

THE FOOTBALL FEDERATION OF AUSTRALIA
REASONS FOR DECISION OF THE ANTI-DOPING TRIBUNAL
J E Marshall SC (Chair), Dr R Muratore & Mr S Corbishley

IN THE MATTER OF ADRIAN VIZZARI

9 November 2011

A. INTRODUCTION

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 and impose an appropriate sanction (ADP rule 121). In accordance with ADP rule 124 the tribunal comprises the persons listed above. The athlete accepts that he is bound by the ADP and that the tribunal has full jurisdiction to deal with this matter.
2. These are our written reasons under ADP rule 141 for the decision of the tribunal concerning what is an admitted anti-doping rule violation relating to cannabis.
3. The 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) concerned the outstanding Australian international Stan Lazaridis.
4. It is at least surprising if not remarkable that the only two occasions that have necessitated convening the tribunal in the last 5 years have involved substances which are incapable of performance enhancement. In the unfortunate case of Mr Lazaridis the substance (a prescription hair medication) was supposedly a masking agent but has since been removed from the banned list which is cold comfort to Mr Lazaridis.
5. Of course the FFA has no control over what substances WADA chooses to include on its banned list. The position with football as with virtually every other sport in the world is that it is subject to the universal World Anti-Doping Code and the list promulgated by WADA which regulates anti-doping. The FFA is required to adopt an anti-doping policy which complies with the WADA code and which enforces the WADA list. The circumstances relating to Mr Lazaridis show that WADA's selection of substances to include on the list is not infallible.
6. There has long been and there continues to be controversy as to whether cannabinoids should be included on the WADA list. There is a widely accepted view that cannabinoids are incapable of performance enhancement. It is for that reason that many advocate removal of cannabinoids from the WADA list in conjunction with a preferable means for dealing with the use by athletes of cannabinoids - such as by an illicit drugs policy. However the position that exists and which the tribunal must deal with is that cannabinoids are on the WADA list and are to be dealt with under the FFA's WADA code compliant ADP. It is not possible for an athlete to challenge WADA's inclusion of a substance on the list: WADC 4.3.3, ADP rule 59.
7. Nevertheless, it is important to note that the FFA has very substantially ameliorated (if not resolved) all the difficult policy questions that arise by the

continued existence of cannabinoids on the WADA list. This has been done by a policy guideline that we record below¹:

A precedent has been established to the effect that for a cannabinoid ADRV the sanction for a 1st violation is Ineligibility for not less than 3 months or 12 Competitions (whichever is the greater) but that such sanction may be suspended on conditions that extensive community service is performed and there is no other ADRV for the following 2 years. We consider that to be a suitable precedent for a 1st violation for a cannabinoid ADRV.

8. The policy guideline contained in that notation is commendable for several reasons:
 - (1) It is in line with other major Australian sports, who have adopted similar guidelines.
 - (2) It is based on a precedent established in a decision of Sir Laurence Street AC, KCMG, QC. Sir Laurence has sat as Chairman of the anti-doping tribunal of another major sport for many years and applied his experience as a former Chief Justice of NSW and his experience on that anti-doping tribunal to reach the decision which established the precedent. It is relevant also to note that Dr Jeff Steinweg who is the FFA national medical adviser sat with Sir Laurence as a member of that tribunal.
 - (3) The sanction of 3 months or 12 Competitions has been applied either following the precedent or otherwise in numerous subsequent cannabis decisions across a great many sports in Australia. It has become the standard sanction for 1st cannabinoid offences.
 - (4) By virtue of being a guideline recorded in the ADP it set expectations in writing for what might be the consequences of contravention. This has the attribute of being fair advance warning and also and perhaps just as importantly the attribute of achieving uniformity of outcome.
 - (5) The policy guideline in our view contains a proposed sanction which strikes a fair balance and is considerably different to the two year sanction which would apply for performance enhancing substances such as steroids.
 - (6) Finally, the policy guideline also allows for the proposed sanction to be suspended in appropriate circumstances and thus affords appropriate flexibility to the tribunal's decision making process.
9. As will become apparent we apply the policy guideline in this decision.

B. APPLICATION OF THE ADP

(1) The ADRV established and admitted

10. The athlete has received an infraction notice dated 30 May 2011 alleging two anti-doping rule violations:
 - (1) The first alleges the presence of a cannabinoid in a sample taken from the athlete In-Competition on 13 January 2011 at the National Futsal Championships.

¹ This is from ADP rule 155 and is referred to below in this decision.

