

FINAL NOTICE OF DETERMINATION
26 April 2023



Reference is made to the following Tribunal:

1. Date of the Tribunal Submissions on Sanctions	22nd March 2023 20th April 2023
2. Tribunal that heard the case	General Purpose Tribunal (GPT)
3. Tribunal reference number	GPT 23-07
4. Tribunal Members	David LEWIS (Chair) Anthony SCARCELLA (by video) Robert IACONIS
5. Venue of Tribunal	Football NSW
6. Time of Tribunal	6.30pm
7. Respondent	Sydney United 58 FC
8. Key Words	<i>Schedule 3, Table C, Offence Code 10-01 - "Use discriminatory, homophobic, racist, religious, ethnic or sexist language and/or gestures". "Schedule 3, Table B, Offence Code 08-01 - "Use discriminatory, homophobic, racist, religious, ethnic or sexist language and/or gestures".</i>
9. Finding & Sanction	Guilty of Charges 1 & 4 Not Guilty of Charges 2 & 3 Sanction: Fine and suspended sanctions on page 11.

This document constitutes a Final Notice of Determination resulting from the Tribunal hearing listed above.

Charges against the **Respondent** under Sections 9.2, 16.4 and 16.6 of Football NSW Grievance and Disciplinary Regulations 2023 for alleged breaches of the Football NSW Regulations related to incidents during a NPL NSW Men's First Grade match between Sydney United 58 FC (SUFC) and APIA Leichhardt FC (APIA) on 19 February 2023 at Sydney United Sports Centre.

Football NSW Limited

PO Box 6146, Baulkham Hills BC NSW 2153 | 235 – 257 Meurants Lane, Glenwood NSW 2768
Phone: +61 2 8814 4400 | Fax: +61 2 9629 3770 | www.footballnsw.com.au | ABN 25 003 215 923

Summation of the Tribunal:

The Respondent pleaded NOT GUILTY to the Charges and the Tribunal found that the evidence and submissions:

Supported in part the Charges brought against the Respondent in that it found the Respondent:

Guilty of Charge 1
Not Guilty of Charge 2
Not Guilty of Charge 3
Guilty of Charge 4

Charges and Pleadings:

Charge 1

During the course of the NPL NSW Men's First Grade match between Sydney United 58 FC (SUFC) and APIA Leichhardt FC (APIA) on, 19 February 2023 at Sydney United Sports Centre (Match), SUFC Supporters standing on the far side of the ground (or "the hill side", an area traditionally occupied by Supporters associated with SUFC) used words to the effect of:

- a) *"7 go play with your sticks";*
- b) *"Number 7 you dirty Aboriginal cunt";*
- c) *"You stink";*
- d) *"Go suck your boyfriend's dick you faggot 7"*
- e) *"You should be caring [sic] your rainbow flag you bitch"; and*
- f) *"Come spit on my dick you faggot, you would love that",*

towards Jack Stewart, an APIA player wearing jersey number 7.

The conduct of the SUFC Supporters is, pursuant to sections 19(f) and 16.6(a) of the Regulations, a breach by SUFC of section 16.4(d) of the Regulations, namely:

- Schedule 3, Table C - Offence Code 10-01 *"Use discriminatory, homophobic, racist, religious, ethnic or sexist language and/or gestures"; or, in the alternative,*
- Schedule 3, Table C - Offence Code 07-01 *"Use offensive, insulting, or abusive language and/or gestures (repeated and/or excessive conduct)".*

Charge 2

During the course of the Match, SUFC Supporters standing on the far side of the ground (or "the hill side", an area traditionally occupied by Supporters associated with SUFC) used words to the effect of *"dirty lebo"* and *"run you lebo bitch"* towards Yianni Nicolaou, an APIA player wearing jersey number 38.

