CAS A1/2007

FINAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Henry **Jolson** QC, Barrister, Melbourne, Australia

Ad Hoc Clerks: Mr Tim Holden, Solicitor, Sydney, Australia
Ms Sarah Burgemeister, Solicitor, Melbourne, Australia

In the matter of:

AUSTRALIAN SPORTS ANTI-DOPING AUTHORITY, Canberra, Australia
represented by Mr Anthony Nolan SC, Barrister, Melbourne, Australia,
instructed by Mr Ian Fullagar of Lander & Rogers Lawyers, Melbourne, Australia

- Applicant -

and

SEVDALIN MARINOV
represented by Mr Paul J. Hayes, Barrister, Melbourne, Australia,
instructed by Mr John McMullan of McMullan Solicitors, Melbourne, Australia

- Respondent -

Date of Award: **9 June 2007**

Introduction

1 This Final Award is the third Award rendered by the Tribunal during the course of the hearing which commenced on 1 May 2007, continued on 2 May and concluded on 10 May 2007.

2 On 1 May 2007, the Tribunal rendered a Partial Award that rejected the respondent's submission that the allegation against him was bad in law and should therefore be dismissed. The respondent submitted that "possessing" a prohibited substance was not a doping violation separate from "trafficking" in the 2002 Anti-doping Policy of the Australian Weightlifting Federation (***2002 ADP***). The respondent submitted that there was no separate offence of "possessing" and accordingly the allegation was wrong in law and the application should be dismissed. The Tribunal rejected the application. The application was made at the commencement of the hearing and before any evidence was called.

3 On 9 May 2007, the Tribunal rendered a further Partial Award after the applicant had closed its case, and before the respondent gave any evidence, on the respondent's submission that on the applicant's evidence alone the case against the respondent could not be established or was so unsatisfactory or unreliable that it should not be acted upon. The Tribunal rejected the respondent's application.

4 On each application the costs were reserved and the Tribunal ruled that the Partial Awards be kept confidential and not be made public as the hearing had not, at the dates of those Awards, been completed.

5 The Partial Awards are, for completeness, annexed to this Final Award. Changes have been made to the published version of the Partial Award dated 9 May 2007 to correct a spelling error in paragraph 41 and to add a phrase in paragraph 51 that had been omitted by mistake. It was necessary for the purpose of the Partial Award rendered on 9 May 2007 to review, in detail, the evidence tendered on behalf of the applicant the respondent not having tendered any evidence to that point of the hearing. It is necessary for the purpose of this Final Award to repeat some portions of that Partial Award.

6 On 10 May 2007 the hearing resumed. The respondent gave evidence and at the conclusion of the evidence counsel for both parties made oral submissions. The Tribunal adjourned to consider the issues raised in the hearing. The question for the Tribunal now is whether, having heard all of the evidence, it is satisfied to the required degree of satisfaction, that the respondent was, on 14 November 2003, knowingly involved in

trafficking by storing, possessing or holding a prohibited substance other than for his personal use?

Background

The Parties

7 The respondent, the Australian Sports Anti-Doping Authority (***ASADA***), was established by the *Australian Sports Anti-Doping Authority Act 2006 (Cth).* It came into force in Australia on 14 March 2006. Under that Act ASADA was given the legislative authority to investigate possible violations of anti-doping rules applicable to athletes and support persons. ASADA is authorised to make findings relating to such investigations, to establish and maintain a Register of such findings, to notify athletes, support persons and sporting administration bodies of findings on the Register and of ASADA's recommendations as to the consequence of such findings. ASADA is also authorised to present findings on the Register and its recommendations and the consequences of such findings at hearings of the Court of Arbitration for Sport (CAS) or other sporting tribunals.

8 The Australian Weightlifting Federation (***AWF***) is the National Federation that is responsible for the sport of weightlifting in Australia including performing the functions and powers contained in the applicable Anti-Doping Policy adopted by it. The parties agree that the relevant Anti-Doping Policy for the purpose of this hearing is the 2002 ADP.

9 On 14 March 2006 the AWF referred to ASADA 'All functions and powers relating to the issuing of an infraction notice, the convening of a hearing, the presentation of allegations of a violation of the Anti-Doping Rules at a hearing and all matters incidental thereto'.

10 The respondent, Sevdalin Marinov, was, in November 2003, a head coach of an Australian Weightlifting team under the control of the AWF, and was subject to, and bound by, the 2002 ADP. He was born in Bulgaria in June 1968 (he is 34 years of age) and migrated to Australia on 3 March 1991. He has been involved in the sport of weightlifting since 1979 starting as an athlete eventually winning the Gold Medal for Bulgaria for weightlifting in the fly weight 52KG division at the 1988 Olympics in Seoul. He won the Gold Medal in Overall and Silver Medals in the Snatch, and the Clean and Jerk for Australia at the 1994 Commonwealth Games. He was the World Senior Champion in the 52KG division in 1985, 1986 and 1987 and the European Champion in the 52KG division in 1985 to 1989. He is the World Record Holder in the 52KG division. He retired from competition in 1996. In 1994 the respondent was suspended from the sport for 2 years for using a prohibited substance. The evidence is silent as to the circumstances of the offence or the identity of the substance used.

11 After his retirement from competition the respondent returned to coaching and held a number of senior coaching positions in Australia between 2002 to 2006, including, Australian Junior Coach for the Australian Weightlifting Federation between 2003-2006; Head Coach in 2003 for the World Junior Championships and Oceania Junior Championships; Assistant Coach for the 2003 World Senior Championships and Oceania Senior Championships.

Notice by ASADA of potential anti-doping rule violation

12 On 14 November 2003 three packets each containing substances prohibited under the 2002 ADP were found by Victoria Police in a wardrobe in a bedroom that was used by the respondent.

13 On 15 December 2006 the applicant notified the respondent that the applicant believed that the respondent had '*potentially committed an Anti Doping Rule Violation ('**ADRV**') being possession of prohibited substances, namely anabolic and androgenic steroidal agents, and trafficking of prohibited substances, namely anabolic and androgenic steroidal agents* …' and invited submissions from him as to why the matter should not proceed further.

14 On 18 January 2007 the respondent, through his solicitor, denied that he committed the anti-doping violation. A written submission to the applicant requesting that the matter not proceed further was provided.

15 On 5 February 2007 the applicant notified the respondent that it was not satisfied with the submissions and determined that the respondent had committed an ADRV, '*namely possession of prohibited substances, being anabolic and androgenic steroidal agents*'. As a result details of the ADRV were entered onto the Register of Findings maintained by ASADA. Those details described the ADRV as '*Possession of Prohibited Substances*'. The date of the ADRV was stated to be August-November 2003 and the place at which the ADRV was allegedly committed was at 57 Lynette Avenue, Warrandyte, Victoria, Australia.

16 ASADA's letter continued:

> *"Your client may apply to the Administrative Appeals Tribunal (AAT) for a review of the Decision within 28 days.*
>
> *…*
>
> *Your client has a right to a hearing in relation to this ADRV. Within 14 days of the date of this letter (ie by 19 February 2007) your client should advise ASADA in writing that he:*
>
> *(a) wishes the matter to be referred to a hearing; or*
>
> *(b) waives the right to a hearing in relation to:*

(i) whether he committed the ADRV; and

(ii) what sanctions to apply.

