

A2/2006

FINAL ARBITRAL AWARD

Pronounced by the
COURT OF ARBITRATION FOR SPORT
OCEANIA REGISTRY
Ordinary Division

Sitting in the following composition:

Panel:

Mr David Grace QC

Sole Arbitrator

In the matter of:

AUSTRALIAN WEIGHLIFTING FEDERATION Inc

Applicant

Represented by Mr Anthony Nolan SC, instructed by Mr. D. Boyd of Lander & Rogers, Lawyers

and

MS. JENNA MYERS

Respondent

Represented by Mr. Brett Ihle, Barrister, instructed by Mr Paul Horvath, solicitor

Court assisted by: Mr. Leon Sher, solicitor.

Date and place of hearing: 3 February 2006, Melbourne, Australia

Date of Award: 3 February 2006

Reasons Published: 24 February 2006

PRELIMINARY

1. Jenna Myers, the Respondent, is an elite athlete in the sport of weightlifting. At all material times she has been a member of, and has been contracted to, Australian Weightlifting Federation Inc. the Applicant. The Applicant has an Anti-Doping Policy (**ADP**) to which the Respondent has agreed to be bound under the contract comprised by the rules of the Applicant.
2. Article 3.2 of the Applicant's ADP provides, inter alia, that athletes:
 - "3.2.1 must be knowledgeable of and comply with all Anti-Doping Policies and rules applicable to them;*
 - 3.2.2 must read and understand the **Prohibited List** as it relates to them;*
 - 3.2.4 must take full responsibility, in the context of Anti-Doping, for what they ingest and Use....."*
3. Article 3.4 of the Applicant's ADP provides, inter alia, that the Respondent must:
 - "3.4.1 use its best efforts to assist **Athletes** to fulfil their responsibilities under this Anti-Doping Policy....;*
 - 3.4.3 make reasonable efforts to make this Policy available to **Members, Athletes and Athlete Support Personnel and Persons**;*
 - 3.4.4 develop and implement, in consultation with ASDA and the IWF, drug education and information programs for **Athletes and Athlete Support Personnel**;*
 - 3.4.5 support the initiatives of **ASC, ASDA, the IWF, and the AOC** to stop Doping in sport;*
 - 3.4.6 adopt and implement Anti-Doping policies and rules which conform with the **Code, IWF, AOC** and the **ASC Anti-Doping Core Provisions**;*
 - 3.4.9 require all **Athletes and Athlete Support Personnel** within their jurisdiction to recognise and be bound by anti-doping rules in conformance with the **Code, IWF, AOC, the ASC** and this Anti-Doping Policy....."*
4. Article 5 of the Applicant's ADP provides, inter alia, as follows:

"ARTICLE 5 – ANTI-DOPING RULE VIOLATIONS

The following constitute *Anti-Doping Rule Violations*:

 - 5.1 The presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's* bodily *Specimen*.**
 - 5.1.1** It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their bodily *Specimens*. Accordingly, it is not necessary that intent, fault, negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping violation under **Article 5.1**.

5.1.2 Excepting those substances for which a quantitative reporting threshold is specifically identified in the *Prohibited List*, the detected presence of any quantity of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample* shall constitute an *Anti-Doping Rule Violation*.

5. The term *Prohibited List* is defined in Appendix 1 of the Applicant's ADP as meaning "*the List identifying the prohibited substances and prohibited methods*". That List is published and revised from time to time by the World Anti-Doping Agency (WADA) and forms part of the World Anti-Doping Code (**Code**). The term *Use* is defined in Appendix 1 as being "*the application, ingestion, injection or consumption by any means whatsoever of any prohibited substance or prohibited method*".
6. In October 2005 the Applicant conducted the 2005 Australian Open Weightlifting Championships in Brisbane, Queensland, Australia. The Respondent competed in the 75+ kg Women's category finishing in first place. On 30 October 2005 the Respondent was tested in accordance with the Applicant's ADP. The results of the tests of the "A" and "B" samples completed on 15 November 2005 and 1 December 2005 respectively, revealed the presence of Benzylpiperazine (BZP). BZP is a stimulant but is not specifically referred to in Schedule S.6 of the 2005 Prohibited List of the Code. It is regarded as being included, however, because of the definition "*stimulant*" and the use of the words "*and other substances with a similar chemical structure or similar biological effect(s)*." It is a substance with similar structure or biological effect(s) to amphetamines, which is included in Schedule S.6.
7. There was no challenge by the Respondent to the tests conducted by the Australian Sports Drug Testing Laboratory and the results obtained, nor was there any challenge to the Applicant's assertion that BZP has a similar chemical structure or similar biological effect(s) to the stimulant known as amphetamine, nor that BZP is a prohibited substance as defined by the Code.
8. As a result of the positive tests, the Applicant lodged an Application for a Provisional Suspension of the Respondent with the Court of Arbitration for Sport (CAS). The Application was lodged pursuant to Articles 10 and 11 of the Applicant's ADP. The Applicant and the Respondent both agreed to the jurisdiction of CAS and a *Provisional Hearing* was held on 14 December 2005 (CAS A5/2005). The Application for Provisional Suspension by the Respondent was dismissed. The reason for the dismissal of the application was that the Respondent would be incurably prejudiced if she was prevented from competing in the selection trials for the Commonwealth Games to be held in Melbourne in March 2006, which trials were scheduled for 17 December 2005, a date prior to any possible hearing of the allegation of an Anti-Doping Rule Violation before the

Court. The prejudice would clearly arise as there was no other opportunity for the Respondent to compete prior to the deadline for selection of the team on 15 February 2006.

9. On 5 January 2006 the Applicant lodged and served an Application alleging an Anti-Doping Rule Violation against the Respondent, with CAS.
10. The parties have agreed that the Court has jurisdiction pursuant to Article 11.3 of the Applicant's ADP to determine the matter contained in the Applicant's Application. Pursuant to Article 11.8 of the Applicant's ADP, the Australian Sports Commission, the Australian Sports Drug Agency, the Australian Olympic Committee, the International Weightlifting Federation and the World Anti-Doping Agency all had the right to attend the ultimate hearing of the matter as an observer or interested party. No such body exercised that right.
11. The parties agreed that the Arbitration would be conducted by the Court according to the Code of Sports-Related Arbitration, 2004 Edition, in particular, the rules relating to the Ordinary Division, Rule 38 and following. The parties further agreed for the Court for the purposes of the Arbitration to be constituted by Mr. David Grace Q.C. as sole Arbitrator and that the seat of the Arbitration is in Lausanne, Switzerland. The parties agreed that the Arbitrator would arbitrate on the dispute and render an Award in conformity with the agreement between the parties to submit their disputes for arbitration before the Court and pursuant to the Code of Sports-Related Arbitration, 2004 Edition, so far as it is applicable.
12. Prior to the hearing, an Order of Procedure was agreed to by the parties. That Order included a timetable for the filing and service of written submissions and a brief outline of the evidence witnesses may give at the hearing. After consideration of those written submissions, it became clear to the Court that the Respondent admitted having committed an Anti-Doping Rule Violation and that the only issue to be determined at the hearing of the Court was the appropriate sanction to be imposed. This became clear upon the commencement of the hearing before the Court in Melbourne, Australia on 3 February 2006.
13. By agreement of all parties, the hearing was heard contemporaneously and in conjunction with the hearing involving an allegation of an Anti-Doping Rule Violation made by the Applicant against another weightlifter, Ms Camilla Fogagnolo. She had tested positive to exactly the same substance as a result of a test conducted at the 2005 Australian Open Weightlifting Championships.

