

THE COALITION OF MAJOR PROFESSIONAL AND PARTICIPATION SPORTS

REVIEW OF THE WORLD ANTI-DOPING CODE - PHASE 1

RESPONSE TO 1ST STAKEHOLDER CONSULTATION PHASE: 28 NOVEMBER 2011 – 15 MARCH 2012



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. COMPPS Members are of the view that the current review and consultation process regarding the 2009 World Anti-Doping Code (WADC) presents an excellent opportunity to consider the appropriateness of the WADC and to identify and improve any weaknesses. This submission, therefore, is intended to provide a review by the COMPPS Members of the WADC, including the provision of recommendations that it believes will create a better and more appropriate WADC.

COMPPS Members have individually, and in some cases, in group format, provided responses to previous Code review processes. This submission follows on from, and supports, the contents of the earlier submissions by the relevant COMPPS Members. The Members hope the recommendations included in this submission, together with the earlier submissions, will be taken into consideration and incorporated into the next round of revisions to the WADC. Some COMPPS Members will also separately provide WADA with their individual submissions as part of this process.

Each of the COMPPS Member sports remain committed to the promotion and enforcement of an appropriate WADA-compliant anti doping policy that reflects the WADC. With the exception of TA, the COMPPS members are defined as "Team Sports" under the WADC, and this gives rise to particular challenges in dealing with the WADC. COMPPS members comply with the Australian Sports Commission (ASC) anti-doping policy as a mandatory requirement of their funding agreement with the ASC. Each of the COMPPS Member sports have their own anti-doping policy applicable to their members. These policies also comply with the National Anti-Doping scheme (NAD scheme) administered by the Australian Sports Anti-Doping Authority (ASADA). This includes the policy of the NRL, which is a professional

league. The Australian Rugby League Commission assumes the role of overseeing the NRL programs, and those of the NSW and Queensland Rugby Leagues.

Our Members all participate in their sport on an international level. The AFL does not have an international governing body, but all other COMPPS Members have affiliations and interactions with international sports governing bodies and their associated rules and regulations. This participation includes Events as defined by the WADC, or other competitions run by Major Event Organisations. This means that COMPPS Member sports may be required to comply with other anti-doping policies that are promulgated and mandated by international governing bodies. For example, the Olympic sports (TA, FFA and the ARU), must comply with the Australian Olympic Committee anti-doping policy, and may also be required to comply with the anti-doping policies of their direct governing body (such as FIFA or the ITF). This means that some sports must comply with three or more different sets of rules.

It is our strong 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. COMPPS' submission is as follows:

KEY ISSUES IDENTIFIED:**Issue 1: TUE Process**

There needs to be a vast improvement in the operation of the TUE process for the Prohibited List as it currently stands.

It is suggested that WADA set accreditation standards for those groups authorised to issue TUEs [TUECs] to ensure consistency from sport to sport and country to country. The accredited TUECs could then more easily recognise the decisions of other accredited TUECs.

We also recommend making it easier to gain a retrospective TUE for reasonable treatment, especially in cases where it is agreed by the TUEC that a TUE would have been approved had the TUE application been submitted as required. Retrospective TUEs should be allowed to be issued at any stage of the investigation and prosecution process, including at the hearing, to ensure that resources are not wasted dealing with athletes requiring these substances for legitimate medical purposes. These athletes then can be given the care, with the requisite scrutiny, required.

We also suggest that members of a TUEC, and ad hoc supporting experts, could be provided to the CAS and other hearing panels to support the work of the hearing body (or the TUEC of another jurisdiction if the case involved appealing the decision of a TUEC). If this expert group is the sole expert pool that can be called on to assist the hearing body, the current situation where the hearings become a battle of the experts can be avoided. It also provides a fairer hearing for the athlete, so that experts are not in a 'conflicted' position from having appeared on behalf of the 'prosecuting' ADO. All experts are therefore in a neutral, independent position to advise the hearing body.

This suggestion may also require amendments to the CAS Rules, but also in so far as it impacts on the WADC, we would like to see it included in the WADC that an independent panel of experts is appointed to assist the tribunal/ hearing body. Submissions could then be received about whether the type of speciality required is covered by the experts in the pool, and therefore whether additional independent expert(s) are needed to join the pool for that particular matter. Laboratory reports should also be accompanied by a lay summary to assist hearing bodies to interpret results.

An independent panel of experts, we suggest, would also lead to greater consistency in sanctions internationally.

