

AFL ANTI-DOPING TRIBUNAL
WEDNESDAY, 14 JANUARY 2015
DAY SIX
(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 D. HALLOWES appeared on behalf of Mr [REDACTED] and

[REDACTED]

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1 CHAIRMAN: Good morning. Mr Holmes, are we ready to proceed?

2 Hopefully we have the machine operating.

3 MR HOLMES: We have a witness who has come down from Canberra,
4 Dr Fricker.

5 MR HALLOWES: Mr Chairman, just before that's done, can I just
6 raise one short preliminary matter.

7 CHAIRMAN: Yes.

8 MR HALLOWES: You will recall that yesterday afternoon there
9 was various material provided, including a video played
10 from a Facebook page of, as I understand it, Como
11 Compounding Pharmacy. We were also supplied with an
12 affidavit by David John Mullaly with 41 annexures,
13 including downloads from various Google searches and Como
14 Compounding Pharmacy website. As I understood it, it was
15 suggested to some degree this was in response to an
16 objection taken to GL Biochem material. In my submission,
17 it's difficult to see how that can be the case. It's in
18 relation to Como Compounding Pharmacy and other entities.
19 It was provided at the end. ASADA have had obviously a
20 significant period of time. If they say this material is
21 relevant there is no reason, if it is relevant to whether
22 or not Thymosin Beta 4 was administered to our clients, it
23 was material that could have been investigated and
24 ascertained a significant period of time beforehand.
25 That's a complaint. We have got the material. We will
26 deal with it.

27 Following that, we then wrote to the lawyers for
28 ASADA asking whether or not there was any further material
29 coming, whether there were any outstanding disclosure
30 notices. We received a response indicating that there was
31 still an evidentiary enquiry extant, also that Operation

1 Cobia remains outstanding, although as I understand the
2 scope of that operation it is more extensive than simply
3 the players. But, nonetheless, as I understand it from
4 ASADA there is at least one evidentiary enquiry still
5 taking place in relation to the case against the players.

6 Now, we are nearly at the end of the ASADA
7 opening address. We will then at some stage shortly
8 thereafter be responding. In my submission we should know
9 all of the evidence that's proposed or that might be
10 called against the players, and to have a position where
11 there might be something that crops up next week, the week
12 after is simply unsatisfactory.

13 CHAIRMAN: Mr Hallowes, you can only meet the evidence that's
14 presented against you, and that's what we are doing, isn't
15 it? If they seek to present additional evidence, the
16 later it's sought to be presented the more difficult it's
17 going to be.

18 MR HALLOWES: That's why I wish to place this on record. As
19 I say, it seemed to me that most of the material we were
20 provided, if not all the material, at the end of yesterday
21 was not in essence rebutting some objection that had been
22 taken in relation to GL Biochem; it was simply material
23 that could always have been obtained by the ASADA
24 investigations. I just wanted to place that on record.

25 CHAIRMAN: Okay. The record will reflect those comments.

26 MR IHLE: Can I indicate, Mr Chairman, we wrote a similar
27 letter yesterday afternoon quite surprised there was
28 material being provided really at the same time it was
29 being handed to the Tribunal. We also referred back to
30 the recent material we received in relation to Bio21 and
31 Professor Handelsman.

1 One of the real difficulties that's arising in
2 this case is, as the Tribunal would be painfully aware,
3 there is such a volume of material that just keeping
4 abreast of that material and preparing for what is
5 occurring - and these things happen; there are
6 applications in the running and they have to be dealt with
7 - but this new material is not one or two pages or a
8 three-page statement or anything of that sort and it
9 actually requires further investigation in and of itself.
10 For example, the Bio21 material took a long time to try to
11 correlate what document referred to what and
12 cross-reference it.

13 So not only is it coming late but it's actually
14 detracting from the types of preparations to allow us to
15 present the case as best we can before the Tribunal on a
16 day-to-day basis. So what we have sought is some
17 indication about what specific enquiries are outstanding.
18 The CEO has a power to issue these disclosure notices.

19 Should this be a criminal trial or a civil trial,
20 and I know that it's neither of those things, but the
21 rules of court would say that those types of compulsory
22 procedures could only be done with the leave of the court
23 and on the notice of the parties. So the compulsory
24 disclosure notices which you heard were issued whilst we
25 were sitting late last year are occurring effectively
26 behind closed doors and we don't know what's there.

27 Add to that what seems to have been taken as an
28 approach in this case where, "Unless you specifically ask
29 for it, we are not going to give it to you unless we want
30 to rely on it," so we have to continually back up with
31 these specific requests for documents. For example, we

1 wrote seeking the materials that had gone between ASADA
2 and Professor Handelsman. We got them as at a specific
3 date. There continued to be communications with Professor
4 Handelsman which we only got when we asked for them. So
5 there's no ongoing disclosure in relation to the previous
6 requests. We just have to keep making these rolling
7 requests, otherwise we don't get what's there.

8 CHAIRMAN: I previously referred to the fact that ASADA is a
9 model litigant.

10 MR IHLE: That has been referred to quite extensively, and
11 that's a question of content and degree as well.

12 CHAIRMAN: Mr Ihle, as I said to Mr Hallows, I understand what
13 you are saying. The last thing we want to be doing with
14 this case is jumping at shadows. We have enough to
15 contend with with what we have got without jumping at
16 matters that may not turn out to be an issue.

17 MR IHLE: I wholeheartedly agree, Mr Chairman.

18 CHAIRMAN: The other thing is that there is no way known that
19 the players will not be given the opportunity to fully put
20 their case before the Tribunal. If things have to be
21 delayed or whatever or whatever, that will occur.

22 MR IHLE: We understand that. The invidious position that the
23 players are in, as the Tribunal would appreciate - and we
24 know this from the AFL submissions, we are keen to have
25 these matters finalised.

26 CHAIRMAN: So are we.

27 MR HOLMES: We are very keen to have these matters finalised.
28 We perceive the approach taken by my learned friends as to
29 be one to undermine our evidence rather than to respond as
30 a model litigant, then not model litigants and they don't
31 behave like one.

1 CHAIRMAN: Well, they are in a different position because their
2 clients have got allegations made against them with
3 serious consequences and they have to meet those as best
4 they can. There are professional, ethical
5 responsibilities upon them.

6 MR IHLE: As far as the parties that are in court are concerned
7 the only parties who have had any affect on their legal
8 rights at the moment are the players. They are all
9 suspended.

10 CHAIRMAN: I understand that. Mr Ihle, this is all on the
11 record. Let's see how we go.

12 MR IHLE: If the Tribunal pleases.

13 MR HOLMES: Could I call Dr Fricker?

14 CHAIRMAN: Yes.

15 <DR PETER ALLEN FRICKER, called:

16 CHAIRMAN: Mr Holmes, as I indicated yesterday, we decided that
17 we won't administer an oath to the witnesses. So we will
18 follow that course with Dr Fricker.

19 MR HOLMES: All right. Is your full name Dr Peter Allen
20 Fricker?

21 A. It is.

22 Q. Is your occupation sports physician?

23 A. Correct.

24 Q. I show you page 94 of exhibit AS-4, and a document marked
25 PAF-1. Dr Fricker, before I ask any further questions,
26 you have heard the Chairman refer to the fact that you are
27 not taking an oath. But you realise that these
28 proceedings relate to allegations which may have serious
29 consequences?

30 A. Yes.

31 Q. Do you undertake to tell the truth?

1 A. I do.

2 Q. Is that a statement made by you?

3 A. It is.

4 Q. In paragraph 4 you refer to your curriculum vitae, which is

5 a document marked PAF-1?

6 A. Yes.

7 Q. Can I hand up PAF-1.

8 A. I have that.

9 Q. Yes, but I'm not sure the Tribunal does.

10 CHAIRMAN: We now do. It is not in that folder at the moment,

11 is it, Mr Holmes?

12 MR HOLMES: No, but if that can just be attached as 98A.

13 CHAIRMAN: We will incorporate it into AS-4 in conjunction with

14 the statement which starts at 94.

15 MR HOLMES: All right. Could I take the Tribunal then to

16 page 96, paragraph 15. There is a reference to PAF-2.

17 Page 96, paragraph 15, PAF-2, and the cross-reference

18 there, that's in exhibit AS-5, volume 3, at tab 33.

19 CHAIRMAN: Interview with Dr Fricker of 29 November 2013.

20 MR HOLMES: Yes. I have no further questions.

21 CHAIRMAN: Thank you, Mr Holmes. Mr Gleeson, do you have any

22 questions of this witness?

23 MR GLEESON: No, sir.

24 CHAIRMAN: Mr Grace?

25 <CROSS-EXAMINED BY MR GRACE:

26 MR GRACE: Dr Fricker, prior to the first meeting you had with

27 Mr Dank, you had no previous knowledge of him, I take it?

28 A. Correct.

29 Q. You hadn't even heard the name, I take it?

30 A. No.

31 Q. And it was only because of your association with Mr Kirk

1 Marks, who was working in Doha at the time and Director of
2 Australian International Sports Services, that you agreed
3 to see Mr Dank?

4 A. That's correct.

5 Q. You had received no telephone communication from Mr Dank
6 prior to that meeting?

7 A. None.

8 Q. You had received no documentation?

9 A. None.

10 Q. You had no real knowledge prior to the meeting of any
11 substances or products that he wanted to talk about with
12 you?

13 A. That's right. That's correct.

14 Q. All you knew was some vague reference that Mr Marks told
15 you that he wanted to talk about a product?

16 A. Along those lines, that is right.

17 Q. Along those lines?

18 A. Yes.

19 Q. When you had the first meeting with Mr Dank, did you take
20 any notes of the meeting?

21 A. No, I didn't.

22 Q. How long was the meeting for?

23 A. From memory, it was only about half an hour, 40 minutes,
24 thereabouts.

25 Q. And he was with a Mr Andrew Moufarrige, spelt
26 M-O-U-F-A-R-R-I-G-E?

27 A. Correct.

28 Q. Had you met him before?

29 A. No.

30 Q. Had you heard of his name before?

31 A. No.

1 Q. Had Mr Marks told you that he was coming to the meeting?
2 A. No.
3 Q. At this first meeting you had some discussion with Mr Dank
4 about peptides?
5 A. Mm-hm.
6 Q. And in your statement you have a specific recollection of
7 him mentioning AOD-9604, Hexarelin and GHRP6?
8 A. Yes.
9 Q. I take it you'd never heard of those substances prior to
10 that meeting?
11 A. No, I hadn't.
12 Q. You have probably heard a lot about them since?
13 A. I have, actually, yes.
14 Q. But certainly what he was talking about with you was,
15 notwithstanding your vast experience, somewhat foreign to
16 you?
17 A. Indeed.
18 Q. He explained to you that he was effectively experimenting
19 with these peptides?
20 A. That's right.
21 Q. Isn't really that the effect of what he was saying?
22 A. I think that's correct, yes.
23 Q. And he was telling you, maybe not in direct terms but
24 certainly I suggest this was the impression you got, that
25 he was conducting effectively clinical trials on the
26 footballers he was treating?
27 A. I think so, yes. I think he believed what he was using
28 were effective, but in the same sense he was then seeing
29 how they worked and by that sense experimenting with them.
30 Q. He was talking about such things as injury recovery; is
31 that right?

1 A. He was, that's right.

2 Q. He was talking about immune effects?

3 A. I believe so, yes.

4 Q. I think you may not have said this in your statement, but

5 certainly in your interview did it appear to you that he

6 was all over the place, really, in his description of what

7 the possible effects might be?

8 A. Very broad would be --

9 Q. Very broad?

10 A. Yes, very broad.

11 Q. All right. He was convinced, as explained to you by him at

12 that first meeting, that he was not involved in any

13 untoward doping of players?

14 A. That's correct.

15 Q. His belief as expressed to you was that everything that he

16 was using was not banned?

17 A. That's correct, yes.

18 Q. When he mentioned to you - and I appreciate you can't be

19 specific about what substances he was talking about

20 specifically when he was referring to this topic I'm about

21 to get to. He told you that a number of the substances,

22 if not all, were approved for use by the FDA?

23 A. Not quite. The impression he gave me was that there was

24 some approval under some regulation or provision in the

25 United States that allowed for these peptides, and I'm

26 assuming all of them, to be used on humans. I think in my

27 discussion with him I tried to establish whether they had

28 been approved for human use by the Therapeutic Goods

29 Administration here in this country or by the FDA, which

30 I saw as the authority in the United States. My

31 recollection was that, no, they hadn't been approved by

1 those two agencies but there was some, you know, other
2 clause or some provision which allowed for some use on
3 humans in the United States, and I'm assuming that that
4 was for experimental purposes under prescribed conditions.
5 So that seemed to be the avenue he was using. That seemed
6 to be the argument for him saying these have been approved
7 for use in humans because of some reference to some
8 provision in the United States that said you can use these
9 products on humans.

10 CHAIRMAN: But not the FDA?

11 A. To my knowledge, not the FDA, correct.

12 MR GRACE: You didn't press him on that subject, I take it?

13 A. Not specifically on that subject, no.

14 Q. And FDA, just to make sure we are on the same page, is a
15 reference to the United States Food and Drug
16 Administration?

17 A. Correct.

18 Q. And TGA is a reference to the Australian Therapeutic Goods
19 Administration?

20 A. That's correct.

21 Q. And both of those organisations are government regulatory
22 organisations?

23 A. They are.

24 Q. You say that he did tell you that, "I'm not sure how US
25 approval would apply in Australia, and it really means
26 that these have been approved for, if you like, use in
27 human trials"?

28 A. Mm-hm.

29 Q. Is that right?

30 A. That's right.

31 Q. You received no written material, printed research studies

1 in relation to any of these substances, I take it?

2 A. No. He did provide me with some printed material later on,
3 but no research or literature to back up any of the
4 conversation I was having with him at that first meeting.

5 It was purely talking, and there was nothing that he could
6 give me by way of documentation or research.

7 Q. He wanted you to assist him in his plans to establish
8 clinical trials in Qatar?

9 A. Correct.

10 Q. He wanted you to use your good offices to influence the
11 appropriate persons or authorities to allow him to conduct
12 those trials?

13 A. Yes.

14 Q. In conjunction with Qatari authorities?

15 A. Yes, correct.

16 Q. You weren't amenable to that request, I take it?

17 A. No, not at all.

18 Q. Did you convey that to him at the meeting?

19 A. I did. If I can explain a little bit, there were two parts
20 to his discussion. I think one was obviously he was
21 clearly interested in the performance benefits in terms of
22 immune enhancement or enhancing recovery in injured
23 athletes and so forth. So there was a question about
24 could some studies be done on these peptides on athletes
25 in Qatar, and I said no, not in my knowledge and certainly
26 not in the area where I was working. On the other
27 question, which I think took up a bit more of the
28 conversation, was about the public health aspects of these
29 peptides in relation to could these be trialled to see
30 whether they might be effective in controlling or managing
31 obesity and therefore type 2 diabetes and so forth using

1 an overweight adult population which is badly overweight
2 in Qatar. So there were two parts to his - one was the
3 performance aspect, if you like, sport; the other one was
4 public health, community health.

5 Q. But both effectively were not progressed, as far as you are
6 aware?

7 A. No.

8 Q. That first meeting in terms of timing, would you agree that
9 it was around about early May 2012?

10 A. Yes.

11 Q. I think we have independent records that establish that he
12 did travel to Qatar or at least Dubai either late April or
13 early May?

