

# Governance in Sport: Outside the Box?

Deborah Healey\*

## Abstract

*'Governance' in its simplest form is the way that an organisation is directed and controlled, but the concept of governance also incorporates systems of rules, relationships, and processes to achieve that end. This article focuses on governance of sporting organisations in Australia. Sport in Australia is organised in a singular fashion when compared to other organisations and to sport in other countries. This has significant implications for assumptions about corporate structure, law and governance. The article examines governance of sporting organisations from a number of perspectives and draws distinctions between standard assumptions about governance and the realities of sports governance in Australia. It concludes that a number of assumptions made about organisations in law and governance theory do not apply to Australian sporting organisations. It asks how these anomalies in assumption and execution affect ultimate good governance in sport and impact on the way directors approach their duties.*

**JEL Codes:** K, L

## Keywords

*Company limited by guarantee; Corporations Act 2001; duties of directors; governance; not-for-profit; role of board; sport; sporting organisations; stakeholders.*

## Introduction

The aims of sports generally include fostering excellence in performance for elite athletes, increased participation in the sport, providing a satisfying competitive environment for participants at all levels, and encouraging fans. 'Governance' in its simplest form is the way that an organisation is directed and controlled. In the context of sport it also encompasses the development and maintenance of practical and ethical self-regulation to achieve diverse objectives such as enforcing the rules of the game, implementing anti-doping policies and disciplining athletes. This article will contextualise sports governance against the distinctive and changing nature of sport in Australia. It will consider governance from a number of perspectives: the complex context; the legal obligations of sporting organisations and their officers; and practical governance strategies in the sporting environment. The article does not seek definitively to catalogue governance, but rather isolates some issues which make governance a continuing challenge

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\*The University of New South Wales, Sydney, Australia

for sporting organisations, by drawing distinctions between standard assumptions about organisations and the realities of sport. It takes the view that rigid adherence to the standard assumptions will not necessarily achieve the best outcomes for sporting organisations.

## **Sport: Organisational and Commercial Context**

Commercialisation has changed sport over the last 30 years. There is now a substantial sports 'industry'. A larger sponsorship pool, increased broadcasting revenues and more consistent government funding have all contributed to a larger sporting economy. More athletes are better compensated and have greater expectations of fair treatment in their dealings with sports because of the significant commercial impact of the decisions of sporting organisations.

### *Complexity of Sporting Landscape*

Any meaningful analysis of governance issues in Australian sport requires an understanding of the way it is organised, which has its roots in Australia's historical development and Constitutional Federal system. Sport is played at local, State and national level, with individual incorporated organisations organising and managing sport at each level. Each smaller geographical unit is ordinarily affiliated to a larger geographical organisation, culminating in a national body. In the bigger picture, national level athletes and teams are selected by National Sporting Organisations (NSOs) to represent Australia internationally. NSOs are often affiliated to an international body which makes rules for the particular sport worldwide. NSOs may also be linked to other international bodies such as their National Olympic Committee, which in turn is a member of the International Olympic Committee. This proliferation of organisations creates a complex web of regulation and political considerations.

An additional part of the complexity of the landscape is the economic chasm between the top tier high profile NSOs and other sports, some of which operate predominantly at grass roots or community level. The top tier professional sports such as the football codes (rugby, rugby league, Australian football and soccer (football)), cricket, golf, and tennis are organisers and managers and provide lucrative careers for their best participants. Their professional teams may be privately or community owned. Broadcast rights and sponsorships provide substantial funds to develop and organise all levels of these sports. In addition to their commercial arrangements, most of these top tier sports receive government funding for athlete development and to support community participation.

However, most sports played in Australia, professionally and non-professionally, fall outside this top tier group. These other sports have no lucrative sponsorships or broadcast contracts. Some pay production costs to achieve broadcast coverage. Significant time and energy is spent attracting, training and managing volunteers and attracting and retaining participants, and organising and hosting a myriad of competitions at all levels of participation. Sporting organisations outside the top tier are likely to be dependent on government funds to support important goals like athlete development and participation.<sup>1</sup> Funds are awarded to NSOs at Federal level by the Australian Sports Commission for

specific purposes, subject to compliance with principles of good governance and the implementation of specified policies.<sup>2</sup> State sporting organisations (which are NSO members) may receive State funds for similar purposes. The fact that sports are given (and are often dependent on) 'taxpayer money' rightly increases the level of scrutiny applied to them.

The legal characteristics of organisations within the fabric of sport are diverse. Some sporting organisations and individual teams are incorporated under the *Corporations Act 2001* as companies limited by shares, but this is relatively uncommon. Many sports at both national and state level are incorporated as companies limited by guarantee and have members rather than shareholders. A large number of sporting organisations are incorporated as associations under state laws. Associations also have members, and are more likely to be state organisations, district associations or local clubs. Compliance with associations' laws is generally not as onerous as compliance with the *Corporations Act*.

Top tier sports have governance arrangements which are likely to be similar to commercial entities. Other sports with very large participation numbers<sup>3</sup> have simple governance structures at an individual association level, but extremely cumbersome structures beyond that. This makes governance, particularly at the NSO level, difficult as they struggle to cover the whole of the sport with its divergent interests.