… If your client does elect to proceed to a hearing, it will be conducted before the Court of Arbitration for Sport in accordance with the Code of Sports-Related Arbitration.

NEXT STEPS

As outlined above, your client should now:

- ***If you wish to apply to the AAT for a review of ASADA's decision to make an entry onto the Register, do so within 28 days.***
- ***If you wish for a hearing before the Court of Arbitration for Sport in relation to an Anti-Doping Rule Violation, advise ASADA by 19 February 2007."***

17 The respondent's solicitor responded to the applicant's letter dated 5 February 2007 on 8 February 2007, again denying that the respondent had committed the ADRV and requested that the matter be referred to a hearing before the Court of Arbitration for Sport (**CAS**) in relation to the ADRV. The right to a hearing by the CAS is provided for in Articles 10.7, 10.8 and 11 of the 2004 AWF Anti-Doping Policy (**2004 ADP**) which replaced the 2002 ADP in August 2004. Article 11.4 of the 2004 ADP provides that the CAS will determine if the violation of the 2004 ADP has been committed, and if so what sanction will apply and how long the sanction will apply. The parties have agreed that the CAS has jurisdiction to decide whether the respondent has committed a violation of the 2002 ADP, what sanctions should apply and for how long the sanctions should apply.

18 Consequently, on 15 February 2007, ASADA lodged an Application with the CAS Oceania Registry to determine whether the respondent committed the ADRV and if so what sanctions to apply.

19 On 21 February 2007 CAS, constituted by Mr Henry Jolson QC as sole arbitrator, conducted a preliminary conference by telephone. ASADA was represented by Mr Richard Redman, Senior General Counsel for ASADA and the respondent was represented by his solicitor, Mr John McMullan.

Jurisdiction

20 At the preliminary conference on 21 February 2007, the parties agreed, and subsequently signed an Order of Procedure confirming their agreement, that:

- CAS has jurisdiction to determine, by arbitration, the dispute contained in the Application and that the dispute be referred to CAS for determination by arbitration;
- The following affected parties shall have the right to attend hearings as an observer or interested party - the Australian Sports Commission (ASC), the Australian Olympic Committee (AOC), the World Anti-Doping Agency (WADA), the International Weightlifting Federation (IWF) and the Australian Weightlifting

Federation (AWF). The affected parties were notified of the proceeding and the following responses noted:

- The ASC indicated that the respondent was not bound by the Australian Sport Commission's Anti-Doping Policy at the time of the alleged anti-doping rule violation and, as a result, it did not want to be an affected party to this procedure;
- The AOC did not intend to be in attendance for the hearing and requested receiving advice on the determination in due course;
- The AWF did not wish to participate at the preliminary conference call and requested a copy of the transcript.

- CAS, for the purpose of the arbitration, will be constituted by Mr Henry Jolson QC as sole arbitrator;
- The decision of CAS will be final and binding on all parties save as to any appeal that may be brought under Rule 47 of the Code of Sports-Related Arbitration (the Code), to the Appeal Division of CAS, and no party will institute or maintain proceedings in any Court or Tribunal. In particular, without restricting the generality of the foregoing and for further and better assurances, no party including any affected or third party will have the right of appeal under Section 38 of the *Commercial Arbitration Act* of any of the Australian States or to apply for the determination of a question of law under Section 39(1)(a) of such Act;
- The arbitration will be conducted according to the Code and in particular the provisions relating to the Ordinary Division, Rule 38 ff;
- The seat of the arbitration is in Lausanne, Switzerland;
- The language of the arbitration shall be English;
- The law of the merits, being the substantive law of the dispute, shall be the law of the State of Victoria;
- The 2002 Anti-Doping Policy of the Australian Weightlifting Federation is the relevant policy which applies in the dispute.
- The parties acknowledged that the proceedings and the Award are subject to Rule 43 of the Code which states: '*Proceedings under these Procedural Rules are confidential. The parties, the Arbitrators and the CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings. Awards shall not be made public unless the award itself so provides or all parties agree*.' The parties acknowledged that clause 8.4 of the 2002 ADP applied to the proceedings, which requires the applicant to notify specified entities of the offence and the sanction applied;
- A timetable for the filing and serving of written submissions, witness statements, exhibits and evidence was agreed to. Witness statements were agreed to be in the form of an affidavit or statutory declaration to stand as the witnesses' evidence in chief and be subject to cross examination. The applicant and the respondent filed and served their written submissions and statements of evidence in accordance

with the timetable. Their witness statements were not in the form of affidavits or statutory declarations but the matter has proceeded nonetheless.

- The parties also acknowledged Rule 64 of the Code and reserved their position on costs.

The 2002 Anti-Doping Policy of the Australian Weightlifting Federation

21 In August 2004 the 2002 ADC was replaced by the 2004 ADP. The 2004 ADP did not apply retrospectively to matters pending before August 2004: Article 20.6. The parties in this hearing agreed that the 2002 ADP is the relevant policy which applies in the dispute. The Tribunal considers that the correct approach is that the respondent be dealt with on the basis of the violation that is described and provided for in the 2002 ADP and not the 2004 ADP; that the request by the respondent to refer the matter to a hearing by CAS and the hearing by CAS is pursuant to the process set out in Articles 10 and 11 of the 2004 ADC; and that the sanctions that apply if the violation is established are the sanctions set out in the 2002 ADP. The parties agreed that the relevant sanctions that apply if the anti-doping violation is established against the respondent are those set out in the 2002 ADP.

Alleged Anti-Doping Violation

22 The applicant alleged that the respondent contravened clause 3.2(a) of the 2002 ADP. It reads:

> "*A person (including an athlete) commits a doping offence if:*
>
> *(a) the person is knowingly involved in trafficking, or*
>
> *(b) ...*"

23 "Trafficking" is defined in Clause 15.1 of the 2002 ADP as follows:

> *"Trafficking" means –*
>
> *(a) manufacturing, extracting, transforming, preparing,* ***storing****, expediting, transporting, importing, transiting, offering (whether subject to payment or free of charge) distributing, selling, exchanging, brokering, obtaining in any form, prescribing, commercializing, making over, accepting,* ***possessing****,* ***holding****, buying or acquiring in any manner a prohibited substance*"…
>
> (b) …
> (c) …
>
> *other than for personal use by a person who is not an athlete, for personal use by an athlete where the athlete has approval for therapeutic use, or in the course of a lawful exercise of professional medical, pharmaceutical or analogous activities*." [emphasis provided]

24 "Storing", "possessing" and "holding" are not defined in the 2002 ADP.

