

**BEFORE THE SPORTS DISPUTES TRIBUNAL  
OF NEW ZEALAND**

**SDT/05/05**

**BETWEEN**

**Andrew Stroud**

Applicant

**AND**

**Motorcycling New Zealand (Inc.)**

Respondent

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**FINAL DECISION  
22 DECEMBER 2005**

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Tribunal: Hon Barry Paterson, QC (Chairman), Nick Davidson QC, Carol Quirk

Registrar: Brent Ellis

## Introduction

1. This Final Decision should be read with the Provisional Decision dated 9 November 2005.
2. The Provisional Decision concluded that the processes within Motorcycling New Zealand (“MNZ”) had miscarried, beginning with a “*protest*” by Mr Love as a competitor against the decision of the Steward, Mr New, which relegated Mr Stroud to second place, following a finding that he had passed under a yellow flag.
3. The Provisional Decision held that the “*protest*” should have been an appeal under Rule 7-4-1. “*Every person ... affected by a decision of the Steward*” will have a sole right of appeal to the Appeal Committee of MNZ. Even if it had been a protest under the Rules, the process which followed was defective in a number of respects.
4. The Appeal Committee should have sat on appeal from the Steward’s decision. There was then scope to have remedied defects in the earlier “*protest*” hearing, but the Appeal Committee fell into error, in the way the hearing was conducted.
5. The MNZ Board process did not cure these defects.
6. All MNZ processes, at all levels, were conducted in good faith. The finding of procedural defect was based on the lack of proper opportunity for Mr Stroud to take part and does not come with a criticism of the good purpose and intent of those within MNZ who were involved. The Rules in the Manual of Motorcycle Sport are complex, and there are major differences of view, honestly held, about important elements of race practice and rule application. This Tribunal expects these will be addressed. An example is the different understanding held by experienced officials about the way the area of danger is defined by cones, relevant to a yellow flag caution. Another example is the different views held on the meaning of “overtaking” in the yellow flag rule.

## The consequence of procedural defect

7. The procedures within MNZ had to be “*rewound*”. The only decision which survives is that of Mr New, relegating Mr Stroud to second place.

## What can this Tribunal do?

8. The Provisional Decision sets out the relevant grounds on which an appeal may be heard before this Tribunal (see paragraph 28 Provisional Decision). **Whether a**

**breach occurred** may be appealed if there is substantial new evidence. We heard a good deal of evidence not previously before Mr New, the “*Protest*” Committee, Appeal Committee, or the Board of MNZ. We found no basis to disturb the Steward's finding of breach.

### **The first point as to penalty – is Rule 6-19-1 exclusive?**

9. Mr Love submitted that Rule 6-19-1 applies exclusively, so that relegation was not available to Mr New. Rule 6-19-1 provides

*“Failure to observe flag instructions and signals renders riders liable to fine, exclusion, suspension or disqualification”.*

10. The Tribunal in its Provisional Decision concluded that the Definitions in the Rules create real difficulties with interpretation when applying Rule 6-19-1, and there are other interpretative difficulties.
11. While “*fine*”, “*exclusion*”, “*suspension*” or “*disqualification*” **might** be appropriate as “*fitting*” the facts, this Tribunal concluded **on a provisional basis** that it could not have been intended that these sanctions were the **only** sanctions available for breach of the yellow flag rule, and that there is jurisdiction to go beyond Rule 6-19-1 to relegate, or to apply any other penalty under Rule 7-3-1 (both of which apply to decisions made by Stewards).
12. There is no Rule which sets out exactly what an Appeal Committee may impose (see Rule 7-4-11), but it may for example “*quash or amend*” a decision on penalty. The Board of MNZ may go further, under Rule 7-3-2, which gives it power to suspend and expel a member.

