

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

**SDT/05/05**

**BETWEEN**

**Andrew Stroud**

Applicant

**AND**

**Motorcycling New Zealand (Inc.)**

Respondent

Date and Place of Hearing: 9 September, 2005 at Hamilton

Counsel: J Unsworth for Appellant  
K McDonald and M Branch for Respondent

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**PROVISIONAL DECISION GIVEN ON 9<sup>th</sup> DAY OF NOVEMBER 2005**

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

Registrar: Brent Ellis

## **Introduction**

1. Andrew Stroud is a motorcyclist and one of New Zealand's leading super bike riders. Earlier this year he crossed the line first in a NZ Production Super Bike Championship event held at Mansfield. The event was sanctioned by Motorcycling New Zealand ("MNZ"), the National Sports Organisation for motorcycling in New Zealand. The Steward of the meeting subsequently relegated Mr Stroud to second place promoting Mr Rees to first place. Later in the day a Protest Committee excluded Mr Stroud from the race results. He appeals both his relegation and subsequent elimination.
2. The appeal comes before the Tribunal by agreement of the parties. The agreement provides that the appeal is to be determined in accordance with the rules of the Tribunal.

## **Undisputed Facts**

3. The event in question was a NZ Production Super Bike Championship race held at Mansfield raceway on the 26<sup>th</sup> of February 2005. Race 6 was part of a national series. Mr Stroud crossed the finishing line in first place.
4. A flag marshal reported that Mr Stroud had overtaken Mr Rees shortly before the finishing line under a yellow flag. The Steward relegated Mr Stroud to second place and promoted Mr Rees to first place. Results showing these positions were posted at the event.
5. Another rider, Mr Love, subsequently protested. The ground of the protest was that Mr Stroud passed under a yellow flag and Rule 6-19-1 "was not imposed".
6. A Protest Committee Meeting was convened. The Protest Committee upheld the protest and in its advice to Mr Love gave the following reasons:

"options of Fine – Exclusion – Suspension – or Disqualification. Relegation is not an option. Rider A Stroud is Excluded from the race 6 on Saturday 26/2/05."

The advice noted that "all parties affected by this decision have the right of appeal under Rule 7-2."

7. On the 2<sup>nd</sup> of March 2005 Mr Stroud lodged an appeal against his relegation and elimination. This appeal was heard by MNZ's Appeal Committee on the 22<sup>nd</sup> of March 2005. That Appeal Committee upheld the decision of the Protest Committee.
8. Mr Stroud then requested a review of the Appeal Committee's decision by the Board of MNZ. It met on the 30<sup>th</sup> of March 2005 and upheld the decision of the Appeal Committee. Mr Stroud's appeal is in effect an appeal from the decision of the Appeal Committee, which was subsequently upheld by the Board of MNZ.

### **The Grounds of Appeal**

9. Mr Unsworth for Mr Stroud based the appeal on three broad grounds:
  - (a) A challenge to the factual finding that Mr Stroud overtook Mr Rees under a yellow flag;
  - (b) Procedural unfairness;
  - (c) An inappropriate penalty was administered.

### **Procedural Unfairness**

10. The ground of procedural unfairness is dealt with first. The reasons for this will become apparent from the decision.
11. Mr Stroud complains of procedural unfairness at every step in the process. Those steps were:
  - The first step was Mr New's decision as Steward to relegate Mr Stroud to second place (see para [4] above).
  - Mr New was subsequently approached by Mr Love who advised he wished to protest the penalty imposed as it differed from the penalties allowed under rule 6-19-1. The protest was received at 5.12pm and as worded the protest was against "Andrew Stroud" for passing under a yellow flag. The form said, "6-19-1 wasn't imposed".
  - Mr New then convened a Protest Committee Meeting with himself as Chairman, the clerk of the course Mr Conaghan and the rider's representative Mr Johnstone. That Protest Committee deliberated, without advising Mr Stroud of what it was doing, and came to the conclusion that the only appropriate

remedy under rule 6-19-1 was to exclude Mr Stroud from the results of the race.

