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ORGANISATIONAL STRUCTURE AND GOVERNANCE

OVERVIEW

This chapter examines:

- The construction of modern sport
- Governance
- Role of government
- International governance of sports
- Governance structures and processes
- Structures
- Unincorporated associations
- Incorporated associations
- Incorporation as a company

THE CONSTRUCTION OF MODERN SPORT

The construction of modern sport is rooted in classical liberalism, namely in the concept of freedom of association.¹ Autonomy is therefore a deeply ingrained and cherished principle in the sports world. Indeed, autonomy from formal regularity and public interference is an obsession for sport organisations from the grassroots to the international level. In short, the sports world claims that 'the regulation of sport is best kept private'.²

1 S Szymanski, 'A Theory on the Evolution of Modern Sport' (Working Paper No 06-30, International Association of Sports Economists, 2006).

2 Arnout Geeraert, 'Sports Governance Observer: The Legitimacy Crisis in International Sports Governance' (Report, Danish Institute for Sports Studies, October, 2015) 13 <http://www.playthegame.org/media/5786679/sgo_report_final_3.pdf>.

Unsurprisingly then, 'Australian sport can be described as a traditionally self-regulated activity, with extensive and long-standing networks of sporting clubs/teams, leagues, governing bodies and representative teams at the local, state/territory and national levels'.³

This is not to say that sport is a law unto itself and that sport organisations operate outside the broader legal system. They have, however, enjoyed a level of autonomy greater than most other human fields of endeavour. But, due to the changing nature of sport in Australia, in particular the commercialisation of sport, government funding and a highly competitive market, sport organisations have, over the last 15–20 years, undergone a significant increase in scrutiny and consequent regulation.

This chapter examines the law which impacts the functions of sport organisations, in particular their governance role, the structures and processes that support them and the regulations that control the structures and processes and those who operate them.

GOVERNANCE

Governance is described by the Australian Sports Commission (ASC) as:

the system by which organisations are directed and managed. It influences how the objectives of the organisation are set and achieved, spells out the rules and procedures for making organisational decisions and determines the means of optimising and monitoring performance, including how risk is monitored and assessed.⁴

From an Administrative Law perspective, governance can be described as the system, including societal, legal, bureaucratic and behavioural components, by and under which governing entities are directed, managed and controlled. Corporate governance involves looking at how corporate entities are directed, managed and controlled. Sport governance can perhaps be seen as a combination of the two—with increased leaning toward the latter especially for the larger sport organisations. Jacques Rogge, former President of the International Olympic Committee (IOC), has suggested that sports governance involves the clarification between the rules of the game and the economic and commercial dimensions related to the management of the sport. He also suggests that since sport is based on ethics and fair play, sports governance should fulfil the highest standards in terms of transparency, democracy and accountability.⁵

The traditional position of the sports world is that 'governance' is an internal matter, and external forces (namely governments) should stay out. The conventional view of the governed

3 Robert D Macdonald and Ian M Ramsay, 'Constitutional Voting Rules of Australian National Sporting Organizations: Comparative Analysis and Principles of Constitutional Design' (2016) 7 *Harvard Journal of Sports & Entertainment Law* 53, 60.

4 Australian Sports Commission, *Sport Governance Principles*, <http://www.ausport.gov.au/supporting/governance/governance_principles>.

5 Jacques Rogge, 'Foreword', ('The Rules of the Game' Conference Report & Conclusions: Europe's First Conference on the Governance of Sport, Brussels, 26 & 27 February 2001) 2, <https://www.fia.com/sites/default/files/basicpage/file/governance_sport.pdf>.

and the governors is that sport regulation is a specialised, niche issue, which requires bespoke knowledge and experience.⁶

The distinction between sports governing bodies and state authorities is never entirely neat. The development and encouragement of sport is specifically recognised as an objective of state institutions, whether at regional, national or international level. This gives rise to two interrelated issues:

- 1 potential governmental interference in sporting decisions, and
- 2 state intervention in the regulation and operation of sport.