25 Particulars of the alleged violation were provided by the applicant by letter to the respondent, dated 2 April 2007:

> " *The material particulars in the doping offence are as follows:*
>
> *In or about November 2003 Mr S. Marinov knowingly engaged in storing, possessing and/or holding the following prohibited substances which were located in a cupboard of the bedroom occupied by Mr S. Marinov, situated at 57 Lynette Avenue, Warrandyte, Victoria.* "

26 The applicant identified the substances as:

(a) *"androlone phenylpropionate" contained in a cardboard box labelled "DECA DURABOL… Nandrolone deconoate… 200mg/ml…" containing a vial labelled "Deca Durabol" which contained a substance in the form of a pale yellow liquid".*

(b) *"testosterone propionate, testosterone isocaproate, testosterone deconoate and testosterone phenylpropionate" in a cardboard box labelled "SUSTANON 250… 10ml" containing a vial labelled "Testosterone isocaroate… 60mg … Testosterone deconoate … 100mg" containing a substance in the form of a pale yellow liquid".*

(c) *"stanozolol" in a cardboard box labelled "ILIUM STANABOLIC … 20ml" containing a vial labelled "Olium Stanabolic … 50mg/ml … Stanozolol" containing a substance in the form of a white cloudy liquid".*

Sanctions

27 Under the 2002 ADC the sanction to be applied for a first offence where a person commits a doping offence involving anabolic androgenic steroids, is a minimum of 2 years period of ineligibility for a first doping offence and life for a second doping offence (clause 7.1). The sanction applies from the date of the doping offence unless the Tribunal decides otherwise. The period of ineligibility is the period during which the person is banned from selection to represent Australia in international competition, from competing in any events and competitions conducted by or under the auspices of the AWF, from receiving direct or indirect funding assistance from the AWF and from holding any position within the AWF (See clause 6.1 of the 2002 ADC).

The Law

28 The Tribunal finds that the definition of "trafficking" in the 2002 ADP is a deeming provision containing a number of component words, any one of which alone or in combination with each other disclose the offence of "trafficking" if a person has knowledge of that component: *French v Australian Sports Commission and Ors* CAS 2004/A/651. "Storing",

"possessing" and/or "holding" are each component words in the definition of trafficking. Further, the exclusion from the definition of "trafficking" in the 2002 ADP of personal use by a person, other than an athlete, who is in possession of a prohibited substance, recognises that "possession" alone could constitute the offence of "trafficking" if that person is in possession of a prohibited substance which is not for his or her personal use. The Tribunal considers that this is to ensure that people involved in the sport of weightlifting, other than athletes, do not knowingly possess, hold or store prohibited substances, unless they do so for their own use.

29 The submissions presented to the Tribunal on behalf of each of the parties dealt almost exclusively with the meaning of the word "possessing" in the 2002 ADC. The meaning of the words 'holding' and 'storing' were given less attention. Only the applicant proffered the ordinary meaning of those words as defined in the Macquarie Dictionary which defines "hold" as:

> "*1 To have or keep in the hand; keep fast; grasp. To reserve, retain, set aside. … To keep in custody; detain … … 7 To have ownership of or use of …. 16 To keep or maintain a grasp on something.* "

and the word "store" as:

> "*… 13 To supply or stock with something as for future use. 14 To lay up or put away, as a supply for future use*."

30 The Tribunal is for the present purposes content to accept those definitions adding, however, that knowledge of holding or storing is a necessary element of the offence.

Possessing

31 The Tribunal was referred to a number of Australian cases in which the concept of "possession" was discussed principally in relation to the use of that word in statutes imposing criminal sanctions for importing, possessing and dealing with prohibited drugs. The Tribunal considers that the word should be given its ordinary meaning considered in its contextual setting and having regard to the objectives of the ADP.

32 In *ASC and Dalleagles* 108 ALR 305, the Federal Court of Australia considered the ordinary meaning of the word "possession" and stated:

> "*The word "possession" has a number of applications well reflected in its definition in the Shorter Oxford English Dictionary which includes:*
>
> > *'The visible possibility of exercising over a thing such control as attaches to lawful ownership; the detention or enjoyment of a thing by a person himself or another in his name; the relationship of a person to a thing over*

> *which he may at his pleasure exercise such control as the character of the thing admits to the exclusion of all other persons …'*
>
> *The common law or statutory setting in which the word is used will, in the absence of express definition determine the way in which it will be construed: Towers & Co v Grey (1961) 2KB 315 at 363 (Lord Parker CJ, Winn and Widgery JJ agreeing). As it is recognised in the Oxford English Dictionary definition the word is capable at law of embracing at the relationship between a person and goods which although not in the person's physical custody are held by another from whom that person can require production; Sullivan v Earl Caithness (1976) 2 WLR 361 at 363 (May J, Parke J and Lord Widgery CJ agreeing). In this respect a distinction is sometimes drawn between the transitive verb of 'to possess' and the expression to have in possession.*"

33 In *He Kaw Teh v The Queen* (1985) 157 CLR 523 a decision of the High Court of Australia, Dawson J, at 598 said:

> *"As with importation, possession is a concept which contains within it a mental element, as Aicken J. observed in* ***Williams v The Queen*** *(1978) 140 CLR 591 at 610 –*
>
> *It is necessary to bear in mind that in possession there is a necessary sufficient mental element of intention, involving a sufficient knowledge of the presence of the drug by the accused. No doubt in many cases custody of an object may supply sufficient evidence of possession, including the necessary mental element, but that is because knowledge may often be properly drawn from surrounding circumstances. "*
>
> and
>
> "*...Knowledge is the basis of the necessary intent. There may be a sense in which physical custody or control can be exercised over something in ignorance of its presence or existence, but this has never been deemed sufficient to amount to possession in law. This is what Griffith CJ meant in* ***Irving v Nishimura*** *(1907) 5 CLR 233 at 237:*
>
> > *'If a man has something put into his pocket without his knowledge, he cannot be charged with having it unlawfully in his possession, if the fact appears'."*

34 The Tribunal adopts the definition of possession, propounded by Dawson J, in *He Kaw Teh v R* at 602:

> "*… since possession is used (*in the relevant statutory enactment*) in its barest sense,* (a person) *will possess something if he has custody or control of the thing itself or the receptacle or place in which it is to be found provided that he knows of its presence,* "
>
> and considers that the word "possessing" has a similar meaning.

35 In *R v Dung Chi Dang* [2004] VSCA 38, a decision of the Court of Appeal of the Supreme Court of Victoria, a person was convicted of a number of offences including unlawful possession of drugs of dependence. The drugs were found in a room in a house occupied by him and his wife until he was asked by his wife to leave which he did. 10 days later the Police searched the house and found the prohibited drugs in a bedroom that had been occupied by the accused and his wife before he moved out to live with his parents. He retained a key to the matrimonial home and took some of his clothing but not all of them. Most of his clothing was left at the house. The Court of Appeal said, at para 59:

> "*The jury could have been satisfied of the applicant's possession of the drugs because they were found upon premises "occupied" by him. "Occupied" for the purposes of the first limb includes the right to possess and physical presence in the premises at all times is not required. A person who is temporarily absent from the premises he owns or leases remains the occupier when absent on holidays or whilst working and living elsewhere or whilst briefly separated from their spouse.*"

36 The relevant statute, under which Dang was charged, contained a provision that any substance shall be deemed to be in the possession of a person so long as it is upon any premises occupied by him. There is no like provision in the 2002 ADP. The Tribunal considers that the concept of "occupation" of premises, as discussed in *Dang,* is helpful, but not determinative of, the question whether a person who occupies a room in which prohibited substances are found is in possession of those substances under the 2002 ADP. Occupation of the room is not sufficient alone to establish possession of the substances found in that room. Knowledge that the substances are in the room and the ability to exercise control over the substances in the room is required. Exclusive control is not necessary. A person can have the ability to exercise control over the substances even though he or she is not physically present in the room at all times and temporary absence may not matter.

