

ORGANISATIONAL STRUCTURE, ECONOMICS AND BEST GOVERNANCE PRACTICE IN NON-PROFESSIONAL SPORTING LEAGUES

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Sporting competitions and sports leagues can involve the management of significant budgets, serious sporting pathways for future elite athletes, and can mean running regular competitions for thousands of athletes. Governing the sporting league, which includes policy making and direction setting, takes on great importance, and perceived failures by a governing body (such as the board) can lead to legal action. Best practice governance assists those managing sports competitions to minimise the potential for legal challenges against decisions they (or their various arms such as disciplinary tribunals) make or rules they implement. Best governance practice also helps avoid unnecessary exposure by board members to personal legal liability for their actions taken as board members. Implementing the best possible governance practices can ensure that the competition runs smoothly, risks are appropriately managed, and the best competitive outcomes are achieved.

Introduction

Operating a sporting competition in an optimal fashion requires the application of certain governance principles and strategies. Getting the structure right is vital to the health of a competition. The governance structure of a sport may follow a number of models: the delegate model, where each member (club, State etc.) in the competition appoints a delegate to the board which governs the sport; the independent board or commission; or the board with an all powerful Commissioner who runs the sport.

This paper will consider a range of issues surrounding the good governance of non-professional sporting leagues, and will discuss practices that can maximise the opportunity for the sport to prosper. It will do so by analysing the metropolitan Australian Rules Football League as a case study. However, it is suggested that many of the best governance concepts put forward apply equally to many other non-professional sports.

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Metropolitan leagues in Australian Football are local competitions in Melbourne, Victoria, where players of all ages generally play one game per week between April and August. In the metropolitan Leagues, football is essentially a semi-professional or non-professional pursuit.¹ In Victoria, the larger metropolitan leagues typically have about 6,000-10,000 registered players who play in competitions, constituted by dozens of member clubs. Small leagues may only comprise of eight clubs in a junior competition, with a total of a few hundred players. The clubs sign affiliation agreements with a league agreeing to comply with its rules, and in turn the league signs an affiliation agreement with the State's peak Australian Football body, AFL Victoria. Clubs often have clubroom facilities, sometimes with poker machine or food and bar revenue sources.²

Despite the differences between metropolitan football leagues and the AFL, a consideration of governance structures and practises adopted in the AFL will help steer towards governance models of best fit for a metropolitan football league, and for other non professional sporting leagues. Similar analyses will also be made below of other professional sports and their governance structures to assess best models and practises for non professional sporting leagues.

Each governance structure carries with it different legal consequences. Legislation and the common law may operate to constrain what a board may do in its operations, or more often, what its directors or committee members may do in implementing the sport's constitution, rules and policies. Some structures may be more open to legal challenge than others.³

"Governance" will be defined for the purposes of this paper to mean "the system by which organisations are directed and managed. It...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 Governance is about setting policy and strategic direction for an organisation so it can achieve its long term goals within a regulatory framework, rather than actually completing the work of the organisation. An organisation or league's members use corporate governance to ensure that the board they elect and management they appoint work properly and effectively.

¹ By 'semi-professional', it is acknowledged that there are a number of paid players and coaches in metropolitan football competitions, but that they do not have football as their primary source of income.

² In contrast, players at the Australian Football League (AFL) level are professionals and a number of differing considerations apply. Issues of restraint of trade and the *Trade Practices Act 1974 (Cth)* become important.

³ With unincorporated associations, board members may be sued personally for liability arising from the organization's operation. Generally, with incorporated associations and companies limited by guarantee, liability only extends to the assets of the organisation.

⁴ Australian Sports Commission, 'Governance Principles: A Good Practice Guide for Sporting Organisations', 2007, 1.

The Australian Sports Commission (“ASC”) has provided guidance on suggested best practice for governance of sports organisations and their boards.⁵ The core principles explain important areas of legal significance that sporting organisations should consider, including:

- establishing the organisation under an approved legal structure;⁶
- the need for directors to be aware of their statutory and common law duties which are explored below;⁷
- the documents that set up the organisation, such as its constitution and rules, must convey clear and effective objects⁸ within the limits of which the board can work;⁹
- strict adherence to constitutions, rules, and governing laws.¹⁰

The ASC Governance Principles suggest that the board must adopt a carefully considered risk management strategy and obtain appropriate insurance cover for directors or committee members.¹¹ This will generally cover directors (and other officers) in respect of personal liability for wrongful acts committed by them whilst acting as directors, other than criminal acts. Even though a director may be acting in an honorary capacity, he or she may nevertheless be held personally liable for his or her conduct.¹²

This paper will explore the most appropriate legal structure and processes for a sports league to adopt if it is seeking to create and provide the best product within its capability. It will do so by first considering the most appropriate organisational structure: independent board, delegate model or US Commissioner style leadership.

It will then explore the issue of communication between the league and its members. The unique economic nature of the sports competition and how that may impact on legal structure will be considered. The legal duties of directors

⁵ Australian Sports Commission, ‘Governance Principles: A Good Practice Guide for Sporting Organisations’, 2007,; ‘National Sporting Organisations; Governance: Principles of Best Practice’, May, 2002; ‘Governing Sport – The Role of the Board; A Good Practice Guide for Sporting Organisations’, 2005.

⁶ Either as an incorporated association or a company limited by guarantee.

⁷ See Part IV, Legal Obligations of Board Members.

⁸ Such as stating that the organisation is not-for-profit to ensure that it is exempt from taxation.

⁹ Dale Weightman & Anor v Tasmanian Football League and Craig Carter & Anor v Tasmanian Football League (1995) 4 Tas R 342; see below n 145.

¹⁰ As they are not-for-profit sporting bodies, which exempts them from paying tax, they must carefully adhere to their own rules, as well as laws such as the *Associations Incorporations Act 1981* (Vic) and the *Corporations Act 2001* (Cth) which contain requirements attaching to non-profit bodies to allow them to maintain their tax-exempt status.

¹¹ A reference to directors will include reference to committee members unless stated otherwise.

¹² In *Commonwealth Bank of Australia v Friedrich & Others* (1991) 9 ACLC 946, (1991) 5 ACSR 115, the directors were held personally liable for the debts of the National Safety Council, Victorian Supreme Court decision of Tadgell J.

are described, along with corporate governance principles and finally discussion of the need for accurate and meaningful constituent documents is explored.

With all of these topics and obligations in mind, a sports league will be in a better position to maximise its performance and ensure that all stakeholders, including the athletes, clubs and spectators are getting the most out of the sport.

From the outset, the size and resources of the league will be relevant to the approach taken. Corporate governance in a large league will generally receive appropriate implementation, but in a small league, time and skill levels of board members may restrict the ability of the organisation to apply best governance practices.

Board Models and their Effect on Governance

The Independent Board versus the Delegate Model

In the case of the independent board model, the board has members who are not drawn from the organisations which together form the league presided over by the board. In the case of the delegate model, each member organisation in the league or competition appoints a delegate to the board which governs the league.

One important difficulty with the delegate model is that there can be a conflict of interest between the delegate's duty to the league and *its* best interests, and to the members of the club which it represents. It may be that each club representative has the best *intentions* to act in the best interest of the league as a whole, but it is very difficult to separate the loyalty and duty to one's own club from the duty to the league as a whole. A major issue will often be the perception of conflict from an outside perspective.

Unless outsiders believe that board members are better equipped for their role as directors *because* of their direct knowledge of club needs and operations,¹³ a perception of conflict of interest is unavoidable if a board is composed of club delegates.¹⁴ The delegate model may be well suited to boards such as Cricket Australia or Athletics Australia, whose membership is drawn essentially from constituent states.¹⁵ It is the author's view that a football league of even modest

¹³ As is said to be the case in the Waverley Junior Football league which is comprised of seven junior football clubs: advice of Peter McDougall, Football Victoria, meeting with author of 11th January, 2007.

¹⁴ Stephen F Ross and Stefan Szymanski, 'Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations' (2006) 16(2) *Marquette Sports Law Review* 213, 258.

¹⁵ Athletics Australia (AA) is comprised of eight voting members being each State Athletics Association and that of the Northern territory and the ACT: AA constitution clause 7.1. Cricket Australia follows the delegate model where each State has between one and three delegates with each State having voting rights of the same weighting.

proportions is much better served by a board with no partisan interests, only the interests of the league as a whole for the reasons set out above.

The Crawford Committee in 2003 recommended that the Board of Soccer Australia act independently and show “strict adherence to appropriate governance principles free of any conflict of interest of a financial, personal or representational nature acting in the best interests of the sport as a whole”.¹⁶ The new A-League in Australia appears to have followed this advice and is succeeding. In the author’s view the independent board is a major factor in its current success.

The AFL Independent Board Model

The Australian Football League (AFL) independent board is referred to as a “Commission”. It serves as a good example of the benefits of having an independent board. In the mid 1980’s, the then Victorian Football League clubs faced serious financial problems, which threatened the financial stability of the League.¹⁷ The board, which was composed of club delegates, was described as “an alliance of sworn enemies”.¹⁸ That view was held because each club acted in its own interests which, at times, were not and could not be the same as that of other clubs, for example because of geographical considerations. Crawford identified in his 1993 Review of the AFL that “parochial interests continue to dominate the actions of many clubs”.¹⁹

The self interest displayed by clubs is a major asset in sporting clubs. It can and should be harnessed for club objectives, but not, it is suggested, for deciding major policy or strategic objectives of a league.

