APPEAL TRIBUNAL OF FOOTBALL NEW SOUTH WALES
DETERMINATION IN THE FOLLOWING MATTER:

Member	The Entrance Bateau Bay Football Club
Decision appealed	Decision of Central Coast Football Appeals Tribunal
Date of Decision	6 July 2018
The basis upon which the matter is before the Appeals Tribunal	Sections 10.1(d) and 10.6 of the Football NSW Grievance and Disciplinary Regulations, 2018
Ground(s) of Appeal	Sections 10.3(c) and (e) of the Football NSW Grievance and Disciplinary Regulations, 2018
Date of Hearing	20 September 2018
Date of Determination	21 September 2018
Appeals Tribunal Members	Graham Turnbull SC, Chair Julia Sorbara, Member David Stanton, Member

Introduction and Jurisdiction

1. The Appeals Tribunal (**AT**) has been established in accordance with sections 4 and 10.1 of the Football NSW Grievance and Disciplinary Regulations, 2018 (**FNSW Regulations**) to determine appeals from the Disciplinary Committee (**DC**), the General Purposes Tribunal (**GPT**) and Member Appeals Committees (**MAC**). "Body" is defined in the Regulations to mean a body established under section 4 of the Regulations and relevantly includes the purposes of an appeal to the AT, the DC and the GPT.

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

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

b. lack or excess of jurisdiction of a Body or a Member Appeals Committee;

c. the decision of a Body or Member Appeals Committee was affected by actual bias;

d. the decision was one that was not reasonably open to a Body or Member Appeals Committee having regard to the evidence before the decision-maker;

e. severity, but only where a Body or a Member Appeals Committee imposed one or more of the following sanctions and then only where that sanction is greater than the Minimum Sanction/Suspension applicable to the relevant Offence:

   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 three (3) or more months; or

   iii. a fine of three thousand dollars ($3,000) or more; or

   iv. a bond to be of good behaviour of three thousand dollars ($3,000) or more;

   v. a deduction, loss or ban on accruing six (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;

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. This appeal is from a MAC pursuant to section 10.6 but only where the matter has proceeded in accordance with, and exhausted, that member's own disciplinary/grievance Rules and regulations.

4. 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) a Determination, including any sanction or penalty made by a Body or a MAC, as the case may be;

b. subject to any applicable Minimum Suspension, impose any sanction, measure or make any order it thinks fit or that a Body or MAC, as the case may be, could have imposed under the Regulations or its regulations, as the case may be;

c. conduct a fresh hearing of the matter (***hearing de novo***); or

d. refer 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 FNSW Regulations)

Background facts

5. This appeal arises from a series of unfortunate events that occurred on Sunday 17 June 2018 at Pat Morley Oval on the Central Coast. On that occasion, a third-grade football match was being played between The Entrance Bateau Bay Football Club (**TEBBFC**) and Kanwal Warnervale Football Club (**Kanwal)**.

6. Mr Hall was a player and captain of TEBBFC side. During the course of the second half, a foul was committed by a TEBBFC player on a Kanwal player. As a result of this foul, Kyle Adams of TEBBFC and Andrew Halliwell from Kanwal, commenced to fight. Video footage of the fight reveals that it lasted a number of seconds however was significantly violent to result in Mr Halliwell being sent from the field as he was bleeding profusely. Mr Adams was shown a red card by the referee and left the field.

7. Mr Hall ran to the area where the fight was occurring in order to extricate Mr Halliwell. He was successful in doing so and Mr Halliwell left the field to seek medical attention for his wounds.

8. Following this, Mr Hall says as follows: -

> *"After this had simmered down, I then went over to the referee to talk with him being the captain of The Entrance side. He said both players will be shown red cards for their part in the incident, Ryan Wilson who committed the original foul at the time would also to be shown a yellow card. I agreed entirely with the referee and went to get the two players from my side who would be shown cards".*

9. At this stage, two members of the coaching staff of Kanwal had entered the field of play, namely Rob Walker and Ryan Walker. Mr Hall questioned why they were present and they explained their presence on the basis that they were there to protect players who were fifteen years of age. It appears that a number of junior players were playing in the game with TEBBFC fielding three player where were fourteen, fifteen and sixteen years of age. An argument occurred between Mr Hall and the coaching staff.

