

NST-E22-287876

The Applicant v State Motorcycling Association (with Motorcycling Australia)

## Determination

### National Sports Tribunal General Division

sitting in the following composition:

Panel Member/s

Scott Ellis

in the arbitration between

#### The Applicant

*Applicant*

Represented by Authorised Representative

And

#### State Motorcycling Association

*First Respondent*

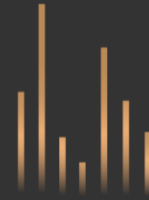
Represented by CEO

With

#### Motorcycling Australia (MA)

*Second Respondent - National Sporting Body*

Represented by Anthony Hynes, Manager Legal & Insurance

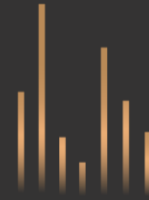


## Overview

1. The Applicant is a motorcyclist and a member of a State Motorcycling Association (SMA). The Applicant competed in events organised by the SMA.
2. On 17 April 2022, during an SMA event, the Applicant failed a random drug test and was suspended from competition pursuant to the SMA's Drug & Alcohol Policy and Testing Procedures (Policy).
3. The Applicant sought to have the suspension lifted under clause 7.2 of Part 2 of the Policy. The issue for determination is whether the Applicant satisfied the requirements of that clause.
4. The Applicant did not satisfy the requirements of clause 7.2 in two respects:
  - a. the Applicant had not provided proof of completing a recognised counselling program, as required by clause 7.2.2 of the Policy; and
  - b. the Applicant provided the results of a pathology test to the first respondent, which the parties agreed showed cannabis in the Applicant's body contrary to clause 7.2.1.
5. The Applicant argued that the cannabis revealed by the test was not a 'Prohibited Substance' within clause 7.2.1 because it was medically prescribed and lawfully consumed. I do not agree. I consider that lawfully prescribed medicinal cannabis remains a 'Prohibited Substance' within clause 7.2 of the Policy.
6. The Policy does not discriminate against the Applicant on the basis that the Applicant has a disability.
7. The application to the Tribunal must be dismissed.

## Procedural background

8. The Tribunal proceedings were commenced on 5 October 2022.
9. The Applicant was represented by an Authorised Representative, who will be referred to as the 'Applicant's representative' throughout this determination.
10. The SMA was initially identified as the respondent to the proceedings. It was represented by its Chief Executive Officer and Company Secretary. In addition, Motorcycling Australia is the national sporting body for motorcycling. The SMA is an affiliated member of Motorcycling Australia. Motorcycling Australia was joined as the second respondent to the proceedings. Mr Anthony Hynes represented the second respondent.
11. I was allocated to this matter by the Chief Executive Officer of the Tribunal.
12. The three parties entered into an arbitration agreement by counterparties, the last of which was dated 7 November 2022. They agreed to my appointment.
13. The parties submitted various documents to the Tribunal. The Registry prepared a bundle of documents which was admitted in evidence at the hearing (Bundle).
14. I made a direction on 29 November 2022 permitting the parties to provide further submissions by 5 December 2022:



- a. the legislative framework supporting prescription of cannabis derived products by medical practitioners; and
  - b. the impact of disability discrimination legislation.
15. The Applicant provided further submissions in time for them to be included in the Bundle. The second respondent provided submissions on 5 December 2022, which was after the Bundle was prepared by the Tribunal Registry. The second respondent's further submissions were tendered along with the Bundle.
16. The matter was heard on 7 December 2022.
17. At the hearing, the Applicant was unwell and did not attend. The Applicant's representative attended and affirmed so much of the Applicant's submissions as were factual assertions. The Applicant's representative gave some limited additional factual evidence. The Applicant's submissions<sup>1</sup> made assertions about a rider with a medical prescription for opioids, who was allowed to ride notwithstanding. The Applicant's representative indicated that they had no first-hand knowledge of this event. In the circumstances, I can give no real weight to this allegation.
18. The representative for the SMA (SMA representative) affirmed the truth of the witness statement dated 14 November 2022, and orally identified the documents referred to in it.<sup>2</sup> The SMA representative was not cross examined. The second respondent tendered no evidence but made submissions.
19. The two respondents largely adopted each other's submissions.

### **Jurisdiction**

20. The jurisdiction of the Tribunal was engaged by s 24(1)(a), 24(1)(b)(i) and s 24(1)(c)(i) of the Act, and by the Second Respondent's Non-NIF Dispute and Complaint Resolution Policy (DCRP). The parties did not challenge the Tribunal's jurisdiction.