The AFL recognised that there were certain common matters which should be run and co-ordinated by an independent and central body. There are also economies of scale in this type of centralisation of resources, rather than having clubs duplicating resources.

The resultant AFL board has been a tremendous success and serves as a very useful model. Decisions of the AFL board are made in the interests of the league as a whole.²⁰ Board members are non partisan. The AFL competition has

¹⁶ Independent Soccer Review Committee, ‘Report of the Independent Soccer Review Committee into the Structure, Governance and Management of Soccer in Australia’ (2003), 3.

¹⁷ Crawford, DA, ‘AFL Administrative Structure Review – Findings’, March, 1993, 5.

¹⁸ Crockett J, *Foschini v Victorian Football League*, Unreported Supreme Court of Victoria, 15 April, 1993, 13.

¹⁹ Above n 17, 7.

²⁰ Ross has noted that having a central body of independent Commissioners to run the AFL avoids the inefficiencies of having clubs determine league policy or negotiate television broadcasting rights sales: Stephen F Ross, ‘Competition Law as a Constraint on Monopolistic Exploitation by Sports Leagues and Clubs’ (2003) 19(4) *Oxford Review of Economic Policy* 569, 578.

blossomed in both financial terms²¹ and in terms of spectator and viewer interest.²² The AFL independent board has acted in a corporate way, running the sport as a business.

There are major differences between the AFL and a metropolitan football league. One is that the AFL is a professional league. This difference is evident in the economic structure of each league. The AFL has a salary cap, a draft, an equalisation policy and revenue sharing. Generally, metropolitan leagues do not have any of these. Another difference is the resources available to the leagues. The AFL operates on a budget of around \$220 million per annum,²³ whereas metropolitan leagues operate on \$1 -2 million per annum.²⁴

However, loyalty to one's own club and rivalry with the others will occur no matter what the league level. For this reason, it is suggested, it will always be difficult to avoid conflicts of interest occurring under the delegate board structure, whereas this conflict does not usually arise under the independent board model. The delegate board also gives the perception of board members having a conflict of interest, even though they may act independently. This perception is also unhelpful.

The preferable model, therefore, is that of the independent board, where the interests of the league is put above the interests of the clubs.²⁵ The trend in metropolitan Leagues has been towards the independent board model. The Essendon District Football League Incorporated ("EDFL") led the way by changing to that model in about 2000. The former Diamond Valley Football League ("DVFL") was the only remaining delegate board model in the major metropolitan leagues, but changed to the independent board model in 2007.²⁶

The US Commissioner Model

Two important issues which need to be considered in relation to the US style Commissioner model are: First, what are the differences, if any, between the United States (US) leagues which have club delegate boards in the professional

²¹ For example, AFL turnover is approximately \$220 million annually, with average player salaries now in excess of \$200,000.00: 109th AFL Annual Report, 2005, 124, 46; and the broadcasting rights for 2007-2011 were bought for a record \$780 million.

²² 'Competitiveness on the Field and Uncertainty of Outcomes: Equalisation Strategies at the AFL', AFL Commission discussion paper, 31st May, 1999, 28.

²³ Australian Football League, 109th Annual Report for the year ended 31st October, 2005, 121, 123.

²⁴ Western Region Football League Annual Report, 2006, 50, lists its total income for the year to 30th September, 2006, as \$1.36 million. The Eastern Football League (EFL) lists its total income for the year ended 31st October, 2006, as \$1.97 million: EFL Annual Report, 2006, 42. The Essendon Districts Football League 2006 Annual Report lists the total income for the financial year as \$988,059.00; Diamond Valley Football League had in 2006 a turnover of approximately \$1 million, advice to the author by the then CEO, Peter Floyd on 9th February, 2007.

²⁵ The former great NFL Commissioner Pete Rozelle called this 'League Think': Above n 14, 254.

²⁶ It is now known as the Northern Football League.

sports and those which have other governance models? Secondly, what can be learned from the US Commissioner model?

US professional sports have a governance model with two typical features: a board constituted by delegates of the clubs in the league – usually the team owner and chairperson – and an all powerful independent Commissioner in charge of many aspects of the sport. Most professional sports teams are owned by companies or individuals with profit as their object. This is in contrast to the vast majority of professional and non-professional sports in Australia, which usually are not for profit organisations owned by members. In briefly considering whether this model has any potential for benefiting metropolitan football leagues, we need to consider some aspects of why it is used in the US, and what the Commissioner does.

The Commissioner performs the role of a Chief Executive Officer (CEO), but has many additional powers. These include the power to:

- negotiate deals regarding television rights (and other league wide contracts);
- over-ride actions taken by the League which are considered adverse to spectators and others;
- serve as the central league administration;
- mediate between owners, and between owners and players;²⁷ and
- create and enforce an internal disciplinary process for individual players as well as owners.²⁸

The Commissioner, appointed by the board of the sport, is “in control of [the League’s] internal affairs” and “is certainly more powerful than a chairperson of the board of a corporation” or a Company President.²⁹ “The Commissioner acts as an employee of the League, but is not under the control and supervision of its own employer”.³⁰ The Commissioner’s power in baseball is so broad that he or she is said to be endowed “with all the attributes of a benevolent but absolute despot”.³¹

The Commissioner has disciplinary powers and is required to exercise them in the “best interests” of the sport as investigator, prosecution and decision maker. The best interests clause “tends to give almost unlimited power” to the

²⁷ Mitten, M, Davis, T, Smith, R & Berry, R, *Sports Law and Regulation: Cases, Materials, and Problems*, Aspen Publishers, New York, 2005, 437.

²⁸ Lentze, G., ‘The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective’ (1995) 6 *Marquette Sports Law Review* 65, 79.

²⁹ Mitten et al, above n 27, 436.

³⁰ Lentze, G., above n 28, 72.

³¹ Ross & Szymanski, Above n 14, 222.

Commissioner whilst the “courts have expansively applied the function of the clause in favour of the Commissioner by giving him (sic) alone the power to interpret this vague standard”.³²

Courts have taken the view that a decision which does not unfairly infringe a person’s rights, contravene the organisation’s rules and does not breach of federal laws is unimpeachable. This is consistent with the view that membership of a sporting league is membership of a voluntary association, and members agree to be bound by the rules.³³ Courts are unwilling “to intervene in matters that involve the business operations of professional sports organisations”.³⁴ However, where “an association’s decision-making process is arbitrary or capricious, or is tainted by malice or bad faith”, courts will intervene.³⁵

The Commissioner under this model has a strong conflict of interest between his or her loyalty to the League as a whole, and loyalty to the club owners who provide employment and security of tenure. It is “very likely that the Commissioner will tend to avoid a dispute with the owners and make decisions in the owners favour”³⁶ a position quite unsatisfactory to the non-owner stakeholders such as the players, broadcasters, spectators or sponsors. Despite this, the owners’ consider the current governance structure including the Commissioner’s position and powers, to be unsatisfactory because it is inefficient.³⁷ The players dislike the Commissioner’s broad powers coupled with the alliances the Commissioner enjoys with the owners, as it favours the owners.

It is suggested that some of the problems raised above by the Commissioner system have led to the proliferation of litigation in US professional sports leagues.³⁸ This does not make it an attractive model to follow.

As noted above, a key difference between the US and Australian professional sports leagues is private ownership of clubs or teams. Particularly in the AFL, clubs are essentially public not-for-profit organisations without private ownership. The major objectives within AFL clubs revolve around the members and supporters sense of belonging, the sense of identity, and the emotional outlet provided by a club.³⁹ The next most important club objective is winning and

³² Lentze, above n 28, 75.

³³ *Charles O Finley & Co., Inc. v Kuhn* 569 F. 2d 527 (7th Cir.), cert. denied, 439 US 876 (1978); Australian courts follow a similar principle, see *Cameron v Hogan* 51 CLR 358 and *Australian Football League & Ors v Carlton Football Club Ltd & Greg Williams* [1998] 2 VR 546.

³⁴ Extracts from the case of *Oakland Raiders v National Football League* 131 Cal. App. 4th 621, 2005, referred to in Mitten et al, above n 27, supplementary materials, 16.

³⁵ Mitten, et al, above n 27, 434.

³⁶ Lentze, G, above n 28, 82.

³⁷ Ibid, 93.

³⁸ Ibid.

³⁹ Foreman, J (2006) ‘Corporate Governance in the Australian Football League: A Critical Evaluation’, Unpublished doctoral thesis, Victoria University, Melbourne, 219-220.

making the finals, and a distant third is the business success of the club.⁴⁰ Metropolitan Leagues are in a good position to deliver each of these objectives to clubs, club members, spectators and others.