- Mr Stroud subsequently appealed the decision of the Protest Committee to the MNZ Appeal Committee. Both Mr New and Mr Stroud appeared before this Committee but not at the same time. Statements were received from various people and considered by the Committee. It upheld the decision of the Protest Committee.
- Mr Stroud then requested a review of the Appeal Committee decision by the Board of MNZ. The Board upheld the Appeal Committee decision.

12. Mr Unsworth relied upon:

- The complicated nature of MNZ's rules and the understanding of them by the officials;
- the failure to define "overtaking" in the rules;
- the variation of the yellow flag rule which operated at Mansfield;
- the official's knowledge of that variation;
- the constitution of the Protest Committee and the manner of the appointment of a "rider's representative";
- the manner in which Mr New relegated Mr Stroud and his imposition of the penalty without giving Mr Stroud the right to make submissions;
- an allegation that Mr New was biased against Mr Stroud;
- the manner in which the Protest Committee conducted itself including Mr New participating in the decision and Mr Stroud not being advised of the hearing until after the decision was made;
- The manner in which the Appeal Committee conducted its appeal, including a failure itself to seek further evidence and make its own decision on the factual dispute, inappropriately interrogating Mr Stroud and in particular hearing the evidence from Mr New in the morning and from Mr Stroud in the afternoon without either being present when the other's evidence was heard;

- the manner in which the Board reviewed the Appeal Committee's decision on 30 March 2005.
13. While the nature of MNZ's rules may have been a contributing factor to what occurred, it is not the central issue. Nor can the allegation of bias against Mr New succeed. There was no credible evidence on which such an allegation could be made. Mr New may have erred in his application of the Rules but, in the Tribunal's view, did not in any sense act in a biased or partial manner.
  14. The issues for consideration are:
    - (a) Was Love's protest a valid one?
    - (b) If there was a valid protest, was the Protest Committee correctly convened?
    - (c) Was the Appeal Committee the correct procedural step and, if so, did it show procedural unfairness?
    - (d) What effect, if any, did the review of the Board of MNZ have?
  15. There are possibly two rules under which Mr New could have taken action against Mr Stroud. The first, rule 7-1, allows the Steward if a matter concerning the operation of the meeting has been brought to his attention other than under protest, to investigate the matter and impose such penalties as allowed in the manual.
  16. Rule 7-2-1 contains the disciplinary powers of the Steward and may be exercised in the case of any Member of the MNZ who has contravened any competition rule, supplementary regulation, or any instruction of the Steward at any meeting. In the Tribunal's view, the more appropriate rule in this case was rule 7-1 as Mr New acted on the flag marshal's advice.
  17. Mr New's evidence was that Mr Love "protested" under rule 7-1-3 against his decision. This rule gives the competitor who considers "himself aggrieved by any matter connected with the competition or the conduct of any official or other competitor" the right to make a formal protest. In the Tribunal's view, the rule did not give Mr Love a right of protest. Mr Love was, in effect, aggrieved by Mr New's decision. The term "conduct of any official" in rule 7-1-3 does not, in the Tribunal's view, apply to a challenge to a decision made by the Steward in the exercise of his discretion. Mr New had made a decision and the correct procedure was for Mr Love to **appeal** that decision under rule 7-4-1. A further pointer to rule 7-4-1 being the

correct rule is that the Steward whose decision is being challenged must, in accordance with the rules, chair the Protest Committee. There is no provision in the rules for the Steward to be replaced. This suggests that challenges to the Steward's decisions are by way of appeal. In passing, we note that the protest form has a portion under which the decision of the Protest Committee is advised. It states that a person affected by the Protest Committee's decision may appeal under rule 7-2. There appears to be no such right of appeal under that rule.

