

DISCIPLINARY & ETHICS COMMITTEE OF FOOTBALL AUSTRALIA
DETERMINATION IN THE FOLLOWING MATTER:

Player and club	Ulises Davila, Macarthur FC
Alleged offence	Offence No. 4, R2 Category 1
Date of offence	6 April 2024
Occasion of offence	Match between Macarthur FC v Western United FC
Basis the matter is before the Disciplinary & Ethics Committee	A referral: see clause 3.3(a) and 11.34(b)(ii)
Date of Disciplinary Notice	9 April 2024
Date of Hearing	17 April 2024
Date of Determination	17 April 2024 (oral pronouncement of determination) 19 April 2024 (written reasons for determination)
Disciplinary Committee Members	Anthony Lo Surdo SC, Chair Peter Speed David Barrett

A. INTRODUCTION AND JURISDICTION

1. The Committee has jurisdiction under clause 3.3 of the "A-League Disciplinary Regulations" applicable to the 2023-24 A-League season (**the Disciplinary Regulations**) to determine matters which have been referred to it pursuant to the Disciplinary Regulations. When a matter is duly referred, clause 3.3(a) provides that the Committee must determine the matter and impose such sanctions as are authorised and appropriate to the determination.
2. In this matter there has been a referral under clause 11.34(b)(ii) of the Disciplinary Regulations. Prior to a referral under clause 11.34(b)(ii) Ulises Davila (**the Player**) had received:
 - a) a Disciplinary Notice (MRP Citation) (**Citation Notice**) issued by the Match Review Panel (**MRP**) pursuant to clause 11.29 of the Disciplinary Regulations. The Citation Notice was issued by the MRP on 8 April 2024 following the identification by the MRP in its post-match review of a Citation Incident under clause 11.1(c)(i) of the Disciplinary Regulations; and
 - b) a Disciplinary Notice (Player Red Card) issued pursuant to clause 11.33 of the Disciplinary Regulations in which the MRP proposed a sanction of two matches, being the Minimum Sanction for the relevant offence (**Disciplinary Notice**).
3. The consequence is that the Player will have an automatic Mandatory Match Suspension (**MMS**) (in this case 1 match). For the reasons detailed below, no part of the above process is able to be referred to the Committee and hence cannot be the subject of challenge.

4. The Table of Offences describes the "Minimum Sanction" for an R2 offence as being "1 additional match plus the Mandatory Match Suspension." The MRP is required by clause 3.5 of the Disciplinary Regulations to apply the Table of Offences. Where the Table of Offences prescribes minimum sanctions such as in the present case, the MRP has no power to propose a sanction that is lower than that minimum. It can, however, in appropriate circumstances propose sanctions over and above either the MMS or a minimum sanction (which includes the MMS).
5. Pursuant to clause 11.34(b)(ii), a Player may elect to refer to the Committee for hearing and determination whether "Exceptional Circumstances" apply and therefore a sanction outside the Range at the Table of Offences should be imposed, provided always that the MMS must be served.
6. By notice dated 10 April 2024, the Player indicated that he did not accept the sanction proposed by the MRP and referred the consideration of the matter to the Committee. The only question which the Committee has jurisdiction to determine in this case is whether there are "Exceptional Circumstances" justifying a reduction of the Minimum Sanction from the MMS plus 1 additional match to the MMS (which has been served).
7. In all the circumstances, the Committee is satisfied that it has jurisdiction to deal with this referral limited only to the question identified in paragraph 6 of this determination.

B. THE HEARING

8. A hearing was held on 17 April 2024. At the request of the Club, the hearing was conducted in person rather than by video-conference as has become the norm in such matters.
9. Disciplinary Counsel was Mr Ivan Griscti, of Counsel. The Player was represented by Mr Angus Macinnis, Solicitor and Mr Leonard Lozina, Solicitor. The Player also attended the hearing with Mr Sam Krslovic, CEO of the Club.
10. Disciplinary Counsel relied upon the following evidence:
 - a) video footage of the incident;
 - b) the Citation Notice; and
 - c) the Disciplinary Notice.

