

STEVEN LOWY AM
CHAIRMAN



30 July 2018

Ms Judith Griggs
Chair
Congress Review Working Group

Dear Ms Griggs

CRWG Proposed Recommendations

I write to you on behalf of my fellow directors on the Board of Football Federation Australia (**FFA**) to reiterate our position regarding two key issues which we understand are being considered by the members of the Congress Review Working Group (**CRWG**) for inclusion in the final CRWG report.

The two key issues are:

1. A proposed FFA Congress model developed to respond to the mandate with which the CRWG was charged, namely to *“propose a new composition for the FFA Congress which ensures a broader and more balanced representation of stakeholders in line with the requirements of the FIFA Statutes, in particular its art. 15 let. j.”*
2. A proposal relating to the *“Pathway for an alternative A-League governance model”*

We understand that there are other recommendations that are being considered by the CRWG and note that the FFA Board’s position has been put forward through its CRWG representative on such matters.

Taking each of the issues in turn, we provide the following which is a high-level summary of the Board’s position. As an overarching comment that is applicable to the topics below, we confirm that the proposals being considered by the CRWG do not satisfy the Guiding Principles that were submitted by FFA to CWRG on 10 June 2018. For convenience these are set out in Annexure A.

A PROPOSED CONGRESS MODEL

We understand the Model that the CRWG is considering recommending be put to the Members of FFA at a general meeting involves a Congress consisting of 29 members and 100 votes with the following breakdown:

- Each of the nine (9) Member Federations to receive six (6) votes (total: 9 members and 55 votes)
- Each of the current Australian A-League Clubs (nine) to receive 3 votes (total: 9 members and 28 votes)
- The PFA to receive seven voting votes (total: one member and 7 votes)
- A Women's Football Council, comprising 3 representatives nominated by each of the above stakeholder groups – the Member Federations, A-League Clubs and the PFA plus an independent chair - to receive 10 votes (total: 10 members and 10 votes).

Consistent with feedback provided to the CRWG throughout the process, the FFA Board has four principal concerns with the Proposed Model:

1. Firstly, it proposes a structure where the voting breakdown in Congress, at least initially, (as represented in the spreadsheets developed by CRWG after allocation of the Women's Council votes) will be 58% for "amateur" football and 41% for "professional" football. This is a breakdown which we believe excessively favours professional football and is likely to lead to the making of decisions that are not in the best interests of the game overall. Unlike the members of the FFA Board, who are independent and have fiduciary obligations to act in the best interests of FFA, members have no such obligations and are entitled to vote in the pursuit of their own specific commercial interests, even where their interests may be in conflict with the best interests of FFA. Given that the decision-making inevitably involves questions of the allocation and distribution of limited game resources, 41% is we believe too large a share of member votes to be held by representatives of professional footballer stakeholder groups. In saying this, we do not allege that the clubs do or would act in bad faith, rather that they act having regard predominantly, if not exclusively, to their own interests. This has consistently been seen in their correspondence demanding more funds for the clubs which necessarily entails a reduction from other areas of the game. At the heart of this issue is the difference between for-profit commercial enterprises such as the A-League Clubs (7 of which also are owned or controlled by non-Australian interests) and not-for-profit governing bodies charged with tending to the interests of the game as a whole. We recognise the legitimacy in the A-League Clubs pursuing their own objectives and commercial imperatives. It is only right for their shareholders that they do so. However, it is important to also recognise that the primary and proper vehicle available to them to do so is in the long term commercial licences they have agreed to enter into which grant them rights of participation, commercial exploitation and asset development.
2. Secondly, the allocation of 28% of the member votes to the A-League Clubs grants them a veto position on any subsequent change to the FFA Constitution. Once this position is ceded to this stakeholder group, it may never be recovered. The A-League Clubs, unlike the Member Federations, have demonstrated through their association, APFCA, that they speak and act as one single bloc. The FFA Directors consider that this veto position in relation to further constitutional change

is not in the best interests of development and advancement of the game in Australia. We understand that there has been some suggestion for addressing this with a constitutional provision that would stipulate that a special resolution could not fail to pass simply by way of the A-League Clubs exercising a veto, however as we have not seen this proposal in detail we are not in a position to comment on its efficacy or legal enforceability.