14 A. It would have been then, yes.

15 Q. You have no reason to dispute that timeframe?

16 A. No, not at all.

17 Q. The second meeting, that occurred about six months later?

18 A. Yes.

19 Q. Is that right?

20 A. That's right.

21 Q. About November 2012?

22 A. Correct, yes.

23 Q. Mr Dank came to your office unannounced?

24 A. He did, yes.

25 Q. You had no forewarning of his attendance?

26 A. No.

27 Q. Was it at that meeting that he gave you some sort of
28 slideshow presentation in relation to AOD?

29 A. I believe he gave me hard copies of a Powerpoint
30 presentation of a number of the peptides that he had been
31 talking about. So there would have been a few pages in

1 all of that particular presentation.

2 Q. In your statement do you say there was about half a dozen
3 pages and - - -

4 A. Thereabouts, yes.

5 Q. Listed AOD, Hexarelin, GHRP and CJC?

6 A. Yes.

7 Q. Do you have that document?

8 A. No, I don't, unfortunately.

9 Q. Do you know what happened to that document?

10 A. I don't. I mean, I can only think that I left it behind in
11 Qatar when I moved back to Australia. There was a
12 possibility I put it into papers to hand on to a colleague
13 just by way of handover of all the stuff I had been doing.
14 I chased that up with him. He couldn't find those copies
15 either.

16 Q. In your statement, and this is at paragraph 35, you
17 say - - -

18 CHAIRMAN: You can go to that, Dr Fricker, if it helps.

19 MR GRACE: You say at the last sentence of 35, "Thymosin and
20 Thymomodulin may have also been in the presentation but
21 I cannot recall exactly"?

22 A. Correct.

23 Q. As I understand the process, you were interviewed by ASADA
24 investigators on 29 November 2013?

25 A. That's correct.

26 Q. And that interview was held in Canberra, at the ASADA
27 office?

28 A. That's right.

29 Q. Dr Stephen Watt was also present?

30 A. Correct.

31 Q. You know him of course?

1 A. I do.

2 Q. And Mr Mark Nichols was the investigator?

3 A. Investigator, correct.

4 Q. And you know him?

5 A. I do now, yes.

6 Q. You didn't know him before?

7 A. Not before, no.

8 Q. During the course of the interview you were asked questions

9 about this second meeting. Then you were asked by

10 Dr Watt - this is at page 24.

11 CHAIRMAN: This is AS-5.3, isn't it, under tab 33. What page,

12 Mr Grace?

13 MR GRACE: Page 24. Do you have that, Dr Fricker?

14 A. I think I do, yes.

15 Q. It starts - the top of the page has got Dr Fricker, "Okay.

16 Obviously it's an association"?

17 A. Yes, I have that.

18 Q. Down towards the bottom of the page Mr Nichols, at line 30,

19 says, "That's about it, I think. Steve, have you got any

20 questions?" Dr Watt says, "Any other substances that he

21 did talk about at all other than the ones that we have

22 sort of gone through?" You say, "No." At that stage you

23 hadn't mentioned Thymosin. You accept that?

24 A. I do, yes.

25 Q. Dr Watt asked you, "Did he mention Thymosin at all?" You

26 say, "Which one?" Dr Watt says, "Thymosin." You say,

27 "That could have been on the Powerpoint thing

28 because - would that be the immune - the immune one?"

29 Dr Watt says, "Yes, yes, potentially." You say, "The

30 immune one, yes, I think there may have been some mention

31 of that." Dr Watt, "Yes, it depends which one you are

1 looking at. Yes." Then you say, "I've got to say it may
2 well have because my memory, it gets hard because I have
3 been reading since then and those names keep coming back,
4 but I am pretty sure that was on the list, like, of
5 Hexarelin, GHRP, whatever, all that sort of stuff. So the
6 Thymosin might well have been in there as part of that.
7 Yes, okay." Then you say, "But, and to be fair, I think
8 it was - I don't think he was really - he was just talking
9 about peptides generally I guess and not really singling
10 out 'I really want to do trials on this one or this one'.
11 It was like, you know, what can you do for me? I've got
12 all these fantastic things that do all sorts of wonderful
13 things for people and, you know, if I can get some trials
14 going, that would be good. He didn't really spend any
15 time at all talking about the science behind any
16 particular product." Then Dr Watt says, "Yes, okay." You
17 say, "Yeah, he was like, 'Here they are. Where do I go?
18 Who do I talk to? Can you help me? These are fantastic.
19 I'm doing these with players. They are great.' That sort
20 of stuff. Very general." That's really the gist of both
21 conversations, wasn't it?

22 A. Indeed.

23 Q. So the suggestion of Thymosin and Thymomodulin really came
24 from Dr Watt during that interview for the first time?

25 A. Yes.

26 Q. And it reappeared in that statement at 35.

27 A. Mm-hm.

28 Q. But you ascribe to the truth of the remark that you made at
29 paragraph 35 that you really can't recall exactly?

30 A. No.

31 Q. Thank you very much, Dr Fricker.

1 CHAIRMAN: Mr Hallowes?

2 <CROSS-EXAMINED BY MR HALLOWES:

3 MR HALLOWES: Doctor, do you still have that transcript of

4 interview before you?

5 A. Yes.

6 Q. If you go to page 15 of that interview?

7 A. Yes.

8 Q. Down at around about line 35 where you are being asked

9 again about the presentation, so it is referring to that

10 second meeting?

11 A. Yes.

12 Q. You were asked by Mr Nichols, "Do you remember if it said

13 on the presentation at all whether he was administering

14 those to the NRL and AFL?" You responded, "No, no, no,

15 no." Mr Nichols echos, "No, no," and you said, "No,

16 pretty dry. This is the product - this is what I believe

17 it does sort of stuff. Yes. I don't remember him putting

18 anything like that into those Powerpoint things as in I'm

19 doing this with Essendon or I'm doing this with, yes,

20 Cronulla or whatever." I take it you were clearly telling

21 the truth during the interview when you gave those

22 answers?

23 A. Yes.

24 Q. And you stand by those today?

25 A. I do.

26 Q. Yes. Thank you. I have no further questions.

27 CHAIRMAN: Any further, Mr Holmes?

28 MR HOLMES: No.

29 CHAIRMAN: Dr Fricker, thank you very much for attending. We

30 don't require your attendance any more.

31 <(THE WITNESS WITHDREW)

1 MR HOLMES: Gentlemen, yesterday at the close of the day we
2 were trying to - - -

3 CHAIRMAN: The interview of Dank with McKenzie.

4 MR HOLMES: Yes. We do have a sound recording of that
5 interview which - - -

6 CHAIRMAN: Where is the transcript of the interview?

7 MR HOLMES: Exhibit AS-3. That's the first volume. It is at
8 page 382. What I was going to do was to play that just on
9 the laptop because the speakers on the laptop aren't so
10 jarring as when it is put through the speakers in this
11 courtroom, the larger speakers. We will just see how it
12 goes; otherwise we might just have to read the transcript.

13 CHAIRMAN: All right. Just give the page again.

14 MR HOLMES: It starts at 382.

15 CHAIRMAN: Thank you. Let's see how it goes, Mr Holmes.

16 (Tape recording of conversation between Mr Dank and
17 Mr McKenzie played.)

18 CHAIRMAN: The reference to "Caro" I assume was Caroline
19 Wilson.

20 MR HOLMES: Caro Meldrum-Hanna.

21 CHAIRMAN: Was it? I thought it might have been Caroline
22 Wilson, who is referred to as "Caro". Anyway, it's
23 neither here nor there.

24 MR HOLMES: Our inference is that it is not. When we were
25 listening to it, at page 384, where Mr McKenzie asks,
26 "Okay, well, why give it to all Essendon players if only
27 some of them had colds and flu?" And Mr Dank responds,
28 "Well, the point is that there is a degree of" - now it's
29 got the word "immunisation(?)" and "pressure". I heard it
30 as "a degree of immuno-suppressant" or "immune
31 suppressant". Mr McKenzie provided a statement, and

1 I perhaps should tender that. It's a statement of Nick
2 McKenzie. It's not dated.

3 CHAIRMAN: Mr Grace, Mr Ihle and Mr Hallowes, have you seen
4 this document?

5 MR GRACE: Yes.

6 MR HALLOWES: I believe so, yes. Can I indicate generally that
7 newspaper articles themselves will be objected to. This
8 is the statement rather than a newspaper article.

9 MR HOLMES: If that could be - - -

10 CHAIRMAN: We will make that AS-15, statement of Nick McKenzie.

11 #EXHIBIT AS-15 - Statement of Nick McKenzie.

12 MR HOLMES: The first two paragraphs are introductory.

13 Mr McKenzie then says, "It's also important to note that
14 the interview was preceded by a large off-the-record
15 interview with Stephen Dank. I cannot provide the notes
16 or details of this off-the-record conversation, but it is
17 important to mention in the interests of fullness and
18 given it may include material that conflicts with or
19 supports the on-record excerpt. It is also necessary to
20 note that shortly after conducting this on-record
21 interview and shortly before publication Stephen Dank
22 sought to alter what he had earlier said about the use of
23 Thymosin Beta-4. This meant that one of The Age's
24 articles was then significantly altered. Dank's
25 alterations came immediately after I had informed him that
26 a representative of Essendon was claiming the club was
27 uncertain if the Thymosin used was Thymosin Beta-4."
28 I don't know what evidence Essendon was relying on there.

29 I continue, "Dank explained his decision to
30 revise what he had said in his interview about Thymosin
31 because he was confused and tired and made a mistake. He

1 said the Thymosin used was Thymomodulin. He has since
2 reiterated several times that Thymosin Beta-4 was not used
3 and that the Thymosin referred to in numerous text
4 messages and discussions was in fact Thymomodulin."

5 He then sets out the transcript of the on-record
6 interview. McKenzie, "Thymosin Beta-4. Why was that used
7 in Essendon players given there is an opinion from a
8 doctor or researcher and other scientist that its effects
9 are uncertain? "That's not totally true, Nick, because
10 with all due respect, right, there is good data, very good
11 data, that supports Thymosin Beta-4 in the immune system."
12 "Okay. Well, why give it to all Essendon players if only
13 some of them had colds and flus?" "Well, the point is
14 that there is a degree of immuno-suppression after a game
15 or a hard training week, right. Often times the ability
16 to back up next week is decreased by the hit on the immune
17 system, right." "Did you see any indications in Essendon
18 players that it actually helped them?" "Well, apart from
19 the fact that they won 11 out of their first 14, right,
20 and we did regular bloods, I mean, at the end of the day
21 this is what makes blood work very, very difficult because
22 you sometimes" - I think he has used the word
23 "indecipherable". In the transcript it's "UI", which is
24 "unintelligible".

25 CHAIRMAN: "UI". I took that to be "unintelligible".

26 MR HOLMES: Yes. "Tracked the shifts, right, but at the end of
27 the day I was very happy with the science, I was very
28 happy working - after working a long time in football,
29 right, that there are periods of malaise which are
30 possibly related to subclinical flus and subclinical
31 colds, right, which can affect performance. When we want

1 to be honest, Nick, how much performance data is there out
2 there on Actovegin? There's a lot, isn't there? No,
3 there's not. Okay. Okay. So you know you've got to
4 extrapolate from the science."

5 The interview moves on to other areas before
6 returning to Thymosin. "Thymosin Beta-4, a substance it
7 says here is prohibited in all roots and out of
8 competition. Well, that must have only - must just - have
9 just only come in this year, and I will get somebody to
10 speak to ASADA about that. That's just mind blowing. Let
11 me check AOD and see if there is any advice on that. No.
12 I will check CJC. Yes, they have listed CJC Thymosin
13 Beta-4. Yes. They must have just banned that. I think
14 they have only just put that in to back up their case.
15 I imagine Essendon would be concerned about that. But,
16 then again, they can't do it retrospectively, can they? Of
17 course not." Signed Nick McKenzie.

18 MR GRACE: Can I place on record, sir, that we object to the
19 receipt by the Tribunal of any of this tape recording, the
20 transcript that's been followed during the tape recording
21 and the statement.

22 MR HOLMES: I imagine that will be on the list when we get the
23 list of objections.

24 CHAIRMAN: It will be on the list, yes.

25 MR HOLMES: Can I turn then to the Facebook page.

26 CHAIRMAN: Yes.

27 MR HOLMES: Can I read Mr Mullaly's affidavit.

28 CHAIRMAN: Do we have that, Mr Holmes?

29 MR HOLMES: I think it was provided yesterday afternoon. It
30 looks like this. After the list of annexures, he solemnly
31 declares and affirms - - -

1 CHAIRMAN: We better formally receive this document as well,
2 Mr Holmes.

3 #EXHIBIT AS-16 - Affidavit of Darren John Mullaly, 12 January
4 2015.

5 MR HOLMES: Paragraphs 1, 2 and 3 are introductory. Then he
6 says, "One of my duties at ASADA has been to work on
7 Operation Cobia. It was the code name for ASADA's
8 investigation in possibly anti-doping rule violations by
9 athletes and support persons in a number of sporting
10 codes, including the AFL, the AFL limb of the operation
11 focusing particularly on allegations of players and
12 support persons associated with Essendon may have used
13 prohibited substances and/or prohibited methods as part of
14 their 2012 supplements programs. As part of my duties
15 involving performing internet website searches to discover
16 information in relation to cases involving Essendon that
17 were subject to the investigation I have provided the
18 results of various internet searches to various
19 anti-doping tribunals."

20 He gives an example of providing to the AFL
21 Anti-Doping Tribunal in a matter involving a Victorian
22 Football League player. The searches were of the
23 substance Clenbuterol on the Google website. "The Google
24 internet searches contained information posted on the
25 internet for several years prior to the player's alleged
26 anti-doping rule violations. The internet searches
27 established information that was readily available to the
28 player should he have conducted a Google search of the
29 substance Clenbuterol that he had ordered at a later time.
30 I provided on 30 September screen shots of certain
31 archived internet pages for a product called Kronik to the

1 Court of Arbitration For Sport involving an international
2 basketball player from New Zealand. The archived internet
3 page screen shots for the Kronic product were taken from
4 an internet source called the 'Wayback Machine'."

5 If you go to DM-1, which is at page 13, here's a
6 true copy of the Wayback Machine pages submitted to the
7 CAS in that case. That's the Webster case. They are
8 referred to in the award which starts at page 28. I don't
9 think I need to go to that.

10 He then describes the Wayback Machine internet
11 site: "In preparing for the Webster matter referred to
12 above I attempted to gain access to the historical
13 internet pages. I consulted with ASADA IT section in
14 order to see whether this was possible and was directed to
15 the Wayback Machine website. My understanding of the
16 Wayback Machine website is that the site conducts
17 automatic trawls over an internet page from time to time
18 and archives that page as at that particular point in
19 time. When using the Wayback Machine you are required to
20 input a particular web page's URL address in the Wayback
21 Machine browser and then click on the browse history tab.
22 DM-3 is a true copy of the home page of the Wayback
23 Machine obtained by me on 7 January 2015. If the Wayback
24 Machine internet site has archived the internet page which
25 has been input in a search, a calendar containing the
26 dates that the internet page has been archived is
27 displayed."

28 Annexed and marked DM-4, that's at page 51, is a
29 true copy of a search of the Medical Rejuvenation Clinic's
30 website obtained on 7 January. "On 27 November 2013, on
31 that day I took screen shots of the MRC website content.