The state is a stakeholder in the sporting sector. Governments are often major contributors to the budgets of sporting associations and must regulate a number of the activities related to sport. However, there is a need for care in terms of the role government plays in sport regulation: is it constructive or disruptive?⁷

According to the ASC, governance concerns three key issues:

- 1 how an organisation develops strategic goals and direction
- 2 how the Board/committee of an organisation monitors the performance of the organisation to ensure it achieves these strategic goals, has effective systems in place and complies with its legal and regulatory obligations
- 3 ensuring that the Board/committee acts in the best interests of the members.⁸

The object of the latter two points is to ensure the organisation operates within its legal and compliance framework, whether it be bestowed by a competition convener or some other authority such as the Australian Sports Anti-Doping Authority (ASADA) or the ASC or by the legislators.

ROLE OF GOVERNMENT

Sporting activity in Australia is intruded upon by a web of governmental departments and statutory authorities.

Federal controls

The Commonwealth Government's principal means of overseeing sporting activity is through the ASC, a statutory authority located previously within the Department of Regional Australia, Local Government, Arts and Sport and, more recently, Health. This authority (discussed further

6 Ravi Mehta, 'The Future of Sports Governance: Will Sport Sustain Its Traditional Model of Autonomy?' *LawInSport* November 2016, <<https://www.lawinsport.com/articles/item/the-future-of-sports-governance-will-sport-sustain-its-traditional-model-of-autonomy>>.

7 Ravi Mehta, 'The Future of Sports Governance: Will Sport Sustain Its Traditional Model of Autonomy?' *LawInSport* November 2016, <<https://www.lawinsport.com/articles/item/the-future-of-sports-governance-will-sport-sustain-its-traditional-model-of-autonomy>>.

8 ASC Definition and outline on Governance (March 2017), <<http://www.ausport.gov.au/supporting/clubs/governance>>.

below) reports to the Federal Minister for Sport (currently also the Minister for Health). Australia, like most other countries, has distinct government policies for sport in place from time to time.

Governments around the globe have recognised the importance of developing national policy in sport.⁹ The reasons are complex and varied, ranging from the desire to achieve international status by sporting success (hence the development of national 'institutes' of sport in various countries) to the desire to fund and oversee the development of sports facilities to encourage greater physical fitness in citizens. Drug use in sport is one issue that merits particular attention, and led to the establishment of a particular statutory authority in Australia, ASADA.¹⁰

Other government departments also have an interest in sporting activity. At the federal level, the Department of Foreign Affairs and Trade is responsible for the negotiation of international agreements to which Australia is party. These international agreements concern issues such as doping in sport. For example, the Council of Europe adopted an Anti-Doping Convention in 1989, to which Australia is a party. In addition, Australia is a member of the Monitoring Committee, established under the Anti-Doping Convention.¹¹ The Department of Education and Training is responsible for initiatives in the areas of training and employment, as well as policies concerning youth that have a clear connection with sporting activity. Even the Attorney-General's Department is engaged in activities relevant to sport, as sporting activity may raise problems involving the application of the criminal law.¹² The Department of Industry, Innovation and Science has an interest in sporting activity owing to the importance of the sport and leisure industry. Sporting activity represents approximately 1 per cent of Australia's GDP, according to a Frontier Economics Report.¹³

There are also several important Commonwealth statutory authorities concerned with the regulation of sport. Most important among these are the Australian Sports Commission and the Australian Sports Anti-Doping Authority (each established as a corporate body by legislation: *Australian Sports Commission Act 1989* (Cth) (ASC Act) and *Australian Sports Anti-Doping Authority Act 2006* (Cth) (ASADA Act)).

The Australian Sports Commission

The ASC was established to oversee the delivery of services to sport in Australia. It is a corporate body and its activities are to be supervised by the Commonwealth Minister for Sport.¹⁴ The general mandate of the ASC is to encourage and provide for participation and achievement by

9 Global developments are well traced in A Wise and B Meyer, *International Sports Law and Business* (London: Kluwer, 1997) as well as J Nafziger, *International Sports Law* (2nd edn, New York: Transnational, 2004).

10 See below and in particular Chapter 8 'Doping'.

11 The purpose of the Convention is to establish rules to harmonise anti-doping regulations. The convention and subsequent efforts to combat doping in sport are discussed in further detail in Chapter 8 'Doping'.