### **The need for further consideration**

13. Mr Love had not appeared or been represented at any hearing, and his was the “*appeal*” which questioned the scope of the penalties available to the Steward for passing under a yellow flag. Therefore all parties were given an opportunity to make submissions within fourteen days **on the extent of a Steward’s powers to impose penalties for breach of the yellow flag rule.**

### **Mr Love’s response**

14. Mr Love said the intent of his “*protest*” was that Rule 6-19-1 should be enforced, and he identified a safety issue of importance to motorcycle racing in New Zealand. He

did not seek to benefit from the outcome, but he says that he expects fellow competitors will abide by the Rules.

15. He lodged a "*protest*" because Mr New indicated that was the correct procedure, and he emphasised that he had only wanted to point out what he considered an incorrect ruling handed down **for such a serious safety offence**.

#### **Mr Rees**

16. Mr Rees competed this year in the Australian Superbike Championship representing New Zealand as the current 2005 Superbike Champion, but felt "*under a cloud*" as to whether he had been awarded the Championship because of the contest raised by these appeals. He advised the Tribunal that he has retired from racing as the current New Zealand Superbike Champion. In a balanced submission he says that Mr Stroud should have to undertake a "*stop and go*" penalty which would have affected him by some 30 seconds at Manfield Park, had there been further laps to complete the race.
17. In an endurance race at Pukekohe a time penalty of 20 seconds was imposed on Mr Stroud and Mr Rees. His submission was that a 20 second time penalty would be a "*fair judgment*" to reflect the infringement. Quite how that would affect the Championship was not made known to us.

#### **Mr Unsworth for Mr Stroud**

18. Mr Unsworth, in a submission for Mr Stroud, addressed the Provisional Decision at paragraph 48, which recorded that not all the considerations in the Provisional Decision had been advanced during the hearing process. Mr Unsworth referred to his written submissions which went to the application of Rule 6-19-1.
19. In the Provisional Decision the Tribunal had looked at the Definitions in the Rules of the penalties set out under Rule 6-19-1, some of which seemed inappropriate to apply against a race already run, but some of the considerations referred to in the Provisional Decision were not fully explored in the hearing and the Tribunal considered the parties had to be given an opportunity to address them.
20. Mr Unsworth challenged the entitlement of this Tribunal to consider Mr Love's "*appeal*". However, the Tribunal has found it has that power, which cures the flaws in the MNZ process. This is an appeal by way of rehearing, and it is within the Tribunal's jurisdiction. Otherwise important corrective and curative powers would be

lost, once this Tribunal has jurisdiction. Appellate procedures are structured, in part, for that purpose.

21. Otherwise Mr Unsworth supports relegation as originally imposed (the appeal on the facts having failed).

## **MNZ**

22. Ms McDonald for Motorcycling New Zealand made a number of submissions regarding the Provisional Decision, some of which submissions were determined in the Provisional Decision (further submissions were invited only on the correct interpretation of Rule 6-19-1). The Tribunal, for the sake of completeness, responds to all her submissions.
23. First she submitted that there was no breach of the principles of natural justice by the Appeal Committee when Mr Stroud was not present to ask his own questions, and hear the questions asked Mr New by the members of the Appeal Committee. While Ms McDonald says that Mr Stroud would not have “*cross examined*” Mr New as to the facts, this misses the point. Mr Stroud was entitled to be present throughout the process, to hear what was said, and to respond as he thought appropriate. A party must be able to participate in the process sufficient to know what is under consideration. The right to be heard is much affected if that party does not know what else is said and done before the Tribunal.
24. Counsel’s second submission was that if there was a breach of natural justice that did not invalidate the decision of the Appeal Committee. Ms McDonald puts this on the basis that the true question is whether a procedural defect produced an unfair result. Some procedural faults are of no moment. Here, it is not possible to conclude that the Appeal Committee would, or probably would not, have reached a different conclusion or the same decision by a different reasoning process, had the principles of natural justice been followed. While an Appeal Committee is not bound by the rules of evidence (Rule 7-4-10(i)), Rule 7-4-10(f) provides that appeals are by way of re-hearing based on the evidence produced at the first hearing, conducted by the persons or body whose decision is appealed against. That is why there are obligations to file written material including submissions under Rule 7-4-10(j), while allowing the Appeal Committee to conduct the hearing of the appeal “*in the manner it thinks fit*” under Rule 7-4-10(g).
25. The third submission was that the decision of the Board of MNZ must be considered. Ms McDonald points out that the Provisional Decision did not deal expressly with the

