

SPORTS TRIBUNAL
of New Zealand

ANNUAL REPORT
2020/21



MISSION OF THE SPORTS TRIBUNAL OF NEW ZEALAND

The mission of the Sports Tribunal is to ensure that national sport organisations, athletes and other parties to a sports dispute have access to a fair, objective and just means of resolving sports disputes within the Tribunal's jurisdiction that is also affordable, timely and efficient.

PERIOD COVERED BY THIS ANNUAL REPORT

The 2020/21 Annual Report of the Sports Tribunal reports on activities and cases decided during the time period 1 July 2020 to 30 June 2021. Cases filed during this time but not decided as at 30 June 2021 will be reported on in the Annual Report for the following year.



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CHAIRMAN'S FOREWORD

Covid and its consequences have continued to have a significant effect on our work but the core need for us to be available to provide an accessible, intelligible and inclusive adjudicative function has remained.

There is an ongoing tension between the approach of a few lawyers who are keen to capture our processes and run highly aggressive adversarial cases on the one hand and unrepresented athletes who are all at sea and feeling disadvantaged in an environment which is totally foreign to them.

The challenge for the Tribunal is to be fair, firm and independent while creating an ethos in which the true nature of a dispute can be identified and reacted to in a sensible, sensitive and consistent manner.

It is too early to evaluate whether the changes to the World Anti-Doping Code relating to young and recreational athletes are sufficient to bring balance and fairness into this important part of our work. The potential is there for much better outcomes especially if DFSNZ is sensible and exercises a prosecutorial discretion such as is routinely applied throughout the legal system in NZ.

A highlight for the year was Sport NZ creating an independent mediation service under the stewardship of Michael Heron QC to assist people to resolve their own disputes which invariably is better for all involved. Coupled with this is the Integrity Working Group under Don Mackinnon which is reviewing the entire landscape of dispute resolution in the Sports Sector. We are hopeful that this will address some

long outstanding anomalies including the Tribunals lack of full independence, the duplication of bodies dealing with Drug cheating cases, the absence of any workable and sensible appeal procedure from cases we have heard, and our statutory basis being in the Sports Anti-Doping Act. We are confident that a clean slate framework will emerge which will capture the essence of sports related disputes and have a robust system imbued with integrity to deal with them.

There were no changes in the membership of the Tribunal during this year and we have continued to be well served by a diverse and dedicated team. Mike Selwyn continued as Registrar for the first half of the year following which we were delighted to have Neela Clinton return from Australia and take up the position which she had previously held.

Hon Sir Bruce Robertson KNZM, VGSM
Chairman

ABOUT THE SPORTS TRIBUNAL

The Sports Tribunal is an independent statutory body that determines certain types of disputes for the sports sector. It was established in 2003 by Sport and Recreation New Zealand (now known as Sport New Zealand) in response to recommendations of a 2001 Taskforce which identified a need to help National Sporting Organisations (NSOs) avoid lengthy and costly legal battles, and to provide athletes with an affordable forum where they could access high quality and consistent decision-making to resolve disputes.

The Tribunal was continued under the name of the Sports Tribunal of New Zealand by the Sports Anti-Doping Act 2006 (the Act).

The Tribunal can hear and decide the matters set out in section 38 of the Act. These are:

- Anti-doping violations, including determining whether an anti-doping violation has been committed and imposing sanctions
- Appeals against decisions made by a NSO or the New Zealand Olympic Committee (NZOC) if the rules of the NSO or NZOC allow for an appeal to the Tribunal. Such appeals include:
 - appeals against not being selected or nominated for a New Zealand team or squad
 - appeals against disciplinary decisions
- Other “sports-related” disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear
- Matters referred by the Board of Sport New Zealand.

The Act sets out the requirements for the appointment of Tribunal members including the Chairperson and Deputy Chairperson(s). These include both legal experience and substantial involvement in sport. Information about the current Tribunal membership is provided at the end of this report.

