**APPEALS TRIBUNAL OF FOOTBALL NEW SOUTH WALES**

**DETERMINATION IN THE FOLLOWING MATTER:**

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| **Player/Official/Member/Association Member/Participant/Club** | Thomas James v Football NSW<br>AT 21-01 |
| **Decision Appealed** | Appeal from the decision of the General Purposes Tribunal of Football NSW |
| **Date of Decision** | 8 February 2021 |
| **The basis upon which the matter is before the Appeals Tribunal** | Sections 9.8, 10.1(c) & 10.2(e) of the Football NSW Grievance and Disciplinary Regulations, 2020 |
| **Ground(s) of Appeal** | Section 10.3(d) of the Football NSW Grievance and Disciplinary Regulations, 2020 |
| **Date of Hearing** | 13 April 2021 |
| **Date of Determination** | 16 April 2021 |
| **Appeals Tribunal Members** | Anthony Lo Surdo SC, Chair<br>Hon. Graham Turnbull SC, DCJ, Vice-Chair<br>Iain Rennie, Member |

## I. Introduction

1. Under section 10.1 of the Football NSW Grievance and Disciplinary Regulations, 2020 (**Football NSW Regulations**), the Appeals Tribunal (**AT**) is responsible for hearing appeals from the Executive of Football NSW (**Executive**), the Disciplinary Committee (**DC**), the General Purposes Tribunal (**GPT**) and the Member Appeals Committee (**MAC**).

2. The sole grounds of appeal prescribed by section 10.3 of the Football NSW Regulations are as follows:

   (a) a party was not afforded a reasonable opportunity to present its case;

   (b) lack or excess of jurisdiction;

   (c) the decision was affected by actual bias;

   (d) the decision was one that was not reasonably open having regard to the evidence before the decision-maker;

   (e) severity, but only where the decision imposed a sanction of at least:

      i. a Fixture/Match Suspension of 6 or more Fixtures/Matches (excluding Trial Matches, Tournaments, the NPL Pre-Season Competition, the FFA national titles or any Football NSW Representative Matches); or

      ii. a Time Suspension of 3 or more months; or

      iii. a fine of $3,000 or more; or

      iv. a bond to be of good behaviour of $3,000 or more; or

      v. a deduction, loss or ban on accruing of 6 or more competition points; or

      vi. exclusion, suspension or expulsion of a Club or Team from a competition; or

      vii. relegation to a lower division; or

(f) leniency, but only in the case of an appeal brought by Football NSW or an appeal allowed by the Executive pursuant to section 10.2(g) (Appeal from a MAC).

3. Upon the hearing of an appeal, the AT may:

(a) dismiss, allow in whole or part, or vary (whether by way of reduction or increase) any decision including any sanction or penalty, made by a Body or a MAC; and

(b) subject to any applicable Minimum Suspension/Sanction and Maximum Suspension, impose any sanction, measure or make any order it thinks fit or a decision that either the DC, the GPT or the MAC could have imposed or made under these Regulations, or its regulations, as the case may be;

(c) conduct a fresh hearing of the matter (hearing *de novo*), but only in exceptional circumstances (as determined by the Appeals Tribunal in its absolute discretion); or

(d) remit the matter to the Body or the MAC from which the appeal originated, or to the tribunal (or similar) that dealt with the matter at first instance, for rehearing and issue any directions or orders in relation to the rehearing of the matter that the AT deems appropriate.

(s 10.4(b) of the Football NSW Regulations)

## II. Admissibility and Jurisdiction

4. This appeal arises from a determination of the GPT issued on 7 December 2020 (**GPT Determination**). It has been brought pursuant to section 9.8 of the Football NSW Regulations.

5. Section 9.8(b) of the Football NSW Regulations requires that such an appeal be brought within 7 working days of the issuing of the determination the subject of the appeal, that is, by 17 February 2021. A notice of appeal was lodged on 17 February 2021. It was subsequently amended by notice lodged on 22 February 2021. The appeal has been brought within time.

6. The AT is accordingly satisfied that the appeal is both admissible and that it has jurisdiction to hear it.

7. Further, neither party raised any objection to the admissibility of the appeal nor to the AT having the requisite jurisdiction to hear it.

## III. Background Facts

8. Thomas James (the **Player**), is a member of the Wollongong Wolves National Premier League Men's First Grade squad. On 18 October 2020, the Player participated in a home game against Sydney United 58 FC (**SUFC**) at Albert Butler Memorial Park.

9. On 19 November 2020, Football NSW referred two charges against the Player under sections 9.2 and 16.4 of the Regulations.

10. Charge 1 was in the following terms:

> **CONDUCT ALLEGED**: During the NPL 1 1st Grade Preliminary Final match between Wollongong Wolves FC (the **Club**) and Sydney United 58 FC on 18 October 2020 at Albert Butler Memorial Park, Thomas James (the **Participant**) spat on the face of the opposition Player, Adrian Vlastelica.
>
> **THIS CONDUCT IS ALLEGED TO BE IN BREACH OF:** Sections 9.2 and or 9.4 and/or 16.4(D) of the Football NSW Grievance and Disciplinary Regulations, namely: Schedule 3, Table A, R3 Offence, Offence Code 02-01: "Spitting on an opponent or any other person".