FINDING

14. The Court formerly finds that the Respondent has committed an Anti-Doping Rule Violation within the terms of the Anti-Doping Policy of the Applicant.

SANCTION

15. At the commencement of the hearing it was agreed that the following provisions are applicable in relation to a sanction for an Anti-Doping Rule Violation found to have been committed pursuant to Article 5.1 of the Applicant's ADP (relevant provisions only have been reproduced):

"ARTICLE 13 – SANCTIONS ON INDIVIDUALS

- 13.1** *Disqualification of Results in Event During which an **Anti-Doping Rule Violation** Occurs.*

*An **Anti-Doping Rule Violation** occurring during or in connection with an **Event** may lead to **Disqualification** of all of the **Athlete's** individual results obtained in that **Event** with all consequences, including forfeiture of all medals, points and prizes....."*

- 13.2** **Imposition of Ineligibility for Prohibited Substances and Prohibited Methods.**

Except for the specified substances identified in **Article 13.3**, the period of *Ineligibility* imposed for a violation of **Article 5.1** (presence of *Prohibited Substance* or its *Metabolites* or *Markers*), **Article 5.2** (Use or Attempted Use of *Prohibited Substance* or *Prohibited Method*) and **Article 5.6** (Possession of *Prohibited Substances* and *Methods*) shall be:

First violation: Two (2) years' *Ineligibility*

Second violation: Lifetime *Ineligibility*

However, the *Athlete* or other *Person* shall have the opportunity in each case, before a period of *Ineligibility* is imposed, to establish the basis for eliminating or reducing this sanction as provided in **Article 13.6**.

- 13.4** **Additional Sanction**

13.4.2 A Committee or the CAS may determine, in addition to applying the sanction outlined in Article 13.1-13.3, that a *Person* who has committed an *Anti-Doping Rule Violation* is required to go to counselling for a specified period

- 13.6** **Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances.**

13.6.1 If the *Athlete* establishes in an individual case involving an *Anti-Doping Rule Violation* under **Article 5.1** (presence of *Prohibited Substance* or its *Metabolites* or *Markers*) or Use of a *Prohibited Substance* or *Prohibited Method* under **Article 5.2** that he or she bears *No Fault* or *Negligence* for the violation, the otherwise applicable period of *Ineligibility* shall be eliminated. When a *Prohibited Substance* or its *Markers* or *Metabolites* is detected in an *Athlete's Specimen* in violation of **Article 5.1** (presence of *Prohibited Substance*), the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* eliminated.....

13.6.2 This Article 13.6.2 applies only to *Anti-Doping Rule Violations* involving **Article 5.1** (presence of *Prohibited Substances* or its *Metabolites* or *Markers*), Use of a *Prohibited Substance* or *Prohibited Method* under **Article 5.2**, failing to submit to *Sample* collection under **Article 5.8**. If an

Athlete establishes in an individual case involving such violations that he or she bears *No Significant Fault or Negligence*, then the period of *Ineligibility* may be reduced, but the reduced period of *Ineligibility* may not be less than one-half of the minimum period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this section may be no less than 8 years. When a *Prohibited Substance* or its *Markers* or *Metabolites* is detected in an *Athlete Specimen* in violation of **Article 5.1** (presence of *Prohibited Substance*), the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* reduced."

13.6.3 The IWF may also reduce the period of *Ineligibility* in an individual case where the *Athlete* has provided substantial assistance to the IWF which results in the IWF discovering or establishing an *Anti-Doping Rule Violation* by another *Person* involving *Possession* under Article 5.6.2 (*Possession by Athlete Support Personnel*), Article 5.7 (*Trafficking*), or Article 5.8 (administration to an *Athlete*). The reduced period of *Ineligibility* may not, however, be less than one-half of the minimum period of *Ineligibility* otherwise applicable. If the otherwise applicable period of ineligibility is a lifetime, the reduced period under this Article may be no less than 8 years."

16. The following terms are defined in Appendix 1 of the Applicant's ADP:

"No Fault or Negligence: The *Athlete's* establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had *Used* or been administered the *Prohibited Substance* or *Prohibited Method*."

"No Significant Fault or Negligence: the *Athlete's* establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or Negligence*, was not significant in relationship to the *Anti-Doping Rule Violation*."

17. It was common ground that the Respondent's Anti-Doping Rule Violation was a first violation and that therefore the period of ineligibility was two years, subject to the applicability of Article 13.6 of the ADP.
18. There was no challenge to an Order being made for the disqualification of the Respondent's individual results obtained in the Australian Championships in October 2005. Accordingly, it was accepted that the Respondent would forfeit her first placing achieved at that Championships including all medals, points and prizes, pursuant to Article 13.1 of the ADP.
19. It was also common ground that pursuant to Article 6.1 of the ADP. The Respondent had the burden of proof to establish specified facts or circumstances pursuant to Article 13.6 of the ADP, the standard of proof being by a balance of probability.

EVIDENCE AND THE COURSE OF PROCEEDINGS

20. The Respondent relied upon the following written material:

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- (a) Written submissions;
 - (b) Statement of the Respondent;
 - (c) Statement of Mark Brown (Coach)
 - (d) Pacific Laboratory Medicine Services Analysis Report dated 24 January 2006;
 - (e) Pacific Laboratory Medicine Services drug analysis report dated 31 January 2006 (by Peter Bowron, Senior Hospital Scientist) and Launceston Pathology Chain of Custody Form dated 31 January 2006;
 - (f) Australian Securities and Investments Commission company extract dated 27 January 2006 in relation to Fortius Group Pty. Ltd.
 - (g) Business Affairs, Victoria, business name extract for Fortius dated 16 December 2005;
 - (h) Letter from Camilla Fogagnolo to Belinda Van Tienen of Fortius Group Products dated 27 January 2006;
 - (i) Letter from Paul Horvath, Solicitor, to the Managing Director of Fortius Products dated 27 January 2006;
 - (j) Letter dated 2 February 2006 from Keith Murphy, Managing Director Fortius Products to Mr. Paul Horvath;
 - (k) Photocopies of advertising literature concerning Fortius Products including Synephrine;
 - (l) Character Reference of Anthony O'Malley dated 2 February 2006.

21. The Respondent and Mr. Mark Brown were made available by Counsel for the Respondent for cross-examination by Counsel acting on behalf of the Applicant. Counsel for the Applicant indicated that he accepted the character reference and its contents received from Mr. O'Malley. Counsel for the Applicant also accepted the correctness of the drug analysis conducted by the Pacific Laboratory Medicine Services referred to in its reports dated 24 and 31 January 2006, did not dispute the chain of custody of the substance analysed and accepted that the Respondent had tested positive as a result of consuming a product called "Fortius Synephrine" which was distributed by Fortius Group Pty. Ltd. There was an acceptance by the Applicant that the Respondent had used BZP inadvertently by consuming Fortius Synephrine. It was also accepted that BZP was not listed as an ingredient on the label of the bottle containing the Fortius Synephrine product.
22. The Respondent had been drug tested on 6 occasions between 12 September 2004 and 17 December 2005. Except for the positive test on 30 October 2005

she has always tested negative. She gave evidence on her own behalf and adopted her statement as being true and correct.

"Sporting History

Throughout my life I have been involved in sport. In 2000 I got in touch with Robert LEWANDOWSKI, a weightlifting coach, through the Tasmanian Institute of Sport. At that time LEWANDOWSKI was coaching three other female weightlifters including Belinda VAN TIENAN. My first ever training session with weightlifting was 24 May, 2000.

Between 2001 and 2005 I have been involved in many State, National and International competitions in both junior and open categories. During such competitions I have won numerous medals and broken several Tasmanian and National records for my division(s).

