

## **COALITION OF MAJOR PROFESSIONAL & PARTICIPATION SPORTS**

### **REVIEW OF THE DRAFT WORLD ANTI-DOPING CODE V2.0 (DATED 1 DECEMBER 2012)**

### **WADA CONSULTATION PHASE III**

**1 MARCH 2013**



## INTRODUCTION

The Coalition of Major Professional and Participation Sports (COMPPS) consists of the following organisations:

- Australian Football League (AFL);
- Australian Rugby Union (ARU);
- Cricket Australia (CA);
- Football Federation Australia (FFA);
- National Rugby League (NRL);
- Netball Australia (NA); and
- Tennis Australia (TA).

One of COMPPS' roles is to provide a collective response on behalf of its Member sports where their interests are aligned. The World Anti-Doping Code impacts on each of the COMPPS members as a result of Australia's adoption and ratification of the UNESCO International Convention against Doping in Sport, and as a signatory to the World Anti-Doping Code. COMPPS members represent national professional sports funded by the Australian Sports Commission, and include both Olympic and non-Olympic sports/disciplines.

COMPPS is therefore committed to reviewing, and providing feedback on, the draft World Anti-Doping Code as part of WADA's consultation with stakeholders. Reiterating the issues raised in the COMPPS Phase I submission dated 15 March 2012 and the Phase II submission dated 15 October 2012, COMPPS now provides the following additional recommendations arising out of the draft World Anti-Doping Code version 2.0. It is hoped that these observations will assist WADA in redrafting the final World Anti-Doping Code to take into account the challenges faced in implementing anti-doping programs at a national level, particularly for those 'week-in-week out' professional sports. COMPPS Members remain of view that the sports bodies need to work closely with anti-doping and other relevant authorities to ensure the integrity and quality of the sports they govern. The COMPPS submission is as follows.

### PHASE III RECOMMENDATIONS:

The COMPPS Members raise the following issues for consideration by the World Anti-Doping Code drafting team as follows:

1. “Prohibited Association” – Article 2.10;
2. Increase in Sanction from Two to Four Years Suspension - Article 10.2; and
3. Financial Impost on Athletes: “Payment of CAS Cost Awards” – Article 10.12.

#### 1. “Prohibited Association” – Article 2.10

Draft Article 2.10, headed “Prohibited Association” sets out as follows:

*Association by an Athlete in a professional or sport-related capacity with any Athlete Support Personnel who:*

*(i) is serving a period of Ineligibility; or ~~who~~*

*(ii) has been found in a criminal or, disciplinary or professional proceeding within the previous eight years to have been involved with doping where the Athlete knew or should have known in conduct which would have constituted a violation of anti-doping rules if Code-compliant rules had been applicable to such Person.*

*In order for this provision to apply, it is necessary that the Athlete has previously been advised in writing by an Anti-Doping Organization with jurisdiction over the Athlete, or by WADA, of the Athlete Support Personnel’s disqualifying status.*

*[Comment to Article 2.10: For example, Athletes should not be working with coaches or trainers who are Ineligible on account of an anti-doping rule violation. Similarly, they should not be associated with physicians or other Persons who have been identified as involved with doping in criminal or professional disciplinary proceedings criminally convicted or professionally disciplined in relation to doping.]*

The COMPPS Members have concerns that these proposed amendments as currently drafted appear to be unworkable and unenforceable. While the general intent of the article is clear, in practical terms, it is hard for COMPPS Members to understand how these provisions could be implemented:

- (a) The article refers to: “*conduct which would have constituted a violation of anti-doping rules if Code-compliant rules had been applicable to such Person*” that resulted in “*criminal, disciplinary or professional proceeding[s]*”.
- a. While there is a reference in the Comment to Article 2.10 that a person was “*criminally convicted or professionally disciplined*”, there is nothing in the Article itself requiring a finding or sanction against the person as determined by the relevant decision-maker in the “*criminal, disciplinary or professional proceeding[s]*”. The fact that there were “proceedings” does not mean that the case against the person was made out.
  - b. It is not clear who has the power to make a determination that a “*criminal, disciplinary or professional proceeding*” “*would have constituted a violation of anti-doping rules*” if the Code had applied to the person. If it is any Anti-Doping Organisation [ADO] (and/or WADA), then the power should be clearly set out, outlining the criteria to be taken into consideration. The appeal mechanism available to the person about whom a determination is made which potentially could impact on their ability to associate freely and to earn an income should also be outlined.
  - c. Presumably also the version of the Code referred to in determining the definition of the anti-doping rule violation would be the Code in force at the time of conduct/omission leading to the “*criminal, disciplinary or professional proceeding*”. This should be clarified.
- (b) This article only becomes relevant once an ADO advises an Athlete of a ban or sanction over an “Athlete Support Personnel” in writing. It is not clear how “in writing” will be interpreted ie: it could potentially include letter, email, SMS, a media release or publishing on a website. It needs to be clarified whether the onus is on the Athlete to determine whether a potential “Athlete Support Personnel” they intend to engage with (noting that “Associate” has not been defined here) has been deemed by an ADO/ WADA to have committed an anti-doping rule violation, particularly if the intention is for ADOs worldwide to rely on information posted on their website, perhaps not in a language the Athlete can access.
- (c) An individual outside of the sports community, for example, a doctor working in private practice in the community, may be sanctioned by the relevant medical association for prescribing substances, including Prohibited Substances, for non-

therapeutic use (ie: assuming that this came within the new definition of “administration” and thereby is deemed to be an anti-doping rule violation). The draft Article anticipates that the doctor may not come within the definition of “Athlete Support Personnel” if they were not “working with, treating or assisting an Athlete”. The doctor may subsequently apply for a position as a team doctor with a club, either within the same country they were sanctioned, or elsewhere internationally. Until the contract of employment is signed, or otherwise the person begins to “treat” an Athlete, the person does not fall within the definition of “Athlete Support Personnel” and the ADO would not be required to advise any Athletes. There is no requirement for an ADO to advise a national sporting organisation, or other body (such as a club), who may have employed the doctor; the club being unaware that a decision deeming conduct as an anti-doping rule violation has taken place. This draft Article then would require any organisation to include in their contracts of employment (as one option) a clause allowing for termination where any ADO or WADA determined that the employee had been deemed to have committed an anti-doping rule violation, in order for this clause to be activated once the employer became aware of this decision.

- (d) Note that neither the ADO or the Athlete associated with the “Athlete Support Personnel”, once they have been advised of the person’s status by the ADO, has any obligation to pass that information onto the body (club/team) responsible for engaging/employing the “Athlete Support Personnel”.
- (e) The implementation and enforcement of this clause would also be extremely difficult for an ADO. An ADO would have to be aware of: “criminal, disciplinary or professional proceeding[s]” over the past eight years that could be deemed to have been anti-doping rule violation under the relevant WADA Code, and relating to a person who is, or may potentially become, a person defined as an “Athlete Support Personnel”. This also implies that ADOs would work closely with relevant professional associations and law enforcement agencies to educate those bodies on what types of offences may potentially be deemed to be an anti-doping rule violation. This process of relationship building and education of professional associations by ADO is a good initiative and could be further expanded in the WADA Guidelines on “Coordinating Investigations and Sharing Anti-Doping Information and Evidence”.

- (f) The draft Article also states that the ADO (or WADA) should notify any potentially impacted Athlete. Any failure by an ADO to do this, while not leading to a sanction under the Code, could be extremely damaging for an ADO politically. This is an extremely onerous obligation on ADOs. It is further noted that the fact that there is no positive obligation on the ADOs to take action under this draft Article, could also lead to the possibility of corruption and abuse, where particular Athlete Support Personnel are protected by not having a determination (as to whether they have been deemed to have breached an ADRV) made in relation to them.
- (g) It is submitted that the period of eight years is too long in this context. (It is also noted that the eight year timeframe here is not in line with the proposed fourteen year statute of limitations provided by this draft Code).

