

UNDER

the ISAF Racing Rules of Sailing  
(America's Cup Edition, September  
2013)(RRSAC)

AND IN THE MATTER OF

a report made to Yachting New Zealand  
by the International Jury of the 34<sup>th</sup>  
America's Cup concerning  
**Matthew Mitchell** and **Andrew Walker**

## Introduction

1. We have been appointed by Yachting New Zealand (YNZ) to conduct an investigation and report to YNZ. The requirement for this report arises because YNZ received a report from the America's Cup International Jury (ACIJ) dated 6 September 2013, in accordance with RRSAC 69.1(c). This obliges YNZ to proceed in accordance with RRSAC 69.2 and carry out an investigation, and, if appropriate, hold a hearing. The purpose of a hearing would be to determine if YNZ should take any disciplinary action within its jurisdiction, and suspend the competition eligibility, including ISAF eligibility, of either party named in the report.
2. The YNZ regulations include a prescription to R69 of the RRS. Clause 4.5.2 provides as follows:
  - (i) YNZ shall appoint from time to time one or more Complaints Commissioners, a Rule 69 Hearings Committee and a convenor of that committee;
  - (ii) A report under rule 69.2 or any other report shall be in writing and must detail the alleged gross infringement of a rule, or of good manners or sportsmanship, or conduct it is alleged has brought the sports into disrepute;
  - (iii) All written reports shall be referred to one or more of the Complaints Commissioners who may:
    - a) Decide to take no action, or
    - b) Investigate the report.If the Commissioner(s) considers, after investigations, that a hearing is appropriate, the Commissioner(s) shall present evidence before a panel of not less than three Hearing Committee Members chosen by the Hearings Committee Convenor;
  - (iv) Before a hearing takes place, a copy of the complaint shall be provided to the person or persons the subject of it;
  - (v) Notification of the hearing shall be given to the person or persons against whom the complaint is made, with advice that they may attend the hearing, may be represented, and may make submissions and present evidence relating to the complaint.
3. As the procedure followed by the ACIJ, and the wording of the relevant provisions in

RRSAC 69 are the same as in the ISAF RRS, we have proceeded with our investigation in accordance with the YNZ prescription referred to above, and on the basis that if we report that a hearing is appropriate, the hearing procedure would be as set out in that prescription.

4. In accordance with the protocol established by YNZ for investigations under Rule 69 following receipt of a report under Rule 69.1, the affected parties (Andrew Walker and Matthew Mitchell) have been invited by us to provide information (whether it be submissions, documents, evidence or other relevant material) for us to consider in the course of our investigation. Submissions and materials were received from them, but in addition both parties advised YNZ they wished us to have the full transcript of the hearing before the ACIJ<sup>1</sup> and the documents produced during the course of that hearing, including signed interview record statements obtained when jury members Bryan Willis and Graham McKenzie interviewed Oracle Team USA (OTUSA) members between 12-16 August 2013.<sup>2</sup>
5. This evidential material had been the subject of a confidentiality order incorporated into decision JN116.<sup>3</sup> Subsequently the ACIJ issued a further decision JN124 dated 14 December 2013 in which it ordered that the Certified Court Reporter Transcript of Case AC31 (with the name of "Sailor X" redacted) be made available to the two YNZ Commissioners. On 20 January 2014 we received the transcript of the evidence and the exhibits, including the signed interview record sheets, as part of the documentation submitted to us by Matthew Mitchell and Andrew Walker. In addition ISAF have provided us (also on a confidential basis and for our use only) a copy of the decision of the ISAF Disciplinary Commission under Rule 69.3 in respect of another affected party, namely Dirk de Ridder.
6. We are grateful to the parties, to the ACIJ, and to the ISAF Disciplinary Commission for making this material available to us.

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<sup>1</sup> Jury Case AC31, Jury Notice JN116, Decision dated 3 September 2013

<sup>2</sup> Admitted as Exhibits as part of the record of evidence by the ACIJ

<sup>3</sup> Paragraph 84 JN116, referring to JN115 and the order recorded in paragraph 111 of JN116 whereby "the Court Reporter uncertified rough draft transcript from Jury Case AC31 that forms part of the record of this Case shall remain permanently confidential."

## **Allegations and findings of misconduct against Matthew Mitchell and Andrew Walker**

7. The report from the ACIJ dated 7 September 2013 under 69.1(c) to ISAF and the MNAs of the four competitors in respect of whom findings of misconduct were made states, in respect of the two New Zealand competitors:

### **Matthew Mitchell**

#### **"Findings:**

After his arrival in San Francisco on 15<sup>th</sup> July 2012, Matthew Mitchell was involved with the assembly of boat BAR. It was the first time Matt assembled an AC45. Matt testified that he had never read the AC45 Class Rule.

He was aware that filling a kingpost was on the BAR job list, but at the hearing he claimed that he did not know what 'fill kingpost' meant and that he did not realize that it might involve a rules violation.

Simeon Tienpont (OTUSA) stated in his signed interview record as well as in the hearing that, after Matt asked him for help, he and Matt carried out the job of filling the kingpost with resin together. Matt claimed he did not see anyone fill the kingpost. The Jury is comfortably satisfied that Matt participated in filling the forward kingpost of BAR with resinous material.

In his evidence Matt claimed he had only picked up the kingpost from the workbench and noted it was heavy, and that he looked into the end and saw resinous material with something floating in it. In his signed interview record Matt stated that he did not think the kingpost being heavy was exceptional. The Jury finds that Matt participated in filling the forward kingpost, but even if he was not involved in including the additional weight, Matt knew that the kingpost was heavy. It should have been apparent to a sailor of Matt's experience that when finding a kingpost that was nearly 2.5 times heavier than the norm, its legality was obviously questionable.

Matt was the BAR boat captain. He is currently an AC72 boat captain and AC34 is his fifth America's Cup campaign. The AC45 class rule is 12 pages long. It is difficult to accept that a person with Matt's experience would not have familiarized himself with the rules.

#### **Decision:**

The Jury is comfortably satisfied that the action was a gross breach of a rule and of good sportsmanship.

#### **Penalty:**

Matt Mitchell is excluded from sailing on a Yacht competing in the Match for the 34<sup>th</sup> America's Cup until 4 races have been completed. RRSAC Rule 69.1(c) requires the Jury to inform his National Authority (Yachting New Zealand) and the International Sailing Federation, which bodies may impose further penalties; however, the Jury will recommend that no further action be taken.

#### **RECOMMENDATION TO YNZ & ISAF:**

The Jury recommends no further action be taken."

### **Andrew Walker**

#### **"Findings**

When Mark Turner, OTUSA shore team manager, left the site of the AC45 Regatta in Newport, Rhode Island in June 2012, it was clear in his mind that Andrew Walker was in charge of the shore team at the regatta. This established the seniority of Andrew over Bryce Ruthenberg, among others. Andrew denied this seniority in the hearing.

Andrew was involved in frequent conversations with other members of the shore team, and particularly Dirk de Ridder from the sailing team, regarding the progress of the work that needed to be completed before the boat was ready for measurement and practice sailing.

In June 2012, at the site of the AC45 Regatta in Newport, Rhode Island, Andrew acquired the necessary lead shot and assisted Bryce Ruthenberg with the placement of approximately 1.8kg of lead weight in a Kevlar bag in the forward kingpost of OTUSA boat 4 (known as 'Oracle Spithill').

Following completion of the installation of the Kevlar bag with the lead shot into the kingpost, Bryce reported this to Andrew. Andrew stated at the hearing that he received this report before the boat was launched and confirmed that he knew this was against the Class Rule.

