



Volume 7, Number 1
Winter 2016

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Harvard Journal of Sports & Entertainment Law

Student Journals Office, Harvard Law School

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www.harvardjsel.com

U.S. ISSN 2153-1323

The *Harvard Journal of Sports & Entertainment Law* is published semiannually by Harvard Law School students.

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Journal of Sports & Entertainment Law

HARVARD LAW SCHOOL

Volume 7, Number 1

Winter 2016

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Comparing NCAA and Olympic Athlete Eligibility Dispute Resolution Systems in Light of Procedural Fairness and Substantive Justice

Josephine (Jo) R. Potuto* and Matthew J. Mitten**

ABSTRACT

The traditional adjudicative model for resolving disputes involves public judicial systems (i.e., courts) established and administered by the government. But disputes also are resolved by alternative dispute resolution (ADR) systems outside the traditional model that are established and administered by private parties. The National Collegiate Athletic Association (NCAA), International Olympic Committee (IOC), and United States

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Olympic Committee (USOC) use differing ADR systems to resolve intercollegiate and Olympic athletic eligibility disputes that are afforded very deferential review by courts with the merits of their respective determinations almost always judicially upheld and enforced. Olympic sports athlete eligibility disputes are resolved at the international level by the Court of Arbitration for Sport (CAS), an external system of arbitration that has been called the gold standard for resolving athlete disputes. The NCAA uses a system of internal committees comprised of faculty and institutional and conference staff to resolve intercollegiate athlete eligibility disputes, which is the subject of perpetual criticism and has led to calls for reform measures mirroring CAS's external arbitral process. In this Article we describe the NCAA's internal systems for resolving athlete eligibility disputes, which often are misunderstood by commentators without due consideration of the need for its ADR processes to be tailored to effectively, efficiently, and fairly resolve disputes in light of the NCAA's particular demographics and needs. We also describe the CAS arbitral system as well as the corresponding American Arbitration Association (AAA) system used to resolve domestic Olympic athlete eligibility disputes in the U.S. and the requisite procedural fairness and substantive justice both systems provide to athletes, which justify judicial recognition and enforcement of their arbitration awards. Considering the salient differences between the ADR processes for resolving Olympic and intercollegiate sports athlete eligibility disputes, we explain why the NCAA's ADR processes provide a commensurate level of procedural fairness and substantive justice to athletes that responds to the demographics and requisites of its approximately 460,000 student-athletes, its eligibility requirements, and the thousands of annual competitions that it administers. Finally, we offer suggestions to improve the NCAA's processes for resolving athlete eligibility disputes without jeopardizing its needed autonomy or ability to govern its affairs in an efficient and effective manner.

I. INTRODUCTION

For more than 100 years the National Collegiate Athletic Association¹ (“NCAA”) and the International Olympic Committee² (“IOC”) in combination with the United States Olympic Committee³ (“USOC”), which all

¹ The NCAA was founded in 1906 in response to the deaths of 18 college football players and serious injuries to another 150 or so. President Theodore Roosevelt urged administrators from Princeton, Yale, and Harvard to reform the game to prevent deaths and serious injuries from occurring, threatening to propose federal legislation to outlaw football if they did not do so. See WALTER BYERS, *UNSPORTSMANLIKE CONDUCT* 38–40 (U. Mich. Press, 1995). The NCAA has three divisions. See 2014–15 NCAA Division I, II, III Manuals, available at <http://www.ncaapublications.com/>. Overriding NCAA foundational principles, including the amateurism principle, apply similarly to all three NCAA divisions, as do the enforcement/infractions and student-athlete reinstatement processes. NCAA BYLAW Chapter 19; Student-Athlete Reinstatement Frequently Asked Questions at 2, <http://www.ncaa.org/compliance/reinstatement/student-athlete-reinstatement-frequently-asked-questions>. Division I, and more specifically its football bowl subdivision, is what commentators, media, and the public typically mean when they discuss the NCAA. For these reasons, all citations to NCAA bylaws and constitutional provisions are to the 2014–15 NCAA Division I Manual available at <http://aspsa.dasa.ncsu.edu/sites/aspsa.dasa.ncsu.edu/files/images/2014-15%20NCAA%20Division%20I%20Manual.pdf>. Similarly, all textual references are to Division I legislative processes, boards, councils, cabinets, and committees.

² In 1894, thirteen nations, including the United States, met during the Congress of Paris to create the IOC and the modern Olympic Games, which were reestablished by Pierre de Coubertin of France. See generally MATTHEW J. MITTEN, TIMOTHY DAVIS, RODNEY K. SMITH & N. JEREMY DURU, *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 258 (3d ed. 2013). The IOC is “an international non-governmental not-for-profit organization” domiciled in Lausanne, Switzerland. International Olympic Committee, Olympic Charter, Rule 15. It is the “supreme authority” within the Olympic movement. Olympic Charter, Rule 1. The Olympic Movement includes “organisations, athletes and other persons who agree to be guided by the Olympic Charter.” *Id.*

³ The USOC is a federally chartered corporation authorized by Congress “to exercise exclusive jurisdiction . . . over all matters pertaining to United States participation in the Olympic Games, the Paralympic Games, and the Pan-American Games, including representation of the United States in the games.” 36 U.S.C.A. §§ 220502, 220503(3) (A). The Supreme Court held that the USOC is a private entity, not a state actor. See *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 547 (1987). Similarly, the Supreme Court held that the NCAA is not a state actor. See *NCAA v. Tarkanian*, 488 U.S. 179, 201 (1988). See generally Josephine R. Potuto, *NCAA as State Actor Controversy: Much Ado About Nothing*, 23 MARQ. SPORTS L. REV. 1, 3–8 (2012).

are private associations, respectively have regulated “amateur”⁴ athletic competition within the United States and internationally. The NCAA exercises plenary governing authority over intercollegiate athletic competition in the United States,⁵ while the IOC exercises plenary governing authority over Olympic sports competition worldwide and the USOC does so nationally.⁶ These governing bodies adopt and enforce their respective rules defining and regulating the eligibility of Olympic sport and NCAA athletes to compete, including anti-doping rules designed to safeguard the health and

⁴ The USOC currently defines an “amateur athlete” as “any athlete who meets the eligibility standards established by the [NGB] or Paralympic Sports Organization for the sport in which the athlete competes.” BYLAWS OF THE UNITED STATES OLYMPIC COMMITTEE, Section 1.3(c) (effective March 8, 2013). The IOC permits each International Federation (the world governing body for each Olympic sport) to establish its athlete eligibility requirements, Olympic Charter, Rule 40, and virtually all of them permit professional athletes to participate in the Olympic Games and other international competitions. For a detailed discussion of the history of the IOC’s “amateurism” rules and the professionalization of Olympic sports since the 1970’s, *see generally* JAMES A.R. NAFZIGER, INTERNATIONAL SPORTS LAW 132–46 (2d ed. 2004). The NCAA defines college athletics as “an avocation” in which student-athletes are “protected from exploitation by professional and commercial enterprises” and are “primarily motivated by education and the by the physical, mental and social benefits to be derived.” NCAA CONST.ART. 2.9. *See* NCAA BY-LAW art. 12. In its narrowest sense, amateurism in collegiate sports means that athletes who are, or have been, paid to play are ineligible to compete in varsity collegiate athletic competition. More broadly, amateurism in collegiate sports means that student-athletes professionalize themselves if they capitalize financially on their athletic skill or reputation. NCAA BYLAW 12.5.2. *See generally*, Josephine R. Potuto, William H. Lyons & Kevin N. Rask, *What’s in a Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student-Athletes*, 92 ORE. L. REV. 879, 889–92 (2014) (hereinafter Collegiate Model). The NCAA concept of amateurism, as well as its implementation, is subject to increasing challenge in the courts. *See, e.g., NCAA v. Collegiate Licensing Co., Elec. Arts, Inc.*, Fulton City, Georgia, Civil Action No. 2013CV238557 (Nov. 1, 2013); Order Granting in Part and Denying in Part Motion for Class Certification at 2, *In re NCAA Student–Athlete Name & Likeness Licensing Litig.*, No. C 09-1967CW (N.D.Cal, 2013).

⁵ There are other national associations that administer collegiate competition, but they operate on a much smaller scale. *See infra* note 45 and accompanying text.

⁶ USOC authority is pursuant to its recognition by the IOC as the National Olympic Committee (NOC) for the United States. *See DeFrantz v. USOC*, 492 F. Supp. 1181, 1188 (D.D.C. 1980) (ruling that the Amateur Sports Act of 1978 gives the USOC “exclusive jurisdiction” and authority over participation and representation of the United States in the Olympic Games).

safety of participating athletes as well as the integrity of athletic competition.⁷

The NCAA has developed, and the IOC and USOC have agreed to be subject to, private dispute resolution mechanisms independent of public court systems,⁸ which provide very limited judicial review of the merits of their decisions. Through these private dispute resolution systems, experts with specialized knowledge of the sport governing body's rules as well as collective experience interpreting and applying these rules adjudicate athlete rules violations and eligibility disputes. The systems are purposefully designed to achieve consistent and predictable results (by the use of experts) and also to be fast, final, and binding because sports competition requires efficient and timely resolution of disputes. The NCAA resolves disputes internally,⁹ with decisions made by committees composed primarily of employees of member institutions or athletic conferences who are selected pursuant to NCAA processes set forth in its bylaws.¹⁰ By contrast, the IOC and

⁷ The IOC Athlete Commission provides Olympic athletes with a voice in IOC governance, including rule-making. The ASA ensures U.S. Olympic sport athletes have a significant voice and vote in USOC rule-making by requiring them to have at least 20% of the membership and voting power of the USOC's Board of Directors and committees. *See generally* Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 Va. SPORTS & ENT. L. J. 71, 89 n.8, 92 (2008). For a discussion of student-athletes' involvement in the NCAA's rule-making processes see *infra* notes 48–54 and accompanying text.

⁸ North American major professional team sports leagues such as Major League Baseball, the National Basketball Association, the National Football League, and the National Hockey League also generally resolve disputes between an athlete and his club or the league affecting his eligibility to compete through private systems of adjudication that are collectively bargained between the players' union and representatives of the league's clubs. *See generally* Mitten & Davis, *Athlete Eligibility Requirements*, *supra* note 7, at 108–09.

⁹ *See generally* Josephine (Jo) R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257 (2010) [hereinafter NCAA Processes].

¹⁰ The NCAA Division I Administration Cabinet makes appointments to most Division I committees. It operates independently of NCAA senior administrative staff. There are divisional and other demographic criteria for committee service. There also is an NCAA process for filling vacancies that unexpectedly arise. For example, in 2014 an individual's term on the Student-Athlete Reinstatement Committee was extended one year. *See* February 1, 2014 Memorandum from the Division I Student-Athlete Reinstatement Committee to the Division I Administration Cabinet, Meeting Materials of Division I Administration Cabinet at 143, *available at* <http://www.ncaa.org/sites/default/files/DI%20Admin.%20Cabinet%20materials%20%202.14.pdf>.

USOC utilize external systems of independent arbitration to resolve Olympic sports athlete eligibility disputes and rules violations. The IOC as well as its recognized International Federations (IFs) and NOCs have agreed to be bound by arbitration awards rendered by the Court of Arbitration for Sport (CAS), an international arbitral tribunal, which resolves disputes arising during the Olympic Games or in connection with other national or international Olympic sports competitions conducted under their auspices, including those affecting athlete eligibility to participate in these events.¹¹ Pursuant to a federal statute now known as the Ted Stevens Olympic and Amateur Sports Act¹² (“ASA”) that recognizes the USOC’s exclusive regulatory authority over Olympic sports in the United States,¹³ the USOC and its recognized National Governing Bodies (NGBs) must comply with American Arbitration Association (AAA) arbitration awards resolving domestic athlete eligibility disputes.¹⁴

The NCAA, IOC, and USOC oversee national and international athletic competitions across sovereign jurisdictional boundaries – the 50 states and District of Columbia for the NCAA and USOC; 205 nations for the IOC.¹⁵ Although each state and nation has its own body of general domestic laws (some of which are applicable to intercollegiate or Olympic sports governing bodies or competitions within their respective geographical boundaries), state and national courts routinely refuse to invalidate NCAA,¹⁶ IOC,¹⁷

¹¹ See *infra* notes 22–32 and accompanying text.

¹² 36 U.S.C. §§ 220501, et seq. There are no similar sports-specific international or national laws defining or regulating the governing authority of the IOC or NCAA.

¹³ 36 U.S.C.A. § 220503(3) (A).

¹⁴ 36 U.S.C. § 220509(a). See USOC BYLAWS, Section 9.7.

¹⁵ OFFICIAL WEBSITE OF THE OLYMPIC MOVEMENT, available at <http://www.olympic.org/national-olympic-committees>.

¹⁶ NCAA bylaws, rules, and policies are not *per se* exempt from the coverage of applicable state constitutional provisions and statutes or from state common law contract claims. The NCAA also is not *per se* exempt from federal law; many legal challenges are grounded in federal antitrust law. Historically, courts generally characterized NCAA eligibility bylaws as noncommercial regulations that are *per se* legal under federal antitrust law. See, e.g., *Smith v. NCAA*, 139 F.3d 180, 186–87 (3d Cir. 1998), *vacated on other grounds* 525 U.S. 459 (1999); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992); *Marshall v. ESPN, Inc.*, No. 3:14–01945, 2015 WL 3606645, at *14 (M.D. Tenn. June 8, 2015). However, one recent case ruled that NCAA bylaws prohibiting Division I football and men’s basketball players from earning royalties from group licensing of their likenesses violate §1 of the Sherman Act. See *O’Bannon v. NCAA*, 7 F.Supp.3d 955, 1008 (N.D. Cal. 2014) (finding NCAA cannot require member universities to cap economic value of athletic scholarships at less than full cost of attendance and an additional \$5000 annually.). There also are several pend-

and USOC¹⁸ athlete eligibility rules and uphold their enforcement by these governing bodies. Similarly, courts generally uphold and enforce the merits of NCAA internal committee decisions rendered in individual student-athlete eligibility cases¹⁹ as well as AAA²⁰ and CAS²¹ arbitration awards resolving athlete eligibility disputes, even though these adjudications are the

ing cases asserting that various NCAA amateurism bylaws are commercial restraints that violate federal antitrust law. *See, e.g., Hartman v. Nat'l Collegiate Athletic Ass'n*, No. 4:15-cv-00178, 2015 BL (N.D. Cal., filed January 13, 2015); *Gregory-McGhee v. NCAA*, Case No. 4:14-cv-01777 (N.D. Cal., filed April 17, 2014); *Jenkins v. NCAA*, Case No. 3:14-cv-01678 (D. N.J., filed March 17, 2014); *Alston v. NCAA*, Case No. 3:14-cv-01011 (N.D. Cal., filed March 5, 2014).

¹⁷ *See, e.g., Martin v. IOC*, 740 F.2d 670, 677 (9th Cir. 1984).

¹⁸ *See, e.g., Walton-Floyd v. U.S. Olympic Comm.*, 965 S.W.2d 35, 40 (Tex. App. 1998).

¹⁹ For the NCAA, judicial upholding of athlete eligibility decisions often comes on appeal, not at trial. *See infra* notes, 90, 103-105 and accompanying text. *See also, e.g., Hall v. NCAA*, 985 F.Supp. 782 (N.D. Ill. 1997); *NCAA v. Lasege*, 53 S.W.3d 77 (Ky.2001); *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004); *NCAA v. Brinkworth*, 680 So. 2d 1081 (Fla. Dist. Ct. App. 1996). Student-athlete contract challenges to NCAA rules derive from their status as third party beneficiaries to NCAA bylaws; as such, student-athletes have no greater legal rights than would NCAA member universities. *See, e.g., Bloom v. NCAA*, 93 P.3d at 621; RESTATEMENT (SECOND) OF CONTRACTS § 203; NCAA Processes, *supra* note 9. Courts rarely have invalidated NCAA bylaws or policies on the basis of state law. *See, e.g., Hill v. NCAA*, 865 P.2d 633 (Cal. 1994) (upholding NCAA drug testing program); *Brennan v. Bd. of Trustees for Univ. of Louisiana Systems*, 691 So.2d 324 (La. Ct. App. 1997) (same). *But see Oliver v. NCAA*, 920 N.E.2d 203 (Ohio Ct. Common Pleas 2009) (finding NCAA bylaw prohibits attorney representing a student-athlete from being present during contract negotiations between athlete and a professional sports organization and violates contractual obligation of good faith and fair dealing and Ohio public policy, which subsequently was vacated pursuant to the parties' settlement agreement. To prevail, student-athletes must show inconsistency in bylaw or guideline application so random as to be arbitrary or absence of supporting rationale or factual basis so extreme as to constitute bad faith or targeted bias). *See generally*, NCAA Processes, *supra* note 9, at 279-82. Courts also will grant relief necessary to remedy a college sports governing body's failure to follow its student-athlete eligibility rules. *Gulf S. Conference v. Boyd*, 369 So.2d 553 (Ala. 1979).

²⁰ *See Matter of Gault* (U.S. Bobsled & Skeleton Fed'n), 179 A.D.2d 881 (N.Y. App. Div. 1992) ("Although we also may disagree with the arbitrator's award and find most unfortunate the increasing frequency with which sporting events are resolved in the courtroom, we have no authority to upset it when the arbitrator did not exceed his authority.").

²¹ *Gatlin v. U.S. Anti-Doping Agency, Inc.*, No. 308-CV-241/LAC/EMT, 2008 WL 2567657, at *1 (N.D. Fla. June 24, 2008) ("Pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ('New York Convention'), claims that have been properly submitted to arbitration

result of private dispute resolution processes to which athletes are required to submit as a condition of being eligible to compete.²² Thus, these private adjudicatory processes create a body of intercollegiate and Olympic athlete eligibility “laws” and precedent that are recognized and enforced by courts.²³

The law of private associations,²⁴ combined with recognition of sport’s unique need for uniform rules (including athlete eligibility requirements) at all levels of competition,²⁵ underlies and explains the substantial judicial deference afforded to NCAA, IOC, and USOC private dispute resolution procedures and adjudications of athlete eligibility disputes. National and international sports competitions involve diverse (and potentially conflicting) multi-jurisdictional public laws and judicial forums. Judicial deference

and ruled upon by entities such as CAS are barred from relitigation in this forum.”). See generally Mitten & Davis, *Athlete Eligibility Requirements*, *supra* note 7, at 86–88.

²² See generally Mitten & Davis, *Athlete Eligibility Requirements*, *supra* note 7, at 88–90, 99–100, and 128–31.

²³ See generally GUNTHER TEUBNER, *GLOBAL LAW WITHOUT A STATE* xiii (1997) (“[The] globalization of law creates a multitude of decentred law-making processes in various sectors of civil society, independently of nation-states . . . They claim worldwide validity independently of the law of nation-states and in relative distance to the rules of international public law. They have come into existence not by formal acts of nation-states but by strange paradoxical acts of self-validation.”); Matthew J. Mitten & Hayden Opie, “*Sports Law*”: *Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution*, 85 *TUL. L. REV.* 269, 289 (2010) (“For legal theorists, the evolving body of *lex sportiva* established by CAS awards is an interesting and important example of global legal pluralism without states, arising out of the resolution of Olympic and international sports disputes between private parties.”); NCAA Processes, *supra* note 9, at 279–82.

²⁴ The law of private associations affords judicial deference to the bylaws and polices of private associations even if their operations are exclusively internal to one state or nation. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000); *Am. Fed’n of Tech. Eng’rs v. La Jeunesse*, 347 N.E.2d 712 (1976); *Gulf S. Conf. v. Boyd*, 369 So.2d 533, 557-57 (1979); Zechariah Chafee, *The Internal Affairs of Associations Not for Profit*, 43 *HARV. L.REV.* 993, 1022 (1930). Judicial deference to assure uniformity also applies to professional sports. Professional sports are organized under the prevailing North American league or association commissioner models. In the United States they are regulated under the federal labor laws. A discussion of their legal regulation is outside the scope of this Article.

²⁵ The IOC has been described as “a global legislator in international sport, setting common standards.” Ken Foster, *Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport’s Jurisprudence*, in *THE COURT OF ARBITRATION FOR SPORT 1984–2004*, 420, 430 (Ian S. Blackshaw, Robert C.R. Siekmann & Jan Willem Soek eds. 2006). See *infra* notes 48–54 and accompanying text for 2004 (2006). The need for uniform rules has been judicially recognized as “the heart of the NCAA.” *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993).

to private systems for resolving sports disputes with national or international dimensions, including those between athletes and their respective governing bodies, is critical to the development of a uniform body of law that is consistently and predictably applied to resolve the legal rights and contractual obligations of participating athletes commensurate with the geographical scope of the particular level of athletic competition.²⁶ But standing alone, the need for uniformity is insufficient to warrant judicial deference. Courts should defer to eligibility decisions rendered through a private system of sports dispute resolution only if it provides both procedural fairness and substantive justice to the athletes, particularly when, as with NCAA and Olympic athletes, final and binding dispute resolution processes are neither collectively bargained by duly authorized representatives of athletes (as typically occurs only in unionized North American major professional team sports) nor are otherwise the product of arms-length negotiation and agreement.

One of the authors has analyzed the CAS arbitration system, the “gold standard in resolving sports-related disputes,”²⁷ and concluded that it provides an appropriate level of procedural fairness and substantive justice in resolving Olympic sport athlete eligibility disputes.²⁸ Because the AAA arbitration system for resolving domestic Olympic athlete eligibility disputes, including adjudication of alleged doping offenses in accordance with the World Anti-Doping Code (WADC), is similar, it also provides the requisite level of procedural fairness.²⁹

By contrast, there has been persistent, sometimes strident, criticism of the NCAA’s private internal system for resolving athlete eligibility issues arising out of NCAA rule violations as well as for the seemingly inconsistent

²⁶ In that respect, the NCAA faces additional impediments as the judicial deference accorded NCAA decisions often comes on appeal, not at trial. *See infra* notes 104–12 and accompanying text.

²⁷ James A. R. Nafziger, *International Sports Law*, in *HANDBOOK ON INTERNATIONAL SPORTS LAW* 3, 27–28 (James A. R. Nafziger & Stephen F. Ross eds. 2011).

²⁸ Matthew J. Mitten, *The Court of Arbitration for Sport and its Global Sport’s Jurisprudence: International Legal Pluralism in a World Without Boundaries*, 30 *OHIO ST. J. ON DISP. RESOL.* 1, 39–41 (2014–2015). However, scholars have suggested several reforms to enhance the existing level of procedural and substantive fairness provided to athletes. *Id.* at 42–44.

²⁹ *Armstrong v. Tygart*, 886 F. Supp. 2d 572 (W.D. Tex. 2012) (“On balance, the Court finds the [United States Anti-Doping Agency] arbitration rules, which largely follow those of the American Arbitration Association (AAA), are sufficiently robust to satisfy the requirements of due process.”). *See generally* Mitten & Davis, *Athlete Eligibility Requirements*, *supra* note 7, at 99–100.

decisions rendered in individual cases.³⁰ Part of the criticism derives from a

³⁰ For a full rendition of the student-athlete reinstatement process described in this article, as well as a description of perceived inconsistencies in decisions, see Josephine (Jo) Potuto, *The NCAA Student-Athlete Reinstatement Process: Say What?*, 63 BUFF. L. REV. 297 (2015) (hereinafter Reinstatement: Say What?). See, e.g., Marc Tracey, *Tangled Case of a Baylor Football Player Poses a Test for the Rules of Eligibility*, N.Y. TIMES (March 6, 2015), available at http://www.nytimes.com/2015/03/08/sports/ncaaf/football/baylor-players-tangled-case-poses-a-test-for-the-rules-of-eligibility.html?_r=0; Matt Hinton, *NCAA finds pay-for-play, but Cam Newton is in the clear (for now)*, YAHOO SPORTS (Dec. 1, 2011), available at http://sports.yahoo.com/ncaa/football/blog/dr_saturday/post/NCAA-finds-pay-for-play-but-Cam-Newton-is-in-the-clear?urn=ncaaf-290855; Matt Hinton, *Cam Newton Will Live in NCAA Infamy, But He's Not Reggie Bush*, YAHOO SPORTS (December 2, 2010), available at http://sports.yahoo.com/ncaa/football/blog/dr_saturday/post/Cam-Newton-will-live-in-NCAA-infamy-but-he-s-no?urn=ncaaf-291314; Jonathan Bass, *Penn State Ruling Confirms NCAA's Only Consistency is Inconsistency*, GAMEDAYR.COM (September 24, 2013), available at <http://gamedayr.com/sports/ncaa-penn-state-scholarships-ruling-inconsistency/>; Dave Curtis, *Suspension Ends Season for Oklahoma State's Dez Bryant*, SPORTING NEWS.COM (October 28, 2009), available at <http://www.sportingnews.com/ncaa-football-news/124137-suspension-ends-season-for-oklahoma-states-dez-bryant>; George Schroeder, *Analysis: the Johnny Manziel Autograph Case*, USA TODAY (August 16, 2013), available at <http://www.usatoday.com/story/sports/ncaaf/sec/2013/08/15/johnny-manziel-texas-am-ncaa-investigation-autographs-for-money/2662257/>; Darren Rovell, *Photo Shows Manziel Signing*, ESPN (September 13, 2013), available at http://espn.go.com/college-football/story/_/id/9669838/photo-shows-johnny-manziel-signing-autographs-south-florida-autograph-broker-drew-tieman; *Half-Game Penalty for Johnny Manziel*, ESPN (August 29, 2013), available at http://espn.go.com/college-football/story/_/id/9609389/johnny-manziel-texas-aggies-suspended-1st-half-season-opener-rice-owls; Josh Peter, *Dealers Argue Ethics Of College Athlete Autographs*, USA TODAY (October 15, 2014), available at <http://www.usatoday.com/story/sports/ncaaf/2014/10/15/james-spence-jameis-winston-todd-gurley-autographs-florida-state-georgia/17301169/>; Paul Newberry, *Georgia's Todd Gurley suspended 4 games by NCAA*, YAHOO SPORTS (October 29, 2014), available at <http://collegefootball.ap.org/article/georgias-todd-gurley-suspended-4-games-ncaa>; Tucker, *AJ Green: "I Sold Jersey for 'Extra Cash' During Spring Break"*, AJC.COM (September 26, 2010), Andrew Coppens, *NCAA Shows Inconsistency Again in Sanctions Against Montana, Chrystal Ball Run*, BLOGUIN.COM (July 27, 2013), available at <http://thecomeback.com/crystalballrun/2013-articles/ncaa-shows-inconsistency-again-in-sanctions-against-montana.html>; Kyle Kensing, *Mississippi State Decision Reflects Inconsistencies in the NCAA*, SATURDAYBLITZ.COM (June 7, 2013), available at <http://saturdayblitz.com/2013/06/07/mississippi-state-ncaa/>; Matt Norlander, *NCAA Punishment is Inefficient, Inconsistent, Compromised: Here's How to Fix It*, CBSSPORTS.COM (October 25, 2012), available at <http://www.cbssports.com/collegebasketball/eye-on-college-basketball/20681711/ncaa-punishment-is-inefficient-inconsistent-and-compromised-heres-how-to-fix-it>. Resolution of violations regarding university responsibility is also frequently criticized. See e.g., Fiutak, *USC Paying for NCAA's Inconsistency?*, FOXSPORTS.COM (May 26, 2011), available at <http://www.foxsports.com/collegefootball/>

fundamental misunderstanding of how student-athlete reinstatement processes currently operate.³¹ A common complaint is that the NCAA's student-athlete eligibility rules and the NCAA's internal dispute resolution process have been adopted without any effective participation by athletes (e.g., collective voice and/or voting rights).³² Some critics advocate that intercollegiate athlete eligibility disputes should be resolved by external arbitration procedures similar to CAS or AAA arbitration to provide "timely, independent, impartial, and final review of NCAA [student-athlete] eligibility disputes."³³

This article was prompted by this misunderstanding and criticism of the NCAA's private internal system for resolving student-athlete eligibility issues along with the unexamined assumption that the external arbitration system used to resolve Olympic sports athlete eligibility disputes would work equally well for the NCAA. The principal question we address is whether the existing NCAA internal system for resolving intercollegiate athlete eligibility disputes provides an appropriate level of procedural fairness and substantive justice for student-athletes, given the predominant academic and extracurricular nature of NCAA athletic competition; the approximately 460,000³⁴ student-athletes who participate in NCAA sports; and the thousands of violations committed annually by student-athletes, ranging from minor, technical violations to very serious ones that may render them permanently ineligible. In addressing this question, we also consider whether an external dispute resolution system similar to CAS or AAA arbitration would be a feasible and practical alternative that would more effectively achieve these objectives without unduly intruding on the rights of the NCAA to govern itself effectively and to produce intercollegi-

story/usc-football-hit-harshly-by-inconsistent-ncaa-penalty-052611; James Potter, *The NCAA As State Actor: Tarkanian, Brentwood, and Due Process*, 155 U. PA. L. REV. 1269 (2007); David A. Skeel, Jr., *Some Corporate and Securities Law Perspectives on Student-Athletes and the NCAA*, 1995 WIS. L. REV. 669 (1995); Sherry Young, *The NCAA Enforcement Program and Due Process: The Case for Internal Reform*, 43 SYRACUSE L. REV. 747 (1992); C. Peter Goplerud III, *NCAA Enforcement Process: A Call For Procedural Fairness*, 20 CAP. U. L. REV. 543 (1991).

³¹ See *infra* notes 65–86 and accompanying text. For a fuller discussion, see Reinstatement: Say What?, *supra* note 30.

³² For a discussion of the scope of student-athlete participation in NCAA rule-making, including a Division I governance structure adopted in 2014 that enhanced participation, see *infra* notes 44–53 and accompanying text.

³³ Stephen F. Ross, Richard T. Karcher & S. Baker Kensinger, *Judicial Review of NCAA Eligibility Decisions: Evaluation of the Restitution Rule and a Call for Arbitration*, 40 J.C. & U.L. 79, 113 (2014) (hereinafter Ross & Karcher).

³⁴ *Student-Athletes*, NCAA, available at <http://ncaa.org/student-athlete>.

ate athletics with uniformly applied and enforced athlete eligibility rules resulting in fair competition.

In Part II of this Article, we briefly describe the NCAA's Committee on Infractions (COI) and Infractions Appeals Committee (IAC) adjudicative processes, which deal with institutional responsibility for bylaw violations committed by those for whom a university is responsible (coaches, staff, athletes, boosters). We then contrast the infractions process with how student-athlete bylaw violations are processed by the Student-Athlete Reinstatement Committee (SARC)³⁵ and its staff as well as how violations of the NCAA's drug test policy³⁶ are adjudicated by the Drug Testing Subcommittee (DTS) of the Competitive Safeguards and Medical Aspects of Sports Committee (CSMAS).³⁷ In Part III, we summarize the corresponding CAS and AAA arbitration systems for resolving Olympic sport athlete eligibility disputes. In Part IV, we set forth the general requirements of a private legal system for resolving sports disputes that justify judicial deference and then we briefly describe how they are satisfied by the CAS, AAA arbitration, and the NCAA's SARC and DTS processes. In Part V we conclude that issues affecting student-athlete eligibility generally are best resolved by the NCAA's existing internal processes, while suggesting 1) increased disclosure and publication regarding the specific facts, resolutions, and rationales of SARC and DTS determinations affecting student-athlete eligibility; and 2) creation of an external arbitration panel to review SARC and DTS determinations that a student-athlete is ineligible for a full season of competition or more under an arbitrary and capricious standard of review with very deferential and limited judicial review by Indiana courts.

³⁵ NCAA BYLAWS 14.11; 18.4.1–18.4.3.

³⁶ NCAA BYLAWS 10.2; 18.4.1.5.

³⁷ NCAA BYLAWS 12.2.2.2 (d); 31.2.3–31.2.3.8; 2013 NCAA Drug Testing Program Manual, Chapter IV, <https://www.ncaa.org/sites/default/files/5.%20Drug%20Testing%20Program%20Book%202013-14.pdf> [hereinafter "Drug Test Manual"]. CSMAS is a 20-member committee comprised of faculty, medical professionals, a lawyer, and a voting member from the national SAAC. See http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=SAFEGUARDS. 2015–16 NCAA Drug-Testing Program Appeals Process available at <http://www.ncaa.org/health-and-safety/policy/2015-16-ncaa-drug-testing-program-appeals-process> [hereinafter "Drug Test Appeals"]. Although most NCAA committees are division-centric, CSMAS, together with its staff, handles drug appeals for all three divisions. NCAA BYLAWS 21.2.2.1; 18.4.1.5.