The Player, relied upon the following evidence:

- a) video footage of the incident; and
 - b) his disciplinary record.
11. The Committee was also assisted by written submissions provided by the parties and each was afforded an opportunity to speak to those submissions.

C. FACTS

12. In or around the 53rd minute of the match there was a strong and perhaps marginally late challenge by Player Raphael (Macarthur) on Player Vidmar (Western United) which the referee considered to be a foul but not a cautionable offence and in respect of which he played advantage as Western United was in possession of the ball and in the process of a promising attack.

13. The referee stopped play at the request of the VAR and returned to the area where the foul had taken place because, following the challenge, opposing Players Risdon and Raphael had come together and a scuffle had taken place in back play.
14. During the scuffle between Players Risdon and Raphael, the Player also ran in, as did other players. The Player can be seen to place his outstretched right hand in a gripping motion to the neck of Player Risdon just below the chin and push him away.
15. In the audio, the referee can be heard to say to the VAR, "definitely no hand on the neck, Davila" with an inflection in his voice, which we infer was the referee asking for confirmation that his assessment was correct. The VAR responds "I've seen the hand to the neck" and then is heard to say "check complete all clear." The VAR did not request the referee to review the video footage of the incident. The Player was neither cautioned nor sent off.
16. The events giving rise to the Incident Citation are depicted in the pictorial extracts taken from the video which appear below.

Image 1: The strong and slightly late challenge by Player Rafael which preceded the incident.



Image 2: Player Davila making contact with the neck of Player Risdon in a grabbing/gripping motion.



D. SUBMISSIONS

17. What follows is a summary of the parties' written submissions. It does not necessarily encompass every contention put forward by the parties. To the extent that it omits any contentions, the Committee notes that it has considered all of the evidence and arguments submitted by the parties even if there is no specific reference to those submissions in the following summary.
18. In chief, the Player contended, in summary, that:
 - a) the MRP did not have jurisdiction to issue the Disciplinary Notice because it did not, as required by clause 11.1(c)(i) of the Disciplinary Regulations, "turn its mind to, and affirmatively answer, the question of whether 'based upon Law 12 of the Laws of the Game' the incident 'should have been sanctioned with a direct Player Red Card (**Direct Red Card Question**).'" The failure by the MRP to ask itself the Direct Red Card Question can, it was submitted, be inferred from the fact that nowhere in the Show Cause Notice was the Direct Red Card Question adverted to; and
 - b) separately and, had the Direct Red Card Question been asked, a reasonable decision maker would not have characterised the incident as amounting to "Violent Conduct" as that term is defined in the Laws of the Game (**LOTG**). It was submitted that what occurred was "...A full and frank exchange of views which involves elements of both verbal and non-verbal communication. In the course of that exchange of views, Mr Davila placed his hand on the part of the opposing player above the opposing player's shoulder. There was no striking with either an open or closed hand, and crucially, there was no contact with the head or face...[i]t is particularly important to note that the parts of the body where contact is expressly defined under the Laws of the Game to be 'violent conduct' are

limited to the head and face, although it is true that some contact directed to the neck might amount violent conduct [sic]], the same is true of some contact directed to the arm or the hand. It is not the case that all contact directed to the neck or throat is violent conduct. Unless negligible force is shown to have been used.”