12 See Chapter 4 'Violence'.

13 'The Economic Contribution of Sport to Australia', January 2010, *Frontier Economics*, cited by the Australian Sports Commission, <https://www.clearinghouseforsport.gov.au/__data/assets/pdf_file/0020/563321/Frontier_Research_The_Economic_Contribution_of_Sport_summary_report.pdf>.

14 *ASC Act*, s 5. Section 7(a) of the ASC Act also provides that the ASC is established to advise the Minister (for Sport) in relation to the development of sport.

Australians in sport.¹⁵ To this end, the Commonwealth Government provides substantial funding. The funds expended by the ASC for the financial year 2015–16 totalled \$283.4 million.¹⁶ The principal activities of the ASC can be divided up into two distinct categories:

- 1 achieving excellence in sports performance by Australians (s 6(a))
- 2 improving participation in quality sports activities by Australians (s 6(b)).¹⁷

Additional activities of the ASC stipulated in s 6 of the ASC Act include:

- to provide resources, services and facilities to enable Australians to pursue and achieve excellence in sport while also furthering their educational and vocational skills and other aspects of their personal development (s 6(c))
- to improve the sporting abilities of Australians generally through the improvement of the standard of sports coaches (s 6(d))
- to foster cooperation in sport between Australia and other countries through the provision of access to resources, services and facilities related to sport (s 6(e)), and
- to encourage the private sector to contribute to the funding of sport to supplement assistance by the Commonwealth (s 6(f)).

The most visible aspects of the ASC's activities for the public at large were the establishment of the Australian Institute of Sport (AIS)¹⁸ and efforts to use the Sydney 2000 Olympics to increase sports participation and sports-related activities. The AIS, which was established to promote the achievements of elite-level athletes, operates as a part of the ASC. The AIS also undertakes research and development related to sports science and sports medicine. Both activities play a significant role in the development of policies on drugs in sport.

As the Commonwealth Government's statutory authority responsible for developing and funding Australian sport, the ASC has been concerned to ensure that these funds are properly accounted for, that is: paid to organisations that are able to demonstrate that they 'comply with contemporary best practice governance standards. This is not a negotiable obligation'.¹⁹ To be considered for funding, sports will be required to demonstrate good leadership, governance and administration as part of the annual investment and review process. In keeping with the ASC's focus on governance best practice, sport organisations—especially at the higher levels—are expected to adopt corporate rather than association structures. Accordingly, the ASC has developed guidelines for best governance practice.

¹⁵ ASC Act, s 11.

¹⁶ See ASC Annual Report, <http://www.ausport.gov.au/annual_report/chapter_4/summary_of_financial_outcomes>.

¹⁷ The ASC Act provides a lengthy list of objects in s 6. For present purposes, these can neatly be summarised by these bullet points.

¹⁸ This is done in s 9 of the ASC Act.

¹⁹ Governance Reform in Sport, Australian Sports Commission, June 2016, <http://www.ausport.gov.au/__data/assets/pdf_file/0006/649995/Governance_Reform_in_Sport_June_2016.pdf>. In the United Kingdom, Sport England and UK Sport have developed a *Code for Sports Governance* with which all organisations seeking funding for sport or physical activity *must* comply as from April 2017, <https://www.sportengland.org/media/11193/a_code_for_sports_governance.pdf>.

The purpose of these guidelines is to:

- assist members of boards, chief executive officers and managers of sporting organisations to develop, implement and maintain a robust system of governance that fits the particular circumstances of their sport
- provide the mechanisms for an entity to establish and maintain an ethical culture through a committed self-regulatory approach
- provide members and stakeholders with benchmarks against which to gauge the entity's performance.

The size, complexity and operations of sporting organisations differ, so to optimise individual performance, flexibility must be allowed in the structures and systems that are adopted. This flexibility must be balanced against accountability, contestability and transparency. There is an obligation for all sporting organisations to explain to stakeholders if any alternative approach to the best-practice principles is adopted (the 'if not, why not' obligation).²⁰

Moreover, sport organisations who seek Commonwealth funding must observe the 'Sports Governance Principles':²¹

- Principle 1: Board composition, roles and powers
- Principle 2: Board processes
- Principle 3: Governance systems
- Principle 4: Board reporting and performance
- Principle 5: Stakeholder relationship and reporting
- Principle 6: Ethical and responsible decision making.

