

AFL ANTI-DOPING TRIBUNAL

FRIDAY, 23 JANUARY 2015

DAY ELEVEN

(TRANSCRIPT-IN-CONFIDENCE)

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CHAIRMAN:

MR DAVID JONES

MR JOHN NIXON

MR WAYNE HENWOOD

COUNSEL ASSISTING:

MR JUSTIN HOOPER

- - - - -

MR J. GLEESON QC with MS R. ENBOM appeared on behalf of AFL.

MR M. HOLMES QC with MR P. KNOWLES appeared on behalf of the
CEO of ASADA.

MR D. GRACE QC with MR B. IHLE appeared on behalf of 32
players.

MR N. CLELLAND QC with MR D. HALLOWES appeared on behalf of

Mr [REDACTED] and Mr [REDACTED]

- - - - -

1 CHAIRMAN: Good morning, everyone. Mr Grace, are you ready to
2 proceed?

3 MR GRACE: Yes, sir.

4 CHAIRMAN: We were up to Mr Earl when we concluded yesterday.

5 MR GRACE: Yes. First of all, in relation to Sedrak which we
6 parked yesterday, we reviewed the situation overnight and
7 we advised the lawyers for ASADA overnight and I'm not
8 sure if we advised the AFL, but we do so now, and
9 I apologise if we haven't, but we withdraw the objection
10 in relation to Sedrak and we won't trouble you about that
11 issue on the voir dire.

12 CHAIRMAN: Okay. Thank you.

13 MR GRACE: Of course that doesn't mean we won't be making
14 submissions - - -

15 CHAIRMAN: It doesn't mean you accept his evidence, but you are
16 not seeking to have him cross-examined in the absence of
17 his presence. If you want to put arguments about the
18 admissibility of his statement, you can.

19 MR GRACE: Can I hand up the amended document that I
20 foreshadowed yesterday that I have already circulated this
21 morning to my friends in relation to the examples of areas
22 that we would seek to explore with Charter and Alavi,
23 identifying the tab numbers and dates of the various
24 references to the interviews.

25 CHAIRMAN: That's updating what we have already got as PG-10.
26 This can also be PG-10. It essentially replaces it.

27 MR GRACE: Also, can I seek to tender a document which is a
28 facsimile of a web page of a company called Hangzhou
29 Huajin Pharmaceutical Company Ltd. This was a document
30 referred to in the cross-examination of Professor
31 Handelsman and that's in relation to this issue of

1 Thymomodulin powder being extracted from healthy cattle
2 thymus organ.

3 CHAIRMAN: This is just not confined to the voir dire, is it?

4 MR GRACE: No, it's not. We said we would produce it, and
5 that's the document.

6 #EXHIBIT PG-25 - Web page of Hangzhou Huajin Pharmaceutical
7 Company Ltd.

8 MR GRACE: What remains on the voir dire are our objections to
9 Mr Del Vecchio, the receipt of Mr Del Vecchio's statement
10 and emails - - -

11 CHAIRMAN: There are some specific documents that you have
12 identified that you object which are out of AS-20,
13 I think.

14 MR GRACE: Yes.

15 CHAIRMAN: It would help us for either you or Mr Clelland to
16 just take us to those and briefly tell us what your
17 objections are when it's convenient. Perhaps if we deal
18 with Mr Del Vecchio first.

19 MR GRACE: Yes. You will see AS-19 and AS-20, email from Del
20 Vecchio on 14 January - - -

21 CHAIRMAN: They are the ones which at this stage we marked for
22 identification. They are documents - 14 January I think
23 they arose.

24 MR GRACE: Yes.

25 CHAIRMAN: After he appeared here.

26 MR GRACE: Yes, he sent documents.

27 CHAIRMAN: He sent documents to the ASADA investigator, which
28 Mr Holmes tendered.

29 MR GRACE: That's right. We object to their receipt on the
30 basis that we can't cross-examine him. He's refused to
31 attend. It's quite extraordinary that the day after he

1 attends here he's sending those documents to ASADA. That
2 just highlights the problem. But there are some
3 additional documents and if I could just identify them for
4 you in relation to Del Vecchio. On 18 January 2012
5 there's a text message from Charter to Alavi. You will
6 find this at AS-4.2 at page 234. At 13, sorry.

7 CHAIRMAN: This is the pages of text messages?

8 MR GRACE: Yes. Entry 234, Charter to Alavi, "In the office
9 today and Friday. Thursday called Di the phone link up as
10 I am with Serge finalising contract." We would seek to
11 ask him questions about that.

12 Then at page 35 there's an entry on 20 May
13 2012 - sorry, I might have the wrong page. 30 May 2012,
14 Charter to Dank, entry 69, "Have a meeting Thursday with
15 Laurie and Serge at new Wyndham site. Let me know a good
16 time to phone link." Then at page 40 of those text
17 messages, these are the text messages exchanged between
18 Serge and Charter, which the first one you will see on
19 30 March 2012, "I rang Steve Dank to ask how they were
20 selling the peptides and exhibiting at Fitz."

21 We say that's a pretty crucial issue because the
22 allegation by ASADA is that peptides are being provided to
23 Essendon by Dank, and at the same time Dank is running a
24 business. He's running a business possibly with Serge,
25 possibly with Charter, certainly with van Spanje and
26 others, and they are talking about of course not
27 necessarily Thymosin Beta-4 there, but we don't know what
28 they are talking about. But there is mention of HEG in
29 July, there's mention of compounding. Serge to Charter in
30 August, "Want to know if John brought the peptides in
31 yesterday. Also met with pharmacist who can compound",

1 and so on.

2 Then at the bottom, number 10, "The problem is

3 Steve Dank didn't know as much as he pretended to know

4 ...(reads)... Stephen was totally shocked when I told them

5 they were on the banned list." That's a pretty important

6 conversation, if it occurred.

7 CHAIRMAN: I don't think there is much doubt that it occurred,

8 is there? This is an SMS that they have been able to

9 retrieve from the phone.

10 MR GRACE: Yes, but what I'm talking about, sir, is the

11 conversation that Serge has had with Dank that we can't

12 ask about.

13 CHAIRMAN: Yes.

14 MR GRACE: That's referred to in 10 in relation to 5 February

15 2013.

16 CHAIRMAN: Has Del Vecchio made statements, Mr Holmes? In the

17 material are there statements by Del Vecchio?

18 MR HOLMES: Yes.

19 CHAIRMAN: Was he interviewed as well?

20 MR GRACE: Yes.

21 MR HOLMES: Yes.

22 MR GRACE: There's a statement that appears at page 59

23 of - sorry, this is the statement he adopted when he was

24 in the witness box. He said it was true.

25 MR HOLMES: Page 59 of that folder.

26 CHAIRMAN: 59 of AS-4, is it?

27 MR HOLMES: Yes.

28 CHAIRMAN: Okay. We will just have a look at it. Yes,

29 Mr Holmes has taken us to this. So you are objecting to

30 the statements going in.

31 MR GRACE: Yes.

1 CHAIRMAN: And what you are pointing to at the moment is
2 examples of where you say you are prejudiced by an
3 inability to cross-examine him.

4 MR GRACE: Yes. There are many comments he makes in the
5 statement that we would seek to cross-examine him about.
6 One only needs to look at the statement to make that plain
7 without having to say another word to any of you, members
8 of the panel. It would be obvious what the issues are
9 that we would seek to cross-examine him upon. They are
10 core issues involved with this case.

11 CHAIRMAN: His statement deals a lot with conversations he had
12 with Dank.

13 MR GRACE: Yes. Then we have his interview of - - -

14 CHAIRMAN: Where is his interview?

15 MR GRACE: Of 29 May.

16 CHAIRMAN: That's in AS-5, I think. I don't know whether it is
17 5.1 or 5.2.

18 MR HOLMES: Volume 2, tab 25.

19 CHAIRMAN: Thank you.

20 MR GRACE: It hasn't been referred to, I don't think,
21 specifically by Mr Holmes in his opening. I'm not sure
22 whether he intends to rely upon that or not.

23 CHAIRMAN: We will see how it all finishes up in the wash-up
24 following that process we are going to follow which he
25 outlined in his submission. But he hasn't referred to it
26 so far, as I understand it.

27 MR GRACE: No.

28 CHAIRMAN: He did refer a lot to the statement.

29 MR GRACE: Yes. So we have to wait and see on that, if you
30 don't exclude it.

31 CHAIRMAN: He is certainly relying on the statement.

1 MR GRACE: Yes, he is.

2 MR HOLMES: I would be tendering that because, if there is a
3 statement which is signed, you should have the benefit of
4 all the pluses and minuses to get the true picture.

5 CHAIRMAN: I assumed that probably would be the case. But
6 obviously perhaps in your concluding submission you will
7 list the documents that haven't already been referred to
8 that you would want to rely on so we know where we stand.

9 MR HOLMES: Yes.

10 MR GRACE: Can we just understand the position in relation to
11 Mr Earl then. Do you intend to rely on Mr Earl's
12 statements?

13 MR HOLMES: Yes, we do.

14 CHAIRMAN: And the statement on the same basis, I presume.

15 MR HOLMES: I will be tendering tab 25, so when you read the
16 statement of Mr Del Vecchio you also read his transcript
17 where it came from.

18 CHAIRMAN: Yes, I understand. The objection is to any evidence
19 of Mr Del Vecchio going in, and similarly with Earl.

20 MR HOLMES: That's right.

21 MR GRACE: The same with Earl, yes. Whilst we have the text
22 messages open, can I refer you to AS-4.2 - - -

23 MR HOLMES: This is in relation to which witness?

24 MR GRACE: This is Del Vecchio. These are text messages at
25 page 396 to 397, right at the back of AS-4.2. If you go
26 back to 395 you will see a heading. It says, "Shane
27 Charter MMS".

28 CHAIRMAN: Yes.

29 MR GRACE: As I understand it, and Mr Holmes's instructor might
30 be able to confirm this, but MMS is an instant message
31 service.

1 MR HOLMES: Multi-media - - -
2 MR GRACE: Mr Knowles knows.
3 MR KNOWLES: I understand it to be a multi-media messaging
4 service.
5 MR HOLMES: It is a multi-media messaging service, apparently.
6 You use it to send photos or texts or anything,
7 apparently. It's some parallel universe to text messages,
8 I understand, but I haven't graduated to that level of
9 sophistication to know what it is. You will see on 396
10 there's an entry halfway down the page, 10 March 2013; do
11 you see that?
12 CHAIRMAN: Yes.
13 MR GRACE: At 48 minutes 44 seconds. It's from Del Vecchio,
14 Serge, to Shane Charter. [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED] You may recall that there was a business
23 meeting that you have received the minutes of of a lot of
24 characters attending in early 2012, I think it was,
25 January 2012. Del Vecchio was there, Charter and a whole
26 lot of others. You will see the content of those
27 messages. They are all to do with comments by Del Vecchio
28 to Charter about Dank - - -
29 CHAIRMAN: Not very complimentary.
30 MR GRACE: Not very complimentary. "Telling him it was me who
31 first told him unscheduled meant it was not legal." Then

1 later on 396, "WADA rules state if more than two players
2 from the same team are convicted, whole team is suspended.
3 Cronulla would be suspended. North Korea women's soccer
4 team suspended for four years because two women found to
5 be cheating," and so on.

6 CHAIRMAN: What about the Russians?

7 MR GRACE: That's another example. Then you will see the last
8 entry on 397 on 10 March, "Gee, Steve Dank has left an
9 absolute disaster behind. This is getting bigger by the
10 day. Couldn't even check on the status of peptides," and
11 so on. These are pretty crucial documents that we would
12 have sought to question him about, and we can't.

13 Can I next refer to an email at AS-3, at page
14 289.

15 CHAIRMAN: Mr Holmes has previously taken us to that particular
16 document.

17 MR HOLMES: Yes. That's the communication, the contemporary
18 one. The one that Mr Grace has just come from is the one
19 long after the event.

20 CHAIRMAN: This was March 2013.

21 MR HOLMES: 2012. It's the one below.

22 CHAIRMAN: Yes, the bottom.

23 MR HOLMES: 12 March 2012.

24 MR GRACE: For some reason it's resent by Del Vecchio to
25 Charter on 6 March 2013.

26 CHAIRMAN: Yes. The original one is 12 March 2012.

27 MR GRACE: Yes. Mr Holmes put some weight on this in his
28 opening and we are deprived of asking him questions about
29 that.

30 If I could go to page 41 of AS-4.2. These are
31 text messages between Serge and Shane Charter. These are

1 all after the event, but they are relevant issues. For
2 instance, in item 11, "Must have import permit to bring
3 into the country." We don't know what he's talking about
4 there. Item 12, "Hi, mate. I sent you stuff" - - -

5 CHAIRMAN: "Imported for in-vitro use".

6 MR GRACE: Yes, or "in-vivo, laboratory animals use only." This
7 is Serge to Charter. So, even though he knows this, they
8 are selling it to humans, the public, in this business
9 they are intending. Serge to Charter, "Hi, mate. I sent
10 you stuff on Dank. I also want to remind you I require
11 peptide pricing." Serge to Charter, "Does he know that
12 I told Dank peptides are banned?" Charter to Serge, "See
13 Dank is now implicated with peptides at Melbourne Football
14 Club." Serge to Charter, "Yes, I thought so. If I was
15 a ...(reads)... final link that proves a link at Essendon,
16 Dank and peptide. That's the real ace."

17 CHAIRMAN: [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 MR GRACE: Serge to Charter, number 16, "Surprised he's getting
25 death threats as I didn't think he was involved too much
26 ...(reads)... even employed Trent Croad to sell peptides
27 according to media report." Don't know who he is talking
28 about there.

29 Serge to Charter, number 17, "If true, more proof
30 Dank didn't know what he was doing." That relates to that
31 Age article around the same time as the McKenzie article.

1 Then you will see 18 and 19 relate to the same
2 topic. The point about that is that Del Vecchio seems to
3 know a lot. He seems to talk to Charter a lot about
4 what's going on. He seems to talk to Dank. These are all
5 pretty crucial conversations that are occurring and we
6 can't ask him.

7 At 43, item 20, this is Serge to Charter, "Hi,
8 mate. So it all comes down to that letter, the one Dank
9 waved around. The one that said peptides are not
10 scheduled ...(reads)... It's a right royal mess. I'm glad
11 we don't have too much to do with him."

12 Now, what you can make of that I don't know, but
13 we would like to ask Mr Del Vecchio questions about it and
14 Mr Charter, of course.

15 Then if you look at 21, same page, 43, Serge to
16 Charter, "He's obviously the link to how it all got out.
17 Remember the conversation you had with either Hird or Dank
18 where they asked how the peptides thing got out when only
19 three people knew or something like that? Well, it
20 appears Nima was trying to bypass Dank straight into other
21 clubs."

22 And then discussion about Alavi, "See the media
23 still don't get it. Yes. He can source supply
24 ...(reads)... supply of peptides that have not been
25 approved for human use was known to several AFL clubs last
26 year."

27 Then he sets out something that appeared in the
28 Fairfax Media. So he seems to have a lot of knowledge
29 and, insofar as it is sought to rely upon all of this, we
30 can't ask a question. We say that is unfair.

31 CHAIRMAN: I just want to clarify with Mr Holmes the position

1 with respect to these SMS messages. You have taken us to
2 specific ones.