Further information about the Tribunal’s procedures and decisions can be found on its website: www.sportstribunal.org.nz

CASES DEALT WITH BY THE TRIBUNAL 2020/2021

A total of 16 cases were filed with the Tribunal during the year and the Tribunal issued 8 decisions. These are classified by proceeding type below.

	NUMBER OF PROCEEDINGS FILED	NUMBER OF DECISIONS ISSUED
Anti-Doping (Provisional Suspension)	3	3
Anti-Doping (Substantive)	2	2
Appeals against decisions of NSOs or NZOC	11	3
Sports-related disputes by agreement	0	0
Total	16	8

OVERVIEW

16 proceedings were filed with the Tribunal this year compared to 14 last year.

The number of appeals filed against decisions of NSOs and the NZOC was 11 in 2020/21 which was higher than in previous years and a significant increase compared to the two filed in 2019/20. From the 11 appeals filed, seven related to selection or nomination disputes to compete in events including the Tokyo Olympic Games which were postponed in 2020 due to the COVID-19 pandemic. The disruption caused by cancelled and postponed events for qualification, travel restrictions may have contributed to the increased number of appeals related to the Olympics.

For the number of proceedings filed, there were comparably few decisions issued, of the 5 substantive decisions issued by the Tribunal, 2 were anti-doping and the remaining 3 were appeals against NSO's. This is a significant reduction compared to previous years and results from fewer anti-doping cases and the majority of appeals being resolved during the process or withdrawn before the hearing. The details relating to these cases remain confidential.

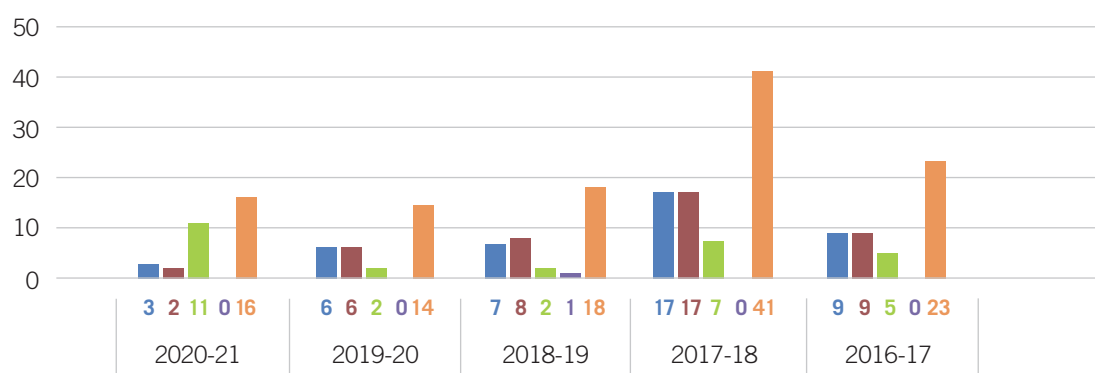
The number of anti-doping cases was unusually low compared to previous years. It is uncertain whether there will be an increase in cases to historical levels or this is a new trend. The new World Anti-Doping Agency (WADA) code was introduced on 1 January 2021. The 2020/21 cases were decided by the Tribunal prior to the introduction of the new rules. There has been no case decided under the new rules.