37 A large part of the evidence and of the submissions by the parties centred on whether or not the respondent, in November 2003, occupied the bedroom in which three packets containing prohibited substances were found and the nature and extent of that occupation.

Standard of Proof

38 The applicant carries the onus of proving the Anti-Doping Rule Violation to the comfortable satisfaction of the Tribunal having regard to the seriousness of the allegation made: *Dos Santos/International Association of Athletic Federations* (CAS 2004/A/383, 27 January 2003); *Korneev and Gbouliev v IOC,* CAS OG 96/003-004. See also *McLaren, R.H., An Overview of Non-analytical Positive and Circumstantial Evidence Cases in Sport* (2006) 16 Marquette Sports Law Review 193.

The Evidence

39 The evidence discloses the following facts. On 14 November 2003 three packets each containing substances later certified to contain derivatives of prohibited substances were found by two members of the Victoria Police Force on a shelf in a wardrobe in a bedroom occupied by the respondent from August 2003 until sometime in November 2003. The address of the house was 57 Lynette Avenue, Warrandyte. The nature and character of his occupation was the subject of evidence and submission to which more detailed reference will be made at a later stage in this Award. One packet was labelled "DECA DURABOL …. Nandrolone deconoate … 200mg/ml …" and contained nandrolone deconoate a derivative of nandrolone. The second packet was labelled "SUSTANON 250 … 10ml and contained a vial labelled 'Testosterone isocaroate … 60mg … Testosterone deconoate … 1000mg" and the third packet was labelled "ILIUM STANABOLIC …20ml" containing a vial labelled 'Olium Stanabolic … 50mg/ml … Stanozolol". Each substance was a substance prohibited under the anti-doping policy of the AWF and the IOC List of Prohibited Substances and Methods and therefore a Prohibited Substance for the purpose of the 2002 ADC.

40 At the time the packets were found the respondent was in Canada coaching an Australian Weightlifting Team at the World Weightlifting Championships. He had left Australia for Canada on 12 November 2003 and returned on or about 22 November 2003. The respondent slept at his father-in-law's house on the night of 11 November 2003.

41 At 2.55pm on 13 November 2003 Murphy's car was intercepted by Police some distance from 57 Lynette Avenue, Warrandyte. His car was searched and a number of illegal drugs were found in it. The Police obtained a search warrant to search the house at Warrandyte and they did so later that day and the next day. It was in the course of the search on 14 November 2003 that they found the three packets on the shelf in the wardrobe in the bedroom used by the respondent. Murphy remained in Police custody from the time he was intercepted on 13 November 2003 until the time his house was searched the next day. There was no time between the time of his apprehension and the time that the house was searched that Murphy had unfettered or any access to the house without the Police being present.

42 Other illegal substances were found throughout Murphy's house and he was later charged and pleaded guilty to a number of drug related offences including trafficking and possessing a drug of dependence namely an anabolic steroid contrary to the *Drug Poisons and Controlled Substances Act 1981* (of the State of Victoria) and possessing a large

quantity of glass vials, anabolic steroid stickers, boxes and an industrial pill pressing machine for the purpose of trafficking in a drug of dependence.

43 Murphy's plea of guilty included pleading guilty to possessing the substances found in the 3 packets found in the bedroom that was used by the respondent. No action was taken by the Police against the respondent. Murphy was charged with seven offences with five of these charges relating to possession and trafficking of various anabolic steroids. Murphy pleaded guilty to all charges including possession of the 3 packets. The Police gave evidence that Murphy appeared to be the only one involved in the possession and trafficking of these substances. There were no fingerprints found on the three packets and no DNA tests were conducted on them as none were requested by ASADA. Murphy was not called by either party to give evidence in this hearing.

44 The respondent had used the bedroom in the house since August 2003 after he separated from his wife. The house was owned or occupied by Keith Murray who was a weightlifter. The nature of Mr Murphy's occupancy of the house was not the subject of any evidence. The hearing proceeded on the basis and the Tribunal accepts that Mr Murphy was the sole and exclusive occupier of the whole of the house and had given permission to the respondent to occupy the bedroom on the first floor of the house without paying any rent and for an indeterminate period of time.

45 At approximately 3:25pm on 14 November 2003, the 3 packets were located by the Police in the upstairs bedroom occupied by the respondent. They were photographed by Police in the position they were found, then identified, labelled and secured and transported to the Collingwood Property Management Unit for safe custody and later analysis. The Police evidence was that the second bedroom was extremely neat in comparison to the rest of the house that was occupied by Murphy. Things were in order, hanging on coat hangers and placed neatly. In the rest of the house, things were laying everywhere. They were piled on top of each other.

46 A photograph was provided to the Tribunal showing the position of the three packets on the shelf in the cupboard as they were located by the Police. The photographs show the three packets positioned on the shelf towards the right hand side when looking at the cupboard and towards the front of the shelf.

47 The forensic evidence concluded that the substance in the packet labelled "DECA DURABOL" contained nandrolone deconoate which is a derivative of nandrolone; the

substance in the packet labelled “SUSTANON 250” contained testosterone propionate, testosterone isocaproate, testosterone deconoate and testosterone phenylproprionate; and the substance in the packet labelled “ILIUM STANABOLIC” contained stanozolol.

48 On 22 August 2006 the respondent was interviewed on behalf of ASADA. He denied any knowledge of the substances saying that he had not seen them before and that he had no knowledge of how they got into the wardrobe.

49 He told the interviewer:

- He had separated from his wife around August 2003. He then lived with Murphy for a couple of months in the end room on the top floor of Murphy's premises in Warrandyte;
- The only people living at Murphy's premises were Murphy and the respondent. The premises were not tidy but the respondent's room was “okay”;
- The respondent kept clothes, a television and a photo of his two children in his bedroom;
- He used the bathroom next to his room but did not use the kitchen. He used to eat his meals at the Hawthorn Weight Lifting Centre, and only used Murphy’s house as somewhere to sleep;
- He had a white Holden station wagon which he parked at Murphy’s house when he went to Canada because there was no room at his father-in-law’s house, or elsewhere, to leave his car.
- He was in the process of moving into his father-in-law’s house before he left for Canada;
- There was a lot of mess but the respondent simply slept at the premises and it was none of his business.
- When he began staying at Murphy's premises his bedroom was not empty there were still things in the bottom of the wardrobe cupboard and on the shelf of the wardrobe;
- He did not know what was on the top shelf of his wardrobe and never placed anything on it;
- He would have gone to the cupboard ‘*basically every day*’;
- The top shelf of the wardrobe was too high for him;
- He had not seen the prohibited substances before and did not have any knowledge as to how they got on the top shelf;
- He had not seen, prior to being shown a photograph during the interview, a container of Metamucil (a form of fibre or laxative) on the shelf.