1 I took the screen shots using 'alt' and 'print' keys and
2 pasted the screen shots into a Microsoft Word document.
3 Annexed to my affidavit marked DM-5 is a copy of the
4 screen shots of the MRC page that I took on 27 November
5 2013. The MRC website home page contains a list of our
6 products and peptides. Under the peptides link there's a
7 product called Thymosin. When I moved the mouse pointer
8 over the Thymosin link a small box appeared which said
9 'Thymosin Beta-4', see page 55."

10 If you go to page 55 - the screen shot starts at
11 page 53. If you go to 54 and 55, there's a heading, "Our
12 products and our brands". Then under the subheading
13 "Peptides" Thymosin is listed. When that product is
14 pointed on with the cursor "Thymosin Beta-4" came up.
15 Going back to paragraph 23, "I clicked and opened the
16 Thymosin link. I was immediately taken to an internet
17 page which had the heading 'MRC peptides for peptides
18 anti-aging, age rejuvenation, wellbeing, sport medicine,
19 hormone replacement, PRP, stem cells, fat loss, advanced
20 cosmeceuticals, Thymosin Beta-4.'" That appears at
21 page 57. That's the MRC website.

22 It describes on that page "Thymosin Beta-4 is a
23 synthetic version of the naturally occurring peptide
24 present in virtually all human and animal cells, Thymosin
25 Beta-4 (TB4). TB4 is not a growth factor. Rather, it's a
26 major actin regulating peptide. TB4 has been found to
27 play an important role in protection, regeneration and
28 remodelling of injured or damaged tissues. The gene for
29 TB4 has also been found to be one of the first to be
30 up-regulated after a wound occurs. It is a first-in-class
31 drug candidate that promotes the following." There are

1 listed a number of bullet points, "Increases red blood
2 cells, stops bleeding, increases endurance, reduces tie
3 up, helps breathing, reduces stomach acid which eliminates
4 ulcers, increases lean muscle mass, helps repair tendons
5 and ligaments, endothelial (blood vessels) cell
6 differentiation (increases red blood cells), angiogenesis
7 (growth of new blood cells from pre-existing vessels) in
8 dermal tissues, keratinocyte migration, collagen
9 deposition, and decreases inflammation. One of the TB4
10 key mechanisms of action is its ability to regulate the
11 cell-building protein, Actin, a vital component of cell
12 structure and movement. Of the thousands of proteins
13 present in cells, actin represents up to 10 per cent of
14 the total proteins and plays a major role in the genetic
15 make-up of the cell."

16 If you go down to the next page, "This potent
17 peptide is a member of a ubiquitous family of 16 related
18 molecules with a high conservation of sequence and
19 localisation in most tissues and circulating cells in the
20 body. TB4 not only binds to actin, but also blocks actin
21 polymerisation and is the actin-sequestering molecule in
22 eukaryotic cells. TB4 was identified as a gene that was
23 up-regulated four-to-sixfold during the early blood vessel
24 formation and was found to promote the growth of new blood
25 cells from the existing vessels. This peptide is present
26 in wound fluid and when administered subcutaneously, it
27 promotes wound healing, muscle building and speeds up
28 recovery time of muscle fibres and their cells. An
29 additional key factor of TB4 is it promotes cell migration
30 through a specific interaction with actin in the cell
31 cytoskeleton. It has been demonstrated that a central

1 small amino acid long-actin binding domain has both blood
2 cell reproduction and wound healing characteristics.
3 These characteristics are uncovered by accelerating the
4 migration of endothelial cells and keratinocytes. It also
5 increases the production of extracellular matrix-degrading
6 enzymes. Research confirms that TB4 is a potent,
7 naturally occurring wound repair factor with
8 anti-inflammatory properties. TB4 is different from other
9 repair factors, such as growth factors, in that it
10 promotes endothelial and keratinocyte migration. It also
11 does not bind to the extracellular matrix and has a very
12 low molecular weight meaning it can travel long distances
13 through tissues." Then there's the product information:
14 "Prediluted Injectables - 6mg per 2000mcg/ml in 3ml vial."

15 I go back to the affidavit. "On 8 January
16 I searched for a copy of the MRC website stated as being
17 archived on 3 April" - - -

18 MR GRACE: You missed some paragraphs.

19 MR HOLMES: Sorry. "Annexed to my affidavit DM-6 is a copy of
20 the screen shots" - - -

21 MR GRACE: The previous one you didn't read.

22 MR HOLMES: Sorry, you are right. 27.

23 MR GRACE: 26 you haven't read.

24 MR HOLMES: 26, "The earliest archived screen shot of the MRC
25 website using the Wayback Machine is stated as being
26 copied on 19 March 2012. I searched the MRC web pages
27 available for the Wayback Machine website claiming to be
28 from 19 March on 8 January. The 19 March 2012 archived
29 screen shot was the only archived page claimed to have
30 been taken by Wayback Machine in 2012," and that is
31 annexed at DM-6, which is at page 63. It starts at 62 and

1 goes to 63. There doesn't appear to be a reference to
2 Thymosin on that page or the following page for DM-6.

3 I return to the affidavit. Then if we go to
4 paragraph 29, "On 8 January I searched for a copy of the
5 MRC website stated as being archived on 3 April 2013.
6 I could not locate the 3 April archived page and was
7 redirected by the Wayback Machine website to an MRC home
8 page stated to have been archived on 9 April. Annexed to
9 my affidavit and marked DM-7 is a copy of the screen shots
10 from the Wayback Machine from 9 April."

11 That starts at page 65, and it has an entry which
12 says, "MRC peptides will cease operations immediately
13 because of the false and defamatory statements made in the
14 media. The clinic and this website will not re-open until
15 such time as it has regained the trust and confidence of
16 the people of Sydney."

17 So if we go back. He searched for the MRC
18 website stated as being archived on 24 August 2013.
19 Annexed and marked DM-8 is a true copy. DM-8 starts at
20 page 67. It says, "Welcome, we are open. Thank you,
21 loyal customers." They talk about sports medicine,
22 peptides. They do have a reference to Thymosin as one of
23 the products that they are - that have been selling.
24 "I performed a Wayback Machine search for the products
25 link on the MRC website. I did that by clicking on the
26 products link. The Wayback Machine took me to a page
27 stated to have been archived on 9 April. This was the
28 only page I was able to recover." DM-9, which appears at
29 page 70, was the only page that he could recover. There
30 is no reference on that page.

31 There is a heading in his affidavit between

1 paragraphs 35 and 36 called "Google searches of
2 bodybuilding forums." Can I just introduce this topic by
3 saying you will recall that we asked for copies of the
4 interviews that Mr Hargreaves had with Mr Charter. He
5 spoke to Mr Charter and had lengthy transcripts made of
6 the conversation. The first one occurred in November
7 2014, before the radio interview, and the second one
8 occurred after that, and it appears that Mr Charter was
9 giving him or showing him some documents.

10 In the course of that interview, and we will be
11 tendering those statements but they are subject to the
12 voir dire, Mr Charter made several statements
13 about - perhaps I should just refer to those statements so
14 that you can understand the relevance.

15 MR GRACE: Sir, these documents were provided for the sole
16 purpose of the voir dire and expressly said so in the
17 correspondence that accompanied them.

18 CHAIRMAN: Yes, I appreciate that they relate to the decision
19 about what's to happen with Charter's statements.

20 MR HOLMES: Perhaps I should hand up the two transcripts. The
21 first interview was on 7 November 2014, and the second one
22 was on 9 December 2014. So you have all the various - - -

23 CHAIRMAN: I think we need to mark them so the record is clear.
24 What I will do is mark them as AS-17 MFI, marked for
25 identification, because they are going to be used for the
26 purposes of determining the admissibility of Mr Charter's
27 statements. So these are transcripts of interview on
28 9 December and what's the other one?

29 MR HOLMES: 7 November 2014.

30 #EXHIBIT AS-17 - (For identification) Transcripts of interviews
31 between Mr Hargreaves and Mr Charter dated 7 November 2014

1 and 9 December 2014.

2 MR HOLMES: Can I draw your attention to page 7. I don't think
3 it is necessary to read them, but on 7 November at page 7
4 Mr Hargreaves asked him, "So when you spoke about Thymosin
5 what were you referring to?" "Well, Thymosin in general
6 terms, if you want - Thymosin is more often used than
7 Thymosin Beta-4, TB4, in general use for your - because
8 especially remember the key demographic he was looking was
9 primarily bodybuilders, gym junkies, athletes in general
10 and one of the big issues with athletes because they train
11 so hard, a lot of athletes overtrain. Post-training you
12 have a window of opportunity for upper respiratory tract
13 infections and suppressed immune function which is part
14 and parcel of someone who is pushing themselves very hard.
15 So Thymomodulin or Thymosin" - and that's where
16 Mr Hargreaves adds to Mr Charter's use of the word
17 "Thymosin" the word "Alpha" and Mr Charter says, "Yeah,
18 Alpha, whichever" - we are happy to have the audio
19 recording. I call for the audio recording. We will defer
20 that call for the moment.

21 "I'm pushing designated generic term for that,
22 but Thymosin is commonly used amongst bodybuilders and
23 athletes to narrow that window and bolster your immune
24 function, is that right? Yeah. It's interesting you talk
25 like that because I thought it was more, well, his intent
26 was more about the protection from colds and everything
27 else. That's what I'm saying. So both these protection
28 from colds depends on whether you are talking about
29 influenza or the common cold. One's more upper
30 respiratory tract infections, bacterially in etiology
31 whereas the influenza's viral so you can't, like, you need

1 anti-viral drugs like Relenza and Tami-Flu to stop that
2 influenza. But if you just have that little cough and
3 suppressed immune system, a higher immune system will keep
4 that at bay. Athletes are very susceptible to that one or
5 two days of cough cold which stuffs up your preparation
6 for the week. So that's why it's used for HIV patients.
7 Exactly. They can't afford to, well, get their immune
8 suppressed in the first place and they're very vulnerable
9 to colds and flu. Colds and, yeah, colds and flu."

10 Then, "Can you please remember I don't have your
11 qualifications. I'm very much uneducated. Well, I'm a
12 bit more educated than I was 12 months ago. But, as
13 I understand, Thymosin is a generic term. It's a bit like
14 - an analogy I have used in the past, it's a bit like
15 talking about citrus fruits and then you've got, you know,
16 grapefruits and oranges and lemons. So I understand
17 Thymosin is a generic term. The actual products
18 themselves are called Thymosin Alpha, Thymomodulin,
19 Thymosin Beta-4 and I think there are other Thymosin Betas
20 as well, but - yeah, they're really - they're the three
21 that I think I have really raised their heads in this
22 case, Thymomodulin, Thymosin Alpha, Thymosin Beta-4. Yes.
23 But when you talk about Thymosin what are you talking
24 about? Which of the three products? Well, when I talk
25 about Thymosin I'm generally - I write it down as Thy or
26 shorthand," and he refers to Thymosin.

27 If I just stop there. "But if you say Thymosin
28 to somebody you are referring to Thymosin Alpha?" There is
29 a reference to the bodybuilding forums.

30 CHAIRMAN: Mr Holmes, if it is convenient, we might take a
31 short break.

1 MR HOLMES: Okay.

2 (Short adjournment.)

3 MR HOLMES: Gentlemen, it was the reference on page 7 of the
4 first interview on 7 November to, "When you see Thymosin,
5 it's Thymosin Alpha, and Thymosin Alpha is commonly
6 used" - I add the word "Thymosin Alpha" - "is commonly
7 used by" - - -

8 CHAIRMAN: "Bodybuilders and athletes to narrow that window."

9 MR HOLMES: What Mr Mullaly has done, if you look at paragraph
10 37, is to search "bodybuilding forum Thymosin" to see what
11 comes up. In 40 he searches "bodybuilding forum Thymosin
12 Alpha" to see what comes up. Then he searches
13 "bodybuilding forum Thymomodulin". That's DM-10. So when
14 you just search for - - -

15 CHAIRMAN: DM-10?

16 MR HOLMES: At page 72. When you search for "bodybuilding
17 forum Thymosin" you will see that all the references are
18 not to Thymosin Alpha; it's Thymosin Beta-4, or the
19 majority.

20 Then if you go to page 95, if you narrow the
21 search and add the words "Thymosin Alpha" you get some
22 references to these proceedings. This is on page 95.
23 Then there's reference to Thymosin Beta-4. The Beta 4
24 still keeps coming up. So we rely on that evidence to
25 contradict or put Mr Charter's evidence in proper context.

26 CHAIRMAN: That's one piece of Mr Charter's evidence you don't
27 rely on.

28 MR HOLMES: Well, we put all his evidence so that when you are
29 taking the entire circumstances into account that has to
30 be taken with a grain of salt.

31 CHAIRMAN: Yes.

1 MR HOLMES: Then going back to paragraph 45, he looked at a
2 forum which was Wayback Machine to 17 November. Again
3 bodybuilding peptides, what comes up is Thymosin Beta-4.
4 The screen shot of that is at DM-13.

5 He did the same with the forum in paragraph 48
6 which was commenced on 4 October. The forum discusses the
7 new peptide Thymosin Beta-4, and the screen shots are
8 there. Then one on 3 November 2011, and again what comes
9 up in paragraph 52 is the dosage for Thymosin Beta-4 and
10 there are screen shots.

11 MR GRACE: Sorry, where are you?

12 CHAIRMAN: Paragraph 52, Mr Grace.

13 MR HOLMES: Then paragraph 54 he opened the forum and the link
14 was from a page on 10 July. It had the same dosage for
15 Thymosin Beta-4. Then paragraph 57 he went back to a
16 forum page in January 2012. Again Thymosin Beta-4 or
17 TB500. There is then reference to the peptides clinic
18 website. Again the website link is reproduced at DM-18,
19 which is at page 148.

20 Then if you look at the peptide products in DM-19
21 at page 152 you again also only get Thymosin Beta-4.
22 Thymosin Beta-4, TB500. You see the TB500 is used
23 interchangeably with Thymosin Beta-4 on page 153. The
24 molecular weight of TB500 or Thymosin Beta-4 is 4963.49.
25 Then there is the molecular sequence on the bottom of 153.

26 If we go over the page to 154 we have more
27 descriptions of the benefits of Thymosin Beta-4. On 155
28 you will see, "Thymosin Beta-4 assurance of product purity
29 certificate of analysis." There are the words, "HPLC
30 report" and "IMG imaging". The Integrated Medical Group,
31 that was Mr Alavi's company that he said he would have to

1 pass the work to and cut out Como Compounding. What
2 appears on the website of this peptide website is a
3 certificate of analysis of a product name of Thymosin.
4 But then the molecular formula for Thymosin is CHNO, which
5 is the molecular formula for GHRP6. So Mr Alavi at this
6 stage is talking about Thymosin Beta-4, using a GHRP6
7 molecular formula and a molecular weight of 873.

8 If we go over the page - - -

9 MR GRACE: You might want to look at page 239.

10 MR HOLMES: We are going to come to that.

11 MR GRACE: The same as 242. Different substances.

12 MR HOLMES: Yes. This is Mr Alavi on 1 October having an HPLC
13 report for Thymosin with the molecular formula for GHRP6.
14 It's just an error. If we go to page 156, which is where
15 I was reading, that's the same certificate of analysis
16 respectfully submitted by Mr Alavi and the reference to
17 Thymosin Beta-4.