COMPARISON WITH PREVIOUS FIVE YEARS

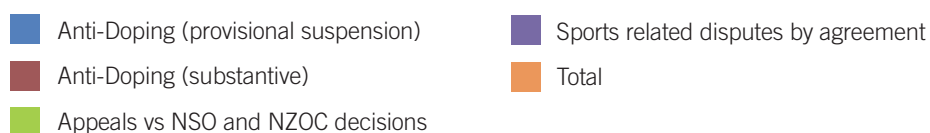
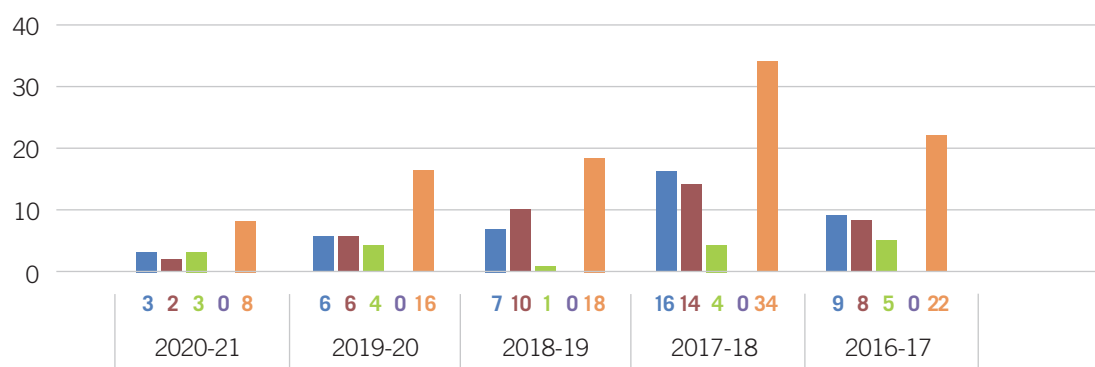
The following graphs show the number of proceedings filed with the Tribunal and decisions issued (classified by proceeding type) in 2020/21 compared to each of the previous five years.

In previous years, the general trend saw an increasing proportion of anti-doping cases compared to appeals against NSOs and the NZOC. Also, cases heard and decisions issued by the Tribunal reflected the number of proceedings filed for that year. The 2020/21 figures differ vastly from previous years in comparison.

Number and type of proceedings filed - yearly comparison



Number of decisions issued - yearly comparison

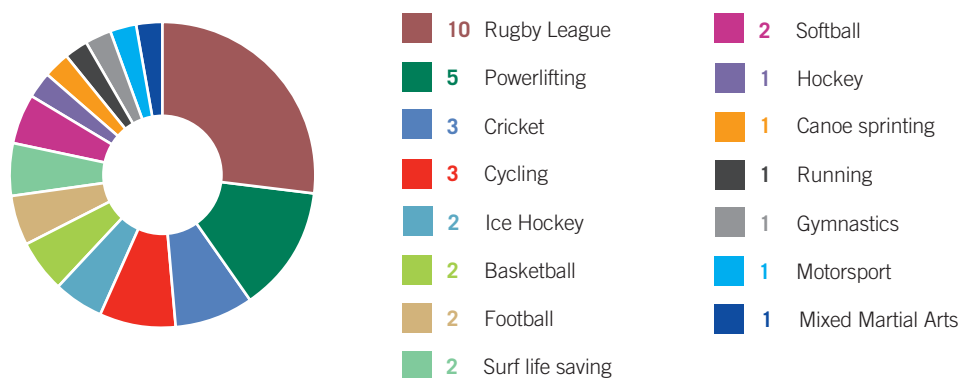


The charts below reflect the types of anti-doping cases and the sports involved for the previous five years.

Anti-Doping Tribunal decisions 2016/17 to 2020/21 by Anti-Doping Rule Violation type



Anti-Doping cases heard by the Tribunal: Sports involved 2016/17 to 2020/21



ANTI-DOPING CASES

The Tribunal hears provisional suspension applications and substantive proceedings for anti-doping rule violations filed by Drug Free Sport New Zealand (DFSNZ), New Zealand's National Anti-Doping Organisation (NADO). The Tribunal is empowered to determine whether a violation has occurred and impose the appropriate sanction under the Sports Anti-Doping Rules (SADR) promulgated by DFSNZ. The SADR mirror the World Anti-Doping Authority's (WADA) Code, a revised Code took effect on 1 January 2021. Most NSOs have adopted the SADR as their anti-doping policy, which impacts everyone in sport from athletes, coaches, medical and administrative staff to parents.