10. The referee then walked towards the Kanwal technical area. Mr Hall accompanied him. A spectator then shouted abuse at TEBBFC players resulting in Mr Hall stating, "*Fuck off, the ref will sort it out, it has nothing to do with you"*.

11. Mr Hall described the events that followed in the following terms: -

> *"At this instance, Rob Walker took offence to this, pushing me chest on chest. I didn't move and stood my ground. Ryan Walker then commented "That's my fucking dad". Rob Walker then jabbed with his right fist under the ribs, at the same moment Ryan Walker threw a haymaker from over his father's left shoulder. It appeared to me that he jumped off the stainless-steel benches we had there and threw the haymaker all in the same motion. I managed to duck out of the way before it connected with the side my head. Rob Walker and I then ended locked up with each other, both throwing short upper cuts at one another. It was at this time*

the entire Kanwal bench and a couple of supporters ran in, stomping on Rob Walker and myself who had now gone to ground with people also on top of us. This was all over within a minute as Troy Campbell managed to get in and pick me up off the ground and get me out safe".

12. Mr Hall's description misses one important fact. The referee, Stuart Golding, was in the middle of the melee when it commenced and was struck on the right side of his head and knocked unconscious. He later received medical attention from an attending ambulance officer.

13. As may be anticipated, a number of individuals were charged with offences under the Central Coast Football (**CCF**) Grievance and Disciplinary Regulations 2018.

14. Relevant to TEBBFC appeal the following charges were brought against TEBBFC by Central Coast Football: -

• Breach of the CCF Code of Conduct (such Code requiring members of CCF to):
– Conduct yourself in a manner that enhances the reputation and goodwill of football on the Central Coast.
– Respect the decisions of match officials & teach children to do the same.
– Not use violence in any form, whether it is against other spectators, Team Officials (including coaches) Match Officials or Players

• 8.2 Team Misconduct – The Entrance BPL Third Grade
a) Each Club must ensure that its Participants do not engage in Team Misconduct.
b) Team Misconduct in relation to a Club is where, in a Match:
iv) its Participants engage in a melee or brawl in a Match (regardless of whether or not it is possible to identify the instigators).
c) Any Club which engages in Team Misconduct will be deemed to have committed Misconduct and CCF may, in its absolute discretion, take any relevant action against the club pursuant to section 8.1(Charges of Misconduct and Disrepute).

15. On 21 June 2018 the General Purposes Tribunal (**GPT**) found the charges against TEBBFC proven. The following penalty was handed down by the GPT against TEBBFC: -

a. Breach of the CCF Code of Conduct;

i. A monetary fine of $2,000;

ii. A good behaviour bond of $2,000 until 31 December 2020;

b. Team misconduct charge:

i. Deduction of 16 competition points for 2018;

ii. All remaining BPL games for 2018 to be played on a neutral ground.

16. The above offences occurred during a period when TEBBFC was on a bond resulting from charges brought against it in 2017. A condition of the bond was that a breach would result in the imposition of the following penalty:

    a. A fine of $2,000;

    b. Removal of all BPL home games to a neutral venue for 12 months from the date of the breach.

17. The GPT invoked the penalties mentioned in [16] above for the breach of the bond.

18. TEBBFC appealed the decision of the GPT. The appeal was limited to the issue of severity. The Central Coast Football Appeals Tribunal (**CCFAT**) heard the appeal on 6 July 2018 and dismissed the appeal.

19. After doing so, the CCFAT varied the penalty in relation to the 2018 offences and entered the following penalty:

    a. A monetary fine of $1,000;

    b. A good behaviour bond of $2,000 until 31 December 2020;

    c. A deduction of 16 competition points from the 3rd Division team for the 2018 competition year;

    d. All BPL games for remainder of 2018 and for all of 2019 to be played away, or at a neutral venue if an away game is not possible, at the discretion of CCF. Should TEBBFC play in the Division 1 competition in 2019, the same no home games ruling would apply.