### *Difficulties with Legal Compliance*

Legal compliance is a particularly difficult and time consuming issue for sporting organisations. In Australia the law generally applies to sport as to other organisations. Laws governing incorporation contain specific requirements. All commercial laws apply to the business side of sport. More generally, the nature of sport itself means that a diverse range of areas of law apply to even the non-commercial grass roots sports. Expensive and complex cases have been fought in commercial areas such as media and broadcasting, sponsorship and professional leagues.<sup>4</sup> Personal injury litigation is always a risk in a sports context, to such an extent that special rules have been made in relation to tort actions for compensation. This risk is exacerbated by the large numbers of volunteers and child participants in sport, making effective risk management in sport extremely challenging (see Healey 2006). Laws relating to employment and occupational health and safety are complex and apply to all sporting organisations which have employees. Community sports have exacting legal child protection responsibilities because of the participation of children.<sup>5</sup> Sporting organisations regularly conduct disciplinary tribunals on matters ranging from on field infractions and other behavioural issues to breaches of rules about member protection. While there are some limits on the intervention of courts in disputes involving members of 'voluntary organisations' like sports in areas such as the enforcement of disciplinary rules,<sup>6</sup> the diversity of legal compliance issues facing sporting organisations is very wide. Sporting organisations, particularly at community level, rarely have the structures or the money to support officials, employees and volunteers to govern effectively. The bulk of their money comes from government funding, which is itself conditional on the adoption of policies, sometimes

at the expense of the strategic objectives of the sport. Sporting organisations often do not have comprehensive risk management strategies, or the funds or knowledge to seek appropriate legal advice. This in turn compounds the impact of the legal risks they face.

All of these features combine to ensure that governance in sport is an extremely complex undertaking.

### *Comparison with Sport Overseas: Structure and Law*

Overseas, the organisation and governance of sport is different. In Europe, for example, sport is integrated at all levels of the community, with amateur and professional streams conducted by the same sporting organisations in a pyramid structure which has some similarity to Australia, although not generally with Australia's federal complexity (Commission of the European Communities 2007). The existence of the European Union (EU) and its rules of economic integration, however, impact significantly upon commercial areas of sport, with the key determinant of the application of these rules being 'economic activity'. Areas such as aspects of the organisation of competitions, free movement of athletes (as workers) between Members, broadcasting and sponsorship are all subject to the Treaty on the Functioning of the European Union (TFEU) (Barani 2007; Weatherill 2007). Other issues such as the rules of the game are outside EU regulations. While there was traditionally no general power for EU regulations to deal with sport (absent commercial activity), in 2009 a specific article (Art. 165) on sport was included in the TFEU by the Lisbon Treaty. Commentators believe, however, that this will not significantly change the impact of the TFEU on sport but rather will clarify it and allow the development of a more comprehensive sport policy for the EU (Parrish et al. 2010: 61–62).

By way of contrast, in the United States amateur and professional sports are quite separate, and are subject to different laws. Amateur sports are made up of community leagues, school athletic associations, state and national regulatory boards, the National Collegiate Athletic Association (NCAA) and other supervisory organisations. They are governed by the Amateur Sports Act, the US Olympic Committee (USOC) and Olympic rules and processes. Professional sports competitions are often run by joint ventures of teams, and controlled by rules made by team owners and by collective bargaining with athletes. There is thus not the same connection between amateur and professional competitions or athletes as in Australia or Europe (Nafziger 2008). Another distinction in relation to the US is that there are notable exceptions to the general application of laws. Major League Baseball, for example, is not subject to antitrust law despite the extent of its commercial activities.<sup>7</sup> Some professional sports leagues have been successful in arguing that they constitute a single entity which is not capable of colluding and therefore not subject to antitrust law in that respect.<sup>8</sup> The collective sale of sports broadcast rights to broadcast major professional leagues is expressly exempt from antitrust laws by the Sports Broadcast Act 1961.

## *Implications for Governance of Sport in Australia*

The complexity of organisation of sport and, in many instances, the lack of sufficient funding, sport's propensity to attract the application of a very wide range of laws, and its distinctive nature when compared to sport overseas all contribute to complications for sporting organisations when they approach the issue of corporate governance. Additional issues for consideration in this area follow.

### **How Does Current Thinking Around Corporate Governance Apply to Australian Sporting Organisations?**

Governance is the system for directing and managing an organisation. Many commentators have expounded definitions of corporate governance, and these contain differing elements and have different emphasis. In the Bell Group case Owen J. made the point that corporate governance is not a term which can be easily defined, stating:

Directors are in control of the assets of a corporation but they do not own those assets. They control the assets on behalf of the corporation and, through the corporation, others having an interest in the wellbeing of the entity. There are no hard and fast rules that constitute 'corporate governance'. But there are some basic underlying principles that have developed over time and now dictate how a director is expected to carry out her or his responsibilities.<sup>9</sup>

His Honour provided a more detailed analysis of what the concept actually entails in the Report of the Royal Commission investigating the collapse of Australian insurance company HIH (the 'HIH Report'),<sup>10</sup> where he stated:

Corporate governance — as properly understood — describes the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations ... the expression "corporate governance" embraces not only the models or systems themselves but also the practices by which that exercise and control of authority is in fact effected. (HIH Report, cited in Du Plessis et al. 2011: 4)

This description clearly envisages more than merely the law of incorporation of an entity. It emphasises that the regulatory framework of corporate governance in Australia is made up of both hard and soft law. The hard law includes the Corporations Act and Associations laws, and other general laws which may be relevant in particular circumstances. The soft law encompasses non-binding codes of practice and guidelines which apply to the particular organisation (Hill 2010).<sup>11</sup> The actual implementation of those hard and soft laws by practices and procedures is also part of the governance.