The key changes to the 2021 Code are on the DFSNZ website and include:

- The addition of a new anti-doping rule violation, protecting whistle-blowers, bringing the total number of anti-doping violations to 11. This violation can carry a lifetime ban from sport.
- Changes to existing anti-doping rule violations of complicity and tampering. Complicity now includes the attempted involvement or cover up of a violation committed by another person with a sanction of between two years and a lifetime ban. Tampering, engaging in fraudulent conduct during results management of a violation, will now be treated as a separate offence and a further consecutive sanction may be applied.
- Other changes to sanctions such as reintroduction of aggravating circumstances, which allow a ban to be extended by an additional year in certain circumstances for example use of multiple prohibited substances at one time.
- Result Management Agreements that allow a ban of four or more years to be reduced by one year if the person admits to the violation and accepts the sanction within 20 days.
- Substances of Abuse, as set out in the 2021 Prohibited List, a group of illegal drugs that are misused in society but if used outside of a sports enhancement context may lead to a reduction in the length of sanction.
- New definitions in the Code to allow for more flexibility in sanctions for young athletes aged 16 - 18 (protected persons) and "recreational athletes" based on their competition level can be treated differently from international or national level athletes for sanction purposes.

2020/2021

This year two substantive anti-doping proceedings were heard and decided by the Tribunal. There has been one proceeding in which a provisional suspension order has been made, but the substantive case has yet to be determined.

The two cases involved the unintentional presence of a prohibited substance in samples taken in competition. They are summarised below.

PRESENCE OF A PROHIBITED SUBSTANCE – THC

Drug Free Sport New Zealand v John Elsmore

John Elsmore, a member of Surf Life Saving New Zealand, was suspended for a period of nine months after testing positive for 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid (a metabolite of THC).

Mr Elsmore was competing at the Surf Life Saving Nationals in March 2020 and was one of four athletes tested at the event. Mr Elsmore was provisionally suspended without opposition on 12 June 2020. He admitted the violation but asked to be heard as to the appropriate sanction.

On 28 July 2020, the parties filed a joint memorandum on sanction that suggested a period of ineligibility of nine months be imposed, backdated to the date of the test for Mr Elsmore's timely admission. The memorandum suggested that it was open to the Tribunal to find no significant fault and stated that Drug Free Sport New Zealand did not seek to establish intention.

It was accepted that the prohibited substance was taken at a social event and was not taken to enhance his sporting performance. The Tribunal agreed with the proposal and imposed a suspension of nine months backdated to commence from 14 March 2020 which was the date of the test.

PRESENCE OF PROHIBITED SUBSTANCES – OCTODRINE AND HEPTAMINOL

Drug Free Sport New Zealand v Sean Winters

Sean Winters, a powerlifter, was suspended for two years for the presence of Octodrine and its metabolite Heptaminol, which are specified substances prohibited in competition. Mr Winters was tested when competing in the Auckland Powerlifting Championships on 19 July 2020.

Mr Winters was provisionally suspended without opposition on 16 September 2020. He admitted the violation but requested that his 'B' sample be tested. Subsequently the 'B' sample was analysed, and its contents confirmed the result of the original test.

On 18 December 2020, the parties filed a joint memorandum on sanction that suggested a period of ineligibility of two years be imposed, backdated to the date of the test for Mr Winters' timely admission. The memorandum stated that Drug Free Sport New Zealand did not seek to establish intention. Mr Winters was aware of his anti-doping obligations and said he tried to ensure there were no prohibited substances in any of the supplement products he used. It was accepted that the supplement contained the prohibited substance but was not taken to enhance his sporting performance.

The Tribunal agreed with the proposal and imposed a suspension of two years backdated to commence from 19 July 2020, the date of the test.

