IN THE AFL ANTI-DOPING TRIBUNAL

IN THE MATTER OF AN ALLEGED VIOLATION OF THE AFL ANTI-DOPING CODE BY [redacted]

[redacted] **(THE PLAYERS)**

DECISION

31 MARCH 2015

The Tribunal is not comfortably satisfied that any Player violated clause 11.2 of the AFL Anti-Doping Code.

BY THE TRIBUNAL

.....

David Jones (Chairman)

.....

John Nixon (Member)

.....

Wayne Henwood (Member)

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Attachments:

REASONS FOR DECISION

31 MARCH 2015

A. INTRODUCTION

1. The Australian Football League (**AFL**) at all relevant times, conducted and continues to conduct the elite Australian football competition (**the AFL competition**).

2. At all relevant times, the Essendon Football Club Ltd (**Essendon**) was and continues to be a participating football club in the AFL competition.

3. [redacted] (collectively, **the Players**) were, at all relevant times, each a player in the AFL competition conducted by the AFL and in particular participated as a player for Essendon in the 2012 AFL season.

4. Between November 2011 and September 2012 it is alleged that Mr Stephen Dank (**Mr Dank**) was a support person employed by Essendon as a Sports Scientist.

5. At all relevant times, the Gold Coast Suns Football Club (**the Suns**) was, and continues to be, a participating football club in the AFL competition.

6. It is alleged that in December 2010 Mr Dank was a support person employed by the Suns.

7. Matches in the AFL competition are played in accordance with the Laws of Australian football (**the Laws**).

8. Section 21 of the Laws applicable at all relevant times sets out the anti-doping policy in relation to Australian football. Consequently, the AFL Anti-Doping Code adopted by the AFL applies to the AFL competition.

9. The AFL Code in force at the time of the alleged violations was the AFL Anti-Doping Code of 1 January 2010 (**the AFL Code**). The AFL Code was amended on 7 March 2014, and some amendments relating to practice and procedure apply to these proceedings. All substantive matters are governed by the 1 January 2010 version of the Code.

10. At all relevant times, each of the Players was bound by a contract entered into by the player with Essendon and the AFL. Each player also signed a player registration application form. Consequently, at all relevant times, each of the Players was bound to comply with the AFL Code. This is admitted by the Players.

11. Clause 3.1(c) of the AFL Code provides that it applies to officials. By virtue of the definition of official in the AFL Code, it is alleged that the Code applied to Mr Dank when he was employed as a support person by Essendon and when he was employed in that capacity by the Suns. Consequently, it is alleged he was bound to comply with the AFL Code.

12. Infraction notices under the AFL Code have been issued by the General Counsel of the AFL to the Players, alleging the same violation against each player. An infraction notice under the AFL Code has also been issued by the General Counsel of the AFL to Mr Dank, alleging a number of violations of the AFL Code. Further details of the infraction notices are provided later.

13. By virtue of the AFL Code and the AFL Rules (October 2013) (**the AFL Rules**) the Disciplinary Tribunal, being the AFL Anti-Doping Tribunal, has jurisdiction to deal with any alleged violation of the AFL Code. Consequently, the AFL Anti-Doping Tribunal, as constituted by David Jones, Chairman, and John Nixon and Wayne Henwood, members (**the Tribunal**), has jurisdiction to hear and determine the violations alleged in the infraction notices. This is not disputed. Relevant provisions of the AFL Rules and of the AFL Code are referred to later. The Tribunal has been assisted by Mr Justin Hooper and Mr Myles Tehan of Counsel.

14. By virtue of Clause 4.2 of the AFL Code, the AFL is a party to these proceedings. Mr Jeffery Gleeson QC and Ms Renee Enbom, instructed by Minter Ellison, appear as Disciplinary Tribunal Counsel appointed by the General Counsel of the AFL pursuant to AFL Rule 42.10. In that capacity they represent the AFL in the proceedings.

15. The Chief Executive Officer (**CEO**) of the Australian Sports Anti-Doping Authority (**ASADA**) is represented by Mr Malcolm Holmes QC and Mr Patrick Knowles, instructed by the Australian Government Solicitor. The CEO, pursuant to the *ASADA Act 2006* (Cth) and the National Anti-Doping Scheme, which is prescribed in the *ASADA Regulations 2006* (Cth), has the right to present findings before the Tribunal. That right is also recognised by Clause 4.1 of the AFL Code.

16. This matter has proceeded on the basis that the ASADA CEO, through Mr Holmes QC and Mr Knowles, has the carriage of the case against the Players and Mr Dank (rather than Mr Gleeson QC and Ms Enbom on behalf of the AFL).

17. All of the players, except Mr [redacted] and Mr [redacted], are represented by Mr Grace QC and Mr Ben Ihle, instructed by Tony Hargreaves and Partners. Those two players are represented by Mr Neil Clelland QC and Mr David Hallowes, instructed by Robert Stary and Associates.

18. Mr Dank did not appear at the hearing. Further reference to his non-appearance is made later when discussing the hearing. The Tribunal considered it appropriate to proceed, in his absence, with the hearing of the alleged violations against him and the determination of those allegations.

19. A glossary to these reasons is attached as **Attachment A**, which sets out, in brief form, the relevant individuals and substances allegedly involved in the proceedings.

B. THE INFRACTION NOTICES SERVED ON THE PLAYERS

20. An infraction notice in the same form dated 14 November 2014 was served by the AFL on each player pursuant to Clause 13 of the AFL Code.

21. The nature of the alleged anti-doping rule violation is use of a prohibited substance in violation of clause 11.2 of the AFL Code in the form it existed at the time of violation (which was the 2010 version). Clause 11.2(a) provides:

It is each Player's personal duty to ensure that no Prohibited Substance enters his body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Player's part be demonstrated in order to establish an Anti-Doping Rule Violation for Use of a Prohibited Substance or Prohibited Method.

22. Clause 11.2(b) provides:

The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an Anti-Doping Rule Violation to be committed.

23. There is a footnote to clause 11.2(b), which provides:

It has always been the case that Use or Attempted use of a Prohibited Substance or Prohibited Method may be established by any reliable means. Unlike the proof required to establish an Anti-Doping Rule Violation under Clause 11.1, Use or Attempted use may also be established by other reliable means such as admissions by the Player, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Clause 11.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organisation provides a satisfactory explanation for the lack of confirmation in the other Sample.

24. The Tribunal set out further relevant clauses of the Code later.

25. The particulars of the violation alleged against each player are as follows:

(a) the prohibited substance used was Thymosin Beta-4 (**TB4**);

(b) the prohibited substance was administered by way of a series of injections; and

(c) the player received the injections between about January 2012 and September 2012.

C. THE INFRACTION NOTICE SERVED ON STEPHEN DANK

26. An infraction notice dated 14 November 2014 alleging a number of violations of the AFL Code (which was the 2010 version) was served by the AFL on Mr Dank pursuant to clause 13 of the AFL Code.

27. All of the allegations against Mr Dank relate to a period while he was bound by the AFL Code, either while at the Suns or at Essendon. Some of the people alleged to be involved in his violations were bound by the AFL Code (such as the Players); others were not. It is the status of Mr Dank, as a person bound by the AFL Code, which attracts the operation of the AFL Code, not the status of other people involved in his alleged violations.

C.1. Relevant clauses of the AFL Code

28. The relevant clauses of the AFL Code which are alleged to have been breached by Mr Dank are clauses 11.6(b), 11.7 and 11.8. Those clauses provide:

> *11.6(b) Possession by an Official In-Competition of any Prohibited Method or any Prohibited Substance, or Possession by an Official Out-of-Competition of any Prohibited Method or any Prohibited Substance that is prohibited Out-of-Competition in connection with a Player or training, unless the Official establishes that the Possession is pursuant to a Therapeutic Use Exemption granted to a Player in accordance with Clause 10 (Therapeutic Use) or other acceptable justification.*
>
> *11.7 Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method*
>
> *11.8 Administration or Attempted administration to any Player In-Competition of any Prohibited Method or Prohibited Substance or administration or Attempted administration to any Player Out-of-Competition of any Prohibited Method or any Prohibited Substance that is prohibited Out-of-Competition, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity*

involving an Anti-Doping Rule Violation or any Attempted Anti-Doping Rule Violation.

29. The Tribunal notes that clause 11.6(b) contains a footnote, which reads:

> *Acceptable justification would include, for example, a team doctor carrying Prohibited Substances for dealing with acute and emergency situations.*

C.2. Specific infractions alleged against Mr Dank

30. The Tribunal notes that the infraction notice issued to Mr Dank alleges various breaches of the NAD Scheme, and the equivalent provisions of the AFL Code (being clauses 11.6(b), 11.7 and 11.8 of the AFL Code). For convenience, the Tribunal refers to the relevant provisions of the AFL Code (which have been set out above). Accordingly, the infractions alleged against Mr Dank are as follows (the infraction numbers are contained in the infraction notice issued to Mr Dank):

Thymosin Beta 4 administration violations

Infraction 2A: *Administration of TB4 to various Essendon players between about January and September 2012, contrary to clause 11.8 of the AFL Code.*

Infraction 2B: *Attempted administration of TB4 to various Essendon players between about January and September 2012, contrary to clause 11.8 of the AFL Code.*

Infraction 2C: *Assisting, encouraging, aiding, abetting, covering up and/or other type of complicity in connection with the administration and/or attempted administration of TB4 to various Essendon players between about January and September 2012, contrary to clause 11.8 of the AFL Code.*

Hexarelin administration violations

Infraction 3A: *Administration of Hexarelin to various Essendon players between about January and September 2012, contrary to clause 11.8 of the AFL Code.*

Infraction 3B: *Attempted administration of Hexarelin to various Essendon players between about January and September 2012, contrary to clause 11.8 of the AFL Code.*

Infraction 3C: *Assisting, encouraging, aiding, abetting, covering up and/or other type of complicity in connection with the administration and/or attempted of Hexarelin to various Essendon players between about January and September 2012, contrary to clause 11.8 of the AFL Code.*

Thymosin Beta 4 and/or Hexarelin possession violations

Infraction 4A: *Actual possession at various times between about January 2012 and September 2012 of TB4 and/or Hexarelin in connection with players competition and/or training at Essendon, contrary to clause 11.6(b) of the AFL Code.*

Infraction 4B: *Constructive possession at various times between about January 2012 and September 2012 of TB4 and/or Hexarelin in connection with players competition and/or training at Essendon, contrary to clause 11.6(b) of the AFL Code.*

Infraction 4C: *Possession by purchase at various times between about January 2012 and September 2012 of TB4 and/or Hexarelin in connection with players competition and/or training at Essendon, contrary to clause 11.6(b) of the AFL Code.*

Infraction 4D: *Assisting, encouraging, aiding, abetting, covering up and/or other type of complicity in connection with the possession (actual, constructive and/or by purchase) at various times between about January 2012 and September 2012 of TB4 and/or Hexarelin in connection with players competition and/or training at Essendon, contrary to clause 11.8 of the AFL Code.*

Selective Androgen Receptor Modulator (SARM) possession violations

Infraction 5A: *Actual possession at various times between about January 2012 and September 2012 of a SARM in connection with players competition and/or training at Essendon, contrary to clause 11.6(b) of the AFL Code.*

Infraction 5B: *Constructive possession at various times between about January 2012 and September 2012 of a SARM in connection with players competition and/or training at Essendon, contrary to clause 11.6(b) of the AFL Code.*

Infraction 5C: *Possession by purchase at various times between about January 2012 and September 2012 of a SARM in connection with players competition and/or training at Essendon, contrary to clause 11.6(b) of the AFL Code.*

Infraction 5D: *Assisting, encouraging, aiding, abetting, covering up and/or other type of complicity in connection with the possession (actual, constructive and/or by purchase) at various times between about January 2012 and September 2012 of a SARM in connection with players competition and/or training at Essendon, contrary to clause 11.8 of the AFL Code.*

Thymosin Beta 4 (in injectable form) trafficking violations

Infraction 6A: *Trafficking in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties, namely Essendon and athletes of the club, TB4 in injectable form between about January 2012 and September 2012, contrary to clause 11.7 of the AFL Code.*

Infraction 6B: *Attempting to traffic in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties, namely Essendon and athletes of the club, TB4 in injectable form and as a claimed ingredient of a product*

called Humanofort, between about January 2012 and September 2012, contrary to clause 11.7 of the AFL Code.

Infraction 6C: *Assisting, encouraging, aiding, abetting, covering up and/or other type of complicity in connection with the trafficking in or attempted trafficking in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties, namely Essendon and athletes of the club, TB4 in injectable form, between about January 2012 and September 2012, contrary to clause 11.8 of the AFL Code.*

Hexarelin trafficking violations

Infraction 7A: *Trafficking in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties, namely Essendon and athletes and support persons of the club, Hexarelin between about January 2012 and September 2012, contrary to clause 11.7 of the AFL Code.*

Infraction 7B: *Attempting to traffic in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties, namely Essendon and athletes and support persons of the club, Hexarelin between about January 2012 and September 2012, contrary to clause 11.7 of the AFL Code.*

Infraction 7C: *Assisting, encouraging, aiding, abetting, covering up and/or other type of complicity in connection with the trafficking in or attempted trafficking in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties, namely Essendon and athletes and support persons of the club, Hexarelin between about January 2012 and September 2012, contrary to clause 11.8 of the AFL Code.*

Humanofort trafficking violations

Infraction 8A: *Trafficking in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties, namely Essendon and athletes, prohibited substances in a product known as Humanofort, namely IGF-1, IGF-2, MGF, FGF, Follistatin and TB4, between about January 2012 and September 2012, contrary to clause 11.7 of the AFL Code.*

Infraction 8B: *Attempting to traffic in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties, namely Essendon and athletes of the club, prohibited substances in a product known as Humanofort, namely IGF-1, IGF-2, MGF, FGF, Follistatin and TB4, between about January 2012 and September 2012, contrary to clause 11.7 of the AFL Code.*

Infraction 8C: *Assisting, encouraging, aiding, abetting, covering up and/or other type of complicity in connection with the trafficking in or attempted trafficking in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties, namely Essendon and athletes of the club, prohibited substances in a product known as Humanofort, namely IGF-1, IGF-2, MGF, FGF, Follistatin and TB4, between about January 2012 and September 2012, contrary to clause 11.8 of the AFL Code.*

Human Growth Hormone (hGH), SARMs, Hexarelin, MGF and CJC-1295 trafficking violations

Infraction 9A: *Trafficking in, by selling, giving, transporting, sending, delivering and/or distributing to a Carlton Football Club support person, one or more prohibited substances, namely Human Growth Hormone (hGH), SARMs, Hexarelin, MGF and CJC-1295, between about March*

2012 and October 2012, contrary to clause 11.7 of the AFL Code.

Infraction 9B: *Attempting to traffic in, by selling, giving, transporting, sending, delivering and/or distributing to a Carlton Football Club support person, one or more prohibited substances, namely Human Growth Hormone (hGH), SARMs, Hexarelin, MGF and CJC-1295, between about March 2012 and October 2012, contrary to clause 11.7 of the AFL Code.*

CJC-1295 trafficking violations

Infraction 10A: *Trafficking in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties, namely the Suns and support persons of the club, CJC-1295, in December 2010, contrary to clause 11.7 of the AFL Code.*

Infraction 10B: *Attempting to traffic in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties, namely the Suns and support persons of the club, CJC-1295, in December 2010, contrary to clause 11.7 of the AFL Code.*

Infraction 10C: *Assisting, encouraging, aiding, abetting, covering up and/or other type of complicity in connection with the trafficking in or attempted trafficking in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties, namely the Suns and support persons of the club, CJC-1295, in December 2010, contrary to clause 11.8 of the AFL Code.*

CJC-1295 complicity violation

Infraction 11: *Assisting, encouraging, aiding, abetting, covering up and/or other type of complicity in connection with the use*

or attempted use of CJC-1295 by a Suns player in December 2010, contrary to clause 11.8 of the AFL Code.

Hexarelin, SARMS, CJC-1295 and GHRP6 trafficking violations

Infraction 12A: *Trafficking in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties, namely in the sport of baseball, one or more prohibited substances, namely Hexarelin, SARMS, CJC-1295 and GHRP6, between February 2012 and March 2012, contrary to clause 11.7 of the AFL Code.*

Infraction 12B: *Attempting to traffic in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties, namely in the sport of baseball, one or more prohibited substances, namely Hexarelin, SARMS, CJC-1295 and GHRP6, between February 2012 and March 2012, contrary to clause 11.7 of the AFL Code.*

Infraction 12C: *Assisting, encouraging, aiding, abetting, covering up and/or other type of complicity in connection with the trafficking in or attempted trafficking in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties, namely in the sport of baseball, one or more prohibited substances, namely Hexarelin, SARMS, CJC-1295 and GHRP6, between February 2012 and March 2012, contrary to clause 11.8 of the AFL Code.*

CJC-1295, GHRP6, a SARM (s22), Hexarelin, MGF and IGF-1 trafficking violations

Infraction 13A: *Trafficking in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties who were customers of the Medical Rejuvenation Clinic, a prohibited substance or substances, including namely CJC-1295, GHRP6, a SARM (s22), Hexarelin, MGF, IGF-*

1 between November 2011 and September 2012, contrary to clause 11.7 of the AFL Code.

Infraction 13B: *Attempting to traffic in, by selling, giving, transporting, sending, delivering and/or distributing to a third party or parties who were customers of the Medical Rejuvenation Clinic, a prohibited substance or substances, including namely CJC-1295, GHRP6, a SARM (s22), Hexarelin, MGF, IGF-1 between November 2011 and September 2012, contrary to clause 11.7 of the AFL Code.*

D. OUTLINE OF THE CASE OF THE ASADA CEO

31. At the commencement of the hearing, the ASADA CEO tendered a statement providing a short outline of his case. It is helpful to refer to that outline. A brief summary follows.

32. The Players and Mr Dank were contractually bound by the AFL Code. That Code incorporates the prohibited list published and revised from time to time by WADA.

33. It is contended that the Players were injected with, among other substances, TB4 during the period from January 2012 to September 2012. During this period, urine and blood samples taken from some of the players were tested for the presence of prohibited substances. Those tests were not designed to detect TB4. None of the tests detected the presence of prohibited substances.

34. Notwithstanding the absence of any positive test result, it is contended by the ASADA CEO that the evidence establishes that one of the substances administered to the Players was TB4.

35. The ASADA CEO's case is one based on circumstantial evidence. Some of the circumstantial evidence is referred to in 27 paragraphs of the short outline provided by the ASADA CEO. It is not necessary at this stage to refer to the evidence that the ASADA CEO relies upon. That is done later when considering the ASADA CEO's case as finally presented to the Tribunal.

36. It is contended by the ASADA CEO that during the relevant period TB4 was a prohibited substance within the meaning of the prohibited list and the AFL Code applicable at the relevant time.

37. Apart from infractions relating to Mr Dank's alleged possession, and administration, of TB4, whilst at Essendon, it is contended by the ASADA CEO that Mr Dank committed other infractions of the AFL Code relating to other prohibited substances, namely CJC-1295, GHRP6, a SARM (s22), Hexarelin, Mechano Growth Factor, Insulin Like Growth Factor 1, Insulin Growth Factor (IGF-1), Insulin Growth Factor 2 (IGF-2), Fibroblast Growth Factor and Follistatin.

38. It is contended by the ASADA CEO that some, but not all, of the infractions alleged against Mr Dank relate to the supplementation program he conducted at Essendon. All, it is contended, occurred while he was bound by the AFL Code. In support of the ASADA CEO case against Mr Dank, a number of contentions are particularised in 7 paragraphs of the outline. There is no need to refer further to those contentions. That will be done later when considering the ASADA CEO's case as finally presented against Mr Dank.

E. OUTLINE OF THE CASE FOR THE 32 PLAYERS

39. Counsel for these players provided a written short outline of their case prior to the commencement of the hearing. It is helpful to refer to it. A brief summary follows.

40. It is contended that on the evidence the ASADA CEO has provided to the Players prior to the hearing, it cannot be established that any particular one of the 32 players was administered TB4 during the relevant period specified in each infraction notice.

41. It is contended that the evidence does not establish the necessary facts upon which the Tribunal could be comfortably satisfied in order to make a finding of the commission of the alleged anti-doping rule violations. Details of necessary facts are set out, it being made clear that their case was not limited to these facts. It is not necessary to refer to these facts at this stage. They will be referred to when the case as finally presented by the 32 players is being considered.

42. It is also contended that any suggestion that reliance can be placed on any statement made by Mr Dank to any of the 32 players that he was injecting them with any particular substance (including TB4) must be treated with the greatest deal of scepticism. Details of reasons for this are stated, it again being made clear that their case is not limited to those reasons. Again it is not necessary to refer to those reasons at this stage. They will be referred to when the case as finally presented by the 32 players is being considered.

43. Mr Grace QC, for the 32 players, expanded orally at the hearing on the written short outline. There is no need to set out what he said. The matters he outlined will be referred to, as with the written outline, when the case finally presented by the 32 players is being considered.

F. OUTLINE OF THE CASE FOR THE 2 PLAYERS

44. Identical written responses by each of these players was provided to the Tribunal prior to the hearing. A brief summary of the responses follows.

45. It is contended that at all relevant times each player was informed and reasonably believed that any substance administered to him complied with current WADA anti-doping policies and guidelines. At no relevant time were the players informed, nor did they believe, they were being injected with TB4.

46. There is no issue that the players were injected by Mr Dank at Essendon, but it is not accepted they were injected with TB4. It is contended that the evidence is incapable of satisfying the Tribunal that the players were injected with TB4, which the Tribunal will have to be satisfied is a prohibited substance under the AFL Code.

47. Other matters are raised which are not necessary to mention at this stage. They will be considered when the Tribunal is considering the case finally presented by these players at the conclusion of the hearing.

48. Mr Clelland QC, for these players, expanded orally on their responses at the hearing. The matters he raised will also be considered when the Tribunal is considering the case finally presented by these players at the conclusion of the hearing.

G. THE AFL ANTI-DOPING CODE

49. The AFL Code in force in 2012, when violations by the Players and Mr Dank are alleged to have occurred (and in 2010 when a violation is alleged against Mr Dank), was the AFL Anti-Doping Code of 1 January 2010. That is the Code applicable to substantive matters, including the alleged violations. The Code was amended on 7 March 2014, and some procedural amendments apply to these proceedings but not to matters of substance.

50. The AFL Code is central to these proceedings. It is necessary to refer to some of its provisions. Reference is also made to the WADA prohibited lists which form part of the AFL Code.

G.1. Clause 1 - objectives of the 2010 Code

51. Clause 1(a) provides that:

> *the AFL subscribes to a philosophy and adopts a stance that ensures that the AFL Competition is conducted upon the basis of athletic prowess and natural levels of fitness and development and not on any pharmacologically enhanced performance.*

52. Clause 1(d) provides that:

> *the AFL subscribes to a philosophy and adopts a stance that sets an example for all participants in the sport of Australian Football by condemning the use of performance enhancing substances.*

G.2. Clause 2 – definitions in the 2010 Code

53. The ASADA CEO relies on the definition of an "official" for the application of the Code to Mr Dank.

54. Clause 2.1 defines "Official" to mean:

> *a coach, trainer, manager, agent, team staff, official, medical or para-medical personnel, parent or any other Person working with, treating or assisting a Player participating in or preparing for the AFL Competition.*

G.3. Clause 3 - Application of the 2010 Code

55. Clause 3.1(a) provides that the Code applies to Players, whether in or out of competition.

56. Clause 3.1(c) provides that the Code applies to Officials.

G.4. Clause 5 – Prohibited Classes of Substances and Prohibited Methods

57. The ASADA CEO relies on the specific warnings given to the Players in clause 5 of the 2010 Code.

58. Clause 5.3(a) of the Code provides that:

> *Persons to whom this Code applies are specifically cautioned the WADA Prohibited List describes, amongst other things, prohibited classes of substances. The naming of substances in the WADA Prohibited List is by way of example only and the fact that a substance is not so named does not affect its prohibition if the substance is within a prohibited class.*

59. Clause 5.3(c) of the Code provides that:

> *Persons to whom this Code applies are specifically cautioned it is the obligation of each Person to whom this Code applies to inform himself of all substances and methods prohibited under this Code. It is not a defence to any claim that a Person has breached this Code for that Person to contend:*
>
> (i) *ignorance that a substance or method is prohibited*;
>
> (ii) *an honest and reasonable, but mistaken, belief that a substance or method is not prohibited under this Code*;
>
> (iii) *lack of intention to use or administer a Prohibited Substance or Prohibited Method*;
>
> (iv) *inadvertent use or administration of a Prohibited Substance or Prohibited Method*;

(v) *that the substance or method was used or administered for therapeutic purposes unless permission has been given on behalf of the AFL under clause 10; or*

(vi) *that the substance or method in question did not enhance the performance of the Player concerned or was otherwise not performance enhancing.*

G.5. Clause 6 – The WADA Prohibited List

60. Clause 6.1 provides that:

> *This Code incorporates the WADA Prohibited List which is published and revised by WADA and changes from time to time.*

G.6. Clause 11 – Anti Doping Rule Violations

61. Clause 11 addresses the ways in which a person can contravene the 2010 Code. Clause 11.2 deals with the anti-doping rule violation alleged against the Players in this proceeding. For convenience, the Tribunal repeats the text of the clause 11.2 below.

G.6.1. Clause 11.2 - Use or Attempted Use by a Player of a Prohibited Substance or a Prohibited Method

62. Clause 11.2(a) of the Code provides that:

> *It is each Player's personal duty to ensure that no Prohibited Substance enters his body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Player's part be demonstrated in order to establish an Anti-Doping Rule Violation for Use of a Prohibited Substance or Prohibited Method.*

63. The ASADA CEO's case against the Players is that they have violated clause 11.2 by use of a prohibited substance being TB4.

64. Clause 11.2(b) of the Code provides:

> *The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an Anti-Doping Rule Violation to be committed.*

65. Footnote 9 to clause 11.2 provides:

> *It has always been the case that Use or Attempted use of a Prohibited Substance or Prohibited Method may be established by any reliable means. Unlike the proof required to establish an Anti-Doping Rule Violation under Clause 11.1, Use or Attempted use may also be established by other reliable means such as admissions by the Player, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Clause 11.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organisation provides a satisfactory explanation for the lack of confirmation in the other Sample.*

G.7. Clause 15 – Proof of Doping

66. Clause 15.1 relevantly provides for the *Briginshaw* standard, that:

> *the AFL shall have the burden of establishing that an Anti-Doping Rule Violation has occurred. The standard of proof shall be whether AFL has established an Anti-Doping Rule Violation to the comfortable satisfaction of CAS or the Tribunal bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability, but less than proof beyond a reasonable doubt.*

67. Footnote 30 to clause 15.1 provides:

> *This standard of proof required to be met by the Anti-Doping Organisation is comparable to the standard which is applied in most countries to cases involving professional misconduct. It has also been widely applied by courts and hearing panels in doping cases. See, for example, the CAS decision in N, J, W, W v FINA, CAS 98/208, 22 December 1998.*

68. Clause 15.2 provides that:

> *Facts related to Anti-Doping Rule Violations may be established by any reliable means, including admissions.*

69. Footnote 31 to clause 15.2 provides that:

> *For example, an anti-doping organisation may establish an anti-doping rule violation under clause 11.2, … based on a player's admissions, credible testimony of third persons, reliable documentary evidence, reliable analytical data from either A or B sample or conclusions or conclusions drawn from the profile of a series of players' blood or urine samples.*

G.8. WADA Code 2009

70. The 2010 Code is based on the WADA Code 2009.

71. WADA publishes a list of prohibited substances and methods every year. The prohibited list is referred to in the 2010 Code. A new prohibited list is published by WADA towards the end of each year so that athletes are aware of what is prohibited in the next year.

G.9. The WADA Prohibited List

G.9.1. WADA Prohibited List 2009 (1 Jan 2009 to 31 Dec 2009)

72. The ASADA CEO makes no allegations that are relevant to the WADA Prohibited List 2009. It was noted by Mr Holmes QC for historical context in light of significant changes to the WADA Prohibited List 2010.

73. The heading of section 2 (S2) for the 2009 List is:

> *Hormones and related substances*

74. Section 2.2 (S2.2) of the 2009 List provides that the following substances and their releasing factors are prohibited:

> *Growth Hormone (GH), Insulin-like Growth Factors (e.g. IGF-1), Mechano Growth Factors (MGFs)*

G.9.2. WADA Prohibited List 2010 (1 Jan 2010 to 31 Dec 2010)

75. The Prohibited WADA List 2010 is relevant to Mr Dank only, who is alleged to have committed anti-doping violations in December 2010.

76. The heading of section 2 (S2) of the 2010 List is:

Peptide Hormones, Growth Factors and Related Substances

77. The heading in S2 changed from "*Hormones and related substances*" to "*Peptide hormones, growth factors and related substances*". Counsel for the ASADA CEO noted that the change to the heading of S2 in the 2010 List was, in his submission, very significant.

78. Section 2.5 (S2.5) of the 2010 List provides that the following substances and their releasing factors are prohibited:

> *Growth Hormone (GH), Insulin-like Growth Factor-1 (IGF-1), Mechano Growth Factors (MGFs), Platelet-Derived Growth Factor (PDGF), Fibroblast Growth Factors (FGFs), Vascular-Endothelial Growth Factor (VEGF) and Hepatocyte Growth Factor (HGF) as well as any other growth factor affecting muscle, tendon or ligament protein synthesis/degradation, vascularization, energy utilization, regenerative capacity or fibre type switching and other substances with similar chemical structure or similar biological effect(s).*
>
> (emphasis added)

79. Mr Holmes QC noted the other significant change to the 2010 List was to the prohibited substances from "*Growth Hormone, Insulin-like Growth Factors"* (previously S2.2 in 2009) to the words above in S2.5 of the 2010 List. Mr Holmes QC placed emphasis on the addition of the underlined words above.

G.9.3. WADA Prohibited List 2011 (1 Jan 2011 to 31 Dec 2011)

80. The WADA Prohibited List 2011 is relevant to the Players and Mr Dank. The ASADA CEO's case is that the supplementation program was implemented by Mr Dank from about September 2011 through to September 2012.

81. The WADA Prohibited List 2011 introduces a new category, being Section 0 (S0). S0 is the only relevant change to the WADA 2011 List.

82. The heading of S0 of the 2011 List is "Non-approved Substances".

83. S0 of the 2011 List provides as follows:

> *Any pharmacological substance which is not addressed by any of the subsequent sections of the List and with no current approval by any governmental regulatory health authority <u>for human therapeutic use</u> (ie. Drugs under pre-clinical or clinical development or discontinued) is prohibited at all times.*

84. Mr Holmes QC emphasised the words "*for human therapeutic use*". In order to not be prohibited under S0 of the 2011 List, there has to be a current approval and not just for human use but for human *therapeutic* use.

G.9.4. WADA Prohibited List 2012 (1 Jan 2012 to 31 Dec 2012)

85. Section 0 (S0) of the 2012 List is the same in all material respects to the 2011 List. The words "*designer drugs and veterinary medicines*" are added to S0 in the 2012 List but those words are irrelevant for the purpose of this proceeding.

86. The 2012 List is relevant to the Players and Mr Dank. Consent to treatment forms were signed by the Players in February 2012.

87. The ASADA CEO's allegation against the Players with respect to the use of the prohibited substance, TB4, relates to the period from about February 2012 to September 2012.

88. Section 1 (S1) of the 2012 List is relevant to Mr Dank's alleged infractions relating to anabolic agents.

89. S1(2) of the 2012 List provides that:

> *Other Anabolic Agents, including but not limited to: Clenbuterol, selective androgen receptor modulators (SARMs), tibolone, zeranol, zilpaterol are prohibited.*

90. Selective androgen receptor modulators (SARMS) are also referred to in the 2010 and 2011 Lists.

91. Section 2 (S2) and section 2.5 (S2.5) of the 2012 List is the same as in the 2010 and 2011 Lists.

H. THE AFL RULES

92. The Tribunal is established and operates under Rule 42 of the AFL Rules. It is necessary to refer to some of these Rules.

93. Rule 42.4 sets out the natural justice and other obligations of the Tribunal. It is required to provide any person whose interest will be directly and adversely affected by its decision, a reasonable opportunity to be heard (Rule 42.4(a)(i)).

94. Rule 42.3(c) provides that the Tribunal is not bound by the rules of evidence or by practices and procedures applicable to courts of Record, but may inform itself as to any matter in any such manner as it thinks fit.

95. Rule 42.3(f) provides that where the Tribunal is dealing with an alleged contravention of the AFL Code (which is the position here), Rule 42 shall be read in conjunction with the provisions of the Code provided that, to the extent of any inconsistency, the provisions and guidelines contained in the AFL Code shall prevail.

96. Rule 42.5 provides that the standard of proof is comfortable satisfaction. That is the standard under the AFL Code for proof of a violation of that Code and thus is the standard that applies in this matter. The Tribunal considers this standard later.

97. By reason of Rules 42.14(a) and (b), it can be implied that if a charged person fails to appear at the hearing of the charge, either personally or by his or her legal representative, the Tribunal may proceed to hear and determine the charge or matter and any sanction in the absence of the person.

98. Mr Dank has been charged with a number of violations of the AFL Code. Apart from being represented by his Counsel by telephone link at the first Directions hearing of the Tribunal, he has not attended the hearing, either in person or through his legal representative. The Tribunal has heard and is determining the charges against him in his absence.

99. Rule 42.3(b)(iii) provides that the Tribunal panel members shall decide questions of fact and law. The panel members that constitute the Tribunal in this matter, which includes the Chairman, have decided all questions of fact and law. The decision and these reasons for decision are their unanimous decision.

I. BURDEN AND STANDARD OF PROOF

100. The AFL has the burden of establishing that an anti-doping rule violation has occurred. The burden and standard of proof is stated in Clause 15.1 of the AFL Code. The standard of proof requires that an anti-doping rule violation be established to the comfortable satisfaction of the Tribunal, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

101. These are serious allegations. Although the ASADA CEO does not allege that any of the Players knowingly used a prohibited substance nor is there any allegation of dishonesty on the part of the Players, each of the Player's charged faces a sanction which has the potential to affect his livelihood, his immediate future and general reputation. Likewise, Mr Dank faces sanctions which have the potential to affect his livelihood and his future.

102. Having considered all the relevant evidence the Tribunal must be comfortably satisfied, bearing in mind the seriousness of the allegation made, that the particular charge then under consideration has been proved to the requisite standard before finding that an anti-doping violation occurred.

J. THE HEARING

103. Following the issue of the infraction notices on 14 November 2014 and service upon the persons named in them, Directions hearings were held by the Tribunal on 18 November, 1 December and 8 December 2014.

104. Matters relating to production of documents, cross-examination of witnesses, filing and service of documents, hearing arrangements and other matters of practice and procedure were considered at the Directions hearings.

105. At the Directions hearing held on 18 November 2014, an issue was raised as to whether hearings of the Tribunal in this matter should be in private or in public. Submissions were made, including submissions from the legal representative for a number of media organisations, as to the decision that should be made. Under the AFL Rules and the AFL Code, the decision is to be made by the Chairman.

106. On 8 December 2014, the Chairman ruled that the hearing be conducted in private and the matter has proceeded on that basis.

107. The Chairman's ruling on the issue is **Attachment B**.

108. The hearing has proceeded on the basis that the question of whether there have been any violations of the AFL Code should be first considered and determined. If any violation was established to the comfortable satisfaction of the Tribunal, a further hearing would be held to consider and determine the question of penalty.

109. The substantive hearing commenced on the 15 December 2014 and continued on 18, 19 and 20 December 2014, 12, 13, 14, 15, 20, 21, 22, 23, 27, 28 and 29 January 2015 and 16 and 17 February 2015.

110. There has been an infraction notice issued against each of the Players alleging the same violation of the AFL Code. There has been an infraction notice issued against Mr Dank alleging a number of separate violations of the AFL Code.

111. Thus there are 35 infraction proceedings before the Tribunal and, in the case of Mr Dank, the proceedings relate to a number of separate violations.

112. The proceedings relating to each infraction notice have been heard together. The matter has proceeded as one joint hearing rather than a number of separate hearings. It is appropriate that the matter proceed in this way. There is considerable overlap in the evidence and in the factual and legal issues arising in the proceedings relating to the Players and to Mr Dank.

113. A joint hearing avoided the delay and substantial additional expense that would have been involved in conducting separate hearings, which would have involved the repetition of evidence and submissions. It avoided the possibility of inconsistent findings. Counsel for the Players did not oppose all matters being heard together at the one hearing. At the first Directions hearing Mr Stanton, Counsel for Mr Dank who appeared by telephone link, stated that it was his tentative view that his client's case should be heard with the others. Prior to the next Directions hearing he and his instructing solicitor informed the Tribunal that they had no instructions from Mr Dank and were no longer acting for him. Neither Mr Dank, nor any person representing him, has attended the hearing which has proceeded in his absence.

