



Arbitration CAS (Oceania Registry) A1/2009 Australian Sports Anti-Doping Authority (ASADA) c. Peter Atkins, award of 4 November 2009

Sole Arbitrator: Mr David Grace QC (Australia)

Surfing

Doping (stanozolol)

Athlete's knowledge of the prohibition against the taking of performance enhancing drugs in sport

Failure of an athlete to give evidence before the CAS

Clarity of the rules and predictability of sanctions

- 1. The fight against doping in sport has a long and public history in Australia and throughout the world. An athlete who is an elite national competitor in his sport, a man of 33 years of age and a competitor in the sport for many years, would know of the prohibition against the taking of performance enhancing drugs in sport. An inference can clearly be drawn as to such knowledge from the fact that on the doping control test form signed by him he made no mention of his possession and use of the prohibited substance. It is inexplicable as to why he would omit mention of the use of that substance to those completing that form or to those conducting the test if it was the case that he had no knowledge that use of the substance was contrary to the Rules of the sport.**
- 2. The failure of an athlete to give evidence before the CAS is not of itself evidence. The athlete cannot be compelled to give evidence and his silence cannot amount to an implied admission. He is entitled to take that course and it is not evidence of either guilt or innocence. In the criminal law of Australia and in a number of other jurisdictions where the standard of proof of guilt is beyond reasonable doubt, silence on the part of an accused person cannot fill in gaps in the prosecution case. However when the failure of an accused person to give evidence is a circumstance which may bear upon the probative value of the evidence which has been given, the tribunal may take that failure into account only for the purposes of evaluating the evidence before it. A tribunal cannot, and cannot be required to, shut its eyes to the consequences of exercising the right not to give evidence in a case where assertions are made as to a state of knowledge or lack of knowledge on the part of an athlete.**
- 3. Clarity and predictability are required so that the entire sport community are informed of the normative system in which they live, work and compete, which requires at the very least that they be able to understand the meaning of rules and the circumstances in which those rules apply. Therefore, if, when analysing different sets of rules, the interpretation of "individual sport" and "team sport" does not allow to clarify these definitions with a view of deciding whether or not the other members of a boat crew in which one member tested positive should also be sanctioned, the boat crew results should not be annulled.**

Surf Life Saving Australia (SLSA) has, pursuant to its Constitution, promulgated an Anti-Doping Policy (ADP). SLSA's position on doping is stated in Clause 2 of the ADP as follows:

"SLSA condemns doping as fundamentally contrary to the spirit of sport. The purpose of this ADP is to protect Athletes' fundamental right to participate in doping-free sport ..."

The ADP is intended, *inter alia*, to apply to any participant in sporting activity who is a member of SLSA. On 30 June 2009 ASADA, on behalf of SLSA, issued an Infraction Notice to Mr. Atkins pursuant to Clause 15 of the ADP. The Infraction Notice alleged Anti-Doping Rule Violations against Mr. Atkins relating to a doping control sample provided by him on 22 March 2009 which was analysed to contain the metabolites of Stanozolol. Stanozolol is a prohibited substance listed on WADA 2009 Prohibited List. Two violations were alleged, namely the "*presence of a prohibited substance or its metabolites*" and "*the use of a prohibited substance*". SLSA has referred a number of anti-doping functions, powers and responsibilities to ASADA. These include investigating possible Anti-Doping Rule Violations within the sport of Surf Lifesaving, issuing Infraction Notices, convening hearings before the Court of Arbitration for Sport (CAS) (Clause 16 of the ADP), presenting allegations of Anti-Doping Rule Violations and all relevant, incidental matters and hearings before CAS and notifying the results of investigations and hearings and other matters to relevant bodies. Mr. Atkins has elected to have the matter referred to a hearing by CAS who is given jurisdiction under the ADP to determine if a violation of the ADP has occurred.

An Order of Procedure was agreed to by the parties however this was subsequently amended due to the fact that ASADA filed a second application against the second, third, fourth and fifth named affected parties. It was agreed that both applications be heard simultaneously at the same hearing. The supplementary order of procedure records that the parties agreed that the CAS has jurisdiction to determine, by arbitration, whether the CAS has jurisdiction to determine the substantive dispute (the preliminary issue) and that the parties agree to refer that issue to CAS; and thereafter, if CAS determines that it does have jurisdiction, the parties agree to refer the substantive dispute to CAS for determination by arbitration.

