

# Football Federation of Australia Disciplinary & Ethics Committee

## Determination in the matter of a Grievance between Wellington Phoenix Football Club Players Timothy Payne and Oliver Sail and Football Federation of Australia (FFA)

Committee members:

Lachlan Gyles SC, Acting Chair  
Anthony Lo Surdo SC, Deputy Chair  
Robert Wheatley, Member

**16 June 2020**

### A. INTRODUCTION

1. Timothy Payne and Oliver Sail (**Players**) are members of the Wellington Phoenix Football Club (**Club**) which competes in the Hyundai A-League (**HAL**), the premier men's football league in Australia administered by the Football Federation Australia (**FFA**).
2. On 16 March 2020, the Players and other members of the Club, including support staff travelled to Australia, at the request of the FFA with the intention to complete the HAL 2019-2020 season.
3. In accordance with the *Public Health (COVID-19 Quarantine) Order 2020* (**Order**), issued by the New South Wales Government on 16 March 2020 and arrangements made by the FFA with government authorities, the Players and other members of the Club were required to observe a 14-day quarantine period at the Sydney Academy of Sport and Recreation Facility, Narrabeen (**Facility**).
4. Strict adherence with the Order would have prevented the Club from training whilst in isolation. However, the FFA secured permission from the NSW Government authorities that permitted the Club to train whilst in isolation on condition that the Players and other members of the Club remained within the Facility and did not come into contact with any other persons from outside of their group for the duration of their 14-day isolation.
5. On 23 March 2020, the FFA suspended the 2019/2020 HAL season until further notice. That evening, the Players attended a Club function at the Facility at which the Players, other members of the Team and support staff were permitted by the Club to consume alcohol.
6. Towards the end of the function, a few of the team including the Players decided to order some more alcohol and Player Sail did that by use of an app on his phone. The alcohol was delivered to a different location from where the Players were,

because of social distancing requirements, and Player Sail went and got it using a golf cart. The additional alcohol was then consumed by those who were "kicking on".

7. After the function ended, and between about 12.30 am and 1 am on 24 March 2020, the Players, whilst intoxicated, took a golf cart from the Facility without authority. They proceeded to drive the vehicle out of the Facility and onto a public road, the Wakehurst Parkway. The vehicle was initially driven by Player Sail who crashed it. Player Payne then took over the driving.
8. At 1.20 am, the Players were stopped by police whilst driving on a public road at Oxford Falls Road, Oxford Falls, approximately 5 km west of the Facility. Player Payne was subjected to a roadside alcohol breath analysis to which he returned a positive test. The Players were then voluntarily conveyed by police to Mona Vale police station where Player Payne was subjected to a further breath analysis at 2:02 am and again produced a positive result of .0100 grams of alcohol in 210 litres of breath. He was charged with the offence of "*mid-range PCA first offence*" pursuant to section 110(4)(a) of the *Road Transport Act, 2013 (NSW)* and required to appear at Manly Local Court on 8 June 2020.
9. The Players were returned by police to the Facility at or around 2.30 am. They immediately located Mr Shaun Gill, the Club's Operations Manager and admitted their actions.
10. On 24 March 2020, the Players returned to New Zealand with the Team and support officials.

#### **B. PROCEDURAL BACKGROUND**

11. On 30 March 2020, the FFA issued written notices to each of the Players outlining conduct which it asserted constituted breaches of the clauses 2.1 and 6.1 of the FFA National Code of Conduct (**Code**) and providing them with an opportunity to provide submissions as to culpability and any appropriate sanctions to be imposed by 2 April 2020 (**FFA Notices**).
12. Clause 2.1 of the Code provides that, "*a Member must not bring FFA or the game of football into Disrepute.*" Clause 2.2 prescribes a number of circumstances which, without limiting the generality of clause 2.1, will be taken as having brought football into Disrepute.
13. Clause 6.1(a) of the Code relevantly provides that, "*Professional Players...are the public face of football in Australia and so their behaviour is subject to greater scrutiny. Accordingly, a Professional Player...must:*
  - (a) *at all times behave in a manner that promotes and upholds the highest standards of integrity, dignity and professionalism;*
  - (b) *comply with any team protocol and procedures, including in relation to alcohol, curfews and inappropriate relationships; and*
  - (c) *not act in a manner contrary to the best interests of the team."*
14. On 2 April 2020, the Club provided a letter on behalf of the Players in response to the FFA Notices.