II. NCAA STUDENT-ATHLETE ELIGIBILITY PROCESSES

The NCAA is a private association of approximately 1,200 four-year colleges and universities.³⁸ NCAA bylaws establish rules applicable to member colleges and universities, coaches, other university athletic department personnel, boosters, and student-athletes,³⁹ including bylaws that student-athletes must comply with to be eligible to compete in intercollegiate athletics,⁴⁰ as well as the processes by which bylaws are enforced and violations are punished.⁴¹ Although there is no direct contractual relationship between the NCAA and student-athletes, NCAA bylaw requirements are incorporated into the scholarship agreement between NCAA member institutions and their student-athletes.⁴² Student-athletes annually agree in writing to abide by NCAA bylaws and, before signing, they are directed to review a

³⁸ *Membership*, NCAA, available at <http://www.ncaa.org/about/who-we-are/membership>. The 1,200 NCAA members also include the athletic conferences to which colleges and universities belong and affiliated members such as junior colleges.

³⁹ See, e.g., NCAA BYLAWS 11.1.1 (responsibility for violations) and 6.4.2 (boosters).

⁴⁰ Student-athletes must comply with campus academic and conduct requirements applicable to all students. See NCAA BYLAW 14.01.2. They also must comply with NCAA bylaws that set minimum academic standards for competition eligibility. These standards cover full time enrollment, NCAA BYLAW 14.1.7; initial eligibility, NCAA BYLAWS 14.3.1 to 14.3.6; and continuing eligibility, NCAA BYLAWS 14.4.1 to 14.4.3.9. They dictate amateur status. NCAA BYLAW Chapter 12. They prohibit the use of controlled substances. See NCAA BYLAW 18.4.1.5. They prohibit the receipt of extra benefits. See NCAA BYLAW 16.02.3. Benefits are cash, gifts, services, and favors. A benefit is an “extra” benefit, and prohibited, when it is special to student-athletes and not generally available to all students or specific cohorts of them. *Id.*

⁴¹ See NCAA BYLAW 19; 14.11. The underpinning of all NCAA rules enforcement is the obligation of institutions to assure their staff and student-athletes are rules-compliant and to self-report violations. See NCAA Processes, *supra* note 9, at 105, 118–19, and 142–51.

⁴² See Big Ten Tender of Financial Aid form, on file in the Office of JR Potuto. In what is called the student-athlete statement, they also agree to report violations they may have committed as well as violations of others of which they have knowledge. NCAA CONST. ART. 3.2.4.6; NCAA BYLAWS 14.1.3.1, 30.12; NCAA Form 12-3a, NCAA Form 08-31, Student-Athlete Statement, NCAA Division 1.

summary of pertinent NCAA bylaws.⁴³ They also receive regular education on the scope and meaning of bylaws that affect them.⁴⁴

Some critics have expressed concern that requiring student-athletes to comply with NCAA bylaws is unfair because student-athletes have no realistic alternative to NCAA competition and have no formal role in the adoption of NCAA bylaws affecting their intercollegiate athletics eligibility. We generally agree that student-athletes, particularly those with elite athletic abilities, have no viable alternative if they seek both to pursue a college degree and to participate in sports at the highest level of intercollegiate athletic competition.⁴⁵ Although alternative opportunities to compete in some professional team or individual sports (e.g., baseball, basketball, football, hockey, soccer, golf, and tennis) are available to some NCAA student-athletes, professional sports governing bodies have various rules effectively restricting athlete eligibility to compete until they reach a particular age.⁴⁶ Moreover, major league professional sports offer very few opportunities to compete at a sport's highest level of competition and then only to the most skilled college athletes.⁴⁷ Regardless of their future availability to a very small number of NCAA students-athletes with the requisite ability who

⁴³ Students (and institutional staff members) commit unethical conduct by “refusing to furnish information relevant to an investigation of a possible violation of an NCAA regulation when requested to do so” and by “[k]nowingly furnishing . . . false or misleading information concerning . . . involvement in or knowledge of matters relevant to a possible violation of an NCAA regulation.” NCAA BYLAW 10.1 (a), (d).

⁴⁴ NCAA CONST. ART. 3.2.4.6; NCAA BYLAWS 14.1.3.1, 30.12; NCAA Form 12-3a, NCAA Form 08-31, Student-Athlete Statement, NCAA Division 1. See OREGON L.REV. —, n.173. The Student-Athlete Reinstatement Committee has adopted guideline reinstatement conditions. NCAA Division I Student-Athlete Reinstatement Guidelines (2014) (hereafter Reinstatement Guidelines), available at <http://www.ncaa.org/sites/default/files/Division%20I%20Guidelines%20%28May%202014%29.pdf>. A mitigating factor under the Reinstatement Guidelines is the failure of a university to provide rules instruction. In addition, bylaws that carry a significant withholding or ineligibility condition involve conduct that is clearly rules-violative—academic fraud, for example—and student-athlete action to conceal that conduct underscores their recognition that they are committing NCAA violations.

⁴⁵ The National Association of Intercollegiate Athletics (NAIA) also regulates intercollegiate athletics competition, but on a much smaller scale. Its members generally are part of a state college system. See <http://naia.cstv.com>. Other national collegiate sports governing bodies include the National Christian College Athletic Association, United States Collegiate Athletic Association, and National Junior College Athletic Association. MITTEN ET. AL, SPORTS LAW AND REGULATION, *supra* note 2, at 100.

⁴⁶ *Id.* at 620–27.

⁴⁷ See *infra* notes 219–20.

satisfy the applicable eligibility requirements, professional sports opportunities do not offer the concomitant ability to attain a college degree.

On the other hand, the claim that student-athletes have no voice or vote regarding NCAA bylaws affecting their athletic eligibility is overstated. Each NCAA college or university has a Student-Athlete Advisory Committee (SAAC) comprised of student-athletes who are members of its intercollegiate athletic teams.⁴⁸ University SAAC members serve on the respective conference SAACs⁴⁹ and, in turn, on the national SAAC, which formally takes positions on proposals to modify existing NCAA bylaws or add new ones, including those affecting student-athlete eligibility. A revamped NCAA Division I governance structure now provides student-athletes with formal voting authority regarding the adoption of Division I bylaws.⁵⁰ They also serve on each of the seven standing committees that

⁴⁸ NCAA BYLAW 21.7.7.3.1.1. At the University of Nebraska each team has at least one representative; the two largest squads (track and field and football) have four representatives each. Policy, Student-Athlete Advisory Committee, University of Nebraska-Lincoln, on file in office of JR Potuto, UNL Law College; January 5, 2015. Email from Keith Zimmer, Associate Director for Life Skills, to JR Potuto, on file in office of JR Potuto, UNL Law College.

⁴⁹ See 2013–14 Big Ten Handbook, Rule 4.4.2.2.C.3.; NCAA BYLAW 21.7.6.2. Under the Division I governance structure in place through 2014, SAAC conference representatives attended NCAA Council meetings and served on NCAA cabinets and on committees with impact on student-athletes or their experience. NCAA BYLAWS 21.7.5.1.1.1; 21.7.5.2.1.1; 21.7.5.3.1.1; 21.7.5.2/1.1; 21.7.5.5.1.1; 21.7.5.6.1.1. As time of publishing, it is unclear how many of the cabinets and committees will be maintained. The authors nonetheless provide some description here of the level of student-athlete participation to put in perspective claims that the student-athlete voice was missing from the former governance structure. Under the former structure, there were four association-wide committees, including the Olympic Sports Liaison Committee; NCAA BYLAW 21.2.5; and Sportsmanship and Ethical Conduct Committee; NCAA BYLAW 21.2.8. Each had a student-athlete member from each of the three divisions who collectively shared one vote. Among other committees, there was a student-athlete on CMAS and a student-athlete who served in an advisory capacity to the SARC. See *supra* note 37 and *infra* note 75. There were two voting members on the Men's Basketball Issues Committee (16 members); NCAA BYLAW 21.7.5.5.3.1.1; Women's Basketball Issues Committee (16 members); NCAA BYLAW 21.7.5.5.3.2.1; and Football Issues Committee (24 members); NCAA BYLAW 21.7.5.5.3.3.1. There were no student-athletes on any committee charged with interpreting bylaws or granting waivers from their operation, however. See NCAA BYLAWS 19.1.1; 21.7.5.1.3.1 to 21.7.5.1.3.2; 21.7.7.2; 23; and 22.1.1.

⁵⁰ There also are two student-athlete voting members on the 40-member Division I Council; there is one student-athlete voting member on the 24-member Division I Board. Hosick, *Board Adopts New Division I Structure*, (Aug. 7, 2014, 11:49

report to the Division I Council.⁵¹ For those areas in which the five major conferences⁵² are autonomous, 15 of the 80 votes are allocated to student-athletes.⁵³ Autonomy subject areas cover many issues directly relevant to student-athlete interests, including financial aid, time demands, and awards and benefits.⁵⁴

The NCAA's internal processes for resolving student-athlete eligibility issues through the SARC and DTC are final and binding dispute resolution procedures. As such, these student-athlete eligibility dispute resolution processes constitute a form of arbitration, which is broadly defined as "a private process of adjudication in which the parties in dispute with each other choose decision-makers . . . and the rules of procedure, evidence, and decision by which their disputes will be settled."⁵⁵ More specifically, the NCAA, its member universities and colleges, and their student-athletes "1) . . . agree or consent to arbitrate the dispute between them; 2) . . . select a method of dispute resolution intended to obtain a fair decision by a neutral third party in less time and at less cost than would be expected in court; and 3) the decision or award of the arbitrator is . . . final."⁵⁶ Like other forms of arbitration, the NCAA's agreed upon internal dispute resolution processes are "an inexpensive, speedy, informal, and private alternative to the judicial system."⁵⁷

a.m.), available at <http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure>.

⁵¹ Hosick, *Student Voice Vote Continues to Grow Stronger*, available at <http://www.ncaa.org/about/resources/media-center/news/student-voice-vote-continues-grow-stronger> (Feb. 5, 2015).

⁵² These are the Atlantic Coast, Big Ten, Big 12, Pacific 12, and Southeastern Conferences.

⁵³ Hosick, *Board Adopts New Division I Structure*, (Aug. 7, 2014, 11:49 a.m.), available at <http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure>.

⁵⁴ Marc Tracy, *Areas of Autonomy, What Do They Mean*, N.Y. TIMES (Aug. 6, 2014), available at http://www.nytimes.com/interactive/2014/08/06/sports/ncaa-autonomy-translation.html?_r=0. Other subject areas are career pursuits, insurance, and recruiting restrictions. *Id.*

⁵⁵ Carrie J. Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 949 (2002).

⁵⁶ Ian R. Macneil, et. al, FEDERAL ARBITRATION LAW §2.1.1 (1994).

⁵⁷ STEPHEN K. HUBER & MAUREEN A. WESTON, ARBITRATION: CASES & MATERIALS 4 (3d. ed. 2011).

A. INSTITUTIONAL BYLAW ADJUDICATION PROCESS

Every student-athlete violation of NCAA rules (except for positive drug tests for substances prohibited by the NCAA, which generally are his or her individual responsibility) also is a violation for which an institution is responsible and may be sanctioned.⁵⁸ NCAA bylaw violations run the gamut from minor, technical violations that are committed inadvertently,⁵⁹ such as a student-athlete's one-time receipt of an "extra benefit"⁶⁰ of minimal value (e.g., a hamburger), to serious, intentional violations such as academic fraud or the receipt of big dollar cash payments."

The NCAA enforcement staff investigates and presents allegations and proof of bylaw violations for which institutions can be held responsible. Institutional and coach responsibility and punishment (but not that of student-athletes) is determined through the NCAA's enforcement/infractions process,⁶¹ which for serious violations involves adversarial hearings⁶² before the COI⁶³ and a right of appeal to the IAC.⁶⁴ Universities generally appear before the COI and IAC represented by legal counsel.⁶⁵ The COI writes

⁵⁸ NCAA Processes, *supra* note 9, at 297–301.

⁵⁹ NCAA BYLAW 19.1.4; List of Incidental Infractions (Level IV), as of August 1, 2013, http://ncaa.org/sites/default/files/Violation%2BStructure_Level%2BIV_Conference%2BInfractions.pdf. There are four categories of NCAA violations. NCAA BYLAWS 19.1.1–19.1.4. Incidental violations, classified as Level IV, are handled by Conference offices. NCAA BYLAW 19.12.2.

⁶⁰ Extra benefits are any item or service provided to a student-athlete that is not also available to students who are not athletes. NCAA BYLAW 16.02.3. The seriousness of an extra benefit violation depends on the value of the benefit and the knowledge and intent of a student-athlete who receives it. Level I and II violations are handled by the Committee on Infractions. Level I, the most serious violations, provide or are intended to provide a substantial recruiting or competitive advantage or substantial impermissible benefits. NCAA BYLAW 19.1.1. Level II violations provide more than a minimal but less than a substantial recruiting or competitive advantage or impermissible benefit. NCAA BYLAW 19.1.2. Level III violations are isolated or limited in nature and provide no more than a minimal recruiting or competitive advantage to a university or minimal impermissible benefit to a student-athlete. NCAA BYLAW 19.1.3. They violations constitute what formerly were known as secondary violations. *See* 2011 NCAA Division I manual, NCAA BYLAW 19.02.2.1; NCAA BYLAW 19.9.4 (d).

⁶¹ NCAA BYLAW 19. Violations committed by other institutional employees also are handled through the enforcement/infractions process.

⁶² NCAA BYLAW 19.7.

⁶³ NCAA BYLAW 19.7. The responsibility of coaches and other institutional staff members also is handled through the enforcement/infractions process. *Id.*

⁶⁴ NCAA BYLAW 19.10.

⁶⁵ NCAA BYLAWS 19.02.1; 19.7.1.2; 19.7.2, 19.7.3.

detailed infractions reports setting forth the reasons for its findings and the penalties it imposes;⁶⁶ the IAC does so in more truncated fashion.⁶⁷

B. STUDENT-ATHLETE ELIGIBILITY REINSTATEMENT PROCESS

The consequences to a student-athlete for committing an NCAA bylaw violation are determined by the SARC and its staff⁶⁸ (adjudication of responsibility and sanctions for a drug testing violation is determined by the DTS⁶⁹). In academic year 2010-11, the last year for which data are reported, approximately 1,850 student-athlete violations were sufficiently serious to trigger the formal involvement of the NCAA student-athlete reinstatement process.⁷⁰ Student-athletes are ineligible to compete from the point at which they commit a violation until their eligibility status is resolved.⁷¹

Even for the most serious student-athlete violations, the NCAA enforcement staff conducts no investigation, makes no allegation of violations, and compiles no evidence to support allegations.⁷² Instead, the university at which a student-athlete is enrolled investigates, determines the relevant

⁶⁶ See NCAA BYLAW 19.8.1.2. There also is a right of appeal to the Infractions Appeals Committee. NCAA BYLAW 19.10.

⁶⁷ An analysis of proposals to externalize the NCAA's rules enforcement/infractions process to independent third parties is outside the scope of this article. For a description of the College Athlete Protection Act, proposed federal legislation that would do so, see Brian L. Porto, *New Rules for an Old Game: Recent Changes to the NCAA Enforcement Process and Some Suggestions for the Future*, 92 ORE. L. REV. 1057, 1087-90 (2014).

⁶⁸ See Reinstatement: Say What?, *supra* note 30. For a schematic that diagrams the reinstatement process, see Student-Athlete Reinstatement Process, *available at* <http://www.ncaa.org/sites/default/files/Student-Athlete%2BReinstatement%2BProcess%2BChart.pdf>.

⁶⁹ See Drug Test Manual, *supra* note 37, Chapter IV, art. 8.2.4. at 10.

⁷⁰ See Student-Athlete Reinstatement Frequently Asked Questions [hereinafter Reinstatement Questions] 4, *available at* <http://www.ncaa.org/compliance/reinstatement/student-athlete-reinstatement-frequently-asked-questions>. Less serious violations are resolved by an institution's report of a violation to its conference office. See *supra* note 56.

⁷¹ They are resolved either by an institution's conclusion that a student-athlete committed no violation or by reinstatement to eligibility through the student-athlete reinstatement process. Certification of continuing eligibility is the responsibility of the institution at which a student-athlete is enrolled. Pre-enrollment, eligibility certification is handled by the NCAA Eligibility Center.

⁷² The most the staff may do is to request that an institution gather and submit additional information. NCAA Divs. I, II, III Comms. on Student-Athlete Reinstatement Policies and Procedures 6 [hereinafter Policies and Procedures].

facts,⁷³ decides whether a violation was committed,⁷⁴ reports any findings of violations to the NCAA enforcement staff,⁷⁵ and typically reports those findings to the SARC staff and requests reinstatement to eligibility of the culpable student-athlete.⁷⁶ There is no fact-finding by any NCAA committee, no adversarial hearing before an adjudicatory body analogous to the COI, and no appeal of a SARC decision to an internal NCAA appellate body equivalent to the IAC. The exclusive role of the SARC and its staff is to ensure that a university provides a fully developed factual record to support its conclusion as to the seriousness of the violation reported,⁷⁷ to assess the degree of student-athlete culpability based on the facts that an institution reports, and to decide whether and under what conditions a student-athlete may be reinstated to competition eligibility.

The SARC has five members⁷⁸ who are full-time employees of NCAA member institutions or conferences, plus a nonvoting student-athlete from the national SAAC.⁷⁹ Because of the very large volume of reinstatement requests, the minor nature of many of the violations, and the need for speed in resolving eligibility issues, the reinstatement staff handles reinstatement requests in the first instance; the SARC hears university appeals from staff

⁷³ Policies and Procedures, *supra* note 72, at 2. A fundamental obligation of NCAA membership is that institutions must be rules compliant, investigate, and promptly report suspected violations. NCAA CONST. Arts. 2.1, 2.8; 6.01; NCAA BYLAWS 19.2.1; 19.2.3; 10.2.2.

⁷⁴ See Reinstatement Questions, *supra* note 70, at 2–3; Policies and Procedures, *supra* note 72, at 2.

⁷⁵ Because a student-athlete's violation is a violation for which a university is responsible, the university also reports the violation to the NCAA enforcement staff.

⁷⁶ In a unique case, *Paxson v. University of Kentucky*, No. 09-C1-6404 (Ky. Cir. Ct., filed Jan. 15, 2010), a student-athlete requested a judicial order requiring his university to determine whether he violated NCAA amateurism rules based on a journalist's blog post suggesting his lawyer may have communicated with a Major League Baseball club that drafted him. The university declined to do so, but withheld him from intercollegiate competition because he refused to be interviewed by NCAA staff regarding his "unresolved eligibility questions." The court denied his motion for a temporary injunction, and he subsequently left the university without any official determination of his eligibility to compete. Ross & Karcher, *supra* note 33, at 107–08.

⁷⁷ See Policies and Procedures, *supra* note 72, at 2.

⁷⁸ See NCAA BYLAW 21.7.7.3.1. As with all NCAA committees, members of the SARC are faculty and administrators at member institutions and conferences, not NCAA staff members. NCAA BYLAW 21.7.1. They are appointed through formal NCAA processes. NCAA BYLAW 21.7.3.

⁷⁹ See NCAA BYLAW 21.7.7.3.

decisions.⁸⁰ To limit the scope of the reinstatement staff's discretion and enhance the likelihood that cases with similar facts are treated similarly across all NCAA member institutions, the SARC has adopted guidelines that prescribe reinstatement conditions (sanctions) for particular violations.⁸¹ For minor violations, there is no withholding of a student-athlete from competition.⁸² Serious violations can result in withholding for a substantial number of competitions (including permanent ineligibility),⁸³ a decrease in the total number of years (five) a student-athlete has to compete,⁸⁴ and sometimes both consequences.⁸⁵

Only an institution may appeal a staff refusal to depart downward from a guideline reinstatement condition or a staff assessment of student-athlete culpability greater than the university believes is warranted.⁸⁶ The SARC

⁸⁰ See Reinstatement Questions, *supra* note 70, at 2; Policies and Procedures at 20. See Division I Student-Athlete Reinstatement Committee Duties & Responsibilities [hereinafter Reinstatement Duties]

⁸¹ See Reinstatement Questions *supra* note 70, at 2; Reinstatement Policies and Procedures, *supra* note 72, at 20. See Reinstatement Duties, *supra* note 80. There are 28 pages of guidelines for staff to use in dealing with the consequences to student-athletes attendant on their commission of violations. See Reinstatement Guidelines *supra* note 44. The SARC also specifies how reinstatement conditions are calculated, including which student-athlete competitions count in the withholding calculation. Policies and Procedures, *supra* note 72, at 15.

⁸² Violations involving money benefit of less than \$100, for example, require disgorgement of the benefit but no withholding. See Reinstatement Guidelines, *supra* note 44; BYLAW 16.11.2.1.

⁸³ Violations involving benefits worth more than \$100 involve disgorgement of the benefit and also competition withholding calculated on the value of the benefit. See Reinstatement Guidelines, *supra* note 44. Extra benefit withholding penalties, for example, begin at 10 percent of a year's competitions for benefits over \$100 up to 30 percent for benefits over \$700. *Id.* at 20, 21; NCAA BYLAW 16.11.2.1. See, e.g., Reinstatement Guidelines, *supra* note 44, at 5; Reinstatement Questions *supra* note 70, at 4.

⁸⁴ Only about one percent of all cases result in a student-athlete's permanent ineligibility. See Reinstatement Questions, *supra* note 70, at 4.

⁸⁵ When a penalty is a year's withholding and also a season of eligibility, a student-athlete loses two seasons of competition.

⁸⁶ See Reinstatement Questions, *supra* note 70, at 1. A student-athlete may not independently trigger the SARC process or appeal from SARC imposition of a reinstatement condition. See *infra* notes 183–84 and accompanying text. A student-athlete's statement is included in a university's submission, however. Reinstatement Questions, *supra* note 70, at 1. In addition to challenging downward departures or assessment of student-athlete culpability, an institution also may try to persuade the committee to reconsider its guideline withholding condition or challenge the authority of the SARC to adopt a particular guideline against it. Appeals are scheduled based on when they are submitted and the date of a student-athlete's next

may revise a staff decision, but only to decrease a withholding condition or otherwise reduce the adverse impact on a student-athlete (e.g., it cannot impose an increased period of student-athlete ineligibility).⁸⁷

NCAA bylaws that affect athlete eligibility cover a very broad range of subject matter that includes amateurism (e.g., involvement with agents or signing a professional contract), academic eligibility and misconduct, financial aid requirements, and extra benefits. These bylaws often are complicated in their own right, and even more so in combined operation. In addition, application, interpretation, and enforcement of student-athlete eligibility criteria depend on familiarity with campus admissions, grading, degree-completion, and other protocols. By staffing the SARC with faculty and staff from member universities, the NCAA student-athlete reinstatement process incorporates expertise in both the areas of NCAA bylaws and also campus protocols.

An approach by which student-athletes are ineligible from the time they commit a violation until their eligibility is restored incentivizes a university with information about his or her possible violation of an NCAA rule to work expeditiously to investigate and report it. It is consistent with the NCAA's guiding principle of institutional control, including an institution's obligation to educate student-athletes regarding eligibility requirements; to monitor for potential violations; to cooperate with the NCAA to ensure bylaw compliance; and to report violations when uncovered.⁸⁸ Putting the onus for rules compliance squarely on member institution facilitates enforcement of NCAA rules by precluding student-athletes from competing

scheduled competition. Policies and Procedures, *supra* note 72, at 8. The SARC has one or two weekly times scheduled to hear and consider appeals.

⁸⁷ See Reinstatement Questions, *supra* note 70, at 1. Case summaries of student-athlete reinstatement staff decisions typically are posted on the NCAA website. Policies and Procedures, *supra* note 72, at 7, 14. They are brief renditions of the facts, with neither institution nor student-athlete identified. See *infra* notes 203, 220 and accompanying text. See generally, Reinstatement: Say What?, *supra* note 30. The SARC decides an appeal immediately after a hearing ends. Its decision is added to the staff report. January 5, 2015 Email from Laure Ragoss, Director of Compliance, University of Nebraska, to Josephine (Jo) R. Potuto, on file in office of JR Potuto. If the SARC affirms the reinstatement staff's decision, that information is added to the online staff reinstatement decision.

⁸⁸ A fundamental obligation of NCAA membership is that institutions must be rules compliant. NCAA CONST. ART. 2.8; NCAA BYLAW 19.2.1; NCAA Processes, *supra* note 9, at 105, 118–19, and 142–51 and accompanying text. Pursuant to the cooperative principle, universities are required promptly to report suspected violations and to cooperate with an NCAA investigation. See NCAA CONST. ARTS. 2.1, 2.8, 6.01; NCAA BYLAWS 10.2.2, 19.2.1, 19.2.3; NCAA Processes, *supra* note 9, at 289–92.

pending determination of their eligibility to do so, thereby avoiding the problem of attempting to offset any institutional competitive advantage gained if they competed but ultimately were determined to have been ineligible.

From the NCAA's perspective, however, there are two significant flaws in the current system, but neither of them directly impact or adversely affect student-athletes' legitimate interests. The first flaw is the likelihood of uneven rules enforcement that impact competitive equity among NCAA member institutions that are not equally adept at uncovering violations or willing to undertake the same thorough and probing job of deciding whether violations were committed. A student-athlete who committed a violation that adversely affects his or her eligibility should not be heard to complain of a lack of substantive fairness because a student-athlete at another school managed to escape detection or sanction.

Another significant flaw is the current widespread perception of inconsistent decisions across cases considered by the SARC.⁸⁹ In its own right, a perception of internal inconsistency and unfairness ill serves the NCAA,⁹⁰ which also may contribute to a reluctance by trial judges and juries to defer to NCAA decisions that result in a student-athlete's ineligibility.

⁸⁹ Reinstatement: Say What?, *supra* note 30.

⁹⁰ Increasing the public confidence in the fairness of NCAA reinstatement processes is a worthwhile goal independent of its possible impact on trial verdicts. *See, e.g.*, TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 273–74, 278 (2d ed. 2006); Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 *POL. BEHAV.* 119, 135 (2003); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 *LAW & SOC'Y REV.* 103, 132 (1988); Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 *LAW & SOC'Y REV.* 809, 827 (1994).

DIAGRAM OF STUDENT-ATHLETE REINSTATEMENT PROCESS

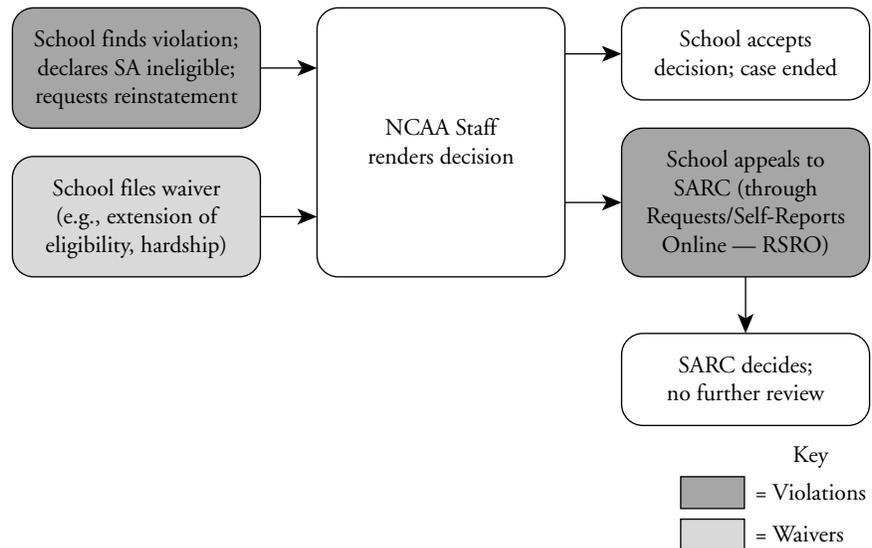


Chart derived from ncaa.org/sites/ama/sar/DocumentLibrary/Technology/Website/2015WebsiteUpdates/StudentAthleteReinstatementProcessChart.docx; MR:tas

C. STUDENT-ATHLETE DRUG TESTING VIOLATION ADJUDICATION PROCESS

The NCAA’s drug testing program was established to ensure that athletes reap no competitive advantage from using performance-enhancing drugs; to avoid pressures on athletes to ingest drugs to be competitive; and to protect the health and safety of athletes.⁹¹ The CSMAS adopts drug testing policies and procedures,⁹² and its DTS resolves drug testing appeals.⁹³

As a condition of participating in intercollegiate athletics, all student-athletes must provide written consent to random, suspicionless drug testing

⁹¹ Drug-Test Manual, *supra* note 37, Chapter IV at 4. NCAA member institutions may develop their own drug testing programs (several universities have done so), but student-athletes’ positive tests are not required to be reported to the NCAA and are not subject to NCAA sanctions.

⁹² The NCAA Executive Committee has final approval for these procedures and ultimate authority for implementation of the NCAA drug testing program. NCAA CONST. Art. 2.1.

⁹³ NCAA BYLAWS 21.2.2, 12.2.2.2, 31.2.3, 31.2.3.8; Drug Test Manual, *supra* note 37.

for the presence of NCAA prohibited controlled substances⁹⁴ at NCAA championships and Division I football bowl games.⁹⁵ Except in Division III, student-athletes also are subject to random out-of-season testing. Collection and testing of specimens is handled by an independent drug testing consultant selected by the NCAA.⁹⁶

The presumptive sanction for a student-athlete's first-time positive test for a banned substance (a quasi-strict liability offense)⁹⁷ is ineligibility to participate in intercollegiate competition for one calendar year and loss of one season of eligibility.⁹⁸ The presumptive penalty may be reduced to one-half season of ineligibility or eliminated entirely if a student-athlete can show circumstances that mitigate his or her degree of fault for the violation.⁹⁹

As is the case for other NCAA rules violations, a student-athlete is ineligible to compete from the date of being notified of a positive drug test

⁹⁴ The NCAA's list of banned substances includes performance-enhancing drugs such as anabolic steroids, stimulants (e.g., cocaine and amphetamines), and certain illegal recreational drugs such as marijuana and heroin. Drug Test Manual, *supra* note 37, Chapters I and IV, Art. 1 at 2, 4. Although the United States Supreme Court has not evaluated specifically the adequacy of the NCAA drug testing program because it does not constitute state action, this program complies with the elements the Court has identified as needed to make random, suspicionless drug testing of athletes by public educational institutions constitutional. See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995). See also *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (random urinalysis of treasury department employees on promotion or when carrying guns); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989); *Board of Education v. Earls*, 536 U.S. 822, 824 (2002); *Hill v. NCAA*, 865 P.2d 633 (Cal.1994). Courts have ruled that the NCAA's drug testing program satisfies applicable state constitutional law requirements. See e.g., *Hill v. NCAA*, 865 P.2d 633 (Cal. 1994); *Brennan v. Bd. of Trustees for Univ. of Louisiana Systems*, 691 So.2d 324 (La. App. 1997).

⁹⁵ NCAA BYLAW 14.1.4. The consent form is signed by student-athletes in all three divisions; consent to testing at bowl games is specific to Division I, the only division whose football teams play in bowl games.

⁹⁶ Currently this responsibility is handled by the National Center for Drug-Free Sport.

⁹⁷ NCAA BYLAW 18.4.1.5.1; Drug Test Appeals, *supra* note 37, ¶¶5 (a)-(c), 10. The penalty applies even if the drug violation occurs outside the playing season. NCAA BYLAW 18.4.1.5.

⁹⁸ NCAA BYLAW 18.4.1.5. After serving the required suspension, a student-athlete must test negative for any banned drugs and be cleared by the SARC for his or her eligibility to compete in intercollegiate athletics to be restored. Drug Test Manual, *supra* note 37, Chapter IV, Art.9.0 at 11.

⁹⁹ Drug Test Appeals, *supra* note 37, ¶ 5(a)-(c).

unless and until an appeal to the DTS is resolved in his or her favor.¹⁰⁰ A quorum of three DTS members can hear an appeal,¹⁰¹ which are heard by telephone and are not governed by formal rules of evidence.¹⁰² Institutions and athletes may be represented by counsel. Like the SARC, the DTS attempts to resolve an appeal before the student-athlete's next scheduled competition if possible. The DTS members who hear the appeal deliberate and vote immediately after the hearing, and prompt notification of their decision is communicated by phone to the university's athletics director.