APPEALS AGAINST DECISIONS OF NSOs OR NZOC

11 appeal proceedings were filed with the Tribunal in the 2020/21 reporting year. The Tribunal heard and decided four appeals against the decisions of NSOs, with two relating to non-nomination for the Olympic Games heard together as they raised the same issue.

Seven appeals directly related to the Tokyo Games, some cases required considerable urgency due to the deadlines imposed by the International Sports Federations to accept quota allocation slots for the Games. Five cases were withdrawn without the need for a formal hearing. One further appeal related to the Games for non-selection was dealt with early July, which is outside the time period covered by this report.

The majority of appeals filed during 2020/21 were resolved or withdrawn prior to hearing. While there were no decisions issued and the details for these cases remain confidential these were part of the Tribunal's workload as a significant amount of time and resource was occupied.

The four cases are summarised below.

APPEAL AGAINST DECISION OF NSO

Daniel Wallis v Athletics New Zealand

The Sports Tribunal heard an urgent appeal by Daniel Wallis, who had been refused permission to compete at the World Half-Marathon Championships scheduled to take place in Poland on 17 October 2020.

Athletics New Zealand (ANZ) outlining health and safety risks, based its decision on the increasing danger that Covid-19 presented to the athletes.

Mr Wallis asked ANZ to reconsider its decision on several occasions, however ANZ refused to change its stance to grant Mr Wallis permission and both parties agreed to refer the matter to the Tribunal for determination.

The Tribunal noted the unique nature of the case and the dedication and experience of Mr Wallis but accepted that the process that ANZ followed was fair, reasonable and appropriate.

The Tribunal considered that there was no basis for it to issue any direction to ANZ to enter Mr Wallis in the international event, or to reconsider the decision. Accordingly, the appeal was dismissed.

Biggles Racing Team v Motorcycling New Zealand

The Sports Tribunal heard an appeal against two decisions by Motorcycling New Zealand's Appeal Panel ("the Appeal Panel") involving motorcyclists from other teams to those of the Biggles Racing Team ("the Appellant"). The Appeal Panel in both cases had overturned infringement notices issued to two riders.

The Appellant sought to have the decisions of the Appeal Panel overturned because it contended it had a right to be involved in those internal appeals and was denied natural justice.

The Tribunal considered that the critical issue in the case was whether the Appeal Panel was correct when it ruled that the actions of the stewards were outside of their jurisdiction.

The Tribunal determined that the clear and ambiguous words of Motorcycling New Zealand's Rules meant that the stewards' powers only operated within the days of a meeting or until matters raised at a meeting have reached a conclusion. This meant that the inspection of the bikes outside of race meetings was not lawful.

Therefore, the Tribunal dismissed the appeal.

NOMINATION / SELECTION APPEALS

Olivia Hodgson v Archery New Zealand

Olivia Sloan v Archery New Zealand

Ms Hodgson and Ms Sloan separately appealed to the Tribunal against a decision of Archery New Zealand (ANZ) not to nominate either athlete to be part of the Tokyo Olympic Games team.