On 11<sup>th</sup> July 2012, Andrew was in receipt of an email from Bryce reminding the shore team not to forget to put weight in the kingposts of AC45 Ben Ainslie Racing (BAR). Even though he knew the modification contravened the AC45 Class Rule, Andrew assumed that the modification must have been approved by Dirk de Ridder and Richard Slater (OTUSA Rules Advisor).

**Decision:**

The Jury is comfortably satisfied that this conduct constituted a gross breach of a rule and of good sportsmanship, and that this was compounded by not telling the truth during the hearing.

**Penalty:**

Andrew Walker is excluded from further participation in any role in the 34<sup>th</sup> America's Cup. RRSAC rule 69.1(c) requires the Jury to inform his National Authority (Yachting New Zealand) and the International Sailing Federation, which bodies may impose further penalties.

**RECOMMENDATION TO YNZ & ISAF:**

The Jury makes no recommendation."

8. In carrying out our investigation and completing this report we have had reference to the following documents supplied by Matthew Mitchell and Andrew Walker:
- (a) Certified Court Reporter transcript of Case AC31, signed interview statements, and other exhibits produced in the course of the hearing;
  - (b) A document entitled "Statement of Events" (in the form of a declaration under the NZ Oaths and Declarations Act 1957) by Matthew Mitchell dated 17 January 2014;
  - (c) A document entitled "Contentions by Matthew Mitchell" dated 16 January 2014;
  - (d) A document from Matthew Mitchell entitled "A summary of facts with the benefit of hindsight" dated 16 January 2014;
  - (e) An email from Will McCarthy to Matthew Mitchell dated 18/1/2014;
  - (f) A written submission from Andrew Walker's US counsel Benjamin Ballard dated 20 January 2014.

## **The scope of YNZ's jurisdiction, by reference to relevant rules and the YNZ prescription**

9. In summary, we consider YNZ is not bound to adopt or follow either the factual findings or the decision as to "liability"<sup>4</sup> or sanction as found in the ACIJ decision JN 116. Our reasoning follows.
10. Rule 69.2 provides a broad discretion to an MNA. An investigation is not a requirement, nor is a hearing. If there is a hearing the MNA may take disciplinary action within its jurisdiction as it considers appropriate, including suspending eligibility permanently or for a specified period of time.
11. The YNZ prescription for Rule 69 (paragraph 3) states that if the Complaints Commissioner(s) consider a hearing is appropriate *the Commissioner(s) shall present evidence before a panel of not less than three Hearing Committee members chosen by the Committee Convenor*. In our view it follows that in making our investigation and when reporting, the quality of the evidence we would need to present and also the availability of any witness we consider would need to be called by us were a hearing to be recommended is a crucial factor.<sup>5</sup> We need to consider the evidence that has been made available to us (the transcript and the exhibits) and the information that has been supplied by Matthew Mitchell and Andrew Walker to determine whether we consider we can present evidence which would satisfy the YNZ Hearings Committee as to liability, to that Committee's *comfortable satisfaction*.
12. As with protest committees which have occasion to deal with serious misconduct arising during a regatta, a championship or a race series held in New Zealand, the jurisdiction of the ACIJ is limited to the AC event, and does not extend beyond that. This is evidenced by the extent of any sanctions a protest committee (in this case the ACIJ) can impose, which are limited to sanctions affecting the competitor's involvement in the event in question. By contrast an MNA and beyond ISAF have jurisdiction to impose further sanctions, including removing eligibility to compete for substantial periods.
13. The rule focuses on misconduct of a competitor and imposes sanctions on individuals, not an organisation.<sup>6</sup> The ISAF Rule 69 defines "Competitor" as a member of the crew, or the owner, of a boat. However the RRSAC Rule 69 is differently worded, referring to "a person associated with a competitor", thus enabling in this case employees of OTUSA who were

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<sup>4</sup> Adopting the common law descriptor in relation to the civil rather than the criminal jurisdiction, which we think is appropriate

<sup>5</sup> To state the obvious: of itself, the ACIJ decision is not evidence. The YNZ prescription makes it clear that, if we were to recommend a hearing, evidence will be required. It is not the decision, but the availability and quality of the underlying evidence, that is of first importance to us.

<sup>6</sup> Noting the RRSAC Rules include Rule 60 enabling action against a yacht.

not crew members but shore crew to be subject to the sanctions of the rule. Neither of the New Zealand affected parties have taken issue with our jurisdiction in this regard.

14. Matthew Mitchell and Andrew Walker have made it plain that if a hearing were to proceed they would call evidence and through that means and (we assume) through submissions would dispute the findings of fact and the conclusion in JN 116 that they were liable under Rule 69. In our view if the YNZ Hearings Committee holds a hearing, it will be a *de novo* hearing. The Committee may reach findings of primary fact and inferences of secondary fact which are different from those reached by the first instance decision-maker. Similarly the Committee can apply the rules framework to the facts differently from the way the ACIJ has done.
15. We do not consider that the ACIJ's decision as to liability is in any way binding on a MNA (or for that matter ISAF). In fact the Rule 69 procedure is more commonly invoked in the context of a protest committee sitting during a single regatta or a local, regional or national championship, having to determine (if it arises) allegations of serious misconduct at short notice with the protest committee and the competitors under pressure of time.<sup>7</sup> When a report is made and there is the prospect of much more serious sanctions being imposed either by the MNA, or the ISAF Disciplinary Commission, we consider that there is an obligation on each of those bodies to make its own assessment of the evidence before it, and make a decision independantly of the decision in the RRS 69.1 report.
16. Although the ACIJ no doubt had more resources and time available to it (as seen for example in its ability to complete prior interviews, and then have a full transcript of evidence available) than most protest committees, the same principles apply nevertheless. In our view, it is our responsibility on behalf of YNZ to assess the evidential material and any further information supplied to us for ourselves, and to reach our own conclusions. These may be different to those of the ACIJ. As our task is to determine whether a hearing should be conducted, we have a responsibility to assess all of the available information and evidence in order to decide whether we believe that a case brought before a YNZ Hearings Committee has sufficient prospect of establishing liability to the standard of proof required (comfortable satisfaction) to justify such proceedings being undertaken.
17. That is not to say that the decision and findings of the ACIJ are to be disregarded. We accept and acknowledge that the ACIJ had the advantage of dealing directly with the witnesses involved and of hearing first-hand counsels' submissions in a viva voce hearing.

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<sup>7</sup> The Protest Committee's jurisdiction ends at the completion of the event.

Even so, we do not think it would be appropriate for us to simply adopt the ACIJ's findings. We also need to consider whether the ACIJ decision **was** reached in compliance with the rules of natural justice, with due procedural fairness and, viewed objectively, whether we consider the requisite standard of proof can be attained at a further hearing.

18. Finally, we refer to the wording of the relevant rule provision itself, which contains no express limitation on the MNA's powers of investigation and hearing. In our view, and in accordance with the conventional approach to statutory interpretation, we consider that if the authors of Rule 69 (whether the AC version or the ISAF version) intended that an MNA was restricted in the scope of its investigation and at any hearing to an acceptance of the findings of fact and of liability by the first-instance Committee or Jury, R69.2 would have explicitly so stated. It does not.

### **The scope of our investigation**

19. We have concluded there is an obligation on us (and if there is a hearing, on the YNZ Hearings Committee) to reach our own conclusions in respect of the separate events and circumstances which led to the jury instigating action against Andrew Walker and Matthew Mitchell - remembering that allegations against them<sup>8</sup> must be established to the *comfortable satisfaction*<sup>9</sup> of a YNZ Hearings Committee.