The conduct of the SUFC Supporters is, pursuant to sections 19(f) and 16.6(a) of the Regulations, a breach by SUFC of section 16.4(d) of the Regulations, namely:

- Schedule 3, Table C – Offence Code 10-01 *“Use discriminatory, homophobic, racist, religious, ethnic or sexist language and/or gestures”*; **or, in the alternative,**
- Schedule 3, Table C – Offence Code 07-01 *“Use offensive, insulting, or abusive language and/or gestures (repeated and/or excessive conduct)”* **or, in the alternative;**
- Schedule 3, Table C – Offence Code 06-01 *“Use offensive, insulting, or abusive language and/or gestures (isolated incident)”*.

Charge 3

During the course of the Match, SUFC Supporters standing on the far side of the ground (or “the hill side”, an area traditionally occupied by Supporters associated with SUFC) used words to the effect of *“Cypriot/Turkish cunt”* towards Michael Kouta, an APIA player wearing jersey number 21.

The conduct of the SUFC Supporters is, pursuant to sections 19(f) and 16.6(a) of the Regulations, a breach by SUFC of section 16.4(d) of the Regulations, namely:

- Schedule 3, Table C – Offence Code 10-01 *“Use discriminatory, homophobic, racist, religious, ethnic or sexist language and/or gestures”*; **or, in the alternative,**
- Schedule 3, Table C – Offence Code 07-01 *“Use offensive, insulting, or abusive language and/or gestures (repeated and/or excessive conduct)”* **or, in the alternative;**
- Schedule 3, Table C – Offence Code 06-01 *“Use offensive, insulting, or abusive language and/or gestures (isolated incident)”*.

Charge 4

During the course of the Match, SUFC Supporters standing on the far side of the ground (or “the hill side”, an area traditionally occupied by Supporters associated with SUFC) used words to the effect of:

- a) *“Do you suck the ref’s dick”*;
- b) *“I’ll fuck you up the arse”*;
- c) *“Faggot”*;
- d) *“Fuck you ref”* and
- e) *“Keep the flag down if you’re gay”*

towards Daniel Cornofsky, the Second Assistant referee (AR2).

The conduct of the SUFC Supporters is, pursuant to sections 19(f) and 16.6(a) of the Regulations, a breach by SUFC of section 16.4(d) of the Regulations, namely:

- Schedule 3, Table B – Offence Code 08-01 *“Use discriminatory, homophobic, racist, religious, ethnic or sexist language and/or gestures”*; **or, in the alternative,**
- Schedule 3, Table B – Offence Code 05-01 *“Use offensive, insulting, or abusive language and/or gestures (repeated and/or excessive conduct)”* **or, in the alternative,**
- Schedule 3, Table C – Offence Code 10-01 *“Use discriminatory, homophobic, racist, religious, ethnic or sexist language and/or gestures”*; **or, in the alternative,**
- Schedule 3, Table C – Offence Code 07-01 *“Use offensive, insulting, or abusive language and/or gestures (repeated and/or excessive conduct)”* **or, in the alternative;**

- Schedule 3, Table C – Offence Code 06-01 “Use offensive, insulting, or abusive language and/or gestures (isolated incident)”.

On 13 March 2023, Football NSW issued the **Respondent** with a Notice of Charge in relation to the above matters.

Pleadings

The Respondent pleaded NOT GUILTY to all Charges in its Notice of Response to Football NSW.

The Respondent was represented by Mr Leonard Lozina, Solicitor of Stevens Vuaran Lawyers.

Respondent’s Notice of Response

The Respondent made the following written submissions in its Notice of Response:

Charge 1

The charge should be dismissed. There is insufficient evidence to find the charge proven. The standard of proof that needs to be discharged is on the balance of probabilities, taking into account the principles outlined in *Briginshaw v Briginshaw* [1938] HCA 34 As most recently interpreted by the High Court in *Neat v Karajan Holdings* [1992] HCA 66 where it was stated:

“The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, 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, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary ‘where so serious a matter as fraud is to be found’. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.” (Mason CJ, Brennan, Deane and Gaudron JJ)

“But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proven. 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 to the question whether the issue has been proven to the reasonable satisfaction of the tribunal” (Dixon J at 361-1)

The charge is a serious one and with heavy consequences for the Club with insufficient evidence for the Tribunal to find against the Club that the alleged conduct was committed by supporters of the Club.