Issue 2: Consistency of sanctions

There is a lack of transparency in decision-making internationally which has a number of consequences relating to rights of affected parties and the development of an international jurisprudence contributing to greater consistency of decision-making across jurisdictions and sports. Fully reasoned decisions must be published by a disciplinary/ hearing panel and made publicly available for transparency purposes. This then allows for affected parties to appeal the decisions. For international-level teams and athletes, any affected party should be entitled to bring an appeal before the relevant disciplinary panel. For example, this may include the team ousted from competing at an Event by a sanctioned team.

This lack of transparency may in part be due to a lack of clarity around the definition of Doping and the anti-doping rule violations. If the violations were clearly expressed, there would not be any need for “Comments” under the violations. By way of example, see Article 2.1.2: this could be simplified to read that proof is established where the B sample confirms the A sample analysis, or where the B sample is not analysed, the A sample analysis stands alone. Elsewhere it can be stated that the Athlete has the right to request that the B sample be analysed for confirmation of the A sample result.

It should also be clarified what weight should be given by a hearing body to any “Comments”.

Where a team sanction applies, particularly in the case of systemic doping, the WADC must provide an indication of an appropriate sanction and the period of time that the sanction should apply to that team/ nation and provide that such team sanction must apply across all jurisdictions and events during the period of sanction. A situation occurred recently whereby a team suspension was imposed by an International Federation for an event it controls in 2015 (the FIFA Women’s World Cup), however the sanction did not apply for events controlled by the IOC (being the 2012 Olympic Games). As a result a team found guilty in 2011 of systemic doping of such seriousness that the team is banned from a major international event in 2015 will be competing in an equally major international event in 2012. This also has the effect of punishing athletes who are not yet in the national team, while allowing team members to those sanctioned to continue playing without penalty. This disparity and inequity should not be allowed to occur.

There is also a lack of consistency when considering decisions for the same substances when the results of hearings are announced. For example, in the WAFL, one player received a 2-year ban for pseudoephedrine, as compared with bans recorded of 3 months or lower in other sports. Similarly with the cases involving methylhexanamine, some sports/

nations were not sanctioned at all, while in Australia, athletes received bans of 2 years. It would be useful for WADA to commission more research and transparency around the decisions by hearing panels, so that future panels could consider prior decisions in their determinations.

WADA should facilitate the sharing of national and international research efforts in a transparent manner through a central portal to enable those working in the anti-doping field to access this information. This would then contribute to the breaking down of barriers, and building up of trust in the decisions of other tribunals. One positive outcome from improved transparency would be, together with greater flexibility in the rules for the tribunals in cases of inadvertent doping (not just for specified substances), that tribunals could apply that flexibility in an open and considered manner. Tribunals should be given greater flexibility to apply principles of fairness and justice and award suspended sentences, reprimands and other appropriate sanctions, which also reflects the sophistication of an advanced criminal justice system. It does not assist the fight against doping to spend scarce resources on cases of this nature, and to be bound to give heavy, disproportionate sanctions where there have been no attempts to cheat.

Under Article 10.4, there therefore needs to be greater prescription to achieve consistency in penalties where the substance was not used to enhance sport performance. The WADC should also clarify what is meant by “performance enhancement” ie: is it returning the athlete to usual capacity after illness/ injury, or is it solely addressing attempts to achieve more than your natural capability during training and/or competitions.

It would also be helpful if criteria were outlined for results management authorities to consider when determining whether to convene a Provisional Hearing, and whether to apply a Provisional Suspensions under WADC Article 7.5.1. These criteria could identify the types of cases for which this Article would be applicable, and what factors should be taken into consideration eg: prohibited substance involved, timing before a major event, level of athlete, age/ maturity of athlete, sophistication of ADRV alleged, and whether there is any potential for manipulation of evidence or witnesses etc.

The WADC should also be more prescriptive around the quality and expertise of hearing body panel members, including CAS arbitrators. Tribunals must contain members with a strong knowledge of, and background in, sport. In the case of CAS, arbitrators should have an understanding of sport in the international context. Arbitrators must also adequately represent the diversity of the athlete and athletes support personnel populations in order to

produce more consistent sanctions. It would also assist if objective and transparent criteria were published for nominees to the various WADA programs and committees, to ensure that all those involved in the anti-doping movement, and more broadly from other relevant industries, had the opportunity to apply and assist WADA.

There should be a provision for athletes to waive their right to a hearing and accept a minimum sanction (or sanction offered), subject to sanctions being prescribed as minimums rather than maximums. This recognises the savings to both parties in not having to run a hearing.

ADOs with results management responsibility should be able to determine whether the assistance provided is sufficient, without the assistance having to lead to “discovering or establishing” an anti-doping rule violation. That is, provided the information is bona fide, then it should be taken into consideration, even if does not lead to a conviction. Sports should also be left to determine whether or not athletes and athlete support personnel within their jurisdiction should be compelled to provide evidence in relation to an anti-doping matter.