- (2) The second alleges "Use" of a cannabinoid on 13 January 2011 at the National Futsal Championships.
11. The first ADRV of presence is admitted by the athlete, but even were that not the case it is established. The taking of the sample In-Competition on 13 January 2011 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 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic-acid (a metabolite of cannabis). A letter dated 20 April 2011 (which on reflection should be admitted) records that the Register referred to in ADP rule 53 had an entry made on it which recorded that the "*sample when analysed was an adverse analytical finding for 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic-acid (a metabolite of cannabis)*". That is relevant as ADP rule 53 provides:
53. Matters on the ASADA Register: Where a person has had the opportunity to challenge an entry on the ASADA Register in the AAT (including any appeal from the AAT to the Federal Court) but has not done so or has done so unsuccessfully, the person may not dispute the matters contained in the entry on the ASADA Register in response to an allegation of an ADRV or in any hearing under this ADP.
12. The athlete had the opportunity to challenge that entry but did not. The consequence is that in this hearing the athlete could not dispute the matters contained in the entry, namely the positive test result.
13. This is a very sensible rule for the reason that if the athlete wishes to dispute the analysis (or other matters relating to an adverse analytical finding such as the taking of the sample² or chain of custody³) the most appropriate thing to do is challenge that in the Federal Administrative Appeals Tribunal (**AAT**) with ASADA/ADRVP who is in the best position to deal with such issues. Whilst all other matters are best dealt with by the WADA code article 8 hearing body with responsibility for any sanction, in Australia the AAT has historically been the place where matters relating to testing⁴ (not sanction) have been resolved and there is no reason to allow an athlete to re litigate the outcome in the AAT.
14. The second ADRV is not established. Cannabinoids are dealt with in category S8 which is in that part of the WADA list that relates to substances prohibited only In-Competition. The term 'In-Competition' means the period commencing twelve hours before the relevant match. In this case that would require proof that the cannabis was consumed on the day of the match being 13 January 2011. There is not the evidence to support this and indeed after the athlete provided his evidence as to when the consumption occurred the FFA (responsibly) no longer pressed this allegation. The evidence which we accept is that the use was not on match day. Accordingly there can be no offence of use.

² 'VZZ' and Australian Sports Drug Agency [2001] AATA 776 upheld in *Riordan v ASDA* (2002) 120 FCR 424.

³ *Rainey and Australian Sports Drug Agency* [1999] AATA 682.

⁴ See above footnoted cases and also, *Pileggi and Australian Sports Drug Agency* [2004] AATA 762 upheld *Pileggi v ASDA* [2004] FCA 955; (2004) 138 FCR 107 which related to circumstances at the time of requesting a sample.

15. Before moving ahead, the Register entry relating to cannabis was (rightly) limited to “alleged” use⁵. Hence ADP rule 53 sensibly has no application to ‘use’ and is no barrier to a finding in favour of the athlete on that ADRV.⁶

(2) A Specified Substance

16. All cannabinoids are treated as Specified Substances under the WADA code and under the ADP. The relevant WADA code article is WADC 10.4 which is replicated in ADP rule 155 as follows:

WADC 10.4: Elimination or Reduction of the Period of *Ineligibility* for Specified Substances under Specific Circumstances

155. WADC 10.4: Where an *Athlete* or other *Person* can establish how a Specified Substance entered his or her body or came into his or her *Possession* and that such Specified Substance was not intended to enhance the *Athlete’s* sport performance or mask the use of a performance-enhancing substance, the period of *Ineligibility* found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of *Ineligibility* from future *Events*, and at a maximum, two (2) years’ *Ineligibility*.

To justify any elimination or reduction, the *Athlete* or other *Person* must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The *Athlete* or other *Person’s* degree of fault shall be the criteria considered in assessing any reduction of the period of *Ineligibility*.

[Comment to Article 10.4: Specified Substances as now defined in Article 10.4 are not necessarily less serious agents for purposes of sports doping than other Prohibited Substances (for example, a stimulant that is listed as a Specified Substance could be very effective to an Athlete in competition); for that reason, an Athlete who does not meet the criteria under this Article would receive a two-year period of Ineligibility and could receive up to a four-year period of Ineligibility under Article 10.6. However, there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation.

This Article applies only in those cases where the hearing panel is comfortably satisfied by the objective circumstances of the case that the Athlete in taking a Prohibited Substance did not intend to enhance his or her sport performance. Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include: the fact that the nature of the Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete’s open Use or disclosure of his or her Use of the Substance; and a contemporaneous medical records file substantiating the non-sport-related prescription for the Substance. Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance.

While the absence of intent to enhance sport performance must be established to the comfortable satisfaction of the hearing panel, the Athlete may establish how the Specified Substance entered the body by a balance of probability.

In assessing the Athlete or other Person’s degree of fault, the circumstances 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. It is anticipated that the period of Ineligibility will be eliminated entirely in only the most exceptional cases.]