19. Disciplinary Counsel submitted, in summary, that:
 - a) the matter comes before the Committee as a result of a citation by the MRP;
 - b) the Citation Notice was issued by the MRP in respect of an incident that occurred during the match between Macarthur FC and Western United FC. It complies with the requirements of clause 11.30(b) of the Disciplinary Regulations. There is no requirement that the Citation Notice contain specific reference to the Direct Red Card Question, as framed on behalf of the Player, or any other form of words derived from clause 11.1(c)(i) of the Disciplinary Regulations;
 - c) the Citation Notice discloses that the MRP reviewed the video footage and identified the commission of Offence 4 “Assault on a player (e.g. violent conduct when not challenging for the ball).” On any sensible interpretation, the MRP turned its mind as to whether a red card offence was committed based on Law 12 of the LOTG. Violent Conduct is an intrinsic part of the Category 1 offence of “Assault on a Player”;
 - d) by determining that the Player committed an act of Violent Conduct, the MRP has, of necessity, turned its mind to determine that the Player committed an offence based on Law 12 of the LOTG which should have been sanctioned with a red card;
 - e) the submission that the Citation Notice does not disclose consideration of the so-called Direct Red Card Question, is therefore a nullity and is misconceived;
 - f) the alternative submission, that the Player’s actions did not constitute Violent Conduct, apart from being incorrect and inconsistent with the video footage, is not available to the Player. The only available basis to challenge the MRP proposal for sanction (as the proposal is the minimum sanction for the Offence) is that provided by clause 11.23(b)(ii) (sic) of the Disciplinary Regulations, namely, as to whether there are “Exceptional Circumstances” that justify a sanction outside of the Range at the Table of Offences;
 - g) the Player had the opportunity to contend that the Offence was not committed when asked to “show cause” pursuant to the Citation Notice. The Disciplinary Notice confirms that the Player’s submissions were considered and the MRP determined that the Offence was committed. That determination cannot be challenged;
 - h) the sole basis for a challenge to the proposed sanction, being the existence of Exceptional Circumstances, has not been pressed on behalf of the Player; and
 - i) there is no proper basis to the Player’s challenge to the MRP’s determination and it ought to be dismissed.
20. By way of reply, the Player contended, in summary, that:
 - a) Disciplinary Regulation 11.30 is not prescriptive of the only matters that must be included in a show cause notice. The use of the word “include” is

inconsistent with the proposition that the matters listed in Disciplinary Regulation 11.30 are the only essential integers. That language, accordingly, does not exclude any additional matters which may be part of the Show Cause Notice including things which are necessary to enable a person on whom such notice is served to ascertain whether or not each of the jurisdictional preconditions for the Show Cause Notice is apparent on the face of the notice itself;

- b) identification of a Category 1 offence is not the same as forming the view that a direct red card offence has been committed. "Violent conduct" is only identified as one example in the Category 1 offence of assault on a player, which means that such an offence is not synonymous with violent conduct;
 - c) Exceptional Circumstances presently apply in two ways. First, it is presumed by the Player that it will be exceptional for the MRP to misunderstand and to misapply the powers given to it under the Disciplinary Regulations. Second, the circumstances are exceptional to the extent that the offence purportedly identified by the MRP did not occur, as was confirmed by the VAR contemporaneously with the decision of the referee which the MRP has purported to rectify; and
 - d) Disciplinary Regulations 3.3(a) and 4.4 provide that the Committee has jurisdiction to "determine" matters which are "referred" or "referable" to the Committee. The power to "determine" must necessarily include the power to determine, as requested by the Player, that the referral from the MRP is invalid. Any attempt by the MRP to exercise powers other than in the manner in which the Disciplinary Regulations provide, is an action beyond power and where, as here, that occurs, the consequence is that the decision beyond power should be quashed. In oral argument, Mr Macinnis for the Player also referred the Committee to Disciplinary Regulation 13.1(c)(i) which is to a similar effect as Disciplinary Regulations 3.3(a) and 4.4.
21. In oral argument, Mr Macinnis, referred to the decision of the Committee in *Pantelidis* (2009) in support of a submission that the Committee should, as the Committee did in that case, treat the reference to "matters" in Disciplinary Regulations 3.3(a), 4.4 and 13.1(c) broadly and as applying to the whole of the controversy or dispute including affording players a right of review as to whether an offence occurred which right would extend to a consideration of what had been done or, as submitted by Mr Macinnis, what the MRP in this case had omitted to do, that is, its alleged failure to consider the Direct Red Card Question.
 22. Mr Macinnis quite correctly conceded, however, that the Committee in *Pantelidis* was considering an iteration of the disciplinary regulations which has since been amended and which limits the circumstances and matters than can be properly the subject of consideration by the Committee.
 23. Mr Macinnis also referred to the decision of the Committee in *Mastrantonio* (2023) and, in particular, the comments made by the Committee in that case as to what, properly, comprises violent conduct in further support of the Player's contention that his conduct was not violent conduct. The Player did not, however, contend that the offence in this case should be re-categorised nor how it should be re-categorised and the consequences of so doing.

