

AFL ANTI-DOPING TRIBUNAL
MONDAY, 16 FEBRUARY 2015
DAY FIFTEEN
(TRANSCRIPT-IN-CONFIDENCE)

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CHAIRMAN: MR DAVID JONES
MR JOHN NIXON
MR WAYNE HENWOOD

COUNSEL ASSISTING: MR JUSTIN HOOPER

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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]

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1 CHAIRMAN: Good morning, everyone. Mr Holmes, can we start
2 with you?

3 MR HOLMES: Yes, there's an issue, if I may say. The players
4 want to insist on enforcing the rules of evidence and want
5 to address as a preliminary matter a couple of pages in
6 exhibit A3. This relates to GL Biochem and what sort of a
7 company GL Biochem is.

8 CHAIRMAN: Yes.

9 MR HOLMES: Whether it's a fly-by-night Chinese company where
10 you pay cash or whether it's a subsidiary of a
11 multinational with an operation here in Melbourne called
12 Mimotopes.

13 You will recall in exhibit AS-9, the dramatis
14 personae, that we said that Mimotopes is a subsidiary,
15 Mimotopes Pty Ltd is a Melbourne based peptides supplier
16 with whom Stephen Dank had contact and is part of the same
17 corporate group as GL Biochem. The way we sought to prove
18 that was to tender a number of records. This Tribunal
19 upheld the objections - - -

20 CHAIRMAN: Yes, I noted this in relation to paragraph 428,
21 I think it was.

22 MR HOLMES: Yes, that's what I'm dealing with now.

23 CHAIRMAN: I didn't have the actual exhibits with me when I was
24 going through this and I was trying to recollect, and my
25 recollection was that a document that made some reference
26 we ruled out, but what you seem to be referring to was
27 another document.

28 MR HOLMES: Yes, it is page 31 to 33.

29 CHAIRMAN: It was AS-3, document 9, 31 to 33.

30 MR GRACE: To 34.

31 MR HOLMES: Sorry, it goes over to 34.

1 CHAIRMAN: So we want AS-3.

2 MR HOLMES: AS-3. This is where we proved that fact. How do
3 we prove it? We go on the US Securities Exchange
4 Commission website where we see the documents that are
5 filed with that government authority by CBI, and we know
6 that GL Biochem is still going and we know that Mimotopes
7 is still going and we know that CBI is still going. We
8 have a record of when CBI acquired or merged with GL
9 Biochem and the details of the other subsidiary,
10 Mimotopes.

11 That is being objected to. If that goes out and
12 this Tribunal puts the blinkers on, then there is no
13 evidence of what GL Biochem is. There is no evidence that
14 Mimotopes is the subsidiary of CBI, a multinational. This
15 Tribunal would be walking around ignoring what is on
16 record. My friends have had this since last December - -
17 -

18 CHAIRMAN: This particular document wasn't objected to, was it?

19 MR GRACE: It was, sir.

20 MR HOLMES: It was objected to.

21 CHAIRMAN: But we didn't rule on it.

22 MR HOLMES: No, because at the time they put their list of
23 pages that they were objecting to, they didn't include
24 these pages. So I assume and I accept it's an oversight.

25 CHAIRMAN: That it was just inadvertent.

26 MR HOLMES: Yes, because if you look at the transcript it was
27 objected to at the time.

28 CHAIRMAN: At the time that you went through it.

29 MR GRACE: No, at the time I made submissions on the voir dire.

30 CHAIRMAN: I think you might have, too, when Mr Holmes was
31 referring to it.

1 MR GRACE: Yes, I did.

2 MR HOLMES: Back in December.

3 CHAIRMAN: Because he did take us through it to a fair extent.

4 MR HOLMES: There should be highlights perhaps every page

5 except for the last page. So it is a filing with the US

6 Securities and Exchange Commission. It's on their

7 records. It is there. They can look at the records.

8 They can verify this. They have had it since last

9 November/December. It cannot seriously be in dispute that

10 GL Biochem is not a subsidiary of CBI. It cannot

11 seriously be in dispute that Mimotopes is a subsidiary of

12 CBI. But we can have the players having objections to the

13 admissibility of evidence.

14 This Tribunal functions efficiently in most

15 matters because the rules of evidence don't apply, and it

16 can inform itself in the most appropriate way and not

17 waste time and get on with the real issues. That's what

18 we would urge.

19 CHAIRMAN: It has a date June 8, 2009. So that's the date

20 which what appears in this document is on the record, is

21 it?

22 MR HOLMES: Yes. If you look at the bottom, sec.gov.

23 CHAIRMAN: The source of it is businesswire.com news,

24 et cetera.

25 MR HOLMES: It is the sec.gov.

26 CHAIRMAN: That's the Securities and Exchange Commission, is

27 it?

28 MR HOLMES: Yes, the official US Securities and Exchange

29 Commission website. So it is probative, it is relevant,

30 it goes to a matter in issue. It has been fairly

31 disclosed.

1 CHAIRMAN: You seek to use it as to the reliability of the
2 Chinese company as the supplier.

3 MR HOLMES: Yes.

4 CHAIRMAN: Because there is an attack made on the basis that,
5 "Well, how do we know it's Thymosin Beta-4 that was
6 provided by this company? They could be mickey mouse like
7 other Chinese companies. There is no certificate of
8 analysis for the substance. What reliance can you place
9 on the substance being provided, if it is accepted the
10 substance was provided, is Thymosin Beta-4?"

11 You seek to put this forward as evidence of
12 the structure of the particular company and then say,
13 "Well, based on that, the Tribunal can draw certain
14 inferences from that in relation to the standing of the
15 company and the reliability of the company and whether the
16 company would be likely to have supplied what it is said
17 it supplied." Is that basically it?

18 MR HOLMES: Exactly.

19 CHAIRMAN: Can you just elaborate again on the objection,
20 Mr Grace?

21 MR GRACE: Yes. Can I go to paragraph 425 of ASADA's CEO's
22 submissions .

23 CHAIRMAN: Yes.

24 MR GRACE: 425 says, "The court has heard general evidence
25 about the unreliability and poor quality of certain
26 Chinese suppliers of peptides. However, this general
27 evidence does not establish that the products supplied by
28 GL Biochem were not what they purported to be. In fact,
29 Professor Handelsman made clear that there were many high
30 quality peptide suppliers in China. Charter's evidence
31 was that he went to some length to ensure the quality and

1 reliability of his peptide suppliers. He said, "I went
2 through about six or seven factories before I found the
3 right one." He said he was there for weeks looking for
4 them, being GL Biochem in Shanghai. He went on to state
5 he went through their quality control, took samples, ran
6 through them the laboratory to make sure they were up to
7 standard." Well, we know there is no corroboration of
8 that. Anyway, that's what he said.

9 CHAIRMAN: You challenge that, obviously.

10 MR GRACE: Yes. Then 428, "There is independent evidence to
11 support Charter's confidence in the quality of supply from
12 GL Biochem." Then there is a reference to "records lodged
13 with the Securities and Exchange Commission indicate that
14 GL Biochem" and I won't read all of that out. You will
15 see the dot points which is a fair - - -

16 CHAIRMAN: That's a fair summary.

17 MR GRACE: That's a fair summary of what's in that article.
18 Then 429, "These are not the characteristics of a
19 disreputable, unreliable supplier." Charter's evidence is
20 that he chose GL Biochem as a supplier because it was GMP
21 certified. Then there is discussion about what that means
22 and contrasts with Ali Baba where - - -

23 CHAIRMAN: No one has mentioned the 40 thieves yet.

24 MR GRACE: No, and an assertion that GL Biochem cannot be put
25 into the false GMP type company. Then over the page, "Nor
26 does the reference to non-GMP custom peptides undermine
27 this position. GL Biochem's own website indicates the
28 company sells both custom and GMP peptides." Then there
29 is reference to Mr Xu. Of course, Mr Xu refused to
30 cooperate, although he had some conversation with
31 Mr Walker at some stage. Then there is reference in 432

1 to the GL Biochem certificate of analysis.

2 MR HOLMES: Are these pages the basis of the objection?

3 MR GRACE: Yes, but I'm just giving the background.

4 MR HOLMES: The basis of the objection to the US Securities and
5 Exchange Commission filing, why this Tribunal shouldn't
6 act on it.

7 MR GRACE: I will come to it. Then we go to the transcript.
8 Could I take you to the transcript, page 135.

9 CHAIRMAN: I don't think we have it, but anyway.

10 MR GRACE: Perhaps I will read it. It's not very long.
11 Mr Holmes in his opening says, and actually commences on
12 page 134, and refers to - if you go to page 28 of AS-3 you
13 will see Mr Holmes says at page 134 - - -

14 MR HOLMES: Was that in relation to the other pages?

15 MR GRACE: Yes. At page 28 of the bundle - - -

16 MR HOLMES: I object to the reference to the other pages. This
17 is not something I said in relation to this document at
18 that time. So why is it relevant now?

19 MR GRACE: I want to give you the background and as to the
20 context of the objection that was made. If you let me
21 finish - - -

22 MR HOLMES: The reason I'm interrupting is we are very pressed
23 for time. It is two days.

24 CHAIRMAN: We are pressed for time. I understand that.

25 MR HOLMES: And the basis of the objection so this Tribunal can
26 deal with it.

27 CHAIRMAN: What are you saying, Mr Grace? That it is of no
28 probative value? In the end - let's assume the document
29 stays in. In the end, it's a matter for us as to, okay,
30 that's all very interesting, but how far does it take you
31 in terms of the establishment of the fact that this

1 particular prohibited substance was supplied by this
2 particular company? It can only be put as a circumstance
3 by Mr Holmes that can support an ultimate inference that
4 what was supplied was what they said they were going to
5 supply. You can point to a whole lot of things, which you
6 are doing, that tends to say, "Well, you can't be
7 comfortably satisfied, assuming you accept that's what
8 they said they were going to supply, that that's what in
9 fact they supplied." Are we really jumping at shadows
10 over all this, really?

11 MR GRACE: We are not, because this is a plank that ASADA
12 relies upon to establish the ultimate inference that what
13 was supplied in 2011 was Thymosin Beta-4 because of the
14 reputation of this particular company. I note that when
15 I objected during the course of the opening to 28 to 30
16 and then Mr Holmes went to 31 immediately after he
17 referred to that, you interrupted, sir, and said, "It
18 wouldn't need the caution formally to be cautious about
19 this document," because we are referring to the caution
20 which appears on page 30, you see the last paragraph on
21 page 30?

22 CHAIRMAN: Yes.

23 MR GRACE: "It wouldn't need the caution formally to be
24 cautious about this document, Mr Grace, I can assure you.
25 Some people might suggest there is a bit of puffery there.
26 Yes, 31," and then the discussion goes on to 31 to 33. If
27 you go to page 34, you have exactly the same caution.

28 CHAIRMAN: "Undue reliance".

29 MR GRACE: But this is the exact - - -

30 MR HOLMES: I assume that's a requirement of the US Securities
31 and Exchange Commission. That's what they have here.

1 MR GRACE: But this is a document produced by CBI, not by the
2 Securities and Exchange Commission.

3 CHAIRMAN: It is on their website.

4 MR GRACE: It is on their website in 2009. We are talking
5 about late 2011. It is in an archive that's been
6 extracted and you will see at the bottom of the page, page
7 34, "Archives". It is no longer up there on the website.

8 Then if we go to my objection which appears at
9 page 862 of the transcript, you will see I say this at
10 line 27 on page 862, "At 28 to 30 in AS-3, press release.
11 We don't know who the author is of this. An organisation
12 perhaps called Business Wire, but who knows. You will see
13 28, 29, 30 and 31, 32, 33 and 34. There is no provenance
14 of this. I'm not sure what use ASADA seeks to make of it.
15 It is hearsay. It is asserting GMP status on page 31.
16 The last dot point, 'GMP synthesis', whatever that means."

17 "Further up the page under 'CBI merger with GL
18 Biochem', third line, 'Global market for non-GMP custom
19 peptides.' There is issue, we say, about relevance and,
20 more to the point, how does a 2009 document in relation to
21 GMP have any relevance to a 2011 transaction, 2012
22 transaction involving this company? If some support is
23 sought to be found from that, that somehow because of some
24 claimed association between an organisation called
25 Mimotopes based in Melbourne and GL Biochem that it is
26 suggested gives some status to GL Biochem, it's been
27 unexplained and not the subject of any evidence. So we
28 would seek to have that excluded just on the basis of
29 relevance."

30 So that was the objection made at the time. You
31 then ruled on pages 28 to 30 and said they are excluded.

1 We say what's contained in pages 31 to 34 is in large part
2 a replication of what's in 28 to 30, with the same caution
3 at the end of the document as appeared at page 30. So it
4 is just puffery, assertion, marketing and other
5 descriptions you could make of it.

6 CHAIRMAN: The fact that these companies are subsidiaries of
7 the American company, which these documents demonstrate,
8 as I understand it, is that right?

9 MR GRACE: They suggest that.

10 MR HOLMES: They do. They clearly do.

11 CHAIRMAN: I can't see how that's puffery.

12 MR HOLMES: No.

13 CHAIRMAN: Other statements and the caution obviously is
14 directed to where predictions are being made about what
15 the performance of the companies might be and what they
16 might do in markets and all that sort of thing. They are
17 saying, "You have be cautious about that because they are
18 looking at the future." But, essentially, it seems to me
19 that you are relying upon this document on the basis of
20 its being tied into the American company.

21 MR GRACE: Tied into the American company and the description
22 of its subsidiaries in Shanghai and Melbourne.

23 CHAIRMAN: As subsidiaries of the American company.

24 MR HOLMES: Yes, and, as my friend has fairly conceded, what we
25 have put there and how we have used it is a fair
26 description of that document. They have not put on any
27 evidence to suggest that that is unreliable, not the
28 situation. That is the situation in 2009, two years
29 before this transaction occurred and we know from the
30 website it's still going on. So this is a substantial
31 company, part of a global multinational, which has a

1 trading history and is still flourishing.

2 The submissions we make on pages 114 and 115,
3 they arise fairly out of this. We were fair to the
4 players on day one when we produced this document. We
5 produced it in our tranche of documents earlier than that.
6 We read it out to them. It can't seriously be in dispute.
7 But here on the last day we are wasting time saying, "As a
8 matter of the laws of evidence you can't rely on this."
9 Really.

10 CHAIRMAN: All right.

11 MR HOLMES: You can see how we have used it and it is
12 clearly not in dispute.

13 CHAIRMAN: We will just take a moment to have a word about it,
14 I think. We will receive the document, Mr Holmes, but we
15 make it very clear as to its probative value and weight,
16 having regard to the attack that's made on it, is very
17 much an issue. So that stays in as part of AS-3.

18 MR HOLMES: Gentlemen, there is a matter which has arisen in
19 relation to the RD Peptides contract. You will recall a
20 late tender was made of a document which was produced by
21 Mr Charter to Mr Hargreaves between interviews and there
22 are two affidavits.

23 CHAIRMAN: This relates to the affidavit of Melissa Jane
24 Gangemi.

25 MR HOLMES: Yes, there is an affidavit from Ms Gangemi and
26 Mr Calwell. I would seek to read Ms Gangemi's affidavit
27 and there is an affidavit from Mr Caldwell.

28 CHAIRMAN: Ms Gangemi's affidavit was with your submission,
29 Mr Holmes. Do we have Mr Caldwell's affidavit?

30 MR HOLMES: It was, yes. We lodged the affidavit and some
31 confidential submissions separate to the main submissions.

1 CHAIRMAN: I will find those.

2 MR HOLMES: I am hearing on my right they are doing some web
3 searches now about CBI; they are doing some web searches
4 now about what we have in those pages to see what the
5 current situation in 2015 is. We don't know what that
6 position is, although I have made those statements. But
7 CBI is still trading.

8 CHAIRMAN: Yes, if there is other stuff to go in you can let us
9 know. The confidential submission relates to the
10 [redacted] matter. I'm just trying to find Caldwell's
11 affidavit.

12 MR HOLMES: I think my friend is about to launch that affidavit
13 now.

14 CHAIRMAN: That's with the players. Okay.

15 MR HOLMES: Can we have an exhibit number for Ms Gangemi's
16 affidavit?

17 CHAIRMAN: Yes.

18 #EXHIBIT AS-31 - Affidavit of Melissa Jane Gangemi.

19 CHAIRMAN: Mr Grace, you have an affidavit?

20 MR GRACE: I have an affidavit of David John Caldwell, a
21 forensic computer analyst. It is dated 11 February 2015 .
22 I seek to read that and have it tendered.

23 CHAIRMAN: I think you referred to that in your submission,
24 didn't you?

25 MR GRACE: Yes. It was served with the submissions.

26 CHAIRMAN: It will be PG-30.

27 MR GRACE: I seek to tender the original.

28 #EXHIBIT PG-30 - Affidavit of David John Caldwell.

29 CHAIRMAN: This relates to the purchase contract.

30 MR HOLMES: The one that came to light.

31 CHAIRMAN: That Mr Charter referred to when being interviewed

1 by Mr Hargreaves.

2 MR HOLMES: Yes.

3 CHAIRMAN: Both those are in.

4 MR HOLMES: Have you had an opportunity to glance at those two
5 affidavits?

6 CHAIRMAN: We certainly had a look at the one of Ms Gangemi.

7 I will just have a look at Mr Caldwell.

8 MR HOLMES: They just deal with two matters. The document was
9 created, the RD Peptide's document was created using a
10 Photoshop program. As they both agree, it was created
11 using that program on 24 November last year. There are
12 various options as a result of that disclosure or
13 discovery.

14 So I will now go to commence my submissions, if
15 that's an appropriate course.

16 CHAIRMAN: Yes, it is.

17 MR HOLMES: I think the time starts now.

18 CHAIRMAN: Okay, it does. Like they say in golf, we have put
19 you under the clock.

20 MR HOLMES: We have put in lengthy written submissions and I'm
21 not going to re-read those. This is a matter where the
22 case that we opened to on that exhibit AS-1 we would say
23 has been sustained, but I would like to start with looking
24 at the first matter.

25 The first matter is this question of the standard
26 of proof. In doing that, I want to emphasise that we are
27 in a court because everybody here is taking this
28 seriously, as they should. These proceedings would
29 ordinarily be at the AFL where we first started on day one
30 and I would imagine if there was just one player we would
31 be doing it there and we would be giving it the same

1 seriousness as we are today. This is a contractual
2 tribunal set up to hear these allegations of infractions.
3 At the outset the matter is to be taken seriously, but it
4 is not to be given any special treatment because it has
5 been multiplied by 34 or been joined with 34 other cases.
6 The standard of proof that this Tribunal applies is not
7 that of the criminal standard.

8 CHAIRMAN: There is no worries about that. We won't be
9 applying the criminal standard of proof, Mr Holmes, I can
10 assure you.

11 MR HOLMES: Just to jump ahead, Mr Grace's fifth leg argument
12 really comes from the criminal law.

13 CHAIRMAN: As to how you apply the standard of proof that we
14 have to apply in relation to a circumstantial case is
15 another matter, compared to how you apply the beyond
16 reasonable doubt standard of proof in a criminal
17 circumstantial case. Shepherd's case, for example, that
18 Mr Grace referred to, was a criminal case.