3 MR HOLMES: I didn't take you to any of these.

4 CHAIRMAN: No, that's what I just wanted to confirm, that
5 certainly at this stage you are not relying on those
6 particular text messages.

7 MR HOLMES: This, if I may say, is a straw man argument that is
8 set up. These are long after the event, with Mr Del
9 Vecchio repeating his mantra, "Dank didn't know what he
10 was talking about."

11 CHAIRMAN: Which he said in his statement.

12 MR HOLMES: And he said it over and over again. With respect
13 to my friend, I appreciate that some of the evidence of
14 particular witnesses is critical, but for him to describe
15 Mr Del Vecchio as crucial really is hyperbole if you read
16 his statement. [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 CHAIRMAN: But you are not relying on these text messages.

20 MR HOLMES: Not these ones, no.

21 MR GRACE: I'm happy for that - - -

22 MR HOLMES: But he wants to ask him questions about it because
23 the statement has been tendered. So that's the relevance
24 of his submissions.

25 CHAIRMAN: Yes, you are seeking to rely upon the statement.

26 MR HOLMES: Yes.

27 CHAIRMAN: And what he is outlining is areas of
28 cross-examination that he would seek to raise with him.
29 Of course, in cross-examination he's not confined to
30 what's in the statement. He's at large as long as it is
31 relevant.

1 MR HOLMES: Yes, and really if these are relevant, my friend
2 can tender them, I could tender them, but he just wants to
3 have a royal commission where he can ask about everything.
4 We can imagine the length of the proceedings if all these
5 questions were allowable.

6 CHAIRMAN: All right. I just wanted to know the status of it.

7 MR HOLMES: I'm not going to take you to them as presently
8 advised.

9 CHAIRMAN: If there is any additional SMS messages, they will
10 be in the written submissions.

11 MR HOLMES: Yes.

12 CHAIRMAN: Thanks.

13 MR GRACE: That concludes what I wanted to say about Mr Del
14 Vecchio to outline the issues. Can I next go to a
15 two-page document that we tendered that's headed
16 "Documents' objections schedule on behalf of the 32
17 players".

18 CHAIRMAN: Yes. What about Robinson? You have mentioned about
19 Robinson before.

20 MR GRACE: I'm not quite sure where we are at in relation to
21 Mr Robinson, whether Mr Holmes intends to - - -

22 CHAIRMAN: There's a statement from Robinson.

23 MR GRACE: His interviews.

24 MR HOLMES: Sorry, we are dealing with Mr Robinson under 44.
25 I have referred to the parts of his transcript.

26 CHAIRMAN: But you are relying upon Robinson's interview.

27 MR HOLMES: Robinson's interview?

28 CHAIRMAN: It is an interview or a statement.

29 MR HOLMES: I have only taken you to particular parts of his
30 interview, yes. The parts that I have relied upon have
31 been identified in the opening.

1 CHAIRMAN: Yes. Obviously you have referred to specific parts
2 of the interview, but we would need the whole interview
3 from the point of view of again seeing it in context.

4 MR HOLMES: My friends say that if you see it in context they
5 want to cross-examine him. So they would like you to look
6 at it with blinkers on just at the parts that I have
7 looked at, that I have addressed you on. So we have said,
8 "All right, that may be sufficient for our purposes and so
9 we will park him in paragraph 44 of our submissions;
10 namely, we don't refer to any other parts at the moment
11 but we will read his transcript elsewhere just to make
12 sure that" - - -

13 CHAIRMAN: There isn't any other parts.

14 MR HOLMES: Yes.

15 CHAIRMAN: But at this stage you are only seeking to rely upon
16 the specific parts - - -

17 MR HOLMES: The specific parts I have identified, yes.

18 MR GRACE: If it is just that part, we have no problem.

19 CHAIRMAN: All right. That's fine. If it turns out as a
20 result of their submission that they seek to rely upon
21 more with respect to Robinson, then you can renew your
22 objection.

23 MR GRACE: Yes.

24 CHAIRMAN: So we have the document.

25 MR GRACE: Do you have the two-page document?

26 CHAIRMAN: Yes, which is headed "Documents objections schedule
27 on behalf of the 32 players".

28 MR GRACE: Yes. Can I just turn to the second page first. You
29 will see a heading, "Documents which are admitted only for
30 the purpose of the voir dire and therefore not to be
31 admitted on the hearing proper".

1 CHAIRMAN: Walker.

2 MR GRACE: That's the Walker affidavit and then transcript of
3 the Hargreaves interview with Charter, the peptide
4 purchasing contract with RD Peptides.

5 CHAIRMAN: Yes.

6 MR GRACE: That of course all relates to whether or not you
7 accede to the submission in respect of the exclusion of
8 Charter and Alavi. So that stands or falls with that.

9 CHAIRMAN: I think what we have to do, particularly as far as
10 the players' counsel is concerned, but it could affect the
11 others, is that after we have given our decision on the
12 objections taken to the admissibility of these documents,
13 give you an opportunity, depending on the result, and
14 let's say we admit the evidence, to give you then an
15 opportunity to say, "Well, whereas documents before were
16 solely for the voir dire, in view of the fact that this is
17 going to be evidence on the general issues we would seek
18 to have certain documentation now be admitted on the
19 general issues."

20 MR GRACE: Yes.

21 CHAIRMAN: So we can do that, and that picks up also what we
22 discussed yesterday about the submissions that you have
23 been making to us then being relevant to the assessment of
24 the credibility and weight to be given on the general
25 issues.

26 MR GRACE: I wouldn't seek to go through the exercise I've been
27 going through in the last couple of days in any closing
28 submission.

29 CHAIRMAN: No, we would accept that, on those matters.

30 MR GRACE: Yes. This document, can I just go through it?

31 CHAIRMAN: Yes, that will help us, thanks. So we need AS-3,

1 I think.

2 MR GRACE: We need AS-3. This is the diary note at 107, 108 of
3 Charter. It's dated 29/8/11. So that's a document that
4 we say if reliance is being placed upon that, which we
5 understand it is, as being a note of a conversation with
6 Dank and Charter which contains some sort of shopping
7 list, then we say it would have been the proper subject of
8 cross-examination. But if the reliance to be placed on it
9 is somehow said to be supportive of the background to
10 Dank's supplementation program at Essendon, then we say
11 it's unfair not to allow us to have the opportunity of
12 cross-examining Charter in relation to it.

13 CHAIRMAN: Just so that we understand the basis of the
14 objection, can I take it that it is not in dispute this
15 was a document produced by Charter to the investigators?

16 MR GRACE: Yes.

17 CHAIRMAN: Is that the position? It came from Charter.

18 MR GRACE: Yes, he explains it in his interviews.

19 CHAIRMAN: That's what I mean. He is then interviewed about
20 it. So your objection to this is tied in with the
21 inability to cross-examine Charter because you can't ask
22 questions about it.

23 MR GRACE: Yes. It rests or falls with the interviews.

24 CHAIRMAN: With the interviews. Okay.

25 MR GRACE: 113 and 114 is the same because the documents are
26 meaningless without those interviews in any event.

27 At 28 to 30 in AS-3, press release. We don't
28 know who the author is of this. An organisation perhaps
29 called Business Wire, but who knows. You will see 28, 29,
30 30 and 31, 32, 33 and 34. There is no provenance of this.
31 I'm not sure what use ASADA seeks to make of it. It is

1 hearsay. It is asserting GMP status on page 31. The last
2 dot point, "GMP synthesis", whatever that means.

3 Further up the page under "CBI merger with GL
4 Biochem", third line, "Global market for non-GMP custom
5 peptides." There is issue, we say, about relevance and,
6 more to the point, how does a 2009 document in relation to
7 GMP have any relevance to a 2011 transaction, 2012
8 transaction involving this company? If some support is
9 sought to be found from that, that somehow because of some
10 claimed association between an organisation called
11 Mimotopes based in Melbourne and GL Biochem that it is
12 suggested gives some status to GL Biochem, it's been
13 unexplained and not the subject of any evidence. So we
14 would seek to have that excluded just on the basis of
15 relevance.

16 CHAIRMAN: We have a helpful document which I think Mr Holmes
17 gave us which gives us the transcript pages with respect
18 to each of these documents.

19 MR GRACE: Then we have at page 687 - Mr Holmes hasn't referred
20 to this. Again he will accuse me of attacking a straw man
21 or something of that nature. Sorry, he has referred to
22 it. He won't criticise me.

23 CHAIRMAN: Yes, he has.

24 MR GRACE: What this relates to is some conversation that a
25 Mr Le Grand has had with Mr Xu. I'm not sure if a
26 statement has been obtained from Mr Le Grand. We
27 certainly haven't seen it. But it is said to be a
28 statement relied upon as truth of its contents and we
29 would object to it in circumstances where presumably Mr Le
30 Grand is available. He's a journalist who works for The
31 Australian newspaper in Melbourne. He refers to

1 conversations made by Mr Xu. We know that investigators
2 spoke to Xu and he wouldn't cooperate.

3 MR HOLMES: With us.

4 MR GRACE: With ASADA. He cooperates with The Australian,
5 according to Mr Le Grand, but we don't know if anything of
6 what he says is true or not. There is no way of checking
7 it. It is so tenuous and speculative that it should be
8 excluded from your consideration.

9 MR HOLMES: Just before we leave this item, we are only
10 tendering it in respect of the statements made by Mr Xu
11 because, as Mr Grace has said, he wouldn't cooperate with
12 us, but he will answer questions from Mr Le Grand. So you
13 can ignore the rest of the parts of the - - -

14 CHAIRMAN: But it's the parts, Mr Holmes, Mr Xu said when
15 Mr Charter came to visit his sprawling, et cetera, and
16 Mr Xu provided Mr Charter with samples of various
17 peptides, including the banned substance Thymosin Beta-4,
18 I assume you put before the Tribunal as some evidence that
19 that occurred.

20 MR HOLMES: Yes, because Mr Xu is saying that.

21 CHAIRMAN: And that's the basis upon which it is relied upon
22 and that's the basis upon which it is objected to. It is
23 clearly hearsay.

24 MR HOLMES: Yes, and Mr Xu said the only Thymosin peptide
25 supplied by GL Biochem to Mr Charter was Thymosin Beta-4.
26 "The Thymosin we synthesise and supply always refers to
27 Thymosin Beta-4." That supports the lack of a catalogue
28 number.

29 CHAIRMAN: What Mr Grace is objecting to is that matter being
30 evidence in that way.

31 MR GRACE: Yes. We should have subpoenaed Mr Xu from China.

1 CHAIRMAN: You will no doubt tell us why we should receive it.
2 You just say, "Look, it's" - - -
3 MR GRACE: How can we test it? How do we even know that
4 statement was made? We rely upon the word of Mr Le Grand
5 that it was made.
6 MR HOLMES: There are emails from Mr Xu saying the same thing.
7 But, really - - -
8 CHAIRMAN: Certainly you are not in a position to examine
9 either Mr Le Grand or Mr Xu.
10 MR GRACE: Yes, but can I take you to 214 in the same volume.
11 This is the updated quotation. This is the same Mr Xu at
12 page 687 who says, "The Thymosin we synthesise and supply
13 always refers to Thymosin Beta-4." That's what he says
14 apparently to Mr Le Grand at 687. Then at 214, "Please
15 confirm the updated quotation and CNY as follows" and
16 gives a table, and with the prices in RMB of Thymosin and
17 Thymosin Beta-4.
18 So what do we make of that as compared to the
19 conversation with Mr Le Grand? How can you possibly place
20 any weight upon what he said to Mr Le Grand and how can we
21 test it?
22 CHAIRMAN: Yes.
23 MR GRACE: The next document, I have already referred to it the
24 other day, Charter document headed "Steve Dank". That's
25 that missive that Charter prepares.
26 CHAIRMAN: That he provided to ASADA.
27 MR GRACE: Character reference in relation to Mr Dank.
28 MR HOLMES: Sorry, this is?
29 MR GRACE: This is 297.
30 CHAIRMAN: And that's referred to in Mr Walker's affidavit.
31 MR HOLMES: It goes from 297 to 303.

1 CHAIRMAN: It falls into the category of statements by Charter
2 sought to be relied upon. That's one of them. It's one
3 that he provided rather than following the interview,
4 et cetera.

5 MR GRACE: You will recall that was the one at 301 where he
6 says he brought them all through Customs, at the top of
7 the page, lists them all. We know it's not true. So you
8 have to determine this case by reliable evidence.

9 MR HOLMES: Sorry, I think all he says there is, "I declared
10 them at Customs." The document I think Mr Grace tendered
11 had peptides in the plural. What Mr Grace is doing is
12 changing the word "declared" into an itemised list of
13 them. Anyway.

14 CHAIRMAN: This is in the same category as the other statements
15 you have objected to with respect to Charter because this
16 is provided by Charter.

17 MR GRACE: Then we have that email from Charter to Kerrison at
18 461. This is apparently for the Hexarelin, I think.
19 What's interesting about this is he says, "Go to the SMS
20 from me to Cedric on 19/12/2011, email is good for
21 peptides." They have downloaded all these SMSs. It's not
22 on his phone.

23 MR HOLMES: Sorry, I think that text was there, the second one,
24 the SMS. Can I just have a look at AS-4, page 11, 199.

25 MR GRACE: That's the second one. The first one is not there.

26 MR HOLMES: Here is where we really have a problem. The SMS
27 from Mr Charter to Nima on 29 December 2011, which is
28 referred to in this email in this page, is objected to.
29 But it's not objected to when it is in AS-4. So is that
30 text message really in dispute?

31 CHAIRMAN: Which is the text message, Mr Holmes?

1 MR HOLMES: If we go to page 11 of the text messages and if we
2 go to text message 199, it's not disputed that these text
3 messages were downloaded, their integrity, and it says
4 it's from Charter to Alavi - - -

5 CHAIRMAN: You have previously taken us to this.

6 MR HOLMES: Yes. It says, "The peptides delivered 3.30
7 yesterday. Have you got them?" Now, I know we are
8 hearing an objection to it here, but we are not hearing an
9 objection to it there.

10 MR GRACE: No, we are not objecting to that.

11 MR HOLMES: One of the things that is not seriously in dispute
12 is that that is a relevant consideration to whether you
13 uphold this objection.

14 MR GRACE: What we are objecting to is the SMS to Cedric on
15 19 December 2011, "Email is good for peptide order. Can
16 we pay the 735 to peptide company to complete the order?"
17 Where is that? The point we make about that is two
18 points. Firstly, it's not on the downloads. It is not on
19 the downloads because it has been deleted or it never
20 happened. Where is the independent proof that that text
21 message was sent?

22 MR HOLMES: Gentlemen, Mr Grace has said it has been deleted,
23 and I can understand the basis for that submission because
24 of the credit he has said about Mr Charter. We have not
25 said that we have produced every text message from every
26 phone that these gentlemen used.