11. Charge 2 was in the following terms:

> **CONDUCT ALLEGED:** Further to Charge 1, the Participant raised his right boot in a backwards direction, with studs showing, making contact with the face of the opposition Player, Cristian Gonzalez.
>
> **THIS CONDUCT IS ALLEGED TO BE IN BREACH OF:** Section 16.4(d) of the Football NSW Grievance and Disciplinary Regulations, namely: Schedule 3, Table A, R2 Offence Code 04-01" "*Serious violent conduct that has caused bodily harm or responsibility for a Melee (Grade 2)".*

12. Charge 1 related to an incident which escaped the referee's attention. The Player was charged with spitting on the face of an opponent, namely, Adrian Vlastelica. The GPT found, in summary, that in or about the 37th minute of the match and after exchange between the Player and Mr Vlastelica, the Player had

blown a "raspberry" at Mr Vlastelica and that, as a consequence, some saliva had sprayed onto his face.

13. The GPT concluded that Charge 1 had not been established because spitting on an opponent required an element of intent to eject saliva from the mouth. It said that the intent of blowing a raspberry, by its very definition, is to express derision or contempt at an opponent. Whilst common sense dictates that blowing a raspberry must result in releasing saliva particles into the air, the GPT was not satisfied that the Player intended to deliberately eject saliva from his mouth onto the opponent.

14. Charge 2 relates to an incident in the 43rd minute of the game, resulting in the Player being shown a red card and dismissed from the field of play for violent conduct against an opposing player, namely, Mr Cristian Gonzalez. The GPT found, in summary, that the Player's right boot made contact with the face of Mr Gonzalez. At the time of contact, the Player's right foot was raised in an unnaturally high position and he kicked out his right boot in a backwards direction making contact with the face of Mr Gonzalez. The GPT was accordingly satisfied that Charge 2 was established.

15. The GPT also found that the evidence did not support a downgrading of the charge to Schedule 3, Table A, R2 Offence, Offence Code 02-01 "violent conduct". In doing so, it rejected the submission of the Player that the Notice of Determination in MGPT 20/01 justified a downgrading of the charge. It distinguished that earlier case on the basis that the reasons for determination were encapsulated in two paragraphs and involved a late guilty plea. There was no analysis of the evidence available to the GPT and the video footage of the incident in MGPT 20/01 on its own without the additional evidence, including the Match Official's reports, was of little assistance.

16. As to sanction, Football NSW submitted that the sanction should be greater than the minimum and that an appropriate sanction would be 16 fixtures. Having regard to the competing submissions as to sanction, the GPT formed the view that the minimum suspension of MMS + 12 Fixtures was appropriate.

## IV. Grounds of Appeal

17. By Amended Notice of Appeal filed on 22 February 2021, the Player contends that the GPT should, after properly taking into consideration the evidence and the findings in MGPT 20/01, have only found the Player guilty of Schedule 3, Table A, R2, Offence Code 02-01 "Violent conduct" and should have imposed a sanction appropriate to that conduct. In other words, the Player contends that the GPT erred in refusing to downgrade Charge 2 from "*Serious Violent Conduct*" to "*Violent Conduct*" and that it was a decision that was not reasonably open to the GPT having regard to the evidence before it (s 10.3(d) of the Football NSW Regulations).

18. Football NSW cross-appeals on the following grounds:

    (a) having regard to the evidence before it, the GPT's decision to dismiss Charge 1, was not reasonably open to it (s 10.3(d) of the Football NSW Regulations);

    (b) in the alternative, with respect to Charge 1, the same facts and findings of the GPT give rise to the lesser charge of – Schedule 3, Table C Offence Code 03-01 "*Unsportsmanlike or unprofessional behaviour*" and that pursuant to section 13.11(f), if the GPT was not satisfied that Charge 1 was made out on the evidence before it, and should have been satisfied that the lesser charge had been proved. Football NSW contends that the AT should find the Player guilty of the lesser charge (see also s 10.4(b)(ii) of the Football NSW Regulations); and

    (c) the penalty imposed by the GPT with respect to the charge of "*Serious Violent Conduct*" was too lenient and the appropriate penalty is MMS + 15 fixtures (s 10.3(f) of the Football NSW Regulations).

## V. The Issues

19. The Appeal and Cross-Appeal gives rise to the following issues:

    (a) whether the GPT's decision to dismiss Charge 1, was reasonably open having regard to the evidence before it;

(b) did the evidence before the GPT in relation to Charge 1 support a finding of a lesser charge of - Schedule 3, Table C Offence Code 03-01 "*Unsportsmanlike or unprofessional behaviour*". If so, and in the alternative, whether in these circumstances, the GPT's decision to dismiss Charge 1, was reasonably open having regard to the evidence before it;

(c) whether the sanction imposed by the GPT in relation to Charge 2 was reasonably open having regard to the evidence before it. More particularly, whether the evidence supports the downgrading of the charge of "*Serious Violent Conduct*" to "*Violent Conduct*" under Schedule 3, Table A, R2 ,Offence Code 02-01 and, if so, the appropriate sanction; and

(d) if the answer to (a) or (b) is in the negative, the appropriate sanction and whether it should be served wholly or partly concurrently with that for Charge 2.

