

## A GUIDE TO THE WORLD ANTI-DOPING CODE

Third Edition

The law relating to anti-doping changes rapidly. The World Anti-Doping Code was first adopted in 2004 to provide a common set of anti-doping rules applicable across all sport worldwide. The Code has evolved and changed significantly through two major processes of review. This third edition provides essential guidance and commentary on the 2015 Code which replaces the 2009 Code. The 2015 Code contains many significant changes in the core Articles of the Code, particularly in the regime on sanctions for anti-doping rule violations, and in the amended International Standards. The text outlines how the current law has developed from anti-doping rules and principles in operation before the Code and explains the central role of the Court of Arbitration for Sport in this development and in applying the current Code. This third edition will be an important single resource for any reader working or studying in the field.

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# A GUIDE TO THE WORLD ANTI-DOPING CODE

The Fight for the Spirit of Sport  
THIRD EDITION

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(CANTAB) BARRISTER



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## PREFACE TO THE THIRD EDITION

I worked on this third edition of this text over the 2015 Christmas break – a time of tranquil repose in New Zealand, when the weather is usually good and you can relax with family and friends, eat and drink *al fresco* and swim in the sea if you are so inclined. But for a sports lover, even one on a holiday break, this was a very troubling time. Many claim with some justification that 2015 was one of the worst for sport and its management, with FIFA corruption and doping scandals dominating the media. 2016 seemed to continue the same way.

Since the second edition, we have seen several significant doping issues in sport, which have generated increasing awareness of the scale of the problem facing it. The ending of the Armstrong saga in terms of the imposition of sanctions in the sport of cycling produced a report by the Independent Commission for Cycling revealing the extent of the systemic issues which the sport had to address and caused Union Cycliste Internationale (UCI) to adopt a range of measures to try and address them. The long-running investigation into alleged doping at National Rugby League (NRL) and Australian Football League (AFL) clubs in Australia came to a close in the Court of Arbitration for Sport (CAS), at least, with the decision that thirty-two Essendon players had used a prohibited substance and were to be subject to a two-year period of ineligibility. Later in 2016, there was a further final unsuccessful appeal to the Swiss Federal Tribunal, which saw the bans maintained.

Perhaps most disturbing were the investigations commissioned by WADA into allegations of systemic doping and the covering up of doping violations by Signatories to the Code. The content of the reports created great difficulty for the sporting organisations involved and affected athletes in the short time-frame before the Rio Olympics, producing a hurried response by way of rule-making by international sporting organisations and subsequent challenges by athletes to eligibility decisions before the CAS Ad Hoc Division sitting in Rio. The whole affair raised concerns about the general effectiveness of the anti-doping system. The dust is now

settling after the publication of a further final report at the end of 2016, and the result seems likely to be a more coherent anti-doping regime, with clearer proportionate sanctions where non-compliance by Signatories to the Code is established.

A casual reader of the world's sporting media over the past two years might be forgiven for thinking that, to borrow from the Roman historian Tacitus, writing about life under some Roman emperors, corruption in sport has become the fashion of the day. Certainly, it seems very naive to think that any elite competitive sport based on physical performance is free from doping in any form. Add to this increasing concerns about the way in which developing young athletes in sports like rugby appear to be obtaining prohibited substances such as steroids (often over the Internet) in order to make the grade.

The current disturbing picture highlights the importance of sports having good clear rules to combat corrupt practices which participants understand and a good system to enforce them. While this text does contain some comment on the effectiveness of the rules under the Code, and makes some suggestions for change in its concluding chapter, its focus is on providing a guide to the operation of the rules for those working with them.

Since the second edition, the 2009 Code and International Standards have been amended under the review process required by the Code. After a very extensive process, the 2015 Code introduced significant changes in several important areas – notably, in relation to sanctions under a completely refashioned Article 10, one of the main themes of which is the introduction of tougher penalties for those who might be called 'real cheats'. The nature of current problems has emphasised the need for investigations which go beyond testing (and may well involve 'whistle-blowing' informants as a source of intelligence and information). This shift in anti-doping activities, which has been gathering momentum for some time, is recognised in changes in the Code and Standards.

Previous editions were published when the Code was about to be amended, but I thought that this third edition would best serve its purpose as a guide to a much changed 2015 Code if it appeared about two years after that Code had started to operate.

While recent events emphasise the continued relevance of the fight against doping and the role of the anti-doping rules in the Code in that fight, this work does not conduct the fight. Nor does it discuss how the fight should best be conducted. The aim of this text remains to provide comment and practical assistance on the rules contained in the Code in



order to help all those operating under the Code interpret and apply its provisions in an efficient, fair and effective manner.

As the anti-doping area becomes more complex, as the rules change to meet current challenges and are regularly reviewed, it is important to keep in mind that the purpose of any decision-making process under the Code is to provide a reasoned decision in a timely manner which is truly accessible to those who are subject to the rules in the Code.

While there is no doubt that the Code has become more detailed and that many more CAS awards and tribunal decisions applying its provisions are being produced, the aim of this work (notwithstanding the regretted increase in length required to cover and comment on the Code regime) remains to keep things as simple as possible. This approach is consistent with the aim of the Code: to create a set of sport-specific rules for anti-doping which can stand alone and be interpreted without recourse to national law, and which provide a certain predictable set of rules for use by a range of participants in sport.