18. As noted in the previous paragraph, the Tribunal is of the view that if this had been an appropriate protest, the Tribunal was correctly convened. However, if that had been the case, there were deficiencies in the manner in which the Protest Committee operated. Mr Stroud, who was the person who was most affected by any decision of the Protest Committee, as he faced the prospect of being disqualified or eliminated with possible adverse consequences on a series, was entitled both to know of the protest and to be present at the hearing to make submissions. A failure to give Mr Stroud this right was a breach of the principles of natural justice. While a strict interpretation of the rules would have allowed Mr New to chair the Protest Committee, there is a further matter of concern. He indicated that he took no part in the decision. It was therefore made by two persons where the rules require a committee of three to make the decision. The Tribunal is of the view that if the protest had been properly made in accordance with the Rules, the decision of the Protest Committee must be set aside for the reasons given.
19. The Appeal Committee considered the matter as an appeal from the Protest Committee. In the Tribunal's view, it should have considered the appeal as being from the Steward's decision. The Tribunal accepts that if the appeal had been properly conducted, it would have remedied the procedural defects already referred to. The Appeal Committee received many statements. While the Appeal Committee was entitled to conduct the hearing in a manner it thinks fit, it had a requirement, in the Tribunal's view, to observe the principles of natural justice. Mr Stroud was entitled to a fair hearing. Several sub-rules of rule 7-4 clearly contemplate a hearing, e.g. the Appeal Committee is established to hear appeals, and a hearing "will be convened at a place and time convenient to the Appeal Committee, who will notify the parties to the appeal of that date, place and time". (rule 7-4-10). In this case, Mr Stroud was not present when Mr New gave his evidence. Natural justice dictates, in the Tribunal's view, that not only should Mr Stroud have been present and entitled to ask his own questions but he was entitled to hear the questions asked of Mr New by

the members of the Committee. In the Tribunal's view, there was a basic denial of Mr Stroud's right to natural justice and the Appeal Committee's decision can not be upheld.

20. As a result of the Tribunal's findings, the only decision which survives is Mr New's decision relegating Mr Stroud to second place. Mr Stroud has, in effect, been denied a right of appeal. The agreement between Mr Stroud and MNZ provides that this Tribunal will hear the appeal in accordance with its Rules. In the circumstances, it treats this appeal on a *de novo* basis. It is, in effect, Mr Stroud's first appeal. In doing so, the Tribunal has considered the statements and evidence considered by the Appeal Committee, although in many instances it is unable to give great weight to those statements.
21. A relevant matter is Mr Love's position. On one view he has no rights because he adopted an incorrect procedure to challenge Mr New's original decision. However, he was encouraged to make a protest and in the Tribunal's view his protest should be considered as an appeal by the Tribunal. Because of the manner in which the matter came before the Tribunal, Mr Love has not had an opportunity to make submissions. His interest is in whether Mr Stroud should be disqualified or relegated if he does not succeed in his appeal against the factual finding. His position will be addressed later in this decision.

### **The Factual Challenge**

22. It is now necessary to address Mr Stroud's challenge to Mr New's decision that Mr Stroud had infringed the yellow flag rule. In the Tribunal's provisional view, the "field of play" rule may apply. However, neither party addressed this rule. In the circumstances, the Tribunal can resolve the factual challenge without determining whether or not the rule applies to infringements of the yellow flag rule. The "field of play" rule is referred to later in this decision because MNZ would be wise, in the Tribunal's view, to amend its rules to make it clear whether or not the Rule applies in the circumstances of this and similar cases.
23. MNZ has a set of rules entitled 'Manual of Motorcycle Sport'. It is common ground that the Mansfield event was substantially conducted under these rules. The yellow flag rule is rule 6-19. The relevant part reads:

The following flags will be recognised as the standard colours to be used as signals to riders during a race:

...

**Yellow:** waived – SLOW DOWN NOW – Proceed with extreme caution. No overtaking until the danger area is passed, be prepared to stop.