Pursuant to directions from the CAS all parties have filed and served upon each other written submissions in support of their respective contentions. In addition, a number of statements of evidence from proposed witnesses were filed and served however these statements were subsequently withdrawn at the hearing. No witnesses gave evidence, however substantial evidentiary material was filed in support of the submissions made.

The hearing proceeded on 29 September 2009 in Melbourne, Victoria, Australia and occupied a substantial part of the day. All parties presented extensive oral submissions. At the conclusion of the hearing CAS announced that it would reserve its decision and deliver its Award at a subsequent date.

The written and oral submissions were primarily directed to three issues:

The jurisdictional issue – whether Mr. Atkins is bound by the Anti-Doping Policy (ADP) of SLSA;

Whether, if Mr. Atkins was bound by the ADP, he committed Anti-Doping Rule Violations (the substantive dispute); and

Whether, if Mr. Atkins committed Anti-Doping Rule Violations this had the effect of annulling the result of the Currumbin Barbarians Surf Lifesaving Club Men's Open Surf Boat Team in the 2009 Australian Championships race (the sanction issue).

LAW

CAS Jurisdiction

1. Mr. Atkins contends that the CAS does not have jurisdiction to hear and determine the substantive dispute between the parties because the CAS could not be satisfied that the contract in existence between SLSA and Mr. Atkins (created by the application by Mr. Atkins for membership dated 9 September 2008), had legally incorporated into it the provisions of the ADP upon which ASADA and SLSA rely in alleging the Anti-Doping Rule Violations by Mr. Atkins. Reliance is placed upon the alleged absence of evidence that Mr. Atkins was aware of the existence of the ADP or its terms. It was contended that the ADP was “*significant*” in the contractual relationship between SLSA and Mr. Atkins and because SLSA did not bring the ADP to the attention of Mr. Atkins prior to or at the time the contractual relationship was entered into, the ADP is not enforceable by SLSA (and therefore ASADA) against Mr. Atkins.
2. In order to consider these contentions, the facts must first be outlined.
3. Mr. Atkins was born on 29 April 1975 and at the time of the alleged doping rule violations was aged 33 years. He has been described as being a long serving participant in Surf Lifesaving. He is recorded as having joined SLSA on 4 October 2002. On 9 September 2008 he applied for annual membership of SLSA for the 2008/2009 Season. He signed the application and made a declaration which, inter alia, included the following:

*“5. **The SLSA Constitution** is a Contract between me and SLSA. I will be bound by it & any regulations, policies and codes of conduct made under it. It is necessary & reasonable for promoting SLSA and Surf Lifesaving as a community service ... (emphasis, by underlining, added).*

*12. **I have read, understood, acknowledge and agreed** to the above declaration I acknowledge that if my application for membership be successful I will be entitled to all benefits, advantages, privileges & services of SLSA membership”.*
4. There was no dispute that Mr. Atkins was involved in Surf Lifesaving competition including involvement on 22 March 2009 in the Men's Open Surf Boat event conducted at the 2009 Australian Surf Lifesaving Championships held at Scarborough Beach in Perth, Western Australia. He was a member of the winning team representing Currumbin Barbarians Surf Lifesaving Club. The winning team comprised four oarsmen and a sweep man. On that day at 1332 hours, Mr. Atkins was notified that he was required to report to the Doping Control Station at Scarborough Beach for the purposes of a doping control test. He received written notification of that requirement and signed the following statement:

"I acknowledge I have received information outlining ASADA's sample collection procedure and my rights and responsibilities, as an athlete, in relation to this process I understand that if I do not comply with a request to give a sample, I may be disciplined by my sporting organisation and/or my name may be placed on the ASADA Register of Findings ..."

