



**Background**

1. Mr Jacobs was tested at the 2010 National Short Course Championships after the 100m individual medley final on 14 November 2010. The "A" sample was positive for 1-3 dimethylpentylamine or, as it is also known, methylhexaneamine, which is the term we shall use in this decision. A provisional suspension was imposed on 14 December 2010. The "B" sample analysis confirmed the "A" sample analysis.
2. Anti-Doping Rule violation proceedings were filed with the Tribunal alleging a violation under Rule 3.1 of the Sports Anti-Doping Rules (SADR) on 16 February 2011. Mr Jacobs admitted the alleged violation by his statement of defence of 8 March 2011 and said that he did not wish to participate in the hearing.
3. After the Tribunal's minute of 17 March 2011, Mr Jacobs provided statements and submissions seeking to rely on SADR 14.4 to reduce the period of ineligibility of two years. Subsequently on 8 June 2011, a statement from his coach, Mike Lee, was received by the Tribunal.
4. The hearing of the substantive Application was held on Tuesday 14 June 2011 by telephone conference. Mr Jacobs was represented by Michael Smyth as counsel. Drug Free Sport was represented by Paul David.

**Status of Substance**

5. At the time of the test, methylhexaneamine was a "non-specified" stimulant under S.6a of the World Anti-Doping (WADA) Prohibited List 2010. Under the WADA Prohibited List 2011, methylhexaneamine became a "specified substance" under S.6b. The Tribunal has previously considered and determined a violation involving this substance which occurred in 2010 by reference to its changed status on the 2011 List. This approach was adopted in fairness to New Zealand athletes by reason of the approach internationally in relation to other similar cases - see *Drug Free Sport New Zealand v Rangimaria Brightwater-Wharf* (ST 14/10, decision 29 November 2010, at paras 23-25).

6. Drug Free Sport submitted that the same approach to the potential application of SADR 14.4 should be adopted in this case as was adopted in the *Brightwater-Wharf* decision. The Tribunal agrees.

#### **SADR 14.4**

7. Under SADR 14.4 it is possible for the Tribunal to reduce the two year period of ineligibility for specific substances if the athlete establishes:
  - (a) How the substance came into his or her system; and
  - (b) That the substance was not intended to enhance the athlete's sports performance.
8. The first requirement must be established on the balance of probabilities; the second to the higher standard of comfortable satisfaction. Corroborating evidence is required in addition to the athlete's word to establish the absence of an intent to enhance sports performance. Mr David, for Drug Free Sport, produced a recent decision of *Oliveira v USADA* (CAS 2010/A/2107, decision 6 December 2010) which has considered these questions in the context of the taking of a nutritional supplement which contained a prohibited substance.
9. Under SADR 14.4, if the Tribunal reaches the point where it is satisfied as to the two preconditions, the question then becomes one of assessing what period of ineligibility appropriately reflects the level of fault.

#### **Facts**

10. Prior to his retirement from competitive swimming after the 2010 National Short Course Championships Mr Jacobs was a successful club swimmer, competitive at the National level and a place-getter in a number of National Championships. Apart from being selected for the Youth Olympic Team in 2005 he was not, however, ever part of the Swimming New Zealand high performance programme and therefore never part of the registered drug testing pool.

11. In addition to swimming, Mr Jacobs has competed at surf lifesaving for approximately five or six years. Again he competes at club level rather than international level. He continues his participation in surf lifesaving.
12. Mr Jacobs works as a builder and explained in his written evidence that his reason for retiring from competitive swimming was that his work commitments were now too onerous to allow him to train at a level sufficient to maintain his competitiveness. Mr Lee, who has been Mr Jacobs' coach for his entire New Zealand career, confirmed that in 2009 and into 2010 he was aware that Mr Jacobs' work commitment was affecting his ability to absorb a full training load. Mr Lee reduced the training load but was also aware that Mr Jacobs was taking some supplementation to assist his energy levels. In previous years Mr Lee had advised Mr Jacob as to appropriate supplements but in this latter period, while Mr Lee appears to have known that Mr Jacob was taking supplements, he apparently made no enquiry to identify or advise Mr Jacobs on the appropriateness of the supplements which Mr Jacobs was then taking.
13. Mr Jacobs said that he became aware of a supplement called "Jack3d" because he knew a few rugby players and cyclists who were taking the same product. He also became aware of another product called "Super Pump". He decided to try the supplements and bought the products online.
14. Although Mr Jacobs' evidence attached webpage material which described these products the Tribunal understands that Mr Jacobs did not investigate the ingredients of the products at the time he commenced their use, other than to refer to their labelling. His evidence was that he believed that these were energy drinks which contained creatine and caffeine which would assist him in getting over the tiring effects of a working day and give him energy for training.
15. Mr Jacobs said that he can now see that the ingredient list for both products shows methylhexaneamine but that he was not aware that this was a prohibited substance under the WADA Code. He said that he had

not been part of the high performance programme and accordingly had not participated in any drug free education. However, in answer to questions from Mr David, he confirmed that he was generally aware of the drug testing programme, Drug Free Sports' services and the requirement not to take prohibited substances. He accepted that he should have taken more care to fully research the ingredients in the supplements and to check whether they were able to be legally taken.

16. When Mr Jacobs was subject to testing at the 2010 Championships he declared that he had taken "Super Pump". Mr Smyth for Mr Jacobs pointed to this declaration as some corroboration that Mr Jacobs was not taking the supplements for performance enhancing purposes and in an honest, although careless, belief that this supplement did not contain any prohibited substance.

