IN THE COURT OF ARBITRATION FOR SPORT

OCEANIA REGISTRY

AT SYDNEY **Ref. A1/2013**

IN THE MATTER OF

THE AUSTRALIAN SPORTS ANTI-DOPING AUTHORITY

on behalf of

ATHLETICS AUSTRALIA

and

JARROD BANNISTER

AWARD

Introduction

1. These proceedings arise from an Application by Australian Sports Anti-Doping Authority ("ASADA"), on behalf of Athletics Australia ("AA") dated 25 May 2013 to the Oceania Registry of the Court of Arbitration for Sport ("CAS") seeking sanctions against Mr Jarrod Bannister ("the Athlete") in respect of alleged breaches by the Athlete of AA's Anti-Doping Policy ("the Policy").

2. It is common ground between the parties, and, indeed, indisputable that ASADA has authority to bring the Application on behalf of AA.

3. ASADA and AA (together called "the Applicants") alleged, in their Application, that the Athlete has breached Articles 6.4 and 6.5 of the Policy. AA is a signatory to the World Anti-Doping Code and the Policy, as is required, is substantially identical to the World Anti-Doping Code ("the WADC"). Article 6.4 of the Policy concerns what is known as an Athlete Whereabouts Violation and Article 6.5 is concerned with Tampering or Attempting Tampering of any part of Doping Control (as those terms are defined in the Policy).

4. In the hearing before CAS which occurred on 21 June 2013 the Applicants confirmed, in circumstances more fully outlined below, that they were not pressing the alleged breach of Article 6.5 dealing with Tampering with any part of the Doping Control so that the only issue which requires determination is the allegation made in respect of Article 6.4 of the Policy, namely the Athlete Whereabouts Violation.

5. Shortly prior to the CAS hearing on 21 June 2013 the Athlete informed CAS and the Applicants that he admitted commission of the Athlete

Whereabouts Violation and it was on this basis that the Applicants withdrew their Tampering allegation.

6. Accordingly, the only issue which arose for determination at the CAS hearing on 21 June 2013 concerned the sanction to be imposed in respect of the admitted breach of Article 6.4 of the Policy.

7. Article 19.3.3 of the Policy deals with the sanctions applicable to breaches of Article 6.4. Relevantly it states that the period of ineligibility shall be at a minimum one year and at a maximum two years based on the Athlete's degree of fault.

8. The comment to Article 19.3.3 which forms part of the Policy and is to be used to interpret the Policy (see Article 26.2) states:-

> *"The sanction under Article 19.3.3 shall be two years where all three Filing Failures or Missed Tests are inexcusable. Otherwise, the sanction shall be assessed in the range of two years to one year, based on the circumstances of the case."*

9. Although not originally sought in the Application, Mr Ben Ihle of counsel who appeared for the Applicants at the hearing indicated at the hearing that as a result of an "eleventh hour instruction" orders were also sought pursuant to Article 19.9 of the Policy requiring the Athlete to repay prize money of $500.00 received by the Athlete by reason of competing in an athletics Grand Prix event held in Melbourne in April 2013, that being an event which post-dated notification by ASADA to the Athlete of the alleged breaches of the Policy.

10. Mr Lynch of counsel who appeared on behalf of the Athlete at the hearing did not oppose this additional relief being sought or apply for any adjournment in order to deal with the matter. I gave liberty to either party to make further submissions in respect of this matter, if they saw fit, at the

conclusion of the hearing in addition to the oral submissions which were made in respect of it at the hearing.

11. During the course of the hearing, Mr Lynch, on behalf of the Athlete, fairly and properly indicated that the Athlete was not relying upon Article 19.6.2 of the Policy which provides for the reduction of the period of ineligibility where there is "No Significant Fault or Negligence" on behalf of the Athlete. Rather, he indicated that the Athlete's case was confined to submissions about the "degree of fault" for the purposes of Article 19.3.3.