5. At 1525 hours on 22 March 2009, approximately 2 hours after the notification had been given, Mr. Atkins gave a urine sample as requested. At the time of the giving of the urine sample there is no dispute that Mr. Atkins advised the collection official that the only medication, vitamin or supplement he was taking was "Endura 600 mls" with the substance being taken on 22 March 2009. There is no suggestion that Endura is another name for Stanozolol. On 21 April 2009 the National Measurement Institute of the Australian Government reported to ASADA that after the sample was screened for stimulants, narcotics, diuretics, anabolic agents and other substances, the metabolites of Stanozolol were confirmed in the sample. On 29 April 2009 Mr. Atkins was notified of this result of the analysis of his "A" Sample and on 15 May 2009 he was notified by ASADA that the test conducted on his "B" Sample also revealed the presence in his urine sample of Stanozolol. Mr. Atkins did not dispute before the CAS that the urine sample was validly taken nor did he dispute the result of the analysis of that urine sample.

Submissions of the Parties

6. Mr. Atkins contends that the absence in Clause 5 of the membership application form of reference to the ADP is of crucial significance as to whether the ADP is incorporated into the contractual relationship between SLSA and Mr. Atkins. Additionally, reliance was placed upon the absence of evidence that Mr. Atkins was aware of the ADP or that it was brought to his attention by SLSA. It was asserted on behalf of Mr. Atkins that there was no evidence that he was aware that any ADP existed or that he had read and understood it. An additional point initially raised, but not pursued ultimately, was that Mr. Atkins was not subject to the ADP that came into existence in December 2008 and which replaced the ADP existing in September 2008. The new ADP obviously did not exist in September 2008 when he applied for membership. During the course of the hearing Mr. Atkins abandoned any reliance upon this issue as it became clear that the relevant provisions of the ADP were identical regardless of which policy was relied upon.
7. Mr. Atkins also relied upon the absence of any mention in Clause 5 of the membership application form of the word "sport" or participation in sporting events or any reference to Surf Lifesaving as a sport. Indeed there is no reference to the word "sport" or "sporting events" anywhere on that form. This supported a submission that the activity engaged in was not a sport. It was submitted that that absence lends substantial weight to the need for SLSA to have brought specifically to the attention of Mr. Atkins the existence of its ADP. This was highlighted by the existence in the SLSA Constitution of stated objects which acknowledge that SLSA is a charitable community service organisation and is primarily devoted to saving lives as opposed to conducting a recognised sporting competition. It was acknowledged that whilst reference is made in the objects contained in the Constitution to various objects of organised sporting competition and the encouragement and promotion of performance-enhancing drug free

competition, those two objects were in contrast to the remaining 26 lifesaving oriented objects. In relation to the declaration signed by Mr. Atkins, it was submitted that there was no evidence that he was told specifically what the policies, regulations and codes were prior to or at the time he signed the membership application form, nor was there any evidence that he was provided with copies of such documentation or directed to whether he could review or examine the material.

8. Mr. Atkins submitted that SLSA had not done enough to ensure that he and other Surf Life Savers who competed at the National Championships were aware that they were subject to an “Anti-Doping regime” and in particular, the ADP. Reliance was placed upon the introductory comments in the World Anti-Doping Code to the effect that athletes should be informed of the Anti-Doping Rules in force. It was contended that mere mention of the word “policies” in the membership application form rather than specific reference to “Anti-Doping Policy” and an accompanying direction as to where it could be sourced, read and considered falls short of the standards prescribed by the World Anti-Doping Code and regulations made by ASADA. Reliance was also placed upon CAS jurisprudence. In CAS 94/129 (23 May 1995), the CAS stated:

“The fight against doping is arduous, and it may require strict rules. But the rule-makers and rule appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorized bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders”.

9. Endorsement of the above approach by the CAS in CAS 2004/A/725 (20 July 2005) was relied upon. There it was said:

“Secondly, the principles underlying the approach adopted by the CAS in [CAS 94/129] and similar cases cannot be ignored, ...”.

