



Motorsport Australia Investigatory Tribunal

FINDINGS & DETERMINATION ON PENALTY

Under the provisions of the Motorsport Australia Manual of Motor Sport, Judicial Appendix, "Tribunals and Judicial Procedures", an Investigatory Tribunal was convened to consider modifications detailed in Technical Bulletin #17 (**the Bulletin**) released in relation to the accelerator pedal set-up (Modifications) for vehicles competing in the National Trans Am Series (**Series**).

CONSTITUTION OF THE TRIBUNAL

The Tribunal appointed to hear the matter was:

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| <i>Chair:</i> | Justice Peter Davis |
| <i>Tribunes:</i> | Mr Stephen Lisk |
| <i>And:</i> | Mr Andrew Jones |
| | |
| <i>Secretary:</i> | Mr Curtis Deboy |

INTERESTED PARTIES

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| <i>Motorsport Australia Advocate:</i> | Mr Steven Chopping AM |
| <i>Competitor:</i> | Mr Paul Morris – Car 67 |
| <i>Competitor:</i> | Garry Rogers Motorsport – Mr Steffan Millard |
| | |
| <i>Motorsport Australia Technical Manager:</i> | Mr Scott McGrath |
| <i>Australian Racing Group (ARG):</i> | Category Manager – Mr Liam Curkpatrick |
| <i>Category Technical Advisor (PBR):</i> | Mr Cameron Sendall |

TERMS OF REFERENCE

The objective of the Tribunal was to consider and investigate:

- What the proper process should be with respect to the testing and implementation of the Modifications;
- Whether the testing and implementation of the Modifications were in breach of the Regulations;¹
- Whether GRM was in breach of the Regulations;
- What recommendations or findings, if any, it determines appropriate if there was a breach of the Regulations.

¹ 2023 Trans Am Series Sporting and Technical Regulations (the Regulations).

BACKGROUND

On 1 August 2023 Motorsport Australia referred the controversy to the Investigative Tribunal and Terms of Reference (TOR) were provided.

The Investigative Tribunal found that Garry Rogers Motorsport (GRM) cars #34 (Moffat) and #45 (Dalton) drove with the Modifications in round 3 of the Series on 9-11 June 2023 at Winton Motor Raceway (the principal decision).

The Investigative Tribunal further found that the Modifications were in breach of the regulations and ordered:

“By 4 pm on 13 September 2023 any of the six persons who were invited and appeared at the Investigative Hearing may provide written submissions on the question of penalty for the breach to each of the other persons who were invited and appeared, and to the Secretary of the Investigative Tribunal, Curtis Deboy.

Should any person who makes written submissions wish to supplement their written submissions with oral submissions they must advise Mr Deboy of that desire by 4 pm on 15 September 2023 and arrangements will be made for the Investigative Tribunal to be reconvened.

In the absence of any such indication by 4 pm on 15 September 2023 the Investigative Tribunal will determine the question of penalty on any written submissions received.”

Written submissions on penalty were received from Mr Paul Morris, GRM and Motorsport Australia. No party sought to supplement their written submissions with oral submissions. The Investigative Tribunal has determined the question of penalty on the written submissions received.

PROCESS APPLIED

- a) Findings and Recommendations of the Investigative Tribunal.
- b) Written submissions on penalty.

PRELIMINARY POINTS

Three issues were raised in the written submissions that challenged findings made in the principal decision. The Investigative Tribunal deals with these issues as preliminary points.

Finding that the GRM cars ran the Modifications at round 3

Surprisingly, given how the various parties represented their respective positions during the investigative hearing, there is now dispute as to whether cars entered by GRM were running with the Modifications in round 3 of the Series held at Winton Motor Raceway on 9-11 June 2023.

Mr Chopping, on behalf of Motorsport Australia, submitted:

- “7 While there is clear evidence that the GRM cars #34 and #45 were fitted with the modifications at Round 1, there is no clear evidence that the cars were so equipped at, in particular, Round 3, the only event for which GRM could be penalised. The Tribunal concluded ‘the only rational inference to be drawn is that those cars ran with the modifications at rounds 2 and 3. GRM never suggested otherwise.’ It is respectfully submitted that a positive finding that the modifications were fitted for Round 3, is imperative before any penalty can be considered. The evidence in this regard is non-existent and an absence of denial by GRM is insufficient to make a positive finding of a technical breach.
- 8 Indeed, there is accepted evidence that L Dalton continued to use left foot braking and eschewed use of the modification (if fitted to his car). It is entirely likely that the modified components were not fitted to Dalton’s car #45, as his preference was for left foot braking and he did not use the pedal extension to assist right foot braking.”