20. We deal with each of the cases of Andrew Walker and Matthew Mitchell separately. In each case, we begin by considering issues of liability- i.e. whether we would be able to muster and present sufficient evidence that might persuade a YNZ Hearings Committee to determine to its *comfortable satisfaction* that one or both of the allegations against the affected parties are established. In each case we have also dealt with the issue of possible further sanction -i.e. we consider whether (assuming that there is enough evidence to justify proceedings before a YNZ Hearings Committee) we would actually recommend a hearing. That is because the ultimate consideration must be whether proceedings before a YNZ Hearings Committee can be justified if , in the end, there is no real prospect that an additional sanction or penalty would be likely to be imposed upon either party, beyond the sanction imposed by the ACIJ.

### **The Allegations**

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<sup>8</sup> Paragraphs 4.4 and 4.6 of Jury Case AC31 (JN116)

<sup>9</sup> This is a standard of proof that falls between the "balance of probabilities" standard and the "beyond reasonable doubt" standard. In short, the standard of proof will vary (increase) depending on the seriousness of the allegations the affected party is facing. This standard of proof is that adopted by the ISAF Disciplinary Commission, and is also used by the Court of Arbitration for Sport

21. Turning now to our investigation in relation to Andrew Walker and Matthew Mitchell, they concern two different boats (in respect of Andrew Walker – OTUSA AC45 Boat 4 (which we will refer to from now on as “Boat 4”); and in respect of Matthew Mitchell – OTUSA AC45 Boat BAR (which we will refer to from now on as “Boat BAR”)). In respect of Boat 4 the allegation relates to work undertaken, or knowledge of work undertaken, in contravention of the class rules on Boat 4 at the time of preparation of Boat 4 for the Newport, Rhode Island Regatta. In relation to Boat BAR, the allegation relates to involvement in work undertaken contrary to the class rules or being aware certain work that was undertaken was contrary to the class rules, this time prior to the San Francisco Regatta.
22. In the case of each of them we need to consider whether there is sufficient evidence to establish before a YNZ Hearings Committee, to its *comfortable satisfaction*, in respect of Boat 4 the placement of approximately 1.8kg of lead weight in a Kevlar bag in the forward kingpost (also sometimes called the dolphin striker) was done by Andrew Walker, or that he assisted Bryce Ruthenberg in carrying out the work; and in respect of Matthew Mitchell whether he was involved in filling the main or centre kingpost of Boat BAR with “resinous material”,<sup>10</sup> the ACIJ decision in relation to Matthew Mitchell<sup>11</sup> being that he and Simeon Tienpont carried out the work together. Our report will examine the evidence in support of the findings in that regard.
23. The separate consideration in relation to each party relates to the allegation of “being aware” that weight had been added and that this action was contrary to the AC45 class rules (paragraph 4.4 JN 116 in respect of Andrew Walker); or “*should have been aware this action was contrary to the AC45 class rules*” (paragraph 4.6 JN116 in respect of Matthew Mitchell). We see this as quite a different situation from that relating to Dirk de Ridder who is alleged to have *given instructions or directions* to add weight into the kingpost of Boat 4 - different because the evidence shows there was a hierarchy of management control in relation to modifications (as opposed to repairs) being made to these boats. The evidence<sup>12</sup> describes a set protocol or procedure whereby any modifications were required to be “signed off” by OTUSA rules expert Richard Slater, and involved a process of management approval and therefore a direction that the work could proceed. To our mind the assertion of knowledge that the work in question was contrary to the AC 45 rules implies an obligation on shore crew to *report a breach*, since the breaking of the class rule is the action of the person or persons who carried out the work. So we need to consider the situation of a team member, who did not give an instruction or direction to carry out

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<sup>10</sup> Paragraph 4.6 of JN116 alleges “the addition of weight into a kingpost”

<sup>11</sup> Paragraph 65 of JN116

<sup>12</sup> Russell Coutts page 59 line21;Richard Slater page 145 lines 7-13



the work (which is not in our view established against either party on the evidence), but is alleged to have carried out illegal work to a kingpost on Boat 4 or Boat BAR. Then, if we conclude it cannot be established to the required standard of proof that Andrew Walker or Matthew Mitchell carried out or assisted in the illegal work/activity, what is an appropriate response at MNA level where the issue is the "non-reporting" of a breach of the class rules – on the evidence in each instance can this amount to serious misconduct in the context of Rule 69, for this event, and in light of the OTUSA management structure?

24. On this last matter, this for us divides into two categories. This is because Andrew Walker has admitted knowledge of the work being carried out (but denies being involved in the work itself), and has also admitted that he knew what had been done was contrary to the Class Rules.<sup>13</sup>
25. For his part, Matthew Mitchell, denies any involvement in adding weight to a kingpost on Boat BAR. However he says he saw the dolphin striker (forward king post) on a workbench, lifted it up and noted it was heavy. He said he was not aware of whether it was rule compliant.<sup>14</sup> His evidence to the ACIJ was that he assumed that for the job list to include this direction the proposed modification must have been through the proper process and a check had been made that it was rule compliant.<sup>15</sup> He referred to the job list prepared and signed off by Andrew Henderson posted at the construction area, and the words "fill kingpost" and said he assumed that whatever clearance was needed had been obtained for that work.<sup>16</sup>
26. In summary, Andrew Walker stated he knew that the work that had been done to add weight to the kingpost of Boat 4 was contrary to the Rules (or considered it was likely to be); Matthew Mitchell stated he was not aware or familiar with the Rules in that respect, was aware of the kingpost being heavy when he picked it up, but having seen it on an authorised job list assumed that the work had been authorised or approved.
27. In respect of Andrew Walker we remind ourselves that the allegation against him<sup>17</sup> was *involvement* in the addition of weight into a kingpost of at least 1 AC45; or *was aware that such weight had been added*, and was or should have been aware this action was contrary to the Class Rules. In respect of Matthew Mitchell the allegation was<sup>18</sup> that he was

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<sup>13</sup> Interview record of Andrew Walker, answer to Question 2, also page 1 Additional Statement dated 13/8/13; also Transcript of Evidence pages 322 and 359

<sup>14</sup> Written Interview Record, answer to Question 1, and Supplementary Written Statement dated 14/8/13, page 1; also Transcript of Evidence page 475

<sup>15</sup> Transcript, page 488

<sup>16</sup> Transcript, page 470

<sup>17</sup> Paragraph 4.4 JN116

<sup>18</sup> Paragraph 4.6 JN116

involved in the addition of weight into a kingpost of at least 1 AC45 and should have been aware this action was contrary to the Class Rules.