19 MR HOLMES: Yes. In a criminal case, because you are concerned
20 with proof beyond reasonable doubt, there are those
21 additional hurdles that, where you have circumstantial
22 evidence you have to establish not only that guilt is the
23 reasonable inference, but it must be the only reasonable
24 inference, and on top of that - - -

25 CHAIRMAN: No other reasonable hypothesis.

26 MR HOLMES: Yes, and if there is any other reasonable
27 explanation that is consistent with innocence, then they
28 must acquit. That's where the criminal law is looking at
29 a concept which is not present in this Tribunal. This
30 Tribunal has a different textural concept. It starts with
31 the balance of probabilities and then raises it. So it

1 looks at the satisfaction which has been accumulated by
2 the material and we don't have to exclude other things.
3 All this Tribunal is concerned with is the reasonable
4 satisfaction. In that respect, we adopt and endorse the
5 AFL's submissions on the standard of proof. They are set
6 out in paragraphs 10 to 27.

7 CHAIRMAN: Yes, we have read those.

8 MR HOLMES: The only caveat we would put on that adoption - - -

9 CHAIRMAN: What do you say about those factors that Mr Gleeson
10 refers to and expresses some doubt? They are factors that
11 were raised in the submissions of the players. I will
12 just get the paragraph. They come out of Briginshaw.

13 MR HOLMES: In paragraph 18 there is the reference to what
14 Justice Dixon said about "the seriousness of the
15 allegation, the inherent unlikelihood of the occurrence of
16 the description given and the gravity of the consequences
17 flowing from the particular finding."

18 CHAIRMAN: Yes.

19 MR HOLMES: Those three considerations bear down on the mind of
20 a Tribunal in a civil case, but in these proceedings only
21 the first one has been referred to and this Tribunal
22 should not put back into the consideration those
23 additional paragraphs 2 and 3. But if you were to do
24 that, we endorse the observations that follow. But as to
25 the consequences in paragraphs 23 to 25, that may be the
26 consequences, but that's for another day.

27 CHAIRMAN: Yes. 19 and 20 is where Mr Gleeson picks up this
28 point, refers to what you have just referred to, which
29 I think is a footnote where the code refers to a serious
30 matter. What Mr Gleeson is saying is the fact that that
31 is referred to and nothing else could lead you to a view

1 that it wasn't intended that the other matters be taken
2 into account. On the other hand, it might be said, "Well,
3 it's not necessarily the intention that matters referred
4 to by Briginshaw shouldn't be taken into account by the
5 fact that the seriousness is - it might have been thought
6 necessary to emphasise the importance of the seriousness
7 of the alleged violation." Is there any learning on this,
8 Mr Holmes?

9 MR HOLMES: Learning in the sense of?

10 CHAIRMAN: In the sense of any decisions, and I'm talking about
11 particularly CAS decisions, and I think you were involved
12 in Fogarty, an interesting case.

13 MR HOLMES: Sorry. French?

14 CHAIRMAN: No, Fogarty.

15 MR HOLMES: Foggo?

16 CHAIRMAN: Foggo. You were one of the panel, where there was
17 some time, as I recall it, on the question of proof. But
18 I'm just enquiring as to whether you are aware of any
19 decisions where this particular question has arisen.

20 MR HOLMES: I hate to say this, but we haven't given
21 consideration to Foggo. Gentlemen, there is reference in
22 the footnote to the standard being comparable to the
23 standard which is applied in most countries in cases
24 involving professional misconduct.

25 CHAIRMAN: That's right, and the players have referred to that.
26 One can see the wisdom in that, having regard to the fact
27 we are dealing with professional footballers and this is a
28 disciplinary matter affecting them and affects their
29 livelihood.

30 MR HOLMES: Accepting all of that and then accepting that this
31 is a case of inadvertent doping, not deliberate doping,

1 deliberate doping by Mr Dank but not by the players - - -

2 CHAIRMAN: It can still carry up to two years suspension.

3 MR HOLMES: We have said that and that's where we made the
4 qualification about the AFL submissions. They are looking
5 at the question of sanction and what the likely sanction
6 is. We haven't endorsed that. It may be the likely
7 sanction.

8 CHAIRMAN: We don't know.

9 MR HOLMES: We don't know.

10 CHAIRMAN: But certainly the potential for a two-year
11 suspension.

12 MR HOLMES: I think in our submissions you will see a reference
13 to, because of the inadvertence, there may be a reduction
14 down to one year and so we are looking at that period.

15 Do you have our list of authorities, our folder
16 of authorities? Perhaps we can hand those up, because
17 what I would like to take you to is a case which bears on
18 the question that the Chairman just raised about the
19 seriousness and the livelihood of a suspension on these
20 players.

21 I would like to take you to a case of Sullivan v
22 Civil Aviation Safety Authority, CASA. This was a case
23 involving a hearing leading to the potential cancellation
24 of a helicopter pilot's licence. If you go to paragraph
25 109, that is the paragraph we are concerned about. It is
26 under tab 12.

27 CHAIRMAN: Yes, we have it.

28 MR HOLMES: There is an assertion about the need to apply
29 Briginshaw and that it was a general principle of law
30 which should be espoused in these cases. I read paragraph
31 109: "When dealing with this argument, there is a problem

1 with identifying those facts which can properly be
2 characterised as serious or grey. As to the first
3 difficulty, it may be tempting when the Tribunal is
4 reviewing a decision affecting the manner in which an
5 applicant carries on business activities or engaged in
6 commercial decision making to characterise adverse
7 findings as serious or grave. The loss of an ability to
8 carry on a commercial activity such as a helicopter
9 Charter service truly has serious consequences to the
10 individual."

11 That was the case before the court. "But other
12 findings made by the Tribunal in other statutory contexts
13 may equally have serious impacts upon a party. A finding
14 that a fact that an applicant's evidence as to limitations
15 upon physical movements or physical capacities is not to
16 be accepted may have equally serious impact. Decision
17 making in a commercial context it is respectfully
18 considered" - and I say by analogy in this football
19 context - "does not necessarily attract any degree of
20 caution in fact finding than decision making in, for
21 example, social security or welfare context. Such
22 findings of fact have long recognised as calling for
23 considerable caution before being made and for care being
24 exercised in respect of the evidence upon which the
25 finding is made. Findings as to a party or a witness
26 having engaged in fraud are but examples." Then there is
27 reference to the solicitors.

28 Can I stop there and go back to the first day
29 where there is a single case before this Tribunal. This
30 Tribunal under the Code applies to the AFL and to the VFL,
31 professionals and amateurs. You don't apply the Code in a

1 different way; you approach the matter seriously and then
2 you look at the text of the Code and then you apply it,
3 and that's where we adopt the submissions of the AFL.

4 We have distinguished the deliberate doping, and
5 that's something different. If you go to our fifth
6 authority, it's the case of de Bruin. It is a CAS case.
7 In paragraph 26, "The panel is equally in no doubt that
8 the standard of proof required of FINA is high, less than
9 the criminal standard but more than the civil standard."
10 This is a case back in 1998, before there was a World
11 Anti-Doping Code and it all depended upon the provisions
12 of the applicable association, and here it was the
13 International Swimming Federation. "To adopt a criminal
14 standard, at any rate where the disciplinary charge is not
15 a criminal offence, is to confuse the public law of the
16 State with the private law of an association. The panel
17 further accepts that in as much an allegation of
18 manipulation includes an element of mens rea and
19 attributes dishonesty to an athlete, whereas other doping
20 offences may be ones of strict liability, such an
21 allegation bespeaks of an extremely high level of
22 seriousness."

23 Then if you go over to the following page,
24 paragraphs 39 and 40, "In essence, the appellant contended
25 that the burden of proof lay upon the respondent to
26 eliminate all possibilities other than manipulation by the
27 appellant." That resonates with what the players are
28 saying here, that we have to disprove or eliminate other
29 possibilities.

30 "We do not believe that this position reflects a
31 correct legal analysis. The respondent's burden was only

1 but sufficiently to make the panel comfortably satisfied
2 that the appellant was the culprit. But even if the
3 appellant's contention were correct, we consider that that
4 burden had been discharged."

5 Before I leave the authorities, could you go to
6 tab 6. On the first page the High Court started with the
7 statement, "The ordinary standard of proof required of a
8 party who bears the onus in civil litigation in this
9 country is proof on the balance of probabilities. That
10 remains so where the matter to be proved involves criminal
11 conduct or fraud. On the other hand, the strength of the
12 evidence necessary to establish a fact or facts on the
13 balance of probabilities may vary according to the nature
14 of what is being sought to prove. The authoritative
15 statements have been often made as to the effect that
16 clear, cogent, strict proof is necessary where so serious
17 a matter as fraud is to be found. Statements to that
18 effect should not however be understood as directed to the
19 standard of proof."

20 Here the text does alter the standard of proof
21 and it subsumes these matters. By raising it, it includes
22 these matters and you shouldn't add them back in on top of
23 the comfortable satisfaction. I continue, "Rather, they
24 should be understood as merely reflecting a conventional
25 perception that members of our society do not ordinarily
26 engage in fraudulent or criminal conduct." That's the
27 likelihood of the occurrence occurring. Here we are not
28 suggesting there is a deliberate act, as the AFL has
29 pointed out. "And a judicial approach that a court should
30 not likely make a finding that, on the balance of
31 probabilities, a party to a civil litigation has been

1 guilty of such conduct." Then there is reference to
2 Justice Dixon.

3 CHAIRMAN: What in essence you say is that if you look at your
4 case as to the alleged violation against the players, I'm
5 not talking about Dank, you take into account that it's
6 not being alleged that they acted dishonestly; it's being
7 accepted that they were in effect subject to a program
8 that was provided by others, namely the club - - -

9 MR HOLMES: They were willing participants in the program.

10 CHAIRMAN: They were willing participants, but you wouldn't say
11 that they were fully informed participants in terms of the
12 program.

13 MR HOLMES: No.

14 CHAIRMAN: I think that's a fair way - they had some
15 information, but whether you would say that was - - -

16 MR HOLMES: They, for example, were told repeatedly that this
17 was approved by WADA. They signed a document that said
18 the WADA approval was annexed. They never saw that. They
19 never satisfied or discharged the obligation - - -

20 CHAIRMAN: That comes into the question of whether you could
21 say there is no fault or no significant fault. I suppose
22 it is the sort of fault aspect or the mens rea or
23 knowledge aspect of the violation. It is not put in any
24 sense that they were dishonest, for example.

25 MR HOLMES: I think we have said that in our written
26 submissions. We don't suggest that they were any more
27 than willing participants in the supplementation program
28 organised by Essendon, that they signed documents which
29 they must have known weren't correct. They had no
30 annexures. But that doesn't form any component of whether
31 or not an infraction has occurred.

1 If I go then to this assertion by the players
2 that we must disprove any reasonable inference consistent
3 with innocence. They make that, for example, at paragraph
4 21. This is their fifth leg.

5 CHAIRMAN: Is this Mr Grace's?

6 MR HOLMES: Yes. If I don't go to every paragraph in it - - -

7 CHAIRMAN: No, Mr Holmes, if we go to every paragraph, we won't
8 be talking about this matter being decided before the 2015
9 season starts, it will be the 2016 season.

10 MR HOLMES: If you look at the last sentence of that paragraph
11 21, "Unless ASADA can comfortably satisfy the Tribunal
12 that these alternate explanations are not open to
13 reasonable inference on the material before the Tribunal,
14 then the violations will not be made out." I couldn't
15 understand where that came from. I found something
16 similar in the Victorian judges' directions in relation to
17 circumstantial evidence. But that, with respect, is
18 inconsistent with the texts of the AFL Anti-Doping Code
19 and to impose that requirement is to lead this Tribunal
20 into error. This Tribunal is to assess the evidence and
21 to weigh the evidence and see if it has come to a
22 comfortable satisfaction that a certain event has occurred
23 and we have identified the facts that you need - - -

24 CHAIRMAN: But in going through the process that you have to go
25 through in reaching comfortable satisfaction, you have to
26 consider whether there are other explanations about things
27 and weigh those explanations as part of the intellectual
28 exercise that you have as to whether you are comfortably
29 satisfied.

30 MR HOLMES: Yes, you do. But you focus on how satisfied you
31 are. You don't focus on, "Can we exclude that? Can we

1 exclude that possibility?"

2 CHAIRMAN: In the end it's comfortable satisfaction. That's
3 what we have to apply.

4 MR HOLMES: Yes. I'm repeating myself. Just the words used
5 "beyond reasonable doubt", that test looks at other
6 possibilities. It is almost like a top down reasoning
7 compared to a bottom up reasoning. The bottom up
8 reasoning is to assess the individual facts and to see
9 what the accumulated weight establishes, not to pick each
10 individual one. I'm going to come back to Mr Grace
11 saying, "You can't even be satisfied that Mr Charter went
12 to China."

13 MR GRACE: No, Shanghai.

14 MR HOLMES: Or Shanghai. But I will come back to that. But
15 what are we all doing here? What have we all heard? Just
16 to continually say, "There is a possible doubt here,
17 there's a possible doubt there, there's a possible doubt
18 there," rather than to stand back and to consider the
19 matter as almost a jigsaw. A matter in isolation may have
20 apparent little weight, but when it fits in a sequence of
21 events that is supported by what has gone before and what
22 follows and those events involve text messages that have
23 been obtained independently and involve email chains.

24 There's doubt, for example - they call it an
25 allegation about testing by Eagle Laboratories. Eagle
26 Laboratories in the material has produced documents, has
27 answered enquiries about the testing, but they cast doubt
28 on that. They say there is an allegation that there was
29 an email exchange with Eagle. They say, "You can't be
30 sure." With respect, you put in the chain of going to
31 Shanghai, coming back, sending an order, communicating

1 with Anthony, the delivery to Melbourne and the
2 commencement of the compounding. What does Alavi say? He
3 says, "I better get cracking. This is a big order, a big
4 contract." We know even when Mr Serge Del Vecchio came
5 along and later produced a document, that confirmed that
6 they were talking about potential work for the AFL club.

7 All of this, there's a logical consistency. But
8 if you take it piecemeal and say, "Oh, well, we could have
9 had delivery notes, we could have had this, we could have
10 had that," but what we do have does have weight when
11 looked at in the big picture and when analysed in detail
12 as our written submissions have said.

13 Can I go back to our authorities. I want to
14 briefly take you to Knight v The Queen.

15 CHAIRMAN: That's number 13.

16 MR HOLMES: The particular passage is at page 502, it is the
17 very last one. This is just going back to we shouldn't
18 absorb criminal directions or criminal reasoning which is
19 associated with a different contextual standard of proof.

20 In the middle of that paragraph, or I will read
21 the whole paragraph: "The question is not whether the
22 trial judge failed to give an appropriate direction to the
23 jury, but whether the jury acting reasonably must have
24 entertained the reasonable doubt about the guilt of the
25 appellant. In his charge the trial judge instructed the
26 jury to the effect that they should only find by inference
27 an element of the crime charged if there were no other
28 inference or inferences which were favourable to the
29 appellant reasonably open upon the facts. A direction in
30 those terms is often called for where the prosecution
31 relies upon circumstantial evidence. However, it is a

1 direction which is no more than an amplification of the
2 rule that the prosecution must prove its case beyond
3 reasonable doubt and a question to which it draws" - can
4 I just say that's the text draws attention - "that arising
5 from the existing of competing hypotheses or inferences
6 may occur in a limited way in a case which is otherwise
7 one of direct rather than circumstantial evidence."

8 So all of this approach is informed by the
9 criminal law and the criminal law standard, and not the
10 civil law standard.

11 Can I then take issue with another issue relating
12 to the standard in the players' submissions. Again, I'm
13 just cherry-picking here, unfortunately. I would like to
14 make sweeping statements, but - - -

15 CHAIRMAN: My understanding of your position in relation to the
16 circumstantial case and proof is that, with respect to the
17 various circumstances that you rely upon, what you say is
18 that we consider whether something is probable and
19 ultimately in terms of drawing any inference, such as an
20 inference that Thymosin Beta-4 was supplied from China to
21 Alavi, we have to be comfortably satisfied about that.
22 But we don't have to be comfortably satisfied of each
23 circumstance. Have I caught that correctly, Mr Holmes?

24 MR HOLMES: Yes.

25 CHAIRMAN: That's the way you put it.

26 MR HOLMES: Yes.

27 CHAIRMAN: You have identified a whole series of events or
28 circumstances from which you say - well, first of all, you
29 say, and I think there is agreement on this, so we at
30 least have agreement on this, that there is indispensable
31 facts to be able to establish violation and there's a

1 number of indispensable facts. Of course, Shepherd's case
2 talks about indispensable facts as part of the chain of
3 reasoning. Then you take each of the indispensable facts
4 and set out circumstances which you say we should at least
5 find are probable and comfortably satisfied lead to an
6 inference, for example, that there was a supply from
7 China.

8 MR HOLMES: Yes.

9 CHAIRMAN: Whereas the players are seeking to lift it higher in
10 terms of the degree of satisfaction of the particular
11 circumstances upon which the inference might be based. Of
12 course, you can have circumstances and then an
13 intermediate inference which then supports an ultimate
14 inference.

15 MR HOLMES: Yes.

16 CHAIRMAN: And that's where clearly you are at issue with what
17 they are putting to the Tribunal and what you are saying
18 is, "Well, what they are putting might be appropriate for
19 a criminal case but not for this case."

20 MR HOLMES: Yes, because they impose the added burden of
21 addressing what might be above the comfortable
22 satisfaction. You have to exclude all these other things
23 which they keep coming back to, "But what about this, what
24 about that," rather than looking at what has been
25 established and are you comfortably satisfied that those
26 facts have been established.

27 They seek to create a nagging doubt, I think is
28 the best way to describe it, in relation to a lot of
29 little items by saying, "But we could have had more. But
30 we could have had more." This Tribunal lives in a real
31 world. It has been charged with a duty to apply a common

1 sense approach, it is a serious matter, and to look at the
2 evidence carefully. But it has not been charged with any
3 duty to dispense criminal justice. You have been charged
4 with a duty to dispense the contractual terms of the
5 arrangement organising the AFL, and that is a serious
6 matter. But you only have to be comfortably satisfied
7 that certain facts have been established.

8 CHAIRMAN: In essence, and I might have this completely wrong
9 and my colleagues will tell me if they see it differently,
10 but in reading through all the submissions, in essence it
11 seems to me what the players are saying, and Mr Grace has
12 gone through it very comprehensively, Mr Clelland and
13 Mr Hallows have taken a somewhat different approach, but
14 it's a helpful approach in terms of the analysis of it,
15 but in the end really what they are saying is, "Look, when
16 you look at all this, there is just too much doubt about
17 these indispensable facts to be comfortably satisfied."

18 That's a classic jury question, in the sense that
19 we have to decide it. "Do we think there's too much doubt
20 or do we say we are comfortably satisfied? Okay, there is
21 this doubt and that doubt, but we are still comfortably
22 satisfied because of the strength of the circumstances
23 that we consider apply."