114. However, even though this is a joint hearing where all the cases are being heard together, the Tribunal has to separately consider the case against each player and determine whether the Tribunal is comfortably satisfied that each player has committed the violation alleged against him. In the case of Mr Dank, the Tribunal has to separately consider the case against him with respect to each of the violations alleged, and whether it is comfortably satisfied he committed any of those violations.

115. At the hearing, an application was made by Michael Abrahams, a lawyer employed by Essendon, to represent Essendon as a person with an interest in the proceedings. After hearing submissions from him and from the parties, the application was refused.

K. THE EVIDENCE

116. The Tribunal has received a substantial body of documentary evidence in these proceedings.

117. The documentary evidence includes, but is not limited to, business records, correspondence, contemporaneous emails and SMS text messages, expert and other reports, statements of witnesses, newspaper reports, transcripts of interviews with witnesses, and transcripts of interviews with the Players and with other Essendon players who are not the subject of an infraction notice. No written statement or transcript of an interview with Mr Dank is in evidence, as he was not interviewed as part of the ASADA or AFL investigations. Statements alleged to have been made by Mr Dank to third parties have been led in evidence by the ASADA CEO.

118. Viva voce evidence has been given by expert witnesses Professor Handelsman and Dr John Vine. Reports by them were also tendered as evidence. Mr Del Vecchio attended and gave viva voce evidence. He confirmed the contents of a statement he had made to ASADA investigators but declined to answer any further questions. Thus his evidence could not be tested by cross-examination. Evidence was also given by Dr Peter Fricker about contact he had with Mr Dank.

119. Counsel for the Players sought to cross-examine other witnesses, in particular Mr Charter and Mr Alavi. The ASADA CEO endeavoured to secure their attendance at the hearing but they did not attend. The Tribunal could not compel their attendance.

The credibility and reliability of their evidence, which is relied on by the ASADA CEO, is a major issue in these proceedings.

120. At the conclusion of the presentation of the ASADA CEO's case, counsel for the Players objected to evidence that was sought to be led and relied on by the ASADA CEO. The Tribunal conducted a voir dire on the admissibility of the evidence the subject of objection. It included, inter alia, the evidence of Mr Charter and Mr Alavi. After hearing submissions and receiving evidence on the voir dire, the Tribunal delivered a Ruling, which is **Attachment C**. To assist understanding, the Ruling includes a table of the documents the subject of the Ruling.

121. To avoid the proceedings being delayed, the Tribunal did not provide reasons for the Ruling when it was delivered. Those reasons are now provided as **Attachment D**.

L. CIRCUMSTANTIAL EVIDENCE

122. The ASADA CEO's case against each of the Players and against Mr Dank depends on circumstantial evidence.

123. The Tribunal is entitled to draw inferences from facts which have been established by direct evidence. The Tribunal did not rely on an inference as proof of a fact which was significant in establishing an element of the violation under consideration unless it was comfortably satisfied of the facts upon which the inference was based and was also comfortably satisfied that the inference should be drawn.

124. In determining whether an inference should be drawn the Tribunal considered the evidence as a whole and did not disregard a piece of evidence or circumstance because, when considered alone, it did not support an inference being drawn. The Tribunal considered the totality of the evidence in determining whether an inference should be drawn. In other words, as the ASADA CEO submitted, the standard of comfortable satisfaction may be met even if none of the facts from which an inference is drawn, assessed in isolation, meet that standard. It is the cumulative weight of the facts, rather than the quality of proof of each individual fact, which is important.

M. BACKGROUND

125. Before moving to a consideration of the violations alleged against the Players and Mr Dank, the positions of the parties, the issues and events involved with those violations, it is helpful to that consideration to provide some background. This does not need to be lengthy but is intended to provide a helpful context.

126. The ASADA CEO in his closing written submission provided a comprehensive and detailed narrative of events 80 pages in length. That narrative has been most helpful to the Tribunal in its consideration of this matter. The Tribunal has drawn upon the narrative in the compilation of this background. The detail of the ASADA CEO's narrative does not need to be included having regard to the purpose of this background.

127. Mr Dank, whilst working at the Manly NRL Club (**Manly**) as director of physiology and sports science, met Mr Robinson who worked as a consultant to the club between 2007 and 2008. Mr Dank had commenced at Manly in 2004. Manly won the NRL Premiership in 2008.

128. Mr Robinson moved to the Geelong Football Club (**Geelong**) in 2007 as high performance manager. He used the services of Mr Dank whilst at Geelong.

129. Mr Robinson commenced with the Suns on 1 October 2010 as high performance manager. At about the same time, Mr Dank commenced with the club as a "sports science consultant". That consultancy ended in 2011.

130. During 2010 Mr Dank and Mr Robinson were involved in the treatment of a Suns player. This treatment is the subject of an alleged violation by Mr Dank.

131. Around July to August 2011, Mr Dank met Maged Sedrak, a compounding chemist in Kogarah, Sydney. Mr Dank had previously obtained peptides from a Wally Reynolds. Subsequent to their meeting, Mr Sedrak commenced to supply peptides to Mr Dank.

132. In August and September 2011, Mr Dank and a Dr Khan were involved in the treatment of a Penrith NRL player Sandor Earl. At the time Mr Dank was associated with Penrith.

133. On 6 August 2011 a meeting was held at AFL House involving the AFL, Paul Roland of ASADA, James Hird and Paul Hamilton and Danny Corcoran, officials at Essendon. This followed Mr Hird raising the subject of peptides and their use with an ASADA doping control officer when the officer was at Essendon.

134. There was discussion at the meeting about peptides and whether they were banned in sport. The AFL and the ASADA CEO were satisfied with Mr Hird's explanation about his enquiry and the matter was taken no further.

135. In early August 2011 Mr Charter met Mr Alavi and discussed with Mr Alavi the prospect of him becoming the potential supplier of pharmacy products to Mr Charter's "Dr Ageless" business.

136. Mr Robinson was appointed high performance coach at Essendon for the period 1 September 2011 until 31 October 2014. He was to report to the general manager of football and to the head coach.

137. It appears that Mr Dank first came into contact with Mr Charter in August 2011. Mr Robinson about this time promoted Mr Dank to Mr Hird sending him a paper co-authored by Mr Dank promoting the effectiveness of the product Lactaway. When applying for the job at Essendon reference was made by Mr Robinson's agent to Mr Dank with respect to his expertise in "pharmacology/supplementation".

138. From August 2011, Mr Alavi used Mr Charter to source equipment from China for his pharmacy compounding business. On 29 August 2011, Mr Robinson arranged for Mr Dank to meet with Dr Reid, the Essendon club doctor. Dr Reid stated when interviewed by investigators, that Mr Robinson had insisted that Mr Dank come with him. Mr Robinson described Mr Dank as a "biochemist, a pharmacist, a nutritional expert…the best in Australia." Mr Dank arranged with Mr Charter to send some boxes of B-dose forte injections to Dr Reid.

139. On 28 September 2011 Mr Dank was interviewed for the position of sports scientist at Essendon by Mr Hird, Mr Robinson, Mark Thompson and Mr Corcoran. At the interview Mr Robinson recalled Mr Dank saying that he would never cross the WADA Code by using illegal substances. After the meeting Mr Hird invited Mr Robinson and Mr Dank to his home to discuss what they were going to do to "turn this club around."

It was agreed that Mr Dank was to introduce and run a supplements program complying with the WADA Code and the AFL Code.

140. Subsequently, the offer of employment as Sports Scientist was confirmed, commencing on 1 November 2011. Mr Dank's function included "responsible for the design of supplementation protocols and recovery procedures and their implementation."

141. Mr Dank was referred to Mr Alavi by Mr Charter in late 2011. In November 2011 Mr Dank introduced himself to Mr Alavi and approached him about his business being the official pharmacy to supply Essendon. They developed a working relationship until about September 2013 when contact ceased. Mr Dank used Mr Alavi as a pharmacist in relation to Mr Dank's businesses MRC and ICB.

142. Events relating to their relationship and in particular the supply of substances to Essendon are discussed when considering the alleged violations. That is also the position with respect to the obtaining of substances through Mr Charter from China and the compounding of those substances by Mr Alavi and what, if any, were supplied to Essendon and administered to the Players. These are areas where there are many issues.

143. By early January, it was apparent that Essendon players were being given substances without the approval of Dr Reid. He approached Mr Hird. As a result, a meeting was convened about the middle of January 2012 involving Mr Dank, Mr Robinson, Mr Thompson, Dr Reid and Mr Hamilton. Mr Dank and Mr Robinson were tackled about the unauthorised injection of players. It was decided, Mr Hird has stated, that no more supplements would be administered without the prior approval of Dr Reid.

144. At the end of the meeting, Mr Robinson was asked to re-affirm the supplementation protocols. He did so in an email of 15 January 2012. It set out matters that Mr Dank had agreed with Dr Reid, including the provision of informed consents by players. In response Mr Hird confirmed his position on supplements that they must be legal, not harm the player and there must be player consent. Subject to these guidelines, Mr Hird's position was: "As long as we stick to those three guidelines and you and Steve think it will help us then lets go for it."

145. On 17 January 2012, Dr Reid wrote to Mr Hird and Mr Hamilton about players being given subcutaneous injections including AOD-9604. He strongly pointed out his concerns as club doctor. After referring to a substance he stated:

> *I think we are playing at the edge and this will read extremely badly in the press for our club and for the benefits and also for side effects that are not known in the long term. I have trouble with all these drugs.*

146. Prophetic words. Concerns about supplements being offered had been raised by players at a leadership meeting on 16 January 2012.

147. On 30 January 2012, Mr Hird exchanged text messages with Mr Corcoran, who was overseas. Reference was made to lay people injecting players with Mr Hird stating:

> *Understand about the injecting and don't want to push the boundaries. Just need to make sure we are doing everything we can within the rules as the other clubs are a long way ahead of Reidy and us at the moment.*

148. Mr Hird had referred to "Reidy… stopping everything".

149. On 8 February, the Essendon players attended a meeting at the Club auditorium. The meeting was addressed by Mr Hird, Mr Robinson and Mr Dank and related to the new supplement protocols. Either at the meeting or by 13 February 2012 the vast majority of players signed a document "patient information/informed consent" form. The players consented to the administration of 4 substances including AOD-9604 and Thymosin, which substances were to be injected. 38 players signed forms consenting to injections of Thymosin. The forms are quite extraordinary and will be referred to in more detail later. It was asserted that the proposed treatment was WADA compliant.

150. Mr Charter introduced Mr Dank to Serge Del Vecchio sometime prior to 12 March 2012. They met and Mr Dank spoke about peptides. Mr Del Vecchio has stated that he questioned Mr Dank about whether he was allowed to use peptides on professional athletes. Mr Del Vecchio did his own investigations whether peptides mentioned by Mr Dank were banned and found that they were, which he communicated to Mr Dank.

151. The injection regime of Essendon players continued and will be discussed later. For example, Mr Dank informed Mr Hird by text message on 12 April 2012: "*All I.V. and injections completed*." On 19 April 2012, Mr Dank texted Mr Hird: "*This afternoon's*

group went very well on hyperbaric. All injections completed for the week," to which Mr Hird replied "*Good news. Now lets take it up to the Blues*."

152. In May 2012, Mr Dank and Mr Alavi exchanged messages about setting up a business venture at Qatar. This was pursued by Mr Dank who visited the Middle East but the venture did not come to fruition. Dr Fricker gave evidence about his contact with Mr Dank in relation to this venture. At the time Dr Fricker was working at the Aspire Zone Foundation as Chief Sports Medicine Advisor.

153. In mid May 2012, a meeting occurred at Essendon between Mr Hird, Dr Reid, Mr Thompson, Mr Dank and Mr Oliver. Mr Dank was told to cease injections but there is no evidence any player was told to refuse any injections from Mr Dank. It is clear from the interviews with the players that injections continued.

154. What substances were injected, and in particular whether TB4 was injected in any player, and if so whom, are critical issues in this matter.

155. Curriculum Vitae of Mr Robinson and Mr Dank are in evidence. They set out details of their experience, qualifications and employment history.

N. ASSESSMENT OF EVIDENCE - DETERMINATION OF FACTS

156. It is the function of the panel members constituting the Tribunal to determine the facts in this matter. This function is an intellectual and dispassionate function.

157. The determination of the facts involves an assessment of the credibility of the witness giving the evidence and an objective and dispassionate assessment of the reliability, probative value and weight to be given to the evidence before the Tribunal. Such assessments are of critical importance in this matter having regard to the issues and the way the ASADA CEO has put its case against the Players and Mr Dank.

158. Here the ASADA CEO, in contrast to many anti-doping cases, cannot rely upon test results of the Players to establish a violation by any of them. There is no contemporaneous record at Essendon of the substances injected in the Players as part of the Essendon supplements program.

159. The ASADA CEO's case is a circumstantial case. It is based on circumstantial evidence. The establishment of the ASADA CEO's case in relation to each alleged violation depends on inferring that a violation has occurred from established facts, events or circumstances. Consequently the circumstantial evidence must be carefully and objectively assessed as to its reliability, probative value and the weight to be given to it.

160. The evidence includes numerous text messages, emails and statements by and transcripts of interviews with a number of persons including the Players. None of these persons, apart from the expert witnesses, Dr Fricker and Mr Del Vecchio, gave viva voce evidence before the Tribunal. In giving his viva voce evidence, Mr Del Vecchio adopted his statement but refused to be cross-examined. The veracity, reliability and probative value of this documentary evidence have to be assessed.

161. The assessment involves taking into account a number of factors such as considering whether a person has a possible bias or motive not to tell the truth or to exaggerate. The ability of the person to remember events accurately and his or her preparedness to overstate or understate the facts must be considered. Did the person have a motive to protect himself/herself or others?

162. Counsel for the Players sought to cross-examine a number of persons, in particular Mr Charter, Mr Alavi and Mr Del Vecchio, who as noted earlier attended the Tribunal but refused to be cross-examined. The others refused to attend. The Tribunal has no power to compel their attendance. Consequently, counsel for the Players sought to have their evidence excluded. After hearing argument, the objections were not sustained and the Tribunal received the evidence.

163. While there is no automatic right to cross-examination in proceedings such as the present proceedings before this Tribunal, the question remains whether cross-examination is required for a fair hearing. Cross-examination is a weapon that lawyers use to test the truth of a witness's evidence as well as the truthfulness of the witness who gave the evidence. Cross-examination may also impact upon the reliability of a witness and the reliability of the witness's evidence. It may lead to doubts about the witness's truthfulness or reliability or, on the other hand, enhance it. That is a judgment to be made by the trier of fact when considering the effect of the

cross-examination, including matters such as the demeanour of the witness while giving evidence.

164. In considering the reliability, probative value and weight to be given to the evidence of persons who were not available to be cross-examined and have their evidence tested in that way, the Tribunal has taken into account the outline of matters which counsel for the Players wished to cover in cross-examination but were unable to do so.

O. ASSESSMENT OF PARTICULAR WITNESSES' CREDIBILITY AND RELIABILITY

165. The ASADA CEO acknowledged that the evidence of Mr Charter, Mr Alavi and Mr Dank in these proceedings gave rise to significant issues of credit and reliability. The ASADA CEO submitted that the Tribunal should approach the evidence of each of these witnesses with caution. The Tribunal accepts the ASADA CEO's submission regarding the credit and reliability of each of these witnesses, and has exercised caution when assessing the weight to be given to their evidence. The evidence from Mr Charter and Mr Alavi principally consisted of answers which each gave to questions put by the ASADA investigators in formal interviews. However, Mr Charter also volunteered a very detailed document, described by Mr Grace QC as a considered document, which dealt with his previous dealings with Mr Dank, the arrangements that Mr Charter made for Mr Dank to team up with Mr Alavi, and the arrangements for establishing with Mr Dank and Mr Alavi what Mr Charter described as the whole peptide business model which was to supply supplements to Essendon. Mr Charter also went into great detail in this document concerning his trip to China to source peptides. Mr Charter also participated in two interviews with Mr Hargreaves, the solicitor for the 32 players. Mr Dank, who has been charged with a number of anti-doping rule violations, was interviewed by Mr Nick McKenzie, a Fairfax journalist, and on the ABC. Following the interview with Mr McKenzie, Mr Dank contacted him to alter what he had said in that interview. Neither Mr Charter nor Mr Alavi was willing to make an affidavit setting out the answers to the questions put to each witness by the ASADA investigators.

166. The credibility of a witness is a critical consideration in any assessment of a witness's evidence and a finding on credit will, and often does, affect judgment on the reliability

of that witness's evidence. It is trite to say that cross-examination is a weapon used to test the strength or weakness of a witness's evidence, as well as assisting to test the truthfulness and therefore the reliability of the witness giving the evidence.

167. In this hearing the Tribunal has been confronted with the difficult task of assessing the credibility and reliability of Mr Charter, Mr Alavi and Mr Dank without hearing from any of them and without the opportunity of assessing their demeanour while giving evidence. Neither Mr Dank nor Mr Charter nor Mr Alavi has attended the Tribunal hearing. Unlike, for example, Mr Charter, Mr Dank did not provide any statement to ASADA investigators about this matter. Nor was he interviewed by them about this matter. The only direct evidence from Mr Dank sought to be placed before the Tribunal, apart from contemporaneous communications, is evidence of statements he made in television and newspaper interviews. There was evidence from some players as to what Mr Dank said to them in relation to injections they were receiving. For example, that they were being injected with Thymosin. Obviously, as he was not interviewed by ASADA investigators nor attended to give evidence at the hearing, he has not been questioned about these statements, which have not consequently been tested in any way.

168. Mr Dank has chosen not to attend the Tribunal hearing although he was made aware of the hearing and the date on which it was to commence.

169. Mr Alavi and Mr Charter have also not attended the Tribunal hearing and Mr Alavi opposed an application which the ASADA CEO made to the Supreme Court of Victoria seeking an order compelling his attendance at the Tribunal hearing given that the Tribunal had no power to compel the attendance of Mr Charter and Mr Alavi. The Supreme Court declined to make the orders sought by the ASADA CEO (see *ASADA v 34 Players and One Support Person* [2014] VSC 635). Mr Charter did not take part in the Supreme Court proceedings.

170. The failure of Mr Charter, Mr Alavi and Mr Dank to attend and give evidence before the Tribunal has deprived the Tribunal of the opportunity to assess the credibility of these critical witnesses under cross-examination, whether that cross-examination is from counsel on behalf of the Players or from counsel on behalf of ASADA.

O.1. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] [redacted]

[redacted]

[redacted] [redacted]

[redacted]

O.2. The credibility and reliability of Mr Charter

183. Next, the Tribunal considers the submissions made by the ASADA CEO and on behalf of the Players relating to the credibility and reliability of the evidence given by Mr Charter.

184. In his assessment of the credibility and reliability of Mr Charter, the ASADA CEO referred to the following matters. The Tribunal again stresses that some matters on which the ASADA CEO relied were in contention.

185. First, the ASADA CEO submitted that the RD peptides purchase order which Mr Charter produced in his second interview with Mr Hargreaves was a fraud. The ASADA CEO described this document as the "Photoshop document," which had been created using the Adobe Photoshop software. The ASADA CEO alleged that this document had been concocted by Mr Charter to assist the Players and damage the ASADA CEO's case.

186. Secondly, the ASADA CEO submitted that on a fair reading of the interviews between Mr Hargreaves and Mr Charter, Mr Charter went out of his way to give evidence which would help the Players.

187. Thirdly, the ASADA CEO submitted that Mr Charter was in breach of his written commitment to GL Biochem that the substances which he was purchasing from that organisation would only be used for research purposes and were not for human consumption. Mr Xu of GL Biochem would not make any transaction until Mr Charter had signed that undertaking. It was submitted that Mr Charter signed the undertaking and having obtained the peptides supplied them to Mr Alavi thereby failing to honour his commitment to GL Biochem. It is in issue in these proceedings whether Mr Charter did in fact purchase TB4 from GL Biochem.

188. Fourthly, the ASADA CEO submitted that Mr Charter's dealings with Customs demonstrated his willingness to say whatever was necessary to serve his own actual or perceived personal interests. Upon his return to Australia from China on 2 December 2011, Mr Charter, when questioned by customs officers, denied that he had "*bought or sent any peptide or other goods while he was in China*." Mr Charter told the customs officer that he didn't think the quality of the peptide product was up to Australian standards but may be in the future. He told the officer that if they (presumably, the Chinese manufacturers) got the product up to quality standard, then he may consider importing it into Australia. Less than a week after making this statement to Customs, it is submitted that Mr Charter placed an order for peptides to be delivered by GL Biochem.

189. Fifthly, the ASADA CEO submitted that Mr Charter made a number of contradictory statements relating to issues such as his purchase of HGH, his claim that he brought samples back from Shanghai and his statement that the order was in Mr Alavi's hands when Mr Dank asked Mr Charter how the order was going.

190. Finally, the ASADA CEO referred to the fact that Mr Charter had previously been convicted of drug trafficking and that further unrelated criminal charges were pending.

191. Mr Grace QC and Mr Clelland QC mounted a powerful attack on the credibility or, perhaps more accurately, the lack of credibility of Mr Charter concerning his Customs declaration upon his return to Australia on 2 December 2011 and the account he gave regarding the peptides, which he claimed to have personally tested at GL Biochem before purchasing the peptides and returning to Australia with the peptides in his custody. Mr Charter in an interview with an ASADA investigator claimed that he had brought the peptides back into Australia and declared them to customs officers. As the

ASADA CEO pointed out in his submission regarding the credibility of Mr Charter he had answered "no" when asked whether he had bought or sent any peptide or other goods while he was in China. The customs declaration which is in evidence speaks for itself. As Mr Grace QC alleged, Mr Charter concocted a specific account citing concern that Custom officers had with the Mechano Growth Factor which he claimed to have brought with him from China and Mr Grace QC submitted that the account which Mr Charter gave to the ASADA investigator was stunning in its falsity and audacity. Mr Clelland QC referred to the different versions which Mr Charter gave in an interview with ASADA and in his interview with Mr Hargreaves, Mr Charter's tendency to engage in hyperbole and noted that Mr Charter investigated whether he could obtain employment with ASADA. Finally, Mr Clelland QC referred to Mr Charter's general background, which no doubt includes a reference to his problems with the law which led to a sentence of imprisonment which was imposed in 2007.

O.3. The credibility and reliability of Mr Dank

192. In assessing the credibility and reliability of Mr Dank, the ASADA CEO referred to a number of considerations and the Tribunal once again stresses that some matters on which the ASADA CEO relies remain in contention.

193. The first matter to which the ASADA CEO referred related to what the ASADA CEO alleged was the letter which had been prepared by Mr Dank and which was backdated and was to be signed by Mr Alavi. The ASADA CEO alleged that, by this letter, Mr Dank was attempting to change the type of Thymosin given to the players to Thymomodulin after Mr Dank was alerted to the possibility that TB4 was a banned substance.

194. Secondly, the ASADA CEO alleged that Mr Dank was prepared to experiment with substances which had not been approved for human use.

195. Thirdly, the ASADA CEO alleged that Essendon's supplementation scheme was concealed from the medical staff and from senior management.

196. Fourthly, the ASADA CEO submitted that Mr Dank told Mr Alavi that he would have the Thymosin, Hexarelin and CJC-1295 tested at Mimotopes. The ASADA CEO alleged that Mr Dank did not ask Mimotopes to test these substances.

197. Fifthly, the ASADA CEO alleged that Mr Dank in his interview with Mr McKenzie made a clear admission of his use of TB4 on the Players. The ASADA CEO maintained that the follow up call made by Mr Dank involving an alteration of what he had said in the interview was an attempt to undermine the admission which Mr Dank had made. The probative value of this alleged admission and what weight should be given to it are important matters for the Tribunal to consider.

198. Mr Clelland QC referred to Mr Dank's lack of relevant knowledge and expertise which was demonstrated very clearly by the misleading contents of the consent form which the Players were required to sign. Professor Handelsman was very critical of the information given to the Players, as well as the lack of relevant information which should have been, but was not, given to them before each player signed the consent form. Professor Handelsman described the form as atrocious, and detailed the many errors in or omissions from the consent form.

199. Secondly, Mr Clelland QC referred to what he described as the Thymomodulin letter which has already been referred to as the letter alleged by the ASADA CEO to have been backdated and signed by Mr Alavi.

200. Thirdly, Mr Clelland QC referred to the statement made by Mr Dank in the course of his interview with Nick McKenzie, and his follow up call to alter what he had said.

201. Fourthly, Mr Clelland QC alleged misrepresentation on the part of Mr Dank regarding the testing of substances at Mimotopes. This was a matter raised by the ASADA CEO where it was alleged that although Mr Dank told Mr Alavi that he would have substances tested at Mimotopes, Mr Dank did not in fact ask Mimotopes to test those substances.

202. Having considered all the evidence relating to the credibility and reliability of Mr Alavi, Mr Charter and Mr Dank and the submissions on behalf of the ASADA CEO and on behalf of the Players, the Tribunal finds that the credibility of each of these principal participants is at a low ebb and each man in acting as he did in his own way and for his own motive saw a golden opportunity to "feather his own nest." [redacted]

P. STATEMENTS MADE BY DANK TO McKENZIE

203. The ASADA CEO relied on what he described as an admission by Mr Dank of his use of TB4 on the players in an on the record interview with Mr Nick McKenzie, a Fairfax journalist. The ASADA CEO tendered the transcript of the interview between Mr McKenzie and Mr Dank. In that interview, Mr McKenzie first raised the issue when he asked Mr Dank:

> *OK Thymosin Beta 4, why was that used in Essendon players given there is umm that…ah like ah there is an opinion from a doctor, or a researcher, another scientist that it…that it could…that its effect are uncertain?*

204. Mr Dank replied:

> *Well that's not totally true Nick because with all due respect right, there is good data that supports TB4 and the immune system.*

205. Mr McKenzie then asked:

> *Oh well why give it to all Essendon players if only some of them had colds and flu?*

206. Mr Dank replied:

> *Well the point is there is a degree of immune-suppression after a game or a… or a hard training week right, often times the ability to back up next week can be decreased by a hit on the immune system, right.*

207. The ASADA CEO stated that when Mr Dank was confronted by Mr McKenzie with the news that the ASADA website listed TB4 as a prohibited substance Mr Dank's immediate response was not to say that he didn't use TB4. Instead Mr Dank stated:

> *Well that must have only come in this year and I will get someone to speak to ASADA about that. That's just mind blowing.*

208. Mr McKenzie then checked the position relating to TB4 and having informed Mr Dank that TB4 was banned Mr Dank responded with:

> *You can't help but think that they've only just put that in to help their case.*

209. Shortly after Mr McKenzie conducted this on the record interview, Mr Dank sought to alter what he had earlier said about TB4. The ASADA CEO submitted that the follow up call to "alter" rather than "clarify" what he had said was an admission that he had made an admission, was an action taken after he realised the importance of his earlier statement and was an attempt to undermine the earlier admission rather than reflecting the true position. Mr Dank explained to Mr McKenzie that his decision to revise what he had said in his interview about Thymosin was because he was confused and tired and had made a mistake. He said that the Thymosin used was Thymomodulin. Mr McKenzie noted that his interview with Mr Dank was preceded by a large off the record conversation which Mr McKenzie stated may include material that conflicted with or supported the on the record interview. That earlier interview remains off the record.

210. As previously noted, Mr Dank's credibility and reliability is at a low ebb. His erratic and at times eccentric behaviour is highlighted by the misleading and inaccurate contents on the consent forms which the players were required to sign. The statements made by Mr Dank to Mr McKenzie were not contemporaneous statements, but were made some months after he had left Essendon and after Mr McKenzie raised the topic of TB4 during the on the record interview with Mr Dank. The explanation provided by Mr Dank after Mr McKenzie referred to TB4 was that the injections were to aid immune-compromised players to back up next week. That was not the expressed purpose of injections of TB4.

211. Mr Dank, although sight unseen, presented as a person who had an innate ability to concoct answers to questions put to him at will. His failure to attend the Tribunal hearing deprived counsel for the Players, or indeed counsel for the ASADA CEO, of any opportunity to test Mr Dank's evidence on this or any other issue in cross-examination. The difficulties which confront the Tribunal when there is no opportunity to test the evidence in cross-examination are highlighted by the inability of counsel for the Players to question Mr Dank about the two statements which he made in his interview with Mr McKenzie on which the ASADA CEO particularly relied as admissions by Mr Dank, and the inability to question him regarding the purpose and aim of what was described as the "follow up" call (which the ASADA CEO submitted was an admission that he had previously made an admission and was an attempt to undermine his earlier admission).

212. Given the circumstances in which the alleged admissions were made and the lack of any opportunity for cross-examination, to which must be added Mr Dank's lack of credibility and reliability, the Tribunal is far from being comfortably satisfied that statements made by Mr Dank relating to TB4 in the course of his interview with Mr McKenzie were true. Nor is the Tribunal comfortably satisfied that what was described as the follow up call constituted any admission on Mr Dank's part as alleged by the ASADA CEO.

213. Reference has been made to evidence from some players about statements made to them by Mr Dank about the supplements program. The Tribunal's conclusions about the lack of credibility and reliability of Mr Dank apply when assessing the reliability of these statements made to some players.

Q. THYMOSIN BETA 4: WAS IT A PROHIBITED SUBSTANCE?

214. A critical issue in relation to ASADA's case against the Players concerned the question whether TB4 was a prohibited substance at the relevant time, namely between about January 2012 and September 2012.

215. Mr Knowles, who advanced ASADA's final oral submissions on this issue, relied on three propositions to establish that TB4 was a prohibited substance at the relevant time.

216. ASADA'S primary submission was that WADA had determined that TB4 was a prohibited substance and in the light of that determination by WADA by reason of Clause 6.3 of the AFL Code it was not open for the Players to challenge the prohibited status of TB4 in these proceedings.

217. Clause 6.3 of the AFL Code states:

> *WADA'S determination of the prohibited substances and prohibited methods that will be included on the WADA prohibited list and the classification of substances into categories on the WADA prohibited list is final and shall not be subject to challenge by a player or other person based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport.*

218. Dr Watt, in his email to Dr Irene Mazzoni, the Manager of Research and the Prohibited List at WADA, sought confirmation that TB4 was prohibited under s.2.5 due to its ability for vascularisation and regenerative capacity. Dr Mazzoni responded, "You are right, TB4 is prohibited under s.2.5."

219. Based on that response by Dr Mazzoni and given her position of authority as Manager of the Prohibited List, Mr Knowles submitted that Dr Mazzoni's response to Dr Watt constituted a determination by WADA, although he acknowledged that Dr Mazzoni's email was not a determination by the Prohibited List Committee. Consequently, Mr Knowles submitted that given WADA'S determination that TB4 was included on the prohibited list it was not open for the Players to challenge that position due to Clause 6.3 of the AFL Code. That clause, Mr Knowles submitted, should be given its ordinary meaning.

220. Mr Grace QC in his submission on behalf of the Players argued that ASADA could not rely on Clause 6.3 of the AFL Code in these proceedings as the evidentiary presumption created by that clause was directed to substances specifically listed on the prohibited list. That was not the position here, Mr Grace QC submitted, as Dr Mazzoni's reply in her email to Dr Watt did not, and could not, amount to a determination. The email reply to Dr Watt's query, Mr Grace QC submitted, did not, to use his word, "enliven" the operation of Clause 6.3 of the AFL Code.

221. Having considered all the oral and written submissions of the parties, the Tribunal was not satisfied that Clause 6.3 of the AFL Rules had any application to the facts established in this case. The Tribunal accepted Mr Grace QC's submission that the email reply to Dr Watt's query did not amount to a determination by WADA which triggered the operation of Clause 6.3 of the AFL Code.

222. The first alternative submission advanced by ASADA contended that TB4 was a prohibited substance under the s.2.5 category of the 2012 WADA prohibited list. In the further alternative, ASADA contended that TB4 was also a prohibited substance under the s.0 category of the 2012 WADA prohibited list on the assumption that TB4 did not fall under the s.2.5 category.

223. The s.2 category of the 2012 Prohibited List provided (so far as relevant):

The following substances and their releasing factors are prohibited:

2.0 Any pharmacological substance which is not addressed by any of the subsequent sections of the list and with no current approval by any governmental regulatory health authority for human therapeutic use.

2.5 Growth hormone (GH) Insulin-like Growth Factor 1 (IGF(1)), Fibroblast Growth Factors (FGF's), Hepatocyte Growth Factor (HGF), Mechano Growth Factors (MGF's), Platelet-Derive Growth Factor (PDGF), Vascular-Endothelial Growth Factor (VEGF) as well as any other growth factor affecting muscle, tendon or ligament protein synthesis/degradation, vascularisation, energy utilization, regenerative capacity or fibre type switching: And other substances with similar chemical structure or similar biological effect(s).

224. Professor David Handelsman, Professor of Reproductive Endocrinology and Andrology and Director of the ANZAC Research Institute, stated in his report which is in evidence that TB4 was considered a doping agent under section 2 of the prohibited list, "*as a growth factor affecting muscle, tendon or ligament vascularisation and regenerative capacity as well as having interaction with hypoxia-inducing factor*." The ASADA CEO acknowledged that Professor Handelsman qualified his position by noting that his opinion was based on, and limited to, animal studies, as there have not been any studies conducted on the benefit of an administration of TB4 to humans. Consequently, Professor Handelsman conceded that there was a possibility that his opinion may change when the effect of administering TB4 to humans was known. However, Professor Handelsman maintained that on the current state of scientific knowledge, based on animal experiments only, TB4 fitted into the 2.5 category of prohibited substances.

225. The Players were critical of Professor Handelsman expressing his opinion on the properties and biological effect of TB4 given, they submitted, that Professor Handelsman's opinion was entirely based on second hand material. They submitted that the most that could reasonably be said about TB4 is that it has regenerative "potential" for humans and that was not a conclusion upon which the Tribunal could attain a state of comfortable satisfaction.

226. Having considered and weighed all the evidence on this limited issue, in addition to the submissions of counsel, the Tribunal was comfortably satisfied to accept Professor

Handelsman's opinion that on the existing state of scientific knowledge based on experiments with animals TB4 fitted into the 2.5 category of prohibited substances at the relevant time. However the Tribunal also considered the further alternative whether, had TB4 not fitted into the 2.5 category of prohibited substances, TB4 was nonetheless captured by the S.0 category as a pharmacological substance with no current approval by any governmental regulatory health authority for human therapeutic use.

227. Professor Handelsman stated in evidence that TB4 had never been approved by any major regulatory agency for human therapeutic use. He was taken to task by counsel for the Players on this issue, and Professor Handelsman conceded that he had not checked the register of all national regulatory agencies in the world to determine whether TB4 had been approved for human therapeutic use. From his experience in the Australian regulatory environment, Professor Handelsman stated that there were about 10 really leading agencies in the world who have great expertise and are very stringent in what they allow for the marketing of drugs, and that many smaller countries which lack the necessary expertise defer to the major agencies when determining whether a drug should be approved.

228. Professor Handelsman supported his evidence by stating that any use of a drug for marketing purposes, which he said is what registration meant, would require some scientific publications on it. There were, Professor Handelsman said, no publications which refer to clinical use of TB4. Further, there was no evidence that TB4 had been marketed for use, which one would certainly expect if an organisation had gone to the trouble and expense of seeking registration of TB4 for human therapeutic use.

229. Submissions on behalf of the Players claimed that Professor Handelsman's report and evidence lacked the necessary precision and veracity to be relied on to prove to the Tribunal's comfortable satisfaction that TB4 was captured by S.0 of the prohibited list. They submitted, inter alia, that the Tribunal could not be satisfied from the evidence given by Professor Handelsman that TB4 was not approved by any regulatory authority in the world.

230. The Tribunal considered all the written and oral submissions on this issue. Given that there were no published human trials relating to the benefit of TB4, which the Tribunal accepted was the likely position had the substance been approved for human

therapeutic use, coupled with the fact that there was no evidence that TB4 had been marketed for use, the Tribunal was comfortably satisfied that had TB4 not already been captured under s.2.5 of the prohibited list, then the substance would fall into the S.0 category.

231. Accordingly, the Tribunal is comfortably satisfied that TB4 was a prohibited substance at the relevant time.

R. THE TRIBUNAL'S TASK

232. Before proceeding to consider the further issues that have to be resolved in this matter, the position of the parties with respect to them and the Tribunal's conclusions on those issues, it is appropriate to reflect briefly on the task that the Tribunal faces.