20. An appeal regarding the imposition of a penalty for breach of the 2017 bond was dismissed on the basis that if the penalty for a breach was considered to be too harsh, TEBBFC should have exercised its appeal right in 2017 and failed to do so, accordingly any appeal right was well out of time and no right remained.

21. TEBBFC now appeals the determination by the CCFAT to the Appeals Tribunal. It appeals on the basis that the decision of the CCFAT was affected by actual bias (10.3(c) FNSW Regulations) and on severity (10.3 (e) (ii) FNSW Regulations).

The Nature of the Appeal

10.3 (c) "The decision of a Body or a Member Appeals Committee was affected by actual bias".

22. The basis of this appeal is an allegation made by TEBBFC that during the CCF AT hearing, a comment to the effect that TEBBFC had a "culture problem" was stated. This was allegedly said "several times". In support of this ground, TEBBFC said as follows:

> *"It seems there were already prejudicial views and decisions before hearing the appeal and we believe this has been reflected in the determination. We do not have a culture problem but there is definitely an image or perception problem which we are and were trying to address."*

23. In a legal setting, actual bias is established in very limited circumstances. In *Reid v Commercial Club (Albury) Ltd*[1], the following summary of principles was stated:

> [68] **A finding of actual bias is a grave matter**: *Sun v Minister for Immigration and Ethnic Affairs* (1997) (*Sun v Minister*) 81 FCR 71 at 127 per Burchett J. Authority requires that **an allegation of actual bias must be distinctly made and clearly proved**; that **such a finding should not be made lightly**; and that **cogent evidence is required**: *South Western Sydney Area Health Services v Edmonds* [2007] NSWCA 16 at [97] and the authorities there cited.
>
> [69] **Where the issue is actual bias in the form of prejudgment, the appellant had to establish that the primary judge was "so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented**": *Minister for Immigration and Multicultural Affairs v JiaLegeng* [2001] HCA 17; 205 CLR 507 at [72] per Gleeson CJ and Gummow J (Hayne J agreeing at [176]). See also Kirby J at [127].

24. There has not been evidence to prove prejudgment by the CCFAT in this matter. Rather, the highest the evidence establishes is that during the hearing, a comment to the effect that TEBBFC had a "culture problem" was stated. Such a remark must be seen in light of the fact that the CCFAT was considering both the 2018 incident and the consequential breach of the 2017 bond. That bond had been entered following an earlier breach of the CCF Grievance and Disciplinary Regulations by TEBBFC. The 2017 matters related to an inability of TEBBFC to control the behaviour of its supporters. In support of its appeal to the CCFAT in 2017, the TEBBFC said as follows:

> *"From the events that occurred (off the field) both clubs need to review their instructions to their respective teams and how the implementation of the "team officials" should be managed on game day. Our club will follow through with better and more thorough instructions to our teams to ensure this type of event can be averted at an early stage and to not escalate."*

25. In light of the fact that in 2018 the CCFAT was again hearing a matter involving TEBBFC's inability to control its players and spectators, we do not see the remark complained of to be anything else but a comment consistent with the repeated breaches of the Regulations. Further, if TEBBFC had "followed through" as it said it would in 2017, it is unlikely that it would have found itself in breach of the Regulations in 2018.

26. It should also be noted that the suggestion of a culture problem emanated from TEBBFC. In its submissions before the CCFAT it said as follows:

"As a totally new committee for the 2018 season we recognised the club's troubled past and poor reputation within the football community. There is a strong appetite amongst us to bring a cultural change throughout the club. This change was starting to happen before the recent unsavoury incident with the advent of a much more family friendly atmosphere, a strong focus on our junior teams, developing a clear pathway for juniors to develop within our ability based and free TEBBFC Academy and producing improved governance for the overall

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1 [2014] NSWCA 98 at [68]–[69] (Gleeson JA, Emmett JA and Tobias AJA agreeing).

club. We are about implementing this change in culture and raising our reputation within the local community and will make these firm decisions in the best interests of the club. Nothing else is higher in our minds."