decision of the Board of MNZ. Rule 7-4-12 provides that no “charge, penalty, decision or order” will be “held invalid by reason only of any defect, irregularity, omission or want of form, unless the Board is satisfied that there has been a miscarriage of justice”. Counsel submits that this test of “miscarriage of justice” is set at a high level, “and therefore the decision of the Board should stand”. The miscarriage of justice arises from the way the Appeal Committee conducted its business, and that was in no way cured by the MNZ Board’s process.

26. The fourth submission is comprehended in the discussion which follows.

**Reconsideration by this Tribunal of the penalties available for breach of the yellow flag rule – is Rule 6-19-1 exclusive?**

27. The Provisional Decision set out the reasons why Rule 6-19-1 may not be exclusive as to penalty. The reasons are repeated.

*“The Penalty*

39. *Having determined that the decision that Mr Stroud infringed the yellow flag cannot be overturned, it is necessary to consider the appropriate penalty. Mr New initially imposed relegation and it appears from the evidence before the Tribunal that this has been a penalty which has often been imposed for a breach of the yellow flag rule. In endurance races where there are different classes of vehicle, time penalties have also been imposed. Because of the findings on procedure already made, it is in effect necessary for this Tribunal to consider the penalty anew but in doing so it has had regard to Mr New’s views and the past practice of MNZ officials. It is, however, necessary to first consider whether Mr Love’s point was correctly taken, namely that Rule 6-19-1 applies and disqualification [this should have read: relegation] was therefore not available to Mr New, in which case it would not be available to this Tribunal.*

40. *Arguably, there are two possible sources of the steward’s power to impose a sanction on a breach of the yellow flag rule. The first is Rule 6-19-1 which states:*

*“Failure to observe flag instructions and signals renders riders liable to fine, exclusion, suspension or disqualification.”*

41. *Rule 7-3-1 sets out the penalties which may be imposed by the steward pursuant to “this Rule”. They are:*

- (a) reprimand;*
- (b) a fine of not more than \$50;*
- (c) exclusion from entry at the meeting;*
- (d) referral of any matter to the Board;*
- (e) relegation and/or exclusion;*

- (f) in Road Race, a time penalty exists for jumping the start, refer to Rule 6-21-19.

The Tribunal interprets “this Rule” to mean Rule 7 and notes that it was under Rule 7-1 that Mr New made his initial decision.

42. Rule 6-19-1 refers to “exclusion, suspension or disqualification”. Each of these penalties is defined in the Manual. The definitions are:

**Exclusion:** the prohibiting of a person or body of persons from taking part either in some particular capacity or in any capacity whatsoever in a certain vehicle or of vehicles of a certain type or a vehicle accessory, from being driven or used in a specified competition. **Exclusion may be pronounced by a competent authority either before, during or after the competition, and may be made retrospective, subject to confirmation by the Steward of the meeting before doing so.** [Emphasis added in this Final Decision]

**Suspension:** The prohibition by the MNZ Board, for a definite period or sine die of a person or body of persons or a certain vehicle or of vehicles of a certain type or of a vehicle accessory from taking part in any capacity or being driven or used, as the case may be, in vehicle competition within New Zealand.

**Disqualification:** The loss for all, or a stated time, of any right to take part in any capacity whatsoever in any international vehicle competition. A sentence of disqualification may be pronounced on any person or body of persons or on any one or more vehicle by the Board. The rights lost under a sentence of disqualification can only be restored by MNZ.