28. The ACIJ findings in respect of Andrew Walker, in the Decision JN116, Paragraph 54 records that he acquired the necessary lead shot and assisted Bryce Ruthenberg with the placement of lead weight in a Kevlar bag in the forward kingpost of Boat 4, and the Jury stated its comfortable satisfaction this conduct constituted a gross breach of a rule and good sportsmanship.
29. The Jury was comfortably satisfied that Matthew Mitchell *participated* in filling the forward kingpost of Boat BAR with resinous material.<sup>19</sup> In Paragraph 66 the Jury records that “even if he was not involved in including the additional weight, Matthew Mitchell knew that the kingpost was heavy... and its legality was obviously questionable”.
30. Referring to the different potential findings of serious misconduct there was no allegation against either Andrew Walker or Matthew Mitchell of *giving instructions or directions* to add weight into either Boat 4 or Boat BAR. In relation to the *carrying out* of illegal work, there is a finding Andrew Walker acquired lead shot and assisted Bryce Ruthenberg in placing lead weight in the forward kingpost of Boat 4; and in respect of Matthew Mitchell that he participated in filling the forward kingpost of Boat BAR with resinous material. There is no additional finding against Andrew Walker, but what appears to be an “alternative finding” in respect of Matthew Mitchell that if he did not participate in filling the forward kingpost he knew it was heavy and ought to have known its legality was obviously questionable.
31. We note that in both the Interview Record and the Transcript of Evidence in respect of Andrew Walker he denies carrying out any part of the work which added weight to the kingpost of Boat 4, but admitted knowledge that the work had been done, and that it was contrary to the Rules, yet there is no finding of misconduct in that regard, by contrast to Matthew Mitchell.
32. On the face of it this is an apparent anomaly, but since we have concluded that if a hearing is conducted by a YNZ Hearings Committee it will be a *de novo* hearing, with witnesses called to give evidence and the Hearings Committee able to make its own findings on the evidence and as to sanction independently of those arrived at by the ACIJ, we consider it follows that from the evidence it might hear, the YNZ Hearings Committee would be free to make different findings in respect of the allegations recorded against each OTUSA team member as referred to above. Given that the allegation against Andrew Walker included the alternative contention he was aware that the weight had

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<sup>19</sup> Paragraph 65

been added and was or should have been aware this action was contrary to the Class Rules, and that there are admissions in his Interview Record and in the Evidence Transcript to this effect, we proceed on the basis that the Hearings Committee (if there was a hearing) would be able to impose sanctions (additional to any imposed by the ACIJ) in respect of that matter. Whether it should is a matter we consider later in this report.

### Questions of procedural fairness

33. We consider that in a hearing such as that conducted by the ACIJ<sup>20</sup> the principles of natural justice are relevant and should be applied in the conduct of the hearing when the tribunal or arbitral body reaches its findings. We have disquiet about certain aspects of the way in which the case was heard by the ACIJ. It is not, of course, our task to carry out anything like a judicial review of the ACIJ decision. At the same time we do have to be mindful of the way in which a fair hearing process would be carried out in New Zealand.

Specifically, we note these concerns:

(a) The ACIJ made procedural decisions in particular those in JN106 which specified the proposed hearing date, the location and "provided orders in respect of specified witnesses".<sup>21</sup> While that decision also recorded that the parties were to be given the opportunity to call their own witnesses, in our view there would be an obvious difficulty for Andrew Walker or Matthew Mitchell to persuade another OTUSA team member to appear and give evidence whereas the witnesses that were called before the hearing, as listed at the commencement of the Evidence Transcript, were those who were *directed* to appear and be examined by the ACIJ. This is relevant to our concern about OTUSA team members who were not called as witnesses;

(b) We are troubled by the fact that the ACIJ failed to include an allegation of gross misconduct against Simeon Tienpont. He was called as a witness by the ACIJ and described himself as a sailor in OTUSA and (at the time he gave evidence) a boat captain of the Oracle AC72. He was interviewed by AC Jury Members and signed an Interview Record Sheet dated 13 August 2013. In it he stated that he put resin in the dolphin striker of Boat BAR, alleging that he assisted Matthew Mitchell in this and had been asked by Matthew Mitchell and Kyle Langford to do that work.<sup>22</sup> We struggle to understand how a senior sailing member of OTUSA who admitted in an interview with ACIJ Jury Members filling a kingpost on Boat BAR with resin should not have faced an

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<sup>20</sup> Or indeed in a hearing were it to be conducted by YNZ for ISAF, or the Court of Arbitration for Sport

<sup>21</sup> Paragraph 9, JN116

<sup>22</sup> In answer to Question 2 Interview Record Sheet and page 1 Additional Statement dated 13/8/13; Transcript of Evidence, pages 497, 498, 499 and 524

allegation of serious misconduct under Rule 69 as Bryce Ruthenberg, Andrew Walker, Kyle Langford and Matthew Mitchell did.

(c) We have additional concerns about other OTUSA Members who had a part to play in the management and control of boat construction and assembly and were in a position of authority including giving directions to shore crew members. In this regard:

- (i) Mark Turner was a witness called by the ACIJ. At the Jury's request he identified himself as the Shore Team Manager. He advised that all the shore crew and boat builders report to him.<sup>23</sup> In relation to Boat 4 he advised the ACIJ that Piet van Nieuwenhuijzen was the boat captain *"and he would have detailed the job list to the ... whoever it was"*.<sup>24</sup> In Bryce Ruthenberg's evidence there is also reference to Piet van Nieuwenhuijzen. In relation to a discussion about the subject of adding weight to the forward kingpost of Boat 4, his evidence is of recollecting *"about five of us standing around in the - in the - inside the tent, talking about the weight moving forward and low."*<sup>25</sup> On request his recollection of who was involved is stated as being *"Andy, myself, Piet, (deleted name), and Cheese [Dirk de Ridder]"*.<sup>26</sup> Later in his evidence he refers to a discussion – Andy and I talking to Piet outside the tent.<sup>27</sup> At that point he identifies Piet as a sailor on Boat 4 and the boat captain for Boat 4.<sup>28</sup> In answer to a subsequent question Bryce stated *"Our conversation was along the lines of sort of signing-off on it with the boat captain a little bit. But he finished it up by saying, "Just carry on and get the job done", something to – something like that."*<sup>29</sup>
- (ii) The evidence of the OTUSA Rules Advisor Richard Slater includes questions and answers about who makes decisions as to modifications to the boats, and his answer was *"The boat captain"*. He clarified that the boat captain was somebody sailing on the boat, not a shore person.<sup>30</sup> Given this evidence, we are concerned that Piet van Nieuwenhuijzen was neither interviewed nor required to give evidence as a witness before the ACIJ. Particularly since a finding in respect of Andrew Walker relates to his responsibility or seniority at the site in Newport Rhode Island.<sup>31</sup>

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<sup>23</sup> Transcript, pages 113 and 114

<sup>24</sup> Transcript, page 113

<sup>25</sup> Transcript, page 200

<sup>26</sup> Transcript, page 200

<sup>27</sup> Transcript, page 207

<sup>28</sup> Transcript, page 207

<sup>29</sup> Transcript, page 208

<sup>30</sup> Transcript, page 145

<sup>31</sup> Paragraph 52, JN116

(d) Additionally we have a concern about Andrew Henderson, described by Bryce Ruthenberg as his "direct manager" and reporting to Mark Turner.<sup>32</sup> He was described by Bryce Ruthenberg as "creating master lists and creating a final job list to start off with at each event".<sup>33</sup> In his evidence Andrew Walker describes Andrew Henderson as the Head of Rigging.<sup>34</sup> In the evidence of Kyle Langford he also describes Andrew Henderson as the Head of the Rigging Team (identified as Hendo in emails).<sup>35</sup> This witness is the individual who put together a proposed job list for Boat BAR based, apparently, on the work which had been done to Boats 4 and 5. Andrew Henderson is identified (without dispute from any witness) as the author of a master list which was printed out and put on the workshop wall at the location where Boat BAR was being assembled.<sup>36</sup> The evidence of Dean Curtis refers to a job list being sent to him in relation to Boat BAR, copied into an email from Kyle Langford, and "*then my Head of Department, Andrew Henderson, took those jobs and allocated them to people*".<sup>37</sup> The evidence of Matthew Mitchell refers to this job list for Boat BAR on site at San Francisco.<sup>38</sup> It included the line that said "fill kingpost". This job list and the reference to weight to go in the kingpost was also referred to by the witness Simeon Tienpont.<sup>39</sup> We have received a copy of exhibits produced during the hearing. Exhibit No.5 is an email from Andrew Henderson to various OTUSA Team Members and which advises he has made a master list (attached) that he was to print and leave on the rig container door. The list is attached to the email. It is headed "BAR Platform Job list 10/7/12" and includes the words "fill kingpost", with the person responsible described as "Dean".