In short, the ASC recognises that 'Volunteer boards, committees and administrators in particular carry extra responsibilities and burdens associated with the complex legal and regulatory environment within which they must operate'²² (that is, govern) and it has developed both mandatory requirements and guidelines to ensure compliance with the law and good practice.

Australian Sports Anti-Doping Authority

ASADA (formerly the Australian Sports Drug Agency or ASDA) was established in 2006 to implement Australia's responsibilities under the 1989 Anti-Doping Convention.²³ ASADA, established as a statutory authority, has broad functions in this area, including:

- advising the ASC about sports drug and safety matters that should be included in any agreement under which the ASC gives money to a sporting organisation—ASADA Act s 21(1)(c)

20 Sports Governance Principles, Australian Sports Commission, March 2012, <http://www.ausport.gov.au/__data/assets/pdf_file/0020/644303/CORP_33978_Sports_Governance_Principles.pdf>.

21 See <http://www.ausport.gov.au/supporting/governance/governance_principles> for a full exposition of these principles>.

22 <http://www.ausport.gov.au/supporting/governance/governance_principles>.

23 ASADA Act s 20. For a full discussion of ASADA see Chapter 8 'Doping'.

- supporting and encouraging the sporting community to develop and implement comprehensive programs, and education initiatives, about sports drug and safety matters—ASADA Act s 21(1)(e)–(f)
- collecting, analysing, interpreting and disseminating information about sports drug and safety matters—ASADA Act s 21(1)(h).²⁴

Importantly, ASADA is responsible for making and administering the rules under which athletes are tested for prohibited substances and methods. This is done by means of a National Anti-Doping Scheme,²⁵ which is set out in the form of a Regulation to the ASADA Act.²⁶ Under the National Anti-Doping Scheme, ASADA conducts regular testing of athletes, in and out of competition, determines whether an anti-doping violation has occurred (after providing the athlete with an opportunity to be heard on the matter), maintains a register of defaulting athletes and investigates allegations of anti-doping violations (including trafficking and assisting others in an anti-doping violation). ASADA is also responsible for results management, with strict provisions regarding the provision of information concerning drug tests.²⁷

The impact of state and territory organisations

Every state and territory in Australia has its own government department responsible for sport and recreation. Initially, these departments were focused on increasing local participation in sporting activity. Additionally, the state governments established state-based Institutes of Sport, designed to foster the participation of athletes at the elite level. Thus, to use Victoria as an example, the State Government established a department responsible for sport and recreation (Sport and Recreation Victoria), which in turn established the Victorian Institute of Sport.²⁸

INTERNATIONAL GOVERNANCE OF SPORTS

At the international level sport is governed by a plethora of organisations. These include the IOC, International Sports Federations (ISFs), national sports bodies (National Sports Federations [NSFs], some Olympic and some non-Olympic), National Olympic Committees (NOCs) and regional organisations.²⁹ However, through its influence and a system of divested authority, the

²⁴ ASADA Act s 21.

²⁵ More detail concerning the National Anti-Doping Scheme and anti-doping law generally is contained in Chapter 8 'Doping'.

²⁶ The National Anti-Doping (NAD) Scheme is set out in sch 1 to the *Australian Sports Anti-Doping Authority Regulations 2006* (Cth) (ASADA Regulations).

²⁷ More detail concerning the National Anti-Doping Scheme and anti-doping law generally is contained in Chapter 8 'Doping'.

²⁸ The other states and territories also have their own Institutes of Sport.

²⁹ See J Nafziger, *International Sports Law* (2nd edn, New York: Transnational, 2004).

IOC has ensured that it plays the key role in determining the international legal norms which govern sport.

The International Olympic Committee

Internationally, the most influential sporting organisation is the IOC. The Olympic Charter, r 15 provides that:

The IOC is an international non-governmental not-for-profit organisation, of unlimited duration, in the form of an association with the status of a legal person, recognised by the Swiss Federal Council in accordance with an agreement entered into on 1 November 2000.³⁰

Curiously, the legal status of the IOC is not clear. Incorporated under Swiss Law, the IOC purports to have legal personality under both national and international law. Even though it is debatable whether such declarations of international personality are legitimate, it appears to be essentially what lawyers refer to as an 'NGO' or non-government organisation. It is recognised as a legal entity, although it is not incorporated in the usual sense of that word.