18 Then if you go to page 158, this same website we
19 heard about Mr Dank talking about, "You must take the
20 hormone and blood testing is required," and they set out a
21 description of the "blood test for growth hormone
22 stimulating peptides are as follows". IGF-1, the test.
23 IGFBP. Over the page, BSL, TSH, SHBG and TST, and then
24 PSA testosterone testing. That was the blood testing that
25 Mr Dank was organising for the Essendon players across the
26 board. We have some examples of that which you will see
27 in exhibit AS-3 where those tests are referred to.

28 Then I go back to the heading between 67 and 68,
29 the Como Compounding Pharmacy website and Facebook page.
30 I will leave you to read those paragraphs 68 to 83 because
31 it's more powerful if we see what the - - -

1 CHAIRMAN: This is where the video comes in.

2 MR HOLMES: Yes.

3 CHAIRMAN: Because you can get to the video from that website.

4 MR HOLMES: This is it.

5 (Video on Como Compounding Pharmacy played.)

6 MR HOLMES: If you look at the bottles, the one on the far
7 right we will be suggesting to you is a reference to
8 Thymosin Beta-4. You see on the right-hand side it says
9 "Thymos". Then the next shot, "Thymosin Beta-4.
10 Hexarelin. CJC-1295." So these are the products that
11 Mr Alavi was selling in August 2012. You will recall
12 Mr [REDACTED] the player, was texting about Thymosin
13 injections in late July 2012. One of the players spoke
14 about the Thymosin injection regime going for 23 weeks,
15 which would take it well into August as well. The dosage
16 on the bottle - - -

17 CHAIRMAN: Your eyes are obviously better than mine, Mr Holmes.

18 MR HOLMES: No, I hadn't picked this one up. It may be in the
19 screen shot attached to the affidavit.

20 CHAIRMAN: Is there much more to go on it? We will run it
21 right through.

22 (Video on Como Compounding Pharmacy played.)

23 MR HOLMES: Gentlemen, we handed up a colour copy of the
24 annexures yesterday.

25 CHAIRMAN: Yes. That was in relation to a Facebook page,
26 wasn't it?

27 MR HOLMES: We will be saying you can see the concentration for
28 the Thymosin Beta-4 being 3,000 micrograms. So the
29 evidence about how you distinguish Thymosin Alpha from
30 Thymosin Beta by the standard concentration levels, which
31 is another matter that Mr Charter gave, he was clearly

1 trying to put all the references to Thymosin as references
2 to Thymosin Alpha - he was or the questions were suggested
3 to him. We say if you look at the actual text messages,
4 the actual emails and the August Facebook page the reverse
5 is true.

6 MR GRACE: Where do you say the 3,000 - - -

7 MR HOLMES: It is not clear - I'm putting them on notice.

8 CHAIRMAN: Yes. It can be a matter for submissions - - -

9 MR GRACE: When you say "putting them on notice", do you mean
10 you are going to be producing evidence?

11 MR HOLMES: No, that's what our submission is.

12 MR GRACE: Sorry, I thought there was further evidence coming.

13 CHAIRMAN: Mr Holmes, essentially as I understand it in
14 relation to this material, there's a critical issue here
15 as to if Thymosin is being referred to, which is a generic
16 term, what specifically is being referred to in terms of
17 Thymosin Beta-4 or Thymosin Alpha.

18 MR HOLMES: Yes.

19 CHAIRMAN: There's information about the characteristics and
20 the purposes. You are putting forward material which you
21 say supports that where it's said that various purposes
22 such as are referred to in the material are consistent
23 with Alpha that indicates they are consistent with Beta.

24 MR HOLMES: Yes. Mr Charter said the generic reference of
25 Thymosin is to Thymosin Alpha because bodybuilders - - -

26 CHAIRMAN: Yes. But essentially in the end in relation to
27 Thymosin Beta-4, in the end, obviously a pretty critical
28 part of your case will be to try and establish the
29 circumstances as to what was the purpose of the treatment
30 by Dank and his colleagues of the players, what were they
31 seeking to achieve with these players by this treatment,

1 and then look at that purpose once conclusions are reached
2 about the purpose, and there may be dispute about it, but
3 look at that purpose against the evidence that relates to
4 the purpose for these particular substances, and you will
5 say that the purpose indicated is rejuvenation, assisting
6 following training, things like that relating to muscles,
7 and then when you look at the purposes of the types of
8 Thymosin that fits Beta-4.

9 MR HOLMES: It does.

10 CHAIRMAN: And therefore they are circumstances that should
11 lead the Tribunal towards it being Beta-4 that the players
12 got. Is that in basic terms the basis of what is being
13 put in relation to this material? If Charter's evidence
14 is used by the Tribunal, Charter is saying Alpha. What
15 you are saying is, "Well, he might be saying Alpha but
16 it's not consistent" - - -

17 MR HOLMES: He might be saying it now to try to help the
18 players.

19 CHAIRMAN: But it's not consistent with that material.

20 MR HOLMES: And it's inconsistent with the assertion of the
21 person who was responsible for it, Mr Dank, because he
22 said to McKenzie, "It was Thymosin Beta-4." That's what
23 he gave them. Then he tries to recant from that.

24 CHAIRMAN: Yes, I'm just trying to put this material where it
25 relates to the bodybuilding et cetera. You are seeking to
26 use it as part of the overall circumstances that goes to
27 the inference, that is the likelihood, that the type of
28 Thymosin given to the players was Thymosin Beta-4 rather
29 than Thymosin Alpha.

30 MR HOLMES: Yes.

31 CHAIRMAN: Okay.

1 MR HOLMES: Is that a convenient time?

2 CHAIRMAN: Yes, it is. Thanks.

3 LUNCHEON ADJOURNMENT

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1 UPON RESUMING AT 1.30 PM:

2 CHAIRMAN: Mr Holmes.

3 MR HOLMES: Gentlemen, I was going through Mr Mullaly's
4 affidavit.

5 CHAIRMAN: Yes.

6 MR HOLMES: Paragraphs 68 to 83 relate to the Facebook page,
7 and that's something we just discovered last week, or
8 Mr Mullaly discovered last week, when he was using the
9 Wayback Machine. The paragraphs that follow, the first
10 one is at 84 and following, RD Peptides, this is not
11 really how we present our case. This is evidence in
12 response to something that Mr Charter produced to
13 Mr Hargreaves, and so it's perhaps not appropriate in
14 opening. The same with Thymomodulin, Thymomodulin powder
15 search.

16 At 102, the GL Biochem website, that was the one
17 that related to the page in court book volume 1, AS-3. If
18 I could take you to DM-36, which is at page 226. You will
19 see that that's the web page and there's a reference to
20 Thymosin Beta-4 acetate with the catalogue number 55820.
21 Immediately above it there's Thymosin Alpha-1 acetate, but
22 there's no catalogue number. So that's really taking that
23 back to what it was - - -

24 CHAIRMAN: What date is that at?

25 MR HOLMES: It doesn't say in the affidavit. The affidavit
26 doesn't say.

27 CHAIRMAN: That might be current.

28 MR HOLMES: That might be current.

29 CHAIRMAN: There is no reference to the Wayback Machine, so
30 I assume it's current.

31 MR HOLMES: No. I don't think I need to read that, but can

1 I say that that's the nature of the case we are going to
2 present. In terms of an opening, we will supplement that
3 with Wayback Machine entry as far back as we can go to see
4 if the same arises.

5 CHAIRMAN: Okay.

6 MR HOLMES: Could I take you to page 155.

7 CHAIRMAN: Of this Mullaly document?

8 MR HOLMES: The Mullaly affidavit. There's, in the middle of
9 the page, the reference to IMG. That's Mr Alavi's
10 company. This is in relation to Thymosin Beta-4 assurance
11 of product purity certificate of analysis. On the
12 right-hand side, "With the flu season in full stream, are
13 there any peptides suggested in strengthening one's immune
14 system so as to not fall ill?" The answer to that
15 question is as follows, and I quote, "Thymosin Beta-4 has
16 been shown to boost the immune system significantly.
17 Currently immune-compromised patients rely on Thymosin
18 Beta-4 daily to maintain a healthy immune system.
19 Thymosin Beta-4 can be used in the short term as an immune
20 stimulant to assist in overcoming any sort of infection."

21 Whilst we have been concentrating on Thymosin
22 Beta-4 as to the purpose of taking it or to administer it
23 is to aid recovery, there seems to have been a thought
24 evidenced by Mr Dank's conversation with Mr McKenzie and
25 by this passage that Mr Dank and Mr Alavi also thought it
26 had immune system boosting properties.

27 MR GRACE: I object to this, sir.

28 MR HOLMES: That's a submission, so - - -

29 MR GRACE: It's an assumption based upon thin air with no - - -

30 MR HOLMES: I was referring to Mr McKenzie's evidence of what
31 Mr Dank said.

1 CHAIRMAN: What Dank told him.

2 MR HOLMES: Yes.

3 MR GRACE: But Alavi was questioned five times by

4 investigators. He was not asked anything about that.

5 I might add that 156 is nothing to do with Alavi's

6 business. It's a business called Peptide Clinics. If you

7 look at the - it's a clinic that's associated with the

8 Maroubra, New South Wales pharmacy.

9 If you look at page 158, Peptide Clinics is

10 associated with Maroubra Pharmacy online. It's nothing to

11 do with Alavi, Dank or anyone else to do with this case.

12 156 is Peptide Clinics, and that's the Maroubra Pharmacy

13 clinic. Somehow they have lifted onto their website

14 something that may or may not have appeared on the IMG

15 website. We don't know because this is not an IMG website

16 download, even though Mr Mullaly claims it to be.

17 MR HOLMES: Sorry, do you want to cross-examine Mr Mullaly?

18 MR GRACE: No, I don't need to. The document speaks for

19 itself.

20 MR HOLMES: Then please don't contradict him.

21 CHAIRMAN: The evidence is objected to. That will be noted.

22 Submissions can be put in relation to the objection and

23 the use the Tribunal makes of the evidence, if any.

24 MR HOLMES: Yesterday there was a question raised when I took

25 the Tribunal to various passages of Mr Robinson's

26 evidence, "Are you only going to refer to the passages of

27 evidence that you have referred to in your opening?"

28 I will say primarily that's right. I use the

29 qualification "primarily" for this reason. Mr Chair,

30 before lunch you raised the question of the purpose of the

31 injections.

1 CHAIRMAN: Yes.

2 MR HOLMES: I hadn't intended to take the Tribunal to the
3 passages in the players' transcripts where they give
4 evidence about what did they understand the purposes to
5 be. But we prepared a draft schedule over lunch which
6 lists the players and gives a summary of what they say was
7 told to them. For example, Mr [REDACTED] at page 36, he,
8 Dank, would say, quote, "Blah, blah, blah, blah, it
9 helps recovery." So that's other passages in the evidence
10 that I would take you to in response to a question from
11 the Tribunal. So I'm not going to exclude my - - -

12 CHAIRMAN: I didn't understand that in relation to what you are
13 relying upon was exclusive to what you referred to, but
14 they are sort of the primary matters which you are drawing
15 our attention to in the material that you seek to rely
16 upon, but it's not exclusive.

17 MR HOLMES: Yes. They did ask about other lines of enquiry.
18 The investigation goes on. This case is taking longer
19 than we had anticipated. There are unpredictable turns in
20 it. For example, we had Mr Serg Del Vecchio come to the
21 witness box yesterday and only want to give his name and
22 address and what he stated was true and correct. He
23 didn't want to answer questions.

24 We received over the lunch two emails which we
25 had not seen or heard of or were aware of prior to lunch.
26 As they have immediately become available we have
27 immediately asked for them to be copied and brought to
28 court. I would like to be able to turn around and hand it
29 to you, which I expect I will be able to do in a short
30 time. So I'm not closing my case. I'm closing the
31 opening as to the way we pitch our case. It's exactly the

1 same as we started with those 18 paragraphs in our short
2 summary.

3 CHAIRMAN: I understand that. But we have to get to some form
4 of closure so that we can move next to the stage of the
5 proceedings that concern, firstly, whether the AFL intend
6 to put anything before us and then of course the position
7 of the players.

8 That doesn't mean, Mr Holmes, that you can't
9 re-open to put further evidence before the Tribunal, as
10 can happen in a court. If that's sought to be done, then
11 it has to be looked at at the occasion. All parties have
12 to be heard on it, and the Tribunal decides whether in the
13 circumstances it is appropriate that the further evidence
14 be received.

15 This happens in criminal trials, that police come
16 across evidence during the course of the trial, it might
17 even be after the Crown has closed its case, and it is
18 dealt with by the judge. He rules "yes" or "no". If it
19 is "yes", that can mean that further opportunities for
20 cross-examination or submissions et cetera have to take
21 place to ensure that it's fair.

22 MR HOLMES: Yes.

23 CHAIRMAN: But at this stage what happens, we don't know.

24 MR HOLMES: All right. Can I tender court book volume part D,
25 sections 1 and 2. It's a one volume - - -

26 CHAIRMAN: We haven't got that.

27 MR HOLMES: It's the company searches and disclosure notices
28 and documents returned.

29 CHAIRMAN: Have the other parties got them?

30 MR IHLE: Yes.

31 MR HALLOWES: Yes.

1 CHAIRMAN: It's court book part D, sections 1 and 2, volume 1.
2 MR HOLMES: That's the one, yes.
3 CHAIRMAN: That will be AS-18.
4 #EXHIBIT AS-18 - Court book part D, sections 1 and 2, volume 1.
5 CHAIRMAN: Anything further, Mr Holmes?
6 MR HOLMES: That finishes my opening, although I did mention
7 somebody is coming from the AGS to here with a document.
8 CHAIRMAN: We will deal with that when that arises.
9 Mr Gleeson, you have already indicated an application in
10 relation to infraction notices.
11 MR GLEESON: Yes.
12 CHAIRMAN: Apart from that matter, is the AFL proposing to put
13 any evidence before the Tribunal?
14 MR GLEESON: Not otherwise, sir. The only issue we would seek
15 to raise is how you are going to treat the infraction
16 notices and the various codes. We provided you with a
17 folder at I think the first directions hearing named
18 "Infraction notices".
19 CHAIRMAN: Yes.
20 MR GLEESON: It is a matter for you, but just as to practical
21 convenience, as to whether you want to mark them as an
22 exhibit.
23 CHAIRMAN: It is probably a good idea, I think, so the record
24 is clear as to what it is we have. We have already marked
25 your statement of agreed facts together with relevant
26 facts as AF-1.
27 MR GLEESON: Yes.
28 CHAIRMAN: So we have the infraction notices which we could
29 make AF-2. AF-3 could be the AFL Rules and the Code.
30 MR GLEESON: Yes.
31 #EXHIBIT AF-2 - Infraction notices.

1 #EXHIBIT AF-3 - AFL Rules and the Code.

2 CHAIRMAN: I think Mr Holmes has put in the folder that has the
3 prohibited list on it.

4 MR GLEESON: Yes.

5 CHAIRMAN: That's already in, I think.

6 MR GLEESON: Yes.

7 CHAIRMAN: So that doesn't need to be included.

8 MR HOLMES: AS-2.

9 CHAIRMAN: It's at AS-2. Okay. Were there any other
10 documents?

11 MR GLEESON: No, sir, that's it.

12 CHAIRMAN: Are you ready to proceed with the application in
13 relation to the infraction notices?

14 MR GLEESON: Yes, I am.

15 CHAIRMAN: We have a note of argument. Mr Grace, Mr Ihle and
16 Mr Hallowes, have you had that document?

17 MR IHLE: Yes.

18 CHAIRMAN: Are you ready to proceed to deal with the issue?

19 MR GRACE: Yes. It might be best if I circulated these now and
20 gave everyone a chance to have a look at it. Can
21 I indicate what I'm handing up. It's an outline of
22 written submissions which are six pages long. There are
23 two cases that I have copies of that I'm going to provide.
24 One is a High Court decision delivered in 1996 in the
25 matter of Walsh v Tattersalls. It deals with the issue of
26 duplicity. The second is a decision of the Court of
27 Appeal of the Supreme Court of Victoria in relation to
28 Woods v The Legal Ombudsman in relation to disciplinary
29 proceedings against a lawyer and concerning the issue of
30 duplicity in the context of disciplinary proceedings which
31 we would say are analogous to these proceedings.