D. DEFERENTIAL APPELLATE COURT JUDICIAL REVIEW

In trial litigation against the NCAA challenging a determination by the SARC or DTS that a student-athlete is ineligible to compete for violating one of its rules (whose respective decisions constitute final internal resolution of the subject dispute), the NCAA generally is perceived as a heartless national organization with plenary authority that overreaches and exploits student-athletes. The NCAA does not have any fan base or institutional loyalty to offset a jury's likely sympathy for a student-athlete who plays a popular sport at one of its local member universities and is resorting to litigation to have his or her eligibility restored.¹⁰³ Even in bench trials, or in preliminary injunction proceedings before a judge, there is evidence of trial court reluctance to adhere to traditionally applied principles of judicial deference to the NCAA's private association decision-making.

Although the NCAA typically prevails, its success often comes on appeal.¹⁰⁴ By that time the damage to competitive equity has been done. By the time the litigation has finally concluded, a student-athlete who pre-

¹⁰⁰ Drug Test Manual, *supra* note 37, Chapter IV, Art.8.2.4. at 10.

¹⁰¹ Drug Test Manual, *supra* note 37, at ¶ 1. The CSMAS chair and other designated committee members also may hear appeals. Like all NCAA committees, a member must recuse himself or herself when the appeal is brought by one's institution or an institution in his or her conference.

¹⁰² *Id.* at ¶ 8.

¹⁰³ Potuto, *NCAA State Actor Controversy*, *supra* note 3, at 15n.47.

¹⁰⁴ See Paul M. Barrett, *When Students Fight the NCAA in Court, They Usually Lose*, BLOOMBERG BUSINESS WEEK (July 2, 2014), available at <http://www.businessweek.com/articles/2014-07-02/when-students-fight-the-ncaa-in-court-they-usually-lose>. The data are that student-athletes prevail in whole or part at trial in 49 percent of the cases they bring, but that more than 70 percent of intermediate appellate courts reverse the trial decision in whole or part and, of those that do not, another 70 percent are reversed on appeal to a state supreme court. See *id.* 34 student-athlete trial wins (70 percent of 45) will be reversed by an intermediate appellate court; of the remaining 15 trial wins, another 11 (70 percent of 15) will be reversed by a state supreme court.

vailed at trial and competed during the pendency of appellate review may have exhausted his or her collegiate athletics eligibility (or left the university for another reason), thereby avoiding any individual consequence for an NCAA rules violation if the trial court's ruling is reversed. Pursuant to its Restitution Rule,¹⁰⁵ the NCAA may vacate competition results and impose penalties on a university that, while the litigation was pending, competed with a student-athlete whose ineligibility was ultimately upheld by an appellate court. Although perceived as draconian, the purpose of the Restitution Rule is to create a significant disincentive for the university to allow a student-athlete to participate in intercollegiate athletics while appellate review of a trial court's refusal to enforce the SARC's determination of his or her ineligibility is pending.

The NCAA is not subject to the constraints of the federal constitution,¹⁰⁶ and student-athletes do not have a constitutionally protected property right or liberty interest in intercollegiate athletics competition, a prospective athletics scholarship, or a future professional playing career.¹⁰⁷ Consistent with the law of private associations, appellate courts provide very deferential judicial review of SARC and DTS final adjudications that affect a student-athlete's eligibility to participate in NCAA intercollegiate athletics. Deferential judicial review avoids unwarranted judicial micromanagement of NCAA student-athlete eligibility determinations and upholds the First Amendment freedom of association rights of member institutions.¹⁰⁸

¹⁰⁵ NCAA BYLAW 19.13.

¹⁰⁶ *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

¹⁰⁷ *Hall v. NCAA*, 985 F.Supp. 782, 799800 (N.D. Ill. 1997); *Bloom v. NCAA*, 93 P.3d 621 (Colo. App.2004); *Hart v. NCAA*, 550 S.E.2d 79, 86 (W. Va. 2001); *Hall v. NCAA*, 985 F. Supp. 782, 799–800 (N.D. ILL. 1997); *Graham v. NCAA*, 804 F.2d 953, 955 (6th Cir. 1986); *Hebert v. Ventetuolo*, 638 F.2d 5 (1st App. Ct. 1981); *Colo. Seminary v. NCAA*, 570 F.2d 321 (10th Cir. 1978); *Parish v. NCAA*, 506 F.2d 1028 (5th Cir. 1975).

¹⁰⁸ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Roberts v. Jaycess*, 468 U.S. 609, 623 (1984). Deferential judicial review in the context of state regulation also upholds the strictures of the dormant commerce clause. See *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988); *Sporhase v. Nebraska*, 458 U.S. 941 (1982); *Edgar v. Mite Corp.*, 457 U.S. 624 (1982); *Sporhase v. Nebraska*, 458 U.S. 941 (1982); *Bibbs v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). The Nevada Supreme Court held unconstitutional a state statute that imposed procedural requirements on NCAA enforcement policies and infractions hearings due to its effect on interstate commerce. See *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993).

In *NCAA v. Lasege*,¹⁰⁹ the Kentucky Supreme Court upheld the SARC's sanction of permanent ineligibility for a Nigerian student-athlete who professionalized himself under NCAA amateurism bylaws by being paid to play professional basketball in Russia. The court explained that "[i]n general, the members of [private associations such as the NCAA] should be allowed to 'paddle their own canoe' without unwarranted interference from the courts," adding that judicial relief is warranted only if the NCAA "act[s] arbitrarily and capriciously toward student-athletes."¹¹⁰ Reversing the intermediate appellate court's affirmance of the trial court's injunction that permitted Lasege to compete for the University of Louisville during the 2000-01 season, it held that the trial court erroneously applied *de novo* review by substituting its judgment and reaching "a different conclusion as to [plaintiff's] intent to professionalize."¹¹¹ It ruled that mere judicial disagreement does not make a decision arbitrary or capricious; instead, a determination must be "clearly erroneous," we mean unsupported by substantial evidence."¹¹²

The Kentucky Supreme Court also validated the NCAA's Restitution Rule and upheld its authority to offset the competitive advantage gained by Louisville when Lasege played intercollegiate basketball during the 2000-01 season by retroactively imposing sanctions on the university, including forfeiture of wins in the games he played:

The trial court's belief that the NCAA's Restitution Rule 'thwarts the judicial power' is simply without foundation. NCAA Bylaw 19.8 . . . 'does not purport to authorize interference with any court order during the time it remains in effect, but only authorizes restitutive penalties when a temporary restraining order is ultimately dissolved and the challenged eligibility rule remains undisturbed in force.' The authority of the courts is thus in no way compromised, and NCAA Bylaw 19.8 merely allows for post-hoc equalization when a trial court's erroneously granted temporary injunction upsets competitive balance. If the trial court's preliminary conclusions carry the day, and a student-athlete's eligibility is confirmed by

¹⁰⁹ *NCAA v. Lasege*, 53 S.W.3d 77 (Ky. 2001). See also *Brennan v. Bd. of Trustees for Univ. of Louisiana Systems*, 691 So.2d 324 (La. App. Cir. 1 3/27/97) (upholding student-athlete's unsuccessful DTS appeal resulting in loss of one-year of competition eligibility for violating the NCAA drug testing program).

¹¹⁰ *Lasege*, 53 S.W.3d at 83.

¹¹¹ *Id.* at 85.

¹¹² *Id.* Courts have adopted and applied the arbitrary and capricious standard in analyzing the validity of an NCAA committee's refusal to grant a waiver to an NCAA rule that would provide eligibility to participate in intercollegiate athletics. *Hall*, 985 F.Supp. at 794 (N.D. Ill.); *Bloom*, 93 P.3d at 623 (Colo. App.); *Brinkworth*, 680 So.2d (Fla. App.).

final determination, no restitutionary remedy is warranted or appropriate, and NCAA Bylaw 19.8 provides for none.¹¹³

III. OLYMPIC SPORT ATHLETE ELIGIBILITY ADJUDICATION PROCESSES

A. CAS ARBITRATION

The CAS is a private international arbitral body based in Lausanne, Switzerland, whose jurisdiction is based on agreement of the parties, which provides final and binding resolution of sports disputes. It was created in response to “the need for a unitary international legal system that protects the integrity of Olympic and international athletics competition, while also safeguarding athletes’ legitimate rights and adhering to fundamental principles of natural justice.”¹¹⁴ The International Council of Arbitration for Sport (ICAS), a group of 20 distinguished jurists and lawyers with a sports and/or arbitration background (some of whom are former Olympians) also based in Lausanne, oversees the CAS and its group of approximately 300 arbitrators, and manages its budget, appoints its member arbitrators, and promulgates the Code of Sports-Related Arbitration (Code).¹¹⁵ All parties in a CAS proceeding have the right to be represented by counsel.¹¹⁶

At the site of each Olympic Games, the CAS operates an ad hoc Division that consists of a pool of 9-15 CAS arbitrators chosen by the ICAS, which provides expedited resolution of all disputes arising during the Games or within a period of ten days preceding the Opening Ceremony, including athlete eligibility disputes with the IOC or an IF.¹¹⁷ Disputes are resolved by a panel of three arbitrators appointed by the president of the CAS ad hoc Division, who is a member of the ICAS.¹¹⁸ Generally, the panel must render a written reasoned arbitration award within 24 hours of the filing of a request for CAS adjudication,¹¹⁹ which ensures “fast, fair, and

¹¹³ *Lasege*, 53 S.W.3d at 88.

¹¹⁴ Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 9–10.

¹¹⁵ CAS, Code of Sports-Related Arbitration (hereinafter “Code”), *available at* <http://www.tas-cas.org/en/index.html>.

¹¹⁶ *Id.* at R30. CAS proceedings usually are conducted in either English or French (the two official languages of the CAS).

¹¹⁷ Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 11.

¹¹⁸ *Id.* at 12. The Olympic Charter and the general principles and rules of law that the arbitration panel deems appropriate constitute the governing substantive law applied by the panel to the facts of the case. *Id.*

¹¹⁹ *Id.*

free' resolution of disputes involving an athlete's eligibility to participate in the Olympic Games."¹²⁰

For disputes occurring outside of the Olympic Games, the CAS appeals arbitration procedure is used to resolve appeals from final decisions of the IOC or an IF affecting an athlete's competition eligibility, including doping, disciplinary, and other issues.¹²¹ In addition to the authority to interpret and apply athlete eligibility rules in individual cases, CAS panels are empowered to invalidate sport governing body rules when appropriate to do so.¹²² These proceedings usually are conducted before a three-person panel with each party choosing one arbitrator and the president of the CAS appeals arbitration procedure (who is an ICAS member) appointing the third arbitrator who serves as the panel's chair.¹²³ The Code requires the CAS panel to issue a written reasoned award that resolves the parties' dispute within three months after receiving the case file.¹²⁴

In both CAS ad hoc Division and appeals arbitration proceedings, the arbitration panel exercises *de novo* review,¹²⁵ and not the very narrow 'arbitrary and capricious' or 'rational basis' standards that national courts generally apply when reviewing sport governing body rules and decisions."¹²⁶ In either type of proceeding, the CAS panel resolves the parties' dispute by majority decision. All CAS ad hoc Division and most appeals arbitration

¹²⁰ Mitten & Davis, *Athlete Eligibility Requirements*, *supra* note 7, at 79.

¹²¹ Code, *supra* note 116, at R.47.

¹²² See, e.g., *British Olympic Ass'n v. World Anti-doping Agency*, CAS 2011/A/2658, award of 30 April 2012 (invalidating British Olympic Association bylaw providing that an athlete found guilty of a doping offense is ineligible for selection to the British Olympic team because it is inconsistent with WADC's exclusive sanctions); *USOC v. IOC*, CAS 2011/O/2422, award of 4 October 2011 (invalidating IOC rule prohibiting an athlete sanctioned for a doping violation with a suspension of more than six months from participating in the next Olympic Games because it is inconsistent with WADC's exclusive sanctions).

¹²³ Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 12. The applicable substantive laws generally are the relevant sport governing body rules (e.g., IOC or IF rules, or the WADC for doping cases) and the law of the country in which the governing body is domiciled, although the CAS panel has authority to resolve the dispute according to the "rules of law" it deems appropriate. Code, *supra* note 116, at R.58.

¹²⁴ Code, *supra* note 116, at R.59.

¹²⁵ Code, R. 57 provides: "The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance." *Id.* at R.57. Similarly, Article 16 of the Arbitration Rules for the Olympic Games states "[t]he Panel shall have full power to establish the facts on which the application is based;" and Article 17 authorizes it to "rule on the dispute" in accordance with the applicable law.

¹²⁶ Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 14.

awards are published on the CAS website.¹²⁷ These awards are binding only on the parties, but CAS panels often cite and rely on prior awards that address the same or similar issues in an effort to create a uniform body of Olympic sports law. As one CAS panel observed: “In CAS jurisprudence there is no principle of binding precedent, or *stare decisis*. However, a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel. Whether that is considered a matter of comity, or an attempt to build a coherent corpus of law, matters not.”¹²⁸

CAS ad hoc Division and appeals arbitration awards are subject to judicial review by the Swiss Federal Tribunal (SFT), Switzerland’s highest court. The SFT has ruled that “the CAS is a true arbitral tribunal independent of the parties,” which “offers the guarantees of independence upon which Swiss law makes conditional the valid exclusion of ordinary judicial recourse.”¹²⁹ In a 2003 case, the SFT rejected the plaintiffs’ contention that the CAS is not impartial when it decides a dispute between an athlete and the IOC.¹³⁰ It ruled that the CAS, whose operations have been overseen by the ICAS since 1994, is sufficiently independent from the IOC for its arbitration decisions “to be considered true awards, equivalent to the judgments of State courts.”¹³¹

Article 190(2) of the Swiss Federal Code on Private International Law of December 18, 1987 sets forth only very limited procedural and substantive grounds for judicially challenging a CAS award before the SFT,¹³²

¹²⁷ See tas.cas.org under “Jurisprudence” tab.

¹²⁸ *International Assn. of Athletics Federations v. USA Track & Field and Jerome Young*, CAS 2004/A/628, award of June 28, 2004, at ¶ 19. See also *Anderson, et al. v. IOC*, CAS 2008/A/1545, award of July 16, 2010, at ¶ 55 (“although a CAS panel in principle might end up deciding differently from a previous panel, it must accord to previous CAS awards a substantial precedential value and it is up to the party advocating a jurisprudential change to submit persuasive arguments and evidence to that effect.”).

¹²⁹ *G. v. Federation Equestre Internationale (Gundel)*, in *Digest of CAS Awards 1986–1998* (Matthieu Reeb ed., 1998) at 561, 568–69.

¹³⁰ *A. and B. v. IOC and FIS (Lazutina)*, *A. and B. v. IOC and FIS*, in *Digest of CAS Awards III 2001–2003* (Matthieu Reeb ed., 2004) at 674.

¹³¹ *Id.* at 689. It concluded: “As a body which reviews the facts and the law with full powers of investigation and complete freedom to issue a new decision in place of the body that gave the previous ruling, the CAS is more akin to a judicial authority independent of the parties.” *Id.* at 686.

¹³² Switzerland’s Federal Code on Private International Law, CAS (1987), available at [http://www.hse.ru/data/2012/06/08/1252692468/SwissPIL%20B%20перед.%202007%20\(аиr\).pdf](http://www.hse.ru/data/2012/06/08/1252692468/SwissPIL%20B%20перед.%202007%20(аиr).pdf). Procedural grounds for vacating an award include: an irregularity in the composition of the arbitration panel (e.g., lack of independence or

which has vacated very few CAS awards.¹³³ As a foreign arbitration award in all countries except Switzerland,¹³⁴ a CAS award is subject to judicial review in national courts of countries, including the U.S., that are parties to Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), an international treaty,¹³⁵ and its enforcement may be refused on substantially the same grounds. Pursuant to Article V(2)(b) of the New York Convention, a national court may refuse to recognize and enforce a CAS arbitration award if doing so “would be contrary to the public policy of that country.”¹³⁶ Similar to the SFT, U.S. courts have construed this defense very narrowly and enforced the one CAS award that has been judicially reviewed to date.¹³⁷

impartiality); an erroneous assertion of jurisdiction; a failure to comply with the scope of an arbitration agreement by not ruling on a submitted claim or ruling on extraneous matters; or a violation of the parties’ rights to be heard or to be treated equally. See generally Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPP. DISP. RESOL. L.J. 51, 55–58 (2009). The sole basis for challenging the substantive merits of a CAS award is its incompatibility with Swiss public policy, a defense that the SFT has stated “must be understood as a universal rather than national concept, intended to penalize incompatibility with the fundamental legal or moral principles acknowledged in all civilized states.” *N., J., Y., W. v. FINA*, 5P.83/1999 (1999) (Switz.), in CAS, Digest of CAS Awards II: 1998-2000 at 775, 779 (Matthieu Reeb ed., 2002). It has ruled that “even the manifestly wrong application of a rule of law or the obviously incorrect finding of a point of fact is still not sufficient to justify revocation for breach of public policy of an award made in international arbitration proceedings.” *Id.* at 779.

¹³³ Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 16–17. See generally Despina Mavromati & Matthieu Reeb, *The Code of the Court of Arbitration for Sport—Commentary, Cases, and Materials* (Wolters Kluwer International 2015).

¹³⁴ To ensure uniform procedural rules consistent with Swiss law for all CAS arbitrations, the “seat” of all CAS arbitration proceedings is always deemed to be Lausanne, Switzerland regardless of where it is geographically held. Code, *supra* note 116, at R28.

¹³⁵ U.N. Conference on International Commercial Arbitration, *Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. A/CONF (June 10, 1958) June 10, 1958, 21 U.S.T. 2517 [hereinafter “New York Convention”], 9 U.S.C. § 201 et seq.

¹³⁶ *Id.* at Art. V(2)(b).

¹³⁷ In *Gatlin v. U.S. Anti-Doping Agency, Inc.*, No. 3:08-cv-241, 2008 WL 2567657 (N.D. Fla. 2008), a federal district court ruled that a CAS arbitration award rejecting an athlete’s claim that his prior doping violation for taking prescribed medication violated the Americans with Disabilities Act, which the court characterized as “arbitrary and capricious,” did not violate the New York Convention’s public policy exception and justify its refusal to recognize the award. *Id.* at *1.

B. AAA ARBITRATION

The USOC is authorized by the IOC and ASA to represent the United States in all matters relating to its participation in the Olympic Games. The USOC selects an NGB as the unitary governing authority for each Olympic sport within the United States,¹³⁸ which is a member of the corresponding IF that governs the sport on a worldwide level. Pursuant to a series of hierarchical contractual agreements with the IOC and IFs, the USOC and its NGBs are required to adopt, apply, and enforce IOC and IF rules that determine or affect U.S. athletes' eligibility to qualify for, or participate in, Olympic or other international sports competitions as well as to comply with CAS awards resolving issues concerning the eligibility of American athletes that arise in connection with the Olympic Games or in disputes with an IF or the World Anti-Doping Agency.

The USOC and all NGBs must comply with the ASA, which establishes a legal framework for protecting the participation opportunities of Olympic sport athletes.¹³⁹ It mandates that the USOC establish a procedure for "swift and equitable resolution" of disputes "relating to the opportunity of an amateur athlete . . . to participate" in the Olympic, Paralympic, Pan-American Games, and world championship competitions ("protected competitions").¹⁴⁰ It also requires the USOC to hire an athlete ombudsman to provide free, independent advice to athletes regarding resolution of disputes regarding their eligibility to participate in protected competitions.¹⁴¹

Section 9 of the USOC's Bylaws creates both procedural and substantive rights for athletes regarding their participation in protected competitions. The USOC Bylaws prohibit an NGB from "deny[ing] or threaten[ing] to deny . . . the opportunity to participate" to an athlete otherwise qualified¹⁴² to do so, who has the right to file a complaint with it

¹³⁸ An NGB has no authority to regulate intercollegiate or interscholastic competition in the sport it regulates. 36 U.S.C. § 220526(a).

¹³⁹ The ASA requires an NGB to provide all athletes under its jurisdiction with an equal opportunity to participate "without discrimination on the basis of race, color, religion, sex, age, or national origin." 36 U.S.C. § 220522(a)(8).

¹⁴⁰ 36 U.S.C. § 220509(a).

¹⁴¹ 36 U.S.C. § 220509(b).

¹⁴² USOC BYLAW, Section 9.1. An athlete has no federal constitutional right to participate in the Olympic Games, *DeFrantz v. USOC*, 492 F. Supp. 1181 (D.D.C. 1980), and the ASA does not create any substantive athletic participation rights that athletes can enforce in litigation against the USOC or an NGB. 36 U.S.C. § 220505(b)(9). *See generally*, Mitten & Davis, *supra* note 7, at 94–97. As one Seventh Circuit judge remarked, "there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the

against an NGB that allegedly adversely affected his or her athletic eligibility by denying him or her the opportunity to participate.¹⁴³ Pursuant to the ASA, an athlete dissatisfied with USOC's resolution of the complaint may submit the dispute to final and binding arbitration in accordance with the Commercial Rules of the AAA¹⁴⁴ and may be represented by counsel. The AAA proceeding is held in person or telephonically before a single arbitrator selected by the parties from a closed pool maintained by the AAA (most of whom are U.S. CAS arbitrators). The arbitrator is required to render a timely written and reasoned award, which is published on the USOC's website.¹⁴⁵

A Section 9 arbitration award is subject to very limited judicial review, largely on procedural grounds. The award will be judicially confirmed and enforced if the arbitrator had jurisdiction and authority to resolve the issues therein and the award involved no "‘corruption,’ ‘fraud,’ ‘evident partiality,’ or any similar bar to confirmation".¹⁴⁶ The reviewing court does not exercise *de novo* review and will not vacate an arbitration award simply because it disagrees with the arbitrator's resolution of the merits of its claims or defenses.¹⁴⁷

C. AAA/U.S. CAS DOPING ARBITRATION

In the U.S. there is a specialized arbitration proceeding for resolving alleged doping violations that the United States Anti-doping Agency (USADA), an independent private anti-doping agency for Olympic sports in the U.S., has jurisdiction to prosecute.¹⁴⁸ An athlete who chooses to chal-

eligibility, of athletes to participate in the Olympic Games." *Michels v. USOC*, 741 F.2d 155, 159 (7th Cir. 1984) (Posner, J., concurring).

¹⁴³ USOC BYLAWS, Section 9.2.

¹⁴⁴ USOC BYLAWS, Section 9.7.

¹⁴⁵ These awards are available at <http://www2.teamusa.org/About-the-USOC/Organization/Legal/Arbitration-and-Hearing-Panel-Cases/Section-9.aspx>.

¹⁴⁶ *Lindland v. U.S. Wrestling Ass'n, Inc.*, 227 F.3d 1000, 1003 (7th Cir. 2000).

¹⁴⁷ *Gault v. United States Bobsled and Skeleton Fed'n*, 578 N.Y.S.2d 683 (N.Y. App. Div. 1992).

¹⁴⁸ USADA handles the initial adjudication procedure that most IFs require its U.S. member NGB to undertake when a U.S. athlete tests positive for a banned substance. Applying the IF's rules (which are based on the WADC), a USADA Review Board of 3-5 persons considers written submissions by USADA and the athlete charged with a doping violation to determine whether the evidence is sufficient to warrant a hearing. U.S. Anti-doping Agency, Protocol for Olympic and Paralympic Movement Testing, Section 11 (2014). If so, USADA proposes doping charges and sanctions against the athlete consistent with the IF's rules. WADA or an IF may challenge USADA's disposition of a doping matter by appealing to the

lenge USADA's alleged doping violation and proposed sanction may request a hearing before a three-person AAA panel¹⁴⁹ whose members are also U.S. CAS arbitrators¹⁵⁰. In the AAA/U.S. CAS arbitration proceeding,¹⁵¹ USADA and the athlete are adverse parties.¹⁵² After hearing the parties' evidence, the AAA/U.S. CAS panel issues a written arbitration award with reasons for its decision.¹⁵³ The athlete or USADA may appeal this award¹⁵⁴ to a three-person CAS panel that exercises *de novo* review and renders a final and binding award,¹⁵⁵ which is subject to very limited judicial review by the SFT (and potentially a U.S. federal court under the New York Convention).¹⁵⁶

IV. REQUISITES OF PROCEDURAL FAIRNESS AND SUBSTANTIVE JUSTICE THAT JUSTIFY JUDICIAL RECOGNITION AND DEFERENCE TO PRIVATE DISPUTE RESOLUTION SYSTEMS

To justify judicial recognition and deference, a private legal system to resolve sports disputes should provide procedural fairness and substantive justice, particularly to athletes who are required to be bound by its decisions as a condition of participating in a sport. Procedural fairness requires that athletes receive reasonable notice of a governing body's rules and the poten-

CAS. *See, e.g.*, WADA v USADA, USBSF, and Zachery Lund, CAS OG 06/001 (2006) (successful WADA challenge to sanction USADA imposed on U.S. athlete for doping violation because too lenient).

¹⁴⁹ This is a right provided by the ASA because a doping violation and sanction may affect an athlete's ability to participate in a protected competition.

¹⁵⁰ This is a necessary requirement because the IFs and WADA have agreed to be subject only to CAS arbitration.

¹⁵¹ Special AAA Supplementary Procedures apply to USADA doping arbitrations, including rules that provide the panel with broad discretion to "determine the admissibility, relevance, and materiality of evidence offered." Rule R-28 and that permit the panel "[to] 'consider the evidence of witnesses by declaration or affidavit', but shall give it only such weight as [it] deems it entitled to after consideration of any objection made to its admission." Rule R-29. *Jacobs v. USA Track & Field*, 374 F.3d 85 (2d Cir. 2004) (rejecting athlete's petition to compel arbitration pursuant to general AAA Commercial Rules).

¹⁵² The IF for the particular sport may observe the proceeding or participate as a party.

¹⁵³ USADA Arbitration Decisions, *available at* <http://www.usada.org/testing/results/arbitration-decisions/> (last visited Nov. 5, 2015).

¹⁵⁴ The IF or WADA also may appeal.

¹⁵⁵ *See, e.g.*, *Landis v. USADA*, CAS 2007/A/1394 (2008) (affirming AAA/U.S. CAS arbitration award finding that Floyd Landis committed a doping violation and sanction imposed).

¹⁵⁶ *See supra* notes 137–140 and accompanying text.

tial consequences for violations as well as the opportunity to present their case to an unbiased decision maker if violations are alleged or disputes arise.¹⁵⁷ Substantive justice — “just results in individual cases” — requires procedural fairness combined with a reasoned decision based on the information in the record that both follows applicable precedent and does not discriminate against those challenging the decision.¹⁵⁸

At a minimum, a system that provides procedural fairness and substantive justice must have the following components: 1) an open forum accessible to all those who may be adversely affected by a decision, including the right to be represented by counsel; 2) independent, impartial, and unbiased decision-makers; 3) a full and fair opportunity for all parties to be heard; 4) timely, reasoned, and final decisions; and 5) the development of a clearly articulated uniform body of law that applies equally to all those similarly situated and that provides a consistent and predictable application of the regulations and rules that govern the private entity.¹⁵⁹ In the following sections we evaluate, respectively, the CAS, AAA, SARC, and DTS processes for handling student-athlete eligibility issues to determine whether they meet the foregoing five criteria for procedural fairness¹⁶⁰ and substantive

¹⁵⁷ Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 18. For purposes of federal constitutional due process, the U.S. Supreme Court has described procedural fairness as meaning that individuals with interest that that may be abridged by a decision must have notice of that action and a reasonable opportunity to show an unbiased fact finder that the action should not be enforced against them. See *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975). Constitutional claims require a state actor. See *Barron v. Balt.*, 32 U.S. 243 (1833). See also *United States v. Stanley*, 109 U.S. 3 (1883).

¹⁵⁸ Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 18–19.

¹⁵⁹ *Id.* at 20.

¹⁶⁰ The United States Constitution applies to state actors, not private ones. See *Barron*, 32 U.S. at 250–51 (1833); *Civil Rights Cases*, 109 U.S. 3, 17 (1883). Because the NCAA is not a state actor, *Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179, 199 (1988), the NCAA is not required to comply with the due process requirements of the 14th Amendment. See, e.g., *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91 (1978); *Goss v. Lopez*, 419 U.S. 565, 583 (1975); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Moreover, student-athletes do not have a constitutionally protected property right to compete in a college sport or a liberty interest subject to due process protection. See, e.g., *Graham v. NCAA, Nat'l Collegiate Athletic Ass'n*, 804 F.2d 953, 955 (6th Cir. 1986); *Colo. Seminary (Univ. of Denver) v. Nat'l Collegiate Athletic Ass'n*, 570 F.2d 320, 321 (10th Cir. 1978); *Bloom v. NCAA*, 93 P.3d 621, 624 (Colo. App. 2004); *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Tex. 2005) (stating that “the overwhelming majority of jurisdictions” find no due process constitutional right of students to participate in college athletics competition); *Hart v. NCAA*, 550 S.E.2d 79, 86 (W. Va. 2001). The USOC and NGBs are not state actors. See *S.F. Arts & Ath.*,

justice that a private legal system for resolving Olympic and intercollegiate athlete eligibility disputes should have to justify judicial recognition and enforcement of its decisions.

A. CAS

Open Forum. The CAS system provides an open forum that is fully accessible to athletes, who have the right to directly initiate an arbitration proceeding and to be represented by counsel. Athletes frequently are represented by volunteer pro bono lawyers in CAS ad hoc Division proceedings, and ICAS has established a legal aid fund to pay attorneys' fees to enable them to have access to CAS arbitration. CAS appeals arbitration proceedings are free of charge except for a filing fee of approximately \$1,000, which is waived if an athlete qualifies for legal aid. If an athlete prevails in a dispute with an IF, the CAS panel has the discretion to order the IF to contribute towards his or her attorneys' fees and expenses (unless he or she received legal aid).¹⁶¹

Independent and Impartial Adjudicators. In *Canas v. ATP Tour*, the SFT held that an athlete's agreement to arbitrate a dispute before the CAS as a condition of being eligible to participate in a sports event is enforceable because it "promotes the swift settlement of [sports] disputes . . . by specialized arbitral tribunals that offer sufficient guarantees of independence and impartiality."¹⁶²

Inc. v. United States Olympic Comm., 483 U.S. 522, 545 (1987); *Behagen v. Amateur Basketball Asso.*, 884 F.2d 524, 530 (10th Cir. 1989), and Olympic sport athletes have no constitutionally protected property rights or liberty interests protected by the due process clause. See *De Frantz v. United States Olympic Comm.*, 492 F. Supp. 1181, 1194 (D.D.C. 1980).

¹⁶¹ Mitten, *Arbitration for Sports Jurisprudence*, supra note 28, at 21–22.

¹⁶² *Canas v. ATP Tour*, Tribunal federal [Tf] [Federal Supreme Court] Mar. 22, 2007, 4P.172/2006 (Switz.), at 4.3.2.3. But see *Pechstein, C v. Deutsche Eisschnelllauf-Gemeinschaft e. V. (DESG)*, U 1110/14 Kart (Munich Higher Regional Ct., January 15, 2015) (mandatory CAS arbitration provision violates German antitrust law because the International Skating Union abused its worldwide monopoly governance of skating by requiring athletes to consent to an arbitration system with a structural defect "which places the neutrality of CAS fundamentally in question" because "the majority or perhaps the entirety of the persons included on the list of arbitrators are more closely connected to the governing bodies than to the athletes"). This case is being appealed to the Bundesgericht, Germany's highest court. Christian Keider, *Guide to the Higher Regional Court's Decision in the Pechstein Case*, LawinSport (January 29, 2015), available at [http://www.lawinsport.com/articles/item/a-guide-to-the-higher-regional-court-s-decision-in-the-pechstein-case?highlight=WY\]wZWNoc3Rla](http://www.lawinsport.com/articles/item/a-guide-to-the-higher-regional-court-s-decision-in-the-pechstein-case?highlight=WY]wZWNoc3Rla)

The SFT has upheld the independence of the CAS from the IOC and IF,¹⁶³ although many of its arbitrators (particularly the European ones) have historical or current connections with the IOC or an IF. In *Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano*,¹⁶⁴ the SFT held that “the independence and the impartiality demanded from the members of an arbitral tribunal extend to the party appointed arbitrators as well as to the chairman of the arbitral tribunal.”¹⁶⁵ However, it acknowledged that “absolute independence by all arbitrators is an ideal which will correspond to reality only rarely,”¹⁶⁶ observing that there is a closed list of CAS arbitrators required to have legal training and recognized expertise regarding sport and that many CAS arbitrators have pre-existing associations and contacts with Olympic sports organizations, administrators, and counsel as well as others associated with the Olympic Movement. It determined that “an arbitrator may not be challenged merely because he was chosen by one of the parties to the dispute”¹⁶⁷ and there is “no justification for a special treatment of CAS arbitrators, namely to be particularly strict in reviewing their independence and impartiality,”¹⁶⁸ requires a case-by-case determination rather than “immutable rules.”¹⁶⁹

Full and Fair Opportunity to be Heard. Because CAS ad hoc Division and appeals arbitration panels exercise *de novo* review over the decisions of the IOC and IFs affecting an athlete’s eligibility to compete in Olympic and international sports events, athletes have a full and fair opportunity to be heard and to raise any relevant factual and legal issues, thereby enabling any procedural defects in the governing body’s resolution of the dispute to be remedied.¹⁷⁰

Timely, Reasoned Decision. Both CAS ad hoc Division and appeals arbitration proceedings provide timely (within 24 hours of filing or three months from when the file is transmitted to the arbitrators, respectively) and reasoned written awards, which constitute a final and binding resolution

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¹⁶³ See *supra* notes 132–134 and accompanying text.