24 MR HOLMES: That's exactly right. You three gentlemen are the
25 jury.

26 CHAIRMAN: That's what this case comes down to, in the end.

27 The sad thing about this case is that we have all had to
28 spend all this time on a case where, if there had been
29 proper records kept and someone like Dank had come and
30 given full explanations, et cetera, there either wouldn't
31 have been any violation alleged or the matter would have

1 been dealt with very swiftly, as is the usual situation.
2 But we are left in a situation where we have multiple
3 hearing days, we have thousands of documents, we have
4 substantive submissions and that's the position we are
5 left in because that's what's unfolded.

6 In the end, it's all going to come back to us as
7 to just are we comfortably satisfied, having regard to all
8 that you each put by way of your submissions on the
9 evidence, and it's been very helpful, if I may say so, to
10 have all of the submissions in the way that they have been
11 put. In a sense it hasn't made life easier for us, but we
12 are not here to just do easy things. But we have to weigh
13 it and see whether we are comfortably satisfied, taking
14 into account all that you put and the strength that you
15 say is present in relation to the evidence and how
16 evidence - again, there is a difference between you and
17 the players in terms of the extent to which documents, for
18 example, support the evidence of Charter and Alavi,
19 whereas the players are sort of tending to take a
20 position, "Well, if it has come from them, can it really
21 support them," because they are the source of the document
22 and they haven't given everyone all the documents, I think
23 everyone is agreed on that, and they have been selective.
24 So there can be a doubt there, as a result, that what
25 seems to be the position mightn't be the position. But,
26 again, that's a matter for us.

27 MR HOLMES: And that's the approach of looking at one in
28 isolation and saying, "Just because that document came
29 from Charter, Dank or Alavi, you can't rely upon it."

30 CHAIRMAN: That's not the end of the story, particularly with
31 contemporaneous documents.

1 MR HOLMES: But that would lead you into error, because I have
2 just given you the example of the Eagle Pharmaceuticals
3 and we have a folder which I propose to hand up, of
4 documents. In our submissions we refer to a document.
5 Rather than we all spend time looking through the various
6 folders everywhere, we refer to a document which was
7 produced from Eagle Pharmaceuticals. You know the email
8 chain that Mr Charter or Alavi produced about sending the
9 peptides and the Thymosin Beta-4 to Eagle Pharmaceuticals?

10 CHAIRMAN: Yes.

11 MR HOLMES: Eagle Pharmaceuticals provides a document which is
12 under tab 6 which we have referred to in our submissions
13 and this has been supplied by Alavi to Eagle
14 Pharmaceuticals, and you see the peptide formulations that
15 Mr Alavi has filled in. We know he has been compounding
16 the Thymosin Beta-4 and what does he do? He puts in
17 Thymosin and he puts in the concentration levels. We know
18 there is a debate about that.

19 My friends want to cast doubt about, "You haven't
20 been able to prove the exact dosage." But you have been
21 able to prove that Dank asked, "What peptide do you want
22 next?" "Thymosin Beta-4." Then Charter then says to
23 Alavi. "What peptide does Steve want next?" "He wants
24 Thymosin Beta-4," and gives the size and the labels. Then
25 you have the dispensing and then you have at the same time
26 Alavi sending Thymosin to Eagle Pharmaceuticals and you
27 have the chain where in the correspondence he provides a
28 reference to Thymosin Beta-4. Sometimes it's Thymosin,
29 sometimes it's Thymosin Beta-4. But the nagging doubt
30 ignores the consistent chain of events and the fact that
31 they had been dealing with and ordering and obtaining

1 Thymosin Beta-4 and that they do have it and they paid for
2 it.

3 So that's where this nagging doubt approach and
4 the criminal law jury advocacy - I accept, gentlemen, you
5 are a jury of three, but you have assessed evidence of
6 this sort, your experience on assessing evidence the AFL
7 is fortunate to have because of the vast experience you
8 bring, and it is not for me to tell you that. But where
9 they are seeking to lead you into error is to adopt the
10 criminal approach, not the comfortable satisfaction of the
11 AFL Anti-Doping Code. There is a doubt.

12 MR CLELLAND: Mr Chairman, can I just clarify that's certainly
13 not our intention to lead the Tribunal into error. We
14 don't submit that the criminal standard is appropriate and
15 we do not rely upon something in the nature of a nagging
16 doubt. We say you would not be close to comfortably
17 satisfied on most of the so-called indispensable issues
18 that have been identified by ASADA.

19 CHAIRMAN: I understand that, Mr Clelland.

20 MR CLELLAND: Thank you.

21 CHAIRMAN: That's the bottom line in the end. That's the
22 bottom line in the end. Everyone has put their
23 submissions as to why they say we should be and why so we
24 shouldn't be.

25 MR CLELLAND: Yes.

26 CHAIRMAN: You rely on specific things such as the lack of
27 analysis and all that sort of thing. Now, as to how much
28 weight we put on that, that's a matter for us. But you
29 put a certain amount of weight on it and we have to assess
30 that.

31 MR HOLMES: One can expect in a criminal trial, where the State

1 is bringing proceedings, a counsel of perfection that
2 these matters be addressed. But as you pointed out,
3 Mr Chairman, this Tribunal doesn't have powers. It has to
4 do the best it can in the facilities that have been
5 available to it. The same applies to the parties. You
6 have to deal with what is put before you and approach it
7 not approaching a criminal standard looking for doubt here
8 or there, but whether or not you are satisfied the
9 infraction has occurred.

10 CHAIRMAN: Mr Holmes, these documents in this folder we just
11 have are already in evidence, aren't they?

12 MR HOLMES: They are.

13 CHAIRMAN: Perhaps what we might do, just while we are thinking
14 about it, for the purposes of the record it's probably a
15 good idea to mark your closing submission. We can mark
16 AS-32 as the closing submission relating to the players
17 and AS-33 as the index of documents referred to in closing
18 submissions, and AS-34 - - -

19 MR HOLMES: I think AS-33?

20 CHAIRMAN: AS-33 is that folder of documents and AS-34 is the
21 Dank closing submission, just so the record is clear as to
22 what we actually have. We have already dealt with the
23 affidavit.

24 #EXHIBIT AS-32 - Closing submission relating to the players.

25 #EXHIBIT AS-33 - Index of documents referred to in closing
26 submissions.

27 #EXHIBIT AS-34 - Dank closing submissions.

28 MR HOLMES: If you mark the Dank submissions, are you going to
29 mark the players submissions as well?

30 CHAIRMAN: That will be AS-32, just so the record is clear.

31 MR GRACE: Sorry, that should be PG.

1 CHAIRMAN: The players, yes. PG will be Mr Grace and Mr Ihle's
2 closing submission, which is number 31.
3 #EXHIBIT PG-31 - Closing submission from Mr Grace and Mr Ihle.
4 CHAIRMAN: I think we have dealt with the affidavit.
5 Mr Clelland's is PC-4. PC-4 is the two players' closing.
6 Mr Gleeson and Ms Enbom we said is AF-5, the AFL closing
7 submission, just so the record is clear. There is the
8 confidential one in relation to - perhaps we better mark
9 that separately. We will make that AS-32A, confidential
10 closing submission of the CEO. We might take a 10-minute
11 break.
12 #EXHIBIT PC-4 - Closing submission on behalf of players [REDACTED]
13 and [REDACTED]
14 #EXHIBIT AF-5 - AFL closing submission.
15 #EXHIBIT AS-32A - Confidential closing submission of CEO of
16 ASADA.
17 (Short adjournment.)
18 CHAIRMAN: I meant to mention at the start of the hearing this
19 morning we have Myles Tehan of counsel who is providing us
20 some assistance with Justin Hooper. He is seated there
21 next to Justin, so you all know who he is. Mr Holmes,
22 would you like to continue?
23 MR HOLMES: Yes. Can I now turn just to look at this RD
24 Peptides contract which was the subject of the two
25 affidavits.
26 CHAIRMAN: Yes.
27 MR HOLMES: You will recall that there was a flotation of an
28 idea that, instead of just going over there to visit
29 factories, he must have ordered 10 milligrams of Thymosin
30 Alpha from somewhere else, because that was allegedly his
31 intention. That was on 7 November, but then Mr Charter

1 was still talking to Mr Walker, the ASADA investigator,
2 but then he ceased to be cooperative. Then Mr Charter we
3 now know created the purchase contract using Adobe
4 Photoshop.

5 There doesn't seem to be much difference between
6 the two affidavits. Mr Caldwell says that the most
7 obvious options in relation to the creation of a
8 photoshopped file are - he gives three: It was a
9 fabrication totally created on the date; someone scanned a
10 hard copy document and created a file using the Adobe
11 Photoshop; or someone has scanned a hard copy document and
12 created a file and then edited. Photoshopping is
13 apparently well known as the way to edit a document. But
14 it all happened on 24 November, by which time Mr Charter
15 had severed ties completely with his previous discussions
16 with Mr Walker.

17 It is our submission that it is most likely in
18 his attempt to balance the ledger he was trying to help
19 the players, and I think Ms Gangemi also refers to another
20 contract where the number of the contract or the reference
21 number is the date and if you look at the particular
22 reference there are three documents that Ms Gangemi refers
23 to. Perhaps I will go there.

24 CHAIRMAN: We have the affidavit and the exhibits to the
25 affidavit.

26 MR HOLMES: There is a reference to another contract in our
27 written submissions. In our written submissions on this
28 contract we refer at - - -

29 CHAIRMAN: Is it 356 on?

30 MR HOLMES: Yes. It is a Hengli contract. Mr Caldwell takes
31 issue about this, and I think it is worth looking at the

1 document that Ms Gangemi refers to, which is in the
2 documents produced by Alavi. In Ms Gangemi's affidavit
3 there is a reference to a Sichuan Hengli contract where
4 the date was used. One possibility is this RD contract
5 was a previous contract which Mr Charter altered, because
6 you will see there are two underlined sections of the
7 document, the date up the top, so as to fit in with the
8 story that he wanted to tell about going over there to
9 obtain 10 grams of Thymosin Alpha.

10 The players in their written submissions refer to
11 the original email in AS-3 at page 223, which is the
12 table.

13 CHAIRMAN: Yes.

14 MR HOLMES: That table relates to the possibility of a monthly
15 supply which was a business which - could I stop there.
16 I have just been given the Sichuan Hengli documents. They
17 are in AS-18 at page 196. Do you have exhibit AS-18?

18 CHAIRMAN: Yes.

19 MR HOLMES: There you have a contract. The date of the
20 contract is April 27, 2012 where the number given, PI
21 number, is HM20120427. If you go over the page, Sichuan
22 Hengli also has a further invoice dated 21 June 2012 and
23 the PI number for that particular transaction is
24 HM20120621. If we go over the page, there's a third
25 invoice for 5 December 2012 and you see how the date has
26 been used to be the contract number. This is referred to
27 by Ms Gangemi in her affidavit - sorry, it is in the
28 written submissions as a further example of why this RD
29 Peptides contract is likely to be a photoshopped contract
30 which predated 24 November 2011.

31 Then the players make a submission that the

1 reference to the 10 gram is somehow supported by the
2 reference to the order that I was referring to on the
3 original email exchange with GL Biochem. That's in AS-3
4 where they had the monthly supply basis, but clearly that
5 was a separate transaction to the purchase; 149(g) in the
6 players' submissions.

7 CHAIRMAN: That is under the heading "RD Peptides".

8 MR GRACE: 150(g).

9 MR HOLMES: 150(g).

10 CHAIRMAN: Yes.

11 MR HOLMES: Alavi's reference to 9g, the 10 grams minus the 1g
12 which was allegedly delivered on 18 February. This is
13 said to be a supporting piece of evidence that Charter
14 sought and obtained 10 grams of Thymosin Alpha. The
15 original email exchange was in relation to a monthly
16 supply basis. That was not a transaction which was
17 consummated in November 2011. It was not a transaction
18 that was consummated in December 2011 or in January 2012.
19 The original quotation where that was provided was in
20 relation to the possibility of a business being
21 established involving Dank and Alavi with MRC and Ed van
22 Spanje and so they were looking at a monthly order going
23 forward and pricing for that.

24 This alleged one-off transaction is inconsistent
25 with that email exchange. That is consistent with the
26 table on the final page of the Biochem email exchange
27 recording a list of the products purchased - not a list of
28 the products purchased, but an updated quotation.

29 Then could I turn to a different topic.

30 CHAIRMAN: Your position in relation to the RD Peptides
31 document is that it's fabricated.

1 MR HOLMES: It is fabricated.

2 CHAIRMAN: It is not evidence of a purchase of Thymosin Alpha.

3 MR HOLMES: It's a document created in November to assist the
4 players. There is no evidence that it was acted upon at
5 the time. It is inconsistent with the Customs
6 declaration, which is the only independent statement, but
7 a record of what occurred. He said he went over there to
8 visit a factory and he was asked did he purchase any other
9 products. If there had been a purchase on 28 November, as
10 the RD Peptides contract allegedly establishes, then he
11 has lied to the Customs.

12 Then in Mr Mullaly's affidavit, as we say in our
13 written submissions, he has looked at the RD Peptides
14 website and even though the address is different you will
15 see that the phone number is the same and when he has
16 clicked on Thymosin for the RD Peptides website they give
17 a synonym, Thymosin is Thymosin Beta-4. So, if you are
18 buying Thymosin from RD Peptides, the inference is from
19 their website that they sell Thymosin Beta-4 under the
20 name of Thymosin.

21 The reaction was, when we found that, that the
22 streets of Melbourne would be awash with Thymosin Beta-4
23 if you had 10 grams of Thymosin Beta-4. The same as with
24 Thymosin alpha. There is no explanation for why there was
25 that purchase; there is no explanation as to why it fits
26 in with his trip where he says he went to visit a factory
27 and he didn't buy any products while he was over there.

28 MR GRACE: Where did he get the HGH?

29 MR HOLMES: He bought the HGH, as he said on one version, he
30 went to the chemist and bought it, the local pharmacy,
31 I think the phrase is. Here instead he comes forward with

1 a transaction which, when one uses the exchange rate, is a
2 \$15,000 transaction. When you compare that with the value
3 of the total order that he actually placed on 8 December,
4 it's more than double that. So clearly this transaction
5 is so large in relation to one product as to be inherently
6 improbable.

7 Again, this is one of those cases where the only
8 evidence in relation to this transaction that he puts
9 forward is the contract which supports the players and his
10 version which has been given to Mr Hargreaves and responds
11 to assistance to provide evidence. There is an
12 unfortunate phrase used - well, the document comes out, if
13 you read the transcript, in response to a series of very
14 leading questions and it is clear that Mr Charter knows
15 what would assist the players and this is one thing that a
16 fair reading would suggest would assist the players, but
17 that is an unnecessary element to establish its falsity.

18 Can I then go to a different topic, the backdated
19 letter.

20 CHAIRMAN: Yes.

21 MR HOLMES: Sorry, Ms Gangemi is reminding me there is a
22 reference in the players' submission, paragraph 12 at
23 150G, this is the 150(g) that I'm grappling with. Can
24 I perhaps read this onto the record. I don't want to
25 mislead. "To the extent that the 32 players assert that
26 the reference to 9 grams in Charter's 28 November
27 interview was a reference to Thymosin, the players are
28 wholly wrong. From earlier portions of the transcript it
29 is clear that Dank wanted Thymosin for the AOD study. The
30 reference to 9 grams properly understood is clearly a
31 reference to 9 grams of AOD that Alavi was promised from

1 Metabolic Pharmaceuticals which never came. If the
2 Tribunal looks to the transcript of the interview with
3 Mr Alavi in AS-7, tab 2, page 303 line 46 to page 304 line
4 8, there is the following response which is attributed to
5 Mr Walker but must because of the context have been given
6 by Mr Alavi. Mr Walker asked about the text message 181
7 in a document he had provided Mr Alavi who then
8 responded."

9 Could I hand up - do you have that?

10 CHAIRMAN: Yes. We have an extract of the interview between
11 Mr Walker and Mr Alavi.

12 MR HOLMES: There is a paragraph which commences - - -

13 CHAIRMAN: 181 starts off down the bottom of page 303.

14 MR HOLMES: Yes, and the question or the answer commences, "So,
15 oh, yeah, okay, yeah."

16 CHAIRMAN: That's Walker.

17 MR HOLMES: It says Walker, but it appears to be an error and
18 should be Mr Alavi. The entry that follows, "Would that
19 be about right, Mr Walker" - that should be Mr Walker.
20 But there is also another error in the transcript. There
21 is a reference in that answer to "David Kennedy". Do you
22 see the reference to "Kennedy" in the third or fourth last
23 line on page 304?

24 CHAIRMAN: I'm just trying to pick it up.

25 MR HOLMES: Line 4.

26 CHAIRMAN: Yes.

27 MR HOLMES: So Mr Alavi is saying, "So, oh, yeah, okay, yeah,
28 so what Dank's saying they have given you and I \$36,000
29 worth of AOD for research. I told them that we are ready
30 to start. We can get the Thymosin ready in two weeks.
31 Can you meet with Robin and I 3.30 Thursday? So I guess

1 this is the 9 grams which he was promising which never
2 came. You know, one gram came and I would be - I would be
3 very surprised if David" - the transcript says "Kennedy"
4 but it should be "Kenley" - "had actually given him
5 \$36,000 worth of AOD for research knowing what he knows,
6 you know, as CEO of a pharmaceutical company. There's
7 other ways of doing things." Mr Walker, "Would that be
8 about right, \$4,000 a gram?" So can I correct that
9 transcript.

10 CHAIRMAN: Yes.

11 MR HOLMES: Can I turn now to the backdated letter.

12 CHAIRMAN: Just so the record is clear, we will just formally
13 mark this as corrected transcript, AS-35.

14 #EXHIBIT AS-35 - Corrected transcript.

15 MR HOLMES: In the bundle of documents I've handed up, AS-33,
16 the backdated letter, the sequence is that on
17 26 June - - -

18 CHAIRMAN: I will just get the tab.

19 MR HOLMES: Tab 1. I'm repeating at the moment the submissions
20 that were made.

21 CHAIRMAN: You are addressing the interpretation that the
22 players say should be put on that document and the
23 creation of that document.

24 MR HOLMES: Yes. The particular significance that stands out
25 is the wording of the document where Mr Dank, who is a
26 sport scientist and has been for some years, has found it
27 necessary to go and speak to a pharmacist that he has
28 known for some six months and to get from him a
29 certificate that the product, Thymosin or Thymomodulin,
30 does not contain any banned substances in accordance with
31 the WADA Code. Just the wording of that document, he

1 wants to provide a record that Thymosin means
2 Thymomodulin; he wants to provide a record that that
3 substance which was provided did not contain any banned
4 substances. Yet we know he's represented to the players
5 that he's got something from WADA, he's got something from
6 ASADA, we don't know what it is, no one has ever seen it
7 except for one person and in view of the number of people
8 who are present it can't be accepted that what he saw was
9 anything of substance.

10 We know that Dank has been advising Robinson in
11 previous conversations whilst he was at the Gold Coast
12 Suns and whilst he was at Essendon whether or not a
13 product was covered by the WADA Code. So why would he go
14 to Alavi to substantiate this substance that he has been
15 giving the players, the substance being Thymosin, which he
16 now wants us or the reader to accept as Thymomodulin?