GRM submitted:

- “1. No evidence was presented by any party that suggested GRM were competing with cars in the modified specification during Round 3 at Winton. This has been incorrectly assumed. GRM presented evidence to the effect that it was not in our cars, through video, data and written submission, which was accepted by all parties who appeared at the Investigative Hearing.
2. The specification of the GRM cars during Round 3 at Winton was not raised at the Investigative Hearing and it has been incorrectly inferred from our post Round 1 report, without GRM having an ability to respond to this allegation.”

Contrary to those submissions, there are solid bases upon which an inference was drawn that the two GRM cars (#34 Moffatt and #45 Dalton) were fitted with the Modifications in round 3. Those bases are:

1. In the document “GRM TransAm gearbox selector and pedal box prototype report” which was produced by GRM before the Symmons Plains meetings, it is said:
 - “• We request that all GRM cars can be granted permission to run the boot while 2 of GRM’s cars (Moffat & Dalton) run with the pedal box modifications to further evaluate the setups in racing conditions.”

2. It is clear from the “GRM TransAm gearbox selector and pedal box prototype - post round 1 report” produced by GRM after round 1 at Symmons Plains that both the Moffat and Dalton cars ran with the Modifications at round 1. The report contained:

- “• On-car testing has been completed across 2 of GRM’s Trans Am entered cars at Round 1 of the National Trans Am Series at Symmons Plains. Cars #34 (James Moffat) and #45 (Lochie Dalton) were fitted with the modifications to the pedal box.
- The drivers were generally very happy with the modifications to the pedal box.
- They reported that they had no issues with downshifts, axle tramp, rear locking etc across the entirety of the weekend, not typical of what has been seen previously.
- Importantly, the drivers stated they had no negative feedback about the installed upgrades, except for the minor adjustments that require trialling, stated below:
 - o The throttle pedal needs to be, at 0%, further towards the firewall which will allow for the brake and throttle to be more closely matched up once the brake pedal goes long in a long stint.
 - o The throttle pedal pad needs to be spaced across further towards the right side firewall (away from the brake pedal) slightly more to prevent a driver accidentally grabbing both pedals un-intentionally.” (emphasis added)

And:

- “• We request that all GRM cars can be granted permission to run the boot and the pedal box modifications to further evaluate the setups under racing conditions.”

3. No scrutineer or steward had their attention drawn to the Modifications in any of rounds 1, 2 or 3 of the Series.

4. After concerns were raised by Mr Paul Morris, Motorsport Australia, on 1 August 2023, referred the questions of the Modifications to this Investigative Tribunal.

5. By the Terms of Reference, Motorsport Australia determined that the following matters should be investigated:

- “- Whether the Modifications should have been permitted in selected GRM vehicles during competition rounds of the Series.
- Whether the Modifications to the GRM vehicles were in breach of the Regulations.” (emphasis added)