1 I also hand up a document that was produced by
2 the AFL from Professor McKinnon. Professor McKinnon in
3 2013, in July, made the mistaken claim that Thymosin Alpha
4 is often referred to as TB500. That in the end was not
5 relied upon obviously, as we have heard. But his two-page
6 document is an interesting document because it lists the
7 countries in which Thymosin Alpha is approved. That ties
8 in with some of the evidence that was given by Professor
9 Handelsman. So I provide that.

10 In context, I will explain how that is relevant
11 in the course of the submissions. So if I could just hand
12 these up now.

13 CHAIRMAN: So have counsel for the AFL and ASADA seen this?

14 MR GRACE: No, not yet. They have seen Professor McKinnon's
15 document.

16 CHAIRMAN: No, I mean your outline submissions.

17 MR GRACE: No, they haven't. If I could hand these up to the
18 panel.

19 CHAIRMAN: Just for the sake of the record so again it's
20 identified, Mr Gleeson, your note of argument we will make
21 as AF-4.

22 MR GLEESON: Thank you.

23 #EXHIBIT AF-4 - AFL note of argument.

24 CHAIRMAN: Mr Grace's material we will note as PG-5,
25 submissions and related material on application for
26 amendment.

27 #EXHIBIT PG-5 - Players' submissions and related material on
28 application for amendment.

29 CHAIRMAN: Are you adopting this as well, Mr Hallowes.

30 MR HALLOWES: Yes, I was just going to indicate, Mr Chairman,
31 I don't intend to hand up a separate outline, but I seek

1 to adopt the submissions and the outline submissions made
2 by Mr Grace and Mr Ihle.

3 CHAIRMAN: Thank you.

4 MR GRACE: Sir, before we get on to these submissions, could
5 I seek to attach to the Charter transcripts that were
6 tendered a document which we have provided to our friends
7 last week.

8 CHAIRMAN: Do you want an opportunity to read this, Mr Gleeson,
9 before you proceed or are you happy to proceed? We will
10 give you an opportunity to respond at an appropriate time.

11 MR GLEESON: Could I ask for just five minutes to skim through
12 the written outline?

13 CHAIRMAN: Yes. I think it will be helpful for you to have an
14 understanding of how the players are putting it.

15 MR GLEESON: Yes.

16 CHAIRMAN: I have had raised before - I was pretty green in
17 this field because I think it was the first anti-doping
18 case that I did where there was an issue of duplicity
19 raised and some argument about it. I reached the
20 conclusion then that duplicity didn't apply in relation to
21 these types of proceedings. For example, it's the same
22 penalty whether a person is found guilty of one or two.
23 I think it was the matter of Clark. As I recall, Mr Dann
24 was in it, I think.

25 MR IHLE: Perhaps I'm wrong. I thought it was the matter of
26 [REDACTED] It was a question of double penalty rather than
27 duplicity.

28 CHAIRMAN: And it arose in Clark as well, I think, was the
29 first. Anyway, you have a chance to look at it and then
30 we'll proceed.

31 MR GLEESON: Thank you.

1 MR GRACE: In the meantime, sir, could I just mention one
2 matter. Mr Holmes tendered the transcripts of the Charter
3 interviews with Mr Hargreaves.

4 CHAIRMAN: Yes.

5 MR GRACE: In those interviews there's reference to some
6 documents. Some of the documents are already produced in
7 AS-4.1, which is some handwritten notes. At page 33,
8 I think it is, of AS-1. So that should be perhaps
9 identified as being incorporated into that transcript
10 because it's referred to in the questions and answers.

11 Similarly, there was a discussion in one of
12 the interviews of Mr Charter purchasing some peptides from
13 another company in China called RD Peptides. That's why
14 RD Peptides features in the Mullaly affidavit that's been
15 tendered today. So I seek to have attached to the
16 tendered document the document Mr Charter referred to.

17 MR HOLMES: Are you objecting to the tender or are you
18 tendering the document?

19 CHAIRMAN: He is tendering the document to accompany the other
20 which was - Mr Holmes, it was AS-16. So this document,
21 "Purchasing contract", we will make PG-6.

22 MR GRACE: And should be marked for identification only.

23 CHAIRMAN: Yes.

24 #EXHIBIT PG-6 - (For identification). Document, "Purchasing
25 contract."

26 CHAIRMAN: There is another one, is there, Mr Grace?

27 MR GRACE: No, that's it.

28 MR HOLMES: Mr Grace spoke about the legislation and the effect
29 of the legislation when this issue of an amendment came up
30 yesterday. His summary of the effect of the legislation
31 as it applied when these proceedings commenced was, in my

1 respectful submission, inaccurate. The legislation
2 governing the NAD scheme changed not last week but
3 1 January. So if Mr Grace is going to pursue his summary
4 of the effect of the legislation that you can't either
5 clarify or amend the particulars because of the previous
6 legislation, I would want to be heard on that.

7 CHAIRMAN: I was going to give you the opportunity to be heard
8 in relation to the application anyway.

9 MR HOLMES: But I don't think that either of my friends have
10 realised that the Act and the regulations have been
11 amended.

12 CHAIRMAN: Effective 1 January.

13 MR HOLMES: Yes. Nor have they given consideration, and
14 neither have I, to the transitional provisions.

15 CHAIRMAN: I think we would be very grateful if the learned
16 members at the Bar table gave some consideration to these
17 matters before we are asked to consider them.

18 MR GRACE: I don't know if there is misunderstanding or
19 I wasn't clear, but I only raised that if an additional
20 charge was to be laid that my understanding of the
21 legislation would be it would have to go back before the
22 Anti-Doping Review Panel for consideration. I'm not sure
23 if Mr Gleeson replied directly on that or not, I can't
24 recall. He may have. But my understanding was either
25 from Mr Gleeson or from Mr Holmes they didn't have to do
26 that if they wanted to lay an extra charge; under the AFL
27 Rules they could do that anyway.

28 CHAIRMAN: The first question is whether this amendment
29 involves an additional charge.

30 MR GRACE: My assumption was it didn't.

31 CHAIRMAN: Or an amendment of particulars relating to an

1 existing charge, because the Code says that you violate
2 the Code if you use a prohibited substance. The Drugs,
3 Poisons and Controlled Substances Act says you commit an
4 offence if you use a prohibited substance. You then have
5 to determine what is a prohibited substance. You go to a
6 schedule in each case. If you lay a charge, whether it's
7 under an infraction notice or a charge under the drugs
8 act, you have to provide particulars of the offence you
9 are alleging, which means you have to particularise what
10 the substance is that you say is prohibited and the person
11 used, and you have to particularise as well as you can
12 when the use took place and where the use took place.

13 But particulars are different to the element. As
14 you would all know, and particularly you, Mr Grace,
15 practising in the criminal jurisdiction, amendments to
16 particulars regularly occur in a situation where it
17 doesn't alter the offence but the particulars correspond
18 with the way the case is being put. The purpose of
19 particulars is to ensure that those defending know what
20 they have to meet. You don't get anywhere with just a
21 charge saying a person used a prohibited substance. The
22 first question is, "What is the prohibited substance you
23 allege that I used?" If it is a violation that you used a
24 prohibited substance under the Code, what's the substance?

25 Now, as you would know, it doesn't always follow
26 with criminal charges that where there are a number of
27 things mentioned it's duplicitous, and one of the best
28 examples of course is the law of theft where there can be
29 a number of items particularised as to what has been
30 stolen, but to prove the offence you don't have to prove
31 that each of those items were in fact stolen. You prove

1 the offence if you prove that any of those items have been
2 stolen. So we need to focus, I think, on what the nature
3 of the particularisation is.

4 It's not as though, as I understand it, they are
5 saying, "Look, we have now discovered that there was a
6 further course of treatment which relates to this other
7 substance, and therefore we need to include that in the
8 infraction notice." If that was the situation they would
9 be in all sorts of trouble in trying to do that at this
10 stage when you have come here to defend this case on the
11 basis of certain particulars as to the course of conduct
12 that's said to have occurred where the use took place.

13 But my understanding of what they are saying is,
14 "We are not changing what we say took place at all. What
15 we want to change is our particularisation of
16 the substance that we say they were given as part of this
17 course of conduct to include as an alternative another
18 substance whereby if the Tribunal is satisfied as to
19 either the offence is proven."

20 In terms of unfair prejudice, leaving aside the
21 question of whether it's duplicitous, and from your point
22 of view obviously you would prefer that the amendment
23 wasn't made, but in terms of unfair prejudice in the
24 conduct of the defence where the way in which the case has
25 not changed, except that they have particularised another
26 substance that has arisen during the course of the
27 evidence, well, then we need to know, because prejudice is
28 pretty fundamental to amendments, where is the prejudice
29 in the conduct of the offence with this amendment being
30 made.

31 Usually it's looked at as to whether further

1 evidence needs to be called or whether there needs to be
2 further cross-examination. All those sorts of things come
3 into amendments when the Crown seek to amend a presentment
4 or an indictment during the course of a trial. In the
5 end, fairness prevails, and particularly ensuring there is
6 no unfair prejudice. There is prejudice in the sense that
7 you are worse off having this there than it's not there,
8 but it doesn't necessarily mean that that prejudice is
9 unfair. Okay. Let us know when you are ready.

10 (Short adjournment.)

11 CHAIRMAN: Mr Gleeson.

12 MR GLEESON: Thanks, Mr Chairman. The Tribunal, I appreciate,
13 has read the note of argument and you understand that the
14 application is put on two alternative bases, that is that
15 there is a need for a ruling clarifying the reference to
16 Thymosin Beta-4; alternatively, an amendment to the
17 particulars of the charge contained in the infraction
18 notice such that it is expressly identified that Thymosin
19 Beta-4 reference includes TB500.

20 As to clarification, the basis for the
21 application is that the terms are used synonymously or
22 interchangeably. They are for present purposes
23 effectively the same product designed to achieve the same
24 purpose, and they are both prohibited substances.

25 Can I ask the Tribunal to take up AS-3 and turn,
26 please, to page 227. It is the email from Shane Charter
27 of 12 January 2012 to Nima Alavi that has below it a
28 document headed "How to use TB500 (Thymosin Beta-4)".
29 This document appears to be the document that set the
30 hares running. It refers on three occasions to Thymosin
31 Beta-4, and on those only three occasions that Thymosin

1 Beta-4 is referred to it's as part of a compendious phrase
2 "TB500 (Thymosin Beta-4)". It's in the heading "How to
3 use TB500 (Thymosin Beta-4)", the subheading immediately
4 under it that repeats that phrase, and then in the first
5 part of the narrative at the end of the first sentence,
6 "TB500 (Thymosin Beta-4)".

7 So it is this device of referring to TB500, then
8 referring in parenthesis to Thymosin Beta-4, that reveals
9 the intent of the author to refer to the products
10 synonymously. It's the conventional device adopted when
11 one seeks to indicate that the term referred to also has
12 another name.

13 MR GRACE: Who is the author?

14 MR GLEESON: The Mullaly affidavit, which is the bound volume
15 and you were referred to this morning, has at page 153 an
16 extract from a website Peptide Clinics Australia, and it
17 similarly employs the device of using the compendious
18 phrase, only this time plumping for the reverse order,
19 Thymosin Beta-4 - TB500. That's at page 153. Then if you
20 turn a couple of pages further on to 156 and 157, there is
21 in the lower left corner of 156 "Thymosin Beta-4 (TB500) -
22 30mg injectable peptide". It is repeated below with a
23 60 mg reference. Then on the right again, under "Product
24 Information", "Thymosin Beta-4 (TB500)". The same occurs
25 on page 157.

26 Could the Tribunal then take up volume AS-4,
27 please, and turn up Professor Handelsman's report dated
28 3 December 2014. That's at page 64. The structure of the
29 report is of some significance in this context. What
30 Professor Handelsman does is he states at page 64 in the
31 first sentence that it's "an expert statement on

1 background physiology and pharmacology, including the
2 basis for prohibition under the prohibited list for the
3 following areas and substances", and one of the bullet
4 points is Thymosin Beta-4. He makes some preliminary
5 comments and then works his way through a series of
6 substances. That commences at page 10 of his report,
7 which is page 73 of the volume.

8 First of all, in paragraph 13 the professor deals
9 with specific GH-releasing peptides. Then under
10 paragraph 13, in 13.1, he refers to the structure of the
11 peptides. Then in paragraph 14 he deals with GHRP6, and
12 he says that it is a releasing factor of endogenous GH.
13 In paragraph 15 he deals separately with Hexarelin and
14 says that it's a releasing factor of endogenous HGH. In
15 paragraph 16 he refers to CJC-1295 and uses similar
16 language.

17 Then he comes to paragraph 17, "Thymus extract
18 peptides, Thymomodulin and Thymosins." He deals with
19 Thymomodulin, and we heard in his oral evidence the
20 reference to the crude extract of calf thymus and so on.
21 Then he comes in 17.4 to deal with Thymosin Alpha and
22 Thymosin Beta-4 "having been fully characterised
23 structurally according to their precise amino acid
24 sequence and developed for therapeutic trials".

25 In 17.5 he deals with Thymosin Beta-4. He
26 describes it, its chemical structure, its physiology and
27 pharmacology in 17.5.3. Then in 17.5.4 he deals with
28 TB500, which he describes as an analogue of Thymosin
29 Beta-4. An analogue is described in the Oxford Dictionary
30 as a person or thing seen as comparable to another.

31 "TB500, a short peptide analogue of Thymosin

1 Beta-4 has been identified in horse doping and the
2 prospects of Thymosin Beta-4 as a doping agent has been
3 outlined. As TB500 was invented as an analogue of
4 Thymosin Beta-4, it is presumed by design to have the same
5 properties as Thymosin Beta-4. These include acting as a
6 growth factor which affects muscle, tendon or ligament
7 vascularisation and regenerative capacity hence banned
8 under WADA category S2. TB500 has not been marketed for
9 human therapeutic use anywhere. Hence, TB500 is banned
10 under the WADA prohibited list categories S0 and S2."

11 He then proceeds to discuss Thymosin Beta-4 in
12 17.5.5 and following through until 17.5.12. He therefore
13 deals structurally in this report with TB500 as a subset
14 of Thymosin Beta-4. He goes on to deal separately in 17.6
15 with Thymosin Alpha. He then goes on to deal with human
16 therapeutic trials and SARM S22 and following.