12. Further, as will be explained in a little more detail below, the alleged breach of Article 6.4 was said in the Application to arise out of three Missed Tests which occurred on 30 May 2012, 31 July 2012 and 17 September 2012 respectively. By admitting to the breach of Article 6.4 of the Policy, the Athlete necessarily admitted that there had been Missed Tests on each of those dates. However, the thrust of the Athlete's case at the hearing was that the Missed Test on 31 July 2012 was not "inexcusable". It is to be remembered that the comment to Article 19.3.3 indicates that if all three Missed Tests are "inexcusable" then the mandatory sanction is a period of two years ineligibility. It is only if the reasons for missing one of the tests is not "inexcusable" that there is a discretion to impose a lesser sanction of somewhere between one and two years ineligibility.

13. Therefore, the issues to be determined by me are as follows:-

    (a) whether the Missed Test on 31 July 2012 was not "inexcusable";

    (b) if the Missed Test was not "inexcusable" what sanction should be imposed for the purposes of Article 19.3.3; and

(c) irrespective of the determination of issue (b) above, whether the $500 prize money received by the Athlete by reason of his participation in the Grand Prix event in April 2013 should be ordered to be repaid to AA pursuant to Article 19.9 of the Policy.

14. Before attempting to resolve these issues, it is necessary to set out some details of the procedural aspects of this case and my relevant findings of fact.

Commencement of Proceedings and Jurisdiction

15. ASADA issued to the Athlete an Infraction Notice dated 1 March 2013 in respect of the alleged breaches of the Policy which were the subject of the Application already referred to. The Infraction Notice informed the Athlete of his right to have the allegations heard by CAS pursuant to Article 17.5.2 of the Policy. The Athlete exercised that right.

16. Consequently, the Applicants filed the Application referred to above.

17. Subsequently, following a directions hearing, the parties agreed, in June 2013, to an Order of Procedure (the "O of P") to regulate the proceedings before CAS in respect of the allegations contained in the Application.

18. The parties agreed that CAS, for the purposes of the hearing, would be comprise by me as Sole Arbitrator and that the I would arbitrate on the dispute and render an Award in conformity with the agreement between the parties to submit their dispute for arbitration before CAS (see paragraph 1 and 8 of the O of P).

19. The parties also expressly acknowledged in the O of P the jurisdiction of CAS to hear and determine the dispute in its Ordinary Division (see paragraph 2 of the O of P).

20. The parties also agreed in the O of P that the arbitration would be conducted by CAS according to the Policy and the Code of Sports-Related Arbitration ("the Code") and agreed to a timetable in respect of the lodgement of written submissions on evidence of the hearing. As stated, the hearing was agreed to take place on 21 June 2013 and occurred on that date. At the conclusion of the hearing, I informed the parties that I would reserve my decision and publish my Award in due course. This document constitutes that Award.

The Hearing before CAS

21. In accordance with the agreed timetable, each of the parties filed evidence and written submissions with CAS prior to the hearing. Details of the written evidence filed on behalf of each of the parties is contained in the document prepared by the CAS clerk, Ms Alice Dillon entitled "Exhibit and MFI List for Trial: CAS Bannister" which is incorporated by reference herein. I have read and fully considered all that evidence. In addition, Mr Nathan Sims, the High Performance Operations Manager for AA, Mr Joel Milburn, an Australian athlete, and the Athlete all gave oral evidence (and were cross-examined) at the hearing. That oral evidence is accurately recorded in the transcript which was taken of the hearing. I have also fully considered that evidence and incorporate by reference the Transcript.

22. Prior to the hearing ASADA lodged written submissions dated 11 June 2013 to which the Athlete responded on 19 June 2013. ASADA filed submissions in response to the Athlete's submissions on 20 June 2013. Additionally, each of the parties made very helpful detailed oral submissions during the course of the hearing and, pursuant to leave granted by me, ASADA filed two further sets of submissions dated 24 June 2013 and 5 Jul 2013 and the Athlete filed a further submission entitled "Further

Comparative Case as to the Tariff of Ineligibility" subsequent to the conclusion of the oral hearing. I have read and considered all such submissions. I do not propose to deal in this Award expressly with all of the submissions which have been made but, as stated, they have been fully considered and I propose to only refer to such submissions to the extent necessary to explain the basis for this Award.

Facts

23. The Athlete is a highly accomplished javelin thrower who competed for Australia in the 2012 London Olympics. As an elite athlete, the Athlete was required by the Policy to comply with the Athlete Whereabouts Policy which is incorporated by reference into the Policy. In this regard I accept the submissions filed by the Applicants dated 24 June 2013.