## 2. Increase in Sanction from Two to Four Years Suspension - Article 10.2

COMPPS Members are concerned that the effect of the proposed amendments in Article 10.2 are that the starting point for all sanctions would be four years, instead of the previously accepted two years. COMPPS Members are not in favour of increasing the current proposed base line sanctions from two years to four years as a general principle. The basis for this objection is that the proposed increased sanction is disproportionate to the anti-doping rule violation. The case of Katrin Krabbe (1996) stands for the proposition that the four year sanction imposed by the IAAF was found to be: “excessive, disproportionate and unfair”, and contrary to an athlete’s right to earn a living through their sporting endeavours. Instead it was accepted that a two year sanction was a more appropriate sanction based on the anti-doping rule violation committed.<sup>1</sup>

A useful comparison can also be made between the criminal sanctions imposed relating to match fixing (or sports fraud more broadly), and the draft Code sanctions, which do not attract a criminal penalty. A European Union study from March 2012 into sanctions imposed under relevant national legislation for match fixing, bribery and corruption found that terms of imprisonment were generally imposed of between six months and two years.<sup>2</sup>

<sup>1</sup> See the *Case of Katrin Zimmerman Krabbe v Deutscher Leichtathletik Verband (DLV) and International Amateur Athletic Federation (IAAF) (Munich Court of Appeal, Germany, 28 March 1996* discussed in [http://www.olympic.org/Documents/Reports/EN/en\\_report\\_264.pdf](http://www.olympic.org/Documents/Reports/EN/en_report_264.pdf) at p32-33, and referred to in many subsequent cases, including *Edwards* at pg 34 and at *Z v DFB* pg 23-24.

<sup>2</sup> KEA European Affairs, “Match-fixing in sport: A mapping of criminal law provisions in EU 27” at p 110-111, [http://ec.europa.eu/sport/news/documents/study-sports-fraud-final-version\\_en.pdf](http://ec.europa.eu/sport/news/documents/study-sports-fraud-final-version_en.pdf) (viewed 24 February 2013)

COMPPS members are particularly concerned with the proposed amendments relating to specified substances:

10.2.2 Where an anti-doping rule violation involves a specified substance or a substance not described in Article 10.2.1 nor a specified substance, and where the Anti-Doping Organization can establish that the commission of the anti-doping rule violation was reckless or intentional, then the period of Ineligibility shall be four (4) years.

Instead it is suggested that the increased sanctions should be limited to the more serious anti-doping rule violations, as is proposed by Article 10.2.1, and therefore relevant parts of 10.2.4:

10.2.1 A violation involving any Prohibited Method or a Prohibited Substance in the classes of Anabolic Agents, Peptide Hormones, Growth Factors and Related Substances, Hormone and Metabolic Modulators, or Diuretics and Other Masking Agents, shall result in four (4) years Ineligibility unless the Athlete or other Person can establish that the commission of the anti-doping rule violation was neither intentional nor reckless.

10.2.4 An Athlete or other Person, upon the approval of both WADA and the Anti-Doping Organization with results management responsibility, may be sanctioned with a period of Ineligibility of between four (4) and two (2) years by admitting the anti-doping rule violation as asserted under Article 10.2.1 or 10.2.2 promptly after being confronted with the anti-doping rule violation by an Anti-Doping Organization.

### **3. Financial Impost on Athletes “Payment of CAS Cost Awards” – Article 10.12**

COMPPS Members are not in support of the amendment to draft Article 10.12 relating to the “Payment of CAS Cost Awards” as set out below as a matter of principle:

Athletes and other Persons shall ~~be Ineligible~~ not be allowed to participate in Competition until any CAS cost awards against them have been paid, unless fairness requires otherwise.

*[Comment to Article 10.12: The determination of whether fairness requires that a period of Ineligibility be extended for non-payment of a CAS cost award shall be initially made by the Anti-Doping Organization which has jurisdiction over the Athlete or other Person’s return to eligibility. Such decision may be appealed pursuant to Article 13.]*

COMPPS members are concerned that a financial barrier to return to competition is counter to the provisions relating to the rehabilitation of the Athlete, and, more importantly, that sport represents for most athletes their best opportunity for earning the money required to pay the CAS costs imposed. To prevent athletes from having the financial means to discharge their debt, effectively amounts to an additional sanction, which is unfair and unsupportable.

Signed for and on behalf of the COMPPS' Members.

1 March 2013.

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