⁵ This (and the other common finding “may have used”) is sensible as it is not appropriate for any finding as to whether or not an ADRV has actually been committed to be made by any person or body apart from the WADA Code article 8 hearing body, which in this case is this tribunal.

⁶ For whilst the athlete disputes he did use cannabis ‘In-Competition’ he does not dispute that this is what has been alleged against him.

17. What is significant is that the FFA, in common with other major Australian sports, has included as part of this rule the following policy guideline in the form of a note:

Our note: A precedent has been established to the effect that for a cannabinoid ADRV the sanction for a 1st violation is Ineligibility for not less than 3 months or 12 Competitions (whichever is the greater) but that such sanction may be suspended on conditions that extensive community service is performed and there is no other ADRV for the following 2 years. We consider that to be a suitable precedent for a 1st violation for a cannabinoid ADRV.

This is the policy guideline that has already been referred to above.

18. In applying ADP rule 155 it is necessary to work through each of the matters and then deal with the appropriate sanction.
19. The first matter which must be established by the athlete is how the Specified Substance entered the athlete's body. That has been established here as the athlete has explained in evidence before the tribunal when he consumed the substance and the circumstances relating to his consumption.
20. The second matter which must be established by the athlete is that the substance was not used with the intention to enhance the athlete's sport performance. The athlete has explained, as is to be expected, the use of a cannabinoid is antithetical to competitive athletic performance. Whether that is so in every sport need not be considered. The tribunal accepts that the use of a cannabinoid is incapable of enhancing performance in football.⁷ It is further necessary for the athlete to have corroborating evidence as to the absence of an intent to enhance sport performance. The corroboration in this case is provided by the very nature of the substance and if necessary coupled with the timing of its ingestion.
21. Each of the above matters must be established to the tribunal's comfortable satisfaction. We are so satisfied. Mr Vizzari has appeared before us and appears as a truthful man who is very concerned as to the ADRV and the gravity of the situation. We unreservedly accept him as an honest witness. Indeed he accepts that the use of the substance was "silly" and "irresponsible" for several reasons, but perhaps most significantly because it could operate to impair his performance and let down his team mates. He told us that he has played in 21 of the last 25 National Futsal Championships and feels he has fallen short of what is required to be a role model to younger players. He proposes to remedy that.

C. SANCTION

(1) Factors affecting sanction

22. Having reached the stage where WADC 10.4, ADP rule 155 has been made out it is necessary to consider the athlete's "degree of fault". Some overseas cases have expressed difficulty in applying the criteria of "degree of fault" to the use of cannabinoids as almost invariably the use is intentional albeit foolish and ill considered.
23. However it is necessary to assess "degree of fault" in relation to the nature of the ADRV.

⁷ It is generally accepted that cognition, concentration and exercise performance are impaired, all of which are critical in football.

24. Intentional use of a Specified Substance may have a greater degree of fault if the ADRV is Use. However, the ADRV of Use has not been established. Use out of competition, as is the case here (and will almost always be the case with cannabinoids), is NOT an ADRV. Indeed the WADA Code adopts the somewhat paradoxical position that use of cannabinoids *per se* is not banned. Hence intentional consumption of a cannabinoid out of competition should be largely (if not entirely) irrelevant to the issue of "degree of fault".
25. The relevant ADRV is presence in a sample. This leads to consideration of how long after use can metabolites be detected in a sample:
 - (1) Cannabis leaves when burnt and the smoke inhaled by humans causes tetrahydrocannabinol (**THC**) to be metabolised in the lungs. THC then rapidly and extensively metabolises into various metabolites as it is absorbed into the blood stream. Peak blood levels of THC are reached within 10 minutes and rapidly declines within the first hour after ingestion. These metabolites are however highly fat soluble and may therefore remain for long periods of time in the fatty tissues of the body. The cannabinoids are slowly released back into the blood stream, slowing the body's elimination of the substance completely. It is this phenomenon that makes it possible for THC and its metabolites to be detectable in the blood for several days, and for traces to persist for several weeks, possibly longer. One study reported that the average time limit until the last positive result (using a cut off of 20 ng/ml) was 31.5 days, with upper limit in the sample group of 77 days.
 - (2) The residual level of cannabinoids in the body is subject to substantial individual variability. The dosage ingested, an individual's history, the potency of the substance ingested and the time elapsed since smoking are all factors that affect the detectable amount in the body. Even in the case of blood testing it is very difficult to determine the time of administration from blood concentrations of THC and its metabolites even where the smoking habits of the individual and the exact dosage consumed are known. At best blood testing may indicate recent use.
 - (3) However the traditional urine testing leads to an even more imprecise result, i.e. it is an even weaker indicator of current cannabis intake. There is no simple relationship between urinary levels of THC metabolites and the time of consumption. Therefore a urine test cannot be used to distinguish between use within the last 24 hours and use perhaps as long as a month ago.
 - (4) As the cannabinoid metabolites can subsist in the body for long and unpredictable periods of time in fat cells, it is very difficult for an athlete to know whether a sample will have any metabolites present.
26. The tribunal also regards it relevant that the WADA technical document "WADA Technical Document – TD2010DL" sets threshold levels for detection of various substances in Table 1, including metabolites of cannabinoids:

