

**THE FOOTBALL FEDERATION OF AUSTRALIA**  
**REASONS FOR DECISION OF THE ANTI-DOPING TRIBUNAL**  
**The Hon Justice R Pepper, J E Marshall SC (Chair) and**  
**Dr R Muratore**

**IN THE MATTER OF TROY HEARFIELD**

4 June 2013

**A. INTRODUCTION**

(1) Preliminary matters

1. The Anti-Doping Tribunal is established under Part 7 of the Football Federation Australia National Anti-Doping Policy (**ADP**) and its role is to hear and determine allegations of Anti-Doping Rule Violations (**ADRVs**) and where the ADRV is established, impose an appropriate sanction (ADP rule 121). The ADP is fully compliant with the World Anti-Doping Code (**WADC**) and replicates verbatim the relevant articles of the WADC.
2. In accordance with ADP rule 124 the tribunal comprises the persons listed above.
3. Before dealing with the substantive issue we note that the Anti-Doping Tribunal is rarely constituted as there have been almost no incidents of doping in football in this country. The last time the tribunal had to sit (differently constituted) was in November 2011, on that occasion dealing with a cannabis case. The tribunal does not consider the existence of a positive test in this case as anything other than the result of an effective testing program conducted by the FFA. It is certainly not evidence of an outbreak of the use of drugs in football. This is the first case in the history of the A-League in which a footballer has tested positive for a substance capable of performance enhancement. In this context, it is important to note that there has been much recent publicity following the announcement by two Federal Ministers of an investigation into the use of peptides in sport. This case has absolutely nothing to do with peptides.

(2) Overview

4. The athlete, A-League footballer Troy Hearfield, accepts that he is bound by the ADP and that the tribunal has the necessary jurisdiction to deal with this matter. The athlete also accepts that he has committed the ADRV of presence (under the equivalent of WADC 2.1). The substances that were present in his sample were D-methamphetamine and D-amphetamine, which are stimulants and also illicit drugs. The evidence is that the illicit stimulants were consumed on the evening of Friday 26 October 2012 and were detected in a sample taken two days later following his football match on 28 October 2012.
5. The athlete advanced a defence of No Fault or Negligence under the equivalent of WADC 10.5.1. The tribunal rejected that defence. He also advanced a defence of No Significant Fault or Negligence under the equivalent of WADC 10.5.2. The tribunal accepted that defence and, on 17 May 2013, imposed a sanction of 15 months ineligibility dating from the date of his provisional suspension.

6. These are the tribunal's written reasons under ADP rule 141 for the decision which imposed that sanction.

#### **B. APPLICATION OF THE ADP**

7. The athlete received an infraction notice dated 29 November 2012 which alleged the anti-doping rule violation of presence of D-methamphetamine and D-amphetamine in a sample taken from the athlete In-Competition on 28 October 2012 following the A-League match between Melbourne Heart and Central Coast Mariners.
8. The substances D-methamphetamine and D-amphetamine are each non-specified stimulants in S6.a of the WADA Prohibited List for 2012. Hence they are prohibited substances for the purposes of WADC 2.1 (ADP rule 31).
9. In the absence of any issue such as chain of custody, laboratory error or a TUE, the doping control forms and laboratory analyses are evidence that satisfies the elements of the alleged ADRV of presence.
10. As it transpires the ADRV of presence was admitted by the athlete, but even if that were not so, the ADRV has been established by the materials tendered at the hearing. The taking of the sample In-Competition on 28 October 2012 is covered by the Doping Control Notification Form before the tribunal. The analytical results of the A sample and the B sample revealed the presence of D-methamphetamine and D-amphetamine, both of which are stimulants.
11. The case of the FFA is that the testing forms and sample analysis reports establish the anti-doping rule violation. As stated above, the A-sample and B-sample analysis reports evidence an anti-doping rule violation of presence under WADC 2.1 (ADP rule 31).
12. Absent a defence being established, the standard sanction of two years ineligibility under WADC 10.2 (ADP rule 150) is applicable. Logically the next matter to arise is the question of the athlete's defence.

#### **C. THE ATHLETE'S DEFENCE**

13. Briefly, the case as presented by the athlete was this:
  - (1) He accepted that he had consumed the stimulants. The occasion was 2 days before the day of the match when the sample was taken; it was when his sister made a surprise visit from interstate to celebrate (early) his birthday.
  - (2) They drank quite a bit and at some point he drank a glass of JD & Coke in one go that contained the prohibited stimulants that had been added to the glass by his sister.
  - (3) The sister asserted that she had put the drugs in her glass for her to consume without telling him and that he had picked up her glass and drank it.
  - (4) All fault lay with the sister and the athlete was not even negligent. Alternatively, whatever fault or negligence there was should be held to be not significant.
14. In light of that outline, theoretically defences may exist, depending upon the facts as found, under ADP rules 155, 156 and 157 (WADC 10.4, 10.5.1 and 10.5.2). In

this particular case no defence is available under ADP rule 155 (WADC 10.4) because the stimulants in question are not specified.