In simple terms, corporate governance involves the way the directors develop a system of governance to fit the needs of the organisation.<sup>12</sup> There is no 'standard' model of corporate governance although most approaches share common features. Directors play the central role in the process of governing, and the arrangements developed by a board will differ depending upon the circumstances: issues such as size and structure, and the place of the organisation

in the hierarchy, all play an important role. In the context of NSOs, for example, governance involves plans and strategies for the whole of the sport. The extent of commercialisation significantly impacts on objectives, strategies, risks and governance arrangements in the sports context. The singular nature of sport which was outlined in the first part of this article strongly suggests that corporate governance in sport should be significantly different to that of other entities.

In the sports context the Australian Sports Commission (ASC) states that governance concerns three key issues:

- How an organisation develops strategic goals and direction
- How the board of an organisation monitors performance to achieve those goals, has effective systems in place and complies with its legal and regulatory obligations
- Ensuring that the board acts in the best interests of the members. (ASC 2012: 2)

This simple sketch belies the intricacies of the subject matter. It cannot be disputed, however, that the board of directors governs the organisation. In considering corporate governance and sport, we turn first to the laws which impose specific obligations on the board and directors in relation to governance.

### **Duties Imposed on Directors and Officers by Law: The Minimum Standards**

Good governance assumes that directors will comply with their legal obligations generally, and in particular, their legal obligations to the organisation. Some of the significant obstacles to general legal compliance by sporting organisations were raised in the first part of the article. The specific laws on directors' duties really set only minimum standards of behaviour for directors and office holders and in themselves provide little by way of positive direction to directors as to how best to fulfil their obligations to the company and improve governance. Nevertheless they are a critical bottom line for directors and will be set out briefly here.

Obligations on directors, commonly called directors' duties, are imposed by the common law, the Corporations Act, or the Associations law of a relevant State or Territory, depending upon the law of incorporation. The process of incorporation creates the organisation as a legal person separate from its members, so individual members of incorporated bodies are protected from liability in respect of the activities of the organisation. They may, however, have obligations as directors and officers and they may be liable for breach of these if they do not perform them in accordance with the law. The incorporation document, the constitution or rules of the organisation, forms a legally enforceable contract between the members. The obligations imposed on board members by law apply regardless of whether sporting organisations are community based, listed or privately owned, and how boards are constituted.

Directors have a duty at common law to exercise reasonable skill and care, as well as a fiduciary duty of good faith. Directors are, metaphorically, agents of the members or shareholders to act in the best interests of the company, so the

powers of directors must always be used in the interests of the company. The duty of care of directors means that they must become familiar with the company and how it is run.<sup>13</sup> The board must be able to satisfy itself that the company is being properly run. Directors must take steps to guide and monitor the management of the company.<sup>14</sup> In *ASIC v Adler*,<sup>15</sup> for example, Santow J. described the duties of directors in the following way:

1. A director should become familiar with the fundamentals of the business ...
2. A director is under a continuing obligation to keep informed about the activities of the business ...
3. Directorial management requires a general monitoring of corporate affairs and policies by way of regular attendance at board meetings
4. A director should maintain familiarity with the financial status of the company.

Directors must not allow their own or any other person's interests to come before the interests of the company, or make use of their position to gain an advantage for themselves or anyone other than the company. It is no answer to say that dishonesty was not involved in the particular situation or that the company did not suffer any loss in examples involving advantage. These basic common law duties apply to organisations even if there are no specific duties contained in the law of their incorporation.

The duties imposed on directors under the Corporations Act are similar but not identical to the common law duties. These duties have more regularly been the subject of enforcement by the authorities in the recent past, despite that fact that they have effect in addition to the common law rules (Du Plessis et al. 2011: 242). The duties are imposed on 'officers' of a corporation. An 'officer' is broadly defined to include a director, secretary or executive officer (*Corporations Act 2001*, s9). Compliance with the duty of care and skill imposed is measured objectively, under a reasonable person test by reference to the circumstances of the company, and the role and responsibilities which the officer has within the corporation. For these purposes, responsibilities are not confined to statutory responsibilities, but include whatever responsibilities the officer has in practice.<sup>16</sup> Civil and criminal penalties apply to contraventions of the Corporations Act. Criminal penalties are substantial, involving fines of up to \$220,000 per offence and/or imprisonment for up to five years. Officers of the company can also be disqualified from managing a company. Officers must act for a proper purpose, and always in the best interests of the company. As well as the potential for civil liability, an officer who is recklessly or intentionally dishonest may be criminally liable for breaches of the Corporations Act. 'Insolvent trading' is prohibited and the test of insolvency involves whether the company can pay its debts as they fall due. Directors may be personally liable for debts incurred through insolvent trading (although there are some defences).<sup>17</sup>

The law covering incorporated associations differs from the Corporations Act, and associations' laws differ significantly as between the Australian States. Where there are no specific obligations on directors and officers in those laws,

the common law duties of directors will apply. New South Wales, for example, has provisions dealing with insolvent trading in relation to specified organisations, and also provisions relating to disclosure of interests, and dishonest use of position and information, but no general rule on care and diligence (*Associations Incorporation Act 2009* NSW, ss 31–33; 67–71). South Australia provides that officers of specified associations must act with reasonable care and diligence. Those with turnover over \$500,000 have particular obligations re audit. Insolvent trading is an offence *Associations Incorporation Act* SA, ss3; 49AD). Other States and Territories do not specify duties. WA, Victoria and SA require disclosure of pecuniary interests by directors.