Issue 3: Criteria for the Prohibited List

“Doping” should not be defined by the anti-doping rule violations. The definition should make it clear that the WADC is intended to prevent cheating ie: prevent the use of substances that are reasonably believed to enhance performance or allow an athlete to recover more quickly, therefore creating an unfair advantage over their competitors. Issues relating to the health of the athlete should be dealt with separately, as several of our Member sports have done through illicit drug testing policies. These policies complement their WADC compliant anti-doping policies.

The primary and threshold test for inclusion of a substance or method on the Prohibited List should be that it is performance enhancing. Secondary is whether the substance or method is injurious to athlete health and/or whether it is contrary to the spirit of sport. The “spirit of sport” is not an objective criterion, it potentially covers issues broader than doping, and consideration should be given to whether it should be removed as one of the criterion for listing a substance on the Prohibited List.

In order to achieve transparency in the Prohibited List, WADA should expressly indicate on the Prohibited List which, after “performance enhancing”, of the other criteria have been

applied to each substance or class of substance included on the Prohibited List. Performance enhancing must be the first criterion for every substance on the Prohibited List, and this criterion must be defined to include masking agents of performance enhancing substances. Where medical or scientific evidence is relevant, a brief summary of that medical or other scientific evidence should also be included in the commentary to the List.

The distinction between substances and methods prohibited at all times and those prohibited in-competition only is important, and should be maintained, because some substances prohibited out of competition should be treated as a health issue via Illicit Drug Policies or similar mechanisms, rather than as Doping.

Issue 4: Regulation of Supplements

Given the extent of the inadvertent 'doping' by athletes internationally on account of tainted or mislabelled supplements, there needs to be greater recognition of the problem in the WADC. Educational tools developed by WADA and NADO should identify key companies and countries for which the risk of contaminated substances are high, to expand upon the "managing the risks of nutritional supplements" mandatory item in the education section of Article 18.2.

WADA should increase its involvement with UNESCO and the Governments to achieve greater harmonisation of the approval process for products intended for human consumption, beyond medicinal products. WADA could lead the way in creating a list of approved/ safe supplements or accredited supplement companies. WADA could also develop a warning list of all supplements that have led to positives around the world and require the ADOs to inform athletes of genuine risks in relation to particular substances. WADA's enhanced role should include greater co-operation with professional bodies, such as medical associations, to assist with the sanctioning and education of their members involved with the deliberate and or/ negligent doping of athletes (for example in cases where those professionals fall outside the "Athlete Support Personnel" definition).

Issue 5: Doping Identified Through Non-Analytical Means – Level of Athlete Targeted

Given the emphasis on inter-agency collaboration as a means of combating doping and the growing importance of violations being identified through non-testing means, the WADC needs to be rewritten through this altered lens.

The WADC should assist ADOs by providing more practical guidance on how sports and ADOs can work with law enforcement and other professional bodies to uncover and interrupt

distribution channels for performance enhancing substances, beyond the WADA investigations guidelines. This assistance should be provided relating to the use and importance of intelligence analysis, rather than only in investigations. WADA needs to take a greater role, and be explicit in the WADC on how inter-agency collaboration can be harnessed in the fight against anti-doping. WADA must also determine how to monitor this requirement and to enforce non-compliance by ADOs.

It would be useful for WADA to commission research into the ADRVs that have been established and /or contributed to through non-analytical means since it was introduced into the 2009 WADC. Anecdotally, our view is that too many resources are being wasted on athletes who are not, and never will be, elite athletes, or support personnel to that level of athletes. We would like to see guidance provided to sports and ADOs on the type of education and investigative resources that are appropriate for amateur and veteran (masters) level athletes, as compared with the elite and emerging (sub-elite) athletes. In particular, consideration should be included in the WADC relating to whether the athlete is a minor, who they were influenced and assisted by, what stage they are at in their sporting career, and whether they have had any access to anti-doping education resources.

There should also be greater harmonisation and cooperation prescribed in the WADC between IFs, NADOs and Major Event Organisers. The training of doping control staff should also be more prescriptive in the IST, so that all testing agencies could be objectively assessed through the ISO accreditation system. This would allow greater recognition of testing between ISO accredited testing agencies. Some of our member sports have reported instances of one testing agency leaving the home of an athlete after collecting a sample, and for the next testing agency to arrive to collect a second sample only minutes after the athlete had provided the first sample. This type of duplication is a burden on the athletes, a waste of resources and does not promote the anti-doping cause.