233. Plainly enough, it is the task of the Tribunal to determine whether it is comfortably satisfied that each of the Players and Mr Dank violated the AFL Code as alleged in the respective infraction notices. That is easier said than done. The particular circumstances of this matter make it a challenging task, indeed a formidable one.

234. Essendon, the Players and the supplements program for Essendon players followed in season 2012 are central to the Tribunal's task, as are the roles played in the implementation of the program by a number of people and in particular Messrs Dank, Charter and Alavi.

235. Often, indeed it could be said ordinarily, there is direct evidence of the alleged code violation which can be placed before the deciding body. Such evidence may be the results of analysis of blood or urine samples taken from the athlete. It may be the direct evidence of a person who witnessed a particular prohibited substance being used by an athlete or who provided or administered such substance. There may be contemporaneous records of all substances used by or administered to an athlete and those records may reveal the use of a prohibited substance.

236. That is not the position in this matter. The ASADA CEO has carried out an extensive and comprehensive investigation, which has included AFL involvement, over a period of some two years. A substantial number of documents have been obtained from a range of sources including Essendon and Messrs Charter and Alavi. No documents

have been provided by Mr Dank or his companies, nor has he made himself available to be interviewed by investigators.

237. A range of people, including the Players and Messrs Charter and Alavi, have been interviewed. Statements and transcripts of interviews have been obtained as part of the investigation. Text messages have been accessed and transcribed. There are a substantial number of them. They include messages sent and received by Messrs Dank, Charter and Alavi. Other documents, such as email messages, correspondence and business records have been obtained.

238. What was not located was any record of what substances were administered to the Players as part of the season 2012 supplements program implemented by Essendon. There is no record of when any substances were administered or by whom they were administered. In particular, no record was located by the investigation of the administration of any injections to Players as part of the program. It is not in dispute that a large number of injections were administered, nearly always by Mr Dank, to the Players but no record of injections was located as a result of the investigation. It is quite extraordinary that no such records existed at Essendon for such a program, bearing in mind its importance and the potential health risks and other consequences. As has been stated, no documents have been produced by Mr Dank or his companies.

239. In the absence of direct evidence, the ASADA CEO's case is a circumstantial one. It relies upon, inter alia, a substantial amount of documentation obtained by the investigation.

240. A complicating factor has been the refusal by Messrs Charter and Alavi to attend the hearing and give viva voce evidence, and in particular be cross-examined. They could not be compelled to attend as the Tribunal has no power to compel the attendance of such witnesses. This has particularly disadvantaged the Players because their counsel could not cross-examine these witnesses. Although he attended, Mr Del Vecchio refused to allow any cross-examination of himself. Counsel for the Players sought to have documentary statements and records of interviews excluded, but the Tribunal ruled they should be received. However, the absence of witnesses has made the Tribunal's task more difficult. As previously stated, Mr Dank has not attended the hearing.

241. On any view, these are major, complicated proceedings involving a circumstantial case based on a wide range and voluminous number of documents where critical witnesses who have provided documents, statements and records of interviews have not attended to be cross-examined. The hearing occupied 16 sitting days. The ASADA CEO's primary closing written submission contains 717 paragraphs, 799 footnotes and, including appendices, is 363 pages in length. An additional submission by the ASADA CEO relating to the infractions alleged against Mr Dank contains 348 paragraphs, 290 footnotes and is 84 pages in length. The ASADA CEO made a further confidential submission.

242. The closing written submission of the 32 players consists of 182 paragraphs, 192 footnotes and is 77 pages in length, with a summary table of the interviews of the Players as an appendix. Shorter written submissions were provided by the 2 players and Disciplinary Tribunal Counsel engaged by the AFL General Counsel. Closing oral submissions were provided over two days.

243. Thus, the task of the Tribunal is challenging, indeed formidable. The case of each party who has appeared has been presented and argued by senior and junior counsel comprehensively and searchingly. It is fair to say that no stone has been left unturned and no issue or point not pursued. The Tribunal appreciates the assistance counsel have provided, but it is fair to say that the quality of the presentation and argument of the cases has made the task of the Tribunal in deciding the matter a very difficult one.

S. THE ALLEGED VIOLATION BY EACH OF THE 34 PLAYERS

S.1. Introduction

244. The Tribunal proceeds to consider the violation of the AFL Code alleged to have been committed by each of the 34 Players.

245. There are two elements that need to be established to the Tribunal's comfortable satisfaction. They are:

(a) that each player was injected with TB4; and

(b) that TB4 was a prohibited substance under the AFL Code at the relevant time.

246. The Tribunal has already considered element (b) and is comfortably satisfied that at the relevant time TB4 was a prohibited substance under the AFL Code. Thus, that element has been established.

247. With respect to element (a), it is agreed by the ASADA CEO, the AFL and the Players that there are three indispensable elements or facts (links in the chain of reasoning) that need to be established to the comfortable satisfaction of the Tribunal in order for each violation to be established. The Tribunal agrees with their analysis. The indispensable elements or links are:

(a) TB4 was procured from sources in China; and

(b) TB4 was obtained by Mr Alavi, compounded and provided to Mr Dank in his capacity as Sports Scientist at Essendon; and

(c) Mr Dank administered TB4 to each Player.

248. However, although these are indispensable links in the chain of proof, the facts relevant to each are not viewed in isolation as some facts are relevant to more than one link.

249. The Tribunal proceeds to consider each of the indispensable elements or links in the chain of proof.

S.2. The first link: TB4 was sourced from China

S.2.1. The case as submitted by the ASADA CEO

250. In his written submission, the ASADA CEO has comprehensively set out the case, and the evidence supporting it, that TB4 was sourced from China. This was developed further by his counsel in oral submissions. A summary of this case and the evidence follows.

251. It is alleged that:

(a) the TB4 was delivered to Mr Alavi in two separate shipments;

(b) the first shipment was arranged by Mr Charter and delivered to Mr Alavi on 28 December 2011 (**the first shipment**); and

(c) the second shipment was arranged through Mr Charter's associate, Cedric Anthony, and delivered to Mr Alavi on 18 February 2012 (**the second shipment**).

252. In determining this element or link the Tribunal has to consider whether the evidence establishes to its comfortable satisfaction the shipments were received by Mr Alavi and whether the substance (or one of the substances) was TB4.

253. The Tribunal refers to the submissions put by the ASADA CEO on the reliability of statements made by Mr Charter and Mr Alavi. Those submissions and the Tribunal's conclusions on the assessment of their evidence are set out earlier. Further, it is submitted by the ASADA CEO that the production of documents by Mr Charter and Mr Alavi to ASADA was incomplete.

S.2.1.1. The first shipment: Mr Dank requested TB4

254. It is submitted that the evidence establishes Mr Charter had a meeting with Mr Dank on 11 September 2011 when Mr Dank requested assistance in sourcing peptides. Further, Mr Charter stated that at a second meeting Mr Dank requested assistance in obtaining a number of peptides including TB4. It is submitted this evidence should be accepted because it is corroborated by a contemporaneous file note made by Mr Charter. Reference is made to the circled word "Ed" on the file note. It is submitted that this does not support an inference that Mr Dank intended the TB4, and the "thy" referred to, be used in his business ventures with Ed Van Spanje rather than his work with Essendon. Any suggestion to that effect by Mr Charter in his interview with the 32 players' solicitor, Mr Hargreaves, should not be accepted because of Mr Charter's lack of credit. Reference is made to evidence which it is submitted supports the inference that the TB4 referred to was intended for use at Essendon and that Mr Dank desired to obtain TB4 and not another Thymosin such as Thymosin Alpha. There is no need to set that evidence out.

S.2.1.2. The first shipment: Mr Charter purchases TB4 from GL Biochem

255. It is submitted the evidence establishes that Mr Charter travelled to Hong Kong on 26 November 2011 and later travelled to Shanghai. His evidence is that while he was in China he obtained samples of a number of substances including TB4. It is submitted that there can be no doubt that Mr Charter met and did business with representatives of GL Biochem, as stated in Mr Charter's interviews with

investigators. His evidence is corroborated by contemporaneous emails and business records, in addition to statements from Mr Vincent Xu an executive of GL Biochem.

256. Reference is made to an email on 1 December 2011 by Mr Xu to Mr Charter with a quote for the supply of certain peptides on a monthly basis. It included a quote of US$1500 per gram for 5 grams per month of TB4.

257. On 8 December 2011, after returning to Australia, Mr Charter replied to the email requesting confirmation of a price for different amounts of the requested peptides including 0.25g of TB4. It is submitted that these substances were purchased by Mr Charter in the quantities set out in this email. Reference is made to the evidence which it is said supports this inference. There is no need to set this evidence out. It includes evidence that Mr Charter obtained a certificate of analysis for at least one of the products ordered being, Mechano Growth Factor (MGF) and evidence of a statement by Mr Xu to The Australian newspaper that Mr Charter purchased peptides from GL Biochem including TB4.

258. Consequently, it is submitted the Tribunal can be satisfied that Mr Charter purchased the first shipment of peptides from GL Biochem and arranged for it to be delivered to Mr Alavi.

S.2.1.3. The first shipment: did the first shipment in fact contain TB4?

259. It is submitted that on the basis of evidence referred to there can be no doubt that included in the first shipment was a substance purported to be TB4. Was this in fact TB4?

260. It is submitted that there is evidence relating to the unreliability and poor quality of certain Chinese suppliers of peptides. However, other evidence is referred to as supporting that what in fact was supplied was TB4. This includes evidence from Professor Handelsman that there were many high quality peptide suppliers in China and records lodged with the Securities and Exchange Commission in the United States on 11 June 2009 which indicate that GL Biochem was not a disreputable or unreliable supplier.

261. Reference is also made to the evidence of Mr Charter that he chose GL Biochem because it was GMP certified and Professor Handelsman's evidence that GMP certification is a worldwide prescriptive standard to ensure the quality manufacture of

pharmaceuticals. The certification is confirmed by the GL Biochem website. Further, Mr Xu told an investigator that GL Biochem had a global reputation for producing high quality products and that there could be no dispute that if a product was sold as TB4 it would in fact be TB4.

262. Further, it is submitted that the provision of the certificate of analysis which was included in the first shipment for MGF should enable the Tribunal to be confident that TB4 was in fact supplied. It is submitted that if GL Biochem was able to certify the genuineness of one of the products supplied, it is more likely that the others supplied were also genuine. It is said by the ASADA CEO that the most plausible explanation for the absence of other certificates is that they were provided by GL Biochem but not produced by Mr Charter to ASADA. In addition the analysis conducted at Bio-21 supports the conclusion that TB4 was included in the second shipment and consequently it was also included in the first shipment.

263. Submissions are made in support of the contention that Mr Charter had not purchased Thymosin Alpha in addition to TB4 at the time of the first shipment, contrary to what had been suggested by counsel for the 32 players.

S.2.1.4. The second shipment

264. Reference is made to evidence of Mr Alavi when interviewed that he received a further supply of peptides from Cedric Anthony. It is submitted that this supply is evidenced by a hand written record compiled by Mr Alavi's laboratory assistant, Vania Giordani, a person not subject to the same credibility issues as Mr Alavi. The record states that a number of peptides were received by Mr Alavi's business on 18 February 2012 including "Thymosin". Mr Alavi stated that it was his understanding that Mr Anthony obtained the peptides from the same supplier as the first shipment. He also produced to ASADA certificates of analysis and HPLC reports in relation to the Hexarelin and Thymosin. It is submitted that the Tribunal should accept that the certificates of analysis and HPLC reports for the second shipment reflect information provided by GL Biochem about the peptides, and corroborate Mr Alavi's evidence that he received 1g of TB4 from Mr Anthony on 18 February 2012.

265. When interviewed on 14 April 2014 Mr Alavi stated that he asked Mr Anthony for analysis certificates in relation to the second shipment and had received the documents

by email and had located them in a box in a storage container. They were certificates of analysis for Hexarelin and "Thymosin" as well as matching HPLC reports.

266. Mr Alavi stated:

> *One thing to note.is that there's no supplier on either of them and I think what Shane, Cedric and Steve and all these guys were trying to do was keep (me) in the dark about the supplier, so that they could put a healthy mark-up on the--- on the raw ingredients so—so that's probably why I didn't receive any certificates of analysis for the first lot which actually, you know, did them a disservice because I was not happy giving anything out.*

267. The genuineness of the February certificates is very much in issue. It is submitted from the similarities between the MGF certificate and the February certificates the Tribunal should infer that the February certificates evidence the purchase from GL Biochem of Hexarelin and TB4. It is submitted that the Tribunal should infer that any identifying information contained in the certificates has been removed to protect the identity of the supplier and thereby protect the financial interests of Mr Charter and Mr Anthony in keeping Mr Alavi unaware of their source of supply. A detailed comparison of the certificates is made in the submission. There is no need to set this out.

268. It is submitted that the genuineness of the TB4 supplied in the second shipment is further supported by the results conducted at the Bio-21 Institute.

S.2.1.5. The RD Peptides issue

269. When interviewed by Mr Hargreaves, Mr Charter stated that he had purchased Thymosin Alpha (which is not a prohibited substance) from RD Peptides when on his Shanghai trip in November 2011. He produced at his second interview a purchase contract with the letterhead of RD Peptides listing a purchase of ten 1g vials of "Thymosin". It is submitted by the ASADA CEO that there are a number of reasons why this evidence should not be accepted, which are set out. One of these is that there is evidence that suggests that the purchase contract was fabricated after the interview on 7 November 2014. Metadata for the document discloses that it was created using Adobe Photoshop on 24 November 2014. This suggests the document is not a photo of an actual document, but a version created in Photoshop.

270. It is submitted that the document and Mr Charter's evidence about the purchase of Thymosin Alpha should be wholly rejected.

S.2.2. Response by the 32 players to the ASADA CEO's case

271. A comprehensive written submission has been provided on behalf of the 32 players. Oral submissions were also made by their counsel. A summary follows.

272. It is submitted that there are problems with the assertion of the ASADA CEO that text messages of 2 August 2011 and evidence of treatment of Mr Earl and other footballers with TB4 sourced from Mr Sedrak support his contention that TB4 is what was intended for use at Essendon. Details in support of this submission were provided.

S.2.2.1. The alleged first delivery on 28 December 2011

273. Issue is taken with the contention of the ASADA CEO that evidence of Mr Charter was consistently given about this delivery. It is submitted that when evidence of Mr Charter relied upon is considered in the light of all his evidence it is clear that he has been anything other than consistent in his evidence. There have been deliberate and persistent lies told by Mr Charter, it is submitted. The 32 Players' submission separately addresses the credibility of witnesses, including Mr Charter. The Tribunal has earlier reviewed the credibility of witnesses.

274. Consequently, it is submitted that he must be considered as a wholly unreliable source of information. Particular reference is made in support of this submission to the evidence relating to his encounter with Customs on returning to Australia from China. It is pointed out that when interviewed by investigators, Mr Charter had said that he had brought back the peptides he had purchased in China and declared them at Customs. In the light of the Customs documentation in evidence relating to his return to Australia, it is submitted that this account is false. He concocted an account of what had occurred with Customs.

275. It is submitted that Mr Charter's account of any matter cannot be accepted unless it is supported by independent, reliable evidence. Documentary evidence relied upon by the ASADA CEO has been provided by Mr Charter and is therefore neither independent nor reliable. For example, for the file note relied upon by the ASADA CEO to have any meaning, Mr Charter's evidence about it has to be accepted. An example of independent reliable evidence is the Customs documentation which only

confirms that Mr Charter arrived from China on 2 December 2011 and was searched by Customs officials.

276. Thus, it is submitted that unless Mr Charter's evidence can be corroborated by evidence, such as the Customs documentation referred to above, it should be rejected and not acted upon. Self-serving, incomplete and selective documentation produced by Mr Charter should be considered with the same scepticism.

277. [redacted]

278. It is submitted that the press release in relation to the merger of GL Biochem with a United States company, relied upon by the ASADA CEO in support of the case that GL Biochem is a reliable supplier, should be given no weight as it is self-serving, marketing puffery, the veracity of which cannot be tested.

279. It is submitted that there are problems in accepting the evidence of Mr Xu. He was not formally involved in the investigation. In the circumstances, his statements to a journalist and an ASADA investigator should carry no weight. Those statements could not be tested.

280. In summary, it is submitted that the evidence does not support a finding to the comfortable satisfaction of the Tribunal that the first order ever contained a substance identified by reliable means to be TB4. There is a dearth of reliable evidence.

S.2.2.2. The alleged second delivery on 18 February 2012

281. It is submitted that, if anything, the evidence relating to this delivery is more vague, more imprecise and more generally lacking in documentary corroboration than the first delivery. There is no evidence about its origin, no invoices, email exchanges, international money transfers or claims for reimbursement. It is put that it is "a phantom delivery which seemingly appears out of thin air."

282. With respect to the reliance placed by the ASADA CEO on the certificates of analysis, HPLC documents and Mr Alavi's evidence, it is submitted that this evidence, for the reasons set out, has to be treated with a great deal of scepticism. There is no independent or contemporaneous evidence of the creation or transmission of the documents. They do not contain dates of analyses, and were only produced by Mr Alavi at his fifth and final interview.

283. Further, even if the documents were received by Mr Alavi this does not provide reliable support that the substances are what the documents purport them to be or that they were sourced from GL Biochem. The "certificates" contain little more than incorrect pro-forma information, without reference to a batch, date, source or quality control.

284. With respect to the ASADA CEO'S attempt to explain away the difficulties with the dubious certificate of analysis as an attempt to conceal the supplier, this should be regarded as tenuous at best.

285. It is submitted that there is no evidence of where the second delivery was purchased, Mr Alavi only making an assumption it was GL Biochem. Identification on delivery that it was Thymosin does not establish that it was TB4.

S.2.2.3. RD peptides

286. It is submitted that the evidence relied upon by the ASADA CEO as indicating that the purchase order provided by Mr Charter to Mr Hargreaves is a forgery, does not do so. Reference is made to the affidavit of David Caldwell as supporting this submission and it is contended that the document provides some support for the existence of a transaction as described by Mr Charter to Mr Hargreaves. Further, reference is made to other evidence which it is maintained supports a suggestion that Mr Charter sought and sourced 10g of Thymosin Alpha.

287. In summary, it is submitted that the Tribunal could not be comfortably satisfied that TB4 was the only type of Thymosin involved in the chain of events, if there was such a chain of events.

S.2.3. Response by the 2 players to the ASADA CEO's case

288. These players adopted the submissions of the 32 players but provided a separate written submission and oral submissions by their counsel. A summary follows.

289. Submissions were made about the credibility of witnesses. In particular, it is submitted that the Tribunal should be slow to accept any part of the evidence of Messrs Dank, Charter and Alavi which is adverse to the Players on a material issue. As stated, the Tribunal has set out earlier its assessment of the credibility of these witnesses.

290. The fundamental submission is that the ASADA CEO's case is fatally flawed, in large part because of the absence of satisfactory evidence concerning the identity and continuity of any particular substance.

S.2.3.1. The alleged first delivery on 28 December 2011

291. It is submitted that with respect to this purported delivery there is no evidence of any reliable scientific testing of the kind identified by Professor Handelsman or Dr Vine. No certificate of analysis seems to have been provided relating to this delivery and there is none in evidence.

S.2.3.2. The alleged second delivery on 18 February 2012

292. There is reliance by the ASADA CEO on a handwritten receipt and the purported certificate of analysis produced by Mr Alavi. It is submitted that the evidence strongly suggests the certificate is a fabrication and the Tribunal should not rely upon it. A number of irregularities are identified. The explanation advanced by the ASADA CEO of a desire not to reveal the supplier is speculative. There are irregularities that still are not explained.

293. The evidence of the testing in May 2012 should be treated with caution. The difficulties with the results were referred to by Professor Handelsman and Dr Vine. This testing alone, it is submitted, could not establish the substance being tested was TB4. There is no basis to connect the substance tested to the second delivery. This would be pure speculation and not founded on any proper evidentiary basis.

294. In summary, it is submitted that the provenance of the second delivery is highly questionable. There is an absence of texts, e-mails, invoices or statements to support this delivery occurred as alleged.

S.3. The second link: the TB4 was obtained by Mr Alavi, compounded and provided to Mr Dank in his capacity as sports scientist at Essendon

295. The Tribunal now turns to the position of the parties with respect to this element in the chain of proof relied upon by the ASADA CEO to establish that each of the Players was administered TB4.

S.3.1. The ASADA CEO's case

296. The written submission of the ASADA CEO sets out facts and circumstances it is submitted establish this element. Oral submissions by his counsel were also made. A summary follows.

S.3.1.1. First supply of peptides

297. It is submitted that based on the information contained in contemporaneous material, the Tribunal should conclude that:

(a) on 28 December 2011, Mr Alavi had received 0.25g of TB4;

(b) in January 2012, Mr Alavi compounded the TB4 into 26 vials at a concentration of 3mg/ml; and

(c) on or about 18 January 2012, Mr Alavi supplied the 26 vials of TB4 to Mr Dank in his capacity as Essendon Sports Scientist.

S.3.1.2. Mr Alavi first received TB4 on 28 December 2011

298. Reference has already been made to submissions of the ASADA CEO with respect to this matter. Reference is made in this part of the submission to the text message sent by Mr Charter to Mr Alavi on 29 December 2011 at 11.08am. It says "*the peptides delivered 330 yesterday have you got them*". It is submitted that the Tribunal should infer that the delivery contained the peptides ordered by Mr Charter from GL Biochem. The evidence from which it is submitted this inference can be drawn is set out. There is no need to set that evidence out here.

S.3.1.3. Mr Alavi did not receive any peptide samples from Mr Charter

299. It is submitted that when the evidence is assessed as a whole there is not sufficient evidence for the Tribunal to conclude that Mr Charter brought peptide samples back with him from China. The Tribunal should treat Mr Charter's statements on this issue cautiously as he has given conflicting accounts and the suggestion that he brought the peptides back to Australia does not sit with other evidence. It is submitted that there is not sufficient evidence for the Tribunal to be satisfied that Mr Charter returned to Australia with samples. Rather it should conclude that the first peptides received by Mr Dank were sourced from the first peptides supply from the first GL Biochem supply received on 28 December 2011.

S.3.1.4. Evidence that the Thymosin received on 28 December 2011 was TB4

300. The ASADA CEO relies upon correspondence between Mr Alavi and Eagle Analytical Services in the United States. Mr Alavi sent samples for analysis to Eagle on 20 January 2012. On 24 January Eagle sent an email requesting an explanation about a number of the samples including TB4.

301. It is submitted that the Tribunal should infer from this request on TB4 that Mr Alavi believed the substance he received and sent Eagle was TB4.

302. Reference is made to Mr Alavi's reply to Eagle of 6 February 2012 and in particular his reference to a link for "Thymosin". It is pointed out that the wayback machine internet tool shows the "Thymosin" link contains the same information as that emailed by Mr Charter to Mr Alavi and Mr Dank on12 January 2012 concerning the optimum means by which to prepare and administer and store TB4. It is submitted that the fact that Mr Charter provided this information and Mr Alavi provided the link to it to Eagle further evidences that Mr Charter and Mr Alavi understood the substance to be TB4 and not some other form of Thymosin.

S.3.1.5. Mr Alavi compounded TB4 for Mr Dank

303. It is submitted that from contemporaneous materials the Tribunal can infer that Mr Alavi compounded Hexarelin and TB4 received from Mr Charter for Mr Dank.

304. Reference is made in support of this contention to text messages between Mr Charter and Mr Alavi on 31 December 2011, 8 January 2012, 9 January 2012 and 10 January 2012 relating to the making up of the Hexarelin. Reference is also made to the Como

invoice to Essendon of 31 January 2012 (being invoice #1924) recording that 14 vials of Hexarelin were dispensed on 10 January at a cost of $4,200.

305. Reference is made to further text exchanges of 11 and 12 January 2012 which it is submitted demonstrate that Mr Dank had full knowledge of the type of "Thymosin" obtained by Mr Charter (being TB4) and also that the relevant parties refer to TB4 generically as Thymosin.

306. It is appropriate to set out the following exchange of text messages that are relied upon by the ASADA CEO.

SENDER	RECIPIENT	MESSAGE	DATE AND TIME
Shane CHARTER	Stephen DANK	Which peptide do u need next?	11/01/2012 12:17:04 PM (AEDT)
Stephen DANK	Shane CHARTER	Thymosin beta-4. Then CJC-1295.	11/01/2012 12:41:03 PM (AEDT)
Shane CHARTER	Stephen DANK	Quantities?	11/01/2012 12:40:34 PM (AEDT)
Shane CHARTER	Nima ALAVI	Thymosin beta-4. Then CJC-1295. Steve wants next	11/01/2012 5:35:16 PM (AEDT)
Stephen DANK	Shane CHARTER	Hi mate. Thymosin – 20 x 5 ml vial.	12/01/2012 9:14:31 PM (AEDT)
Shane CHARTER	Nima ALAVI	Hi mate. Thymosin – 20 x 5 m vial. Steves request	12/01/2012 9:19:49 PM (AEDT)

307. Reference is also made to Mr Charter's email to Mr Dank and Mr Alavi which was titled TB4 and contained instructions on how to use TB-500 (TB4). Reference is also made to the following exchange of text messages between 15 and 17 January 2012.

SENDER	RECIPIENT	MESSAGE	DATE AND TIME
Shane CHARTER	Nima ALAVI	Hi mate. Thymosin – 20 x 5 ml vial. Steves request Do u know when it will be ready?	15/01/2012 7:13:38 PM (AEDT)
Nima ALAVI	Shane CHARTER	Should be ready today sometime	16/01/2012 8:58:04 AM (AEDT)

SENDER	RECIPIENT	MESSAGE	DATE AND TIME
Nima ALAVI	Shane CHARTER	Got a few problems with the thymosin formulation. Not dissolving very well also, I'm sending you a trial which may be of interest	16/01/2013 4:51:17 PM (AEDT)
Shane CHARTER	Nima ALAVI	Contacted manufacturer to get some ideas Try the CJC that is the next one he needs	17/01/2012 10:39:19 AM (AEDT)
Shane CHARTER	Cedric ANTHONY	Got a few problems with the thymosin formulation. Not dissolving very well Have tried to email supplier still no answer on best way to dissolve see if you ring them locally	17/01/2012 10:40:43 AM (AEDT)

308. The Como invoice to Essendon of 31 January 2012 has been referred to. It records that 26 vials of "peptide thymosin" made up at 3mg/ml at a cost of $6,500 and 7 vials of Hexarelin made up at 8mg/ml at a cost of $3,360 were charged to Essendon on 18 January 2012. Further entries indicate that on 18 January 2012, 8 vials of "peptide thymosin" made up at 8mg/ml a vial and 27 vials of Hexarelin made up at 5mg/ml a vial were dispensed to Essendon. These further entries were reversed on the same day. The ASADA CEO does not submit these peptides were dispensed to Mr Dank on behalf of Essendon. Rather it can be inferred the entries were made in error.

309. Reference is also made to the following text messages:

SENDER	RECIPIENT	MESSAGE	DATE AND TIME
Shane CHARTER	Nima ALAVI	Can we have CJC and RP 6 ready by Friday?	18/01/2012 11:27:21 AM (AEDT)
Nima ALAVI	Shane CHARTER	I've had a chat to Steve Dank. He is picking up some of the peptides tomorrow..Hes still researching the hexarelin.. Have a chat to him, he may not need the others for now…also, are you available tomorrow for a quick chat? We can meet at the city if you like..	18/01/2012 11:31:58 AM (AEDT)

310. Based on the Essendon invoice and the text messages it is submitted the following can be inferred:

(a) Mr Alavi was able to resolve the formulation issues and compound the TB4;

(b) that the peptides Mr Dank picked up from Como on 19 January 2012 were the peptides listed on the Essendon invoice, namely 26 vials of TB4 made up at 3mg/ml and 7 vials of Hexarelin made up at 8mg/ml; and

(c) by the entry on the Essendon invoice Mr Alavi was aware that the TB4 and Hexarelin were being dispensed to Mr Dank in his Essendon capacity.

S.3.1.6. Concentration of TB4 dispensed in January 2012

311. This is in dispute. It is submitted by the ASADA CEO that Mr Alavi compounded the January supply of TB4 and dispensed it to Mr Dank at a concentration of 3mg/ml. This it is said is supported by the Como invoice of 31 January2012, the player consent forms and the cost of each vial of "peptide thymosin."

312. It is further submitted that if each vial contained this concentration, each would have contained 9mg of TB4. Compounding 26 vials would have required 0.234mg of TB4. Based on this evidence, the Tribunal should infer that the 0.25g of TB4 was sufficient to make up the 26 vials. Reasons for this conclusion are set out in the ASADA CEO'S written submissions. There is no need to set them out here. It also should be inferred that the peptides compounded in January were placed in 10ml vials although it could be concluded that they did not contain 10ml or 5ml of liquid.

313. Finally, it is submitted that dispensing TB4 at 3mg/ml is consistent with vials shown in the August 2012 Como promotional video which have a label recording a potency of TB4 at 3000mcg/ml.

S.3.1.7. Mr Alavi dispensed TB4 to Mr Dank in his Essendon capacity

314. It is submitted that contemporaneous documentary evidence establishes that the January supply of peptides must have been provided to Mr Dank in his capacity as Essendon Sports Scientist rather than in his MRC or ICB capacity, these being his own businesses.

S.3.1.8. Mr Dank was placing non-MRC orders directly with Mr Charter

315. It is submitted that a number of pieces of correspondence demonstrate that MRC orders were placed directly with Como or jointly with Como and Mr Charter whereas Mr Dank's non-MRC orders were placed solely with Mr Charter. It can be inferred from the text messages that the January peptides were ordered directly from Mr Charter. He liaised with Mr Dank to determine which peptides were to be compounded and how this was to occur. On the other hand the evidence establishes that MRC orders were placed primarily with Como. For example on the 21 November 2011 in an email to Mr Alavi, Ed Van Spanje listed the products that MRC required. This email was not sent to Mr Charter.

S.3.1.9. Invoice #1924 (31 January 2012)

316. It is submitted that the Tribunal should not infer from references in this invoice to MRC and ICB peptides were dispensed to either of them rather than Essendon. Referring to evidence of Ms Giordani, it is submitted that the reference to MRC and ICB on the invoice indicates that the peptides were supplied to Essendon at the MRC and ICB price rather than they being the customer.

S.3.1.10. Efforts made to obtain payment from Essendon for peptides

317. Reference is made to an email from Mr Alavi to Mr Charter on 8 February 2012 which refers to Essendon not making a payment and a text message from Mr Charter to Mr Dank on the same day asking "Can u check why EFC have not paid Como invoice from NIMA?" It is submitted that together they add weight to the conclusion that the Hexarelin and TB4 obtained as part of the first supply of peptides by Mr Charter and dispensed by Mr Alavi in January 2012 were procured for and supplied to Mr Dank on behalf of Essendon.

318. Mr Charter stated that he believed that the vials were going to Essendon rather than MRC because MRC were requesting hundreds of vials not 40 to 50. It is submitted that this statement is supported by the Register of Peptides supplied by IMG to ICB for the period March 2012 to July 2012 which reveals monthly totals ranging each month from 700 to 2445.

319. It is acknowledged that by email of 12 February 2012 Mr Dank indicated that MRC had paid the invoice. However, it is submitted that in fact no such payment was

received which is supported by Mr Alavi's email to Mr Charter of 22 March 2012 stating that he had not received any payment from Mr Dank, Essendon, MRC or ICB.

S.3.1.11. Clear vials

320. It is submitted that based on consistent evidence provided by Mr Alavi, Ms Giordani and others, the Tribunal should infer that the peptides supplied in January 2012 were compounded into clear vials and subsequent deliveries were compounded into amber vials. Ms Giordani told investigators that after she commenced in January 2012 the batch of peptides was compounded in clear vials but only amber vials had been subsequently used.

321. Further, evidence of Ms Hobson, the former Essendon Strength Scientist, supports the use of clear vials.

S.3.1.12. Fried peptides

322. A matter that has received considerable attention is a claim by Mr Dank to Mr Alavi that peptides supplied to him by Mr Alavi in a clear vial were affected by sunlight and consequently "fried".

323. Mr Alavi claimed he was told this by Mr Dank which is supported by evidence provided by Mr Del Vecchio. Further, it is submitted that the fact that Eagle did not proceed with testing is consistent with Mr Alavi's claim that testing was not required because the peptides had been "fried".

324. Another matter is whether Mr Dank had the TB4 tested at Mimotopes. It is submitted from contemporaneous evidence and information that Mr Dank never sought to have the TB4 and Hexarelin tested at Mimotopes. What was analysed was GHRP-6 and MGF and it should be inferred that Mr Dank's claim of testing is untrue.

S.3.1.13. Documentary evidence relating to the re-credit

325. The circumstances of the re-credit and the conclusions that should be drawn have received considerable attention.

326. Reference is made to documentary evidence of 14 and 15 February 2012. It is submitted that it is consistent with Mr Dank claiming that the peptides were "fried", Mr Alavi accepting this and reversing the charges and then dispensing further products to Mr Dank in his Essendon capacity once the outstanding amount was reduced below

$25,000. It is submitted that Mr Dank falsely claimed the peptides were "fried" to avoid making payment.

S.3.1.14. Peptide manual

327. Mr Alavi gave evidence of a peptide manual he put together. It appears it was created on 5 July 2012. It was forwarded to the Melbourne Football Club on 10 September 2012 on behalf of a company of which Mr Alavi had been a director. The manual contains information on Hexarelin and Thymosin as well as other substances. The Thymosin section refers to TB4 but not Thymosin Alpha. Purity levels of substances manufactured are also referred to. Ms Hobson found a copy of the manual in her office at Essendon.

328. It is submitted that from the contents of the manual and other matters that it should be inferred that Mr Alavi compounded TB4 for Mr Dank in his capacity as Essendon Sports Scientist. The information in the manual referable to Thymosin is consistent with TB4 and not Thymosin Alpha.

S.3.1.15. Second supply of peptides

329. Based on the information contained in the contemporaneous materials, it is submitted the Tribunal should conclude:

(a) on 18 February 2012, Mr Alavi received a further 1g of TB4;

(b) Mr Alavi subsequently compounded TB4, including in May 2012;

(c) Mr Alavi supplied TB4 to Mr Dank in his capacity as Essendon Sports Scientist, including on or around 11 May 2012.

S.3.1.16. Evidence of receipt of second supply

330. It is submitted that the Tribunal should accept Mr Alavi's evidence about this supply. It is confirmed by the handwritten receipt. Mr Alavi also produced to investigators certificates of analysis and HPLC reports in relation to Hexarelin and "Thymosin."

331. With respect to these documents, it is submitted for the reasons previously advanced, that they establish that TB4 was contained in the second delivery.

S.3.1.17. Timing of subsequent supplies

332. Mr Alavi referred in his evidence to sourcing peptides in April 2012 from Sichuan Hengli Technology.

333. It is submitted that Sichuan invoices of 21 June 2012 and 5 December 2012 recording purchases of 2g and 1.5g of "Thymosin" evidence purchases of TB4, Mr Alavi stating that the substances purchased were TB4.

S.3.1.18. Second supply used to fill May 2012 orders

334. It is submitted the fact that a second delivery occurred can be inferred from contemporaneous text messages. The following messages were exchanged whilst Mr Dank was in the Middle East investigating a business venture in Qatar.

SENDER	RECIPIENT	MESSAGE	DATE AND TIME
Stephen DANK	Nima ALAVI	Great mate. Can you organise the Thymosin for the AOD study? I have now started the study.	09/05/2012 8:32:45 PM (AEST)
Nima ALAVI	Stephen DANK	I'll let Vania know.. She should have it ready for you in a couple of days.. Also, send me the info/brief on Qatar when you get a chance..	10/05/2012 12:13:57 AM (AEST)

335. There is a further exchange of text messages in August 2012, where Mr Dank refers to "Thymosin" and "AOD". As part of that exchange, when asked by Mr Dank "*did they go alright with efficacy?*", Mr Alavi sent the following text message in response:

SENDER	RECIPIENT	MESSAGE	DATE AND TIME
Nima ALAVI	Stephen DANK	Yep it did the job.. Amazing repair properties	05/08/2012 11:23:01 PM (AEST)

336. It is submitted that the Tribunal can infer from the reference in the above message to "repair properties" that what is being referred to is TB4 and not Thymosin Alpha, and that therefore the "Thymosin" referred to in the May 2012 text messages is also TB4.

S.3.1.19. Bio-21 testing

337. This was a matter that received considerable attention and was the subject of evidence by the two experts.

338. Bio-21 is a mass spectrometry and proteomics facility of Melbourne University. In response to disclosure notices a large number of files were identified and disclosed to ASADA.