24. Lastly, and relatedly, Mr Macinnis referred to the decision of the Committee in *Burgess* (2023) noting the “jurisdictional conundrum” identified by the Committee in that case, being the apparent tension between clause 11.22(b)(ii) (now clause 11.33(b)(ii)) of the Disciplinary Regulations which provides that on a referral under that provision the “sole question” is sanction and clause 13.1(e) which provides that the Committee is not bound by the categorisation of an offence. Mr Maciness submitted that these proceedings were an appropriate vehicle to resolve that jurisdictional conundrum.

E. CONSIDERATION AND FINDINGS

25. The Committee has addressed its jurisdiction under the heading “Introduction and Jurisdiction.”
26. Pursuant to clause 3.3(a) of the Disciplinary Regulations, the Committee must determine matters that have been referred to it and impose such sanctions as are authorised and appropriate to the determination.
27. Here, there has been a referral by the Player pursuant to clause 11.34(b)(ii) of the Disciplinary Regulations. The metes and bounds of that referral are determined by clause 11.34(b)(ii) and not the reference to the term “matters” in clause 3.3(a) or elsewhere in the Disciplinary Regulations.
28. Prior to the referral:
- a) the MRP determined that there was a “Citation Incident” pursuant to clause 11.1(c)(1) of the Disciplinary Regulations, being an incident which, in the opinion of the MRP comprised a breach of Law 12 of the LOTG which should have been sanctioned with a direct Player Red Card and that escaped the referee’s attention (as defined by clause 11.2 of the Disciplinary Regulations). The MRP issued the Citation Report and afforded the Player an opportunity to make submissions as to whether the offence had been committed; and
 - b) having determined that an offence had been committed, the MRP issued a Disciplinary Notice.
29. Clause 11.2 of the Disciplinary Regulations sets out the matters that the MRP may take into account in determining whether an incident has escaped the attention of the referee. That clause makes plain that it is in the sole discretion of the MRP to determine whether an incident has escaped the attention of the referee and moreover specifically provides that any decision of the MRP that an incident escaped the attention of the referee, “is final and may not be challenged before a Judicial Body.”
30. Therefore, no part of the MRP process of either determining the existence of a Citation Incident or the existence of an offence is able to be challenged before this Committee, a matter which Mr Macinnis for the Player accepted in argument.
31. The sole issue for this Committee on a referral by a player is to determine whether there are “Exceptional Circumstances” for the purposes of clause 11.34(b)(ii) of the Disciplinary Regulations such as to enliven the Committee’s jurisdiction to reduce a player’s suspension from the minimum sanction, in this case 1 match over the MMS.