Most sports teams in the US are privately owned and profit is the objective. It is in the historical context of private team ownership that the need for Commissioners arose, as an objective party to oversee and conciliate all of the partisan interests, as well as to discipline players who were engaged in improper gambling.⁴¹

Ross and Szymanski advocate that the professional US sports leagues should retain an independent company to co-ordinate certain aspects of the competition (such as playing rules, revenue distribution, television rights, all contracts, and rules relating to the engagement of players). This they argue is more efficient economically, less likely to be in breach of anti-trust statutes,⁴² and avoids disputes amongst team owners.⁴³

Despite criticisms of the Commissioner model, the professional sports leagues in the US do not feel the need to change. This is primarily because owners, players and other stakeholders have enjoyed enormous economic success under strong and powerful leadership.⁴⁴ However, that economic success (and spectator appeal) could be eroded unless the financial disparities between clubs in sports such as baseball are addressed.⁴⁵

The US Commissioner model has been tried sparsely in Australian sport. Australia's National Basketball League ("NBL") is unusual in Australian professional sports as there is primarily private ownership of teams.⁴⁶ The independent board model was trialled in it, but was abandoned recently in favour of a return to a delegate board comprising owners, plus a Commissioner appointed by the board, and a Chairman selected from amongst the

⁴⁰ These goals of AFL clubs were based on answers provided in a survey of some 54 directors of AFL clubs in the period around 2004 – 2006.

⁴¹ White Sox players in the 1919 Baseball World Series after investigation admitted to 'throwing' the finals series after accepting gamblers' money, despite being hot favourites: Lentze, above n 27, 70. Judge Kenesaw Landis was appointed the first Commissioner of baseball in 1920; since that time all other major professional sports leagues have adopted this model: Mitten et al., above n 27, 436.

⁴² In Australia known as competition laws or trade practices legislation.

⁴³ Ross & Szymanski, above n 14, 225-226, 239, 244-245.

⁴⁴ Most recently in the National Football League (NFL) under Commissioner Paul Tagliabue and in the National Basketball Association (NBA) under Commissioner David Stern: Lentze, above n 28, 93.

⁴⁵ Commissioner Bud Selig has acknowledged this as an MLB issue: 1999 AFL Commission Discussion Paper, above n 21, 19; the Major League Baseball's Executive Vice President of Baseball Operations also recognised the problem: above n 22, 17.

⁴⁶ The nature of that private ownership may change in the near future as the NBL is exploring the option of having each team as a franchise, owned by a central corporate body. This will create greater common interests amongst the teams: advice from Chuck Harmison, then NBL General Operations Manager, to the author on 20th February, 2007.

owner/delegates. This is one of the few major professional sports in Australia whose governance and economic structure more closely mirrors the major US professional sports.

The NBL appointed its first Commissioner in 2003. The Commissioner does not have the broad powers of Commissioners in the US, but is certainly more powerful than the CEO, whose role was replaced and superseded by that of Commissioner.⁴⁷ The Commissioner is the spokesperson for the NBL, as opposed to the Chairman. Given that there is private ownership of clubs, the clubs look to the League and the Commissioner to improve the “bottom line”, and judge them by that standard.

The Commissioner model in US professional sports is acknowledged, even by its creators, to be inefficient, subject to clear conflicts of interest and may, in conjunction with its delegate board of governance, constitute a breach of anti-trust statutes, as it can be argued that some clubs are acting together to “hamper rival clubs by precluding more efficient ways of organisation or of obtaining capital”.⁴⁸

The NBL in Australia has attempted to follow the US Commissioner model to varying degrees over time, and it is suggested that it has not been a worthwhile model for professional sports in Australia given its limited success. It therefore holds little appeal for Metropolitan Football Leagues, whose preference is for a more egalitarian board model rather than the more autocratic Commissioner model. The Commissioner model was designed with private club ownership in mind. Given that Metropolitan Leagues are owned by their member clubs, which in turn are not privately run but owned by the individual members of the clubs themselves, it is largely irrelevant.

Strong and Effective Communication between the League, its Members and League Employees

For proper and effective governance of a sports league of any type or size, strong and effective communication is needed between the board and the members of the League. In metropolitan football leagues, the members are primarily the constituent clubs. Other members include stakeholders such as players, umpires, local councils, financial backers and perhaps spectators or supporter groups.⁴⁹

⁴⁷ Advice of Chuck Harmison, then NBL General Operations Manager, to the author on 20th February, 2007.

⁴⁸ Ross & Szymanski, above n 14, 243.

⁴⁹ In professional sport, Hindley identified the input of spectator or supporter groups (in his example, professional football/soccer in the United Kingdom) as an emerging stakeholder who should be consulted in the model of good governance. He argues that the old style model of command and control, with the League imposing its rules and views as the all powerful peak body, is an anachronism. Good governance, he argues, requires the league taking account of a number of matters including utilizing networks and partnership, bargaining and co-operation with groups such as

Leagues need to balance and protect the interests of players, clubs and spectators.⁵⁰

Beyond the moral duty to consider the interests and views of various stakeholders, this group may provide invaluable input to the running of the league: "The information and 'wisdom' of all stakeholders in and around the organisation is a valuable commodity which directors need to appreciate and use".⁵¹ It is the members who are the legal owners of the league and who are the most important stakeholders: "members, as identified in the constitution, own the organisation. [As] legal owners [they] have the right to make changes to the constitution, to appoint or elect members to the board, and to determine that the organisation should wind-up or close".⁵²

The members of the league need effective communication with and ready access to balanced and understandable information about the league and its corporate proposals. Participation at general meetings should be made easy.⁵³ It is advisable that the "external auditor attend the annual general meeting and be available to answer shareholder questions about the conduct of the audit and the preparation and content of the auditors report".⁵⁴

Crawford, in his Review of AFL governance, identified clearly the problem of communication between League personnel, including administration, board and Commission members, and the clubs: "What did become crystal clear during the review was that the most fundamental problem that exists in the relationship between the Commission, Clubs and management of the AFL is "LACK OF ADEQUATE, CLEAR AND CONCISE COMMUNICATION" (author emphasis)".⁵⁵

The board of a football league is set up to run a competition. It is the Clubs as league members who vote the board into their positions. The board is therefore accountable to the Clubs.

supporter groups, as part of the good governance model he advocates. To date, he observes, the supporter groups have been largely ignored: David Hindley, 'Political Football' (2003) 6(4) *CGI: Corporate Governance International* 18, 25-27. See also Foreman, J, above n 39, 70-72 & 94-97.

⁵⁰ See Australian Stock Exchange (ASX) Corporate Governance Council, 'Principles of Good Corporate Governance and Best Practice Recommendations', March 2003, principle six, p. 39-41 and principle ten, p. 59-61.

⁵¹ Garratt, B, *The Fish Rots from the Head*, London, Harper Collins Business, 1996, quoted in 'Governing Sport – The Role of the Board' (2005), above n 5, 15. Stakeholders should be recognised for the contribution they can make to the long-term success of the corporation: OECD Principles of Corporate Governance, (1999), 35.

⁵² Above n 5, 'Governing Sport – The Role of the Board' (2005), 15.

⁵³ ASX Good Governance Principles, above n 50, 39.

⁵⁴ Ibid, 40.

⁵⁵ Crawford, DA, AFL Administrative Structure Review above n 17, 26.

Accountability can occur by way of regular formal or informal meetings between board representatives and the member Clubs. In this way, the Clubs have the opportunity to provide regular input into matters that affect them.⁵⁶ It would be potentially damaging to the relationship and the league if concerns raised by key stakeholders were regularly ignored.

It has been found in studies of both the International Olympic Committee (“IOC”) and the Federation of International Football Associations (“FIFA”) that “communication to constituents [or member organisations] was generally found to be weak, thus compromising the planning and control roles of the board of those bodies”.⁵⁷ Such a failure to communicate and consult ought to be avoided at all costs.

It is advisable that there be healthy communication, a healthy relationship and a clear separation of powers between the board on the one hand, and the CEO (or General Manager)⁵⁸ of a metropolitan football league that runs the league, on the other. To avoid inconsistency of instructions and board views being given to the CEO, the preferred position is that the Chair of the board will be the first and major point of contact for the CEO with the board.⁵⁹

A study in the area of non-profit sporting organisations in Victoria found that “the higher performing boards had better executive-board exchanges” which was “presumed to relate to the presence of mutual trust and respect”.⁶⁰

The Unique Economic Nature of the Sports Competition

Sports leagues are unique in that each team relies on all the other teams for the competition to survive. Strong rivalries may exist between clubs, but there is generally no interest in having one of the clubs reach financial ruin, or be so weak on the field that its supporter base falls away.⁶¹

Clubs or teams depend on the ongoing survival and success of each other for the success of the competition. If the one team wins all the time – as may be said to

⁵⁶ The Essendon Districts Football League (EDFL) adopted a process of extensive consultation in seeking to overhaul and review its constitution. Over a two year period concluding around early 2005, regular meetings were held with a select group of club presidents, who were legally qualified, to seek feedback and input to the new constitution. The new constitution was adopted at a general meeting without resistance and with the consent of the clubs. Advice of Stan Pettett, General Manager of the EDFL to the author on 6th February, 2007. The consultation is ongoing in relation to league rules: Annual Report 2006, 2.

⁵⁷ Foreman, J (2006), Above n 39, 74. FIFA was also described as a ‘personal fiefdom’.

⁵⁸ Michie, J & Oughton, C, *The Corporate Governance of Professional Football Clubs in England*, (2005) 13 *Corporate Governance* 517, 525.

⁵⁹ Australian Sports Commission, (2007) ‘Governance Principles’, above n 5, 15.

⁶⁰ Foreman, J, above n 39, 82.