3. Thirdly, the Proposed Model delivers the PFA a greater voting representation as each Member Federation (7), which again is in our view disproportionate. It is disproportionate in that, as with the A-League Clubs there are other, more appropriate vehicles through which the PFA exercises its fundamental role as the elite players' representative. These vehicles are the Collective Bargaining Agreements for the national teams, the A-League and the W-League. Through its negotiation of and entry into these agreements the PFA performs its primary and essential role as the union body advocating and securing appropriate terms and conditions of employment, player development and player welfare for the several hundred elite Australian players it represents. In a Congress context, as a member, the PFA's proper role would be to bring an elite player perspective to Congress when carrying out its functions (i.e. election of directors and amendment of the Constitution) but not to assume a level of influence that is disproportionate with the numbers of football constituents it serves, vis-à-vis the entire football community.
4. In relation to the Women's Council, which is to assume 10 voting delegates under the Proposed Model, we comment as follows. In terms of achieving gender equality within the governance structures of the game (not limited to the FFA Congress) we refer you to the attached FFA Guiding Principles that the FFA representative tabled at the commencement of the CRWG process which advocate for true 50:50 gender representation at all levels of the game. However, the construct of the Women's Football Committee as a ten-person voting member of Congress appears to be exactly that, a construct to plug a gap in the voting numbers of an otherwise binary Congress model. To address this issue of the "numbers gap", in the FFA Guiding Principles we advocated for the expedited introduction of special interest groups as an inclusive way of reflecting the diversity of interests within the game and achieving a broader, not just larger, Congress. Whilst we appreciate there may be some concerns in relation to the "readiness" of special interest groups, we would urge the CRWG to reconsider this issue in relation to a number of stakeholder groups that clearly (in addition to the players), if not in a formal sense, have been active and integral participants in the game and will remain so, such as the NPL clubs, coaches and referees through their respective representative bodies. Their expedited introduction on a set of probationary conditions that they would need to continue to meet to retain membership could be a means of not only broadening the Congress but avoid the artificiality of the proposed Women's Football Council being used to fill the numbers gap between the professional and amateur stakeholders.

In an effort to reach consensus, we note that the FFA Board formulated three (3) alternative Congress models for consideration by the CRWG which were not supported. A copy of these models are set out in Annexure B to this letter

The three (3) Congress models have been influenced by FFA's Guiding Principles and each have the following common characteristics:

1. The removal of the prescribed majority provision under which 60% is required to elect directors to FFA's board.
2. If the Member Federations, as a collective stakeholder group, hold a percentage of Congress greater than 51%, a director could not be elected solely because of the Member Federation's voting as a block. To be elected as a director, a vote from a different stakeholder group in such circumstances would be required.
3. The Women's Council is to include a greater number of independent female candidates that meet the criteria set by the CRWG.

As to the removal of the prescribed majority requirement, the FFA Board considers that requirement reflects the circumstances of FFA's establishment and early years of operation and is no longer relevant in circumstances where the FFA Congress expands beyond 10 members. Accordingly, each model is predicated on its removal and replacement with an ordinary majority, which would bring FFA into line not only with standard corporate practice in Australia but also with the FIFA Statutes, AFC Statutes and the provisions that apply to the elections of other FIFA member associations as well as the Member Federations.

We note also that the second proposed Congress model allows for the Association of Amateur Football Clubs to be allocated two (2) votes from inception. Again, this is consistent with the FFA Board's position that special interest groups should be included in the FFA Congress as soon as possible.

As the A-League Clubs would receive greater than 25% of the Congress votes, it is our view that, as noted above, it is important that there be a constitutional provision introduced that stipulates that a special resolution would not fail to pass simply by way of the A-League Clubs exercising a veto.

B PATHWAY TO ALTERNATIVE A-LEAGUE MODEL

We appreciate and acknowledge the opportunity granted to submit FFA's position on this topic into the CRWG throughout the process. We understand however that the FFA proposed approach is not currently favoured by the other CRWG members. The FFA approach proposed an extensive stakeholder consultation process, including a representative working group, informing the ultimate decision-making process to be undertaken by the FFA Board which would then lead into the requisite commercial and legal negotiation of the league participation agreements (or licences) between FFA and each of the participating A-League Clubs. We understand the model being favoured by CRWG involves the formation of a working group – consisting of representatives of the A-League Clubs, PFA, Member Federations and FFA – tasked with developing or “negotiating” a new leagues governance model that, after being put to the FFA Board for its endorsement, will be subject to approval by the members of the FFA Congress.

In short, the key difference in the FFA approach and the one being favoured by the other CRWG members is that the FFA approach retains the core and foundational good governance principle that the Australian Sports Commission (and the wider corporate sector) promote and follow, namely that it is the independent directors of a company, acting in accordance with their fiduciary duties, that manage the affairs of a company and in so doing make the necessary decisions in the interests of the company. It is not, under these best practice corporate governance principles, the role of the shareholders or in our

case members, to make these business decisions as the members are not disinterested or independent. The critical role of the members (who are, using the broad analogy with the Australian political system, the “electorate”), is to elect and remove the Board (who is the “parliament”). Suggestions that the Congress is the “parliament” is a distortion, and a process whereby the Board is simply expected to “ratify” or “rubber stamp” the wishes of the members fundamentally misunderstands and undermines the role of a board of independent directors properly exercising their duties. There is a key difference between Board and Congress decision-making. One is decision-making by independent persons with fiduciary obligations to act in the best interests of the Company whereas members of the Congress have no such obligations and the only constraint on their decisions is that they cannot be beyond the purpose for which the company exists.