Clearly each of these laws is central to the obligations confronting directors in governing an organisation. They are onerous in nature, particularly in the sports' context when one considers that very many directors are volunteers. Some may have little commercial experience. Compliance with the relevant law does not mean, however, that the organisation will necessarily be well run. Other rules and guidelines assist directors and officers to determine the way they should approach the task of governing the organisation in a constructive way, and some of these follow.

### **Other Aspects of Corporate Governance**

Even before the Global Financial Crisis of 2007 corporate governance in Australia had been brought sharply into focus by local developments involving poor governance performance and steps had been taken to examine the issue. The influential ASX Corporate Governance Council's Principles of Good Corporate Governance and Best Practice Recommendations 2007 (amended 2010) (ASX Principles) replaced an earlier 2003 version, and defined corporate governance as '... the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations'. The ASX Principles identify the following essential corporate governance principles:

- 'Lay solid foundations for management and oversight
- Structure the board to add value
- Promote ethical and responsible decision making
- Safeguard the integrity in financial reporting
- Make timely and balanced disclosure
- Respect the rights of shareholders
- Recognise and manage risk
- Remunerate fairly and responsibly. (ibid: 3)

Each of the ASX Principles is supplemented by more detailed individual recommendations. These ASX Principles apply only to listed entities, and there are few of these in Australian sport, but they provide general guidance for all corporations. The OECD Principles of Corporate Governance also provide guidance and they are applicable to not-for-profit entities such as companies limited by guarantee, although not-for profits have a different legal framework, different types of shareholders and different purposes (OECD 2004).



In the context of sport, the Australian Sports Commission has issued a number of guides to assist sporting organisations with governance, the most recent being 'Sports Governance Principles' (ASC 2012). The ASC Guide enunciates six principles (ASC Principles) covering:

- Board composition, roles and powers
- Board processes
- Governance systems
- Board reporting and performance
- Stakeholder relationship and reporting
- Ethical and responsible decision making (ASC 2012).<sup>18</sup>

When compared with the ASX Principles (2007[2010]), the ASC Principles appear to list areas of focus rather than action points, although the material on the individual Principles does fulfil that function. Interestingly, the ASC Guide adopts the 'if not why not' obligation contained in the ASX Guidelines, which means that there is an obligation to explain to stakeholders if any alternative approach to the ASC Principles is adopted (ASC 2012: 1).

The ASC Guide also identifies the following essential 'governance systems' for an effective sporting organisation:

- A strategic planning framework identifying core organisational values, goals and performance management indicators
- Clearly documented board/management interaction, including appropriate delegations and authority of all parties
- A thorough process for identifying and monitoring legal, compliance and risk management requirements
- A thorough system of audit, including internal and external processes
- A performance management system to provide evidence and ensure monitoring of legal compliance and performance against plans (ASC 2012: 2).

Well-developed rules and regulations of this kind serve two purposes. They assist sporting organisations and their officers to make appropriate governance choices. They are also beginning to influence court determinations about corporate governance, setting benchmarks for judicial decision-making in a number of more recent cases,<sup>19</sup> and having an '... indirect effect in the production of legal liability for corporate boards' (Kingsford-Smith 2012: 25).

## **Governance in Australian Sport: The Issues**

Following on from the ideas provided above, and using the NSO in particular as a model, governance is the way the sport is controlled and guided by its NSO. NSOs need to balance the interests of participants, the development of the sport at elite and community levels, and the interests of its fans through rules, regulations, and compliance with external legal norms. These external legal norms include most particularly the laws and rules on corporate governance, which apply not only to the organisation itself but also to the incorporated bodies which make up its membership, and also compliance with other laws. As has been noted, there

are many sporting organisations which are not NSOs, but they need to balance their own place in their sporting hierarchy in developing governance models.

Sporting organisations differ from other incorporated entities in the way they are constituted, developed and governed. Each of these differences results in governance for sporting organisations being more complicated and difficult than it is for other organisations. Some important examples of this are discussed below.

### *The Board*

The Board is the key to corporate governance. A corporation is ‘an abstraction’,<sup>20</sup> and the Board is ‘the directing mind and will ... the very ego and centre of the personality of the corporation.’ The Board must act in accordance with the law and the constitution of the incorporated body. A number of distinctions arise when one considers the role of directors in commercial corporations and in sporting organisations.

The ASC Guide nominates the following duties for board members in the context of governance:

- ... complying with all relevant legislation;
- exercising decision-making based on the ‘reasonable person test’ ...;
- ensuring the proper keeping of records, registers, accounts, reports and lodgement of documents;
- ensuring that the organisation only exercises those powers and functions permitted to it under its constitution and rules (ASC 2012).<sup>21</sup>

Looking at the applicable laws, these provide a rough list of ‘minimum requirements’ for a board but context dictates that a significant number of other issues are relevant to the approach to governance in a sports context.