⁶¹ However, where one city has two teams in a sport, the demise of one team may in fact improve the economic and supporter base of the other team.

happen in Premier League soccer in the UK, or in baseball in the US⁶² – there is a real likelihood that less competitive teams may face financial difficulty because they are not competitive. Without teams to compete against, the better teams have no competition to compete in and ultimately would fail to exist.

The unique nature of the sports economy has been summarised as follows:

*Traditional professional sports leagues in the United States and Australia are built upon cooperation among individual clubs. Clubs must agree on a vast range of issues, from the seemingly simple, such as scheduling games, to the very complex, such as revenue sharing. According to many commentators, this feature of a traditional professional sports league distinguishes its structure from all other forms of business organisation.*⁶³

As has been noted in a US Major League Baseball (“MLB”) Review, “Sports leagues do not function as free markets...[they] are blends of co-operation and competition – co-operation for the sake of producing satisfactory competitiveness”.⁶⁴ In the commercial world, however, a business without any substantial competitors increases its own size so that it supplies the goods or services to the entire market. It is then likely to be very successful.

In order to ensure that competition amongst clubs is healthy, a sports league must ensure that all teams are competitive. In the Melbourne metropolitan Australian football leagues, this particularly applies to the teams in the highest division of each competition, as they generate the highest revenue and spectator interest. These efforts by the league to maintain an even and well balanced competition are sometimes referred to as “equalisation strategies”⁶⁵, or attempts to achieve “competitive balance”.

Apart from on-field competitiveness, competitive balance is also directed at the financial stability of clubs. Financial stability affects a club’s ability to pay coaching staff, medical staff, players, and have club facilities such as gym equipment, physiotherapy equipment or video facilities. A study of the AFL has

⁶² The Dutch national soccer league is another example of an imbalanced competition where only a few teams regularly win the championship: Ross, above n 20, 579; and see ‘Equalisation Strategies at the AFL’ paper, above n 22, 12-19.

⁶³ James B Perrine, ‘Media Leagues: Australia Suggests New Professional Sports Leagues for the Twenty-first Century’ (2002) *12 Marquette Sports Law Review* 703, 715-716.

⁶⁴ Richard C Levin, George J Mitchell, Paul A Volcker and George F Will, *The Report of the Independent Members of the Commissioner's Blue Ribbon Panel on Baseball Economics* (2000), 5.

⁶⁵ Equalisation strategies aim to ‘achieve competitiveness and evenness on the field and uncertainty of outcomes which in turn maximise public interest’ and to narrow the gap between teams on the competition ‘ladder’: ‘Equalisation Strategies at the AFL’ paper, above n 22, 3.

found that “clubs that were well managed “off field” had a stronger correlation to “on field” success”.⁶⁶

Non-professional sports leagues can learn something from professional sports, although quite clearly their circumstances differ in many important respects. The AFL, and the NFL in the US, are heavily regulated competitions in order to equalise the competition and the Clubs. League revenue is shared amongst the clubs. Player talent is shared by way of limits to the number of players on the club playing list and salary expenditure is limited so that one club can not buy all the best players and then “buy” a premiership (salary cap).⁶⁷

The result in the AFL is that over a period of 20-30 years (up to 1999), “on-field evenness has increased during [the] period. What this means of course is that the hopes of more supporters are sustained for longer in the season”.⁶⁸ This translates to increased game attendances, increased supporter interest, and increased television viewing audiences.

In contrast, Major League Baseball in the US is a very uneven competition.⁶⁹ The “Blue Ribbon Baseball Review” (2000) acknowledged that “the goal of a well-designed league is to produce adequate competitive balance. By this standard, MLB is not now well-designed...proper competitive balance will not exist until every well-run club has a regularly recurring reasonable hope of post-season play”.⁷⁰

In the United Kingdom the Court in *Eastham v Newcastle United Football Club*⁷¹ “recognised that the Football League [the national soccer competition organiser] had a special and legitimate interest in maintaining the overall quality of the sport through competitive balance”,⁷² and imposing restrictions to promote

⁶⁶ Foreman, J, Above n 39, 104, referring to a 1993 study by Dawson, M, ‘Club Management and Football Success, Unpublished Masters thesis, La Trobe University College of Northern Victoria. Foreman also notes ‘that the low success clubs had a stronger focus on “on field” issues than “off field”’: 104. See also Michie, J & Oughton, C, above n 58, 517, where the authors state that ‘good corporate governance brings benefits’ to the organisation.

⁶⁷ Some commentators criticise these first two aspects of league equalisation, namely restricted list size and salary cap as being artificially rigid and preventing inferior teams from improving quickly: Ross, above n 20, 571.

⁶⁸ ‘Equalisation Strategies at the AFL’ paper, above n 22, 28. See also Davies, C, ‘Draft Systems in Professional Team Sports and the Restraint of Trade Doctrine; Is the AFL Draft distinguishable from the NSWRL draft?’ 2006 *Australian and New Zealand Sports Law Journal*, 1(1), 80, 91-92. The author there expresses the view that the AFL is now an even competition.

⁶⁹ In US baseball, half the teams are uncompetitive. One of the best teams in the competition, and with the highest payroll, the New York Yankees, spent US\$63 million on player salaries in 1997, compared with the lowest payroll of Montreal, US\$9 million: ‘Equalisation strategies at the AFL’, above n 22, 15-19. Perrine also notes that there is a lack of competitive balance in the MLB: above n 63, 721.

⁷⁰ Levin et al, above n 64, 5.

⁷¹ [1963] 3 All ER 139.

⁷² Ross, S, above n 20, 574.

competitive balance. That principle was followed in Australia's High Court in *Buckley v Tutty*.⁷³

Under European Community Law, "competitive balance justifies restraints where overall attendance and television viewership increase if each season features a close contest for the league championship, and when each team has a reasonable chance to contend for the championship every few years".⁷⁴ However, Europe's dominant sport, soccer, operates differently to Australian and American professional sports leagues.

There is some interest in having one or two dominant teams in the domestic competition. These teams can then play in the European competitions, the Champions League or UEFA Cup, and be strong and competitive. Therefore, having only a few Clubs regularly winning the national championship disproportionately may enhance television viewing and fan support because the bigger prizes being sought lie in the European competitions.

Applying Competitive Balance Principles to Metropolitan Football Leagues

If there were a highly regarded or lucrative competition in Melbourne between the best Australian Rules teams in each metropolitan league, this imbalanced competition model might be worth considering. However, as that does not occur, and is unlikely to occur in the near future, the model that promotes competitive balance is to be preferred.

These professional examples translate to metropolitan football. If the competition is relatively even, with every team having a realistic chance of playing finals football, interest – from sponsors and spectators - and revenue in the competition is likely to increase.

Where the board comprises an independent group of directors, the board must act in the best interests of the league as a whole, not any particular club. This helps to ensure that the objective of competitive balance is always being pursued.

One distinguishing feature between AFL football and metropolitan leagues is the promotion/relegation system in use in metropolitan leagues, also in use in professional soccer in the United Kingdom. This provides that the team which finishes last on the ladder in first division is relegated to second division and the team finishing first from the division below is promoted to first division.⁷⁵ The

⁷³ (1971) 125 CLR 353: Barwick CJ, McTiernan, Windeyer, Owen and Gibbs JJ: The leagues have a legitimate interest in ensuring that 'teams fielded in the competitions are as strong and well matched as possible, for in that way the support of the public will be attracted and maintained, and players will be afforded the best opportunity of developing and displaying their skill', 377.

⁷⁴ Ross, S, above n 20, 579.

⁷⁵ In the Victorian Amateur Football Association ('VAFA') the bottom two teams of a Grade are relegated, while the grand finalists from the grade are promoted: Rules of the VAFA, Rule 11.

composition of the first division clubs is constantly changing, whereas this does not occur in the AFL. In metropolitan leagues, there may be strong clubs who are rarely if ever relegated.⁷⁶

Creating an attractive sporting product is essential to growth in the current economic environment. As Foreman noted in her study, the US market has shown in the past fifteen years “significant growth in the [sports] industry”.⁷⁷ At the same time, “the major sports in the US faced increasing competition from second tier sports such as wrestling and NASCAR”.⁷⁸

It is suggested that there is serious competition amongst all sports and forms of entertainment for the spectator and sponsor’s support.⁷⁹ This translates to the Australian sports market. Thus, metropolitan football leagues can grow and compete in the market place for a larger share of the economic pie even though they will never rival the major sports such as the AFL, particularly in light of significant television rights revenue.⁸⁰

Equalisation has been tried in the Victorian Country Football League (VCFL) with a salary cap in the 1990’s. However, it was abandoned after it was found to be too hard to police. More recently, clubs in the VCFL have trialled a player points system as a form of equalisation strategy. Players are attributed points according to their ability with each team only allowed a specified maximum number of points used to field a team each week. The jury is still out on the player points system.

It can therefore be concluded that what is unique to sporting competitions is that teams depend on each other for the survival of both the League and the clubs. This means that there are common interests between competitors, which is a different situation to other economic activities. This aspect of sports competitions needs to be taken into account when considering appropriate structures, governance and constituent documents, discussed elsewhere in this paper.

⁷⁶ This is certainly the case in the Eastern Football League (EFL), where there are four very strong clubs: Noble Park, Vermont, East Ringwood and East Burwood: advice from Rob Sharpe, EFL CEO, to the author on 17th January, 2007. In the WRFL, the strong clubs who are almost without fail in the top five of first division are Parkside, Port Colts, Spotswood and St Albans, with Hoppers Crossing also strong and with the benefit of poker machine revenue: advice from John Batty, WRFL CEO, to the author on 12th February, 2007.