27. The use of the phrase "culture change" by an unidentified speaker at the CCF AT hearing, a statement that was not apparently repeated, seems to be a phrase consistent with the belief of TEBBFC. During the course of the hearing before this tribunal when these matters were raised TEBBFC seemingly accepted that this ground, in the circumstances, could not be made out.

28. This ground of appeal is not established.

10.3 (e) (ii) "Severity"

29. On 17 September 2018, Football NSW provided submissions to the AT. Within the submissions was a challenge to the jurisdiction of the AT to determine the appeal in relation to severity.

30. Football NSW submitted that the sanctions imposed by the CCFAT did not meet the relevant threshold required under section 10.3(e) of FNSW's Regulations and accordingly, the Football NSW AT had no jurisdiction to determine the appeal on severity.

31. Section 10.3 of the FNSW Regulations is reproduced in paragraph 2 of the judgment above.

32. One can see from the monetary fine imposed in respect of the 2018 offence, that it is below the monetary threshold referred to in s 10.3(e)(iii) of the Regulations. Likewise, the bond is also below the threshold under s 10.3(e)(iv). That being so, each of those components of the severity appeal do not engage the jurisdiction of the AT.

Potential Defect in the Regulations

33. The relief sought by TEBBFC was as follows: -

    a. Reinstatement of BPL Home games;

    b. Reduction of all penalties imposed to no more than $2,000 (the entire financial penalty imposed was $3,000 when one considers the breach of the 2017 bond);

    c. No relief was sought in respect of the competition points that were removed.

34. Section 10.3 of the FNSW Regulation does not make provision for the AT to have jurisdiction in circumstances where home games are moved to a neutral ground. The financial loss to a club from this occurring may be considerable. It appears to the AT that the right of appeal on severity ought to be granted for orders such as these, given the financial implications to a Club affected by such an order.

35. There are other reasons for permitting the AT to review such a penalty. Penalties of this sort are not uncommonly imposed and accordingly, consistent with the regime established, a right to appeal them ought to exist as a matter of fairness.

36. Penalties of this sort can have serious consequences. Apart from the obvious financial loss, there is a loss of a sense of community, particularly to Clubs who

encourage the junior ranks to attend home games played by other teams within the Club. A penalty of this sort can have a significant effect on the finances of a club even threating its viability.

37. Often, the deficiency in a Regulation may be seen by looking at an extreme. If for example, the CCFAT banned home games for ten years, there is as the regulation now stands no power in the AT to review this decision. That should surely not be the intention of the Regulations to remove the right to appeal on the basis of severity, a penalty that may impact one of the members of Football NSW to such an extent that the viability of the Club becomes threatened.

38. It is apparent to the AT that there is a significant omission in the codified grounds for appeal laid out in the regulations and it respectfully suggests that consideration be given to urgently reviewing the regulations with a view to resolving this evident defect. Indeed, it is apparent that there may be other sanctions which could be imposed which don't fall within the codified grounds, for example, closing the ground to spectators.

Issue

39. TEBBFC attempted to accumulate the penalties that had been entered against it in order to overcome the jurisdictional difficulty it faced. Such an approach however, is impermissible. The monetary penalties total $3,000 however, they are in respect of different offences. The first penalty for the 2018 breach of the Code of Conduct was $1,000. The next penalty of $2,000 resulted from a breach of the bond that was entered into in 2017. That was not a penalty imposed by CCFAT as a result of the 2018 incident but rather, a penalty imposed from an incident that occurred in 2017. We believe the CCFAT was correct in dismissing the appeal in respect of the 2017 breach (see above [20]).

Discussion and Decision

40. For these reasons, we believe Football NSW's submission that the AT does not have jurisdiction to consider the severity appeal is correct.

41. There is however a more fundamental difficulty with the decision of the CCFAT. The AT notes that the CCFAT determined that each ground "is dismissed".[2] Those were the terms of the determination.

42. Notwithstanding the determination set out above it then proceeded to vary the penalty and whilst it reduced the monetary fine, it increased considerably the number of home games that now needed to be played at a neutral ground.