### **Factual background**

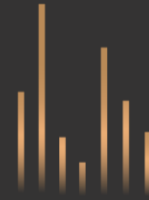
21. The underlying facts were not in dispute between the parties.
22. The Policy applies to any person who is required to be licensed under the MA General Competition Rules (GCRs).<sup>3</sup>
23. The Applicant was a participant in the [REDACTED] State Motocross Championship at [REDACTED] (the Event) on [REDACTED]. The Applicant was required to be licensed under the GCRs and those Rules and Policy applied.
24. On [REDACTED], during the Event, the Applicant underwent drug and alcohol testing pursuant to the Policy. The Applicant returned a non-negative result for methamphetamine.
25. Consequently, and with effect from that date, the Applicant's MA competition license was suspended by the SMA in accordance with Part 2 section 7.2 of the Policy.

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<sup>1</sup> Bundle at page 64.

<sup>2</sup> At paragraphs [9] and [15].

<sup>3</sup> Clause 2(a) of the Policy.



26. The Applicant does not dispute the initial suspension, although the Applicant's representative asserted that the Applicant did not use methamphetamine.
27. On 30 May 2022, the Applicant undertook pathology testing pursuant to clause 7.2.1 of the policy. A copy of the results was provided to the SMA and formed part of the Bundle.<sup>4</sup>
28. The test results do not show the presence of methamphetamine. However, in respect of 'Cannabis Metabolites', the entry reads 'Requires Further Testing'.
29. It appears that there was further testing by mass spectrometry. At page 92 of the Bundle, the result is:

Cannabis Metabolite

11-Nor-carboxyl-THC    CONFIRMED POSITIVE

There is a note on the next page of the test results.

## 11-Nor-carboxyl-THC (or Carboxy-THC) refers to the compound 11-Nor-delta-9-tetrahydrocannabinol-9-carboxylic acid. 11-Nor-carboxyl-THC may arise from cannabis, or from formulations containing delta-9-tetrahydrocannabinol (THC). Claims of prescribed THC dosing may require verification.<sup>5</sup>

### The Policy

30. The Policy has two parts. Part 1 is headed 'Drug & Alcohol Policy'. Part 2 is headed 'Testing Procedures'.
31. For present purposes, the main provisions of the Policy are the definition of 'Prohibited Substance' (in Part 1), clause 4 of Part 1 and clause 7 of Part 2.
32. Clause 3 provides:

For the purposes of this Policy and the Testing Procedures, the following terms shall have the following meanings:

...

**Prohibited Substance** means any substance considered illegal under legislation of the state or territory where the breach occurs, as well as those listed in Schedule 1 of the Criminal Code Regulations 2019 (Cth) as amended from time to time.

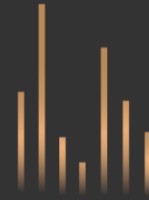
33. Clause 4 of Part 1 of the Policy provides:

The use of drugs or alcohol can adversely affect an individual's ability to participate in Events and can contribute to Significant Incidents. Any person to whom this Policy applies must not:

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<sup>4</sup> Bundle p91.

<sup>5</sup> Emphasis in original.



- 4.1 use, consume, possess, manufacture, sell, purchase or otherwise transfer a Prohibited Substance at or during an Event;
- 4.2 have a blood alcohol reading of more than 0.00 at or during an Event;
- 4.3 have any Prohibited Substance in their system at or during an Event;
- ...

34. Clause 7 of Part 2 relevantly provides:

Any Participant returning a Positive Drug or Alcohol Test result for the first time will:

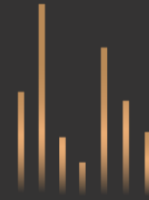
- 7.1 Be immediately excluded from the Event;
- 7.2 Have their Licence suspended, and be prohibited from entering Restricted Areas (all areas except spectator areas), with the lifting of such suspension being conditional upon compliance with the following penalty obligations:
  - 7.2.1 provide to the RCB a pathology report confirming there are no Prohibited Substances or alcohol in the Participants body;
  - 7.2.2 undertake a recognised counselling program at their own expense and deliver to the RCB proof of successful completion of such program.

### The issues

- 35. The overriding issue was whether the Applicant had satisfied the conditions permitting the suspension to be lifted under clause 7.2 of the Policy.
- 36. Clause 7.2 gives rise to two questions:
  - a. had the Applicant provided proof that a recognised (drug) counselling program had been successfully completed?
  - b. had the Applicant provided a pathology report confirming there are no Prohibited Substances in [REDACTED] body?
- 37. It is also necessary to consider whether the Policy impermissibly discriminates against persons with disabilities.