⁷⁷ Foreman, J (2006), Above n 39, 68.

⁷⁸ Ibid at p.69. Ross & Szymanski also refer to the ‘tremendous success and growth of NASCAR’ (National Association for Stock Car Auto Racing) which is attributed to importantly by being a sport not run by its clubs or teams, but by an independent board (which operates for profit: see above n 14, 216 & 249).

⁷⁹ The AFL believe that there is credibility in the argument put forward by the NFL that ‘the real competition is not between clubs ‘but between football and other entertainment interests’, particularly given the NFL’s success: above n 22, 8.

⁸⁰ Worth \$780 million over five years, 2007-11, or \$156 million per year.

Legal Obligations of Board Members

Board members have a number of statutory obligations, such as those under the *Corporations Act* 2001 (Cth) and *Associations Incorporations Act* 1981 (Vic). They also have common law obligations.⁸¹ Most metropolitan football leagues in Victoria are incorporated associations.⁸²

Under the *Associations Incorporations Act* (1981) Vic, a number of obligations and limitations are placed on the Association and its members. The Association:

- may invest and deal with moneys of the association as it thinks fit;⁸³
- may raise or borrow money;⁸⁴
- must make its rules available for members to inspect on request;⁸⁵
- must maintain adequate and accurate accounting records.⁸⁶

A committee member of an incorporated association must not knowingly or recklessly make improper use of information acquired by virtue of his or her position, nor make improper use of his or her position, in the incorporated association, with penalties applying to a breach.⁸⁷ Disclosure of certain pecuniary interests in association contracts is also required.⁸⁸

Under the *Corporations Act*, directors have a duty to avoid conflicts of interest (s.191-196), a duty not to improperly use their position or information (s. 182-183), to keep proper books of account (s.286) and other fiduciary duties of loyalty and good faith (s.180-183 & 191-196).⁸⁹ A breach of these provisions may lead to a significant pecuniary penalty being imposed, disqualification from holding a directorship and payment of compensation.

⁸¹ These obligations are summarized at Baxt, Professor R, *Duties and Responsibilities of Directors and Officers*, Australian Institute of Company Directors, 18th Edition, August, 2005, Southwood Press Pty Ltd, 39, and explained at 39-55 and 57-107.

⁸² The author's observation has been that sporting organizations that are companies limited by guarantee have a turnover of over about \$2 million or more annually, and below that turnover, the organisation tends to be an incorporated association. [this should be limited to Victoria as it is not the case in NSW].

⁸³ *Associations Incorporations Act* (1981) Vic, s.16(1)(a).

⁸⁴ *Ibid*, s.16(1) (b)

⁸⁵ *Ibid*, s.22A.

⁸⁶ *Ibid*, s.30A,

⁸⁷ *Ibid*, s.29A(1) & (2).

⁸⁸ *Ibid*, s.29B.

⁸⁹ These legal obligations are also reflected in the Australian Stock Exchange (ASX) Corporate Governance Council, 'Principles of Good Corporate Governance and Best Practice Recommendations', March 2003, principle three, amended November 2007.

There are in addition two primary common law obligations: the duty of loyalty and good faith,⁹⁰ and the duty of care and diligence (or care, skill and attention) which apply to both groups. These obligations have arisen largely in the context of corporations, which includes companies limited by guarantee and other corporations. The “preponderance of authority” suggests that committee members of an incorporated association are under the same common law obligations as company directors.⁹¹

These duties are strictly applied “and the courts have held on numerous occasions that directors could be in breach of these duties irrespective of whether they acted without fault, either in the form of negligence or intent”.⁹² Directors may be held liable for a breach of these duties despite acting in what they believed was the best interests of the company as a whole.⁹³

Standard of Care and Diligence

The duty of care and diligence places legal responsibility on a director or committee member of a sporting organisation. Tadgell J in *Commonwealth Bank of Australia v Friedrich*⁹⁴ stated:

*What constitutes proper performance of the duties of a director will be dictated by a host of circumstances, including no doubt the type of company, the size and nature of its enterprise, the provisions of its articles of association, the composition of its board and the distribution of its work between the board and other officers.*⁹⁵

Tadgell J also stated that the standard to be applied was that of “a person seeking properly to perform the duties of a non-executive director of that company”.⁹⁶ This could include taking into account “matters personal” to the director.⁹⁷ The *Friedrich* case was significant since unpaid directors were successfully sued for failing to ensure that proper and accurate annual accounts were prepared by the

⁹⁰ Which includes ‘the duty of acting in good faith and for the benefit of the company as a whole; a duty to act for a proper purpose, a duty not to fetter discretions and a duty to prevent conflicts of interest’: Robert Fisher, ‘Duties of Company Directors and Committee Members of Incorporated Associations: Have the Paths Divided?’ (2001) 13 *Australian Journal of Corporate Law* 143, 147.

⁹¹ *Ibid*, 148; see also Twaits, A, below, n 127, 316, and ‘Governing Sport: The Role of the Board’, Australian Sports Commission, 2005, 8-9.

⁹² Du Plessis, J, McConville, J & Bagaric, M, *Principles of Contemporary Corporate Governance*, 2005 Cambridge University Press, Cambridge, 259.

⁹³ *Ibid*.

⁹⁴ (1991) 5 ACSR 115.

⁹⁵ *Ibid*, 125.

⁹⁶ *Ibid*, 124; see also *Australian Securities and Investments Commission v Rich & Others* [2003] NSWSC 85 (24 February, 2003), and *Australian Securities and Investments Commission v Vines* (No 2) [2003] NSWSC 1116 (23 December, 2003) for further discussion about the standard of care and diligence to be expected of directors and officers of corporations. The latter two cases are decisions of Austin J.

⁹⁷ *Ibid*, *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115, 130.

company. The Chairman of the company had failed to take proper account of the auditor's qualifications, and "the fact that he was deceived by Friedrich, the chief executive, did not save him".⁹⁸

The better view is that "the nature of the corporate entity and its business operations will influence the standard expected".⁹⁹ This applies equally to committee members of incorporated associations and directors of companies limited by guarantee.¹⁰⁰ It is suggested that the skills and abilities of committee members of incorporated associations should be taken into account when measuring their actions and decisions. This is because "committee members do not necessarily bring the same skills and expertise to organisational governance, as one would expect from company directors".¹⁰¹

Sievers has summarised the situation as follows:

*It is quite clear that all directors, and probably also committee members of incorporated and unincorporated associations who are in a similar fiduciary position, will now be expected to comply with realistic standards of care, skill and diligence. However worthwhile the purposes of an association and regardless of the fact that the directors or committee members act honestly, from the best of motives, on a voluntary basis and are not paid, they are still in a fiduciary position and as such are accountable to the associations members and the community at large.*¹⁰²

Whilst these duties are essentially created under common law, there is some recognition of them in the *Corporations Act 2001* (Cth).¹⁰³ Under s 180 of that Act, directors are required to "discharge their duties with the degree of care and diligence that a reasonable person would exercise" bearing in mind the circumstances of the corporation, the position and responsibilities held by the person. Section 180(2) contains the statutory business judgment rule. Whether the director has met his or her obligations in making a business judgment is

⁹⁸ Baxt, R, above n 81, 84.

⁹⁹ Fisher, R, above n 90, 155. See also Ford, H, Austin, R and Ramsay, I, *Ford's Principles of Corporations Law*, online edition, updated to service 54, 2006, para [8.420]: Tadgell J in *Commonwealth Bank of Australia v Friedrich* 'observed that there is nothing in statutory company law to suggest that the standard to be expected of a part-time non-executive director of a company not for profit is different from the standard expected of any other director of a profit-making company'. See also above n 95.

¹⁰⁰ These are the two types of legal structure that may be adopted by football leagues, both of which are non-profit organisations, both attracting benefits, such as in the area of taxation, as a result.

¹⁰¹ Fisher, above n 90, 157.

¹⁰² Sievers, AS, 'What is the future for Honorary Directors and Committee Members? – Their Duties and Liabilities', in McGregor-Lowndes, M, Fletcher, K, and Sievers, AS, *Legal Issues for Non-Profit Associations*, Law Book Co, 1996, Sydney, 22, 50.

¹⁰³ Section 230 refers to a director's 'fiduciary duties' essentially as placing an obligation on a director.

judged by reference to whether: 1) he or she has made the judgment in good faith and for a proper purpose; 2) has a material personal interest in the matter; 3) has properly informed himself or herself about the matter, and rationally believes that the judgment is in the best interests of the corporation.