Charges 2 and 3

The submissions for Charge 1 were repeated in response to Charges 2 and 3.

Charge 4

The submissions for Charge 1 were repeated in response to Charges 4 in addition to the following Alternative Submission:

"In the alternative, should the Tribunal find against the Club (which is disputed), there is no evidence that the Club was in any way culpable for the actions of its supporters or that the Club did in any way abrogate from its responsibilities. If (sic.) fact the evidence is that Club went above and beyond its responsibilities to prevent any issues arising from any supporters attending the fixture."

Respondent's Evidence

The Respondent tendered written statements from the following witnesses:

Ante Zekanovic
Antoni Zovko
Autun Brcic
Christian Gonzalez
David Dusevic
Hamish O'Rourke
Hassan Abbas
Izabela Blazevic
Mark Labas
Matthew Bilic
Mr Matthew Sabo
Patrick Cunningham
Steven Puskaric
Taha Al Salami
Vice Bazdaric
Philip Keegan
Rodney Macnamara
Sajad Al Salemi
Mark Ivancic

The Respondent did not call any of these witnesses to give oral evidence and Football NSW did not seek to cross examine any of these witnesses. All of these statements confirm that the relevant deponent did not hear any of the words or abuse that were the subject of all of the Charges.

The Tribunal noted that it accepted this evidence albeit it would give such weight to these statements as it deemed fit.

The Respondent in its amended Notice of Response advised Football NSW that it only sought to cross examine the following witnesses all of whom were APIA players:

Jack Stewart (sic. Stewart) in relation to Charge 1;
Yianni Nicolaou in relation to Charge 2; and
Michael Kouta in relation to Charge 3.

The Proceedings - Charge 1

Jack Stewart, an APIA player, provided three statements to Football NSW: Annexures A1, A2 and A3. Mr Leonard Lozina for the Respondent objected to the inclusion of Annexure A2. The Tribunal noted his objection and advised that it would be given such weight as would be appropriate for its contents. No submissions were made relating to the contents of this Annexure and the Tribunal did not rely on its contents.

Mr Stewart gave very lengthy oral evidence to the Tribunal during which he was questioned at length by Mr Lozina. Mr Stewart confirmed that he complained to his captain, the referee and to the assistant referee at various times during the match to advise them of the abuse that he was subject to from the Sydney United supporters on the hill side of the ground.

Mr Stewart identified several instances from the match video where he could be seen pointing to the assistant referee and/or identifying areas on the hill from which he claimed he was subject to abuse. He noted that whilst he was not overly concerned by the homophobic slurs, he was highly offended by the racial comments that were directed to him in relation to his aboriginal heritage.

Mr Lozina tested Mr Stewart's evidence at length particularly in relation to any alleged bias he may have towards Sydney United, his alleged attempt to ensure that Sydney United would not be admitted to the proposed B League by way of these false allegations, that he was lying and that the alleged abuse did not happen.

Mr Lozina suggested to Mr Stewart that the fact that the AR did not report that he had heard abuse of Mr Stewart meant that it did not happen. Mr Stewart denied this although he could not explain why the AR did not hear it.

Mr Stewart identified a part of the crowd opposite the position of the camera on the hill area as the source of the continual abuse. He claimed that this was an area frequented by Sydney United supporters and that he was certain that's where the abuse came from. Mr Lozina suggested to Mr Stewart that he could not be certain that the abuse came from Sydney United supporters and that indeed it could have come from anyone on that hill. Mr Stewart noted that he had played for Sydney United for a number of years in the past and he was aware that the hill position was the area where Sydney United supporters congregated and whilst he was unable to identify individuals, he was certain that the abuse came from Sydney United supporters and not from anyone else. He said that it did not make sense for the abuse to come from APIA supporters or indeed from neutral supporters.

Mr Stewart became quite emotional when discussing his aboriginal heritage, of which he was very proud, and that the racial abuse to which he was subjected was very hurtful.

