on Testosterone after discussions in length about the side effects and impact on her family and sport*", which letter predates the application for the TUE in September 2017, clearly indicates knowledge on the part of the Athlete of the problems that she may encounter if she used testosterone whilst engaging in sport. The Athlete's later explanation for not including testosterone in her TUE application of September 2017, due to forgetting to write testosterone on her application, is not accepted by the Panel. The Panel has not had the benefit of any evidence from the Athlete nor any supporting medical report which seeks to explain in greater detail her medical conditions, their possible impact upon her actions or inactions, and any other relevant matters that may impact upon the decision of this Panel, including the medical justification for the prescription, administration and use of the prohibited substances the subject of the ADRVs.

70. The Panel finds that, notwithstanding the Athlete's myriad of medical problems (in relation to which the Panel is most sympathetic) the Athlete, as evidenced by her correspondence and answers in her interview, is articulate, is cognisant of each of her medical treatments and prescription history, is an experienced and intelligent athlete and is fully aware of her responsibilities and her obligations as a competitor in sport at a high level. Her SMS exchanges reveal a person who was well aware of what she was doing and exhibited no lack of cognition.
71. As a result of our finding that the Athlete has not established that the ADRVs (or any of them) were not intentional, it is not necessary to consider the submissions in relation to the existence of "*No Fault or Negligence*" or "*No significant Fault or Negligence*". As noted above, the Athlete abandoned any argument in support of a conclusion that her use and possession of the substances could be regarded as being with "*No Fault or Negligence*". In relation to the issue of "*No Significant Fault or Negligence*", once intention is found as indicated above, there is no occasion for the application of a reduction. In any event, the Panel finds that there was significant "*Fault*" or "*Negligence*" on the part of the Athlete for the reasons outlined above and the Panel accepts the submissions of SIA in this regard.
72. In relation to the application of Article 10.6.3 which provides a potential basis for a reduction in sanction for prompt admission, the Panel finds that there is no factual basis for the establishment of a claim for prompt admission even if it was theoretically open to the Panel to consider that any discretion, if it had been exercised, was exercised irrationally.
73. It is clear that in her interview the Athlete made only partial admissions. It is true that by her TUE retroactive application on 23 March 2018 she impliedly admitted the use of growth hormone and testosterone as far back as March 2017 and later in May 2018 she made further admissions by email. It is abundantly clear, however, that it was only after ASADA had undertaken extensive investigations through the disclosures obtained from her mobile phones, iPad and pharmacy

records, that the full extent of the Athlete's use and possession of the prohibited substances was revealed. It could not be said, therefore, that prompt admissions had been made to the totality of the ADRVs even if it could be said that there were admissions to some of them.

74. It is important to note that each of the six ADRVs carries with it a sanction of a period of ineligibility of 4 years. It is only through the operation of Article 10.7.4.1 of the Policy that, in the circumstances of the Athlete's case, the maximum sanction that can be imposed is that based on the violation that carries the more severe sanction, which is 4 years pursuant to Article 10.2.1.
75. There is no basis upon the evidence before the Panel that would allow a conclusion that prompt admissions had been made. Further, it appears that both WADA and SIA have not approved any reduction in sanction. Further, in the opinion of the Panel, the seriousness of the violations in their totality and the Athlete's degree of fault would, on any view, have disintitiled the Athlete to any reduction in the period of ineligibility.
76. Accordingly, the Panel finds that the Athlete has committed the ADRVs and that she should be subject to a period of ineligibility of 4 years dating from 21 March 2018 (the date of the imposition of Provisional Suspension upon her by PA pursuant to Article 7.9.1 of the Policy). The Panel also determines that the Athlete's results, from 23 September 2016 (the date of the first possible non-presence ADRV occurrence) to the date of this Determination, will be disqualified, with all resulting consequences including the forfeiture of any medals, points and prizes, pursuant to Article 10.8 of the Policy.

The Tribunal therefore Determines

1. That Cristine Ashcroft has committed the following Anti-Doping Rule Violations:
 - (a) *Presence of a Prohibited Substance/s or its Metabolites or Markers, namely Exogenous Testosterone, Androsterone, Etiocholanolone and 5 β - androstane-3 α , 17 β -diol on 21 October 2017;*
 - (b) *Presence of a Prohibited Substance/s or its Metabolites or Markers, namely Exogeneous Androsterone, Etiocholanolone and 5 β - androstane-3 α , 17 β -diol on 21 February 2018;*
 - (c) *Use of a Prohibited Substance, namely Testosterone, on or about 3 August 2017 to on or about 21 February 2018;*
 - (d) *Possession of a Prohibited Substance, namely Testosterone, on or about 3 August 2017 to on or about 19 December 2017;*
 - (e) *Use and/or Attempted Use of a Prohibited Substance, namely Growth Hormone, on or about 23 September 2016 to on or about 30 September 2017; and*
 - (f) *Possession of a Prohibited Substance, namely Growth Hormone, on or about 23 September 2016 to on or about 30 September 2017.*
2. That a period of four (4) years' ineligibility be imposed on Cristine Ashcroft commencing on 21 March 2018.
3. That the results achieved by Cristine Ashcroft in competitions dating from 23 September 2016 to the date of this Determination be disqualified with all resulting consequences including the forfeiture of any medals, points and prizes.

4. Pursuant to Article 8.4.4 of the Policy each party shall bear their own costs of this hearing.

3 day of December 2020

Mr. David Grace AM QC (Presiding Member)

Dr. Peter Harcourt OAM

Ms. Sarah Cook OLY GAICD