Conflicts of interest and acting in the best interests of the company

The broad duty to prevent conflicts of interest also includes a duty of directors to disclose any other interests,¹⁰⁴ and a duty not to improperly use their position or information.¹⁰⁵ Best practice governance suggests that directors must be concerned with what is in the best interests of their sport overall rather than have a narrow interest or conflict of interest, for example because they are affiliated with some other group.¹⁰⁶

Committee Chair David Crawford in his extensive review of soccer in Australia in 2003 emphasised the need for boards to not only require that directors declare any other interests he or she may have, but also to register such interests, and agree to be bound by a specific conflict of interest policy.¹⁰⁷

What amounts to a conflict of interest in the sporting context has been formulated in this way: “it could mean that where a [director] has a loyalty to some other interest than that of the [league], the director should not act while that other loyalty persists”.¹⁰⁸ The likelihood of conflict must be significant or substantial before the director has breached his or her duty. Deciding whether there has been a conflict may depend on the type of company and the nature of the extraneous loyalty.¹⁰⁹ Where a board director declares a conflict of interest in connection with a particular matter being considered by the board, it may be enough to leave the board room and not participate in discussion or voting on that issue.¹¹⁰

If a director complies with the obligation to act in the interests of the company as a whole, conflicts of interest will be avoided. The *Corporations Act 2001*

¹⁰⁴ *Corporations Act 2001* (Cth) s 191-196; see Constitution of Athletics Australia, Rule 56.

¹⁰⁵ *Corporations Act 2001* (Cth) s 182-183.

¹⁰⁶ See 1999 AFL Commission discussion paper, above n 22, 19, which quotes a 1999 *Street and Smith's Sports Business Journal* article. This type of conflict arises under the delegate board model.

¹⁰⁷ Above n 16, recommendations 36-39, page 11, 25-26.

¹⁰⁸ Ford, Austin & Ramsay, above n 99, [9.060]. The Constitution of the Eastern Football League deals with this matter by requiring persons seeking appointment to the board to ‘cease holding any office of an Affiliated Senior Club or Affiliated Junior Club Member...immediately upon election’: Clause 9.1.

¹⁰⁹ Ford, Austin & Ramsay, above n 99, [9.060]-[9.070].

¹¹⁰ The Essendon District Football League (EDFL) Rules apply a rule similar to this. The EDFL Incorporated Statement of Rules provides that at board meetings, ‘any Board Member who is an interested party in a matter before the Board of Management shall, at the request of the Board of Management, leave the meeting during the hearing and discussion of the matter, and not be involved in the determination relating to the matter’, Rule 9.19(b).

specifically requires a director (or other officer of a corporation) to “exercise their powers and discharge their duties:

- (a) in good faith in the best interests of the corporation; and
- (b) for a proper purpose”.¹¹¹

Despite the existence of obligations to members of a company and shareholders, “the law recognises that it is impossible for a person to serve many masters and a director does not have to do so”.¹¹² The primary duty is to the company, or sporting organisation.

The duty to act in the best interests of the company as a whole also requires that the director must not allow personal advantage to override the interests of the company. The director must exercise the powers conferred on him or her in the interests of the company as a whole and for the purpose for which the powers were conferred.¹¹³

The independent board model was found above to be the preferred model for Metropolitan Football Leagues for a number of reasons which include the reduced likelihood of conflicts of interest. This enhances the ability of board members to act in the interests of the League as a whole, to act for a proper purpose, and to act in good faith, a director’s common law duties.

Financial accountability: proper records, annual auditing and financial risk

Perhaps the most important legal duty arises in the area of the financial accountability of the company or association. Directors or committee members must ensure that proper books of account are kept.¹¹⁴ They are required to provide an assurance that the published accounts, generally prepared and audited annually, give a fair and true view of the organisation’s financial position.¹¹⁵

Directors are also required to provide an assurance that the organisation can meet its debts, meaning that it is solvent.¹¹⁶ If the organisation is already insolvent or

¹¹¹ Corporations Act 2001 (Cth), s.181.

¹¹² Baxt, Professor R, above n 81, 42.

¹¹³ Australian Corporations Law Principles and Practice, LexisNexis online, Chapter 1.2 Interpretation, Black, AJ, editor Williams, J, last updated April, 2008, paragraph [1.2.0266], “Directors Duties”.

¹¹⁴ Section 30A of the *Associations Incorporations Act 1981* (Vic) requires associations to maintain adequate and accurate accounting records. Section 30B of that Act requires associations with a turnover of over \$200,000.00 in the previous financial year or with assets of over \$500,000.00 to be professionally audited annually. For company obligations see s. 286(1) of the *Corporations Act 2001* (Cth). See also *Commonwealth Bank of Australia v Friedrich*, above n 94-98.

¹¹⁵ Section 297 of the Corporations Act 2001 (Cth).

¹¹⁶ Section 295 (4) of the Corporations Act 2001 (Cth).

becomes insolvent as a result of incurring the debt, and there were at the time reasonable grounds for suspecting the insolvency, the director may be liable.¹¹⁷

In order to safeguard integrity in financial reporting, an organisation should “put in place a structure of review and authorisation designed to ensure the truthful and factual presentation of the company’s financial position”.¹¹⁸

*The existence of an audit committee is recognised internationally as an important feature of good corporate governance. If there is no audit committee, it is particularly important that the company disclose how its alternative approach assures the integrity of the financial statements of the company and the independence of the external auditor, and why an audit committee is not considered appropriate.*¹¹⁹

Additionally, the audit committee should report to the board, and there should be written policies and procedures for the “selection and appointment of the external auditor, and for the rotation of external audit engagement partners”.¹²⁰

Not every sporting board however, requires an audit committee. As has been stated in this paper, there is no single model that fits every sporting organisation. The size and level of sophistication of each organisation needs to be taken into account. It may be that policies of the board, rather than consideration by a separate audit sub-committee, is as much care as a small sporting league can take on finance issues. This may be enough to ensure good governance in a very small League, but larger Leagues are more likely to require an audit or finance committee.

It is the author’s view that directors of non-profit companies, as distinguished from committee members of incorporated associations, are entitled to take calculated risks, particularly financial risks. This is because companies are expected to be run as a business, as opposed to sporting associations, which do not have the same business objectives.¹²¹ The general duty of a company director is this: “Director’s duties must achieve a balance between keeping directors accountable to the interests of the company while allowing them discretion to make decisions which inevitably involve a degree of risk”.¹²² Committee members of an association do not have the same mandate to take risks.

¹¹⁷ Du Plessis, McConvill & Bagaric, above n 92, 266, and s 588G of the *Corporations Act 2001* (Cth).

¹¹⁸ ASX ‘Principles of Good Corporate Governance’, above n 48, 29.

¹¹⁹ Ibid, 30.

¹²⁰ ASX ‘Principles of Good Corporate Governance’, above n 50, 33. These only apply to ASX listed companies but do provide guidance in other contexts.

¹²¹ Sievers, AS, above n 102, 44-45.

¹²² Ford, Austin & Ramsay, above n 99, [8.015].

The ASC notes the following in relation to risk:

Risk is an inevitable and unavoidable component in organisational growth and development, providing both opportunities and potential threats to the health of an organisation.

*Risk management involves not only taking protective measures but also evaluating opportunities and, where appropriate, taking considered risks designed to facilitate the growth and development of the organisation.*¹²³

On a practical level, ensuring that all Board members and officers of the organisation have appropriate insurance cover will protect against most of the above potential personal liability issues, other than criminal acts. The level of insurance cover will vary with the size of the sporting organisation.

One final duty of a board member “is to the legal entity...to ensure that the company or association meets all requirements in law”.¹²⁴ This includes obligations at common law discussed above, and other obligations such as those under employment, trading, taxation, occupational health and safety laws, and more recently, the *Working With Children Act 2005 (Vic)*.¹²⁵

By adhering to the above laws and principles, board members will minimise the risk of legal action being taken against them or the league. These laws also form part of good governance, such as with avoiding conflicts of interest or acting for the league as a whole. Acting within the bounds of these legal obligations will increase the chance of the league prospering, and will certainly avoid unnecessary distraction by legal claims being made against the league, enabling the board to focus and invest in the improvement of its product, the sport itself.

Application of Corporate Governance principles

In order to adopt best governance practices, an analysis of governance principles from the corporate world is instructive. However, an interesting observation of sports organisations, including major national leagues and clubs, suggests that whilst a number of board members hail from the corporate world, corporate governance principles are not always closely followed. This seems particularly

¹²³ Above n 5, ‘Governing Sport’ (2005), 13-14. Generally, a director will not be held liable for any decisions made or risks taken if done in good faith in the interests of the company and made for a proper purpose: *Harlowe’s Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483 at 493 and see s.181 *Corporations Act 2001 (Cth)*.

¹²⁴ Above n 5, Governing Sport (2005), 8. ‘The interests of the company must always come first’, Baxt, Professor R, above n 81, 40.

¹²⁵ This generally requires adults who volunteer in sports or work with children under 18 to have mandatory criminal records checks conducted by police, with previous offenders potentially being refused a permit to work with children.

the case in privately owned clubs in the US where the board chair or owner – often wealthy – is involved with the club as a hobby, or as a release from the rigours of the corporate world. That person is then often a delegate on the sporting league board. The need to make a profit is often not a high priority, but the desire to be a winner is strong, and the corporate branding for other business interests is often very valuable. Best governance practices may unfortunately be given a lower priority than in the purely business world.

Best practice corporate governance involves the implementation of certain basic standards and guiding principles. These may be extracted from the Australian Stock Exchange's (ASX) Principles of Good Corporate Governance (2003) or from the Organisation for Economic Co-Operation and Development (OECD) Principles of Corporate Governance 2004. The ASX Principles are not mandatory for companies listed on the Stock Exchange, but are presented as recommendations for best practice. Both the ASX and the OECD Governance Principles offer a valuable framework for sporting leagues (and other sports organisations) on best governance, with necessary modification to fit the size of the league.