15. That leaves possible defences of:
  - (1) No Fault or Negligence under ADP rule 156 (WADC 10.5.1); and
  - (2) No Significant Fault or Negligence under ADP rule 157 (WADC 10.5.2).
16. The athlete did contend for No Fault and No Negligence. That is always a difficult task for an athlete due to the high standard required by that defence, as explained in the comment to WADC 10.5.1 and 10.5.2 and in the decisions on that provision. For the reasons below we do not find that defence was established.
17. The athlete also contended for No Significant Fault and No Significant Negligence. We find that defence made out. We have imposed a sanction of a period of Ineligibility of 15 months.
18. The two defences under WADA Code Article 10.5 are set out below in full together with the comment:

**WADC 10.5.1: No Fault or Negligence.**

156 WADC 10.5.1: If an *Athlete* establishes in an individual case that he or she bears *No Fault or Negligence*, the otherwise applicable period of **Ineligibility** shall be eliminated. When a *Prohibited Substance* or its *Markers* or *Metabolites* is detected in an *Athlete's Sample* in violation of Article 2.1 (presence of *Prohibited Substance*), the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* eliminated. In the event this Article is applied and the period of *Ineligibility* otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of *Ineligibility* for multiple violations under Article 10.7.

**WADC 10.5.2 No Significant Fault or Negligence**

157 If an *Athlete* or other *Person* establishes in an individual case that he or she bears *No Significant Fault or Negligence*, then the otherwise applicable period of *Ineligibility* may be reduced, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this Article may be no less than 8 years. When a *Prohibited Substance* or its *Markers* or *Metabolites* is detected in an *Athlete's Sample* in violation of Article 2.1 (Presence of *Prohibited Substance*), the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* reduced.

*[Comment to Articles 10.5.1 and 10.5.2: The Code provides for the possible reduction or elimination of the period of Ineligibility in the unique circumstance where the Athlete can establish that he or she had No Fault or Negligence, or No Significant Fault or Negligence, in connection with the violation. This approach is consistent with basic principles of human rights and provides a balance between those Anti-Doping Organizations that argue for a much narrower exception, or none at all, and those that would reduce a two year suspension based on a range of other factors even when the Athlete was admittedly at fault. These Articles apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. Article 10.5.2 may be applied to any anti-doping violation even though it will be especially difficult to meet the criteria for a reduction for those anti-doping rule violations where knowledge is an element of the violation.]*

*Articles 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.*

To illustrate the operation of Article 10.5.1, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.)

For purposes of assessing the Athlete or other Person's fault under Articles 10.5.1 and 10.5.2, the evidence considered must be specific and relevant to explain the Athlete or other Person's departure from the expected standard of behaviour. Thus, for example the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article.

While minors are not given special treatment per se in determining the applicable sanction, certainly youth and lack of experience are relevant factors to be assessed in determining the Athlete or other Person's fault under Article 10.5.2, as well as Articles 10.4 and 10.5.1.

Article 10.5.2 should not be applied in cases where Articles 10.3.3 or 10.4 apply, as those Articles already take into consideration the Athlete or other Person's degree of fault for purposes of establishing the applicable period of Ineligibility.]

(underlining added)

19. The most relevant words in the comment are:
  - ... a sanction could not be completely eliminated ... in the following circumstances
  - ... (c) sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink).
20. This part of the comment was referred to during the hearing in connection with the No Fault and No Negligence defence propounded by the athlete.

#### **D. NO SIGNIFICANT FAULT OR NEGLIGENCE – SOME CASES**

21. Before dealing with the factual matters, the tribunal proposes to make some observations about the defence of no significant fault or negligence and make reference to three cases of particular relevance when dealing with that defence.
22. The comment to WADC 10.5.2 provides a real indication of when the defence might be available. The comment first notes the defence is "meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases".

23. Next, the comment provides an illustration of when the defence of No Fault or Negligence could not arise:
- (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination)
24. Later the comment continues to explain that, "*depending on the unique facts of a particular case*", illustration (a) above may well be an appropriate application of No Significant Fault or Negligence:
- ...if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.
25. The **first** of the relevant cases is the decision of Mr David Grace QC as sole CAS arbitrator in the matter of *Australian Weight Lifting Federation v Jenna Myers* being the reasons published on 24 February 2006<sup>1</sup>.
26. In that case, the athlete had acquired a product (Synephrine) which inadvertently contained a stimulant BZP. It was an accepted fact that BZP was not listed as an ingredient on the label of the bottle: award paragraph 21. The CAS arbitrator found that the athlete concerned had effectively been warned against the use of so called supplements.
27. This tribunal notes that the warning is in the ADP itself and there is a further specific warning at the front of the ADP in the following terms:



**IMPORTANT WARNING**

**YOU MUST FIND OUT WHICH DRUGS ARE PROHIBITED**

**IGNORANCE IS NO EXCUSE.**

**YOU MUST BE AWARE OF THE RULES IN THIS ADP AND WHAT IS PROHIBITED**

**THIS ADP ADOPTS THE STRICT LIABILITY PRINCIPLE.**

**ATHLETES ARE RESPONSIBLE FOR ANYTHING FOUND IN THEIR SYSTEM.**

28. Further, the CAS arbitrator found that (at that point in time) there were deficiencies in the relevant website and it may not have been possible to ascertain from the relevant website that Synephrine contained a banned substance.
29. This tribunal notes, relevantly, in this case the substances appear on the face of the WADA prohibited list as banned substances.
30. The CAS arbitrator found that the fault or negligence of the athlete there, when viewed in the totality of the circumstances, was significant: paragraph 45.

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<sup>1</sup> There is the parallel decision in the matter of *Australian Weight Lifting Federation v Fogagnolo*; however the reasons do not materially differ and it is convenient to refer just to the *Myers* award.

31. It has been suggested that the award in the *Myers* matter takes a very stringent view as to the scope of the No Significant Fault or Negligence defence under WADC 10.5.2.
32. This raises for consideration what is meant by "significant". Given that the athlete must establish how the prohibited substance came to be in the sample<sup>2</sup>, if the negligence or fault of the athlete was causative, it could well be said that the fault or negligence was significant. That would be so even if there were other factors which were also causative. Further, something may be significant even if it is not the predominant cause or the most dominating factor. The fact that an athlete might point to some other factors (apart from his/her fault or negligence) that were relevant does not mean the athlete would have established no significant fault or negligence. How these observations apply to a particular case will depend on all the facts the athlete is able to establish.
33. If the decision of the CAS arbitrator in the *Myers* matter is stringent then it is only so in accordance with the scope of the defence as explained by illustration (a) in the comment to WADC 10.5.2. In our view the CAS arbitrator in *Myers* applied WADC 10.5.2 in the way contemplated by the comment.
34. The **second** decision which the tribunal considers relevant is that of *Kutrovsky v International Tennis Federation*, being an award of 3 October 2012. In that case the CAS appeal panel rejected a defence advanced pursuant to WADC 10.4 (the specified substance defence). However the CAS panel there went on to find that a defence under the WADC 10.5.2 (no significant fault or negligence) was made out.
35. The CAS panel (paragraph 9.49) said the athlete's fault was to be measured against the fundamental duty of an athlete owed under the program and the World Anti-Doping Code to do everything in his power to avoid ingesting any prohibited substance. The CAS panel noted certain circumstances said to be favourable to Kutrovsky (paragraph 9.51) and adverse to Kutrovsky (paragraph 9.52).
36. The CAS panel having identified factors favourable and adverse to Kutrovsky then dealt with the appropriate sanction under a new heading. The reasoning is in paragraphs 9.55 and 9.56 as follows:

9.55 It seems to the Panel that, absent circumstances evidencing a high degree of fault bordering on serious indifference, recklessness, or extreme carelessness, a 24 month sanction would be at the upper end of the range of sanctions to be imposed in a case falling within Article 10.5.2 WADC. A 12 month sanction is the mandatory minimum. Article 10.5.2 WADC permits a reduction of the period of ineligibility but sets as the minimum allowable period of ineligibility in cases of no significant fault to be one half of the period otherwise applicable, in this case one half of two years. Is a panel bound to start from the premise that only a case involving the least significant amount of fault will result in a 12 month period of ineligibility with the consequence that a panel is required to assess fault relative to that baseline and increase it from there or is there some other way to look at Article 10.5.2 and the reduction of penalty envisaged by it? Article 10.5.2 WADC and its comments offer no precise guidance. In the light of the perceptible purpose of Article 10.5.2, in the context of the WADC, as a whole this Panel starts from the position that a sanction of 12 months will only stand where there is a very low degree of significant fault on the part of the athlete. In Kutrovsky's case, the Panel has determined that there is more than the minimum lack of significant

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<sup>2</sup> ADP 157 (WADC 10.5.2) provides: "...the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* reduced."

fault present so it must assess a penalty, greater than 12 months but, since the fault was not egregious, one substantially less than 24 months.

9.56 Having regard to all of the circumstances, the Panel has come to the conclusion that the 24 month sanction imposed by the Decision [under appeal] was too severe. Having regard to Kutrovsky's degree of fault and, to both the mitigating and aggravating factors listed above, the Panel concludes that an appropriate sanction would be a period of Ineligibility of 15 months. The Panel emphasises that this is not simply a decision to, effectively, split the difference between the periods of Ineligibility urged by the parties but, rather, represents the Panel's own evaluation and weighing of the evidence and the submissions received, as well as the Panel's careful, if cautious, consideration of the authorities that it has found of relevance.