¹⁶⁴ A_234/2010 (1st Civ. Ct. 2010).

¹⁶⁵ *Id.* at 12–13.

¹⁶⁶ *Id.* at 13.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 14.

¹⁶⁹ *Id.* at 15. The Code prohibits CAS arbitrators from representing any party in a CAS arbitration proceeding. Code, *supra* note 116, at 18.

¹⁷⁰ Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 25–26.

of the parties' dispute subject to very limited judicial review by the SFT and national courts pursuant to the New York Convention treaty.¹⁷¹

Consistent, Uniform Body of Law. Although CAS ad hoc Division and appeals arbitration awards bind only the parties, this collective body of CAS awards resolving athlete eligibility disputes “provide guidance in later cases, strongly influence later awards, and often function as precedent,” which reinforce and help elaborate “established rules and principles of international sports law.”¹⁷² Based on an illustrative sample of CAS doping violation and sanction awards as well as sport nationality requirement awards, it appears that the CAS arbitration system generally is facilitating “the development of a clearly articulated uniform body of law and its predictable application in a consistent manner.”¹⁷³

In sum, the CAS system for providing final and binding resolution of disputes affecting the eligibility of athletes satisfies procedural fairness. However, as one of the authors of this article observed, it is “very difficult to objectively measure the extent to which [it] produces substantive justice.”¹⁷⁴

B. AAA

AAA arbitration of domestic athletic eligibility and participation opportunity disputes (including those involving doping violations and sanctions) also appears to provide procedural fairness and substantive justice to U.S. Olympic sport athletes based on application of the foregoing same five requirements. An athlete who believes his or her opportunity to participate in a “protected competition” has been denied by an NGB has the right to institute Section 9 or AAA/U.S. CAS doping arbitration and to be represented by counsel. Although there is no legal aid fund to finance the costs of these arbitration proceedings, an athlete is entitled to receive free, independent advice concerning the dispute from the USOC athlete ombudsman, who maintains a list of attorneys willing to provide pro bono representation

¹⁷¹ See *id.* at 26–27.

¹⁷² Nafziger, *International Sports Law*, *supra* note 4, at 48–61.

¹⁷³ Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 28–39. See also Lorenzo Casini, *The Making of Lex Sportiva by the Court of Arbitration for Sport*, 12 GERMAN L. J. 1317, 1327 (2011) (observing that “the CAS has made a crucial contribution to the making of global sports law . . . [by] develop[ing] common legal principles among sporting bodies . . . [and] interpret[ing] and harmoniz[ing] sports law”).

¹⁷⁴ Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 39–40. On the other hand, the CAS’s “procedural fairness increases the likelihood of substantive justice, or at least tends to alleviate any potential concerns about a lack of systematic substantive justice.” *Id.* at 40.

to athletes. All AAA sports arbitration proceedings are heard and resolved by independent and impartial arbitrators (most of whom are U.S. CAS arbitrators) who provide *de novo* review and are required to provide the parties (including athletes) with a full and fair opportunity to be heard and to issue a timely, reasoned, and final award. AAA Section 9 and AAA/U.S. CAS doping arbitration awards are published on the USOC and USADA websites respectively and prior awards in both categories of cases frequently are cited and relied on by arbitrators in subsequent proceeding involving similar issues, which facilitates the development of a clearly articulated uniform body of U.S. law regarding Olympic athlete eligibility disputes with consistent, predictable application.¹⁷⁵

C. SARC

The student-athlete reinstatement process involves responsibility divided between NCAA institutions and the SARC, and we evaluate their respective roles. Before doing so, we note that the NCAA rules waiver process has important implications for the procedural fairness and substantive justice afforded student-athletes in connection with athlete eligibility issues because it permits them to prospectively challenge the substantive scope and application of an NCAA bylaw before committing a violation and rendering themselves ineligible, an action that triggers the SARC process.¹⁷⁶ In *NCAA v. Brinkworth*, a Florida appellate court described this waiver process and concluded:

Under the NCAA procedure, the university submits a waiver request on behalf of the student-athlete to the eligibility staff. If the staff turns the waiver request down, then the university may submit an appeal on behalf of the student-athlete to the Eligibility Committee. In this case, after a rejection by the Eligibility Committee, the Committee also entertained a request for reconsideration. As we view the matter, these procedures are both adequate and fair.¹⁷⁷

Open Forum. Although only an NCAA member institution may bring an athletic eligibility reinstatement request and present a case in favor of

¹⁷⁵ AAA Section 9 arbitration awards are not subject to judicial second guessing on the merits, but AAA/U.S. CAS doping arbitration awards may be appealed and are subject to *de novo* review by the CAS.

¹⁷⁶ See NCAA Processes, *supra* note 9, at 275–76. This is precisely the path taken by Jeremy Bloom in his challenge to NCAA amateurism bylaws. *Id.* at 281–82.

¹⁷⁷ *NCAA v. Brinkworth*, 680 So.2d 1081, 1084 (Fla. Dist. Ct. App. 1996).

reinstatement,¹⁷⁸ student-athletes provide written statements that are included as part of a university's reinstatement request,¹⁷⁹ participate in appeals to the SARC, and may be represented by counsel.¹⁸⁰ An important feature of this internal process, which is advantageous to student-athletes, is that they pay neither filing fees nor any costs in connection with any stage of this process and usually do not incur attorneys' fees because the university generally represents their interests in a full and adequate manner.¹⁸¹ In addition, NCAA bylaws permit an institution to pay a lawyer to represent a student-athlete before the SARC or in communications with its staff.¹⁸²

Independent and Impartial Adjudication. Unlike CAS and AAA arbitration, which are external processes utilizing independent arbitrators, the NCAA's athletic eligibility determination processes are internal forms of arbitral adjudication. First, the university at which a student-athlete is enrolled determines whether he or she committed a violation; second, the SARC decides the reinstatement condition to be imposed based on the facts presented to it regarding a student-athlete's culpability based on his or her conduct, knowledge, and intent. Because of its interest in maintaining a student-athlete's eligibility and also because a student-athlete's violation is an institutional violation for which it can be sanctioned, the university does its best to find facts that mitigate his or her culpability for a violation and

¹⁷⁸ Reinstatement Questions, *supra* note 70. Generally in private associations, only its members may avail themselves of association processes and only members are directly responsible to the association.

¹⁷⁹ Policies and Procedures, *supra* note 72, at 1. See *Bloom v. NCAA*, 93 P.3d 621, 628 (Colo. App. 2004); *NCAA v. Brinkworth*, 680 So.2d 1081, 1084-85 (Fla. App. 1996).

¹⁸⁰ Policies and Procedures, *supra* note 72, at 8-10.

¹⁸¹ In addition, should a student-athlete seek the Assistance of a lawyer, lawyer fees may be covered by the student-athlete's university. NCAA BYLAW 16.3.2

¹⁸² NCAA BYLAW 16.3.2 (NCAA proceedings related to a student-athlete's eligibility). Measured against the process due in student challenges to adverse consequences to their student status—"an informal give and take" where students have an opportunity to tell their story, the NCAA student-athlete reinstatement process readily passes due process muster. *Goss v. Lopez*, 419 U.S. 546 (1975). Students rarely succeed in challenges to university decisions regarding admissions, continued matriculation, academic standards and academic dismissals, or to challenges to decisions in disciplinary processes. See, e.g., *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978); *Harris v. Blake*, 798 F.2d 419 (10th Cir. 1986); *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990); *Davis v. Regis College, Inc.*, 830 P.2d 1098 (Colo. App. 1991); *Shabrabani v. Nova Univ.*, 779 F. Supp. 599 (S.D. Fla. 1991). Challenges to a grade or grading practice require evidence of serious wrongdoing. See, e.g., *Naragon v. Wharton*, 737 F.2d 1403 (1984); *Keen v. Penson*, 970 F.2d 252 (7th Cir. 1992).

prevent or reduce any period of ineligibility. A majority of its members are institutional faculty members and others outside the athletic departments of NCAA colleges and universities. The SARC appointment process,¹⁸³ composition,¹⁸⁴ length of service,¹⁸⁵ and procedures¹⁸⁶ all underscore its independence and impartiality despite being an internal NCAA committee. Its members are prohibited from hearing cases involving an institution from the same athletic conference as their institution. To date, no student-athlete or court has expressed any general or individualized concerns regarding the independence or impartiality of the SARC or its members.¹⁸⁷

¹⁸³ The NCAA Division I Administration Cabinet makes appointments to most NCAA committees, including to the SARC. It operates independently of NCAA senior administrative staff.

¹⁸⁴ The SARC includes faculty and others who are not part of the competitive athletic environment. There are subdivisinal and other demographic requirements. The Committee includes a non-voting member of the national student-athlete advisory committee. For a list of current members, see NCAA Division I Student-Athlete Reinstatement Committee, *see* http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1REINSTATE.

¹⁸⁵ Committee members serve two three-year terms. *See id.* On occasion the term is extended to assure continuity of experience on a committee. *See, e.g.*, Memorandum from the Div. I Student-Athlete Reinstatement Comm. to the Div. I Admin. Cabinet, Meeting Materials of Div. I Admin. Cabinet at 143 (Feb. 1101, 2014) (requesting one-year extension of a member's term), *available at* <http://www.ncaa.org/sites/default/files/DI%20Admin.%20Cabinet%20materials%20%202.14.pdf>. One of the authors served nine years on the Division I Committee on Infractions. During that time, several resignations occurred because of the heavy time demands, and one member resigned because of appointment to another NCAA committee. She knows of no instance in which a member of the Infractions Committee or, for that matter, any NCAA committee, failed to complete a term because of pressure to resign related to committee decisions. Committee members are appointed through conferences. Another reason for a committee member to resign is movement to a position at a university in a different conference.

¹⁸⁶ Committee members may not hear cases involving institutions from the same athletic conference as their institution. Policies and Procedures, *supra* note 72, at 14–15. Ex parte communications with NCAA staff are prohibited. *Id.* at 12–13.

¹⁸⁷ In employment and consumer transaction disputes, courts have invalidated a “take-it-or-leave-it” provision in an arbitration agreement providing one party with unilateral control over selection of the arbitrator(s) because it does not provide a process for ensuring a fair and impartial arbitration proceeding that is an effective substitute for a neutral judicial forum. *See, e.g., McMullen v. Meijer, Inc.*, 355 F.3d 485 (6th Cir. 2004); *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798 (Mo. 2015), reh'g denied (June 30, 2015); *Nishimura v. Gentry Homes, Ltd.*, 134 Haw. 143, 338 P.3d 524 (2014). 2015 WL 2061986 (Mo.). Unlike these types of cases, NCAA student-athlete eligibility disputes generally do not involve the alleged violation of a federal or state statutory right that cannot be effectively vindicated because the arbitration proceeding is unfair or biased. Moreover, the application of even the very deferen-

Full and Fair Opportunity to be Heard. The most significant element of the reinstatement process that inures to the benefit of student-athletes is that a student-athlete's own university conducts the factual investigation and decides whether a student-athlete committed violations, not the SARC or its staff. A university's interests typically are co-extensive with those of its student-athletes. It shares the goal of surfacing any facts that might exculpate its student-athlete or mitigate culpability, both to protect a student-athlete's interests and facilitate his or her return to competition as well as to avoid liability and a sanction for a student-athlete's rules violation, which also constitutes a violation by the institution.¹⁸⁸

The SARC's decision regarding the athletic eligibility effects of an NCAA rule violation focuses on a student-athlete's culpability for it, and does not involve consideration of whether he or she committed a violation. In addition, student-athlete reinstatement guidelines regarding the reinstatement conditions to be applied limit the scope of the SARC's discretion and, therefore, also limit the extent to which a student-athlete's independent presentation of exculpatory evidence might influence its decision.¹⁸⁹

Timely, Reasoned Decision. The effective governance of sports competition requires speedy resolution of athlete eligibility disputes. Because there are a limited number of intercollegiate athletic competitions in which stu-

tial arbitrary and capricious review standard of SARC decisions permits courts to resolve the merits of NCAA student-athlete eligibility disputes in extreme cases, which does not occur under the traditional scope of judicial review of arbitration awards resolving employment or consumer transaction disputes. On the other hand, courts have upheld a collectively bargained provision in an employment agreement giving one party the unilateral authority to select the arbitrator(s) to resolve a future dispute because "the parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen." *Williams v. NFL*, 582 F.3d 863, 885 (8th Cir. 2009) (citing *Winfrey v. Simmons Foods, Inc.*, 495 F.3d 549, 551 (8th Cir. 2007)).

¹⁸⁸ See *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004); *NCAA v. Brinkworth*, 680 So.2d 1081, 1084-85 (Fla. App. 1996).

¹⁸⁹ Claims cognizable on appeal are restricted to a SARC refusal to depart downward from a guideline reinstatement condition or a staff decision assigning a greater degree of student-athlete culpability than a university believes is warranted. Policies and Procedures, *supra* note 72, at 8. It may relitigate a factual conclusion or its conclusion that particular violations were committed only if it produces new evidence on appeal. *Id.* See NCAA Division I Request to Appeal Decision of Student-Athlete Reinstatement Staff, on file in office of JR Potuto. Appeals are handled either by telephone or on the paper record. Telephone appeals typically take 30 minutes, with SARC staff, university, and student-athlete each allocated ten minutes. NCAA BYLAW 21.7.7.3.3.1; Policies and Procedures, *supra* note 72, at 8. The reinstatement staff attempt to resolve a case before a student-athlete's next date of competition.

dent-athletes can participate annually, and they have only four years of competition eligibility within a five-year window,¹⁹⁰ student-athlete eligibility to disputes need speedy resolution. Many student-athlete violations are resolved as soon as a student-athlete repays any extra or impermissible benefits received without any adverse consequences on their athletic eligibility.¹⁹¹ Other NCAA rules violations disqualify a student-athlete from competing in only one or two games or athletic events.¹⁹² The potentially more significant adverse consequences of other violations may be ameliorated by a showing of a student-athlete's lack of any intent to commit a violation or by some other mitigating circumstance.¹⁹³ Even when a student-athlete is held out of competition for significant periods or is rendered permanently ineligible, he or she often disputes neither the commission of a violation nor a university's factual rendition of how and why it occurred.¹⁹⁴ Brief summaries of SARC appeals decisions without identification of the involved institution or

¹⁹⁰ NCAA BYLAWS art. 12.8 (Seasons of Competition: Five-Year Rule). There also are only a specified number of competitions per season, and individual sports often have 10 or fewer. Nebraska women's swimming and diving team, for example, competed in 10 regular season competitions in 2013-14. See *Swimming and Diving: 2012-13 Schedule*, NEBRASKA ATHLETICS, available at http://www.huskers.com/SportSelect.dbml?SPSID=85&SPID=31&Q_SEASON=2012 (last visited Jan. 26, 2015). The Alabama women's outdoor track and field team, as another example, competed in six meets. See <http://www.rolltide.com/sports/c-ctrack/sched/alab-c-x-track-sched.html>.

¹⁹¹ See NCAA BYLAW 16.01.1.1. See, e.g., Reinstatement Guidelines, *supra* note 44; BYLAW GUIDELINE 12.1.2.1.6 (3), at 5; NCAA BYLAW 16.11.2.1 (3), at 23. Unless other violations are involved (payment was made by an agent, for example), disgorgement of the benefit is the only consequence when the benefit is worth \$100 or less. For a full discussion of NCAA reinstatement guidelines, see Reinstatement Processes, *supra* note 9.

¹⁹² Extra benefit withholding penalties, for example, begin at 10 percent of a year's competitions for benefits over \$100 up to 30 percent for benefits over \$700. Reinstatement Guidelines, *supra* note 43; NCAA BYLAW 16.11.2.1(3). Receipt of prize money over necessary expenses pre-enrollment, as another example, triggers a withholding penalty of 10 percent of a year's competitions for net prize money over \$500 up to 30 percent for net prize money over \$1000. Reinstatement Guidelines, *supra* note 44, at 4.

¹⁹³ See, e.g., NCAA BYLAW 10.1(b); Reinstatement Guidelines, *supra* note 44, at 4. The mitigating circumstances are narrowly defined, however. See *infra* note 225 and accompanying text.

¹⁹⁴ *Lasege*, 53 S.W.3d at 84 ("The NCAA's eligibility determinations are entitled to a presumption of correctness—particularly when they stem from *conceded* violations of NCAA regulations.").

student-athlete are readily accessible on the NCAA website and may be relied upon as precedent in future similar cases.¹⁹⁵

Consistent, Uniform Body of Law. Although a particular reinstatement guideline may be criticized as ill-advised or too harsh, guidelines substantially reduce the likelihood of biased treatment of a student-athlete in a particular case or inconsistency across cases. Consistency is also enhanced by having the same five-member SARC resolve all appeals in a given year rather than utilizing different panels of adjudicators, as is the case with different three-person combinations of CAS and AAA arbitrators. In addition, the availability of published summaries of SARC decisions contributes to the development of consistent treatment of student-athletes pursuant to the SARC appeals process for resolving athletic eligibility issues arising out of their violation of NCAA rules.

D. DTS

The DTS student-athlete drug testing violation adjudication process equals or exceeds the procedural protections of SARC processes.¹⁹⁶ The appointment of DTS members follows the same procedures as the appointment of SARC members. As a whole, the DTS is more independent than SARC because it includes at least one member — a high school representative — not employed by an NCAA university or conference, as well as medical professionals and a lawyer.¹⁹⁷ The impartiality and neutrality of the DTS is enhanced by its adjudication process, which maintains the anonymity of the student-athlete and institution bringing an appeal. In contrast to the SARC process for student-athlete reinstatement, a student-athlete who desires to challenge a positive drug test or the consequences for his or her athletic eligibility has a right to require the university to bring an appeal on his or her behalf.¹⁹⁸ Both the student-athlete and university may be represented by counsel, present evidence and witness testimony, and ask questions of those involved in the sample collection, chain of custody, and testing procedures.¹⁹⁹ Notice of the result of the DTS's adjudication is generally provided

¹⁹⁵ See Policies and Procedures, *supra* note 72, at 7–14.

¹⁹⁶ For a general description of the procedure for challenges to positive drug test result, see Drug Test Appeals, *supra* note 37.

¹⁹⁷ See Drug-Test Manual, *supra* note 37.

¹⁹⁸ *Id.*

¹⁹⁹ Drug Test Appeals, *supra* note 37, ¶ 5, ¶ 8. The Drug Test Subcommittee deliberates and decides the appeal immediately after the appeal is concluded. *Id.* at ¶ 9.

to the student-athlete's university immediately after the hearing, which is usually before his or her next scheduled athletic competition.

Unlike SARC decisions, DTS decisions are not posted on the NCAA website, even in a truncated form similar to SARC reports. Thus, summaries of past DTS decisions in similar cases are not available to a university or to student-athletes and their counsel for use as precedent in DTS proceedings. Although the DTS has published guidelines for eliminating or reducing the presumptive one-year period of intercollegiate athletics eligibility for a positive drug test, its failure to publish even brief summaries of its adjudications inhibits the documented development of a uniform body of NCAA drug testing law with consistent, predictable application to all student-athletes.²⁰⁰

V. CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, the authors disagree with critics who believe that a wholesale systematic move from the current NCAA internal system for resolving student-athletes' rule violations that adversely affect their athletic eligibility to an external dispute resolution system would materially enhance procedural fairness and substantive justice for student-athletes. On the contrary, the authors believe that an external process risks narrowing those protections. In this part, we evaluate some of the reasons proffered by commentators for moving to an external system. We then suggest reforms to enhance the procedural fairness and substantive justice afforded student-athletes without intruding on NCAA associational rights, its prerogatives as a private association, or the central requisites of NCAA enforcement and management of student-athlete eligibility issues.

A. *Advocates for Change Misunderstand Reinstatement Process*

In calling for an external student-athlete reinstatement process, critics proceed from a fundamental misunderstanding of how athlete eligibility issues currently are handled internally by the NCAA. In other words, they erroneously assume that, similar to the NCAA process for adjudicating rules violations by member institutions and imposing sanctions, NCAA staff investigate student-athlete rules violations and bring charges that are resolved

²⁰⁰ As a justification for not doing so, the NCAA takes the position that each case, which typically focuses on the student-athlete's culpability for a positive drug test, should be decided on its own merits. Given that the SARC's appeal process generally focuses on a student-athlete's culpability for violation of other NCAA rules, this is not a convincing rationale.

by an internal NCAA adversarial hearing.²⁰¹ Based on this misunderstanding, they advocate the need for an external system similar to CAS or AAA arbitration to offset what they see as an internal NCAA system stacked against student-athlete interests.

Critics also fail to consider the literally thousands of student-athlete eligibility issues that arise annually, and what that portends for an external system to resolve disputes. First, the nature and scope of potential student-athlete NCAA rules violations are much broader than those of Olympic and professional sport athlete rules violations, which involve primarily disciplinary issues for on-field or off-field misconduct and drug use that do not require specialized consideration of academic requirements or extra benefits rules. Second, there are hundreds of thousands more student-athletes who participate in intercollegiate sports and also many more college competi-

²⁰¹ See e.g., Ross & Karcher, *supra* note 33, at 80 (“Imagine being a star athlete at a prominent Division I college or university. Now suppose that the National Collegiate Athletic Association (“NCAA”) notified your college or university that you were being investigated for possible violations of their regulations, and shortly thereafter found a violation, declaring that you were ineligible to participate in intercollegiate athletics.”). Critics and commentators also regularly discuss college athletics and student-athletes as though they all were elite athletes, all competed in the FBS, and all were concentrated in revenue sports with professional analogues. See, e.g., RONALD A. SMITH, *PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM* (University of Illinois Press, 2011); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 71 (2006); Frank G. Splitt, *Time for Accountability in Sports: Corrupt Collegiate Athletics Overshadow Faltering Academic Mission*, NATIONAL CATHOLIC REPORTER, Nov. 14, 2008, at 11a; Report of the Knight Found., *Comm’n on Intercollegiate Athletics, A Call to Action: Reconnecting College Sports and Higher Education* (2001); MURRAY SPERBER, *BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION* (2000); The Coalition on Intercollegiate Athletics (COIA), *A Framework for Comprehensive Athletics Reform* (2003); F. WILLIAM G. BOWEN & SARAH A. LEVIN, *RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES* (Princeton Univ. Press 2003); H. JAMES J. DUDERSTADT, *INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT’S PERSPECTIVE* (2000). Because of the potentially big payoffs for professional athletes, the impact of eligibility decisions on student-athletes with professional prospects may have particularly significant consequences. These student-athletes constitute only a minuscule proportion of all NCAA student-athletes, however. See Tony Manfred, *Here Are The Odds That Your Kid Becomes A Professional Athlete (Hint: They’re Small)*, BUS. INSIDER (Feb. 10, 2012), available at <http://www.businessinsider.com/odds-college-athletes-become-professionals-2012-2?op=1>. Even assuming, as the authors do not, that the current NCAA system ill-serves elite athletes, it is hardly wise policy to dismantle a system that works well for the great majority in preference to one that focuses on a small minority.

tions than Olympic and professional athletes and sports competitions,²⁰² for which eligibility disputes between athletes and their respective governing bodies are generally resolved by external arbitration.²⁰³ An extremely conservative estimate of the total number of intercollegiate competitions involving the 120 NCAA Division I Football Bowl Subdivision (FBS) universities held annually is more than 25,000;²⁰⁴ the total number of all annual intercollegiate athletic competitions in NCAA Divisions I, II, and III likely is more than 50,000.²⁰⁵ Third, the vast majority of student-athlete

²⁰² More than 1100 colleges and universities field varsity athletic teams on which more than 460,000 NCAA student-athletes compete. See text accompanying *supra* note 38. Approximately 13,300 athletes competed in the most recent summer and winter games (2780 in the 2014 Sochi Winter Games; registration.olympic.org/en/faq/detail/id/194; 10,500 in the 2012 London Summer Games, www.englishclub.com/vocabulary/sports-olympics-2012-london.htm). There are 1200 Major League Baseball players (40 players on a roster and 30 teams), and 1696 National Football League players (53 players on a roster and 32 teams). Major League Baseball Official Info, MLB.COM, http://mlb.mlb.com/mlb/official_info/about_mlb/rules_regulations.jsp; <http://mlb.mlb.com/team/index.jsp>, NFL.COM, <http://www.nfl.com/teams>; Marc Illibridge, *The Anatomy of a 53-Man Roster in the NFL*, available at <http://bleacherreport.com/articles/1640782-the-anatomy-of-a-53-man-roster-in-the-nfl>.

²⁰³ Mitten & Davis, *Athlete Eligibility Requirements*, *supra* note 7, at 143 (“Although arbitration is an efficient process that works well for resolving athletic eligibility disputes for the few thousand U.S. professional and Olympic sport athletes, it probably is not a feasible alternative for resolving eligibility disputes affecting the nation’s more than . . . four hundred thousand NCAA student-athletes.”).

²⁰⁴ Division I FBS universities must sponsor at least 16 intercollegiate sports. NCAA BYLAW 20.9.9.1. I. Virtually all of them sponsor many more; for example, The Ohio State University sponsors 37 sports. Even using just the minimum number that is required, there are 1920 teams in Division I FBS alone. Division I FBS varsity competitions for individual sports teams average at least eight competitions per team annually exclusive of post season. As one example, the Nebraska women’s swimming and diving team competed in 12 regular season competitions in 2012-13. http://www.huskers.com/SportSelect.dbml?&DB_OEM_ID=100&SPID=31&SPSID=85. Team sports generally have many more competitions. Baseball heads the list, with 56 possible regular season games. NCAA BYLAW 17.2.5.1. Men’s and women’s basketball teams may play 29 regular season games. NCAA BYLAW 17.3.5. Football trails with 12 regular season games. NCAA BYLAW 17.9.5.1. Assuming only ten competitions annually for each FBS team and the minimum number of sports teams sponsored, the number of competitions is 9,840 (5 x 19,680). This number is an undercount, as FBS teams routinely play teams from the other subdivisions in Division I. Some sports also play teams in Divisions II and III. The actual number of annual FBS competitions likely is more than 25,000.

²⁰⁵ Team sponsorship requirements are fewer in the other two Division I subdivisions and in Divisions II and III. The number of total competitions, therefore, would not be four times the number in Division I FBS, but likely is higher than

rules violations are not serious and are resolved with no or minimal impact on their athletic competition eligibility.

B. Proposed Reforms

Although the authors do not believe a wholesale move to an external arbitration system to adjudicate student-athlete eligibility disputes is warranted or advisable, we believe the two following reforms would potentially enhance the procedural fairness and substantive justice provided to student-athletes without jeopardizing the NCAA's needed autonomy or ability to manage its affairs in an efficient and effective manner consistent with its legitimate objectives.

1. Sunshine to Ensure Consistent Resolution of Student-Athlete Eligibility Issues.

The arbitration appeal would be heard by a panel of three experts in intercollegiate sports law (e.g., sports law professors, AAA arbitrators with specialized intercollegiate sports knowledge).²⁰⁶ The appeals panel either could be a permanent panel appointed to hear appeals or one selected from a predetermined pool of at least 15 experts (one selected by the student-athlete, one selected by the NCAA, and the panel chair selected by agreement of the two experts). The advantage to the first alternative is the likelihood of enhanced consistency among the cases.

2. Student-Athlete Limited Right to External Arbitration Appeal

When the SARC imposes a reinstatement condition resulting in a student-athlete's loss of eligibility for more than one calendar year, we propose that the student-athlete should have the right to external arbitral review of the SARC's decision. It is outside the scope of this Article to provide a full description of how this process might be formulated, but it should have the following elements.

twice the number in Division I FBS. There are approximately 8560 annual Olympic and national team competitions in Olympic years (205 countries, 400 events in Olympic years, 28 summer and 7 winter sports each held every two years, plus a number of additional national competitions). Olympic.org, available at <http://www.olympic.org/national-olympic-committees>; see MITTEN ET. AL, SPORTS LAW AND REGULATION 261. There are 2430 annual major league baseball games (15 x 162), more than in any other professional sport.

²⁰⁶ For a fuller discussion of this and other reforms to the current student-athlete reinstatement process, see generally Reinstatement: Say What?, *supra* note 30.

(1) The arbitration appeal would be heard by a three-person panel of independent arbitrators²⁰⁷ (with one selected by the student-athlete, one selected by the NCAA, and the panel chair selected by agreement of the parties' chosen arbitrators) who would be drawn from a specialized pool of at least 15 AAA arbitrators with expertise in intercollegiate athletics sports law. Alternatively, all appeals could be resolved by a permanent panel of arbitrators comprised of three individuals with specialized knowledge in intercollegiate sports law. The advantage to the latter alternative is the likelihood of enhanced consistency among the cases it resolves.

(2) The arbitral panel would apply an "arbitrary and capricious" standard of review, meaning the SARC's decision would be overturned only if "clearly erroneous" (i.e., "unsupported by substantial evidence").²⁰⁸ We acknowledge that CAS and AAA arbitral review generally employs a *de novo* review standard that permits the arbitrators to substitute their judgment for that of the sport governing body in resolving athlete eligibility issues,²⁰⁹ but cases arising in the context of Olympic sports do not embody the unique features of the NCAA student-athlete reinstatement process. First, the conclusion that a violation was committed is made by a student-athlete's institution, a fact-finder most inclined to advance a student-athlete's interests by discovering exculpatory evidence regarding his or her commission of a violation and any mitigating factors that ameliorate culpability for a violation. Second, the SARC promulgates reinstatement conditions embodied in reinstatement guidelines that constrain the reinstatement staff's discretionary decisions and, in particular, preclude it from imposing an increased reinstatement condition beyond an applicable guideline. Third, there is a narrow range of factors that justify mitigation of a student-athlete's responsibility for a rules violation.²¹⁰ This narrow range of factors that may

²⁰⁷ We suggest that this pool be comprised exclusively or at least primarily of tenured law professors who teach and write in the field of college sports law. In our opinion, sports law professors have the best and broadest background in sports law issues as well as the requirements of procedural due process. Although they are employees of NCAA universities, we also believe that tenured sports law professors will be impartial (particularly if they are precluded from reviewing any cases involving their own university or another one in its athletic conference) and, compared to practitioners, will have no potential professional stake in the outcome of cases.

²⁰⁸ See *supra* note 114 and accompanying text.

²⁰⁹ See *supra* note 128 and accompanying text.

²¹⁰ One of the authors prosecuted criminal cases and also was a reporter for a sentencing and corrections drafting project. She can attest that mitigation in SARC assessment of culpability does not typically consider the type mitigation that is available in criminal sentencing. She worked on an appeal involving a student-athlete who violated NCAA bylaws by selling his complimentary tickets for a foot-

be considered eliminates the opportunity for nuanced exercises of discretion by reinstatement staff. Fourth, the SARC has authority to decline to impose a reinstatement guideline condition or to overturn a staff decision, but it is only permitted to decrease the reinstatement condition (e.g., student-athlete's period of ineligibility) imposed by the reinstatement staff.

(4) The arbitration panel would complete its review of a case, which would not necessarily require a hearing (but if it did would be by telephone), and provide a brief reasoned decision in writing within seven days after the filing of an appeal unless the parties agree to an extended time of time.²¹¹

(5) It is important to ensure needed uniformity in the resolution of student-athlete reinstatement appeals and to avoid a potential Dormant Commerce Clause problem arising out of judicial review of the arbitration panel's awards by courts in different jurisdictions, which creates the risk of potentially conflicting judicial decisions. Therefore, the NCAA (which is based in Indianapolis), its member institutions, and student-athletes should agree that Indiana courts have exclusive jurisdiction and authority to review the arbitration panel's awards,²¹² which would apply Indiana law and the traditional very limited scope of judicial review of arbitration awards.²¹³

As we discussed previously, the NCAA employs an ineligible-until approach in reinstatement cases to incentivize prompt institutional investigations and reports of violations, to decrease the competitive advantage an institution would obtain if an ineligible student-athlete could compete until

ball game (at the same market price that other students sold their tickets). SARC provided no mitigation for the fact that the athlete came from a family of limited means, that the sale was the first such activity by the athlete, that it was prompted by a particular family emergency. Limited mitigation was accepted for the fact that the athlete came forward of his own volition to report the violation.