The basic standards that may be distilled from both sets of Principles include the following:

- clear disclosure to stakeholders and transparency of operation;
- appropriate board and management structures;
- a committee to monitor and report on the financial position of the organisation;
- compliance with all laws and having set policies to ensure such compliance;
- having a board with suitable and broad skill, experience and independence;
- a board aware of all its legal obligations, including disclosing all other board and other professional obligations, hence avoiding conflicts of interest and devoting appropriate attention to the role;
- regular evaluation of the board and management's fulfilment of their obligations.

Importantly, the ASX Good Governance principles recognise that its recommendations are not a "one size fits all" prescription as "the range in size and diversity of companies is significant".¹²⁶ For example, as Twaits has observed, "small organisations will simply not have sufficient resources to

¹²⁶ ASX 'Principles of Good Corporate Governance', above n 50, 5.

enable officers to contract in specialist accounting, legal and other advice to enable them to properly discharge their statutory and fiduciary obligations to the organisation".¹²⁷

Apart from a clear delineation of roles as between the Board and management,¹²⁸ there are other basic requirements for good corporate governance according to the Australian Stock Exchange (ASX). The Board needs a balance of skill, experience and independence.¹²⁹ There is a need for "integrity among those who can influence a company's strategy and financial performance, together with responsible and ethical decision making".¹³⁰

The board needs to act "in the best interests of the company as a whole rather than of individual shareholders or interest groups".¹³¹ Accurate presentation and reporting of a company's financial and non-financial information¹³² and an effective risk management strategy – including the adoption of appropriate policies – are also part of good corporate governance.¹³³

Michie and Oughton would add to this the need for "best practice guidelines on information disclosure, the appointment of directors, board composition, [and] induction and training of directors".¹³⁴ Of the professional football clubs in the United Kingdom they surveyed, none "had an appraisal or training procedure for directors".¹³⁵ They therefore conclude that "there is also a need for a clear set of procedures for the appraisal and training of directors".¹³⁶ In a business as large as English football, for example, many professional clubs did not have "the risk evaluation and business planning procedures in place to manage the risks facing their clubs, and [did not] plan accordingly". It is suggested that in Australian sporting clubs and leagues, both non-professional and professional, this may well be an issue that needs to be addressed.

The ASX principles rather are "guidelines designed to produce an efficiency, quality or integrity outcome"¹³⁷, and "can provide a reference point for enhanced

¹²⁷ Twaits, Andrew, *The Duties of Officers and Employees in Non-Profit Organisations*, (1998) 10 *Bond Law Review* 313, 320.

¹²⁸ ASX 'Principles of Good Corporate Governance', above n 50, principle one, 15-17.

¹²⁹ *Ibid*, principle two, 19-24.

¹³⁰ *Ibid*, principle three, 25-28.

¹³¹ *Ibid*, 22.

¹³² *Ibid*, 29-33.

¹³³ *Ibid*, principles seven and eight, p. 43-49. Risk management comprises of the identification of potential risks, then evaluation, control and monitoring those risks, including disclosure of the risks: International Olympic Committee, 'Basic Universal Principles of Good Governance of the Olympic Movement and Sports Movement', http://multimedia.olympic.org/pdf/en_report_1292.pdf, 5.

¹³⁴ Michie, J & Oughton, C, above n 58, 517.

¹³⁵ *Ibid*, 526.

¹³⁶ *Ibid*.

¹³⁷ ASX 'Principles of Good Corporate Governance', above n 50, 5.

structures to minimise problems and optimise performance and accountability”.¹³⁸

It should be noted that a number of major Australian and international companies that followed the principles collapsed during the late 1990s and early 2000s.¹³⁹ Further to these examples which raise questions as to the benefit of good governance practices, there is a view that adherence to good governance principles places an “unnecessary burden on Australian businesses”, and in fact is responsible for the “under-performance of Australian companies”.¹⁴⁰

However, the current wisdom is that good governance is important and that it reduces the possibility of organisational fraud and collapse, enhances organisational risk management and is seen by the OECD as “a key element in improving economic efficiency and growth”.¹⁴¹

The sage words of Justice Owen, in his *Report of the HIH Royal Commission*, balance the competing views about whether good governance is beneficial:

*Good governance processes are likely in my view to create an environment that is conducive to success. It does not follow that those who have good governance processes will perform well or be immune from failure. Risk exists to some extent at the heart of any business. Risks are taken in the search for rewards. No system of corporate governance can prevent mistakes or shield companies and their stakeholders from the consequences of error.*¹⁴²

These sentiments apply equally to sporting organisations. That is, as far as it is possible to follow best governance practices in a sporting league, this should be done, perhaps adjusting the approach to compliance with recommendations, depending on the size of the league. For example there may in some cases be few or no paid employees to whom tasks can be delegated by a board.

Further, the basic requirement is that board members attend meetings, carefully consider all issues put before them, and seek as far as is reasonably practicable to minimise the risk of injury or loss to sporting participants, referees, team officials, spectators or any other interested party. It means board members need to ensure that any unacceptable risks be dealt with and managed – at the least ensuring that someone else is dealing with the issue, if not dealing with it themselves. This includes, for example, investigating risk areas in the league and

¹³⁸ Ibid, 3.

¹³⁹ World.Com in the USA and Ansett, Pasminco HIH & One.Tel in Australia: Du Plessis, J, McConville, J & Bagaric, M, above n 92, 11.

¹⁴⁰ Ibid, 11.

¹⁴¹ Ibid, 13, citing the OECD ‘Principles of Corporate Governance’ (April, 2004), 35.

¹⁴² Quoted in Du Plessis, McConville & Bagaric, above n 92, 12.

taking steps to reduce risks to an acceptable level, rather than waiting for a legal claim to arise. Following the best governance principles outlined above will increase the likelihood that the board puts steps in place to run the league as efficiently as possible, and focuses on policies and strategies that assist in achieving the members' objectives.

Constituent Documents of the League

The independent board has been found above to be the best structure for a Metropolitan League. It is essential then, that the constitution, statement of purposes and statement of rules be properly and clearly written, and accurately reflects the league's objectives. These objectives need to take account of best practice governance, economic considerations (such as an equalisation strategy) and legal compliance, and provide power to the board to implement those objects. The board or its delegates, such as any disciplinary tribunal, and the executive officers risk exposing themselves to legal challenge if acting outside their authority.

One author has observed that "the constitutions of many state, territory and national sporting bodies [appear] to be all but indecipherable, often including hand written amendments or references to regulations and by-laws which simply do not exist".¹⁴³ Further, "many associations pay little or no heed to the provisions of their rules".¹⁴⁴ The same author believes that some organisations may disregard or flaunt their rules. However, in these litigious times, failing to follow rules will inevitably land an organisation in court, a result that is expensive, disruptive and undesirable.

In the cases of *Dale Weightman & Anor v Tasmanian Football League* and *Craig Carter & Anor v Tasmanian Football League*,¹⁴⁵ the articles of association of the league did not properly confer authority on persons to act as a Tribunal, and the suspensions imposed on the plaintiffs were declared void. The court also criticised the articles of association because they lacked meaning in some parts, and were obscure in meaning in others. The case illustrates the need for constitutional review in some cases, and for a constitution to be properly drafted in other cases.

Best practice management of the league, and where appropriate, management of the clubs, should be enshrined in the constitution. This could, for example, include regular assessment of the financial position of clubs by the league.

¹⁴³ Twaits, A, above n 127, 316.

¹⁴⁴ *Ibid.*

¹⁴⁵ (1995) 4 Tas R 342.

The ASC best practice recommendation is that the board have power to exercise all powers of the organisation except those to be exercised in General Meeting.¹⁴⁶

Metropolitan football leagues in Victoria also have an obligation to comply with their agreement with their parent body, AFL Victoria. AFL Victoria and Members agree to mutually provide each other with copies of their Business Plan and Financial and Periodic Reports.¹⁴⁷ Leagues may obtain both financial support and advice from AFL Victoria. Leagues are required to operate to a high standard, and must not bring AFL Victoria into disrepute.¹⁴⁸ Leagues therefore need to be aware of what is contained in their own constitutions, and obligations that are owed to other organisations under affiliation or participation agreements.

As previously stated,¹⁴⁹ it is essential to the health and success of the metropolitan football leagues that key stakeholders, the member clubs in particular, have a role in important decisions regarding how the competition functions. The members should be able to vote the board out of office if they are unhappy about how it is governing the league. They should have the power to veto a league budget, or reject proposals to change the constitution; or vote against a proposal to allow a club to enter the competition or be expelled from it.

In the 1993 review of the AFL, Crawford recommended that the clubs have the power to reverse a decision of the AFL Commission to admit, expel, relocate or require a merger of a Club provided that 75% of all clubs voted to reverse. Only three clubs need to request a vote on the issue, and then the AFL is required to convene an extraordinary general meeting.¹⁵⁰

Crawford also recommended that the AFL Commission have very broad almost unfettered powers: He recommended in relation to the Power of the Commission, that:

With the exception of:

- i. the appointment of Commissioners at Annual General Meetings; and*
- ii. the implementation of a Commission decision to admit, expel, relocate or merge a Club without Clubs being consulted;*

¹⁴⁶ 'National Sporting Organisations; Governance: Principles of Best Practice', 2002 above n 5, 3.