10. The rationale for requiring clarity of rules extends beyond enabling athletes in given cases to determine their conduct in such cases by reference to understandable rules. As argued by the Appellants at the hearing, *“clarity and predictability are required so that the entire sport community are informed of the normative system in which they live, work and compete, which requires at the very least that they be able to understand the meaning of rules and the circumstances in which those rules apply”.*
11. Mr. Atkins submitted that the above principles were equally applicable to him in relation to being bound by the ADP because the means by which he was purportedly bound by the ADP fell well short of the test propounded in the abovementioned decisions.
12. Reliance was also placed upon applicable Australian contractual law and specifically the decision by the High Court of Australia in *Toll (FGCT) Pty. Ltd. v Alphapharm Pty. Ltd.* (2004) 219 Commonwealth Law Reports 165 (see specifically at paragraphs [45] – [57]). It was submitted that that case was authority for the proposition that if an unusual term (such as the word “policies” in the membership application form signed by Mr. Atkins) is used, those words must be specifically drawn to the attention of the party affected due to their unusual or significant

impact and effect. It was contended that because the ADP was purported to be a significant part or term in the contractual relationship between SLSA and Mr. Atkins, it should have been squarely brought to his attention prior to or at the time that he signed the contract that was the membership application form. The use of the word “policies” did not satisfy this legal requirement, which is supported by English and Australian cases that stress the need to draw specifically to a contracting party’s attention unusual or difficult terms affecting the proposed relationship.

13. Accordingly, it was submitted that Mr. Atkins was not contractually bound to the ADP and therefore CAS did not have jurisdiction to determine the substantive issue as the ADP was the only document that gave CAS jurisdiction.
14. ASADA submitted that there was no requirement at common law or in the World Anti-Doping Code (“the Code”) that athletes must have read and understood an ADP in order for it to be binding upon them. It was contended that the anti-doping movement throughout the world would be undermined if an athlete was able to escape sanction on the basis of a claim of not having read or understood an ADP. In relation to the issue of the applicable contractual law, it was submitted that where a contract is signed, as was the case with the membership application form signed by Mr. Atkins, there was no requirement to prove actual subjective awareness of the terms. Reliance was placed upon the High Court of Australia decision in *Toll* (see above) and particularly the statements in that case to the effect that the fact that a person has signed a document without reading it does not put the other party in a position of having to show that due notice was given of its terms.
15. ASADA also relied upon the fact that Mr. Atkins had not given evidence to support the assertions that he was not aware that the ADP was part of the contractual relationship between him and SLSA and, that he was not aware of the existence of the ADP or its terms. It was contended that the assertion that a person in the position of Mr. Atkins, who was a National Champion competing in a National Championships with many years of experience in competition, would not have knowledge of the existence of rules sanctioning drug use in sport was improbable. Reliance was placed on a statement by Justice Rich of the High Court of Australia in *The Insurance Commissioner v Joyce* (1948) 77 Commonwealth Law Reports 39 (at page 40), that “*when circumstances are proved indicating a conclusion and the only party who can give direct evidence prefers the well of the Court to the witness box a Court is entitled to be bold*”.
16. It was stressed that the anti-doping movement has a long history in Australia and it would be ludicrous to suggest that Mr. Atkins had no knowledge of it or that he did not know there were rules in his sport imposed by SLSA that required competitors to be drug free. Reliance was sought to be placed upon a high profile athlete in the same sport who had tested positive for exactly the same substance, Stanozolol, a number of years earlier, and who had received a lengthy period of disqualification (see CAS A3/2005, 20 December 2005). That case had attracted a great deal of publicity in 2005.
17. Furthermore, reliance was placed upon the document signed by Mr. Atkins at 1325 hours on 22 March 2009, when he was provided with written notice of the intention to obtain a sample

from him, and his acknowledged receipt of information outlining ASADA's sample collection procedures and his rights and responsibilities, amongst other matters.

18. It was contended, also, that it was highly significant that on the doping control test form completed by Mr. Atkins and signed by him at the time that the test was taken, he noted that he had taken "Endura" but made no mention of taking Stanazolol. Although that particular form allowed comments to be made by Mr. Atkins about any surprise that he had been tested or of any other complaint, he made no comment. It was submitted that all of these factors taken together made it clear that Mr. Atkins well knew that he was not permitted to use Stanazolol because of his knowledge of the existence of rules against such use.