²¹¹ This would be an adequate period of time for the arbitrators to resolve most cases. By comparison, the CAS ad hoc Division resolves cases within 24 hours after their filing. One of the authors has resolved several AAA Section 9 cases within seven days of their filing by aggrieved Olympic sport athletes.

²¹² Mitten & Davis, *Athlete Eligibility Requirements*, *supra* note 7, at 144 n.354 ("Establishing a uniform national substantive law for resolving intercollegiate athletic eligibility disputes would be consistent with the CAS objective of establishing a worldwide, uniform *lex sportiva* for Olympic and international sports.").

²¹³ *See supra* notes 132–140, 149–150, and accompanying text. In reviewing the arbitration award, an Indiana court will apply an extremely deferential standard of review (i.e., even lower than arbitrary and capricious review) that is virtually the same in all jurisdictions and won't resolve the merits of the case even if it determines the arbitration award is so flawed on procedural or substantive grounds that it will not be judicially enforced. The court vacates the award, which would effectively uphold the SARC determination.

a final determination is made that he or she was ineligible, and to minimize the instances in which an ineligible student-athlete who competed avoids any adverse consequences because he or she leaves a university before an ineligibility sanction can be enforced. The NCAA adopted its Restitution Rule to handle instances in which the SARC's ineligibility sanction is enjoined by a trial court during the pendency of litigation, but is reversed on appeal.²¹⁴ The policy considerations underlying the ineligible-until approach and the Restitution Rule need to be considered if student-athletes are able to appeal the SARC's ineligibility determination to an arbitration panel.

In part, we address these considerations by requiring that an arbitration panel resolve an appeal within seven days of its filing, which should be required to be done within three business days after written notification of the SARC's ineligibility sanction determination.²¹⁵ What cannot be controlled, however, is how long it will take a court to review the arbitration panel's award. We believe that the optimum accommodation of the parties' competing interests is the following proposal. A student-athlete would be able to compete during the seven-day period during which an arbitration appeal is filed and the panel renders its decision. If the panel affirms the SARC's ineligibility determination: (a) the institution would be subject to the Restitution Rule if the student-athlete competed during that week; (b) if the student-athlete requests judicial review of the arbitration award by an Indiana court, the student-athlete would be ineligible to compete during the pendency of the judicial appeal, which is very unlikely to result in vacation of the panel's decision under the traditional standard of review. If the arbitration panel eliminates or reduces the SARC's ineligibility determination and the NCAA appeals to an Indiana court, the student-athlete would be eligible to compete during the pendency of the appeal and the Restitution Rule could not be applied against his or her institution even if the panel's decision is judicially vacated.

C. *Final Thoughts*

Rulemaking authority, including the ability to adopt private dispute resolution procedures, derives directly from the system that spawns it. Sports dispute resolution processes are tailored to respond to the individual-

²¹⁴ See *supra* notes 114–15 and accompanying text.

²¹⁵ We believe this period of time would be sufficient, given that all relevant documents and information regarding the case have already been developed. Arbitration appeal forms should be available on the NCAA website, and appeals could be required to be filed electronically.

ized needs of the particular system to ensure effective and efficient internal governance of athletic competition.²¹⁶ Although the rulemaking and dispute resolution processes for NCAA and Olympic sports are different, each corresponds to the specific demographics, geographical scope, and requisites of their respective athletic competitions, governing bodies, and athletes. Their respective private systems of dispute resolution provide procedural fairness and substantive justice to athletes whose eligibility is affected by their decisions, thereby warranting the significant degree of judicial deference afforded to their respective internal or external adjudication processes.

²¹⁶ See, e.g., Potuto & Parkinson, *If It Ain't Broke, Don't Fix It: An Examination of the NCAA Division I Infractions Committee's Composition and Decision-Making Process*, 89 NEB. L. REV. 101 (2011); *supra* notes 117, 142–146 and accompanying text.



Constitutional Voting Rules of Australian National Sporting Organizations: Comparative Analysis and Principles of Constitutional Design

Robert D. Macdonald and Ian M. Ramsay¹

ABSTRACT

In 2012 and 2013, four Australian national sporting organizations (“NSO’s”)—the Australian Football League, the Australian Rugby League Commission Limited, BA Limited (Basketball Australia) and Football Federation Australia Limited—were also the national league competition organizer (“NLCO”) for their sport. All four NSO’s are not-for-profit companies. We apply the model of optimal voting rules proposed by James Buchanan and Gordon Tullock to the actual voting rules adopted by the NSO’s. This model focuses on the minimization of costs associated with voting. We find that the NSO voting rules largely conform to the model although there are exceptions. In particular, “constitutional issues” (amendment of the NSO’s constitution and company wind up) require the approval of a greater propor-

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tion of the members than “electoral issues” (election and removal of company directors). Those issues with the highest costs (such as the appointment and removal of NSO company members and national league clubs) are typically removed from the domain of voting by company members to strengthen the independence of the NSO from the company members.

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I. INTRODUCTION

Voting is a common non-market resource allocation mechanism and an important means of exercising control in organizations. It is central to the collective decision-making processes of company members and directors alike, as well as the decision-making processes of many unincorporated associations. Yet surprisingly little attention is paid to the choice of voting majority rules adopted by sporting entities in either the sports law or sports economics literature.

National Sporting Organizations (“NSO’s”) are the cornerstones of Australian sport governance. The responsibilities of an NSO range from the promotion and development of a sport to the selection of national representative teams. One of the most important roles of an NSO is the organization and conduct of the elite-level club-based national league, or the sanctioning of another entity to act as that national league competition organizer (“NLCO”).

This article is an analysis of the differences in the voting rules in the corporate constitution of four leading NSO’s, the Australian Football League (“AFL”), Football Federation Australia Limited (“FFA Limited”), BA Limited (trading as “Basketball Australia”) and the Australian Rugby League Commission Limited (“ARLC Limited”). All four NSO’s are companies limited by guarantee incorporated pursuant to the *Corporations Act 2001* (Cth) (Austl.), yet the company members, their voting rights and voting majorities required to pass resolutions of different kinds are substantially different. To explain these differences, we adapt and apply the model of optimal voting majority rules proposed by public choice economists James Buchanan

and Gordon Tullock.² The primary focus of our study is the corporate constitution of each NSO during a unique era in 2012 and 2013, when all four NSOs, or a wholly owned subsidiary, were also the NLCO in their respective sports.

The three basic options for the exercise of power by the members of a company are constitutional amendment, replacement of the company directors or wind up of the company. Sport governance further involves substantial regulation of the activities of sporting entities in labour, product and capital markets. We are therefore interested in comparing the constitutional voting rules faced by company members on the fundamental “*constitutional issues*” of amendment of the corporate constitution and voluntary wind up of the company, the “*electoral issues*” of the election and removal of company directors and a limited selection of “*regulatory issues*”, the admission and removal of company members and national league clubs.

According to Buchanan and Tullock, rational individuals drafting a political constitution from behind a “veil of uncertainty”, would specify the voting majority rule for any issue as the proportion of voters which minimizes the sum of the expected external costs and expected decision-making costs associated with that issue.³ External costs are those imposed by the collective actions of others when an individual is on the losing side of a vote. These represent the private negative externalities incurred by voters as the result of a collective decision and fall to zero when the voting rule requires unanimity, whereby no voter would be subject to the costs of a collective decision being made without their agreement.

Decision-making costs are clearly understood as being incurred in the time, effort and cost of negotiating to secure collective agreement. Decision-making costs are a positive function of the required majority, rising to a maximum when the voting rule requires unanimity.

Both external costs and decision-making costs are influenced by the nature of the issues being voted upon as well as the nature of the voters—their identity, number and heterogeneity of preferences. The central normative implication of this model is that for any issue, where the expected external costs are high relative to the expected collective decision-making costs, the passage of a resolution of the company members ought to require the support of a larger proportion of voters in comparison to the majority required when there is a relative equality of external costs and decision-mak-

² JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY*, EDITED AND WITH AN INTRODUCTION BY CHARLES K. ROWLEY (Charles K. Rowley, ed. Liberty Fund 2004) (1962).

³ See *infra* note 78 on the assumptions of the Buchanan & Tullock model.

ing costs. We argue this model offers a good explanation of the differences in the constitutional voting rules faced by the company members of these four NSO's, while also noting the influence of the mandatory and default voting majority rules of the *Corporations Act 2001* (Cth) (Austl.).

In applying Buchanan and Tullock's constitutional model to the corporate context, we extend the analysis of sport and league governance to unexplored territory. Legal scholars and economists tended to concentrate upon the (optimal) assignment of decision-making rights among the entities involved in the collective enterprise of sport but overlooked analysis of the voting majority rule, the collective decision-making process itself; even though voting is a central aspect of constitutional drafting. The four Australian case studies fill another gap, by providing the institutional detail previously overlooked in the development of earlier normative models of optimal league and sport governance. Further comparison of the constitutional voting rules of major leagues in the United States and England also highlights the utility of the Buchanan and Tullock model for analysis of incorporated and unincorporated entities of various kinds, irrespective of jurisdiction.⁴

We develop this argument as follows. In Part II we outline the relevant features of Australian sport and league governance. Part III explains Buchanan and Tullock's model in greater detail, noting the impact of the nature of the issue and the identity, number and preference heterogeneity of voters upon the hypothesized optimal voting majority rule. Part IV outlines the historical context and detail of the constitutional voting rules of each NSO, then Part V compares and contrasts these rules. All four NSO's offer examples in line with the Buchanan and Tullock model, along with some confounding examples. In particular, we show how this model aids analysis of the evolution of the independence of the NSO/NLCO board of directors from the company members. A conclusion follows in Part VI.

⁴ See, e.g., THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED ARTICLES OF ASSOCIATION (amended May 31, 2007), in PREMIER LEAGUE HANDBOOK SEASON 2013/14 469–87 (2013) [hereinafter FAPL LIMITED ARTICLES], <http://www.premierleague.com/content/dam/premierleague/site-content/News/publications/handbooks/premier-league-handbook-2013-14.pdf>, [http://perma.cc/Q2X2-PEU9]; CONSTITUTION & BYLAWS OF THE NATIONAL FOOTBALL LEAGUE (rev. 2006) [hereinafter NFL CONST.], http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf, [http://perma.cc/H4GF-4MKF]; MAJOR LEAGUE CONSTITUTION (filed Sept. 20, 2013) [hereinafter ML CONST.], available at <http://www.sanjoseca.gov/DocumentCenter/View/21719>, [http://perma.cc/M9A7-LCAQ].

II. SPORT GOVERNANCE AND CORPORATE LAW IN AUSTRALIA

This century has seen increased professional and policy emphasis upon the good governance of sport, with parallel growth of academic interest in both the sports law and sport economics literature.⁵ The Organization for Economic Co-operation and Development (“OECD”) defines corporate governance as the set of relationships between the management, board, shareholders and other stakeholders of a company which provide structure for the formulation, attainment and review of corporate objectives and performance.⁶ Conceptually, we define sport governance to include these internal corporate governance aspects of sporting entities—clubs, competition organizers, State and Territory (sub-national) sport governing bodies (hereinafter “State Associations”), NSO’s, international federations (“IF’s”) and other entities—as well as the relationships between them. We define league governance narrowly to refer to such issues within the context of a sporting league, whereas sport governance encompasses a wider set of entities and objectives than the profitable and efficient conduct of a league and its participant clubs.

From one perspective, corporate governance is necessary due to agency problems and because corporate constitutions and the individual contracts between a company and its managers are incomplete.⁷ Corporate constitu-

⁵ Sports lawyers and sports economics typically discuss sport and league governance in the context of debates regarding private and state regulation of sport and the economic design of labour and product markets regulations and competition tournament formats. See, e.g., James A.R. Nafziger, *European and North American Models of Sport Organization*, in HANDBOOK ON INTERNATIONAL SPORTS LAW 88 (James A.R. Nafziger & Stephen F. Ross eds., 2011); Stefan Szymanski, *The Economic Design of Sporting Contests*, 41 J. ECON. LIT. 1137 (2003).

⁶ OECD, PRINCIPLES OF CORPORATE GOVERNANCE 11 (rev. 2004), <http://www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf>, [http://perma.cc/7WK2-6ZYH].

⁷ See, e.g., John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies*, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 35–54 (Reinier Kraakman et al. eds., 2nd ed. 2009) (explaining the set of individual statutory contracts created by the corporate constitution via the principal-agent framework); Oliver Hart, *Corporate Governance: Some Theory and Implications*, 105 ECON. J. 678, 679–80 (1995) (arguing corporate governance is necessary to mediate agency problems where contracts are incomplete). An alternative “constitutional” approach to corporate governance emphasizes a clear division of powers between company members and directors, the importance of collective deliberation on matters and the opportunity for decisions to be contestable, see e.g., STEPHEN BOTTOMLEY, THE CONSTITUTIONAL CORPORATION: RETHINKING CORPORATE GOVERNANCE (2007). For a thoughtful survey of competing theories of corporate

tions are incomplete because it is too costly, if not impossible, to draft a constitution contemplating the rights, obligations and preferences of principals (company members) and agents (company directors) in all possible future states of the world. Voting facilitates deliberation by company members and reconciliation of their conflicting preferences in a collective exercise of their residual decision-making rights.⁸ Although our focus in this article is the design of a process for collective decision-making by the principals, we recognize that voting by company members is an important element of the incentive, monitoring, enforcement and error-correction mechanisms holding directors to account.⁹

The corporate constitution necessarily defines the voting rights of the company members and the division of powers between company members and directors.¹⁰ The constitution is shaped by corporate law, other legislative or regulatory requirements and the private contractual agreements between an NSO and other sporting entities. Before explaining the economics of constitutional voting rules, we first outline the corporate governance implications of these sources of public and private law in the context of the Australian sporting industry.

law and their relevance to sporting entities, *see* Colin Huntly, *In Search of an Appropriate Analogy for Sports Entities Incorporated Under Associations Incorporation Legislation in Australia and New Zealand Using Broadly Conceived Corporate Law Organic Theory* (June 15, 2005) (unpublished PhD thesis, Murdoch University), <http://researchrepository.murdoch.edu.au/83/2/02Whole.pdf>, [<http://perma.cc/9UGR-8WUDU>].

⁸ *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 401–02 (1983) (explaining voting rules as a residual decision-making mechanism for issues not addressed by contract, statute or fiduciary principles).

⁹ For specific analysis of the role and importance of member voting rights in serving these functions in U.S. corporate law, *see, e.g., id.*; *see also* Brett W. King, *The Use of Supermajority Voting Rules in Corporate America: Majority Rule, Corporate Legitimacy, and Minority Shareholder Protection*, 21 DEL. J. CORP. L. 895 (1996); Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129 (2009).

¹⁰ On the evolution of common law and statutory provisions relating to the division of powers between members and directors and member voting rights in Australian corporate law, *see, e.g.*, Elizabeth Boros, *How Does the Division of Power Between the Board and the General Meeting Operate*, 31 ADEL. L. REV. 169 (2010); John Maltas, *The Historical Development of Legal Principles and Procedures Evident in Modern Australian Corporate Legislation*, 1 J. APPLIED L. & POL'Y, 1, 111 (2008); Michael J. Whincop, *The Role of the Shareholder in Corporate Governance: A Theoretical Approach*, 25 MELB. U. L. REV. 418 (2001).

A. *Sport in Australia*

Australian sport is best 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. Contemporary NSO's enjoy an effective monopoly position in a sport, courtesy of official recognition by the Australian government statutory agency, the Australian Sports Commission ("ASC") and affiliation to the relevant IF.¹¹

National leagues and competitions in Australian sport have traditionally (but not always) been 'closed leagues' of teams managed by not-for-profit sporting clubs or State Associations. Other common features of a distinct 'Australian model' of professional team sport also emerged in the past 25 years. In particular, other governance features of this Australian model include an NLCO independent of the participant clubs and few voting rights afforded to either national league clubs or State Associations on regulatory issues.¹² The company members of an NSO or NLCO are typically the

¹¹ The IF–NSO relationship (for example, the relationship between the Fédération Internationale de Football Association ("FIFA") and FFA Limited) is relevant in at least two ways. An IF may impose constitutional requirements upon its Members. *See, e.g.*, FIFA STATUTES, art. 13(a) & (d) (July 2013) (the obligations of FIFA Members include requirements "to comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time . . . [and] to ensure that their own members comply with the Statutes, regulations, directives and decisions of FIFA bodies"), http://www.fifa.com/mm/document/AFederation/Generic/02/14/97/88/FIFASTatuten2013_E_Neutral.pdf, [<http://perma.cc/FNH3-SLVJ>]. An IF may also suspend or elect to recognize a different entity as a member. *See, e.g.*, Robert D. Macdonald & Ross Booth, 'Around the Grounds': A Comparative Analysis of Football in Australia, in *THE GAMES ARE NOT THE SAME: THE POLITICAL ECONOMY OF FOOTBALL IN AUSTRALIA* 236, 254 (Bob Stewart ed. 2007) (discussing the transfer of FIFA membership from Soccer Australia Limited to FFA Limited (then known as Australian Soccer Association Limited) in 2003).

¹² An "Australian model" stands in contrast to the "North American" and "European" models of professional team sports. *Compare* Macdonald & Booth, *supra* note 11, at 238–39 (arguing that a majority of Australian sports exhibiting a majority of the following characteristics: (i) an NLCO that is owned or part-owned by the NSO and a company limited by guarantee; (ii) strategic direction of the NLCO is set by an independent board of directors; (iii) a "closed" national league with a fixed number of clubs and no promotion/relegation system; (iv) minimal club relocation with national league expansion via the sale or granting of expansion licenses to new entrants; (v) a league competition format including a home and away season followed by a finals series for the best home and away season teams, with a tournament format where the top ranked clubs enjoy a double-chance in the finals series; (vi) the interests of the national representative team being superordinate to those of the

State Associations and/or national league clubs (or their representatives or appointees) of the relevant sport. Company membership is also sometimes afforded to the directors of the NSO. Most national league clubs are located in the five largest State capital cities of Sydney, Melbourne, Brisbane, Perth and Adelaide, though many clubs are now owned by private investors.

The AFL organizes Australia's most popular national league, which is also known as the AFL, in the indigenous sport of Australian football. This competition commenced in 1897 as the Victorian Football League ("VFL"), based in Melbourne and Geelong. National expansion of the VFL commenced in the 1980s and transformed the competition organizer into the NSO in the 1990s. Founded in 1977, the National Soccer League ("NSL") was the original club-based national league in Australian sport. It was succeeded in 2005 by the A-League, which is organized by FFA Limited, an entity which assumed the role of NSO from Soccer Australia Limited in 2003. The National Basketball League ("NBL") first tipped-off in 1979 and is the oldest continuous club-based national league in Australia. The NBL has a history of continual league governance reform and was organized by BA Limited between July 2009 and October 2013. ARLC Limited organizes the National Rugby League ("NRL"), the strongest rugby league competition in the world and second-most popular league in Australia. The NRL traces its roots to the New South Wales Rugby League ("NSWRL") competition, which commenced play in 1908 and was a purely Sydney-based competition for most years thereafter. The four sports of Australian football, association football, basketball and rugby league (or variants thereof) have consistently ranked among the top ten for participation in organized or club-based sport.¹³

national league; (vii) national league clubs (irrespective of ownership) with the primary object of on-field success subject to breaking even; (viii) collective bargaining between the NSO/NLCO and player associations and salary caps on club player salary expenditure; (ix) centralized sale or licensing of national broadcasting rights and other intellectual property by the NSO/NLCO; (x) equal sharing of centrally collected revenue between national league clubs and addition grants from the NSO/NLCO to clubs in need of special financial assistance; (xi) substantial NSO/NLCO funding of national league clubs and sport development programs, and (xii) extensive state funding of facilities, stadia and junior talent identification and development programs), *with Nafziger, supra* note 5; Szymanski, *supra* note 5, at 1149–52 (comparing the structure of U.S. baseball and (European) soccer).

¹³ See STANDING COMMITTEE ON RECREATION AND SPORT, PARTICIPATION IN EXERCISE, RECREATION AND SPORT: ANNUAL REPORT 2010, at 35 box 3 (rev. Feb. 2012) (reporting total participation in top ten organized physical activities in Australia, 2001 to 2010), http://www.ausport.gov.au/__data/assets/pdf_file/0018/436122/ERASS_Report_2010.PDF, [<http://perma.cc/ZMV3-LHKA>]; *id.* at 42 box

State intervention in the form of funding and regulation has rapidly grown since the 1970s. Australian Government funding of the ASC totalled \$307.7 million (Australian dollars) in the 2012/13 financial year, having grown by an order of magnitude in 30 years.¹⁴ The NSO's of many smaller sports (including BA Limited) are now heavily dependent upon the Australian Government funding disbursed by the ASC, whereas the aggregate revenue of the four NSO's in this study alone was \$755 million in 2012. State investment in the construction of stadia and sporting facilities is also substantial.¹⁵ Rationale for state intervention broadly includes matters of public interest such as the protection of the health and safety of sporting participants¹⁶ or protection of the integrity of sporting competition.¹⁷ The object of ensuring the international success of Australian representative teams and athletes has been more controversial.¹⁸

⁴ (reporting total participation in top ten club-based physical activities in Australia, 2001 to 2010).

¹⁴ See RHONDA JOLLY, SPORTS FUNDING: FEDERAL BALANCING ACT 67–69 (June 27, 2013) (reporting Australian Government funding of sport and recreation at large (from 1973/74 to 1982/83) and specific funding of the ASC (from 1983/84 to 2012/13)), http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/2550377/upload_binary/2550377.pdf;fileType=application/pdf, [http://perma.cc/A2AM-NJ4Z]. All financial values in this article are reported in Australian dollars (AUD).

¹⁵ See John K. Wilson & Richard Pomfret, *Government Subsidies for Professional Team Sports in Australia*, 42 AUSTRALIAN ECON. REV. 264 (2009).

¹⁶ See, e.g., *Australian Sports Anti-Doping Authority Act 2006* (Cth), s 20B (explaining the function of the Australian Sports Anti-Doping Authority (“ASADA”) is to “assist the CEO [chief executive officer] in the performance of his or her functions”); *Id.* s 21 (explaining the functions of ASADA CEO include matters pertaining to sports doping and safety matters).

¹⁷ See, e.g., AUSTRALIAN SPORT & RECREATION MINISTERS, NATIONAL POLICY ON MATCH-FIXING IN SPORT (June 10, 2011), [http://www.health.gov.au/internet/main/publishing.nsf/Content/F6DB8637F05C9643CA257C310021CCE9/\\$File/National%20Policy%20on%20Match-Fixing%20in%20Sport%20\(FINAL\).pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/F6DB8637F05C9643CA257C310021CCE9/$File/National%20Policy%20on%20Match-Fixing%20in%20Sport%20(FINAL).pdf), [http://perma.cc/VR42-6QPX].

¹⁸ Compare INDEPENDENT SPORT PANEL, THE FUTURE OF SPORT IN AUSTRALIA (2009) (arguing the bias toward funding of Olympic sports and success in elite-level international sport ought to be re-balanced toward a greater investment in the most popular Australian sports and sports participation), https://secure.ausport.gov.au/__data/assets/pdf_file/0006/334338/CrawfordReport.pdf, [https://perma.cc/ZTD7-8HA6], with ASC, AUSTRALIA'S WINNING EDGE 2012-2022: OUR GAME PLAN FOR MOVING FROM WORLD CLASS TO WORLD BEST (2012) (placing heavy emphasis upon success in elite-level international sport by setting explicit annual sporting and off-field performance targets for all ASC-funded NSO's), http://www.ausport.gov.au/__data/assets/pdf_file/0011/509852/Australias_Winning_Edge.pdf, [http://perma.cc/EX72-AXQE].

B. *The Australian Sports Commission and NSO Regulation*

The Australian Government commenced substantive funding of Australian sport in 1973/74. The ASC was originally established in 1985 and the *Australian Sports Commission Act 1989* (Cth) later re-organized and integrated a number of government agencies to give the ASC the primary role in Australian Government sport policy.¹⁹ Legislative objects of the ASC include the provision of leadership in the development of sport in Australia, increased sports participation and improved Australian sporting performance.²⁰

The ASC first released formal sport governance principles for NSOs in 2002.²¹ These were updated in 2007,²² 2012²³ and 2013.²⁴ The general scheme of the ASC NSO governance principles has been to prescribe, on an 'if not, why not' regulatory basis, that an NSO be incorporated as a company limited by guarantee under the *Corporations Act 2001* (Cth), with the majority of the independent board of directors to be elected by the company members and with the board to be empowered to exercise all powers of the company excepting those required to be exercised by the company members at a general meeting of the company.²⁵ The 2012 sport governance principles were supported by the ASC's publication of a Template Constitution for

¹⁹ For an overview of the evolution of the Australian sporting system," see INDEPENDENT SPORT PANEL, *supra* note 18, 60–85; Jolly, *supra* note 14; SPORT 2000 TASKFORCE, *SHAPING UP: A REVIEW OF COMMONWEALTH INVOLVEMENT IN SPORT AND RECREATION IN AUSTRALIA* 53–102 (1999), https://www.clearinghouseforsport.gov.au/__data/assets/pdf_file/0017/634013/Shaping_Up_-_A_Review_of_Commonwealth_Involvement_in_Sport_and_Recreation_in_Australia.pdf, [https://perma.cc/28FE-YL5T].

²⁰ *Australian Sports Commission Act 1989* (Cth) ss 6(1)(a)–(b).

²¹ ASC, NATIONAL SPORTING ORGANISATIONS GOVERNANCE: PRINCIPLES OF BEST PRACTICE (May 2002).

²² ASC, GOVERNANCE PRINCIPLES: A GOOD PRACTICE GUIDE FOR SPORTING ORGANISATIONS (2007), available at https://anzsla.com/sites/default/files/ASC_Governance_Principles_2007.pdf, [https://perma.cc/8G7C-S2CS].

²³ ASC, SPORTS GOVERNANCE PRINCIPLES (Mar. 2012), http://www.ausport.gov.au/__data/assets/file/0010/485857/ASC_Governance_Principles.pdf [http://perma.cc/5HT7-4W5U];

²⁴ ASC, MANDATORY SPORTS GOVERNANCE PRINCIPLES (Mar. 2013), http://www.ausport.gov.au/__data/assets/pdf_file/0003/531165/ASC_Mandatory_Sports_Governance_Principles.pdf, [http://perma.cc/Y43R-TACH]

²⁵ See generally Jean-Loup Chappelet & Michaël Mrkonjic, *Existing Governance Principles in Sport: A Review of Published Literature*, in ACTION FOR GOOD GOVERNANCE IN INTERNATIONAL SPORTS ORGANISATIONS: FINAL REPORT 222 (Jens Alm ed. 2013) (reporting comparative analysis of sport governance principles published around the world, including the ASC sport governance principles), <http://>

NSO's.²⁶ A new ASC policy of performance-based NSO funding was released in March 2013 and included revised sport governance principles²⁷ for which compliance was mandated for 'large partner' NSO's receiving more than \$5 million in annual ASC funding. This category includes BA Limited.²⁸ The 2013 mandatory principles represent a template for sport governance 'best practice' as it is perceived by the ASC, and in practice, the performance of all

www.playthegame.org/fileadmin/documents/good_governance_reports/aggis_final_report.pdf, [http://perma.cc/A5NX-EUKN].

²⁶ The Template Constitution proposes that an NSO ought to be a company limited by guarantee, that an NSO should recognize only one entity as the sport controlling body in each State and Territory, with those entities being the only voting company members of the NSO. The Template Constitution ensures the independence of the NSO board of directors by limiting the voting rights of the company members (exercising one vote each) to the admission and removal of company members (via special resolutions) and the election (via either a simple or exhaustive ballot) and removal of company directors (via an ordinary resolution). Other mandatory provisions of the *Corporations Act 2001* (Cth) (Austl.) are not addressed. See ASC, TEMPLATE CONSTITUTION (2012), http://www.ausport.gov.au/__data/assets/pdf_file/0004/484555/Template_Constitution.pdf, [http://perma.cc/J683-DZ5P].

²⁷ ASC, MANDATORY SPORTS GOVERNANCE PRINCIPLES 1 (Mar. 2013) (arguing the mandatory principles "are critical to good governance and therefore to the achievement of outcomes under ASC funding. This sub-set will be non-negotiable requirements for NSOs to be eligible for full future funding from the ASC"), http://www.ausport.gov.au/__data/assets/pdf_file/0003/531165/ASC_Mandatory_Sports_Governance_Principles.pdf, [https://perma.cc/7GA6-DU7T]. The mandatory principles relate to the corporate structure of the NSO, the workings and composition of the NSO board, annual reporting, strategic planning and performance review requirements and require, inter alia, that the NSO is the single national entity for all forms of the sport. *Id.* princ. 1.1. The NSO must be a company limited by guarantee. *Id.* princ. 1.3. Company directors must be term-limited, with staggered elections of directors. *Id.* princ. 2.1. A nominations committee must propose candidates for election as a director. *Id.* princ. 2.2. The chair must be elected by the board of directors. *Id.* princ. 2.4. These principles form part of a policy emphasis upon performance-based NSO funding; see ASC, *supra* note 18.

²⁸ See ASC *Raises Governance Standards*, AUSTRALIAN SPORTS COMMISSION (Mar. 20, 2012), <http://www.echo.net.au/2013/03/asc-raises-governance-standards/>, [http://perma.cc/P8NY-28TX] (last visited 26 July 2014). On the basis of the \$5 million threshold, BA Limited was the only NSO of the four in this study to be subject to the mandatory sport governance principles, see ASC, AUSTRALIA'S WINNING EDGE INVESTMENT ALLOCATION 2013-14 (Apr. 2013), www.ausport.gov.au/__data/assets/pdf_file/0005/526154/Investment_Allocation_fact_sheet.pdf, [http://perma.cc/ZT37-GJPH]; ASC, INVESTMENT ALLOCATION 2014-15 (2014): http://www.ausport.gov.au/__data/assets/pdf_file/0006/625236/Investment_allocation_201415_FINAL.pdf, [http://perma.cc/9HJ2-HZVZ].

sports has been reviewed annually by an ASC division, the Australian Institute of Sport (“AIS”).²⁹

Commentators have noted the clear parallels to governance guidelines published by the OECD and the Australian Securities Exchange (“ASX”),³⁰ leading to suggestions that the ASC guidelines, prior to 2012, were both prescriptive and not well-suited to the demands of governance in the sports industry.³¹ Compliance with the ASC sports governance principles is nevertheless a prerequisite for ASC ‘recognition’ of a national governing body as an NSO, which affords the opportunity to apply for ASC funding.³²

The NSO recognition criteria, along with NSO affiliation to the relevant IF, create an effective state-sanctioned monopoly in the provision of sport governance services by each NSO.³³ This is the practical effect of the regulatory and funding framework established by the ASC. Individuals seeking to join together in sporting pursuits are nevertheless free to do so as an unincorporated group or to adopt one of the many available incorporated

²⁹ See AIS, *SPORTS TALLY 2014: AUSTRALIA'S WINNING EDGE* (Apr. 2014), http://www.ausport.gov.au/__data/assets/pdf_file/0010/576172/Sports_Tally.pdf, [http://perma.cc/Q84N-WS8B]

³⁰ See OECD, *supra* note 6 (first published 1999, rev. 2004); ASX, *CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS* (3rd ed. 2014) (first published 2003, rev. 2007, amended 2010), <http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf>, [http://perma.cc/QD5S-4P6A]. For comparisons of earlier versions of the ASC governance guidelines to the OECD and ASX principles, see, e.g., Lloyd Freeburn, *National Sporting Organisations and the Good Governance Principles of the Australian Sports Commission*, 5 *AUSTRALIAN & NEW ZEALAND SPORTS L.J.* 43 (2010); Jeremy Pearce & Lisa Thomas, *National Sporting Organisations and Director Independence: Best Practice or a Response to Crisis?* *THE ANZ-SLA COMMENTATOR* 83 (2011).

³¹ See Freeburn, *supra* note 30, at 79–80.