24. Pursuant to clause 3.6 of the Athlete Whereabouts Policy ("the AWP") the Athlete, as a member of ASADA's Registered Testing Pool ("RTP") was required to advise ASADA of one specific nominated hour between the hours of 6.00am and 11.00pm each day when he would be available and accessible for testing at a specific location. Failure of an athlete to be available as the specified location at the specified time could lead a Whereabouts Failure being declared against him (see Article 5 of the AWP).

25. Article 6.4 of the Policy provides that where there are three Missed Tests within an 18 month period as determined by the relevant Anti-Doping Organisation (in this case, ASADA) then that shall constitute an Anti-Doping Rule Violation ("ADRV"). Appendix 1 to the Policy defines "Missed Test" to mean a failure by an athlete to be available for testing on any given day at the location and time specified in a 60 minute time slot

identified in his Whereabouts Information for that day, in accordance with the Rules of ASADA.

26. The AWP constitutes those ASADA Rules and sets out in considerable detail the circumstances in which an athlete may be declared to have committed Missed Test (see, especially, Article 6.1 and following of the AWP).

27. By reason of Article 6.1(c) of the AWP one of the requirements for declaring a Missed Test is that during the specified one hour time spot, the Doping Control Officer ("the DCO") did what was reasonable in the circumstances (that is given the nature of the specified location) to try to locate the Athlete. The comment to Article 6.1(c) explains that once the DCO has arrived at the location specified to the one hour time slot, if the Athlete cannot be located immediately then the DCO should remain at that location for whatever time is left of the one hour time slot and during that remaining time he/she should do what is reasonable in the circumstances to try to locate the athlete.

28. What is "reasonable" for the DCO to do depends, of course, on the nature and extent of the Whereabouts Filing Information which has been provided by the Athlete.

29. In this regard Article 3.5 of the AWP is of significance. Relevantly Article 3.5(d) requires the Athlete to provide the following information:-

> *"For each day ... the full address of the place the athlete will be residing (eg home, temporary lodgings,* ***hotel*** *etc)."* (emphasis added)

30. Article 3.6 of the AWP specifies that the Athlete's Whereabouts File must also include for each relevant day a specific nominated hour between the

hours of 6.00am and 11.00pm each day where the Athlete will be available and accessible for Testing at a specific location.

31. Although this is not a case where there is an allegation of a Whereabouts Filing Failure, the provisions of Article 4.1 of the AWP which deal with a Filing Failure are relevant. Article 4.1 sets out the only circumstances in which an Athlete may be declared to have committed such a failure. The comments to Article 4.1 (the precise legal significance of which is questionable in the absence in the AWP of a provision similar to Article 26.2 of the Policy but which are certainly intended to provide guidance to an athlete) suggests that a Final Failure may occur where the Athlete "includes information ... insufficient to enable ASADA to locate him/her for testing (eg, 'cycling the streets of Melbourne')".

32. Whilst these provisions of the AWP are not directly relevant because the Athlete has admitted the Missed Test and because no Filing Failure as such has been alleged they are relevant for the purposes of considering whether, on the facts of this case, the Missed Test on 13 July 2012 was "inexcusable".

33. The Application relies on three Missed Tests on 30 May 2012, 13 July 2012 and 17 September 2012. By reason of his admission of breach of Article 6.4 and the submissions made before me confining his "defence" to be Missed Test of 13 July 2012 the Athlete has acknowledged that the Missed Tests on 30 May 2012 and 17 September 2012 were "inexcusable". In those circumstances it is not necessary to set out in detail the facts relating to those Missed Tests. Rather, the relevant factual enquiry is in respect of the Missed Test on 13 July 2012.

34. Prior to the London Olympics, a number of Australian Athletes who were to compete at those Olympics were in Europe for training and/or to

compete in lead-up events to the Olympic Games. The uncontradicted evidence is that AA had made arrangements for such athletes to stay at a hotel in Cologne, Germany (the Ameron hotel) which was used by AA as its European team base. The purpose of having such a base was, according to Mr Lynch, to provide the athletes with medical support and a team environment for those that are overseas for extended periods of time before major championships. Mr Lynch's unchallenged evidence was that AA had an arrangement with the hotel where he was the booking point and athletes let him know the bookings that they would require for an hotel. He would record the relevant details in a spreadsheet and from time to time when he had been informed by a sufficient number of athletes that they wished to make bookings, he would make a booking with the hotel on a "batch system" basis as per his spreadsheet.