17 The document was sent at 9.57 on the 26th. Then
18 at 9.58 he said, "Hi, mate. I sent it through to you."
19 Then there's a follow-up. On the morning he sends a text
20 message at 8.08, "Hi, mate. Are you there?" Then at 9.48
21 the document is emailed back to Dank containing Alavi's
22 signature.

23 So, as we have put in our written submissions,
24 the timing of the emails, the timing of the text messages,
25 the following up both the evening before and in the
26 morning shows that Alavi was keen to sign it as a matter
27 of urgency. Sorry, Dank was keen for Alavi to sign it as
28 a matter of urgency.

29 I mention our submissions rely only on the
30 written documents and not from the interviews of Alavi,
31 where Alavi says he's been chasing him since the beginning

1 of February or earlier, the date of the letter, to sign.
2 So it's clear that there is no evidence to support that
3 version of Alavi, so it's one of those conversations or
4 statements that we don't seek to place any reliance on.
5 But that doesn't undermine the fact that Dank went out of
6 his way to cover his tracks and to have evidence that the
7 Thymosin he was using was not Thymosin Beta-4, as the
8 preceding chain of events clearly demonstrates, but was
9 the subject Thymomodulin.

10 When you look at the players' comments on this
11 letter and on Thymomodulin you see that they tend to
12 suggest that the word "Thymomodulin" was used prior to
13 March 2012. In fact up until that time the only reference
14 was to Thymosin and Thymosin Beta-4 in all of the
15 transactions and all of the emails and all of the text
16 messages. So it just seems inconsistent that this letter
17 has any veracity other than to establish a cover-up that
18 the Thymosin he was injecting was Thymosin Beta-4.

19 Then there's a reference to the interchange
20 between Dr Nekoe and also Mr Dank. You will recall there
21 was an interchange in May between Dr Nekoe and Dank where
22 Dr Nekoe was also a user of Thymosin Beta-4. So he
23 texted Dank and said, "Let me know how I can get the
24 Thymosin Beta. I'm interested in multi-dose vials." Then
25 on the 29th he again follows up Dank and refers to
26 Thymosin Beta-4 - or beta.

27 Then on the 30th there's reference to the website
28 link about the interesting article on the Cycling News
29 website. Here is where the reference is to Thymomysin,
30 and the players say, "That should be understood as a
31 reference to Thymomodulin. It's closer to Thymomodulin."

1 But I think the answer to that is in Dr Nekoe's response.
2 The next morning he said, "As far as Thymosin being banned
3 or not, that's why I sent you the link." So at the time
4 it's clear that the parties involved in the communications
5 thought it was Thymosin and not what the players would
6 have you interpret.

7 I'm then going to interrupt my submissions by
8 going to an overview. I think the matters of detail are
9 in our written submissions.

10 CHAIRMAN: It is very comprehensive, Mr Holmes.

11 MR HOLMES: You have to look at the individual items based on
12 the submissions which have been made and which have been
13 responded to. I intend to go into particular ones, but
14 I would feel much more comfortable before going into
15 particular issues if I reminded you of how the case
16 originally started. If you have exhibit AS-1 you have the
17 outline of the - - -

18 CHAIRMAN: That's the outline of your original submission.

19 MR HOLMES: No, the outline of the case that's being advanced
20 by the CEO. We identified 27 signposts.

21 CHAIRMAN: Yes, I'm familiar with that.

22 MR HOLMES: What I would like to do is to - - -

23 CHAIRMAN: That was your original outline of the case back in
24 December.

25 MR HOLMES: Correct. The evidence supports those 27 signposts.
26 It is in paragraph 8 of AS-1. I would like to take you
27 through those 27 signposts because when they were
28 originally identified last year - - -

29 CHAIRMAN: We didn't have the evidence.

30 MR HOLMES: We didn't have the evidence. We didn't understand
31 the significance if you have a piece of jigsaw - until the

1 jigsaw is filled in, you can't properly assess the
2 significance of it. The first piece in the jigsaw was the
3 text on 2 August 2011. On 2 August 2011 - we refer to
4 this in paragraph 72 of our factual narrative - we have
5 Dank with Mr Earl and Dr Khan at his surgery. They are
6 using Thymosin after surgery. They are using Thymosin to
7 aid recovery from the shoulder reconstruction. Dank is
8 reporting on his use of the peptide Thymosin to Robinson.
9 Dank and Robinson in the previous year, 2010, had used
10 CJC, another peptide, [REDACTED]
11 [REDACTED] the same procedure that we allege is used
12 for recovery at Essendon in the following season.

13 The second signpost, if you go to paragraph 92,
14 we have a text message which is prophetic in the sense
15 that it talks about what was going to happen the following
16 season. On 23 August Dank in the evening sends a text
17 message to Robinson and talks about the importance of
18 Thymosin, which is going to be their vital cornerstone.
19 The text reads, "Don't forget how important Thymosin is.
20 This is going to be our vital cornerstone next year. It
21 is the ultimate assembly regulator protein and biological
22 modifier."

23 The reference to "our" is understandable because,
24 firstly, Robinson is now secure at Essendon. He has had
25 his letter of offer on 11 August to start on 1 September.
26 His manager on 1 August has said that, "Dean can bring his
27 exclusive contacts, Stephen Dank". Before this text is
28 sent Robinson promotes Dank using his Lactaway paper.
29 Before this text is sent Robinson had introduced Dank to
30 Dr Reid. Dank is talking to Robinson about what they are
31 going to use as their vital cornerstone. This is a clear

1 statement of intention to use Thymosin at Essendon in
2 2012.

3 They continue to evidence their intention to use
4 Thymosin in the third signpost, which is at paragraph 125
5 of our written submissions. These are the texts that are
6 sent on 4 and 5 October. They are talking between
7 themselves, Dank and Robinson, "Hi, mate. Peptides didn't
8 make the WADA list for next year." So they clearly don't
9 need to go to a compounding chemist to get a certificate
10 saying the peptide is not on the banned list.

11 They then go on to talk about CJC-1295 and
12 whether it does or doesn't. Dank says, "Thymosin and GPLC
13 doesn't." But Dank says, "But never submitted for
14 therapeutic use." Then there's a reference to the licence
15 being dissolved. So they proceed on an assumption that
16 the peptides they intend to use, that's the Thymosin, are
17 not caught by the WADA list for 2012.

18 We then go to the request to source peptides
19 which is at paragraph 111 of our written submissions.
20 This is on 13 September, paragraph 111. By this stage
21 Dank has followed Robinson and come from Sydney to
22 Melbourne. By this stage Robinson has met Dr Reid on
23 29 August. By this stage Dank has met Charter and has
24 ordered B-dose Forte vitamin injections for Essendon.
25 Dank has arranged for them to be delivered to Dr Reid.

26 Even before this meeting, Charter is texting Dank
27 asking him to follow up Essendon to see if they are on to
28 it, and Dank texting a response that he will do. So he is
29 following him up and he is looking to Dank being able to
30 arrange a response and payment for the account before this
31 meeting. So they have had some meetings. At this stage,

1 on the 13th, Dank asked Charter to find a source for
2 peptides, including Thymosin Beta-4. So Dank is now
3 beginning to carry out his intention to obtain Thymosin in
4 accordance with his plans with Robinson for next year.

5 What is our fifth signpost? It is the fact that
6 Charter travels to China on 26 November, which is at
7 paragraph 146 of our written submissions. As we put in
8 our written submissions, Charter travels to Shanghai to
9 fill the order or to source the peptides. Charter does
10 embellish this event by saying he spent weeks accessing
11 factories from Shenzhen to Shanghai. He said, "I went
12 through about six or seven factories before I found the
13 right one with the good quality stuff." In fact if you
14 look at the Customs declaration he tells the story that he
15 visited a factory, which is obviously a reference to the
16 factory which prompted Mr Xu to send the first email - - -

17 CHAIRMAN: It is one of Mr Grace's, I think.

18 MR HOLMES: PG-18, yes. At PG-18 he went to Hong Kong and then
19 on to China to visit a factory where they manufacture
20 peptide hormones. That's clearly a reference to GL
21 Biochem and that's corroborated by the email of
22 1 December. The air ticket arrangements are in AS-3, and
23 I don't need to take you - - -

24 MR GRACE: You should. How did he get to Shanghai?

25 MR HOLMES: Can I just stop there. That's exactly the point
26 I wanted to make. We have an email on 1 December thanking
27 him for his visit. We have a plane ticket from Melbourne
28 to Hong Kong. We have him flying into Customs on
29 2 December. What Mr Grace nags in my ear, "How did he get
30 from Hong Kong to Shanghai?" Can I say what the hell has
31 that got to do with ordering peptides. It's the nagging,

1 just trying to distract you gentlemen from your task.

2 Your task is to recognise the facts as common
3 sense would tell you. We have the air ticket. We have an
4 email from Shanghai. We know he went to Shanghai because
5 we know all of his dealings - we know because Mr Xu tells
6 us. We know that he tells us. He is consistent with
7 this. This is where not only does Mr Grace irritate me by
8 nagging away, but he confuses the consistent statements
9 that have been made by Charter and Alavi with the purchase
10 of the peptide under the 8 December transaction with the
11 visit that went on and the use of samples.

12 There is clearly a lot of inconsistent evidence
13 about the samples and whether he tested them there,
14 whether he brought them back. But there isn't the same
15 inconsistency with the purchase on the 8 December email,
16 there isn't the same inconsistency with Xu saying, "Thank
17 you for the visit." He clearly did go to Shanghai. So
18 how does it advance the task that you gentlemen have to
19 make of assessing it to say, "You haven't proven" - - -

20 CHAIRMAN: He's trying to cast doubt on whether he went to
21 Shanghai by saying, "You haven't produced, for example, an
22 airline ticket from Hong Kong to Shanghai, where you
23 produced an airline ticket to Hong Kong." What you say is
24 when you look at all that's available about this that's
25 not a problem.

26 MR HOLMES: It's more than not a problem. There is enough
27 clear and cogent evidence by whatever description you call
28 in aid that he travelled over there first for the visit,
29 that he visited GL Biochem and that he placed the order.
30 The continual pointing out that the records are not
31 100 per cent complete doesn't really assist you in your

1 task because you have to weigh up what is placed before
2 you rather than what is not placed before you.

3 The next bullet point, the signpost - - -

4 CHAIRMAN: 8.6.

5 MR HOLMES: I see the time.

6 CHAIRMAN: Yes, we will stop there and come back after lunch.

7 LUNCHEON ADJOURNMENT

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1 UPON RESUMING AT 1.30 PM:

2 CHAIRMAN: Mr Holmes, we were at 8.6. These are these 27
3 propositions.

4 MR HOLMES: Yes, which we made at the outset - - -

5 CHAIRMAN: I might say it is very helpful to us to have you
6 take us through those propositions and refer across to the
7 submissions, particularly the chronology of events.
8 That's helpful to us.

9 MR HOLMES: Item 6 was the placing of the order for the
10 peptides with GL Biochem. We have the series of emails
11 containing that. We also have the bank transfer. We also
12 have the consistent statements of Mr Charter that he
13 placed the order and that Thymosin Beta-4 was in the
14 order. There has never been any dispute about that or
15 inconsistent statements about the actual order, the
16 transaction.

17 As to matters of detail, we know he added
18 Hexarelin. We know he had Mr Anthony collect it. Even
19 the first email from Mr Charter when he made the order, he
20 referred to the fact that his associate, can it be
21 delivered to his Shanghai office, and it's clearly a
22 reference to Mr Anthony. So that sixth signpost was
23 clearly there at the outpost and it's still there.

24 Number 7 in AS-1, this is 8.7, there was a number
25 of interviews that Mr Charter gave. We listened to them,
26 in particular with 3AW, that he clearly remembers placing
27 the order at Mr Dank's request and that he remembered it
28 because of the electronic transfer; again a consistency.

29 We then have the peptides arriving. Again, the
30 sequence and the evidence - this is item 8 which is in
31 paragraph 183 of our written submissions - that clearly

1 establishes that the peptides arrived. We have a text
2 which says, "Peptides delivered 3.30 yesterday. Have you
3 got them?" Then the next series of text messages in
4 paragraph 185, "Hexarelin, can we make up the whole 3
5 grams?" We know that Alavi then says in the text message,
6 "I'll get cracking." Then there's a reference, "Did Steve
7 want to pick up today or we re-open on Tuesday."

8 So it's clearly the commencement of the
9 compounding operations because they have arrived. The
10 existence of the text messages and the content of the text
11 messages is clearly referable, cogently referable to the
12 delivery or arrival of the first shipment.

13 Then the texts form a narrative. If you look at
14 the text messages in 186 and 187, there's a continual
15 talking about the peptides that have arrived and
16 Hexarelin, and then once Hexarelin is dispensed on
17 10 January they turn to Thymosin Beta-4. So the narrative
18 is consistent with and suggests cogently that the peptides
19 have been ordered, the peptides have been supplied and the
20 peptides are now being compounded.

21 Then we get to signpost 9, which is paragraph
22 189. This is a critical chain of emails which clearly
23 followed the visit to China, the order, the delivery, the
24 compounding of Hexarelin and addresses what Steve wants
25 next. Importantly, it's Charter who contacts Dank. So
26 Charter has gone up there at the request of Dank, and
27 "What peptide do you need next?" Dank replies, "Thymosin
28 Beta-4 then CJC-1295." That's a clear statement of the
29 peptide that he wants and it's consistent with the order
30 which had been placed on GL Biochem.

31 Then Charter again, because he's dealing with

1 Dank, it's not Alavi, "What are the quantities?" Then you
2 can see that Charter passes on the instructions to Alavi,
3 "Thymosin Beta-4, then CJC Steve wants next." If you just
4 looked at that text message in isolation, "Thymosin
5 Beta-4, then CJC-1295 Steve wants next," those words would
6 mean nothing unless you knew what "Thymosin Beta-4" meant,
7 what "CJC-1295" meant and what "Steve wants" meant.
8 Common sense tells you you expand your frames of reference
9 and they are the critical text messages where we have the
10 commencement of the compounding process for the Thymosin
11 Beta-4.

12 Then, Charter passing that on to Alavi, we have
13 Dank asking for Thymosin 20 but in 5 ml vials. So at that
14 stage he only wants 20, he only wants 5 ml vials. What
15 does it matter whether it was 21 or 22 or 18 or 19? It is
16 the fact of the compounding of the peptide which has
17 arrived, put into the compounding process, put into the
18 vials and given to Dank. That's the critical issue. It's
19 the chain of supply of the substance, not what particular
20 dosage or concentration is used, and there are some
21 changes to that dosage. Then Dank having told Charter
22 that, they repeat the obvious chain. Charter passes that
23 on to Alavi, because Alavi is Charter's contact.

24 We then go to the tenth signpost. The tenth
25 signpost is an email which on 12 January is sent by
26 Charter to Dank and Alavi.

27 CHAIRMAN: Paragraph 190.

28 MR HOLMES: 190, yes. Charter prepares that email. He types
29 in the title "Thymosin Beta-4" and he types his message,
30 "Steve, just want to check you agree with the below so we
31 can make it up accordingly ..." Then, as has been pointed

1 out by the players, what follows appears to be a scissors
2 and paste, a cut and paste of extracts taken from the
3 website of peptide labs. But, I might ask rhetorically,
4 "So what?" We have these sports scientists, I'm not sure
5 what description you would have of Charter, or you would
6 have a description of Alavi as a compounding pharmacist
7 who is being introduced to the world of peptides and
8 athletes and the potential burgeoning market of a major
9 AFL club in Melbourne and for him to be the supplier.

10 You can understand why his lack of experience
11 might tend to lead him to pick up what he can learn from
12 the internet. But that doesn't take away from the
13 preceding text messages, "Which ones does he want next?"
14 "Thymosin Beta-4." He has given the size of the vial, he
15 hasn't given any instructions about how they are made up,
16 so why wouldn't Charter go to the internet? Why wouldn't
17 he put that together? It's confirmatory of the preceding
18 signpost and it continues the reference to Thymosin
19 Beta-4.

20 There's also a reference to TB500. It's apparent
21 that that website, or Charter when putting this together,
22 he treats them as interchangeable. It shows his
23 inexperience with the substance, but the fact that he has
24 repeated the title on the email "Thymosin Beta-4" and the
25 "Thymosin Beta-4" in the preceding text, it continues the
26 chain of the supply of the prohibited substance.

27 The 11th signpost, that is the dispensing of the
28 26 vials of peptide Thymosin and the seven vials of
29 Hexarelin on 18 January, that appears in the submission at
30 paragraph 207. It is clear that the text messages in the
31 previous signposts confirm that that's the consequence of

1 the act of compounding being finished by Alavi and the
2 vials being dispensed and in the texts which follow
3 18 January they ask for CJC-1295 and GHRP6. They are the
4 substances that are left in the order. They are working
5 through this order. So it is also consistent with, at
6 this stage, the draft Thymosin consent forms are sent to
7 Dank. So, it is all coming together. He has now got his
8 hands on the 26 vials of Thymosin and a further seven
9 vials of Hexarelin.

10 We go to the 12th signpost. Alavi tells
11 investigators that he believes he received and compounded
12 Thymosin Beta-4. That admission, when you read his
13 evidence, is reluctantly made. The same statements are
14 made by Charter. It is corroborated by the previous
15 signpost. It's clearly corroborated by what Alavi did
16 next. It appears that the day he dispensed this to
17 Essendon, he sent it to Eagle Analytical Services.
18 I mentioned this morning how that's been independently
19 corroborated. Just because he gave us a copy of the
20 emails, you cannot dispute that he sent the sample of his
21 compounded Thymosin Beta-4 to Eagle. He described it as
22 Thymosin. But Eagle reply to Alavi and they say, "Please
23 enlighten us on what the Hexarelin, CJC-1295 and Thymosin
24 Beta-4 are." This is in paragraph 210.

25 The Eagle email tells us that they received the
26 sample on 20 January. So, allowing a couple of days for
27 it to be sent over there, it is sent on or around the time
28 they have dispensed the Thymosin to Essendon.

29 The 14th signpost is that the testing didn't
30 proceed.

31 CHAIRMAN: What about 13?

1 MR HOLMES: Sorry. 13, paragraph 10, the samples are sent to
2 Eagle.

3 CHAIRMAN: Okay. We have covered that. That's picked up by
4 210.

5 MR HOLMES: 210 and 211, because 211 is sent on 24 January. We
6 received the samples on the 20th and they must have been
7 sent shortly before that.

8 CHAIRMAN: You want to go to 8.14.

9 MR HOLMES: Yes. That testing didn't proceed, so we don't have
10 that testing. We do have the record of it being received
11 by Eagle, and they have confirmed that the testing didn't
12 proceed and the samples had been destroyed.

13 We then come to the second shipment. There are a
14 number of indicia leading up to this. I know Mr Grace
15 says they failed to grapple with the genesis of it, but if
16 you look at paragraphs 253 to 256, as Alavi said on
17 8 February leading up to it, "I will liaise with Cedric
18 regarding more peptides when required."

19 Then on 12 February in our paragraph 246, on that
20 day Charter emails Dank enquiring if MRC has paid Nima so
21 he can place the next order. Dank emails Charter, "MRC
22 has paid Nima on the peptides," and at 2.18 Charter
23 forwards earlier messages to Alavi stating, "I believe MRC
24 have finally paid the EFC invoice. Once the previous
25 invoice balanced, Cedric can place the next order." We
26 then have the second shipment arriving and Vania Giordani
27 making a handwritten record of receipt of Thymosin on
28 18 February.