43. The Central Coast Grievance and Disciplinary Regulation 2018 outlines the power of the CCFAT (**the CCF Regulations**). In particular, under the CCF Regulations, the following power was provided to the AT: -

> "13.4 Decisions of the Appeal Tribunal
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> (a) An Appeals Tribunal determination will be in accordance with the majority opinion of the Appeals Tribunal members;
>
> (b) The Appeals Tribunal has the power to: -

[2] *GPT Decision* [47], [51] and [55].

i. Dismiss, allow in whole, or in part, an appeal, or vary (whether by way of reduction or increase) a determination, including any sanction or penalty, made by a body or a member appeals committee as the case may be;

ii. Subject to any applicable minimum suspension/sanction and maximum suspension, impose any sanction, measure or make any order it thinks fit or that a body or member appeals committee, as the case may be, could have imposed upon these regulations or its regulations as the case may be;

iii. Conduct a fresh hearing of the matter (de novo); or

iv. remit the matter to the Body or the Member Appeals Committee 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 Appeals Tribunal deems appropriate"

44. CCFAT submitted that this Regulation provided a wide power that permitted it to impose the sanction it considered to be appropriate in the circumstances. Section 13.4(e) of the CCF Regulations would appear to achieve this purpose. It provides as follows:

> "The Appeals tribunal has the power to either reduce or increase any sentence being appealed against and to impose further penalties as they see fit."

45. There can be little doubt that the power is a wide one.

46. We make the observation that s 13.4 of the CCF Regulations is inconsistent with the Appeal provisions contained in s 10 of FNSW Regulations. In particular, s 13.4(e) of the CCF Regulations does not have an equivalent regulation in FNSW Regulations. In the case of conflict between the two regulations, FNSW has the power to decide which regulation takes precedence (see section 1(g) of FNSW Regulations) and the FNSW Regulations apply exclusively to any disciplinary matter (section 3(a) of the NSW Regulations). Furthermore, such an approach ensures the objective of consistency and transparency of approach in respect of the handling of all disciplinary matters involving Members of FNSW (see s 2(d) of FNSW Regulations).

47. In these circumstances, CCF should consider reviewing their Regulations to the extent they are inconsistent with FNSW Regulations bearing in mind what is set out above.

48. TEBBFC complains that the CCFAT did not give notice to the Cub that it was contemplating imposing a greater penalty than that imposed by the GPT determination. CCFAT confirmed that no notice of its intention to do so was given to the Club. A similar circumstance was raised and dealt with before a differently constituted AT in Wollongong United FC v Football South Coast. In that judgment, the AT said as follows: -

> 23. The basis of the application by WU was that the FSC Appeals Committee had not given notice to WU that it was contemplating imposing a greater penalty than that imposed by the GPT determination. In the criminal law,

this is known as a failure to provide a Parker direction. In McL v R, Kirby J said the following regarding a Parker direction:-

"For a long time, appellate courts in Australia have followed a practice of informing an appellant when the court has reached a tentative conclusion that, as a result of invoking the appellate process, the appellant stands in risk of a punishment more severe than that previously imposed. The purpose of providing such a notice includes that of affording the appellant, in an appropriate case, the opportunity to consider withdrawing or seeking leave to withdraw the appeal or part of the appeal so as to avoid an outcome that could not have been contemplated in initiating the appeal. Additionally, such a notice gives the appellant the opportunity, by evidence and argument, to persuade the appellate court to change its tentative opinion. Support for viewing such a notice as included in the fair conduct of proceedings before an appellate court in Australia can be found in decisions of this Court.