15. On 3 April 2020, the New Zealand Professional Footballers Association (**NZPFA**) also made written submissions on behalf of each of the Players in response to the FFA Notices.
16. On 17 April 2020, the FFA issued letters to each of the Players by which it:
  - (a) noted that neither the submissions made on behalf of the Club nor those made by the NZPFA contested whether the Players engaged in the conduct alleged by the FFA to have constituted a breach of clauses 2.1 and 6.1 of the Code but rather were directed to matters in mitigation of sanction;
  - (b) found that the Players breached clauses 2.1 and 6.1 of the Code; and
  - (c) imposed a four (4) match suspension.
17. As permitted by clause 7.4 of the Code, on 29 April 2020, each of the Players lodged a Grievance in the form of an "Application Form" under the Judicial Bodies By-Law. Each of those applications was accompanied by documents styled, "Annexure to the Judicial Bodies By-Law Application Form" by which the Players contest only the severity of the sanction imposed by the FFA for their admitted breaches of clauses 2.1 and 6.1 of the Code.
18. In accordance with directions made by the Chair, the parties each filed written submissions together with written statements and other documentary evidence.
19. The Committee convened in the early afternoon of 5 June 2020. FFA Disciplinary Counsel, Mr Ivan Griscti, of Counsel, appeared for the FFA. The Players were represented at the hearing by Mr Nicholas Condylis, of Counsel. The Players each appeared by AVL from Wellington together with Mr Jacob Spoonley of the NZPFA.
20. By email dated 9 June 2020, the Committee sought the parties' views on a matter that had not arisen directly during the course of the hearing as to a possible approach to sanction whereby the Players would not necessarily receive the same sanction and the Committee would consider a lesser sanction being imposed on Mr Payne than Mr Sail by reason of certain matters outlined in that email and invited Counsel to be heard by way of short supplementary written submissions as to whether such an approach should be adopted having regard to the Committee's sanction objectives of individual and general deterrence.
21. Each of the parties provided the Committee with supplementary written submissions pursuant to the invitation of the Committee to do so.
22. This is our determination of the matter, which is to "*briefly provide the reasons on which the determination is based*" in accordance with clause 18.1 (b) of the Judicial Bodies By-Law.

### **C. JURISDICTION AND ADMISSIBILITY**

23. The Committee derives its jurisdiction from the Code, FFA Grievance Resolution Regulations (**Regulations**), FFA Judicial Bodies By-Law and the FFA Constitution as follows.
24. A "Grievance" is defined in the Regulations as including a dispute between Members (which includes the FFA and players) in relation to decisions made or sanctions imposed under the Code (see clauses 1.1, 1.2 and 28.1 of the Regulations). Each Member submits exclusively to the jurisdiction of the Regulations and Grievances are to be heard and determined by a Judicial Body.

25. Under clause 6.1 of the Judicial Bodies By-Law, this Committee has jurisdiction to determine, a "Disciplinary Dispute" which is defined, relevantly, as a dispute between the FFA and a "Constituent" in relation to a decision made by the FFA, or sanction imposed by the FFA on a Constituent, as a result of a finding by the FFA that a Constituent has breached one or more of the FFA Statutes. "Constituent" is defined in the FFA Constitution as including a player. "FFA Statutes" is defined in the FFA Constitution as meaning the Constitution, including any By-laws, as amended from time to time in accordance with its terms and any other statutes, regulations or policies promulgated by FFA, as amended on notification from FFA from time to time. The Code forms part of the FFA Statutes (Code, clause 1.2).
26. Under clause 7.4 of the Code, a Member who disputes a sanction imposed under the Code may appeal in accordance with the Regulations, provided that it does so within seven business days of notice of the sanction. Written notice of the sanction was provided by the FFA to the Players on 17 April 2020. The Grievance was lodged by the Players on 29 April 2020, that is, within seven business days of notice of the sanction.
27. The Committee accordingly determines that has jurisdiction to consider the Grievance the subject of these proceedings and that it is admissible. Neither party contended to the contrary.
28. Consistent with the approach of the Committee in *Merrick*<sup>1</sup>, the hearing was conducted *de novo* although in this case limited to the issue as to sanction alone. In hearing this Grievance, the Committee stands in the shoes of the original decision maker, the FFA, and has approached the matter accordingly. Its obligation is to determine what sanction should be imposed for the Players' admitted breaches of clauses 2.1 and 6.1(a) of the Code.

#### D. SUBMISSIONS AND EVIDENCE

29. The Players relied upon the following:
  - (a) written submissions by Mr Jacob Spoonley, NZPFA, dated 29 April 2020, which included a reference to media reports of the following incidents which it was submitted on behalf of the Players involved more egregious behaviour than the conduct the subject of their admitted breaches:
    - Lachie Hunter (AFL), 16 April 2020; fined \$5,000 by his club and suspended for 4 games for driving whilst intoxicated (0.123) and damaging four parked cars;
    - Tyson Stengle (AFL); fined \$2500 by his club and suspended for 4 games for driving an unregistered vehicle and whilst intoxicated (0.123);
    - Tyrone Roberts-Davis, Latrell Mitchell, Josh Addo-Carr and Nathan Cleary (NRL); each found to have breached social distancing protocols and handed a suspended one game ban and suspended fines;