6. The TOR provided that the Tribunal was to consider and investigate:

- “- Whether the testing and implementation of the Modifications were in breach of the Regulations;
- Whether GRM was in breach of the Regulations.”
7. The Tribunal Book which contained documents upon which the Investigative Tribunal was to (and did) rely was distributed to the parties before the hearing. The Tribunal Book included practice, qualifying and race results for each of the four rounds of the Series conducted up to that point.
8. GRM made written submissions to the Investigative Tribunal relevantly in these terms:
- “2. Approval was granted prior to Round 1, Race Tasmania (below email from Scott McGrath to GRM with Cameron Sendall (PBR) and Liam Curkpatrick (ARG) in copy) and also approval was granted at Round 2 - Phillip Island, prior to competition for an indefinite period.
3. There is no evidence to suggest that this modification results in a performance advantage. The driver of GRM Car #45, Lochie Dalton, has solely used the left foot braking technique in all competition during the 2023 TransAm series. Our evidence to support this includes video footage recorded from inside the car during competition and logged data traces. Both of which clearly show the use of the left foot to operate the brake pedal and overlap on the throttle and brake data, which is only possible when left foot braking.
4. Furthermore, GRM cars #45 and #116 were not fitted with the optional Throttle Pedal Support plate which was released in PBR Technical Bulletins 17 and 17b for Round 4 at Queensland Raceway. A choice that we would not have made if the change would give us a performance improvement.” (emphasis added)
9. Nowhere did Motorsport Australia suggest that the GRM cars were not run at round 3 with the Modifications. The thrust of Motorsport Australia’s submission was that the Modifications had been authorised through the issue of the Bulletin. The submissions from Motorsport Australia suggest that the Modifications were present at each race meetings. In its written submissions, Motorsport Australia said:
- “9. The modification was not brought to the attention of scrutineers or the Technical Delegate at each race meeting. There was nothing about the outward appearance of any changes, nor any apparent difference in driving/operating a car with the modifications. Had the changes being trialled been detected or declared the Chief Scrutineer would probably have been able to exercise use the Minor Ineligibility Form procedure on the basis that the otherwise unpermitted modification was not performance enhancing.” (emphasis added)
10. Mr Morris made a written submission to the Investigative Tribunal. In that submission, Mr Morris said:

“Evidence will demonstrate that GRM developed a modification to the pedal setup on the Trans Am, as early as February this year. This is a breach of the Regulations and a breach of the Motorsport Australia National Competition Rules.

There is no doubt that this no compliant modification was used in at least Round 3 of the Series and almost certainly in Rounds 1 and 2.” (emphasis added)

11. At the commencement of the Investigative Tribunal hearing, the Chair made the following statement:

“The terms of reference as we know concern modifications to the accelerator pedal setup by Garry Rogers Motorsport in cars which competed in the 2023 Trans Am series. The Trans Am Series regulations were amended, it seems as at 18 July to include the relevant parts. Garry Rogers Motorsport competed with the changed modifications in the three rounds of the competition before the 2023 technical regulations were amended. Now by round four, which ultimately occurred at Qld Raceway in August rather than Sydney Motorsport Park in June. The regulations had been amended, so it’s really the first three rounds that are relevant.” (emphasis added)

12. Submissions were then heard from Mr Morris as to whether penalty could be applied in relating to racing in rounds 1 and 2. Then the Chair said to Mr Morris:

“Any penalty would only apply to the third round because of rule 5. Correct?”

13. Mr Morris acknowledged the correctness of that statement and upon invitation no other party made any submissions on the point. The parties then knew that a question for determination was breach of the regulations by GRM in round 3.

14. A question arose as to whether Mr Lochie Dalton used left foot braking and therefore gained no advantage from the Modifications. Mr Millard, who appeared at the Investigative Tribunal for GRM, said this:

“Chairman just uh, we’ve referred to in our submission evidence that one of our drivers #45 Lockie Dalton has solely been using left foot braking for the entirety of this season. So if you would like us to submit that video and data evidence so we can do that.” (emphasis added)

And later:

“So we have evidence that shows that Lockie Dalton has solely been using left foot braking for the entirety of the season through video on board video.”

15. That could not have been meant to mean that the Modifications were not fitted to his car “for the entirety of the season” because GRM’s report after round 1 said that the Modifications were fitted to both cars. Mr Millard’s statement meant, and could only mean, that Mr Dalton was in fact using

a left foot braking technique, not that the Modifications were not fitted. Neither Mr Millard nor any other party made a submission that the Modifications were not fitted to the cars in round 3.

Even in the criminal law where the burden of proof is upon the Crown to prove a case beyond reasonable doubt, and where the liberty of the subject is at risk, a failure of a defendant to offer an innocent explanation can be a relevant consideration in some circumstances.²

Here the two GRM cars were, by GRM's own admissions, fitted with the Modifications in rounds 1 and 2. They were given approval at round 2 - Phillip Island for an "indefinite period". That leads to a clear inference that the cars were fitted with the Modifications in round 3. That was specifically asserted by Mr Morris in his written submissions. The GRM submission denied that some cars were fitted with the Modifications in round 4 at Queensland Raceway. No such denial was made in relation to any GRM cars which competed in round 3. It was made clear at the Investigative Tribunal that the only round of the Series that could attract a penalty was round 3. Given the absence of any notification to scrutineers or stewards at round 3, it was only GRM who had direct knowledge of whether any of their cars were fitted with the Modifications in round 3. Throughout the investigate hearing, GRM made no assertion that their cars were not fitted with the Modifications during round 3.