32. The Committee has no power to conduct a judicial or merits type review of the decision by the MRP to issue the Citation Notice and the Disciplinary Notice, as the Player appears to contend by reference to his contention that the MRP failed to ask and resolve the Direct Red Card Question to properly enliven its jurisdiction; and it would be in error for the Committee to do so.
33. As will become apparent, the Committee has limited itself, as it is bound by the Disciplinary Regulations, to a consideration of the "sole question" as to whether there were Exceptional Circumstances justifying a reduction in the minimum sanction. However, prior to considering that issue and whilst not germane to its reasoning process, the Committee intends to briefly address the other principal arguments advanced on behalf of the Player.
34. The Committee notes that the video and audio reveal the referee indicating to the VAR that he did not see the Player's hands on the neck of Player Risdon and appears to ask for confirmation. The VAR responds "I've seen the hand to the neck" and then is heard to say "check complete all clear." It appears to the Committee that the referee and the VAR may have been at cross-purposes. Their exchange is at best equivocal as to whether the referee saw or had sufficiently brought to his attention the incident that became the subject of the Citation Notice.
35. Having regard to the terms of clause 11.2 of the Disciplinary Regulations, it was plainly open to the MRP to have determined, as it did and in its sole opinion, that the incident had escaped the referee's attention and it is no part of the Committee's role to entertain a challenge to that determination including as to the MRP's reasoning process.
36. The Citation Notice does not, in terms, refer to Law 12 of the LOTG, nor does clause 11.30 of the Disciplinary Regulations require a Citation Notice to include such a reference. The Citation Notice complies in all material respects with the requirements of clause 11.30 of the Disciplinary Regulations. The purpose of those requirements is to provide a player with sufficient information to be apprised of the facts, matters and circumstances as they relate to the alleged offence. In this case, the relevant offence is particularised in paragraph 4 of the Citation Notice and it is demonstrably clear that those particulars relate to a breach of Law 12 which includes offences such as that contained in the Citation Notice and extends to offences punishable by a direct red card such as "violent conduct".
37. Law 12 of the LOTG defines "Violent Conduct" as:

"...when a player uses or attempts to use excessive force or brutality against an opponent when not challenging for the ball, or against a teammate, team official, match official, spectator or any other person, regardless of whether contact is made."

In addition, a player who, when not challenging for the ball, deliberately strikes an opponent or any other person on the head or face with the hand or arm, is guilty of violent conduct unless the force used was negligible."
38. Further, "using excessive force" is defined as "when a player exceeds the necessary use of force and/or endangers the safety of an opponent and must be sent off."

39. We reject the submission that the footage can be characterised as merely a "...full and frank exchange of views which involves elements of both verbal and non-verbal communication" and during which "...Mr Davila placed his hand on the part of the opposing player above the opposing player's shoulder..."
40. The video depicts the Player placing his outstretched right hand in a gripping motion to the neck of Player Risdon just below the chin and pushing him away.
41. It is hard to conceive of any deliberate non-negligible force applied to a player's neck being "necessary" (when not challenging for the ball) and hence not "excessive". Rhetorically one asks when is it ever "necessary" to grab another player by the neck and push them away? It certainly was not necessary in this case.
42. As Law 12 of the LOTG makes clear, the degree of force required to constitute "violent conduct" may differ depending upon the sensitivity and susceptibility of the part of the body to which that force is applied. Any non-negligible contact with a player's head, neck or throat can endanger the safety of that player, expose that player to unacceptable risk of harm and is punishable by a direct red card. Making contact with Player Risdon's throat comprised Violent Conduct as defined in the LOTG, albeit, in this case, at the lower end of offending but sufficient to justify the sanction as proposed by the MRP.
43. In so far as Exceptional Circumstances are concerned, the Committee has, in many prior decisions including, most recently, in *Nino* (5 April 2024), set out the limits of what may or may not comprise "Exceptional Circumstances" for the purposes of clause 11.34(b)(ii) of the Disciplinary Regulations.
44. The Regulations define "Exceptional Circumstances" as follows:

Exceptional Circumstances means circumstances operating at the time of the Offence and relating to the commission of the Offence and not to the impact a sanction may have. The following are not Exceptional Circumstances:

(a) the significance or importance to the Participant or their Club of the A-Leagues Match in which the Offence was committed;

(b) the significance or importance of any match or tournament in which the Participant will be ineligible to participate because of the imposition of a sanction within the Range at the Table of Offences;

(c) the point in the A-Leagues Match at which the Offence was committed;

(d) the conduct, including actions, words or gestures of any Player or Team Official of the opposing team during or related to the A-Leagues Match; and

(e) any disciplinary decision taken or failure to take a disciplinary decision by a Match Official during the A-Leagues Match.