## VI. The Hearing

20. The AT heard the appeal on the evening of 13 April 2021 by audio-visual means.

21. At the hearing, the Player was represented by Mr Chris Sheppard, solicitor and director of the Club. Mr Sheppard also represented the Player at the hearing before the GPT. Football NSW was represented by Mr Marco P. Nesbeth, of counsel, instructed by Mr Lorenzo Crepaldi, Head of Legal and Compliance at Football NSW. Also in attendance at the hearing was Mr Michael Kantarovski from Football NSW primarily in his capacity as Tribunal Secretary.

22. The parties provided the AT with the following written submissions:

(a) the Player, dated 22 February 2021;

(b) Football NSW, dated 4 March 2021; and

(c) the Player, in reply, dated 18 March 2021.

23. The parties were each afforded the opportunity to supplement their written submissions orally during the course of the hearing and the AT heard from each of them.

24. The Player also relied upon the following documents each of which was referred to in his written submissions:

    (a) written submissions, dated 25 November 2020, relied upon by the Player in the GPT proceedings the subject of the appeal; and

    (b) the statement of the Player, dated 25 November 2020.

25. Attached to the Player's written submissions is a "*Mental Health Treatment Plan*" (Annexure D) and a referral to Dr Olga Lavelle, Clinical Psychologist (Annexure E), each dated 10 February 2021. These were self-evidently, given the dates of their creation, not before the GPT and Football NSW opposed the Player relying upon them. At the hearing, Football NSW did not press its objection to the admissibility of these documents and they were admitted by the AT provisionally and subject to relevance.

26. The Player also sought to rely upon the following documents relevant to MGPT 20-1:

    - the undated statement of Mr Araujo (Annexure C to the Player's Amended Submissions, dated 22 February 2021;
    - Statement of Craig Fisher, Referee, dated 24 February 2020;
    - Statement of Patrick Teleki, Assistant Referee, dated 25 February 2020;
    - Statement of Raymond Osborne, Assistant Referee, dated 23 February 2020;
    - Notice of Charge;
    - the video evidence of the incident; and
    - the Notice of Determination, dated 13 March 2020.

27. Football NSW objected to the Player relying upon these documents with the exception of the video of the Araujo incident and the Notice of Determination in that case on the basis that they were not in evidence before the GPT. The AT admitted the documents provisionally subject to relevance and to determining

whether there were exceptional circumstances that would permit their reliance under s 13.11(k) of the Football NSW Regulations.

28. As to the documents comprising Annexures D and E to the Player's submissions, it is self-evident, given the date of their creation that that these documents could not have been before the GPT. That is reason enough to exclude them. Further, and in any event, the AT is not persuaded of their relevance. It is not contended that the Player was under any psychological impairment at the time of the incident, such that it would explain, qualify or mitigate the conduct or otherwise mitigate the sanction imposed by the GPT. Accordingly, the tender of those documents is rejected as irrelevant.

29. As to the documents referred to at [26] of this determination, it can be inferred from the terms of [109] of the GPT Determination that it had before it at least the Notice of Determination in MGPT 20/01 and the video footage and that it did not have the Match Officials' reports. There is no mention made of the GPT having before it the undated statement of Mr Araujo or the Notice of Charge. These are matters which the AT expects that the GPT would have mentioned if they had been in evidence. Further, the evidence discloses that these documents were first made available by Football NSW to the Player via Dropbox link on 19 November 2020 at the time of laying Charge 2.

30. The Player submitted that there were exceptional circumstances for the purposes of s 13.11(k) of the Football NSW Regulations to permit him to rely upon documents relating to MGPT 20/01 that were not in evidence before the GPT. He submitted that they were not in evidence because Football NSW did not disclose the documents and that it, in effect, withheld evidence from the GPT.

31. The Player developed these submissions in oral argument asserting that Football NSW had a duty of disclosure and, as such, was obliged to provide individuals subject to disciplinary charges, prior decisions of tribunals which dealt with the same or similar sanctioned conduct. He claimed that full disclosure of that evidence should have been afforded to him at first instance.

32. The Player advances serious allegations of, in effect, prosecutorial misconduct by Football NSW. This raises issues as to whether Football NSW had a duty as alleged and, if so, the source and content of that duty.

33. Under both the common law and professional conduct rules, Australian prosecutors are required to serve upon the defence all material in their possession that is relevant to determining the guilt or innocence of the defendant. That requirement extends to material that is adverse to the prosecution case and is fundamental to ensuring the defendant receives a fair trial. In *Mallard v R* (2005) 224 CLR 125, Justice Kirby explained there is a common law requirement in Australia for the prosecution to provide the defence with all material which, "…*may cast a significant light on the credibility or reliability of material prosecution witnesses or the acceptability and truthfulness of exculpatory evidence by or for the accused*".