Despite this plethora of information identifying Andrew Henderson as Head of Rigging, a person who gave directions to shore crew as to work to be undertaken, and who provided a master list of work to be done on Boat BAR including the direction "fill kingpost" he was neither interviewed nor called as a witness for the ACIJ, nor was he the subject of a RRSAC Rule 69 allegation. Yet there is no doubt he directed the work on question to be done, and held a position of authority.

34. A further concern relates to the procedure followed by the ACIJ in calling witnesses. Specifically, the direction that the order of witnesses was such that Matthew Mitchell was called to give evidence before Simeon Tienpont. Given that OTUSA had provided the

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<sup>32</sup> Transcript, page 188

<sup>33</sup> Transcript, page 192

<sup>34</sup> Transcript, page 333

<sup>35</sup> Transcript, page 420

<sup>36</sup> Transcript of Evidence, pages 420 and 421 (Bryce Langford)

<sup>37</sup> Transcript of Evidence, page 453

<sup>38</sup> Transcript of Evidence, page 469

<sup>39</sup> Transcript of Evidence, page 497

ACIJ with signed Interview Sheets, in which Simeon Tienpont advised he had added resin to the forward kingpost of Boat BAR and that he had done so in consort with Matthew Mitchell; whereas Matthew Mitchell's written statement did not state who had carried out the work but denied any involvement in it, we consider that it was appropriate for the order of those two witnesses to be reversed, as a matter of natural justice.

35. Finally, we note the extent to which leading questions were put to witnesses by both their counsel and by the ACIJ jury members, an undesirable practice which inevitably affects the reliance that can be placed on an answer from a witness, particularly (as often recorded in the Evidence Transcript) where the witness is simply acknowledging by a "yes" a proposition put to him by counsel or a member of the Jury.
36. Again, it is not our task to assess whether the ACIJ decision was right or wrong. But we do think these are all issues that bear on the question of what the likely outcome of a *de novo* hearing before a YNZ Hearings Committee might be.

#### **Analysis of Evidence in relation to Andrew Walker**

37. Andrew Walker completed an interview which was recorded in writing, was signed by him and is dated 13 August 2013. In addition to responses to pre-printed questions, there is an additional statement also dated 13 August 2013. In answer to the specific Question 1 he stated he did not take part in adding weight to a kingpost but states weight was added to Boat 4 in Newport. In answer to Question 2 he stated "Bryce [Ruthenberg] told me he added weight himself". In the additional statement he stated:

- He was not involved in the decision-making or idea;
- Bryce told him of weight being added- "believe weight was added to kingpost being 1 below wing, only Boat 4";
- When Bryce told me I thought "what are we doing?".

38. He went on to state that it was embarrassing, he did not talk about it, he knew there was performance pressure from the sailing team. He stated he knew Cheese [Dirk de Ridder] was involved, "he is a forceful sailor". He also stated he got the email about BAR "fill the kingpost", as one of the people in the email chain. Again in the written record of the interview he repeated that Bryce "told him about it" [weight added to the kingpost], and said he did not take part. He said he had not changed from his previous evidence. He was shown the kingpost and said he had never seen it, he did not know whether it was weight in kingpost or dolphin striker. He was showed iron filings and said he had not seen them before.

39. In his evidence before the ACIJ<sup>40</sup> his counsel took him through the Interview Record and in answer to questions he confirmed:

- He first learnt that weight had been added to the kingpost in Newport a day or two before the boat was to go into the water;
- He was told weight had been added to the kingpost by Bryce Ruthenberg;
- He did not participate in any way with Bryce in doing that;
- He recalled discussion about moving weight around in emails, about moving lead into kingposts, but didn't remember a discussion with five people in Newport deciding to go ahead and do the job.<sup>41</sup>

40. He was questioned extensively by members of the ACIJ. Juror McKenzie referred him to the signed Interview Record of Bryce Ruthenberg. In answer to questions he denied remembering Dirk instructing anyone at a meeting to add lead to the kingpost in Boat 4, or giving a direct instruction to Bryce to put lead in the forward kingpost to Boat 4, and said there was never an instruction from him and Dirk to Bryce to put lead in the kingpost. He stated he was not present when Dirk told Bryce to put weight in the forward dolphin striker of Boat 4. He agreed he recalled a discussion with Bryce after he had done the work and that he had testified to that.<sup>42</sup> The statements by Bryce Ruthenberg about how the work had been done allegedly with Andrew Walker's involvement were denied by him when they were put to him.<sup>43</sup>

41. He was asked about the statement that he had bought lead shot and said "no, there was no place in Newport to buy lead shot as far as he knew and in any event lead pellets were on hand in the Oracle compound", because, (as he explained), of a need to add weight to the boats (as legally permitted).<sup>44</sup> He provided more detail as to how the lead was added to bring the boats up to weight in answer to further questions.<sup>45</sup>

42. In answer to questions by Juror Hofland as to who put weight in the main kingpost his answer was "Bryce", but then questioned the reference to the main kingpost as opposed to the forward kingpost and said he did not know who put weight in the main kingpost.<sup>46</sup> In cross-examination by counsel he denied there was a meeting between him and Bryce to figure out how to do the work but that he had been told by Bryce that the work had been

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<sup>40</sup> Commencing at page 315 of the Transcript

<sup>41</sup> Page 328, line 19, Evidence Transcript

<sup>42</sup> Page 334, Evidence Transcript

<sup>43</sup> Pages 334 and 335, Evidence Transcript

<sup>44</sup> Page 345, Evidence Transcript

<sup>45</sup> Page 345, Evidence Transcript

<sup>46</sup> Page 382, Evidence Transcript

done after Bryce had done it.<sup>47</sup>

43. The only witness who gave evidence before the ACIJ who implicated Andrew Walker in the carrying out of the work (adding weight to the forward kingpost to Boat 4) was Bryce Ruthenberg. His Interview Record is also dated 13 August 2013. There are answers to specific questions and an additional six pages in a written statement. In answer to Question 1 he acknowledged taking part in adding weight to a kingpost on Boat 4 at Newport. In answer to Question 3 he said he did the work on Boat 4 with Andrew Walker. In answer to Question 4 he stated Dirk de Ridder instructed him to act.
44. On page 1 of the additional Interview Record he states "*I put the weight in Boat 4*". On Page 3 of the Interview Record he states "*Andrew Walker and myself did the kingpost work itself*". He then gave detail about the work: "*How we did it, I made a Kevlar sock and Andy bought lead shot and filled up the kingpost. We both weighed it – filled what we could in the kingpost (forward)*". On page 4 of the Interview Record he stated Dirk gave direction to put weight in dolphin striker –was never an instruction to just put weight forward. He said "*Andy was present when I received instruction from Dirk to put weight in dolphin striker*." On page 5 of the Interview Record he stated "*I knew that between Andy and Dirk it was decided I do the job. I to do the work as I am at the bottom*", and later "*would not do such work if I did not have instruction to do so*".
45. At the end of page 5 "*Andy and I spoke about it no more than next day(sic) and confirmed it had been done*".
46. On page 6 of the record "*Andy organised the lead being purchased. Was lead. Handed over brown bag and contents [kingpost]*."
47. The Record of Evidence with the cross-examination of Bryce Ruthenberg commences at Page 184 of the Evidence Transcript. Aside from describing a general discussion involving five OTUSA members<sup>48</sup>, (the people present identified as Andy Walker, Bryce Ruthenberg, Piet van Nieuwenhuijzen, "JK" and Dirk de Ridder) he recounts a more detailed conversation about how the work would be done with Andrew Walker.<sup>49</sup> On Page 208 of the Transcript his description is "*I remember Andy saying he's had – he's got the lead shot or he found it or it had come, or something*".
48. In questioning by Jury Members, and in answer to a question by Juror McKenzie as to