35. Relevantly the spreadsheets indicate that the Athlete informed Mr Lynch that he would be arriving at the Ameron Hotel in Cologne, Germany ("the Cologne hotel") on 2 July 2012 and was checking out on 12 July 2012. The spreadsheet also indicated that Mr Joel Milburn wished to stay at the hotel from 3 July to 15 July 2012.

36. It appears that, in order to save on costs for the athletes, Mr Lynch adopted a practice, in the booking process, of putting athletes with similar accommodation date requests together in twin share rooms if they indicated sharing a room was acceptable to them.

37. Notwithstanding the information recorded on Mr Lynch's spreadsheets, it appears that Mr Milburn arrived at the hotel in Cologne prior to Mr Bannister. Mr Milburn checked in on 2 July 2012 whilst Mr Bannister arrived the following day, 3 July 2012.

38. According to Mr Milburn's unchallenged evidence he booked into the room (Room 502) on 2 July 2012 and was somewhat surprised and disappointed when Mr Bannister turned up the next day to share his room. His disappointment was because he hoped to have a room to himself but it appears that Mr Bannister was placed in the same room as Mr Milburn pursuant to the "twin share" procedure to which I have referred.

39. Mr Bannister's unchallenged evidence is that when he arrived at the hotel on 3 July 2012 he attended at reception and gave his name. He was then given a key or security card enabling him access to the lifts and to Mr Milburn's room.

40. Thus, the situation, so far as the hotel was aware, based on information received by it from Mr Lynch, was that Mr Bannister would be staying in Mr Milburn's room until 12 July 2012. Mr Milburn's room was Room 502. However, according to the evidence of the General Manager of the hotel (Ms Nicole Souter) the system of record keeping at the hotel, whilst recording that two people were occupying Room 502 for the period of 3 July 2012 until 12 July 2012, did not record the name of the second person occupying that room. Rather it only recorded the name of the person who had first booked in, Mr Milburn. The hotel's policy where two people were sharing a room was that it took one signature/registration form at check in for the person who checked in first and did not require the second person to fill in and sign a registration form. Nor, it seems, did the hotel keep a record of when the second person actually left the hotel.

41. Accordingly, unless specifically informed of the room number in which Mr Bannister was staying, a person seeking Mr Bannister at the hotel would not, except by serendipity, be able to determine, by enquiry at the hotel reception, the relevant room number for Mr Bannister.

42. The combination of the practices and conduct detailed so far means that at the relevant time the hotel records only revealed Mr Bannister staying at the hotel until 12 July but did not indicate in which room he was staying nor when in fact he departed from the hotel.

43. Notwithstanding the information contained in Mr Lynch's spreadsheet and the hotel records, it is now common ground between the parties, consistently with the unchallenged evidence of both Mr Bannister and Mr Milburn, that, in fact, Mr Bannister was occupying room 502 at the hotel with Mr Milburn at least up to and including 13 July 2012.

44. The Whereabouts Filing procedures adopted by ASADA enabled athletes to update very quickly details of their location by use of the internet. The entries made by athletes (or others on their behalf) indicating their location were logged on a document entitled "Athlete Activity Report" and it is common ground that the relevant entry on the Athlete's Activity Report for 13 July 2012 recorded his location, for the purposes of possible drug testing, as the Ameron Hotel in Cologne, Germany. However, the entries did not contain any further detail. They did not indicate the room number at the hotel in which the Athlete was staying nor did they indicate a particular part of the hotel, such as the lobby, where the Athlete may be found at the nominated hour for the purposes of drug testing. This is in contrast, for instance, to the entries made by the Athlete on his Activity Report when he went to London for the Olympic Games. Then his Activity Report described with much more precision his location (see, eg, entry for August 3 2012 – "Village level 7 21b"). However the Athlete says, and I accept, that this increased level of detail was put in by him at the specific instruction of the Team Manager in London.