(underlining added)

37. It may be thought that the CAS panel in *Kutrovsky* adopted too broad an approach to the application of the defence in WADC 10.5.2.
38. It seems to this tribunal that the CAS panel did not correctly apply WADC 10.5.2 and that the result was a broadening of the requirement in the Code. The reason is that the CAS panel (in paragraph 9.55) appears to this tribunal to approach the matter in the wrong way. The question posited in the middle of the paragraph does not seem to be the correct question. In any event, the answer the CAS panel gave was:
- "... this panel starts from the position that a sanction of 12 months will only stand where there is a very low degree of significant fault on the part of the athlete"
39. This tribunal considers that statement to be an error. If there is significant fault (low degree or otherwise) then WADC 10.5.2 has no application.
40. The proper interpretation of the WADA Code (as reproduced in the ADP of the FFA) is that where the athlete establishes no fault then there is no period of ineligibility. It is eliminated. Where the athlete fails to establish no significant fault or negligence then the 2 year period of ineligibility applies. The reduction from 2 years down to a minimum of 1 year under WADC 10.5.2 requires as a prerequisite a finding of no significant fault or negligence (ie an absence of significant fault and an absence of significant negligence).<sup>3</sup> Where there is a low degree of significant fault or negligence WADC 10.5.2 is simply not applicable. That is in contradistinction to the view held by the CAS panel in *Kutrovsky*. This tribunal considers the CAS panel in *Kutrovsky* was wrong in its interpretation of WADC 10.5.2. The effect of the reasoning of the CAS panel in *Kutrovsky* is that for a very low degree of significant fault on the part of the athlete, a 12 month period of ineligibility applies. For a high degree of significant fault short of reckless indifference, a 24 month period of ineligibility applies. That is simply not what WADC 10.5.2 states nor is it consistent with other decisions of other tribunals and panels applying the WADA Code. This tribunal does not propose to follow that aspect of *Kutrovsky*.<sup>4</sup>

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<sup>3</sup> This point is reinforced by the reference to fault being "doubly relevant" in *Knauss v International Ski Federation* CAS 2005/A/847 20 July 2005 (see award at paragraph 7.3.5).

<sup>4</sup> Although not relevant to this case, we note that the decision in *Kutrovsky* is of importance because it (correctly) applies WADC 10.4 relating to Specified Substances. It may be that having rejected the athlete's defence under WADC 10.4 the CAS panel in *Kutrovsky* felt some sympathy towards the athlete. It is potentially the case that having had to make the hard decision that the athlete could not establish a defence under 10.4, the CAS panel then was overly lenient in its approach to a defence under 10.5.2.

41. The **third** decision which the tribunal considers of relevance is that of the rugby league Anti-Doping Tribunal in the matters of *Humble and Oake* of 30 May 2011. That decision rejected a defence under the equivalent of WADC 10.4 but then went on to consider a defence under WADC 10.5.2. In that situation the Anti-Doping Tribunal of rugby league<sup>5</sup>, determined that the fault of the athletes there was not significant nor was there significant negligence. We set out paragraphs 31-33 of that decision:

31 The players point to the example in the comment to the rule which is the administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete. Here the drink was relevantly administered by the club via the trainers and the disclosure that was made was factually quite wrong. In our view it is within or sufficiently close to that example for it to be relevant. That said we wish to make it plain that there is no defence of "the trainer said it was ok". In this case there was much more.

32 It is imperative to note that it is not one sole factor which supports the players' position. Prominent is the total absence of the players' involvement in the purchase of this substance. That is coupled with the unambiguous nature of their belief that the mixed drink was "just like Reactivate". Thinking it was the same as Reactivate, that was disclosed on one of the testing forms.

33 Due to the special circumstances of these two players, it follows that the decision we have reached does not apply to other cases and different sets of facts. For instance, a player who:

- (1) purchased Jack3d without undertaking appropriate checks and searches (and failed to uncover the fact it contained methylhexanamine);
- (2) knew generally of Jack3d's claims to improve energy having regard to the advertising literature on the package, and also having been told so by other people who had used it; and
- (3) took Jack3d prior to competition knowing that it would give increased energy,

could expect to receive a 2 year period of ineligibility.

42. We agree with the approach taken by the tribunal chaired by Sir Laurence Street and on those facts this tribunal (also) would have concluded that there was no significant fault or negligence.
43. Having outlined that background legal position, it is now relevant to look at the facts contended for by the athlete in this case.

## **E. FINDINGS - OVERVIEW**

44. The athlete's defence, outlined in paragraph **13** above, relied on written statements and the oral evidence of the athlete and his sister.
45. The athlete has been playing at a high level from an early age and said he was aware of his obligations under the ADP. He had attended seminars on anti-doping during his time at the Australian Institute of Sport. He knew that precautions needed to be taken to ensure prohibited substances did not enter his body.
46. The athlete is close to his sister and they keep in touch although she lives in Brisbane. Prior to the night in question they had not seen each other since the previous Christmas.

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<sup>5</sup> That tribunal comprised Sir Laurence Street AC, KCMG, QC (former Chief Justice of New South Wales), Dr Jeff Steinweg (who is the FFA medical adviser) and businessman and retired league player Mr Sean Garlic.