34. Similarly, the law regarding the prosecution's duty to disclose is reflected in professional conduct rules such as Rule 29.5 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 and Rule 87 of the Legal Profession Uniform Conduct (Barristers) Rules 2015:

> A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person.

35. Typically, information that is required to be disclosed includes:

(a) statements of witnesses, whether or not the prosecution intends to call them to testify in court;

(b) advance notice of any discrepancies between what is contained in witness statements and the evidence to be led;

(c) information that calls into question the credibility of witnesses, including their criminal record where relevant;

(d) expert evidence, including forensic and medical evidence;

(e) relevant transcripts of interviews, video and audio recordings, photographs, telephone and listening device intercepts; and

(f) all other material that might tend to suggest that the accused person is innocent.

36. There is no provision in the Football NSW Regulations requiring Football NSW to provide the type of disclosure alleged by the Player.

37. In the AT's view, the question of an obligation on the part of Football NSW to provide the material in question misapprehends the generally recognised obligation of disclosure on a prosecuting authority. MGPT 20/01 had no direct or indirect relationship to the case under appeal. It self-evidently involved a different player, at a different time and in a different match. Accordingly, at its highest, it can be no more than a guide as to a potential approach and informative as to sanction.

38. The obligation of disclosure at law could only arise where Football NSW is aware of relevant evidence relating to the specific matter being prosecuted. That "obligation" would only reflect the usual touchstone of fairness which arises in any prosecution. The prosecutor would disclose fully, in a timely manner, on a sensible appraisal, matters relevant or possibly relevant to an issue in *the case*.

39. In the AT's experience so much is reflective of what seems to be usual practice by Football NSW. Football NSW's usual practice, as they did in this case, is to provide evidential material in their possession which might assist a proper and fair determination of the issues before a tribunal. Additional material which might assist a defence or might assist in establishing mitigating circumstances in relation to the offence is typically disclosed, as it was here.

40. Here it is apparent that Football NSW has gone further. MGPT 20/01 was material that was not relevant to the merits of the actual contested prosecution. It was another case altogether and so was only capable of providing guidance to the potential application of the provision in potentially similar circumstances, or perhaps, guidance in relation to sanction.

41. The AT is of the view that documents relevant to MGPT 20/01 was not provided by Football NSW out of any duty or obligation of disclosure as commonly understood. It seems to have been provided out of a discretionary decision to advance the fairness of the process and assist the parties and the GPT. It is material that is not binding on any tribunal in any way and Football NSW was not obliged to provide it.

42. Accordingly, Football NSW's failure to provide additional material relating to the evidence led in MGPT 20/01 was not a failure in relation to an obligation at all. There was no such obligation.

43. As a result, there is no basis for asserting that the non-provision of the documents in issue was an "*exceptional circumstance*" for the purposes of s 13.11(k) of the Football NSW Regulations. Indeed its provision in this case was the exception.

44. Lastly, it was at all times open to the Player to have requested the disclosure of any additional material relevant to the charge in MGPT 20/01 at or prior to the hearing before the GPT. He did not do so.

45. The AT accordingly determines that the Player be permitted to rely upon the Notice of Determination and video footage in MGPT 20/01 as those documents were in evidence before the GPT. All other documents pertaining to MGPT 20/01 upon which the Player intends to rely are rejected because they were not in evidence before the GPT and no exceptional circumstances have been shown to otherwise permit the Player to rely upon those additional documents. In any event, the AT is of the view that the additional documents, which the AT had considered for the purpose of ruling upon their admissibility, would not have assisted the Player's case.

## VII. The Parties' Submissions

46. What follows is a summary of the parties' submissions. It does not necessarily encompass every contention put forward by the parties. To the extent that it omits any contentions, the AT notes that it has carefully considered all of the evidence and arguments submitted by the parties, including those made orally at the hearing, even if there is no specific reference to those submissions in the following summary.

**CHARGE 1**

*Football NSW*

47. Football NSW contends that the finding by the GPT that it was not satisfied that the Player "*intended to deliberately eject saliva from his mouth on the opponent by blowing a raspberry*" was not open to it having to its findings that:

    (a) it is common sense that blowing raspberries must release saliva particles into the air;

    (b) the Player suddenly turned to face Mr Vlastelica (thereby giving him little chance to react) and in doing so, caused their faces to come into close proximity; and

    (c) the Player blew a raspberry before turning and then walking away.

48. Implicit in the GPT's finding is that blowing a raspberry may technically fit the description of spitting but given the severity of the sentence for such an offence, the drafters of the LOTG could not have contemplated that blowing a raspberry amounted to such a serious offence.

49. The definition of spitting in the LOTG is necessarily broad to avoid too narrow a construction being applied. Otherwise, if players are so minded they will simply adapt their behaviour to circumvent the LOTG. Blowing a raspberry amounted to spitting in this particular case. The Player intended to express derision and contempt by blowing a raspberry and to forcibly deposit saliva on Mr Vlastelica's face (or did so at least recklessly or negligently [see s 16.5(a) of the Football NSW Regulations]). Football NSW accordingly submitted that Charge 1 had been made out.