43. The definitions of “exclusion”, “suspension” and “disqualification” leads [sic] to serious difficulties of interpretation when considering Rule 6-19-1. In the Tribunal’s view, only the penalty of “exclusion” can possibly have application in this case. This is because neither “suspension” nor “disqualification” as defined, have retrospective effect. Even if a Steward can suspend, notwithstanding that suspension is a “prohibition by the MNZ Board” (and the Tribunal makes no decision on this point), the wording of the definition clearly suggests an action which has future effect. Likewise, the definition of “disqualification” also imports a future event. Neither definition is said to have retrospective effect. As “exclusion” is defined as having retrospective effect, the Tribunal would have thought that there would have been a similar provision in the other two definitions if they were intended to also have retrospective effect.
44. Exclusion can be retrospective but its definition does not suggest that it was intended to be used to disqualify a rider as the Protest Committee purported to do in this case. Its emphasis is on capacities and vehicles.
45. It is therefore the Tribunal’s view that while in certain circumstances, exclusion or suspension or disqualification may be appropriate, the limited nature of the sanctions as defined suggests that it can not have been intended that these sanctions and a fine were the only sanctions for a breach of the

*yellow flag rule. In many circumstances, and in the Tribunal's view this is one of those circumstances, a fine for such a breach would not be appropriate. In these circumstances, the Tribunal is of the view that the more general penalty sanctions under Rule 7-3-1 also have application to yellow flag breaches. Because of the definition of the terms used in Rule 6-19-1, the Tribunal is of the view that it could not have been intended that those penalties were the only penalties that could be imposed. In the circumstances, Mr New's decision to relegate Mr Stroud was a decision which he was entitled to make.*

46. *In the Tribunal's view, there is no basis to overrule Mr New's decision to relegate. Mr Love's appeal was based on a misconception of Mr New's powers that he could not impose relegation. That misconception is readily explicable by the complexity and contradictory nature of the Rules.*

47. *Mr Stroud seeks the reinstatement of relegation if his appeal on the factual grounds does not succeed. There is no evidence to suggest that any person other than Mr Rees was affected by the overtaking. It is therefore the provisional view of the Tribunal that the penalty should be relegation to second position."*

28. The Tribunal recognised the express retrospective effect of exclusion. The wording of the Definition did not seem to operate as a "*disqualification*" as that term is understood, as it is defined as a "*(prohibition) ... from taking part*". The definitions of disqualification (applying only to international events), and suspension, leave just fine and "*exclusion*" available to the Steward for this race. Even then, exclusion is "*by a competent authority*" and has retrospective effect if the Steward confirms it. So if the Steward imposes the penalty, this presumably does away with that requirement.
29. A further consideration was that where sanctions are involved, the Rules should not be read to prefer an interpretation which is so restrictive as to the range of penalties, unless that is the plain and unavoidable reading.
30. This led to the provisional view that it could not have been intended that Rule 6-19-1 was exclusive, but the Tribunal did feel some unease about this, given the specific reference to the particular breach in Rule 6-19-1.
31. We have been compelled to reconsider this issue.
32. Ms McDonald submits that Rule 6-19-1 is exclusive, and if a rider breaches the Rules in a particular race then that person runs the risk of being "*excluded*" **from the results**, and that is what exclusion means when the Rules are read as a whole.
33. Ms McDonald referred to other parts of the Rules to show that exclusion is applicable per race, in the way "*disqualification*" is usually understood. To reinforce the point



there is reference to Rule 6-12, which provides for "*instant exclusion*" for refuelling other than at the allotted pit; and Rule 10.6 which relates to exhaust systems which must be fitted and mounted in a certain way, failing which "*this will be cause for exclusion*". Rule 6-11 refers to circumstances including careless riding and other infringements, which may be punished by "*fine, exclusion, suspension or disqualification*". A competitor starting in a race before fees are paid should be liable to a similar range of penalties under Rule 5-8-2, and Rule 5-9-1 renders a competitor liable to exclusion, suspension or disqualification (but not a fine) for competing with an injury or medical condition which may affect riding.