27 CHAIRMAN: The objection, Mr Grace, really comes down to the
28 fact, again, that you can't ask Charter about it.

29 MR HOLMES: Yes, you can't cross-examine someone.

30 CHAIRMAN: Because these are messages from Charter.

31 MR GRACE: Yes. The SMSs from Charter to Anthony have been

1 downloaded, both before and after the December 2011
2 entries. They start at page 38 of 4.2. There are six of
3 them. It starts on 21 July 11, ends 10 January 13. You
4 would have thought that's a relevant text message to have
5 been downloaded. So the point is that Charter sends an
6 email to Kerrison saying, "Go to the SMS from me to Cedric
7 on 19/12/2011." There is none. So we object to the
8 receipt because there is no independent corroborating
9 material for that SMS.

10 CHAIRMAN: Okay.

11 MR GRACE: Can I now go to the email from Alavi to Walker at
12 page 515. This is in the same category as other
13 documentation that we can't cross-examine about, so
14 I don't need to add anything to that.

15 CHAIRMAN: This is with the Alavi letter signed, et cetera.

16 MR GRACE: Yes.

17 MR HOLMES: This is the backdating letter.

18 MR GRACE: The backdating letter.

19 CHAIRMAN: You have referred to that in terms of your inability
20 to question Alavi about this.

21 MR GRACE: Yes. The next item is the Charter interview with
22 3AW which is relied upon. That falls into the same
23 category, the general Charter material.

24 MR HOLMES: Which page is that?

25 MR GRACE: Page 712.

26 CHAIRMAN: We listened to this, as I recall.

27 MR HOLMES: We listened to the first part of it.

28 MR GRACE: The Dank interview with McKenzie, which is the next
29 item, will be addressed by Mr Clelland. Then the next
30 category, statements of Earl, statement with Charter with
31 attachment, statement of Del Vecchio, we have dealt with

1 that. The next is the Sedrak interview. We have dealt
2 with that. The Robinson interview, we have dealt with
3 that.

4 CHAIRMAN: Robinson on the basis that it is confined to what
5 Mr Holmes has indicated, you are not objecting to, as
6 I understand it.

7 MR GRACE: The Hobson one we withdraw. Then we have the
8 Charter and Alavi transcripts; same category.

9 CHAIRMAN: Yes.

10 MR GRACE: And the email from Del Vecchio, I have already dealt
11 with those two items. So that completes the list of
12 objections.

13 Now I wanted to turn to our written submissions
14 to discuss some general principles with you. I don't want
15 to repeat what's been set out in writing because you will
16 be able to read that of course at your leisure, but
17 I wanted to highlight a number of principles that have
18 been gleaned from the cases. The CEO of ASADA provided a
19 list of authorities. We have provided a list of
20 authorities as well, and copies of them.

21 CHAIRMAN: Yes.

22 MR GRACE: There are some common authorities. It's perhaps
23 convenient just to look at the folder, the white folder
24 that the CEO of ASADA has provided, at least initially.

25 If I could take you to tab 2. It is the case
26 that there are quite a few authorities that have been
27 provided to you, but essentially they boil down to a few
28 essential principles. In tab 2 you will see the decision
29 of Justice Brennan when he was a member of the
30 Administrative Appeals Tribunal and judge of the Federal
31 Court of Australia back in 1979 in the matter of Pochi.

1 An interesting case, Pochi. The names that you read about
2 in Pochi keep on reappearing in the courts and in the
3 media, at least in Victoria.

4 But Justice Brennan was considering a case where
5 Pochi applied for citizenship and he did take the oath of
6 allegiance. Unfortunately for him, before the oath was
7 taken he was arrested for supplying cannabis and sentenced
8 to imprisonment and deportation was subsequently ordered
9 and he sought a review of the decision.

10 There were issues arising in relation to the
11 process that was employed by the minister and Justice
12 Brennan revoked the deportation order eventually. But in
13 the course of his judgment at page 256 of volume 26 of the
14 Australian Law Reports he said this, commencing at the
15 seventh line, the paragraph "How are facts to be proved
16 and how is the sufficiency of proof to be determined when
17 there are no rules of evidence ...(reads)... but may
18 inform itself on any matter in such manner as it thinks
19 appropriate." Not dissimilar to the wording used, of
20 course, in the Code and the rules binding this panel.

21 "Although the Tribunal was governed by statute in
22 the approach which it must take in assessing the evidence
23 ...(reads)... the weight to be attached to it is a matter
24 for the person to whom Parliament has entrusted the
25 responsibility of deciding the issue."

26 The case went on appeal and behind tab 3 in the
27 same folder you will find the decision of the Full Federal
28 Court on appeal which was decided in 1980 in volume 31 of
29 the Australian Law Reports commencing at page 666.
30 Justice Deane, who was then a member of the Federal Court,
31 wrote a lengthy judgment which commenced at page 681. In

1 the course of his judgment at 686, the last substantive
2 paragraph on 686 said this, "There is no universally
3 applicable definition of the requirements of the rules of
4 natural justice which must, in the absence of legislative
5 provision to the contrary, be observed by a statutory
6 tribunal empowered to make or to review decisions
7 affecting the rights, property or legitimate expectations
8 of a person."

9 Then there is a reference to Justice Stephen's
10 judgment in Salemi and it goes on, "The reason for this is
11 that the precise contents of those rules will vary
12 according to the statutory framework of the particular
13 proceedings ...(reads).... it is in this regard that the
14 affinity between banishment of an established resident
15 consequent upon a criminal conviction and punishment for
16 an offence is relevant."

17 Then it goes on to discuss issues concerning
18 punishment and legitimate exercise of deportation powers
19 and I won't trouble you with that.

20 Then I want to, and for convenience again, refer
21 to another case in the CEO's folder, a more recent
22 decision of the Court of Appeal of New South Wales behind
23 tab 14. It's a case called Commissioner for Children and
24 Young People v FZ, unreported, [2011] NSWCA 111. There
25 Justice Young, with whom the other members of the court
26 agreed, said this at paragraph 25, and this was in the
27 context of an issue as to whether a particular person was
28 a danger or a risk to children. I think it might have
29 been a parent.

30 At paragraph 25 Justice Young referred to a case
31 called Ramsay in which Justice Spender of the Federal

1 Court 2005 had said, "While a right to cross-examination
2 is not necessarily to be recognised in every case
3 ...(reads)... in important respects to the case a party
4 wishes to present." In paragraph 26, "Thus it is
5 necessary to consider how close to the core of the issue
6 this particular matter is."

7 Then there is a reference further in the judgment
8 at paragraph 69 to a discussion that occurred during the
9 course of the appeal. "There was discussion before us as
10 to what should have happened had the evidence before the
11 tribunal disclosed ...(reads)... what degree of
12 unavailability was required before this position was
13 reached."

14 Paragraph 70, "I believe this may be the wrong
15 way of looking at the problem. The real question is
16 whether to omit the evidence ...(reads)... and compelling
17 reason why that witness is unavailable, the Tribunal might
18 still consider it appropriate not to receive the
19 evidence."

20 71, "Accordingly, I do not consider that
21 examination of the concept of witness unavailability such
22 as that which occupies texts such as in the 8th Australian
23 edition of Cross on Evidence need concern us in this
24 case."

25 72, "Again the Tribunal might be of the view that
26 it is fully capable of having a fair trial by discounting
27 the weight of the evidence of a person who does not attend
28 the hearing and is thus not cross-examined."

29 So what I have read out to you in these several
30 cases is essentially the principles that the cases really
31 enunciate. You have before you on the voir dire an

1 affidavit from Mr Walker setting out all the reasons why
2 he couldn't achieve the result of getting Alavi and
3 Charter here. We know that the CEO went to the lengths of
4 going to the Supreme Court of Victoria after coming here
5 first seeking a direction from this panel or ruling under
6 the Commercial Arbitration Act to at least be given leave
7 to issue subpoenas against Charter and Alavi to compel
8 their attendance here. What would have happened then if
9 they had refused to give evidence, one doesn't know.

10 That is all accepted. It is accepted they were
11 reluctant witnesses. It is accepted that there is no
12 compulsion on the part of this Tribunal. There is no
13 compulsion or jurisdiction under the Commercial
14 Arbitration Act to get them here. That's what perhaps
15 Justice Spender was talking about in an analogous
16 situation.

17 It is really the wrong way of looking at it.
18 It's all commendable that the CEO of ASADA has done
19 everything he can to achieve the result of getting them
20 here, but that doesn't alleviate the problem of not having
21 them here. When Justice Spender talks about "core
22 witness", and we say in our submissions to you "core
23 witness", "crucial witness", it's the core issue in this
24 Tribunal that Charter and Alavi address. Not having the
25 ability to cross-examine them we say tilts the balance
26 because of the nature of that evidence that they give and
27 is sought to be relied upon by ASADA.

28 It could not be said in ASADA's case that the
29 evidence of Charter and Alavi is insignificant, not
30 crucial, not core. It's core evidence, and we can't
31 challenge it, other than by assertion and submission,

1 pointing out the weaknesses in it that we have done over
2 the last few days. But that's as far as we can go. We
3 can't make good to any complete extent, although we have
4 no onus of course to do so, the points we make without
5 having them in the witness box. We think we could, but
6 that's a statement, assertion.

7 Not to have them here really deprives this
8 hearing of the character of a fair hearing; it deprives
9 this hearing, and it is no fault of the Tribunal or the
10 panel, who strive to afford us natural justice, but you
11 are placed in an impossible position, in our submission,
12 as to affording us natural justice as the rules require
13 without the presence of these people.

14 We have the absurd situation, of course, where
15 Mr Del Vecchio responds to a request to attend, attends,
16 gives evidence as to the truth of contents of his
17 statement and then refuses to be cross-examined, and ASADA
18 seeks to rely upon the Del Vecchio statement in those
19 circumstances.

20 Mr Holmes, to his credit, conceded, "Well, it's
21 not crucial." But that just exemplifies the issues that
22 are before you. If it is not crucial, why rely upon it at
23 all? The unfairness cannot be perhaps more starkly
24 demonstrated by that charade that occurred. When I say
25 "charade", it is not caused by Mr Holmes - - -

26 MR HOLMES: Mr Del Vecchio came along and expressed a genuine
27 belief. He wasn't challenged about the belief he had, the
28 fear he had from being sued by Mr Dank. He came here and
29 he said that to you. He faced you. He is a member of
30 this society who is entitled to take that view. So, for
31 my friend to characterise that as a charade, that, with

1 respect, is not a charade. That's a citizen coming along
2 and explaining why, "before a Tribunal that doesn't have
3 power to compel me to give evidence, this is why I'm not
4 cooperating any further."

5 I take it the Tribunal is aware of all the
6 defamation actions that Mr Dank has been initiating.

7 CHAIRMAN: I don't think they have gone very far, Mr Holmes, as
8 I understand.

9 MR HOLMES: I appreciate that.

10 MR GRACE: I was at pains to try to point out I'm not
11 suggesting that what I call a charade was orchestrated at
12 all by ASADA or the AFL, but they must have known that
13 Mr Del Vecchio was going to have that response in advance.
14 Then we have the spectre the very next day of Del Vecchio
15 sending an email to ASADA with further evidentiary
16 material containing minutes of a meeting with Dank,
17 amongst others, and Charter, and he's worried about being
18 sued for defamation. It's extraordinary. In any event,
19 that highlights the spectre of unfairness that pervades
20 the situation where these persons are not present to be
21 cross-examined.

22 In our written submissions you will see reference
23 to a number of cases, some of which I have referred to;
24 the issues of not being able to test the evidence. You
25 will see at paragraph 12 I refer to a decision of Justice
26 Wilcox in Australian Postal Commission v Hayes, a Federal
27 Court decision in 1989. There I set out the essential
28 quote at page 326 of the Federal Court report where
29 His Honour says, "The testing of opposing relevant
30 material by cross-examination is an essential feature
31 ...(reads)... where the relevant standard of satisfaction

1 is more stringent than a mere finding on the balance of
2 probabilities."

3 So we rely upon that and everything else that we
4 have set out there in writing is quite clear. You will
5 see a reference on paragraph 15 to a case called Roach v
6 Page, which was a case arising in the bankruptcy
7 jurisdiction of the New South Wales Supreme Court. You
8 will see in paragraph 21 Justice Sperling of the New South
9 Wales Supreme Court in that case referred to the fact that
10 a party may be unfairly prejudiced if unable to test the
11 truth of a representation by cross-examination.

12 In paragraph 16 we point out that the applicable
13 standard of proof in this Tribunal is comfortable
14 satisfaction, being greater than mere balance of
15 probability but less than proved beyond reasonable doubt.
16 The more serious the allegation being considered, the
17 greater degree of evidence which is required to achieve
18 the requisite degree of comfortable satisfaction necessary
19 to establish the commission of the offence.

20 CHAIRMAN: Mr Grace, just before you leave 15, there is
21 reference there to the decision of Justice Beaumont.

22 MR GRACE: Yes.

23 CHAIRMAN: I don't know whether you have had a look at the case
24 of Papakosmas v R, 196 CLR 297, where Justice McHugh makes
25 some comments about these provisions, this is the Uniform
26 Evidence Act provisions. I might just read out an extract
27 from his judgment. No doubt you can check it yourselves.
28 "Some recent decisions suggest that the term 'unfair
29 prejudice' may have a broader meaning than that suggested
30 by the Australian Law Reform Commission and that it may
31 cover procedural disadvantages which a party may suffer as

1 the result of admitting evidence under the provisions of
2 the Act."

3 Then he refers to the decision of Justice
4 Beaumont.

5 MR GRACE: What page are you referring to?

6 CHAIRMAN: This is just an extract that I have without the page
7 reference.

8 MR GRACE: It is paragraph 93. We've just got it up on the
9 computer.

10 CHAIRMAN: He goes on to say, "It is unnecessary to express a
11 concluded opinion on the correctness of these decisions,
12 although I'm inclined to think that the learned judges
13 have been too much influenced by the common law attitude
14 to hearsay evidence and have not given sufficient weight
15 to the change that the Act has brought about in making
16 hearsay evidence admissible to prove facts in issue and
17 have not given sufficient weight to the traditional
18 meaning of prejudice in the context of rejecting evidence
19 for discretionary reasons."

20 So it was obiter and, as he said himself, he was
21 not expressing a concluded opinion. But it's in relation
22 to this issue of what constitutes unfair prejudice, which
23 is the provision now in the Uniform Evidence Act which
24 applies in considering whether, in a civil proceeding,
25 hearsay evidence, evidence of statements, should be
26 received or not received where the maker of the statement
27 is unavailable. The unavailability has been given a
28 fairly broad interpretation. A person doesn't have to be
29 in hospital or dead; there can be other reasons for being
30 unavailable.

31 So the critical thing in those provisions with

1 respect to a civil proceeding is what constitutes unfair
2 prejudice. It's got to be more than prejudice. There is
3 no question you are prejudiced by this material. The
4 question is: is it unfair? You are saying it is, because
5 of all the reasons that you have outlined.

6 MR GRACE: Yes. We go back of course to the Anti-Doping Code
7 which gives you the blueprint as to how you make any
8 findings, positive findings of an anti-doping rule
9 violation. You will recall I read out to you article 15.2
10 of the AFL Anti-Doping Code which provides that violations
11 may be established by any reliable means.

12 Now, ASADA seeks to suggest to you, if not by
13 direct statement certainly by implication, that the
14 anti-doping violation against each player has been
15 established by a reliable means, the reliable means being
16 this procedure that's been invoked of seeking to tender
17 material - - -

18 CHAIRMAN: Wait a minute. It's not confined to that. The
19 ASADA case is, and obviously we are looking forward to
20 getting Mr Holmes's concluding submission which is
21 identifying these facts and circumstances, but essentially
22 what he's saying is that ultimately, based upon all the
23 evidence that he puts before us, we can reliably reach
24 comfortable satisfaction.