50. In the alternative, Football NSW submitted that if the AT finds that blowing a raspberry is not spitting, then, at the very least, it must amount to "*Unsportsmanlike or unprofessional behaviour."* Having regard to the findings of the GPT, especially at [92], Football NSW contended that the lesser charge of "*Unsportsmanlike or unprofessional behaviour"* is made out.

51. As to sanction, Football NSW argued that having regard to the nature and seriousness of the conduct, the Player's experience and age (27 at the date of

the alleged offences), his lack of remorse and contrition and not guilty plea, the appropriate sanction for "*Unsportsmanlike or unprofessional behaviour"* should be 4 fixtures.

*THE PLAYER*

52. The Player submitted that Football NSW's contention that there does not need to be an element of intent in order to be guilty of the offence of spitting should be rejected. He relied upon the Cambridge Dictionary definition of "*spitting*" as "*to force out of the contents of the mouth, especially saliva*" and that to force something from one's mouth implies an element of intent. He also relied upon the Australian Pocket Oxford Dictionary definition of "*raspberry*" as being a "*sound made by blowing through the lips, expressing derision or disapproval*" in further support of his contention that the act of blowing a raspberry does not involve an intent to eject saliva from the mouth. In these circumstances, the Player maintained that the cross-appeal should be dismissed.

53. As to Football NSW's alternative contention that the GPT should have found the Player guilty of a lesser charge of "*Unsportsmanlike or unprofessional conduct*", the Player submitted that he was not charged either primarily or, in the alternative, of that lesser charge. Further, the Player pointed to section 13.11(f) of the Football NSW Regulations in support of his contention that before a tribunal is able to find a relevant participant guilty of a different charge, not only must the tribunal be satisfied that the different charge has been proved, but the person charged must have been given an opportunity to address the tribunal in relation to that charge.

54. The Player contended that he was never given the opportunity to address the GPT on the offence of "*Unsportsmanlike or unprofessional conduct"* and, accordingly, it was not open to the GPT to have made such a finding nor, therefore, is it available to the AT to do so on appeal. The Player accordingly submitted that this alternative case on the cross-appeal should also be dismissed.

55. As to sanction, the Player submitted that if Football NSW's cross-appeal in relation to Charge 1 is upheld, that the minimum sanction of MMS + 8 fixtures would be appropriate, especially given the fact that this is not a case of the Player intentionally spitting at the opposing player and it would be the first

offence of this nature by the Player. When all the circumstances of this incident are analysed, the Player submitted that it is at the very bottom of the scale of seriousness and therefore the minimum sanction is appropriate.

**CHARGE 2**

*THE PLAYER*

56. The Player accepted that whilst a finding of "*violent conduct*" was reasonably open to the GPT on the evidence before it, "*serious violent conduct*" was not a finding that was reasonably open to it on the evidence.

57. The Player contended that the finding of "*serious violent conduct*" was not reasonably open to the GPT having regard to the evidence before it because:

(a) pursuant to regulation 13.11(f), the GPT had the ability to downgrade Charge 2;

(b) the GPT failed to have regard to all of the evidence before it, in particular, the evidence relevant to the determination of the GPT in an earlier matter, MGPT 20/01 and that, had it done so, it would have found the Player guilty of the lesser charge of "*violent conduct*". In particular, the Player argued that the GPT erred in:

- its findings at [109] that the Notice of Determination in MGPT 20/01 was of little assistance to the Player or the GPT and that it was only of little assistance because all of the evidence available to the GPT was not considered;

- failing to take into consideration the Match Officials' reports in MGPT 20/01, in particular, that the physical injury suffered by the player in those proceedings was similar to those suffered by Mr Gonzalez in the present case;

- failing to take into consideration the statement of the charged player in MGPT 20/01, Mr Araujo which, the Player contends should have been disclosed to the Player together with other material relevant to MGPT 20/01 which was disclosed to the Player, for the purposes of the present case;

- failing to give due consideration to the principle of parity when dealing with similar offences.

58. The Player submitted, in summary, that Mr Araujo's actions in MGPT 20/01, "*…were significantly more violent, malicious and had the intention of striking the victim in the face when compared to the [Player's] incident. Mr Araujo's charge was downgraded… Based upon that precedent, it was not reasonably open to the GPT to find the [Player] guilty of Serious Violent Conduct*." (Submissions, [36]).

59. Therefore, had the GPT considered all of the evidence before it, Charge 2 would have been downgraded from "*serious violent conduct*" to "*violent conduct*" and the GPT would have imposed a sanction of 5 fixtures.