47. There seems to be some issue between the athlete's wife and his sister. Although the athlete did not want to accept that, his sister said they did not get on. His sister also said that she did not believe that the athlete's wife liked her. The wife's statement tended confirmed the position. She said:

"I do not like it when my husband and his sister drink together as they become loud and rowdy..."

The wife's statement suggests that when the athlete and his sister drink together, they do not do so in moderation. This is consistent with what occurred on the night the illicit stimulants entered the athlete's system.

48. At about 2pm on Friday 26<sup>th</sup> October 2012 the athlete was at his home when his sister arrived unexpectedly. Shortly after his sister arrived, the athlete telephoned his wife to let her know that his sister had arrived to celebrate his birthday. His actual birthday was on the 31<sup>st</sup> but his sister was unable to get away from her business on that day and thought she would surprise him. They decided to have a few drinks and a barbeque. His wife told him that if he and his sister were going to be drinking she would stay at her parent's house.
49. At this point the tribunal notes some of the evidence of the athlete's sister. The sister has been in a relationship with her partner for a number of years. She and her partner are illicit drug users. They have used a variety of illicit stimulants including cocaine and ecstasy. In conjunction with her partner, the sister purchased the relevant stimulants in Queensland from a supplier from whom they had previously obtained their drugs.
50. Returning to the day in question, between "3pm and 11pm" (according to the athlete's statement) on Friday 26<sup>th</sup> October 2012 the athlete and his sister consumed what the athlete himself described as a large quantity of alcohol. Curiously, the athlete claimed in his oral evidence that he went to bed at 9:30-10. Obviously, that is inconsistent with being able to say that he was still drinking up to 11pm.
51. In his statement he said that he had consumed half a 750ml bottle of Jack Daniels and that his level of intoxication was medium to high. The tribunal finds that it was more likely on the high side. The athlete said that his level of intoxication was such that he was unable to recall the entirety of events from that evening.
52. The version of events presented to the tribunal was that the athlete's sister crushed a tablet containing the drugs into her glass. The sister said that she believed the drug to be an ecstasy tablet. She said she used the bottom of her glass to crush the tablet (while her brother was not looking), scooped the crushed tablet into her glass with her hand and then stirred the powdered tablet into her drink using her finger. She also said she put the glass down before drinking any and went to the bathroom. Upon her return she saw the athlete holding her glass. She claims she knew it was hers by the lip gloss. The (identical) evidence the athlete and his sister gave was that she said to him:

"Hey, you are drinking my drink!"

That is exactly how it appears in paragraph 35 of his written statement which was adopted by his sister in her written statement. The athlete's written statement continued:

[athlete] "So what. Go get another one. We're drinking the same drink anyway".

[sister] "It's mine, it's got lip gloss on it".

[athlete] "I don't care about that".

The athlete said he "*then proceeded to consume the whole drink in one go*".

53. The sister's oral evidence was that she did try to stop him but he skulled the drink in one go and said "*go get me another one*".
54. The athlete and his sister also gave other evidence as to later events, which are less important.
55. The athlete provided scientific evidence of Professor Ian Whyte. His evidence was that having consumed the substances later found in the athlete's sample, the contention by the athlete that he consumed the substances on 26 October and not on the day of the match (being the in-competition sample two days later on 28 October 2012) was plausible. Indeed, Professor Whyte says in his report that the levels found in the athlete's sample were consistent with taking the substance two days earlier. Although that evidence does not confirm the use was on 26 October, it certainly does not negate the athlete's assertion.
56. Overall, the tribunal considers that the scientific material does assist in reaching a finding that the illicit drugs containing the banned stimulants were consumed on the occasion of the evening of Friday 26 October.
57. Further the tribunal finds the drugs purchased by the sister were the pathway by which stimulants came to be found in his sample.

#### **F. FINDING ON NO FAULT OR NEGLIGENCE**

58. The tribunal is unanimous in concluding that, even on the version of events as presented, the defence of No Fault or Negligence is not available.<sup>6</sup> Although the athlete has established "how the *Prohibited Substance* entered his or her system" that is not enough.
59. The definition of *No Fault or Negligence* is:
 

*No Fault or Negligence: The Athlete's* establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the *Prohibited Substance* or *Prohibited Method*.
60. The requirement for utmost caution coupled with that part of the comment to WADC 10.5.1 and 10.5.2 set out below is of particular importance:
 

... a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) ...

(c) sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink).
61. The tribunal finds that the sister is a "person within the Athlete's circle of associates"; in other words she fits the description in the comment above. On behalf of the athlete it was submitted that it was not a case of "sabotage" as the sister did not intend to cause a problem for her brother. The tribunal accepts there was no intent by the sister to cause him trouble with his sport; however the tribunal considers that the case is either within the concept of *sabotage* as used in the comment or is so close that any difference does not matter.