17 That's a report dated 3 December 2014. The
18 infraction notices were issued on 14 November 2014.

19 Then could the Tribunal please turn up in the
20 same volume page 100. That's the Professor Handelsman
21 report of 11 December 2014. He is asked a series of
22 questions there. But in his preliminary comments he says
23 in paragraph 2, "In my previous report I referred to the
24 following substances: Thymomodulin, Thymosin Alpha and
25 Thymosin Beta-4 (including its synthetic analogue TB500)."
26 He's asked the question about the text message, and you
27 have seen that. He's asked question 2, which he answers
28 in the same way as he answered question 1. Question 3,
29 there's a reference to the email with attachments; and
30 question 4, about the content of the consent form.
31 Question 4 is the point at which TB500 gains any

1 meaningful relevance for present purposes, because there,
2 when he's asked about, and you will see at the top of
3 page 102, that same phrase "Thymosin Beta-4 (including its
4 synthetic analogue TB500) he says this: "In my opinion,
5 considering the performance enhancement context of these
6 communications, the substance was probably TB500 or
7 Thymosin Beta-4 but not Thymosin Alpha or Thymomodulin,
8 for the same reasons as in question 1 as well as the
9 description of TB500 in the email of 12 January 2012 from
10 Charter to Alavi and Dank suggesting that the lyophilised
11 (freeze-dried) TB500 be reconstituted in sterile saline at
12 a concentration of 5 milligrams per ml, or 5,000
13 micrograms per ml."

14 He then recommends it be administered in a
15 certain way. "These dosage recommendations correspond
16 precisely to those in the 'consent form' for Thymosin
17 suggesting that the substance was actually TB500 rather
18 than Thymosin Beta-4."

19 I would seek to enquire of Professor Handelsman
20 on his return as to whether by saying that he means only
21 that the attachment to the 12 January email used that
22 compendious phrase putting TB500 first. There are two
23 alternative scenarios that I would seek to explore with
24 him. One is that there is a known dosage specified for
25 TB500 and a known dosage specified for Thymosin Beta-4,
26 and that the consent forms referred to only the former,
27 therefore he concludes, in what he calls a weak inference,
28 it's probably TB500.

29 MR GRACE: He didn't say that. That wasn't the evidence.

30 MR GLEESON: No, bear with me. Another alternative is that
31 there is only one known dosage specified for Thymosin

1 Beta-4 and/or TB500, and that's the one that's in the
2 article attached to the 12 January email, and therefore
3 he's not distinguishing between the two dosage regimes to
4 draw his inference; he's simply relying on the article
5 that we have all seen, and it says what it says, using
6 that compendious phrase.

7 If his answer is, "The only reason I draw the
8 weak inference that it's TB500 perhaps slightly more
9 likely than Thymosin Beta-4" - if that's the only reason
10 being that article, well, that's one thing. But it
11 appears that that's possibly the basis for the weak
12 inference, and he quite candidly says it's slightly
13 speculative as to TB500 being in there. But the evidence
14 is there that he thinks it's slightly more likely.

15 So for those reasons and in that context we say
16 it's open to the Tribunal to say that the infraction
17 notice as presently particularised captures both products.
18 In the brief moment I had to skim the outline of argument
19 provided on behalf of the 32 players, they, with great
20 respect, overreach a little bit in terms of their
21 strenuous opposition to the proposition that these are the
22 same products. It is not said by us that they are the
23 same products. The phrase used and quoted in their
24 submission is that they are effectively the same product;
25 they have the same effect.

26 They are not precisely the same product. One is
27 a 43 amino acid peptide, and the other one is I think a
28 seven amino acid peptide. But, in the context in which
29 this infraction notice alleges use of a prohibited
30 substance and the context in which those phrases are used
31 interchangeably in the document that, as I say, seems to

1 have sent the hares running, we say it is sufficient for
2 the purposes of these proceedings to clarify that the
3 reference to Thymosin Beta-4 captures a reference to
4 TB500.

5 If the Tribunal is not attracted to that course,
6 then we say there ought be leave to amend the particulars
7 contained in the infraction notice so that there is an
8 alternative allegation that the use was a use of TB500.

9 To be clear, it is not alleged - - -

10 CHAIRMAN: But it is the one use.

11 MR GLEESON: Correct.

12 CHAIRMAN: That's the point.

13 MR GLEESON: Correct.

14 CHAIRMAN: It's not - it can't be put that there was a use of
15 one and a use of the other.

16 MR GLEESON: No.

17 MR GRACE: Yes, it can, sir, with respect.

18 CHAIRMAN: That's not the case. The case is not being put on
19 that basis, Mr Grace.

20 MR GRACE: Yes, it is, sir.

21 CHAIRMAN: No, it's not. It's not being put on the basis that
22 they used Thymosin Beta-4 and they used TB500, in my
23 understanding.

24 MR GLEESON: Absolutely correct.

25 CHAIRMAN: It is being put on the basis that there was one
26 substance that they used and that that substance was
27 either Thymosin Beta-4 or the other substance. What you
28 are saying is that that's not two infractions.

29 MR GLEESON: No.

30 CHAIRMAN: It's one infraction, and the particularisation makes
31 clear how the allegation is put.

1 MR GLEESON: Yes.

2 CHAIRMAN: I know points have been raised by Mr Grace in his
3 submission about majority situations et cetera, and of
4 course there are examples in the criminal law. One that
5 immediately comes to mind is the offence of intentionally
6 or recklessly causing injury, and the offence can be
7 proved by a jury being satisfied that it's one or the
8 other and the jury do not have to be unanimous as to which
9 one it is. Similarly, with a culpable driving charge
10 which alleges gross negligence or driving under the
11 influence, the jury can find the charge proven if they are
12 satisfied that it's one or the other, and they don't have
13 to be unanimous as to which one it is. What they have to
14 be unanimous is that the offence has been committed.

15 Alternatively it could be said, "Well, you could
16 issue another infraction notice for the TB500 on the basis
17 that the infractions are alleged in the alternative."

18 MR GLEESON: Yes.

19 CHAIRMAN: But relate to the one substance.

20 MR GLEESON: Yes.

21 CHAIRMAN: But what you are saying is that you should be able
22 to do it by particularising it that way in the one
23 infraction.

24 MR GLEESON: Yes, that's right. The issue really emerged
25 during the cross-examination of Professor Handelsman.
26 Could I take the Tribunal to some transcript. I don't
27 know whether you have printed it off or - - -

28 CHAIRMAN: We have got it printed off, but we don't have it
29 with us. But you can - - -

30 MR GLEESON: I will just remind you. It's fairly fresh.

31 Mr Grace interjected at the moment that I foreshadowed

1 this application but it in fact arose during questions
2 from me. I think I understand the way he puts that, but
3 it's, with great respect, not quite right.

4 CHAIRMAN: What page, Mr Gleeson?

5 MR GLEESON: I'm at 290.

6 CHAIRMAN: Yes.

7 MR GLEESON: I asked some questions of Professor Handelsman
8 about the point at which a product ceases to be sensibly
9 known as Thymosin Beta-4, and in that context I was asking
10 him only about, for example, the inadvertent or human
11 error process where one of the 43 amino acids drops off.
12 So I was very much focusing on the Thymosin Beta-4.

13 In the course of answering that, I put the
14 question at the foot of 293, "Just to fit this back into
15 the context of the prohibited substances list, if an
16 entity was earnestly trying to produce Thymosin Beta-4,
17 but either due to human error or inadvertence failed to do
18 a particularly good job of doing so and left out one of
19 the amino acids, would the product they produce remain an
20 S2 prohibited substance in the sense that it would remain
21 a growth factor affecting muscle tendon or ligament
22 protein vascularisation or regenerative capacity?"

23 "A. Well, let me answer that question. That's
24 an important point, but it requires a parallel knowledge.
25 To give you an example, many peptides that in their full
26 length it's known for a long time that you can shorten
27 them by quite a lot and they still have the same
28 biological activity as TB500 as a short analogue shows."

29 A little further down, line 16, "The fact that
30 there is a short peptide analogue TB500, and I don't know
31 off the top of my head and I didn't look in enough detail

1 to know how short that is, but I believe it's quite a bit
2 shorter, which means that all the biological activity is
3 contained in part of the molecule."

4 So it is quite right for Mr Grace to say, and for
5 the written outline that we have just received to say,
6 that the word or phrase "TB500" came up during my
7 questions of Professor Handelsman, but I was not exploring
8 the issue of whether TB500 was a different product to
9 Thymosin Beta-4, and I was not alive to the fact that
10 the - this might be my naivety or it might be because it
11 wasn't spelled out in the outline, but I wasn't alive to
12 the fact that the players were to contend that there was a
13 difference between TB500 and Thymosin Beta-4 such that if
14 there was a finding of use of the former the charge
15 against them would fail.

16 CHAIRMAN: Even though the other substance is prohibited.

17 MR GLEESON: Yes. But it became clear during the course of the
18 cross-examination, and, in fairness, very clear, at
19 page 306, line 10 from Mr Grace, "You agree, do you not,
20 that TB500 is a different substance to Thymosin Beta-4?"

21 "A. It's a short analogue, so it is closely
22 related to it. It is designed to be closely related to
23 it, and it is."

24 "Q. But it's not the same?"

25 "A. It's not identical, no."

26 "Q. So when someone produces a manual that
27 equates the two that would be quite wrong?"

28 "A. Well, wrong depends in what context you mean
29 it. If they are meant to be used interchangeably with
30 each other, that's understandable because they are meant
31 to do the same thing. So in that sense I wouldn't call it

1 absolutely wrong. But if it is meant to say that these
2 are exclusive products, they aren't the same, no."

3 "Q. You have come to the conclusion, have you
4 not, that what the players consented to was not Thymosin
5 Beta-4 but in fact TB500?"

6 "A. Look, it's a weak conclusion because the
7 evidence is not allowing me to reach a conclusive
8 interpretation. But I think on balance that's the most
9 likely, yes."

10 "Q. That's based upon the dosage that was
11 specified on the consent forms."

12 "A. Yes. But I would call that pretty flimsy
13 evidence, frankly, and I just went on balance towards
14 that. But it's certainly possible that it was actually
15 Thymosin Beta-4 rather than TB500."

16 "Q. But you can't say to any degree of certainty
17 in relation to either, can you?"

18 "A. Well, I don't think the report ever referred
19 to deciding one or the other as a matter of certainty.
20 Just on balance there was a little bit of indication from
21 the dosage regimen that it might have been TB500. But it
22 could well have been Thymosin Beta-4."

23 So based on that transcript - I must say I tend
24 to the view that he is relying on that article that's
25 attached to the 12 January report as containing that
26 dosage regime and only that. But I would like to explore
27 that with him.

28 CHAIRMAN: So what is the aspect that you want to explore with
29 him in relation to this issue as to how the two line up in
30 relation to each other?

31 MR GLEESON: Only this, that to put to him or ask him, "Is the

1 sole basis for you leaning slightly towards TB500 over
2 Thymosin Beta-4 the fact that the article on the
3 12 January email puts TB500 first in that compendious
4 phrase?" If his answer to that is, "Yes, I'm not
5 comparing and contrasting two dosage regimes. I am just
6 saying there is only one known to me, and it is for
7 TB500," then I'm clear. It sounds like along the Bar
8 table everyone is more clear than I am, and they,
9 I suspect, think that that is his sole reason. I think
10 that might assist the Tribunal to know the answer to that
11 question.

12 But at any rate that's part of how it became
13 clear during the cross-examination of Professor Handelsman
14 that this point was one that was seeking to be relied upon
15 by the players, the somewhat counterintuitive proposition
16 that the charge should fail because it was another
17 prohibited substance they took.

18 CHAIRMAN: Obviously we haven't got to any formal position as
19 far as their defence is concerned, but I have never
20 understood that that was the defence, that it was not the
21 substance alleged and another substance which is conceded
22 as a prohibited substance.

23 MR GRACE: Not the defence.

24 MR GLEESON: Well, it might be no more than that you can't be
25 sure.

26 CHAIRMAN: That it was the Thymosin Alpha.

27 MR HALLOWES: Just so that no-one is misunderstanding, the
28 defence is that it can't be established it was Beta-4, and
29 in due course I will be outlining what I say is
30 considerable uncertainty as to what it was.

31 CHAIRMAN: I certainly accept, Mr Hallows - we certainly

1 accept that the defence will be maintaining a strong
2 position that when all the circumstances are considered
3 the Tribunal can't be comfortably satisfied what these
4 people administered.

5 MR HALLOWES: Yes.

6 CHAIRMAN: When one takes account of the way in which they
7 operated.

8 MR HALLOWES: Thank you. I just wanted to make that - - -

9 CHAIRMAN: I well understand that argument. But I haven't had
10 an understanding - and in fairness to the defence they
11 haven't been asked to put forward formal details of
12 defence. I haven't had an understanding that there's no
13 violation because there might have been another prohibited
14 substance rather than the prohibited substance Thymosin
15 Beta-4.

16 MR GLEESON: Yes.

17 CHAIRMAN: But they are entitled to rely upon any defence that
18 is open on the basis of the evidence that's before the
19 Tribunal. There's no question about that.

20 MR GLEESON: Yes. If I might just stay with the transcript for
21 a little bit longer. At 342, when Mr Ihle took up the
22 reins, at line 20, "Although, based on the material you
23 have seen and the questions you have been asked to answer
24 in writing in this case, you think there's more than a
25 spectre of the possibility that TB500 is the substance
26 that we are talking about here rather than Thymosin
27 Beta-4."

28 "A. Yes, it's quite possible. But based on, as
29 I said, a weak inference based on the way in which it was
30 made up for dosing purposes."

31 "Q. So a weak inference but albeit the more

1 probable of the two if you are just comparing TB500 and -
2 - -"

3 "A. Yes, agreed."

4 We concluded from the totality of the
5 cross-examination, including those passages, that what
6 would likely be ultimately put - let me go back a step.
7 From the fact that it was positively put to Professor
8 Handelsman that it's more likely it was TB500 than
9 Thymosin Beta-4, we infer that it would have probably led
10 to a submission in closing that you can't be satisfied it
11 was Thymosin Beta-4 because it might have been Thymosin
12 Alpha and it might have been TB500, because Professor
13 Handelsman actually leans slightly towards TB500 and
14 that's not in the infraction notice.

15 CHAIRMAN: I understand.

16 MR GLEESON: As to the balance of our argument as to why an
17 amendment should be allowed, we have set the matters out
18 in the note of argument. There is one other transcript
19 reference I will take you to in that context, and that's
20 at 369. I think we pick that up in our note of argument,
21 but at the top of 369, Mr Ihle says to Professor
22 Handelsman, "You agree with me that, in some of the
23 marketing material you've seen, Thymosin Beta-4 and TB500
24 are used interchangeably as if they are describing the
25 same substance, but in fact as you have identified one is
26 quite different to the other. One is seven amino acids
27 long and the other is 43?"

28 The professor answered, "Yes, that's a much more
29 forgivable mistake because they are really two versions
30 of trying to do the same thing. In that sense they are
31 much more reasonably considered interchangeable. But

1 that's not the case for Thymosin Alpha-1 and Thymomodulin
2 which are totally different substances."

3 We recognise that what Professor Handelsman says
4 there, significantly in line 7, is it's a mistake to use
5 them interchangeably, and, when you think of a seven amino
6 acid versus a 43 amino acid compound, you can see why he
7 uses that word "mistake". But he says that it is - the
8 use of them interchangeably can be considered reasonable,
9 there in line 9, in that sense.

10 So we aren't particularly troubled by whether the
11 first alternative, that is a clarification, or the second
12 alternative, being an amendment of the particulars, is the
13 course adopted. But we do urge the Tribunal to adopt one
14 of those two courses.