50 The respondent's father-in-law was called by the applicant. He is and was in 2003, President of the Australian Weightlifting Federation. He gave evidence that:

- The respondent was married to his daughter but they separated in 2003;
- In November 2003, he went to Canada as the International Technical Delegate for the World Weightlifting Championships;
- The respondent was there as well;
- In the time between the respondent's separation from his wife and his trip to Canada, the respondent regularly spent time at his house for dinner and doing laundry;
- He also stayed at his premises on an occasional basis and this was not unusual;
- The respondent had some of his more valuable belongings (such as his Olympic gold medal) at his house, but his general items, such as clothes, were not at his residence as the respondent was not living there;
- There was room for the respondent to park his car either on Springvale Rd (out the front of his house) or in the driveway in front of the garage;
- There was no parking available in his garage;
- There had been no arrangement for the respondent to move into his house from Murphy's house before the trip to Canada. He told the respondent when they were in Canada together to move out of Murphy's house after being informed by phone on 13 November 2003 that Murphy had been taken into Police custody for allegedly being found in possession of banned substances;
- In cross examination he said that between July and November 2003 it was not unusual for the respondent to regularly sleep over at his house, visit for dinner and do the laundry.

The Respondent's evidence

51 The respondent gave evidence by adopting his unsigned written statement in which he repeated much of what he said in the interview on 22 August 2006, and added:

- In 1994 he was suspended from the sport for 2 years for using a prohibited substance.
- At the time the packets were found in the wardrobe he was no longer living there and he was out of the country and had been out of the country for some time.
- He did not use other parts of the house much. He did not have a key to the house and was usually let in by Murphy at night. If Murphy wasn't there the door would be left unlocked and he would lock the door behind him.
- He left the house early each morning and returned late each night 6 days a week; he usually stayed at Murphy's house about 4 nights a week and stayed the other 3 nights at his father in law's house.

- The house was generally very messy “there may or may not have been prohibited substances at the house”; “he was not aware of what products were being kept at the house”; and “he did not ask”.
- He denied he possessed or dealt with any prohibited substances at or during the time he was staying at Murphy’s house.
- Before travelling to Canada on 12 November 2003 he had moved out of Murphy’s house and was in the process of moving his clothes from the house to his father in law’s house. He still had some but not many clothes at Murphy’s house. He was not living at Murphy’s house by the time he left for Canada. Most of his clothes were at his father in law’s house. While he was in Canada he left his car at Murphy’s house as there was no place to park the car long term at his father in law’s house.
- The more likely explanation for the presence of the three packets in the wardrobe was that Murphy had put them there for his own purpose.

52 The respondent was cross examined extensively on his record of interview and on his witness statement. He said:

- He knew Murphy through weightlifting but had not been to his house prior to moving in. Upon entering the house, he cannot recall the state of the rooms on the ground floor. However, he observed the rooms on the second level to be messy.
- When he first entered his room he observed an unmade bed and a cupboard. There were some items including papers on the ground.
- When he first went into the room in August 2003 he saw the shelf in the cupboard, but did not even look as to what was on the top shelf. The shelf was 'pretty high', such that he couldn't see what was on the shelf. However, he didn't need to look as he had sufficient space for his clothing.
- He had seen the container of ‘Metamucil’ before but can not recall when. He did have difficulty seeing the container. He cannot recall how tall the shelf is but it was so high he could not see what was on it.
- His personal possessions were in a basket in the room on 14 November 2003.
- He was not in possession of any drugs for personal use in November 2003.
- The television set that was in the bedroom belonged to his mother-in-law. It had not been moved back to his father-in-law's premises as it was not needed.
- He hung his tracksuit on a hook on the door by grabbing the side of the coat hanger. It was difficult for him to hang up the coat hanger because it was high and he was short – 5 feet tall. It was put to him that when doing this he would be looking in the direction of the shelf, however he maintains that he did not see a 'red material product' also on the shelf.
- On 11 November 2003 (the night before he flew to Canada) he had slept at his father-in-law's house. He had not shifted any belongings out of Murphy's house to

his father-in-law's house between August and November 2003. His day to day possessions were still at Murphy's house.

- He identified Deca Durabol is an anabolic agent, that Nandrolone is a similar agent that enhances performance and that Ilium Stanabolic is an anabolic steroid. Further, he knew about anabolic steroids since at least prior to 2000. He knew that Sustanon is a similar agent and is prohibited because it contains testosterone.
- Given his position as coach of the Australian junior teams and Victorian Institute of Sport he is careful to check premises that he moves into and didn't observe any drugs.
- A more likely explanation for the presence of the drugs in the room was that Murphy was using them for his 'purposes' and had left them there. He couldn't give a reason for suggesting the drugs found in his bedroom were Murphy's or a time when Murphy would have put them in his room.

The Applicant's submission

53 The applicant submitted that the Tribunal should be comfortably satisfied that the respondent was in continued occupation of the second bedroom and the contents of the wardrobe, from about July 2003 until he left for Canada on 12 November 2003, and knew that the three packets were in the wardrobe on the shelf during all or part of that period and that the packets contained prohibited substances.

54 The applicant submitted that the evidence that the respondent was a tidy person and maintained his bedroom in a tidy state compared with the extremely untidy state of the rest of the house occupied by Murphy highlights the continued occupation of the bedroom by the respondent. The applicant relies on the following evidence to support the finding that he still occupied the bedroom when he went to Canada and was not in the process of moving out as he had claimed. The respondent's clothing and personal possessions were found by the Police in that bedroom on 14 November 2003; the clothes that were in the bedroom and cupboard were the respondent's; the respondent's vehicle was parked at the premises; and so many of his clothes were in the wardrobe; his personal possessions included a television set he had borrowed and a photograph of his children in and on a set of drawers near the corner of his room.

55 The applicant submitted that the respondent in his interview with Mr McQuillen on 22 August 2006 demonstrated a consciousness of guilt in his evidence by attempting to minimize the length of time he stayed at Murphy's house and his attempt to elevate his occasional stay at his in-laws premises into evidence that he was not living at Murphy's house. His statement to the interviewer on 22 August 2006 that an arrangement had been made prior to his trip to Canada for him to reside with his in-laws and his statement that he was in the process of shifting out of Murphy's house before he left for Canada was contrary to the evidence given to the Tribunal by his father-in-law and that also demonstrated, according to the applicant, a consciousness of guilt.

56 The applicant submitted that the evidence and the inferences to be drawn from the evidence establish that the prohibited substances were in the cupboard during the respondent's occupancy and that the Tribunal can be comfortably so satisfied. The applicant submits that once it is established that the prohibited substances were located in the wardrobe in the bedroom there are only 3 possibilities as to when and how they could have got there:

(i) They were there when the respondent first occupied the room in August 2003 and were there without his knowledge, but that is improbable given the frequent use of the wardrobe by the respondent and the position of the 3 packets at the front of the shelf in the wardrobe.