29 We then go to the next signpost on 8 February.
30 It's dealt with at paragraph 230, and this is the players'
31 meeting. Again, there is no dispute as to the subject

1 matter of this meeting or what occurred. In essence, we
2 put out those propositions in our submissions. If you
3 look at paragraphs 618 to 637, you will see the
4 propositions that we maintain about the meeting, who was
5 present, what was said, what they were urged to do, what
6 they were told about it, leading to the players signing up
7 to injections of Thymosin.

8 The 17th signpost - you may recall the Vania
9 document on 18 February. It records the receipt of
10 Thymosin.

11 CHAIRMAN: Yes.

12 MR HOLMES: We deal with how that's demonstrated to be Thymosin
13 Beta-4 by relying on what has gone before and the evidence
14 of the testing of Bio21.

15 But can I go forward then. I had dealt with 16,
16 that's the players' meeting. I was going then to 17.
17 Then when the injections were actually being made, the
18 signpost was that six players admitted the possibility
19 they had received injections of Thymosin. You add to that
20 three who believed they had been injected with the
21 substance that they consented to. You then add to that
22 eight who believed they had been injected with amino
23 acids, which as we refer to in that previous email
24 interchange or text interchange between Robinson and Dank
25 on 4 and 5 October, that was how they were going to
26 describe Thymosin.

27 Then we know that [REDACTED] and [REDACTED] had
28 sent contemporaneous texts of receiving Thymosin
29 injections subsequently, and as late as I think 27 July
30 2012.

31 Then perhaps the most significant thing is what

1 was the purpose of these injections? The purpose of these
2 injections was to aid recovery. That's what they were
3 told. If we go back to the very first signpost, what was
4 the signpost? It was Dank sitting in Dr Khan's surgery
5 with Earl recovering from the shoulder reconstruction and
6 Dank saying, "We are utilising Thymosin to aid recovery
7 after surgery."

8 Then if we go to the next signpost, 18, the forms
9 actually pick this up because they say the purpose of the
10 injections was "to achieve a reduction in the time
11 required for recovery". Recovery from what? This is Dank
12 getting all the players to sign up to a recovery injection
13 regime. Whether they need recovery or not, it's going to
14 last for the season. It's clearly intended by Dank and
15 the players to have a recovery benefit.

16 The next signpost is paragraph 19. On 9 March
17 Dank texts Hird, "IVs start next week and Thymosin with
18 Ubiquinone. We will start to see some real effects."
19 That's paragraph 67. It is clear the intention with
20 Thymosin and Ubiquinone is going to affect them, their
21 recovery will be better; their performance, one could
22 infer, was going to be better.

23 We then go to paragraph 20 and we have the
24 reference to the Dr Nekoe text messages and the Cycling
25 News, and Dr Nekoe is seeking Thymosin Beta; that's
26 paragraph 267.

27 Then we go to paragraph 21, and that's the
28 signpost Dank and Alavi prepare the backdated letter and
29 that's been dealt with separately.

30 Then we have in signpost 22 the alleged
31 photograph produced by [redacted] said to be around the

1 end of the season, around Grand Final week.

2 Signpost 23, paragraph 338. This is significant
3 because it comes six months after the peptide
4 supplementation program has commenced that Alavi is
5 creating this document on 5 July. It's a record of
6 peptides which he will dispense. One can say it's just
7 shortly before the Facebook website which Como also
8 established or had up and running in August 2012. It
9 follows the introduction of the Dank supplementation
10 program and it follows Alavi's dispensing of peptides to
11 Essendon.

12 How is it used by Mr Alavi? It's subsequently
13 sent to the Melbourne Football Club. So another AFL club
14 is being beguiled and encouraged to come into the world of
15 peptides. What Thymosin is being referred to? Alavi
16 wants another AFL club to use Thymosin Beta-4. He uses
17 Thymosin, Thymosin Beta-4 interchangeably. There is no
18 reference to any other type of Thymosin. There is no
19 reference to Thymomodulin or Thymomosin, whatever that
20 spelling was in the Nekoe text message.

21 Then we have in signpost 24 - - -

22 CHAIRMAN: That's the McKenzie interview.

23 MR HOLMES: That's the McKenzie and Dank interview where we
24 pointed out the clear admission by Dank that that's what
25 he's been using, the clear admission by Dank about what
26 the science shows. We have the attempt to recant. We
27 have the admission that he had made an admission. I know
28 Mr Clelland will disagree with the recanting. It's not a
29 clarification. It is clearly somebody trying to retract
30 something he realises he wishes he never said. That is an
31 admission that he had made an admission.

1 The 25th signpost, these are pretty hard for the
2 players to ignore. It confirms that the regime of
3 injections was in force, they were freely acknowledging
4 that they were taking Thymosin; [REDACTED] on 20 April,
5 paragraph 309, and [REDACTED] on 19 July 2012, paragraph
6 339, and freely referring to [REDACTED] So, any suggestion
7 that the regime of Thymosin injections didn't continue
8 from its inception in February through to July really
9 cannot stand in the face of that clear evidence.

10 Now we come to Robinson and we have paragraph 26.
11 This is a signpost which I would just like to deal with
12 separately because Mr Grace in his submissions alleged
13 that there had been some misrepresentation, distortion,
14 selective reading of the transcript. This is Robinson.
15 It is paragraphs 251 to 252. This is Robinson's evidence.

16 You will recall that I said Robinson was visiting
17 him daily during this season. He went down there. The
18 only evidence that he saw was vials in the fridge marked
19 "Thymosin". He didn't see the slab of whatever Mr [REDACTED]
20 saw. He didn't volunteer or mention Thymomodulin. His
21 evidence was clear. He was asked about the substances.
22 He was asked about what he saw. He clearly said he saw
23 Thymosin. The facts are that Robinson's first interview
24 occurred over three days, from 19 to 21 March. There are
25 475 pages of transcript. During those three days Robinson
26 does not mention the word "Thymomodulin", not once.

27 I handed up a document AS-33. If you go to tab
28 12, we see this is the transcript at page 89, early on
29 these three days. He asks about the supplements and where
30 they were administered. "They were kept in his office?"
31 Answer, "Yes, they were." "Whereabouts?" Either

1 stainless steel cabinet or in the fridge area." They talk
2 about slushy machines. "So what supplements did he have
3 within the office that you recall?" No suggestion of
4 leading or whatever. "Tell us. Tell us the name of the
5 supplements." 41, Mr Robinson names some. He's asked to
6 go slower. He's going to. "Would you mind", and then he
7 spells them over the next page, Arginine, Coenzyme Q10.

8 Then it goes down, over on page 91, what does
9 Robinson volunteer? "What else was in his office?"
10 "Thymosin I think was one that was in his office." So he
11 comes forward with Thymosin. There is no suggestion about
12 it. Then we go down to line 21, "Which ones were in the
13 cabinet?" "I believe Thymosin were in the fridge." Then
14 it goes on, "Lactaway".

15 Then the only other time it was mentioned, at
16 199, on the third page in that tab, down at line 36, "Did
17 we mention Thymomodulin or Thymosin? Does Thymomodulin
18 ring a bell with you?" Answer, "No, Thymosin." So,
19 gentlemen, what is a fair reading of those extracts I have
20 given you? "Does Thymomodulin ring a bell? No. What is
21 in the fridge? Thymosin."

22 We have a debating point. You may recall when
23 I tendered these or referred to them, Mr Grace got up and
24 said, "Oh, we're not sure whether we want to cross-examine
25 Mr Robinson to clarify anything. Are you going to just
26 refer to those matters?" We thought it was a fair answer
27 put in the proper context. We provided the entire
28 transcript. Then he gets up in the written submissions
29 and accuses I guess me, the CEO, in putting the
30 submissions, that "You have misled this Tribunal because
31 you haven't mentioned other matters."

1 If there was any dispute about that, why didn't
2 he go ahead with the right, which he had, to ask for him
3 to attend for cross-examination? This is where the
4 opportunity to cross-examine was in his hands. If he
5 wanted to dispute that it was Thymosin in the fridge, he
6 could have. But that evidence now - - -

7 MR GRACE: I'm not disputing that.

8 MR HOLMES: That's exactly right. There is clear, cogent,
9 admitted evidence that he had Thymosin vials in the fridge
10 which were seen by somebody who went in there every day
11 during this period, and clear evidence that Thymomodulin
12 did not ring a bell with him.

13 That has backfired on the players. How can they
14 tell this Tribunal in good faith, "Look, we challenge this
15 evidence that the Thymosin Beta-4 ever got into the fridge
16 in Thymosin vials because we weren't given the opportunity
17 to cross-examine Mr Robinson." That's just a debating
18 point, with respect. In this civil proceeding we have led
19 evidence which creates a powerful, persuasive effect and
20 they have not sought to put any evidence to contradict
21 that.

22 What they have done is to grab on to a slab of
23 white vials in plastic that nobody else saw, nobody else
24 referred to, from [REDACTED] who said, "Every time I went
25 along I asked him about what substance I was getting and
26 I was told it was Thymosin Alpha." With respect to
27 Mr [REDACTED] that is clearly not something which this
28 Tribunal, when weighing up the evidence in a common sense
29 fashion, can accept. We embrace the elegant submissions
30 of the AFL in how the players' evidence in one matter can
31 be used in the other matters. If they had wanted to

1 bolster Mr [REDACTED] evidence, they could have led evidence
2 from any one of the players who went into Mr Dank's
3 office.

4 There is one further passage in Mr Robinson's
5 evidence which I would like to rely on. Can I just give
6 you the reference to this, because this one is worth
7 looking up. In the interviews with Robinson, he was asked
8 about the text message on 1 August 2011. It is under tab
9 13. It is page 11.

10 At page 12, line 40, Ms Kerrison asked him, "Is
11 there any particular reason why he was saying this case
12 will be of interest to you?" Sorry, I didn't realise that
13 the photocopy was there on the back of the page. At line
14 40, "Why this case will be of interest to you? Can you
15 recall?" Line 40, "Mainly because of the recovery time."

16 There is the phrase that appears in the 1 August
17 text message which he's being asked about. There's also
18 the phrase that's come out of the consent forms. The
19 players have signed up exactly to what they had planned.
20 "Mainly because of the recovery time, how quick you can
21 recover from shoulder surgery." Again, whether it is
22 Thymosin, Thymosin Beta-4, now he adds the word
23 "Thymomodulin". "I don't know what it is. I got
24 told - the only thing I ever got told was Thymosin or
25 Thymomodulin worked on the thymus gland and was good for
26 your immune system. That was all I knew it for."

27 Thymomodulin didn't come into the conversations
28 until I think it was a text message towards the end of
29 March 2004, after they had signed up, after they had made
30 their plans for the season the previous August and after
31 they had purchased the Thymosin Beta-4 from GL Biochem.

1 I have already tendered the entire transcript.

2 CHAIRMAN: Yes, it is already there, and we have received that
3 bundle of specific documents from the tender documents
4 already as AS-33.

5 MR HOLMES: There was one more signpost, and that is it is
6 rather interesting to recall that this was identified.
7 Dank was unsupervised at Essendon except by his long
8 associate, Robinson. He was the one he reported to. He
9 was the one that he made his plans with in August and
10 October and late 2011. They were able to do exactly what
11 they had set out to do and planned to do for the 2012
12 season.

13 We say he was unsupervised. My friends say,
14 "Well, he was haphazard and he was erratic." There may be
15 somewhere between the two. But that freedom which
16 Essendon gave him and that belief that Robinson had in his
17 performance, to abbreviate it, "He was at Manly Rugby
18 League Club when they won the Grand Finals, he was at
19 Geelong when they won the Grand Finals, he's got this
20 history of being there and Essendon should take him on."
21 You can see why Dr Reid said, "Robinson insisted that he
22 come along with him."

23 Can I just give a response to one of the players'
24 submissions that we disagree with. They accuse the CEO or
25 our submissions of not grappling with the genesis of the
26 second supply, and the genesis of the second supply,
27 I think that's tackled or raised by both [REDACTED] and
28 [REDACTED] in their submissions at 26 and it's raised by the
29 32 players at paragraph 75.

30 It's clear when the first order was made there is
31 contemporaneous email correspondence and there is in that

1 correspondence a mention that I have already referred to
2 on 8 February that, following the first supply, Alavi says
3 to Charter, "I will liaise with Cedric regarding more
4 peptides when required." That's at AS-3, page 275. There
5 is reference on 12 February, "I believe MRC have finally
6 paid the invoice. Once the previous invoice is balanced,
7 Cedric can place the next order." That's 276.

8 That Alavi would liaise with Anthony on future
9 orders, that's consistent with the MMS that was sent by
10 Charter to Anthony on 27 January containing Alavi's
11 business card. That is referenced at AS-4, tab 2,
12 document 80, page 395, that the electronic business card
13 was sent from Charter to Anthony containing Alavi's
14 contact details. It can be inferred then that Charter is
15 putting Anthony in contact with Alavi. We don't have the
16 extensive text messages, but we do have the references by
17 Alavi in early February to the further orders and liaising
18 with Anthony.

19 There is other evidence. There is the
20 handwritten receipt from Giordani of Thymosin. There was
21 one gram of Thymosin which was received. Alavi did not
22 have any other Thymosin when he received the second
23 supply, as he had compounded all of the 0.25. Our
24 calculations are in our written submissions. You will see
25 how we show that 0.25, although it's obviously a very
26 small amount to non-compounding chemists, can be
27 compounded to provide the 26 vials and the sample for
28 Eagle Analytical Services.

29 The records show that Alavi didn't receive any
30 further supplies of Thymosin until the Sichuan Hengli
31 order, which was received in July 2012. From that

1 purchasing history it can be inferred, and this will be
2 dealt with by Mr Knowles, that the Thymosin tested by
3 Giordani at Bio21 was the Thymosin received in the second
4 supply. You have seen our submissions in the written
5 submissions about the testing at Bio21.

6 It's our submission that the focus and the
7 evidence shows that this Tribunal can be comfortably
8 satisfied that the Thymosin compounded and dispensed from
9 Alavi from that second supply as a result of that testing
10 and as a result of the sequence leading up to it was
11 Thymosin Beta-4.

12 I think that concludes the overview of the 27
13 signposts. I would like now to turn to the player
14 evidence. One of the significant things about the players
15 is that they didn't really dispute or respond to our
16 analysis of the propositions that could be made
17 comfortably from the players' evidence, but they did
18 assert that it is impermissible for the CEO to use the
19 player transcripts against anybody else.

20 Where does that come from? That comes from
21 the criminal law. It doesn't come from these proceedings.
22 There is no raising of the privilege against
23 self-incrimination. That was addressed at the time of the
24 interview. So that general principle of law has no
25 application. So what do they do? They say in a criminal
26 trial one co-accused doesn't give evidence against another
27 co-accused. You can't lead the co-accused's evidence.

28 CHAIRMAN: We have been through that.

29 MR HOLMES: You have been through that, but where did that come
30 from?

31 CHAIRMAN: We have ruled that it is cross-admissible. It is a

1 question then, of course, as I think Mr Gleeson very
2 correctly points out in his submission, as to what's the
3 probative value of a statement by one player in relation
4 to the case against other players.

5 MR HOLMES: I agree with that.

6 CHAIRMAN: And that's a matter of judgment for us.

7 MR HOLMES: Exactly. I'm not responding to that because

8 I endorse that. I've got on this side Mr Grace saying,

9 "It is impermissible what you're doing," and I think to

10 myself, "The Tribunal has ruled that it is permissible,

11 but we have a written submission from senior counsel

12 saying that it is impermissible." This is paragraph 178.

13 I don't want to be accused of taking Mr Grace's words out

14 of context. Can I just go to that?

15 CHAIRMAN: 178.

16 MR HOLMES: Yes. 178, 179, "Whilst the Tribunal has ruled that

17 the players' transcripts are cross-admissible, the

18 suggested use that ASADA seeks to make of them goes beyond

19 that which is permissible given the standard of proof."

20 CHAIRMAN: I think what he is saying is - it comes back to what

21 I was saying before about probative value. What he is

22 saying is, "Look, the Tribunal has ruled that they are

23 relevant, but we don't think really they provide any

24 significant probative value in a cross way in terms of

25 one's being used in relation to the position of others."

26 That's effectively what it seems to me he is saying,

27 rather than saying, "Well, notwithstanding the fact that

28 you've ruled that the evidence can be used in this way, we

29 say it can't." I think it's more what he is saying is,

30 "You have this standard of comfortable satisfaction and

31 really the use of the evidence in this way doesn't take

1 you very far."

2 MR GRACE: If you read on further, sir - - -

3 CHAIRMAN: I might be wrong, but that's the way I read it.

4 MR GRACE: If you read beyond that sentence that Mr Holmes read

5 in 179 and 180, you will understand the context in which

6 we make that argument.

7 MR HOLMES: Can I just allow you to finish reading those two

8 paragraphs?

9 CHAIRMAN: I have looked at that before. It does come down to

10 probative value. He is saying to sort of use it in that

11 way, you would really be speculating.

12 MR HOLMES: He is saying it is not permissible, and that is

13 where there is no legal basis. You are very charitable,

14 if I may say, in your interpretation of the submissions.

15 If he had put it in those words, we wouldn't have risen to

16 the bait.

17 CHAIRMAN: I don't know what my learned colleague on the left

18 thinks, but that's the way I interpret it.

19 MR HOLMES: Can I just say in our submissions we pointed to an

20 example where the players sometimes were queueing up or

21 waiting around in groups outside his office to get

22 injections. When you know that the players are going in

23 there regularly, with others waiting outside, you can see

24 that it's a reasonable inference to draw that, if they

25 have all signed up to the same injection protocol, then it

26 is a situation where they are likely to have been

27 observing the same things and going through the same

28 treatment. As Mr Gleeson said, there is no suggestion

29 there was a change of treatment or somebody got any

30 special treatment.

31 So we would urge the use, as we have originally

1 put in our written submissions. We say there is
2 corroboration that some players received the injections
3 from a brown vial and some received it from a clear vial
4 and both were subject to the same regimes, or you can
5 infer that they were - - -

6 CHAIRMAN: That's an example of something where you attach a
7 different significance to it to what the players attach to
8 it, the different vial situation. What you say is that
9 doesn't necessarily mean they haven't been injected with
10 the same substance.

11 MR HOLMES: We also say the clear vials came from the first
12 shipment and the amber vials came from the second
13 shipment.

14 CHAIRMAN: They could both be Thymosin Beta-4.

15 MR HOLMES: They could both be Thymosin Beta-4. Doubts that
16 might exist if you were going to take the criminal law
17 approach in relation to the second shipment don't apply in
18 relation to the first shipment. So those who received the
19 clear vials cannot be subject to the same result as those
20 who received the amber vials. If you are going to accept
21 the criminal law, is there a doubt about the genesis,
22 whatever that genesis may mean, of the second shipment.