In August 2003 I suffered an accident during training. It took me nearly a full year to get over the training accident and I was less than successful in my return to national competition in Brisbane. This coincided with a time with my training where it seemed that LEWANDOWSKI had lost all interest in me and I pretty well trained on my own from August 2003 until June 2004.

Mark BROWN took over my coaching role in mid 2004. Between July 2004 and October (and November) 2005 I participated in several more State, National and International competitions under BROWN's coaching. I have won medals and set new records at some of these competitions as well as "qualifying" for the Commonwealth Games trials and national selection for the Oceania and South Pacific Championships, which were held at Melbourne in early October 2005.

The last event that I competed in was the Commonwealth Games Trials in December 2005 where I clean and jerked a personal best and new national under 20 record.

History of Supplement Use

My first coach, LEWANDOWSKI, discussed the possibility of me taking a supplement sometime in 2002. I discussed the matter with him and nothing further transpired.

In January 2005 I became aware of the Fortius products through VAN TIENAN (who was at the time living and training in Victoria). We spoke about the Fortius products and that she was a distributor of the products. Belinda mentioned Fortius products by their particular names which included Protein, Tribulus and Synephrine. I did not think much of this conversation at the time.

I later recall having a conversation with Camilla FOGAGNOLO at training. She told me that she was taking the "Fortius Synephrine" and that it was helping her lose weight, but added that she had not lost any strength. At the time I was considering whether or not I needed to get my bodyweight down to (and compete at) the 75 kilogram class. FOGAGNOLO said she had spoken to ASDA personnel regarding the status of Synephrine and had also researched the product contents on their website, to get confirmation that the product was alright to take. She also said that she had been drug tested by ASDA while taking the Synephrine and that everything had been okay.

Around Easter 2005 VAN TIENAN gave me a pamphlet on the products available from Fortius Group. VAN TIENAN said she had been drug tested by ASDA whilst using Fortius products and had not tested positive to any prohibited substances. Around June 2005 I became aware that more lifters were using Fortius products,

and in particular the "Fortius Synephrine". I heard that other lifters had been getting the supplement through VAN TIENAN.

During this time, FOGAGNOLO seemed to have reduced her body weight considerably. She told me that she had done so through a combination of the use of "Fortius Synephrine", sensible nutrition and an increased training volume.

Based on this and the need for me to lose weight (without sacrificing strength) I discussed the matter again with BROWN. BROWN said that if my weight increased further, it might inhibit my ability to get into the right 'starting position' when attempting lifts. We decided that, given the information we had received and the benefits we saw in FOGAGNOLO, "Fortius Synephrine" would be a good, safe and clean way to assist in ensuring I did not put on more weight. BROWN told me that Fortius Products had been 'on the market' for a number of years and had been widely circulated throughout the weightlifting fraternity, by (amongst others) a number of weightlifters themselves.

In my conversations that I had over time with FOGAGNOLO, she regularly highlighted that she had been drug tested a number of times whilst using "Fortius Synephrine" without any problems.

I got a bottle of "Fortius Synephrine" through BROWN in early October 2005. He told me that he checked all of the contents listed on the Fortius promotional pamphlet and on the bottle's label with the ASDA website. He showed me the results he found which, according to the website, showed that none of the listed contents were prohibited. In fact Synephrine was specifically named as a stimulant which is not prohibited.

The bottle came with an intact tamper-proof cap on it, as well as a 'safety' seal which was also intact. The label and bottle (which was very professional looking) gave us no reason to suspect that there was anything wrong with it.

I began to use the product only after satisfying myself by inquiries made by my coach, myself and the word of other athletes who were using the products and returning negative tests that the product was safe. I believe that at that time that between my coach and I we had made all inquiries that we could reasonably have made to ensure that Fortius Synephrine was a safe supplement to take. By safe I mean without health risks and without containing any prohibited substances. I was not at that time, nor have I ever been, in the financial position to test the contents of the bottle before taking it. Given the information I had at the time, I would have considered such a step as unnecessary anyway.

I only ever used the Synephrine twice. Both times it was from the same bottle, the one that I had received from BROWN.

I was drug tested by ASDA at the Brisbane Nationals and declared at this time that I had been using the Synephrine. I was then advised via telephone by ASDA that I had tested positive to a substance called Benzylpiperazine (BZP). It became immediately apparent to BROWN and I that there must have been something in the Fortius Synephrine that we weren't aware of.

Immediately after I was notified by ASDA that I had tested positive, my coach and I took my bottle into the manager's office at the Launceston PCYC. The police officer in charge there (Peter Riggall) then witnessed Mark taping up the lid on the bottle of Synephrine and we all witnessed each other signing and dating over the taped area and the bottle was left at the office for 'safe keeping'.

A short time later our state weightlifting President, told BROWN that FOGAGNOLO herself had also been tested positive to the same substance following testing at the Nationals in Brisbane.

I later became aware that Sergo CHAKOYAN (a Victorian lifter) had tested positive to BZP a few weeks earlier. I was advised that he was also taking Fortius Synephrine. As we had no association at all with Sergo, we were further convinced that the Synephrine had to be at fault.

I immediately began to receive a number of SMS messages from FOGAGNOLO and VAN TIENAN. I still have these messages on my phone. In general terms they said 'everything would work out ok' and that 'the lawyers were on to it' and 'everything was being tested' and that 'we had nothing to worry about'.

We then found out that yet another male lifter that was taking Fortius Synephrine had tested positive to BZP.

I was also present when BROWN spoke over the phone with VAN TIENAN about who in fact was making, bottling sealing and capping the product (Synephrine).

I have since been advised by an accredited analytical laboratory in New South Wales that a sample of Synephrine which we sent them from the bottle which we had sealed in the presence of the police officer at the Launceston PCYC contains BZP. Given this finding, the BZP must have come from the "Fortius Synephrine".

I never would have taken the Synephrine if I knew that it contained BZP.

I am aware that Fortius products have been sold by a number of weightlifters for at least the last two years and was not aware of any previous doping violations associated with these products.

Education

During my period as an athlete at a somewhat 'elite' level, I have been part of the national junior and senior squads, and also the Commonwealth Games 'shadow team'. In all my travels to state, national and international events. I have not been party to any verbal or written material that covered the risks associated with the use of nutritional supplements.

I have had a very limited exposure to the 'world of nutritional supplements' and elite level sport. Knowing what I now know, as a consequence of this doping violation and the wealth of information that has been brought to my attention since then, it is now very clear to me that there are very real risks associated with the use of any form of nutritional supplement.

Stance on Doping and Drug Cheats

Since BROWN has been my coach, I have come to learn that he adopts a very tough stance in relation to the use of drugs in sport. I support this stance and believe that people who knowingly take prohibited substances to gain an advantage over others are cheaters and ruin the very spirit of competitive sports and endanger their health.

My decision to take the "Fortius Synephrine" was based on considerable research completed by my coach, as well as what I considered 'credible' information and advice that I received from fellow athletes, also performing at the elite level that "Fortius Synephrine" did not contain any prohibited substance and accordingly did not lead to any positive tests.

Assistance to AWF and IWF

Given the position that I take regarding drug cheats and the position I now unwittingly find myself in I would gladly assist WADA, ASDA, the AWF and/or IWF in its endeavors to investigate the "Fortius Products" and to educate other athletes. To this end I have made efforts to contact the company from which I purchased Fortius Synephrine. I have not had any formal response from the company as to how its products became contaminated (My lawyer, on my behalf, sent the "Fortius Group" a letter dated 27 January 2006). I will forward to AWF lawyers any response as soon as it is received.