24. A local variation of rule 6-19, known as the “Mansfield Variation” applied. Under it a rider is only prevented from overtaking when a yellow flag is being waved if the overtaking occurs between cones which are placed on the Mansfield track. The evidence suggested that either the riders were told that the cones were there as assistance to them in the event of a yellow flag or that the no passing under the yellow flag rule only applied between the cones. MNZ concedes for the purposes of the appeal that the cones denoted the “danger area” for the purposes of rule 6-19. The Tribunal notes that this concession differs from the position taken by the Appeal Committee.
25. The Tribunal accepts the evidence of the Steward, Mr New, and the flag marshal at Higgins Corner where the overtaking occurred, Mr Bolstad, as to the sequence of events on the day. They were:
- Mr Bolstad reported the overtaking movement by radio to the chief flag marshal, Mr Webster, immediately after the overtaking.
  - Mr Webster advised Mr New that Mr Stroud had passed Mr Rees under the yellow flag.
  - Mr New stopped both riders as they entered the pit gate. He told Mr Stroud that he was relegating him to second place and promoting Mr Rees to first place for the offence of passing under the waved yellow flag at Higgins Corner on the last lap of the race. Mr Stroud countered by saying that the pass had been completed before the yellow flag. Mr New was not prepared to argue at that stage and said he would come and see the riders in their respective pit area.
  - Mr New went to his office and asked Mr Webster to have Mr Bolstad draw a diagram of the incident as soon as he came in at the end of the day. Mr Bolstad signed a plan which was prepared by Mr Webster. This plan shows that the overtaking took place opposite Mr Bolstad’s flag point box and after the cones.
  - Mr New then visited the pits and spoke to both Mr Rees and Mr Stroud. Mr Rees could not say whether the pass was before or after the cones



because he was focusing on his riding. Mr Stroud told Mr New that the pass had been before the cones and was therefore legal. Mr New's response was that because the pass was made after the cones he was relegating Mr Stroud to second place under rule 7-3-1 of the Manual. Mr Rees was elevated to first place. In response to Mr Stroud's question as to whether he would review his decision if he could find video or photographic evidence of the incident, Mr New advised that he would review the decision based on anything Mr Stroud could provide. No evidence was provided.

- Mr New told the timekeeper of Mr Stroud's relegation and provisional results were then posted. They were provisional as Mr Stroud had a right to appeal the decision.
- After the last race of the day Mr New was approached by Mr Love who advised that he wished to protest the penalty imposed on Mr Stroud as it differed from the penalties allowed under rule 6-19-1. Mr Love lodged the protest and paid the required fee.

26. Mr Stroud's position as submitted by Mr Unsworth is that the various MNZ bodies who dealt with this factual issue could not reasonably, or even on the balance of probabilities, have reached the factual finding that Mr Stroud overtook after the cones. In a detailed argument Mr Unsworth submitted:

- (a) Mr Bolstad's evidence should be treated with caution. This was in effect a submission that Mr Bolstad got it wrong because he was relatively inexperienced and untrained, gave incorrect evidence as to the distance he was from the track and described the physical position of the riders in terms which conflicted with descriptions by other witnesses. Further, his evidence as to positions was suspect in view of the speed at which the riders were travelling, and the fact that he did not himself draw the plan of the incident although he did sign it. It was suggested that the chief flag marshal should have given evidence both before the MNZ Appeal Committee and this Tribunal.
- (b) Mr Rees' frank acknowledgement that he did not know whether he was passed before or after the cones, could not undermine Mr Stroud's evidence.
- (c) Mr Stroud's evidence that he overtook Mr Rees before the cones, should be accepted.

- (d) Statements from other witnesses as to what happened, supported Mr Stroud's evidence. While none of these witnesses gave evidence before the Tribunal, many of them had presented statements to the MNZ Appeal Committee.
  - (e) A statement from Mr Harris, who did not appear in support of his statement, should be accepted. His evidence calculated that based on speeds and distances which he assumed indicated that the overtaking must have taken place before the cones.
  - (f) Parallax error applied to those witnesses who supported the flag marshal's evidence.
27. Ms McDonald for MNZ accepted that the issue was whether Mr Stroud overtook Mr Rees under the yellow flag and after the cones and noted that this raised an issue on which the parties differ, namely what constitutes overtaking. MNZ does not accept Mr Stroud's position that in order to overtake a rider only needs to have his front wheel in front of the other bike. The internationally understood position in MNZ's view is that an overtaking manoeuvre is completed when the rear wheel of the machine that was passing is in front of the front wheel of the machine that was passed. Ms McDonald also submitted that the factual finding is outside the scope of what is appealable, alternatively if Mr Stroud is able to appeal the factual finding, the finding was in any event correct.
28. The parties have agreed that the Tribunal's rules apply to this appeal. Rule 12.1.3 contains only four circumstances which could possibly be applicable to this appeal. They are:
- (a) That natural justice was denied.
  - (b) The decision maker acted outside of its powers and/or jurisdiction (i.e. acted *ultra vires*).
  - (c) That substantially new evidence has become available after the decision, which is being appealed, was made.
  - (d) In respect of a decision relating to misconduct involving the Appellant that the penalty was either excessive or inappropriate (this ground has no relevance to the factual finding but is relevant to Mr Stroud's ground of inappropriate penalty).