### **Submissions**

17. Mr Smyth, for Mr Jacobs, accepted that Mr Jacobs had been careless but that on the facts it was clear that the adverse test was the result of taking these particular substances and that, on Mr Jacobs' evidence, they had not been taken for performance enhancing purposes. If those preconditions were accepted by the Tribunal, Mr Smyth then submitted that Mr Jacobs should not be held to the same high standard as a high performance swimmer registered on the Drug Free Sport programme.
18. Mr Smyth referred to the Tribunal's previous decision in *DFS v Boswell*, *DFS v Wallace* and the *Brightwater-Wharf* decision. He also drew the Tribunal's attention to two recent decisions on the FINA website where, in respect to the same substance, ineligibility periods of three and nine months had been imposed.
19. In respect to the issue of intention, Mr Smyth relied upon the discussion in the *Oliveira* case and emphasized that the question was the athlete's intention rather than the fact that the product was potentially performance enhancing.

20. For Drug Free Sport, Mr David emphasized that while the first precondition of identifying the source of the prohibitive substance was clear from the evidence that it was considerably more debateable whether Mr Jacobs could comfortably satisfy the Tribunal that he had not consumed the supplements for the purpose of enhancing performance. In respect to the *Oliveira* case, Mr David pointed out that an athlete may not know what is in a substance but may still intend to enhance performance.
21. If the Tribunal was satisfied that there was no intention to enhance performance then Mr David submitted that this was a case of serious carelessness where no meaningful attempt had been made by Mr Jacobs to identify the ingredients of the supplements and to obtain some objective assurance that these ingredients were not substances which were prohibited or specified under the WADA Prohibited List. Given that degree of fault Mr David submitted that any period of ineligibility would have to be significant.

### **Decision**

22. As previously indicated the Tribunal agrees that it is appropriate to deal with this prohibited substance as if a specified substance. On the evidence, it is clear that the source of the adverse test was the taking of these two supplements by Mr Jacobs, both of which contained methylhexaneamine.
23. The Tribunal has given serious consideration to the question of whether or not Mr Jacobs can establish that he did not have a performance enhancing intention in taking these substances. We are mindful of the distinction drawn in the *Oliveira* case between the athlete's intention and the actual effect which the substances might have.
24. We accept, albeit by a narrow margin, that Mr Jacobs has discharged the onus of establishing that his personal intent was not to enhance performance but rather focused on overcoming work tiredness with the assistance of what he believed to be a caffeine and creatine combination supplement.

25. The Tribunal is conscious that supplements of this type, as the internet pages annexed to Mr Jacobs' evidence show, are promoted with suggestions of all sorts of positive benefits, some of which could undoubtedly be described as performance enhancing. Any athlete who takes such a substance is running a serious risk of a Tribunal determining that those aspects of the promotional material did motivate the athlete to use the supplements and accordingly that an athlete in those circumstances cannot discharge the obligation of showing lack of intent. In Mr Jacobs' case he did not access the general promotional material until after the adverse test but instead relied upon word of mouth and health shop endorsements.
26. The WADA Code and the SADR place a high burden on athletes to be responsible for what they put in to their body. A Court of Arbitration for Sport (CAS) panel stated the following in an advisory opinion (*FIFA and WADA*, CAS 2005/C/976 & 986, 21 April 2006, at para. 73):
27. *"The WADC imposes on the athlete a duty of utmost caution to avoid that a prohibited substance enters his or her body ... The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interests of all other competitors in a fair competition ..."*
28. A competitor for a number of years at national level, even though not in the high performance squad, cannot avoid that fundamental obligation of the Code and Rules.
29. Obviously a period of ineligibility must be applied. Mr Jacobs has been provisionally suspended from 14 December 2010 and the ensuing period must be taken into account. In the Tribunal's view the *Brightwater-Wharf* decision, which also involved methylhexanamine taken in a supplement and where a six month ineligibility period was imposed, is more relevant than the *Boswell* and *Wallace* decisions. In both those cases a substance had been prescribed by doctors to athletes for a medical condition. In the Tribunal's view the circumstances here are significantly more serious than in the *Brightwater-Wharf* case, where the athlete had made conscious attempts to identify the product ingredients, where the

offending ingredient was ambiguously described, and the athlete had sought assurance from the supplier. In the present case Mr Jacobs really has taken no meaningful steps to obtain assurance other than his interpretation of the product label.

30. What can be taken into account in mitigation is that Mr Jacobs was upfront in his declaration at the time of testing that he had been taking "Super Pump". This does confirm his lack of appreciation of the nature of the prohibited ingredient of that substance, albeit the result of his own lack of enquiry. As well the work factor which motivated him into taking the supplements was extraneous to his swimming activities and the Tribunal has accepted that his purpose in doing so was not to enhance performance. Finally Mr Jacobs did admit the breach and he accepted both personally, and through his counsel, that he had been wrong in relying upon informal assurances rather than making proper enquiry.
31. In the circumstances the Tribunal imposes an ineligibility period of 12 months commencing from 14 December 2010. During this period of ineligibility Mr Jacobs will not be able to compete in any other sports subject to the New Zealand Sports Anti-Doping protocol, including surf lifesaving.
32. The Tribunal does express concern, arising not only from this case, of the failure of coaches and athletes to identify, enquire about and record what supplementation is being taken during training and performance programmes. As Mr Lee correctly said, most athletes take supplements. Taking the wrong supplements can be disastrous for athletes. Both coaches and athletes should apply appropriate disciplines and precautions in relation to supplement use, including better acquainting themselves with supplement ingredients likely to cause problems in a drug testing situation thus ensuring that athletes avoid taking supplements containing those ingredients.



Dated: 22 June 2011

A handwritten signature in blue ink, consisting of a large, stylized initial 'A' followed by a long, horizontal, slightly wavy line.

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**A R Galbraith QC**  
**(Deputy) Chairperson**