Mr Crepaldi for Football NSW asked Mr Stewart if he was motivated to make these allegations in an attempt to ensure that Sydney United could not qualify for the B league. Mr Stewart said that this thought never entered his mind and that he was telling the truth. He said that there was no benefit to him at all in making these allegations and had he known that making them would have resulted in such an inquisition he would not have proceeded.

Mr Crepaldi also asked Mr Stewart about a Football NSW article written about him on 4 July 2022. Mr Stewart confirmed that this article identified his aboriginal heritage and that his heritage was public knowledge after the publication of that article.

Mr Stewart was an excellent witness, who gave his evidence in a forthright manner without embellishment. He did not resile from his allegations at any time during the cross examination and the Tribunal found him to be a credible and honest witness.

Further, the Tribunal noted that it was incredible that not one of the spectators heard any abuse of Mr Stewart yet a number of them heard Mr Stewart call a young Sydney United fan "fat".

The Proceedings – Charge 2

Mr Yianni Nicolaou gave oral evidence to the Tribunal and was cross examined by Mr Lozina.

During the course of his evidence Mr Nicolaou suggested that a person wearing a black t-shirt abused him for 2 to 3 minutes in the 58th minute of the match when he was outside the field of play sitting on the ground near halfway on the hill side of the ground. He was sitting as he had been fouled and the referee had awarded him a free kick.

A spectator wearing a black t-shirt approached him from outside the fence, dropped his beer and then said something to him.

Mr Nicolaou gave an account of the words used by this person which was quite lengthy and included a whole series of alleged verbal abuse relating to both him, his mother as well as other slurs. The video of this incident was available to the Tribunal and it was clear that the verbal exchange took no more than 7 seconds.

It would be quite impossible for the man in the black t-shirt to use the full set of words attributed to him in 7 seconds that Mr Nicolaou claimed were uttered. It is clear from his body language that he was at the very least berating Mr Nicolaou and it was not, as Mr Lozina claimed, a friendly verbal exchange. However, the Tribunal could not accept Mr Nicolaou's evidence and therefore the Tribunal could not make a finding of guilt under this Charge 2.

The Proceedings – Charge 3

Mr Michael Kouta gave oral evidence to the Tribunal and was cross examined by Mr Lozina.

Mr Kouta played left fullback for APIA in the first half and was substituted in the 55th minute. He therefore played on the hill side of the field in the first half.

His verbal evidence differed from his written statement in that he alleged that he was called a “Turkish cunt” rather than a “Turkish/Cypriot cunt” by spectators on the hill side in the first half. He explained that he was a Cypriot and therefore such a statement was a significant racial slur to a member of his community.

Mr Kouta did not report this to any of the match officials or indeed to anyone else and no other person was able to corroborate his evidence. He also identified the Sydney United spectator group on the hill as those responsible for these racial slurs however he was not able to identify any particular person.

In the absence of any corroboration, on the balance of probabilities the Tribunal was uncomfortable to make a finding of guilt relating to this allegation.

The Proceedings – Charge 4

The Assistant Referee (AR2), Mr Daniel Cornofsky was the only independent witness to give evidence of racial and homophobic slurs. He reported that this abuse took place throughout the match and he confirmed that he officiated on the hill side of the field.

He noted that he did not turn around to look at the crowd as he was scared to do so. He also agreed that his role as a Match Official meant that he was required to watch the Field of Play at all times and that he should not be looking at the crowd at any time.

He further noted that he reported the abuse to his fellow referees at half time noting that he was “coping a lot of abuse out there”. He confirmed that all of the abuse in his written report was directed to him during the match.

Under questioning from Mr Lozina, Mr Cornofsky stated that he also heard homophobic abuse directed to the APIA players and in particular to Mr Stewart as well as to him by the crowd behind him on the hill.

Mr Lozina asked how he could leave such an important piece of evidence out of his written report. Mr Cornofsky replied that he simply forgot to mention that and left it out.

Mr Cornofsky was again consistent in his evidence and could not be shaken in cross examination that he was abused. He asserted that it was the Sydney United supporters behind him who were the source of this abuse.