45. As the Committee noted in *Bojic* (2010), "Exceptional Circumstances" comprise those that are not "a common thing on the football field". A similar approach was taken by the Committee in *Akoto* (2010), *Berisha* (2016), *Burgess* (2023) and *Nino* (2024).
46. In *Berisha*, the Committee observed that the term "Exceptional Circumstances" is defined both positively and negatively. To comprise "Exceptional Circumstances",

the circumstances must be "operating at the time of the Offence and relating to the commission of the Offence and not to the impact a sanction may have" and must not be one of the circumstances the Disciplinary Regulations have identified as not comprising Exceptional Circumstances.

47. That the Match Official (and VAR) did not at the time "take a disciplinary decision" is expressly identified as not being an Exceptional Circumstance, a matter which Mr Macinnis quite correctly accepted in argument.
48. As the Committee commented in *Ikonomidis* (2023), the evident object and purpose of the definition of "Exceptional Circumstances" is to enable a participant charged with an offence to rely upon a potential array of circumstances other than those which are expressly excluded, in support of a claim that the Committee should impose a sanction outside of the minimum prescribed by the Table of Offences. Those circumstances, however, must be "exceptional", that is extraordinary or unusual or uncommon in football.
49. The circumstances must bear both a close temporal relationship to the offence and relate to its commission.
50. A player's antecedence, disciplinary record, nature of the offending, conduct immediately after the offence and character more generally are not matters which either individually or collectively were "operating at the time of the Offence" nor are they matters which relate to or have the necessary nexus to the commission of the offence (see *Ikonomidis*). The same can be said for matters pertaining to how the MRP may or may not have procedurally conducted itself several days after the event.
51. Such an approach is entirely consistent with situations in which the Committee has determined that "Exceptional Circumstances" existed for the purposes of the Disciplinary Regulations (see, for example, *Akoto*, *Bojic*, and *Berisha*). Common to each of those cases was the existence of facts and circumstances operating at the time of the commission of the offence which were extraordinary or unusual and which caused, contributed, explained, mitigated or otherwise related to the commission of the offence.
52. Therefore, to be "exceptional" the circumstances must be extraordinary or unusual or not common in the game of football and there must be a connection between those circumstances and the commission of the offence itself.
53. Given that it is this Committee's view that the contact with Player Risdon's throat did comprise Violent Conduct as defined in the LOTG (and as determined by the MRP), these proceedings are not an appropriate vehicle for resolving the jurisdictional conundrum raised in *Burgess*.
54. The matters upon which the Player relies do not and cannot, self-evidently, comprise "Exceptional Circumstances", that is, in the sense of being exceptional or extraordinary or unusual in the game of football. Neither of the matters upon which the Player relies were operating at the time of the offence nor relate to the commission of the offence. Further, and as the Committee noted most recently in *Nino*, it is all too common for players to run in and confront opposing players arising from an incident in respect of which they take issue, as did the Player in this case.

F. RESULT

55. There being no Exceptional Circumstances and it being the only grounds upon which this Committee has jurisdiction in the case of a referral by a player pursuant to clause 11.34(b)(ii) of the Disciplinary Regulations to justify a reduction of the minimum sanction from the MMS plus 1 additional match to the MMS, the sanction of the MMS plus one additional match is confirmed.

A handwritten signature in red ink, appearing to read 'A. Lo Surdo', is centered on the page.

AP Lo Surdo SC, Disciplinary & Ethics Committee Chair

19 April 2024