25 Now, as to whether we reach comfortable
26 satisfaction or not is going to depend on the judgment
27 that we take about the reliability of a whole range of
28 evidence. We could get to a situation where we could say,
29 "Well, we have looked at all this evidence and possibly
30 the situation is suspicious, possibly it may have
31 happened, but when we look at the evidence as a whole it's

1 not sufficiently reliable for us to be comfortably
2 satisfied of the element of the violation."

3 MR GRACE: Yes.

4 CHAIRMAN: The difference is what you are saying is, well, we
5 don't even get to consider the evidence because we don't
6 admit it. The other side of the coin is, well, it gets
7 admitted, it doesn't get excluded, but having been
8 admitted doesn't mean that we just accept it and you can
9 have a situation where we admit it, but in the end when we
10 assess it in the whole context of the evidence we reach a
11 conclusion that it's not sufficiently reliable for us to
12 be comfortably satisfied. No doubt, if we receive the
13 evidence, that's what you will be saying in your final
14 submission.

15 MR GRACE: Yes. I suppose essentially the difference between
16 us, talking about this issue, is that we submit that the
17 Tribunal is incapable of relying upon this material
18 because to do so would breach the rules of natural justice
19 to the extent that the rules under which this Tribunal
20 operates would be not complied with because, by our
21 inability to test the reliability of these statements made
22 by these witnesses - - -

23 CHAIRMAN: Yes, and it's based on, as has been pointed out in
24 the authorities, that the rules of natural justice depend
25 on the context and the circumstances. There is no hard
26 and fast set of natural justice rules that apply in every,
27 say, administrative proceeding. There are certain
28 principles, but then you have to look at them in the light
29 of the circumstances.

30 MR GRACE: Yes.

31 CHAIRMAN: You have said, "Well, when you look at the

1 circumstances here of what's involved, possible
2 consequences, et cetera, that's the form a fair hearing
3 should take."

4 MR GRACE: Yes.

5 CHAIRMAN: That's the way you put it, isn't it?

6 MR GRACE: Yes.

7 CHAIRMAN: For it to be a fair hearing in these circumstances,
8 then this evidence shouldn't be admitted in the situation
9 where it hasn't been able to be tested by
10 cross-examination.

11 MR GRACE: Yes. I think you understand the argument.

12 CHAIRMAN: Yes, I think we do. It is one thing understanding
13 the argument; it is another deciding it.

14 MR GRACE: But if you are against us in relation to this
15 primary submission about admissibility, then we would
16 certainly be pressing you, in relation to this issue of
17 weight, that the weight that should be afforded to so much
18 of this evidence as I have outlined over recent days, as
19 to how it is so lacking in credibility in some respects,
20 in a lot of respects, is a matter of great significance
21 for your ultimate decision making.

22 CHAIRMAN: You know better than us, I suppose, now, because we
23 have been out of the jurisdiction for a while, but with
24 the way the criminal trials proceed with the new
25 provisions relating to standard directions and all that
26 sort of thing, there are standard directions in relation
27 to reliability of evidence which the judge can be asked to
28 give to the jury, in the situation where evidence has been
29 admitted but there are real issues about its reliability,
30 to try and ensure that the jury doesn't attach weight to
31 it that the evidence doesn't warrant.

1 MR GRACE: Yes.

2 CHAIRMAN: We might take a break.

3 (Short adjournment.)

4 CHAIRMAN: Mr Grace, are there any additional matters now that

5 need to be covered in your submissions on the

6 admissibility?

7 MR GRACE: I don't believe so.

8 CHAIRMAN: You have covered what you wanted to cover?

9 MR GRACE: I think you are well abreast of the issues that

10 I have raised and understand them.

11 CHAIRMAN: Yes. I think that's a fair comment. Mr Clelland,

12 I think, is going to put some submissions to us. There's

13 a document, Mr Clelland, from Robert Stary Lawyers which

14 sets out the objections to interviews, et cetera. Do you

15 want to add anything to what Mr Grace has said about

16 those?

17 MR CLELLAND: Can I firstly start by adopting generally the

18 submissions of Mr Grace on behalf of my clients. The

19 document to which you have referred, Mr Chairman, is a

20 letter dated 14 January 2015. I don't even know whether

21 it's been tendered or has an exhibit number. Perhaps it

22 should be.

23 CHAIRMAN: I don't think we formally marked it. Perhaps we

24 should. We will mark yours PC-3 on the voir dire. I will

25 just formally mark Mr Grace's as PG-26 on the voir dire.

26 #EXHIBIT PC-3 - (Voir dire) Letter from Robert Stary Lawyers

27 dated 14 January 2015.

28 #EXHIBIT PG-26 - "Documents' objections schedule on behalf of

29 the 32 players referred to by ASADA in its opening".

30 MR CLELLAND: Thank you, Mr Chairman. You will see that the

31 document spells out that the basis for the objections in a

1 global sense is that they relate to documents which
2 contain representations made by, and then there are a
3 number of persons who are listed, and then the kinds of
4 documents not exhaustively stated are set out below that,
5 and the fifth person is Mr Stephen Dank and I will deal
6 with that shortly.

7 For the Tribunal's assistance, can I ask if you
8 have the document in front of you to go to page 2.

9 CHAIRMAN: Yes, you have some numbered documents.

10 MR CLELLAND: That's right.

11 CHAIRMAN: Some of which I think Mr Grace has included and
12 perhaps some he hasn't. You take us to them as you wish.

13 MR CLELLAND: What I'm proposing to do is really adopt the
14 submissions made by Mr Grace in relation to documents 33,
15 36, 37, 95, 113, 144 and 154.

16 CHAIRMAN: Yes.

17 MR CLELLAND: I'm then going to ask the Tribunal to delete
18 these numbered documents: 38, 60, 64, 65 and 87. We
19 don't press those. So you are left with these documents:
20 108, 123, 127, 130, 136, 138, 139, 140, 141, 143, 145,
21 146, 155 and 156.

22 All I want to say about those is that, on our
23 analysis of our learned friend's opening on behalf of
24 ASADA, those documents which fall generally under the
25 rubric of post-event representations, they haven't been
26 referred to specifically or in any meaningful way in the
27 opening, so what we can do is just reserve our position.

28 CHAIRMAN: On that basis reserve your position with respect to
29 those because if they are not referred to in the
30 concluding submissions of ASADA, then they won't form part
31 of the evidence upon which we act.

1 MR CLELLAND: Quite, and then we don't need to trouble you with
2 them. If it arises, we will deal with them.

3 CHAIRMAN: If they are, then obviously you raise them and we
4 will then know that we need to make a decision about them
5 in terms of what we act upon. That's fine.

6 MR CLELLAND: Just while I'm undertaking this process of just
7 identifying what this aspect of the submissions relates
8 to, put aside Mr Dank for the moment, there is a related
9 question of what I will call it the cross-admissibility of
10 the players' interviews. Again we think that's the kind
11 of matter that can be dealt with in our final submissions,
12 depending on how our learned friends on behalf of ASADA
13 seek to deal with it.

14 MR HOLMES: With respect to my learned friend, I don't think
15 that's a matter that's capable of being left to the final
16 submissions and the Tribunal goes off and reserves. It's
17 a matter that I opened on. You may recall when we were
18 first hearing early December or late November we asked
19 that all matters be heard together, evidence in one be
20 evidence in the other. We have been proceeding on that
21 basis ever since.

22 I appreciate Mr Clelland has said in response to
23 the notices to admit of the AFL, "Our two clients admit
24 they are the statements they made. They are not
25 challenging that. But you can't use one of our clients
26 against the other client." Mr Grace also adopted this.
27 But, with respect, that's what happens in a criminal
28 trial - - -

29 MR CLELLAND: I don't need to hear the argument developed.

30 MR HOLMES: If I can just finish. This is really going to lead
31 this Tribunal into error, with respect. I opened on two

1 particular - - -

2 CHAIRMAN: You took us to [REDACTED] and [REDACTED]

3 MR HOLMES: I think it was [REDACTED] and [REDACTED] One said,

4 "I had all the injections and he told me it was Thymosin."

5 The other one said he had all the injections "and he told

6 me it was the good one, Thymosin Alpha, every time." The

7 Tribunal's reaction was, understandably, with the passage

8 of time and the press publicity of these various

9 substances, that has influenced his consciousness in

10 answering the questions.

11 There common sense would tell you that one is

12 relevant to the other and I put them all in and I tendered

13 them all. So they are all in there as part of ASADA's

14 case against all the players. We don't seek to say the

15 case against Mr [REDACTED] you should have no regard to

16 or you cannot have regard to other players' interviews.

17 MR CLELLAND: I haven't seen that submission anywhere in our

18 learned friend's opening.

19 MR HOLMES: I think I spoke about Mr [REDACTED] and Mr [REDACTED]

20 MR CLELLAND: I'm conscious also that probably in a number of

21 places, but for example at page 183 of the transcript, we

22 did ask that our learned friends identify if something was

23 being put into evidence, for what purpose it was being put

24 into evidence, but if we are now on notice that they rely

25 upon each of the players' interviews in each of the cases

26 of the other players, I will deal with it.

27 CHAIRMAN: I don't think that necessarily deals with it

28 satisfactorily for us, if I may say so. The situation is

29 we have had reference to some parts of two player

30 interviews. Clearly all the player interviews are in as

31 evidence in this matter. As you would expect, they are

1 the people who are the subject of the violation notices.

2 It is a question, Mr Holmes, of what use you
3 propose to make of those statements or some of the
4 statements that are contained in the player interviews;
5 what use you intend to make of them in establishing the
6 case against each player. We don't know that at the
7 moment.

8 MR HOLMES: You know it in respect of one aspect. We were
9 having a discussion about the purpose for which these
10 injections were administered, why were they taking these
11 substances. I said that I was going to prepare a schedule
12 of quotes from all the players as to what was the purpose
13 that Mr Dank was injecting them pursuant to this program
14 that he and Essendon had put together.

15 Now, when you look at all of those you come to
16 the view that the substance is a particular substance, on
17 our submission. So we have always said evidence in one is
18 evidence in the other. We weren't going to tender a
19 document compiling all of the evidence about the
20 injections and say, "But this document, which we tender in
21 a single document, you have to break up in relation to
22 each of the individual players."

23 I think, with respect, it appears that we have
24 been proceeding that evidence in one is evidence in the
25 other. My friends have a different attitude and that
26 needs to be resolved at this stage.

27 CHAIRMAN: Yes, that's very true. But from our point of view,
28 in determining an issue such as this, the use that's
29 sought to be made is critical. If you are saying each of
30 the players has said that the injection regime was such
31 and such, then the fact that each of the players have said

1 that that's the injection regime, we can use that to be
2 satisfied that that was the injection regime for all of
3 them, or if we have a situation where some of them say
4 that's the injection regime and some of them can't recall
5 what the injection regime was, that we can use the
6 evidence of those who could recollect as evidence that
7 that was the injection regime that the others got.

8 MR HOLMES: Correct.

9 CHAIRMAN: Similarly, if one of the players can recall a name
10 in relation to the product or a vial or something like
11 that and others can't, then we can use the evidence of
12 identification, et cetera, from some players - - -

13 MR HOLMES: And vice versa.

14 CHAIRMAN: As evidence in relation to the others.

15 MR HOLMES: That's right, and vice versa, so that when the
16 Tribunal is looking at the totality of the evidence of the
17 injections, what did Mr Dank do? What did he say? You
18 can't take them in isolation. That's how we have always
19 presented it and that's why we said at the outset evidence
20 in one is evidence in the other.

21 CHAIRMAN: I'm not comfortable about dealing with this sort of
22 in a blanket sense as distinct from looking at it in terms
23 of us having the benefit of the ASADA submissions as to
24 just how they say they use it and how it's relevant.
25 I know what your objection is going to be, and let's leave
26 aside the criminal court business. It's a situation where
27 it is hearsay in the sense that it is statements by people
28 who are not called - - -

29 MR CLELLAND: Arising out of a compulsory examination.

30 CHAIRMAN: Arising out of a compulsory examination and it
31 should be confined to the case of the particular person

1 who made the statement as distinct from being available
2 against other persons.

3 MR CLELLAND: Quite.

4 CHAIRMAN: Of course, there is no argument that it wouldn't be
5 admissible for that purpose in a criminal court.

6 MR CLELLAND: That encapsulates it. But like you, Mr Chairman,
7 for our part we would be grateful to understand how ASADA
8 say this Tribunal can actually deal with it on the basis
9 that has now been outlined by Mr Holmes.

10 CHAIRMAN: Our position is that we are not prepared to rule on
11 that at this point and we will look at it after we get the
12 submissions.

13 MR HOLMES: Gentlemen, can we take that on board because that
14 might affect the future conduct of the proceedings. If
15 this Tribunal is going to adopt the criminal law
16 approach - - -

17 CHAIRMAN: We are not adopting the criminal law approach,
18 Mr Holmes. What we are saying is that we do not think
19 that we are sufficiently informed about the use of this
20 evidence to make a decision about whether the evidence
21 should be used for that purpose, and that's not applying
22 the criminal principles. It's applying the sort of
23 principles that Mr Grace has talked about that have to be
24 applied in relation to a proceeding such as this. But we
25 don't think it just automatically follows that because
26 this is a domestic Tribunal that it can be used for any
27 purpose.

28 MR HOLMES: Can I respond to that? In my opening I said
29 Mr [REDACTED] evidence that he only got Thymosin Alpha
30 should not be accepted, and I said the reason for that is
31 because Mr [REDACTED] simultaneously was getting injections

1 and was being told it was Thymosin. Now, I have led those
2 in each other's.

3 CHAIRMAN: Yes.

4 MR HOLMES: In Mr [REDACTED] case, the case against him, I would
5 seek a direction from the Tribunal that Mr [REDACTED] attend
6 these proceedings so that it's not hearsay, he can give
7 that evidence and this Tribunal, with respect, has power
8 to compel a relevant witness to attend in that respect
9 because he's a player.

10 CHAIRMAN: Even though he's the subject of a violation.

11 MR HOLMES: Even though he's the subject to a violation,
12 because it is not in relation to his violation. It is in
13 relation to the violation of Mr [REDACTED] Mr Grace can
14 decide whether or not he wants to cross-examine him. We
15 will make an application in relation to every one of the
16 players so that it is no longer hearsay evidence, but it
17 is direct evidence where they have an ability to
18 cross-examine.

19 So that's the concern and we have to face up to
20 it now because, if we wait until the decision, it could be
21 on the basis that there's an unfair prejudice because you
22 take the view that they are not here for
23 cross-examination, the witnesses we are seeking to call
24 against each player. We can address that in respect of
25 those identified witnesses, and we would make that
26 application.

27 CHAIRMAN: That's the last situation I want to get into.

28 MR HOLMES: I agree, and that's why, with respect - - -

29 CHAIRMAN: Mr Clelland, just give us the gist of your objection
30 as far as the use of this evidence is concerned.

31 MR CLELLAND: Can I confine it - - -

1 CHAIRMAN: Let's start off with Dank.

2 MR CLELLAND: I'm happy to do that.

3 CHAIRMAN: Because that obviously needs to be addressed.

4 There's a statement of Dank to McKenzie which it would

5 appear ASADA desire to use, not just against Dank, but in

6 relation to the players as well.