On the merits

19. I have considered carefully the submissions that have been made by the parties, whether written or orally at the hearing. I have come to the conclusion that Mr. Atkins is contractually bound by the ADP of SLSA and that therefore the CAS has jurisdiction to determine the substantive dispute and the sanction issue by Arbitration. I so find for the following reasons:
20. The fight against doping in sport has a long and public history in Australia and throughout the world. A person in the position of Mr. Atkins, being an elite national competitor in his sport, a man of 33 years of age and a competitor in the sport for many years, would know of the prohibition against the taking of performance enhancing drugs in sport. Surf Life Saving is clearly both a sport and a community activity, as recognised clearly in its Constitution.
21. An inference can clearly be drawn as to Mr. Atkins knowledge of the prohibition against the use of performance enhancing drugs from the fact that on the doping control test form signed by him he made no mention of his possession and use of Stanazolol. Mr. Atkins does not dispute that Stanazolol was in his system nor that it was used by him. It is inexplicable as to why he would omit mention of the use of that substance to those completing that form or to those conducting the test if it was the case that he had no knowledge that use of the substance was contrary to the Rules of the sport of Surf Life Saving.
22. The High Court of Australia in *Toll* (see above at [54]) stated with clarity that:
"where a person has signed a document, which is intended to affect legal relations, and there is no question of misrepresentation, duress, mistake or any other vitiating element, the fact that the person has signed a document without reading it does not put the other party in the position of having to show that due notice was given of its terms".
23. There is no reason in the circumstances of this case why the general rule (set out in *Toll* at [57]) should not apply namely that where there is no suggested vitiating element *"a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document"*. I find that there is no vitiating element existing in this case whether due to the term comprised by the word *"policies"* being significant, unusual or analogous to an exclusion clause or otherwise. There was no requirement

for SLSA to use the words “*Anti-Doping Policy*” to make the ADP incorporated into the contract between SLSA and Mr. Atkins.

24. Clause 5 of the Membership Application Form signed by Mr. Atkins clearly refer to “*codes of conduct*” after the word “*policies*”. Clause 2.26.4 of the SLSA’s Code of Conduct provides, inter alia, that “*competitors will never consider cheating and in particular, not attempt to improve their individual performance by the use of drugs*”. The specific reference to drugs in the Code of Conduct reveals the weakness in the argument of lack of knowledge of the policies of SLSA in relation to drug use in sport. As was acknowledged at the hearing, Mr. Atkins was clearly contractually bound by the Code of Conduct. To suggest, therefore, that he was ignorant of the existence of the ADP, or that he was ignorant that sanctions would apply to performance enhancing drugs (such as Stanozolol) being used by him, is without foundation.
25. Based upon the material placed before the CAS, I am entirely satisfied that Mr. Atkins is bound by the ADP. I am so satisfied without considering the effect, if any, of the failure of Mr. Atkins to give evidence. The failure of an athlete to give evidence before the CAS is not of itself evidence. The athlete cannot be compelled to give evidence and his silence cannot amount to an implied admission. He is entitled to take that course and it is not evidence of either guilt or innocence. In the criminal law of Australia and in a number of other jurisdictions where the standard of proof of guilt is beyond reasonable doubt, silence on the part of an accused person cannot fill in gaps in the prosecution case. However when the failure of an accused person to give evidence is a circumstance which may bear upon the probative value of the evidence which has been given, the tribunal may take that failure into account only for the purposes of evaluating the evidence before it. A tribunal cannot, and cannot be required to, shut its eyes to the consequences of exercising the right not to give evidence in a case where assertions are made as to a state of knowledge or lack of knowledge on the part of an athlete. If it was necessary for my decision, I would have found that Mr. Atkins was in the best position to explain to the CAS his state of knowledge given that he sought to be exculpated from the ramifications of signing the membership application form and its attendant declaration. As indicated, I did not require to have resort to the application of this principle in the circumstances of this case, however it is an important consideration for athletes to take into account if a similar case was to arise in the future. The application of the principle in appropriate cases is reinforced by the common law of Australia (see the *Insurance Commissioner v Joyce*, cited above at paragraph 19, and *Weissensteiner v The Queen* (1993) 178 Commonwealth Law Reports 217).