### *Who Makes Up the Board?*

Directors of commercial corporations limited by shares are generally successful business people appointed for their skill, or shareholders or their representatives. Directors are appointed by a shareholder or groups of shareholders. They are paid to govern the corporation mainly to generate profits for the corporation and its shareholders. If directors do not do generate profits, they are replaced. None of these commercial assumptions apply when one looks at the Boards of many sporting organisations. Directors are more often than not unpaid and their continued directorship depends on outcomes other than profit making, although they are expected to manage with financial prudence. Directors of sporting organisations, often companies limited by guarantee or associations, traditionally rose from the ranks of sports administrators or players and often had no commercial experience, although this has changed significantly of late and sports particularly at the professional and NSO levels appoint directors who are commercially adept. Experience in sport has shown, however, that commercial appointments to boards do not necessarily ensure financial viability or other success.

The skill level of directors of sporting organisations overall is, for reasons noted above, of variable quality. They are still, however, subject to the testing legal obligations outlined above.

The success of directors of not-for-profit sporting organisations are measured in a different fashion to commercial directors — they are likely to be judged on whether the sport is a ‘success’, although as noted later in this article, there is no one measure of success in sport and sporting organisations routinely have multiple and ill-defined objectives, resulting from their complex membership and multiple stakeholders.

The makeup of the board and how board members are elected or appointed in sporting organisations depends upon who has a right to appoint or who votes under the constituent documents. Some boards are made up of board members representing particular constituents of the organisation, for example, a particular state, ‘the country’, ‘the city’, ‘the referees’. This leads to suggestions that they are not ‘independent’, because directors in this situation may feel compelled to put the interests of the group or organisation which nominated them before that of the organisation they are governing. ‘Independent’ in this context generally means the director does not represent a nominating stakeholder, or a nominating constituency. Other sports boards consist of directors nominated by members or internal stakeholders who suggest independent candidates, who are then confirmed by vote of all the members. Sports tend to think that if a person resigns from a previously held position which might have raised issues of ‘independence’ the problem is solved, but that is not automatically the case. Some sports are governed by an ‘independent commission’ which itself may actually appoint replacement commission members.<sup>22</sup> This raises other issues, such as the level of involvement of stakeholders in appointments.

The ASC Guide makes a number of suggestions in relation to the structuring of boards. They advise that where states are members of a NSO each state should have equal voting power irrespective of member numbers. They also advise against board representation on the basis of state, and emphasise that boards of NSOs should be made up of independent members owing their duties to the NSO board and no-one else. Many organisations have been restructured to take account of these features but some still exist under the old paradigm with state representation at board level. Making changes to address issues such as this in a sport is often hard fought.

### *The Board and Success*

In a company limited by shares the directors owe their duties to the company as a whole and not to individual shareholders. The Board has the obligation to deliver value to shareholders, although the extent to which this means that the only real purpose is the delivery of shareholder value is open to debate (see Clarke 2007: 67). In this context the place of stakeholders is discussed below.

The creation of value and what this might entail in a practical sense is less easily quantifiable for a not-for-profit company limited by guarantee or an association in sport. The board members still owe their duties to the company as a whole and not to individual members. The objectives in the constitution of

the particular organisation will illuminate this question. Members in a company limited by guarantee are different from shareholders, however — they are not looking to shareholder value in a monetary sense as a sign of success because money may not be distributed to them. One might surmise that their wishes involve ‘the good of the sport’ and they see value in sporting success, but as observed by the Crawford Review and previously noted, sporting success is notoriously subjective and difficult to define (Independent Sport Panel 2009). To one member, success may involve Olympic Gold medals or winning a particular game. To another, significant growth in the number of junior participants or participants overall may be the key. Financial growth and stability in the sport may appeal to others. There are many other measures which might be relevant. Not all are mutually exclusive but the emphasis to be placed on each will vary depending upon the particular priorities of the member. Prioritising the relevant interests will be challenging for a sport.

The ASC Guide provides some recognition of the heart of the key outcomes which might be achieved in the following statement about the role of the Board, which is certainly not focussed on monetary value:

The board’s primary responsibility is one of trusteeship on behalf of its stakeholders, ensuring that the legal entity, the organisation, remains viable and effective in the present and for the future. (ASC 2012: 6)

If an organisation is not successful, as noted above, the redress in a commercial corporation is to remove the directors. This proposition is complicated in sport by the structure of some organisations, because in a large national sport only a few may have a vote. In NSOs, for example, the voting members are usually the state-based organisations. In some NSOs individual participants are non-voting members. The constitutions of these NSOs make individual participants members of the NSO automatically when they become registered participants of the sport at a state level, and the constitutions of the state organisations also provide for this. This approach is employed to ensure that the NSO is able to exercise a supervisory role over all disciplinary proceedings of participants, to promote fairness and consistency. In other sports participants are not members of either the NSO or the state body. They may only be voting members of a district association. While views on measures of success may differ significantly within a sport, only a few people or organisations may have the capacity to remove the board of the NSO because of the way voting rights are distributed.