339. Ms Giordani carried out tests at Bio-21 on 9 May 2012. It is submitted from the test results and the experts' interpretation of those results that it can be inferred that she tested TB4. On the basis of the expert evidence it is possible that the substance tested was TB4 and not possible it was Thymosin Alpha or Thymomodulin. It is submitted for the reasons set out, the Tribunal can be satisfied, having regard to the surrounding facts and circumstances, the substance was TB4. The test results are probative of whether the substance was TB4 although it is conceded that on their own they are not determinative.

S.3.1.20. Mr Alavi compounded second supply of TB4

340. It is submitted the Tribunal should infer that Mr Alavi compounded the second supply and it was compounded into amber vials.

341. Based on Ms Giordani's evidence she would have compounded only a few vials of TB4 prior to the Bio-21 testing. It can be inferred, it is submitted, that enough TB4 remained to compound at least the 15 vials dispensed to Mr Dank on or after 11 May 2012.

S.3.1.21. Second supply was dispensed to Mr Dank in his Essendon capacity

342. It is submitted that based on the evidence that is set out the Tribunal should infer that the second supply was dispensed to Mr Dank in his Essendon capacity. This evidence includes statements from players that they were injected with substances from brown vials.

343. Reference is made to the fact that there is no evidence that Mr Dank or Essendon were charged for the second supply. However, it is pointed out that Mr Alavi was providing peptides for use by Mr Dank in trials without imposing any charge. Reference was made to the following exchange of text messages:

SENDER	RECIPIENT	MESSAGE	DATE AND TIME
Nima ALAVI	Stephen DANK	Ok, the guys on Fri night mentioned that they had paid you for the AOD? Shall I be charging	13/08/2012 2:41:14 PM (AEST)

		this to MRC? I thought this was for trials so I haven't charged for it.. If not I don't want to give out any more for free.. Let's speak about this tomorrow..	
Stephen DANK	Nima ALAVI	It is for trials. They had paid for CJC. This was for trials. This guy today is trials. He is being injected tomorrow by Dr. Dan Bates	13/08/2012 7:23:26 PM (AEST)

344. It is submitted that Mr Charter in his evidence stated that Mr Dank informed him he was doing a research project on professional athletes and he assumed this involved Essendon players. Consequently, the Tribunal should infer that Mr Alavi provided the TB4 from the second supply for free for Mr Dank to use in this research project.

S.3.2. Response of the 32 players regarding receipt, compounding and supply of TB4

345. A summary of the response of the 32 players to the case put by the ASADA CEO follows.

S.3.2.1. The alleged first shipment

346. Whilst it is conceded that the record of text messages tends to suggest there was a courier delivery to Mr Alavi on 28 December 2011, it is submitted that there is no reliable evidence as to where the delivery originated from, what it contained, through whose hands it had passed. There is a complete lack of evidence of continuity. There are serious evidential questions about the delivery, where it originated from and what it contained.

347. Further, Mr Alavi has no independent knowledge of what he was compounding. He cannot say what he was compounding. The experts in their evidence refer to the questionable authenticity of substances emanating from China without independent analysis or the supplier being beyond reproach.

348. It is submitted that the two text messages sent on 11 January 2012 which refer to TB4 are the only messages between those concerned that refer specifically to TB4. The other messages refer to Thymosin (simpliciter) and there are messages from Mr Dank that refer to Thymomodulin.

349. In any event, 0.25g was insufficient of the product to compound as directed. On the basis of a calculation that is set out, it is submitted that 0.25g could never fulfil the order of 20 x 5ml vials. In addition the reference on the Essendon invoice to 8 vials raises further questions about the quantity of any substance compounded and dispensed by Mr Alavi as "Thymosin".

350. It is submitted that the evidence relating to the Essendon invoice which contains the cancellation or reversal is so contradictory and vexed as to render it incapable of reasonable interpretation. Reliance is placed on the following answer given by Mr Alavi to investigators:

> *"When I showed Steve that, he said, 'Oh no. That was supposed to be charged to ICB or MRC.' So, then we credited it and it got charged there. But that stock was taken to Steve to take with him to Sydney or wherever it was he was going."*

351. As to why such substances were not subsequently billed to MRC or ICB, it is submitted that the evidence that the substances were "fried" could provide an explanation. Reference is also made to the non-compliance by MRC and ICB with requests by ASADA for information and hence the need for the Supreme Court proceedings.

352. Further, it is submitted that it makes no sense that Mr Dank would concoct a story of the peptides being fried to remove a liability of Essendon to pay. The reasoning of the ASADA CEO in relation to the invoice should be rejected.

353. Reference is made to explanations put forward by the ASADA CEO for inconsistencies in the evidence. It is submitted that these explanations are without reliable foundation and that unless the Tribunal accepted such explanations it could not be comfortably satisfied that Mr Alavi compounded TB4 and provided it to Mr Dank in January 2012.

S.3.2.2. The alleged second shipment

354. It is submitted that there is no direct evidence that this delivery was compounded or supplied to Mr Dank let alone making its way to Essendon. There are no invoices to Essendon for any dispensed Thymosin products after January 2012. The text

messages around May 2012, relied upon by the ASADA CEO relate to Thymosin for the AOD study, which was to be conducted in Qatar.

355. Accordingly, the Tribunal could not be satisfied that any part of the second delivery made its way to Essendon.

356. It is submitted that evidence of Ms Giordani is illustrative where she refers to Mr Van Spanje from MRC ordering all of the substances which were referred to in her interview and that she "compounded quite a lot" for him and MRC and that it was "constant".

357. It is submitted that evidence regarding the colour of the vials does not support the alleged second delivery. It can be fairly assumed that most glass vials used were either clear or amber in colour depending on the intended functionality. The Como video shows TB4 vials dispensed as having a bright orange top whereas no player gave evidence of seeing such a prominent and distinctive colour in any of their interviews.

S.3.2.3. Bio-21 documents

358. Reference is made to the Bio-21 analysis headed "THY A5" and the contention of the ASADA CEO that this relates to the substances in the second delivery.

359. It is agreed that there is not much difference between the evidence of the experts on this analysis but where there is the evidence of Dr Vine should be preferred. He maintained that the analysis is so imprecise as to be attended with considerable doubt or as put by Dr Watt "unreliable".

S.3.3. Response of the 2 players regarding receipt, compounding and supply of TB4

360. A summary of the response of the 2 players to the ASADA CEO's case follows.

S.3.3.1. The first delivery

361. It is submitted that the first issue is whether this delivery is the subject of the request made by Mr Charter for a compounding of Thymosin around 12 January 2012. The request appears to be for 20 x 5ml vials and made shortly after an email from Mr Charter to Mr Alavi and Mr Dank recommending a concentration of 10mg per 2ml. It is submitted that such a concentration would need 0.5g of substance.

362. The second issue is whether Mr Alavi was successfully able to compound it. Reference is made to text messages from Mr Alavi referring to difficulty he was having with the process and his assumption that he had been able to dissolve the substance. Care needs to be taken before relying upon such an assertion.

363. The third issue is whether any substance compounded to Mr Dank was in a usable state. Reference is made to the evidence about the substance being "fried". Although Mr Dank did not have tests conducted by Mimotopes, it is submitted there is a reasonable possibility that Mr Dank, at the very least, believed the substance should or could not be used. This is supported by the evidence of the reversing of the entry in the invoice. The assertion that Mr Dank was lying to avoid payment is guesswork.

364. The fourth issue is whether in any event the substance found its way to Essendon. It is pointed out that the request for compounding Thymosin was made at the same time as a request for compounding CJC and it is not suggested that was for supply to Essendon. Further, the reference to 26 vials in the invoice and the level of concentration, which it is submitted would require more than 0.25g.

S.3.3.2. The absence of Essendon records is an important consideration

365. In summary, it is submitted that there is a litany of difficulties with the continuity of the original substance which do not allow for a conclusion that the 0.25g of TB4 was received by Essendon and, in any event, that it was injected in any individual player.

S.3.3.3. The second delivery

366. It is submitted that the proof of this delivery is highly questionable. The handwritten receipt was produced at his last interview by Mr Alavi. There is a lack of other evidence about the delivery. In particular, there are no texts, emails, invoices, statements or other records to confirm this delivery.

367. For reasons previously referred to, the certificate of analysis cannot be relied upon. There is a distinct possibility that people involved were acting fraudulently.

S.3.3.4. Bio-21 testing

368. Apart from flaws identified by Dr Vine, it is submitted that there is no evidence that any substance tested by Ms Giordani was compounded and provided to Mr Dank for Essendon. There are no records such as invoices or receipts to support such a

contention. Further, Como were offering various substances for sale and Mr Dank was servicing many customers.

S.3.3.5. Player interviews

369. It is submitted that the interviews do not assist the proof of provision and continuity. Looked at as a whole they do not reveal a structured program to permit a finding that any individual player received the same injections from the same deliveries.

S.3.3.6. Different Thymosins

370. As will be clear, there is reference in the evidence of communications between the main participants to Thymosin, TB4 and Thymomodulin. An important issue is what they were referring to when they used these words. In particular, whether they meant TB4 or Thymosin Alpha or some other substance. It is submitted a finding as to what was meant when the words were used can only be evidence of intention or belief.

371. Professor Handelsman referred in his evidence to TB4 having properties such as growth and recovery, whereas Thymosin Alpha had properties that help the immune system. It is submitted that it needs to be borne in mind that the principal participants do not have his expertise and there appears to be some use of the word Thymosin concerning the immune system and its importance to professional sports people.

372. It is pointed out that the consent forms signed by the players refer to Thymosin. Mr Charter in his interview distinguishes between TB4 and what he describes as straight Thymosin. He allows for the possibility that TB4 and Thymosin Alpha were ordered at different times. When interviewed by Mr Hargreaves, Mr Charter claimed that when he was referring to Thymosin he was always referring to Thymosin Alpha.

373. It is submitted that the Tribunal may consider that when Thymosin is being referred to it is a reference to TB4 but it may conclude that there is uncertainty because the evidence indicates that the people concerned were themselves confused about the nature and differences in the various Thymosins.

S.4. The third link: Mr Dank administered TB4 to each of the Players

S.4.1. The ASADA CEO's case

374. In written submissions and supporting oral submissions by his counsel, the ASADA CEO has set out the facts and circumstances it is submitted establish that this occurred. A summary follows.

375. Reference is made to the attendance of each of the Players at the auditorium at Essendon when the supplement program was explained to them. An appendix to the submission summarises relevant evidence given by the Players.

376. It is submitted this evidence supports the following propositions.

(a) The officials present at the meeting.

The meeting was addressed by Mr Dank and Mr Robinson and related to the new supplement protocols. Mr Hird was present and also addressed the meeting. It is not clear what other officials were present but it should be accepted that Dr Reid was not present.

(b) What the players were told at the meeting about the supplement program.

Reference is made to media claims by Mr Dank that the Players were fully informed of what they were to be administered. The fact that each player signed a consent form consenting to receiving injections of Thymosin demonstrates that they were at least informed that this was to take place.

The Players overwhelmingly recall being given assurances during the meeting that all substances to be used in the program had WADA and/or ASADA approval. Some Players referred to Mr Dank describing the substances to be used as being for recovery purposes. Some recall that Thymosin was specifically identified by Mr Dank. The Players were informed that the program would involve injections. It is likely Mr Dank made a power point presentation.

(c) The Players were told the program was "close to the edge."

Several players recall being told during the meeting the program was "close to the line." A number of examples are referred to such as [redacted] recalling that Mr Robinson told the Players that the program was like being on a cliff

and going right to the end but not over it. [redacted] recalled Mr Hird saying that they would be pushing the boundaries but it would be completely legal and state of the art.

(d) The signing of forms consenting to injections of Thymosin.

These forms were handed out during the meeting and at, or shortly after, the great majority of the Essendon players present signed forms. Each of the 34 Players charged signed forms with a total of 38 signing. A separate form was signed for the administration of Tribulus, Colostrum, AOD-9604 and Thymosin. The latter two substances were to be administered by injection.

Each form was in identical terms and reference is made to various aspects including the injection regime. Each of the forms referred to an appendix documenting WADA compliance but this appendix was not included as part of each form.

(e) The Players were directed to keep the program secret.

Reference is made to the evidence of various Players that they were told during the meeting to keep the program secret and not discuss it with anyone who was not present at the meeting. For example, [redacted] stated that they were told that "It had to stay in house because they didn't want it getting out to other clubs because they thought that this would give us a competitive edge."

377. Neither Dr Reid nor Dr De Morton was present at the meeting. It is submitted that the evidence establishes that the doctors were specifically excluded from knowledge of the supplement program, including that injections were involved.

378. Reference is made to declarations completed when a total of 30 blood or urine samples were provided to doping control officers. It is pointed out that on 27 occasions the player failed to declare any injections to the doping control officer.

S.4.1.1. Common features of the Players' evidence about their injections

379. It is submitted that there is considerable consistency in the Players' recollection of aspects of the injection regime and their evidence supports a number of propositions.

(a) The purpose of injections was for "recovery".

It is submitted that the clear recollection of most players in their evidence is that they were told that the purpose of the injections was for "recovery" although some said they were told the injections were to boost immunity. An appendix to the submission sets out relevant evidence of the Players relating to this issue.

(b) The substance the Players were injected with was Thymosin.

It is contended that many players either recalled being injected with Thymosin or gave evidence suggesting this was probable. For example, six players recalled receiving injections of Thymosin. Details of this evidence is set out in an appendix.

(c) The injections started after the meeting and continued for the season.

It is contended that the Players' evidence overwhelmingly suggested that the injections commenced after the meeting and the consents and continued for the whole season. A summary of this evidence is set out in an appendix to the submission. This appendix also provides details of the evidence of the Players about the frequency of injections.

(d) Where the injections were given and the vials used.

It is contended that the Players' evidence overwhelmingly demonstrates that the injections occurred in Mr Dank's office from a vial that was in his fridge. A summary of this evidence is set out in an appendix to the submission.

380. A summary of the Players' evidence about the vials used is set out in an appendix to the submission. It is contended that the evidence supports a number of findings including that most Players were injected from brown vials while some were injected from clear vials. The evidence supports the proposition that Mr Dank received separate deliveries of Thymosin in brown and clear vials.

381. Relevant evidence of each individual player about their own injection regime is set out in an appendix to the submission.

382. Counsel for the ASADA CEO in oral submissions took the Tribunal through the 27 matters referred to in the short outline of his case and how they related to the written submission provided.

S.4.2. The response of the 32 players

383. A summary of their response as contained in their written submissions and oral submissions follows.

384. It is contended that there is no evidence that states what Mr Dank gave any player during the 2012 season. His representations to them in whatever form are vague and imprecise and can no more reasonably be applied to TB4 as they can to other substances, including other Thymosins. Statements by Mr Dank as to what he was injecting players with cannot be accepted at face value.

385. It is submitted that Mr Dank is a person of little or no credibility who often speaks and behaves erratically and irrationally. For example, it is submitted that he lied to the Players about their being injected with AOD-9604 as the investigation found no source for this substance prior to August 2012.

386. The uncertainty around what the Players were given is a constant source of dread, uncertainty and concern for the Players and their families. It is contended that it is a fundamental flaw in the ASADA CEO's case.

387. The assertion of the ASADA CEO that Mr Dank did not obtain injectable substances from any source other than Mr Alavi early in 2012 is challenged. For example, the evidence of [redacted] of how the vials were packaged does not sit comfortably with the evidence of Mr Alavi. Further, Mr Alavi had referred to possible other sources when interviewed.

388. It is submitted that the interview of Mr Robinson with investigators supports the suggestion that a form of Thymosin other than TB4 was intended to be used at Essendon. There is some dispute about the interpretation of Mr Robinson's evidence on this matter when interviewed on 19 March 2013. However, reliance is placed on the following passage from Mr Robinson's interview of 8 August 2013.

> *MS KERRISON: And do you remember him – I mean can you give us any more background as to why Thymosin might be used there, whether it's Thymosin or Thymosin Beta 4?*

MR ROBINSON: In all honesty, I don't know more than Thymosin or Thymomodulin. That's all I know about this. I don't know exactly what it is. I can't give you any more. I wish I could.

…

MS KERRISON: But in relation to that text message there, do you remember him actually using a term Thymosin Beta 4? Did he explain that at all in your conversation with him?

MR ROBINSON: I'll make this clear, because I know this has come up. I have never heard of Thymosin Beta 4.

> *…*
> *There is a difference, but you can still dose the same. I've never heard of Beta 4 – anything like that. So I don't know what – Thymosin or Thymomodulin, as you would see in one of my emails,* ***it was told to me it was Thymomodulin****. Now I couldn't tell you. Is Thymosin Beta 4 Thymomodulin, or is Thymomodulin something different to Thymosin? I couldn't tell you what the relationship is. But all I ever heard was Thymosin or Thymomodulin.*
> *…*

Mainly because of the recovery time, how quick you can recover from shoulder surgery. Now, again, whether it's Thymosin, Thymosin Beta 4, Thymomodulin, I don't know what it is. I got told – the only thing I ever got told was ***Thymosin or Thymomodulin worked on the thymus gland and was good for your immune system.*** *That was what I knew it for.*

(emphasis added)

389. It is further submitted that the suggestion Mr Dank was using Thymosin at Essendon to assist with perceived immune-compromise due to training loads is supported by evidence from reliable sources such as Dr Fricker who Mr Dank met in the Middle East.

390. Further, support is also provided by evidence from Mr Alavi who said when interviewed that Thymosin "boosts your immune system" and that he was dispensing

it to a customer of Mr Dank who had HIV. The use of Thymosin Alpha to bolster the immune system and treat HIV was referred to in a journal cited by Professor Handelsman.

391. It is contended that the following response of Mr Dank to The Age journalist, Nick McKenzie, when interviewed is also relevant:

> *Well, the point is that there is a degree of immune-suppression after a game or a hard training week, right. Often times the ability to back up next week is decreased by the hit on the immune system, right.*

392. The submission of the 32 Players contains a summary table of the Players' evidence under headings of date of interview, Thymosin consent form, injection, injection location, description of vial other notes, AOD and other injections and period of AOD injections, etc.

S.4.3. The response of the 2 players

393. As already stated, these players rely on the submissions of the 32 players. In addition, it is submitted as follows.

394. It is submitted that the player interviews do not assist with the question of provision or continuity. The interviews as a whole do not reveal a structured program (or indeed anything that resembles an orderly, regulated procedure for administering supplements) to permit a finding that each player or any individual player received the same injection from the same shipments.

395. The ASADA CEO's submissions are assessed as follows:

> *Notwithstanding the extensive nature of the written submissions of ASADA, they do not succeed in overcoming the fundamental defects in the case. The submissions made by ASADA require a significant degree of speculation and guesswork. Although ASADA have disavowed reliance on the evidence of Charter, Alavi and Dank other than in ostensibly a very limited way, their submissions are nonetheless replete with propositions relying on those people where there is no corroboration, the evidence is not against their interest, at least as it would have been likely to have been perceived by them at the time, and is not inherently plausible.*

396. The 2 players did not hold back in their closing written submission about the Tribunal's task in these proceedings. Paragraph 45 states:

> *The Tribunal is being asked to perform the almost impossible task of reconstructing a series of events which were on any view ill conceived, little understood and poorly regulated. Not only does the absence of records reveal a scandalous breach of the duty of care owed to the players, it places insurmountable obstacles in the path of ASADA. Furthermore those responsible have been shown to be lacking in appropriate expertise, to be ignorant about the nature of the so called supplements and to have acted with a reckless disregard for the welfare of the players. The evidence that has been submitted relies to a considerable degree on people who are demonstrably unreliable and dishonest. In the result the Tribunal is left with limited and unreliable evidence from which it is effectively being asked to make quantum leaps of reason rather than drawing properly available inferences.*

S.5. Disciplinary Tribunal Counsel closing submissions

397. In their closing written submissions counsel set out their role, which in summary is to assist the Tribunal to perform its task of determining whether there have been any anti-doping rule violations.

398. The submissions are brief but helpful. They state, inter alia, as follows:

> *There is force in the argument in the 32 Players' Submissions that difficulties arise when one attempts to cherry-pick reliable evidence from discredited witnesses. ASADA has identified a substantial body of contemporaneous documentary evidence that tends to support the allegations. The task for the Tribunal is to determine whether this documentary evidence sufficiently buttresses those consistent aspects of the evidence of Dank, Charter and Alavi so as to sustain the alleged violations.*

T. THE ESSENDON SUPPLEMENT PROGRAM FOR SEASON 2012

399. Before moving to the Tribunal's conclusions concerning the alleged violation by each of the Players, it is appropriate and necessary, to consider the Essendon supplement

program for 2012 (the **Supplement Program**) and the Tribunal's conclusions with respect to that program. It is important to the issues that have to be determined, it being alleged that the implementation of this program involved the administration to each of the Players of a prohibited substance, TB4. Some of the events referred to have been included in the background. However, there is a need to refer to them again in this context and in more detail.

400. An appropriate starting point is 1 August 2011 when Mr Robinson's manager/agent, Alastair Lynch, wrote to Paul Hamilton at Essendon about an offer of employment by Essendon to Mr Robinson. Relevantly, the letter stated:

> *Dear Paul, Thanks very much for your employment offer to Dean Robinson as Physical Performance Manager. Dean is really excited by the prospect of working at Essendon at what shapes to be a most exciting time. However, as I indicated over the phone, the all-inclusive offer of $240,000 is significantly less than what that which he will earn at the Gold Coast Suns next year. He will not entertain a move at this level…*
>
> *Through his excellent industry connections he (Mr Robinson) will drive significant cost savings for the club in this process… Potential side benefits of having Dean in the Essendon stable are as follows: Cost savings – Dean can deliver direct and conservative saving of more than $650K, and bring priceless IP and consultation with exclusive global contracts world leaders in their respective fields. Some of this is ongoing on an annual basis. Global Contacts – Dean has developed close working relationships and consultancies with world leading practitioners in a number of relevant fields who do not have anything to do with anyone else in the AFL. Just to name a few, these include: <u>Steve Dank – Sydney (pharmacology/supplementation)</u>… to quote just one example of the benefits to the club, Essendon would have the use of world-first second-to-none hypoxic diagnostic and prescription equipment.*
>
> (emphasis added)

401. Mr Dank and Mr Robinson had worked together at Manly where Mr Robinson was Performance Manager between 2004 and 2006 and a consultant during 2007 and 2008. As Performance Manager, Mr Robinson described in a CV his objective: "Develop

optimum high performance programs based on performance enhancement, injury prevention and rehabilitation." Mr Dank was the Director of Physiology and Sports Science for Manly for the period 2004-2007.

402. Mr Robinson was the High Performance Manager at Geelong in the period 2007-2010. He gave the same description in a CV of the objective of this position as he gave for the Manly position. Whilst there, blood tests of the Geelong players were carried out. Mr Robinson suggested profiling players including "amino acids analysis." While at Geelong Mr Robinson used the services of Mr Dank.

403. On 5 July 2010, Mr Robinson was offered the position of high performance manager at the Suns. He commenced on 1 October 2010. Mr Robinson gave the same description in a CV of the objective of this position as the earlier positions. At the same time Mr Dank commenced as a "sports science consultant" with the Suns. His role was terminated before the commencement of the 2011 AFL season. Issues arise as to whether Mr Dank was an official with the Suns.

404. On 11 August 2011, Essendon wrote to Mr Robinson confirming an offer of employment as High Performance Coach. The period of employment was from 1 September 2011 until 31 October 2014, reporting to the general manager football and the head coach. Mr Robinson in a CV described the objective of the position: "co-ordinate a team of experts in the area of high performance to develop optimum high performance programs based on scientific principles in the areas of performance enhancement, leadership, medicine, psychology, injury prevention and rehabilitation."

405. On 22 August 2011, Mr Robinson emailed Mr Hird a paper co-authored by Mr Dank on the effectiveness of the substance Lactaway on fatigue during exercise. Mr Hird responded expressing interest and inquiring whether it was easy to source.

406. About this time, Mr Robinson introduced Mr Dank to Dr Reid, the Essendon Club Doctor. On 23 August 2011, Mr Dank sent a text message to Mr Robinson stating: *"Don't forget how important thymosin is. This is going to be our vital cornerstone next year. It is the ultimate assembly regulatory protein and biological modifier."*

407. On the same day, Benita Lalor, the Essendon Dietician, informed Mr Hird that Lactaway had shown no meaningful proof of beneficial effects and may cause

damage. Mr Hird emailed her message to Mr Corcoran commenting "This is what we are up against."

408. Mr Robinson arranged for Mr Dank to meet with Dr Reid on 29 August 2011. When interviewed by investigators Dr Reid said that when:

> *Dean Robinson was appointed to the club as being this guru, so I didn't doubt that. He had been in several good jobs and then he insisted that Steve Danks came with him. Steve Danks was various things told to me, he's a biochemist, he was a pharmacist, has been 10 years in professional sport, he was a nutritional expert…*

409. Dean Robinson said to Dr Reid that Dank was the "*Best in Australia*".

410. On 29 August 2011, Mr Dank arranged with Mr Charter for the supply of a quantity of B-dose forte vitamin injections for delivery to Dr Reid. Essendon later paid for the injections. At this stage Mr Dank had no formal position with Essendon.

411. Mr Robinson arranged for Mr Dank to meet with him and Messrs Hird, Corcoran, Thompson (being the Essendon Assistant Coach) and Hamilton on 28 September 2011. Mr Robinson informed investigators that Mr Dank expressly stated that he would never cross the WADA Code. After the interview Mr Hird sent a text message to Mr Robinson inviting him and Mr Dank to his home to discuss what they were going to do to "turn this club around."

412. It was agreed that Mr Dank was to introduce and run a supplement program complying with the WADA Code and the AFL Code. Mr Robinson described Mr Dank's responsibilities as:

> *Looking at the supplements, looking at WADA Code and AFL Code and seeing what falls within the code and what we can use, consulting with a doctor and getting the tick-off from the doctor prior to utilisation of any supplements. It was to source the supplements.*

413. On 30 September 2011, Mr Robinson, on behalf of Essendon, wrote to Mr Dank formally confirming the offer of employment as Sports Scientist at Essendon and welcoming him to the team. A position description was set out which included:

Responsible for the design of supplementation protocols and recovery procedures and their implementation.

414. In late 2011, Mr Dank met Mr Alavi and approached him about being the pharmacist for Essendon. Mr Alavi has stated he welcomed the approach because it was a great business opportunity.

415. On 16 November 2011, Mr Dank facilitated the commencement of the taking of blood samples from Essendon players. It would appear this was done without the knowledge of Essendon club doctors. Samples were subsequently sent to Dr Ijaz Khan at Chullora, NSW for analysis. Further blood samples were taken on 30 November 2011, apparently without the knowledge of the Essendon club doctors, and sent to Dr Khan for analysis.

416. In early January 2012, Dr Reid approached Mr Hird upon hearing that some players were said to have been injected with AOD-9604, a peptide he knew nothing about. Mr Hird has stated that he and Dr Reid discussed how they should deal with the matter so as to ensure that Messrs Robinson and Dank complied with his earlier directive about supplementation protocols.

417. A meeting took place on 15 January 2012 between Messrs Robinson, Dank, Thompson, Hamilton and Dr Reid. Messrs Dank and Robinson were questioned as to why the unauthorised injection of players had occurred. Mr Hird has stated that the answers were uninformative and that it was decided that no more supplements would be administered without the approval of Dr Reid.

418. Mr Robinson was asked to re-affirm the supplementation protocols and did so by email which stated:

Hi Guys,

Subsequent to this morning's meeting I thought it is pertinent that we have a written outline of the process and procedures we will follow for supplementation.

Steve once you have identified a supplement we would benefit from that is not contravening any laws of sport based on the WADA code, you have agreed to the following points with Dr Bruce Reid.

Provide Dr Bruce Reid with a summary of the literature which will include:

1. *Both the scientific name and its common name.*
2. *All clinical findings both positive and negative.*
3. *State to the best of your knowledge the known or potential side effects both short and long-term.*
4. *Complete list of references for his perusal should he need any further information.*
5. *Statement from you that this supplement is not contravening any WADA guidelines.*

- *Once Dr Bruce Reid has received the above information he will have sufficient time to make recommendation as to its suitability for the use with our players. If Dr Reid requires further information this will be provided to him so he can be completely comfortable that in the event of him recommending the supplement, in the best of his knowledge it does no harm. He will present his recommendation back to the Head Coach, High Performance Coach and to Steve Dank.*
- *If the supplement is recommended then a letter of informed consent will be produced and given to the player to sign prior to the first administration of the supplement, the player will have right of refusal and also be able to refuse the supplement at any point in the future. As part of this informed consent the player will also be made aware that it is our competitive advantage and in being so that they are not permitted to speak about our supplement program outside of the Head Doctor, Head Coach, High Performance Coach and Steve Dank.*

If I have missed anything please let me know.

419. Mr Hird responded to Mr Robinson, with copies to Mr Dank and Dr Reid, as follows:

Sounds good Deano, you know my thoughts on supplements

1. *it must not harm the player*
2. *it must not be illegal (according to WADA and AFL drug guidelines)*
3. *we must get player consent.*

420. Mr Robinson also sent to Dr Reid a further email containing a number of articles on peptide research. They had previously been forwarded to him by Mr Dank.

421. On 16 January 2012, concerns were raised at a player leadership meeting about supplements. A consensus was reached that greater information was required to enable true informed consent to be obtained. [redacted] [redacted] stated that [redacted] [redacted] raised the issue of supplements and described the meeting as follows:

> [redacted] *used the blunt words, but he was saying "What the hell's this new supplement program that we're doing? What is it? These injection shit, I don't like it. Where's it coming from? I want to know what we're – you know, what is – the players were concerned. 'Look, I've never heard of injections being done before' as – that was the common theme from the group.*

422. Following the meeting, Mr Oliver, the Performance Psychologist, raised the issue of informed consent with Mr Robinson pointing out that each supplement had to be consented to separately and explained in a way the Players would understand.

423. Consequently, Mr Robinson drafted a document which Mr Oliver edited. On 17 January 2012 Dr Reid wrote to Messrs Hird and Hamilton as follows:

> *Despite repeated requests as to exactly what we are giving our players and the literature related to this, I have at no time been given that until last Sunday (15 January 2012).*

424. Reid's letter also stated:

> *I have some fundamental problems being the club doctor at present.*
>
> *Last week the players were given subcutaneous injections, not by myself, and I had no idea that this was happening and also the drug that was involved…*
>
> *For example, the injection that we have given to our players subcutaneously, was a drug called AOD/9604, is an Oligomeric Peptide.*
>
> *If we are restoring to deliver this altered growth hormone molecule, I think we are playing at the edge and this will read extremely badly in the press for our club and for the benefits and also for side effects that are not known in the long term, I have trouble with all these drugs.*

425. The letter also stated:

> *I am frustrated by this and now I feel I am letting the club down by not automatically approving of these things. I need to collect my thoughts as these drugs have been given without my knowledge.*
>
> *I am sure Steve Danks believes that what we are doing is totally ethical and legal, however, one wonders whether if you take a long stance and look at this from a distance, whether you would want your children being injected with a derivative growth hormone that is not free to the community and whether calf's blood, that has been used for many years and is still doubted by most doctors, is worth pursuing.*

426. Notwithstanding what Mr Dank had told people at Essendon, significantly, the ASADA investigation found no evidence of Mr Dank obtaining AOD-9604 for injection before August 2012. There is evidence of it being compounded as a cream by Como in May 2012.

427. On 30 January 2012, Mr Hird and Mr Corcoran exchanged text messages. Mr Hird stressed the need for a meeting stating, "Reidy has stopped everything, which is getting a little frustrating…understand about the injecting and I don't want to push the boundaries. Just need to make sure we are doing everything we can within the rules as the other clubs are a long way ahead of Reidy and us at the moment."

428. On 8 February 2012, the Essendon players attended a meeting at the club concerning the supplement protocols. The meeting was addressed by Messrs Hird, Dank and Robinson.

429. The evidence of the Players indicates the following:

(a) Messrs Hird, Dank and Robinson addressed the meeting;

(b) Mr Dank gave a PowerPoint presentation regarding the supplements;

(c) The players were assured all supplements were approved by WADA/ASADA;

(d) The players were provided with the 'informed consent' forms during the meeting, and the majority signed the forms at the time based on the information communicated during the meeting; and

(e) The majority of players could not recall whether other coaching staff or club doctors were present during the meeting.

430. Each of the Players signed the "patient information/consent forms" in which they consented to the administration of Tribulus, Colostrum, AOD-9604 and Thymosin, the latter two to be administered by injection. The relevant contents of this form are set out below:

> *This information is provided to help you understand the intervention that is being recommending for you. Before you begin the intervention, I want to be certain that I have provided you with enough information in a way you can understand, so that you're well informed and confident that you wish to proceed. This form will provide some of the information. I will also have a discussion with you.*
>
> *PLEASE BE SURE TO ASK ANY QUESTIONS YOU WISH. It's better to ask them now, than wonder about it after we start the intervention.*
>
> *Nature of the Recommended Intervention: Thymosin Injection – .5ml – 3000 mg per ml.*
>
> *The recommendation for the following intervention for you:*
>
> *1 Thymosin injection once a week for six weeks and then 1 injection per month.*
>
> *I base this recommendation on the visual examination(s) I have performed, on any x-rays, models, photos and other diagnostic tests that have been taken, and on my knowledge of your medical and physiological history. I have also taken into consideration any information you have given me about your needs and wants. The intervention is recommended because enhance the rate of recovery. The benefits of this treatment are an expected reduction in the time required for performance recovery. The prognosis, or chance of success, of the treatment is considered to be very based on empirical research.*
>
> *The risks of the treatment are nil as reported by the company safety data and no adverse events have been reported in the literature.*

I expect that it will take approximately all season (pre- and in competition) to complete the intervention, but it could be shorter or longer based on what we experience as the intervention progresses.

WADA Compliant Anti-Doping Policy

All components of the intervention/s are in compliance with current WADA anti-doping policy and guidelines (see appendix for documentation to this effect) as of 1st January 2012.

431. Professor Handelsman was asked to comment on the contents of this form. He described the form as "alarmingly inadequate." He stated that the form would never be acceptable to any competent Australian human ethics review committee. He pointed out that the form, while modelled on the participant information and consent forms codified in the NHMRC national statement on ethical conduct of human research in general requirements for consent, there were a number of defects including the following:

(a) No letterhead indicating which institution is the sponsor of this treatment;

(b) No description of what "thymosin" is or what it does;

(c) No comment that the drug is not approved for human therapeutic use anywhere in the world;

(d) Misleading claim by the signatory Mr Dank that he has competence to evaluate medical tests (x-rays, models, photos or diagnostic tests) and medical and physiological history;

(e) Fails to provide "sufficient information and adequate understanding" of participation;

(f) No description of the manner or site of injection (subcutaneous, intramuscular);

(g) No description of nature of monitoring during the participation;

(h) No proper description of risks including listing of reported side-effects;

(i) *Unacceptable statement that the risks are "nil";*

(j) *Misleading statement that no adverse events have been reported in the literature;*

(k) *False and misleading statement that the injection is WADA Code compliant;*

(l) *No contact details of any independent person to discuss risks and benefits of treatment;*

(m) *No contact details for any independent party to complain about any adverse effects of treatment or participation;*

(n) *No comment on right and opportunity to withdraw or revoke consent;*

(o) *No comment on what compensation is available for injury resulting from the treatment;*

(p) *No declaration of financial or other interests in the project by Mr S Dank;*

(q) *Numerous spelling and grammatical mistakes indicating an unprofessional construction.*

This "patient information/informed consent form" would never be acceptable to any competent Australian Human Ethics Review Committee. Failure to provide adequate and proper basis of informed consent suggests that the participants consent to participate in this treatment would be null and void.

432. On 16 February 2012, which was after injections had commenced, Paul Turk, Essendon's Conditioning Coach, sent Mr Dank a copy of the supplementation plan they had put together for "game day." Under the plan Mr Dank was responsible for "Humanoforte" and "injection" post-game.

433. On 27 March 2012, Mr Dank and Mr Hird exchanged text messages about the list of players who will be administered "IVS". It is apparent the injections continued with Mr Dank texting Mr Hird on 19 April 2012, "this afternoon's group went well on

hyperbaric. All injections completed this week." To which he responded that this was good news.