Substantive Dispute

26. Consequent upon the findings that Mr. Atkins was subject to the ADP of SLSA, I find that Mr. Atkins has committed the two Anti-Doping Rule Violations specified in the Infraction Notice, namely the “*presence of a prohibited substance or its metabolites*” and “*the use of a prohibited substance*”. This conclusion is not the subject of dispute and it was accepted as the consequence of a finding adverse to Mr. Atkins in respect of the preliminary jurisdictional issue. Through the combined operation of Clause 17 of the ADP and Articles 9 and 10 of the World Anti-Doping Code the following sanctions are imposed upon Mr. Atkins:

27. Disqualification of the result obtained as a member of the winning team representing Currumbin Barbarians Surf Lifesaving Club in the Men's Open Surf Boat event conducted at the 2009 Australian Surf Life Saving Championships held at Scarborough Beach in Perth, Western Australia, including forfeiture of any medals, points and prizes obtained as a result of being part of the winning team.
28. Ineligibility to compete for a period of 2 years in respect of each Anti-Doping Rule Violation, with the period of ineligibility to be served concurrently and to commence on 5 May 2009 (being the date of his provisional suspension) and concluding at midnight on 4 May 2011.

The Sanction

29. The issue to be determined is whether, consequent upon the finding that Mr. Atkins has committed Anti-Doping Rule Violations, this has the effect of annulling the result of the Currumbin Barbarians Surf Lifesaving Club Men's Open Surf Boat team in the 2009 Australian Championships race. The Affected Parties, Messrs. Clark, Williams, Martin and Parr are directly affected by this issue. There is no suggestion that any of them had knowledge of the fact that Mr. Atkins had used a performance-enhancing drug prior to the competition.
30. Clauses 17 and 18 of the ADP of SLSA deal with the sanction issue insofar as it applies to individuals and teams. Articles 9, 10 and 11 of the Code are incorporated by reference and apply. I have already determined that Mr. Atkins, as a result of his Anti-Doping Rule Violations, will have his results disqualified. Does this disqualification mean that his teammates also have their results disqualified and therefore their team result annulled? Resolution of the matter is not free from difficulty.
31. Article 9 of the Code provides that an Anti-Doping Rule Violation in individual sports in connection with an in-competition test automatically leads to disqualification of the result obtained in that Competition with all resulting consequences including forfeiture of any medals, points and prizes.
32. Article 11 of the Code provides consequences to teams as a result of Anti-Doping Rule Violations committed by members of a team. Article 11.2 provides that if more than 2 members of a team in a team sport are found to have committed an Anti-Doping Rule Violation during an Event period, the ruling body of the Event shall impose an appropriate sanction on the team (eg: loss of points, disqualification from the Competition or Event, or other sanction) in addition to any consequences imposed upon the individual athletes committing the Anti-Doping Rule Violation.
33. The issue in dispute is whether the Open Surf Boat Race is an individual or a team sport. If it is an individual sport then the result for the whole crew and the boat may require to be disqualified pursuant to Article 9. If it is a team sport the result will stand unless the ruling body for the Event has established rules for the Event which imposes consequences for team sports

stricter than those set out in Article 11.2 (see Article 11.3). It was common ground at the hearing of this matter that SLSA, the ruling body for the Event, had not established stricter rules which would affect the operation of Article 11.2.