### *Relationship Between Board and Executives*

The relationship between the board and the senior staff has been the subject of differing views. An earlier version of the ASC Guide identified the relationship between the board and the CEO and senior executives as involving the board as the mind of the organisation and the executives as the hands (ASC 2007). The Crawford Review, however, criticised this approach, stating that it presents a diminished view of the role of management. The Review stated that executive teams should be the main initiators of strategy and change, as well as negotiating commercial arrangements with sponsors, governments and media

organisations, characterising the relationship between Board and Executive in the following way:

... the role of the board is to appoint, support and challenge the executive team but it is the executive team that drives the business. They are “minds” as well as “arms”. And as is common practice in the corporate world, the CEO should be a member of the Board. (Independent Sport Panel 2009: 25)

The ASC Guide now talks of segregation of responsibilities between the Board and management, with the Board in control and management to be ‘... accountable, operate with delegated authorities, have appropriate levels of skills, and perform against the established key performance indicators’ (ASC 2012: 12).

These relationships are likely to be very difficult to navigate in circumstances where there are few staff members, perhaps only a CEO, or all those involved in governance are volunteers. This is the case in more than a few sports.

### *Stakeholders*

The traditional focus of corporate governance was on shareholder primacy — the satisfaction of shareholder expectations. More recently corporate governance has focussed on the role of other interested parties both inside and outside the corporation, such as creditors, potential investors, consumers and the community at large in recognition of the roles and interaction with the corporation. The OECD Principles of Corporate Governance note that corporate governance involves relationships between the company’s management, the board, shareholders and other stakeholders (OECD 2004: 11).

Definitions and views of who are stakeholders vary, and of course the concept will vary in relation to a particular corporation and its circumstances. One interesting definition refers to stakeholders in a corporation as:

... the individuals and constituencies that contribute, either voluntarily or involuntarily, to its wealth-creating capacity and activities, and that are potential beneficiaries and/or risk bearers. (Post et al. 2002, cited in Du Plessis et al. 2011: 23)

Du Plessis et al. (2011: 24) catalogue a list of stakeholders which includes shareholders, employees, creditors, customers, the community, the environment and government.

Stakeholders are generally divided into internal and external categories. Internal stakeholders in for-profit companies are generally shareholders and employees. In sport, this is true for corporations where there are shareholders, but in sports structures which substitute members, the members would thus be internal stakeholders. External stakeholders are groups such as commercial partners and customers. External stakeholders in sport may also be sponsors, government bodies and international parent organisations. Umbrella bodies such as the International Olympic Committee and Australian Olympic Committee and Commonwealth Games Association may also be external stakeholders. All these stakeholders have a particularly prominent role in a sport context because of the importance of their funding to organisations.

The place of members, participants and fans in sport is quite distinctive because all have input, connection and allegiance to the sport. Members who are not participants are sometimes internal stakeholders with a vote and sometimes internal stakeholders without a vote. The issue of the role of members has been considered in depth in the context of AFL clubs (Paterson 2010). Whether members of individual AFL clubs are stakeholders in the AFL itself is another issue. Not all participants are voting members in all organisations, particularly the NSO, although they have significant interest in the way the NSO is governed because it directly affects them. In one sense they are consumers, but one would argue that they are more wedded to the sporting organisation than most other consumers are wedded to a supplier. For a participant there may be no alternative to their sporting organisation if they wish to participate in that particular sport, so they are likely to have more invested in the organisation that can deliver the sport to them. Fans are important stakeholders in many sports, particularly the professional sports. The disconnect between the commercial nature of an organisation and the wishes of its fans was strongly underlined in the UK in 2009 when the Culture Secretary posed a number of questions to the Football Association claiming that core constituents had been excluded from its decision making for too long. It was suggested at the time that legislation should be enacted to achieve appropriate reform within the sport (Scott and Gibson 2009; Gibson 2011).

The ASC Guide states that the Board should provide an avenue for key stakeholder input into the strategic direction of the organisation, and the strategic plan should form the basis of all local initiatives with input and agreement from all stakeholders. It also states that the board should be broadly reflective of the organisation's key stakeholders, but not at the expense of skill mix and the organisation's objectives. Outcomes of board processes should be communicated to stakeholders and performance review should take stakeholder views into account (Principles 1.7. and 1.8, ASC 2012: 5). In all of its discussion of stakeholders the ASC Guide does not indicate its views on what persons or bodies constitute stakeholders. It is unclear if its view is that stakeholders go further than funders and members. If all participants, members and non-voting members, district organisations and clubs down the hierarchy, and fans fall within the definition of stakeholder, it would resolve a number of issues raised in this article.

### *Formulating Objectives*

Formulation of objectives by the Board of a sporting organisation is necessarily a difficult exercise given the complexity of relationships outlined in this article and the range of operations of many sporting organisations such as NSOs. The Crawford Review underscored the difficulties sports have in determining objectives and delivering outcomes, and provided a number of insights into other complexities of sports governance including goal setting and the difficulty noted above with actually determining sporting 'success'.<sup>23</sup> Some of these issues are discussed below.