---

<sup>1</sup> Merrick v FFA, 17 March 2019

- Mitch Nichols (HAL), May 2017; suspended 4 games for admitted possession of cocaine at a Sydney nightclub;
- (b) written submissions by Mr Nicholas Condylis, of Counsel, dated 2 June 2020, which were supplemented orally during the course of argument and supplementary written submissions, dated 12 June 2020;
- (c) evidence:
  - Statement of Player Payne, dated 2 June 2020 (**TP Statement**);
  - Statement of Player Sail, dated 2 June 2020 (**OS Statement**);
  - Transcript of 26 March 2020 radio interview on Radio Sport, New Zealand with Player Payne;
  - Report from Dom Vettise, registered clinical psychologist, dated 18 May 2020;
  - Statement of the Club in support of Player Payne, dated 29 April 2020;
  - Statement of the Club in support of Player Sail, dated 29 April 2020;
  - Statement of New Zealand Professional Footballers' Association in support of the Players, dated 3 April 2020;
  - Log of charity/community service hours for Player Payne;
  - Log of charity/community service hours for Player Sail;
  - Character reference given by Ufuk Talay for Player Payne, dated 2 June 2020;
  - Character reference given by Ufuk Talay for Player Sail, dated 2 June 2020;
  - Further statement of the Club, dated 2 June 2020; and
  - Statement (undated) from the Chief Executive of Professional Footballers Australia.

30. The FFA relied upon the following:

- (a) written submissions by Mr Ivan Griscti, Disciplinary Counsel, dated 28 May 2020, which included a reference to and evidence of media reports of the following off-field sports-related incidents:
  - (1) which the FFA determined had brought the game into disrepute:
    - Mitch Nichols (HAL), May 2017; suspended 4 matches for admitted possession of cocaine at a Sydney nightclub; and
    - Olyroos Players, Atkinson, Wales, Wilson and McGree, 2019; suspended from national team participation for breaches of the Code

by bringing the game into Disrepute after an incident in their team hotel room involving a female and for which Atkinson, Wales and Wilson were suspended for approximately 9 months and McGree for 4.5 months;

- (2) which had occurred in the German Bundesliga involving, FC Ausburg coach Heiko Herrlich who, on 15 May 2020, was suspended for one match after leaving his hotel room to purchase toothpaste in breach of lockdown restrictions and Hertha Berlin player Kalou who, on 8 May 2020 was suspended for the entirety of the season for breach of physical distancing rules; and
  - (3) involving AFL Adelaide Crows coach Ben Hart, who was stood down for 6 weeks and 16 players received a suspended one match sanction for training in breach of social distancing protocols;
- (b) oral submissions by Mr Griscti made during the course of argument;
  - (c) supplementary written submissions dated, 10 June 2020;
  - (d) written statement of the Chief Executive Officer of the FFA, James Johnson, dated 28 May 2020; and
  - (e) written statement of the Chief Operating Officer of the FFA, Mark Falvo, dated 28 May 2020.

#### E. SUMMARY OF THE PLAYERS' SUBMISSIONS

31. Between 26 March 2020 and 1 April 2020, after an internal investigation into the matter and several meetings involving Club management, the Club determined to impose the following disciplinary sanctions on the Players (**Club Sanctions**):
  - a written final warning that any incident of a similar nature or of bringing the Club or the League into disrepute would result in immediate dismissal;
  - the satisfactory completion of an alcohol education/counselling course;
  - the satisfactory completion of 40 voluntary hours at NESAs, an anti-drink driving organisation that works with families of drunk drivers;
  - payment for the damage to or replacement of the damaged golf cart;
  - payment of all legal fees and fines associated with the police action; and
  - a fine of NZD1,000 per player to be donated to NESAs.
32. The Players' "core submission" is that the FFA's four-match suspension is disproportionate given the following factors which they assert to be mitigating:
  - (a) they immediately took responsibility for their actions and have shown genuine remorse and contrition;
  - (b) the FFA has overstated the extent of the negative media attention the Incident attracted and damage the Incident otherwise caused the FFA and the game;
  - (c) Mr Payne went on public radio in New Zealand and unreservedly apologised for his actions such that any negative media reporting of the Incident has been outweighed by the reporting of Mr Payne's apology;

- (d) the conduct of driving the golf cart and ending up on a public road was inadvertent;
- (e) this will be the first sanction imposed by the FFA on either Player;
- (f) both Players have already been punished by the Club; and
- (g) the FFA has not taken a balanced perspective as to the relevance of any COVID-19 restrictions to any sanction,

each of which will be considered further.