³² See ASC, *ELIGIBILITY CRITERIA FOR THE RECOGNITION OF NATIONAL SPORTING ORGANISATIONS BY THE AUSTRALIAN SPORTS COMMISSION* Criteria A2, A7 & B2 (2006) (on file with authors); ASC, *ELIGIBILITY CRITERIA FOR THE RECOGNITION OF NATIONAL SPORTING ORGANISATIONS BY THE AUSTRALIAN SPORTS COMMISSION 2009–2013* Criteria A2, A7 & B2 (2009) (on file with authors) (the 2006 and 2009 eligibility criteria included identical requirements that a national governing body be the “pre-eminent organisation” for the development of the sport in Australia, that it conduct annual national championships or national leagues and that it had “formally committed to a governance structure that is consistent with the ASC’s governance principles”).

³³ A further practical concern is to ensure the corporate governance structure facilitates exemption from income tax. See AUSTRALIAN TAXATION OFFICE, *INCOME TAX EXEMPTION AND SPORTING CLUBS* (Mar. 21, 2011), available at <https://www.ato.gov.au/workarea/DownloadAsset.aspx?id=11488>, [https://perma.cc/E466-SQEW].

forms. These include companies incorporated pursuant to the *Corporations Act 2001* (Cth) or to associations incorporation legislation governing not-for-profit associations of all kinds.³⁴ The *Australian Sports Commission Act 1989* (Cth) neither provides the legal framework for specialized forms of incorporated sporting entities, nor requires individuals to seek the authorization of the ASC before forming of a sporting club, league or sport governing body of any kind.³⁵ The cumulative impact of the ASC sport governance principles and regulation is mixed. They have trailed contemporary governance reforms by ‘leading’ NSO’s but offer a template for ‘laggard’ NSO’s, especially those dependent upon the financial support of the Australian government.

C. Corporate Governance in Practice

Australian sports have a long tradition of federal sport governance structures formed by the respective State Associations, although decision-making (or voting) rights have been unequally distributed across States and Territories. League governance structures—where the basic unit of organization is the sporting club and a “group of clubs make up a league or association within which they conform to a common code of rules and compete amongst themselves”³⁶—have been aptly described as an “alliance of sworn

³⁴ Not-for-profit entities, especially those of a smaller economic scale, are often incorporated pursuant to State or Territory associations’ incorporation legislation rather than the *Corporations Act 2001* (Cth). The six State statutes are the *Associations Incorporation Act 2009* (NSW); *Associations Incorporation Act 1981* (Qld); *Associations Incorporation Act 1985* (SA); *Associations Incorporation Act 1964* (Tas); *Associations Incorporation Reform Act 2012* (Vic); *Associations Incorporation Act 1987* (WA). In the two Territories, these statutes are the *Associations Incorporation Act 1991* (ACT); *Associations Act 2003* (NT).

³⁵ As with Australian NSOs, national governing bodies in other common law jurisdictions such as New Zealand (e.g. the New Zealand Rugby Union Incorporated, incorporated pursuant to the Incorporated Societies Act 1908 (N.Z.)) and the United Kingdom (e.g. The Football Association Limited, incorporated pursuant to the Companies Act 1985 (U.K.)) are private legal entities incorporated pursuant to the mainstream companies or incorporated associations legislation. This differs from many European nations, where national sport governing bodies are specifically delegated power via statute or civil code. See Robert C.R. Siekmann & Janwillem Soek, *Models of Sport Governance Within the European Union*, in HANDBOOK ON INTERNATIONAL SPORTS LAW 112 (James A.R. Nafziger & Stephen F. Ross eds., 2011).

³⁶ *R v. Judges of the Federal Court Ex Parte Western Australian Football League (Inc)* (1979) 143 CLR 190, 217 (Austl.) (Stephen J. noting in a case involving the sport of Australian football, “[t]he basic unit in organized football is the club. A group of clubs make up a league or association within which they conform to a common code of rules and compete amongst themselves.”).

enemies".³⁷ For both NSO's and NLCO's, the past 30 years saw a transition from the traditional "delegate" model to an "independent director" model of internal corporate governance. Such reforms have been intended to allay the problems of self-interested State Associations and national league clubs, as well as the high decision-making costs of the delegate model.

The delegate model saw State Associations and/or league clubs appoint one or more individuals as their representative(s) to the decision-making bodies of the relevant national governing body or league competition organizer. Delegates traditionally enjoyed substantial collective decision-making rights and tended to vote in accordance with the interests of the entity or group appointing them. Starting in the 1980s and 1990s, this model was progressively superseded in various sports, as contemporary commercial and legal demands prompted corporate governance reform of sporting entities of all kinds. Independent decision-making rights were granted to the directors of NSO's or NLCO's and the scope of the residual decision-making rights of company members was restricted, in many cases to the bare minimum necessary for the functioning of the company.³⁸ The contemporary NSO director is required to be independent of the company members, so their statutory and fiduciary duties are owed to the NSO, not to those company members appointing or electing individuals to the board of directors.³⁹

³⁷ *Foschini v. Victorian Football League* (1983) (Unreported, Supreme Court of Victoria, Crockett J., 15 April 1983) 13 (Austl.) (describing the nature of cooperation between the 12 VFL clubs of the time).

³⁸ On this evolution, see James B. Perrine, (2002). *Media Leagues: Australia Suggests New Professional Sports Leagues for the Twenty-First Century*, 12 MARQ. SPORTS L. REV. 703, 713–5 (2002) (explaining the reforms in Australian football and rugby league); David Shilbury, Lesley Ferkins & Liz Smythe, *Sport Governance Encounters: Insights From Lived Experiences*, 16 SPORT MGMT. REV. 349 (2013) (interviewing former NBL Chair Malcolm Speed on the nature of Australian sport governance reform). The corporate constitution will explicitly define the scope of the independence of the board of directors from control and authority of the company members, see *Wayde v. New South Wales Rugby League Limited* (1985) 180 CLR 459, 466 (Austl.) (in finding the decision of NSWRL Ltd. board of directors to not invite a club to participate in the NSWRL competition in the next season was valid, "[i]t is a point of great importance that the decisions were made in the exercise of a power that is expressly conferred on the board.").

³⁹ See *Corporations Act 2001* (Cth) s 181(1) (requiring directors and officers of a company to act in good faith in the best interests of the company and for a proper purpose); on the independence of NSO directors, see also ROBERT P. AUSTIN & IAN M. RAMSAY, *FORD'S PRINCIPLES OF CORPORATIONS LAW* ch. 8 (15th ed. 2013) (explaining the Australian law regarding duties of directors to act properly, in the interests of the company and with care); ASC, *supra* note 23, princ. 1.8 (explaining an NSO board ought to be comprised of independent directors, whether elected or appointed); Pearce & Thomas, *supra* note 30.

Another closely-related reform of the past 30 years was the implementation or formalization of the contractual relationship between the NSO, NLCO, State Associations and national league clubs of many sports.⁴⁰ This process also involved the transfer of issues previously addressed in the NSO/NLCO corporate constitution to the internal rules and regulations of an NSO or NLCO and/or to the newly implemented contracts. Many regulatory issues, in particular, were thereafter subject to the approval of the NSO or NLCO board of directors, not the company members. These contractual innovations occurred for three main reasons. First, a formalized contract was thought to strengthen the relationship between sporting entities as a defense against the breakaway of national league clubs to form rival leagues.⁴¹ Second, it was perceived to be easier for a company (NSO and/or NLCO) to enforce contractual obligations against national league clubs or State Associations, than to enforce the constitutional obligations of the company members via constitutional processes.⁴² Finally, contractual certainty facili-

⁴⁰ These contracts have been variously known as “affiliation agreements”; “commitment agreements”; “loyalty agreements”; “participation agreements”; “charters”; “licenses” and “memoranda of understanding.”

⁴¹ The threat of a breakaway rival league partly motivated VFL governance reform in the mid 1980s, see GARY LINNELL, FOOTBALL LTD: THE INSIDE STORY OF THE AFL 17–35 (1995); ROSS OAKLEY WITH JONATHON GREEN & GEOFF SLATTERY, THE PHOENIX RISES 13–36 (2014). The breakaway Super League competition split rugby league in the mid 1990s, until formation of the NRL competition in 1998, see *infra* Part IV.D. Super League and a similar threat within rugby union itself also prompted the formation of the SANZAR partnership of the “traditional” rugby union governing bodies in South Africa, New Zealand and Australia to create the Super Rugby and Tri-Nations competitions. See generally Macdonald & Booth, *supra* note 11, at 239–57.

⁴² See, e.g., Dick Seddon (one of the four inaugural VFL Commissioners appointed in 1985), who, when reflecting upon the governance reforms of the 1980s, noted:

It had proven to be too difficult to deal with recalcitrant clubs who were serial offenders under the VFL Constitution, so another mechanism was required in addition to the [VFL] commission [a decision-making body with limited powers to sanction the VFL clubs at that time]. In my opinion that mechanism was contractual obligations, rather than constitutional obligations, because it is much easier in law to deal with a breach of contract than to obtain a majority or three-quarters majority vote at the board table for a constitutional breach.

OAKLEY ET AL., *supra* note 41, at 73–74 (quoting Seddon). Contracts between the NSO, NLCO and national league participant clubs may however breach Australian statutory competition law, see *News Limited v. Australian Rugby Football League Limited* (1996) 64 FCR 410 (five-year exclusive agreements between league competition organizer and participant clubs invalid as exclusionary provisions under the *Trade Practices Act 1974* (Cth)).

tated both the sale of club licenses as (national) leagues sought to expand;⁴³ as well as providing additional mechanisms for the removal of clubs from (national) leagues if deemed necessary, whether at the expiration of a fixed-term contract⁴⁴ or where in breach of the terms of that contract.⁴⁵

Our specific interest is constitutional reform itself. Across the four sports, this occurred prior to, independently and occasionally as a direct consequence of the Australian government regulator. The ASC has a long history of conducting governance (and operational) reviews of many NSOs and sports. In particular, it played an important supporting role in the governance reforms of association football and basketball during the 21st century. On the other hand, the ASC had little discernable impact upon the constitution reforms of the AFL in the 1990s or of ARLC Limited in the 2010s (for additional detail, see Parts IV and V).

D. *The Corporations Act 2001 (Cth)*

The main statute regulating companies in Australia is the *Corporations Act 2001 (Cth)*. This Act contains key mandatory rules that govern the formation, management, operation and wind up of companies. These rules include the duties of directors and officers of companies. Some rules governing the management of companies are replaceable rules. They are default rules but can be displaced or modified in the company's constitution. The Act also regulates takeovers and managed funds and sets out the licensing and disclosure rules that apply to financial products, financial services and financial markets. Companies registered under the *Corporations Act 2001 (Cth)* must be either public or private companies. These categories subdivide further. For example, a public company may be formed as a company limited by shares or another type of company, such as a company limited by guarantee—the type of company used by many sporting entities. As noted above,

⁴³ See, e.g., VICTORIAN FOOTBALL LEAGUE CLUB LICENCE cl. 14 (1985) (“Licensee acknowledges and confirms VFL has absolute discretion to (a) grant new Licences; (b) determine number of Licences including issue of expansion Licences; (c) determine location of such Licences; and (d) determine any fee payable in respect of any new or expansion Licence”) (on file with authors).

⁴⁴ See, e.g., *News Limited v. South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563 (Austl.) (league competition organizer did not breach *Trade Practices Act 1974 (Cth)* s 45 in applying criteria for selecting clubs to participate in a downsized league from the season after the expiry of existing club licenses). See also discussion *infra*, Part IV.D.

⁴⁵ See, e.g., VICTORIAN FOOTBALL LEAGUE CLUB LICENCE, *supra* note 43, cls. 7–8 (establishing grounds entitling the VFL to terminate a club license with immediate effect, with the Licensee to have no claim for damage or otherwise).

all four NSOs in this study are public companies limited by guarantee, pursuant to the *Corporations Act 2001* (Cth).

A company limited by guarantee does not have share capital.⁴⁶ Instead, the liability of its members is limited to the respective amounts that the members agree to contribute to the property of the company if the company is unable to meet its liabilities upon being wound up.⁴⁷ There is consequently an absence of a formal market for corporate control (based on the acquisition of shares) as exists for privately-owned or listed companies, though this is replaced by electoral and product market competition between those individuals, groups and legal entities seeking to control a sport.

A person who will be a member of a proposed company may lodge an application for registration of a company limited by guarantee with the Australian Securities and Investments Commission (“ASIC”). The applicant must, at the time of registration, have the written consents of the persons named as proposed members, directors and company secretaries.⁴⁸ The minimum allowable number of (proposed) members is one.⁴⁹ Subject to compliance with the registration requirements, the company will then come into existence as a body corporate at the beginning of the day on which the company is registered by ASIC.⁵⁰

The constitution of a company is a statutory contract between, inter alia, the company and each company member.⁵¹ A public company limited by guarantee will adopt a constitution upon registration if each proposed member named in the registration application agrees in writing to the terms of that constitution before the application is lodged.⁵² This pre-registration requirement for unanimity differs from the voting rule for adoption of a constitution once the company is registered.

⁴⁶ *Corporations Act 2001* (Cth), s 254SA (companies limited by guarantee have been prohibited from paying a dividend to members since 2010). Commentary in this article is generally restricted to companies limited by guarantee.

⁴⁷ *See id.* s 517.

⁴⁸ *See id.* s 117. *See also* AUSTIN & RAMSAY, *supra* note 39, para. 5.060 (explaining the prerequisites for and effect of the registration of a new company).

⁴⁹ *See Corporations Act 2001* (Cth) s 114.

⁵⁰ *See id.* s 119.

⁵¹ *See id.* s 140 (the corporate constitution (and any replaceable rules) have effect as a statutory contract between the company and each member, between the company and each director and company secretary and between a company member and each other member, but does not create rights for or impose duties upon outsiders); *see also* AUSTIN & RAMSAY, *supra* note 39, pt. III (overview of the Australian law of corporate governance under the *Corporations Act 2001* (Cth) and relevant case law).

⁵² *See Corporations Act 2001* (Cth) s 136(1)(a).

The *Corporations Act 2001* (Cth) reserves certain fundamental decision-making rights—including election and removal of company directors, constitutional amendment and wind up of the company—for exercise by eligible voting company members, via the passage of a resolution of the required form at a general meeting.⁵³ Some of these voting rules are mandatory. Others may be formulated by the company members and specified in the constitution to override, supplement or modify the replaceable rules (default rules) provided in the *Corporations Act 2001* (Cth).⁵⁴ For example, the replaceable rules specify that the quorum requirement for a meeting of company members is a minimum of two members, who must be present at all times during the meeting,⁵⁵ while each member of a company limited by guarantee will have one vote each at a meeting,⁵⁶ unless otherwise provided for in the constitution.

The *Corporations Act 2001* (Cth) does not define an “ordinary resolution”. All resolutions are therefore “ordinary” except those otherwise defined by statute or by the corporate constitution itself. The common law has evolved to define a “resolution” or an “ordinary resolution” as requiring a majority of those members present in person or by proxy and voting at a

⁵³ Our commentary is limited to provisions of the *Corporations Act 2001* (Cth) relevant to the voting rights of members of a public company limited by guarantee. A comprehensive analysis of voting (and corporate law) ought to address: (i) Subject—What issues are voted upon? (ii) Eligibility—Which individual and which classes of company members are eligible to vote on an issue? What disqualifies a member from being eligible to vote? (iii) Calling of a vote—Is voting mandatory on an issue? How are resolutions to be proposed in relation to other matters? Is a petition required to call a meeting for the conduct of a vote on a resolution? Is a motion required to conduct a vote at a meeting? What are the procedural requirements of such petitions and the conduct of meetings? (iv) Quorum—How many eligible members must be present (in person or via a valid proxy) for a meeting and vote to occur? (v) Weighting—How many votes are allocated to each eligible voting member? (vi) Proxies—Are proxy votes allowed? If so, under what conditions? (vii) Ballot—May a vote be held at a meeting of the company, via a postal or electronic ballot, or via a circulating resolution? Is a vote at a meeting decided by a show of hands or a poll? (viii) Procedure—How should eligible voting members allocate their votes in a ballot? (ix) Vote counting—How is the vote counted? By the meeting chair? By a scrutineer nominated by the chair or the members? (x) Majority—What voting majority is required for a resolution to pass? What is the process in the event of a tie? How are abstentions and invalid votes treated?

⁵⁴ *Corporations Act 2001* (Cth) s 141 (identifying the provisions of the Act applicable as replaceable rules).

⁵⁵ See *id.* 249T(1); see also *id.* s 249T(2)–(4) (determining quorum, time in which to achieve quorum, when meeting dissolved).

⁵⁶ See *id.* s 250E(2).

meeting of the company to be in favor for that resolution to be passed.⁵⁷ Unless otherwise provided for in the corporate constitution, company directors may be appointed by a resolution of the members at a general meeting of the company.⁵⁸ Members may also remove a director by resolution, despite anything in the constitution, or in any agreements between the director and the company or the director and a company member or members.⁵⁹

A special resolution is a resolution of a company that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution.⁶⁰ For example, the *Corporations Act 2001* (Cth) mandates a special resolution if the members wish to adopt the inaugural constitution after company registration,⁶¹ modify or repeal the existing constitution,⁶² change the name of the company⁶³ or commence the voluntary wind up of the company.⁶⁴ A constitution may additionally provide that a special resolution to modify or repeal the constitution does not have effect unless further requirements, as specified in the constitution, have also been complied with.⁶⁵

⁵⁷ See generally AUSTIN & RAMSAY, *supra* note 39, at para. 7.490. For historical context and doctrinal analysis of voting rules and the division of powers between the company members and board of directors, see *supra* note 10.

⁵⁸ See *Corporations Act 2001* (Cth) s 201G.

⁵⁹ See *id.* s 203D(1); see also *id.* s 201A(2) (a public company must have a minimum of three directors, with at least two ordinarily residing in Australia). The process for removal of directors at a general meeting is not a replaceable rule. However, the case law offers conflicting views on whether the members must comply with any alternative constitutional requirements or simply the statutory procedural requirements. *Id.* s 203D(2)–(6); see also AUSTIN & RAMSAY, *supra* note 39, para. 7.230.

⁶⁰ See *Corporations Act 2001* (Cth) ss 9 (dictionary—special resolution); see also *id.* s 249L(1) (in case of special resolution, the notice of a meeting of a company's members must set out the intention to propose a special resolution, state the resolution and state the time, place, location and proxy entitlements for the meeting).

⁶¹ *Id.* s 136(1)(b).

⁶² *Id.* s 136(2); see also *id.* s 246B (a resolution to vary or cancel the rights of a class of members must be approved in accordance with any relevant constitutional procedure. If there is no constitutional procedure, a special resolution of the company and of the class of members whose rights are being varied or cancelled (or equivalent written consent) is required).

⁶³ *Id.* s 157(1)(a).

⁶⁴ *Id.* s 491(1).

⁶⁵ *Id.* ss 136(2)–(3); see also *id.* s 232 (remedies available to company members to, inter alia, overturn (or prevent) conduct, acts, omissions or member resolutions that are oppressive, unfairly prejudicial or unfairly discriminatory).

There are few specific requirements in the *Corporations Act 2001* (Cth) relating to company membership.⁶⁶ A company may therefore provide the criteria for membership in the constitution or other documents or contracts specifically incorporated into the constitution. Such criteria may specify any lawful restrictions upon membership or the transfer thereof, as well as grounds for the termination of membership or rescission of the contract to become a member.⁶⁷ The constitution may therefore afford existing members the right to approve the admission or expulsion of members by a resolution, special resolution or some other voting majority; such resolution may feasibly be structured to be contingent upon, or only validated by, a decision of the board of directors.

III. THE ECONOMICS OF CONSTITUTIONAL VOTING RULES

A. Voting, Constitutions and Governance

From an economic perspective, a sport or league governance structure might be characterized as, inter alia, a nexus of contracts and principal-agent relationships⁶⁸ or a system of team production.⁶⁹ Voting itself has attracted

⁶⁶ *Id.* s 231(a)–(b) (people are members of a company if they are so named when the company it is first registered, or if they agree to become members of the company after its registration and their name is entered of the register of members).

⁶⁷ See generally AUSTIN & RAMSAY, *supra* note 39, paras. 6.395–6.460 (termination of company membership).

⁶⁸ Coase is the starting point for most research on the “theory of the firm” and transaction cost economics; arguing that contracting parties implement governance structures that minimize the costs of a transaction, see Ronald H. Coase, *The Nature of the Firm*, 16 *ECONOMICA* 386 (1937); Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960). For the foundations of the nexus of contracts and principal-agent approaches, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305 (1976). Williamson highlights the differences in transaction frequency, transaction uncertainty and asset specificity as the determinants of the transaction costs of alternative governance structures, see, e.g., Oliver Williamson, *Corporate Governance*, 93 *YALE L.J.* 1197 (1984); Oliver E. Williamson, *The Economics of Governance*, 95(2) *AM. ECON. REV.* 1 (2005). For normative analyses of sport and league governance using these theories, see, e.g., Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations*, 16 *MARQ. SPORTS L. REV.* 213 (2006) [hereinafter Ross & Szymanski, *Inefficient Joint Ventures*]; STEPHEN F. ROSS & STEFAN SZYMANSKI, *FANS OF THE WORLD, UNITE!: A (CAPITALIST) MANIFESTO FOR SPORTS CONSUMERS* (2008) [hereinafter ROSS & SZYMANSKI, *FANS OF THE WORLD*]; Stefan Szymanski & Stephen F. Ross, *Governance and Vertical Integration in Team Sports*, 25 *CONTEMP. ECON. POL'Y* 616 (2007) [hereinafter Ross & Szymanski, *Governance and Vertical Integration*]. *Com-*

considerable attention in doctrinal and economic analysis of corporate law,⁷⁰ as well as in the development of economic theory which recognizes the fundamental dual nature of a constitution. A constitution is both an agreement between individuals to undertake private collective action and a framework for reaching future agreement between those individuals.⁷¹ Voting rules are an important part of a constitutional framework for reaching future agreement.

The wider governance structure of a sport or a league is defined by a constitution, the decisions and regulations of the governing body or competition organizer so constituted and other (contractual) agreements between parties which are outside of the scope of that constitution. These structures generally have been regarded as agreements designed to maximize the joint wealth of parties (governing bodies, competition organizers and clubs) engaged in the joint production of sporting contests (collective action) via the

pare Amicus Curiae Brief of Economists in Support Of Petitioner at 7–28, *Am. Needle, Inc. v Nat'l Football League* 130 S. Ct. 2201 (2010) (No. 08–661) (arguing a league is not a single economic entity for the purposes of an antitrust defense), http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_661_PetitionerAmCuEconomists.authcheckdam.pdf, [http://perma.cc/MLD2-5EJE]; *with* Brief of Economists as Amici Curiae in Support of Respondents at 3–8, *Am. Needle, Inc. v Nat'l Football League* 130 S. Ct. 2201 (2010) (No. 08–661) (arguing a league is a single economic entity), http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_661_RespondentAmCuEconomists.authcheckdam.pdf, [http://perma.cc/7KGZ-LTM8].

⁶⁹ See Armen A. Alchian, & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 787–91 (1972) (team production theory of the firm inverts the standard principal-agent model to view the board of directors as a single monitor of multiple agents, where the monitor is motivated by the right to the residual surplus of the collective action); see also *id.* at 790, note.15 (applying team production theory to identify league commissioner as a monitor of league clubs).

⁷⁰ See *supra* notes 8–10.

⁷¹ On the economic conception of an organization as a constitutional system, see Anthony J. Evans & Nikolai G. Wenzel, *A Framework for the Study of Firms as Constitutional Orders*, 24 CONST. POL. ECON. 2 (2013); Adam Gifford Jr., *A Constitutional Interpretation of the Firm*, 68 PUB. CHOICE 91 (1991); Viktor J. Vanberg, *Organizations as Constitutional Systems*, 3 *Constitutional Political Economy* 223 (1992). For the strongest applications of public choice/constitutional economics theory (including the role of Buchanan & Tullock's model) to corporate law, see BOTTOMLEY, *supra* note 7; Whincop, *supra* note 10, at 420–46. For a thorough review of the public choice/constitutional economics literature on voting, see DENNIS C. MUELLER, *PUBLIC CHOICE III* 67–208 (3rd ed. 2003).

efficient assignment of decision-making rights between those parties.⁷² Even parties with not-for-profit objectives can be reasonably assumed to seek to maximize the (joint) revenue and minimize the (joint) costs of the collective action, irrespective of who enjoys claims to the (residual) surplus.

According to Ronald Coase, then Oliver Williamson among others, efficient governance design involves evaluation of the relative costs of alternative governance structures to identify the cost-minimizing form of legal relations between parties. These “transaction costs” may be summarized as the costs of identifying and evaluating possible transactions between individuals, as well as the costs of negotiating, policing and enforcing those agreements once they have been made.⁷³ In some cases transaction costs will be minimized by creating a corporate entity and managing relationships within the framework of corporate law, the division of powers between company members and directors and governance by executive fiat. In other cases it may be more efficient for parties to enter into private arms-length contracts, either on a one-off or ongoing basis. Coase also recognized that not all costs are private.⁷⁴ Some costs, termed ‘negative externalities’, are those incurred by individuals as a consequence of the transactions entered into by other parties. As we shall see below, Buchanan and Tullock’s decision-making costs and external costs may be understood as examples of transaction costs and negative externalities, respectively.

Using this transaction cost framework, economists have modelled the division of powers between the league competition organizer and participant clubs, with conflicting opinions on the optimal allocation of decision-making rights.⁷⁵ Yet analysis of the optimal voting majority rule itself has been

⁷² See Roger G. Noll, *The Organization of Sports Leagues*, 19 OXFORD REV. ECON. POL’Y 530, 540–4 (2003); GERALD W. SCULLY, *THE MARKET STRUCTURE OF SPORTS* 22-3 (1995); Szymanski & Ross, *Governance and Vertical Integration*, *supra* note 68, at 616. The “peculiar economics” of sport dictate that sporting competition requires a minimum of economic co-operation between parties on the rules of the sport and the tournament format of the sporting competition, *see* Walter C. Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. ECON. 1 (1964). Sport and league governance structures might seek to promote optimal effort from the sporting participants, but may also be rent-seeking, collusive and in breach of competition law.

⁷³ RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 6 (1988) (summarizing transaction costs as the search and information costs, the bargaining and decision-making costs and the policing and enforcement costs of a transaction).

⁷⁴ *See* Coase, *The Problem of Social Cost*, *supra* note 68.

⁷⁵ Compare Stephen Ross and Stefan Szymanski, who argue a league competition organizer completely independent of the participant clubs and endowed with all decision-making rights (including residual decision-making rights and residual claims on league profits) would provide appropriate incentives to the competition

generally overlooked, even though voting is both a fundamental element of corporate law and a common feature of the constitutions of many unincorporated associations. Economists and legal scholars have typically focused upon the optimal division of powers within a (sport or league) governance structure, with less emphasis upon the identification of optimal voting majorities or the economics of voting as a decision-making process in itself.⁷⁶ Parallel debates regarding the relative efficiency of constitutional provisions negotiated by company members and that of the mandatory and default rules in corporate law may also overlook the detail of voting majority rules.⁷⁷ Governance and constitutional design therefore demands consideration of:

organizer and eliminate the collective decision-making costs of the clubs, see Ross & Szymanski, *Inefficient Joint Ventures*, *supra* note 68; ROSS & SZYMANSKI, *FANS OF THE WORLD*, *supra* note 68; *with* Egon Franck and Helmut Dietl et al., who argue the costly negotiations of the competition organizer-participant club relationship and an independent competition organizer with residual decision-making rights and claims to the residual league profits will leave clubs with insufficient incentive to invest in playing talent; see Egon Franck, *Beyond Market Power: Efficiency Explanations for the Basic Structures of North American Major League Organizations*, 3 EUR. SPORT MGMT. Q. 221 (2003); Helmut Dietl, Egon Franck, Tariq Hasan & Markus Lang, *Governance of Professional Sports Leagues—Cooperatives Versus Contracts*, 29 INT'L REV. LAW & ECON. 127 (2009).

⁷⁶ The constitutional voting rules of sport governing bodies and league competition organizers tend to be addressed without extensive discussion or formal economic analysis of the alternative voting majority rules considered or proposed as discrete collective decision-making processes, see, e.g., Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective*, 6 MARQ. SPORTS L. REV. 65, 86–88 (1995) (proposing alternatives to the prevailing U.S. league governance models, including voting rules requiring a two-thirds majority, three-quarters majority, or the unanimous agreement of clubs on different issues). Stephen Ross & Stefan Szymanski discuss the transaction costs of constitutional voting by league clubs as an impediment to league restructuring intended to remove the clubs from the future decision-making processes of a league competition organizer. These commentaries are generally limited to economic comparisons of “club-run” and “vertically separated” leagues, see e.g., Ross & Szymanski, *Inefficient Joint Ventures*, *supra* note 68, at 245–52; ROSS & SZYMANSKI, *FANS OF THE WORLD*, *supra* note 68, at 133–34 & 166–74; Szymanski & Ross, *Governance and Vertical Integration*, *supra* note 68, at 622–23.

⁷⁷ See, e.g., Marc T. Moore, *Private Ordering and Public Policy: The Paradoxical Foundations of Corporate Contractarianism*, 34 OXFORD J. LEGAL STUD. (2014). *But see* King, *supra* note 9 (explaining supermajority voting rules in U.S. corporate law); Schmucl Nitzan & Uriel Procaccia, *Optimal Voting Rules for Profit Maximising Firms*, 51 PUB. CHOICE 191 (1986) (discussing alternative voting majority rules in the context of mandatory and default rules provided by corporate law).

- the allocation of decision-making rights between (in the context of this study) national sport governing bodies, national league competition organizers, State Associations and national league clubs;
- whether to use corporate law or contract (including choice of jurisdiction) as the legal form of collective relations between the relevant individuals or entities;
- those individuals or entities (or classes thereof) to be assigned the status of company member;
- the allocation of decision-making rights between the company members and the board of directors of a company and
- whether to adopt, supplement or replace the default and mandatory rules provided by corporate law, including the voting majority rules attached to various issues.

Buchanan and Tullock offer a viable model for the design of voting rules within this wider set of inter-related constitutional and governance design issues, with the common objective being an efficient allocation of decision-making rights in order to maximize the joint profits (or joint surplus) of the collective action.

B. The Buchanan & Tullock Model

In their ground-breaking integration of social contract theory, economic methodology and the philosophical device of the “veil of uncertainty”, James Buchanan and Gordon Tullock propose that:

For a given activity the fully rational individual, at the time of constitutional choice, seeking to agree to the terms of a political constitution will try to choose that decision-making rule which will *minimize* the present value of the expected costs. He will do so by minimizing the *sum* of the expected external costs and expected decision-making costs.⁷⁸

⁷⁸ BUCHANAN & TULLOCK, *supra* note 2, at 67. Buchanan and Tullock’s model rests upon three central assumptions. First, that constitutional voting rules should be modelled from the perspective of the individual (methodological individualism). Second, these individuals have stable preferences and seek to maximize their utility (individual rationality), subject to the concession that the inherent uncertainty of the outcomes of collective decision-making limits the rationality of individuals, for there can never be a precise relationship between individual choice and outcome, as with purely private decision-making, BUCHANAN & TULLOCK, *supra* note 2, at 30–37, 41–44. Third, these individuals are unaware of their future identity as a member of either the majority or minority group of voters on an issue (“veil of uncertainty”), BUCHANAN & TULLOCK, *supra* note 2, at 73–77. The veil of uncertainty is akin to the “veil of ignorance.” See, e.g., John Rawls, A THEORY OF JUSTICE (1971) (the basic structure of society ought to be that agreed upon by parties from behind a “veil of ignorance” to their future identity and status in that society). The design of corporate constitutions typically proceeds with better information

This model has since become a popular normative benchmark in political science and constitutional economics.⁷⁹ Whincop, in particular, argues the logic of Buchanan and Tullock's model is useful for both positive and normative analysis of the efficient constitutional voting rules for the various issues addressed by Australian (and English) corporate law.⁸⁰

External costs are those an individual may expect to be imposed upon them by other voters when not in agreement with a collective decision made via the voting process. External costs therefore include both direct (financial) costs imposed upon a voter and the opportunity costs of rejected options that were favored by the individual.⁸¹ The external cost function is expected to decline with the voting majority, falling to zero when the voting rule requires unanimity among the voters.⁸² High external costs may result in a

about market conditions and relationships between parties than suggested by either the veil of uncertainty or the veil of ignorance modelling assumptions.