34. The Tribunal notes other provisions as follows.

- Under Rule 5-2-9 any person who competes while not the holder of a current competition licence should be liable to a "*fine, suspension or disqualification for life*".
- Under Rule 5-7-3 a rider who allows a non-entered person to compete on their entered motorcycle without permission "*should be excluded from the meeting*".
- Under Rule 5-8-3 no entry should be accepted "from a disqualified or suspended competitor until the time of his/her disqualification or suspension has expired" (that strongly suggests that disqualification or suspension have "forward" implication).
- Under Rule 6-8-3 "*a competitor may not, under the penalty of exclusion, receive any outside assistance during the race*".
- Under Rule 6-10 (overtaking) – Any competitor "*guilty of foul or unfair riding should be excluded, suspended, disqualified, or otherwise punished*".
- Under Rule 6-16 – a list of unpaid fees fines etc. shall immediately after the meeting be forwarded to the Secretary of the Club holding the meeting to MNZ which shall enter information in a register and which may not allow competitors to enter or compete until moneys have been paid, and until then "*they should be deemed to be excluded, suspended, or disqualified*".

35. The Tribunal accepts that "*exclusion*" can be applied to "*disqualify*" (in ordinary parlance) a competitor from obtaining any points in a race, even though the definition

does seem more like a disqualification as that word is commonly understood. The dictionary provided by these Rules leads to that conclusion.

36. This returns the Tribunal to the very point of Mr Love's "*protest*". The Appeal Committee imposed the sanction of exclusion after deciding that relegation was not an option under Rule 6-19-1. Rule 7-3-1 had no application.
37. In considering whether Rule 6-19-1 is restrictive, it is necessary to consider the meaning of "*renders riders liable*" as that term appears in the Rule. In the civil context it means "*renders responsible at law*"; see *Baylis v. Waugh* [1962] NZLR 44 and *Dairy Containers Ltd v. NZI Bank Ltd* [1995] 2 NZLR 30. Thus, while an infringement renders a rider **liable** for a sanction, the imposition of that sanction is not mandatory.
38. In *Squibb United Kingdom Staff Association v Certification Officer* [1979] 2 All ER 452 at 459, CA per Shaw, J:

*"The phrase 'liable to' when used otherwise than in relation to legal obligations has an ordinary and well understood meaning, namely 'subject to the possibility of' "*
39. In Collins Dictionary of the English Language (2nd Ed.) the word "*render*" is defined as "*to cause to become*". In the Oxford English Dictionary Vol. VI "*liable*" is defined as "*exposed or subject to, or likely to suffer*".
40. There is Canadian authority in relation to offending which holds the word "*liable*" as meaning "*may be condemned to*" under the provisions of the Highway Code in Quebec. While there is authority, in the context of specific statutes, whereby the words "*liable to*" mean "*bound to pay*" those authorities differ from the expression employed here "*renders .... liable*" to what is a range of penalties.
41. Wherever there is doubt in respect of a penal provision which leads to sanctions, interpretation should favour the person potentially subject to them. For that reason the Tribunal concludes that Rule 6-19-1 is discretionary as to whether a penalty applies, and which of the penalties applies.
42. Thus, if Rule 6-19-1 is given a restrictive interpretation, there were three options open to Mr New. He could have taken no action, or he could have fined Mr Stroud, or he could have excluded him from the result. Disqualification was not available, and suspension is a Board function but **may** be delegated. The Tribunal does not have to reach a concluded view on that last issue.