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<sup>47</sup> Page 396, Evidence Transcript

<sup>48</sup> Page 200, Evidence Transcript

<sup>49</sup> Pages 202 and 203, Evidence Transcript



whether the same work was done to Boats 4 and 5 he answered: "No, I don't know. I know I did 4. No, I know I did 4."<sup>50</sup> In answer to questions by counsel there was the following exchange:

Q. Alright. Now – if you could turn to the notes on page – I am sorry – page 3 of the notes. There is reference in the first couple of paragraphs there. I've got a box around it. And this refers to what you and Andy did. It says, "Andy bought" the "lead shot" –

A. Yeah

Q. " – and filled up the kingpost". "Andy bought" the "lead shot". That was your recollection then, correct?

A. Yeah. At the time of the interview I thought he – he bought – had the lead shot bought or he went out and bought it at the time of this interview.

Q. Right. Now, you're saying here today that Andy and you together put the lead shot in the kingpost.

A. Yep.

Q. And you heard Mr –

A. Well, he was there while I did it, yes".

49. There is conflicting evidence between these two witnesses. Further in Bryce Ruthenberg's signed interview statement and in the transcript of his evidence there are statements which implicate Andrew Walker in the carrying out of the work, and other statements or answers where he states the work was done by him (alone). An important question we have considered as a result is whether there is other evidence which corroborates one version, or the other. Mark Turner was the Shore Team Manager for OTUSA. He signed an Interview Record Sheet on 12 August 2013, answering the pre-prepared questions and provided an additional Statement also dated 12 August 2013. In answer to Question 2 about who did the work of adding weight to the kingpost his answer was "Bryce Ruthenberg did the work on AC45". In the additional record accompanying the written questions he stated "Bryce Ruthenberg (rigger) did the work on 4, not sure if it was also AC5 at Newport. Andrew Walker (boat builder) and Dave Little (sail maker) of my team also in Newport, but did not do the work." Mark Turner gave evidence before the ACIJ. He was asked questions by Juror McKenzie referring to his statement given on 12 August 2013. In answer to the question "so who did the work on Boat 4 to the kingposts? Do you know?" he answered "Well, it was Bryce that informed me that he was the one that put it in there". In answer to a question "Was there anybody else?" he answered "He didn't – well, he didn't attain to, like, you know, how it got there, but – well, sorry. Let me start again. He made me aware

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<sup>50</sup> Page 231, Evidence Transcript

that the other people who were there on site fully knew about the situation". In answer to the question "who else was on site?" he answered "Andrew Walker, Dean Curtis and a sail maker Dave Little".

50. The findings of the ACIJ in respect of Andrew Walker are that he acquired the necessary lead shot and assisted Bryce Ruthenberg with the placement of lead weight in a Kevlar bag in the forward kingpost of Boat 4.<sup>51</sup>

51. The findings in respect of Bryce Ruthenberg include a statement "the Jury accepts Bryce's evidence that he did not act alone".

52. Because of the seriousness of the allegations of gross misconduct under Rule 69, it is our view that the standard of proof required goes considerably beyond the "balance of probabilities", and is at the higher end of the spectrum between that evidential standard and the "beyond all reasonable doubt" standard. Although in his signed Interview record and in evidence to the ACIJ Bryce did assert that the work done on the forward kingpost of Boat 4 involved Andrew Walker, his Interview Record and Evidence to the Jury contradicts this, with references to carrying out the work alone. We also find his statement that Andrew Walker purchased the lead questionable, and conclude the evidence from Andrew Walker that lead material was available on site in order that the AC45 boats could be brought up to weight by the addition of corrector weights (in the specified locations) to be more credible. Paragraph 52 of JN116 refers to Andrew Walker's responsibility at the Newport Rhode Island site, according to evidence from Mark Turner the Shore Team Manager. The IJ seem to have placed some importance on Andrew Walker denying his seniority over Bryce Ruthenberg; we regard the issue as rather moot since it is clear from other findings that the direction or instruction to carry out the work came from a sailor on Boat 4.<sup>52</sup> We also note the evidence of Richard Slater<sup>53</sup> and Bryce Ruthenberg<sup>54</sup> which identify the boat captain (of the sailing team) as the person from whom instructions would be taken by the shore crew for any modifications to the boats. There is also an unexplained contradiction between the statement in JN116 Paragraph 54 that Andrew Walker acquired the necessary lead shot and assisted Bryce Ruthenberg with the placement of *[that material]*, with the statement in the following Paragraph 55 "following completion of the installation of the Kevlar bag with the lead shot into the kingpost, Bryce reported this to Andrew". If Andrew Walker had assisted in placement of the Kevlar bag

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<sup>51</sup> Paragraph 54, JN116

<sup>52</sup> By the ACIJ in respect of Dirk de Ridder, Paragraphs 69, 70 and 76 of JN116; ISAF Disciplinary Commission Decision 2013/009/DC also identifies the instruction or direction as having been given by Dirk de Ridder

<sup>53</sup> Page 145, Transcript of Evidence

<sup>54</sup> Pages 207 and 208, Transcript of Evidence

with lead shot into the kingpost, it would have been unnecessary for Bryce to have reported the work had been completed.

53. Our conclusion following a careful review of all the evidence that we have been provided with is that we are not satisfied that evidence, if provided to a YNZ Hearings Committee, would establish to its *comfortable satisfaction* that Andrew Walker was involved in carrying out the work which added weight to the forward kingpost of Boat 4.
54. As previously referred to, Andrew Walker admitted being told by Bryce Ruthenberg that work had been done, adding weight to the forward king post to Boat 4, and admitted that he knew or thought this was contrary to the Class Rules. An additional question is whether a hearing should be conducted to consider whether additional sanctions should be imposed in relation to that matter – knowledge of a breach of the rule, as opposed to the giving of a direction or instruction to carry out the work, or completing the work.
55. Our conclusion is that the penalty already imposed upon Andrew Walker (exclusion from the remainder of the America's Cup Regatta) was a sufficient penalty for the acknowledged transgression. We consider that to justify the imposition of further sanctions by YNZ under RRSAC Rule 69.2, a YNZ Hearings Committee would need to be satisfied (to the standard of proof appropriate) that Andrew Walker either directed that the work be carried out, or was involved in the actual completion of the work.

#### **Analysis of Evidence in relation to Matthew Mitchell**

56. The essence of the evidence given by Matthew Mitchell to ACIJ was that he had not been involved with the AC45 class before July 2012.<sup>55</sup> Although he was appointed boat captain for BAR, he was not familiar with all of the details of the relevant class rules.<sup>56</sup> He took it that others in Team Oracle were familiar with the rules,<sup>57</sup> and he relied on their professionalism and integrity.<sup>58</sup> Although he saw the task 'fill king post' in the job list that was posted on a container wall, he did not personally do the work. In his initial interview notes, however, he said that when he had picked the king post up off a work bench at some point, he had noticed it was heavy. Looking inside it, he had seen resinous material with what he took to be lead shot.<sup>59</sup> He did not report what he had seen to anyone, and took no further steps in respect of it.<sup>60</sup> It was his evidence that he

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<sup>55</sup> Pages 468, Transcript of evidence

<sup>56</sup> Page 483 and 484 Transcript of evidence

<sup>57</sup> Pages 468 Transcript of evidence

<sup>58</sup> Pages 475 & 486 Transcript of evidence

<sup>59</sup> Repeated in evidence at the hearing, page 475 Transcript of evidence.