Current Work Situation

I am currently a full-time student pursuing a career in Parks and Wildlife management. Through my study I am required to attend several different educational institutions around Tasmania and engage in practical work. I am currently engaged in practical work where I work a fourteen day cycle (ten days on,

four days off). Through my practical placements I earn a small amount of money which covers my living expenses. I currently live with my Mum in Frankford."

23. In her oral evidence she said that she was the oldest child in a large family and had five brothers and two sisters. She had reached the highest level of any family member in relation to sport. She said that she had never had the Applicant's ADP brought to her attention. She emphasised that the bottle of Fortius Synephrine had a tamper proof lid and she and her coach had checked the ingredients on the ASDA website. She accepted that she had made a mistake in her statement in saying that Camilla Fogagnolo had told her that she had researched the product and its contents on the ASDA website. She accepted Fogagnolo's assurances given at the contemporaneous hearing before the Court that she had never told her that that had occurred. She accepted that at the time of each of her drug tests in 2004 and 2005 she had received the ASDA Anti-Doping Information Card which opened into a pamphlet containing information and warnings concerning drug use. She said that at the time that she received those cards she was not told what to do with them and had never read the information contained on that card. She agreed that she was an elite weightlifter but said that she had never had meetings with the Applicant or with the Tasmanian Weightlifting Association wherein there had been warnings of the dangers of the consumption of supplements. She said that she had never been sent information from ASDA or the Applicant and had never seen the Anti-Doping Information Handbook 2005 published by ASDA. She said that Mark Brown had told her when he looked at the website that Synephrine was not prohibited. She said that she also looked at the website to confirm that information. She thought that the product was "*clear*" to use at any time. She said if "*BZP had been on the label as an ingredient she would have researched it and not taken it*".
24. During cross-examination by Counsel for the Applicant she agreed that on each occasion she had been given the ASDA Anti-Doping Information Card she had not read it because she had not been told to read it. She was referred specifically to a section in that card which stated the following:

ASDA ANTI-DOPING INFORMATION CARD
 AUSTRALIAN SPORTS DRUG AGENCY
 REFERENCING THE WORLD ANTI-DOPING CODE PROHIBITED
 LIST (EFFECTIVE 1 JANUARY 2005)

"VITAMIN, HERBAL AND NUTRITIONAL SUPPLEMENTS

ASDA cannot determine the status of vitamin, herbal and nutritional supplement products in sport. Due to their multi-ingredient nature, supplements are considered to present more risk to athletes than registered pharmaceutical products –

therefore ASDA is unable to accurately determine the status of any supplement product.

There is a risk that supplements may contain impurities, such as ingredients that are not listed on the label, which could cause a positive test.

ASDA operates a *Supplement Information Scheme*. This scheme allows supplement manufacturers to have the content of their products independently analysed and verified. ASDA communicates the results of this analysis to Australian Athletes – this information better informs athletes on what guarantees supplement product manufacturers are willing to give in relation to their products.

For more information regarding the scheme and to view supplement products that have been analysed, go to the ASDA website - www.asda.org.au

USE OF SUPPLEMENT PRODUCTS IS AT THE ATHLETE'S OWN RISK"

She said that she had not read that warning. She said that she had assumed there was a policy of strict liability applicable to her in relation to the consumption of substances but that she did not necessarily believe that she would be responsible if she tested positive. She said that she didn't know that she would be responsible for every prohibited substance detected in a doping control sample. She said that she didn't have internet access but relied upon the access utilised by her coach. When she looked at the ASDA website in September 2005 she only looked at one page that indicated that Synephrine was not prohibited. She accepted that she had to take some blame for the positive test result, however. It was not until 30 October 2005 (after the doping control test) that she had "*flipped*" through the ASDA Anti-Doping Information Card. She emphasised that she completely trusted the advice given to her by her coach Mark Brown and also trusted what Belinda Van Tienen had told her. She was fortified in what Van Tienen had told her because Van Tienen had been drug tested many times with negative results. She stressed that she was not aware that there was a risk of consuming prohibited substances by taking nutritional supplements. She agreed that she should have read the ASDA Anti-Doping Information Card and she agreed that she chose not to read that document. In re-examination by her own Counsel she said that Mark Brown didn't have the bottle with him when he checked the ASDA website, agreed that the ASDA Anti-Doping Information Card emphasised that you take nutritional supplements at your own risk and accepted that "*strict liability*" means ones own fault. She stressed that no one had told her what "*strict liability*" means. She thought that Fortius was a legitimate company because it had distributors of its products amongst the weightlifting fraternity. She said that she had only tried the Synephrine product on three occasions and didn't think that there was anything wrong with it. If she had thought so she would never have taken it as she would never deliberately use a prohibited substance. She said that she did not think the ASDA Anti-Doping Information Card was relevant to her and she put the card in her drawer at home without looking at it.

25. Mr. Mark Brown, the Respondent's coach, in his statement said:

"Position on Drug Use in Sport

I have been an official, competitor and sports coach with the sport of weightlifting for the past 20 years. My association with weightlifting started in Western Australia, at a Police and Citizen's Youth Club where I was a member. I became head coach at this club and also managed a number of W.A. state junior teams. I was the sport's Junior Development Officer during 2001 and lectured on topics associated with the sport of weightlifting at various schools during this time, which included the role of drugs in sport.

Throughout my association with sport, I have maintained an aggressive 'anti-drug' approach to the duties I have had to perform as a coach, team manager, mentor or official. I have also taken instant action to deter any athlete, coach or official from any conduct that would cast doubt on the credibility of their sport.

History with Jenna Myers

In June 2004 I moved to Tasmania. Around that time I had also learned that a female lifter in Tasmania, Jenna Myers, was no longer training and had been recovering from serious injury. I made an approach to Jenna with a view to offering my expertise as her coach, Jenna accepted.

I recall one of the first comments that I had made to Jenna (in the presence of her mother) along the lines of 'if you want to take illegal drugs – I don't care how good you are – go and find another coach'.

Since the time I have been Jenna's coach, history shows that she has made a very steady and considerable improvement under my direction. Her continued improvement during 2005 saw her get selected for a host of national and international standard events.

During 2005, Jenna's body weight was steadily increasing. My concern at the time was that key lifting positions (ie: the start) would be compromised. I was also aware at the time that another Tasmanian lifter, Camila FOGAGNOLO had a rapid drop in bodyweight whilst maintaining good performance during this time. I was told by FOGAGNOLO that she had been using "Fortius Synephrine" obtained through Belinda VAN TIENAN (who I knew was a weightlifter), who was selling products.

I enquired with FOGAGNOLO as to the product and was given assurances that she herself had been tested by ASDA whilst taking the Fortius Synephrine. I was also given a Fortius promotional pamphlet by Jenna, a document that outlined the range of products and it included Synephrine. I told Jenna that I would research the ingredients listed with the Synephrine product in particular in the next few days and check the ingredients on the ASDA website.

I was also aware that Fortius brand products had been on sale for at least the previous two years, and also knew that they were being sold by weightlifters and were well known by the weightlifting fraternity. I was not aware of any athlete that had previously tested positive to a Fortius product, nor did I know of any concerns as to the reputation of the product.

When I researched the product on the ASDA website, I checked all of the contents listed on the Fortius promotional pamphlet with the ASDA website. I showed Jenna the results I found which, according to the website, showed that none of the listed contents were prohibited. In fact Synephrine was specifically named as a stimulant which is not prohibited.