*Responsibility, remorse and contrition*

- 33. The Players took immediate responsibility for their actions and have demonstrated the highest level of remorse and contrition. They have acknowledged that the conduct was unacceptable and are genuinely disappointed for their inability to display better judgement. Player Payne gave an interview on public radio in New Zealand on 26 March 2020 in which he expressed his sorrow, remorse and acute embarrassment and expectation that there would be repercussions from those actions which he would accept. It is submitted that "credit should be given for the level of public contrition" that Player Payne has exhibited.
- 34. Player Sail made no public comment regarding the incident until after the completion of the investigation by the Club. It is nevertheless submitted that Mr Sail's remorse and contrition is genuine and well-intended.
- 35. The Players rely upon the evidence of Mr Vettise, a clinical psychologist, in his report of 18 May 2020, in which he concludes for the reasons there stated that each of the Players has acted in a manner consistent with taking full responsibility for their actions.

*FFA has overstated the negative media attention the incident has attracted and damage otherwise caused to the game*

- 36. The Players submitted that the FFA has adduced no evidence of any damage caused by the incident to the game, other than the opinion evidence of Messrs Johnson and Falvo and ad hoc media articles referred to at attachment I of its submissions. In reliance upon an undated statement from the Chief Executive of Professional Footballers Australia, the Players submitted that the community's actual interest in the story was minimal, as is evident from the extent of the media coverage that the incident received and the level of social media interest exhibited.

*Mr Payne's public radio apology has largely remedied any negative reporting on the incident and rendered any disrepute negligible*

- 37. There has been widespread reporting in the media of Player Payne's apology. Of the 29 headlines relied upon by the FFA, the Players submit that 11 concerned Mr Payne's apology and that those articles "would not necessarily cause any damage to the game's reputation." Rather, it was submitted that those articles portray commendable conduct of an A-League player admitting a mistake and unreservedly holding himself accountable for it.
- 38. It is submitted that Player Payne's apology on public radio was just as widely reported as the incident and that its reception by the media has arguably restored

the game's image and nullified any damage the incident otherwise caused to the standing of the game. No reference was made by the FFA, at least directly, as to the media's reception of Player Payne's apology and thus, it was submitted, it is not clear whether it took the apology into account when making its determination as to sanction.

39. Although Player Sail did not give the same public apology as Player Payne, the latter's apology, it was submitted, still had the effect of counterbalancing any negative media associated with the Players' conduct.

*The underlying conduct was inadvertent*

40. The Players did not intentionally seek to drive the golf cart to a public road. They assert that they got lost and were attempting to find their way back to the Facility when they were stopped by the police. Their evidence is consistent, it is said, with the Players being intoxicated, the time being around 1 am, the Facility not being well lit, the Players not being from Sydney and not otherwise being familiar with the Facility.

*Both players have impeccable disciplinary records and are of good character*

41. The incident is the first occasion either player has faced sanction from the FFA for an off-field matter.
42. Character references provided by the Club's Head Coach, Ufuk Talay, speak to the Players being of integrity and their conduct to be out of character. Further, both players have performed considerable community service.

*The Club has already imposed punishments on the Players*

43. The Club Sanctions imposed on the Players is a relevant mitigating factor. The imposition of a four-match suspension would lead to the Players being disproportionately punished.

*The FFA has not taken a balanced perspective as to the relevance of COVID-19 and quarantine restrictions to any sanction*

44. The Players contended that the emphasis by the FFA on the incident occurring during COVID-19 as an aggravating factor is misplaced because neither player has been charged or found to have breached any restrictions the subject of the Order, there was no evidence that the Players breached any such restriction, there has been no investigation or official finding by the FFA that any restriction was breached, and there is no evidence quantifying the risk that the Players actually posed to the community (if any).
45. The Players accept that there was a breach of the protocols imposed upon them by the Club and/or the FFA while staying at the Facility. The Players however, reject that their conduct should be seen as analogous to recent breaches of the COVID-19 related restrictions by players in other codes.
46. It was submitted that the FFA has not taken into account the stresses that the COVID-19 restrictions caused including payment deferrals and reductions for April and May to support the Club and to ensure the viability of the competition during the pandemic, the Players having to leave their friends and families to live and train in Australia indefinitely due to the pandemic and the emotional stress caused by the uncertainty of the ever-changing COVID-19 restrictions. According to Mr Vettise,



the worry, uncertainty and unforeseen stress on many of the general population brought about by COVID-19 has led to out of character behaviour for many individuals and that although this does not justify the Players' conduct, it provides some context for it.