⁷⁹ On the significance and impact of THE CALCULUS OF CONSENT, see Charles K. Rowley, *Public Choice: The Origins and Development of a Research Program*, in, THE ELGAR COMPANION TO PUBLIC CHOICE, at 12, 25–31 (Michael Reksulak, Laura Raz-zolini & William F. Shughart eds., 2013); see KEITH L. DOUGHERTY & JULIAN EDWARD, THE CALCULUS OF CONSENT AND CONSTITUTIONAL DESIGN 1–19 (2011).

⁸⁰ Whincop, *supra* note 10, at 420–46 (presenting an economic analysis of collective action by shareholders). See also BOTTOMLEY, *supra* note 7, at 47 note 144 (citing Buchanan & Tullock as one of the influences in the economic analysis of political and corporate constitutions).

⁸¹ The 1996 decision to merge two AFL clubs, Fitzroy (based in Melbourne, Victoria) and the Brisbane Bears (based in Queensland), was only approved by the company members of the AFL (the appointees of the AFL clubs) after an alternative proposal to merge the Fitzroy and North Melbourne clubs was rejected 14-1 in an informal poll. This was due to the perceived external costs to the other AFL clubs of a merged Fitzroy-North Melbourne "super team." To Fitzroy, the external cost of the informal poll was the foregone opportunity of that merger proposal. See also *infra*, text accompanying note 115. On the interaction between external costs and decision-making costs in the US major leagues, see Ross & Szymanski, *Inefficient Joint Ventures*, *supra* note 68, at 218 ("club-run leagues forego attractive business opportunities because they are unable to overcome the significant transaction costs involved in agreeing on how to distribute the proceeds from the opportunity") and Clay Moorhead, *Revenue Sharing and The Salary Cap in the NFL: Perfecting the Balance Between NFL Socialism and Unrestrained Free-Trade*, 3 VAND. J. ENT. & TECH. L. 641, 652–56 (2006) (explaining the unwillingness of some NFL teams to accept the legitimacy of a resolution passed by a three-quarters majority of the NFL clubs; this being an example of perceived external costs); see also, Joel M. Guttman, *Unanimity and Majority Rule: The Calculus of Consent Reconsidered*, 14 EUR. J. POL. ECON. 189 (1998) (explaining the distinction between direct costs and opportunity costs as two elements of external costs).

⁸² BUCHANAN & TULLOCK, *supra* note 2, at 61.

minority choosing to veto a resolution where side payments or vote trading across issues are not possible, even though its passage might result in a net improvement in collective welfare. Buchanan and Tullock's ideal decision-making rule is therefore unanimity, where external voting costs are zero, voters are not subject to coercion and the calculus of consent simplifies to calculation of the net benefits of the alternatives put to the voters.⁸³

Any voting rule other than a requirement for unanimity may therefore be understood as a function of the decision-making costs of the issue,⁸⁴ the time and effort required to secure agreement including the "costs of higgling and bargaining over the terms of trade"⁸⁵ necessary to ensure agreement between the parties. Reaching collective agreement becomes more complex as the required voting majority increases, so decision-making costs are expected to rise with the required voting majority. The opportunity costs of indecision suggest the time taken to reach agreement is also a factor in decision-making costs. Decision-making costs also include those of acquiring information necessary to make an informed decision about an issue prior to voting and the value of side-payments required to secure agreement.⁸⁶ High decision-making costs may prompt adoption of a lower voting majority than unanimity, the collective assignment of decision-making rights to an independent party by all the voters or unilateral action by individuals themselves.

In seeking to minimize the sum of external costs (E) and decision-making costs (D), the optimal majority voting rule is a trade-off between blocking the power of small coalitions of voters (decision-making costs) and reducing the expropriation of minority interests (external costs). FIGURE 1 highlights this intuition by assuming the sum of external costs and deci-

⁸³ See *id.* at 91–92. Maximization of net benefits is also the objective in similar models of optimal voting majorities and the optimal number of voters, see Milton Z. Kafoglis & Richard J. Cebula, *The Buchanan-Tullock Model: Some Extensions*, 36 PUB. CHOICE 179 (1981); see Robert Tollison, *Optimum Legislative Sizes and Voting Rules*, 5 POL'Y STUD. J. 340 (1977).

⁸⁴ BUCHANAN & TULLOCK, *supra* note 2, at 91–92.

⁸⁵ See *id.* at 69.

⁸⁶ Decision-making costs and the problem of small coalitions blocking super majority resolutions have been well-documented. See, e.g., Ross & Szymanski, *Inefficient Joint Ventures*, *supra* note 68, at 226–36. For additional analysis of decision-making costs in non-sporting contexts, see Yoram Barzel & Tim R. Sass, *The Allocation of Resources by Voting*, 105 Q.J. ECON. 745 (1990) (econometric modelling); Herbert J. Kiesling, *Potential Costs of Alternative Decision-Making Rules*, 4 PUB. CHOICE 49 (1968); (formal mathematical modelling); Luis Miller & Christoph Vanberg, *Decision Costs in Legislative Bargaining: An Experimental Analysis*, 155 PUB. CHOICE 373 (2013) (utilizing an experimental economics methodology).

sion-making costs are initially minimized with a simple majority, as in an ordinary resolution. If decision-making costs are held constant, a perceived increase (decrease) in the external costs from curve *E* to *E1* in FIGURE 1, suggests the optimal voting majority ought to be higher (lower). This example might feasibly represent the differing perceptions of the external costs in the election of directors of the AFL, which requires a simple majority, and of FFA Limited, which requires a “prescribed majority” of 60% (see Part IV.B(3)). If external costs are held constant, a perceived increase (decrease) in the decision-making costs relating to an issue, as represented in FIGURE 2 by the two curves *D* and *D1*, implies a lower (higher) optimal voting majority.⁸⁷

Five implications are clear. First, there is no ex-ante reason to assume that either a simple majority or any other voting majority rule is optimal, for the optimal majority in any case depends upon the ratio of external costs to decision-making costs. Second, an absolute majority (50% +1) is the minimum possible majority that will ensure voters cannot simultaneously pass contradictory resolutions on an issue. Third, the repeated overturn of resolutions due to small changes in voting coalitions (vote cycling), especially for purely redistributive zero-sum issues, may be lessened by adopting a higher voting majority rule.⁸⁸ Fourth, however, is that the potential for opportunistic ‘hold-up’ by voters increases with the voting majority rule, as individual voters are of increasing marginal importance and in a stronger position to seek concessions or side-payments in return for their support.⁸⁹ Fifth, importantly, Buchanan and Tullock’s model is a framework for the choice of governance structures and comparison of the relative costs of pri-

⁸⁷ In Figures 1 and 2, *D* is the decision-making costs curve, *E* is the external costs curve, *K* is the number of voters required to vote in favor of a resolution for it to be passed and *N* is the total number of voters. The shape of *D* and *E* is a crucial assumption, see, e.g., DOUGHERTY & EDWARD, *supra* note 79, at 57–72 (arguing there are horizontal regions at the extremes of both *D* and *E*, implying the possibility of a range of optimal voting majorities); see MUELLER, *supra* note 71, at 76–78 (arguing the simple majority rule is popular because of a discontinuity and large fall in the otherwise positively sloped *D*, where $K/N = 50$).

⁸⁸ See Whincop, *supra* note 10, at 425–28. On the voting paradoxes causing vote cycling and the “impossibility” of democratically aggregating rational individual preferences into a social welfare function consistent with the preferences of the majority, see Kenneth J. Arrow, SOCIAL CHOICE AND INDIVIDUAL VALUES (2nd ed. 1963); see also MUELLER, *supra* note 71, at 79–127 (explaining the problem of vote cycling on a given issue and vote-trading across issues as a solution to the problem).

⁸⁹ See, e.g., ROSS & SZYMANSKI, FANS OF THE WORLD, *supra* note 68, at 45–47 (discussing opportunism and hold up problems in sporting leagues).

vate or collective action;⁹⁰ where collective decision-making may occur via the voting of all parties, or the collective assignment of decision-making authority to either a smaller group or to an individual. The costs of collective decision-making also depend upon the nature of both the issue in question and the nature of the voters themselves.

FIGURE 1: OPTIMAL VOTING MAJORITIES WITH CHANGE IN EXTERNAL COSTS CURVE

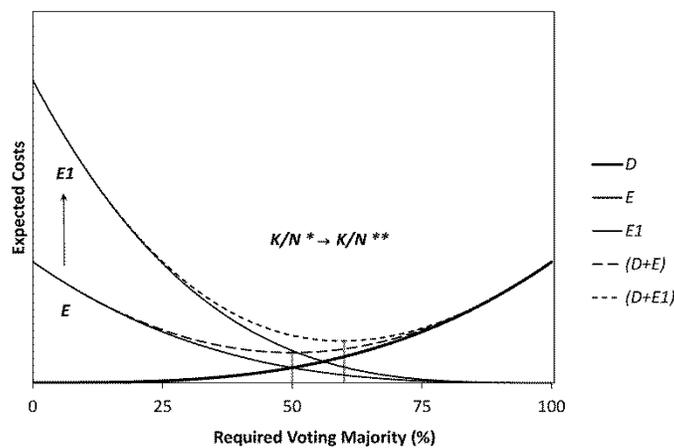
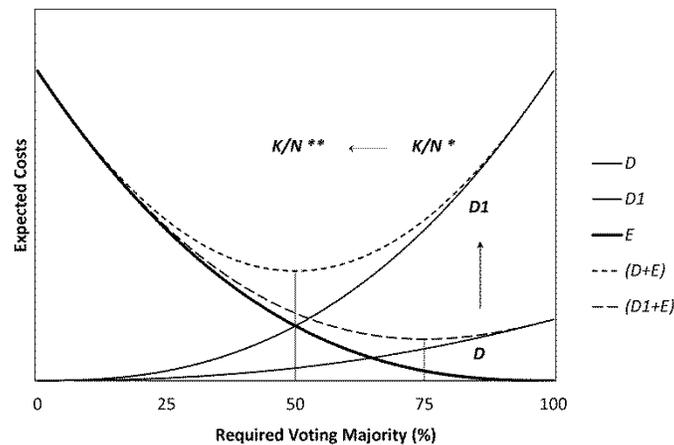


FIGURE 2: OPTIMAL VOTING MAJORITIES WITH CHANGE IN DECISION-MAKING COSTS CURVE



⁹⁰ See BUCHANAN & TULLOCK, *supra* note 2, at 47–59; Rowley, *supra* note 79, at 47–59.

C. Issues

Commentators on constitutional design and the economics of sport and league governance generally distinguish between constitutional, electoral and regulatory issues.⁹¹ As noted earlier, the *Corporations Act 2001* (Cth) itself distinguishes the fundamental “*constitutional issues*” of corporate form and identity (post-registration constitutional adoption, constitutional amendment and company wind up), for which a special resolution (75% majority) is mandatory; from “*electoral issues*”, where an ordinary resolution (simple majority) is required for the election (a replaceable rule) and removal of company directors.⁹² These same constitutional and electoral issues arise if parties seek to privately form an unincorporated association governed by a constitution, only there will be no mandatory or default voting majority rules. We further define “*regulatory issues*” as those regulations addressing individual conduct and the operation of markets. These include, for example, regulations dealing with the rights and responsibilities of national league clubs, State Associations, the NLCO and the NSO in labor, product and capital markets; regulations dealing with revenue-sharing between those entities, and regulations dealing with the form and integrity of the individual sporting contest and sporting competitions. Although these issues typically fall outside the domain of corporate law, parties are not precluded from assigning of voting rights on such regulatory issues in the corporate constitution.

Both across and within these categories, external costs are expected to rise with the magnitude of the economic and legal consequences of an issue.

⁹¹ Buchanan & Tullock distinguish the “*constitutional stage*” of collective decision-making, where unanimous agreement on the choice of constitutional arrangements is assumed, from the “*legislative stage*”, where collective action occurs within the scope of that constitution. This unanimity assumption overcomes the “infinite regression” problem of selecting rules for making rules. BUCHANAN & TULLOCK, *supra* note 2, at 6 (“[o]ne means of escape from what appears to be a hopeless methodological dilemma is that of introducing some rule for unanimity or full consensus at the ultimate constitutional level of decision-making”). Similarly, unanimous agreement of the (prospective) company members is required if a corporate constitution is to be adopted upon the initial registration of a company. *Corporations Act 2001* (Cth) s 136(1)(a). In our classification, this “*pre-registration stage*” is distinguished from the “*post-registration stage*” where the company members face the “constitutional issues” requiring a special resolution, as well as the “electoral issues” and “regulatory issues,” which attract various different voting majority rules.

⁹² See also DOUGHERTY & EDWARDS, *supra* note 79, at 4–7 (explaining that vote trading and negotiation of the terms of a proposed resolution are less feasible for electoral issues than other issues); see Nitzan & Procaccia, *supra* note 77 (economic analysis of the distinction between ordinary and special resolutions).

All else equal, issues with the highest external costs imply a higher optimal voting majority.⁹³ Those issues with permanent consequences, those representing a zero-sum game or those issues generating strong preferences or a strong endowment effect are expected to attract high external costs.⁹⁴ On the other hand, external costs are expected to be lower for positive sum issues, where decisions are reversible and where preferences are weak or the endowment effect is small.

For example, constitutional amendments or wind up of the company may significantly, if not also permanently, modify the allocation of decision-making (and property) rights of company members, thereby imposing high external costs upon those voting against a successful special resolution.⁹⁵ Contrast this to the election of company directors or others empowered with decision-making authority. This has an indirect effect upon external costs faced by the company members, for the election is merely a prelude to the actual decision-making process itself and such decisions may be reversible. The potential for high external costs is limited by the scope of the constitutional authority afforded to any decision-maker and is therefore greatest where one elected individual enjoys unilateral and unfettered decision-making rights.⁹⁶

Regulatory issues often represent a zero-sum game. Resolutions proposing to alter the scope or allocation of valuable rights (e.g. the sale of sponsorship and broadcasting rights), monopsonistic labor market regulations or reform of revenue-sharing mechanisms will inevitably impose a net cost upon some company members and benefit others. These distributional

⁹³ See, e.g., Bengt-Arne Wickström, *Optimal Majorities for Decisions of Varying Importance*, 48 PUB. CHOICE 273, 289 (1986) (arguing the optimal voting majority will only be higher for more important issues when individuals are risk averse and there is greater variance in the expected net benefit of those issues most important to voters).

⁹⁴ The “endowment effect” proposes that actors currently endowed with decision-making rights (or property) will not be willing to pay (WTP) as much to acquire such rights as they are willing to accept (WTA) as the sale price. Whether rights are valued simply because of their possession (irrespective of their economic value), because the $WTP < WTA$, or due to some other status-quo bias requires empirical investigation, see, e.g., Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 UCLA L. REV. 2 (2013).

⁹⁵ See, e.g., Rowley, *supra* note 79, at 27; Nitzan & Procaccia, *supra* note 77, at 198–202.

⁹⁶ See, e.g., Jonathon M. Reinsdorf, *The Powers of the Commissioner in Baseball*, 7 MARQ. SPORTS L.J. 211 (1996) (explaining the evolution of the MLB commissioner’s authority, commencing with the “absolute power” of the inaugural MLB commissioner, Judge Kenesaw Mountain Landis, under the Major League Agreement of 1921).

problems may elevate decision-making costs to the point where the decisions reached are sub-optimal. At worst, there may be no agreement at all. In contrast to U.S. major leagues such as the NFL or MLB,⁹⁷ few regulatory issues are subject to voting by company members or national league participant clubs in Australian national leagues, with an independent decision-maker (the NSO) perceived the lowest cost governance option.

D. Voters

The number and heterogeneity of voters and their preferences first depends upon those parties or classes assigned the status of voting company member—an issue raising the question of whether transaction costs are minimized via the use of corporate law and/or contract to formalize legal relations between parties.

1. Number of Voters

Where the voting majority rule is held constant, both decision-making costs and external costs necessarily rise with the number of eligible voters and the actual number of voters. The voting majority rule is therefore often smaller in large voting groups in order to contain decision-making costs.⁹⁸ Where exit from the group of voters is either not feasible or undesirable, voters may instead resort to exercising voice within the group, implying higher decision-making costs.⁹⁹ This is usually, but not always, the case in sport and league governance.¹⁰⁰ Conversely, external costs increase with the

⁹⁷ See *infra* text accompanying notes 271–276 and notes 278–279.

⁹⁸ See BUCHANAN & TULLOCK, *supra* note 2, at 107–08; Kafoglis & Cebula, *supra* note 83. Compare Karol Boudreaux & Jody Lipford, *Group Size, Group Heterogeneity, and Voting Rules: An Application of the Buchanan-Tullock Model to the European Union*, 5 EUR. J. L. & ECON. 133 (1998) and Andreas P. Kyriacou, *Decision Rules, Membership and Political Centralization in the European Union*, 27 EUR. J. L. & ECON. 143 (2009) (arguing voter heterogeneity increased with expansion of European Union in the 1980s and 1990s, prompting increased use of supermajority voting rules in place of unanimity voting rules), with W. Mark Crain & Robert D. Tollison, *Legislative Size and Voting Rules*, 6 J. LEGAL STUD. 235 (1977) (arguing econometric analysis of U.S. State legislatures offers weak evidence (controlling for heterogeneity) of smaller voting majority rules in larger legislatures).

⁹⁹ See Albert O. Hirschman, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970); MUELLER, *supra* note 71, at 139.

¹⁰⁰ National league clubs occasionally choose voluntary “exit” rather than “voice.” See, e.g., *News Limited v. Australian Rugby Football League Limited* (1996) 64 FCR 410, 465–96 (explaining actions of eight Australian Rugby League clubs seeking to exit league during “Super League war”); see also Robert D. Macdonald & Rick

number of voters who fail to vote on either an ordinary resolution or a special resolution. Corporate law provides that both types of resolution will be passed by the required majority of those present and voting at a meeting, as opposed to an absolute proportion of all voters. Quorum requirements therefore cap the external costs by limiting the number of non-voters.¹⁰¹

2. Voter Heterogeneity

All else equal, a heterogeneous group of voters will have higher decision-making costs and higher external costs than a relatively more homogeneous group.¹⁰² The optimal voting majority therefore depends upon the relative change in decision-making costs and external costs,¹⁰³ but greater heterogeneity reduces the likelihood of collective action, irrespective of the majority voting rule.¹⁰⁴ Heterogeneity is expected to increase with the importance of the issue being voted upon and the potential for greater heterogeneity naturally rises with the eligible number of voters, the actual number of voters and the number of voter classes.

Heterogeneity may be evident among the voters themselves (especially where there is a formal distinction between classes of voters in the corporate constitution),¹⁰⁵ in their preferences for alternative outcomes (as allowed by

Burton, *The Evolution of Governance in the Australian National Basketball League*, in *THE SPORTS BUSINESS IN THE PACIFIC RIM: ECONOMICS AND POLICY* 224–25 (Young Hoon Lee & Rod Fort eds., 2015) (explaining exit of the South Dragons NBL club in response to costly governance reforms that included removal of NBL club voting rights on regulatory issues).

¹⁰¹ See Keith L. Dougherty & Julian Edward, *The Properties of Simple vs. Absolute Majority Rule: Cases Where Absences and Abstentions are Important*, 22 J. THEORETICAL POL. 85 (2010) (explaining the distinction between voting rules requiring simple majority, simple majority with quorum, or absolute majority (and treatment of absences and abstentions) is non-trivial when assessed against various criteria for choice between rules).

¹⁰² See BUCHANAN & TULLOCK, *supra* note 2, at 110; Rowley, *supra* note 79, at 28.

¹⁰³ See Kafoglis & Cebula, *supra* note 83, at 184–85. Compare Barzel & Sass, *supra* note 86 (econometric analysis finding greater heterogeneity of voter preferences associated with more inclusive majority voting rules in corporate constitutions of condominium homeowner associations), with Boudreaux & Lipford, *supra* note 98; Kyriacou, *supra* note 98.

¹⁰⁴ See Kafoglis & Cebula, *supra* note 83; Rowley, *supra* note 79, at 28.

¹⁰⁵ See, e.g., Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445 (2008) (identifying causes of heterogeneity, including differences between shareholder classes); see also Bård Harstad, *Majority Rules and Incentives*, 120 Q.J. ECON. 1535, 1553–61 (2005) (modelling effect of heterogeneity of voter size and preferences).

the structure of the voting process),¹⁰⁶ in the intensity of preferences for alternatives,¹⁰⁷ in the probability of alternative outcomes being successful,¹⁰⁸ in voter risk aversion toward change from the status quo,¹⁰⁹ as well as in the ability of voters to identify the optimal outcome among the choice(s) being voted upon.¹¹⁰

Buchanan and Tullock argue a simple majority yields the minimum sum of external costs and decision-making costs only when adopting the restrictive assumptions that individual preferences are equally intense over all separate issues and there is no vote trading.¹¹¹

E. Implications

1. Optimal Voting Majority Rules

As a methodology, Buchanan and Tullock's model assumes an objective of cost minimization in constitutional design. As a normative tool, Buchanan and Tullock's model assumes that any constitutional voting majority rule ought to represent the sum of the external costs and the decision-making costs faced by the voters for that particular issue. Therefore, *all else equal, the closer a voting majority rule is to unanimity, the greater the ratio of external costs to decision-making costs. Issues with the highest ratio of expected external costs to decision-making costs ought to have the highest voting majority rule.* A relatively more heterogeneous group of company members is expected to encounter relatively higher external costs *and* higher decision-making costs than expected for a more homogeneous group. Buchanan and Tullock's original reasoning suggests greater heterogeneity demands a higher voting majority rule. Decision-making costs are expected to rise with the number of voters, implying a lower majority voting rule for larger groups. The choice of company members influences both the number and preference heterogeneity of voters.

¹⁰⁶ See, e.g., Harstad, *supra* note 105, at 1553–61; Kafoglis & Cebula, *supra* note 83, at 183–85.

¹⁰⁷ See, e.g., BUCHANAN & TULLOCK, *supra* note 2, at 121–26; Saul Levmore, *Voting with Intensity*, 53 STAN. L. REV. 111 (2000).

¹⁰⁸ See, e.g., DOUGHERTY & EDWARD, *supra* note 79; Nitzan & Procaccia, *supra* note 77, at 198.

¹⁰⁹ See, e.g., Wickström, *supra* note 93, at 289.

¹¹⁰ See, e.g., Nitzan & Procaccia, *supra* note 77, at 196–97 (arguing weighted voting rights ought to favor those voters most skilled at identifying optimal alternatives).

¹¹¹ BUCHANAN & TULLOCK, *supra* note 2, at 121–25.

2. Implicit Assumptions of Corporate Law

Legislators must draft corporate law statutes such as the *Corporations Act 2001* (Cth) (Austl.) from behind a veil of uncertainty. In the absence of information regarding the nature and intensity of voter preferences or voter expertise on different matters, a default simple majority voting rule equally weights external costs and decision-making costs. In such circumstances, a simple majority also weights the probability of a resolution being passed or defeated equally. The mandatory requirement for a special resolution to approve constitutional amendment or voluntary wind up implies a legislative assumption that such proposals have very high external costs; such that maintenance of the status quo ought to be preferred unless there is a strong collective preference to the contrary.

IV. NSO CONSTITUTIONAL VOTING RULES

We specifically analyze those constitutional voting rules in force between February 2012 and October 2013 when all four NSOs were also the NLCO in their sport. TABLE 1 summarizes the key economic features of the four NSOs from that time. TABLE 1 also identifies the State Associations and national league clubs in each sport. These entities collectively include incorporated not-for-profit associations, companies limited by guarantee, private companies limited by shares and one national league club operated by an ASX-listed public company.¹¹² Only some of these national league clubs and State Associations enjoy the status of NSO company member.

Population is a reasonable proxy for the heterogeneity of market size of these (potential) company members (see TABLE 2). Australia is a heavily urbanized nation of around 23 million people. National league clubs are based in State capital cities ranging in population from over four million to regional centers less than one tenth as large. The most populous Australian State (New South Wales (“NSW”)) is four times larger than the smallest to currently host a national league club in these four sports (South Australia (“SA”).

The constitutional voting rules of the AFL Articles and Memorandum of Association are the oldest in their current form (1997), followed by those of FFA Limited Constitution (2007). The ARLC Limited Constitution (adopted in 2012) marks the commencement of the era when all four companies were both the NSO and NLCO. The 2013 de-merger of Basketball

¹¹² Brisbane Broncos Limited, which operates the Brisbane Broncos NRL club, is listed on the ASX (ASX code: BBL).

Australia (the NSO) and the NBL competition organizer (the NLCO) marks the end of this era. For consistency, we explain the BA Limited Constitution as adopted in 2009, prior to the de-merger. The constitutional voting rules of each NSO from 2009 to 2013 are summarized in TABLE 3, with the commentary below following this order of ‘constitutional seniority’.

TABLE 1: PROFILE OF THE FOUR SPORTS

Sport	Australian Football	Association Football	Basketball	Rugby League
National Sporting Organisation	Australian Football League	Football Federation Australian Limited	BA Limited ["Basketball Australia"]	Australian Rugby League Commission Limited
National League	Australian Football League	A-League	National Basketball League	National Rugby League
Inaugural Season	1897	2005/06	1979	1908
National League Clubs & Location¹	Total AFL Clubs (18) Victoria (10) Carlton Collingwood Essendon Geelong Hawthorn Melbourne North Melbourne Richmond St Kilda Western Bulldogs New South Wales (2) Greater Western Sydney Giants Sydney Swans Queensland (2) Brisbane Lions Gold Coast Suns South Australia (2) Adelaide Port Adelaide Western Australia (2) Fremantle West Coast Eagles	Total A-League Clubs (10) New South Wales (4) Central Coast Mariners Newcastle Jets Sydney FC Western Sydney Wanderers Victoria (2) Melbourne Heart Melbourne Victory Queensland (1) Brisbane Roar South Australia (1) Adelaide United Western Australia (1) Perth Glory New Zealand (1) Wellington Phoenix	Total NBL Clubs (8) New South Wales (2) Sydney Kings Wollongong Hawks Queensland (2) Cairns Taipans Townsville Crocodiles South Australia (1) Adelaide 36ers Victoria (1) Melbourne Tigers Western Australia (1) Perth Wildcats New Zealand (1) New Zealand Breakers (Auckland)	Total NRL Clubs (16) New South Wales (10) Canterbury Bulldogs Cronulla Sharks Manly Sea Eagles Newcastle Knights Parramatta Eels Penrith Panthers South Sydney Rabbitohs St George-Illawarra Dragons Sydney Roosters Wests Tigers Queensland (3) Brisbane Broncos Gold Coast Titans North Queensland Cowboys (Townsville) Aust. Capital Territory (1) Canberra Raiders Victoria (1) Melbourne Storm New Zealand (1) New Zealand Warriors (Auckland)
State & Territory Sporting Associations¹	Total (8) AFL Northern Territory Ltd. AFL NSW/ACT Commission Limited AFL Queensland Ltd. Australian Football League (Victoria) Limited Football Tasmania Limited South Australian National Football League Inc. West Australian Football Commission Inc.	Total (9) ACT Football Federation Inc. Football Federation Northern Territory Inc. Football Federation SA Inc. Football Federation Tasmania Limited Football Federation Victoria Inc. Football NSW Limited Football Queensland Ltd. Football West Limited Northern NSW Football Limited	Total (8) ACT Basketball Association Inc. Basketball NT Inc. Basketball Queensland Limited Basketball SA Inc. Basketball Victoria Inc. New South Wales Basketball Association Limited Tasmanian Basketball Association Inc. Western Australian Basketball Federation (Inc.)	Total (8) New South Wales Rugby League Ltd. Queensland Rugby Football League Limited Country Rugby League of New South Wales Inc. Victorian Rugby League Inc. South Australian Rugby League Inc. Western Australian Rugby League Limited Northern Territory Rugby League Inc. Tasmanian Rugby League Inc.
International Sporting Federation	n.a.	Fédération Internationale de Football Association	International Basketball Federation	Rugby League International Federation
NSO Revenue²	\$471.493 m	\$84.589 m	\$14.179 m	\$185.668 m
ASC Funding³	\$1.165 m	\$5.680 m	\$6.115 m	\$1.012 m
10 Yr. ASC Funding³	\$7.307 m	\$59.817 m	\$48.458 m	\$9.466 m
Total Attendance⁴	6,238,876	1,666,942	586,811	3,151,660
Ave. Attendance⁴	31,509	12,348	5,239	16,415
Sport Participation⁵	241,500	489,100	354,800	104,100

Notes & Sources:

1. National League clubs and State or Territory Associations as at June 2013.

2. NSO annual revenue for financial year ending 2012 (AFL & ARLC Limited: Nov. to Oct. BA Limited & FFA Limited: July to June); see AFL, 116TH ANNUAL REPORT 2012, at 128 (Dec. 17, 2012); ARLC LIMITED, CONSOLIDATED GENERAL PURPOSE FINANCIAL REPORT FOR THE YEAR ENDED 31 OCTOBER 2012, at 6 (Dec. 18, 2012); BA LIMITED, SPECIAL PURPOSE FINANCIAL STATEMENTS FOR THE YEAR ENDED 30 JUNE 2012, at 4 (Oct. 12, 2012); FFA LIMITED, GENERAL PURPOSE FINANCIAL REPORT FOR THE YEAR ENDED 30 JUNE 2012, at 9 (Oct. 9, 2012).

3. ASC funding for financial year ending 2012. 10 year ASC funding for financial years 2003/04 to 2012/13; see DAVID SHILBURY & PAMM KELLETT, SPORT MANAGEMENT IN AUSTRALIA: AN ORGANISATIONAL OVERVIEW 102 (4th ed. 2011) (sport funding allocations 2003–2008); ASC, ANNUAL REPORT 2008–2009, at 146–47 (2009) (grant allocations to sports); ASC, ANNUAL REPORT 2009–2010, at 117–18 (2010) (grant allocations to sports); ASC, ANNUAL REPORT 2010–2011, at 122–23 (2011) (grant allocations to sports); ASC, ANNUAL REPORT 2011–2012, at 124–5 (2012) (grant allocations to sports); ASC, AUSTRALIA'S WINNING EDGE INVESTMENT ALLOCATION 2013/14 (2013).

4. Attendance data for the 2012 AFL, 2012 NRL, 2012/13 A-League & 2012/13 NBL regular seasons. See AFL RECORD SEASON GUIDE 2013, at 808 (Michael Lovett ed. 2013) (AFL attendance); Hyundai A-League Sets New Attendance Record, FOOTBALL FEDERATION AUSTRALIA (Apr. 3, 2013), (on file with authors); NATIONAL RUGBY LEAGUE, STATE OF THE GAME 2012, at 2, 4 (2012) (on file with authors); NBL ATTENDANCE VARIABLES, 1985–2011/12 (Oct. 2013) (on file with authors).

5. AUSTRALIAN BUREAU OF STATISTICS, PARTICIPATION IN SPORT & PHYSICAL RECREATION, AUSTRALIA (CAT. NO. 4177.0), Table 6 (2011–12).

TABLE 2: AUSTRALIA & NEW ZEALAND, ESTIMATED POPULATION
AT 30 JUNE 2012 ('000,000s)

Region	Population	City Population (GCCSA / SUA)
New South Wales	7.307	Sydney* (4.673 / 4.293), Newcastle (0.421), Wollongong (0.283), Central Coast (0.317)
Victoria	5.632	Melbourne* (4.248 / 4.086), Geelong (0.179)
Queensland	4.568	Brisbane* (2.192 / 2.099), Gold Coast (0.592), Townsville (0.171), Cairns (0.142)
Western Australia	2.437	Perth* (1.900 / 1.834)
South Australia	1.656	Adelaide* (1.278 / 1.251)
Tasmania	0.512	Hobart*^ (0.217 / 0.206)
Northern Territory	0.236	Darwin*^ (0.132 / 0.116)
Australian Capital Territory	0.376	Canberra*^ (0.375 / 0.412)
AUSTRALIA	22.710	
NEW ZEALAND	4.433	Auckland (1.508), Wellington (0.490)

Notes:

Population estimates for June 30, 2012; all figures rounded to the nearest thousand. * Capital cities. ^ Cities not hosting national league clubs in 2012-2013. GCCSA = Greater Capital City Statistical Area Population. SUA = Statistical Urban Area Population.

Sources:

AUSTRALIAN BUREAU OF STATISTICS, AUSTRALIAN DEMOGRAPHIC STATISTICS (CAT. NO. 3101.0), Table 4 (Sept. 2013); AUSTRALIAN BUREAU OF STATISTICS, REGIONAL POPULATION GROWTH (CAT. NO. 3218.0), Table 1 (Dec. 2012); STATISTICS NZ, SUBNATIONAL POPULATION ESTIMATES, Table 1 (June 30, 2013).