43. In the Provisional Decision, the tentative view was expressed that if the only available sanction was a fine, this could not have been the intention of the Rules. The Tribunal now accepts that exclusion was available. On the basis that the imposition of a sanction is not mandatory and that there is no intermediary sanction between a fine and exclusion, there is an argument that the restrictive interpretation gives an absurd result and should not be adopted. This view is supported by the surprise of some of the MNZ's officials' at learning that relegation was not available, the past practice of both relegating and applying time penalties for breaches of the yellow flag rule, and the wider range of sanctions available under the International Rules, such sanctions including ride-throughs. If it is accepted that the restrictive interpretation gives an absurd result, there is an argument for ignoring the restrictive interpretation and allowing the Steward to exercise his or her rights under Rule 7-3-1.
44. The contrary view is that Rule 6-19-1 applies to a specific situation and contains the only range of sanctions available, thus excluding the application of other sanctions under the general Rule 7-3-1. This construction is supported by a principle of statutory interpretation, namely that a general sanction provision can not be applied if there is a specific provision to cover a specific situation, unless the statute expressly or impliedly permits the application of the more general sanction.
45. Notwithstanding the unfairness and hardship which this decision **may** create, the Tribunal has concluded that the restrictive interpretation is the correct one in this case. The Manual is replete with rules with provisions where particular sanctions apply. Many of these have already been noted. If Rule 6-19-1 can be given a non-restrictive construction, so can all these other rules. In the Tribunal's view, it could not have been intended that so many specific provisions could be ignored in favour of the general provision. Further, if Rule 7-3-1 is to apply in this case, it is necessary to read into Rule 6-19-1 words which are not there, namely "*and any other remedy under Rule 7-3-1*". It is only in the clearest circumstances that a rule should be so constructed. This is particularly so in this case when MNZ supports the plain meaning of Rule 6-19-1 and where it has not sought to incorporate into the Manual the wider international rules.
46. The Tribunal has come to the conclusion that Rule 6-19-1 is to be restrictively interpreted after a great deal of consideration and debate. A restrictive interpretation of the Rule may, in many cases, lead to a harsh and unfair result and possible injustices even though there is a spectrum of possibilities resulting from no penalty to exclusion, and in some cases disqualification, and suspension. The lack of options in the exercise of discretion is curious, especially given the range of sanctions in Rule

7-3-1. In this case, whichever interpretation is adopted there will be perceived unfairness to one of the parties to this proceeding. However, this possible unfairness does not, in the Tribunal's view, allow it to give a meaning to a rule which is plainly not available when the normal rules of construction are applied. There is no "override" provision because the Tribunal does not like the results of applying an orthodox interpretation. The result, however, does show the need to review this and other provisions in the Manual.

47. As already indicated, the Tribunal does not consider that a fine is appropriate. It accepts MNZ's submission on this point. This leads to the inevitable conclusion that the sanction to be imposed in this case is one of exclusion.

## **RESULT**

48. For the reasons given, Mr Stroud's appeal is dismissed.

## **CONCLUSION**

49. This Final Decision is not complete without some overall expression of the Tribunal's perspective of the case. The case has taken longer than the Tribunal would have liked. That resulted from the need for an evidential hearing, and the receipt of further submissions over a quite extended period. It will be obvious that the Tribunal has reached the final decision with some misgivings, particularly because of the straitened effect of the interpretation of the Rules, providing a limited range of penalties in these circumstances. That is not to say that the penalties in Rule 6-19-1 may not be appropriate. It does seem odd, however, that where the Rules provide, as here, for a decision that there be no penalty, that there is no graduated range of penalties to fit the particular breach. As Motorcycling has in other cases imposed penalties other than those held available under Rule 6-19-1, this is something that must be addressed as a matter of urgency.
50. It is also important to recognise that while Mr Stroud has been unsuccessful in his appeal, he has succeeded in his case that the processes adopted were flawed. His position in that sense has been vindicated.
51. The Tribunal concludes by noting that every participant in this process, from officials through to competitors and adjudicating bodies, have acted in good faith, if some have fallen into process error. The problem has arisen essentially because of the way the Rules are drafted, and can quite easily be put right. The case has also been useful, so the Tribunal thinks, in helping Motorcycling recognise that there are

legitimate differences of view over very fundamental safety issues. We have referred to the different circumstances of “*overtaking*”, in relation to the cones. This too can be quite easily be resolved.

52. The manner in which the case has proceeded should also be noted. This has been a strongly contested, but courteous process, into which the parties have put a great deal of skilful effort. Out of this comes a clear indication by this Tribunal of the need for consideration of Rule amendments.



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**Hon B J Paterson QC (Chairman)**  
**22 December 2005**