This specific information on the website coupled with the previous reputation of the product led me to the conclusion that the Synephrine was safe and in fact, legal to use. At all times in making my inquiries into the product I was also mindful that under Australian law, all foods and food supplements prepared in this country are obliged to have ALL of the ingredients listed on the product. Part of the approval process that I gave the Synephrine included a consideration that the product, being Australian made, did in fact list everything that was in the bottle.

To the best of my knowledge, Jenna was not in the financial position to have the product tested before use. Given the inquiries that she and I had made including the feedback from the other athletes I was satisfied that she supplement was safe.

On or around the 6th October 2005, I received the bottle of Fortius Synephrine from FOGAGNOLO. The bottle had its tamper-proof top intact. Shortly after I gave the bottle to Jenna and gave her the 'green light' to use the supplement.

On the afternoon of 25 November 2005, Jenna advised me that she had failed a drug test and returned a sample that was positive for Benzylpiperazine (BZP). I immediately met up with her. After a short discussion I began to suspect that her bottle of Fortius Synephrine had to be the source of the contamination.

The bottle was then taken to the officer in charge of the PCYC, Peter Riggall, who then (with Jenna also present) witnessed me seal the bottle with clear sticky tape. Myself, Jenna and Peter all then signed over the tape and the bottle was placed in a cupboard at the office, to be held.

ON the evening of 25 November 2005 I was spoke to VAN TIENEN on the phone. During this conversation I was informed by VAN TIENEN that she and Corran HOCKING were making and bottling the "Fortius Synephrine". I know of both VAN TIENEN and HOCKING through weight-lifting circles. I was assured by them that 'everything would be ok'.

On 29th December 2005, I attended at the office of Peter Rigall with a secure medical kit to extract a sample of the bottle's contents. This process was undertaken in the presence of Peter Rigall. The seal that we had signed and placed on it did not appear to be tampered with. Both myself and RIGALL completed and signed the 'Request For Drug Analysis' form that came with the secure medical sample kit. I placed a tamper proof seal around the postage box. I then sent the sample via registered post to Pacific Laboratories Medical Service to have the sample tested for the presence of BZP.

On 6 January 2006 I received an email from Peter BOWRON of the Pacific Laboratories Medical Service, who advised me that BZP was in the sample.

Education

I now know that there is substantial information available on the perils associated with the use of nutritional supplements. During my coaching career, I don't recall ever having received a document or warning in any form in relation to supplement use, and the risks associated.

I place particular importance on my own professional reputation and the validity of the coach/athlete relationship. Jenna is only 19 years old, a relatively shy and reserved 'country girl'. I believe that Jenna considers me to be somewhat of a 'father figure'.

Ramifications

Jenna is now faced with the prospect of having her Commonwealth Games 'dream' taken from her, in addition to a host of other personal and financial rewards that she would in fact now be looking at, if it wasn't for this."

26. In his oral evidence Mr. Brown attested to the truth of his statement. He said that until he became the coach of Jenna Myers he had never coached a weightlifter at senior level. He was shown the ASDA Anti-Doping Information Card, acknowledged that he had seen it before and had one in his possession but didn't know if there was anything contained within it in relation to the dangers of using nutritional supplements. He was now aware of ASDA's position in relation to nutritional supplements. He was aware that the Applicant's ADP was a recent

document and he acknowledged having read excerpts from it. He accepted that the Applicant has an obligation to implement its ADP and an educational responsibility in relation thereto. He said that the Applicant to his knowledge had received very little education from the Applicant in relation to doping matters but accepted that the Applicant would strive to inform coaches in relation to doping issues. He believed that an athlete at an elite level would receive a copy of the ADP from the Applicant and believed that it was referred to in the team agreement that the Respondent signed in October 2005 to compete at the Oceania Championships. He said, however, that the Applicant could have done more to educate elite athletes as to their responsibilities. He said that the ADP did not mention supplements and that he wasn't aware personally of warnings in relation to supplements. He emphasised that he was totally "*anti-drug*" but that he knew very little of the risk of using supplements. He said that it was normal for him to go to the ASDA website where he discovered that the contents of the Fortius Synephrine was not prohibited.

27. In cross-examination by Counsel for the Applicant he said that he had been to a weightlifting coaches' course and had been told that the Applicant was totally against doping. He accepted that the athlete was always responsible for what the athlete ingested. He said that he had never seen the Anti-Doping Information Handbook 2005 published by ASDA and had never seen the warning contained therein in relation to the use of supplements. He considered at the relevant time that his searches of the ASDA website prior to the consumption by the Respondent of the Fortius Synephrine were adequate, but accepted, when shown other pages contained within the ASDA website, including lists of approved manufacturers, that the searches conducted by him were inadequate. He accepted that his advice to the Respondent was fundamentally flawed. He accepted that he didn't obtain a guarantee from the manufacturer but relied upon the fact that Fortius had been in existence since 2002 and his belief that someone reputable manufactured the product. He said that the managing director of Fortius was a former weightlifter. In re-examination by Counsel for the Respondent he accepted that if he had read the warnings on the ASDA web page he may have erred on the side of caution and told the Respondent not to use the product. He said that that the Respondent relied on him as a father figure because she had lost her own father as a young child.

28. Mr. Anthony O'Malley is the President of Weightlifting Tasmania Inc. He gave a glowing character reference for the Respondent. He stated:

"I have known Jenna Myers since she commenced in the sport of weightlifting as a 14 year old in the year 2000. I have come to know Jenna quite well from regular contact at statewide weightlifting competitions and social events conducted by Weightlifting Tasmania inc. over the last five years. I have also had the opportunity to coach Jenna on a number of occasions at National Championship events. From time to time I have also visited Jenna in her family home at Holwell.

Jenna is an honest, hard working, and reliable young woman. I have observed Jenna to overcome personal adversity in her efforts to attain a Commonwealth Games berth in 2006. In 2004, Jenna suffered a devastating leg injury during training. At the time I was personally anxious that the injury would terminate her weightlifting career. Jenna showed remarkable courage and determination to recover from the injury and continue her career to an international level. In the last eighteen months, Jenna's considerable performance improvements are directly attributable to both her enthusiasm for weightlifting and her quiet diligence to training.

I have always found Jenna to be willing to assist with officiating tasks at weightlifting events and enthusiastic about promoting her sport. Combined with her courage and enthusiasm, Jenna's affable nature makes her an excellent role model for our more junior athletes.

Jenna has made considerable sacrifices to compete at an international level. While currently holding down a full time job in a regional locality, Jenna has to travel significant distances to attend daily training sessions. Regardless of the sacrifices of time and resources that Jenna makes, she takes it all in her stride and manages to balance her life of work and training with a mutually supportive family life.

When Jenna first informed me of her positive doping control test for benzylpiperazine she was very distraught. Jenna was unable to comprehend how her sample would have returned positive to the substance. The resulting media attention has been devastating for her. Having grown up in a small country community myself, where individuals are well known within their own locality, I can appreciate the social stigma that Jenna now feels. Regardless of the personally devastating effect of this tragic event, Jenna has continued to show her enormous courage and strength of character in how she has subsequently dealt with the situation.

Jenna has a well developed sense of responsibility to herself, her family and her sport. For Jenna to knowingly consume any illicit performance enhancing substance would be totally out of character."