*Comparable circumstances and appropriate sanction*

47. The Players contend that each of the two off field examples relied upon by the FFA as justification for the four match suspension imposed upon the Players, the first, the 2019 Olyroos incident in which players engaged in consensual sexual activity with a woman at the team hotel and the second, in 2017, involving Mr Mitch Nichols, who was suspended for four matches after being charged with cocaine possession at a Double Bay nightclub, involves conduct which is more egregious than that involving the Players.
48. Each of the sanctions imposed in other codes for off-field incidents, namely, the recent matters involving Lochie Hunter (AFL), Tyson Stengle (AFL), Tyrone Roberts-Davies, Latrell Mitchell, Josh Addo-Carr and Nathan Cleary (NRL) also involve behaviour more egregious than the conduct of the Players.
49. They further submit that the three COVID-19 examples relied upon by the FFA to justify the four-match suspension, in particular, being Heiko Herrlich, Salomon Kalou and Ben Hart are distinguishable on their facts and none justify a four-match suspension.
50. In their written submissions, the Players contended that the appropriate sanction is a reprimand or, alternatively, a one match suspension which should be suspended for 12 months.
51. However, in oral submissions, Mr Condylis withdrew those submissions. He submitted that the appropriate sanction was either, in the first instance, a two-match suspension or, in the alternative, a four-match suspension with two matches suspended. It was submitted that the two-match sanction should be suspended for a period of 12 months on condition that the Players and each of them do not engage in any off-field conduct in breach of the Code.
52. In making this submission, Mr Condylis quite properly raised with the Committee, a potential restriction on the Committee's power to suspend any part of any sanction. He submitted that, in his understanding, where the Committee determines to suspend any part of a sanction that the part of the sanction that comes into immediate effect must be at least one half of the total sanction to be imposed.
53. The Committee expressed the view during the course of argument that where it was dealing with a matter under the Code, it had a wide discretion under Article 21.5 of the FFA Constitution as to the type of sanction it could impose and that the limitation to which reference was made only applied to conduct on the field of play which constituted an infringement of the Laws of the Game. The parties and the Committee proceeded on this basis.
54. The limitation to which reference was made during the course of argument is found in Regulation 11.12 of the FFA National Disciplinary Regulations. Those regulations form part of the FFA Statutes and apply to any infringement of the Laws of the Game by any Participant during a Match played in Australia or otherwise played under the direction or control of the FFA. Self-evidently, the Regulations do not apply to a matter involving an alleged breach of the Code.

55. In their supplementary written submissions, the Players contended that an appropriate sanction for each player is a three-match suspension. In support of that submission, Mr Condylis points to many of the matters summarised in this determination as justifying of a reduction in sanction. The Players otherwise accepted that the sanctions for each of them should be the same, thereby essentially disposing of the point about which further submissions had been sought. In the light of that acceptance, which was in line with the position taken by Counsel Assisting, it would not be open to the Committee to differentiate between the Players in terms of sanction, even if it had formed the view that this may be justified, which it had not.

**F. SUMMARY OF THE FFA'S SUBMISSIONS**

56. In reliance upon the evidence of Messrs Johnson and Falvo, the FFA submits that the conduct of the Players was profoundly embarrassing to the FFA, especially in circumstances where it had sought and received special permission from the NSW Government to enable the team to stay at the Facility and to continue to train whilst in quarantine.
57. The conduct would have also damaged the reputation of the FFA and the game of football with the general public. The FFA and the Club had been granted special privileges that were not available to members of the general public and the Players had disregarded the conditions in which they were granted.
58. The Players' conduct had the potential to endanger the general public by driving a vehicle on a public road under the influence of alcohol in a manner that was dangerous to other road users and by exposing members of the public and the police officers who attended the scene to a contagious disease which was the reason for their quarantine.
59. It is difficult to conceive how the Players could have left the Facility inadvertently but if this had happened, it ought to have been apparent to them after a short period of travelling west on the Wakehurst Parkway, and well before they turned around, that they were travelling away from the Facility. They continued in the same direction for 5 km until they came into contact with police officers who conducted a breath analysis test and then conveyed the Players to the Mona Vale police station.
60. The principal role of the FFA under the Code is the protective responsibility that it has for the reputation of football in Australia. Any sanction must properly protect the good name and reputation of the FFA and football with the general public, its participants and members and in this particular case, the New South Wales and Australian governments.
61. Given the continued threat of COVID-19 and the need for the FFA to obtain relevant approvals before recommencing the HAL season, it is important that the sanction is seen by the Government and public officials as one that is a meaningful penalty for the conduct. Consistent with the objectives of the Code, the sanction also needs to serve as a punishment to the Players for the damage that their breach has caused to the good name and reputation of the FFA and football in Australia. The sanction also has an important role as a deterrent to other players breaching similar obligations.
62. It is not appropriate to take into any significant account the penalty that the Club imposed on the Players. The match ban sanction for a breach of the Code serves an

entirely different purpose, that is, to redress the damage caused by the conduct of the Players to the good name and reputation of the FFA and the game of football in Australia.