23 Other matters which the players seem to be
24 consistent on is that they were told in the auditorium
25 meeting that they were going close to the edge, they were
26 going close to the cliff, they were going close to the
27 line, they were pushing the boundaries. It is clear that
28 they were told the injections were to aid recovery. It's
29 clear that they were signing up to an injection with
30 something called Thymosin. There appears to have been a
31 Powerpoint, but Essendon doesn't have that Powerpoint.

1 I mentioned going to the cliff. I'm not going to go
2 through that again. I told you they were willing
3 participants.

4 Then I have also mentioned how they managed to
5 conceal the program from Dr Reid or Dr De Morton; they
6 weren't involved in this. I don't need to go through that
7 again. It is clear that the players were expressly
8 instructed to conceal the injections. Why would the
9 players conceal the injections? You remember - - -

10 CHAIRMAN: That was so that their competitors wouldn't find out
11 that they had this great advantage. It was going to smash
12 Collingwood and everyone else.

13 MR HOLMES: They wanted to conceal it from Dr Reid and you may
14 recall the text message exchange from Hird at the end of
15 January when he was I think in Europe. The text messages
16 are referred to in our submissions on page 59, paragraph
17 216. Hird sends a text message to Danny Corcoran, "Hi,
18 Dan. Hope all is going well. How is Milan? No stress
19 but need to organise a meeting with you, Reidy, Danksy and
20 the Weapon the day you get back. Reidy has stopped
21 everything which is getting a little frustrating. Need to
22 get your United Nations skills back in action."

23 Corcoran responds, "You know I read your book on
24 world doping while I was away." He goes on, "And once lay
25 people start injecting players there are always issues.
26 We must be careful here for a host of reasons. Looking
27 forward to catching up." Then Hird responds, "Understand
28 about injecting. Don't want to push the boundaries."
29 That's exactly what they then tell the players. "Just
30 want to make sure we are doing everything we can within
31 the rules as the other clubs are a long way ahead of Reidy

1 and us at the moment."

2 I'm reminded, why do they use Dr Khan for all
3 these blood tests? Why do they conceal the blood tests
4 and what they were doing from Dr Reid? They were pushing
5 the boundaries. They knew they were going into areas
6 which they had been warned about. When they were told to
7 keep this program secret and not discuss it with anybody,
8 if you look at Mr [REDACTED] for example, Mr [REDACTED] said they
9 were told they wanted it to be confidential within the
10 playing group. "I remember them saying that only a couple
11 of the coaches were aware of what the supplement program
12 was going to be." Mr [REDACTED] another player, in his
13 transcript at AS-6.3, he said the supplement program was
14 "hidden from view within the football club".

15 [REDACTED] also says something along those lines,
16 "The second form was confidentiality, so the three people
17 who facilitated it and the playing group, the 2012 playing
18 group, that the group is the only ones to know." And the
19 three people he was talking about were Dank, Robinson and
20 Hird. Others; Dank said, it was almost a bit of
21 intellectual property. [REDACTED] recalls the players being
22 told by [REDACTED] to keep the program a secret.

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

27 There are some other matters that we are going to
28 respond to and I am going to hand over to Mr Knowles
29 because they are matters which are more appropriately
30 dealt with by Mr Knowles.

31 MR KNOWLES: In the interests of time, I will structure the

1 submissions perhaps not in a logically ordered way, but in
2 a way that will be most time efficient by commencing on
3 the question of whether or not Thymosin Beta-4 is a banned
4 substance, which is put in issue by 32 of the players.

5 CHAIRMAN: Yes.

6 MR KNOWLES: I will then go back to something more like what
7 Mr Holmes was addressing and to deal with two questions
8 relating to the calculation of the 0.25 grams and the
9 compounding of the 0.25 grams and the significance and
10 what can come out of the evidence relating to the testing
11 that took place at Bio21.

12 In respect of the first issue that Thymosin
13 Beta-4 is a banned substance, the CEO relies on
14 essentially three propositions. The first, put simply, is
15 that Thymosin Beta-4 is a banned substance because WADA
16 says it is banned. I will come back to that with some
17 finesse, but that is the four corners of the submission
18 and it depends on an interpretation of clause 6.3 of the
19 AFL Code.

20 The second proposition is that Thymosin Beta-4 is
21 banned under category S2.5 of the prohibited list, the
22 WADA prohibited list, on the basis that it is a growth
23 factor affecting muscle, tendon and ligament
24 vascularisation and regenerative capacity. That is very
25 hard to say, so I might just use a shorthand of it, that
26 it's a growth factor.

27 The third basis is that Thymosin Beta-4 is a
28 banned substance under the S0 category in the prohibited
29 list, on the basis that it has not been approved for human
30 therapeutic use.

31 In our written submissions in relation to Mr Dank

1 where it became relevant, we did highlight some of the
2 changes to the WADA prohibited list in the 2010, 2011,
3 2012 years. However, with Mr Dank - - -

4 CHAIRMAN: That doesn't apply to the players' situation,
5 Mr Knowles, does it?

6 MR KNOWLES: With respect, that's correct, Mr Chairman. There
7 is really no detail or nuance that has to be said about
8 the prohibited list in 2012.

9 Going back to the first submission as to why it
10 is banned, I would ask the Tribunal to turn to clause 6.3
11 of the AFL Code. Exhibit AFL-3 should be the Rules and
12 the Code. It is extracted at page 11 of our submissions.

13 CHAIRMAN: I have it.

14 MR KNOWLES: The first proposition we put in relation to this
15 is that this clause means what it says when it says that,
16 "WADA's determination of the prohibited substance and the
17 prohibited methods that will be included on the prohibited
18 list and the classification of substances into categories
19 on the prohibited list is final and shall not be subject
20 to challenge."

21 CHAIRMAN: The argument from the players, as I understand it,
22 is that what happens is not a determination within the
23 meaning of that clause.

24 MR KNOWLES: Yes, we rely on an email from Dr Mazzoni, but
25 I accept that it is not a determination by the prohibited
26 list committee, but the committee is not referred to in
27 clause 6.3 and it can't be suggested that a person in the
28 position of Dr Mazzoni doesn't have authority to speak for
29 WADA. That is a determination, in our respectful
30 submission.

31 I should say out of fairness that the players do

1 point to the decision of Williams which deals with a
2 different aspect, albeit a related aspect. The question
3 in that case was whether a particular substance fell under
4 the catch-all category of being similar. WADA asserted
5 that it was a similar substance and therefore caught by
6 the catch-all. The Court of Arbitration for Sport said,
7 "Well, no, WADA's assertion is not sufficient" - - -

8 CHAIRMAN: That's not a determination.

9 MR KNOWLES: "It has to be proved." We distinguish that
10 position. We are not dealing with a catch-all or a
11 description of a substance as being similar. We are
12 dealing with a position where, although not expressly
13 named, the only question is whether Thymosin Beta-4 is a
14 growth factor in the relevant sense and WADA has said it
15 is. But there are certainly some similarities with
16 the arguments that were put in Williams, but we simply say
17 that that doesn't apply here and that clause 6.3 should be
18 given its ordinary meaning. Even if we are wrong on that
19 clause, 6.3 comes back to deal with a secondary argument
20 raised by the players under category S2.5 of the Code, but
21 I will deal with that separately.

22 In relation to S2.5, the category, the players'
23 argument which was foreshadowed in our written submissions
24 and elaborated in the 32 players' written submissions
25 appears to be that because the testing to date on Thymosin
26 Beta-4 - - -

27 CHAIRMAN: Is on animals.

28 MR KNOWLES: Is in-vitro or on animals, one can't be certain
29 that it is a growth factor in the relevant sense in
30 humans. They cite a transcript reference from Professor
31 Handelsman where he discusses the possibility - or I think

1 his words were that there is "scant" evidence on humans.
2 True that is. But in our submission the best available
3 scientific evidence suggests that it will have that
4 effect, albeit that without scientific trials on humans
5 one could never be absolutely sure. But absolute
6 certainty is not the standard of proof for which this
7 Tribunal is to determine the matter.

8 In fact, at various other points of the players'
9 submissions, the 32 players' submissions, I should say,
10 there are attacks made on the evidence given by Professor
11 Handelsman. But to Professor Handelsman's credit in this
12 case, in my respectful submission, he acknowledged the
13 relative lack of information, but nowhere was it
14 challenged that Thymosin Beta-4 did in fact have these
15 potential effects. Nowhere was it challenged that the
16 underlying in-vitro or animal studies that were referred
17 to were accurate or correct. It really is moving into the
18 realm of speculation, beyond the realm of scientific
19 knowledge, to suggest that it wouldn't have this
20 particular effect on humans.

21 It's then also put by the players, and this goes
22 back to clause 6.3, that Thymosin Beta-4 couldn't fall
23 under category S2.5 because it hasn't been shown by ASADA
24 that it meets two of the three criteria for listing on the
25 prohibited list. Those criteria are that use of the drug
26 is against the spirit of sport, that there is the
27 potential to enhance performance or that it represents a
28 risk to health.

29 I will come back to the question of whether there
30 is in fact evidence of that, and in my submission there
31 is. But if clause 6.3 does not have the effect of my

1 primary submission, that it's banned because WADA says
2 it's banned, at the very least clause 6.3 must prevent a
3 challenge by a player to say, "You can't consider a growth
4 factor that has the relevant characteristics to be a
5 prohibited substance because it doesn't meet the criteria
6 in the WADA Code," and if that submission needs any
7 support beyond the text of clause 6.3 it's found in the
8 footnote - one doesn't have to look far - where it says,
9 "The question of whether a substance meets the criteria in
10 this clause, criteria for including substances and methods
11 on the prohibited list in a particular case, cannot be
12 raised as a defence to an anti-doping rule violation."
13 That, in my respectful submission, is the end of it.

14 The players suggest, "Well, this can only apply
15 where there is an expressly named substance." But the
16 response to that might be, "Well, clause 6.3, which is
17 based on a provision of the WADA Code, isn't expressly
18 limited by that." But the second response is WADA has
19 seen fit to limit or to prohibit the use of the growth
20 factors with the relevant characteristics. Once it's
21 established by Professor Handelsman's evidence that this
22 is such a growth factor, then this Tribunal, if it were to
23 go behind WADA and consider whether the criteria would be
24 met, would, in my respectful submission, be falling into
25 error because it would be intruding onto the turf, so to
26 speak, of the prohibited list committee.

27 The position that was also put, and perhaps in
28 our written submissions we reserve the right to lead
29 further evidence if this submission was to be put. From
30 the 32 players the riposte was, "Well, that's an implied
31 admission that you haven't proved the case." If it is a

1 case we have to prove, which for the reasons I have
2 already said it is not, then one looks to what are the
3 criteria. Putting aside the question of it being against
4 the spirit of sport, there's certainly some subjective
5 evaluation there, but the other two criteria, that it has
6 the, and I emphasise the word, "potential" to enhance
7 sports performance. Accepting the players' argument at
8 their highest, that we can't know because there's no human
9 trials, at the very least the gravamen of Professor
10 Handelsman's evidence is that there is a potential that
11 the effects noted in animal trials and in-vitro trials
12 would be repeated in humans and that would be a
13 performance enhancing effect.

14 The second criterion would be that it represents
15 a risk to the health of a player. Professor Handelsman's
16 report, and I don't need to take the Tribunal to it, but
17 the report of 3 December which is in exhibit AS-7, at
18 paragraph 17.5.8 Professor Handelsman describes the flip
19 side of the regenerative capacity of this substance is
20 that it does promote cellular growth, sometimes irregular
21 cellular growth, and creates a risk, not a certainty but a
22 risk, of carcinogenic effects. So, the risk to health is
23 also established by Professor Handelsman's evidence which
24 was not challenged.

25 Now, what was put to Professor Handelsman in
26 evidence was a phase 1 human trial where relatively large
27 doses of Thymosin Beta-4 were taken with no adverse
28 effects. In my respectful submission, that doesn't remove
29 the risk of harmful effects on humans because the phase 1
30 human trial doesn't involve repeated dosages over a long
31 period, nor is it a longitudinal study. One would expect

1 for something like a risk of a carcinogenic effect that it
2 won't happen overnight, but it will happen. So the fact
3 that a phase 1 trial hasn't been shown to have any adverse
4 effect doesn't remove the risk to human health, and that's
5 all that would need to be shown for that criteria to be
6 satisfied.

7 To move on then to the S0 category, this is an
8 area where the 32 players' submission did make criticism
9 of Professor Handelsman which were, if I might submit,
10 patently unfair to Professor Handelsman. Professor
11 Handelsman to his credit admitted in his evidence that
12 he's not an expert in all regulatory environments. He was
13 then cross-examined on various transnational and national
14 bodies for recognising and registering drugs, but his
15 admission that he's not an expert on all regulatory
16 environments is no more than an honest and credible
17 statement that he doesn't carry around with him in his
18 head an encyclopedic knowledge of every drug that's ever
19 been registered anywhere in the world. It's not even
20 known whether it's possible to do a search of every drug
21 that's ever been registered anywhere in the world.

22 What Professor Handelsman stated was, to his
23 knowledge, that the major drug regulatory agencies around
24 the world have not registered Thymosin Beta-4 for human
25 therapeutic use. He said further that many other
26 countries simply follow the lead of those major regulatory
27 agencies. Importantly, he said that in his searches
28 there's not even any what was called marketing material
29 involving or promoting the use of Thymosin Beta-4.

30 So, we know there's only been phase 1 human
31 trials. There is no marketing material and none of the

1 major regulatory bodies have listed it. In my submission,
2 it's not a large inference to draw that it's not been
3 registered anywhere.

4 The players have led no evidence on this issue.
5 They have suggested it in submissions, but it was open and
6 available to them, if they wanted to demonstrate that it
7 had been registered anywhere in the world, that evidence
8 could have been obtained. That's not an attempt to
9 reverse the onus of proof; I accept that we bear the onus
10 of proof. But whenever one considers whether the burden
11 of proof or the onus has been satisfied, ringing in my
12 ears at least are the words of Chief Justice Mansfield in
13 *Blatch v Archer* that, when assessing evidence, one
14 considers a party's capacity to produce evidence and the
15 other party's capacity to rebut that evidence.

16 Here we have a case where stones have been thrown
17 at Professor Handelsman in cross-examination and in final
18 submissions, but the players haven't come above the
19 parapet to lead their own evidence.

20 CHAIRMAN: They called an expert.

21 MR KNOWLES: Not on the question - - -

22 CHAIRMAN: No, but they did call an expert.

23 MR KNOWLES: Yes, and in fact that's telling, if I might say.

24 On something that they thought was a contestable
25 proposition Dr Vine came along, and I will speak about his
26 evidence later, but there was no Dr Vine in respect of the
27 registration of drugs anywhere else in the world. So
28 that, in my submission, would allow the Tribunal to more
29 comfortably draw the inference which I'm inviting it to
30 make.

31 The other short point to make is the inherent

1 tension in the submission of the 32 players. In respect
2 of the category S2.5, they say, "Well, there's no human
3 trials. You can't be sure it has this effect."

4 Notwithstanding the entire absence of human trials, they
5 want the Tribunal to believe that somewhere in the world
6 it has been registered.

7 CHAIRMAN: For human consumption.

8 MR KNOWLES: For human therapeutic use, which in my submission
9 is implausible, shouldn't be accepted. We do accept, and
10 Professor Handelsman accepted in cross-examination, that
11 S0 is an alternative category. The way S0 is worded means
12 you can't fit into S0 and 2.5. So in terms of the
13 Tribunal's analysis it would first come to consider 2.5.
14 But to consider a submission in the alternative, then S0
15 would be the submission to be considered.

16 I apologise if I have gone through that quickly,
17 but we are short on time.

18 CHAIRMAN: No, that's been very clear, Mr Knowles, thank you.

19 MR KNOWLES: I might move to a separate topic which is largely
20 dealt with in our written submissions and so I won't
21 repeat it. It is an important issue of how, in respect of
22 the first shipment, the January shipment, a quarter of a
23 gram of Thymosin Beta-4 can be compounded in a way that
24 would allow it to be sufficient for Mr Dank to use at
25 Essendon.

26 At paragraphs 499 to 500 of our written
27 submissions we have set out in quite a detailed way - and
28 I understand the mathematics of it at least aren't
29 challenged, the plausibility of it may be, but the
30 mathematics aren't challenged - that if the concentration
31 of the Thymosin Beta-4 was 3 milligrams per ml or

1 3,000 micrograms per ml, and if each vial had 3
2 millilitres in it, then there would be sufficient, subject
3 to one caveat I will come to, amounts of the raw substance
4 to produce the 26 vials of Thymosin Beta-4 which were
5 dispensed to Essendon. There would also be sufficient to
6 produce two test vials as well as one vial at a different
7 concentration that was sent to Eagle Pharmaceuticals.

8 The fact that the vial that was sent for testing
9 at Eagle Pharmaceuticals was at a different concentration
10 and a different volume than the final product is not, in
11 my submission, telling against our principal submission
12 that it was at 3 milligrams and 3 mls because the evidence
13 of the people doing the compounding, Vania and Alavi, as
14 we have set out in the written submissions, was that they
15 often produced the first batch or the test batch
16 separately and so that would explain the difference.

17 The caveat that I mentioned earlier was that
18 Mr Alavi in his evidence said that normally when
19 substances are provided, slightly more than 2.5 grams, for
20 example, would be given to allow for wastage in
21 compounding, and we have factored that amount in in
22 performing the calculations. We don't do it in any
23 underhanded way; we expose that in the reasons at 499 and
24 500 of our submissions.

25 The only matters on that, though, which really
26 require elaboration beyond our written submissions really
27 come from the documents which support the proposition that
28 the concentration was at 3 milligrams per ml and that the
29 volume was likely to be 3 mls.

30 If I could take the Tribunal first, and in the
31 thousands of documents the Tribunal has been given, this

1 one may be the most important. It is the invoice from
2 Como Pharmacy which is behind tab 3 of our key documents.

3 CHAIRMAN: Of the ones that you have handed up.

4 MR KNOWLES: Yes. I'm looking on the reverse page of the
5 second leaf. So it is page 197 in the top right-hand
6 corner, which are the numbers, of course, from AS-3. The
7 invoice shows on 18 January initially the dispensing of
8 eight peptide Thymosin at 8 milligrams per ml in 8 ml
9 vials and 27 Hexarelin at 5 milligrams per ml in a 5 ml
10 vial. The 27 Hexarelin, that number there, if the
11 Tribunal goes to the next column under the letters "QTY",
12 quantity, you will see that in fact it was 26 vials of
13 Hexarelin. The mathematics are that 26 times 250, which
14 is the unit price in the next column, equals \$6,500.
15 What's important is the next entry which reverses it on
16 the same day is such that - there are three entries on
17 18 January and then what's instead dispensed is the 26
18 peptide Thymosin and seven Hexarelin.

19 It is our submission that the first reversal
20 between the first entry on 18 January and the second entry
21 on 18 January in fact just reflects some kind of mistake
22 made at the time and corrected immediately, because you
23 will see that what was meant to be dispensed was not 27 or
24 26 vials of Hexarelin, but 26 vials of peptide Thymosin,
25 and that's the quantity dispensed in the body line, and
26 instead of eight peptide Thymosin it should instead have
27 been seven Hexarelin.