Regrettably, some written decisions applying the Code and some of the wide-ranging comment on them seem to lose sight of the need to provide straightforward reasoned decisions for those who are most affected by the rules under the Code – usually, the athletes. The accessibility of the law under the Code is very important, and there is a risk of this being lost if decisions become too long and involved as a result of the attempt to set out and review case law (which often does no more than provide examples of the application of the Code in different factual situations).

Many decisions which apply the Code to particular circumstances are inherently factual, and the task of the tribunal is the familiar one of interpreting the provisions of the Code correctly on the basis of the words used and applying them to the facts of the case. In providing commentary on the Code – in particular, on the key Articles which set out the elements of the violations, the requirements for proof and the applicable sanctions – I have tried to provide comments which can be considered and applied in a straightforward way in order to elucidate the meaning of a provision before applying it in the circumstances of a particular case. This approach seems particularly relevant where decisions under the Code are most likely to be made by tribunals at national level or tribunals established by international federations – a hearing before CAS should be the exception, if the system is working well. The idea of the case summaries (which have been revised, with some removed and about thirty added) is to provide examples of the Code's provisions in action in order to assist

## PREFACE TO THE THIRD EDITION

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all those who operate and make decisions under the Code in the process of applying the Code.

I believe that in this sporting world, where the effective and fair application of uniform rules to combat doping – the Code – has never been more important, this work can contribute most effectively if it remains faithful to the aim expressed for the first edition in 2008: to provide a practical guide to the rules for those working with the Code.

## PREFACE TO THE SECOND EDITION

Recently, an anti-doping expert with many years' experience in the field told me that he had encountered more difficult issues in his work in the past twelve months than in the past twelve years. This comment and others like it, together with my own experiences in working with the legal issues arising in the anti-doping area has prompted the writing of the second edition of this guide to the World Anti-Doping Code.

While the regulation of doping in sport has been a fast moving field over the past decade, there has been a quickening of the pace in the last three years, since the publication of the first edition of this text. The obvious change in the regulatory framework since the first edition has been the adoption, from 1 January 2010, of the 2009 Code by Signatories to the Code. The significant changes brought about by the 2009 Code, in particular in relation to the imposition of sanctions, means that the process of hearing and determining particular periods of ineligibility has become complex. The new Code has been accompanied by revised International Standards and Guidelines. However, the increase in activity in the field is not simply the result of changes in the rules. Rather, several factors have worked together to produce an increase in investigative work and inquiries by anti-doping organisations and more allegations before sports tribunals and the Court of Arbitration for Sport (CAS) in which the provisions of the 2009 Code and operation of new Standards and Guidelines have had to be considered. Anti-doping organisations have focussed increasingly on the investigation of violations under the Code which are not established by testing alone, and new rules in Standards and Guidelines relating to matters such as athlete whereabouts and biological passports have provided more data on which these investigations can be based. State authorities have also become increasingly involved in anti-doping regulation and investigation under applicable national laws, whether sport-specific criminal or general public health legislation. This has made more information available to anti-doping organisations under the Code and given greater impetus to their investigations, as well as giving rise to difficult

legal issues where the provisions of national law and the rules under the Code come into potential conflict. In addition, in the area of testing, the development of effective tests for particular performance-enhancing substances such as the latest variants of erythropoietin (EPO) and human growth hormone (hGH) has caught more athletes who had been prepared to take the risk and take performance-enhancing substances. These developments have meant that there is more regulation to be understood and operated by those working in the area and more material available to anti-doping organisations upon which allegations can be based.

Whether there is in fact more or less doping in sport is hard to assess, but there has been a significant increase in the efforts to detect doping and bring forward anti-doping allegations against the athletes and support persons involved. While the vast majority of athletes young and not so young, professional and amateur, are dedicated to competing clean, the demands of modern sport and the ready availability of performance-enhancing substances for sale (particularly over the Internet) mean that the temptation to cheat is ever present. It would seem, from the decided cases which more wide-ranging investigations by anti-doping organisations are producing, that this temptation is one that some athletes find hard to resist.

Today, those who have to deal with anti-doping issues are confronted by more complex regulatory issues, an increasing number of investigations and allegations involving complex evidence, a complex decision-making process under the Code, in particular as regards the imposition of sanctions, and a wide range of decisions under the Code from various sporting tribunals around the world, from CAS and national courts, in particular the Swiss Federal Tribunal.

This second edition of the text retains the approach and structure adopted in the first. It seeks to explain and comment on the provisions of the 2009 Code and the principles which are applied in making decisions under it. The important points are again illustrated by summaries of key decisions by sporting tribunals at national level and CAS and from national courts, in particular the Swiss Federal Tribunal, where appeals from CAS under the Code will be brought. Some thirty new summaries have been added to the text.

While each chapter of the first edition has been the subject of amendment, the most significant legal developments have, perhaps, taken place in the area of the proof of use of prohibited substances by other evidence, apart from positive tests, including data obtained and evaluated under biological passport regimes, the rules established to assist in obtaining such

evidence, and in the sanctions regime under the 2009 Code. The process of a tribunal imposing a sanction under the Code now more frequently involves a more difficult evaluation of the degree of fault in connection with a violation.

In the past two years, there have been significant wide-ranging anti-doping investigations in many jurisdictions often involves both State and sporting authorities. Several are currently ongoing. The level of resource and commitment to the fight against doping in sport from both anti-doping organisations operating under the Code and States supporting the Code in accordance with their obligations under the UNESCO Convention appears likely to increase. This second edition again seeks to provide an up-to-date guide to the Code and its operation for those working in a rapidly developing area.

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