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<sup>6</sup> Although the defence is called "No Fault or Negligence", it is necessary for the athlete to establish both no fault and no negligence.

62. It was also submitted on behalf of the athlete that the drink was not the athlete's drink; it was the sister's drink. On the case as presented, that much may be accepted however the tribunal does not consider that difference to be enough to displace application of the example contained in the comment. In any event (on the case as presented) by his conduct the athlete adopted the glass containing the drugs as his drink after being told that it was his sister's glass (see the matters in paragraphs **52-54** above and **63** below).
63. The athlete gave evidence of elaborate steps he says he invariably takes to ensure he never consumes any other person's food or drink, yet on the case as presented he chose not to heed his sister's objection, he did not ask why, he did not pause, he downed the whole contents in one go.
64. The tribunal unanimously finds that on the case as presented there was some fault and/or some negligence. Or, in terms of the defence the tribunal is not satisfied there was no fault and no negligence.
65. Pursuant to WADC 3.1 (ADP 47) the onus is on the athlete to establish the defensive case that he presented and the standard of proof is on the balance of probability. That standard is different (and lower) to the comfortable satisfaction referred to in WADC 3.1. Nevertheless, the burden is on the athlete to actually persuade the tribunal that the case as presented is more likely than not true. The Anti-Doping Organisation (here the FFA) does not have to negate the athlete's defence under WADC 10.5.1 or 10.5.2; the athlete must positively prove it. Therefore, even absent vigorous testing by cross-examination, the nature and quality of the defensive evidence put forward by the athlete, in light of all the facts established, must be such that it leaves the tribunal actually satisfied (albeit not comfortably so) that the athlete's defence is more likely than not true.
66. Two of the members of the tribunal are not satisfied that the athlete's defence is more likely than not true. Two of the members of the tribunal do not accept the case as presented and are not satisfied on the balance of probability that the taking of the illicit stimulants was accidental.
67. The tribunal (by majority) finds that the athlete made a foolish decision to accept illicit drugs from his sister after he had a considerable amount to drink in circumstances where his better judgement did not prevail. The evidence put forward by the athlete in his witness statement as to whether he had ever taken illicit drugs was that he had "*never knowingly taken a prohibited drug knowingly whilst playing soccer*" (underlining added). When his sister was asked about this topic she said that he tells her he never takes drugs "*in season*". She was asked about the words "*in season*" and said "*well that's what he says*".
68. For the majority of the tribunal there were too many inconsistencies and convenient assertions in the case as presented by the athlete. Some were:
  - (1) The assertion that the athlete had no idea his sister was an illicit drug user.
  - (2) That the whole drink containing the illicit drugs was consumed in one go over objection. Had the case been that he had only one sip from the glass before being corrected it would have been implausible that there could have been a positive test 2 days later. To avoid scientific rebuttal, the case had to be put on the footing that the whole of such a drink had been consumed. This is linked to the next point.

- (3) That the sister could readily tell at a distance which of two otherwise identical glasses was her glass; yet the athlete would have the tribunal accept that at the point of picking up "her" glass he was oblivious as to which glass was which.
- (a) He claimed he only found out about the lip gloss afterwards. During the hearing the athlete was asked whether it was possible he and his sister had swapped glasses before the supposed downing in one go. The athlete responded that it was not possible because "she had lip gloss on hers".
  - (b) The athlete was then asked whether he could remember that she had lip gloss on her glass. He answered "no". (That answer meant the previous answer was no proper answer at all). He was then asked why he had just said that and he answered "she told me *afterward*". This is to be contrasted with his evidence in his written statement where he claimed she had said at the time "it's got lip gloss on it".
  - (c) The athlete was further asked whether (based on his own recollection) it was possible they had swapped glasses. He answered quite definitely that it was not possible. When then asked why, his answer was "I guess it is possible".
  - (d) The evidence concerning lip gloss was entirely unsatisfactory.
- (4) That the sister never told her brother that she had put illicit stimulants into the glass until several days after she was aware of the positive test for illicit drugs. If it had happened the way it was presented one would expect her to have immediately told him on the night. Even allowing for her not wanting to have admitted to what had happened, once she first became aware that he has tested positive for an illicit drug the tribunal finds it implausible that she would wait several days before coming forward.
69. While the majority of the tribunal does not accept that the consumption was accidental, insofar as the athlete knew that he was ingesting an illicit substance at the time of the ingestion, the tribunal unanimously finds that the athlete had no intention to consume the stimulants *for performance enhancement reasons*. The tribunal (by majority) infers that the athlete was not wholly candid out of concern as to the potential ramifications (in this tribunal and elsewhere) of an admission of the use of illicit drugs.
70. For the reasons above, the tribunal does not accept that the athlete has established the defence of No Fault or Negligence.