The inference that the two GRM cars, #34 (Moffat) and #45 (Dalton) were fitted with the Modifications in round 3 was obviously open and GRM's conduct of its case before the Investigative Tribunal left no logical option but to draw the inference. It was drawn.

There is no basis to revisit the finding made by the Investigative Tribunal that cars #34 and #45 were fitted with the Modifications in round 3. The penalty hearing will proceed on that basis.

The new submission that permission had been given for the modifications through an "instruction"

As was observed in the principal decision, the 2023 Motorsport Australia Manual: National Competition Rules (NCR) defines "Rule" as:

"Rule: The Code and NCR, including any Supplementary Regulation, bulletin, or written instruction." (emphasis added)

In considering the status of Technical Bulletin #17, the Investigative Tribunal observed in its Findings and Recommendations:

"There is no definition of 'bulletin' in the NCR. Probably it is meant to refer to communications otherwise authorised under the NCR by persons recognised as officials and organisers, etc.

² *Azzopardi v The Queen* (2001) 205 CLR 50 at [64]-[68] following and explaining in *Weissensteiner v The Queen* (1993) 178 CLR 217.

In any event, there is nothing in the NCR to suggest that a bulletin issued by a manufacturer authorises the use by a competitor of an otherwise unauthorised component.”

For the first time GRM now submits that the written approvals to the Modifications by Motorsport Australia and PBR constitutes an “instruction”. GRM submits:

- “3. Irrespective of the above³ and to comment on the process, it was our understanding that the modification was given the approval by both Motorsport Australia and PBR. This approval constitutes an instruction given by a Motorsport Australia Official which then forms part of the Rules as stated in the NCR (page 35 and copied below in *italics*) and Series Entry Form (image copied below).

Definition of Rules in NCR:

‘Rules: The Code and the NCR, including any Supplementary Regulation, Sporting Regulation, bulletin, or written instruction.’

CONDITIONS

- (1) By signing this Series Entry Form, each Competitor and Driver acknowledges that all Events (whether or not part of a Series) will be held under the FIA International Sporting Code including Appendices; the National Competition Rules (*NCR*) and the Circuit Race Standing Regulations (*CRSR*) of *Motorsport Australia*, the Sporting and Technical Regulations of the Trans Am Series, the Supplementary Regulations, any Further *Supplementary Regulations* or instructions and any Bulletins that may be issued by *Motorsport Australia* (collectively referred to as the *Rules*), and that the *Competitor* and *Drivers* agree to be bound by these Rules.
- (2) This Series Entry Form must be read in conjunction with the *Rules* of which it forms a part.” (emphasis added)

There is no definition of “instruction” in the NCR. Rules T2.1 and T2.3 of the Regulations provide as follows:

“T2.1 Modification

- 2.1.1 Each *Automobile* must remain unmodified, in compliance with all aspects of these Technical Regulations and identical in all respects to the production make/model as supplied by the original vehicle manufacturer.
- 2.1.2 Any aspect relating to the construction, modification and/or preparation of the *Automobile* including the location, fitment/mounting of any ancillary component that is not specifically authorized in the present regulations is prohibited.”

And:

“T2.3 Automobile Component Requirements

- 2.3.1 In all cases, when interpreting the present regulations, any component on an *Automobile* eligible to compete must be original equipment supplied by the manufacturer or *Controlled Component* supplier unless otherwise specified in these regulations.”

³ The denial that GRM cars ran the Modifications in round 3.

T2.1 and T2.3 specifically deal with modifications and components. The only authorisation for modification of vehicles or the use of other than original equipment supplied by the manufacturer is if there are “specifically authorized in the present regulations” (T2.1.2) or “specified in these regulations” (T2.3.1).

The general definition of “Rules” in the NCR and conditions 1 and 2 of the Series Entry Form should not be read to overcome the specific prohibitions in T2.1 and T2.3 of the Trans Am Regulations. Further, the purported authorisation by Motorsport Australia to use the Modifications was never intended by Motorsport Australia to be an “instruction”. As explained in the principal decision, Motorsport Australia erroneously thought that PBR could authorise the use of the Modifications by force of regulation T2.1.1 of the Regulations and PBR’s status as “original vehicle manufacturer”.