*Football NSW*

60. Football NSW submitted that:

(a) the Player seeks to make new submissions attempting to compare the present matter with MGPT 20/01 in an attempt to advance the position that the finding of "*serious violent conduct*" was not reasonably open to the GPT. No error of law is identified, rather, the Player is attempting to encourage the AT to engage in a merits review, with reference to arguments which, in substance, were before the GPT;

(b) section 13.11(b) of the Football NSW Regulations, provides that a tribunal may have regard to but will not be bound by its previous determinations. It therefore follows that the GPT cannot fall into error by not having regard to one of its previous determinations;

(c) it is not readily apparent why the offence code was downgraded in MGPT 20/01 but if it was on account of the guilty plea and matters relevant to mitigation, there is no doubt as to the correctness of the decision;

(d) there was no credible evidence before the GPT to support the proposition now being advanced by the Player that the present matter involved "*lesser malice, force, intent and/or recklessness*" when compared to MGPT 20/01 and that there is accordingly any parity between the offences; and

(e) that the appropriate penalty is MMS + 15 fixtures for the following reasons:

- the Player's actions involved a kick to the face and as the GPT observed, it was fortunate that Mr Gonzalez's injuries were not more serious;

- it remains the case that the Player has taken no responsibility for his actions, or acknowledged that his actions were reckless and dangerous;

- the Player has shown no contrition or remorse for his actions;

- the Player does not accept the findings of fact of the GPT;

61. As to sanction, the Player submitted that in the event that the offence of "*serious violent conduct*" is maintained, Football NSW has advanced no reasons to interfere with the GPT's sanction of MMS + 12 fixtures and that it should not be disturbed.

## VIII. The Applicable Law

62. An appeal involves the consideration of whether the decision under consideration is affected by legal, factual or discretionary error (see, for example, *Allesch v Maunz* (2000) 203 CLR 172). The question as to whether there is any evidence of a particular fact is a question of law. Likewise, the question as to whether a particular inference can be drawn from facts found or agreed is also a question of law (see, for example, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355 per Mason CJ).

63. A decision is not reasonably open to a tribunal having regard to the evidence before it (and is thus affected by error) if that evidence in its totality preponderates so strongly against the conclusion found by the tribunal that it can be said that the conclusion was not one that a reasonable tribunal member could reach (see, for example, *Calin v The Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 and *Mainteck Services Pty Limited v Stein Heurtey SA* [2013] NSWSC 266).

64. Further, the AT will only intervene to set aside a determination on the ground that it is unreasonable if "*there was no information available to the tribunal on which reasonable and honest minds could possibly reach the conclusion"* (see the decision of the Appeal Committee of the Football Federation of Australia in the *matter of Roy O'Donovan,* 25 January 2016 at [16] and the cases there referred to).

65. For the purposes of an appeal generally, it will be necessary to demonstrate legal error, not merely an erroneous ruling, and the error must be material to or likely to affect the outcome of the decision appealed from; that is, the decision must be one which is vitiated by error (see, for example, *Hamod v Suncorp Metway Insurance Ltd* [2006] NSWCA 243 at [11], *Yates Property Corp Pty Ltd (in liq) v Darling Harbour Authority* (1991) 24 NSWLR 156 at 177).

## IX. Standard of Proof

66. Section 13.16 of the Football NSW Regulations provides that, "*[u]nless the circumstances of a matter require otherwise, a Body must make a determination on the balance of probabilities."* "*Body"* includes the GPT and the AT.

67. The Player contended that the nature of this case required that the GPT and the AT be "comfortably satisfied" in accordance with the test laid out in in *Briginshaw v Briginshaw* (1938) 60 CLR 336. As Dixon J observed in *Briginshaw* (at 361-362):

> when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence...It cannot be found as a result of a mere mechanical comparison of probabilities. The standard is of 'reasonable satisfaction'…but reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer.... In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

68. The so-called *Briginshaw* principle is thus understood as requiring care in cases where serious allegations have been made or a finding is likely to produce grave consequences. Importantly, and despite some confusion on this point, *Briginshaw* does not alter the standard of proof, that is, on the balance of probabilities, as the High Court of Australia emphasised in its authoritative re-statement of the *Briginshaw* principle in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 at 449–50. In that case, the High Court held (at 170-171) that, "*…the strength of the evidence necessary to*

*establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove."* Thus, in a particular factual context, the more serious the misconduct alleged, the more cogent must be the evidence required to meet the civil standard of proof and thus to discharge the onus of proof.

69. Most recently in *Musa v Alzreaiawi* [2021] NSWCA 12 (19 February 2021) the NSW Court Of Appeal reiterated that the requirement in *Briginshaw* that there should be clear and cogent proof of serious allegations, does not change the standard of proof, but merely reflects the perception that members of the community do not ordinarily engage in serious misconduct.

70. The GPT was, contrary to the Player's submissions, correct in observing that *Briginshaw,* typically applies to cases involving fraud or dishonesty. However, it is not the only circumstances in which it may apply. Whilst, as the Player correctly observes, a standard akin to *Briginshaw* is applied by the Court of Arbitration for Sport, it does not apply universally in such cases, apart from those involving alleged anti-doping violations. It ultimately depends upon the seriousness of the conduct in question and is subject to any applicable rules or regulations governing the conduct.