#### **G. FINDING ON NO SIGNIFICANT FAULT OR NEGLIGENCE**

71. As noted above, the tribunal (by majority) finds (a) by majority, that the athlete made a foolish decision to accept illicit drugs from his sister after he had a considerable amount to drink in circumstances where his better judgement did not prevail, (b) unanimously, that the athlete had *no intention* to consume the stimulants *for performance enhancement reasons* (of any kind ie nothing to do with training and nothing to do with a competition), (c) unanimously, that the athlete in fact gained *no* performance enhancing benefit in the circumstances found by the tribunal and (d) unanimously, that the stimulants were taken in circumstances entirely unrelated to sport. It is against those central findings that it is next necessary to consider what is required by an athlete to establish No

Significant Fault or Negligence.<sup>7</sup> In what follows, the member of the tribunal in the minority on the fact finding agrees with the majority that the finding by the majority would result in the reasoning set out below.

72. The definition of *No Significant Fault or Negligence* is:
- No Significant Fault or Negligence*: The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or Negligence*, was not significant in relationship to the anti-doping rule violation.
73. Under heading "**No Significant Fault or Negligence – some cases**" the tribunal considered three particular cases where the question of *significant* fault or negligence was considered. In each of the cases referred to, the substance which led to the ADRV of presence had been consumed for performance enhancement reasons. That is not the case here. The tribunal regards that as an important difference.
74. The WADC adopts what the tribunal regards as an anomalous approach to illicit drugs. Illicit drugs such as those involved here (also cocaine and ecstasy) are covered only by that part of the prohibited list which prohibits substances "*In-Competition*". They are not prohibited at all times, which would be the case if they were steroids. For practical purposes that means the use of these illicit stimulants is only prohibited if the consumption occurs in the 12 hours before the relevant football match.<sup>8</sup>
75. However, the WADC does create an ADRV of presence if some residue from the consumption of the illicit drug is found in a sample taken on match day. In other words what is penalised is not the consumption of the illicit drug per se but only the fact of its presence if the presence is in a sample taken on match day. This approach to the use of illicit drugs leads to considerable difficulty and anomalous outcomes.
76. For example, stimulants might be used regularly by an athlete for training purposes to improve performance when training and to gain an edge in the selection process. They may also be used to assist in weight reduction. Those uses of stimulants are clearly for performance enhancing purposes. An extension of the example could involve an athlete taking stimulants in pre-season training and thereby out-performing other athletes for a position in a football squad. In the view of the tribunal that is cheating, is inappropriate and is conduct that should be completely prohibited; yet the WADC does not have that consequence. Unless such an athlete happened to play a match, happened to have a sample taken and still had residue of the stimulant in the sample, such disgraceful conduct would go undetected and unpunished by the WADC. What is more the FFA, because it is obliged to wholly adopt the WADC has no choice other than to adopt an ADP which is consistent with the WADC.
77. However, the fact that the ADP must be the same as the WADC does not mean this tribunal must apply the rules in the ADP oblivious to practical reality. If this

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<sup>7</sup> Although the defence is called "No Significant Fault or Negligence", it is necessary for the athlete to establish both no significant fault and no significant negligence.

<sup>8</sup> The use of illicit stimulants in the 12 hours before a match (Competition) is an ADRV (presumably) because consumption of a stimulant so very proximate to competing cannot be disassociated from actual and/or intended performance enhancement.

were a case where the athlete had taken these illicit stimulants for a purpose such as in the example above, the tribunal would not hesitate in imposing a two year sanction. To illustrate, assume that the facts were an athlete was using stimulants mid week to train harder and maintain a place in a squad but tried to be cunning and did not to use the stimulants close to match day to avoid detection in an In-Competition test. Also assume that the use was nevertheless detected in an In-Competition test. In such a case, the tribunal would have no hesitation in imposing a 2 year sanction and would have to give most serious consideration to whether there was aggravation within WADC 10.6.

78. At this point the tribunal refers to the decision in *ASADA v O'Neill* CAS 2008/A/1591 of January 2009 being an award of a CAS appeal Panel constituted by The Hon Tricia Kavanagh, Alan Sullivan QC and David Grace QC. In that case a cyclist deliberately took a stimulant for performance enhancing purposes, related (at least) to training. He claimed that he had ceased taking the stimulant a certain number of days before the relevant cycling race so as, on his case, to ensure there would be none in his system and therefore none in a sample taken In-Competition. However his sample did contain residue of the stimulant. At first instance, the sanction was 15 months on the ground that O'Neill had established that there was no *significant* fault or negligence. The CAS appeal panel overturned that finding and imposed a sanction of a period of two years ineligibility. This tribunal respectfully agrees with the outcome of that case on appeal.
79. The decision of this tribunal to impose a sanction of a period 15 months ineligibility in this case is not in conflict with the decision of the CAS appeal panel in *ASADA v O'Neill*. This tribunal is of the view that the case here is different because here the tribunal finds the athlete did *not* take the stimulants for performance enhancing reasons.
80. Returning to the anomalous outcomes, another difficulty with the WADC is that intentional consumption of illicit stimulants for reasons entirely unrelated to sport may result in substantial sanctions if residue of the stimulant happens to be detected in an In-Competition sample. On the other hand, if only detected pursuant to an illicit drugs policy, no sanction at all may be imposed. In Australia other major football codes have illicit drug policies. Some of those allow several "strikes" before any sanction at all is imposed. Indeed, one of the illicit drug policies has been criticised for being too lenient. The point of making reference to this is to illustrate the vastly different outcomes that could apply to athletes in different football codes (or even in the same code) who take illicit stimulants for reasons entirely unrelated to sport. It all depends upon whether residue is detected in an In-Competition sample.
81. An example of a very substantial sanction for taking illicit stimulants is the decision of the Australian Rugby Union "Judicial Committee" dated 20 July 2006 in the matter of Wendell Sailor. In that case the athlete, a prominent rugby league and rugby union footballer, had taken cocaine. He has subsequently publicly made it clear that he did not wish to implicate any other people (whoever they may have been) in his misconduct and hence was limited in the evidence he chose to adduce at his hearing. Inevitably, that resulted in a limitation on the scope of any defence he could run. It should be accepted that Wendell Sailor did consume cocaine midweek but for reasons entirely unrelated to sport. Notwithstanding the potential similarity with that case, the limitation in the scope of the evidence and