28 The second point to note on this invoice, and
29 I raise it by way of supporting the proposition that there
30 may have been different quantities or different
31 concentrations and volumes of the same substance, I said

1 that it's not implausible and in fact in my submission the
2 Tribunal will find or should find that there was a
3 different concentration dispensed to Essendon of Thymosin
4 Beta-4 than was in fact sent to Eagle Pharmaceuticals for
5 testing. But the first entry for Hexarelin on 10 January
6 shows 14 Hexarelin at 5 milligrams in a 5 ml vial, whereas
7 the entry for Hexarelin on 18 January, and I'm talking
8 about the bottom entry, the one that was actually
9 dispensed, shows 8 milligrams in an 8 ml vial. So there
10 are variations within Mr Alavi's compounding practices.

11 What perhaps, though, is the most important
12 aspect of the invoice or the most important information
13 that comes out of that invoice is that the amounts
14 dispensed, so the bottom entry and the bottom line, show
15 peptide Thymosin at a concentration of 3 milligrams per
16 ml, which is the amount or the concentration which the
17 calculations in our submissions rely upon, but also the
18 price.

19 The price is such, although it's not immediately
20 clear because there's no proper unit price quoted on that
21 line of the invoice, but 26 peptide Thymosin to equal the
22 price of \$6,500 would amount to \$250 per vial. That is a
23 price that's not without some provenance in the evidence
24 because when Mr Alavi was pitching his business to Mr van
25 Spanje for the sale of peptides - and this document can be
26 seen behind tab 5 and I'm looking at the second page
27 behind tab 5 of AS-3, page 209 - what he was pitching was
28 3,000 micrograms per ml, and I'm looking at the words here
29 "Thymosin 3,000 micrograms per ml," which is in the bottom
30 row of the first table, 3,000 micrograms of course being
31 equivalent to 3 milligrams, the vial size is 3 mls and

1 importantly the unit cost is \$250.

2 So the Tribunal can comfortably infer that when
3 26 vials of peptide Thymosin at 3 micrograms per ml were
4 dispensed and they were dispensed at a price of \$250 per
5 unit, they can comfortably infer, or the Tribunal can
6 comfortably infer, that's of the 3 ml quantity at the same
7 price that was quoted to Mr van Spanje, and that is only
8 one month beforehand.

9 Counsel for the two players draw attention at
10 paragraph 22 of their submission that it would seem
11 unlikely that a vial in respect of the first supply,
12 I don't think it's in dispute that it is a clear vial,
13 that a vial of 10 ml capacity would only be filled to 3
14 ml. There are a number of reasons why, in my submission,
15 that it is not unlikely or that it is not seemingly
16 unlikely that the vials would be less than full. One of
17 those reasons is that Mr Alavi, and I only need to give
18 the reference, but it is AS-7, in the third document,
19 which is Mr Alavi's interview, page 23, line 47 to page
20 24, line 1, Mr Alavi gives evidence that they weren't
21 always completely filled.

22 On its own, Mr Alavi's evidence might not count
23 for much, but there is some confirmation of that from two
24 places. The first I took you to before is the invoice
25 itself because the Hexarelin that was distributed on
26 18 January 2012, which again it is not in dispute was in
27 clear 10 millilitre vials, was only 8 millilitres
28 according to the invoice, so that wasn't completely full.
29 But perhaps more forcefully, if the Tribunal either now or
30 in its own time has regard to exhibit PG-21, which is the
31 close-up of the video, the Facebook video from August

1 2012, at least some of the bottles, particularly the
2 bottles of Mechano Growth Factor, are clear from the photo
3 not completely full.

4 So there's no practice from Mr Alavi, even on his
5 own evidence, but even on more reliable evidence, there is
6 no practice from Mr Alavi to completely fill the bottles.
7 So the 3 milligrams per ml and 3 mls per vial calculation
8 that has been submitted in our written submissions are an
9 inherently plausible way to produce 26 vials that were
10 dispensed to Essendon of Thymosin Beta-4.

11 While I mention it, it's not specifically on this
12 topic, but while I mention the Facebook video, it is also
13 telling that in that key shot the camera spans across the
14 vials and on the far right-hand side the vial is
15 specifically named "Thymosin Beta-4" and on the enhanced
16 vision from that video, I couldn't pick it up myself, but
17 once one sees the enhanced photographs we see the
18 concentration at 3,000 micrograms per ml. So again
19 further evidence, if further evidence be needed because it
20 is actually written on the invoice, but further evidence
21 that that was the concentration.

22 Mr Charter's evidence in his interviews with
23 Mr Hargreaves that anything dispensed at 3,000 micrograms
24 per ml must be Thymosin Alpha because that's the standard
25 concentration, is even by the standards of Mr Charter's
26 evidence unreliable because we have the photograph in the
27 Facebook video showing here is something labelled
28 "Thymosin Beta-4" at 3,000 micrograms per ml and we have
29 the invoice itself, and we also have the fact that there
30 is no evidence that at least before February 2012 Mr Alavi
31 ever obtained Thymosin Alpha, and he did obtain Thymosin

1 Beta-4 because that is what the GL Biochem records show.

2 I should then turn to the Bio21 information and
3 the relevance of it. Primarily it is relevant to
4 establishing what the players put as a fifth leg or a
5 fifth link in the chain that the substance was in fact
6 Thymosin Beta-4. We have already addressed that, but in
7 my submission the fifth leg is a fifth wheel. It is
8 unnecessary because the propositions earlier put that
9 Charter obtained Thymosin Beta-4 from China and Alavi
10 compounded Thymosin Beta-4 and Dank administered Thymosin
11 Beta-4, they all assume that the substance was Thymosin
12 Beta-4. The CEO accepts it's not just enough for a
13 substance to be named or thought to be Thymosin Beta-4, it
14 has to be Thymosin Beta-4, so the fifth leg doesn't really
15 add anything to the propositions which we accept are
16 essential elements of the matters we have to prove.

17 But the issue at hand was the Bio21 information.
18 It is primarily relevant to establishing that the second
19 supply was in fact Thymosin Beta-4. But inferentially it
20 is also relevant to the first shipment and that is
21 because, if the Tribunal is satisfied that the second
22 shipment based on the Bio21 results and other information
23 was Thymosin Beta-4, then it could more readily be
24 accepted that the source from which Mr Alavi was obtaining
25 this material was a reliable source and therefore that the
26 first shipment was also Thymosin Beta-4.

27 In respect of the Bio21 information there has
28 been an outbreak of peace to some extent between the
29 players and ASADA on the differences, if any, between the
30 evidence of Dr Vine and Professor Handelsman. I hope to
31 characterise it fairly as the difference is really one of

1 expression and context, largely subject to two issues
2 I will come to, and that is both experts accept that the
3 test that received the most attention in cross-examination
4 from 9 May 2012 shows results which, allowing for
5 calibration error, are consistent with the substance being
6 Thymosin Beta-4, are inconsistent with that substance
7 being Thymosin Alpha and, subject to one caveat by
8 Dr Vine, inconsistent with the substance being
9 Thymomodulin.

10 Dr Vine's caveat which is referred to in our
11 written submissions, I don't need to take the Tribunal to
12 the evidence, was that he accepted Thymomodulin was a
13 mixture of peptides. He accepted that a mixture you would
14 ordinarily see peaks on a mass spectrometer at various
15 different graphs, but he did reserve his position that it
16 is possible that it could be a mixture that coincidentally
17 was made up of substances all with roughly identical
18 molecular weights. But that's a caveat that the Tribunal
19 could put out of its mind because, given Professor
20 Handelsman's evidence of how Thymomodulin is created as a
21 crude lysate or a crude extract of a calf's thymus gland,
22 the potential that it would be entirely made up by
23 substances all with coincidentally the same molecular
24 weight would be infinitesimally small. But Dr Vine was
25 quite correct to reserve his position and he didn't
26 profess to be an expert in the thymus or in Thymomodulin.

27 So the area of agreement is that the test could
28 be consistent or is consistent, allowing for calibration
29 error, with Thymosin Beta-4. There is a further area of
30 agreement in that it is inconsistent with Thymosin Alpha.

31 The issues that are between the parties or

1 between the experts, as I said, come down to context and
2 whether one goes further and draws an inference that the
3 substance that was tested in that test was Thymosin
4 Beta-4. Professor Handelsman expressed by reference to
5 various contextual factors, including the name of the file
6 and other matters, that it was Thymosin Beta-4.
7 Ultimately that's not a question for the experts. That's
8 a jury question.

9 CHAIRMAN: That's a question for us.

10 MR KNOWLES: Because neither Dr Vine nor Professor Handelsman
11 are as fully aware of the context as you gentlemen are.
12 We have set out in our written submissions the reasons we
13 say why the context suggests that it is Thymosin Beta-4,
14 but there is something of Professor Handelsman's evidence
15 that is useful in understanding this context.

16 What is being dealt with is not laboratory
17 science of the rigours of Dr Vine and we certainly don't
18 put forward the Bio21 test as conclusive proof as one
19 would in an analytical sample case that this is clearly
20 Thymosin Beta-4. But Professor Handelsman has his feet
21 firmly planted on the ground and understands that a
22 suburban pharmacist might cut corners and might use rough
23 and ready checks. His phrase I think was "perfection is
24 the enemy of good". In circumstances where what we have
25 is all the evidence pointing in the direction of Thymosin
26 Beta-4 being obtained by this pharmacy, and someone goes
27 off to test what is not an unknown product in the dark,
28 they receive Thymosin Beta-4, they go to test it and they
29 get results consistent with it, then the Bio21 information
30 is powerful evidence in support of the proposition, albeit
31 that on its own it wouldn't withstand or meet the

1 comfortable satisfaction test.

2 There are two issues of conflict that arise from
3 the submissions of the 32 players. At paragraphs 108 and
4 109 of their written submissions the 32 players say that
5 four out of five tests done on 9 May 2012 do not show
6 Thymosin Alpha or Thymosin Beta. At best that submission
7 is misleading, because it doesn't tell the full story of
8 those five tests that were performed on that date. What
9 would be more accurate to say is that five out of five of
10 those tests don't show Thymosin Alpha, but three out of
11 those five tests only show a ruler on the bottom axis of
12 the graph that goes up to about 3,500 daltons, at best
13 4,000 daltons. The uncontested evidence is that the
14 molecular weight of Thymosin Beta-4 is 4,963.

15 I'm reminded that the graphs I'm talking about
16 can be more helpfully viewed at tab 7 of my documents.
17 They are PG-17. But the first test on PG-17, this is in
18 tab 7 of the bundle of documents, the first test shows no
19 peak in Thymosin Beta-4, which one would expect to see
20 just a little short of the 5,000 axis. That may be
21 accepted. I will come back to that test.

22 The second test on the next page is one of the
23 tests I'm talking about. The axis on the bottom only goes
24 up to 4,000 daltons and the agreed evidence of both
25 Professor Handelsman and Dr Vine was that on that test you
26 couldn't tell one way or another whether what was being
27 tested was Thymosin Beta-4. The example put to me earlier
28 was that if you had a ruler that was six foot, you could
29 tell from the mark on the ruler where I would be, my
30 height, but you couldn't tell Mr Holmes's height because
31 he is six foot six and the ruler just doesn't extend far

1 enough.

2 The third test is the test that received the most
3 attention during cross-examination and, allowing for
4 calibration error, that is a result consistent with the
5 presence of Thymosin Beta-4. The fourth and the fifth
6 tests are another one of these short ruler tests where we
7 simply can't say whether or not Thymosin Beta-4 was being
8 tested.

9 If the Tribunal would just give me a moment,
10 I want to give a transcript reference for where Dr Vine
11 and Dr Handelsman agreed. I don't need to take the
12 Tribunal there, but it is all on page 757 of the
13 transcript. Professor Handelsman at lines 10 to 15 raises
14 the issue of the bottom axis measurements being too short
15 and Dr Vine agrees at lines 29 to 31 of page 757.

16 That leaves the first test which discloses the
17 presence of neither Thymosin Alpha nor Thymosin Beta-4,
18 but the evidence of Vania is that when using the Bio21
19 machines it was a multi-staged process that involved
20 firstly using a different machine entirely and then
21 testing different fractions. So the fact that one test
22 doesn't disclose the presence of Thymosin Beta-4 doesn't
23 reduce the weight of the CEO's submission once account is
24 taken for that.

25 So, as I said, the players' submission that four
26 out of the five tests don't disclose the presence of
27 Thymosin Beta-4 at best is strictly true, but doesn't tell
28 the whole story. But really the position is that there's
29 no sign of Thymosin Alpha on any test. There is signs
30 consistent with the presence of Thymosin Beta-4 on one
31 test and three of the tests we don't know about Thymosin

1 Beta-4 because it can't be determined from the
2 measurements.

3 That then leads to a final point that came up in
4 the cross-examination of Professor Handelsman and is
5 raised again in paragraph 111 of the written submissions
6 of the 32 players. They say that Professor Handelsman
7 contradicted his earlier evidence regarding the molecular
8 weight of Thymosin Beta-10. The Tribunal might remember
9 Professor Handelsman was taken to the diagram in his first
10 report of 3 December which included diagrammatic
11 structures of the peptide chain of Thymosin Beta-10,
12 Thymosin Beta-4 and Thymosin Beta-15. Those diagrams show
13 that Thymosin Beta-10 is a 43 amino acid chain peptide,
14 but over his lunch break Professor Handelsman searched the
15 ChemSpider database and came up with a document which is
16 AS-23 which showed that Thymosin Beta-10 has a 38 amino
17 acid chain.

18 The players in their submission at paragraph 111
19 say this is a conflict, but they don't in fact refer the
20 Tribunal to where Professor Handelsman resolved this
21 conflict in his own evidence. Despite Mr Ihle's best
22 attempts to control the witness, Professor Handelsman came
23 back to his earlier questions about this and said he
24 wanted to add something, and he did add something at page
25 742, lines 9 to 22, which again in the interests of time
26 I won't take the Tribunal to, but Professor Handelsman's
27 evidence was that the ChemSpider report in AS-23 is
28 probably accurate, but that the diagram in his original
29 report showing the 43 amino acid chain for Thymosin
30 Beta-10 was probably what he said is a proform of Thymosin
31 Beta-10 where five of the amino acids at the start of the

1 chain are chopped off in the process of manufacturing the
2 product.

3 He also raised that the distinction with Thymosin
4 Beta-15 in the two reports and the ChemSpider analysis is
5 probably explained by the fact that there is a methionine
6 link in the amino acid chain which is probably oxidised.
7 Whilst that descends somewhat into the technical evidence,
8 it shows two things: Firstly, that the players' criticism
9 of Professor Handelsman's evidence is unfair, but perhaps
10 of more substance what it does show, and as Dr Vine
11 admitted in the transcript, is that the report of 9 May
12 2012 which does show a substance consistent with the
13 molecular weight of Thymosin Beta-4, is that that is
14 unlikely to be Thymosin Beta-10 because we know from
15 Professor Handelsman's correction that the 43 amino acid
16 chain, which might have a roughly similar weight to
17 Thymosin Beta-4, is in fact a proform and that it's
18 chopped off in the manufacturing process, but also one has
19 to look again at the context of this evidence.

20 It's suggested that it could be Thymosin Beta-10
21 because of an arguable similar molecular weight. The
22 reference to Thymosin Beta-10 in the experts' evidence
23 stands alone. There is no reference to Thymosin Beta-10
24 in any of the lay evidence. There is no evidence that
25 Mr Charter obtained it or that he was interested in
26 obtaining it. There is no evidence that Mr Alavi
27 compounded it or even thought he was compounding it.
28 There is no evidence that it was ever even available to
29 the public.

30 We know from the Ali Baba website that
31 Thymomodulin is sold by the tonne, or at least a substance

1 describing itself as Thymomodulin is being sold by the
2 tonne. If the players' contention that this could have
3 been Thymosin Beta-10 had any real substance, one would
4 expect the players to have put on some evidence akin to
5 what they put on from the Ali Baba website to suggest that
6 it's a real possibility in the real world, outside the
7 world of mass spectrometry, that it is a real possibility
8 that Thymosin Beta-10 could have been obtained.

9 The final reason on the question of could it have
10 been Thymosin Beta-10 is that you will recall that both
11 Dr Vine and Professor Handelsman in their evidence
12 referred to the ChemSpider website and they took a margin
13 for error around the result of the test of 9 May, and they
14 obtained results from that search of what substances it
15 could be. Professor Handelsman showed that Thymosin
16 Beta-4 was the only substance that came up. Dr Vine made
17 the point that the ChemSpider website is not encyclopedic,
18 especially on the question of proteins, and Professor
19 Handelsman deferred to Dr Vine's more frequent use of the
20 ChemSpider website.

21 But what is interesting is that, firstly, even
22 allowing for the limitations of the ChemSpider website,
23 Thymosin Beta-10 didn't come up in that search. Thymosin
24 Beta-4 was the only type of Thymosin that came up.
25 Secondly, even accepting Dr Vine's statement that
26 ChemSpider is not encyclopedic or comprehensive for those
27 particular types of protein, it is accurate enough that
28 Dr Vine thought it was sufficient to refer to in his
29 report.

30 The whole reason ChemSpider came to be used and
31 came to be referred to in this evidence was that Dr Vine's

1 own report referred to it. So, whilst we accept and
2 certainly do not challenge Dr Vine's evidence that it may
3 not be encyclopedic, this Tribunal shouldn't infer from
4 that the reverse, that is that it is inaccurate, because
5 Dr Vine, an expert whose credentials are not challenged,
6 felt it sufficiently reliable to refer to it in a report
7 to this Tribunal.

8 I'm also reminded not only was it the only
9 Thymosin within that range that Professor Handelsman found
10 over lunch from the ChemSpider website; it's the only
11 organic substance, the only substance with a CAN number,
12 which is a classification number given to chemicals, which
13 suggests that the other substances, as Professor
14 Handelsman said, are not naturally occurring. They are
15 synthetic and products that are really only created in the
16 research laboratory context. They are certainly not
17 substances which would be available to people like
18 Mr Charter and they are not substances which GL Biochem
19 are advertising for sale, unlike Thymosin Beta-4.

20 That completes everything I wanted to say on the
21 Bio21 information. The next matter which I might deal
22 with is a short point. Paragraph 20 of the submissions of
23 the two players raises a question which may have been
24 rhetorical, but I will attempt to answer it, which is how
25 do we know that Dank even used the substances that were
26 part of the first supply, the January supply, because they
27 were fried and Dank may not have used the fried peptides?

28 There are a number of things that could be said
29 about that, but what the evidence does show is that the
30 first supply was in clear vials, the second supply was in
31 amber vials. We then concentrate only on the clear vials

1 because it is only where clear vials are used that the
2 suggestion that the peptides could have been fried comes
3 from. But what we have is Suki Hobson, an official at
4 Essendon, saying that she was injected with Hexarelin from
5 a clear vial. So, Dank didn't have any inhibitions about
6 using substances from clear vials, peptides from clear
7 vials, on Suki Hobson. Why, it might be thought, would he
8 have any inhibition using another type of peptide from a
9 clear vial on the players?