29. In a letter dated 10 January 2006 Camilla Fogagnolo had written to Belinda Van Tienen of the Fortius Group Pty. Ltd. advising that she intended to have analysed the sample of Fortius Synephrine sold to her. She requested that Fortius Group Pty. Ltd. contact the supplier or manufacturer of the substance with a view to ascertaining whether it was possible that the Fortius Synephrine consumed by her was "contaminated" by BZP. She said *"I ask that you enquire with the supplier or manufacturer if they can give any explanations as to how traces of BZP may have come to be in a batch of Fortius Synephrine"*.
30. On 27 January 2006 Mr. Paul Horvath, solicitor for the Respondent wrote to the Managing Director of Fortius Products complaining that his client had tested positive as a result of consuming Fortius Synephrine which contained BZP. He said: *"I seek as a matter of urgency an explanation as to how the product came to contain BZP, given that it is not a substance listed on the label as being an ingredient of Fortius Synephrine"*.

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31. By letter dated 2 February 2006, Mr. Keith Murphy, Managing Director of Fortius Products replied to the correspondence dated 10 January 2006 and 27 January 2006. The relevant parts of his letter state as follows:

"The product we well as "Fortius Synephrine" is manufactured by our supplier, a company we have dealt with for over two years.

During the time we have dealt with our supplier, we understand that the produced has been used extensively by both weight lifters and other athletes the subject of in competition testing by ASDA. We have no other complaints from athletes in relation to the product and understand that use by them has not resulted in any positive tests.

In addition to the two positive tests recorded by your clients, we are aware of at least two other cases of positive tests having been recorded under circumstances similar to those which we understand relate to your two clients. We believe that your clients are aware of the two athletes (weightlifters) who are involved.

In the above circumstances, we believe that a batch was contaminated with BZP. We have had independent scientific tests performed on samples from what we believe to be the contaminated batch. This process was delayed due to matters out of our control and the control of the scientist undertaking the testing for us.

We have just received the results of the independent testing referred to above which we have been advised confirm the presence of BZP in the products supplied to us and sold as "Fortius Synephrine". We approached our supplier for an explanation. As of today's date we have not had any of our calls returned.

We can assure you and your clients that this matter is of great concern to us and that if we receive a reply form our manufacturer/supplier we will advise you immediately"

32. By the time of the hearing on 3 February 2006 no further advice had been received from Fortius Products.

SUBMISSIONS OF THE RESPONDENT

33. The Respondent made the following submissions:
- 33.1 She had very limited drug education and had not attended any drug education seminars or meetings where the Applicant's ADP had been discussed. It was stressed that the Respondent lived in an isolated state of Australia and because of her place of residence and work it was understandable that she was not as knowledgeable as other athletes in relation to the dangers of nutritional supplements.
 - 33.2 The Respondent relied upon the fact that she had bought and used the product in good faith. Furthermore, that she had done everything that was reasonable to do in the circumstances to check the safety of the product.

She treated her coach as a father figure and trusted that his searches on the internet of the ASDA website were adequate in ascertaining that there was no danger in using the Fortius Synephrine product. It was reasonable that someone in her position, being 19 years old and not having the amount of drug education that other more experienced athletes might have, to accept the recommendation and advice from Belinda Van Tienen who was an experienced weightlifter to the effect that she had been using the product and had always tested negative at doping tests. It was stressed that she honestly and reasonably believed that she was complying with the Applicant's Anti-Doping requirements.

- 33.3. It was stressed that the Respondent, although an elite athlete and state and national record holder, received no education from ASDA, the AWF, IWF, WADA or any other governing authority on the risks associated with taking nutritional supplements. She has evinced and maintains a strong stance against the use and presence of drugs in sport. In accordance with that firmly held position, both she and her coach made several inquiries of the product before the commenced using Fortius Synephrine. Such inquiries included, but were not limited to:
- (a) Consulting the ASDA website in relation to Prohibited Substances and noting that none of the advertised ingredients in Fortius Synephrine were listed as Prohibited Substances;
 - (b) Scrutinizing the product pamphlet and label of the bottle of Fortius Synephrine before using it whilst being mindful of Australian laws requiring all food-products and food-related products produced in Australia to set-out accurately the contents of the product;
 - (c) Observing at the time of receipt of the product that the seal of the bottle had not been tampered with in any way;
 - (d) Openly disclosing the use of Synephrine on her Doping Control test form;
 - (e) Inquiring of the distributor of the product and other users of the product as to their experiences with the product including the fact that ASDA tests conducted of them over the period that they used Fortius Synephrine never yielded any adverse results; and
 - (f) Relying on the widespread use and general reputation of Fortius Products in the competitive weightlifting community.
- 33.3 It was further submitted that due to her limited income, it was not possible for her to have the Fortius Synephrine tested by a scientific laboratory to

confirm its contents and that she did not believe this was either necessary or appropriate in any event.

- 33.4 The Respondent submitted that given all the facts and circumstances, the prohibited substance was consumed by her through no fault or negligence on her part, thereby attracting the operation of Article 13.6.1. It was stressed that it was important to take into account in this regard the Respondent's age, her position of relative inexperience, her lack of education on the risks associated with the use of supplements (specifically contrasted against the success of which she had achieved within the sport of weightlifting), the enquiries which she had made of the product before commencing use of it and her practical inability to have the supplement tested before use. A strong plea was made that the Respondent had actually exercised the "*highest level of caution*" that she practically could in the circumstances and that, accordingly, the exercise of utmost caution did not cause her to know, nor could she reasonably be expected to have known that the use of the Fortius Synephrine would lead to her testing positive to the use of a prohibited substance. Alternatively, it was submitted that the Respondent bore no significant fault or negligence (pursuant to Article 13.6.2). It was emphasised that there was no evidence of any intention on the part of the Respondent to consume illegal performance enhancing drugs and that the Respondent's undoubted good character and reputation for honesty and integrity were factors that ought to be taken into account in her favour both in relation to the acceptance of her version of events and generally.
- 33.5 Counsel for the Respondent relied upon a number of previously decided cases of the Court: *Knauss v ISF CAS 2005/A/847*, *Edwards v IAF CAS OG 04/003*, *Squizzato v FINA CAS 2005/A/830* and *Baggaley v ACI, SLA and ASC CAS 2005/A3*. Counsel also relied upon, insofar as those submissions were equally applicable to the Respondent, the submissions that were made contemporaneously by Counsel acting on behalf of Camilla Fogagnolo (*AWF v Fogagnolo CAS A4/2006*).
- 33.6 In *Knauss*, the athlete ingested a nutritional supplement which caused the Anti-Doping Rule Violation. This was in the context of clear warnings by National and International Sports Federations and other appropriate authorities of the risk of contamination and/or mislabelling in nutritional substances. The athlete had requested written certification from the manufacturer that its products were clean. In those circumstances the Court came to the conclusion that notwithstanding his attempts to establish there was no contamination, the athlete had clearly failed to exercise the care required for "no fault or negligence", namely utmost caution.