7 MR CLELLAND: Yes.

8 CHAIRMAN: So let's start with Dank.

9 MR CLELLAND: Let's deal with Dank and then I will respond to

10 your invitation at an appropriate time in relation to the

11 player interviews. Again we invited but received no

12 statement from ASADA in their submissions as to whether

13 they intended to use the evidence of Mr Dank.

14 CHAIRMAN: What page is that on?

15 MR CLELLAND: Page 183.

16 CHAIRMAN: It starts at 382.

17 MR CLELLAND: Sorry, we are at cross-purposes. What are you

18 referring to, Mr Chairman?

19 CHAIRMAN: It is Dank's interview with McKenzie.

20 MR CLELLAND: Can I just slow you down for a moment. The

21 submissions of ASADA, notwithstanding their silence in

22 their opening, if you look at the submissions, the written

23 submissions by the CEO of ASADA regarding the receipt of

24 evidence, if you have that document, that seems to make

25 clear that it is intended to rely upon the evidence of

26 Mr Dank, that is his statements to Mr McKenzie in the

27 main, not just against Mr Dank but against each of the

28 players.

29 CHAIRMAN: Yes, I understand that.

30 MR CLELLAND: So if it wasn't clear - - -

31 CHAIRMAN: If it was only in relation to Dank, you wouldn't be

1 concerned.

2 MR CLELLAND: That's right. I will come to the concerns we
3 have about this odd situation that's developed. There are
4 proceedings against Mr Dank in this Tribunal where he is
5 absent, so there is no contradictor on behalf of Mr Dank.
6 Notwithstanding his absence, this material is being led
7 against him and no doubt findings will be sought from this
8 Tribunal that they should reject exculpatory statements
9 made by Mr Dank and deal with him on the basis of what
10 might be claimed to be inculpatory statements.

11 In any event, there are actually two transcripts.
12 Can I just invite the Tribunal firstly to go to page 342,
13 this is in AS-3. I will come back to this, but this is
14 the transcript of the interview that was briefly touched
15 on by Mr Grace in his submissions. This is an interview
16 that aired on the 7.30 Report.

17 CHAIRMAN: This is the ABC interview.

18 MR CLELLAND: Correct. At one stage, I think when,
19 Mr Chairman, you were being taken to the McKenzie
20 interview and there was a reference to Caro and you took
21 it to be a reference I think to Ms Caroline Wilson, but
22 you will see that the reporter on the 7.30 Report was a
23 Caro Meldrum-Hanna. So there's that interview. Although
24 there's been little or no focus on it, we understand
25 nonetheless that it's relied upon by ASADA.

26 Then as you have rightly pointed out,
27 Mr Chairman, at 382 of the same volume you will find the
28 interview between a Mr Nick McKenzie of Fairfax Media and
29 Mr Stephen Dank in April 2013.

30 There are two points that need to be made about
31 these interviews, and in particular that with Mr McKenzie.

1 The first point is that these are not ASADA interviews.
2 They are not ASADA statements. They have none of the
3 formality. They have none of the adoption that is
4 apparently relied upon in the case of Mr Charter or
5 Mr Alavi.

6 The second thing to bear in mind is this: This
7 is an expurgated version of an interview that was
8 conducted by Mr McKenzie. Mr McKenzie has apparently
9 claimed some form of journalistic privilege, as now
10 apparently exists, so that you don't have the whole
11 document. I withdraw that. You don't have a recording or
12 transcript of the entire interview between Mr McKenzie and
13 Mr Dank on that occasion.

14 Just to complete the picture, if the Tribunal
15 recalls, a statement of a Mr Nick McKenzie was also
16 tendered as AS-15 and it's a statement that was prepared
17 by ASADA, as I understand it. He prepared it and gave it
18 to ASADA, I'm sorry; I withdraw that. Mr McKenzie,
19 amongst other things in that statement, gave some
20 description of the circumstances surrounding his interview
21 with Mr Dank and was also at pains to explain that Mr Dank
22 had contacted him some time shortly after the interview
23 explaining that his references to Thymosin Beta-4 were in
24 error. I think ASADA would have it that that was a
25 recanting. Mr Dank no doubt would have it that it was a
26 clarification. So we will come back to that, but that's
27 part of the materials. It would seem to us, with respect,
28 that if the interview with Mr McKenzie goes in, then it
29 would be appropriate for Mr McKenzie's statement to go in.

30 CHAIRMAN: I assume that's intended by the fact that it was
31 tendered.

1 MR HOLMES: Yes.

2 MR CLELLAND: But if the interview went out, logically the
3 statement would go out because it purports to reproduce
4 aspects of the interview that touched on Thymosin Beta-4.

5 CHAIRMAN: Yes. Well, it has no other relevance.

6 MR CLELLAND: We would think not. The problem - perhaps it's
7 worth doing this first of all. If we go to the interview
8 with Mr McKenzie, I might just take you to a couple of
9 portions of it. Could I ask the Tribunal to go to page
10 384. I will just identify for the moment the references
11 to Thymosin Beta-4 in that interview.

12 CHAIRMAN: The fourth paragraph.

13 MR CLELLAND: I haven't got line numbers on my document.

14 CHAIRMAN: We haven't either.

15 MR CLELLAND: It probably really starts with Mr McKenzie,
16 "I understand colostrum," which he had been asking some
17 questions about, and then moved on asking this, "Thymosin
18 Beta-4, why was that used in Essendon players given
19 there's, um, that, like, there's an opinion from a doctor
20 or a researcher or another scientist that it could - that
21 its effects are uncertain?" Answer, "Well, that's not
22 totally true, Nick, because with all due respect, right,
23 there's good data, very good data that supports Thymosin
24 Beta-4 and the immune system."

25 So there are two things that are of significance
26 perhaps about that. Firstly, the Tribunal has heard
27 enough about the pharmacology of Thymosin Beta-4 as
28 opposed to Thymosin Alpha as opposed to Thymomodulin and
29 so forth, that the effects on the immune system are not
30 addressed by the administration of Thymosin Beta-4.

31 The second thing to identify is that it's not

1 exactly clear just what Mr Dank was saying about its
2 administration, but no doubt ASADA would seek to argue
3 that there was some adoption by Mr Dank of the proposition
4 that it had been administered.

5 Then if the Tribunal, just for the purpose of
6 this exercise, goes to 398.

7 CHAIRMAN: Mr Holmes took us to some of those passages.

8 MR CLELLAND: I think so. At the bottom of 397 is probably the
9 right starting point because Mr McKenzie introduces it and
10 says that he has Googled something in relation to ASADA.
11 Then he says, "How often were the Essendon players taking
12 Thymosin Beta-4? Once a week. Oh. Recording deleted.
13 Hang on, Thymosin Beta ...(reads)... that must have only
14 just come in this year and I will get someone to speak to
15 ASADA about that. That's just mind-blowing." Then the
16 interview moves on. There was a further reference to
17 Thymosin Beta-4 a little further down.

18 The statement of Mr McKenzie says, amongst other
19 things, that "It is necessary to note that shortly after
20 conducting this on-the-record interview and shortly before
21 publication, Stephen Dank sought to alter what he had
22 earlier said about the use of Thymosin Beta 4. This meant
23 that one of The Age's articles was then significantly
24 altered. Dank's alteration came immediately after
25 I informed him that a representative of Essendon was
26 claiming that the club was uncertain if the Thymosin used
27 was Thymosin Beta-4. Dank explained his decision to
28 revise what he had said in his interview about Thymosin
29 because he was confused and tired and had made a mistake.
30 He said Thymosin used was Thymomodulin" - and I will just
31 remind you of that first comment by Mr Dank in the context

1 of it being an immuno suppressant.

2 Then Mr McKenzie's statement goes on, "He has
3 since reiterated several times that Thymosin Beta-4 was
4 not used and the Thymosin referred in numerous text
5 messages and discussions was in fact Thymomodulin."

6 That may say as much about Mr Dank's
7 understanding of Thymosin and its various emanations and
8 Thymomodulin as anything else. But what you have got is,
9 as I say, an uncautioned interview where Mr McKenzie
10 introduces Thymosin Beta-4 on each occasion that it's
11 raised, then there are some responses by Mr Dank and then
12 shortly after that interview he has contacted Mr McKenzie
13 and said, "I was in error in referring to it as Thymosin
14 Beta-4. I meant this other substance."

15 The problem with the attempt by ASADA to rely
16 upon that material, that is those portions that I have
17 referred to, against the players in this Tribunal is
18 manifold and it may ultimately put this Tribunal in a
19 difficult position. Mr Dank, as I say, is not present.
20 But ASADA nonetheless has proceeded to run its case
21 against him, as I understand it and, as I say, no doubt
22 will seek various adverse findings against him and no
23 doubt would ask, for example, that the Tribunal reject
24 Mr Dank's explanations to Mr McKenzie and in some way to
25 use what was said to be at least an adoption by Mr Dank of
26 some statement by Mr McKenzie during the interview
27 regarding Thymosin Beta-4.

28 The analogy with a criminal trial is helpful up
29 to a point. There are good reasons in a criminal trial
30 why a co-accused's record of interview is not admissible
31 against a co-accused. It is untestable and there are

1 inherent dangers in a co-accused being fixed with the
2 content of a statement that is only admissible against
3 another accused for all sorts of reasons.

4 But in a criminal trial that material wouldn't be
5 led in the absence of the co-accused. So that's the first
6 difference. This material is being put in against
7 Mr Dank. He's not here.

8 CHAIRMAN: You wouldn't be conducting the criminal trial in his
9 absence.

10 MR CLELLAND: Correct. It wouldn't happen.

11 CHAIRMAN: That doesn't apply here. You can't have a situation
12 here where someone can avoid being dealt with by just not
13 turning up.

14 MR CLELLAND: Of course not. But nonetheless this Tribunal
15 still has to accord him natural justice. He is still
16 entitled for the Tribunal to properly consider the
17 evidence against him. The effect for the players is that
18 there is no contradictor of that material, that is
19 Mr Dank, and yet we don't have the opportunity on behalf
20 of the players to cross-examine Mr Dank.

21 As you say, Mr Chairman, quite rightly in a
22 criminal context it just wouldn't happen. The oddity here
23 is that it is being led against Mr Dank. So it is in. It
24 is before the Tribunal. It is sought to be relied upon
25 against the players, and then we move really into the
26 situation, I suppose, as with Mr Charter and Mr Alavi
27 where the fundamental complaint is we don't have an
28 opportunity to test the material, and ultimately in the
29 circumstances of this hearing we say it will result in
30 procedural unfairness and a denial of natural justice.

31 CHAIRMAN: The same arguments put by Mr Grace.

1 MR CLELLAND: Quite. One of the differences of course is the
2 interview with Mr McKenzie is not a formal interview as
3 were the ASADA interviews with Messrs Alavi and Charter.
4 Of course there was a statement where very shortly after
5 Mr Dank has sought to clarify his reference or his
6 response to Mr McKenzie's use of the expression "Thymosin
7 Beta-4" as being in error.

8 So one of the difficulties is in addition to that
9 giving rise to an unfairness, we say, in relation to the
10 players, but there is a potential difficulty insofar as we
11 would seek a determination from this Tribunal that Mr Dank
12 is somebody who should be cross-examined before the
13 Tribunal act on that material because we would say there
14 are issues going to credit, credibility and indeed a host
15 of matters where one would want to explore; firstly, was
16 he actually saying that Thymosin Beta-4 had been
17 administered and, if so, on what basis he could have
18 concluded that.

19 Plainly he is entitled to an unbiased hearing by
20 this Tribunal; yet the way this is unfolding, we are in a
21 position of almost needing to flag a variety of issues,
22 including credit issues, that we would want to agitate
23 with Mr Dank as a witness as being a reason why the
24 Tribunal should not act on his evidence, and he's not here
25 and the Tribunal is going to hear that material in his
26 absence. So I just point to that.

27 I'm not quite sure what the solution to it is.
28 But it seems to us to be fundamentally unfair to take an
29 interview with Mr Stephen Dank some time well after the
30 events between he and Mr McKenzie in 2013 and say, "We
31 want to use those utterances of Mr Dank against each of

1 the players," and they won't have an opportunity to
2 cross-examine him or test them. Mr Chairman, you referred
3 this morning to not just prejudice but unfair prejudice.
4 It is hard to think that there could be a more unfair
5 prejudice than that.

6 It seems on our reading that the principles are
7 tolerably clear for this Tribunal in terms of evidence
8 that it can act on and how it would treat evidence.
9 Clearly you can inform yourself in any appropriate manner
10 if the material is rationally probative. You can in that
11 vein receive hearsay evidence if it is rationally
12 probative.

13 The threshold question under the Code, and
14 probably under the common law as well, is whether it is
15 reliable evidence upon which you can act. Then the
16 overarching requirement is according natural justice to
17 the parties, and in particular to the players. This
18 hearing dealing with this evidence, Charter, Alavi and
19 Dank, in this circumstance the requirements of natural
20 justice dictate that there be an opportunity to test their
21 evidence.

22 Now, I have heard the exchange between yourself,
23 Mr Chairman, and Mr Grace earlier on. I understand that's
24 an alternative way in which the material could be dealt
25 with, and of course we would advance the submissions or at
26 least adopt them in the event that the Tribunal - - -

27 CHAIRMAN: If the evidence was received and we said that it was
28 available to act upon. Another difference is in a
29 criminal court you have a jury situation where clearly
30 there are concerns about the ability of a lay jury to be
31 able to assess evidence in terms of probative value and

1 things of that nature.

2 MR CLELLAND: Contamination, yes.

3 CHAIRMAN: Which are not issues that we have here. We have to
4 instruct ourselves properly, but it is not as if we are
5 equivalent to a jury.

6 MR CLELLAND: In terms of being at least theoretically
7 rationally probative, clearly one would expect that
8 Mr Dank could or should be able to give evidence about the
9 supplement program at Essendon.

10 CHAIRMAN: He could give evidence about a lot of things.

11 MR CLELLAND: Generally and also specifically as to what
12 substances he intended or represented - and they may not
13 be the same thing - were being administered. But in truth
14 the Tribunal has no way of knowing what Mr Dank's position
15 would be if he were to give evidence. So you just don't
16 have that confidence of, "Look, here is a signed statement
17 from somebody. They are of impeccable character. There's
18 a consistent account. They have signed it as being true
19 and correct and they become unavailable." That's probably
20 the least problematic example of the absent witness.

21 That is not this case. Mr Dank has not given a
22 consistent or even coherent account of the matters I have
23 referred to either generally or in relation to whether he
24 was intending or purporting to administer Thymosin,
25 Thymomodulin, Thymosin Beta-4 or Thymosin Alpha. Again
26 I refer you back to his first comment about the context in
27 which it was being administered as an immuno suppressant.

28 What is apparent is that he couldn't fill that
29 evidentiary gap identified and explained so eloquently
30 yesterday, I think it was, by Dr Vine; that is the actual
31 chemical composition and structure - and you need

1 both - of any substance which was injected. There does
2 not seem to be any suggestion at all that Mr Dank, as
3 being the person who's the final link in the chain, could
4 give that kind of evidence at all. I don't think that
5 that's otherwise suggested.