434. Dr Reid made a diary note in early 2013 about events in 2012 relating to the supplement program. In it, he stated:

> *All injections stopped-3/52 post Anzac Day…..we then: 1. Banned all injections. 2. Reinforced that through Thompson and Hird…kept doing some. Yelled at by myself+ coaches. I think coaches/P. Hamilton considered sacking but not sure what happened.*

435. Dr Reid further stated that the consent form had not been shown to him and he did not know who approved the consent form. The diary also stated:

> *Danks talk talk talk...mentioned many supplements…no process...injected players at hyperbaric…he claimed on t.v. we all approved of all supplements...we did not even get to the process stage which he agreed to in January 2012.*

436. Notwithstanding what occurred, as noted by Dr Reid, it is clear that the injections continued through the season, as indicated by the evidence of players set out in Appendix D to the ASADA CEO's submission. For example, [redacted] stated that he had played the last six games and could recall getting injections during that period.

437. On 15 June 2012, Mr Robinson emailed Messrs Hird, Thompson, Corcoran, Hamilton, Wallis and Drs Reid and De Moreton a schedule of supplements "*post bye to gf*" which included subcutaneous injections of "*Thymomodulin 1.5iu weekly 2 days pre-game*".

438. In early September 2012, Essendon did not renew Mr Dank's contract and he ceased working for the club. [redacted] gave the following reasons in his evidence for his departure:

> *We lost faith, the injuries we were suffering, the performance, you need a shot, no you gave it to me yesterday."* [redacted] *also said, "From my perspective, the players and staff, players especially, lost sort of faith. I lost faith in the program…it didn't seem to be working. The lack of reporting was*

concerning…and then also the fact that the injuries that we were sustaining, the performance that we were sustaining as well meant that I lost faith in the program and…the budget in which he was seen to have blown out was why I thought he was no longer required at the club.

439. What conclusions can be drawn about the Essendon supplement program from these events and circumstances?

440. The first is the deplorable absence of records relating to the program and its administration. There are some emails, text messages and other documents, such as the consent forms. A comprehensive investigation over a period of two years has failed to locate any record of the substances that were injected in players, when the injections took place, where they took place, the person who administered each injection, details of any other person present and details of the player being injected. The conclusion the Tribunal reaches is that no such records were ever kept at Essendon.

441. Whether Mr Dank kept any records of his own is unknown. He has not provided any information or documents to the investigation and attempts by the ASADA CEO to obtain an order, compelling production of documents by his companies, from the Supreme Court was unsuccessful. In any event this was Essendon's program involving their players. It was the responsibility of the club to ensure that comprehensive and accurate records were kept. It would be unthinkable that a medical clinic that administered injections would not keep comprehensive records relating to such administration. Yet that is what was happening at Essendon under the supplement program.

442. Not only were there no such records, but there were no records relating to the receipt and storage at the club of substances that were being used to inject players. There were no certificates or other records of analysis of these substances. Such analysis is vital to ensure that what is being injected is in fact what was intended to be injected. The conclusion the Tribunal reaches is that no such analysis was carried out.

443. If these records had been kept it is highly unlikely these proceedings would have been necessary as they would have clearly revealed the position. It was the responsibility of Essendon, as the employer of the Players, to keep such records and to ensure they

were comprehensive and accurate and regularly checked to ensure they were up to date.

444. There was a complete failure to initially obtain the approval of the program from club doctors and supervision by them of the program. Reference has been made to the evidence of Dr Reid. Initially he was not aware injections were taking place. They continued even though he had instructed they cease. The protocol agreed was not followed, as he pointed out. He was not consulted in relation to the consent form. There is no need to repeat Professor Handelsman's analysis of that form. It speaks for itself. The Players, by signing, were not providing a truly informed and acceptable consent. Indeed, it is clear that the Players had no actual knowledge of the substance with which they were injected.

445. Although he reported to Mr Robinson who had some input, it is clear that the supplement program was the brainchild of Mr Dank and he was the one who drove its implementation. Although not a qualified medical practitioner, Mr Dank injected the Players. That did not take place in an appropriate clinical setting but in his office. One would expect that such injections to players at a football club would be administered by a club doctor or someone acting under his instruction and supervision.

446. All in all, there appears to have been an unquestioning reliance on Mr Dank. From time to time issues were raised with him but his explanations were accepted and he continued his injection regime. Apart from some involvement from Dr Reid, who was effectively bypassed, there were no steps taken to check what Mr Dank was proposing or doing with some independent person who had the necessary qualifications and experience. One of the players said in his interview that Mr Dank acted as if he was God. It seems that he was treated as if he was God in relation to the supplement program.

447. The Tribunal is satisfied that what led Essendon to go down this path was a desire to obtain a competitive edge over the other teams in the competition. This is reflected in comments by Mr Hird that have been referred to. One of the players recalled Mr Dank saying at the meeting he was going to take it to another level and "Push it to the edge." Mr Hird and others stressed that the program needed to be legal, not harmful to players and WADA compliant and were assured and re-assured by Mr Dank that it

was. Whether any health problems may affect the Players in the future is clearly a matter of real concern to them, as indicated in their submissions.

448. In summary, the Tribunal concludes that the supplement program was not of the standard and rigour one would expect from an elite football club like Essendon. It was not subject to rigorous supervision and oversight in its formulation, implementation and execution by club medical personnel and others with the necessary qualifications and experience. There was far too much reliance on Mr Dank, and to a lesser extent Mr Robinson and too much executive responsibility given to Mr Dank. Decisive action was not taken when it was clear there were concerns and issues. Rather, Mr Dank's explanations were accepted and he was allowed to continue his supplement program. Players were not properly or adequately informed of what was happening and their purported consent by signing the form was not a truly informed consent.

449. Most importantly, there was a deplorable failure to keep comprehensive records of the supplement program and its administration.

U. THE ALLEGED VIOLATION BY EACH OF THE PLAYERS: THE TRIBUNAL'S CONCLUSIONS

450. Having set out a summary of the ASADA CEO's case and the response of the Players to that case, the Tribunal turns to its conclusions.

451. The Tribunal has already stated that it is comfortably satisfied TB4 was a prohibited substance under the AFL Code at the relevant time. The conclusions that follow relate to whether the Tribunal is comfortably satisfied that each player was injected with TB4.

452. As already discussed, the ASADA CEO's case on this critical issue is a circumstantial one. It rests upon circumstantial evidence, which simply means that the ASADA CEO seeks to establish certain facts from direct evidence and then if those facts are established, by a process of reasoning, infer other facts and ultimately infer that each player was injected with TB4.

453. In these circumstances, each piece of evidence needs to be carefully examined. However, the case is not decided by a series of separate and exclusive judgments on each item of evidence. It is the cumulative effect, a consideration of the totality of the

circumstances, that is important. One circumstance existing by itself may have little effect, but other circumstances may make that circumstance more likely to be true, and also in combination make those circumstances themselves likely to be true.

454. As already discussed, in this case the circumstantial case put by the ASADA CEO involves a chain of reasoning leading to an ultimate conclusion that a violation has occurred in the case of each player. The chain consists both of facts and inferences from facts leading to the conclusion that a violation occurred.

455. In a case such as this, the ultimate conclusion can only be as strong as the chain upon which it depends and a chain is only as strong as its weakest link. The Tribunal must subject the chain of reasoning to close scrutiny to see that each link, whether of facts or of inference from facts, has been established to its comfortable satisfaction.

456. As already discussed, there are three indispensable elements or links in the chain of reasoning that need to be established to the comfortable satisfaction of the Tribunal for each violation to be established.

457. In considering these elements or links, the assessment of the evidence is of critical importance. The Tribunal has already discussed the approach to be followed in assessing the evidence.

458. It has also discussed the approach to be taken to the evidence of Messrs Charter, Alavi and Dank. Their evidence is hearsay evidence, as they did not attend the hearing, give viva voce evidence and be cross examined. Their credibility, the veracity and reliability of their evidence, its probative value and the weight to be given to it, is very much in issue.

459. [redacted]

460. The Tribunal now proceeds to consider and state its conclusions with respect to each of the indispensable elements or links in the chain of reasoning. A summary in some detail has already been set out of the ASADA CEO's case, and the players' response with respect to each of these elements or links.

U.1. The first element or link – TB4 was procured from sources in China

461. It is alleged by the ASADA CEO that TB4 was delivered to Mr Alavi in two separate shipments, the first being delivered on 28 December 2011 and the second on the 18 February 2012. Both shipments were allegedly sourced from GL Biochem in China.

U.1.1. The first shipment

462. The Tribunal considers the first shipment.

463. Put simply, the ASADA CEO relies upon evidence of Mr Charter, contemporaneous documents, text messages and the evidence of other witnesses, in particular Mr Vincent Xu of GL Biochem. It is submitted that this evidence establishes that Mr Dank sought Mr Charter's assistance to obtain a number of peptides including TB4 and later Mr Charter travelled to Hong Kong on 26 November 2011 and then travelled to Shanghai. There Mr Charter met with and transacted with representatives of GL Biochem and obtained samples of GHRP-6, CJC-1295, IGF1-LR3 and TB4.

464. It is submitted the evidence relied upon by the ASADA CEO establishes that 0.25g of TB4 was purchased, together with other substances, from GL Biochem on 8 December 2011. The peptide order including the 0.25g of TB4 was collected by Mr Charter's business associate, Mr Anthony, and its delivery via courier to Mr Alavi arranged.

465. Consequently, the ASADA CEO submits that the Tribunal can be comfortably satisfied that the first shipment was purchased by Mr Charter from GL Biochem and arranged to be delivered to Mr Alavi.

466. Put simply, it is contended by the Players that Mr Charter's evidence was not consistent about this delivery. He should be considered a wholly unreliable source of information, reference being made to the conflict between his evidence and the Customs evidence relating to his entry into Australia. His evidence should not be accepted unless supported by independent, reliable evidence. Documentary evidence

provided by him is neither independent nor reliable, for example the file note. The Players submit that such evidence should be treated with a great deal of scepticism.

467. Having referred to the contentions of the parties the Tribunal proceeds to its conclusions. It notes that the case of the ASADA CEO is reliant on evidence from Mr Charter about this shipment being accepted as purchased by Mr Charter from GL Biochem with Mr Charter arranging for this first shipment to be delivered to Mr Alavi. In view of the issues about his credibility and the reliability of his evidence it is necessary for the Tribunal to consider whether there is other reliable evidence that tends to support it. That evidence does not have to be independent in the sense required, for example, of the evidence of an accomplice in a criminal trial. Contemporaneous documents, such as file notes, text messages and emails, even though produced by the witness or involving the witness, if they tend to support the evidence of the witness, may lead the Tribunal to accept the witness' evidence and rely upon it.

468. However, in determining the weight to be given to any such supporting evidence account has to be taken of its source and the fact that there has not been an opportunity to cross examine the witness about that evidence.

469. There are inconsistencies in Mr Charter's evidence. His evidence of what occurred on his return to Australia when checked by Customs cannot be accepted. His evidence about obtaining samples whilst in China and testing them is implausible and not supported by any other evidence and should not be accepted. His production of documents has been incomplete.

470. However, it does not follow that all his evidence about this shipment should be rejected. In the Tribunal's view, the contemporaneous file note by Mr Charter tends to support his evidence that Mr Dank sought his assistance to obtain a number of peptides including TB4 and that evidence should be accepted.

471. On 1 December 2011, Mr Xu sent Mr Charter an email with a quote for the supply of peptides including Thymosin and TB4. He states, "I also thank you very much for your time to visit us, it's our greatest honour. It is really happy to meet you, and I'm pleased to hear you are impressed with our corporation, hope we may create our

business at soonest." This email tends to support Mr Charter's evidence about having contact with GL Biochem and sourcing TB4 from them.

472. On 8 December 2011, after his return to Australia, Mr Charter replied to the email seeking confirmation of a price for different amounts of the requested peptides including 0.25g of TB4. The Tribunal considers it can be inferred these substances were purchased by Mr Charter in the quantities referred to having regard to the following circumstances: Mr Charter signed a declaration that the products would not be used for human use; Mr Xu subsequently emailed Mr Charter an invoice; the international transfer of funds from Mr Charter's bank account to GL Biochem; the text message from Mr Charter to Mr Anthony on 19 December 2011; a certificate of analysis for one of the products, MGF, was provided; Mr Charter subsequently invoiced Mr Alavi for peptide raw powders and sourcing costs; Mr Xu informed the Australian newspaper and an investigator that Mr Charter purchased peptides from GL Biochem including TB4.

473. The newspaper article of 31 October 2014, quotes statements made by Mr Xu when contacted by the journalist. It was reported that Mr Xu had said the only Thymosin supplied to Mr Charter was TB4 which was for research only, not for human use. Peptide products had been supplied to Mr Charter after he signed a non-human-use agreement.

474. An investigator spoke to Mr Xu by telephone on 8 November 2014. He confirmed that Mr Charter was a customer and had purchased TB4. GL Biochem had provided all the documents still in their possession to an Australian journalist but were concerned about the way the matter had been reported and the disclosure of Mr Xu's identity.

475. The Players submitted that there are problems in accepting the evidence of Mr Xu. He was only contacted at a late stage and was not involved formally in the investigation. His statements could not be tested and should carry no weight. These are matters that need to be taken into account in assessing his evidence. There is no apparent motive for Mr Xu not to tell the truth in stating that he supplied TB4 to Mr Charter. The Tribunal considers his statements on that issue should be accepted and accepts them. They tend to support the evidence of Mr Charter with respect to his contact with GL Biochem and to establish that TB4 was purchased by Mr Charter from GL Biochem.

476. Mr Charter has stated that after funds cleared, his business associate, Mr Anthony, collected the peptide order including TB4 (0.25g) and facilitated its delivery via courier to Mr Alavi. This evidence is consistent with an email from Mr Charter to Mr Xu of 16 December 2011 where he said: *"I will get a colleague to come across to pick up the order and pay for the Hexarelin as soon as you confirm the cleared funds."* As contended by the ASADA CEO, it is also consistent with evidence relied upon by him in relation to the second element or link concerning receipt by Mr Alavi. The Tribunal is of the view that Mr Charter's evidence on this aspect should be accepted.

477. After considering the submissions of the parties, assessing the evidence and considering the cumulative effect of the evidence, the Tribunal is comfortably satisfied that Mr Charter purchased the first shipment of peptides, including what was purported to be TB4, from GL Biochem and it was arranged to be sent to Mr Alavi.

478. There is a critical issue as to whether what was purported to be purchased was in fact TB4. This will be considered after the second shipment is considered.

479. Reference has previously been made to submissions of the parties regarding statements made by Mr Charter to Mr Hargreaves about purchasing Thymosin Alpha in November 2011 from a company in China, RD Peptides. The Tribunal does not accept these statements made by Mr Charter, nor does it accept his statement to Mr Hargreaves that when he was referring generally to Thymosin he was referring to Thymosin Alpha.

U.1.2. The second shipment

480. The Tribunal has previously set out a summary of the ASADA CEO's case that there was a second shipment of TB4 and the response of the Players.

481. Put simply, it is the ASADA CEO's case that this shipment was arranged by Mr Charter's associate, Mr Anthony, and received by Mr Alavi on 18 February 2012. The shipment contained 1g of TB4. Reliance is placed on the evidence of Mr Alavi that there was this shipment. Various documents are relied upon and it is contended that they tend to support Mr Alavi's evidence and that evidence should be accepted.

482. It is contended by the Players that the evidence relating to this delivery is vague, imprecise and lacking in documentary corroboration. The provenance of this delivery is highly questionable.

483. Having referred to the contentions of the parties the Tribunal proceeds to its conclusions. The first thing to note is that, unlike the first shipment, there are no documents in evidence such as invoices, email exchanges or international money transfers that tend to support evidence that this shipment occurred. There is no documentary evidence of the source of the shipment and in particular that it came from GL Biochem.

484. Mr Alavi has stated that he believed he received a further supply of peptides from Mr Anthony. It was Mr Alavi's understanding that Mr Anthony procured the peptides from the same source as the first shipment, namely GL Biochem. Mr Alavi had no actual knowledge of the source of the second shipment.

485. It is contended by the ASADA CEO that the shipment is evidenced by a handwritten record of receipt compiled by Mr Alavi's laboratory assistant, Ms Vania Giordani. The ASADA CEO submitted that the document should be considered reliable. It records under the date 18 February 2012 and the heading "Peptide": CJC-1295, GHRP6, HT-II, Thymosin, Hexarelin. When interviewed, Ms Giordani said she did not know Mr Charter or Mr Anthony. She did not know where raw material for peptides she compounded was sourced from.

486. The Tribunal notes that this manual record was only produced by Mr Alavi in his fifth and final interview with ASADA investigators on 14 April 2014. The interview that ASADA conducted with Ms Giordani occurred two months prior to the interview when Mr Alavi produced the document. Consequently, the note purportedly prepared by Ms Giordani was not shown to her during her interview, nor was any explanation sought from her about the document. As a result the Tribunal does not have the benefit of any evidence from Ms Giordani about the document. For example, it does not have evidence from her confirming that she prepared the document as a business record of Como and the circumstances surrounding the entries on the document. The fact that Ms Giordani did not give evidence about the compilation of this document is, in the Tribunal's view, an important consideration in assessing the probative value of

the document in establishing that the second shipment occurred. It means that the document is only of limited probative value.

487. At his interview on 14 April 2014, Mr Alavi stated that he asked Mr Anthony for some analysis certificates in respect of the second shipment. He said he had received the documents by email and had located them in a box in a storage container. He said they comprised certificates of analysis for two substances, Hexarelin and Thymosin as well as matching HPLC reports. Mr Alavi has stated that he knew the peptides were coming from China but he did not know where in China.

488. The ASADA CEO placed considerable reliance on the February certificates. Issues have been raised about their genuineness. It is submitted that from similarities between the earlier MGF certificate and these certificates the Tribunal should infer that they evidence the purchase from GL Biochem of Hexarelin and TB4.

489. The ASADA CEO accepted that the certificates are not in the form provided by GL Biochem to Mr Anthony in relation to the first shipment. It was contended that identifying information had been removed to protect the identity of the supplier. Mr Alavi has stated that he thought he was being kept in the dark about the supplier and that is why he did not receive any certificates for the first shipment. It was contended that the absence of certain information is consistent with the protection of the identity of the supplier.

490. The ASADA CEO submits that the Tribunal should infer that the certificates otherwise disclose the contents of the original certificates. A number of reasons are given for that inference being drawn. There is no need to set them out.

491. With respect to the "Thymosin" certificate the following is noted by the Tribunal: There is no Company heading or address; the wording of the warranty is different to the MGF certificate; there is no Company stamp; there are no details of who prepared and checked the certificate; the molecular formula is not expressed in proper chemical notation; there is no lot number; the molecular weight is incorrect or transposed; there is no date on the certificate. The Hexarelin certificate has the same defects.

492. It is submitted by the ASADA CEO that the certificates are supported by the HPLC reports that were also produced by Mr Alavi. Further, the documents accurately

record the catalogue number and sequence information for each substance and contain the relevant amino acid sequence.

493. [redacted]

495. Apart from the matters that have been referred to, the Tribunal notes that there is no independent or contemporaneous evidence of their creation or transmission. Professor Handelsman in his evidence indicated that he would have "doubts" if he received such a certificate. The Tribunal has grave doubts about the authenticity of the certificates and, in particular, the "Thymosin" certificate. In the Tribunal's view it is too unreliable to be relied upon in reaching a conclusion about the second shipment. It has no probative value and no weight can be attached to it.

496. The Tribunal later considers the analysis by Ms Giordani on 9 May 2012 of a substance she believed to be TB4 at the facilities of Bio-21. There is no reason not to accept her evidence about conducting this analysis and the dispensing she says occurred following her compounding the substance she believed to be TB4. The analysis that she carried out could not have been of the substance provided in the first shipment, and there is no credible evidence which establishes the source of the substance which Ms Giordani tested at Bio-21. The Tribunal notes that the compounding and test analysis carried out by Ms Giordani was almost three months after the alleged second shipment was said to have been delivered.

497. The following exchange took place between Ms Giordani and the investigator, Mr Walker. He asked, "The raw material for the peptides that you started to compound yourself. Do you know where that came from, where that was sourced from?" Her answer was, "No." When this exchange is considered in the context of her other answers to questions during the interview the Tribunal considers it reasonable to infer that her answer is a reference to the peptides that she compounded in May 2012.

498. In the Tribunal's view, the circumstances of the compounding and test analysis conducted by Ms Giordani in May 2012 do not tend to support the contention by Mr Alavi that a second shipment occurred in February 2012. The matter is subject to too much doubt and uncertainty.

499. The handwritten receipt by Ms Giordani provides limited support for Mr Alavi's evidence. The ASADA CEO in his submission referred to the timing of subsequent supplies of peptides as part of his submission that a second shipment was received by Mr Alavi. In this submission he refers to evidence from Mr Alavi that in March 2012 he identified an alternative supplier of peptides, namely Sichuan Hengli Technology. He said that he ordered peptides from this company in April 2012 and they arrived in mid May 2012. He produced an invoice which indicated that a number of peptides were ordered in late April 2012 but did not include any form of Thymosin. It is submitted by the ASADA CEO that the Tribunal should infer from two further invoices produced by Mr Alavi that he purchased TB4 from this company later in 2012. Those invoices refer to "Thymosin" but Mr Alavi stated that the Thymosin purchased was Thymosin Beta 4.

500. The ASADA CEO submitted that these documents corroborated Mr Alavi's oral evidence about the second shipment because a second supply of TB4 was necessary to dispense TB4 in May 2012, the first shipment having been exhausted. Apart from the invoices and what Mr Alavi said about them, there is no other evidence about the supply of these peptides. On the evidence before the Tribunal, it could not be comfortably satisfied that any substance supplied was in fact TB4.

501. Reference has already been made to Ms Giordani's evidence that she did not know the source of the substance she compounded and tested. Apart from her handwritten receipt, there is no documentary evidence of the receipt of Thymosin or TB4. In the Tribunal's view, there is too much doubt and uncertainty about the source of the substance that Ms Giordani compounded and tested in May 2012 for the Tribunal to infer that it came from a second delivery to Mr Alavi on 18 February 2012.

502. After considering the submissions of the parties, assessing the evidence and its cumulative effect, the Tribunal is not comfortably satisfied that Mr Alavi received a shipment of what was purported to be TB4 on 18 February 2012 that was supplied by GL Biochem.

503. The Tribunal returns to the issue of whether the purported TB4, the subject of the first shipment, was in fact TB4. Put simply, the ASADA CEO's case is that the evidence establishes that it was. It is submitted that Mr Charter had gone to some length to ensure the quality and reliability of his source of peptides. GL Biochem is a substantial company and should be regarded as a reliable supplier. Further, support is provided by the fact that an MGF certificate was provided and by the Bio-21 analysis of the substance contained in the second shipment.

504. The Players point to the absence of any evidence, such as a certificate of analysis of the substance contained in the first shipment. There is a dearth of reliable evidence that it was in fact TB4.

505. Having referred to the contentions of the parties, the Tribunal proceeds with its conclusions. Evidence was given by Professor Handelsman and Dr Vine about the composition of TB4 and its analysis. It establishes the following: TB4 has a specific chemical composition, structure and sequence; the length of the amino acid chain for TB4 increases the risk of error in production; there is an appreciable risk that a substance represented to be a peptide, such as TB4, imported into Australia may in fact not be that substance; sophisticated and reliable testing procedures are required in order to safely determine whether a substance was in fact TB4.

506. There has also been evidence about the unreliability and poor quality of some Chinese suppliers of substances. However, Professor Handelsman gave evidence that there were many high quality peptide suppliers in China. Mr Xu told the investigator that GL Biochem had a global reputation for producing high quality peptides and there could be no dispute that if a product was sold as TB4 it was TB4.

507. Reliance was placed by the ASADA CEO on records relating to the proposed merger of an American company, CBI, with GL Biochem.

508. The document is headed as a press release and is dated June 11 2009. It is stated that Commonwealth Biotechnologies Inc. (CBI) is pleased to provide the following market update regarding its intended acquisition of the outstanding shares of GL Biochem.

509. Key features of the planned acquisition are set out including the following statement about GL Biochem:

GL Biochem and its associated companies bring with them net income after tax of over $2 million, net assets of $8.5 million and have demonstrated compound annual revenue growth of over 40% and net asset growth of 60% for the last 5 years.

510. GL Biochem is described as an international leader in the research, development, manufacture and marketing of diverse biochemical and fine chemicals, with a particular strength in peptides, peptide reagents and related products.

511. The ASADA CEO submits that the information in the press release about GL Biochem does not indicate that the company is a disreputable or unreliable supplier. Reference is made to Mr Charter's evidence that he chose GL Biochem as a supplier because it was GMP certified. It is stated on the company's website that it is GMP certified. Reliance is placed on the evidence of Professor Handelsman about GMP certification which he stated was a worldwide prescriptive standard. However, he acknowledged that disreputable suppliers may falsely claim GMP certification.

512. The ASADA CEO submitted that this evidence strongly supports that GL Biochem is a company of substance and a reputable supplier and one that in fact would have supplied the substance it purported to supply.

513. The Players submit that the contents of the release are self-serving marketing puffery, the provenance and source of which cannot be identified and the veracity of which cannot be tested. It was submitted that no weight should be attached to its contents.

514. In the Tribunal's view, the Players' submission has merit. The document is not an official document compiled or issued by a government body, such as the Securities Exchange Commission, or an auditor. It was ascertained that this document was on the Commission's website in 2009. In the Tribunal's view, it is self-serving and promotes the proposed acquisition of shares in GL Biochem to the market as being a good outcome. Although the Tribunal did not sustain the objection to its receipt into evidence, it is of limited probative value and weight. The fact that the company is GMP certified is relevant and does carry some weight. However, it is not determinative of the issue but a factor to be taken into account.

515. Reference has been made to Mr Xu's statement to the ASADA investigator about GL Biochem. The Tribunal has accepted his statement that he supplied TB4 to Mr

Charter. However, the statement about the company is self-serving. Mr Xu is responding to an investigator about the supply of substances by his company, which are the subject of an investigation. In these circumstances, it can be expected that Mr Xu would wish to portray his company in a favourable light. In the Tribunal's view, little weight can be attached to his statement about the company and his assertion that what in fact was supplied was TB4.

516. Further, if there was a certificate of analysis of the TB4 purportedly supplied, it might be expected that Mr Xu would refer to it in his discussion with the journalist and the investigator. It is something of significance. He did not produce any documents to ASADA and told the investigator he had provided all the documents that his company still had on hand to the journalist. However, no reference is made to a certificate in the newspaper article. Having regard to the purpose of the article, it can be inferred from this that no certificate was supplied to the journalist by Mr Xu, which tends to support a conclusion that there was no such certificate.

517. [redacted] The Tribunal concludes that there was no certificate of analysis of the substance purported to be TB4 in the first shipment. As previously stated, the Tribunal does not accept Mr Charter's assertion that he tested samples at GL Biochem.

518. The ASADA CEO relies upon the correspondence between Mr Alavi and Eagle Analytical Services in the United States. Mr Alavi sent samples for analysis to Eagle on 20 January 2012 and they requested an explanation about a number of samples including TB4. Reference is also made to Mr Alavi's response and the material he provided. It is submitted that it can be inferred from this that Mr Alavi believed the substance he received and forwarded to Eagle was TB4.

519. The Tribunal is comfortably satisfied that the first shipment received by Mr Alavi contained a substance that was purported to be TB4. His exchange with Eagle supports an inference that he believed the substance he received was TB4. However, the question still remains whether it was in fact TB4.

520. Consideration needs to be given as to whether the Bio-21 analysis provides support for the contention that TB4 was in fact supplied in the first shipment even though the

analysis related to the second shipment. It has been put that if it is probative of TB4 being in the second shipment it is also probative of TB4 being in the first shipment. In the light of the Tribunal's conclusions in relation to whether there was a second shipment the Bio-21 analysis is not probative of whether the first shipment was in fact TB4. This is because the Tribunal has not found that the substance compounded and tested by Ms Giordani came from the second shipment that the ASADA CEO alleges occurred. However, in case the Tribunal is wrong in this conclusion it proceeds to consider the evidence relating to the Bio-21 analysis on the assumption that there was a second shipment and the substance compounded and tested by Ms Giordani came from that shipment.

521. ASADA issued notices to produce to Bio-21 which required Bio-21 to disclose for the period 1 December 2011 to 1 October 2013 "Any and all records pertaining to the use of and or analysis conducted at the Bio-21 Mass Spectrometry and Proteomics Facility," by a number of named persons and entities. As the ASADA CEO observed in his final submissions a large number of files were identified and disclosed to ASADA on USB sticks. Professor Handelsman was provided with the Bio-21 printout for each analysis and invited to comment on the likely nature and identity of the substances which were analysed.

522. In his report dated 10 January 2014 Professor Handelsman stated that the molecular weight of Thymosin A1 was 3066.3 while the molecular weight of TB4 was 4963.5. He stressed that his comments on the tests were necessarily guarded because of the limited information available relating to the methodology used but also there was a lack of information as to what samples were analysed which included information about their appearance, whether there were any markings on the samples, how the samples were processed before they were analysed and what process controls were run together with the samples.

523. While acknowledging that his opinion was guarded, Professor Handelsman in commenting about Test 1 with the file name THY A5 stated:

> *Images A and B shows a peak with a mass/charge (M/2) ratio indicating a substance with a molecular mass of 4971 (rounded).*

Image A shows a wide molecular mass range with low signal/noise ratio in the region of interest. Image B narrow the molecular mass range and shows a better signal/noise ratio.

This molecular mass is close to the molecular weight of TB4 and far from Thymosin A1.

524. Professor Handelsman stated that if the question underlying the analysis was whether this result identifies Thymosin A1 or TB4, within the error of this methodology and software, this result can be considered clearly to identify the substance as TB4 and not Thymosin A1.

525. Dr Vine, a highly qualified scientist with more than 40 years experience in the analysis of drugs and biologically significant compounds in human and animal biological samples, provided a report which dealt with similar issues to those covered by Professor Handelsman in his evidence. Dr Vine stated that he had extensive experience with a wide range of mass spectrometers and in the presentation and interpretation of mass spectrometric data.

526. Dr Vine considered the test results obtained from Bio-21 including the result of Test 1 with the file name THY5 and stated:

While all of these materials have peaks in roughly the right range for TB4, in my opinion none of them can be claimed to prove the presence of TB4 to any recognised standard applicable to sports and regulatory drug testing. A single unresolved (10 DA wide) mass spectrometric peak with a M/Z value above the calibrated range of the mass spectrometer falls a long way short of reliable identification. I am unaware of any sports drug testing authority (human or animal) or regulatory agency (human, environmental or agricultural) which would accept identification on this basis. Where mass spectrometry is used for such purposes, usually at least three structurally significant peaks would be required together with chromatographic separation. For peptide identification, enzymatic digestion and liquid chromatography tandem mass spectrometry sequence analysis of the peptide fragments would be the preferred identification methodology. I am therefore in agreement with Dr Watt who states (page 10 of his report): 'Additionally THY A5, Thymosin 00F,

Thymosin TR6 all have similar spectra to the file TB4. It is not possible to say with certainty that his (sic) is actually TB4,' it may, however be concluded that the THY A5 mass spectrum… is not that of Thymosin A1 as, despite any calibration error and lack of resolution of the mass spectrometer, the difference is too great for whatever is present in the material designated as THY A5 and Thymosin A1 to be confused.

527. The opinion expressed by Professor Handelsman in his report and confirmed in his evidence was predicated on the assumption that the result of the analysis conducted at Bio-21 identified either Thymosin A1 or TB4.

528. Dr Vine was of the opinion that it could not be reliably concluded that the materials which were analysed at Bio-21 had been shown to contain their purported constituents. While Dr Vine acknowledged that the analysis of Thymosin A1 provided support for its identity, the same could not be said for the other materials including TB4 where unknown calibration, accuracy and poor resolution together with the use of a single mass spectrometric peak did not provide reliable identification. Dr Vine stressed that the evidence did not support the conclusion that the identity of the material was TB4. It was, he said, *"A possibility, but it isn't a certainty, not by a long way."*

529. In reaching his conclusion Dr Vine referred to the industry which supplied peptides and proteins and noted that there were a number of companies which produced materials of very dubious authenticity and Dr Vine emphasised that when one ordered these materials it was certainly necessary to check and test that what was ordered was in fact delivered. Dr Vine with his experience at Racing Analytical Services over many years where testing was also carried out for Australian Customs on seized materials or prohibited imports stated that it was quite a frequent occurrence for these materials not to be what they were labelled to be. Dr Vine stressed that it was of vital importance that these materials were properly identified and that, he stated, had not been done in this case.

530. The ASADA CEO submitted that accepting the expert evidence that it was possible that the substance tested at Bio-21 was TB4, having regard to the surrounding facts and circumstances the Tribunal can, and should be, satisfied that the substance tested was TB4. A number of reasons were provided to support this submission. Whilst Dr Vine conceded that it was possible that the substance tested was TB4, in the Tribunal's

view, this submission of the ASADA CEO flies in the face of much of the evidence given by Dr Vine on this issue which is accepted by the Tribunal. Further, the Tribunal found that a consideration of the facts and circumstances on which the ASADA CEO relied did not support the submission that the substance tested at Bio-21 was TB4. Many of the reasons provided by the ASADA CEO were contentious and lacked any proper evidentiary basis. Whilst acknowledging that the Tribunal may rely on analytical data which does not satisfy the strict requirements of proof under the AFL Code, having considered the evidence and the respective submissions on this issue the Tribunal is not comfortably satisfied that the result of the Bio-21 analysis in itself establishes that the substance purported to be TB4 tested at Bio-21 was in fact TB4. However, although for the purposes of this consideration it is assumed and accepted that the Bio-21 analysis relates to the second shipment the ASADA CEO alleges occurred, the result of the analysis is a relevant matter for the Tribunal to consider along with all the other relevant circumstances when determining whether it is comfortably satisfied that the substance purported to be TB4, the subject of the first shipment, was in fact TB4.

531. On this issue it is instructive to refer to the decision of the Court of Arbitration for Sport in the matter of *Mark French* (Award 11 July 2005).

532. *French* was a cyclist who was investigated along with others in relation to the use of prohibited substances. He admitted injecting a product known as "Testicomp." The information leaflet that accompanied the product stated that it contained Cortisonacetat dil, which is a Glucocortcosteroid, which is a prohibited substance.

533. The panel held that the label by itself was insufficient to establish a finding of fact that the specific material possessed by *French* contained the prohibited substance. A test of a sample of the product was negative for Corticosteroids.

534. It was submitted that proof of the content of the substance as a prohibited substance was not required because of the admission of *French* as to his use of Testicomp. The panel did not agree and stated (at page 13):

> *The Respondents' submission is to the effect that the proof of the contents of the bucket containing the glucocorticosteroid as a prohibited substance is not required because of the admission of the use of Testicomp by French was a*

breach of his contractual duties. The Panel finds that an admission to use of Testicomp does not amount to an admission that there has been use of a prohibited substance unless the product used is shown by chemical analysis to contain that which it purports to contain by its product leaflet. The content itself must be proved to have contained the prohibited substance and that was not proved. An admission of use of Testicomp does not factually prove the fact of what it is that has been used and that it contains the substance contained on the label. It is at best hearsay evidence. Although the Panel is not bound by the rules of evidence having regard to the seriousness of the allegation and the consequences that would follow upon a finding of doping, we find we should not act on the admission alone. As indicated above in the statements filed by Dr Trout and Prof. Lattiff, the only evidence before this Panel is that the product Testicomp is negative for the presence of a prohibited substance. Therefore, it is found that it is not established to the necessary degree of satisfaction that the product Testicomp did in fact contain a prohibited substance or that French used a prohibited substance by using Testicomp.

535. The Tribunal does not suggest that a reliable certificate of analysis is indispensable in determining whether in fact TB4 was provided in the first shipment. However, its absence is an important consideration in determining whether the Tribunal is comfortably satisfied that TB4 was in fact provided.

536. The Tribunal has previously considered in some detail the Thymosin certificate produced by Mr Alavi in his final interview. For the reasons stated in that consideration the certificate does not support the contention that TB4 was in fact contained in the first shipment.

537. After considering the submissions of the parties, assessing the evidence (which does not include the evidence relating to the Bio-21 analysis) and considering the cumulative effect of the evidence, the Tribunal is not comfortably satisfied that the 0.25g of the substance purported to be TB4 in the first shipment from China delivered to Mr Alavi was in fact TB4. It is possible it was, but the Tribunal is not comfortably satisfied it was. Further, having carefully considered the evidence which includes the evidence relating to the Bio-21 analysis as previously discussed, and considered the cumulative effect of the evidence, the Tribunal is not comfortably satisfied that the 0.25g of the substance purported to be TB4 in the first shipment from China to Mr

Alavi was in fact TB4. Again, it is possible that it was, but the Tribunal is not comfortably satisfied that it was.