(ii) Murphy put them there after the respondent move in but that is a fanciful proposition given that there would appear to be no reason why he would put them there when he had the whole of the rest of the house and garage to store them and that he had no opportunity to put them there before he was apprehended at 2.55pm on 13 November 2003.

(iii) That the prohibited substances were placed in the cupboard by the respondent.

57 The Tribunal should be satisfied that in either scenarios (i) or (ii) the respondent knew of the presence of the substances and by reason of his continued occupation of the room he was knowingly in possession and thereby trafficking in prohibited substances or had stored or held those prohibited substances.

The Respondent's submission

58 The respondent submitted that the evidence does not establish to the high level of comfortable satisfaction required by the Tribunal that the respondent knew that the prohibited substances were in the wardrobe and accordingly he has not committed any offence under the 2002 ADP. The respondent does not have to show that his version is reasonably possible but the applicant has to show that it is reasonably probable and highly so.

59 The respondent submitted:

- He had been co-operative with the authorities.
- The evidence supports the temporary nature of his residence at Murphy's premises. The respondent was simply 'camping' at his house. The respondent left early in the morning, returned late at night, did not leave anything in the fridge, did not eat breakfast there and did not do his laundry there and was in the process of moving back to his in-law's house shortly before he left for Canada on 12 November 2003.

- His 1988 Olympic Gold Medal and some of his belongings were kept at his father-in-law's place at Nunawading where he regularly stayed over, regularly ate and also attended to his laundry.
- It is most likely that the 3 packets were placed there by Murphy on the top shelf before the respondent moved some of his possession into the room or placed there while the respondent was overseas or shortly prior to leaving for overseas. The packets were Murphy's. He pleaded guilty to possessing them. The respondent was not charged with possessing or trafficking the items.
- There is no evidence that there was a lock on the door of the room and that the respondent locked it whenever he was not there. Murphy was free to enter the bedroom at will during the times that the respondent stayed at his in-law's premises and also during the 24 hours between 12 and 13 November 2003 whilst the respondent was overseas.
- Even if the packets were on the shelf as shown in the photo that was tendered in evidence it is not known whether the respondent would have been able to see the entirety of the packets or only part thereof and what was written on the packets, or indeed whether he was even paying attention to these items in a difficult to reach part of his wardrobe which he didn't use.
- The location of the packets on the shelf, the height of the shelf, the respondent's height, and taking into account the "possible sight lines" is consistent with the respondent's statement that until he was shown the photographs on 22 August 2006 he had never seen the 3 subject items and didn't know the packets were in the wardrobe.
- The respondent suggested two possibilities: the three packets were either there before the respondent moved in and he just never saw them; or the three packets were put there in the window of time between 11 and 14 November 2003. If one was to speculate it is more likely to be the first proposition.
- The respondent made no admissions. The items do not contain any fingerprints and have not been tested by the applicant to see if they contained traces of the respondent's DNA. The absence of the respondent's fingerprints or DNA on the drugs means there is no physical link (and inference of knowledge) between the drugs and the respondent. The case against the respondent is circumstantial.
- He did not use the top shelf of the wardrobe and did not own any of the items on the top shelf and had difficulty reaching the top shelf as it was too high and he couldn't put anything there.
- Occupation of the bedroom for the 3 month period July, August & November 2003 does not necessary mean that he exercised domain or control exclusively over all parts of the room.
- The respondent did not exercise exclusive domain or control over the bedroom and certainly not over the top shelf of the wardrobe.
- The fact that the room occupied by the respondent was tidy compared with the remainder of the property which was messy means and weighs little so far as the

respondent's knowledge of the items is concerned or the likelihood of him being in possession of them and when viewed in conjunction with all of the evidence does not elevate the evidence above the threshold of the high standard of proof required to be met by the applicant; and

- The respondent has led no evidence demonstrating that even if the respondent knew he was in "possession" of the 3 items he was in "possession" of such items for the purposes other than "personal use".

60 The respondent submitted that the Application should be dismissed with costs and that the Tribunal direct the applicant to remove the respondent's name from the Register of Findings.

The failure to call Murphy

61 Murphy was not called to give evidence by either of the parties and no explanation was given for their failure or inability to call him. The respondent invited the Tribunal to draw an inference in favour of the respondent that Murphy's evidence would not have assisted the applicant's case by reason of the applicant not calling Murphy without explanation for not doing so. Where a party is able to call a witness who might be presumed to provide evidence in support of that party and fails to do so without explanation may lead to an inference against that party who would be expected to call or rely upon that evidence: *Jones v Dunkel* (1959) 101 CLR 298 (HCA). In appropriate circumstances a tribunal might infer that the uncalled evidence would not have assisted that party's case and any proper inferences which are open on the evidence called could be more readily drawn against the party failing to call the witness.

62 The Tribunal considers that it was equally open to the respondent to call Murphy in the absence of any explanation for not calling him. The respondent's case is that Murphy pleaded guilty to possessing a number of prohibited substances including the substances contained in the three packets found on the shelf in the wardrobe of the room occupied by the respondent.

63 Accordingly, the Tribunal is entitled to draw the inference that Murphy's evidence would not have assisted either the applicant or the respondent and the Tribunal can be more comfortable in drawing adverse inferences against either party on issues that Murphy could have given evidence about, providing those inferences are open on the evidence.

Disposition

64 The Tribunal concludes that the respondent was the sole occupier of the bedroom on the first floor of the house owned or occupied by Murphy from sometime in August 2003 until sometime after 14 November 2003. The Tribunal finds that contrary to the evidence he gave to the Tribunal that he was in the process of moving out of Murphy's house before he left for Canada, he only moved out of that bedroom when he returned from Canada in November 2003 after his father-in-law advised him to move out when he was informed that Murphy was arrested for being in possession of drugs that were found in Murphy's house.

65 The Tribunal considers that there were sufficient items of his clothing and personal effects in the bedroom, including photographs of his children, to conclude that he had not moved out. The Tribunal accepts that the respondent had some items of his clothing and other personal items at his father-in-law's house but it is probable that those items were left there not because he was moving out of Murphy's house but because he did not need them at Murphy's house whilst he was using the bedroom at Murphy's house. The Tribunal accepts the respondent's evidence that he was not fully living at Murphy's house and that he used Murphy's house only to sleep and to shower there between August 2003 and 14 November 2003 and it is probable that the respondent was using Murphy's house merely to have somewhere to sleep. The Tribunal finds, however, that whilst the respondent was using the bedroom for that purpose no-one else occupied the room. The evidence comparing the tidy state of the bedroom with the rest of the house which was extremely untidy supports that finding. The Tribunal notes that the door to the room did not have a lock on it and that if any other person had wanted to, they could have easily gained access to the room. There is no evidence however that Murphy ever went into the bedroom or had any need to.

66 A critical question in this hearing is when the three packets were placed on the shelf in the wardrobe. A subsidiary but less critical question is who put them there?

67 The respondent's evidence is that he had not seen the three packets before he was shown photographs of them by the investigator on 22 August 2006 and did not have any knowledge as to how they got onto the shelf.