6 In terms of cross-examination of Mr Dank, there
7 would be issues of credit and credibility that would
8 arise, much in the same way as those matters identified by
9 Mr Grace. The Tribunal has already heard about some of
10 those. It would seem that there is a body of material,
11 whether that material is confined to the voir dire or is
12 admitted on the hearing proper, that would suggest that
13 Mr Dank in the eyes of those who dealt with him was a
14 charlatan, and a dangerous one at that.

15 There are a number of issues separate to those
16 kind of observations or statements. The Tribunal has
17 heard about the claims which ASADA says are false that he
18 had administered or had access to AOD 964 at particular
19 times; the claim of testing of the substance by Mimotopes,
20 also said to be an untrue statement by him [REDACTED]
21 [REDACTED] the so-called backdated letter;
22 Mr Sedrak's comments about him; Mr Del Vecchio's comments;
23 indeed Mr Charter's comments; the observations of
24 Professor Handelsman. So it goes on. So there are
25 significant credit issues and very good reason to find
26 that the things that Mr Dank may have represented at any
27 given time could not be relied upon.

28 If I can just invite you to go back to - - -

29 CHAIRMAN: We might just break at this stage, Mr Clelland.

30 MR CLELLAND: Certainly.

31 MR HOLMES: Just before we adjourn, would the Tribunal have any

1 objection to adjourning at 3 pm this afternoon ?

2 CHAIRMAN: No, that's fine. We understand. In terms of

3 Tuesday, we don't mind starting a bit later if it meant

4 that it would be feasible for you to come down Tuesday

5 morning. Bearing in mind Monday is a holiday, you might

6 feel that you would like to come down Tuesday morning

7 rather than Monday night.

8 MR HOLMES: We will think it over the break, yes.

9 CHAIRMAN: We would be happy to accommodate that if you wanted

10 to.

11 LUNCHEON ADJOURNMENT

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1 UPON RESUMING AT 1.30 PM:

2 CHAIRMAN: Mr Holmes, what do you want to do Tuesday, any
3 thoughts?

4 MR HOLMES: A late start, please. 10.30?

5 CHAIRMAN: Is that enough? A late start, 10.30?

6 MR HOLMES: All right. 11 o'clock.

7 CHAIRMAN: Does that give you enough time?

8 MR HOLMES: More than enough.

9 CHAIRMAN: Okay, 11 o'clock it is. Mr Clelland.

10 MR CLELLAND: Can I return to this question or issue of
11 Mr Dank's character. Before we rose for lunch I was about
12 to take the Tribunal to page 345 of the folder AS-3. This
13 is the interview which aired on the 7.30 Report. So there
14 are some introductory statements by the presenter, there
15 were some questions by the reporter leading up to that and
16 the Tribunal has it.

17 But I want to direct your attention to 345, where
18 the reporter, Ms Meldrum-Hanna, asked the question
19 directly to Mr Dank, "What did you inject Essendon players
20 with? Oh, look, they had intravenous injections for
21 vitamin B and vitamin C which are quite compliant with the
22 WADA Code ...(reads)... look, as I said, I'm not going to
23 go through the specifics of the whole program."

24 Further down the page at about point 8 you will
25 see that he asserted that the program was well documented.

26 CHAIRMAN: You may like to rely upon that.

27 MR CLELLAND: We would. If I can take the Tribunal forward to
28 page 347, at about point 3 of the page, again the reporter
29 asking, "There's one product on Dank's website that stands
30 out. Last week 7.30 discovered Dank's Medical
31 Rejuvenation Clinics ...(reads)... this is the very

1 supplement rumoured to be at the heart of the Essendon
2 scandal." And Mr Dank agrees that it's a curious link.

3 Then at about point 6 of the page, point 7, again
4 the reporter, question, [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 If I could then invite the Tribunal to go forward
13 to 391, so this will be part of the McKenzie interview,
14 about halfway down the page. Mr McKenzie told Mr Dank
15 that he wanted to run some of the negative things past
16 Mr Dank that people had said about him, and he hastened to
17 add that there were some positive things such that he was
18 "affable, knowledgeable, you're a good guy, you'd never
19 harm anybody. But your critics say that you, and this is
20 not my words, this is your critics, the people who attack
21 you say you always think that you're the smartest guy in
22 the room and you've got a bit of a God complex. How do
23 you respond to that?" Dank said, "No, quite the
24 opposite."

25 "How do you think you were caught up in all
26 this," asks Mr McKenzie. "To be reasonably honest, mate,
27 I think there is, you know, vast degrees of associations"
28 - it says "laughing" in brackets - "with some people,
29 right, albeit all above board and professional and there
30 are other associations which I don't really have such as

31 [REDACTED]

1 [REDACTED]
2 Over the page, Dank, "And obviously, you know,
3 the beta, the biotolic contract obviously said things that
4 weren't true. There's a mystique about compounding
5 pharmacies ...(reads)... as a result in the last 18 months
6 since that injury he's now - sorry, since that gunshot
7 he's had about nine hernias."

8 Then there is reference to Mr Robin Willcourt and
9 he looked at that as an interesting medical challenge. [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 Sorry, Mr McKenzie said, "I take your point. I don't see
13 a big deal of treating a bikie if they are injured."

14 Then Mr Dank said, "You know, in Melbourne one of
15 the leading, I probably shouldn't say the top end, it
16 might give it away, but he is one of the leading public
17 prosecutors is a patient. But we don't check him away
18 because he's a public prosecutor." A fairly Catholic
19 attitude towards his clientele.

20 Mr McKenzie said, "Well, can I raise frankly with
21 you now, we are still on the record here, probably the
22 most damaging thing is what has been put to me
23 ...(reads)... you know, why did you go down that path
24 given the questions" - and the last part of that is
25 unintelligible.

26 Again I think seeking to reassure the listener,
27 Mr Dank said, "To be reasonably honest, Nick, you know,
28 the more serious cases we would attend to ...(reads)...
29 so he was the scientist who would do all the consults and
30 then the doctors would write the scripts for him."

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 That's some of the extracts from the two
8 interviews that are provided in the materials and the
9 McKenzie interview in particular is relied upon. It
10 doesn't, in our submission, necessarily require this
11 Tribunal to make a finding about Mr Dank, at least for
12 these purposes. What is apparent, in our submission, is
13 that there are serious questions that arise - - -

14 CHAIRMAN: But what's asserted by people in interviews, if it
15 is not accepted by Dank, is not evidence.

16 MR CLELLAND: What you have is, as I said before lunch, you
17 have a body of material where there are assertions,
18 aspersions, negative statements being made about Mr Dank
19 by others. Our point is this: there is a body of evidence
20 there which would at least form a legitimate basis for
21 cross-examination of Mr Dank.

22 We agree with you, with respect. The Tribunal
23 can't make findings about those matters. What we are
24 doing is pointing out that there are legitimate issues
25 that arise on the material going to questions of credit,
26 credibility, his qualifications, his expertise and indeed
27 the reliability of representations made by him. All we
28 are identifying is that those issues are not simply a
29 hypothetical that we could say to the Tribunal, "Well, we
30 might like to explore credit issues." We say that there
31 is a basis in the materials which would at least found the

1 questioning.

2 CHAIRMAN: You and Mr Grace will challenge everything it is
3 said that Mr Dank has done, particularly in relation to
4 including the substances in the program. I would
5 anticipate that you are going to say, "For whatever
6 reason, this bloke didn't know what he was doing, he was
7 all over the place. Who knows what he had in mind and
8 what he was trying to achieve and what he gave to the
9 players. He's just a complete loose canon."

10 MR CLELLAND: Quite. And there is evidence of - - -

11 CHAIRMAN: I assume that's going to be the tenor of the defence
12 submissions as far as Mr Dank is concerned.

13 MR CLELLAND: Yes. What we are saying is that the Tribunal
14 could not accept his evidence as being reliable evidence
15 if it is sought to rely upon his answers to Mr McKenzie in
16 the absence of the opportunity for representatives of the
17 players to cross-examine.

18 That is really the matters going to credit and
19 credibility. I'm trying to make it clear that I'm not
20 suggesting the Tribunal needs to go to the point of
21 determining those questions. What we are putting is that
22 they legitimately arise on the material, that they are
23 legitimate questions and lines of enquiry that we would
24 expect to and ordinarily have an opportunity to agitate
25 with the witness, and indeed that the Tribunal would need
26 before it could make an ultimate finding as to whether
27 anything relied upon, said or done or claimed to have been
28 done by Mr Dank was reliable evidence. That's the point.

29 There are of course all those issues that were
30 identified by Mr Grace yesterday and perhaps even the day
31 before. The Tribunal will recall all the text messages

1 and emails between Alavi, Charter, Dank. All I need to
2 say about that is that they too would be explored and need
3 to be explored in cross-examination with Mr Dank if
4 material is put before the Tribunal by ASADA on the basis
5 that the Tribunal should accept that Mr Dank said to
6 Mr McKenzie, "I administered Thymosin Beta-4," and that
7 the Tribunal should act on a statement like that.

8 So, if that was the case, we would seek to
9 cross-examine obviously as to his capacity to assert the
10 identity of any substance by exploring such issues as the
11 source, the timing, what he ordered, from whom, when, the
12 time of receipt, form of packaging, system of storage,
13 what he actually knew about the composition of any
14 substance, what was he intending to administer and for
15 what purpose, the system of recording, what was received,
16 what was administered and to whom, the circumstances
17 surrounding the so-called first batch, why it was
18 unusable, the source of any so-called second batch or
19 delivery, the timing and source of any injections and so
20 on, what his knowledge was even anecdotally of Thymosin
21 and the differences between Thymosin and Thymomodulin,
22 Thymo Alpha and so forth.

23 The Tribunal will recall, as I pointed out before
24 lunch, his reference to the immunosuppressant qualities of
25 Thymosin Beta-4. We also note in passing that the
26 McKenzie interview is conducted in April 2013, by which
27 time on ASADA's case Mr Dank back in 2012 had been
28 sufficiently concerned about the alleged use of Thymosin
29 Beta-4 [REDACTED]
30 [REDACTED]

31 Now, the interview with Mr McKenzie is well after

1 that. So what ASADA's case is, as I understand it, is
2 that as some sort of consciousness that he should change
3 the record with Mr Alavi as to what was being compounded
4 from Thymosin Beta-4 to Thymomodulin, but after that it's
5 said that the Tribunal should nonetheless use his
6 statement to Mr McKenzie as proof in some way when he said
7 Thymosin Beta-4 and expresses surprise that it's
8 supposedly prohibited by WADA.

9 It might simply be that the correction by Mr Dank
10 afterwards should be given some weight when he contacts
11 Mr McKenzie afterwards and says, "I wasn't intending to
12 refer to Thymosin Beta-4. I was referring to a different
13 Thymosin." But again ultimately that's just not a matter
14 that this Tribunal is going to be able to resolve on the
15 evidence.

16 CHAIRMAN: Okay.

17 MR CLELLAND: Questioning would also go to things such as his
18 other businesses, sourcing peptides for them. I won't
19 take you to them, but Mr Grace took you yesterday in
20 folder AS-4, page 13, line 225, and page 34, lines 55 to
21 56, and that was that series of texts where there seemed
22 to be a clarification after a conversation with Mr Dank by
23 Mr Charter to Mr Alavi as to what in fact was being
24 ordered was not Thymosin Beta-4 but Thymomodulin or
25 Thymosin.

26 ASADA's response in part seems to be that the
27 players have been given an opportunity to answer the
28 accusations, and you will find that at paragraph 35 of
29 their written submissions. What we say in response to
30 that is that the matters that we have been outlining are
31 really not within the knowledge of the players. What

1 knowledge could they have regarding the chain of supply of
2 any substance and Mr Dank's dealings with others? I will
3 ask my instructor to bring it up on the laptop. It is a
4 short section of Mr [REDACTED] interview, Mr Chairman, and
5 then I'm just about finished.

6 MR HOLMES: Which volume is that?

7 CHAIRMAN: What you are addressing at the moment is in relation
8 to the situation of the player interviews.

9 MR CLELLAND: Correct.

10 CHAIRMAN: There is no dispute that the player interviews are
11 properly before the Tribunal.

12 MR CLELLAND: Yes.

13 CHAIRMAN: The real question is what's the relevance, what's
14 the probative value of statements made and what's the use
15 that can be made of statements made by the various players
16 in their interviews.

17 MR CLELLAND: Yes, although I wasn't intending to quite get to
18 that proposition yet. What I was dealing with was this:
19 As I read ASADA's submissions, they seem directed to this
20 proposition, that the Tribunal is entitled to take into
21 account evidence that is rationally probative. We don't
22 disagree with that, and in certain circumstances that
23 would include hearsay evidence even where there's not an
24 opportunity to cross-examine. Again, in certain
25 circumstances that's correct on the authorities.

26 But clearly, just on the authorities read to the
27 Tribunal this morning, in other circumstances the Tribunal
28 will not be able to be satisfied that the evidence it's
29 being asked to act on is reliable, particularly where
30 there's been no opportunity to test it and, further, where
31 that evidence goes to a core issue as this clearly does

1 and there's no opportunity for the players to test it,
2 then it may well constitute a denial of procedural
3 fairness.

4 One of the further things that ASADA says in
5 their submissions is, "Well, in any event the players had
6 an opportunity to respond to these issues; that is, they
7 had been given an opportunity to answer the accusations."

8 The point I'm making at the moment is what
9 personal knowledge could Mr [REDACTED] for example, have as
10 to the supply chain of material procured by Mr Charter,
11 Mr Alavi or indeed Mr Dank such that they could, as it is
12 suggested, answer these accusations? It is not a matter
13 within their personal knowledge.

14 Perhaps it is sufficient if I just refer you to
15 it, but if you look at it - - -

16 CHAIRMAN: Mr Clelland, the only issue, as I understand it,
17 that we are addressing at this point as a threshold
18 admissibility issue is not whether the interviews are
19 evidence before the Tribunal - it's not being disputed
20 that the interviews are evidence before the Tribunal - and
21 in terms of what conclusions the Tribunal ought to draw
22 from particular interviews, having regard to the factors
23 that you are talking about in terms of how much did the
24 players know and all that sort of thing, well, we would
25 anticipate that that would be covered in submissions, you
26 responding to however ASADA is putting forward its
27 reliance on the admissions or on the statements.

28 What I think the objection is about is the use of
29 statements made by [REDACTED] against [REDACTED]

30 MR CLELLAND: Can I cut you off, Mr Chairman? I was simply

31 going to use an answer of Mr [REDACTED] I'm still dealing

1 with Mr Dank and the assertion in the submissions from
2 ASADA that the players had the opportunity to answer these
3 accusations and in some way that justifies why a statement
4 made by Mr Dank in an interview with Mr McKenzie should be
5 admitted, because the players, so it is said, had an
6 opportunity to answer the accusations.

7 I was still dealing with Mr Dank. I was saying
8 that these players, on the evidence, what opportunity or
9 capacity would they have had to answer anything to do with
10 the so-called supply chain?

11 CHAIRMAN: Wait a minute. When were they interviewed having
12 regard to when McKenzie interviewed Dank? After McKenzie
13 interviewed Dank?