15 We press with some gravity the proposition we
16 advance in paragraph 16 about the potential for absurdity.
17 We see our role as counsel assisting in this matter as
18 doing what we can to avoid avoidable problems. This seems
19 to be an avoidable problem. It also would seem to me, in
20 the absence of a ruling to the effect that we seek, to
21 place an added burden on the Tribunal in its final award
22 where there would be no doubt heated debate about whether
23 the use of Thymosin Beta-4 alone in the existing
24 infraction notice sufficiently captures TB500. It's an
25 issue better addressed now.

26 I won't attempt to address the matters that have
27 been raised in the written outline we just received and
28 would appreciate the opportunity to address that first
29 thing tomorrow morning, if that's convenient.

30 CHAIRMAN: Yes.

31 MR GLEESON: Thank you.

1 CHAIRMAN: Mr Holmes, do you want to say anything at this
2 stage?

3 MR HOLMES: Yes. PG-5, which Mr Grace handed up, has four
4 documents, one which is a six-page written submission, and
5 that's a submission; two is the case of Walsh v
6 Tattersall; three is the case of Woods v Legal Ombudsman;
7 four is a document headed, "Thymosin A (Thymosin Alpha,
8 Thymalfasin)". What follows is an expert report without
9 an expert putting his or her name or qualifications to
10 this. I don't recall it being shown to Professor
11 Handelsman. Professor Handelsman is under
12 cross-examination, and I would ask that that document be
13 returned to Mr Grace.

14 MR GRACE: It was disclosed by the AFL as being an expert
15 report they commissioned from Professor McKinnon.

16 CHAIRMAN: So the author is Professor McKinnon?

17 MR GRACE: And ASADA knows this.

18 CHAIRMAN: Do we know anything more about him?

19 MR GRACE: Mr Gleeson knows.

20 MR GLEESON: He flatters me there, Mr Chairman.

21 MR HOLMES: It's a document produced by the AFL from Professor
22 McKinnon, July 2013, but made some inaccurate claims in
23 it. So, in other words, "We're not calling this expert.
24 We say it's wrong anyway. But we will put it before you."

25 MR GRACE: No.

26 MR HOLMES: You made directions about the service of experts'
27 reports.

28 MR GRACE: This was served by the AFL.

29 CHAIRMAN: They are putting it forward on the basis of this
30 issue having arisen.

31 MR GLEESON: There might be some confusion due to the use of

1 the word "served". There was this disclosure debate that
2 preceded the start of the hearing - who should give the
3 other side what documents they have in their possession,
4 whether they harm their case or assist their case. There
5 was a small number of documents in the AFL's possession
6 that were identified as not being already within the ASADA
7 disclosure. I think this was one of those. So it was
8 disclosed in the sense that it exists. It wasn't served
9 as in the sense of being relied upon as a piece of
10 evidence.

11 I must say, the name McKinnon rings a bell but
12 I don't think I have read it. So it is not a document
13 that we would seek to put into evidence. If it is
14 considered relevant and persuasive, that's something we
15 would have to take into account. But, as I understand the
16 players' argument, he's got it all backwards.

17 MR GRACE: The whole point of putting this in was to emphasise
18 the very last line of the document of Professor McKinnon's
19 that he says that Thymosin A or Thymosin Alpha is often
20 referred to as TB500. Now, we accept that's not right.
21 That's a mistake.

22 But the point that we are making in the
23 submission is that the AFL, who issued the infraction
24 notice some 16 months after this document, was well aware
25 when this document was produced, which was July 2013, that
26 there was the existence of a substance called TB500 and
27 that it was different to Thymosin Beta-4 and it was
28 different to other substances. That's the point that we
29 are making and it is in the written submissions as to the
30 significance of that point. We don't seek to rely upon
31 the report otherwise.

1 MR GLEESON: I don't have any difficulty with that. If that's
2 the only use that's sought to be made of it, then that's
3 fine.

4 MR GRACE: See page 2 of our written submissions.

5 CHAIRMAN: I have just been corrected by my learned friend that
6 they changed the position with intentionally and
7 recklessly caused injury. I think that might have been
8 bound up with the fact that they changed the penalty
9 situation. When I was dealing with it, which was a long
10 time ago, it was the one maximum for - - -

11 MR GRACE: No, it was because it was duplicitous, as held by
12 the Court of Appeal. The legislation changed accordingly.

13 CHAIRMAN: But it was treated that way, wasn't it, up until
14 that ruling?

15 MR GRACE: Yes. Similarly, with the greatest of respect, sir,
16 the analogy to theft charges listing more than one charge
17 or sex charges listing more than one and drugs charges
18 listing more than one have all, as part of prosecutorial
19 practice, resulted in separation of counts, specifying
20 specific items.

21 CHAIRMAN: Even when it was only the one theft in the sense
22 that one occasion when the theft took place but multiple
23 items?

24 MR GRACE: Yes. The reason is you wouldn't know what the jury
25 was unanimous about and they may not be unanimous about
26 whether the burglar stole the TV or whether he stole the
27 computer. He's still guilty of theft and burglary, but in
28 terms of penalty you wouldn't know.

29 CHAIRMAN: Before it was a matter for the sentencing judge to
30 determine as to what he considered to be the situation
31 with respect to those matters to determine the penalty.

1 MR GRACE: Yes.

2 CHAIRMAN: But I'm just demonstrating the fact that I have been
3 out of the jurisdiction for a long time. We are just a
4 bit concerned about where all this is getting to, to be
5 honest. This seems to be a pretty major issue that's
6 arisen. We are getting presented with a lot of material
7 about it to make a decision. We don't want to be rushed
8 into making any decision about this. Also we want to be
9 satisfied that particularly the sort of scientific basis
10 for this has been properly covered before we make any
11 decision.

12 Can I ask counsel what's proposed in relation to
13 the argument about the admissibility of these statements,
14 in terms of the timing of that?

15 MR HOLMES: This is the voir dire?

16 CHAIRMAN: Yes.

17 MR HOLMES: We haven't received a list of what matters are
18 objected to. So we would be arguing in the dark, so to
19 speak, about what the principles are and their
20 application. It depends on where we are at. We did
21 produce Mr Aaron Walker's affidavit about the Charter and
22 Alavi statements. But there's the Earl statement.
23 There's Mr Del Vecchio. They are all in different
24 circumstances.

25 CHAIRMAN: Looking at where we are at with the proceedings,
26 Mr Holmes, you essentially having - - -

27 MR HOLMES: Finished my opening.

28 CHAIRMAN: - put your case through your opening, it would
29 naturally follow on with Mr Gleeson, who has raised that
30 application at that point, and then the defence. It seems
31 to be the logical position to deal with the statements in

1 terms of hearing the argument, hearing any evidence on
2 voir dire and us making a decision about the statements.

3 Quite frankly, what we would like to do is as
4 part of that exercise also decide this issue of the
5 question of what the current particularisations embrace
6 and, if they don't embrace the other substance, there
7 should be leave to amend the infraction notice to allege
8 the other substance as an alternative. Bound up with that
9 is I think the desirability of having some more evidence
10 from the professor, particularly if we are being asked to
11 make some definitive decision at this point of time,
12 whereas otherwise that would be part of the ultimate
13 decision where we have plenty of time to reflect on it.

14 So I think we are really in your hands now in
15 terms of where we proceed with this matter. I think it's
16 best for the next step to be - and we may need to break
17 for this to be put in place - to proceed with this voir
18 dire and at the same time pick up any additional evidence
19 that's required on the issue of this ruling or amendment,
20 and of course have opportunity for you and Mr Grace and
21 Mr Hallows to address us with respect to the amendment
22 issues and it also gives us a chance to properly consider
23 the material that's being put before us.

24 Bearing in mind the potential implications, it's
25 just not something we are going to do on the run. I might
26 have done it on the run when I was 52 or 53. But I'm not
27 going to do it when I'm 74, to put it bluntly. My
28 colleague, he's older than me but his brain is working
29 faster. But I think even he says, "No, all the red lights
30 go up about us doing something on the run as far as this
31 is concerned, bearing in mind the nature of these

1 proceedings, their consequences, their importance."

2 My colleague is saying it might be worthwhile
3 hearing from Mr Grace now, if he wishes to address us now
4 on his submission - - -

5 MR HOLMES: This is the short outline of their case?

6 CHAIRMAN: No, in relation to this amendment, or whether he
7 would prefer to leave it to another time.

8 MR GRACE: Could I perhaps just defer a direct answer to that
9 question by raising a matter that arose as a result of
10 your discussion with Mr Gleeson as to how the case is
11 being put?

12 CHAIRMAN: Yes.

13 MR GRACE: You may recall I said, "No, it's not," or words to
14 that effect. I interjected.

15 CHAIRMAN: You were taking a different position.

16 MR GRACE: And the reason is this. As we understand the case,
17 the first lot of the substance alleged to be Thymosin
18 Beta-4 was purchased by Charter from GL Biochem in early
19 December 2011. He didn't bring that back with him to
20 Australia. He didn't declare it to Customs. He did
21 declare some substances to Customs, although we don't have
22 any declaration that's been provided to us, and I don't
23 think ASADA's got it.

24 Some time later, on or about 28 December 2011, a
25 quarter of a gram of Thymosin Beta-4 materialised by some
26 delivery system, which is unknown, to Mr Alavi. That was
27 said to form the basis of the origin of 26 vials of
28 Thymosin Beta-4 that was compounded by Alavi and provided
29 to Dank along with I think it was 20 vials of Hexarelin on
30 or around 22 or 23 January 2012. I'm not quite sure of
31 the exact date. The 18th, I'm told.

1 There is some issue about whether it was 26 vials
2 or whether it was 34 vials, because there was an invoice
3 for eight vials that was issued and later rescinded. But
4 put that to one side.

5 Now, the dosage is a really important factor.

6 CHAIRMAN: Yes. I understand that.

7 MR GRACE: The reason that dosage is a really important factor
8 is because it would be impossible for the number of
9 injections that were said to have been given to the
10 players, which on the consent forms would amount to once
11 every week for six weeks and then once every month
12 thereafter times 34 - so we are talking about let's say it
13 was over six months, we are talking around about 12
14 injections per player, times 34, that comes to 408; 408
15 injections of Thymosin Beta-4. Impossible from a quarter
16 of a gram compounded into the 3 ml vials that were
17 suggested. So how did this happen?

18 CHAIRMAN: Where did it come from?

19 MR GRACE: Where did it come from? The next event,
20 18 February, according to Alavi's records, one gram of
21 Thymosin is delivered to his compounding pharmacy,
22 unaccompanied by any certificate of analysis. I forgot to
23 mention that in December there was no certificate of
24 analysis.

25 MR HOLMES: None that's available now, not that it was supplied
26 without the certificate. None that's available now. No
27 evidence that it wasn't supplied with it.

28 MR GRACE: But no evidence that it was. We don't have it.

29 ASADA hasn't got it. We haven't got it. That's December.
30 In February we get the delivery apparently of one gram of
31 Thymosin unaccompanied by a certificate. The certificate

1 arrives some time later doctored. Whether it's related to
2 that substance, Professor Handelsman's got great
3 suspicions about it. We would submit to you ultimately
4 you ought not accept it.

5 CHAIRMAN: That's the one you say was fabricated.

6 MR GRACE: Yes. Can I say between that time there is no
7 evidence of any compounding of that substance. There is
8 no evidence that that substance, if it was compounded, was
9 given to Dank. There is no evidence that Dank was billed
10 or Essendon was billed for any substances from Alavi in
11 relation to Thymosin subsequent to 18 February. There is
12 no evidence, other than suggested inference, that Dank got
13 hold of Thymosin from Alavi somehow - if it was
14 compounded, of which there is no evidence - and used that
15 to supplement the supply that he had from the January
16 delivery.

17 We know that in April Alavi goes to Bio21 and
18 pays them \$15,000 to subscribe to their service. We know
19 that Vania Giordani goes to Bio21 at various points in
20 time over the next months and takes along what she says
21 are particular substances and has them analysed by use of
22 their machine. We know that there are documents produced
23 by Alavi on Bio21 letterhead which are forged as to
24 substances - that hasn't come through yet. On Bio21
25 letterhead, purportedly from Bio21 but produced by Alavi.
26 We know that.

27 We don't know how much of the one gram, or how
28 much of a quarter of a gram if it was from that source,
29 was the source of the material that was purportedly tested
30 by Bio21. The amount that would be required to make an
31 effective test is unknown. So we don't know how much you

1 take out of the equation in terms of weight, whether a
2 quarter of a gram or the one gram amount, which then
3 affects the amount of injections and product you can get,
4 not to mention wastage, and that's a different issue, in
5 the compounding.

6 But as part of ASADA's case they say that this
7 woman, Vania, goes to Bio21 with some remnant of Thymosin
8 Beta-4 and has it tested. That's where you get the
9 molecular weight reading of 4971, which is above the 4963,
10 which is said to be the molecular weight of Thymosin
11 Beta-4. Professor Handelsman gave some evidence about
12 that.

13 We know that Vania says that in June - by the
14 way, she's done this in May. We know from the video that
15 Mr Alavi says that he doesn't dispense anything until it's
16 been properly tested and characterised and all the
17 necessary checks are done to protect people's health. We
18 know that Vania, when she's questioned - and I might say
19 Thymosin Alpha was also tested at Bio21 at around about
20 the same time. Sorry, later.

21 We know that Vania says that she compounds
22 Thymosin cream from June onwards, I think it is. Thymosin
23 cream is then dispensed to various purchasers. There is
24 no mention of compounding vials of Thymosin Beta-4 for
25 Dank or for anyone else.

26 So that's position. There's no mention of TB500
27 anywhere, except when we come to Professor Handelsman and
28 except for when Mr Alavi on 12 January has no idea how to
29 compound whatever he's been given and is running around or
30 making phone calls, sending emails to Dank, to Charter,
31 "Help me," and Charter gets something off the internet,

1 which is that document that Mr Holmes and Mr Gleeson have
2 referred to, where there's written "Thymosin Beta-4
3 (TB500). This is how you do it." He then proceeds to do
4 something with it and produces these vials.

5 So we understand the case to be that the one gram
6 of allegedly Thymosin Beta-4 that was delivered on
7 18 February is Thymosin Beta-4 and nothing else; that the
8 quarter of a gram that was delivered in December was
9 Thymosin Beta-4 and nothing else. That's the way the case
10 has been put. Mr Holmes has never suggested in his
11 five-day opening that it's anything else.

12 Now the AFL, who's not presenting the evidence,
13 comes in over the top and says, "Well, we want to amend
14 this infraction notice because, well, it may be the case
15 that it was TB500 based upon the dosage contained in that
16 internet document that Mr Charter has produced." It's
17 such a flimsy basis.

18 Might I add this. We have, as you have now,
19 received this huge mass of material. We have gone through
20 it in detail. It's taken us weeks and months to do this.
21 We have been pressing for materials to be provided to us,
22 and they are still coming. Nowhere in the materials,
23 until we got the second Handelsman report in which there
24 was no suggestion that the substance was TB500, it was
25 merely a compendious report listing all the - this is the
26 3 December document I'm talking about, listed all the
27 various peptides and gave characteristics of them. But
28 nowhere was it suggested that that report was going to be
29 the basis of some claim that the substance could be TB500,
30 because we have never investigated TB500. We have never
31 looked at any scientific literature as to the effect of

1 TB500. We have never gone to the various websites,
2 neither has ASADA it seems, because we have seen
3 Mr Mullaly's product, as to where you can buy TB500 or if
4 you can buy TB500 at all. It may not be able to be
5 purchased anywhere in the world.