29. In the Tribunal's view the factual finding made by Mr Bolstad on the day and acted upon by Mr New cannot be impeached upon any of the allowable grounds. There can be no suggestion that Mr Bolstad's opinion infringed either the principles of natural justice or was *ultra vires*. The only ground upon which it could be set aside, if indeed the Tribunal can on appeal correct such an error, is that there is now substantial new evidence. Mr New was entitled to act upon Mr Bolstad's report. Assuming, without deciding, that this Tribunal can reverse the flag marshal's decision on the grounds of substantial new evidence, it is necessary to consider that evidence.
30. The Tribunal found both Mr Stroud and Mr Rees credible witnesses. Mr Stroud believes that he had overtaken Mr Rees before the flags. Mr Rees candidly accepts that he does not know as he was concentrating on his riding. The Tribunal does not however accept his definition of "overtaking". The dictionary definition is to "catch up and pass". This is consistent with Mr New's evidence that it is internationally understood that an overtaking manoeuvre is completed when the rear wheel of the machine that was passing is in front of the front wheel of the machine that was passed. Unfortunately however there was no authoritative evidence upon which the Tribunal could determine what the international criteria is. Such an important issue should have a settled meaning. The Tribunal does not however need to resolve this issue. It accepts that Mr Stroud genuinely believed that he passed before the cones.
31. While it is possible that Mr Bolstad made a genuine error, the Tribunal does not accept Mr Unsworth's invitation to treat his evidence with caution. It is correct that on some matters Mr Bolstad was obviously mistaken. However, in the Tribunal's view, these matters did not undermine his clear and unshakeable view that the passing took place after the cones. There was other evidence which supported him although like some of the evidence called on behalf of Mr Stroud, it could not be said to be conclusive. The race commentator's evidence supported Mr Bolstad's decision and he was one witness who would have been observing the events at the time. However, like many of Mr Stroud's witnesses, he was not directly in line and was some distance from the passing manoeuvre.
32. The Tribunal found some of the technical evidence given on behalf of Mr Stroud unconvincing, particularly in the form in which it was given. A statement was tendered from Mr Harris but he was not there to give evidence and did not give evidence before the MNZ Appeal Committee. MNZ does not accept his evidence and as it was not tested by cross-examination the Tribunal cannot give it much

weight. Nor can the Tribunal give weight to the allegations of parallax error, as there was no expert evidence on which this theory could be established. The photographic evidence was not of sufficient cogency to add to Mr Stroud's evidence.

33. The Tribunal's Rules provide that the onus should be on the Appellant to prove that the NSO erred on one or more of the grounds set out in the application for appeal. The Tribunal accepts that the onus is on the balance of probabilities (i.e. the civil onus). Some of the witnesses who gave statements to the Appeal Committee were at least 300 metres away from the cones. One of them did not see the cones. Some acknowledged that they were not in line. Some obviously gave their impressions which were favourable to Mr Stroud. Taken together however, the evidence from the eye witnesses was not compelling and was not of a character which could lead the Tribunal to conclude that Mr Bolstad's evidence should be discounted. The evidence called on behalf of Mr Stroud at the Appeal Committee and Mr Stroud's own evidence fell considerably short of the evidence which would have been required to discharge the onus on Mr Stroud to establish a factual error. In the circumstances, Mr Stroud can not succeed on the ground that a factual error was made.