538. The Tribunal has previously stated that it is not comfortably satisfied that a second shipment of what was purported to be TB4 was made to Mr Alavi from China as alleged by the ASADA CEO. However, in case the Tribunal is wrong in this conclusion the Tribunal turns to the question of whether the substance purported to be TB4 was in fact TB4 on the basis that it is assumed and accepted that this shipment alleged by the ASADA CEO in fact occurred.

539. Essentially for the reasons the Tribunal has given in relation to the first shipment, the Tribunal is not comfortably satisfied that the second shipment included a substance that was in fact TB4. Reference has previously been made to the purported certificate of analysis for Thymosin which was produced by Mr Alavi and the Tribunal's assessment of that certificate and its conclusion that it could not be relied upon. In reaching the conclusion that it is not comfortably satisfied that the second shipment included a substance that was in fact TB4 the Tribunal has taken into account the evidence relating to the Bio-21 analysis and the Tribunal's conclusions relating to this analysis.

540. It follows from the conclusions the Tribunal has reached, it is not comfortably satisfied that the first element or link in the chain of reasoning relied upon by the ASADA CEO to establish that a violation by each player has occurred has been made out.

541. The Tribunal has previously considered a submission from the ASADA CEO relating to an alleged supply of TB4 to Mr Alavi by Sichuan Hengli Technology and has stated its conclusions in relation to that submission. It is the Tribunal's understanding from the submission of the ASADA CEO that the reference to this evidence was made as part of his submission that a second shipment was received and not as a receipt and delivery of TB4 forming part of the indispensable elements or links. However, for the avoidance of doubt, the Tribunal reiterates that on the basis of the submission made and the evidence referred to it could not be comfortably satisfied that such deliveries were made of a substance which was in fact TB4.

U.2. The second element or link – TB4 was obtained by Mr Alavi, compounded and provided to Mr Dank in his capacity as Essendon Sports Scientist

542. Proof of this element or link in the chain of reasoning is dependent on proof of the first link. In its consideration of the first element or link the Tribunal has considered and reached conclusions whether TB4 was obtained by Mr Alavi as alleged and procured from sources in China. The Tribunal has stated its conclusions in relation to these matters and it follows from those conclusions that the first element or link has not been established. As the Tribunal is not comfortably satisfied that the first element or link has been established, it follows that it cannot be comfortably satisfied that the second link has been established. This follows from the fact that the Tribunal is not comfortably satisfied that TB4 was in fact received by Mr Alavi in two shipments from China. It further follows that as this element or link in the chain of reasoning is indispensable to establishing that TB4 was administered to each of the Players, the Tribunal cannot be comfortably satisfied that this occurred.

543. However, for the sake of completeness, and in case the Tribunal's conclusions with respect to the first element or link in the chain are wrong, it has proceeded to consider and state its conclusions with respect to the second element or link. It does so on the basis that it is assumed and accepted that Mr Alavi received in the first shipment from China 0.25g of what was in fact TB4 and that there was a second shipment from China that he received and it contained 1g of what was in fact TB4. On this basis, what the Tribunal has to consider is whether it is comfortably satisfied that the TB4, which it is assumed and accepted he received, was compounded by him and supplied to Mr Dank in his capacity as the Essendon Sports Scientist.

544. The Tribunal has already set out a comprehensive summary of the ASADA CEO's case in relation to this element and the responses of the Players. There is no need to repeat them. The case as put by the ASADA CEO is capable of establishing this element or link. However, persuasive submissions have been put as to why the Tribunal should not be comfortably satisfied that the case establishes this element or link. A number of issues are identified.

545. The Tribunal will proceed to examine the ASADA CEO's case in the light of these issues and the position of the CEO and the Players with respect to them.

546. A critical factor in the Tribunal's consideration of this element is the lack of records relating to the compounding and delivery which it is contended by the ASADA CEO occurred. There is no record in evidence before the Tribunal from Essendon of the receipt of any such delivery or of the payment for any such delivery. There is no record before the Tribunal from Essendon of any analysis of any substance that was alleged to have been delivered to Essendon. There are no records before the Tribunal from Mr Dank's companies MRC and ICB. It is apparent that the ASADA CEO considered it important to obtain records from these companies as an order from the Supreme Court was sought to compel their production. That order was not granted and consequently no records were produced. As a result there is no evidence before the Tribunal of business records of those companies relating to any dealings with Mr Alavi, Mr Charter or Essendon. The only records produced by Mr Alavi in relation to compounding and supply are two tax invoices which will be considered later in some detail. There are no dispensing records of Mr Alavi, other than what is contained in the tax invoices, in relation to the dispensing of TB4 which it is alleged occurred. Mr Alavi produced a Register of Peptides relating to supply from IMG to ICB. Reference is made later to this document. There are no records such as receipts or bank statements of any payments received by Mr Alavi in relation to such dispensing.

547. Another critical factor in considering this element is the lack of evidence of analysis of any of the substances alleged to have been dispensed by Mr Alavi and provided to Mr Dank as Essendon Sports Scientist. The Tribunal has previously referred to evidence that Mr Alavi gave to investigators about the importance of analysis by a compounding pharmacist. He stated that it was important to analyse the substance before it was compounded and after it was compounded. This was to ensure that what was ultimately dispensed after compounding was the substance it was intended to dispense. It can be readily understood why such a practice is necessary for a compounding pharmacist. It ensures that the person receiving the substance is receiving what it was intended be dispensed to that person. There can obviously be health implications if that does not occur. The Tribunal has previously referred to evidence of Professor Handelsman about the difficulties that can occur in the compounding of substances. That evidence adds further weight to the importance of analysis being undertaken after compounding and before dispensing.

548. The evidence is that notwithstanding Mr Alavi's evidence as to what constitutes good practice for a compounding pharmacist, no analysis of the first shipment was carried out either before the substance was compounded or after it was compounded. An attempt was made to have an analysis carried out by Eagle in the United States of the substance after it was compounded. It is apparent that Eagle was not familiar with the analysis of TB4 and therefore sought further information in relation to it. It is also apparent that Mr Alavi was not familiar with the substance TB4, including its analysis and sought assistance from documentation that had been provided to him. Ultimately, for commercial reasons Mr Alavi did not proceed to have Eagle analyse the compounded substance. No other arrangements were made and no analysis occurred. There is a suggestion that the compounded substance was analysed by Mimotopes at the request of Mr Dank. As has previously been noted, it is clear that no such analysis occurred.

549. There is evidence, which has previously been referred to, that Ms Giordani carried out an analysis of what was purported to be TB4. As previously stated it is contended by the ASADA CEO that this substance came from the second shipment. It would appear from what Ms Giordani told investigators that this analysis was done on the substance after she had compounded it. The Tribunal has previously considered in detail and stated its conclusions in relation to this Bio-21 analysis. There is no other reliable evidence of any analysis in relation to the second shipment. The Tribunal has previously referred to the "Thymosin" certificate produced by Mr Alavi and concluded that it could not be relied upon.

550. There is no evidence that any analysis was carried out at or by Essendon of any substance that was used by Essendon as part of the 2012 season supplement program. As previously stated, the Tribunal can only conclude that no such analysis ever occurred. The best and most prudent practice to ensure that any substance being administered was the substance intended to be administered was for a test analysis to be carried out of the compounded and dispensed substance before it was administered. In that way the health of a person, such as a player, receiving the substance is best protected.

U.2.1. The first shipment

551. In relation to the first shipment of peptides, the ASADA CEO submits that the Tribunal should conclude that:

(a) in January 2012, Mr Alavi compounded the TB4 into 26 vials at a concentration of 3mg/mL; and

(b) on or about 18 January 2012, Mr Alavi supplied the 26 vials of TB4 to Mr Dank in his capacity as Sports Scientist at Essendon.

552. As already stated, the Tribunal is comfortably satisfied that Mr Alavi received in the first shipment what was purported to be 0.25g of TB4. It is not comfortably satisfied that it was in fact 0.25g of TB4. However, as stated, it proceeds to consider this second element or link on the basis that it is assumed and accepted that what was received in the first shipment was in fact TB4.

553. Following Mr Charter's query to Mr Dank about which peptides he wanted next, there are two text messages sent on 11 January 2012 between Mr Dank, Mr Charter and Mr Alavi that refer to TB4. Those text messages have previously been referred to. They are the only text messages that specifically refer to TB4.

554. On the morning of 12 January 2012, Mr Charter sent Mr Dank and Mr Alavi an email headed "Thymosin Beta 4". Mr Charter stated in this email, "*Steve just check you agree with the below so we can make it up accordingly…*". Below this message from Mr Charter was information on "How to Use TB-500 (Thymosin Beta 4)" sourced from the internet.

555. Late on Thursday, 12 January 2012, Mr Dank sent an SMS to Mr Charter stating "Hi mate. Thymosin- 20x5ml vial". Mr Charter then forwarded Mr Dank's request to Mr Alavi via SMS.

556. The Players submit that the question of whether the TB4 referred to in the SMS messages of 11 January 2012 is the same substance as the "Thymosin" referred to in the SMS messages of 12 January 2012 cannot be comfortably established.

557. The Tribunal comfortably draws the inference that Mr Dank's reference to "Thymosin- 20 x 5ml" in his 12 January text message was a reference to his request for Mr Alavi to compound the substance TB4, as specifically referred to in Mr Dank's

11 January text message to Mr Charter. The Tribunal infers that the absence of information about quantities from Mr Dank's 11 January text message led Mr Charter to send the 12 January email to confirm how Mr Dank wanted the substance made up. The Tribunal infers that it was the receipt of Mr Charter's 12 January email that prompted Mr Dank to send the text message to Mr Charter saying "Hi mate. Thymosin- 20x5ml vial".

558. On 16 January 2012, Mr Alavi sent a text message to Mr Charter informing him that he had "*a few problems with the Thymosin formulation. Not dissolving very well...*".

559. The Tribunal concludes that Mr Alavi's reference to the "Thymosin formulation" was a reference to the substance TB4. The Tribunal is comfortably satisfied that Mr Alavi believed that what he was compounding was TB4.

560. As already stated, in considering this element or link the Tribunal is proceeding on the basis that it is assumed and accepted that TB4 was in fact supplied in the first shipment, although Mr Alavi had no independent knowledge of this.

561. On Como's tax invoice (#1924) for Essendon dated 31 January 2012, an entry dated 18 January 2012 records that "26 Peptide Thymosin 3Mg/Ml Vial" for $6,500.00 was dispensed on 18 January 2012. The Customer is listed as "Mrc & Icb". Mr Alavi when shown the invoice stated that he must have been able to dissolve the substance, despite having "problems" with the Thymosin formulation.

562. The ASADA CEO submits that based on the business record of tax invoice #1924, the Tribunal should infer that Mr Alavi did resolve the problems with compounding the substance. However, there is no contemporaneous documentary evidence to establish that Mr Alavi ever resolved the problems with the "Thymosin formulation" and was able to successfully compound it. As previously stated, there is no evidence that what was compounded was analysed subsequent to compounding.

563. Mr Alavi sent the substance after compounding to Eagle to be tested. Records obtained from Eagle indicate that a single vial of "Thymosin" was sent to Eagle for testing and contained 5mg made up at a concentration of 2.5mg/mL. The sample for testing was received by Eagle in Houston, Texas on 20 January 2012. Analysis of the substance was ultimately not conducted by Eagle. Mr Alavi made a commercial

decision not to have it tested because Eagle's fee to create a method to test the substance was prohibitive.

564. In his interview with ASADA investigators on 9 December 2013, Mr Alavi stated:

> *After making up the first batch of thymosin and hexarelin I had enquired with Eagle pharmaceuticals to test thymosin and hexarelin. Eagle was not able to test these unless we paid $1,500 for a method to be created. I did not want to pay the fee so I started looking for a local testing laboratory. Shane Charter and Steve Dank were putting a great deal of pressure on me for supply of the 2 peptides. I was not comfortable supplying the peptides before having them tested.*
>
> *I had made the thymosin and hexarelin in clear vials not realising that these peptides were light sensitive. Steve Dank mentioned a testing laboratory called Mimotopes. He suggested that he take the batches of thymosin and hexarelin to Mimotopes and have them tested. Due to the absence of any other testing options I gave the batches of thymosin and hexarelin to Steve Dank to take to Mimotopes.*
>
> *The following week I asked Steve Dank what the testing showed. He said that the batches of thymosin and hexarelin "were fried" and that Mimotopes discarded the remainder. I then credited the thymosin and hexarelin from the Essendon account.*

565. Mr Alavi, it appears, relied on the representation of Mr Dank that he had the substance that had been compounded analysed at Mimotopes and that this substance purported to be TB4 was "fried", presumably because it was placed in clear vials. There is no evidence to establish that the substance was ever analysed at Mimotopes. The Tribunal finds that analysis at Mimotopes did not occur. As to why a credit in relation to this item was later included in another invoice is an important matter and is considered later.

566. The ASADA CEO submits that Mr Alavi compounded the first shipment of 0.25g of TB4 and dispensed it to Mr Dank at a concentration of 3mg/mL on the basis that the item of 26 vials in invoice #1924 records a concentration of 3mg/mL for the "Peptide Thymosin".

567. The Players submit that this concentration is inconsistent with what is contained in the consent forms signed on 12 February 2012. The consent forms record that a dosage of 0.5mL of thymosin at 3000mg/mL would be administered to the Players. The course consented to by the Players in the consent forms involved 1 injection per week for 6 weeks and then one every month thereafter.

568. The ASADA CEO submits that the Tribunal should infer that the reference to a concentration of 3000mg/mL in the consent form is a typographical error and should be 3000mcg/mL.

569. The ASADA CEO submits that if each of the vials contained 3mL of TB4 made up at 3mg/mL, each vial would have contained 9mg of TB4. It is submitted by the ASADA CEO that 234mg of TB4 would be required to compound 26 vials at this concentration.

570. The ASADA CEO submits that the Tribunal should infer that the 0.25g of TB4 was sufficient to make up the 26 vials recorded on Invoice #1924. Records obtained from Eagle record that 5mg of the substance in issue were sent by Mr Alavi to Eagle.

571. The Players submit that there was not enough substance to compound as directed by Mr Charter to Mr Alavi in his text message of 12 January 2012 which requested "Thymosin- 20 x 5ml". The Players submit that at least 0.3g would be required to meet the request of 20 x 5ml vials and this increases to 0.39g for 26 x 5 ml vials and 0.78g for 26 x 10ml vials.

572. The Players submit that if the vials were made up as the ASADA CEO alleges with 3ml in each vial then there would be less than 5 injections of 0.5ml per player. The Players contend that 0.25g would not have been a sufficient amount to meet the course consented to by the Players.

573. The Players also note that Mr Dank's request for the compounding of 20 x 5 ml vials of Thymosin was made shortly after an e-mail was sent on 12 January 2012 by Mr Charter to Mr Alavi and Mr Dank which recommended a concentration of 10mg per 2ml. Such a concentration would need 0.5g of the substance. The Players submit that this raises the question whether it is the same substance as the 0.25g imported from China.

574. The Tribunal does not accept Mr Alavi's evidence that peptide suppliers would commonly supply a small additional amount to allow for wastage. There is no reliable evidence before the Tribunal to infer this was common practice. Accordingly, the Tribunal concludes that Mr Alavi received no more than 0.25g of the substance TB4.

575. Consistent with Mr Alavi's contemporaneous SMS message to Mr Charter on 16 January 2012, Mr Alavi conceded that some of the substance compounded was destroyed in the process. The Tribunal concludes that there was some wastage given the compounding problems encountered by Mr Alavi.

576. On Como's tax invoice #1924 for Essendon dated 31 January 2012, a further entry dated 18 January 2012 records that "8 Peptide Thymosin 8Mg/Ml 8Mlvial" for $3,840.00 was dispensed on 18 January 2012. The Customer is listed as "Como Compounding Pharmacy". This entry is reversed on the same day.

577. The Players submit that the entry of 8 vials of "Peptide Thymosin" (of 8ml at a concentration of 8mg/ml i.e. total of 512mg or 0.512g) would have required more than double the 0.25g of Thymosin allegedly purchased from GL Biochem and that it should not be summarily dismissed as an error just because the entry was reversed on the same day.

578. In the Tribunal's view, there is too much inconsistency and uncertainty for the Tribunal to reach any concluded position about the concentration of the vials compounded and dispensed by Mr Alavi in relation to the first shipment. There are a number of possibilities. In particular, the Player's consent form sets out a concentration of 3000mg/mL, invoice #1924 records a concentration of 3mg/ml for 26 vials of Thymosin, the email of 12 January 2012 from Mr Charter records a concentration of 10mg/2ml, the request in Mr Dank's text message of 12 January 2012 requests "20 x 5ml", invoice #1924 also records a concentration of 8mg/ml for 8 vials of Thymosin and there is evidence that the substance was dispensed in 10ml vials.

579. The Tribunal reiterates what it has said earlier about the critical importance of records, including records of analysis, in reaching any conclusions in relation to this element and what Professor Handelsman has said about the difficulties involved in compounding. The Tribunal has had regard to the difficulties that Mr Alavi had while compounding the Thymosin formulation, the lack of any analysis conducted before or

after the compounding, the inconsistent and uncertain information about the concentration at which it was compounded, together with the lack of records at Como in relation to the substance.

580. After considering the submissions of the parties, assessing the evidence and the cumulative effect of the evidence, the Tribunal is not comfortably satisfied that the substance, which was contained in the first shipment and was purported to be TB4, and which was compounded and dispensed by Mr Alavi, was in fact TB4.

581. For the sake of completeness and in case the Tribunal is wrong in the conclusion it has reached about what resulted from the compounding of the 0.25g of TB4, the Tribunal proceeds to consider whether what was compounded was dispensed to Mr Dank in his capacity as the Sports Scientist at Essendon.

582. On 18 January 2012, Mr Alavi sent an SMS to Mr Charter which stated:

> *I've had a chat to Steve Dank. He is picking up some of the peptides tomorrow. Hes still researching the hexarelin. Have a chat to him, he may not need the others for now... also, are you available tomorrow for a quick chat? We can meet at the city if you like ...*

583. In short, the ASADA CEO submits that it can be inferred that the "peptides" that Mr Dank picked up from Como on 19 January 2012 included the 26 vials of TB4 made up at 3mg/mL.

584. The ASADA CEO submits that by the entry on the Essendon invoice #1924, Mr Alavi was aware that the TB4 was being dispensed to Mr Dank in his Essendon capacity.

585. First, the ASADA CEO contends that Mr Dank was placing non-MRC orders directly with Mr Charter.

586. Secondly, in relation to invoice #1924, the ASADA CEO submits that the Tribunal should infer that the first shipment was dispensed to Essendon rather than MRC or ICB.

587. Thirdly, the ASADA CEO submits that the efforts made by Mr Alavi to obtain payment from Essendon for peptides tends to indicate that the first shipment was dispensed to Mr Dank on behalf of Essendon.

588. Fourthly, the ASADA CEO submits that based on the consistent oral evidence provided by Mr Alavi, Ms Giordani and others, the Tribunal should infer that the first shipment of peptides was compounded in clear vials, whereas the second shipment was compounded in amber vials. Mr Alavi has also stated that the clear vials were 10mL vials.

589. Fifthly, Mr Dank told other people about "fried" peptides, including Serge Del Vecchio who noted this in his interview with ASADA investigators.

590. Sixthly, Eagle ultimately did not test the substances and the samples were destroyed.

591. Seventhly, the Mimotopes analysis did not occur. It should be inferred from contemporaneous evidence and information from Mimotopes that Mr Dank never sought to have the Hexarelin and TB4 tested at Mimotopes. Documents from Mimotopes confirm that tests were conducted on GHRP-6 and MGF. They did not test SARM S-22. There is no evidence to support Mr Dank's claim that Thymosin or the Hexarelin were tested at Mimotopes. The ASADA CEO submits that even though Mr Dank had no analytical basis to assert it, the absence of testing does not diminish the strong inference that Mr Dank told others that the TB4 had been "fried".

592. Eighthly, the ASADA CEO submits that it should be inferred that Mr Dank falsely claimed the peptides were "fried" to avoid making payment for the peptides based on the documentary evidence relevant to the re-credit to the Essendon invoice #2083. The ASADA CEO submits that on 14 February 2012, Mr Dank claimed the peptides had been "fried", Mr Alavi accepted Mr Dank's story and reversed the charges. On 14 February 2012, an entry was made on EFC Invoice #2083 reversing the purchase of 26 vials of Peptide Thymosin and 21 vials of Hexarelin.

593. Ninthly, the ASADA CEO submits that the contents of a Peptide Manual created on 5 July 2012 supports the inference that Mr Alavi knew that he was compounding TB4 and dispensing it to Mr Dank in his Essendon capacity. The Thymosin section of the peptide manual only refers to TB4 (not any other type of Thymosin). Based on the contents of the Peptide Manual and the distribution of the manual to other football clubs, the ASADA CEO submits that it should be inferred by the Tribunal that Mr Alavi compounded TB4 for Mr Dank in his capacity as Sports Scientist at Essendon.

594. The Players submit that the evidence in relation to the Essendon invoice #2083 which contains cancelled (or reversed) dispensing of Thymosin in January 2012 is so contradictory and vexed as to render it incapable of reasonable interpretation.

595. When asked about the reversal, Mr Alavi said:

> *When I showed Steve that, he said, "Oh, no. That was supposed to be charged to - to ICB or MRC," so, then we credited it and it got charged there. But that stock was taken to Steve to take with him to Sydney or wherever it was he was going.*

596. The Players submit that the particular item of 26 vials in invoice #1924 was billed to the wrong entity and those vials were taken by Mr Dank to Sydney. That is, the item should not have been billed to Essendon, but rather to MRC or ICB. As to why this item was not subsequently billed to MRC or ICB, the Players submit that it may be that Mr Dank's alleged representation that the peptides were "fried" explains the absence of this evidence.

597. The Players submit that there is a real question as to whether the substance compounded and provided by Mr Alavi to Mr Dank was in a usable state or believed by Mr Dank to be in a usable state. They submit Mr Alavi was apparently told by Mr Dank that it was "fried" because it had been provided in clear vials. The Players submit that although Mr Dank did not seem to actually have tests conducted at Mimotopes on any substance purported to be TB4, there is a reasonable possibility that at the very least Mr Dank believed this substance should not, or could not be used. This possibility, it is submitted, is supported by the tax invoice #2083 from Mr Alavi showing the initial account raised for 26 vials of Thymosin was reversed.

598. The Players submit that it makes no sense that Mr Dank would concoct a story of the peptides being "fried" in order to remove the liability of Essendon to pay. It was not Mr Dank's money involved.

599. The Tribunal notes that Mr Alavi dispensed 26 vials of a substance he believed to be TB4. Mr Alavi's invoice #1924 is addressed to Essendon. The Tribunal notes the following matters in relation to the invoice. The Customer noted against the entry is "Mrc & Icb" which are Mr Dank's businesses. The charge of $6500.00 in tax invoice #1924 was reversed in tax invoice #2083 which is dated 29 February 2012. However,

in that document the date of the credit is 14 February 2012. As previously noted, other than the invoices, there is a complete lack of documentary evidence from Mr Alavi in terms of what was dispensed by Como on 19 January 2012. As previously noted, there is a complete lack of documentary evidence from Essendon in terms of any receipt of the 26 vials. Further, there is no evidence that Essendon paid for the 26 vials.

600. It is necessary to consider the possible explanations for the crediting of the amount charged for the 26 vials. The possible explanations appear to be as follows:

(a) that the substance in the vials was rendered unusable ("fried") and consequently Mr Alavi decided that there should be a credit for the item. On the basis of this alternative there would have been no delivery of the vials to Essendon;

(b) that the item had been incorrectly charged to Essendon when it should have been charged to MRC or ICB. On the basis of this alternative there would have been no delivery of the vials to Essendon because they were being supplied to Mr Dank's companies in relation to non Essendon business activities; or

(c) that Mr Dank did not wish the item to be charged or shown to be charged to Essendon. However, it was still to be received by him as Essendon Sports Scientist, even though Essendon was not being invoiced for it. On the basis of this alternative the vials would have been delivered to Essendon for use in the Essendon supplement program.

601. These possible alternatives are discussed as follows.

U.2.1.1. Alternative (a)

602. There is evidence that Mr Dank said that the vials that he had collected were rendered unusable ("fried") because they were clear vials and the substance had been affected by sunlight. There is no evidence that this assertion was confirmed by analysis as it is clear that Mr Dank did not have the substance tested by Mimotopes. Caution has to be exercised in relation to this alternative because of Mr Dank's lack of credibility. However, there is evidence, which has already been referred to, of Mr Alavi having

difficulties in the compounding of the substance in the 26 vials. Therefore, in the Tribunal's view, this alternative is a possibility.

U.2.1.2. Alternative (b)

603. Reference has previously been made to Mr Alavi's evidence of his conversation with Mr Dank when he was informed by Mr Dank that the item should have been charged to MRC or ICB and that he took the vials to Sydney or somewhere. This alternative does depend upon what Mr Alavi says he was told by Mr Dank. Both are persons whose credibility is at a low level and therefore their evidence has to be treated with caution. Reference has been made to invoice #1924 and the fact that the customer listed against the item of 26 vials was "Mrc & Icb". It is clear that Mr Alavi was transacting business with MRC and ICB which involved supplying substances to them. As already noted, the ASADA CEO has contended that this is not consistent with the way in which Mr Dank operated.

604. Reference has been made to the reliance by the ASADA CEO on the word "Ed" in Mr Charter's file note. It is submitted that "Ed" is a reference to Essendon and tends to support a contention that it was intended that the first shipment was for Essendon. On the other hand, it has been suggested that the word "Ed" is a reference to Mr Dank's business partner Mr Ed Van Spanje and therefore tends to support a contention that the first shipment was not for Essendon but for MRC or ICB. In the Tribunal's view, there is too much uncertainty about the use of this word to place any weight upon its presence in the file note.

605. Having regard to the circumstances, the Tribunal considers that this alternative is a possible explanation for the credit being entered for this item. This alternative in effect means that the dispensing was to Mr Dank's own companies for their own business activities as distinct from being to him as Essendon Sports Scientist.

U.2.1.3. Alternative (c)

606. The ASADA CEO contended that Mr Dank was portraying the program at Essendon as a research program. It was contended that there was an arrangement that Mr Alavi would provide the vials to Mr Dank for use at Essendon in the research program but invoice the vials to Mr Dank's companies. It was contended that as the vials would be used for research purposes, they would be free of charge. The ASADA CEO contends

that this could explain why there is no evidence of a charge being made to Mr Dank's companies for the 26 vials.

607. Further, it is contended that Mr Dank desired to avoid charging Essendon for the item. It is contended that evidence of Mr Alavi following up non-payment by Essendon supports this alternative that the dispensing was to Mr Dank in his capacity as Essendon Sports Scientist. However, the Tribunal notes that there were other items that had been charged to Essendon and not reversed which could explain why Mr Alavi was following up payment by Essendon.

608. The ASADA CEO also contended that the Register of Peptides supplied by IMG to ICB supports his submission that the dispensing would not have been to ICB. As the Register commences in March 2012, it is submitted that it can be inferred that there was no supply to ICB before March 2012. That could be the position but it could also be the position that the Register was not commenced until March 2012 and therefore it does not necessarily follow that the absence of an entry to ICB in January 2012 evidences that ICB did not receive what was dispensed in January 2012. The Tribunal has already referred to the difficulties that arise from the lack of records of Mr Alavi. There is no need to repeat what it has previously said. In the Tribunal's view, there is too much uncertainty about the Register for it to provide any real support for the evidence of Mr Charter relied upon by the ASADA CEO with respect to this matter.

609. Reference has been made to the contentions of the ASADA CEO as to the probative value of the Peptide Manual put together by Mr Alavi. The Tribunal has considered these contentions but is of the view that any connection between the manual and whether the dispensing was to Mr Dank as Sports Scientist at Essendon is too tenuous to be of any real probative value.

610. The Tribunal considers that this alternative (that is, alternative (c)) is also a possible explanation although it has some difficulty in understanding why Mr Dank would wish to avoid Essendon being responsible for payment of an item which it would have the benefit of.

611. When these alternatives are carefully considered and weighed, the Tribunal is unable to be comfortably satisfied that alternative (c), which is the alternative contended by the ASADA CEO, is the alternative that should be accepted. There is too much doubt

and uncertainty surrounding the credit of the item for the Tribunal to be comfortably satisfied that Essendon received the 26 vials.

612. In the result, after considering the submissions of the parties, assessing the evidence and considering the cumulative effect of the evidence, the Tribunal is not comfortably satisfied that the 26 vials were dispensed by Mr Alavi to Mr Dank in his capacity as Sports Scientist at Essendon.

U.2.2. The second shipment

613. The ASADA CEO submits that based on information contained in contemporaneous materials, the Tribunal ought to conclude that:

(a) on 18 February 2012, Mr Alavi received a further 1g of TB4;

(b) Mr Alavi subsequently compounded TB4 in May 2012; and

(c) Mr Alavi supplied TB4 to Mr Dank in his capacity as Sports Scientist at Essendon on or around 11 May 2012.

614. As previously stated, the Tribunal is considering this element on the basis that it is assumed and accepted that the second shipment was received by Mr Alavi and in fact contained TB4.

615. On 9 May 2012, Mr Dank sent an SMS to Mr Alavi which stated:

> *great mate. Can you organise the Thymosin for the AOD study? I have now started the study.*

616. On 10 May 2012, Mr Alavi sent Mr Dank a text message which stated:

> *I'll let Vania know. She should have it ready for you in a couple of days also, send me the info/brief on Qatar when you get chance.*

617. Later on 10 May 2012, Mr Dank sent an SMS to Mr Alavi which stated:

> *I'll ring Vania this morning to get a timeframe for Thymosin. I know she will have 15 vials to do so it will take some time.*

618. On 11 May 2012, Ms Giordani sent a text message to Mr Dank which stated:

hi Steve! Just to let you know that your 15 vials of Thymosin are ready to pick up, also do you want SARM in cream? I do have 5 syringes ready. Regards Vania from Como compound pharmacy.

619. The Tribunal is comfortably satisfied that while the text message exchange between Mr Dank and Mr Alavi does not expressly refer to "thymosin" as TB4, it can be inferred from the communications around the first shipment in January 2012, that Mr Dank and Mr Alavi were both referring to TB4 in their text messages on 9 and 10 May 2012.

620. The Players submit there is no direct evidence that the substance tested by Ms Giordani was compounded. The Players submit that Ms Giordani denies compounding Thymosin, other than "10 or something". The Players submit that Mr Alavi never told ASADA that he compounded 15 vials referred to in the text messages in May 2012.

621. The Tribunal finds that Ms Giordani compounded 15 vials of a substance she believed to be TB4 for Mr Dank. The Tribunal further finds that after the substance was compounded, Ms Giordani sent an SMS to Mr Dank advising that the vials were ready for collection. These facts can be inferred from the text messages cited above.

622. The Tribunal has previously considered in some detail the evidence relating to the Bio-21 analysis and stated its conclusions with respect to that analysis. There is no need to repeat them. The evidence of Ms Giordani to the investigators indicates that it was her practice after compounding a few vials of the substance she then proceeded to conduct an analysis of what she had compounded. There is some suggestion in the submissions that the analysis was done before she carried out the compounding. The Tribunal proceeds to conclusions first of all on the basis that the analysis took place after compounding. In the light of the conclusions that the Tribunal has previously stated about the Bio-21 analysis, the Tribunal is not comfortably satisfied that the analysis establishes that the substance compounded was TB4. The Tribunal accepts that it is a possibility but cannot reach a level of comfortable satisfaction. Further, it could be said that this is less of a possibility if Ms Giordani analysed the substance before compounding it, because that would mean that there was no analysis carried out of the substance that resulted from the compounding.

623. The Tribunal has previously considered the question from where the substance compounded by Ms Giordani emanated. It has stated that it is not comfortably satisfied that if there was a second shipment as alleged by the ASADA CEO to have occurred, it emanated from that shipment. On that basis the Bio-21 analysis provides no probative evidence that the substance compounded by Ms Giordani was TB4 that came from the second shipment and therefore that what she dispensed was TB4 from the second shipment. If the Tribunal is wrong in this conclusion and it is accepted that the substance she compounded and tested was TB4 from the second shipment, in view of the conclusions that the Tribunal has stated about the Bio-21 analysis, it is still not comfortably satisfied that what resulted from the compounding and was dispensed was in fact TB4.

624. Although the Tribunal is not comfortably satisfied that the substance resulting from the compounding was in fact TB4, it proceeds to consider whether there was a delivery of that substance to Mr Dank in his capacity as Essendon Sports Scientist.

625. The ASADA CEO submits that the Tribunal should infer that Como dispensed a second supply of TB4 on or around 11 May 2012 to Mr Dank in his Essendon capacity. The Players submit there is no direct evidence that it was supplied to Mr Dank, let alone made its way to Essendon.

626. The ASADA CEO notes that Mr Alavi has produced the Register of Peptides supplied in vials by IMG, a research company related to Mr Alavi. The Register relates to the period March 2012 to July 2012 and does not record that any TB4 was supplied to ICB during this period.

627. The Players submit that the SMS messages between Mr Dank and Mr Alavi on 9 and 10 May 2012 relate to "Thymosin for the AOD Study". The Players also submit that the text messages in May 2012 must be seen in light of the timing of Mr Dank's trip to Qatar in the Middle East. It is submitted that the only communication regarding Thymosin which was collected by Mr Dank after January 2012 is most probably a reference to that being used for the AOD study in Qatar. The Players submit that it is clear that Mr Alavi was doing business with Mr Dank regarding other non Essendon matters and that is why they were communicating about opportunities in the Middle East.

628. The ASADA CEO refers to Players' evidence that some of them saw brown vials and some of them recall being injected with substances from brown vials. A couple of players said they saw "Thymosin" labels typed on brown vials in Mr Dank's fridge. There is evidence from a player that he was injected from brown vials with a substance that he always asked Mr Dank about and Mr Dank always told him it was Thymosin. The Players submit that the distinct lack of reliable evidence regarding any aspect of the alleged second delivery on 18 February 2012 making its way to Essendon cannot be supported by the evidence from Players regarding the brown vials.

629. There are no records such as invoices or receipts from Mr Alavi or Essendon relating to the second shipment. This can be contrasted with the position in relation to the first shipment where there were two invoices which provided some evidence in relation to the transactions involved.

630. The ASADA CEO submits that the Tribunal should not make any negative finding about the absence of any invoice for compounding of the second shipment. Rather, based on the evidence, the Tribunal should infer that Mr Alavi provided the TB4 from the second supply to Mr Dank for free to use in a research project involving the Essendon players.

631. The Tribunal concludes that 15 vials of the substance purported to be TB4 were dispensed by Ms Giordani to Mr Dank. However, after considering the submissions of the parties, assessing the evidence and considering the cumulative effect of the evidence, the Tribunal is not comfortably satisfied that Ms Giordani dispensed the 15 vials to Mr Dank in his capacity as Sports Scientist at Essendon. There is a complete lack of documentary evidence to support the allegation that the vials were received by Mr Dank in his Essendon capacity. The Tribunal has previously referred on a number of occasions to the lack of records at Essendon. No evidence, such as invoices or receipts, of the alleged May 2012 transaction between Mr Alavi and Essendon has been produced to the Tribunal. The Tribunal concludes that the contention that Mr Alavi provided the 15 vials to Mr Dank for free to use in a research project involving Essendon players is too uncertain having regard to the paucity of evidence to support this proposition. The Tribunal is satisfied that Como was offering various substances for sale and Mr Dank in turn was providing or seeking to provide various substances to different customers.

632. The Tribunal accepts that the substance compounded by Ms Giordani in May 2012 would have been dispensed in 15 brown vials. However, the Tribunal finds that evidence from some players about seeing brown vials at unspecified times during the season is not probative that the vials seen by those players were connected to the vials dispensed by Ms Giordani.

633. The Tribunal has previously referred when considering the assessment of evidence to the reliability difficulties that arise with respect to statements made by Mr Dank to some players. Consequently, there are difficulties in relying upon statements of some players to ASADA investigators which are based on what they were told by Mr Dank. Further, the evidence of some players in relation to their observations of matters such as the colour and presentation of vials is not, in the Tribunal's view, as consistent and probative as the ASADA CEO contends. For example, the evidence of [redacted] as to what he observed in relation to vials is different to what others said they observed. There is too much uncertainty involved for this evidence of the players to be of any significant probative value.

634. It follows from the conclusions that the Tribunal has reached, that it is not comfortably satisfied that the second element or link in the chain of reasoning relied upon by the ASADA CEO to prove a violation by each player has been established.

635. In the result, the Tribunal is not comfortably satisfied that TB4 was administered to any Player. The Tribunal is not comfortably satisfied that any Player violated clause 11.2 of the AFL Code.