in the arguments advanced in that case meant that the *Sailor* decision did not really explore the possibility of a defence based on no *significant* fault (see paragraph 52 of the reasons). Hence no principle that might apply here can be gleaned from the *Sailor* decision.

82. By way of contrast to what happened to Wendell Sailor, examples exist of the use of illicit stimulants which go unpunished because they were not detected in an In-Competition sample. A very successful former rugby league footballer Andrew Johns has publically admitted use of illicit drugs during his football career; yet because no residue was ever detected in an In-Competition sample, his use of illicit stimulants went unpunished.
83. It is against this background that this tribunal has to assess whether the fault or negligence of the athlete in this case in accepting illicit stimulants from his sister should be regarded as significant. If it was "significant" within the meaning of that term in WADC 10.5.2 then the sanction would have to be a period of two years ineligibility.
84. In the view of the tribunal the fault or negligence of the athlete in this case should be found to be not significant for the very particular reason that in this case the consumption of the illicit stimulants was entirely unrelated to performance enhancement and to football.
85. By way of comparison, the tribunal refers to the decision of *WADA v Thompson* CAS 2008/A/1490 being the decision of a CAS appeal panel dated 25 June 2008. In that case Thompson was a track and field athlete in the sport of high-jumping. He had purchased and consumed cocaine two days before competition. Apparently, he gave a forthright account of his consumption of cocaine at a high school graduation party (award paragraph 8.10). The sanction imposed at first instance and upheld on appeal was a 12 month period of ineligibility.
86. In the matter of *Vizzari ats FFA* (November 2011) this tribunal (differently constituted) had to consider the question of degree of fault for the purposes of WADC 10.4. That was a cannabinoid case. The analysis as to degree of fault in that case is of general relevance to the extent of the reduction permissible under WADC 10.5.2.<sup>9</sup>
87. Having regard to the circumstances found, the tribunal considers that it is not appropriate in this case to apply the maximum reduction (which would be to 12 months). The extent of the reduction depends on many factors. Principal in this case is the finding the tribunal makes that the consumption of the illicit stimulants was entirely unrelated to sport. Whilst the athlete was not wholly candid as to the precise circumstances, it is still clear enough to the tribunal that the consumption was with his sister on the night of a celebration when he had consumed too much alcohol to make a proper judgment.<sup>10</sup>
88. For the member of the tribunal in the minority, even on the facts as found by the minority member, the result would be the imposition of the same sanction. Hence

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<sup>9</sup> The tribunal in *Vizzari* also commented on the low threshold which then applied for detection of cannabinoids and this tribunal is pleased to note that WADA has very recently increased the threshold so as to minimise the cannabinoid by-catch.

<sup>10</sup> The tribunal notes that the occasion of a celebration and the consumption of excess alcohol would have been of no relevance if the tribunal had found the stimulants were taken for performance enhancement reasons (whether to do with a match or training).

the tribunal is unanimous as to the outcome irrespective of the factual findings made resulting in that outcome.

89. The tribunal is unanimous in considering that it is appropriate to record that a defence under WADC 10.5.2 may be available for intentionally taking illicit stimulants Out-of-Competition provided (and in the view of the tribunal only provided) the stimulants were taken in circumstances entirely unrelated to sport, where there was no intention to obtain performance enhancement in connection with training or a competition and no performance enhancement was in fact obtained.

#### **H. SANCTION**

90. In light of the above the tribunal imposed a sanction of a period of 15 months ineligibility. The sanction will run from 15 November 2012 being the date of provisional suspension in accordance with WADC 10.9.3 (ADP rule 174) and expire on midnight on 15 February 2014.

*John Marshall*

**J E MARSHALL SC**  
**Chair of the Anti-Doping Tribunal**