### Proof of completion of a drug counselling program

- 38. Clause 7.2.2 provides that, in order for a suspension to be lifted, a rider must provide proof of completion of a recognised drug treatment program.
- 39. The Applicant's representative admitted that proof of completion of a drug program had not been provided to the first respondent. The Bundle did not contain any evidence that the Applicant had participated or completed such a program.
- 40. The Applicant's representative stated at the hearing that the Applicant did not take methamphetamine, and that the original test result was inexplicable. That might explain why a



drug rehabilitation program had not been undertaken. Nevertheless, the initial testing having shown the presence of methamphetamine and that test result not having been successfully challenged, it is necessary for the Applicant to successfully complete a drug rehabilitation course for the suspension to be lifted.

41. The suspension should not be lifted because clause 7.2.2 has not been complied with.

**Is medicinal cannabis a ‘Prohibited Substance’?**

42. As clause 7.2.2 of Part 2 has not been satisfied, it is not necessary to decide whether clause 7.2.1 of Part 2 has been satisfied. However, this was the matter of most interest to the parties, so I will consider it.
43. The Applicant did not dispute that the pathology test results showed the presence of ‘cannabis’ in the Applicant’s body.<sup>6</sup> The respondents did not dispute that the Applicant’s use of cannabis was lawful.
44. The Applicant argued that the cannabis found in the Applicant’s body should not be treated as a ‘Prohibited Substance’ because it was medically prescribed and lawfully ingested. The Applicant also argued that a proper approach to clause 9 and clause 10 of Part 2 supported this conclusion.

*Lawful cannabis*

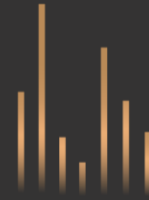
45. The definition of ‘Prohibited Substance’ is set out above. It refers to Schedule 1 of the Criminal Code Regulations 2019 (Cth).
46. Schedule 1 of the *Criminal Code Regulations 2019* (Commonwealth) is a list of various substances and things which are identified as ‘controlled drugs’ for the purposes of paragraph 301.1.(1)(a) Criminal Code (Cth). Item 50 of Schedule 1 identifies ‘cannabis’ as a controlled drug. It has the following description of the drug:
- ‘Cannabis (in any form, including flowing or fruiting tops, leaves, seeds or stalks but not including Cannabis resin or Cannabis fibre).
47. The definition of ‘Prohibited Substance’ is set out above. It has two limbs. The first limb relates to the use of substances which are considered illegal. The second relates to substances listed in Schedule 1. Often there will be an overlap between the two limbs. However, the second limb operates in addition to the first limb. This follows from the use of the expression ‘as well as’ in the definition of Prohibited Substance. The Policy does not refer to the legality or otherwise of substances listed in the Schedule. The two limbs operate independently. The plain meaning of the definition of ‘Prohibited Substances’ is that a substance which falls within the list of substances in Schedule 1 is a ‘Prohibited Substance’ even if the substance is not unlawful in the state or territory where the breach occurs.

*Clause 9 of Part 2*

48. The Applicant argued that medicinal cannabis should not be treated as a ‘Prohibited Substance’ because of clause 9 of Part 2.

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<sup>6</sup> Statement of Agreed facts at [1.5] (Bundle p22), Paragraph 5.3 of the Arbitration Agreement (Bundle p15).



49. Clause 9 of Part 2 provides:

- 9.1 If a person to whom this Policy applies considers there is a possibility that prescribed medication is affecting their ability to participate in an Event, they shall inform the Promoter immediately. It is not necessary for the person to disclose the illness, ailment or the medication which they are taking.
- 9.2 A person who makes a disclosure under clause 9.1 above:
- 9.2.1 may take part in an Event if they provide a medical clearance from their treating medical practitioner clearly stating the medication will not affect the person's ability to perform their duties or, in respect of a rider, stating the medication does not affect the ability of the rider to control a motorcycle; or
- 9.2.2 in the absence of such medical clearance, will be excluded from the Event.

50. Clause 9 does not apply in the context of clause 7. It applies where the rider had taken pre-emptive action to provide medical evidence, rather than after the event, where the rider is seeking to have a suspension lifted. It does not enable inferences to be drawn about the scope of the definition of 'Prohibited Substance' generally, or in clause 7.2.1.

51. In addition, I do not consider that the medical evidence provided by the Applicant satisfies clause 9.2.1. The medical certificate provided by the Applicant from Dr [REDACTED] states:<sup>7</sup>

Note that the duration of action of an inhalational cannabis product is expected to be 2 – 4 hours. Intoxication is a side effect of cannabis treatment, which is avoided by gradual and careful titration. Intoxication will not be expected to persist the next day, so I doubt this will be an issue on race days.

52. This falls short of the categorical assurance contemplated by clause 9.2.1. Whether a rider is affected by the medicinal cannabis depends on when the medicinal cannabis is taken, and the dosage. It is possible that a rider will be affected by medicinal cannabis.