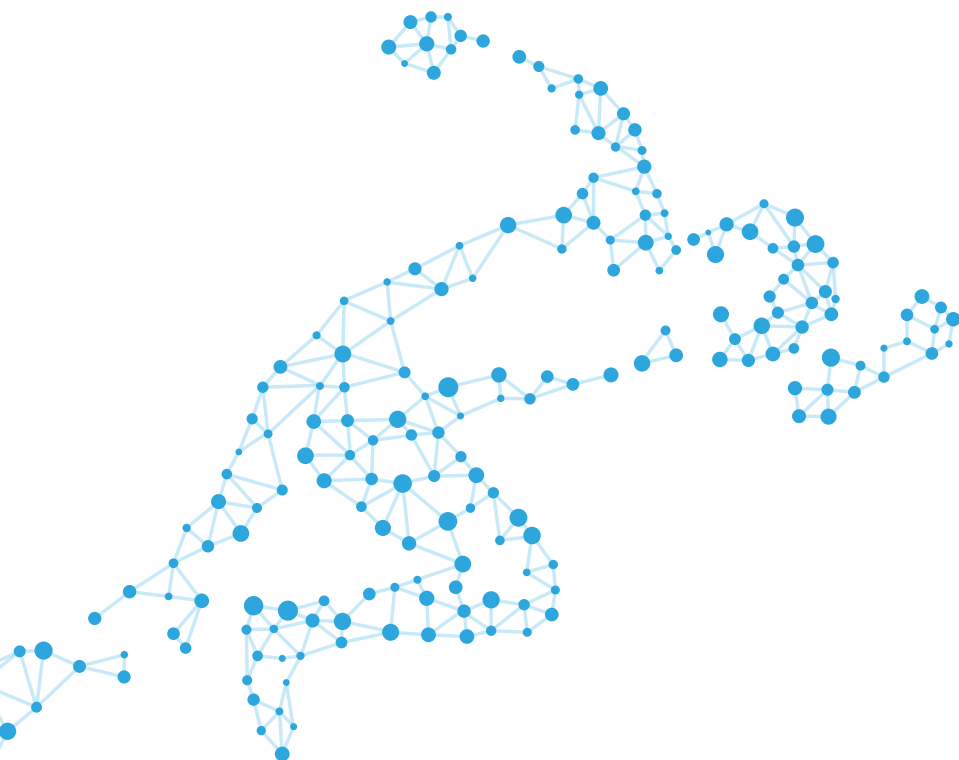
The Appellants submitted that ANZ's nomination criteria had not been properly implemented or followed. Both athletes said they had fulfilled the nomination criteria and ANZ's assessment of their results was incorrect.

ANZ won a quota place in the mixed doubles event which provided two individual spots one male and one female, subject to a successful nomination and selection process. The female quota spot was contested by both appellants. No female archers had been nominated by ANZ to the New Zealand Olympic Committee (NZOC) for selection.

ANZ's nomination criteria, approved by the NZOC, stipulated in order to nominate an athlete they must be capable of achieving a top 16 place demonstrated at a key world event between 2019-2021. ANZ said the appellants' scores fell below the standard required and were therefore ineligible to be nominated to the NZOC.

The appellants produced detailed context to their performances and results to show they were both capable of a top 16 ranking. However the Tribunal found the appellants' assessment of their performances, including trend data, match play rounds and arrow average scores was subjective and outside the interpretation of the criteria.

The Tribunal was satisfied ANZ had considered the appellants relevant competition scores and correctly implemented the criteria. Ultimately both appellants failed to satisfy the nomination criteria. Accordingly both appeals were dismissed by the Tribunal.





MEDIATION ASSISTANCE AND OTHER SUPPORT

In appropriate cases the Tribunal offers advisory assistance and forms of mediation to parties to help settle their disputes by agreement without the Tribunal needing to adjudicate. The Tribunal can conduct mediation at the request of the parties, or in appropriate cases, it can order parties to undertake mediation.

The Tribunal provided substantial assistance in seven cases in this reporting year. Three cases were set to proceed to a hearing with last minute resolution or withdrawal. The remaining cases were facilitated to help the parties identify the relevant issues without the need for a formal hearing and decision.

The first involved an appeal by a High School against a decision of a Secondary Sports Association. An initial appeal was resolved when it was accepted by the parties that the process had been procedurally flawed. A subsequent rehearing that resulted in an identical decision was appealed to the Tribunal but was resolved prior to mediation.

The second case involved a complaint by a branch against the national association relating to proposed constitutional changes and a regulatory framework. Following an administrative preliminary conference, it was determined that the issues could be properly dealt with at the upcoming Annual General Meeting.

A third case involved an athlete who appealed a decision declining a quota spot. It was not clear whether it was a procedural dispute or a non-selection appeal, or whether the Tribunal had jurisdiction to consider the matter. Again, it was possible to promote discussions between the parties to resolve the matter.