63. The sanctions imposed in other sports or jurisdictions are of limited assistance in this case, given that the conduct of the Players was a breach of quarantine conditions that were negotiated by the FFA with the NSW Government and the significant resulting embarrassment and damage caused to the FFA. Further, each will be a product of particular disciplinary codes and those decisions will reflect the particular policy considerations that apply in that particular sport or jurisdiction.
64. The FFA accepts that the Players have shown genuine contrition and remorse, that each has no history of the type of behaviour in issue, that, in light of the uncertainties surrounding COVID-19, it occurred in challenging times and that each of the Players has and continues to make a significant contribution to the community.
65. The FFA distinguishes the incidents involving NRL Players Tyrone Roberts-Davies, Latrell Mitchell, Josh Addo-Carr and Nathan Cleary as involving breaches of general law obligations that apply to all persons and were not breaches of specific quarantine arrangements that had been negotiated with the NSW Government for the purpose of permitting the continuation of the HAL competition. Further, the recent incidents involving the NRL players did not include the aggravating factors in this case of the reckless endangering of other users of the Wakehurst Parkway and exposing attending police officers to a real risk of acquiring a dangerous and contagious virus.
66. The FFA submitted that the two drink-driving incidents involving AFL players Lochie Hunter and Tyson Stengle supported the approach taken by the FFA against the Players as does the approach by the FFA in the matter concerning Player Nichols. In the circumstances, the FFA submits that a meaningful match suspension is warranted and that a four-match suspension is appropriate.
67. The FFA contended that but for the mitigating factors, the conduct would have warranted a more extensive sanction in the vicinity of a six-match suspension. It also submitted that no part of the sanction should be suspended because, given the Players' otherwise exemplary conduct history and their contrition and remorse, it is highly unlikely that they will reoffend and thus it will not serve as any specific deterrence.
68. Mr Griscti contended that the Players should not be treated differently in terms of sanction as they engaged in a joint enterprise, the fact that Player Payne was charged by police and not Player Sail should not count in Player Payne's favour. Whilst Player Payne is required to engage in the Court process and be subject to further public scrutiny, that is not a factor which should affect the appropriateness of the FFA's sanctions which has the purpose of protecting the sport of football in upholding the objectives of the Code. It may be seen as incongruous that a player who is charged with an offence receives a lesser sanction than a player who was not charged with offences simply because the charged player will be subject to further consequences the flow from that charge.

#### **G. THE FFA CODE OF CONDUCT**

69. The FFA has promulgated a document styled "Code of Conduct". It first took effect on 1 January 2007.

70. The relevant provisions of the Code of Conduct are set out below:

1. APPLICATION AND SCOPE

1.1 This Code of Conduct aims to promote and strengthen the reputation of football in Australia by establishing a standard of performance, behaviour and professionalism for its participants and stakeholders. In addition, it seeks to deter conduct that could impair public confidence in the honest and professional conduct of Matches or in the integrity and good character of its participants.

...

2. BRINGING THE GAME INTO DISREPUTE

2.1 A Member must not bring FFA or the game of football into Disrepute.

2.2 Without limiting the generality of clause 2.1, a Member will be taken as having brought football into Disrepute if any of the following occurs:

(a) discriminatory behaviour, including public disparagement of, discrimination against, or vilification of, a person on account of an Attribute;

(b) harassment, including sexual harassment or any unwelcome sexual conduct which makes a person feel offended, humiliated and/or intimidated where that reaction is reasonable in the circumstances;

(c) offensive behaviour, including offensive, obscene, provocative or insulting gestures, language or chanting;

(d) provocation or incitement of hatred or violence;

(e) spectator or crowd violence;

(f) intimidation of Match Officials, which may take the form of (but is not restricted to) derogatory or abusive words or gestures toward a Match Official or the use of violence or threats to pressure a Match Official to take or omit to take certain action regardless of where such action is taken;

(g) forgery and falsification, including creation of a false document, forgery of a document or signature, the making of a false claim or providing inaccurate or false information on a prescribed form;

(h) corruption, including offering a Benefit or an advantage to a Player or an Official in an attempt to incite him or her to violate FIFA Statutes or FFA Statutes;

(i) abuse of position to obtain personal benefit;

(j) commission or charge of a criminal offence; or

(k) any other conduct, behaviour or statement that materially injures the reputation and goodwill of FFA or football generally.

6. RESPONSIBILITIES OF PROFESSIONAL PLAYERS, REPRESENTATIVE PLAYERS & OFFICIALS

6.1 Professional Players, Representative Players and Officials are the public face of football in Australia and so their behaviour is subject to greater scrutiny.

Accordingly, a Professional Player, a Representative Player and an Official must:

(a) at all times behave in a manner that promotes and upholds the highest standards of integrity, dignity and professionalism;

...

71. The sanctions that may be imposed are dealt with by clause 17.1 of the Judicial Bodies By-law which incorporates part of the FFA Statutes, relevantly Art 21.5, which contains a list of sanctions that may be imposed by this Committee in its original jurisdiction.