THE SUBMISSION THAT PENALTIES CAN BE APPLIED IN RELATION TO ROUNDS 1 AND 2

At the beginning of the investigative hearing, the Chair drew the parties’ attention to r 5 of the NCR which is in these terms:

“If it appears from a Steward’s report or otherwise that the conduct of an Event was not in accordance with the NCR or that the results of a Competition have been improperly or incorrectly recorded, Motorsport Australia may refer the matter to an Investigative Tribunal.

No such inquiry may be ordered after the expiration of 60 days after the end of the Competition or after the publication of the final results, whichever is the latter.”

It was indicated by the Chair that while the Investigative Tribunal should explore events before 2 June 2023 (60 days prior to the referral), no disciplinary action could be taken other than in relation to the competition in round 3 of the Series. All parties, including Mr Morris, agreed to that approach and the Investigative Tribunal hearing proceeded on that basis.

Mr Morris now submits that the Investigative Tribunal has power to discipline GRM in relation to breaches of the Regulations that may have occurred in rounds 1 and 2 by GRM running the Modifications on their cars.

It would be unfair, given the way the Investigative Tribunal was conducted, to now consider imposing penalties on GRM in relation to Modifications run on their cars in rounds 1 and 2. Further, because of the way the Investigative Tribunal was run with the consent of all parties (including Mr Morris), the Investigative Tribunal made no findings in relation to rounds 1 and 2. The fact that no findings of any breach of the Regulations by GRM in rounds 1 and 2 results in the Investigative Tribunal now having no jurisdiction to impose penalties in relation to those rounds. Any penalty may only be imposed in relation to the finding of a breach of the Regulations in round 3 of the Series.

RELEVANT PROVISIONS OF THE SPORTING STATUTES

The breach which has been found against GRM is a contravention of the Regulations. The Modifications breach those provisions even though there was no finding that the Modifications enhanced performance.⁴

Rule 6 of the NCR provides, relevantly here:

“6. ACQUAINTANCE WITH AND SUBMISSION TO THE NCR

Each person or group of persons organising or taking part in a *Competition* in whatever capacity:

are deemed to be acquainted with the statutes and regulations of the *FIA*, the Constitution of the Confederation of Australian Motor Sport Limited, trading as Motorsport Australia and the *NCR*;

must submit themselves to the above and to any decision of the sporting authority and its consequences;

acknowledge that the *NCR* is:

made in the best interest of motorsport in Australia;

necessary and reasonable for the purpose of protecting motorsport and establishing safety regulations; and

made in the public interest; ...” (emphasis added)

Rule 58 of the NCR provides:

“58. AUTOMOBILE EXAMINATION

Unless Targeted Scrutineering procedures apply, each Automobile will be examined for compliance prior to commencement of a *Competition*.

At any time during an Event an Automobile may be examined for compliance.

Unless authorised by an official, it is prohibited to remove any sealed component or tamper with any seal.

The Chief Scrutineer having noted an area of minor non-compliance, may complete a statement:

‘In my view, the minor ineligibility noted in the log book of this Automobile does not improve the performance to such an extent that the Automobile be disqualified from this Competition.’

⁴ Rule 58 of the 2023 Motorsport Australia Manual: National Competition Rules (NCR).

A log book bearing such an endorsement will be presented to the Stewards. If approved, the Automobile will be regarded as eligible for that *Competition* in respect of the item/s noted and no protest on that ground will be accepted.

The minor ineligibility noted must be corrected prior to that *Automobile* participating in any future *Event*.

The Technical Delegate if appointed or Chief Scrutineer may authorise the impounding of or sealing of any *Automobile*, any component, and/or the downloading of any data for the purpose of an inspection at a time and place as either may determine. The details of any such inspection will be advised to the *Competitor*. Outside of an *Event*, this authority may be exercised by the *CEO of Motorsport Australia*.

If an *Automobile* has been found to be ineligible the Stewards or other judicial body will impose a penalty of *Disqualification* from the relevant *Competition/s*.

If an *Automobile* is found not in compliance with the applicable technical regulations, it will be no defence to claim that no performance advantage was obtained.