¹⁴⁷ Football Victoria Membership Agreement, clauses 8.4 and 9.14.

¹⁴⁸ Ibid, clause 15.

¹⁴⁹ See the section of this paper above, 'Strong and Effective Communication between the Clubs and the League'.

¹⁵⁰ Crawford, D, AFL Administrative Structure Review, 1993, above n 17, 21-22.

*the Commission be granted the power and authority to take and implement all decisions relating to all aspects of the AFL.*¹⁵¹

It is suggested that this recommendation should be followed by Metropolitan Leagues. This translates to a board with very broad powers to run a League, but with the checks and balances that the member clubs of the league can overturn any major decision by a required vote of members, say two-thirds or three-quarters.

The Essendon Districts Football League Incorporated Statement of Rules provides the board with authority to “exercise all such powers and functions as may be exercised by the League other than those powers and functions that are required by these Rules to be exercised by a General Meeting of the Members of the League”.¹⁵² The board may also do whatever they believe is necessary “for the proper management of the business and affairs of the League”.¹⁵³

Importantly, the constitution reserves to the voting Members, namely the Club delegates, the power to revoke, vary or amend a resolution or decision of the board, or direct the board to act or not act in a specified way on a particular matter.¹⁵⁴ However, any such resolution must be passed by at least 75% of Club delegates present at the meeting.¹⁵⁵ This way the Member clubs have ultimate authority over the League, although as a 75% majority is required, the issue must be one about which there is significant disquiet amongst the Members, and significant agreement amongst the clubs.

The broad power of the board to make By-Laws, which almost automatically come into force after they are made, is provided in many sporting constitutions.¹⁵⁶ It permits the making, revoking, varying, amending or repealing of By-Laws in respect of any matter within its power, provided that it is not inconsistent with its Rules, Constitution or governing legislation.¹⁵⁷

Each Metropolitan League has a different nomination process for board positions.¹⁵⁸ Some board positions may be filled by appointing – as opposed to voting in – persons with specific skills. This can ensure that for example a person

¹⁵¹ Crawford, D, AFL Administrative Structure Review, 1993, above, n 17, 23.

¹⁵² EDFL Statement of Rules, Rule 9.1 (b). Athletics Australia’s constitution provision is very similar: Rule 41.1.

¹⁵³ EDFL Statement of Rules, Rule 9.1 (c).

¹⁵⁴ EDFL Statement of Rules Rule 14.1.

¹⁵⁵ Ibid, Rule 14.3 (a), with certain limited decisions/resolutions exempt from this Rule: Rule 14.3 (b).

¹⁵⁶ EDFL Statement of Rules, Rule 15.1; Athletics Australia (AA) Constitution Rule 41.2; EFL Statement of Rules, Rule 9.6 (e).

¹⁵⁷ Either the Associations Incorporations Act 1981 (Vic) or the Corporations Act 2001 (Cth).

¹⁵⁸ EDFL Statement of Rules, 9.8-9.9, EFL Statement of Rules, 9.1, 9.11-9.13; Western Region Football League (WRFL) Constitution, Article II, S 2, and WRFL Statement of Rules, clause 14.

with accounting qualifications is always on the board, which is highly recommended.

Good governance also requires transparency. It is therefore beneficial that Rules for Member Clubs of a league provide for full access and disclosure of its “public records”.¹⁵⁹ Reciprocal rights should also apply to Member Clubs so that they can inspect the League’s accounts and books showing the full details of the financial affairs of the League.¹⁶⁰ The Western Region Football League practice requiring members to submit annually their balance sheet, and profit and loss statement, is also recommended.¹⁶¹

It may be that best governance practice requires a central regulatory body such as AFL Victoria (in preference to the individual leagues) to review club constitutions to ensure that they are up to date, comply with legislation and are consistent with any League or AFL Victoria rules or regulations.

It is suggested that best practice for the League Constitution is that it will provide an indemnity to directors or committee members where criminal or civil proceedings are taken against them for acts done as a director.¹⁶² Acts not covered by the indemnity should include conduct involving a lack of good faith on the part of the director or committee member.

It is suggested that best practice may also entail having a written agreement with clubs as to their general conduct, including that they be incorporated, comply with all the rules and regulations of the league, agree to be bound by the Tribunal and Appeals Board and their rules,¹⁶³ and that they have insurance. A further requirement may be that the member club agrees not to operate in a manner that will bring the league into disrepute.¹⁶⁴

¹⁵⁹ WRFL Constitution, Article V, S 1.

¹⁶⁰ WRFL Statement of Rules, rule 15.3.

¹⁶¹ *Ibid*, rule 3.3 (b).

¹⁶² Australian Soccer Association Limited Constitution clause 19.1; Athletics Australia Constitution Rule 74. There are, however, significant limitations on the extent to which immunity may be granted to officers of a company. See Corporations Act, s 199A; Trade Practices Act, s77A.

¹⁶³ See Western Region football League 2007 Application for Affiliation Agreement which requires clubs to agree to be bound to the rules and conditions of the League.

¹⁶⁴ A similar provision is contained in the International Basketball Federation (FIBA) ‘Regulations Governing League Organisations’, clause 4.1.

Conclusion

“It is commonly accepted that governance structures have a significant impact on the performance of a sporting organisation”.¹⁶⁵ Ensuring that the right governance model is in place in a sporting league is an important aspect of ensuring that it runs smoothly and effectively, and prospers. Features of best governance practice outlined above include having an independent board; operating with the unique economics of a sports league in mind; following best governance practices including who is on the board, what work is done by the board and the types of policies passed by the board; ensuring compliance by board members of their obligations at law; and ensuring that the constitution is current accurate and is a servant of the league, not a master.

In metropolitan football leagues, the preferred model of governance is the independent board. This is because the model provides for an absence of conflicts of interest (or significantly reduces the likelihood of that occurring); ensures as far as possible that the board will act in the best interests of the league as a whole; enables a league to retain a board of appropriately qualified persons, such as those with accounting, marketing or business backgrounds, rather than necessarily only persons with a football background; and ensures that league economic decisions are not based on the self interest of the members.

Alternative structures have been considered, such as the Commissioner model and the delegate board structure. Neither seem suitable to metropolitan football leagues. The delegate model seems to give rise to an inevitable conflict of interest, while the Commissioner model is better suited to professional leagues with clubs run for profit.

Best governance in metropolitan football leagues requires close consultation between the league and its key stakeholders, most importantly the clubs. A co-operative model, it is suggested, is the most likely to produce a thriving, growing and successful competition.

It has been seen above, that the economics of metropolitan football differ markedly from professional sports leagues, and in particular, from AFL football. Nonetheless, those professional leagues have structures and processes which can be adopted and followed (with any necessary modifications) in metropolitan leagues. Some form of equalisation would be an objective worth pursuing, so that the difference between the top clubs and the bottom clubs in a division are not significant.

¹⁶⁵ ‘Governance Principles: A Good Practice Guide for Sporting Organisations’, Australian Sports Commission, 2007, 2.

Following professional sports league models also grows out of necessity, to some extent. Committee members of incorporated and unincorporated associations have become increasingly subject to legal liability for their actions (or inaction) in carrying out their duties. This is one reason incorporation is essential – to protect board members. With the increased legal liability, other statutory and common law obligations have also expanded.

Insurance has become an essential part of the operation of metropolitan football leagues (and other sports). At the same time, risk management is an important key consideration for the board and executives of leagues. The growing number of laws that must be complied with means that, generally, a board needs a range of persons with broad professional skills and experience to operate effectively. This is a change from the past.

Even though leagues are not-for-profit organisations whose board members are unpaid volunteers, the responsibilities of members are greater than in the past, and some previously suitable board candidates may be unprepared to accept, or unequipped for, such potential risks. Accountability has increased it is suggested, amongst other reasons, because metropolitan football leagues are turning over millions of dollars.¹⁶⁶

Board members of metropolitan leagues must ensure that they are aware of their basic legal obligations. These include the duty to act in the best interests of their member clubs; to avoid conflicts of interest, and to act with due care, skill and diligence. The last mentioned obligation includes all directors and committee members ensuring that they satisfy themselves of the financial viability of the league, and the status of its cash flow and creditor and debtor levels.

Boards of metropolitan leagues need a healthy and positive relationship with, in particular, their executive, and other staff.

Leagues require constituent documents to provide broad powers to the league to transact and manage the business and affairs of the competition. The constitution and rules need to be clear, and provide the members with appropriate checks and balances to monitor and where necessary reign in the board's excesses, by having the power to overturn certain decisions or actions.

Metropolitan football leagues have been dragged into the 21st century, in some cases quite happily, in other cases, "kicking and screaming". The old inefficient style of board administration and management must make way for a new style of board governance which leaves the day-to-day running of the competition largely to paid staff and suitably qualified board sub-committees.

¹⁶⁶ See above n 24.

Twenty-first century football and sporting governance means that Boards need to be able to delegate tasks appropriately and regularly.

Given the significant competition Australian Rules competitions will now have from soccer for participants (as well as for the title, “football”), metropolitan leagues need to follow best governance practices carefully. There is scope, it is suggested, for spectator, player and sponsor interest in these competitions to grow. Following the governance principles outlined above is not a guarantee of success, but it will certainly give each league a greater opportunity to realise its full potential.

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