45. The unchallenged evidence of Ms Angelika Wiesmann who was a Doping Control Officer indicates that she attended at the Cologne Hotel on 13 July 2012 to test the Athlete. Mr Bannister had nominated his one hour time slot window as between 6.00am and 7.00am. Ms Wiesmann arrived at the hotel at 6.00am on 13 July 2012. She asked at hotel reception for the room number of Mr Bannister. The receptionist told her that he remembered Mr Bannister, however, that he had already checked out. It appears that the receptionist provided this information on the basis of the information in the hotel records which, in turn, was derived from Mr Lynch, namely that Mr Bannister was scheduled to check out on 12 July 2012. There appears to have been no actual record kept of whether, in fact, Mr Bannister had checked out or which room he was occupying during his stay.

46. Ms Wiesmann and her colleague then waited in the lobby until 7.00am but did not see Mr Bannister. This is not surprising as Mr Bannister's evidence is that he was in Room 5002 at that time, being unaware of the presence of the Doping Control Officer.

47. It is in these circumstances that the Athlete "missed" the doping control test on 13 July 2012. It is apparent that there are several or multiple causes for missing the test. First, there was the failure of the Athlete to inform Mr Lynch and/or the hotel that he was staying beyond 12 July 2012. Secondly, there was the failure by the hotel to record either the room in which Mr Bannister was staying at the hotel or to have a system providing evidence of when a person such as Mr Bannister staying in a room with another athlete pursuant to AA's "twin share" policy had, in fact, checked out. Thirdly, apart from the material in the AWP to which I have already referred, the Athlete does not appear to have ever been expressly informed by AA or ASADA that, when he was staying in an hotel, he should include details not only of the name and address of that hotel but also of the

specific room number in which he was staying or the precise location in the hotel at which he could be found at the nominated testing hour.

48. The Applicants were somewhat critical, in their submissions, of the Athlete's failure to inform Mr Lynch and/or the hotel that he was staying beyond 12 July 2012. Whether or not there is substance in that criticism is unnecessary to decide because in my view it has no causal significance. Even if Mr Lynch and/or the hotel had been so informed, the hotel would still have had no record of the room in which Mr Bannister was staying and when the doping control officers arrived on 13 July, although they may not have been told that Mr Bannister had checked out, reception would not have been able to tell those officers which room Mr Bannister was in or how to contact him. The missed test would thus have still have occurred.

49. It is in this factual matrix that I need to determine whether or not the missed test on 13 July 2012 was not "inexcusable" so as to permit, if otherwise justified, the imposition of a sanction of less than two years ineligibility.

Law

50. Neither the Policy, nor the WADC nor, as far as I am aware, any previous decisions of CAS or of any other disciplinary tribunal to which I have been referred, cast any light on the interpretation of the expression "inexcusable" as used in the comment to Article 19.3.3 of the Policy.

51. As I have stated, Article 26.2 of the Policy requires the comments to be used as an aid to interpretation to Article 19.3. Interpretation is different to application or exercise of discretion. Confining the comment to its true purpose of being an aid to interpretation, or to be used in interpreting the relevant article, in my opinion Article 19.3.3 is to be construed as meaning

that a two year sanction will be applicable only where all three missed tests are inexcusable. If one or more of the missed tests is not "inexcusable" then the sanction should be reduced based on the Tribunal's assessment of the Athlete's "degree of fault".

52. Further, the fact that Article 19.3.3 expressly recognises that the sanction is to be based on the "degree" of fault evidences that the sanction may be reduced even if the Athlete is to some extent careless, negligent or otherwise "at fault".

53. This interpretation is, in my view, confirmed by the comment to Article 19.6.2 which permits the reduction of a sanction where there is "no significant fault or negligence". That comment reads as follows:-

> *"Article 19.6.2 should not be applied in cases where Articles 19.3.3 or 19.5 apply as those Articles already taken into consideration the athletes ... degree of fault for the purposes of establishing the applicable period of ineligibility."*

54. The Applicants have helpfully and commendably acknowledged in their oral submissions that the discretion afforded by Article 19.3.3 can be exercised even where there is some fault or carelessness on the part of the athlete falling short of "inexcusable" conduct. For the reasons I have given, I think this is a proper concession consistent with the correct construction of the relevant provisions of the Policy.