<sup>60</sup> Page

was not aware that there was anything untoward about the filling of the king post until only three weeks before the jury hearing, when the matter was drawn to his attention.<sup>61</sup>

57. If the matter were to be re-litigated before a Rule 69 Hearings Committee in New Zealand, we have no doubt that would again be the tenor of Matthew Mitchell's evidence.

58. The ACIJ held in respect of Matthew Mitchell that:

*"...the jury finds that Matt participated in filling the forward king post, but even if he was not involved in including the additional weight, Matt knew that the king post was heavy. It should have been apparent to a sailor of Matt's experience that when finding a king post that was nearly 2.5 times heavier than the norm its legality was obviously questionable.*

*Matt was the BAR boat captain. He is currently an AC72 boat captain and AC34 is his first America's Cup campaign. The AC 45 Class rule is 12 pages long. It is difficult to accept that a person with Matt's experience would not have familiarised himself with the rules."*

59. It was on this basis that the ACIJ was "comfortably satisfied" that the action was a gross breach of a rule and of good sportsmanship.

60. As already noted, we acknowledge that the ACIJ had the benefit of seeing and hearing the witnesses. Even so we have a number of concerns about the way in which the evidence was taken and the jury's reasoning.

61. The jury concluded its decision in respect of Matthew Mitchell by saying that it was comfortably satisfied that "the action" (note the singular) was a gross breach of a rule. But in its discussion two separate possibilities were considered – first, the action of filling the king post, and secondly the fact that a sailor of Matthew Mitchell's experience ought to have known there was a question about the legality of the king post. Those are two separate things. However it is not clear from the ACIJ's decision which was 'the action' that gave rise to the breach finding.

62. We therefore consider the evidence that was available in respect of each of these two

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<sup>61</sup> Page 487 Transcript of evidence.

elements separately. We start with the evidence as to whether Matthew Mitchell participated in filling the king post.

63. The only person who gave evidence that Matthew Mitchell assisted in filling the king post was Simeon Tienpont.<sup>62</sup> We cannot find any evidence anywhere in the transcript to suggest that anyone else had implicated Matthew Mitchell in that way.

64. It is not clear to us whether Matthew Mitchell had seen the interview record that was completed by Simeon Tienpont before the hearing, but the essential allegation that weighed most heavily against him seems to have been that he (Simeon Tienpont) *"only poured resin in Dolphin Striker"* and *"assisted"*<sup>63</sup> Matthew Mitchell in filling the king post.

65. At the hearing Simeon Tienpont confirmed that filling the king post was on the job list.<sup>64</sup> He did say that he was present *"....when the resin was in there, with Matt Mitchell to put it in the king post..."*<sup>65</sup> but when asked what role he played in the operation he said:

*"Well, I don't remember that anymore, in what I exactly did or .... or ... or if I was holding it. I don't know if you mean that. I mean, at that time, for me, it didn't seem like a significant ... significant event at all and there was nothing strange in the situation. It was on the job list. We were assembling the ... bowsprit to the spine. This has to gone, because otherwise the net cannot get tensions. And as far as I remember it, I arrived there, and it was a ... I got hold up, you know, to get this done and then to get on with the net."*<sup>66</sup>

66. We note this passage of evidence only because it seems to us to be characteristic of much of the evidence that Simeon Tienpont gave, which reflects a distant and somewhat insecure memory of what actually happened. This is again exemplified by the evidence given towards the end of his examination:

"Q. Were you pouring resin in the ... in the king post?

A. As I mentioned you before, I was there. It didn't strike me as a significant event. I don't remember the details of this whole process. I was there to help them out assembling. I knew there was resin went in. We were there

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<sup>62</sup> Comprising his interview notes dated 13 August 2013 and the evidence at the hearing at pages 495 to 525.

<sup>63</sup> Interview notes

<sup>64</sup> Page 497 Transcript of evidence

<sup>65</sup> Page 498 Transcript of evidence

<sup>66</sup> Page 498 Transcript of evidence.

together assembling it, and to get on with the net.

Q. Where was Matt when resin was going in the king post, if you can remember?

A. As I told you before, I don't ... it just doesn't struck me as a significant event, you know. And I don't remember the details of the ... of how things went. We didn't ... you know, I don't remember the lunch I had that day, either. We do hundreds of jobs on boats and didn't ... I didn't find anything abnormal at that time or strange. So I don't have that ... those kind of details for you."<sup>67</sup>

67. The ACIJ nonetheless appears to have preferred this evidence to the direct evidence consistently given by Matthew Mitchell that he was not involved in filling the king post. There is nothing in the ACIJ's decision that enables us to understand why it preferred Simeon Tienpont's evidence over that of Mathew Mitchell. We regard it as very unsatisfactory that the single most important factual finding against Matthew Mitchell is, in effect, completely unexplained.

68. As already noted, there also seems to us to have been a significant procedural shortcoming. Simeon Tienpont gave his evidence after Matthew Mitchell had been called and examined.<sup>68</sup> Matthew Mitchell effectively gave his evidence in defence of the allegations against him before the single most important witness to the contrary had given his evidence. The ACIJ did subsequently offer Matthew Mitchell an opportunity to give further evidence after Simeon Tienpont had given his evidence, but we do not see that as remedying the procedural defect adequately. Given the seriousness of what was at issue, we regard it as obvious that Simeon Tienpont ought to have been called and examined before Matthew Mitchell.

69. Nor can we see that, when Matthew Mitchell was giving evidence, the central element of the claim against him was put to him as squarely it ought to have been. It is true that Matthew Mitchell was examined about his involvement in filling the king post, but we cannot find any passage of evidence in which it was directly put to him that he was not

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<sup>67</sup> Pages 523 to 524 Transcript of evidence. Note that in this passage Simeon Tienpont does not answer the question as to where Matthew Mitchell was when the resin was going in to the kingpost. Earlier, however, Simeon Tienpont had said that he had poured the resin in: "*I was there helping them out and assembling the parts, and I was there when the resin was in there, with Mat Mitchell, to put it in the kingpost*"; page 498 Transcript of evidence(although even then his answer when pressed as to what his role was, was vague: see the passage at para 67 above).

<sup>68</sup> See page 493 to 495 Transcript of evidence.

telling the truth, or that Simeon Tienpont's evidence would be to the contrary, or offering him any opportunity to explain why it might be that his recollection and Simeon Tienpont's were so different.

70. At a very practical level, if there were to be a hearing in front of a YNZ Hearings Committee, Simeon Tienpont would have to be asked to repeat the evidence that he gave to the ACIJ. We have tried to contact him for the purpose of discovering his availability and willingness to do that, but he has not answered us. There is little to suggest to us that he might be willing to give evidence again. Even if he were to do so, it is far from clear to us that his evidence would be more likely to be accepted than Mathew Mitchell's evidence. Our own assessment of the evidence that each gave to the ACIJ is to the contrary.