6 I add a caveat. We had Professor Handelsman
7 saying in his further report of 11 December that one of
8 his reasons for interpreting a text message in a
9 particular way was because you can't purchase
10 Thymomodulin. We know from Mr Mullaly, thanks to his
11 research, that you can purchase tonnes of the stuff -
12 literally tonnes of the stuff - from certain companies in
13 China as of this day. So Thymomodulin can be readily
14 purchased. But there's been no such research done in
15 relation to TB500.

16 So it's creating a spectre of a huge tangent
17 having to be developed and investigated in this case as to
18 whether it's possible that you can purchase TB500 from
19 some source. There is no suggestion on any of the
20 analyses certificates or any of the Bio21 documentation
21 that what's been analysed is TB500. No suggestion.

22 MR HOLMES: Can I respond when Mr Grace has finished.

23 MR GRACE: No player has ever been asked about TB500.

24 CHAIRMAN: It seems to have arisen out of the responses given
25 by the professor when he was being asked to give his
26 opinion about what was being referred to when there was a
27 reference to Thymosin in certain circumstances, and it was
28 then that the professor introduced 500 when he was also
29 referring to Beta-4, and then further questioning
30 developed around that as to, "Well, is it more likely that
31 it was 500 than Beta-4?" But that's all predicated on his

1 giving an opinion on certain - well, it was conversations
2 that were put to him, as I recall.

3 MR GRACE: Mr Robinson was asked about it on 8 August 2013,
4 TB500. Mr Alavi was interviewed about it, specifically
5 queried about it, on 19 September 2013. So it was in the
6 minds of the investigators 18 months ago. This is not a
7 new development as, with respect, you might have thought
8 from Professor Handelsman's report. It's not. This is a
9 matter that's been investigated. If there was any merit
10 to the suggestion it was TB500 you can be sure, with the
11 way ASADA has prepared this case and investigated it, that
12 we would have received some evidence about it.

13 CHAIRMAN: And it would have been alleged.

14 MR GRACE: Yes. Now the AFL, who hasn't been responsible for
15 this investigation, comes along over the top and seeks to
16 impose upon the players and, if I may say so with respect,
17 the panel the added obligation and responsibility of
18 looking at whether or not this was TB500. The players are
19 not going to allege that they took or concede that they
20 took a prohibited substance other than Thymosin Beta-4.

21 CHAIRMAN: No, I understand that. Their position has always
22 been that anything they took was lawful.

23 MR GRACE: You may not have read this, but there is an
24 extensive report that was produced in March 2014 by
25 Mr Walker, the principal investigator. In it he says
26 that - this is the conclusion that he makes - you can't be
27 sure what the players were given. In his opinion, it was
28 either Thymosin Beta-4 or Hexarelin. But there's no
29 suggestion that we are being charged with an alternative
30 of Hexarelin. Hexarelin's banned. Professor Handelsman
31 refers to it. So we would say as a matter of fairness, a

1 matter of justice, natural justice, we should not have
2 this imposed upon us.

3 I have said all this in opening in relation to
4 the submissions. But you need to understand that
5 background, members of the panel, to appreciate where this
6 fits into the whole equation that's been suggested.

7 I'm happy to defer the balance of any argument to
8 tomorrow on this topic. But I would have thought that
9 what I have said so far as given you the flavour of why we
10 say it's so unfair and so improper for this to occur,
11 forgetting about issues of form or substance in terms of
12 pleadings.

13 CHAIRMAN: Yes.

14 MR GRACE: It's unfair ab initio for this to come in at this
15 late stage.

16 CHAIRMAN: All right. Mr Holmes, you want to respond to that?

17 MR HOLMES: I do.

18 CHAIRMAN: Mr Hallowes, do you want to - - -

19 MR HALLOWES: I just concur with what Mr Grace has said. Can
20 I indicate we certainly wouldn't be putting at the end of
21 the case that it might have been TB500, therefore the
22 players should be found not to have committed an
23 infraction. But the evidence from Professor Handelsman,
24 as I understand it, in a sense comes out of context, and
25 that's not his fault. He's only asked a single question.
26 He has a very limited amount of material. ASADA's
27 investigation has all the material. They claim it points
28 to Thymosin Beta-4, and that's what the allegation is.

29 CHAIRMAN: Yes. Obviously that's why the infraction notice was
30 framed in the way it was, because they considered that
31 their material pointed to that particular prohibited

1 substance.

2 MR HALLOWES: I don't understand from Mr Holmes's opening or
3 anything he has said that he is seeking to change and say,
4 "Look, it might have been Thymosin Beta 500. We're not
5 sure." As I understood it, they still maintain it was
6 Thymosin Beta-4.

7 CHAIRMAN: Yes, that's my understanding.

8 MR GLEESON: Sir, can I just speak to the process. It's not
9 entirely clear to me why Mr Grace is seeking to fragment
10 his submissions. He said he was ready to meet the
11 application and there is time, and I don't think I raised
12 anything novel. We would say that he should make his
13 submissions - we need efficiency above all else - and then
14 Mr Holmes and if I have an opportunity to reply tomorrow
15 morning, otherwise the same problem might arise tomorrow
16 where, with the benefit of the night to think about
17 something new, we get some further delay due to the
18 further need to consider and take on board what Mr Grace
19 has said. But he has said he is ready to make his
20 submissions and we invite him to do so.

21 CHAIRMAN: I think we would be helped, if I may say so,
22 Mr Gleeson, by hearing from Mr Holmes in response to those
23 matters that Mr Grace has just raised with respect to the
24 way the case is put.

25 MR HOLMES: This case arises out of the obligation in the AFL
26 Anti-Doping Code 11.2(a). It's each player's personal
27 duty to ensure that no prohibited substance enters his
28 body. You don't have to have intent, you don't have to
29 have fault, negligence, you don't have to have knowing
30 use, you don't have to have increased performance. We say
31 the evidence points to them using Thymosin Beta-4.

1 How is the case put? You have asked for the
2 facts, matters and circumstances. We started with that
3 skeleton document of 18 milestones or signposts, and
4 Mr Grace has gone through it. But in broad terms Mr Dank
5 comes down to Essendon following Mr Robinson. They intend
6 to use Thymosin. He's using it in Sydney at Dr Khan's
7 surgery. When he comes down he hooks up with,
8 colloquially, Mr Charter, Mr Alavi. There is this blue
9 sky approach of Mr Alavi to how business is going to go.

10 Mr Grace refers to 0.25 of a gram, which we went
11 through in meticulous detail about, coming from GL
12 Biochem. What Mr Grace doesn't refer you to is PG-6, on
13 28 November Charter obtains 10 grams of Thymosin. He goes
14 out of his way when he's talking to Mr Hargreaves to say,
15 "That must be Thymosin Alfa. Must be Thymosin Alpha." We
16 would say no, when you now look at it that's Thymosin
17 Beta-4. We come through. We have the compounding of
18 Thymosin Beta-4. We have the delivery to Dank on
19 18 January at the Essendon Football Club. By the way, on
20 6 December - could I hand up an email. This is the email
21 that came to light and came up this afternoon while we've
22 been talking.

23 CHAIRMAN: Have the others seen it?

24 MR HOLMES: No, no. Remember Mr Del Vecchio was talking to
25 Mr Williams and Mr Charter about buying into the
26 Dr Ageless business, and that's how he found out about
27 peptides. There is a meeting on 6 December. The agenda
28 items, "China received hormones Thursday". That would tie
29 in with the purchasing contract of 28 November.
30 "Analysis. Full range of peptides. GMP" - that's the
31 important thing - "in China, peptide manufacturer, and

1 also non-GMP FSANZ-like compounds by the peptide market is
2 booming. HGH is expensive, limited, et cetera. 45 plus
3 years." That must be the market they are aiming at.
4 "Costs and clinical symptoms."

5 Then if you go down to item 17, "Steve Dank, the
6 fitness trainer at Essendon Football Club, publicity man
7 needed for Dr Ageless. Mario associated with this club."
8 Mr Hargreaves or Mr Charter invited Mario into their
9 discussions with Mr Charter. We asked for Mr Mario's
10 name. We haven't been told it. Mr Hargreaves doesn't
11 know his identity. But it turns out that Mario, we
12 suspect, is a Mario who is a director of Essendon -
13 sorry, Essendon supporters group. His surname is - he's
14 never said he didn't know what he was but he wouldn't
15 provide his identity. We understand, and Mr Hargreaves
16 can correct us about this, that Mario's surname is Biasin.
17 Anyway.

18 So we come to December, and they have got
19 10.25 grams. All of the text messages at that time are
20 all Thymosin Beta-4.

21 We come through to 18 February, when one gram of
22 Thymosin is made up. We also received an email today.

23 Could that first one be marked?

24 CHAIRMAN: Yes.

25 MR GRACE: We object to this.

26 CHAIRMAN: We will mark it for identification, Mr Grace, at
27 this point.

28 MR GRACE: We note it's from Mr Del Vecchio today, 1.44 pm, who
29 came along yesterday and refused to answer questions.

30 CHAIRMAN: He might have had a change of heart.

31 MR HOLMES: We didn't ask for this. This was just sent.

1 MR GRACE: As discussed by Aaron Walker.

2 MR HOLMES: He spoke to Aaron and said, "I've got some emails
3 to send you", or something along those lines.

4 CHAIRMAN: We can sort that out as to how it came about.

5 I will mark it AS-19 for identification. It is an email
6 of 14 January.

7 #EXHIBIT AS-19 - (For identification). Email from Mr Del
8 Vecchio of 14 January 2015, No. 1.

9 MR HOLMES: Again, we are not changing the 18 signposts. We
10 are in those signposts. We come to February and we get
11 another email sent from Mr Del Vecchio. Mr Charter has
12 ordered Thymosin Beta-4, 2,000 mg. I hand up that email.
13 That is an order - sorry, gets a price on 20 January and
14 it's checked on 20 January. There was an attachment with
15 that email. Again, this is still part of the unfolding
16 circumstances of Mr Charter and Mr Alavi and Mr Dank
17 obtaining peptides, and there is that monthly schedule
18 that we have referred to before. It's attached only to
19 the 14 January. So at that same time he's obtaining a
20 quote for 2,000.

21 CHAIRMAN: The date is something 2012, in Chinese.

22 MR HOLMES: If you start at the front, it's from Sergio Del
23 Vecchio.

24 CHAIRMAN: No, I understand that.

25 MR HOLMES: To Aaron Walker, on 14 January 2015. You see
26 there's an attachment, "Monthly peptide list". I think we
27 are familiar with that from AS-3. But the attachment
28 doesn't appear to be referred to in any of the other
29 emails. So we have the attachment which is that monthly
30 supply list.

31 CHAIRMAN: What I'm trying to ascertain, Mr Holmes, if you can

1 help me, is what's the date of the request by Mr Charter
2 for a price on the items that are listed?
3 MR HOLMES: 20 January.
4 CHAIRMAN: 2012.
5 MR HOLMES: 2012. So that's a day or two after the first
6 delivery to - appears to have been made to Essendon.
7 CHAIRMAN: The other document which is in columns.
8 MR HOLMES: Yes.
9 CHAIRMAN: Does that come with these, does it?
10 MR HOLMES: It came with the email on the front page at the top
11 of the page - - -
12 CHAIRMAN: So it came from Del Vecchio.
13 MR HOLMES: It came from Del Vecchio.
14 CHAIRMAN: Do we know what it refers to?
15 MR HOLMES: We know what it refers to because it appears
16 elsewhere in AS-3.
17 CHAIRMAN: Okay. That's all right. You needn't take us to it.
18 I was just trying to ascertain where it was. Again, as
19 this document has just emerged and counsel for the players
20 have not had an opportunity to consider it, it will be
21 AS-20, marked for identification, which is the email from
22 Mr Del Vecchio of 14 January, No. 2.
23 #EXHIBIT AS-20 - (For identification). Email from Mr Del
24 Vecchio of 14 January, No. 2.
25 MR HOLMES: So what we are dealing with is a circumstantial
26 case in 2015 with what documents we can obtain, and
27 this tribunal - - -
28 CHAIRMAN: Particularly in relation to 2011 and 2012.
29 MR HOLMES: That's right.
30 CHAIRMAN: I understand that.
31 MR HOLMES: That's why we point to the admissions by Mr Dank to

1 Mr McKenzie, "I gave them Thymosin Beta-4 - oops, I want
2 to recant that." That's why we point to covering his
3 tracks by backdating the Thymomodulin document. It's
4 those facts, matters and circumstances which, when you add
5 them all up, sure, there might be an attack at one
6 document here and one document there, and trying to add
7 them up and up and up, as Mr - I think it was Mr Little
8 who said, "If we undermine their case rather than it's not
9 a case about determining the truth; it is for ASADA" - so
10 we would say the circumstantial case is as Mr Grace has
11 outlined, but he has only referred to some of the
12 evidence.

13 CHAIRMAN: Mr Grace has put emphasis on this, that as far as
14 the evidence that we have received it only indicated or
15 there was only evidence of a small amount of Thymosin
16 Beta-4 having been received by Alavi which could be used
17 for the Essendon treatments and that that amount was
18 clearly insufficient to be able to complete the number of
19 treatments that the players had based upon the consent
20 forms, et cetera.

21 Certainly we understand your case, and correct me
22 if I'm wrong, that the case is that the supply of the
23 Thymosin Beta-4 to Essendon and then to the players came
24 through - Dank is involved, obviously, but came through
25 Charter and - - -

26 MR HOLMES: Charter and Alavi.

27 CHAIRMAN: Alavi.

28 MR HOLMES: In this joint venture partnership they had.

29 CHAIRMAN: Yes. But what you say is before you didn't
30 necessarily have all the documents that might relate to
31 that supply.

1 MR HOLMES: And we still don't.

2 CHAIRMAN: But the Tribunal could still draw an inference in
3 terms of that supply coming from that source, and you have
4 now got some further information in relation to possible
5 acquisition by Charter of further amounts of this
6 particular substance, which, if that evidence was relied
7 upon, would support the other evidence in terms of the
8 ability to be able to supply to Essendon to carry out the
9 treatment.

10 Clearly, I can understand the players' argument,
11 well, they don't want the Tribunal to draw an inference
12 that there was this supply; where's the evidence that
13 there was the capability to make a supply of that quantum,
14 it not being suggested that it might have come from some
15 completely other source to Essendon, say, through Dank.
16 It's being put that the source has been organised by Dank
17 through Charter, and then Alavi has been involved.

18 So that's their position, which we well and truly
19 understand. What you are saying is, "Well, we have got
20 what we can in terms of documentation. It indicates that
21 there's some Thymosin Beta-4 coming through. When you put
22 it all together, you can reasonably infer that Thymosin
23 Beta-4 was supplied to enable the injections to take
24 place."

25 MR HOLMES: Yes.

26 CHAIRMAN: Look, I don't know about everyone else, but I've had
27 enough for today, I might say. I think we would be
28 assisted - I mean, obviously we can hear your submissions,
29 Mr Grace, in the morning.

30 MR GRACE: Yes.

31 CHAIRMAN: We certainly would be assisted in trying to resolve

1 all these issues. If counsel could have some discussions
2 about just how we are going to proceed with dealing with
3 the admissibility of the statements and also perhaps have
4 some discussion as to what the view is in terms of the
5 need for further evidence to enable the Tribunal to
6 properly determine the matters raised by Mr Gleeson.

7 All right. Thank you. 10 o'clock.

8 ADJOURNED UNTIL THURSDAY, 15 JANUARY 2015