Another selection case involved a sports organisation that failed to follow its own selection process recommendation. It was assisted by the Tribunal and resolved through internal discussions.

The Tribunal also fielded a number of enquiries relating to a wide range of issues from termination of club membership, age grade rule changes, refund of sport registration fees due to covid related cancellation and a request to be discharged from the final year of an 8 year ban due to personal family circumstances.



OTHER MATTERS INVOLVING THE TRIBUNAL IN 2020/2021

SPORT AND RECREATION COMPLAINTS AND MEDIATION SERVICE (SRCMS)

Sport NZ approved the establishment of this independent service to deal with sport and recreation issues across New Zealand. Immediation NZ Limited has been contracted to provide the sports sector with free and confidential assistance to resolve sport and recreation disputes. This service is available from community to elite level sport.

The Chairman and Registrar met with SRCMS in April 2020 to discuss operational matters regarding respective and overlapping services. This meeting included joint discussions with NZOC, DFSNZ and a number of senior sports law practitioners.

CONFERENCES

The Tribunal Members did not attend or present at any conferences during the 2020/21 period. The annual Australian and New Zealand Sports Law Association (ANZSLA) Conference due to be held in Queenstown in 2020 was postponed because of Covid-19 travel restrictions.

However, as many events were hosted online Members took the opportunity to stay connected and receive sector updates regarding the new 2021 WADA Code, review of the Australian National Sports Tribunal's first year of operation, and anti-doping in the Covid-19 environment.

LEGAL ASSISTANCE PANEL

A number of parties to proceedings continue to benefit from access to free or low-cost legal services through the Tribunal's Legal Assistance Panel. The Tribunal is investigating a mentor programme to facilitate entry to practitioners' keen to do sports law and be on the Tribunal's referral list.

It is hoped a number of senior and experienced practitioners will assist these lawyers with case preparation and attendance at hearings to enable them to gain sufficient experience to join the Tribunal's referral list.

EXPENDITURE

Under the Memorandum of Understanding between the Minister for Sport and Recreation, Sport NZ and the Tribunal, Sport NZ employs the Registrar of the Tribunal, provides accommodation for the Tribunal office and funds support and information technology costs.

Sport NZ also funds the other operating costs of the Tribunal, which include those associated with hearing and deciding cases (such as the remuneration paid to Tribunal members, travel, hiring of hearing venues and teleconferencing costs) and producing information resources.

In 2020/21 the other operating costs were \$48,928.

SPORTS TRIBUNAL BIOGRAPHIES

CURRENT MEMBERS OF THE SPORTS TRIBUNAL



CHAIRMAN: HON SIR BRUCE ROBERTSON KNZM, VGSM

Sir Bruce became a High Court Judge in 1987, later was President of the Law Commission and retired as a Court of Appeal Judge in 2010. He was Chair of the Rugby World Cup Authority in 2010-11. Sir Bruce sits on some Pacific Courts of Appeal and the Qatar International Court in Doha. He is the Chairman of the Racing Integrity Board and holds a number of governmental and community appointments.



DEPUTY CHAIRMAN: DR JAMES FARMER QC

Jim Farmer QC is a barrister and former lecturer in law at Auckland and Cambridge Universities, with a PhD from Cambridge, and Blues awarded by both universities in track and cross country running. He was a one-time holder of the New Zealand Universities three mile record and winner of the Auckland six mile track title. In recent years, he has steered his "Georgia keelboats" to New Zealand Championships and in 2012 was the outright winner of the Geelong Race Week in Australia. He was previously a director of Team Zealand. He took part in the Targa Motor Rally in October 2013 and remains an active runner.