14 MR GRACE: A month after.

15 CHAIRMAN: Was it ever put to the players that Dank had said
16 this in an interview with McKenzie?

17 MR GRACE: No.

18 CHAIRMAN: That's fairly relevant, in terms of whether the
19 players had an opportunity to deal with it.

20 MR HOLMES: Sorry, there's nothing to stop the players giving
21 evidence now, is there?

22 CHAIRMAN: What I'm saying, Mr Holmes, is I'm asking whether
23 what Dank has said to McKenzie was ever put to the players
24 when they were interviewed. That's a standard procedure
25 that takes place in any interview. For example, if the
26 police have information, then they will put it to the
27 accused person as part of the interview to give the
28 accused person an opportunity to respond to it.

29 MR HOLMES: But we didn't get the record of interview until
30 some time later. If we were to be - - -

31 MR GRACE: That's rubbish. It was in The Age - - -

1 MR HOLMES: If we were to be putting newspaper articles to
2 witnesses in a formal interview, we would be laughed out
3 of court, with respect.

4 CHAIRMAN: All I'm trying to establish is that this statement
5 of Dank's was never put to the players, and it seems to be
6 that it wasn't. As to whether it should have been or
7 whatever, leave that aside. The players were not given an
8 opportunity to respond to this statement.

9 MR HOLMES: The players were not asked in their record of
10 interview about the transcript of the interview with The
11 Age because we didn't have it.

12 CHAIRMAN: No, but it was never put to the players, "Mr Dank
13 has said that this was" - they were asked a lot of other
14 questions, I accept that, but this proposition of Dank's
15 was not put to them.

16 MR HOLMES: It was not put to them.

17 CHAIRMAN: Because you say it wasn't until later when the
18 transcript was obtained.

19 MR HOLMES: We are addressing two different things. One is
20 what should have been put to them in an interview, whereas
21 what is their opportunity at the moment to present their
22 case. They can present their case on what Mr Dank has
23 said in these proceedings.

24 CHAIRMAN: Yes.

25 MR HOLMES: And that's different to whether or not an
26 interviewer should have put things to the person being
27 interviewed from the newspaper at that stage.

28 MR CLELLAND: The point that we are balking at is this
29 proposition. Paragraph 35 reads, "Secondly, the players
30 have been given the opportunity to answer the assertions
31 contained in the statements, transcripts and media

1 articles." What we took that to be a reference to was the
2 fact that they had participated in these interviews and
3 had certain matters put to them and that's the context in
4 which we make the submission. It is no answer, in our
5 submission, for ASADA to point to that, given the nature
6 of the assertions attributed to Mr Charter, Mr Alavi and
7 Mr Dank. They are not and would not have been matters
8 within the players' knowledge.

9 If the Tribunal pleases, the short proposition is
10 this: because the Tribunal can receive and act on hearsay
11 evidence does not mean that in every circumstance you
12 should. Like the circumstances with Mr Charter and
13 Mr Alavi, we submit you would not act on Mr Dank or any
14 representation attributed to Mr Dank in a way adverse to
15 the players without them having an opportunity to test
16 that evidence, and where it remains untested it is of a
17 kind of evidence which is so unreliable the Tribunal
18 couldn't act upon it. That's the submission.

19 CHAIRMAN: Okay.

20 MR CLELLAND: In terms of the players' interviews, perhaps
21 I should deal with one other thing. There are texts and
22 emails where the maker or the recipient is not available
23 to give evidence. We don't submit that they should be
24 excluded from evidence, but we do reserve the right to
25 make submissions about what weight should be given to them
26 in our ultimate submissions.

27 CHAIRMAN: Absolutely. We understand that.

28 MR CLELLAND: Thank you. The final point is this. This is an
29 issue that arose before lunch and, Mr Chairman, you
30 adverted to it a little time ago, this question of just
31 what ASADA's position is in relation to the use of one

1 player's interview in relation to the case of another
2 player.

3 I hope Mr Holmes doesn't mind if I mention that
4 we had a chat about it outside and it may be that
5 Mr Holmes is in a position, or perhaps not, to actually
6 articulate before the Tribunal and for our benefit just on
7 what basis it is or how it is said that ASADA can and
8 indeed this Tribunal can rely upon the material in that
9 way. If we hear that or we receive it in some form, then
10 we will be in a position to respond to it.

11 CHAIRMAN: I'm glad you mention that because I was going to
12 suggest that perhaps to try and deal with this altogether
13 that Mr Holmes might be able to help us as part of his
14 submissions to give at least some indication or outline of
15 how he envisaged they would be seeking to use the
16 statements of one in relation to the others as part of
17 their case, and then we could give you and Mr Grace, if he
18 wishes, an opportunity to respond to that.

19 MR CLELLAND: Thanks, Mr Chairman.

20 CHAIRMAN: I think that's a good way to deal with it, if we
21 can. All right. Does that conclude your submissions,
22 Mr Clelland, at this stage?

23 MR CLELLAND: It does, thank you, Mr Chairman.

24 CHAIRMAN: I don't know whether you want to make any
25 submissions, Mr Gleeson, or it's best to proceed with
26 Mr Holmes and then if you wish to add anything in light of
27 his submissions, then you may do so.

28 MR GLEESON: We prefer the latter course, Mr Chairman, if
29 that's convenient.

30 CHAIRMAN: Okay. Mr Holmes, you have been very patient.

31 MR HOLMES: It is not often you have an objection to evidence

1 which takes three days before you have an opportunity to
2 respond to the objection.

3 CHAIRMAN: John Nixon's experience and my experience is that we
4 have had objections to evidence go for a lot longer than
5 three days. But we are talking about different
6 jurisdictions.

7 MR HOLMES: We are talking about different jurisdictions, but
8 something that was said after lunch I thought was a nice
9 place to start. "We are not suggesting that the
10 Tribunal" - this is my note of what Mr Clelland said - "we
11 are not suggesting that the Tribunal goes so far as to
12 make a finding against implicitly Alavi, Charter and Dank
13 on credit, but we would ordinarily have the opportunity to
14 cross-examine."

15 That's where we part company. Mr Chairman, in
16 your experience, what "ordinarily" means to you is
17 obviously different to what it means in other Tribunals,
18 other places. So our authorities, if I can take you to
19 them, we start with what happens around the world when
20 these doping cases come to be determined and be resolved
21 by non-judicial processes. It's the WADA Code that is
22 filtered down to all of these jurisdictions and it has
23 been implemented. We are dealing with the implementation
24 here under the AFL Anti-Doping Code.

25 But what would ordinarily happen is that hearsay
26 evidence would be admitted and it would be given such
27 weight as is appropriate in the circumstances; that is,
28 whether or not it is absolutely critical to the decision.
29 When I say "absolutely critical to the decision",
30 sometimes it works in favour of the applicant because the
31 applicant has to prove things, but sometimes under the

1 Code the athlete has to prove things to get a different
2 sanction. In both cases, the applicant and the
3 respondent, they can rely on hearsay evidence. That's the
4 ordinary rules of the game, so to speak.

5 So we are dealing with a radical departure from a
6 global system that has filtered down from the WADA Code.
7 I'm only talking in terms of an objection to evidence on
8 the basis of hearsay denying a person a right to
9 cross-examine. They can make all the comments about its
10 reliability, its credit, although, Mr Chair, you have
11 rightly observed that all of the evidence we have heard
12 over the last three days is their case on credit as if it
13 goes in. So, effectively they are asking you to make a
14 finding because, as Mr Grace has said, as he puts it, "All
15 their evidence is so unreliable you can't even determine
16 it. You can't receive it."

17 That effectively is a final submission. If it
18 has some probative value when it starts, before you
19 consider it, if we came along with just an allegation of a
20 rumour or something, well, then that may not have any
21 probative value and may not be received by you. But we
22 are not dealing with that. We are actually dealing with a
23 situation where Mr Grace has, on one view, demonstrated
24 his ability to present a case on behalf of his client
25 because he's presented a case in which he says ultimately
26 you will find, when you give it weight, you won't give it
27 any weight.

28 CHAIRMAN: Or not enough weight.

29 MR HOLMES: Or not enough weight. That undermines his
30 assertion that he has not had a reasonable opportunity to
31 present his case, because he's done that. All he wants is

1 now, if you like, the matter that's ordinarily used in
2 courts of law, the right to cross-examine, and
3 administrative tribunals in certain circumstances.

4 But I was saying what is the ordinary procedure
5 in anti-doping proceedings and the first one, if you go to
6 tab 7 of the bundle of authorities, this was a case in the
7 boxing world where there was an investigation by the
8 police in Wales of an alleged importation and supply of
9 steroids and money laundering in a period between 2011 and
10 2012 and it involved a number of family members. The
11 evidence that was presented essentially was the
12 prosecution brief including unsigned statements from
13 investigating officers and these people weren't
14 cross-examined and it was all hearsay on a court of law's
15 application.

16 They lost at the first instance tribunal. Under
17 the system in the UK there's an appeal to another hearing
18 body and the appeal process you see at paragraph 10.
19 There was a notice of appeal filed and it came before the
20 tribunal. The grounds of appeal, if you go to 18.4,
21 essentially all of the evidence on which the UK
22 anti-doping relied was indirect, hearsay, unsubstantiated
23 and properly proved. In other words, they had no right to
24 cross-examine the makers of the statements.

25 Paragraph 19, there was a breach of natural
26 justice because the police presented an unsigned witness
27 statement to the Tribunal. Then 2, the information that
28 was presented was based on hearsay, unsatisfactory and
29 incomplete.

30 We go over to ground 1, the appeal panel's
31 decision in paragraph 26. "As we have said, the main

1 complaint about the quality of the evidence that the
2 tribunal has had was that much of it was indirect and/or
3 hearsay. It is, to be frank, neither here nor there that
4 the officer in the case did not sign the copy or any other
5 papers."

6 He gave oral evidence. "We regard it as wholly
7 appropriate in this jurisdiction for Lumsden to give his
8 evidence by reference to material gathered for the
9 purposes of the prosecution." Again hearsay material,
10 I interpolate.

11 "That some or all of it may have been hearsay
12 might have mattered and required strict proof in a
13 criminal case. But the rules of evidence in front of a
14 domestic tribunal such as an anti-doping tribunal or this
15 panel are not so constrained."

16 Then the next complaint is, "The evidence of
17 Mr Thomas, performance director of the WABA, was similarly
18 unsigned or insubstantial. Likewise, it is submitted that
19 in relying upon hearsay (perhaps double hearsay) evidence
20 provided by Mr Howard, the material before the Tribunal
21 was inadequate and insufficient and constituted no
22 evidence of any forensic value. Dr Graham also complains
23 that the various schedules that Mr Howard produced
24 contained nothing more than unsubstantiated, biased
25 opinion."

26 Paragraph 30, "The fundamental misconception that
27 underlies all those arguments is the assumption that all
28 evidence must be given only by those with firsthand and
29 direct knowledge. The appellant and her advisers are
30 simply wrong about that. We repeat that in civil tribunal
31 processes such as the present it is commonplace to rely

1 upon hearsay indirect evidence. Of course, the weight to
2 be attached to that evidence may be a matter of debate and
3 such evidence, like direct evidence, may be capable of
4 rebuttal or answer or explanation by the accused person.
5 In this case, for example, that evidence might have been
6 capable of explanation by the appellant."

7 The rebuttal we have heard basically over the
8 last three days, so they have gone beyond the admission of
9 hearsay evidence. They have demonstrated perhaps they
10 could do better with cross-examination, but in terms of a
11 reasonable opportunity to present their case there has
12 been no unfairness demonstrated by the lack of a right to
13 cross-examine.

14 I go back to paragraph 31. "Putting it in legal
15 terms, the evidence submitted by Mr Howard and by DC
16 Lumsden and otherwise contained within the material which
17 was before the tribunal and is before this appeal panel
18 constituted a prima facie and probably a strong prima
19 facie case that the appellant was directly involved or
20 complicit in the matters with which she was charged. To
21 take but one example, Mr Howard was able to produce a
22 schedule showing that her name was marked as the sender on
23 a number of relevant packages. Of course, this
24 information or his information was second or perhaps
25 thirdhand but that does not make the evidence any less
26 admissible. There might have been an innocent explanation
27 or there might not."

28 So I continue, "What is fatal to the appeal, just
29 as it was fatal to the appellant's approach in front of
30 the tribunal, is that she exercised her right to say
31 nothing and said nothing. She had taken a similar

1 approach during the course of a police interview on
2 12 July. She will have been warned then by way of a
3 standard caution that adverse inferences might be drawn
4 even in the criminal processes, but staying silent gives
5 rise to exactly the same risk in a civil process such as
6 during an investigation by a body like UK anti-doping
7 and/or in the case of a tribunal appeal hearing. We note
8 from the following provisions of the World Anti-Doping
9 Code and from the ADR themselves" - and there is the World
10 Anti-Doping Code. We have quoted that in our written
11 submissions.

12 "These anti-doping rules and procedures are aimed
13 at enforcing anti-doping rules in a global and harmonised
14 way. They are distinct in nature from and are therefore
15 not intended to be subject to or limited by any national
16 requirements and legal standards applicable to criminal
17 proceedings or employment matters. When reviewing the
18 facts and the law in a given case, all courts, arbitral
19 hearing bodies, panels and other adjudicating bodies
20 should be aware and respect the distinct nature of the
21 anti-doping rules and the code and that the fact that
22 those rules represent the consensus of a broad spectrum of
23 stakeholders around the world with an interest in fair
24 sport."

25 So the ordinary rules are based on that. Then if
26 you go to the anti-doping rules being applied by that
27 panel, and they have a resonance with the present ones,
28 "The hearing panel shall have the power to decide on the
29 admissibility, relevance and weight of any evidence,
30 including the testimony of any fact or expert witness and
31 shall not be bound by any legal rules in relation to such

1 matters. Facts may be established by any reliable means,
2 including admissions."

3 The same contractual provisions that the parties
4 to those proceedings agreed and accepted are accepted in
5 these proceedings. These are contractual proceedings.
6 I continue, "The hearing panel may draw an inference that
7 is adverse to a participant charged with the commission of
8 an anti-doping rule violation based on the participant's
9 refusal, after requests made in a reasonable time in
10 advance of a hearing, to appear at the hearing and to
11 answer questions put by the hearing panel or the NADA."

12 Just stopping there, if I can invite you
13 gentlemen to draw on your experience in criminal matters.
14 If when the accused is told about the trial, "you have to
15 turn up and you have to answer any question, otherwise an
16 adverse inference," you would recoil, because that's not
17 what is ordinarily done in a criminal trial. I go back to
18 what would ordinarily apply in criminal proceedings is
19 quite different to anti-doping proceedings.

20 They dealt with it over at paragraph 38 on a
21 different basis, looking at whether or not there was a
22 breach of natural justice, there was no right to
23 cross-examine or hearsay evidence or they shouldn't have
24 taken into account hearsay evidence. Here we are dealing
25 with the daughter. The father was convicted. It was the
26 daughter who wasn't convicted in the criminal trial.