The IOC came into being on 23 June 1894 at the International Athletic Congress of Paris, where the modern Olympic Games were launched. The IOC owns the rights to the Olympic Games and is, according to its Charter, 'the final authority on all questions concerning the Olympic Games and the Olympic Movement'.³¹ Essentially, then, the IOC is an international organisation with legal personality, given recognition worldwide.³² The IOC is resident in Lausanne, Switzerland.

As indicated, the importance of the IOC derives from the universal appeal of the Olympic Games, resurrected in 1896 by Baron Pierre de Coubertin. As the quadrennial celebration of sport (although only two years separates the Summer from the Winter games) held in various locations around the world, the Olympic Games have become the premier international sporting carnival. There has, in the past, been intense bidding and lobbying of the IOC for the right to host the Olympic Games, whether for reasons of assumed prestige or for perceived financial advantages flowing from the Games. The financial success of the Olympic Games and the associated Olympic Movement means the IOC is in a position to establish itself as a governing

30 In force as at 2 August 2016, <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf#_ga=1.156281531.148986234.1488683756>.

31 See IOC, Olympic Charter, Rule 1.1 (IOC is the supreme authority of the Olympic Movement); Rule 58 (The authority of last resort on any question concerning the Olympic Games rests with the IOC); and Rule 7 (Olympic Games are the exclusive property of the IOC). Some limited scope is given for arbitral determinations by the Court of Arbitration for Sport in Rule 15.4—see below and Chapter 3 'Sport Tribunals'.

32 It should be noted that constituent entities, such as the Australian Olympic Committee, are locally incorporated (the AOC is a company limited by guarantee—this concept is discussed later in the chapter). The Olympic Charter also provides in Rule 15(4) that: 'In order to fulfil its mission and carry out its role, the IOC may establish, acquire or otherwise control other legal entities such as foundations or corporations.' Hence, for example, the Australian Olympic Federation is incorporated under the *Associations Incorporation Act 1981* (Vic) (now the *Associations Incorporation Reform Act 1981* (Vic)).

authority over international sports. However, several scandals surrounding the determination of a host city may have tarnished the IOC's moral position.³³

The IOC establishes rules governing eligibility to participate in the Olympic Games as well as, indirectly, rules governing each Olympic sport. The Olympic Charter recognises various ISFs as having authority to oversee and regulate various sports. Each ISF enforces rules concerning its particular sport. The Olympic Charter provides (in r 26) that the ISFs are to:

26.1.1 establish and enforce, in accordance with the Olympic spirit, the rules concerning the practice of their respective sports and to ensure their application.

For example, the IOC recognises the Fédération Internationale de Football Association (FIFA) as the ISF governing the sport of association football (or soccer, as it is known in some parts of the world such as Australia and North America).

However, the ISFs must operate within norms established by the IOC. Rule 25 of the Olympic Charter provides:

[the ISF's] statutes, practice and activities must be in conformity with the Olympic Charter.

Under r 27 which relates to National Olympic Committees (NOCs) (as distinct from ISFs):

In order to fulfil their mission, NOCs may cooperate with governmental bodies, with which they shall achieve harmonious relations. However, they shall not associate themselves with any activity which would be in contradiction with the Olympic Charter. The NOCs may also cooperate with non-governmental bodies.

Each ISF is made up of constituent national federations (NFs) in the relevant sport. Rule 29 of the Olympic Charter states:

To be recognised by an NOC and accepted as a member of such NOC, a national federation (NF) must exercise a specific, real and on-going sports activity, be affiliated to an ISF recognised by the IOC and be governed by and comply in all aspects with both the Olympic Charter and the rules of its ISF.³⁴

A National Olympic Committee must include at least five NFs affiliated to the ISFs governing sports included in the program of the Olympic Games.³⁵ The role of the National Olympic Committees is to 'develop and protect the Olympic Movement in their respective countries, in accordance with the Olympic Charter' (Charter r 27.1). The workings of a National Olympic Committee are independent of the government of the country in question.³⁶