636. Consequently, the Tribunal does not consider it necessary to consider the third element or link in the chain of reasoning, as it is dependent upon the first and second elements or links being established and neither has been established to the comfortable satisfaction of the Tribunal.

637. The Tribunal's decision with respect to the violations alleged against Mr Dank under the AFL Code will be handed down at a later date together with the Tribunal's reasons relating to that decision.

ATTACHMENT A
GLOSSARY

DRAMATIS PERSONAE (EXTRACTED FROM EXHIBIT AS-9):

NAME	DESCRIPTION
Alavi-Moghadam, Nima	Compounding chemist at the Como Compounding Pharmacy
Anthony, Cedric	General Manager at Austgrow International and Shane Charter's business associate
Ashcroft, Marcus	Gold Coast Suns Football Club General Manager of Football
Bates, Dan (Dr)	Doctor at the Melbourne Football Club
Bernard, Roger (Dr)	Doctor and business partner of Shane Charter in the Dr Ageless business
Charter, Shane	A qualified biochemist who owned and operated Dr Ageless
Corcoran, Daniel (Danny)	Essendon Football Club Football Manager
Dank, Stephen	Sports scientist. Gold Coast Suns Football Club Sports Scientist between November 2010 and February 2011. Essendon Football Club Performance Scientist between November 2011 and September 2012
Deeble, Jon	Australian National Baseball Head Coach
Donehue, John	Carlton Football Club Assistant Coach (tackling)
Earl, Sandor	A former NRL player for the Canberra Raiders (2012-2013), Penrith Panthers (2010-2012) and Sydney Roosters (2009)
Fricker, Peter (Dr)	A medical practitioner who was working at the Aspire Zone Foundation as Chief Sports Medicine Advisor when he first met Stephen Dank
Giordani, Vania	Sterile lab technician at Como Compounding Pharmacy from January 2012
Handelsman, David (Professor)	Professor and Director of Reproductive Endocrinology and Andrology at the ANZAC Research Institute

NAME	DESCRIPTION
Hibbert, Darren	Sales representative for Australian Sports Nutrition. Also known as "the Gazelle" and "the Professor". An associate of Dank.
Hird, James	Essendon Football Club Senior Coach 2011 to present
Hobson, Suki	Essendon Football Club Strength Scientist
Khan, Ijaz (Dr)	Doctor associated with the blood samples obtain from Essendon players. Director of InjuryCare Pty Ltd
Mazzoni, Irene	WADA, Manager, Research and Prohibited List
McKenna, Guy	Gold Coast Suns Football Club Senior Coach from 2011 to 2014
McKenzie, Nick	Journalist, The Age
Nolan, John	ASADA investigator
O'Connor, Luke	ASADA investigator
Plompen, Sonia	Mimotopes, Managing Director
Reid, Bruce (Dr)	Essendon Football Club Doctor
Rigby, Barry (Dr)	Gold Coast Sun Football Club Doctor
Robinson, Dean	Former high performance manager at Geelong, Gold Coast Suns and Essendon Football Clubs
Thompson, Mark	EFC Senior Assistant Coach
Tresoriero, Angelo	Compounding chemist at the HealthSmart Pharmacy at the Alfred Hospital. Listed in Stephen Dank's mobile phone contacts as "Angelo".
Turk, Paul	EFC strength and conditioning coach
Van Spanje, Adam	Director at MRC
Van Spanje, Ed	Director of MRC. Listed in Shane Charter's mobile phone contacts as "Ed Peptide"
Walker, Aaron	ASADA investigator
Wallis, Dean	EFC Development Coach
Watt, Stephen (Dr)	ASADA Science and Results Manager
Wilcourt, Robin (Dr)	Anti-ageing doctor. Director of Epigenx Integrated Medicine.
Xu, Vincent	Global sales manager of GL Biochem
Zacharia, Michael (Dr)	Sydney based anti-ageing doctor

ENTITIES:

NAME	DESCRIPTION
Bio-21 Molecular Science and Biotechnology Institute	The University of Melbourne's research centre where Vania Giordani analysed compounded peptides
Como Compounding Pharmacy (**Como**)	Pharmacy owned and operated by Nima Alavi
Dr Ageless	Anti-aging and supplementation business operated by Shane Charter
Eagle Pharmaceuticals (**Eagle**)	US company approached by Mr Alavi to analyse compounded peptides in January 2012
Epigenx Integrated Medicine	An integrated medical practice with interest in hormone balancing, nutrition, weight loss programs and some cosmetic procedures. Dr Willcourt is the Director of the medical practice.
GL Biochem (Shanghai) Ltd	GMP supplier of peptides located in Shanghai, China. Vince Xu is the Global Sales Manager of GL Biochem
Institute of Cellular Bioenergetics Pty Ltd (**ICB**)	A company of which Mr Dank was a director.
IMG	A company associated with Mr Alavi.
Medical Rejuvenation Clinic (**MRC**)	Clinic offering age rejuvenation and well-being and sport science therapies including peptides. Directors included Stephen Dank, Edward Van Spanje, Adam Van Spanje and Zaheer Azmi
Medivet Direct	A company supplying animal health products
Mimotopes Pty Ltd (**Mimotopes**)	Melbourne based peptide supplier with whom Stephen Dank had contact. Part of the same corporate group as GL Biochem.
Sichuan Hengli Technology Co Ltd (**Sichuan Hengli**)	Supplier of peptides from whom Mr Alavi ordered peptides in April, June and December 2012
Sportsmed	Epworth Sports and Exercise Group where Dr Bruce Reid works
World Anti-Doping Authority (**WADA**)	International independent agency composed and funded equally by the sport movement and governments of the world – key activities include monitoring the World Anti-Doping Code.

DESCRIPTION OF SUBSTANCES: [1]

NAME	DESCRIPTION
AOD-9694	AOD-9604 is a synthetic 16 amino acid peptide, which comprise an N terminal Tyr followed by the C terminal 15 amino acids of the 191 amino acid full hGH structure. SO of Prohibited List: AOD-9604 has never been approved by any regulatory agency for human therapeutic use. The clinical trial completed were probably undertaken under the Australian CTN or US IND approvals which provide approval only for use in specific defined clinical trials under HREC supervision. S2 of Prohibited List: AOD-8604 is a fragment of GH and therefore should be considered a GH analog with potential GH bioactivity.
CJC-1295	CJC-1295 is a 30 amino acid analog peptide. It retains full GH releasing bioactivity of hRHRH but has a prolonged circulating half-life (and therefore duration of action). S0 of Prohibited List: CJC-1295 has never been approved by any regulatory agency for human therapeutic use. S2 of Prohibited List: CJC-1295 stimulates release of endogenous hGH secretion.
Follistatin	S4.4 of Prohibited List: Follistatin is an agent modifying myostatin function, a myostatin inhibitor. SO of Prohibited List: Follistatin has never been approved by any regulatory agency for human therapeutic use. Follistatin is a single chain polypeptide with complex substructural features reflecting its binding properties. Follistatin is a member of the inhibin-activin-follistatin family of proteins which interact with the transforming growth factor (TGF) Beta superfamily of proteins. Myostatin (also known as GDF8) is a muscle-specific member of the TGFB superfamily of proteins. Its

[1] Unless otherwise indicated, these descriptions are summarised from the evidence of Professor Handelsman.

NAME	DESCRIPTION
	characteristic physiological property is to limit muscle growth during pre-natal development by limiting the numbers of muscle fibres grown. Based on speculation, inhibition of myostatin has been considered as a mechanism to increase muscle mass and therefore strength and performance in power sports. Administration of follistatin may be considered as a potential doping agent with non-androgenic effects to increase muscle mass and strength.
GHRP-2	GHRP-2 was developed as a more potent Ghrelin agonist than GHRP-6. GHRP-2 is a Ghrelin agonist with potent short-term GH releasing activity via its cognate GH secretagogue (GHS or Ghrelin) receptor. The major impact of GHRP-2 appears to be via attenuation of the dominant somastostatin inhibition in the regulation of pulsatile GH secretion. SO of Prohibited List: GHRP2 has been licensed by Kaken Pharmaceuticals in Japan for diagnostic use (ie. Single dose). This consists of single dose administration to assist in diagnosis of GH deficiency. It has never been approved for therapeutic use nor has GHRP2 been approved for human therapeutic (or diagnostic) use by any other major regulatory agencies including FDA, EMEA or TGA. S2 of Prohibited List: GHRP-2 stimulates secretion of endogenous hGH. The duration of action of GHRP2 as defined by its stimulation of GH secretion is brief, no longer than a day (at most) after administration.
GHRP-6	GHRP-6 is a synthetic Ghrelin agonist which stimulates GH secretion via the GHS (Ghrelin) receptor. GHRP-6 was the first synthetic Ghrelin agonist to be developed. Reasonable speculation that any tissue effect of additional GH exposure stimulated by GHRP-6 administration would last no more than a few weeks

NAME	DESCRIPTION
	beyond the last dose of GHRP-6. SO of Prohibited List: GHRP-6 has never been approved for therapeutic use by any regulatory agency. S2 of Prohibited List: GHRP-6 stimulates secretion of endogenous hGh.
Hexarelin	Hexarelin was developed as a more potent Ghrelin agonist than the first Ghrelin agonist, GHRP-6. It differs from GHRP-6 only in one amino acid (D-methyl tryptophan replacing D-Trp at position 2). It has a very similar pharmacology to GHRP-6 and stimulates GH secretion in a similar pattern to other GHRH or Ghrelin analogs. A single dose of hexarelin increases serum GH levels for up to 3 hours (and that of other hormones like ACTH, cortisol and prolactin for up to 1 hour). SO of Prohibited List: Hexarelin has never been approved by any regulatory agency for human therapeutic use. S2 of Prohibited List: Hexarelin stimulates release of endogenous hGH.
Insulin-like growth factor-1 (**IGF-1**)[2]	IGF-1 is expressly named as a Prohibited Substance in s2.5 of the 2011 and 2012 WADA Prohibited Lists.
Insulin-like growth factor-2 (**IGF-2**)	IGF-2 is a single chain polypeptide of 67 amino acids as a member of the insulin and insulin-like growth factor family of peptides with underlying structural and functional homology. In mammals including humans IGF2 is predominantly a fetal growth factor which is preferentially expressed in early embryonic and fetal development in a wide variety of somatic tissues. In fetal life IGF2 has a major role in the regulation of cell proliferation differentiation, growth, migration and cell survival including the muscoskeletal system whereas in adults its role is unclear but may have local tissue effects supporting cellular maintenance. A drug designed to act as an insulin-like growth factor with similar biological effects to insulin and IGF1, IGF2 is considered a doping agent under section 2 of

[2] This description was not provided as part of Professor Handelsman's evidence.

NAME	DESCRIPTION
	the Prohibited List. S2.5 of Prohibited List: (2011, 2012) S.2.4 of Prohibited List: (2013, 2014) S2.4 or S2.5 of Prohibited List: IGF2 has similar chemical and biological effects to insulin and IGF1. SO of Prohibited List: IGF2 has never been approved by any regulatory agency for human therapeutic use.
Mechano-growth factor (**MGF)**	MGF is a splice variant of insulin-like growth factor-1 (IGF-1). It remains controversial and unproven whether MGF exists in an independent from distinct from IGF-1 in humans. No such molecular entity has yet been identified in human tissues. SO of Prohibited List: MGF has never been approved by any regulatory agency for human therapeutic use. S2 of Prohibited List: MGF is a product of the IGF-1 gene and is also a putative growth factor for muscle. MGF is relevant to anti-doping arising from the controversial speculation of a distinctive role of MGF in muscle growth and injury repair and healing. There is some evidence that the expression pattern of IGF-1 gene products in muscle after injury may be construed as expressing MGF-like activity, it remains contentious whether MGF occurs naturally as a peptide or has any biological effects. Nevertheless, it remains possible that exogenous MGF might have some beneficial (or equally, harmful) effect on muscle physiology if administered exogenously. This highly speculative possibility is considered unpersuasive to implausible by independent experts in the field of IGF biology.
SARM s22	s22 is an aryl propionamide derivative, one of the early generation of non-steroidal androgens collectively referred to as Selective Androgen Receptor Modulators (SARM). This novel class of non-steroidal androgens was developed since the 1990s with the aim to develop more selective androgens which would have certain desirable properties, mainly stimulation of muscle growth and strength, without perceived adverse effects on the prostrate.

NAME	DESCRIPTION
	It is almost certain that s22 would have ergogenic effects due to increasing muscle mass and strength in humans, although this remains to be confirmed for this specific SARM. As a drug designed to act as an androgen, s22 is considered a doping agent under section 1.2 of the Prohibited List. S1.2 of Prohibited List: s22 is a SARM S1.1 of Prohibited List: s22 is an exogenous androgen, a substance with similar chemical structure and biological effects as other synthetic androgens. S0 of Prohibited List: s22 has never been approved by any regulatory agency for human therapeutic use. SARM is an acronym for a specific androgen receptor modulation. It is more of marketing rather than a true pharmacological term, but it refers to a substance that is like an androgen, that is a natural substance that reacts with the androgen receptor that's really like testosterone, but a synthetic derivative of it. SARM is the first type of non-steroidal androgens. For practical purposes and for the WADA Code, SARMs are just an androgen so they are covered under the S1 category and in fact they are specifically mentioned in S1.2.
TB-500	TB-500 is a short peptide analogue of Thymosin Beta-4. While it is not identical to Thymosin Beta-4, it has all the characteristics of the original parent.
Thymomodulin	Thymomodulin is a crude extract of calf thymus, which is produced by the simplest of means – collecting calf thymus from abattoirs, grinding it up, exposing it to acid, centrifuging it to get the debris down and then the clear solution above it. It contains a huge array of proteins and all sorts of materials, in some cases active and in some cases inactive; in some cases their activities counter each other. It is a very crude and very mixed material.
Thymosin[3]	Thymosin is not a substance in itself, but a generic descriptor which, it is contended, can be used to cover

[3] This description was not provided as part of Professor Handelsman's evidence.

NAME	DESCRIPTION
	a number of different Thymosins.
Thymosin Alpha	Thymosin Alpha is a 28 amino acid peptide. It has a wide variety of physiological and pharmacological effects based on experimental studies in animals, cells and cell-free systems. Thymosin Alpha is registered for human therapeutic use in several countries although it is not registered by any major national or regional regulatory agency. Thymosin Alpha may have a very general immune stimulant effect but is not considered to be relevant to performance enhancement.
Thymosin Beta-4	Thymosin Beta-4 is a 43 amino acid peptide member of the family of thymosins, a highly conserved family of 40-60 small peptides originally purified from calf thymus.

ATTACHMENT B:
RULING ON PRIVATE HEARING

IN THE AFL ANTI-DOPING TRIBUNAL

IN THE MATTER OF ALLEGED VIOLATIONS OF

THE AFL ANTI-DOPING CODE BY 34 PLAYERS AND

A FORMER EMPLOYEE OF THE ESSENDON FOOTBALL CLUB

RULING BY TRIBUNAL CHAIRMAN

DAVID JONES

DELIVERED 8 DECEMBER 2014

INTRODUCTION

1. The Australian Football League (AFL), at all material times, conducted and continues to conduct the elite Australian Football Competition (the AFL Competition).

2. At all material times the Essendon Football Club (Essendon) was and continues to be a participating football club in the AFL Competition.

3. Matches in the AFL Competition are played in accordance with the Laws of Australian Football (the Laws).

4. Section 21 of the Laws sets out the Anti-Doping Policy in relation to Australian Football. Consequently, the AFL Anti-Doping Code adopted by the AFL (the AFL Code) applies to the AFL Competition.

5. The AFL Code in force in 2012 was the AFL Anti-Doping Code of 1 January 2010. However, the AFL Code was amended on 7 March 2013 and some amendments apply to these proceedings.

6. Infraction notices under the AFL Code have been issued by the AFL against 34 persons, who were players with Essendon in 2012, alleging violation of the AFL Code in 2012. An infraction notice has also been issued by the AFL against a person who was employed by Essendon in 2012 (the former employee), alleging violations of the Code in 2012. Prior to the issue of the infraction notices show cause notices had been issued to the players and the former employee by the Australian Sports Anti-Doping Authority (ASADA), a statutory authority, and their details entered on the Register of Findings by the Anti-Doping Rule Violation Panel (ADRVP), pursuant to clauses of the National Anti-Doping Scheme (NAD).

7. By virtue of the operation of the AFL Code and the AFL Rules (October 2013), the Disciplinary Tribunal, the AFL Anti-Doping Tribunal, has jurisdiction to deal with any alleged violation of the AFL Code. Consequently, the AFL Anti-Doping Tribunal (the Tribunal), as constituted by David Jones, Chairman, and John Nixon and Wayne Henwood, Members, has jurisdiction to deal with the violations alleged in the infraction notices.

8. At a Directions Hearing held on 18 November 2014, an issue was raised as to whether hearings of the Tribunal in this matter should be in private or in public. Submissions were made as to the decision that should be made. Under the AFL Rules and Code, the decision is to be made by the Tribunal Chairman.

THE AFL RULES

9. These Rules govern the operation of the Tribunal and therefore some reference needs to be made to them.

10. Rule 42.3 gives the Chairman broad powers as to the procedures to be followed and the conduct of the hearing, including form of evidence and who are entitled to attend.

11. The Tribunal is not bound by the rules of evidence or by practices and procedures applicable to Courts of record but may inform itself as to any matter in such manner as it thinks fit (Rule 42.3(c)). Rule 42.4(a) imposes natural justice and other obligations on the Tribunal.

12. Rule 42.14(d) provides: "Subject to any contrary direction of the Chairman in any case, proceedings before the Disciplinary Tribunal shall be open to members of the media accredited by the AFL". However, Rule 42.3(f) provides that Rule 42, in the case of an anti-doping matter, shall be read in conjunction with the AFL Code "provided that to the extent of any inconsistency, the provisions and guidelines contained in the AFL Code… shall… prevail". This is an important qualification of the operation of the Rule.

THE AFL CODE

13. Clause 16(d) of the AFL Code as amended on 7 March 2013 provides: "All hearings before the Tribunal in relation to this Code will be conducted in private unless otherwise authorised by the Tribunal Chairman". The 2010 version of the Code provided for authorisation by the General Manager Football-Operations of the AFL. However, it is accepted that the decision in this case is to be made by the Chairman.

14. Thus the critical question is whether the Chairman, should authorise otherwise in the circumstances of this matter.

15. Clause 18(a) of the AFL Code (Clause 18.1 in the 2010 version) provides:

> "The identity of any Player or other person who is asserted to have committed an Anti-Doping Rule violation may only be Publicly Disclosed by the AFL or ASADA in accordance with this Code, the WADA Code, the ASADA Act, the NAD scheme, the Tribunal rules or the terms of the Confidentiality Undertaking signed between the AFL and ASADA".

16. Clause 19 of the AFL Code is headed Notification and Public Disclosure. It requires the AFL upon the imposition of a sanction for a Code violation to send details of the violation and sanction to a number of persons or bodies including ASADA. In addition, it requires the AFL no later than twenty (20) days after the time to appeal has expired to publicly disclose at least: the disposition of the anti-doping matter including the sport, the anti-doping rule violated, the name of the player or other person committing the violation, the Prohibited Substance or Method involved and the consequences imposed. The AFL is also required to publicly disclose within 20 days any appeal decision concerning violations. The AFL or ASADA are required within the time for publication to send all hearing and appeal decisions to the World Anti-Doping Authority (WADA).

17. "Publicly Disclose" is defined in clause 2 of the AFL Code to mean "disseminate or distribute information to the general public or Persons beyond those Persons entitled to earlier notification in accordance with Article 14 of the WADA Code".

18. Clause 4 of the AFL Code is headed Powers of AFL and ASADA. It refers to the legislative authority of ASADA under its Act and the NAD Scheme to investigate possible violations of the anti-doping rules for Players and Officials under the jurisdiction of the AFL. ASADA has authority to make findings in relation to such investigations and notify the Player, Official and the AFL of its findings and recommendations as to the consequences of such findings. Further, ASADA has legislative authority to present its findings and its recommendations as to consequences at hearings of the AFL Tribunal either at the AFL's request or on its own initiative. ASADA is exercising that authority in appearing in these proceedings. ASADA agrees that the AFL retains all powers and functions relating to the AFL Code including, inter alia, the presentation of allegations of violations at a hearing and

all matters incidental thereto. The AFL is exercising this function through Disciplinary Tribunal Counsel appointed by the AFL General Counsel under AFL Rule 42.10, which also sets out their obligations.

THE ASADA ACT

19. In view of issues that have been raised, particularly by ASADA and which will be referred to later, some reference needs to be made to provisions in this legislation, which came into effect in 2006.

20. The Second Reading Speech provides guidance on the purpose of the Act. The Minister states:

> "In framing the proposed ASADA legislation, the issue of safeguarding athletes' rights was a prime consideration…. Further, the bill contains appropriate privacy safeguards for athletes and sporting support personnel - the Privacy Act 1988 will apply to ASADA's advocacy, education, drug testing, investigative and reporting functions, and any other operations where ASADA is required to collect and deal with sensitive information. Taken together, these provisions will continue to ensure that athletes' rights are protected under the new anti-doping regime".

21. Section 13(1)(k) of the Act concerns the authorisation of the ASADA CEO to present findings on the register and additional information at any AFL Disciplinary Tribunal hearing. Such legislative authority has already been referred to in relation to clause 4 of the AFL Code.

22. Section 13(1)(m) concerns the authorisation of the ASADA CEO to publish information on and relating to the Register if any of three criteria are established. The three criteria are: the CEO considers the publication to be in the public interest; or, the publication is required by the WADA Code; or, the athlete consents and the other conditions (if any) specified in the NAD Scheme for the purposes of the paragraph are satisfied.

23. Clauses 14.2.1 and 14.2.2 of the WADA Code are essentially replicated in clauses 18(a) and 19 of the AFL Code which have already been referred to. Clause 14.2.3 of the WADA Code is not replicated in the AFL Code and gives the player power to redact parts of the decision if he chooses to have it publicly disclosed after there is no finding of guilt.

24. The Explanatory Memorandum to the ASADA Act refers to s.13(1)(m). After referring to the conditions relating to publication it states:

> "These conditions are intended to balance athletes' and support persons' rights against the need to ensure a level of transparency for ASADA's operations and the importance of publicly naming athletes and support persons who ASADA

finds have committed doping violations. Examples of situations where publication might be considered by ASADA to be in the public interest include: findings of doping violations, negative test results and circumstances in which a finding of "no case to answer" could be publicised to clear an athlete's name if that athlete had been the subject of public allegations that were subsequently found to be baseless".

25. With respect to s.13(1)(m), clause 4.22 of the NAD Scheme contained in Schedule 1 of the *ASADA Regulations 2006* (Cth) provides that the CEO is only authorised to publish information if a decision has been handed down for a hearing process conducted in relation to the finding concerning the information, by a sporting tribunal, or the athlete or support person has waived his or her right to a hearing.

THE PRIVACY ACT (COMMONWEALTH)

26. In view of issues raised by parties, it is necessary to make some reference to this legislation. Mr Ihle submits on behalf of the 32 players that he represents that the AFL is an organisation which is bound to apply the privacy principles under this legislation.

27. Section 6 of the Act defines an "APP Entity" as an agency or "organisation". Section 6C relevantly defines "organisation" as a body corporate that is not a " small business operator". By virtue of s.6D(1), the AFL is not a small business operator and consequently subject to the Act.

28. Section 15 of the Act provides that: "an APP entity must not do an act, or engage in a practice, that breaches an Australian Privacy Principle". These principles are contained in Schedule 1 of the Act. Australian Privacy Principle (APP 6) in Part 3 of Schedule 1 of the Act deals with use or disclosure of personal information.

29. Section 6 defines personal information to mean:

> "information or an opinion about an identified individual or an individual who is reasonably identifiable: (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not".

30. Clause 6.1 of APP 6 provides that if an entity holds personal information about an individual that was collected for a particular purpose (the primary purpose), the entity must not use or disclose the information for another purpose (the secondary purpose) unless: (a) the person has consented to the use or disclosure of the information; or (b) sub-clause 6.2 applies in relation to the use or disclosure of the information. APP 6 of the Act says nothing about the restrictions on using the information for a primary purpose.

31. Section 16A of the Act provides for a "permitted general situation" where the collection, use or disclosure of personal information is permitted. Under item 2 of the table set out in s.16A, an entity is entitled to disclose personal information if:

> "(a) the entity has reason to suspect that unlawful activity, or misconduct of a serious nature, that relates to the entity's functions or activities has been, is being or may be engaged in; and
>
> (b) the entity reasonably believes that the collection, use or disclosure is necessary in order for the entity to take appropriate action in relation to the matter".

SUBMISSIONS

32. The Tribunal received a number of submissions relating to whether the hearings should be in private or otherwise. A brief summary of them follows.

MEDIA ORGANISATIONS

33. Leave was given for Mr Quill to appear and make a submission on behalf of a number of media organisations being: the Herald and Weekly Times, Nationwide News, the ABC and the Nine Network.

34. He submits that it is in the interests of the AFL, the game of AFL football, ASADA and the players to have an open hearing. There has been an enormous amount of speculation, rumour and innuendo about this matter, much of which has been ill informed, but giving rise to a perception in the public that the process generally has been flawed.

35. In his submission, a closed door hearing will only perpetuate the speculation, rumour and innuendo and ill informed discussion of the matter. On the other hand, an open hearing will dispel the myths and untruths. The public will be able to better understand the independence of the process generally, and specifically and importantly the process at this hearing. Through the information and understanding, it will restore and build the public's confidence in the process.

36. Consequently, there will be a better acceptance of the findings whereas the opposite will occur if the hearing is closed. There will be less acceptance of the independence of the process and a perception that it is a pre-determined outcome.

37. Mr Quill acknowledges the difficulty of full public access to the hearing. If media are present, public access is not necessary as the media are the eyes and ears of the public. Further, the Tribunal can control media reporting to safeguard sensitive matters, such as identification of participants, by having accredited media permitted to be present

sign a protocol setting out the conditions upon which they are permitted to be present at the hearing. He provided a draft protocol for the Tribunal's assistance.

38. In summary, he submits that with proper reporting of the matter, there will be understanding and acceptance of the Tribunal's findings.

THE AFL

39. Counsel for the AFL, Mr Gleeson, made some submissions on their behalf. He submits that there is a profound public interest in this matter and a concern by the AFL that there be transparency. This interest has been over an extended period of time.

40. This proceeding is important for the game of AFL football. The great concern is that there be a full understanding by the football public and the broader community of the manner in which this hearing is being conducted.

41. Mr Gleeson acknowledges that a final determination by the Tribunal will no doubt on a careful reading reveal the fairness of the process and the sound evidentiary basis for any findings and the reasoning underpinning those findings. However, it is desirable for the process itself to be observed, not just its conclusion.

42. In summary, Mr Gleeson submits that the AFL is very keen for the proceedings to be open if there are no insurmountable practical impediments. One way in which they could be addressed could be to impose conditions on the circumstances in which accredited media representatives are permitted to attend, including conditions as to reporting the identity of participants.

ASADA

43. Counsel for the CEO of ASADA, Mr Knowles, made submissions on his behalf. He stated that the CEO of ASADA opposes any order allowing for the hearing to be in public. He points out that all anti-doping hearings in Australia have been conducted in camera and not in public.

44. He refers to clauses 18 and 19 of the AFL Code and submits that they support the hearing being in private. Those provisions are referred to earlier. He also refers to s.13(k) and s.13(m) of the ASADA legislation, which he submits raise a serious issue as to whether the CEO has the power to present at an open Tribunal, findings and recommendations, unless the players consented to that course. Further, he submits that clauses 14.2.1 and 14.2.2 (which are replicated in the AFL Code and have already been referred to) and clause 14.2.3 of the WADA Code protect the interests of the athlete. To allow day by day media reporting would impermissibly infringe the right of the athlete under the WADA Code in the event that he is found not to have infringed the AFL Code.

45. Mr Knowles submits that there is a real risk of participants in an open hearing being the subject of a claim in defamation. The risk is particularly significant for witnesses in this situation and may result in their being reluctant to attend and give evidence when the hearing is not being held in private. As the Tribunal has no power to compel witnesses to attend and give evidence, he submits this is a very relevant factor.

46. There are also practical considerations to take into account, Mr Knowles submits. Evidence led will involve conduct by third parties who may wish to be heard on whether the evidence relating to them should be heard in the presence of the media. Resolving these issues in running could unduly prolong and complicate the proceedings. Further, if media representatives were to be subject to conditions limiting their ability to report the proceedings there is a real question as to the enforceability of such conditions.

THE PLAYERS

47. Mr Ihle made submissions on behalf of the 32 players he represents. He stated that they were in agreement with ASADA on this issue and are strongly of the view the hearing should be conducted in private. Mr Ihle states that as far as he is aware there has only been one anti-doping case world wide that has been conducted in open hearing and that was because the athlete sought such a hearing.

48. Mr Ihle submits that the exercise of the discretion as to the form of hearing has to be in accordance with all the provisions of the AFL Code. There is a presumption of privacy for the players. He refers to the Privacy Act, which he submits applies to the AFL and the Tribunal, and submits that the discretion has to be exercised consistent with the information privacy principles contained in that legislation, which has been referred to earlier.

49. There is a real risk of defamation proceedings as a result of an open hearing. That risk could deter witnesses from attending the hearing to give evidence and be cross-examined which would compromise the fairness of the hearing as their evidence, which may be in written form, could not be tested. The ability of the Tribunal to obtain the best evidence would be undermined. The ability of advocates to be fearless in representing their clients could also be affected by the risk of defamation proceedings if the hearing was not in private.

50. Mr Hallowes stated on behalf of the player he represents that his client seeks to have his anonymity protected during the course of the proceedings. However, subject to that he does not oppose an open hearing.

51. Mr Norton, on behalf of the player he represents, stated that his client was in the same position. It is accepted that there is a public interest in the matter and an interest in accurate reporting.

52. Mr Stanton appeared by telephone link on behalf of the former employee, the subject of an infraction notice. He stated it was his tentative view that his client's case should be heard with the others. They took the view presently that for various reasons the case demanded a public hearing, with no restriction on the attendance of media representatives.

FURTHER MEDIA SUBMISSION

53. Mr Quill was given an opportunity to respond to the other submissions that have been made. He submits that the privacy and confidentiality concerns raised could be met by appropriate restrictions. With respect to defamation, the defence of qualified privilege would apply. In answer to the fact that there had not previously been an open hearing, Mr Quill submits that this case is unprecedented and exceptional. If it does not attract the exercise of the discretion to open the hearing no case, in his submission, will.

FURTHER PLAYERS SUBMISSION

54. At the Directions Hearing Mr Ihle indicated that a further submission might be made on behalf of the players he represents, relating to confidential matters.

55. A written submission marked confidential and a confidential affidavit have been submitted to the Tribunal on behalf of the 32 players.

56. It was stated that the confidential material was submitted on the basis of certain conditions and undertakings relating to its provision to other parties. However, I have decided not to rely upon this material in reaching a decision due to procedural fairness issues that could arise if I did so. However, in light of the conclusions I have reached without relying upon the material, I do not consider the players' interests have been prejudiced by my adopting this course.

CONCLUSIONS

57. I turn to my conclusions in this matter. The determination of the issue as to whether the hearing of this matter should be other than private is difficult. Comprehensive submissions have been made which are helpful. Consideration of the exercise of a discretion is involved. The discretion cannot be exercised arbitrarily. It must be exercised judicially having regard to what is relevant. Thus, all relevant circumstances have to be considered and weighed in the balance. There are competing considerations to be weighed, the advantages and disadvantages of a hearing that is other than private.

58. As this is a matter involving the AFL Code, the hearing is to be conducted in private unless otherwise authorised by the Chairman of the Tribunal. In other words, the

starting position is that the hearing will be private. This can be contrasted with the position of other disciplinary matters where the starting position is that the hearing shall be open to accredited members of the media. Thus, a different policy position has been taken with respect to anti-doping matters, which is reflected in other provisions in the AFL Code that protect the privacy of players and others who are contractually bound by the Code. Players otherwise would not be bound, for example, to submit to random drug tests, a personally invasive procedure. But if they wish to compete in the AFL Competition they must agree to be bound by the AFL Code. In that way, the public interest in ensuring that football is drug free, particularly of performance enhancing drugs, is advanced. For the same reason, athletes and officials all over the world, in virtually all sports, agree to be bound by the WADA Code which is embodied in the AFL Code.

59. No criteria, or matters to be considered, are stipulated in the AFL Code to be applied in considering whether the hearing should be other than private. In the case of statutory bodies that have power to conduct public inquiries, such as the NSW Independent Commission Against Corruption, criteria are stipulated. In the case of ICAC, the Commission may conduct a public inquiry if it is satisfied it is in the public interest to do so. A number of matters are to be considered, including whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned. Competing public interests recognised by the legislature have to be weighed in determining whether an inquiry should be public.

60. Courts and statutory Tribunals are subject to legal requirements relating to the conduct of their hearings. The principle of open justice applies and hearings are open to the public, although a court or statutory tribunal has the power to suppress the publication of information and restrict the persons who may be present at a hearing.

61. However, this Tribunal is not a court or statutory tribunal such as the Victorian Civil and Administrative Tribunal. It is not established by statute or the common law. It is a domestic tribunal based in contract and established by the AFL Rules and the AFL Code. It does not have the powers that a court or statutory tribunal has to summons witnesses to attend and give evidence and require that evidence be sworn or affirmed. The open justice requirements applicable to courts and statutory tribunals do not apply to this Tribunal. It is an important distinction.

62. There are infraction notices against 34 players who were players with Essendon in 2012 when their violation is alleged to have occurred. In each case the particulars of the alleged violation are as follows: the Prohibited Substance used was Thymosin Beta 4; the Prohibited Substance was administered by way of a series of injections; the injections were received between about January 2012 and September 2012.

63. The infraction notice against the former employee alleges a number of violations. They include violations relating to the alleged administration of Thymosin Beta 4 to

the Essendon players between January and September 2012 when the person was employed by Essendon.

64. Thus there are 35 infraction proceedings before the Tribunal. Lawyers for ASADA state that there is a considerable overlap of the proposed evidence and the factual and legal issues in any proceedings based on the infraction notices served on the players and those based on the infraction notice served on the former employee. Further, the additional evidence in relation to the infraction notice against the former employee is largely documentary and unlikely to extend the length of the proceedings against the players.

65. This matter has been the subject of discussions at the Directions Hearings. It is intended that the proceedings relating to each infraction notice be heard together at the hearing commencing on 15 December 2014, that is that the matter will proceed as one hearing rather than there being separate hearings. This is appropriate in the circumstances. It avoids the possibility of inconsistent findings and the additional time and cost that would be involved in repeating evidence and submissions and is the most expeditious way to deal with the proceedings. The Tribunal has discussed with the parties how it intends to deal with evidentiary issues that might arise from the matters being heard together.

66. The following matters are common knowledge and do not require evidence to establish them. They provide some background to the issues that have been raised, a context.

67. Australian football is an indigenous football code that is played at a wide range of levels throughout Australia. The AFL Competition is an elite professional Australian Football Competition that has teams in Melbourne, Sydney, Brisbane, Gold Coast, Adelaide and Perth. The 18 teams in the competition have substantial memberships. The attendances at AFL matches are the highest of any sport in Australia, as are the television audiences. The television, radio, newspaper and other media coverage of the AFL Competition is extensive, particularly during the football season. The coverage is the most extensive in Melbourne where most of the teams, including Essendon, are located.

68. Further, it is common knowledge that since early 2013 there has been regular and extensive media coverage of allegations concerning the use of performance enhancing drugs by players at Essendon in 2012. That has included coverage of the investigation arranged by Essendon, action taken by the AFL Commission against Essendon and officials of the club and proceedings in the Federal Court brought by Essendon and the coach, James Hird, concerning the lawfulness of the ASADA investigation. An appeal by Mr Hird against the judgment of Middleton J has been heard and the Full Federal Court has reserved its decision.

69. The submissions by Mr Quill and Mr Gleeson have been referred to. It is submitted that the hearing should be open, not in private, with at least accredited media being able to attend and thereby be the eyes and ears of the public. This will mean that they

are accurately informed rather than the matter continuing to be the subject of rumour, speculation and innuendo. There will be transparency and the football and broader community will have a full understanding of how the hearing is being conducted and thereby have confidence in the process and ultimately the result. The public's confidence in the process will be restored. On the other hand, a closed hearing would have the opposite effect of perpetuating the speculation, rumour and innuendo, which would not be in the interests of football or the competition or the players. It would not be in the public interest. Rather the public interest is best served by an open hearing.

70. This is a position supported by the former employee, whose counsel stated that his client was in favour of a public hearing. It is also supported by 2 of the players, the subject of infraction notices, as long as their identities remain private.