The Stewards will impose a penalty of *Disqualification* of any *Automobile* whose construction they deem to be dangerous.” (emphasis added)

Rule 58 of the NCR provides for the imposition of a penalty by the stewards (or other judicial body).⁵ Rule 58 appears to be mandatory in its language so that where a vehicle has been found to be ineligible the judicial body “will impose a penalty of disqualification from the relevant *Competition/s*”. However, the Australian Motorsport Appeal Tribunal has determined that r 58 does not compel such a result where to do so would inflict an injustice.⁶ Further, there is nothing in the NCR to suggest that an Investigative Tribunal has no power to suspend a penalty of disqualification imposed for ineligibility.

DETERMINATION ON PENALTY

Here there are competing considerations.

There are mitigating circumstances.

In the judgment of the Investigative Tribunal, it is highly likely that had the Modifications been noticed by a scrutineer, the stewards at round 3 would have noted a minor ineligibility and allowed the cars to race.

Further, there was no subterfuge involved in the implementation of the Modifications. In particular:

1. the Modifications were manufactured by PBR who is “the original vehicle manufacturer” recognised under the Regulations;

⁵ The Investigative Tribunal is a “judicial body”. See Motorsport Australia Manual of Motorsport “judicial section”, “tribunals and judicial procedures”.

⁶ *Re Mick Patton; CAMS Appeal Tribunal*, September 30, 2014.

2. Mr Sendall, who was pivotal to the manufacture of the Modifications, is both associated with PBR and also nominated in the Regulations as the technical adviser to the Series;
3. GRM informed Motorsport Australia of its intentions to use the Modifications;
4. GRM informed the Australian Racing Group (ARG) the Category Manager of the Series nominated by the Regulations of its intentions to use the Modifications;
5. Motorsport Australia (through Mr Scott McGrath), ARG (through Mr Liam Curkpatrick) and PBR (through Mr Cameron Sendall) all approved the Modifications;
6. after round 1 of the Series, GRM provided to Motorsport Australia and PBR a full report on the Modifications;⁷
7. after round 1 of the Series, further permission was sought and given to run the Modifications in later rounds.

Against that background, it is clear that:

1. Motorsport Australia thought it could authorise GRM to run the Modifications provided PBR (as vehicle manufacturer) approved; and
2. GRM believed it was not breaching the Regulations by running the Modifications.

While recognising that it is not a defence to ineligibility that there was no performance advantage,⁸ the fact remains that the Investigative Tribunal was unable to find that a performance advantage was gained from the Modifications. That is a fact to be taken into account on the question of penalty.

Ultimately, it is for Motorsport Australia as the governing body to oversee compliance with the Regulations. It did not do so here through an apparent misunderstanding.

However, it is in the interests of the Series and the public who follow the Series for the Regulations and the NCR to be applied. The policy of the NCR is clear. All parties involved in a competition should know the rules under which the competition is being conducted.⁹ Any ineligibility will generally result in disqualification even if no performance advantage was gained.¹⁰ The Series is tightly controlled by the Regulations, the underlying spirit of which is to ensure equality of equipment between competitors.

⁷ The document “GRM Trans Am Gearbox Selector and Pedal box Prototype - Post RD1 Report”.

⁸ NCR r 58.

⁹ NCR r 6.

¹⁰ NCR r 58.

While GRM followed Motorsport Australia's approval, it was GRM who initiated the whole affair. It wished to develop and use the Modifications and so it approached Motorsport Australia and PBR. GRM benefited, at least to the extent of having an opportunity to test the Modifications in race conditions. GRM must have known that the other competitors would not have the use of the Modifications and therefore GRM would take any competitive advantage that the Modifications might bring. In the end, as earlier observed the Investigative Tribunal was unable to determine whether or not a performance advantage was achieved.

Balancing all considerations, the Investigative Tribunal has determined that there is no reason to depart from the result prescribed by Rule 58 of the NCR and no good cause has been shown to suspend the penalty. A penalty of disqualification ought to be applied to GRM cars #34 (Moffat) and #45 (Dalton) from all results in round 3 of the 2023 Trans Am Series.

Dated

9th October 2023

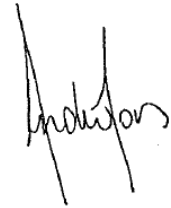
Time 1500hrs AEDT



PETER DAVIS



STEVE LISK



ANDREW JONES