### **The Field of Play Rule**

34. As noted in paragraph 22 above, if the Tribunal had not determined that Mr Stroud was unable to succeed on his factual ground, it would have considered the application of the "field of play" rule. If the rule applies to motorcycling events it will restrict the grounds of an appeal similar to Mr Stroud's unless the decision appealed from was made in bad faith or arbitrarily. The Manual does not assist in determining whether the "field of play" rule applied. Many sports are now using modern technology to ensure correct decisions are made in the first place and some allow technology to be used to subject a controversial decision to a process of review. However, unless the sports rules allow the use of such modern technology, the "field of play" rule applies. In some instances, technology is able to be used because of the rules of an international federation which govern national competitions. In the present case, the Tribunal would have sought further submissions on the rule if it had come to the view that the evidence established that an error had been made. MNZ should consider whether or not this rule is to apply to its future events.
35. There is much jurisdiction from Court of Arbitration and Sport Panels on "field of play" decisions. In a recent arbitral award in *de Lima and Brazilian Olympic Committee v*

*The International Association of Athletics Federation (CAS 2004/A/727)*, the Panel said:

"Before a CAS Panel will review a field of play decision, there must be evidence of bad faith or arbitrariness. In other words the Appellant must demonstrate evidence of preference for, or prejudice against, a particular team or individual."

36. There are several CAS cases which state the principle. In *Korean Olympic Committee v International Skating Union (CAS OG 02/007)* the head note states:

"CAS Panels do not review 'field of play' decisions made on the playing field by judges, referees, umpires or other officials, who are responsible for applying the rules or laws of the particular game."

The Panel in that decision said:

"But there is a more fundamental reason for not permitting trial, by television or otherwise, of technical, judgmental decisions by referees. Every participant in a sport in which referees have to make decisions about events on the field of play must accept that the referee sees an incident from a particular position, and makes his decision on the basis of what he or she sees. Sometimes mistakes are made by referees, as they are by players. That is an inevitable fact of life and one that all participants in sporting events must accept. But not every mistake can be reviewed. It is for that reason that CAS jurisprudence makes it clear that it is not open to a player to complain about a "field of play" decision simply because he or she disagrees with that decision."

37. A field of play decision can be reviewed if it is made in bad faith or arbitrarily. In the *Korean Olympic Committee* case, the Panel considered the fact that the language used to explain the jurisdiction is not always consistent and can be confusing. Thus phrases such as "arbitrary", "bad faith", "breach of duty", "malicious intent", "committed a wrong" and "other actionable wrongs" have been used apparently interchangeably to express the same test. The Panel then said:

"In the Panel's view, each of those phrases means more than that the decision is wrong or one that no sensible person could have reached. If it were otherwise, every field of play decision would be open to review on its merits. Before a CAS Panel will review a field of play decision, there must be evidence, which generally must be direct evidence, of bad faith. If viewed in this light, each of those phrases means that there must be some evidence of preference for, or prejudice against, a particular team or individual. The best example of such preference or prejudice was referred to by the Panel in *Segura*, where they stated that one circumstance where a CAS Panel could review a field of play decision would be if a decision were made in bad faith, eg. as a consequence of corruption. The Panel accepts that this places a high hurdle that must be cleared by any Applicant seeking to review a field of play decision. However, if the hurdle were to be lower, the flood-gates would be opened and any dissatisfied participant would be able to seek the review of a field of play decision."

38. If a national sporting organisation wishes to avoid the application of the “field of play” rule, it should, in the Tribunal’s view, clearly state in its rules the grounds on which a “field of play” decision is reviewable.

### **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 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.

**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 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.

### **Provisional View**

48. The Tribunal has reached a provisional view only because Mr Love was not represented at the hearing. The view which the Tribunal has come to on a steward's powers to relegate was not advanced by any party before it.
49. In these circumstances, it has decided that all parties, including Mr Love, will have the right to make written submissions to the Tribunal on the issue of a steward's powers to impose penalties for a breach of the yellow flag rule. These submissions are to be received within 14 days of the date of this decision and should specifically address this provisional ruling. In this way Mr Love will also have the opportunity to put his case first taken (wrongly) to the Protest Committee.



50. The Tribunal will then issue a final decision.

A handwritten signature in blue ink, appearing to read 'B J Paterson', is positioned above a horizontal dotted line.

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**Hon B J Paterson QC (Chairman)**  
**9 November 2005**