72. The Committee thus has a broad remit to impose "*such other disciplinary sanctions or measures as is appropriate in all the circumstances*". That is the concluding power and the reference to "other" is to a long list of available sanctions which include a reprimand, warning, caution, fine, ban on registration, suspension from participation in a match or from a competition altogether, suspension of accreditation including coaching accreditation, a ban from dressing rooms substitutes benches the stadium or taking part in any football related activity altogether and lastly a requirement to carry out community or social work. For reasons addressed earlier, this includes the unfettered discretion, in appropriate circumstances, to suspend any part of any sanction.

#### H. THE PLAYERS' EVIDENCE

73. Each of the Players provided written statements which was received by the Committee as their evidence in chief and to which the Committee has had regard. Those statements address the basal facts surrounding the incident which are not substantially in dispute and have been summarised in the introduction to this determination. What follows is a summary of the oral evidence given by each Player.

74. Player Sail:

- (a) he is 24 years of age;
- (b) he had consumed between 6 and 7 beers during the evening and prior to the incident in question;
- (c) he was intoxicated;
- (d) he was not aware that he had driven the golf cart out of the Facility;
- (e) he accepted that the golf cart probably had a maximum speed of about 10 km/h;
- (f) he did not notice any double yellow lines, cat's eyes (road reflectors), street lights, other traffic or any other aspect of his surroundings which indicated that the golf cart was being driven on a public road;
- (g) he now knows but did not at the time know that he had driven the golf cart onto a public road. He said this was the first time that he been at the Facility and that it was completely unfamiliar territory to him;
- (h) he accepted that at the time they were stopped by the police that they were a substantial distance from the Facility;
- (i) Player Payne took over the driving of the golf cart after Player Sail crashed into a ditch after having taken a bend in the road too quickly; and
- (j) he accepts that his conduct was dangerous and that it imperilled both the lives of the Players and other members of the community, including other road users.

75. Player Payne:

- (a) he did not recall exiting a gateway to the Facility or otherwise leaving the Facility on the night in question;
- (b) he had consumed probably 7 to 8 beers during the evening and prior to the incident in question;

- (c) he was not thinking at the time, he was intoxicated and taking the golf cart for a ride was a "release";
- (d) they were in the cart for about half an hour prior to being stopped by the police;
- (e) he did not recall driving on a public road, in particular, he had no recollection of any line markings, cat's eyes (road reflectors), street lights, other traffic or any other aspect of his surroundings which indicated that the golf cart was being driven on a public road;
- (f) he took over the driving of the golf cart after Player Sail crashed it. He said that when the crash occurred, he realised that they were not where they were supposed to be and that they decided to go back the way that they had come;
- (g) that the decision to take the golf cart and drive it was "stupid" and a "bad decision";
- (h) that the stress and uncertainties surrounding COVID-19 at the time of the incident did not justify his conduct.

#### **I. DISCUSSION AND APPROPRIATE SANCTION**

- 76. The Committee first acknowledges and thanks Messrs Condylis and Griscti for the high quality of their thorough written submissions, and the assistance to the Players' and the Committee provided by Mr Spoonley.
- 77. The Players' conduct on the night in question was, to say the least, regrettable and fell well short not only of general community expectations of acceptable behaviour but also the high standards of integrity, dignity and professionalism to which they are held accountable as professional footballers and as representatives of the public face of football in Australia.
- 78. The Wakehurst Parkway in Sydney's northern beaches is a notoriously dangerous stretch of badly lit road consisting of various bends and turns and with a maximum speed of 80 km/h. It scarcely needs saying that driving a golf cart, without headlights and at a maximum speed of 10 km/h on the Wakehurst Parkway endangered the lives of the Players, other road users and potential first responders. The fact that the Players did so at a time when they were subject to and breached a 14-day isolation period due to the COVID-19 pandemic elevates the gravity of their conduct.
- 79. An issue at the hearing was whether the Players left the Facility inadvertently. Given the fact that one can only leave the facility through one well marked exit point, the indicia of a public road which should have been evident to the Players once they were on the Wakehurst Parkway, in particular, distinct lane markings, and the fact that they had been travelling for about 30 minutes when stopped by the police, it is difficult to comprehend how leaving the Facility could have been inadvertent even when they were intoxicated. As Player Payne said in evidence, he realised by the time Player Sail had crashed the golf cart that they were not where there was supposed to be. They were supposed to be at the Facility. Inadvertent or not the Players left the Facility in a golf cart which they were not authorised to use and in breach of isolation requirements. It was reckless and irresponsible in the extreme on any view.