Generally commercial corporations, as has been noted, are established to make a profit for their shareholders. Their shareholders may have no other

common interest in the company aside from this. There are, of course, organisations involved in sport which are 'for profit'. They are incorporated with share capital. Some sports are composed of members which include both types of corporations. Some professional teams in Australia are owned by shareholders or individuals, and some are privately owned. In the National Rugby League (NRL) competition the Brisbane Broncos team is owned by a listed company, Melbourne Storm is wholly owned by News Corporation, South Sydney has owners who include actor Russell Crowe, and Newcastle is owned by a mining millionaire. However, most teams in the NRL competition and all teams in the Australian Football League (AFL) competition are community-based clubs owned by members who are sports fans and join annually. Clubs in the A League, the premier football (soccer) competition, are generally privately owned, as are the teams in the newly reconstituted National Basketball League (NBL). Solvency has been a significant issue for many clubs in the A League and the NBL and particularly for the community clubs in other sports. Other sports which are successful, such as V8 Supercars, are wholly privately owned. The Boards of organisations limited by shares have the traditional direct accountability to shareholders in the form of return of profits.

These different types of organisation have differing ownership objectives, and when they coexist, for example, as individual teams within the one competition this may create difficulties.

Sporting organisations which are companies limited by guarantee or associations, however, do not have the primary purpose of making a profit, although a profit may be part of their objectives. If a profit is made it is churned back into the sport. Its members are there to further a common interest in the sport or in participating in the sport. This means that profit making is a means to an end and not the end itself. Such sports may, however, have individual sporting members or teams which have been incorporated expressly for the purpose of returning profit to shareholders. This again contributes to the difficulty which sports have in determining and prioritising objectives.

### *Hierarchy of Sport*

The complex chain of relationships in sport generally and particularly in relation to NSOs was discussed earlier. A number of issues flow from this. Firstly, incorporated sporting organisations at state or district level have members which are often clubs and teams participating in the sport at state or local level. Each of these state or district bodies must also adopt appropriate corporate governance arrangements. While their approach will not necessarily be the same as that of their NSO, the NSO must oversee the governance processes at a lower level to some extent in the interests of propriety and maintenance of the reputation of the sport. While corporations with subsidiaries may have a similar imperative, one can argue that these non-sporting subsidiaries are not usually so numerous or poorly resourced as they are likely to be in sport. This creates additional governance pressure for the NSO.

More importantly, in setting objectives the hierarchical organisation itself is a significant complicating factor for NSOs. The cumbersome and fragmented

nature of Australian sport was underlined by the 2009 Report of the Crawford Review which concluded:

Most of the National Sporting Organisations [NSOs] are hindered by their 'federated' structures, making it harder for the sport to build commercial capability and make decisions that cut across their state and territory structures ... These overly complex structures mean most NSOs are still struggling to gain consensus, alignment and the resources to create a nationally unified vision and product. They involve duplication. Being independent and sub-scale they also provide inferior pathways to talented people which means they don't always attract the best talent. (Independent Sport Panel 2009: 23)

The Crawford Review concluded that the days when it was appropriate for each state or territory sporting organisation to have its own separate company, with its own CEO running the sport in that geographic area, have passed. It argued that sports need to adopt a more centralised and cohesive approach to administration and governance. Change is very difficult, however, because those involved are often unprepared to abdicate entrenched positions of power. Change takes a long time<sup>24</sup> and, in a number of examples in Australia, has been precipitated only by crises such as significant mismanagement or scandal. The ASC Guide states that it is essential that NSOs and their member bodies have aligned objects and purposes to ensure effective and efficient achievement of sport outcomes (ASC 2012: 7). If this could be achieved effectively by member and other stakeholder engagement it would simplify a number of aspects of corporate governance.

### *Sports as Rule Makers*

With few exceptions, a commercial corporation does not have rule making functions, because its only internal rules are its own constitution. It may, however, have processes and procedures. A sporting organisation, on the other hand, has its own formal rules and enforcement systems to deal with a range of sport specific issues such as the way the game is played, discipline on and off the field of play, member protection, selection and anti-doping, so in this respect a sporting organisation has significantly more responsibilities than a commercial corporation. These rules and enforcement systems are multi-layered with internal appeal mechanisms. Sporting organisations often find it difficult to identify a sufficient number of appropriate personnel to adjudicate on these tribunals, particularly when the parties seek to be legally represented. Some of these rules and systems are subject to judicial review; a number will have been imposed on the sporting organisation by funders or as part of membership of an umbrella organisation. All need to be considered, applied and enforced in a fair and timely way. This is a considerable task even for well-resourced organisations. Disciplinary proceedings for on-field conduct alone occur in large numbers every week wherever there are competitions in progress. Appearances in the courts or the Court of Arbitration for Sport to defend outcomes of internal tribunals are not uncommon for a NSO. A significant amount of time and energy goes into developing, establishing and enforcing this internal regulation. While other organisations



may have some internal rules in limited areas, none would have this range of subject-matter, and most would be enforceable only against employees, which gives those other organisations far more leverage in enforcing them than in the sports context.

## Development of Governance Systems in Sport

The ASC emphasises consultation with all stakeholders during the strategic planning phase. Clarity in setting performance indicators which can be measured, and implementation of risk management systems which comply with the Australian Standard, are also essential.<sup>25</sup> Compliance systems should comply with the Australian Standard, including effective internal controls, effective reporting and focus on financial security (Standards Australia 2006). These latter functions are important to individual members and participants in NSW because they rely on the national organisation to enhance their experience within the sport and ensure that their rights are protected. Long term, this broader NSO governance role assists the sport to enhance its reputation in the community and build its membership and participation rates. This increases the marketability of the sport with sponsors and its reputation with funders.