Football NSW Submissions

Mr Crepaldi for Football NSW submitted that it was clear that the vast majority of spectators on the hill were Sydney United supporters and that is where the racial and homophobic abuse emanated from.

Football NSW also stated that Mr Cornofsky's evidence was largely consistent with the evidence of Mr Stewart, in that, the form of abuse suffered by both was remarkably similar. In effect, Football NSW claimed that these two pieces of evidence corroborated each other.

Whilst the witness statements supporting the Respondent's case all stated that no abuse of any kind was heard, none of those statements save for the security guards indicated where they were during the match. In any case, Football NSW submitted that this evidence could not be relied upon.

Respondent's Submissions

Mr Lozina for the Respondent submitted that there was more than sufficient doubt in the evidence that was presented to the Tribunal to make it inappropriate for the Tribunal to find the charges proved against the Respondent. Mr Lozina alleged that there were elements of collusion between the witnesses for APIA and the referees.

Mr Lozina also asserted that the evidence of Mr Cornofsky could not be trusted given that he changed his evidence when presenting to the Tribunal. He claimed that the fact that Mr Cornofsky included a new claim in his oral evidence that there had been homophobic abuse of the APIA players rendered his evidence untrustworthy.

Mr Lozina also claimed that there was no evidence that the supporters on the hill were Sydney United supporters. He claimed there was clear evidence that there was a mixing of supporters and that the abuse of the APIA players, if it happened at all, could have come from anyone including independent supporters.

He also asserted that the APIA players could have been motivated by malice against Sydney United – it was to the advantage of that club that additional slurs were directed at APIA players, as that would disadvantage Sydney United in its ultimate application to join the B league. He suggested that Mr Stewart and others were motivated to ensure that Sydney United would not be able to join the B league.

Further, no Sydney United supporter was identified as responsible for the alleged racial and homophobic slurs and that notwithstanding considerable effort on the part of the Sydney United club, it was unable to identify certain persons who may have been responsible for any comments.

Determination of the Tribunal

As noted above, the Respondent pleaded NOT GUILTY.

The Tribunal was however satisfied that the conduct as described in Charges 1 and 4 took place and that the Sydney United supporters were the source of this abuse. As a result, the conduct was a breach of Schedule 3, Table C, Offence Code 10-01 – *“Use discriminatory, homophobic, racist, religious, ethnic or sexist language and/or gestures”* and Schedule 3, Table B, Offence Code 08-01 – *“Use discriminatory, homophobic, racist, religious, ethnic or sexist language and/or gestures”* and these were the correct and appropriate Charge Codes.

For these reasons the Tribunal found that the Respondent was **GUILTY** of Charges 1 and 4.

It is clear from the Football NSW precedent Appeals Tribunal - FNSW - Sydney United 58 v Rockdale AT 18-04 that a Club is responsible for the behaviour of its spectators.

Submissions on Sanctions

On 20 April 2023 an additional hearing was held by Zoom to permit both Football NSW and the Respondent to make submissions on the appropriate sanctions.

An initial matter was raised by Football NSW being the admissibility and/or relevance of the sanctions imposed by Football Australia on the Respondent resulting from incidents in the Australia Cup final between the Respondent and Macarthur FC in October 2022. It was alleged in that matter that “the Respondent’s supporters made highly offensive gestures and throughout that game and booed Welcome to Country”.

Football NSW sought to admit into evidence the Determination of Football Australia in that matter.

The Respondent objected to the admission of that Determination on the basis that:

1. Several persons were subject to criminal proceedings as a result of that Determination and admission may compromise those proceedings;
2. Whilst this was a matter that had been determined, the Respondent had lodged an appeal and the grounds of that appeal were relevant to add “context” and would need to be considered by the Tribunal if that Determination was admitted; and
3. The admission of that Determination would delay these proceedings.

The Tribunal Chair requested a short break so they could consider a ruling on this question.

The Tribunal determined that it would NOT admit the Football Australia Determination into evidence.