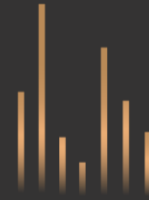
53. The residual risk associated with medicinal cannabis is reflected in the declaration which the Applicant was required to sign to be prescribed cannabis.<sup>8</sup> In it, the Applicant is required to agree that he would:

- Strictly refrain from operating machinery or driving motor vehicles whilst being treated with medicinal Cannabis containing THC.
- Strictly avoid driving, operating machinery, or making significant decisions (ie financial decisions) if feeling intoxicated or cognitively affected while taking medicinal Cannabis.

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<sup>7</sup> Bundle at p85.

<sup>8</sup> Bundle at p84.



54. The Applicant's representative assured the Tribunal that the Applicant would not take medicinal cannabis on race days and would ensure that ■ was not affected when ■ rode.
55. While I accept the bona fides of the assurance provided by the Applicant's representative, the respondents stressed and I accept, that motorcycling is an inherently dangerous sport. A slight error or judgment by one rider might have catastrophic results, not only for that rider but for other riders competing in the event. The sport is not one where the use of cannabis affects only the user. The respondents clearly bear a heavy burden of ensuring that racing is as safe as possible and that the risk of rider error, including by intoxication, is reduced so far as possible.
56. It may be that a policy could be written which combined greater flexibility with stringent safety standards. It may also be that a testing regime could be devised which adequately and objectively controlled the use of medicinal cannabis and its potential effects. However, the Tribunal is required to consider the Policy as it stands.

#### *Clause 10*

57. The Applicant argued that clause 10 also supports the inference that medicinal cannabis is not a 'Prohibited Substance'.
58. Clause 10.3 operates to give the Testing Person a discretion 'in deciding the necessary action to be taken'. It does not appear to apply in the context of lifting suspensions under clause 7 of Part 1. It does not enable an inference to be drawn about the meaning of 'Prohibited Substance' in clause 7.2.
59. In addition, I do not consider that the Applicant's circumstances fall within the scope of clause 10.1. That clause says:

Exceptional circumstances exist if the presence of the Prohibited Substance is beyond the control of the Participant (ie the Participant is administered the prohibited substance in hospital without their knowledge).

60. In the present case, the presence of the Prohibited Substance in the Applicant's body was a matter within the control of the Applicant. The Applicant went to the doctor, got a prescription for it, and administered the medicinal cannabis.

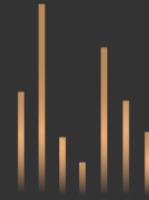
#### *Conclusion – Prohibited Substance*

61. On its face, the definition of 'Prohibited Substance' includes cannabis, even when its use is not unlawful, as discussed in paragraphs 45 to 47 above. The provisions of clause 9 and 10 of Part 2 do not lead to a different conclusion.

#### **Disability Discrimination**

62. I requested and received submissions from the parties about the impact of disability discrimination legislation on the operation of the Policy. I was assisted by the parties' submission.
63. The parties proceeded on the basis that the Commonwealth *Disability Discrimination Act 1992* was the relevant legislation.





64. Dr [REDACTED] letter of 24 August 2022 states that the Applicant has anxiety and degenerative joint pain, which might be considered a disability, for the purposes of the Act, which the cannabis is prescribed to treat.
65. The suspension of a driver's participation in racing operates by reference to the presence of Prohibited Substances, not by reference to any physical characteristics of the rider himself or herself. A rider is suspended because he or she has tested positive, not because the rider suffers from a disability such as anxiety or degenerative joint pain. The Policy does not directly discriminate against persons who have those conditions.
66. It might be argued that the Policy indirectly discriminates against persons who have disabilities such as anxiety or degenerative joint pain. Although the Policy sets an objective standard in relation to the presence of Prohibited Substances which is not directly related to any disability, it is harder for persons with anxiety or degenerative joint pain to meet that standard, because they rely on or use a medicinal cannabis treatment. It is not clear, first, that the use of medicinal cannabis is the only viable treatment for anxiety and degenerative joint point. Further, indirect discrimination is not unlawful if the standard is reasonable. It can be inferred from the declaration at page 84 of the Bundle and Dr [REDACTED] letter<sup>9</sup>, that medicinal cannabis can have an intoxicating effect, which would impact a rider's ability to race. Motorcycling is a dangerous sport. Consequently, the Policy appears a reasonable response.
67. I do not consider that the Policy offends the Act.

**THE TRIBUNAL THEREFORE DETERMINES:**

1. The application is dismissed.

Date: 20 December 2022.



Scott Ellis

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<sup>9</sup> Bundle at p85.