10 We also, perhaps more powerfully, have a
11 significant number of the players, and this is detailed in
12 the schedule that's annexed to our submissions, but a not
13 insignificant number of players report having injections
14 from clear vials. So, the suggestion that Mr Dank
15 decided, "Oh, dear, these are fried, I better not use
16 them," is inconsistent with that. But we also know that
17 Mr Dank wasn't in any position to actually determine
18 whether they were fried or not. He asserted that they
19 were to Mr Alavi, perhaps for his own reasons, but we know
20 that he collected the material from Mr Alavi when they
21 were dispensed, on the basis that he said he would get
22 them tested at Mimotopes and that testing never occurred.
23 He then went back to Mr Alavi and said they were fried.
24 The unstated assumption that Mr Alavi must have had was,
25 "Well, that must have been disclosed in the Mimotopes
26 testing that they were fried." But we know that just
27 couldn't have been the case.

28 So why would the Tribunal, in my respectful
29 submission, come to the position that Dank wouldn't have
30 used potentially fried peptides, when we know he did
31 inject players from clear bottles, we know he did inject a

1 different peptide from a clear bottle to Suki Hobson, and
2 we know he had no basis on which to assert that they were
3 in fact fried.

4 The next matter - - -

5 MR CLELLAND: Mr Chairman, can I just say something just in
6 deference to Mr Knowles. I made a comment at the Bar
7 table which wasn't directed to him. It wasn't that the
8 submission we made was misstated. It was that the
9 interpretation of our submission misstated the burden of
10 proof; that is, the burden on ASADA to prove that Mr Dank
11 had used the material rather than a burden on the players
12 to prove that he had not. That was the point of my
13 comment at the Bar table.

14 MR KNOWLES: I don't take any issue with that.

15 CHAIRMAN: I don't think Mr Knowles takes any issue with that.

16 MR KNOWLES: I wish it were otherwise.

17 CHAIRMAN: You are putting forward the fried aspect, that there
18 is some evidence there that that's what happened. We have
19 to assess that evidence in terms of what we make of it,
20 but it is said, "Well, does that raise some doubts about
21 what went to Essendon in terms of any product that had
22 been compounded?"

23 MR CLELLAND: I think it drives you back to the - - -

24 CHAIRMAN: It is raised in that context.

25 MR CLELLAND: Quite, but it is only really an observation on
26 the way through. It doesn't derogate from the need for
27 ASADA to prove first and foremost on admissible and
28 reliable evidence that Dank administered that substance
29 which is said to have been obtained from Alavi which was
30 said to have been Thymosin Beta-4.

31 CHAIRMAN: Yes.

1 MR KNOWLES: At least on that point there is probably some
2 furious agreement from this end of the Bar table.

3 The next responsive point is a related point, but
4 it comes out of paragraph 147 of the 32 players'
5 submissions. It is the possibility that the Thymosin
6 Beta-4 may have degraded because of the manner that it was
7 transported and stored. This is not just arising from the
8 clear vials of the first delivery, but also the fact that
9 it wasn't kept refrigerated at all times.

10 We have fairly comprehensively anticipated that
11 submission. It is paragraph 695 to paragraph 705 of our
12 written submissions and I don't need to repeat that. But
13 there are two matters which do arise from the players'
14 submissions. The first is they rely without stating the
15 effect of Mr Sedrak's evidence of the possibility that if
16 the recommendation to refrigerate the substance is not
17 complied with, the substances might break down.

18 Mr Sedrak's evidence was that it will break down
19 after three to four months and then it will be water or
20 just loose peptides. Three to four months is more than
21 the timeframe than we are talking here. If the peptides
22 or the Thymosin Beta-4 was dispensed in January and then
23 again in February, we know that for at least a large part
24 of the time it was refrigerated in Mr Dank's office,
25 because that's the players' evidence and that's the
26 evidence also of Mr Robinson. To the extent that it was
27 ever outside, then even if there was some degradation, it
28 would have three to four months of some limited utility,
29 or some utility.

30 So when we also compare that with Professor
31 Handelsman's evidence of the way in which this substance

1 would degrade, if it did become degraded, that it's likely
2 that some molecules may be affected, but it would be
3 unlikely that all of the molecules of Thymosin Beta-4
4 would degrade.

5 The next matter is a short point that may just be
6 a matter of how one reads the submissions, I suspect. But
7 for certainty and clarification, at paragraph 100 of the
8 submissions of Mr Grace and Mr Ihle the players challenge
9 the contention that the orders that Mr Dank made which
10 were not orders for his private company, MRC, were placed
11 directly with Mr Charter. This submission may actually
12 reflect some uncertainty as to what ASADA's case on this
13 was. The submission made by ASADA was in respect of the
14 peptides dispensed in January 2012, which is the first
15 supply, and it was in that supply where it's said that the
16 order was placed directly with Charter.

17 It's never been part of the case put by ASADA
18 that the second shipment, that order was placed directly
19 with Charter. In fact, there's a text message between
20 Mr Alavi and Mr Charter where Mr Alavi says that he will
21 deal directly with Cedric to get further supplies. So,
22 for abundant clarification, the case of ASADA is that the
23 second shipment did not come or was not ordered by Mr Dank
24 directly through Mr Charter, accepting of course that
25 Mr Anthony was an associate of Charter, but there's
26 certainly a degree of ambiguity which should be resolved
27 and I hope that does resolve it.

28 The next matter is a curious suggestion at
29 paragraph 169 of the players' submission that the
30 substance that might have been injected was Hexarelin.
31 I say it's curious because it's a brave defence to say,

1 "I didn't take one banned substance. I took another
2 banned substance." I know that's a caricature of the
3 players' submission, because their submission is in fact
4 we haven't proved that it was Thymosin Beta-4 because of
5 the possibility, not the certainty or not to the state of
6 comfortable satisfaction, that it was Hexarelin. But it
7 does still show the tension in what the players are
8 submitting when they say that what they received was
9 Hexarelin.

10 But, beyond that forensic tension, the evidence
11 is strongly against the proposition that it was Hexarelin
12 instead of Thymosin Beta-4. I choose those words somewhat
13 carefully because the Tribunal will be aware in Mr Dank's
14 case it is alleged that he did administer Hexarelin to the
15 players. We don't identify any specific player and no
16 player is charged with that. But it's clearly not, in my
17 submission, Hexarelin instead of Thymosin Beta-4.

18 CHAIRMAN: You are putting it on the basis that in addition to.

19 MR KNOWLES: Yes. There is a series of reasons why. We know
20 the players consented to injections of Thymosin. They
21 didn't consent to receive Hexarelin. We know that they
22 were told at the auditorium meeting that Thymosin was
23 going to be one of the substances. No player says that
24 Hexarelin was mentioned at the meeting. In fact no player
25 gives any evidence that they were told that they were
26 being injected with Hexarelin, ever, or that they ever saw
27 Mr Dank in possession of Hexarelin. Suki Hobson's
28 evidence is different of course.

29 CHAIRMAN: She says that she was injected with it.

30 MR KNOWLES: Yes. Of course, and perhaps predictably, the
31 players haven't gone into evidence themselves now to say

1 that what they received might have been Hexarelin. We
2 have text messages from two players, Mr [REDACTED] and
3 Mr [REDACTED] between those two players and Dank, which
4 specifically refer to receiving Thymosin injections, and
5 they also mention Thymosin injections being received by a
6 player identified only as [REDACTED] So to suggest, "It
7 wasn't Thymosin; it might have been Hexarelin," flies in
8 the face of all those facts and isn't a submission which,
9 in my respectful submission, the Tribunal should be
10 attracted to.

11 There are two other matters which I wish to
12 address. The first is the contention at paragraph 174 of
13 the players' written submissions; again perhaps a
14 rhetorical contention but one that is worthy of a
15 response. Why would Alavi continue to provide Dank with
16 substances if he hadn't been paid? This can only relate
17 to the second shipment because the necessary premise upon
18 which this submission is put is that he wasn't paid for
19 the first shipment.

20 But in respect of the second shipment there are
21 any number of reasons why someone like Mr Alavi would
22 continue to supply. The first is old-fashioned greed. We
23 knew from the start that Alavi and Charter were interested
24 in Dank, interested in Essendon and interested in MRC as a
25 potential for further work. So the fact that they weren't
26 paid for some early supplies doesn't mean that they didn't
27 see the rivers of gold into the future that would have
28 meant they would be interested in eventually obtaining
29 payment for these supplies.

30 CHAIRMAN: You then had the Qatar situation in terms of
31 potential there which clearly Alavi was interested in

1 tapping into.

2 MR KNOWLES: Yes. This kind of potential is disclosed very
3 early on. In tab 5 of the bundle that has been handed up
4 this is an email where it is said - - -

5 CHAIRMAN: Tab?

6 MR KNOWLES: Tab 5. The second sentence of the second
7 paragraph it is said, "Take a look and let me know what
8 you think. Based on the 40 per cent GP model, it will be
9 very much worth our while." These are people who are
10 mercantilely minded and they are interested in the
11 potential.

12 But also, quite apart from that, in our written
13 submissions at paragraph 615 we have set out some
14 references to further information which suggests that it
15 can be inferred from the contemporaneous text messages
16 that Alavi did provide Dank certain material free of
17 charge because they were used for trials, and Dank was
18 obtaining them on the pretext that they were being used
19 for a research project. Our written submissions deal with
20 that more fully and I don't think I need to go further.

21 The last matter which I wanted to deal with
22 arises from the players' reliance on the decision of Mark
23 French v ASADA. In the list of authorities that we have
24 handed to the Tribunal, at tab 9 we provide a copy of a
25 case, and put short I should say the players may go into
26 more detail about this - - -

27 CHAIRMAN: Is this Burns?

28 MR KNOWLES: This is the Burns decision. [REDACTED]

29 [REDACTED]

30 [REDACTED]

31 [REDACTED]

[REDACTED]

The relevant paragraph and the proposition which I wish to take from this is really at paragraph 19 of the decision. From it one draws the importance, depending on the facts of each case, of admissions. Here in this case we have an admission by Dank that Thymosin Beta-4 was used, and we have the surrounding circumstances which suggest that Thymosin Beta-4 was obtained. The point I seek to make is that one doesn't need to go further and require ASADA to produce conclusive scientific proof that it was in fact Thymosin Beta-4.

In Burns what was put in issue was whether a player who was charged with or alleged to have used a prohibited substance, what was put in issue was whether that substance was in fact what it purported to be. At paragraph 19 the Tribunal say, "In our judgment, there is no further requirement of analytical evidence confirming that substances are indeed what the respondent says they are."

It then cites the decision in USADA v Leogrande,

[REDACTED]

whereas in Burns and in this case we are not talking about mixtures, we are talking about the prohibited substance itself. So we

1 don't need further scientific evidence to show it is what
2 it purports to be, because we have all of the other
3 surrounding circumstances which show the Tribunal can be
4 comfortably satisfied that the product was obtained from a
5 source, that the source was reliable and - - -

6 CHAIRMAN: That's a fundamental point, isn't it? This is one
7 that Mr Clelland raises clearly, in essence saying, "Look,
8 when you try and sift through all this large amount of
9 evidence there is a fundamental thing; namely, that there
10 is no substance that's ever been definitively tested which
11 can be linked to the players, no analytical evidence which
12 one might normally get in one of these cases. In the
13 absence of that, that's very much a matter that should be
14 taken into account in terms of comfortable satisfaction."

15 We know you can have drug cases, for example,
16 which can be proved by circumstantial evidence, even
17 though the actual substance, like heroin or whatever, is
18 not available. Another example of that is situations
19 where there has to be determined whether it's a commercial
20 quantity or not, and you are not able to produce a
21 commercial quantity of heroin and weigh it and do
22 everything else, but it's sought to prove the case on the
23 basis of the circumstantial evidence proving beyond
24 reasonable doubt that the amount of heroin involved in the
25 trafficking was at least the commercial quantity.

26 In essence that's the situation here. That's the
27 way you are approaching the case, and the players are
28 approaching it on the basis, "Well, that's all very
29 interesting. But without the benefit of the definitive
30 analytical evidence then that's an important matter in
31 terms of comfortable satisfaction that the substance that

1 was purchased and compounded and used was the prohibited
2 substance," assuming we are satisfied that Thymosin Beta-4
3 is a prohibited substance. I think that's essentially
4 what Mr Clelland is saying in his submission.

5 MR CLELLAND: Yes, Your Honour.

6 MR KNOWLES: That is a characteristically fair analysis of the
7 position of the parties. This is an unusual case in an
8 anti-doping context.

9 CHAIRMAN: You can say that again, Mr Knowles.

10 MR KNOWLES: Generally yes, but specifically - - -

11 CHAIRMAN: We would be very pleased not to have another one.

12 MR KNOWLES: So will I. Ordinarily one sees a charge of use
13 and attempted use. So you don't need to get into the
14 provenance because, "Either it was anabolic steroids or
15 you thought it was anabolic steroids."

16 CHAIRMAN: "You intended to use anabolic steroids," bearing in
17 mind the very wide definition of "attempt" in the Code
18 compared to the usual criminal law definition of
19 "attempt".

20 MR KNOWLES: But in this case we obviously don't have that.

21 But Burns is instructive because what was found was not
22 attempt but ultimately use. The Tribunal in that case
23 didn't say, "I can't be comfortably satisfied until you
24 tell me where in China these drugs came from." The
25 provenance just didn't come into it. Once there was an
26 admission that was held to be reliable, the Tribunal
27 simply accepted it without further evidence.

28 Each case depends on its own facts. But what
29 ASADA has done in this case is to go above and beyond and
30 try and establish the provenance of the drugs. One can
31 tell from the degree of protest at the very start of today

1 that Mr Grace put on his objection to the document at page
2 30 and 31 that that's a crucial document. If it wasn't,
3 Mr Grace wouldn't have objected so strongly. What it
4 shows is that GL Biochem is a reliable source and the
5 provenance from there through Mr Alavi is shown by the
6 contemporaneous records.

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED] But our case
11 doesn't depend on that, because one thing the Tribunal can
12 have more comfort in is contemporaneous accounts and
13 accounts that are corroborated by other evidence, accounts
14 which have been given consistently, accounts which are
15 otherwise plausible. That doesn't require any great
16 citation of principle. It's just common sense fact
17 finding which we urge upon the Tribunal.

18 CHAIRMAN: Yes. That's one side of the coin. [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 MR KNOWLES: I might hand back to my learned leader.

22 CHAIRMAN: We might have reached a magic moment. [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 There is
26 clearly a different view put by the parties in relation to
27 what evidence supports the evidence of these people.
28 ASADA says that documents, for example, even though they
29 are produced by them, can support their evidence when you
30 look at the circumstances of the documents.

31 On the other side, the players say, "You should
be reluctant to accept that material produced by them

1 supports their evidence. It's coming from the same source
2 in the sense that they have produced it. They haven't
3 produced a lot of other documentation. That raises issues
4 about what confidence you can have in that evidence
5 supporting what they are saying." They are the positions,
6 and we have to resolve them.

7 Mr Holmes, I notice it's 4 o'clock. We would
8 think in the circumstances that we are probably not going
9 to complete the submissions tomorrow. What is your
10 position in terms of further time?

11 MR HOLMES: Can I say we had hoped and we still believe we can
12 finish today. Literally, we have finished now. The
13 additional matters that we have had time to prepare
14 speaking notes for, I have our speaking notes and I think
15 it would be more efficient if I just tendered those
16 speaking notes now.

17 CHAIRMAN: Yes. Did you propose to put in any oral submissions
18 in relation to Dank's situation? It is a pretty
19 comprehensive submission that you have put in relation to
20 Mr Dank. He doesn't know it of course, but he draws some
21 support from Mr Clelland's submission of course in the
22 sense that there is no definitive analysis of any of the
23 substances that it's alleged that Mr Dank has given to a
24 range of people. But, anyway, we understand the basis of
25 your argument that that's not necessary. There's plenty
26 of other evidence that that's what took place. But unless
27 there are things you specifically want to, we don't need
28 you to take us through those submissions relating to Dank.

29 MR HOLMES: We were going to propose that we are here to assist
30 you and, if you have any specific matter in relation to
31 Mr Dank and aligning the two matters so that you can deal

1 with them both at the same time, they need to be resolved
2 in a consistent way - - -

3 CHAIRMAN: Yes. That's true.

4 MR HOLMES: We would respond to any request for assistance
5 expeditiously and provide you with answers and copies to
6 our friends if that need arises. We have tried to put it
7 in the most comprehensive way, and that's why we perhaps
8 took a little time because we needed to focus on the 32
9 and two players first. So, yes, we are here to assist.
10 We don't propose to occupy hearing time.

11 Can I just hand up - there are five speaking
12 notes matters to finish our submissions.

13 CHAIRMAN: All right. You have copies you can give to your
14 colleagues?

15 MR HOLMES: Yes. Ignore the numbers, but the [redacted] and
16 the Thymomodulin photo, we put that there. The
17 reliability of documents about the second supply; an
18 allegation we ignore documents; an allegation we
19 selectively disclosed documents; a discrete one in
20 relation to CJC1295; and then the conflation of two issues
21 in relation to Thymosin and the AOD study.

22 CHAIRMAN: I think we better formally mark these speaking notes
23 which are part of the oral submissions of the CEO, which
24 will be AS-36.

25 #EXHIBIT AS-36 - Speaking notes of the oral submissions of the
26 CEO of ASADA.

27 MR HOLMES: Subject to any questions, that completes the oral
28 submissions for the CEO.

29 CHAIRMAN: Okay. Thanks, Mr Holmes, thanks, Mr Knowles, for
30 your assistance. Mr Grace and Mr Clelland in particular,
31 we would certainly like to conclude the submissions

1 tomorrow, if that's fair to you. We don't want to inhibit
2 you, because there are important matters you have to cover
3 and if necessary I think we would be happy to sit on a
4 little bit longer if it meant that we could conclude the
5 submissions tomorrow. Mr Gleeson may also want to add
6 some things, but we have been assisted by the written
7 submission he has already provided. What is your feeling?

8 MR GRACE: I understand from Mr Gleeson he will be very short
9 and he was going to go prior to us.

10 CHAIRMAN: That's probably a good idea.

11 MR GRACE: I would envisage that we will finish tomorrow,
12 including Mr Clelland.

13 CHAIRMAN: We are prepared to sit on a bit if it is necessary
14 so that we can complete. The other thing I'm thinking of,
15 we need to just tidy up the record. But we did under
16 Mr Holmes's paragraph 44 say we would do a final check as
17 to what material in effect needs to come out of the
18 material that's already been tendered because it hasn't
19 been relied upon with respect to the submissions. So it
20 hasn't been added to what we have already got.

21 What we were going to suggest, rather than us
22 trying to do that as an exercise as part of the hearing,
23 if we ask the counsel assisting us if they could liaise
24 perhaps with the solicitors for the parties with a view to
25 trying to see if that can be agreed as to what documents
26 need to come out and then those documents will be
27 returned, and perhaps a list could be made of the
28 documents that are returned. Does that meet with favour
29 from the parties?

30 MR HOLMES: I think that's appropriate so far as we are
31 concerned. We feel for the person who is going to do it.

1 CHAIRMAN: It just seems a practical way to try to have that
2 sorted out. Thank you for your assistance today and we
3 will resume at 10 o'clock in the morning.

4 ADJOURNED UNTIL TUESDAY, 17 FEBRUARY 2015