55. Each of the parties referred me to various decisions or awards dealing with the equivalent provisions of the WADC to Article 19.3.3 or analogous provisions in the anti-doping codes of other sports for the purpose of informing me of the factual circumstances in which other tribunals have found conduct to be "inexcusable" or have determined what is the appropriate sanction, on the specific facts of a particular case, to be imposed. However, with respect, I do not find reference to any such

authorities particularly helpful. Every case must depend on its facts and, like negligence cases at general law, it is unprofitable to seek to impose a sanction by reference to what some other tribunal did in some other case on different facts, only some of which may be disclosed in the relevant judgment or award. None of the cases to which I have been referred cast any real illumination on what is meant by "inexcusable" for the purposes of Article 19.3.3 and they may, therefore, be put to one side.

56. The Applicants submit that the appropriate sanction in this case is one of a two year period of ineligibility. As stated, in my opinion, that could only be the case where it is found that all three missed tests are "inexcusable". I consider that, on a proper interpretation of Article 19.3.3 and the comment thereto, the burden of proof rests on the Applicants to show that all three missed tests were "inexcusable". That is because Article 19.3.3, on its face, envisages an evaluative role for the decision-maker which evaluation is then fettered or limited by the comment to the effect that where all three missed tests are inexcusable then the sanction shall be two years. The burden of proving that the limitation or fetter on the evaluative task of a decision-maker is engaged rests, in my opinion, upon the person who asserts it. In this case, that is the Applicants.

57. In any event, regardless of upon whom the burden of proof is cast, I do not consider that the missed test of 13 July 2012 was "inexcusable" on the part of the Athlete.

58. The ordinary, natural meaning of "inexcusable" is "not excusable, unable to be excused or justified" (see, eg, *Shorter Oxford English Dictionary*, 5th Edition, Volume 1 p1365).

59. It is apparent from the language of Articles 19.3.3 and the comment to Article 19.6.2, as recognised by the Applicants in their submissions, that

something may be able to be excused or justified even if the Athlete's carelessness or negligence has contributed to the happening of that occurrence.

60. In my opinion, there was some excuse or justification for the Athlete missing the test on 13 July 2012. That excuse or justification comes about in several ways. First, as I have set out, Article 3.5(d) of the AWP provides that the athlete is to give the "full address" of the place where the athlete will be residing and then gives, for example, locations such as home, temporary lodgings, hotel etc. In the case of an hotel an Athlete would not know, in advance of booking the hotel and checking in, which precise room would be allocated to him or her. The obligations of Article 3.5(d) of the AWP could therefore be satisfied in advance by giving the full address of the hotel. Likewise the comment to Article 3.6 providing for identification of the location for testing indicates that the location can be the athlete's place of residence, training or competition or in other locations such as work. It does not, on its face, require, or indicate to, the athlete to identify precisely where at the training venue or work location, the athlete will be at the nominated time. Further, the comment to Article 4.1(b) of the AWP gives as an example of insufficiency of information only an extreme example namely "cycling the streets of Melbourne". Melbourne is a city of more than 3 million people with thousands of streets. Failure to identify a specific hotel room number within a hotel is a long way removed from such an extreme example. It seems to me that the failure of the AWP to be more expressly specific about the level of detail required when someone is staying at an hotel provides some excuse or justification for the missed test.

61. Secondly, in my view, the need for more explicit detail of what is required is confirmed by what happened when the Athlete moved into the Olympic

Village in London. Perhaps recognising the lack of specificity or guidance provided by the AWP, the Athlete's team manager expressly instructed team members, including him, to include the specific details of the room in which he was staying at the Olympic Village. It may be thought that such advice should have been given by AA to its athletes also in respect of hotels at which they were staying prior to the Olympics. There is no evidence of such advice having been given to the Athlete.

62. Moreover, it was not the Athlete's fault, or at least not entirely his fault that the hotel informed the DCO that the Athlete had booked out of the hotel. In fact he had not booked out but the hotel records were not sufficient to enable the hotel reception to know that this was the case. Rather the hotel reception apparently assumed that Mr Bannister was no longer staying at the hotel because of the advice the hotel had received from Mr Lynch as to Mr Bannister's expected duration of stay. In my view, the Athlete was entitled to assume that the hotel would know not only when he checked in as a matter of fact but also when he checked out as a matter of fact. He was entitled to assume that it would know in which room he was staying. The Athlete's missed test, in my opinion, is to some extent excused or justified also by these deficiencies in the hotel record keeping and booking in and booking out process of which he could not be reasonably expected to know.