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- 33.7 In *Edwards* the athlete whilst in a foreign country, ingested glucose which had been purchased for her by her chiropractor. The glucose contained a prohibited substance. She had purchased glucose tablets in stores in the past but on this occasion her chiropractor had obtained the glucose for her. He would normally check the ingredients of over-the-counter medications and was aware of the list of prohibited substances. She argued that it was reasonable for her to accept that the glucose provided to her did not contain any prohibited substances. The fact was, however, that the product had been purchased in a foreign country on that day and no one had examined the packet or the leaflet which accompanied the packet which indicated that the product contained more than glucose. The Court concluded that it would have been clear to any person viewing the tablets that there was more than one ingredient in the tablets and that there was negligence in not ascertaining that no prohibited substance was present within the tablets before they were ingested. The Court found that the factual circumstances did not give rise to the exceptional facts necessary for a reduction of the otherwise mandatory sanction applicable for a doping offence pursuant to the IAAF Rules.
- 33.8 In *Squizzato* the athlete used a cream which she applied to her foot to fight against skin infection between her fourth and fifth toes. The cream was chosen and purchased by her mother who was not aware that it could contain a prohibited substance. The substance did not enhance the athlete's capacity nor did it favour her performance. The athlete claimed that she bore no fault or negligence. The Court found that although she had established how the prohibited substance entered her system, she had failed to abide by her duty of diligence. With a simple check she could have realised that the cream contained a prohibited substance or at the very least she could have asked her doctor, coach or any other competent person to check the contents of the cream. Although the athlete was only 17 years of age she had been competing in the sport of swimming for 10 years and was competing at the highest level. The Court was further of the view that it was indeed negligent for an athlete willing to compete in continental or world events to use a medical product without the advice of a doctor or, at the very least, a physiotherapist. The Court found that she did not bear "*no fault or negligence*". The Court further found that as the athlete appeared "*to have no intention whatsoever to gain an advantage toward her competitors, her negligence and forgetting to check the content of a medical cream can be considered as mild in comparison with an athlete that is using doping products in order to gain such advantage*". Accordingly, the Court found that the athlete appeared to bear "*no*
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significant fault or negligence". A period of 12 months ineligibility was ordered.

- 33.9 In *Baggaley*, the athlete consumed a prohibited substance contained within orange juice which had been placed in a refrigerator by his brother. The Court found that the athlete had established how the prohibited substance entered his system and that he had established by balance of probability that he bore no significant fault or negligence when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence. The Court accepted the athlete's evidence as to his intentions in consuming the orange fruit drink, his lack of intention to consume a prohibited substance and the totality of the evidence called on his behalf. The Court found that the unique circumstances in the case fell within the category of exceptional circumstances and reduced the period of ineligibility from 2 years to 15 months.
- 33.10 Counsel for the Respondent sought to draw analogies from the above-mentioned cases and submitted that the Respondent's conduct bore no more fault than that found by the Court in *Knauss*, *Squizzato* and *Baggaley*.
- 33.11 Counsel for the Respondent places particular emphasis on *Knauss* and the comments by the Court in paragraph 7.3.5 of that case:
- "In the Panel's opinion the requirements to be met by the qualifying element "no significant fault or negligence" must not be set excessively high.... this follows from the language of the provision, the systematics of the rule and the doctrine of proportionality..."*
- 33.12 It was submitted that the Respondent's case was exceptional in the totality of the circumstances and that the case ought to be differentiated from cases such as *Keat CAS 2005* and *Edwards* because of the efforts made by the Respondent to check the contents of the Fortius Synephrine.
- 33.13 It was further submitted that the Respondent has provided substantial assistance to the International Weightlifting Federation (IWF) pursuant to Article 13.6.3 of the Policy. This submission relied upon the correspondence that was tendered to the Court concerning the source of the prohibited substance in the Respondent's system. Furthermore, the Respondent had displayed a preparedness to assist the Applicant in pursuing the Fortius Group for its part in causing Anti-Doping Rule Violations to occur. Fortius Synephrine had been used by other weightlifters competing under the auspices of the Applicant and the distributors of the product were competitive weightlifters in their own right. It was stressed that the enquiries made by the Respondent and her willingness to assist the Applicant and/or any other authority concerned with anti-doping had been and would continue to be of great assistance in

the detection of others engaged in Anti-Doping Rule Violations including possession, trafficking and the administering of prohibited substances. Furthermore, not only did the Respondent openly disclose the Synephrine sample on her Doping Control test form but she has caused an analysis to be made which proved the presence of BZP in Fortius Synephrine. This assisted the Applicant and furthered the Anti-Doping message within her sport from several perspectives including identifying the inclusion of a Prohibited Substance in a supplement widely used by and produced by other competitive weightlifters and identifying the probable source of other Anti-Doping Rule Violations. It was submitted that due to her assistance to the Applicant and the proactive steps that she had taken to identify a contaminated product widely used in weightlifting she has furthered the Anti-Doping message and provided significant assistance to the Applicant in detecting other violations. It was submitted that the period of ineligibility due to the substantial assistance provided should be reduced to 12 months.

SUBMISSIONS OF THE APPLICANT

34. The Applicant made the following submissions:

34.1 The Respondent had failed to establish that she exercised the utmost caution as required by the “*no fault or negligence*” provision in Article 13.6.1.

34.2 In particular, it was stressed that the Respondent had –

- failed to read the ASDA website which provides sufficient warning of the dangers associated with taking supplement products;
- failed to read the ASDA position statement published on 13 May 2003 and contained on the website concerning contamination of products including supplement products;
- failed to make enquiries under the Supplement Information Scheme offered by ASDA;
- failed to read the information for athletes concerning the Supplement Information Scheme;
- failed to seek a guarantee from the “manufacturer” of the supplement product;
- purchased a product supplement from a manufacturer without making adequate enquiries;

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- failed to make enquiries as to whether all of the listed ingredients referred to on the label of the product supplements were prohibited substances.
 - failed to read the warnings in relation to supplements found on the ASDA Anti-Doping Information Card 2005.
 - relied upon the word of others including her coach, Camilla Fogagnolo and Belinda Van Tienen as to the safety of Fortius Synephrine.
35. In relation to whether the Respondent had established “*no significant fault or negligence*”, it was submitted that the fact that the Respondent took some steps did not lessen the type of failures outlined above.
36. It was submitted that the circumstances of the case were not truly exceptional and that this was a straightforward case of the ingestion of supplements with the assumption by the Respondent of the risk. It was submitted that the Respondent had not established that the supplement had been purchased from a reputable source after due and proper enquiries had been made to ascertain that the nutritional supplement did not contain any prohibited substances. Reliance upon the advice of her coach, friends or product labels was tantamount to a type of wilful blindness on the part of the Respondent, it was submitted.
37. Counsel for the Applicant submitted that none of the previous decisions by the Court relied upon by the Respondent were of much assistance as each case had to be determined pursuant to its own unique facts and circumstances. Particular emphasis was placed on Article 20.5 of the Applicant’s ADP which requires the ADP to be interpreted in a manner consistent with the WADA Code.

The commentary on the World Anti-Doping Code contains the following section:

“10.5.1 Comment: *Article 10.5.1 applies only to violations under Article 2.1 and 2.2 (presence and use of Prohibited Substances) because fault or negligence is already required to establish an anti-doping rule violation under other anti-doping rules.*

10.5.2 Comment: *The trend in doping cases has been to recognise that there must be some opportunity in the course of the hearing process to consider the unique facts and circumstance of each particular case in imposing sanctions. This principle was accepted at the World Conference on Doping in Sport 1999 and was incorporated into the OMADC which provides that sanctions can be reduced in “exceptional circumstances”. The Code also provides for the possible reduction or elimination of the period of Ineligibility in **the unique circumstances** where the Athlete can establish that she or he had No Fault or Negligence or No Significant Fault or Negligence, in connection with the violation. This approach is consistent with basic principles of human rights and provides a balance between those Anti-Doping Organisations that argue for a much narrower exception, or none at all, and those that would reduce a two year suspension based on a range of other factors even when the Athlete was admittedly at fault. These Articles apply only to the imposition of sanctions:*

they are not applicable to the determination of whether an anti-doping rule violation has occurred. **Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.**

To illustrate the operation of Article 10.5, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove, that despite all due care, she or she was sabotaged by a competitor. **Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a prohibited substance by the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associate (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink).** However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) **if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements).**

Article 10.5.2 applies only to the identified anti-doping rule violations because **these violations may be based on conduct that is not intentional or purposeful.** Violations under Article 2.4 (whereabouts information and missed tests) are not included, even though intentional conduct is not required to establish these violations, because the sanction for violations of Article 2.4 (from three months to two years) already builds in sufficient discretion to allow consideration of the Athlete's degree of fault".