Whilst a consideration of a request to admit evidence that may or may not be admissible would normally be considered under a voir dire, thereby excluding a jury from being present during argument or disclosure, before the Tribunal where the laws of evidence do not apply, the only question is whether the Football Australia Determination would assist the Tribunal or be of benefit to the proceedings.

Viewing the Determination would not of itself prejudice Tribunal members in that as they are all legal practitioners, they are presumed to have the requisite skills to dismiss the contents of this document in the event that the Tribunal did not admit the Determination into evidence.

The Tribunal determined that whilst the contents of the Football Australia Determination were relevant, the fact that admitting the document would significantly delay the proceedings meant that the interests of both parties were best served by proceeding without a review of that Determination.

Football NSW Submissions

Football NSW submitted that the objective seriousness of the offences was in the mid to high range. There were multiple incidences of abuse both racial and homophobic in nature and the fact that a Match Official was abused was a further aggravating factor.

The Respondent was unable to control its spectators and the Respondent had been found guilty of several similar spectator behaviour breaches as set out in the SUFC Antecedents (2017-2023) document (attached) tendered to the Tribunal. Most recently in the current season the Respondent was issued with a warning letter under GPT 23-03.

As a result, Football NSW proposed the following sanctions:

1. A fine of between \$10,000 and \$12,000; and
2. A deduction of six (6) competition points in the NPL NSW Men's First Grade Competition; and
3. The next two (2) home games to be played behind closed doors without spectators.

In relation to sanctions two and three, these are to be suspended for the balance of the current season and imposed only if the Respondent is found guilty in the current season of any similar offence in addition to any sanction for those offences.

Football NSW noted that there were several mitigating factors in favour of the Respondent:

1. The Respondent deployed and paid for six (6) security guards and six (6) jacketed officials double the number required by Football NSW;
2. The Respondent took active steps to assist with the investigation;
3. The Respondent denounced the behaviour of spectators on its FaceBook page and made it clear that such behaviour would not be tolerated;
4. The Respondent's President had also been subjected to verbal and written abuse.

As a result, Football NSW proposed that the above sanctions be reduced by 50% with the same conditions.

Respondent's Submissions

The Respondent submitted that:

1. The events, whilst regrettable, were of a low range, were not intended to insult and were made by a single minor.
2. The warning letter sent to the Respondent in 2023 lacked detail and was imprecise.
3. The Respondent has taken action and there has been no repeat of this behaviour;
4. The President's social media statement is strong and condemns the behaviour;
5. The adverse publicity is penalty enough; and
6. The minimum sanction of a \$500 fine should be imposed.

The Respondent also requested that only half the costs be paid by the Respondent given that it was only found guilty of two of the four Charges.

Sanctions Imposed

The Tribunal imposed the following sanctions:

1. A fine of \$5,000 payable within 30 days; and
2. A deduction of three (3) competition points in the NPL NSW Men's First Grade Competition; and
3. A single home game to be played behind closed doors without spectators.

In relation to sanctions two and three, these are to be suspended for the balance of the current season and imposed only if the Respondent is found guilty in the current season of any similar offence. The imposition of these sanctions will be in addition to any sanction for the subsequent offences.

Fines Imposed	Refer to Sanctions Imposed above.
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Bonds Imposed	NIL.
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Additional Matters and Fees as per the Notice of Costs:

The Tribunal rejected the Respondent's submission in relation to costs and is directed to pay the full costs of the Tribunal process as assessed by Football NSW.

APPEAL PROVISIONS

1. **Aggrieved parties to a determination of the FNSW GPT may lodge an appeal to the FNSW Appeals Tribunal in accordance with sections 9.8 and 10 of the GDR. Any appeal must be submitted by completing the online Notice of Appeal form (Prescribed Form 12) to tribunal@footballnsw.com.au with the relevant Application Fee within seven (7) working days of the issue of this Final Notice of Determination to Respondent.**
2. **The FNSW Appeals Tribunal may vary, by way of reduction or increase, any sanction, measure or order imposed by the FNSW GPT without the necessity to provide any prior notice to any party to the appeal of its intention to do so.**



David P. Lewis
Chairman
GENERAL PURPOSES TRIBUNAL