Table 1

Threshold substance	Threshold (T)	Max. Combined Standard Uncertainty ($u_{c, Max}$) at T		Decision Limit (DL) ^a
		Absolute	Relative (%)	
19-Norandrosterone	2.0 ng/mL^b	0.3 ng/mL	15	2.5 ng/mL^b
Carboxy-THC ^d	15 ng/mL	1.5 ng/mL	10	18 ng/mL
Epitestosterone	200 ng/mL^b	20 ng/mL	10	240 ng/mL^b
Salbutamol ^{c,h}	1.0 µg/mL^f	0.1 µg/mL	10	1.2 µg/mL
Morphine ^{c,g}	1.0 µg/mL^f	0.1 µg/mL	10	1.2 µg/mL
Cathine ^{c,e}	5.0 µg/mL	0.5 µg/mL	10	6.0 µg/mL
Ephedrine ^c	10 µg/mL	0.5 µg/mL	5	11 µg/mL
Methylephedrine ^c	10 µg/mL	0.5 µg/mL	5	11 µg/mL
Pseudoephedrine ^c	150 µg/mL	7.5 ug/ml	5	170 µg/mL

27. The relevant line is for "Carboxy – THC" and the level is extremely small: 15 ng/ml. The only lower level is 19-Norandrosterone a steroid more commonly known as nandrolone. The detection level for THC is in terms of nanograms which is 10^{-9} of a gram: 0.000000001 of a gram. Less than a millionth of a gram (which is a thousand times as much – a µg).
 28. At this very low level it would be very difficult if not impossible for an athlete to reliably predict when the legal, non-ADRV consumption of a cannabinoid will cease to produce a detectable metabolite. All the athlete can do is not ever consume the substance. Even a test the day before which is negative may not be reliable as exercise on match day could conceivably cause some minute residual amount of the THC in a fat cell to metabolise and be released into a sample. This leads to an anomalous situation where the WADA Code places no prohibition on the consumption of cannabinoids out of competition but creates an ADRV of presence if some tiny remaining amount of metabolite happens to be in a sample taken In-Competition; all in the knowledge that it cannot enhance sport performance (at least in football).
 29. All the above needs to borne in mind when assessing "degree of fault" in relation to the ADRV of presence of metabolites of cannabinoids.
 30. In assessing the facts before us we readily find that the "degree of fault" criteria applied to this athlete for the ADRV of presence of metabolites of cannabinoids warrants a sanction at a very low level.
 31. For all the above reasons we find it appropriate to apply the policy guideline in the note to ADP rule 155 and impose a sanction of 12 matches.
- (2) Suspension of the sanction
32. The guideline also provides "*that such sanction may be suspended on conditions that extensive community service is performed and there is no other ADRV for the following 2 years.*"
 33. We have been presented with a clear proposal for extensive supervised community service.

34. We would in any event have suspended the sanction but are confirmed in our view by reason of the sincere way the athlete has conducted himself in putting together the proposal. Further, we were told at the hearing the athlete has already missed most of the year by voluntarily standing down as a consequence of the embarrassment and humiliation he has experienced as a result of his violation. This was not pursuant to a formal provisional suspension under WADC 7.5.1 and so cannot attract the benefit of WADC 10.9.4. Nevertheless we can have regard to that matter when weighing discretionary matters.
35. Accordingly we suspend the sanction for the time being on these terms:
- (1) By 31 March 2012 the athlete
 - (a) complete the supervised community service as set out in the written proposal comprising marked exhibits #8 and #9 and
 - (b) complete an appropriate course and obtain a coaching licence.
 - (2) Once the athlete has completed the community service he inform the FFA in writing and provide
 - (a) A statement of what he has done
 - (b) Supporting evidence, in a form satisfactory to the FFA, that he has completed the community service.
 - (c) Written verification by the supervisor of completion of the community service.
 - (3) The athlete not commit any other ADRV in the two years from the date of the violation (13 January 2011).
 - (4) Should any of the above terms not be complied with the sanction of 12 matches will crystallise (ie it will no longer be suspended).

John Marshall

J E MARSHALL SC
Chair of the Anti-Doping Tribunal