71. Our final concern in respect of the allegation that Matthew Mitchell was an active participant in filling the kingpost has to do with the way in which the ACIJ's decision is set out. The ACIJ made a finding that Matthew Mitchell actively participated in filling the forward king post. Presumably that amounts to saying that it found that fact established. It seems inconsistent, therefore, with that conclusion that the ACIJ went on to say in the next part of the same sentence that *"... even if he [Matthew Mitchell] was not involved in including the additional weight, Matt knew that the king post was heavy."*

72. If the ACIJ was satisfied that Matthew Mitchell had been involved in adding extra weight to the forward king post, then we struggle to understand why it thought it to be necessary to put the second part of its conclusion in the alternative. It inevitably raises a concern that the ACIJ was not comfortably satisfied that Matthew Mitchell had added weight to the king post – but believed that he should be found to be liable for other reasons notwithstanding.

73. This brings into focus the second element of the ACIJ's finding against Matthew Mitchell. It said that, even if Matthew Mitchell was not involved in adding weight, he *"knew that the king post was heavy. It should have been apparent to a sailor of Matt's experience that when finding a king post that was nearly 2.5 times heavier than the norm, its legality was obviously questionable"*.

74. The way in which this conclusion is phrased is in itself a cause for concern. This is, after all, a question of whether or not there was a gross breach of a rule or good sportsmanship. To conclude that a participant should have known better suggests that

culpability is in the nature of negligence or carelessness, rather than a deliberate act of dishonesty.

75. Matthew Mitchell accepts that he picked the king post up and noticed it was heavy. In fact he volunteered that information in his pre-hearing interview. We cannot find anything in the transcript of his evidence or the interview notes to establish it was 2.5 times heavier than 'the norm'. Indeed, we cannot find anything in the transcript that would allow us to assess what 'the norm' was in the circumstances. For all that the ACIJ was critical of the various sailors, including Matthew Mitchell, there is no evidence that the class rule specifying the correct weight of the kingpost was presented to Matthew Mitchell so that he could comment as to whether or not the king post that he thought was heavy was *'nearly 2.5 times heavier than the norm'*. And yet that is the ACIJ's finding against him.
76. We can see that Matthew Mitchell's admission that when he picked the king post up he noticed it was heavy does provide a basis for suspicion that he might have recognised the possibility it was not rules compliant. Against that, any culpability has to be measured against the reality that the work of filling the king post was on the job list (and for the purposes of this alternative finding he had had no involvement in preparing that job list, or carrying out the actual work); that he was relatively new to the AC45 class; and that he assumed that others involved in the campaign would not be looking to infringe the class rules.
77. If the case against Matthew Mitchell comes down to a question of whether or not, on picking up the king post and feeling that it was heavy, he ought to have taken steps to query it then, in our assessment, the most that could be said on the evidence that we have seen is that he was negligent not to do so. Even accepting that gross negligence might in some rare situation amount to the sort of conduct that would give rise to a breach of Rule 69, we cannot see that this is one of those cases.
78. All in all, we do not think there is a sufficient prospect that a YNZ Hearings Committee would find that Matthew Mitchell's failure to take any steps after feeling that the king post was heavy amounted to a gross infringement of a rule, or good manners or sportsmanship, to justify the commencement of a hearing process in New Zealand.
79. For completeness, we add this. Had we been satisfied that there was sufficient probative evidence to establish that Matthew Mitchell had himself filled the kingpost, knowing it to be in breach of the Rules, and then concealed the fact, we would not



have hesitated to recommend that a hearing process be initiated in New Zealand. If the facts were established, we would also not have hesitated to recommend a further penalty be imposed by YNZ. However, our analysis of the evidence that is available leads us to conclude that the prospect of such finding after a proper process in New Zealand falls far short of justifying any further proceedings.

80. On the other hand, even if we had thought it open to us to conduct a case on the basis that Matthew Mitchell knew the kingpost was heavy and that its heaviness might raise rules-related issues, but did not do anything about that, we would not have recommended any further steps. For essentially the same reasons given in respect of Andrew Walker, in our assessment whatever culpability Matthew Mitchell might have had in that respect is fully answered by the significant penalties he has already been subjected to. We do not consider there is any sufficient prospect that a Hearings Committee would impose a further or different sanction to justify the proceedings that would be required.

### **Availability of Witnesses**

81. In making a recommendation to YNZ, an additional consideration for us is whether witnesses that would be essential in order to bring a case before a YNZ Hearings Committee against Andrew Walker and/or Matthew Mitchell would be available. In each instance, there is a crucial witness that would need to be called to give evidence – Bryce Ruthenberg in respect of Andrew Walker, and Simeon Tienpont in respect of Matthew Mitchell.

82. We have asked Mr Abercrombie, CEO of YNZ, to communicate with both of those people and ask if they would advise whether, if a hearing is held by YNZ, they would make themselves available to give evidence (either in person, or by video-link or some other alternative method which would enable them to be cross-examined). We have only heard from Bryce Ruthenberg in reply, and his response was to refer to the availability of the evidence that he gave to the ACIJ. A clarification sent to him that fresh evidence would be needed from him to a YNZ Hearings Committee has not been responded to. We have not had a response from Simeon Tienpont.<sup>69</sup> In the absence of a confirmation that either or both of the witnesses would be prepared to give evidence before a YNZ Hearings Committee, we cannot recommend that the matter proceed to a hearing. The YNZ procedure for taking action under Rule 69 involves a formal hearing before a duly appointed Hearings Committee with a Complaints Commissioner presenting evidence in

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<sup>69</sup> The communication to each of these potential witnesses included a date by which a reply was requested, now expired

support of the allegation against the party in question. We are not satisfied that we would be in a position to do that.

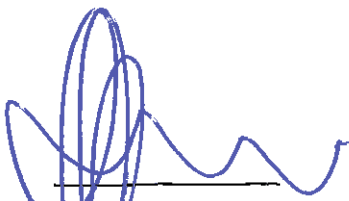
## CONCLUSIONS

83. It is our recommendation under RRSAC Rule 69.2(a) and the YNZ Prescription to Rule 69 that no further action be taken against either Andrew Walker or Matthew Mitchell. Having carefully examined the evidence and other material that has been provided to us in order to complete this report, it is our assessment that a hearing should not be conducted.
84. We have very significant reservations about the ACIJ findings as to responsibility for the *carrying out of work* to the forward kingpost of Boat 4 and the kingpost to Boat BAR, for reasons set out in this report. Further, we are not satisfied that if a hearing were to take place, we would be able to advance sufficient evidence in relation to the alleged involvement of both parties in the work done on these kingposts to meet the requisite standard of *comfortable satisfaction*, having regard to the seriousness of the allegations.
85. In respect of Andrew Walker, he acknowledged having been told that weight had been added (lead shot in a Kevlar bag) into the forward kingpost of Boat 4, this having been reported to him by Bryce Ruthenberg. He stated that he knew this was contrary to the class rule. Given that he and Bryce Ruthenberg had both been given a direction or instruction to carry out the work by a senior member of the Boat 4 Sailing Team, it is our view that the sanction imposed on Andrew Walker by the ACIJ is sufficient penalty for that breach of Rule 69 and recommend that no further action be taken.
86. In relation to Matthew Mitchell examination of the evidence does not satisfy us that we would be able to establish to the *comfortable satisfaction* standard that he was involved in filling the forward kingpost of Boat BAR with resinous material. In relation to his being aware that the kingpost was heavy having picked it up from a workbench,<sup>70</sup> and given that he was aware that a written instruction had been given to carry out this work, we do not consider that a Hearings Committee would likely be persuaded to impose any additional sanction or penalty. We do not recommend further action be taken by YNZ in that respect.

Dated at Auckland this <sup>2<sup>nd</sup></sup> day of April 2014

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<sup>70</sup> Paragraph 66, JN116



**Richard Brabant**  
YNZ Complaints Commissioner



**Royden Hindle**  
YNZ Complaints commissioner