34. The Code defines “*individual sport*” as any sport that is not a “*team sport*”, and defines team sport as a sport in which the substitution of players is permitted during a Competition. A Competition is defined as a single race, match, game or singular athletic contest. Examples are given of a basketball game or the finals of the Olympic 100 meter race in athletics. Additionally where there may be stage races and other athletic contests where prizes are awarded on a daily or other interim basis the distinction between a Competition and an Event will be as provided in the Rules of the applicable International Federation.
35. SLSA makes available to its members a publication described as the “*Australian Surf Sports Manual*”. The publication date is September 2008. A copy was provided to the CAS. It is clear from a perusal of that document that different definitions of “*Competition*” and “*Event*” are applied. For instance, Section 2.9.3 discusses the conduct of competitions and the meaning of “*sections*”, “*disciplines*”, “*events*” and “*race*”. A race is defined as being a round of an event and includes heats, rounds, quarter and semi-finals or final of an event. The Manual uses the word “*competition*” in different contexts to that contemplated by the definition of “*Competition*” in the Code.
36. Section 2.18 has the heading “*Substitution of Competitors*”. It provides inter alia, that in individual events there can be no substitution and that in boat events various substitution rules apply. For instance Section 2.18(f) provides that in events where two or more persons comprise a team, substitution of up to and including all team members is permitted. Therefore members of a boat crew could be substituted between heats and semi-final and between semi-final and final. ASADA submitted that because there could be no substitution during the course of the final boat race the conclusion must be that it is not a sport in which the substitution of players is permitted during a Competition. This is due to the fact that the definition of “*Competition*” in the Code specifies that it comprises “*a single race, match, game or singular athletic contest*”. As outlined above, however, the definition of “*Competition*” in the Code does not deal with every situation that may arise by way of example. The Rules of the applicable International Federation, namely the International Life Saving Federation in respect of Competitions was not the subject of any discussion at the hearing nor were the Rules tendered in evidence. The commentary to the Code does not discuss a similar factual scenario, nor could any relevant CAS decision be discovered. The definition of “*Competition*” in the Code is not exhaustive. It may well include the description of “*Competition*” in the Australian Surf Sports Manual of SLSA, however the true compass of its meaning is elusive.
37. The matter is further complicated by two additional factors. Firstly, Clause 17 of the ADP has been applied in the case of Mr. Atkins. That Clause deals with sanctions and directly applies Articles 9 and 10 of the Code. The commentary to Article 9 provides as follows:

“when an athlete wins a Gold Medal with a prohibited substance in his or her system, that is unfair to the other athletes in that competition regardless of whether the Gold Medalist was at fault in any way. Only a clean athlete should be allowed to benefit from his or her competitive results. For team sports see Article 11 (Consequences to

Teams). In sports which are not Team Sports but where awards are given to teams, disqualification or other disciplinary action against the team when one or more team members have committed an Anti-Doping Rule Violation shall be as provided in the applicable Rules of the International Federation”.

38. I have already set out the applicable parts of Article 11.
39. The second factor concerns Article 11 of the International Life Saving Federation (ILS) Anti-Doping Rules dated December 2008. Article 11.1 provides that:
“If a member of a team is found to have committed a violation of these ISL Anti-Doping Rules during an Event, the team shall be disqualified from the Event”.
40. An “Event” is defined as a series of individual Competitions conducted together under one ruling body (eg: the Olympic Games, FINA World Championships or Pan American Games). Paragraph 8 of the “Background” section on page 3 of the ADP of SLSA specifies that where an athlete is bound by ILS’s Anti-Doping Rules as well as the ADP, that person shall be bound to and have obligations in respect of both policies. In the absence of evidence on the issue I could not be satisfied that the members of the boat crew were subject to the ILS Anti-Doping Rules in relation to the issue of sanction or consequences to teams.
41. It is clear that there is no simple answer available to the question as to whether the boat crew race final was an individual or a team sport. If it be thought that Article 11.1 of the ILS Anti-Doping Rules was applicable this creates further problems. In those rules the definition of “team sport” is a sport in which the substitution of players is permitted during a Competition. ASADA submits that the boat race final was not a team sport and then seeks to rely upon Article 11.1 as the purported consequence to the team. Such reliance requires the finding that the boat crew was a team for certain purposes but not for others.
42. The above discussion and analysis highlights the need for clarification of these definitions by the appropriate sporting federations. It would be a simple matter.
43. In my opinion the difficulty in interpretation and the circularity of reasoning resulting from an attempt to analyse the different sets of rules, as discussed above, provides great difficulty in accepting the submissions by ASADA. As the CAS said in CAS 2004/A/725 (see paragraph 9 above):
“clarity and predictability are required so that the entire sport community are informed of the normative system in which they live, work and compete, which requires at the very least that they be able to understand the meaning of rules and the circumstances in which those rules apply”.
44. Also see the comments set out in CAS 94/129 (at paragraph 8 above).
45. In my opinion those statements apply to this situation. It is incongruous that ASADA seeks to rely upon Clause 18 of the ADP, which has the heading “Consequences to Teams”, in arguing that the boat crew is not involved in a team sport. The necessity for this approach is required because of the lacunae in the ADP which can only provide a sanction for the individual athlete who tests positive and not for persons, such as the innocent crew members in this case, who may be

part of the same “team” in an individual competition as defined in the Code. To disqualify the results of the affected parties would require a conclusion that they competed in an individual sport. At its highest, the adoption of such an interpretation is equally as open as the contrary interpretation. In such circumstances, due to the otherwise adverse results, I cannot subscribe to it.