80. The Players have admitted a breach of clause 2.1 and clause 6.1 of the Code. The task of this Committee is to determine *de novo* the appropriate sanction for the admitted breaches.
81. The Players submitted that the FFA had overstated the negative media attention that the conduct attracted and the damage otherwise caused to the game. In their statements, Messrs Johnson and Falvo expressed their opinion of the effect of the Players' conduct on the potential relationship between the FFA and State and Federal governments, especially as negotiations proceed for the reinstatement of the HAL. Mr Johnson also expressed an opinion that the behaviour of the Players reflected poorly on the HAL and the sport of football in Australia within the community. The Committee has treated each of the statements made by Messrs Johnson and Falvo as opinion only and not as evidence of the fact.
82. The Committee observes that it is difficult to quantify by way of direct evidence the harm caused to the reputation and goodwill of the FFA or football generally from the Players' conduct. The fact remains that the Players' conduct received negative press coverage. Further, the Players have each accepted that their conduct, relevantly, had the effect of bringing the game into disrepute, thus that their behaviour injured the reputation and goodwill of the FFA or football generally. This is also consistent with common sense, applied to a reasonable and objective member of the public.
83. The Committee does not accept that the publicity surrounding Player Payne's apology was a true counterbalance for the damage done by the original conduct. That conduct was far more newsworthy and likely to capture public attention than the apology, and the reporting of the apology while well-intentioned when made may well have had the effect of drawing attention to the underlying conduct and making it more widely known.
84. Clause 1.1 of the Code describes its aim as follows:

This Code of Conduct is to promote and strengthen the reputation of football in Australia by establishing a standard of performance, behaviour and professionalism for its participants and stakeholders. In addition, it seeks to deter conduct that could impair public confidence in the honest and professional conduct of Matches or in the integrity and good character of its participants.
85. Hence, any sanction for a breach of the Code must punish the Players for the conduct, serve to deter the Players from any similar offending and act as a general deterrence to players and participants who might be tempted to offend.
86. The Committee has approached the issue of an appropriate sanction by considering the conduct of the Players, including any conduct that would aggravate the charge and making allowances for any mitigating factors.
87. The Committee is of the view that the appropriate sanction for the conduct absent any mitigating factors is a minimum six-match suspension. In coming to this conclusion, the Committee has had regard to the Players' conduct which either wilfully or recklessly endangered their lives and those of the community at large. The Committee considers the fact that the conduct also constituted a breach of the COVID-19 related isolation conditions under which the Players were permitted to remain at the Facility to be an aggravating factor.
88. The conduct of Player Sail as the driver of the golf cart when they left the Facility and for the most of the time while they were on the road may possibly have raised

the question as to whether a greater sanction was justified for him, but in our view Player Payne could have stepped in and either discouraged Player Sail from taking the golf cart or have refused to accompany him. He must therefore accept responsibility as well. Further, Player Payne took it upon himself to drive the golf cart back to the Facility after Player Sail had crashed it. Acting responsibly, he should not have done so, instead, he should have called for assistance. The Players engaged in a joint enterprise and, in the view of the Committee, should share the consequences of that enterprise equally.

89. The mitigating factors which, in the Committee's opinion, justifies a 2-match reduction in addition to the fact that the conduct was not premeditated and was a momentary lapse of judgement no doubt influenced by the alcohol the Players had consumed and the unusual circumstances which they found themselves in, are:
- (a) the Players took immediate responsibility for their actions and did not contest the violations;
  - (b) the Players have demonstrated the highest level of remorse and contrition with Player Payne taking the further step of giving an interview on public radio in New Zealand on 26 March 2020 in which he accepted full responsibility for his conduct;
  - (c) the articles which followed Player Payne's radio interview on 26 March 2020 which may have mitigated, in part, the effect of the conduct;
  - (d) the Players' impeccable disciplinary records;
  - (e) the statements provided on behalf of the Players by the Club and by the Head Coach, Ufuk Talay, relating to their good fame and character and contribution to the football community including the log of charity/community service hours for each of the Players; and
  - (f) the punishments imposed on the Players by the Club. As to this matter, the Committee notes and supports the commendable manner in which the Club has responded to the Players' behaviour, however, it considers those measures to be insufficient to address the aims and objectives of clause 1.1 of the Code.

## **J. CONCLUSION**

84. The primary reason for the imposition of the sanctions by the Committee is that the reputation of football in Australia is of critical importance, and because the Committee regards it is a privilege not a right to play in the HAL. The Players are role models for the game, and the Committee expects more of HAL players than players in the lower levels of the game, on the field and off. The sanctions as imposed recognise that.
85. The Committee accordingly determines that both Player Payne and Player Sail are to serve a four-match suspension, the intent being that Players can train but that they not be permitted to play those number of HAL matches when the 2019/2020 season re-commences. If for any unforeseen reason the 2019/2020 season does not re-commence, or is cancelled or suspended before the full sanction has been served, it will carry over into the following HAL season.



A handwritten signature in black ink, appearing to read 'LV Gyles', with a long horizontal stroke extending to the right.

**LV Gyles SC**  
**Acting Chair, FFA Disciplinary & Ethics Committee**