DEPUTY CHAIRMAN: HON NICHOLAS DAVIDSON QC

Nicholas Davidson QC is an arbitrator, mediator and strategic advisor with Chambers in Auckland and Christchurch. He was counsel for the Serious Fraud Office at the Wine Box Royal Commission of Inquiry, and for the families at the Pike River Royal Commission. His legal practice extends across many areas of law. He was appointed Deputy Chair of the (then) New Zealand Sports Disputes Tribunal for the term of 2003 – 2011. He was for many years a National Commissioner for New Zealand Cricket, a member of the disciplinary structures within SANZAR and the International Rugby Board; and the FIFA Investigatory Panel. He was appointed a High Court Judge and retired in December 2018.



ROB HART

Rob played cricket for Northern Districts from 1992-04 and for the Black Caps from 2002-04 and is now a director at Ellice Tanner Hart Lawyers in Hamilton. He has been a board member of both the New Zealand Cricket Players Association and New Zealand Cricket. Rob is currently on the boards of General Finance Limited, The Balloons Over Waikato Charitable Trust, Te Puke Cricket Charitable Trust and the Children's Osteopathic Foundation Charitable Trust.



PAULA TESORIERO MNZM

Paula was a New Zealand Paralympics racing cyclist. Among her many achievements, her world record-breaking time in the women's 500m time trial secured New Zealand's first gold medal at the 2008 Summer Paralympics and she then went on to win bronze in both the individual pursuit and the women's individual road time trial. Paula has held senior management positions in the public service. Paula is a former Board member of the Halberg Disability Sport Foundation, and the New Zealand Artificial Limb Service, and currently serves on the Boards of Sport Wellington and Paralympics New Zealand. Paula took up the role of Disability Rights Commissioner in July 2017.



GEORGINA EARL ONZM (FORMERLY GEORGINA EVERS-SWINDELL)

Georgina is a former New Zealand rower. She competed in the double sculls with her sister Caroline Meyer. Among her many achievements, Georgina is a double Olympic gold medalist, having won at Athens in 2004 and Beijing in 2008. In 2016 she and Caroline were awarded the prestigious FISA Thomas Keller Medal.



RUTH AITKEN ONZM

Ruth represented New Zealand at netball in 1979 and was the Silver Ferns coach from 2002-11, leading the team to two Commonwealth Gold Medals (2006 and 2010) and the 2003 World Netball Championship title. Named Halberg Coach of the Year in 2003 and awarded the ONZM in 2011 for services to netball, she retired as the most capped international netball coach in the world with 112 test matches to her credit. After her Silver Ferns retirement, Ruth spent three years in Singapore helping the national team to Asian Champs and Southeast Asian Games success. At the end of 2016 Ruth returned to her home town of Paeroa and is currently Performance Manager with Netball Waikato Bay of Plenty.



DR HELEN TOBIN

Helen is an orthopaedic surgeon who specialises in hip and knee replacements. Her initial work focused on trauma, and she was an instructor and later a director teaching trauma management for the Royal Australasian College of Surgeons (RACS). Helen was also on the New Zealand Trauma Committee; the RACS Trauma Committee; the national board of RACS; and she has been an examiner for RACS since 2015. She was the clinical Head of Department at Hutt Hospital from 2013 to 2017. Since 2016 she has been part of a multidisciplinary committee for ACC, helping with complex cases. Helen is currently a trustee for both the Wishbone Trust (which fundraises for orthopaedic research) and the Hip Fracture Trust.



PIPPA HAYWARD

Pippa is a solicitor at Meredith Connell after obtaining a Bachelor of Arts and a Bachelor of Laws degree from the University of Auckland. She represented New Zealand in hockey between 2012 and 2018, retiring after the Commonwealth Games on the Gold Coast where her team won gold. She was a member of the women's hockey team at the Olympics in Rio de Janeiro and played over 150 tests. Pippa has been a board member of the Hockey Players' Association for the past six years, and is also on the committee of the New Zealand Law Society's Auckland Branch Young Lawyers.

CONTACT INFORMATION

The Sports Tribunal's office is in Wellington.
Enquiries should be directed to the Registrar of the Sports Tribunal.

CONTACT DETAILS

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