27 "Our conclusion on this ground of appeal follows
28 from the foregoing. The Tribunal was perfectly entitled
29 to take account of hearsay evidence. She and her
30 representative, Dr Graham, were provided in advance with
31 all the evidence upon which UK Anti-Doping relied. She

1 had the opportunity by giving evidence personally, as well
2 through the questions put by her representative, to
3 challenge the evidence of any witness upon which UK
4 Anti-Doping relied," but in that case she didn't give
5 evidence and there was some cross-examination carried out
6 on her behalf.

7 So that is what is applied in the UK in
8 equivalent proceedings. If we go to the next tab, tab 8,
9 we have an example from South Africa and the hearsay
10 objection is raised. The hearsay objection related to the
11 requirement to produce corroborating evidence to establish
12 an absence of an intent to enhance sports performance or
13 mask the use of performance enhancing substances.

14 It is only dealt with very briefly in this case
15 at page 35. There is the finding, "The panel's findings
16 on the question of whether or not the panel should accept
17 the hearsay evidence provided by the athlete" - the word
18 in block letters is the athlete's name - - -

19 CHAIRMAN: Because the onus was on the athlete with respect to
20 that.

21 MR HOLMES: Yes. The boot was on the other foot.

22 CHAIRMAN: Yes.

23 MR HOLMES: "Concerning the instructor's provision of the white
24 tablets containing ...(reads)... the panel's reasons for
25 this being that the instructor had refused to make contact
26 with or distance himself from the athlete." Mr Alavi and
27 Mr Charter had refused to make continuing contact with
28 ASADA and distanced themselves from ASADA.

29 "The instructor had seemingly not been prepared
30 to provide any assistance in his defence." I interpolate
31 Charter was not prepared to provide assistance to ASADA;

1 was prepared to provide assistance to the players and
2 their solicitor.

3 Third point, "The instructor ran the risk of
4 possibly being criminally charged for his having given the
5 athlete the while pills without prescription."

6 Mr Chairman, you made the same observations in
7 relation to - I'm not sure whether it was Alavi, Charter
8 or Dank.

9 CHAIRMAN: All three.

10 MR HOLMES: "There was no mechanism whether under the rules or
11 otherwise by which the instructor could be subpoenaed to
12 provide testimony as a witness at a hearing, whether he
13 was reluctant to do so or not." We know from Justice
14 Croft's decision that applies here, but there is a
15 provision under the rules in relation to the players, so
16 that's a different matter.

17 "The athlete did not have financial resources."
18 Then there is reference to the corroborating evidence.
19 So, that's the position in South Africa.

20 We turn over the page to the Canadian case, the
21 International Tennis Federation. This is a case where
22 again the boot was on the other foot. The athlete wanted
23 to prove that the athlete had ingested cocaine without
24 - this is the kissing one. If you go to paragraph 20.
25 The athlete was out drinking, he decided to pull out of
26 the event, withdraw from the event, but he didn't withdraw
27 on that afternoon. He went out partying, so to speak, and
28 in paragraph 20 he met a woman, Pamela, and they kissed,
29 and I quote, "about several times while they were at" the
30 name of the discothèque "and each kiss lasted about five
31 to 10 seconds."

1 There was hearsay evidence that she had taken
2 cocaine. If you go to page 24, paragraph 81. If we start
3 at paragraph 80, "If one rules out deliberate ingestion
4 for recreational purposes, as we do, all other
5 possibilities must necessarily involve ...(reads)... in
6 the presence of her lawyer she repeated these denials and
7 claimed that she had been defamed by the press."

8 It's a bit like Mr Dank after he had spoken to
9 Mr McKenzie. Down to 82, "However, there was no
10 opportunity to discuss with her the content of her
11 statement. The credibility of what she said could not be
12 tested, yet it was important to test her credibility
13 because the content of her pre-prepared statement flatly
14 contradicted the player's evidence that they kissed
15 extensively mouth-to-mouth at the club. Pamela denied
16 this, but she was not prepared to be questioned about it
17 and that was supported by the player's coach."

18 If we go over to paragraph 90 on page 26 - - -

19 MR GRACE: What about 83? Do you want to read that?

20 MR HOLMES: "Unsurprisingly, the ITF did not in the
21 circumstances seek to rely on Pamela as a witness of truth
22 and did not rely on her testimony as a basis for impugning
23 the player's credibility."

24 MR GRACE: Much like Mr Dank, Mr Charter, Mr Alavi.

25 MR HOLMES: "The ITF called no other witnesses to dispute the
26 player's account of the events that night. We do not
27 criticise the ITF in any way for that. We are not
28 suggesting that they should have made detailed enquiries.
29 They made the finding that cocaine was present and used by
30 some customers."

31 Paragraph 86, "We also accept the evidence,

1 albeit hearsay, that Pamela has taken cocaine in the past.
2 She is reported to have said this to a journalist
3 ...(reads)... than one who, like the player, has never
4 used cocaine and would not be willing to do so."

5 Then over at paragraph 90, that's where the
6 finding is made based on it. That was a panel where - - -

7 CHAIRMAN: Again, in that situation the onus was on the player.

8 MR HOLMES: On the player.

9 CHAIRMAN: He had to show how it entered his system.

10 MR HOLMES: Another cocaine one is the following one under tab
11 10. This is the one where the evidence was critical again
12 for the athlete and this is where the athlete again
13 ingested cocaine. The evidence was hearsay. If you go to
14 45 and 46, again the athlete visited a bar in Toronto at
15 about 11 o'clock in the evening. "The athlete alleges
16 that an unknown woman inserted cocaine into his mouth with
17 her fingers whilst seated beside him on a sofa in the bar.
18 He claims this was done against his consent. The witness
19 testified that following the alleged assault she was
20 verbally confronted by the woman whom she believed was on
21 drugs. The witness states she observed the woman was
22 carrying a plastic pouch which the woman confirmed to her
23 contained cocaine."

24 So it was second-hand hearsay. The woman who put
25 the fingers in the mouth and inserted the cocaine told
26 another woman, the witness Karir, and Karir gave evidence
27 of what this person had told her.

28 If we go to paragraph 117, the Tribunal said,
29 "There are a substantial number of unknowns in the
30 athlete's version of events. No one knows who the alleged
31 assailant was or the substance administered by that person

1 ...(reads)... and when I look at the entire circumstances
2 beyond the mere testimony of the athlete I find that the
3 overall events strains my credibility."

4 So there we have in relation to the ordinary
5 course there is no ordinary right to cross-examine and you
6 cannot - I withdraw that. As a matter of ordinary
7 practice in anti-doping tribunals you do not have a right
8 to object to hearsay evidence because you have not been
9 able to cross-examine the witness, because it applies both
10 for the athlete and it applies both for the association or
11 the body alleging an anti-doping infraction. So it is
12 what's fair in all the circumstances.

13 This is not a criminal proceeding where the
14 powers of the State are brought to bear and imposed on a
15 citizen. This is a contractual arrangement that every AFL
16 player agrees with his fellow AFL players and all those in
17 the administration to adopt a regime to resolve disputes
18 between them in a particular way. I'm sorry if I'm
19 repeating what I said at the outset about this not being a
20 criminal proceeding.

21 CHAIRMAN: No, that's all right.

22 MR HOLMES: But it was that "what ordinarily would apply", we
23 are looking at it from a different perspective. However,
24 that's just the WADA Code. I then wanted to take you to
25 the AFL Code and the AFL Rules because the AFL Rules do
26 add on to the AFL Anti-Doping Code in a relevant way.

27 This is the AFL Anti-Doping Code and Rules.

28 CHAIRMAN: Yes, I have it, thanks, Mr Holmes.

29 MR HOLMES: I wanted to start with page 34 of the Code.

30 MR CLELLAND: 2010? 2014?

31 MR HOLMES: It is 2010, in paragraph 15.2, "Facts relating to

1 anti-doping rule violations may be established by any
2 reliable means, including admissions." So there is not a
3 rule that before evidence should be received by a Tribunal
4 this Tribunal must have an address based on all of the
5 evidence in the proceedings to see whether or not they
6 make a ruling that it is unreliable.

7 Mr Clelland quite properly said, "We are not
8 asking you to make a finding on credit. We are not asking
9 you to make a finding that it's unreliable." I think
10 Mr Grace went further than that. But we would say "they
11 may be established by any reliable means, including
12 admissions" looks at the test to be applied by the
13 Tribunal when it's apprised of all of the evidence because
14 only then can it be in a position to see whether or not
15 the facts have been established by reliable means.

16 If you go down to the footnote, "The standard has
17 been applied in courts and hearing panels in doping
18 cases," and there is reference to other cases.

19 31, "Reliable documentary evidence, reliable
20 analytical data, the A or B sample, or conclusions drawn
21 from the profile or a series of a player's blood or urine
22 samples." They are given as but examples. But it is not
23 at the admissibility stage; it is whether or not it has
24 been established. You only address that question of
25 establishing it when you have all of the evidence before
26 you.

27 I go then to the rules which have been grafted on
28 the top of this because this Tribunal hears all sorts of
29 matters. Could I take you to rule 42. I know your
30 attention has been drawn to this in relation to natural
31 justice, and that is in 42.4. You have gone to the

1 authorities which say, "What is the content of the natural
2 justice obligation," and it varies in all the
3 circumstances. Here my friends are saying, "That implies
4 a right to cross-examine in these circumstances."

5 But the players, the AFL, all the parties who are
6 bound by this did not give participants the right to
7 cross-examine. What they did give them is in 42.4(a)(i),
8 "To provide any person whose interests will be directly
9 and adversely affected by its decision" - these are the
10 key words, with respect, that govern this Tribunal - "a
11 reasonable opportunity to be heard." So far you have only
12 been taken to that use of the phrase in that context.

13 But if you go over the other page to 42.7(c), at
14 the next stage of these proceedings again it's a
15 reasonable opportunity to be heard on the question of
16 sanction. So is the reasonable opportunity to be heard,
17 where it is used twice, that's emphasised, does that
18 convey a right to cross-examine or a right to prevent
19 evidence being given because, even though it has been
20 demonstrated on one view of Mr Grace or Mr Clelland, they
21 have had an opportunity to be heard, they have had the
22 evidence since last October, December, the main evidence
23 from Mr Charter, Alavi and Mr Dank, they have had their
24 solicitor go along and interview Mr Charter, they have had
25 the ability to gather evidence and place it before you -
26 we are not dealing with a no case to answer submission;
27 they have readily gone into evidence - we are dealing with
28 have they not had a reasonable opportunity to be heard.
29 In our respectful submission, that has clearly occurred in
30 the present case.

31 I didn't want to go into the evidence this

1 afternoon, but I did want to go to the legal principles.
2 The legal principles are in the other anti-doping cases
3 and the natural justice as agreed to by the parties or
4 adjusted by their contract. We did have a decision which
5 Mr Grace took you to. Could I take you to our list of
6 authorities?

7 CHAIRMAN: Yes.

8 MR HOLMES: You will recall that under tab 14 Mr Grace took you
9 to Justice Young's decision and what Justice Young had
10 said in his judgment at the paragraphs that he referred
11 to.

12 CHAIRMAN: That's tab 14.

13 MR HOLMES: Yes. This was a very grave matter because this was
14 a question as to whether or not he was at risk to the
15 security of children. He hadn't been given the right to
16 cross-examine the key witness. She was a young woman at
17 the time of the offence; I think 14 or something.

18 At paragraph 13, "The Tribunal took into evidence
19 a statement of one KB, the daughter of the party's
20 erstwhile off and on de facto partner. The statement
21 appears to have made some allegations of indecent assault
22 occurring in 2000 when they was about 14. She was 24 at
23 the time of the Tribunal hearing. He was never charged in
24 respect of what was contained in the statement."

25 He wasn't given a right to cross-examine. So he
26 challenged the decision. The decision was set aside
27 below, and that was confirmed on appeal. So Mr Grace took
28 you to paragraphs 25. What he didn't take you to was this
29 was a Court of Appeal bench of three. If we go to the
30 senior appellate judge, Justice Hodgson, in paragraph 3,
31 "In the present case the onus was on the applicant to

1 prove that he does not pose a risk to the safety of
2 children. A hearsay statement may be rationally
3 probative" - and we are familiar with those
4 words - "against the non-existence of such a risk and it
5 may be appropriate to admit such material if it is fair to
6 an applicant to do so. What is fair may depend partly on
7 what is possible."

8 Could I just stop there. The counsel of
9 perfection is essentially what my friends are saying;
10 that, "Unless we cross-examine as we ordinarily do, this
11 is unfair." But it is what is possible in a Tribunal and
12 what are the Tribunal's powers. So I continue, "If it is
13 truly not possible to have the maker of a statement to
14 attend for cross-examination, then in my opinion it may be
15 fair to admit the statement even though the statement is a
16 crucial piece of evidence and to admit it would not have
17 been fair if the maker of it could have attended but did
18 not."

19 So he takes a different view to Justice Young,
20 and in the second paragraph, "I would give greater
21 significance to the question of the unavailability of a
22 witness than does Justice Young."

23 The other member of the Court of Appeal, Justice
24 Handley, agrees with Justice Hodgson and adds some brief
25 additional reasons, "The allegations before the trial
26 judge, Justice Harrison, were unsworn and untested." This
27 is paragraph 79. "They were unarguably critical to the
28 Tribunal's decision. In these circumstances his prospects
29 of success depended upon a successful objection to the
30 admission of KB's statement or a successful
31 cross-examination if her statement was admitted. If the

1 Tribunal had been satisfied on proper
2 materials" - approaching the Supreme Court for a
3 subpoena - "that KB was truly unavailable for whatever
4 reason it could have admitted her statement and given it
5 appropriate weight. I agree with Hodgson J that in such a
6 case the Tribunal would not deny the adverse party
7 procedural fairness."

8 But there there was evidence that, as she was 24,
9 you can't say that she's as unavailable as she was when
10 she was 14. In paragraph 84, "The situation would be
11 quite different if KB was truly unavailable. In that
12 situation a decision to admit her statement would not
13 deprive her of any opportunity to cross-examine that
14 witness. There would be no denial of his right to be
15 heard and no denial of procedural fairness."

16 So I think I was then going to go into the
17 particular aspects of the particular items of evidence.
18 I have one statement to make in relation to the use of the
19 players. Gentlemen, I'm persuaded to draw your attention
20 to the definition of "unavailability of persons" under the
21 Evidence Act.

22 CHAIRMAN: Yes.

23 MR HOLMES: It is subparagraph (f), "All reasonable steps have
24 been taken by the party to prove the person is not
25 available to find the person or secure his or her
26 attendance but without success."

27 CHAIRMAN: There has been some authority about that too,
28 Mr Holmes. It is defined in the legislation.

29 MR HOLMES: Yes. Again, that looks at what is the ordinary
30 case. Is the ordinary case where you apply the rules of
31 evidence or is the ordinary case - - -

1 CHAIRMAN: You'd say you met that test anyway.

2 MR HOLMES: Yes.

3 CHAIRMAN: In that you have done everything you could to have
4 the witnesses attend.

5 MR HOLMES: Yes. I was going to start on the use of the
6 players' transcript in a general proposition, but I think
7 I will leave that until after the weekend, if I may.

8 CHAIRMAN: I think you are entitled to a rest. That's fine.
9 We will pick that up on Tuesday at 11 o'clock. Have a
10 good Australia Day.

11 ADJOURNED UNTIL TUESDAY, 27 JANUARY 2015

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