46. Accordingly whilst Mr. Atkins’ result is disqualified, I find that the Currumbin Barbarians Surf Lifesaving Club boat crew’s result in the Men’s Open Surf Boat race event at the 2009 Australian Surf Life Saving Championships should not be annulled. However, it should be specified in all official publications of SLSA that the crew comprised only Messrs. Clark, Williams, Martin and Parr.

Publication of Award

47. There is no reason why Clause 21 of the ADP should not apply generally, and Clause 21.3 specifically (subject always to a successful appeal). Clause 21 is part of the contractual relationship between the parties. It is set out hereunder:

“21. CONFIDENTIALITY AND REPORTING

21.1 *The identity of any Athlete or other Person who is asserted to have committed an anti-doping rule violation may only be Publicly Disclosed by ASADA, or SLSA after consultation with ASADA, in accordance with the Code, the ASADA Act, the NAD Scheme and the terms of the Confidentiality Undertaking signed between ASADA and SLSA.*

21.2 *ASADA or SLSA, or any official of either, will not publicly comment on the specific facts of a pending case (as opposed to general description of process and science) except in response to public comments attributed to the Athlete, other Person or their representatives.*

21.3 *No later than 20 days after it has been determined in a hearing in accordance with Article 16 that an anti-doping rule violation has occurred and the time to appeal such decision has expired, or such hearing has been waived and the time to appeal the decision has expired, or the assertion of an anti-doping rule violation has not been challenged in a timely fashion, ASADA must Publicly Disclose at least: the disposition of the anti-doping matter including the sport, the anti-doping rule violated, the name of the Athlete or other Person committing the violation, the Prohibited Substance or Prohibited Method involved and the Consequences imposed. ASADA must also Publicly Disclose within 20 days appeal decisions concerning anti-doping rule violations. ASADA will also, within the time period for publication, send all hearing and appeal decisions to WADA. SLSA may also elect to make a public statement in relation to the matter, following consultation with ASADA.*

21.4 *In any case where it is determined, after a hearing or appeal, that the Athlete or other Person did not commit an anti-doping rule violation, the decision may be Publicly Disclosed only with the consent of the Athlete or other Person who is the subject of the decision. ASADA will use reasonable efforts to obtain such consent, and if so consent is obtained, will Publicly Disclose the decision in its entirety or in such redacted form as the Athlete or other Person may approve.*

21.5 *Any decision of an Anti-Doping Organisation regarding a violation of this ADP shall be recognised by all Sporting Administration Bodies, which shall take all necessary action to render such results effective.*

*21.6 Subject to the right to appeal provided in **Article 19**, the Testing, TUE and hearing results or other final adjudications of any organisation recognised by ASADA or any Sporting Administration Body which are consistent with the Code and are within the organisation's authority, shall be recognised and respected by SLSA. SLSA may recognise the same actions of other bodies which have not accepted the Code if the rules of those bodies are otherwise consistent with the Code, the NAD Scheme and/or ASADA's position".*

The Court of Arbitration for Sport rules:

1. The Court of Arbitration for Sport has jurisdiction to determine the substantive dispute by Arbitration.
 2. Peter Atkins is found to have committed two Anti-Doping Rule Violations in breach of Clause 7 of the Anti-Doping Policy of Surf Lifesaving Australia and Article 2 of the World Anti-Doping Code.
 3. The result obtained by Peter Atkins in the Men's Open Surf Boat event conducted at the 2009 Australian Surf Lifesaving Championships is disqualified and any medals, points and prizes awarded to him are forfeited.
 4. Peter Atkins is ineligible to compete during the period commencing on 5 May 2009 and expiring at midnight on 4 May 2011.
 5. The result of the Currumbin Barbarians Surf Lifesaving Club Men's Open Surf Boat Team in the 2009 Australian Championships race remains unchanged and the crew members Lyle Clark, Glen Williams, Randall Martin and Nick Parr are deemed to comprise the winning team.
- (...).