In assessing the various roles required of the organisation, its board and officers in the light of the distinctive features of sport, it is clear that the task of governing a sporting organisation is not a simple one. The question whether too much is expected of directors is raised regularly in a general context. One commentator has stated:

... performed properly, the job of company board director is extremely demanding and can become impossible if the focus on essentials is replaced by an ever-expanding brief. It is optimistic and often counter-productive to expect non-executive directors on a part-time basis to “simultaneously and successfully formulate strategy, hire and fire senior executives, ensure rigid compliance with myriad global procedures, detect fraud, appropriately incentivise and oversee metrics for organisational performance, all without any actionable conflicts of interest” (2004). Yet however complex and challenging the task, governments, investors, employees and the wider public are demanding much higher standards in the competence and performance of boards and directors and will continue to insist that these are achieved. (Clarke 2007: 36)

Based on the view taken in this article, these recognised difficulties in performing the role of a board director are clearly heightened in sporting organisations. It should be apparent by now that sporting organisations are very diverse. While no two organisations are ever exactly the same, the issue of governance is complicated by this diversity and because a number of ‘standard’ corporate assumptions do not generally apply to sporting organisations. Governance paradigms for sport should take account of its unique features to ensure that governance models are applied in a realistic fashion which improves outcomes rather than merely compelling sports to behave in a uniform manner. For some organisations, corporate governance will be approached in a relatively ‘standard’ way. For

others, governance continues to be particularly problematic due to the unique challenges of sport, and a different approach is required.

## Notes

1. In 2010–2011 the ASC provided over \$40m to funded National Sporting Organisations (NSOs) for high performance and participation. The system of sports organisation and funding was comprehensively reviewed in 2009 (the Crawford Review). See Report of Independent Sport Panel (2009). The response of government is contained in Australian Government (2009).
2. Some of the policies implemented are discussed below. See ASC (2009) for criteria for recognition and a list of organisations which are funded and unfunded.
3. Which may include the community arms of the top tier sports.
4. See, for example, *News Limited v Australian Rugby Football League* (1996) 58 FCR 447; (1996) ATPR 41-521; *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563.
5. See, for example, *Carter v NSW Netball Association* [2004] NSWSC 737 (17 August).
6. See *Cameron v Hogan* (1934) 51 CLR 358 at 384 where it was confirmed that the courts will not generally interfere in the ‘... quarrels of political parties, or ... in the internal affairs of any voluntary association, society or club’.
7. *Federal Baseball Club of Baltimore Inc v National League of Professional Baseball Clubs* 259 US 200 (1922). For a complete list of exemptions from US antitrust law see Antitrust Modernization Commission 2007 Chapter 4 at Annexure A.
8. *Copperweld v Independence TubeCorp* 104 S Ct 2731 (1984); see more recently *American Needle, Inc. v National Football League, et al* 500 U.S. (2010).
9. *The Bell Group Ltd v Westpac Banking Corporation* [2008] WASC 239 (No.9) 28 October 2008) [4362], quoted in Du Plessis et al. 2011: 5.
10. The collapse coincidentally affected many sporting organisations insured with the company.
11. The article contains a full discussion of this hard and soft law.
12. See HIH Report (2003) para 6.6, also cited in du Plessis et al. 2011: 11.
13. *Daniels t/as Deloitte Haskins & Sels v AWA Ltd* (1995) 13 ACLC 614.
14. *Ibid* at 662 per Clarke and Sheller JJA.
15. *ASIC v Adler* [2002] NSWSC 171 at 372.
16. *Shafron v Australian Securities and Investment Commission* [2012] HCA 18 (3 May 2012).
17. *Ibid* ss95A; 181; 184(1); 588G & H.
18. See AS 8000-2003 Good Governance Principles, 5, noted in Paterson 2010: 516
19. See Kingsford-Smith (2012 forthcoming), referring to cases such as *ASIC v Rich* 44ASCR [2003] 341 at 358; followed by White J in *ASIC v Rich* [2004] NSWSC 836 at paras 35–36; *Bell Group (in liq) v Westpac Banking Corporation* (No9) [2008] WSC 238 at paras 4362–4367 and 6073; *ASIC v*

- Healey[2011] FCA at paras 192–194; ASIC v Healey (No 2) [2011] FCA 1003 at paras 169–175.
20. *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915]AC 705 per Lord Haldane at 713, 715 cited in Du Plessis 2011: 75.
  21. For a detailed analysis of an earlier version of this ASC document, see L. Freeburn (2010).
  22. The AFL is currently governed by an independent commission and the NRL adopted an independent commission in 2012. See Horvath (2008).
  23. The Crawford Review at 2.1(1) noted that there was no agreed definition in answer to this question.
  24. Recent attempts to reform governance of the sport of rugby league and establish an independent commission took far longer than was anticipated. The concept was mooted in 2009 (Walter 2009). The independent commission finally met for the first time in August 2011 (Ritchie 2011).
  25. See for example the Australian and New Zealand Standard on Risk Management (Standards Australia 2009).

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