71. In the present case, the Football NSW Regulations, relevantly prescribe the standard of proof to be on the balance of probabilities. It could but has not prescribed that proof to be to the level of "comfortable satisfaction". The matters with which the Player was charged relate solely to conduct on the field of play and, whilst they have a degree of seriousness, are not of a nature that warrant proof to the level of comfortable satisfaction.

## X. Consideration and Determination

### Issue 1: whether the GPT's decision to dismiss Charge 1, was reasonably open having regard to the evidence before it

72. Central to the resolution of this question is whether the act of "*blowing a raspberry*" as that term is colloquially known, comprises the offence of "*[s]pitting on an opponent*" for the purposes of Schedule 3, Table A, R3 Offence, Offence

Code 02-01, in circumstances where, in the course of doing so, some saliva from the Player made contact with an opponent.

73. Schedule 3, Table A, R3 Offence, Offence Code 02-01, relevantly provides that it is an offence to spit "*at an opponent or any other person*." "Spit" is not defined either in the LOTG or in the Football NSW Regulations. As the FFA Disciplinary and Ethics Committee found in the matter of *Papadopoulos* (8 December 2017), one thing that can be said about the offence is that it involves a "*directional requirement*", that is, the act of spitting must be directed "*at*" an opponent or any other person.

74. The GPT found, correctly in the view of the AT, that "*spat, spit or spitting*" is "*to eject saliva from the mouth*", whilst the act of "*blowing a raspberry*" involves a sound expressing derision or contempt made with the tongue and lips. There is no question, as the GPT found and common human experience reveals, that blowing a raspberry may result in releasing saliva particles into the air, which, of course, can make contact with another person. The question is whether the act of blowing a raspberry is tantamount to spitting and that, in turn, requires a consideration as to whether the release of saliva in such circumstances has the necessary directional requirement.

75. As to the first issue, there is no question in the view of the AT that "*spitting*" and "*blowing a raspberry*" are two distinct actions. "*Blowing a raspberry*" however, lacks one fundamental element that is common to the offence of spitting. Spitting involves a directional requirement of ejecting saliva at an opponent or any other person. It, of course, does not necessarily require saliva to have made contact with an opponent or any other person. "*Blowing a raspberry*" does not, in the view of the AT, comprise conduct by which a person directs saliva. Indeed, normal human experience dictates that "*blowing a raspberry*" may lead to a "spray" of saliva in an omnidirectional and uncontrolled manner not typically associated with spitting.

76. The AT will only intervene to set aside a determination on the ground that it is unreasonable if "*there was no information available to the tribunal on which reasonable and honest minds could possibly reach the conclusion"* (see *O'Donovan,* above*)* or if that evidence in its totality preponderates so strongly against the conclusion found by a tribunal that it can be said that the

conclusion was not one that a reasonable tribunal member could reach (see the cases referred to in [63] above).

77. For these reasons, the AT is of the view that the GPT's decision to dismiss Charge 1 was reasonably open on the evidence available to it.

**Issue 2: Did the evidence before the GPT in relation to Charge 1 support a finding of a lesser charge of - Schedule 3, Table C Offence Code 03-01 "Unsportsmanlike or unprofessional behaviour"?**

78. Section 13.11(f) is in the following terms:

> If a Tribunal is not satisfied to the requisite standard that a charge(s) before it has been proved, but is satisfied the different charge(s) has been proved, then provided the Member has been given an opportunity to address the Tribunal in relation to the different charge(s), the Tribunal must find the Member guilty of the different charge(s) and apply the appropriate sanction. A Tribunal may, in its absolute discretion, grant a Member, an adjournment for the purposes of answering the different charge(s).

79. The Player was not charged with the alternative offence of "*unsportsmanlike or unprofessional behaviour*." However, section 13.11(f) does not require a Member to, in fact, be charged with an alternative offence for a Tribunal to find that person guilty of another charge.

80. A tribunal must not find a person guilty of another charge unless the following requirements are met:

(a) it is not satisfied to the requisite standard that a charge(s) before it has been proved;

(b) it is satisfied that a different charge(s) has been proved;

(c) the person charged has been given the opportunity to address the Tribunal in relation to the different charge(s).

A tribunal may, in its absolute discretion, grant a person charged with an offence, an adjournment for the purposes of answering the different charge(s).

81. The Player claimed that he was not afforded the opportunity to address the GPT on a lesser charge of "*unsportsmanlike or unprofessional behaviour*." Football NSW does not challenge the truth of this assertion. There is no indication from its reasons that the GPT at any time considered such a proposition nor is there any

evidence that Football NSW made a submission to the GPT in this regard. Football NSW did not contend to the contrary.

82. In these circumstances, the AT is not satisfied that the Player was given the opportunity to address the GPT in relation to a lesser charge of "*unsportsmanlike or unprofessional behaviour*" and, accordingly, the issue does not and cannot arise by way of appeal.