(Emphasis added)

38. It was submitted that in applying the explanations contained in the commentary on the WADA Code (see above) to this case there was no basis upon which the facts or circumstances involved in this case could fall within the categories of "no fault or negligence" or "no significant fault or negligence". It was emphasised that the Respondent could not clearly establish "that the cause of the positive test was contamination in a common multi vitamin purchased from a source with no connection to prohibited substances and the athlete exercised care in not taking other nutritional supplements". (see the Commentary in paragraph 37 above).
39. It was further submitted that there was no evidence of substantial assistance to attract the operation of Article 13.6.3. The information provided was to assist in the Respondent's own hearing before the Court and that therefore the Respondent

was not entitled to any reduction of the period of ineligibility on the basis of “*substantial assistance*”. Accordingly, the sanction that ought to be imposed was 2 years ineligibility.

FINDINGS

40. At the conclusion of the hearing on 3 February 2006 the Court announced its findings and indicated that it would provide full reasons for those findings at a later date. The foregoing rendition of the evidence and the submissions sets out in detail the material that the Court has received. The Court has considered the totality of the evidence and the submissions that have been made by the Applicant and the Respondent.
41. As was conceded by the Respondent at the commencement of the hearing, the Court finds that the Respondent has committed an Anti-Doping Rule Violation.
42. There was no challenge to the Respondent’s evidence to the effect that the prohibited substance had entered her system through the consumption by her of the product Fortius Synephrine. The Court finds that the Respondent has established by a balance of probability that the prohibited substance entered her system through the consumption by her of the product Fortius Synephrine. The establishment of that fact is a precondition for the elimination or reduction of a period of ineligibility pursuant to Article 13.6.1 or 13.6.2.

Applicability of Article 13.6.1

43. The Respondent has not established by a balance of probability that she “*could not reasonably have known or suspected even with exercise of utmost caution*” that she had used the prohibited substance. The Court finds that the Respondent had been effectively warned about the dangers of consuming nutritional supplements and that the information provided, and available, to the Respondent was adequate (see paragraph 24 above) to alert her to the dangers of consuming nutritional supplements that had not been approved. There is substantially more that the Respondent ought to have done to have protected herself. Accepting that the Respondent and her coach Mr. Mark Brown had checked the relevant page of the ASDA website concerning Synephrine and perhaps other ingredients on the label, and accepting the good intentions and the purpose behind the Respondent and her coach undertaking such a task, the evidence revealed the deficiencies in the searches of the ASDA website that were undertaken. Even if these deficiencies had not occurred there was nevertheless the failure to adhere to the risk that Fortius Synephrine may contain impurities such as ingredients that were not listed on the label which could cause a positive test. Those warnings were spelt out with

absolute clarity in the ASDA Anti-Doping Information Cards provided to the Respondent on a number of occasions prior to the date of the positive test. Furthermore, the Respondent ought to have been aware of the different provisions in relation to the use of stimulants in competition as compared to out-of-competition. The reliance by the Respondent upon the advice of Belinda Van Tienen, Camilla Fogagnolo and Mr. Brown was clearly insufficient and significant in the circumstances.

44. The commentary in the World Anti-Doping Code on the equivalent to Article 13.6 notes that the Article is meant to have an impact only in cases where the circumstances are truly exceptional. This Court in *Edwards* emphasised that (at page 16) *"it would put an end to any meaningful fight against doping if an athlete was able to shift his/her responsibility with respect to substances which enter the body to someone else and avoid being sanctioned because the athlete himself/herself did not know of the substance"*. This approach is consistent with Article 5.1.1 of the ADP (see above).

Applicability of Article 13.6.2

45. The Court finds that the Respondent has not established that her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *"no fault or negligence"*, was not significant in relationship to the Anti-Doping Rule Violation. The Court relies upon the matters referred to in paragraph 44 above. It could not be said that the facts and circumstances involved in this case are truly exceptional to attract the operation of this provision. The Court accepts the submission of the Applicant that this was a common case of where an athlete has failed to heed warnings that the Court finds were conveyed adequately to her in written form if not also in spoken form. The Respondent is an intelligent person and studying at a tertiary level. The Court accepts that the Respondent's use of the prohibited substance was inadvertent, not deliberate and most unfortunate given her personal and competitive background and her reputation for honesty and integrity. Indeed there was no challenge to any of those factors by the Applicant. The Respondent may have believed that she had done all that was prudent to have been done, however, when the Court comes to objectively view what the Respondent in fact did it was clearly insufficient in the circumstances. The Respondent has not met the standard of proof incumbent upon her. Furthermore, although not necessary for the decision, the Court finds positively that the Respondent's fault of negligence was significant in relationship to the Anti-Doping Rule Violation.

Applicability of Article 13.6.3

46. The Court finds that there is no jurisdiction to reduce the period of ineligibility pursuant to Article 13.6.3. The Court finds that it was the clear intent of the Applicant that it is only the IWF that has the power to reduce the period of ineligibility due to the provision of substantial assistance. This conclusion is based upon a careful reading of the relevant Articles of the Applicant's ADP and the clear distinction that is made between the powers that may be exercised by the Applicant on the one hand and the Court on the other. Article 13.4 is an example of that distinction. This is not the only example. The Court's conclusion is further reinforced by the provision to the Court by the Applicant of the template used by Australian Sporting Federations provided by the Australian Sports Commission in the formulation of the Applicant's ADP. In that template the opening words of Article 13.6.3 state that "*the hearing body or CAS may also reduce the period ...*". Thus there was a conscious decision by the Applicant to deny the Court jurisdiction to reduce the period of ineligibility pursuant to Article 13.6.3. Even if the Court did have jurisdiction it would find that the assistance could not be described as substantial so as to attract the operation of the provision. The assistance that has been provided is merely to alert the relevant authorities to the fact that the prohibited substance was contained within the Fortius Synephrine product. That level of assistance falls well short of the type of assistance considered in *Knauss*.

CONCLUSION

47. The Court finds that the Respondent cannot avail herself of the provisions of Article 13.6 of the Applicant's ADP and accordingly, the applicable period of ineligibility is 2 years commencing on 3 February 2006.

COSTS

48. The Applicant is the prevailing party and entitled to a contribution towards its legal fees.
49. The Applicant sought Australian AUD \$7374.00 in respect of Counsel's and Solicitors' costs.
50. The Court has taken into account as it is required to do by Rule 64.5 of the Code of Sports-Related Arbitration, the outcome of the proceedings as well as the conduct and the financial resources of the parties. After taking all those matters into account the Court has determined that the appropriate contribution to be made by the Respondent to the Applicant is \$1000.00.

ON THESE GROUNDS

The Court of Arbitration for Sport Rules that:

1. Jenna Myers has breached Article 5.1 of the Anti-Doping Policy of the Australian Weightlifting Federation and has thereby committed an Anti-Doping Rule Violation.
2. Jenna Myers individual results obtained in the Australian Weightlifting Championships held in Brisbane, Queensland in October 2005 are disqualified; accordingly Jenna Myers forfeits her first placing achieved at that Championship including all medals, points, national records and prizes, pursuant to Article 13.1 of the Anti-Doping Policy of the Australian Weightlifting Federation.
3. Jenna Myers is ineligible to compete during the period commencing on 3 February 2006 and expiring at midnight on 2 February 2008.
4. Jenna Myers is required to pay the sum of \$1000.00 in respect of costs to the Australian Weightlifting Federation.



David Grace Q.C.

Sole Arbitrator

24 February 2006