Applying the ASC good governance principles of an independent board making decisions in the best interests of the company to what is being proposed by CRWG for the alternative A-League pathway process is particularly problematic both in general terms as noted above but also more specifically as regards the position of stakeholders that have an interest in the outcome. For example, the A-League Clubs will necessarily be engaged in a commercial negotiation with FFA over the terms of participation. They will have a direct financial interest in the outcome of any Congress vote and therefore should not be entitled to vote as a decision maker on the terms that they will be provided.

That being said, and consistent with the position articulated to the CRWG by FFA’s representative, the FFA Board is willing to put any new leagues governance model to the FFA Congress for ratification provided that members with a direct interest in the outcome are excluded from exercising their vote.

BOARD INDEPENDENCE

We understand that there has been discussion within the CRWG in relation to the removal of the so-called “abstinence rule” from the FFA Constitution. This provision requires that candidates for election as a FFA director may not have held a designated/official position in the game¹ within the year leading to their nomination (previously two (2) years but reduced to one (1) year by a special resolution of the members in November 2017).

While we understand that the CRWG may ultimately decide not to recommend the removal of the “abstinence rule” at this time, we take this opportunity to make clear that it the FFA Board is strongly opposed to any such proposal. One of the fundamental recommendations of the 2003 Crawford report and a cornerstone of the transformation of the game in the period since the establishment of the FFA has been the adoption of the independent director model reflected in the Constitution. It conforms with the ASC’s recommendation. It has received recognition by governance experts as superior to the models of other major Australian sports, including the AFL.

The ASC definition of “Independent Director” is instructive in this regard:

*“a person who has no direct links, **perceived or real**, to any official position within the organisation or its directly related member bodies” [emphasis added]*

Further, ASC commentary and guidance in respect of this matter includes the following:

Similarly, sporting organisations whose operations are predominantly of a business-owner nature should avoid situations where the owners of those businesses are also the key decision makers of the organisation, where those

¹ Refer article 43.1 of the Constitution for full definition.

decisions will have a material effect on the outcomes of those businesses, perceived or actual.

Reduction of the two (2) to one (1) year abstinence period was a significant step taken in 2017 which the FFA directors supported as reflecting the maturity and development of the game since the Crawford report and that conforms with the ASC recommendation. Removal of the one (1) year abstinence period does not and is opposed by the directors. Notwithstanding that CRWG Member representatives and Member Federation Presidents and Club Chairmen may undertake not to nominate or stand for election as an FFA Board director for a period of time following the removal of the one (1) year abstinence period, it will provide the platform for holders of official positions (particularly presidents/chairmen of Member Federations and Clubs) to move at the same AGM from positions as voting members electing the board into the positions as elected directors. In perception, if not reality terms, this would run completely counter to the model of independence that is advocated in both the Australian corporate and sporting sectors.

STANDING COMMITTEES

In relation to the introduction of standing committees, we also take this opportunity to confirm that the FFA Board is generally supportive of the introduction of standing committees that operate in an advisory capacity to the FFA Board. We view such committees as having the potential to positively increase engagement between stakeholders and FFA. In doing so, it notes that Board sub-committees already exist with external members and advocates for an approach that sees a transition from these existing committees into the newly constituted standing committees, chaired by a director of the FFA Board. We also note the importance of ensuring that in selecting the number and remit of the standing committees that the following is given due consideration:

- the challenge of populating and operating such committees given the extensive demands upon members who serve on an honorary basis; and
- the number and remit of the standing committees be limited to those that are priorities for the game in Australia in terms of pursuing the 20 year Whole of Football Plan and the FFA Strategy.

CONCLUSION

Regrettably, while naturally needing to see the final outcome of the CRWG process and the exact proposals to be put to a General Meeting, based on their current understanding, the directors consider that the current CRWG proposals in relation to the new composition for the FFA Congress and the pathway to an alternative A-League governance model are not in the interests of the game. As such, consistent with their fiduciary duties, the directors would have no option but to recommend against their adoption. The concerns articulated in this letter stem from a board of directors who have no interest in this matter other than ensuring the advancement of the game as a whole. It is sent with a deep commitment and passion to see the game continue to go forward for the benefit of all Australians who love and care for it and its future.

Yours sincerely



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Chairman