68 The respondent submits that there are two reasonable hypotheses consistent with his innocence. The first is that the three packets were on the shelf before he moved into the bedroom and he never saw them. Secondly, they were put there after he left the house on

11 November 2003 to stay with his father-in-law just prior to going to Canada and the 14th November 2003 when they were found by the Police.

69 The Tribunal deals with the second hypothesis first, namely that the three packets were put there between 11 November 2003 and 14 November 2003. The respondent gave evidence that the only people living at Murphy's house were Murphy and the respondent. There is no evidence of any other person or persons frequenting Murphy's house at any relevant time. Accordingly, it is reasonable to conclude that the only person who was likely to have put the three packets on the shelf between those dates was Murphy. The Tribunal rejects that as a reasonable hypothesis or probability. There appears to be no basis for Murphy to have any reason or motive to put the three packets in the respondent's bedroom. The respondent gave no evidence of any possible reason. On the contrary, having regard to the presence of prohibited substances elsewhere in Murphy's house and the lack of any attempt to hide those drugs, it is more probable that Murphy would have been kept them somewhere in that part of Murphy's house that was not occupied by the respondent. The Tribunal finds that it is unlikely that Murphy put the 3 packets on the shelf after 11 November 2003. The Tribunal considers that it is more able to draw that inference because of the respondent's failure to call Murphy on that issue without explaining why Murphy wasn't called. The fact that Murphy pleaded guilty to possessing a number of prohibited substances including the contents of the three packets does not provide any evidence of when the three packets were placed on the shelf in the wardrobe of the respondent's bedroom. Further, the Tribunal finds that, for the purpose of the 2002 ADP it is possible for a person to have joint possession of a substance because the power or ability to have custody or control of an item does not have to be exclusive power or ability.

70 Regarding the first hypothesis that the packets were there before the respondent moved into the bedroom and that he simply did not see them, the respondent submitted that the location of the items on the shelf, the height of the shelf, the respondent's height (5 feet), when taking into account the possible sight lines, is consistent with the respondent's evidence that until he was shown the photographs on 22 August 2006 he had never seen the packets. The respondent further submits that his uncontradicted evidence was that he had not used the top shelf of the wardrobe and did not own any of the other items on the shelf, namely some plastic, a container of 'Metamucil', and that the respondent had difficulty in reaching the top shelf as it was too high and he couldn't put anything there. The respondent further submitted that even if he had seen what might have appeared to have been 3 packets it is not known whether he would have been able to see the entirety of the packets or only part of the packets and what was written on the packets.

71 The Tribunal accepts that the three packets were on the shelf in the wardrobe in the respondent's bedroom in the position shown in the photographs taken by the Police on 14 November 2003 and tendered in evidence before the Tribunal and that it is likely that they had been there for some time in that position. The Tribunal cannot determine how long they had been there. However, if Murphy did not put them there after 12 November 2003, the packets were either there when the respondent just moved in (as the respondent suggested was the more likely situation) or the respondent put them there himself, in the absence of evidence, that anyone else lived, used, or came to the house. If the packets were on the shelf, the question remains, did the respondent see them and know that they contained prohibited substances?

72 One photograph shows the wardrobe with the cupboard doors open. The three packets containing the prohibited substances are shown on the right hand side of the shelf at or near the front edge of the shelf when facing the wardrobe. The shelf also has on it a red bag in the left hand corner of the shelf and some plastic in or about the centre of the shelf. To the right of the plastic when facing the cupboard is the container of "Metamucil" and then there is a large space to the right of that container, and then the three packets containing the prohibited substances. They could be clearly seen in the photograph that appears to be taken some feet from the wardrobe.

73 The Tribunal was not assisted by the absence of any evidence of measurements or dimensions of the wardrobe, or of the packets, nor, importantly, the height of the shelf above the floor or the distance or height of the camera. The only evidence of any dimension was the respondent's height, namely 5 feet tall. The Tribunal was invited to look at the photographs and draw whatever conclusions it thought appropriate about those matters from the photographs. The Tribunal found that approach unhelpful. The Police witnesses who gave evidence could have been asked questions relating to the height of the shelf and the possible sight lines going to the issue as to whether or not, given the respondent's height, he could or would have been able to see the packets that he says he could see but no such questions were asked.

74 The Tribunal, having regard to the photographs, takes into account the position of the three packets on the shelf, the relative height of the respondent's clothes hanging on the rail in the wardrobe, in particular a t-shirt, in relation to the height of the shelf above the floor and concludes that the respondent's head would probably be below the height of the hanging rail but not much below it. The Tribunal also takes into account the fact that in the photograph the respondent's Australian track suit is hanging on a hanger that has been placed on a hook inside the left hand door of the cupboard and that the hook appears to be

secured to the door approximately 150mm above the shelf. These estimates are imprecise but in the absence of any evidence of measurement and in response to the parties' invitation to make observations based on the photographs the Tribunal is able to form some views. The Tribunal finds that the respondent, despite his stated lack of height, would have been able to see the packets on the shelf where the Police photographed them when he was close to the wardrobe and certainly if he stepped back from the wardrobe one or two steps.

75 The three packets were clearly labelled. In cross-examination he was able to identify that "DECA DURABOL" is an anabolic agent, that "Nandrolone" is a similar agent that enhances performance and that "ILIUM STANABOLIC" is an anabolic steroid.

76 The Tribunal concludes that if the three packets were on the shelf when he first occupied the bedroom in August 2003, the respondent would have seen the three packets and would have known that they contained substances prohibited by the 2002 ADP.

77 The Tribunal finds that the respondent had custody or control of the three packets on 14 November 2003 and since August 2003. He occupied the bedroom exclusively from August 2003 and accordingly had custody or control (possession) of the room and its contents in which the prohibited substances were found. The respondent was a weightlifting coach at the highest level occupying a room in a house owned or occupied by a weightlifter. If the packets belonged to Murphy the respondent had the power and ability to direct Murphy to get rid of them or to remove them from the bedroom occupied by the respondent. The respondent was able in any event to remove the packets himself and put them beyond his custody and control.

78 There is no evidence, and the Tribunal makes no finding, that the respondent used the substances found on the shelf in his bedroom or that he was supplying, distributing, offering, selling, exchanging or brokering the prohibited substances. The Tribunal's decision is based on a finding that the respondent knew that the packets were on the shelf in the wardrobe in his bedroom, that he knew the packets contained prohibited substances, and that he had the power and ability to remove them or have them removed from his possession, and accordingly was possessing them and holding them.

79 The Tribunal therefore determines that the respondent committed a doping offence of trafficking by possessing and holding prohibited substances contrary to the 2002 ADP.

80 Accordingly, as this is the respondent's second offence, the Tribunal is required to impose the mandatory sanction of being ineligible for life from being selected to represent Australia in international competition, from competing in any events and competitions conducted by or under the auspices of the AWF, from receiving direct or indirect funding assistance from the AWF and from holding any position within the AWF.