83. For these reasons, the AT determines that the cross-appeal must fail and should be dismissed.

**Issue 3: Was the sanction imposed by the GPT in relation to Charge 2 reasonably open having regard to the evidence before it? More particularly, does the evidence support the downgrading of the charge of "Serious Violent Conduct" to "Violent Conduct" under Schedule 3, Table A, R2 ,Offence Code 02-01 and, if so, the appropriate sanction?**

84**.** The circumstances surrounding the incident which gave rise to Charge 2 are helpfully summarised at [72] and [73] of the GPT Determination. That summary is consistent with the video footage to which the AT has had regard. The GPT's account of the circumstances and the video footage is also consistent with the report of Assistant Referee Adabjou who was 10 metres from the incident and had a clear view of it.

85. The findings of the GPT in relation to Charge 2 are carefully recorded at [110] of its determination. The Player does not, in the main, challenge those findings. Relevantly, he does not dispute that:

(a) he kicked out his right boot in a backwards direction making contact with the face of an opponent, Mr Gonzalez;

(b) the incident caused bodily harm to Mr Gonzales in the nature of a blow to the head resulting in short-term dizziness and headaches; short-term pain at the top of the nose and facial lacerations and abrasions; and

(c) his actions in kicking out his right boot in a backwards direction, knowing that Mr Gonzalez was somewhere underneath him, involved the use of excessive force against an opponent when not challenging for the ball.

86. The Player does, however, dispute that the evidence supports a finding of "*serious violent conduct*" and that, by reference to an earlier decision of the GPT

in MGPT 20/01, the GPT in this case erred in failing to downgrade the charge from "*serious violent conduct*" to "*violent conduct*".

87. According to Schedule 3, Table A, R2 Offence, "*violent conduct*" is typically, but not limited to, the use or attempted use of excessive force against an opponent when not challenging for the ball, or against a teammate, club official, team official, match official or spectator. "*Serious violent conduct*", is violent conduct that has, relevantly, caused bodily harm.

88. The Player submitted that the conduct of Mr Araujo's in MGPT 20/01, "*…were significantly more violent, malicious and had the intention of striking the victim in the face when compared to the [Player's] incident. Mr Araujo's charge was downgraded… Based upon that precedent, it was not reasonably open to the GPT to find the [Player] guilty of Serious Violent Conduct*" and that the charge should have been downgraded to violent conduct. In support of his contentions, the Player refers to the principle of parity.

89. Firstly, as to MGPT 20/01, the AT makes the following observations:

(a) the parity principle is based on the concept that like cases should be treated alike and different cases differently: *Green v The Queen* (2011) 244 CLR 462; *Lowe v The Queen* (1984) 154 CLR 606;

(b) section 13.11(b) of the Football NSW Regulations provides that a Tribunal "*…may have regard to, but will not be bound by, its previous Determinations. The General Purposes Tribunal will be bound by Determinations of the Appeals Tribunal*;" and

(c) the Appeals Tribunal is not bound either by its previous Determinations or any determinations of any GPT.

90. Turning to MGPT 20/01, the AT is of the view that the parity principle does not apply in relation to the matter under consideration because the two cases are not alike, and thus the GPT did not err, as the Player contends, in failing to take a course similar to that taken by the GPT in the earlier case. Whilst both cases involved instances of serious violent conduct, that is where the similarity ends:

(a) In MGPT 20/01, the player, Mr Araujo initially pleaded not guilty but later changed his plea to one of guilty. Though not apparent from the

reasoning process, this is usually a factor that is taken into consideration by a tribunal when determining either to downgrade a charge or in relation to sanction, more generally;

(b) Mr Araujo accepted in his written statement that he had struck the opposing player with the studs of his boot along his chin and down his neck. Again, such a frank admission of guilt appears to have been taken into account by GPT in mitigation of sanction;

(c) there is otherwise no detailed or other reasoning to enable a relevant comparison to be made between the two decisions.

The GPT was accordingly entitled, in the view of the AT, to have considered the case before it solely on the evidence adduced and otherwise on its merits.

91. The findings of the GPT recorded at [110] of its determination and summarised at [85] of these reasons are wholly consistent with the video evidence, the report of the Assistant Referee and the injuries to Mr Gonzalez's face depicted in photos taken immediately after the incident.

92. The AT is satisfied to the requisite standard that there was ample evidence to support the findings of the GPT of "*serious violent conduct*" and that the GPT was justified, on that evidence, to decline to downgrade the charge to one of violent conduct.

93. Further, for the reasons outlined, the AT does not consider there to be any relevant parity between the present case and that of MGPT 20/01. Even if there was, the GPT was not bound to follow it and was entitled, as it did, to deal with the matter on its own merits.

94. The Player's conduct, on any objective view, was "*Serious Violent Conduct*". The appeal should accordingly be dismissed.

95. As to sanction, the AT is not persuaded that it should disturb the determination of the GPT of MMS + 12 weeks.

## XI. Relief

96. The appeal of the Player is dismissed.

97. The cross-appeal of Football NSW is dismissed.

98. The GPT Determination is affirmed.

A P Lo Surdo SC
Chair
Appeals Tribunal
Football NSW