63. I therefore conclude that this is not a case where all three Missed Tests were inexcusable. Accordingly I am at liberty, if the circumstances otherwise warrant it, to impose a sanction of less than two years period of ineligibility.

Determination of the Appropriate Period of Ineligibility

64. I have not catalogued all of the evidence relating to the Athlete's compliance or non compliance with the AWP. For the reasons I have already given, it must be accepted that it was inexcusable for him to miss two of the three tests. Further, the evidence before me suggests that, in general, the Athlete adopted a very careless and haphazard (or to use the words of his own counsel, Mr Lynch, a "nonchalant") attitude to his obligations under the Policy. Such an attitude cannot be condoned and the Athlete should have been much more diligent and timely in complying with his obligations than he was. This is not a case which warrants the imposition of a sanction at the lower end of the range which is available. The Athlete submits a 15 to 18 month period of ineligibility is appropriate but I consider his failures to comply with the Policy were so frequent and serious that a stiffer sanction is required.

65. However, I do not consider that the Athlete was deliberately trying to avoid testing. No such submission was made to me by the Applicants and the facts surrounding the second missed test suggest to the contrary. The Athlete gave the full address of the hotel at which he was staying for the relevant period and in fact he was at that address when the testing officers arrived. That consideration together with the considerations I have referred to earlier when discussing whether the second missed test was "inexcusable" leads me to the conclusion that the Athlete's "degree of fault" in the present case although substantial was not so extreme as to justify a sanction at the highest end of the available range.

66. In all the circumstances, I conclude that an appropriate sanction for the purposes of Article 19.3.3 of the Policy is one of twenty (20) months.

67. I note that immediately prior to the hearing when the Athlete indicated to the Applicants that he would be admitting breach of Article 6.4 with the inevitable consequence that he would face a period of ineligibility of at least one year, the parties agreed that that period of ineligibility should start on 19 June 2013.

68. Accordingly, the twenty months period of ineligibility will commence on 19 June 2013 and cease at midnight on 18 February 2015.

Repayment Prize Money

69. The Applicants also submit that the Athlete should repay to AA the $500 prize money he received at the Melbourne Grand Prix meet in April 2013.

70. Article 19.9 of the Policy requires such repayment "unless fairness requires otherwise".

71. I think fairness does require otherwise in the present case.

72. Mr Lynch, on behalf of the Athlete, submitted that the Athlete was invited to compete in the Melbourne Grand Prix by AA. Although AA had ample opportunity to do so, it did not seek to rebut that submission or lead evidence to contradict it. I, therefore, accept that Mr Lynch's submission is factually correct.

73. As submitted by the Applicants the Melbourne Grand Prix occurred after the decision had been made by them to commence these proceedings.

74. AA does not appear to have informed the Athlete when it issued its invitation to him to participate at the Melbourne Grand Prix that, in the event that it was successful in these proceedings, it would seek to have repaid to it any prize money he received as a result of participating at the Grand Prix. The Athlete, as I have said, is an elite athlete who has

represented Australia at the highest level. Presumably, AA saw his participation in the Grand Prix as something which was advantageous to it or to athletics in Australia generally.

75. In those circumstances, I consider it to have been unfair on the part of AA to have invited his participation in the event without informing him that in the event that AA was successful in these proceedings it would seek to recover from him any prize money he won as a result of so participating.

76. Accordingly, I decline to order that the Athlete repay that prize money.

THE COURT OF ARBITRATION RULES THAT:

1. The Athlete has breached Article 6.4 of the Athletics Australia Anti-Doping Policy.

2. That the Athlete's period of ineligibility in respect of that breach be one of twenty months commencing on 19 June 2013 and finishing at midnight on 18 February 2015.

3. That, in accordance with Article 17.5.3 of the Athletics Australia Anti-Doping Policy, each party shall bear in equal proportions the CAS fee and shall otherwise bear their own costs of this proceeding.

Alan Sullivan QC
Sole Arbitrator
Date: 22 July 2013