Costs

81 Rule 64.5 of the Code of Sports-related Arbitration provides:

> "*The arbitral award shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the award shall grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties.*"

82 It is now established in CAS jurisdiction in Australia that the effect of the provision is to recognise that as a general rule the successful party is entitled to a contribution towards its legal costs and expenses incurred in connection with the proceedings subject to the Tribunal retaining a wide and unfettered discretion as to whether in all of the circumstances an order should be made in the particular case and if so as to the amount of the order taking into account in addition to all relevant factors the outcome of the proceedings, the conduct and the financial resources of the parties: see *Austin v Australian Canoeing Inc* CAS 2004/A/599, 15 June 2004.

83 The award of costs to a successful party is made not to punish the unsuccessful party but to compensate the successful party against the expense to which that party has been put by reason of the proceeding: *King v Australian Canoeing Inc* CAS 2004/A/585, 6 April 2004. Justice in many cases can be done by adopting a broad brush approach to the valuation of the competing interests and often it will not be possible to determine the amount of the contribution with regard to any technical analysis: *Austin*.

84 The Tribunal takes notes of the view of the CAS sitting in its appellate jurisdiction in *Cassells v Australian Shooting Association* CAS 2004/A/614, 29 September 2004, at para 30 that:

> *"We think that any award of costs … should take into account that there is no 'scale' of fees in this jurisdiction, and that it is a jurisdiction that should balance the rights of affected athletes and sporting administrators to come to CAS without the*

fear that, should they not be successful, they will be penalised by an onerous award of costs against them. CAS is, and ought to be seen as, a forum that is available to athletes and sport administrators to resolve disputes in an efficient, economical and timely manner. At the same time, successful parties should receive compensation on account of their reasonable costs. The question of reasonableness should be assessed in the light of all relevant circumstances, including the fees charged to them by the practitioners, the ability of the unsuccessful party to pay those fees, … the circumstances giving rise to the appeal, and the relative time and expense that was devoted by the parties to successful and unsuccessful argument."

85 The Tribunal also takes into account what the full panel of CAS said in *French v Australian Sports Commission and Cycling Australia* CAS 2004/A/651, 6 September 2005:

"*14 The Panel needs to be mindful of the role of CAS in hearing and determining sports related disciplinary disputes. The Secretary General of TAS/CAS in the preface to the third volume of the Digest of Awards [Matthieu Reeb, ed. Digest of CAS Awards, Vol III (The Haig: Kluwer Law International)], states at p.xxvi that:*

'… an international court like the CAS, which can offer specialist knowledge, low cost and rapid action, provides a means of resolving sports disputes adopted to the specific needs of the international sporting community'.

15 The failure to maintain low cost and rapid procedure could become the undoing of many positive developments associated with CAS …"

ASADA's Costs

86 ASADA claims total costs inclusive of issuing fees, professional fees incurred by its legal representatives, disbursements and GST, in the sum of $78,704.71.

The Respondent's Costs

87 The respondent claims total costs inclusive of issuing fees, professional fees incurred by its legal representatives, disbursements and GST, in the sum of $72,015.00.

Outcome of the Proceeding

88 The applicant has been successful in establishing that the respondent committed the Anti-doping Violation alleged. The applicant was also successful in two applications made by

the respondent during the course of the hearing, first that the allegation against him was bad in law and secondly after the applicant had concluded its evidence that he had no case to answer.

89 The first application occupied approximately half of the first day's hearing. The applicant closed its case at approximately 1.00pm on the second day of the hearing after which the respondent announced that he wished to make his "no-case" submission. The hearing was adjourned at about 1.30pm with directions that the applicant and respondent put their submissions in writing and the further hearing of the case was adjourned to the following week. The Tribunal ruled that the respondent had a case to answer and the hearing recommenced on the third day and occupied most of the third day.

90 In those circumstances had the respondent not made his unsuccessful first preliminary application it is likely that the evidence that was led on the second day could have been completed on the first day of the hearing and the remaining evidence completed on the second day of the hearing thereby saving one hearing day.

91 However it is not necessary to make any adjustment on that account as the applicant has been successful overall.

Conduct of the Parties

92 There is no conduct of any of the parties that should affect the Tribunal's exercise of its discretion under Rule 65.4 of the Code.

Financial Resources of the Parties

93 There is a very clear imbalance in the respective financial resources of the parties. The respondent works as a casual machine operator assistant on a low after tax income. He has no assets. He has sworn an affidavit to that effect. There was no evidence of the respondent's income, expenses, liabilities, or ability to raise any money to pay a costs order if one was made against him. However, the Tribunal is prepared to accept that the respondent has very little resources available to meet a sizeable costs order. The applicant is a statutory authority and is funded by the Commonwealth of Australia which according to evidence tendered on behalf of the respondent has an annual budget of several million dollars. That is no reason however to deprive the successful applicant of a contribution to its costs. The Tribunal however adopts the observations of the CAS Panel in *Austin v Australian Canoeing Inc* that the discretionary power should not be used as an instrument

of oppression so that compliance with a costs award becomes a heavy burden to be borne long after the appeal has been determined.

Disposition of Costs

94 Taking all of those matters into account the Tribunal considers that it is a fair balance between the competing interests of the applicant and respondent to order that the respondent contributes to the applicant's costs the sum of $7000 within 60 days of this award unless the parties can come to an arrangement for payment to be made on terms acceptable to both of them.

The Arbitration Costs

95 Rule 64.4 of the Code requires the CAS Court Office, upon conclusion of the proceedings, to determine the final amount of the costs of the arbitration, to include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and a contribution towards the costs of witnesses, experts and interpreters. Rule 64.5 of the Code makes provision for the apportionment of the costs between the parties, if the Tribunal thinks it is appropriate to make such an order. In general, the losing party will bear the costs of the arbitration. In the present case, the applicant has been successful but, in view of the Respondent's financial situation, the Tribunal considers it reasonable to order that the Applicant pays 50% and the Respondent 50% of the costs of the arbitration in an amount which will be notified to them by the CAS Court Office.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The respondent has committed a doping offence contrary to clause 3.2(a) of the 2002 Australian Weightlifting Federation Anti-Doping Policy by being knowingly involved in trafficking constituted by his possessing and holding, in November 2003, prohibited substances, namely anabolic and androgenic steroidal agents.

2. The respondent is, for the period of his life, banned from selection to represent Australia in international competition, from competing in any events and competitions conducted by or under the auspices of the Australian Weightlifting Federation, from receiving direct or indirect funding assistance from the Australian Weightlifting Federation and from holding any position within the Australian Weightlifting Federation.

3. The period of ineligibility is to commence from 14 November 2003 the date of the offence.

4. The respondent is to contribute the sum of $7000 towards the applicant's costs to be paid within 60 days of this Award unless the parties come to an arrangement for payment to be made on terms acceptable to them.

5. The costs of the arbitration, to be determined by the CAS Court Office and served on the parties in due course, shall be borne by the parties in the following proportions: 50% of the costs by the Appellant and 50% of the costs by the Respondent.

6. This Award and the annexed Partial Awards be made public.

Melbourne, 9 June 2007

THE COURT OF ARBITRATION FOR SPORT

Mr Henry **Jolson** QC
Sole Arbitrator