Although the principle just stated applies more generally to appellate proceedings, it has special significance in a criminal appeal in which a tentative view is formed by the appellate court that, in its disposition of the appeal, a more severe punishment of the appellant might be called for. Because imprisonment is the most severe sanction known to the criminal law in Australia, the provision of notice will ordinarily apply with particular force where the appellate court is contemplating the substitution of a sentence of imprisonment for a non-custodial sentence or an increase in custodial punishment. In this regard, the content of the requirement of procedural fairness is concerned with the effect on the punishment if it were altered. Because the requirements of procedural fairness depend upon all the circumstances, the obligation has not settled into a rigid Rule of law. It does not oblige a court to spell out all of the detriments that may conceivably flow to an appellant. At least where the appellant is legally represented and it is not apparent that such a representative has failed to appreciate a warning once given, it is not essential to express in fine detail what may follow if the appeal proceeds to finality. The content of the obligation of procedural fairness in such a case depends on the circumstances and the procedure by which the complaint concerning the want of procedural fairness is raised."
(see McL v R (2000) 203 CLR 452 at [125]-[126]

24.The question is whether a Parker direction has any application in appeal proceedings before a sporting tribunal? Obviously in a criminal context, it is relevant given the risk to liberty if an appeal is unsuccessful. Such considerations do not apply before a sporting tribunal.

25. Be that as it may, FSC submitted that in the circumstances the application to amend the appeal grounds should not be granted as to do so would delay the determination of the appeal and require further evidence to be called by those who conducted the appeal regarding the nature of the discussions that

took place before the Appeal Panel (such discussions taking place in the absence of FSC).

26. A further submission made by FSC is that in an appeal process that does not involve lawyers, one needs to avoid being too technical in dealing with an appeal. The AT believes there is merit in this submission. It must be remembered that generally football is conducted throughout the State by volunteers who devote their time and energy for the purpose of the sport. Such volunteers conduct disciplinary hearings and appeals on behalf of various football bodies in order to ensure the proper application of Rules that apply to particular competitions. The application of strict legal Rules is too onerous upon such bodies, particularly in the absence of a right to be legally represented (which is often the case in disciplinary Rules throughout various football associations).

27.There is obviously an advantage in an appeal tribunal indicating to an appellant its intention to impose a greater penalty. To do so would permit an otherwise aggrieved appellant an opportunity to reconsider its position and ultimately save time and expense to all involved in the process by withdrawing the appeal. Furthermore, if an appellant is notified of the prospect of a greater penalty being imposed, it affords the appellant an opportunity to dissuade the appeal tribunal from embarking upon that course."

49. TEBBFC confirmed before the AT that if it had known that the CCFAT intended to increase the penalty, then the severity appeal would have been withdrawn. This of course, would have saved both the CCFAT and the present AT considerable time, not to mention the time, effort and expense involved in both the TEBBFC and CCF dealing with an appeal that would not have proceeded in that circumstance. It is a practical example of the very matter that was dealt with by the AT in the Wollongong FC case. We encourage all member Appeal Tribunals to consider carefully whether they intend to increase a penalty and if a preliminary view is formed that that is an appropriate course to take, that fact be communicated to the appellant at an early stage to permit the appellant an opportunity to consider its position.

50. Whilst there would appear to be no requirement under the CCF Regulations for CCFAT to give notice of an intention to impose a greater penalty upon hearing an appeal against severity, it appears to us that a failure to do so may result in a failure to afford a Member Club a reasonable opportunity to present its case. Such a failure will then invoke the jurisdiction of the FNSW AT as a failure to offer a party a reasonable opportunity to present its case is the first permissible ground of appeal (see s 10.3(a) of FNSW Regulations).

51. In oral submissions before the AT, TEBBFC indicated that if it had been on notice that the CCFAT intended to impose a greater ban on the number of home games, it would have prepared evidence to indicate the extent of the financial loss to the Club through the loss of such games. In its written submissions, TEBBFC stated the extent of the home game ban represented a $30,000 loss of income to the Club. This is a considerable sum of money. Such evidence would be relevant to the consideration by CCFAT of the impact of increasing the penalty determined by

the GPT. As TEBBFC was not given this opportunity, it was not afforded a reasonable opportunity to present its case. As a result, the CCFAT erred.

52. In these circumstances, the determination of CCFAT is quashed.

53. The orders of the AT are as follows:

    a. The appeal by TEBBFC is upheld;

    b. The determination of the CCFAT dated 6 July 2018 is quashed;

    c. The determination of the GPT dated 21 June 2018 is reinstated.

Graham Turnbull SC
Chair
Appeals Tribunal
Football NSW