33 See Nafziger, *International Sports Law* (2nd edn, New York: Transnational, 2004) 31. As a result of the scandal concerning the decision to award the 2002 Winter Olympic Games to Salt Lake City, the internal governance of the IOC was substantially altered. Further discussion of the governance of the IOC is beyond the scope of this work. Those wishing to enquire further on this subject are directed to Nafziger's work as well as A Jennings, *The New Lords of the Rings: Olympic Corruption and How to Buy Gold Medals* (New York: Pocket Books, 1996), which provides a more journalistic account of the scandal. See also S Fridman, 'Conflict of Interest, Accountability and Corporate Governance: The Case of the IOC and SOCOG' (1999) 23 *University of New South Wales Law Journal* 781.

34 Olympic Charter, Rule 29.

35 Olympic Charter, Rules 27 and 28, By-law 1.2.

36 Rule 28.4 prohibits governments or other public authorities from designating any members of an NOC.

The ability of the IOC to perform its overall supervisory function is a direct result of its control of the Olympic Games and all associated intellectual property. The worldwide following of the Olympic Games has led to the IOC becoming recognised as the accepted authority. Only voluntary submission to its rules obliges particular sports to apply IOC standards. The consequence for a particular sport of not following the IOC's rules would presumably be withdrawal of its recognition by the IOC, and loss of its entitlement to offer athletes the opportunity to participate in the Olympic Games.³⁷ In other words, there is presumably nothing to prevent a particular sport from choosing to establish its own ISF. Indeed, all Olympic sports do have ISFs which conform to IOC standard policies. Even wealthy and powerful ISFs such as FIFA continue to play an important role within the Olympic Movement, despite having been in disagreement with aspects of IOC doping policy.³⁸ However, unless an ISF is recognised by the IOC (which involves compliance with the IOC Charter), athletes competing under its rules cannot compete in the Olympic Games.

Hence, for each Olympic sport, we can locate a recognised ISF which establishes rules of competition and eligibility. The ISFs, in turn, recognise different NFs in their sports. Therefore, in the sport of soccer, FIFA (the relevant ISF) recognises the Football Federation of Australia (FFA) as the governing body for Australian soccer (or football, as the local NF now prefers the game to be described). One can therefore see how the rules established by the IOC find their expression at all levels of sport, even in events that are not officially part of the Olympic Games (for example in competition in the A-League, which is the Football Federation of Australia's national competition). Athletes wishing to participate in the sport in question must also be members of the relevant federation. Becoming a member generally obliges the athlete to comply with that federation's rules, which, as described above, are expected to deal with conduct both on and off the field, doping, player movement and eligibility.

It should be noted that the IOC has over the past five years undergone significant reviews of its governance and that of its NOC members. In December 2015, the IOC adopted a Declaration on Good Governance in Sport including the protection of clean athletes.³⁹

37 This is achieved directly and indirectly. First, by constituting itself the exclusive and final authority on questions concerning the Olympic Games, the IOC has the legal power to achieve this object directly. Indirectly, NFs and IFs are obliged (Charter Rule 25) to comply with the Olympic Charter. The Charter also makes compliance with the Charter, IF rules and World Anti-Doping Code (WADC) a condition of eligibility for all competitors, coaches, trainers and team officials in Rule 40. All participants must also be entered by the relevant National Olympic Committee. Rule 7.5 provides that NOCs shall not associate themselves with any activities which would be in contradiction with the Charter.

38 At the 1999 Doping Conference, FIFA was one of two IFs objecting to the concept of standard minimum doping penalties. See <http://nodoping.org/confmond_day2_e.htm>. FIFA has since benefited from a Court of Arbitration for Sport Opinion expressing the view that FIFA's system of tailoring sanctions to individual cases (without regard to the minimum sanction in the World Anti-Doping Code) fulfils its obligation to comply with the Code. The question of minimum sanctions for doping offences and the impact of international law norms on their legality are further discussed in Chapter 8 'Doping'.

39 <<https://www.olympic.org/news/ioc-executive-board-adopts-declaration-on-good-governance-in-sport-and-the-protection-of-clean-athletes>>.