71. The public interest and the public disclosure of confidential information relating to AFL players was considered by Justice Kellam of the Supreme Court in *Australian Football League v Age Company Ltd*.[4] The case concerned the AFL illicit drugs scheme whereby players agree to be random tested for illicit drugs. This scheme is independent of the AFL Code but complements it. Thus, like the requirements of the AFL Code it is based in contract, it also provides for the protection of the privacy of the players.

72. Orders were sought to prohibit the defendants from publishing the identity of three AFL players who, it was said, had been the subject of positive drug tests. It was conceded by the defendants that the information was confidential and at the time they received it they were aware that the information was private information which it was desired to keep confidential. It was argued that nevertheless the protection of the confidential information must give way to the public interest in the identity of the players being disclosed to the public at large.

73. Kellam J stated that "it is quite clear that the public interest disclosure must amount to more than public 'curiosity' or public 'prurience'"[5] pointing out that there is a wide difference between what is interesting to the public and what is in the public interest to make known. His Honour summed up the position as follows:

> "In the end result, it appears to me that there is nothing other than the satisfaction of public curiosity in having the confidentiality of the names of those who have tested positive breached by being released. It may well be a wonderful front page story for the newspapers and a scoop for other sections of the media. No doubt photographs of any players concerned will be published and the issue will be productive of many words of journalistic endeavour. However, I can see nothing that is in the public welfare or in the interests of the community at large which can be served by the identification, and perhaps to a degree the vilification and shaming of those who agreed to be tested

[4] *Australian Football League v Age Company Ltd* [2006] VSC 308

[5] At [84]

randomly pursuant to the terms of the IDP, on the basis that such testing would remain confidential until such time as there were to be three positive tests".[6]

74. Thus, Kellam J was not satisfied that any public interest in disclosure outweighed the public interest in having the information remain confidential. The defendants were restrained from publishing the confidential information.

75. Before turning to the considerations it is said favour the hearing being in private and militate against any form of public hearing it is helpful to make some reference to the Federal Court proceedings referred to earlier and particularly to the judgment of Justice Middleton in *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* [2014] FCA 1019.

76. The proceedings concern the lawfulness of the ASADA investigation that relates to the matters before this Tribunal. The 34 players, the subject of the infraction notices, were not parties to the proceedings and were not identified. However, their involvement in the investigation is referred to in the judgment. His Honour points out that pursuant to the combined effect of the AFL Rules and the AFL Code the 34 Players were obliged to attend interviews and answer questions fully and truthfully, or face possible sanction by the AFL and had agreed to subject themselves to compulsory interviews[7]. The interviews were conducted on the basis that the AFL used its compulsive powers and after an introduction ASADA investigators effectively took over the interview. ASADA recorded each interview and prepared transcripts of them. ASADA also asked the AFL to obtain medical information from Essendon.[8] Persons being interviewed were informed, inter alia, that the investigation involved an allegation that AFL athletes and support persons may have used prohibited substances and may have engaged in prohibited methods.[9]

77. His Honour notes that the 34 Players were legally represented during the course of the interviews and no player refused to answer questions. Indeed they were actively encouraged by ASADA, the AFL and the Club to fully cooperate with the investigation and to answer all questions put to them.[10] Reference is made by his Honour to the circumstances relating to the provision of ASADA's Interim report of its investigation to the AFL, including the basis upon which it was being provided. An ASADA covering letter pointed out that the report was being provided in connection with its investigation under the NAD Scheme and that the use and disclosure by the AFL of the information in the report is subject to the operation of the National Privacy Principles in the *Privacy Act 1988* (Cth), which preclude making the report public. It is also pointed out that the report has been redacted with one of the categories redacted being "sensitive medical information".

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6 At [94]

7 *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* [2014] FCA 1019 per Middleton J at [67] – [68]

8 At [126] – [128]

9 At [133]

10 At [232]

78. It is reasonable to expect that the interviews with the players, which Middleton J found occurred in relation to the ASADA investigation, will form part of the evidence at the hearing and to reasonably expect they will contain private and personal information about the players being interviewed, including sensitive medical information. They were being interviewed about being injected with substances during 2012 whilst playing with Essendon. The alleged violation is being injected with a prohibitive substance. It is reasonable to expect that other evidence to the hearing will contain private and personal information relating to the players interviewed, including sensitive medical information.

79. Relevant provisions of the AFL Code, the ASADA Act, the NAD Scheme and the Privacy Act have already been referred to. There is no need to repeat them. Those provisions protect the privacy of athletes and others who are subject to the AFL Code. Clauses 18 and 19 of the AFL Code support the hearing being in private and are important to weigh in the balance when considering whether the hearing should be other than private. In view of my ultimate conclusions, it is not necessary to determine whether they go so far as to require a private hearing. It is a matter open to argument.

80. With respect to the position under the ASADA Act, reference has been made to the Second Reading Speech of the Minister when the legislation was enacted. Safeguarding athletes' rights was a primary consideration with the inclusion of appropriate privacy safeguards for athletes and support personnel. These policies are reflected in the legislation and also support the hearing being private and are important to weigh in the balance when considering whether the hearing should be other than private.

81. Mr Knowles submissions focused on the limitations on the ASADA CEO's power arising from ss. 13(1)(k) and 13(1)(m) of the ASADA Act. Those provisions have already been referred to. Section 13(1)(k) concerns the authorisation of the CEO to present findings on the register and additional information at any AFL disciplinary hearing. Section 13(1)(m) concerns the authorisation of the CEO to publish information on and relating to the register if one of three criteria are established. The three criteria are: the CEO considers the publication to be in the public interest; or the publication is required by the WADA Code; or the athlete consents and the other conditions (if any) specified in the NAD scheme for the purposes of this paragraph are satisfied.

82. The words "relating to" in s.13(1)(m) are broad and would appear to encompass any allegations made in the course of evidence or submissions arising from information on the register. Significantly, the word "information" is used and not "personal information" which suggests that "information" that is broader than "personal information" is captured. Section 13(1)(m) appears to be the only source of the CEO's power to publish information.

83. Returning to the criteria it does not appear that publication is yet required by the WADA Code and therefore s.13(1)(m)(ia) does not apply. With respect to 32 of the

players s.13(1)(m)(ii) would not apply as they have not consented to publication. That leaves s.13(1)(m)(i) which authorises publication where the CEO considers the publication to be in the public interest. The Explanatory Memorandum to the ASADA Act provides some guidance to the operation of this provision. The Memorandum has previously been referred to.

84. The conditions specified in the NAD Scheme also need to be satisfied for publication to be authorised. The Scheme is a schedule to the ASADA Act. As Mr Knowles points out, in determining the CEO's powers to disclose information at a hearing difficult questions of statutory construction are involved, particularly if the hearing is not conducted in private. In such a situation I do not find it would be beyond the power of the CEO, but it is a matter that is not free from doubt and one that the CEO would understandably be concerned about. A private hearing would alleviate any concerns and remove any doubts about the CEO's power to disclose information at the hearing.

85. It is submitted on behalf of the 32 players that the Privacy Act has application to this matter. The relevant provisions have already been referred to. I am of the view that the AFL (and by extension the Tribunal) are APP Entities that are subject to the Act. This means they are bound to act in accordance with the Australian Privacy Principles (APPs) stated in the Act. An act of an APP entity constitutes an interference with the identity of an individual if the act or practice breaches an APP in relation to personal information about the individual.[11] Personal information is defined in s.6 of the Act.

86. The relevant APP is APP 6. Details have already been referred to. As I have already stated, it can reasonably be expected that personal information of the players will be part of the evidence at the hearing. Subject to a qualification, 2 players consent to any personal information about them being made public. The other 32 do not. Whether the Privacy Act prevents disclosure of their personal information, even to a restricted number of media representatives permitted to be present at a hearing, involves the determination of a number of substantial issues that arise and which would be subject to argument. The matter is arguable either way and in view of the ultimate conclusions I have reached it is not necessary for me to determine. However, a private hearing would remove any doubts about whether the Act applied. It is appropriate to take into account the privacy protection the Act provides and that it might apply if personal information of the players was disclosed to persons not directly involved in the hearing.

87. Reference has been made in submissions to the fact that participants in the hearing may be at risk of defamation proceedings if the hearing was not held in private. In the publication *Justice in Tribunals*, John Forbes notes:

> "…domestic tribunals… often have good reasons for sitting in private. When witnesses cannot be compelled to give evidence they may agree to do so only if observers are excluded. Further, a private hearing is highly desirable when a tribunal cannot offer participants the protection against actions for defamation

11 *Privacy Act 1988* (Cth), s.13

that is enjoyed by judges, witnesses and advocates in the courts, and the threats of defamation actions are not uncommon in 'domestic' cases"[12].

88. This Tribunal cannot offer the protection offered by a court or statutory tribunal. The defence of qualified privilege could be available, but that could be problematic depending on the circumstances. Thus, the defamation risk resulting from a hearing that is not conducted in private is a relevant factor to take into account when considering how the discretion should be exercised. Apart from the defamation risk, it also needs to be taken into account that some witnesses may be less inclined to give evidence if the hearing is not being conducted in private.

89. It is significant that the parties could only refer to one anti-doping case that had not been heard in private and that was where the athlete had specifically requested that the matter be heard in public.

90. To meet privacy concerns, Mr Quill submitted that rather than the hearing being open to the public at large, it could be restricted to accredited media who agreed to certain conditions, such as not identifying persons the subject of infraction notices. Some concern was expressed about the enforceability of such conditions. I do not share that concern. I am confident that any media representative would take seriously any such obligation and act accordingly. There is a Code of Ethics that applies to journalists. Breaches are referred to a Judiciary Committee.

91. The question is what protection of their privacy would such an arrangement provide to the 32 players who seek a private hearing. If it was confined to not disclosing their identity, all other information received at the hearing could be disclosed by the media representatives. This could include private and personal information relating to the 32 players, including sensitive medical information. If it was felt that media representatives should not receive that information in the interests of preserving and protecting the players' privacy and private and personal information, they could be required to leave the hearing while such information was presented to the hearing and thus not receive it. The hearing would go into private session. However, this would be impractical and unworkable, to use Mr Gleeson's expression it would involve "insurmountable practical impediments". It would disrupt the flow of evidence and considerably extend the length of the hearing. It would be frustrating to the media representatives concerned.

92. It would not achieve the public interest objective sought to be achieved by the attendance of the media representatives at the hearing. It would be counter-productive and frustrating to the public, as well as the media, as they would get an incomplete and disjointed account of what was taking place at the hearing. Such a situation would not be in the public interest. Similar considerations would apply if the media remained, but were subject to a suppression condition preventing them from disclosing the information, not just the identity of the person. That would put them in a difficult position and involve practical difficulties in identifying the information that was the

[12] Forbes, J, *Justice In Tribunals*, 3rd Ed, p.180

subject of suppression. However, this arrangement would mean that the media representatives present would still receive the private and personal information even though they could not publish it. I am satisfied that this arrangement would not preserve and protect the privacy and private and personal information of the 32 players as it involves the disclosure of such information to persons not directly involved in the proceedings.

93. Reference has been made to a lack of transparency and confidence in the process if the hearing is held in private. However, it needs to be borne in mind that the constitution of the Tribunal is known, comprising two retired judges and a barrister. The procedures under which it operates are public as are the provisions of the AFL Code which is being administered. The Tribunal will provide detailed reasons for its decision, which will involve a review of the evidence and the issues and its conclusions. The Tribunal also intends to publish, during the course of the hearing, regular statements informing the public of progress.

94. I accept there is a public interest in the public receiving information that is presented to the hearing. For this to occur the hearing would need to be open, at least to media representatives who could provide that information to the public. There is a public interest in preserving and protecting the privacy and private and personal information, including sensitive medical information, of the 32 players. After weighing in the balance all the relevant circumstances, considerations and factors, I am satisfied the public interest in preserving and protecting the privacy and private and personal information of the 32 players outweighs the public interest in the public receiving information presented to the hearing. I am satisfied that the only way their privacy and private and personal information can be preserved and protected is by the hearing being conducted in private. A private hearing is required. Further, a private hearing minimises the defamation risk for the participants in the hearing. It facilitates the availability of witnesses to give evidence and eliminates any complications that might otherwise arise under the ASADA Act or the Privacy Act.

95. It follows that I do not authorise the hearing being conducted other than in private. Rather, I direct that the hearing be conducted in private.

DAVID JONES

CHAIRMAN

ATTACHMENT C
RULING ON OBJECTIONS TO EVIDENCE

IN THE AFL ANTI-DOPING TRIBUNAL

IN THE MATTER OF ALLEGED VIOLATIONS OF

THE AFL ANTI-DOPING CODE BY 34 PLAYERS AND

A FORMER EMPLOYEE OF THE ESSENDON FOOTBALL CLUB

1. Counsel for the Players have objected to the reception by the Tribunal of evidence sought to be relied upon by ASADA as part of their case against the Players. The admissibility of the evidence the subject of objection has been the subject of a voir dire conducted by the Tribunal. Pursuant to Rule 42.3(b)(iii) of the AFL Rules this ruling is the decision of the Disciplinary Tribunal panel members constituting the Tribunal in this matter. Their decision is unanimous and it follows that it is the decision of the Chairman.

	Exhibit Number	Description	Ruling
1	AS-3, pages 28 to 30	Article titled Commonwealth Biotechnologies Inc Announces Agreement to Acquire GL Biochem (Shanghai) Ltd from Business Wire dated 8 June 2009	The objection is sustained and the document will not be received into evidence
2	AS-3, pages 107 to 108	Extract from diary of Shane Charter regarding meeting with Stephen Dank dated 29 August 2011	The objection is not sustained and the document will be received in evidence
3	AS-3, page 113	Extract from diary of Shane Charter regarding meeting with Stephen Dank dated 11 September 2012	The objection is not sustained and the document will be received in evidence
4	AS-3, page 114	Extract from diary of Shane	The objection is not

		Charter regarding meeting with Stephen Dank dated after 11 September 2012	sustained and the document will be received in evidence
5	AS-3, pages 115 to 118	Media/Publication titled Celebrity doctor Michael Zacharia fined $15,000 for illegal prescriptions from Squires R of The Sunday Telegraph dated 8 January 2012	The objection is not sustained and the document will be received in evidence
6	AS-3, page 210	Agreement titled Commitments completed by Dr Ageless Pty Ltd dated 8 December 2012	The objection was withdrawn and the document will be received in evidence.
7	AS-3, pages 214 to 223	Email titled Peptides from Charter S of Dr Ageless Pty Ltd to Anthony C of Ausgrow International dated 17 December 2011	The objection was withdrawn and the document will be received in evidence.
8	AS-3, page 224	Certificate titled Certificate of Analysis from GL Biochem (Shanghai) Ltd dated 20 December 2011	The objection was withdrawn and the document will be received in evidence.
9	AS-3, pages 279 to 281	Handwritten log recording receipt of peptides dated 18 February 2012; Certificates of analysis in relation to Hexarelin and Thymosin Beta-4	The objection was withdrawn and the document will be received in evidence.
10	AS-3, pages 297 to 303	Statement titled Steve Dank from Charter S	The objection is not sustained and the document will be received in evidence.
11	AS-3, page 340	Email titled Fw: Compound Enquiry from Adam G of Australian Sports Drug Medical Advisory Committee to Watt S of ASADA dated 23 January 2013	The objection is not sustained and the document will be received in evidence.
12	AS-3, page 341	File Note titled Steve Dank Call (0407 227 382) from Allardyce B of Australian Sports Anti-Doping Authority dated 5 February 2013	The objection is not sustained and the document will be received in evidence.

13	AS-3, pages 382 to 399	Transcript of Interview between Fairfax journalist Nick McKenzie and Stephen Dank dated 1 April 2013. Provided to ASADA under Disclosure Notice Provisions	The objection is not sustained and the document will be received in evidence, and I make clear received in the case of all parties.
14	AS-3, pages 461 to 462	Email titled Re: Hexarelin from Charter S to Kerrison S of Australian Sports Anti-Doping Authority dated 29 July 2013	The objection is not sustained and the document will be received in evidence.
15	AS-3, pages 463 to 487	Transcript of interview from Channel Seven's "The Inside Man", hosted by Bruce McAvaney between Luke Darcy and Dean Robinson dated 31 July 2013	The document will be dealt with in accordance with paragraph 44 of the submission of Mr Holmes QC and Mr Knowles [AS-21].
16	AS-3, pages 493 to 497	Document titled Further questions for Shane Charter	The objection is not sustained and the document will be received in evidence.
17	AS-3, pages 512 to 514	Email titled Re: Update from Alavi N of Alavi Group and Musgrave L of Alavi Group to Walker A of Australian Sports Anti-Doping Authority CC Nolan J of Australian Sports Anti-Doping Authority dated 9 December 2013	The objection is not sustained and the document will be received in evidence.
18	AS-3, pages 515 to 516	Email titled TRIM: Fw: For Your Records from Alavi N of Alavi Group Pty Ltd to Walker A CC Nolan J dated 11 December 2013	The objection is not sustained and the document will be received in evidence.
19	AS-3, pages 524 to 527	Email titled Fw: from Alvi N to Walker A of Australian Sports Drug Authority dated 16 December 2013	The objection is not sustained and the document will be received in evidence.
20	AS-3, page 530	Email titled Re: Vials from Alavi N of Alavi Group to Walker A of Australian Sports Anti-Doping Authority dated 28 February 2014	The objection is not sustained and the document will be received in evidence.

21	AS-3, page 531	Photograph attached to email titled RE: Vials from Alavi N of Alavi Group to Walker A of Australian Sports Anti-Doping Authority dated 28 February 2014	The objection is not sustained and the document will be received in evidence.
22	AS-3, pages 532 to 533	Email titled Re: ASADA Query from Alavi N of Alavi Group to Walker A of Australian Sports Anti-Doping Authority CC Musgrave L of Alavi Group dated 26 March 2014	The objection is not sustained and the document will be received in evidence.
23	AS-3, pages 534 to 542	Chronology referred to in Mr Alavi's 14 April 2014 interview with ASADA dated 14 April 2014	The objection is sustained and the document will not be received in evidence.
24	AS-3, pages 543 to 683	Report titled Final Investigation Report – Operation Cobia – Australian Football League (AFL) from Walker A of Australian Sports Anti-Doping Authority dated 9 May 2014	Will be dealt with in accordance with paragraph 44 [of AS-21].
25	AS-3, pages 684 to 686	Media titled Dank's Stunning Admission from McKenzie N of The Age dated 13 June 2014	The objection is partly sustained, and certain statements will be received in evidence against all parties; and I will refer to those statements. These are statements by the author, Mr McKenzie. It is on the second page. I will read these into the record. "*In early April 2013, Dank not only told me he used TB4 on Essendon players but said he did so because there was 'very good data that supports Thymosin Beta-4'. When I told him that according to the ASADA website, WADA had*

			specifically banned the drug, he said the move was 'just mind-blowing'. 'I think they've only just put that in to back up their case' against the Bombers, he said. A day later, when I told Dank that The Age was set to publish his comments about TB4, he asked to clarify his interview. He never meant to refer to Thymosin Beta-4, he told me. The drug he had given the Bombers players was in fact Thymomodulin."
26	AS-3, pages 687 to 689	Media titled Witness Shane Charter Promised no Human Use of Peptide at Essendon from Le Grand C of The Australian	The objection is partially sustained and the Tribunal will receive in evidence the following statements from that document - again, I will read from it into the record. "*Mr Xu said that when Charter came to Shanghai in November 2011 to visit his sprawling, biochemical manufacturing plant, he claimed to be the representative of a pharmaceutical company looking to buy peptides for research work. Mr Xu provided Mr Charter with samples of various peptides, including the banned substance Thymosin Beta-4. When Mr Charter had subsequently placed an order to import a larger*

			quantity of peptides, he was asked to provide a written undertaking that they were not intended for human use. Mr Xu said the only Thymosin peptide supplied by GL Biochem to Mr Charter was Thymosin Beta-4. 'The Thymosin we synthesis (sic) and supply always refers to Thymosin Beta-4,' he said. 'The peptide products (such as Thymosin Beta-4) are for research use only, not for human use. We sold our peptide products to Shane Charter after he signed the non-human use agreement.' A copy of Mr Charter's undertaking to GL Biochem - signed and dated December 8, 2011 - holds Mr Charter responsible, for the 'improper use' of peptides by himself or a third party. 'The product outsourced to your company will not be directly applied for usage on human body without appropriate requirements satisfied,' the undertaking reads. 'And precautionary measures, if applicable, will be adopted to ensure that the product will not be used improperly by third party.' Mr Xu said the undertaking was required of all GL Biochem customers to prevent the proliferation of peptides on lucrative black markets around the world."

27	AS-3, page 690	Email titled Contact With Vincent Xu From GL Biochem from Walker A to Fitton E; O'Connor L; Perdikogiannis E and Mullaly D dated 5 November 2014	The objection is not sustained and the document will be received in evidence.
28	AS-3, pages 691 to 692	Email titled Contact With Australian Sports Anti-Doping Authority from Walker A of Australian Sports Anti-Doping Authority to Xu V of GL Biochem (Shanghai) dated 11 November 2014	The objection is sustained and the document will not be received into evidence.
29	AS-3, pages 707 to 711	Web Page titled TB-500 from Medivet Direct dated 27 November 2013	The objection is sustained and the document will not be received into evidence.
30	AS-3, pages 712 to 718	Transcript titled Shane Charter – 3AW interview – 3 December 2014 between Sylvester J and Stevenson R	The objection is not sustained and the document will be received into evidence.
31	AS-3, pages 719 to 720	Media/Publication titled Charter fronts court on drugs counts from The Age; Butcher S and Russell M	The objection is sustained and the document will not be received into evidence
32	AS-3, page 721	Media/Publication titled Case on hold as Dank stays low from The Australian and Le Grand C	The objection is sustained and the document will not be received into evidence.
33	AS-4.1, pages 29 to 35	Statement titled Statement of Shane Charter from Charter S dated 26 July 2013	The objection is not sustained and the document will be received into evidence.
34	AS-4.1, pages 41 to 58	Statement titled Statement in the Matter of Sandor Arben Earl from Earl S dated 18 November 2013	The objection is not sustained and the document will be received into evidence.
35	AS-4.1, pages 59 to 63	Statement of Sergio Del Vecchio dated 14 November 2014	The objection is not sustained and the document will be received into evidence.

36	AS-5	Transcripts of interview with Sedrak	The objection was withdrawn and the document will be received into evidence
37	AS-7	Transcripts of interview with Charter and Alavi	The objection is not sustained and the documents will be received into evidence.
38	AS-12	Affidavits of Aaron Walker	Received on the voir dire only, subject to one part of that documentation that was tendered by Mr Holmes QC on the general issues.
39	AS-17	Transcripts of interview with Shane Charter	The objection is not sustained and the documents will be received in evidence.
40	AS-6	Transcripts of the interviews with the players	The objection is not sustained and the documents will be received in evidence in all cases.
41	AS-19		Will be dealt with in accordance with paragraph 44 [of AS-21].
42	AS-20		Will be dealt with in accordance with paragraph 44 [of AS-21].
43	PG-6		PG-6 was tendered on the general issues, the RD Peptides purchasing contract was received into evidence .
44	AS-15	Statement from Nick McKenzie	Was received into evidence.

2. This ruling by the Tribunal is on the threshold issue of admissibility of the evidence subject to objection. The ruling is not a ruling on the reliability, probative value or weight to be given to the evidence the subject of objection.

ATTACHMENT D
REASONS FOR RULING ON OBJECTIONS TO EVIDENCE

IN THE AFL ANTI-DOPING TRIBUNAL

IN THE MATTER OF ALLEGED VIOLATIONS OF

THE AFL ANTI-DOPING CODE BY 34 PLAYERS AND

A FORMER EMPLOYEE OF THE ESSENDON FOOTBALL CLUB

REASONS

1. The Players objected to the receipt by the Tribunal of the documents set out in the Ruling above.

2. The Players' objections were divided into two broad categories. First, objection was taken to hearsay statements made by various persons such as Mr Dank, Mr Charter, Mr Alavi, Mr Earl and Mr Del Vecchio. Some of these statements were made in interviews with ASADA investigators. Other statements were made to journalists or published in newspapers. The Tribunal has no power to compel persons to attend the hearing, nor any power to compel a witness to answer questions once in attendance. Because it was not possible to compel a person's attendance, the ASADA CEO submitted that the evidence the subject of the objection could not be produced in any better form.

3. Secondly, objection was taken by the Players to various primary documents sought to be tendered by the ASADA CEO.

The Rules and the Codes

4. The parties referred to the WADA Code and various clauses of the AFL Rules and the AFL Anti-Doping Code as relevant to the question of whether the documents should be admitted by the Tribunal.

5. The Introduction to the World Anti-Doping Authority (WADA) Code states:

> *These sport-specific rules and procedures aimed at enforcing anti-doping rules in a global and harmonized way are distinct in nature from and are, therefore, not intended to be subject to or limited by any national requirements and legal standards applicable to criminal proceedings or employment matters. When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport.*

6. The Tribunal is not bound by the rules of evidence. Clause 42.3(c) of the AFL Rules 2013 provides as follows:

> *The Disciplinary Tribunal is not bound by the rules of evidence or by practices and procedures applicable to Courts of record, but may inform itself as to any matter in any such manner as it thinks fit.*

7. Further, the hearing before the Tribunal is to be conducted with as little formality as the particular matter permits. Clause 42.3(b)(i) of the AFL Rules provides:

> *Any hearing by the Disciplinary Tribunal shall be conducted with as little formality and technicality and with as much expedition as a proper consideration of the matters before it permits.*

8. The Tribunal is required to afford natural justice to the parties pursuant to the AFL Rules. Clause 42.4(a)(i) of the AFL Rules provides:

The Disciplinary Tribunal shall provide any person whose interest will be directly and adversely affected by its decision, a reasonable opportunity to be heard.

9. The Tribunal's obligation under the Rules to afford natural justice is reiterated in relation to the issue of sanction. Clause 42.7(c) of the AFL Rules provides:

Before imposing any sanction, the Disciplinary Tribunal shall provide the relevant person a reasonable opportunity to be heard on the question of sanction.

10. The AFL Anti-Doping Code 2014 (the Code) provides that facts may be established by any reliable means. Clause 15.2(a) of the AFL Code provides:

Facts related to Anti-Doping Rule Violations may be established by any reliable means, including admissions.

11. The reliable means by which violations can be established extends to hearsay evidence as indicated by footnote 31 to clause 15.2 of the AFL Code, which provides as follows:

For example, an Anti-Doping Organisation may establish an Anti-Doping Rule violation under Clause 11.2 (Use of Attempted Use of a Prohibited Substance or Prohibited Method) based on the Player's admissions, the credible testimony of third persons, reliable documentary evidence, reliable analytical data from either an A or B Sample or conclusions drawn from the profile of a series of Players' blood or urine samples.

The Players' submissions

12. Counsel for the Players submitted that a spectre of unfairness pervaded the hearing because relevant persons such as Mr Dank, Mr Charter and Mr Alavi were not present to be cross-examined. Notwithstanding Rule 42.3(c) of the AFL Rules, it was submitted that the Tribunal ought to be informed by the rules of evidence to ensure that natural justice was imparted. The decisions of *Sullivan v Civil Aviation Safety*

Authority[13], *Golem v Transport Accident Commission*[14] and *Kostas v HIA Insurance Services Pty Ltd*[15] were cited and it was submitted that the Tribunal should be slow to depart from the rules of evidence to ensure a fair hearing.

13. Mr Grace QC submitted that the documents evidencing previous representations ought not be admitted because the Players have been denied any reasonable occasion to meaningfully test the evidence by way of cross-examination. The decision of *Australian Postal Commission v Hayes*[16] was cited to support a proposition regarding the essential nature of testing opposing evidence by cross-examination.

14. Mr Grace QC and Mr Clelland QC referred in detail to a range of topics that the Players would have explored in cross-examination had persons such as Mr Dank, Mr Charter and Mr Alavi been available to give evidence. It was submitted that all they could do was refer to weaknesses in the out-of-Tribunal representations attributed to these persons. They submitted that the alleged weakness in the out-of-Tribunal representations could not be made good to any complete extent without having the relevant maker in the witness box.

15. Mr Grace QC referred to the decision of *Re Pochi and Minister for Immigration and Ethnic Affairs*[17] and submitted that a denial of the opportunity to cross-examine a witness has been held to lead to a denial of natural justice, particularly where the evidence is of potential importance to the Tribunal's ultimate finding.

16. The contentious evidence from relevant persons such as Mr Dank, Mr Charter and Mr Alavi relates to the personal involvement and knowledge of the nature and identity of the substance that is alleged to have been sourced, supplied, compounded and administered to the Players. Given this evidence relates to the core of the issue in this matter, Mr Grace QC cited the decisions of *Commissioner for Children and Young People v FZ*[18] and *Ramsay v Australian Postal Corporation*[19] and submitted that the

[13] [2014] FCAFC 93 at [93]
[14] [2002] VCAT 319
[15] (2010) 241 CLR 390 at [17] (French CJ), citing *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 256 (Evatt J)
[16](1989) 23 FCR 320
[17] (1979) 36 FLR 33 at 54 (Brennan P at 92 – 493)
[18] [2011] NSWCA 111
[19] [2005] FCA 640; 147 FCR 30 at 47 [27]

right to cross examination of those persons is a necessary part of the obligation to accord natural justice in this proceeding.

17. The Players' Counsel submitted that the Tribunal was required to afford the Players natural justice in accordance with the express obligation in clause 42.4 of the AFL Rules and also at common law as reflected in the decision of *McClelland QC v Burning Palms Surf Life Saving Club*[20]. The decision of *National Companies and Securities Commission v News Corporation Ltd*[21] was cited in support of the proposition that the content of the requirements of natural justice depend upon the circumstance of the case, the nature of the inquiry, the rules under which the Tribunal is acting and the subject-matter before the Tribunal.

18. The Players' Counsel also submitted that the reliability of the contentious evidence could not be established, thus falling short of the requirement of reliability in clause 15.2(a) of the AFL Code. It was submitted that the reliability of Mr Dank, Mr Charter and Mr Alavi's out-of-Tribunal representations about their personal involvement and personal knowledge could only be tested by cross examination because it was not evidence that could be impugned in a substantive way by the evidence of others.

19. Counsel for the Players submitted that the contentious material would not be admissible under the rules of evidence at common law or under the Uniform Evidence Law. Mr Grace QC cited the decision of *Roach v Page (t/as Freehill Hollingdale Page) (No 11)*[22] and submitted that even if the material was found to be admissible under an exception to the hearsay rule, the inability to cross-examine the makers of the representation could found the basis for a discretionary exclusion of the material on the basis that the Players would be unfairly prejudiced.

20. Counsel for the Players submitted that the more serious the allegation, the greater the degree of evidence required to achieve the applicable standard of proof set out in

[20] [2002] NSWSC 470
[21] (1984) 156 CLR 296 at 311-312 (Gibbs CJ)
[22] [2003] NSWSC 907 (Sperling J)

clause 15.1 of the AFL Code. It was submitted that this principle is reflected by the decision of *Ankaragucu Spor Kulubu v S*[23] in the Court of Arbitration for Sport.

The ASADA CEO's submissions

21. Mr Holmes QC submitted on behalf of the ASADA CEO that questions regarding admissibility of evidence should be determined having regard to the WADA Code, the AFL Code and the decisions of other anti-doping tribunals, rather than principles of Australian law relating to the receipt of evidence by Courts or tribunals.

22. The decision of *Re Pochi and Minister for Immigration and Ethnic Affairs*[24] was cited in support of the principle that the Tribunal could rely upon hearsay evidence. Mr Holmes QC submitted that evidence is not unreliable merely by reason of the fact that it is hearsay evidence. Mr Holmes QC referred to the decision of *Hancock v East Coast Timber Products Pty Limited*[25] and submitted that provided the evidence is rationally probative, the relevant question is one of weight rather than admissibility.

23. Counsel for the ASADA CEO cited the decision of *O'Rourke v Miller*[26] and submitted that there is no general right to cross-examine witnesses in disciplinary proceedings, even where a respondent's livelihood is at stake. The decision of *Kingham v Cole*[27] was cited to stand for the proposition that cross-examination is not an essential element of a fair oral hearing.

24. It was submitted that the Tribunal could more comfortably rely on evidence which is not subject to cross-examination in light of the fact that the Tribunal has no power to compel witnesses. This is because there can be no right to cross-examine where a witness cannot be compelled. The decisions of *Rose v Bridges*[28] and *Maclean v Workers Union*[29] were cited to support this proposition.

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[23] CAS 2007/A/1380 MKE at [29]
[24] (1979) 26 ALR 247 at 257
[25] [2011] NSWCA 11 at [82] – [83]
[26] (1985) 156 CLR 342 at 353 per Gibbs CJ (with whom Mason and Dawson JJ agreed)
[27] (2002) 118 FCR 289 at [20]
[28] (1997) 79 FCR 378 at 387 – 388
[29] [1929] 1 Ch 602 at 620-621

25. Mr Holmes QC submitted that it is commonplace for anti-doping tribunals applying the WADA Code to receive hearsay evidence, which by definition prevents a party from challenging the evidence by direct cross-examination. A number of authorities were cited in the anti-doping context where hearsay evidence was admitted and relied upon, including *Tinklin v UK Anti-Doping*; *South African Institute of Drug Free Sport v Mdeletyeni*; *International Tennis Federation v M Richard Gasquet*; *The Canadian Centre for Ethics in Sport v Jeffery Adams*.

26. Counsel for the ASADA CEO also submitted that the requirements of procedural fairness vary depending on the circumstances and upon what is possible[30], which is limited by the powers of the Tribunal. It was submitted that there would be no denial of procedural fairness if the Tribunal were to admit the evidence without the maker of the statement being called. In this respect, Mr Holmes QC submitted that:

- the interviews with witnesses contain first-hand hearsay and are therefore more likely to be reliable;
- the Players have been given sufficient opportunity to evaluate and address the hearsay assertions contained in the statements, transcripts and media articles;
- the test of admissibility cannot be more stringent in the Tribunal than in a Court of law where Mr Dank, Mr Alavi, Mr Charter, Mr Earl and Mr Del Vecchio's evidence would be admissible in civil proceedings under s.63(2) of the Evidence Act (Cth);
- some of the documents would also be admissible in Court proceedings because they are captured by the business records exception to the hearsay rule in s.69 of the Evidence Act.

AFL submissions

27. Mr Gleeson QC submitted that the Players had not established any relevant unfairness that would support a departure from the flexibility regarding admissibility of evidence created by the AFL Rules and the AFL Code. It was submitted that it was difficult to assess reliability of the contentious evidence at this stage of the proceeding and it therefore ought to be received by the Tribunal.

[30] *NSW Court of Appeal Commissioner for Children and Young People v FZ* [2011] NSWCA 111

The Tribunal's finding

28. The question for determination is whether the Tribunal is able to admit the contentious hearsay evidence in circumstances where the relevant makers cannot be cross-examined. The Tribunal has taken into account all of the written and oral submissions made by the parties. While it is not bound by the rules of evidence, they are not irrelevant to the Tribunal's task relating to the admission of hearsay evidence. The evidence of Mr Dank, Mr Charter and Mr Alavi is close to the core of the issue in this proceeding. However, this matter is not governed by principles of Australian law relating to the admission of hearsay evidence by Courts or statutory tribunals. Rather, this is a domestic tribunal based on contractual arrangements. It is governed within the contractual framework of the AFL Rules and the AFL Code. This framework, properly construed, provides for a flexible approach to the reception of hearsay evidence by the Tribunal.

29. Further, the AFL Code as applicable to the Players incorporates terms and phrases from an international legal instrument, being the WADA Code. The overlay of those parts of the WADA Code support the AFL Code being construed in light of the Introduction to the WADA Code. Indeed, the authorities cited by the ASADA CEO in the anti-doping context from around the world confirm that hearsay evidence is commonly admitted into evidence by anti-doping tribunals determining the question of violations within the parameters of the WADA Code.

30. The Tribunal does not accept the contention of the Players that the inability to cross-examine persons such as Mr Dank, Mr Charter and Mr Alavi has led to a breach of procedural fairness in this matter. The Players have had ample opportunity to make submissions about the unreliability of the contentious evidence. The Tribunal also does not accept that the Players have established an unfair prejudice arising from the inability to cross-examine the makers of the out-of-Tribunal representations contained in the contentious documents. The admission of hearsay evidence is an entirely separate issue to the question of the assessment of weight to be given to hearsay evidence. The weight to be given to the contentious evidence will be decided separately in the Tribunal's decision on the question of whether there has been a violation of the AFL Code.

30. On this basis the Tribunal ruled accordingly.