TABLE 3: NSO CONSTITUTIONAL VOTING RULES SUMMARY

NSO	AFL	FFA Limited	BA Limited	ARLC Limited
Voting Company Members	Appointees of AFL Clubs (x 18)	State Body Members (x 9) Football League Members (0 to 2)	Constituent Association Members (x 8) NEW NBL Club Members (x 8)	Director-Members (x 8) Licensee Members (x 16) NSWRL Limited & QRL Limited (x 2)
Voting Weights	1 vote per Appointee	1 vote per State Body Member 1 vote per Football League Member	<i>Weighted Voting:</i> Sum of Constituent Association Member Votes = 60% of total votes Sum of NEW NBL Club Member votes = 40% of total votes <i>Constituent Association Members:</i> between 1 and 12 votes each, weighted by number of registered players <i>NEW NBL Club Members:</i> equal proportion of NEW NBL Club Member votes	1 vote per Member
Company Directors	Between 6 and 9 Commissioners elected by the Members, with no more than one-third being Executive Commissioners appointed by the AFL Commission	Between 5 and 9 Directors, with no more than 6 elected by the Members	Between 5 and 7 Directors, with no more than 2 appointed by the Board	8 Directors
NSO Majority Voting Rules				
Admission of new Company Members	No direct voting rights – Admission of Company Members contingent upon admission of Clubs	No voting rights	Special Resolution, to admit new Constituent Association Members. (75%) No voting rights to admit NEW NBL Club Members	No direct voting rights – Admission of Director-Members contingent upon appointment of Directors
Expulsion of Company Members	No direct voting rights – Expulsion of Company Members contingent upon expulsion of Clubs	No voting rights	Special Resolution to expel Constituent Association Members (75%) No voting rights to expel NEW NBL Club Members	No direct voting rights – Expulsion of Director-Members contingent upon removal of Directors
Merger or Relocation of Company Member	No direct voting rights – Contingent upon merger or relocation of Clubs	No voting rights	No voting rights	No voting rights
Admission of New National League Clubs	Two-thirds Majority, to overturn AFL Commission decision to admit new Club (66.7%)	No voting rights	No voting rights	No voting rights
Expulsion of National League Clubs	Simple Majority, to approve AFL Commission decision to expel a Club (50% + 1)	No voting rights	No voting rights	No voting rights
Merger or Relocation of National League Club	Two-thirds Majority, to overturn AFL Commission decision to merge or relocate a Club (66.7%)	No voting rights	No voting rights	No voting rights
Election of NSO Company Directors	Simple Majority (50% + 1)	Prescribed Majority (60%)	Simple Majority (50% + 1)	Simple Majority of Directors (at a meeting of the Directors, not a General Meeting of the Members) (50% + 1) <i>OR</i> Unanimity, of Licensee Members, NSWRL Limited & QRL

				Limited to elect new Director where < 8 Directors for 6+ months (100%) <i>OR</i> Super Majority, of 75% of Licensee Members + NSWRL Limited + QRL Limited, to elect new Director where < 5 Directors (75% + 100% + 100%)
Removal of NSO Company Directors	Simple Majority (50% + 1) *	Simple Majority (50% + 1) *	Simple Majority (50% + 1) *	Simple Majority, of all Members (50% + 1) * <i>OR</i> Super Majority, of 10 Licensee Members + NSWRL Limited + QRL Limited (62.5% + 100% + 100%)
Amendment of NSO Constitution	Special Resolution (75%) *	Special Resolution (75%) *	Special Resolution (75%) *	Special Resolution (75%) * <i>PLUS</i> Specific Majority, requiring all Licensee Members except 1 + NSWRL Limited + QRL Limited (93.75% + 100% + 100%)
Voluntary Wind Up of NSO	Special Resolution (75%) *			

* Mandatory voting rule, as prescribed by *Corporations Act 2001* (Cth). See Part IV for sources.

A. Australian Football / Australian Football League

The VFL was founded in 1896, when eight clubs (seven from metropolitan Melbourne and one from Geelong) broke away from the older Victorian Football Association (“VFA”) to contest the inaugural VFL season in 1897. The VFA had been formed in Melbourne in 1877 and was the inaugural governing body for “Victorian Rules” football in the indigenous code’s city of birth.

The VFL quickly became popular and the VFL league competition organizer was incorporated as a company limited by guarantee in 1929. The league grew to 12 clubs by 1925, and apart from World War II, remained at 12 clubs until 1987.¹¹³ The South Melbourne Football Club first commenced playing its home games in Sydney in 1982 and permanently relocated to Sydney in 1983. The company (“the League” in the AFL constituent documents) and the competition were both renamed the Austra-

¹¹³ The growth of Australian football in the 19th and 20th centuries was paralleled in southern parts of Australia. The two strongest rival leagues were the South Australian National Football League (“SANFL”) in Adelaide and the West Australian Football League (“WAFL”) in Perth. After World War II, most good players were drawn to the financially stronger VFL clubs.

lian Football League following the 1989 season. Expansion clubs joined in 1987, 1991, 1995, 1997, 2011 and 2012, growing the AFL competition to 18 clubs, though the problem of club self-interest nearly thwarted the expansion of the VFL from 12 to 14 clubs in 1987.¹¹⁴ From 2012, there were 10 AFL clubs based in Victoria (nine in Melbourne) and two in every other mainland State. During this era, three formal merger proposals collapsed under the weight of public opinion or the opposition of other AFL clubs. The Fitzroy Football Club was merged with Brisbane ahead of the 1997 season at the behest of a creditor-appointed administrator.¹¹⁵

Beginning in the early 1980s, the corporate governance of the VFL was transformed from the delegate model (which afforded the VFL clubs collective decision-making rights on all fundamental constitutional issues, electoral issues and regulatory issues) into the Australian exemplar of “best practice” in league and NSO governance, via the creation of an independent commission.¹¹⁶ The VFL Commission was first established on an interim basis in 1984 and permanently adopted in 1985 as a body acting with the delegated authority of the board of directors, which itself comprised VFL club delegates and retained significant residual decision-making authority. Eight years later the AFL clubs heeded the warning of “a need for an ongoing independent Commission with clearly stated powers, capable of taking

¹¹⁴ In 1986, the directors of the VFL were delegates of the 12 VFL clubs. The Oct. 1, 1986 meeting of the VFL directors was convened to approve the admission of two expansion clubs, one each from Brisbane (Brisbane Bears) and Perth (West Coast Eagles). A vote to approve the entry of the Perth-based club either failed, or appeared likely to fail, by one vote, to achieve the required two-thirds majority. The meeting was adjourned so executives of the VFL and the Fitzroy Football Club could negotiate sufficient financial incentives to guarantee the vote of the Fitzroy delegate (including an equal share of the \$4 million license fee to be paid by the expansion club, plus additional finance or bank guarantees). Once the meeting was reconvened, the resolution was passed, 8-4. For similar yet conflicting accounts (of events and the potential financial benefit to Fitzroy) from different parties at the meeting, compare LINNELL, *supra* note 41, at 155-59 with OAKLEY ET AL., *supra* note 41, at 115-20.

¹¹⁵ Three merger proposals were unsuccessful: Fitzroy-Footscray (Western Bulldogs) (1989); Melbourne-Hawthorn (1996); Fitzroy-North Melbourne (1996). See *infra* text accompanying note 81. Former Fitzroy Chairman Dyson Hore-Lacy and former AFL Chief Executive Officer Ross Oakley offer context on the informal poll of AFL clubs on the Fitzroy-North Melbourne proposal and the vote to approve the Fitzroy-Brisbane Bears merger (1996), see DYSON HORE-LACY, FITZROY 141-259 (2000) and OAKLEY ET AL., *supra* note 41, at 237-61.

¹¹⁶ See, e.g., Pearce & Thomas, *supra* note 30, at 12-13 (showing AFL governance structure perceived as “best practice model”).

objective decisions in the long term interests of AFL football.”¹¹⁷ The reform proposals adopted in July 1993 ceded most of the club’s decision-making powers to the AFL Commission,¹¹⁸ which was reconstituted as the independent board of directors of the League.¹¹⁹ The AFL formally assumed national governing body responsibilities in 1995, after the wind up of the under-resourced National Football League of Australia Limited,¹²⁰ and had enjoyed a de facto status as such in the era of national expansion. Save for a few residual rights of the company members, the League enjoys a broad authority to, inter alia, “conduct the Australian Football League [competition]”¹²¹ and to “promote and encourage the Australian National Game of Football”.¹²²

1. Voting Company Members & National League Clubs

The Commission has the right to grant an entity the status of a ‘Club’ and the consequent right to representation in the League.¹²³ After experiments with private ownership in the 1980s and 1990s, nearly all AFL clubs

¹¹⁷ David A. Crawford, AFL Administrative Structure Review – Findings 1 (Mar. 1, 1993) (unpublished report) (on file at the National Sports Informational Centre, Australian Sports Commission).

¹¹⁸ On the evolution of governance from the VFL delegate structure to the independent AFL Commission, see ALLEN AYLETT & GREG HOBBS, MY GAME. A LIFE IN FOOTBALL AS TOLD TO GREG HOBBS chs. 10, 19 (1986); Crawford, *supra* note 115; Dave Nadel, *A Game Goes National*, in THE AUSTRALIAN GAME OF FOOTBALL: SINCE 1858, at 78, 80–89 (Geoff Slattery ed. 2008); OAKLEY ET AL., *supra* note 41, chs. 1–2, 6.

¹¹⁹ AUSTRALIAN FOOTBALL LEAGUE ARTICLES OF ASSOCIATION art. 1 (at Nov. 22, 2010) [hereinafter AFL ARTICLES] (definition of “Commission”).

¹²⁰ See AFL, 99TH ANNUAL REPORT 18–19 (1996). The former national governing body was a relatively weak confederation of the VFL, SANFL, WAFL and other State and Territory governing bodies, but with little practical jurisdiction by the 1990s.

¹²¹ AUSTRALIAN FOOTBALL LEAGUE MEMORANDUM OF ASSOCIATION cl. 2(a) (at Nov. 22 2010) (objects of “the League”).

¹²² *Id.* cl. 2(b) (objects of the “League”); see also AFL ARTICLES, *supra* note 119, at arts. 52–58 (powers and duties of AFL Commission).

¹²³ AFL ARTICLES, *supra* note 119, at art. 1 (definition of “Club”); *id.* art. 112 (Commission may grant status of Club). In the most recent consolidated copy of the AFL Articles & Memorandum of Association provided to the authors (received Nov. 22, 2010), the 16 clubs of the 2010 AFL season are specifically named in the definition of “Club” as well as “any such additional or other clubs as may from time to time be granted the status of a Club and the consequent right to representation on the League.” New Clubs were licensed in 2009 (Gold Coast) and 2010 (Greater Western Sydney), to commence play in 2011 and 2012, respectively.

are companies limited by guarantee, with a public membership-based structure of some kind.¹²⁴ The corporate structure of AFL Clubs is regulated by the AFL Club Licence Agreements and the AFL Rules and Regulations. Since the 1980s, the League and each Club have been contractually bound via a perpetual Licence Agreement. An AFL Licence entitles a Club to nominate one eligible person (an “Appointee”) for membership of the League.¹²⁵ The Appointees are required to act independently and to “not act or be deemed to be a trustee or agent for the Club but shall act independently for the encouragement and promotion of football in accordance with the objects of the League set out in its Memorandum of Association.”¹²⁶ The discretionary right of the AFL Clubs to replace the Appointees nevertheless implies a degree of informal discipline. Individuals voting in opposition to the views of the appointing club will soon be replaced. The State Associations are contractually affiliated with (and some more directly controlled by) the AFL, but not recognized in the Articles and Memorandum of Association of the League.¹²⁷ There were 18 AFL clubs, hence 18 voting Members, in 2012 and 2013.

2. Board of Directors

The AFL Articles of Association provide for between six and nine Commissioners, with no more than one-third being executive Commissioners.¹²⁸ The Commission itself has the responsibility for appointing a Chairman of the Commission from among the non-executive Commissioners¹²⁹ and for appointing and removing a chief executive officer (“CEO”), who is a voting member of the Commission as of right,¹³⁰ and one other non-voting executive Commissioner at its discretion,¹³¹ neither of whom are subject to retire-

¹²⁴ See James Paterson, *AFL Club Membership: A Glorified Stadium Entry Ticket, or a Genuine Ownership Stake in the Club?* 28 *COMPANY & SEC. L.J.* 507 (2010) (comparing the rights of AFL Club members and of AFL Club corporate structures).

¹²⁵ AFL ARTICLES, *supra* note 119, at art. 1 (definition of “Appointee”); *id.* at art. 3–18 (League Membership; appointment, removal and replacement of Appointees).

¹²⁶ *Id.* at art. 10.

¹²⁷ State Associations include the South Australian National Football League Inc. (organizer of the SANFL) and the West Australian Football Commission Inc. (organizer of the WAFL). Those in other States and Territories have been re-organized to give the AFL greater direct control than that held over the two traditional rivals to the former VFL.

¹²⁸ AFL ARTICLES, *supra* note 119, at art. 37

¹²⁹ *Id.* art. 44.

¹³⁰ *Id.* arts. 43–45.

¹³¹ *Id.* arts. 43, 46.

ment by rotation.¹³² At each annual general meeting, the two longest-serving non-executive Commissioners retire from office, along with any other non-executive Commissioner who has not retired within the previous 35 months¹³³ or who had been appointed by the Commission itself since the last annual general meeting.¹³⁴ Retiring non-executive Commissioners are eligible for re-election.¹³⁵

3. Constitutional Voting Rules

Each Appointee has one vote at a general meeting of the League.¹³⁶ Any three Appointees may requisition a general meeting,¹³⁷ with eight Appointees required for a quorum at a general meeting or annual general meeting.¹³⁸ Appointees do not enjoy direct voting rights on the admission, expulsion, merger or relocation of a company member, although the right to appoint company members is a direct consequence of an entity being granted an AFL Club Licence. However, an AFL Commission decision to grant an entity the status of Club, to relocate a Club or to merge Clubs, may be reversed at a general meeting of the League (as requisitioned by any three Appointees) if at least two-thirds of the Appointees vote in favor of reversing the decision.¹³⁹ Therefore, if one-sixth of the Appointees requisition a general meeting, a minority of one-third of the Appointees plus one (seven Appointees in 2012 and 2013) is necessary to approve an AFL Commission decision to admit, merge or relocate an AFL Club or Clubs, and by extension, alter the membership of the company. An AFL Commission decision to suspend or terminate the Licence Agreement of an AFL Club *must be ratified* by a simple majority at a general meeting of all Appointees, being members of the League on the date of that meeting.¹⁴⁰

¹³² *Id.* arts. 45–46.

¹³³ *Id.* art. 39(1).

¹³⁴ *Id.* art. 48.

¹³⁵ *Id.* art. 39(2).

¹³⁶ *Id.* art. 32.

¹³⁷ *Id.* art. 21.

¹³⁸ *Id.* art. 24; *id.* art. 25 (explaining if quorum not present and meeting is adjourned, and if quorum not present within half an hour from the time appointed for the reconvened meeting, three Appointees shall represent a quorum).

¹³⁹ *Id.* art. 15(a); *id.* art. 12(a)–(b) (explaining that the Commission may “(a) relocate the playing, administration or social base of a Club; or (b) recognise, implement and adopt the merger of two or more Clubs, with the consent of the Club or Clubs involved”).

¹⁴⁰ *Id.* arts. 13(a), 15(b).

A prospective candidate for election as a non-executive member of the AFL Commission must be nominated by three Appointees or AFL Commissioners.¹⁴¹ The Appointees may elect non-executive Commissioners by resolution.¹⁴² Those candidates receiving both the highest number of votes and a majority of votes from Appointees present at the meeting are deemed to be elected until vacancies are filled.¹⁴³ The Appointees may also remove and replace a sitting non-executive Commissioner, with both actions requiring separate ordinary resolutions.¹⁴⁴

The Appointees may determine the number of AFL Commissioners by ordinary resolution, subject to the constitutional requirement for between six and nine Commissioners with no more than one-third being executive Commissioners.¹⁴⁵ The AFL Articles and Memorandum of Association are silent on the voting rules for constitutional amendment or the commencement of voluntary wind up of the company. The *Corporations Act 2001* (Cth) mandates a special resolution of the company members in both cases.¹⁴⁶

B. *Association Football / Football Federation Australia Limited*

The Commonwealth Football Association (“CFA”) was the first national governing body in Australian association football. Formed in 1911, the CFA disbanded due to World War I, reconvened in 1921 and was incorporated as Association Football (Australia) Ltd in January 1923. The company was renamed the Australian Soccer Football Association (“ASFA”) in 1926.¹⁴⁷ Organizational and ethnic tensions among and between State league clubs and State Associations later resulted in the formation of the Australian Soccer Federation (“ASF”) in November 1961 and the collapse of the ASFA. By 1973, the ASF was incorporated as a company limited by guarantee under the *Companies Ordinance 1962* (ACT) and was renamed Soc-

¹⁴¹ *Id.* art. 42(2).

¹⁴² *Id.* art. 41.

¹⁴³ *Id.* arts. 41(4)(viii), 41(4)(ix).

¹⁴⁴ *Id.* art. 49(1).

¹⁴⁵ *Id.* art. 37 (number of Commissioners); *id.* art. 47 (Clubs to determine number of Commissioners).

¹⁴⁶ *Corporations Act 2001* (Cth) ss 136(2) (constitutional amendment), 491(1) (voluntary wind up).

¹⁴⁷ See ROY HAY & BILL MURRAY, *A HISTORY OF FOOTBALL IN AUSTRALIA: A GAME OF TWO HALVES* 36–57 (2014) (discussing formation of early national governing bodies in Australian association football).

cer Australia Limited in 1996.¹⁴⁸ Decades of conflict between individuals, clubs and State Associations and regular mismanagement threatened the growth and even the solvency of the NSO.¹⁴⁹ A new entity, Australian Soccer Association Limited, assumed NSO responsibilities in 2003. This company was formed after an independent review into the structure, finances and governance of the sport at the behest of the Australian Government.¹⁵⁰ The company was renamed Football Federation Australia Limited (“FFA Limited”) in 2004. The objects of the company include “to be the premier body for Football in Australia . . . to be the Australian member of FIFA . . . [and] to govern Football throughout Australia”.¹⁵¹ FFA Limited “may [also] establish one or more Football Leagues, including under licence.”¹⁵²

¹⁴⁸ AUSTRALIAN SOCCER FEDERATION MEMORANDUM & ARTICLES OF ASSOCIATION (at Nov. 1972) (documents dated Nov. 1972, lodged Nov. 27, 1973 with the ACT Office of the Registrar of Companies).

¹⁴⁹ See *International Entertainment Corporation Pty Ltd v. Soccer Australia Ltd* [2002] FCR 879 (11 June 2002) (Austl.) (discussing a situation when creditor sought leave to commence wind up of Soccer Australia Limited, before agreeing to a private settlement); John Stewart, *Soccer Australia Saved From Liquidation*, AUSTRALIAN BROADCASTING CORPORATION, NEWS ARCHIVE (June 20, 2002), <http://www.abc.net.au/pm/stories/s586617.htm>, [<http://perma.cc/FT3C-JKTV>] (last visited Mar. 17, 2015). On the evolution and history of the national governing bodies and national leagues in association football, see HAY & MURRAY, *supra* note 147; ROSS SOLLY, *SHOOT OUT: THE PASSION AND THE POLITICS OF SOCCER’S FIGHT FOR SURVIVAL IN AUSTRALIA* (2004).

¹⁵⁰ See REPORT OF THE INDEPENDENT SOCCER REVIEW COMMITTEE INTO THE STRUCTURE, GOVERNANCE AND MANAGEMENT OF SOCCER IN AUSTRALIA (Apr. 2003) (discussing when Australian Government commissioned committee recommends formation of a new entity to assume NSO responsibilities), <http://fulltext.ausport.gov.au/fulltext/2003/soccerinquiry/reportfull.pdf>, [<http://perma.cc/74LJ-Z8A4>]. The Independent Soccer Review Committee was chaired by David Crawford, who had previously advised the AFL on governance reform, *see* Crawford, *supra* note 117; *see also* REPORT OF THE NSL TASK FORCE INTO THE STRUCTURE OF A NEW NATIONAL SOCCER LEAGUE COMPETITION (Dec. 2003) (describing that Task Force commissioned by new NSO recommended new national league to replace NSL), http://fulltext.ausport.gov.au/fulltext/2003/soccer/Task_Force.pdf, [<http://perma.cc/F3T3-RUL9>]; WARWICK SMITH, BUILDING AUSTRALIA’S FOOTBALL COMMUNITY: A REVIEW INTO THE SUSTAINABILITY OF FOOTBALL (Nov. 2011) (Australian Government commissioned report reviewing the NSO and national league reforms), http://www.ausport.gov.au/__data/assets/pdf_file/0020/624161/FFA_sustainability_report.pdf, [<http://perma.cc/FF8T-RMPT>].

¹⁵¹ FOOTBALL FEDERATION AUSTRALIA LIMITED CONSTITUTION (May 2007) [hereinafter FFA LIMITED CONST.] art. 1.1(a)–(c) (Objects of FFA), *available at* http://www.footballaustralia.com.au/dct/ffa-dtc-performgroup-eu-west1/National%20Constitution_1rnkm5524of6m1vl6c8v75hqkt.pdf, [<http://perma.cc/Z5FU-N35N>].

¹⁵² *Id.* art. 1.2.

When founded by the ASF in 1977, the NSL was the first national club-based league in Australia, with 14 clubs drawn from pre-existing competitions in five Australian States and Territories. Over 40 clubs participated in the NSL before the league was disbanded after the 2003/04 season. FFA Limited then established the A-League and remains the NLCO today. The inaugural A-League season was contested in the summer of 2005/06 by a mix of former NSL clubs and new franchises. Expansion then contraction has left 10 A-League clubs based in five Australian States and Wellington, New Zealand (NZ) since 2011/12.¹⁵³

1. Voting Company Members & National League Clubs

The FFA Limited Constitution recognizes two classes of members, the “State Body Members” and the “Football League Members”, with one vote each at a general meeting of the company.¹⁵⁴ The Directors *must* recognize one body from each State, plus one further body from NSW, as a “State Body”,¹⁵⁵ then invite those bodies to apply for company membership.¹⁵⁶ Provisions for two such bodies from NSW replicate the former arrangements under the Articles of Association of Soccer Australia Limited. This reflects the long-term evolution and geography of association football in NSW, where Newcastle-based associations, with claims to being the governing body for “northern NSW”, have enjoyed a considerable power-base since the 1800s.¹⁵⁷ The State Body Members include associations incorporated under the relevant State and Territory associations incorporation legislation and companies limited by guarantee under the *Corporations Act 2001* (Cth). In October 2010, these State Body Members and FFA Limited signed a further

¹⁵³ See HAY & MURRAY, *supra* note 147, at 185–205, 255–258 (summarizing the history of NSL and A-League).

¹⁵⁴ FFA LIMITED CONST. *supra* note 151, art. 6.1 (votes of members); *id.* arts. 3.4–3.5 (explaining Directors must invite “from time to time” the chair of five Standing Committees (for referees, coaches, juniors, women and futsal) and any other Standing Committee instituted by the Directors to apply for company membership (without voting rights)).

¹⁵⁵ *Id.* art. 3.3 (recognition of state bodies).

¹⁵⁶ *Id.* art. 3.4(a) (new Members of company).

¹⁵⁷ The Northern NSW Soccer Federation was recognized as a member of the NSO in both the earliest and latest available versions of the ASF and Soccer Australian Limited constituent documents, AUSTRALIAN SOCCER FEDERATION ARTICLES OF ASSOCIATION art. 5 (at Nov. 1972) (on file with authors); SOCCER AUSTRALIA LIMITED ARTICLES OF ASSOCIATION art. 4 (at Dec. 8, 1990) (on file with authors).

Member Federation Charter to reinforce the shared direction and individual rights and responsibilities of the NSO and its Members.¹⁵⁸

The FFA Limited Directors *may* also invite a representative of a Football League (established by FFA Limited) to apply for company membership,¹⁵⁹ provided that representative has been nominated by a majority at least 75% of the clubs participating in that Football League.¹⁶⁰ FFA Limited established the elite-level national leagues for men (the A-League) and women (the W-League) in 2006 and 2008, respectively. The A-League clubs include Australian companies limited by shares and one limited company incorporated pursuant to the *Companies Act 1993* (NZ) and have fixed term licenses to participate in the A-League competition.¹⁶¹

2. Board of Directors

The FFA Limited Constitution mandates between five and nine Directors,¹⁶² with not more than six Directors to be elected by the Members.¹⁶³ The Directors have discretion to appoint no more than three Appointed Directors (subject to other constraints on the total number of Directors)¹⁶⁴ and must appoint a Chief Executive Officer, who would also be the Managing Director if so appointed.¹⁶⁵

The Elected Directors are able to elect one of their number to be the chairman of directors.¹⁶⁶ Elected Directors hold office for a term of four years, subject to the requirement that commencing with the 2013 annual general meeting and at every second annual general meeting thereafter, half (those having served the longest) must retire from office.¹⁶⁷ An Elected Director is limited to two consecutive terms and then ineligible for re-election

¹⁵⁸ See FOOTBALL FEDERATION AUSTRALIA MEMBER FEDERATION CHARTER (Oct. 2010), available at http://www.footballaustralia.com.au/dct/ffa-dtc-perform-group-eu-west-1/FFA%20Member%20Federation%20Charter_nfgxdu5pbksk1lpo4b6qg5b4r.pdf, [http://perma.cc/Z7L2-AZSG].

¹⁵⁹ See FFA LIMITED CONST., *supra* note 151, art. 3.4(c).

¹⁶⁰ *Id.* art. 3.6(a) (process for electing Football League Member).

¹⁶¹ See *FFA Extends Hyundai A-League Licences to 2034*, FOOTBALL FEDERATION AUSTRALIA (Feb. 18, 2014), <http://www.footballaustralia.com.au/article/ffa-extends-hyundai-a-league-licences-to-2034/1tmf0rjrbq1hr1o2nbojnvu4pl>, [http://perma.cc/9E3L-YH6K], (last visited Mar. 18, 2015).

¹⁶² FFA LIMITED CONST., *supra* note 151, art. 10.1(a)

¹⁶³ *Id.* art. 10.1(b)(i)

¹⁶⁴ *Id.* art. 10.1(b)(ii)

¹⁶⁵ *Id.* art. 13.1 (Chief Executive Officer); *id.* arts. 10.1(c), 10.21 (Managing Director).

¹⁶⁶ *Id.* art. 10.9(a).

¹⁶⁷ *Id.* art. 10.5–10.7 (term of office and rotation of Directors).

until the second annual general meeting after the end of the Director's term.¹⁶⁸ Other than a Managing Director and one Appointed Director, a person is not eligible to stand for election or hold office as a Director if they are (or have in the past two years been) an employee, standing committee member or state zone committee member of FFA Limited or a State Body Member or in an "Official Position" with any body (excluding FFA Limited) participating in, conducting or administering association football in Australia.¹⁶⁹

3. Constitutional Voting Rules

The nine State Body Members and any Football League Members have one vote each at a general meeting of the company,¹⁷⁰ with a quorum requirement of 60% of the voting Members at a general meeting.¹⁷¹ In lieu of constitutional provisions, the *Corporations Act 2001* (Cth) requires the Directors to call a general meeting upon the request of Members with at least 5% of the votes at a General Meeting (one FFA Limited Member).¹⁷² The FFA Limited Constitution does not afford company members the right to vote on the admission, expulsion, merger or relocation of company members or national league clubs.

A candidate for election as a Director must be nominated and seconded by two Members or a Member and a Director and seconded by another Member or Director (other than the Managing Director in both cases).¹⁷³ Directors are elected by a resolution of the voting Members passed by a "Prescribed Majority" of not less than 60% of the Members present and eligible to vote at the relevant general meeting.¹⁷⁴ Up to three rounds of voting are permitted if the nominee(s) receive less than a Prescribed Major-

¹⁶⁸ *Id.* art. 10.12 (maximum term of office); *id.* art. 10.13 (explaining service as "First Director" prior to 2007 Extraordinary General Meeting does not count towards maximum term of office); *id.* art. 10.2 (identifying the First Directors of company at time of incorporation).

¹⁶⁹ *Id.* arts. 10.16–10.17 (Director eligibility and Appointed Directors); *Id.* art. 23.1 (Definition of "Official Position").

¹⁷⁰ *Id.* art. 6.1(a).

¹⁷¹ *Id.* art. 5.1; *Id.* arts. 5.3(b)–5.4 (if quorum not present and a meeting is adjourned to be reconvened, the quorum requirement falls to 40% of the voting Members); *id.* art. 5.3(a) (explaining meeting must be dissolved if quorum not present at a meeting convened or requisitioned by the Members).

¹⁷² *Corporations Act 2001* (Cth) s 249D(a).

¹⁷³ FFA LIMITED CONST., *supra* note 151, arts. 10.14(a)–(b).

¹⁷⁴ *Id.* art. 10.11(a) (elections at general meetings); *id.* art. 23.1 (definition of "Prescribed Majority").

ity but the number of nominees exceeds the number of vacancies.¹⁷⁵ At the second and third ballots, the nominee(s) who received the fewest votes in the preceding ballot shall be deleted from the list of nominees, unless to do so would result in there being no nominees.¹⁷⁶ A casual vacancy will arise (and may be filled by the Directors) if the nominees do not receive a Prescribed Majority at any ballot and if, for the first and second ballots, the number of nominees is less than or equal to the number of vacancies.¹⁷⁷ The FFA Limited Constitution is silent on the removal of Directors, on the process of constitutional amendment and on voluntary wind up of the company by the Members. In accordance with the *Corporations Act 2001* (Cth), members may therefore remove a Director by ordinary resolution¹⁷⁸ and approve either constitutional amendment¹⁷⁹ or the voluntary wind up of the company¹⁸⁰ by the passage of a special resolution.

C. Basketball / BA Limited

The governance of Australian basketball has been regularly challenged by a lack of resources and scarred by the continual battle between the NSO, the national league clubs and the State Associations for control of the NBL competition. The Amateur Basketball Union of Australia (“ABUA”) was formed in 1939 and constituted as an unincorporated association in 1946. After several name changes, this body was incorporated as the Australian Basketball Federation Incorporated (“ABF Inc.”) in 1982 under the *Associations Incorporation Ordinance 1961* (ACT) (Austl.).¹⁸¹ The Members of ABF Inc. included the various State Associations and three national leagues: the NBL, the (elite-level) Women’s National Basketball League and the (second-

¹⁷⁵ *Id.* art. 10.11(b).

¹⁷⁶ *Id.* arts. 10.11(b)(i), 10.11(b)(iii)

¹⁷⁷ *Id.* arts. 10.11(b)(ii), 10.11(b)(iv)–(v) (declaration of casual vacancy); *id.* art. 10.18(a) (Directors may fill casual vacancy).

¹⁷⁸ *Corporations Act 2001* (Cth) s 203D(1).

¹⁷⁹ *Id.* s 136(2).

¹⁸⁰ *Id.* s 491(1).

¹⁸¹ The ABUA was first renamed the Australian Basketball Union, then the Australian Basketball Federation. *See also* BRET HARRIS, BOOM!: INSIDE THE NBL 1–20, 209–15 (1992) (explaining the formation and first decade of the NBL); Macdonald & Burton, *supra* note 100, at 210–14, 219–27 (explaining the origins of NBL and governance reforms from 1989 to 2013); AL RAMSAY, DUNKED: AUSTRALIAN BASKETBALL REVEALED 46–170 (2004) (outlining history of Australian basketball and NBL administration).

tier) Australian Basketball Association.¹⁸² All were entitled to appoint representatives to the Council of ABF Inc., with the number of representatives (all with voting rights) weighted in favor of the largest State Associations.¹⁸³

The NBL was founded in 1979 with 10 clubs drawn from pre-existing State-based competitions. After the NSL, it was the second club-based national league formed in Australia, with 32 different clubs contesting the 35 seasons to 2012/13, including a mix of former State competition clubs and start-up franchises. Only eight clubs (based in five Australian states and Auckland, NZ) participated in the 2012/13 NBL season. NBL Management Limited was incorporated as a company limited by guarantee in 1989 and was the NLCO from 1989 to 2009, often with heavy reliance upon the NSO for financial and administrative support in the 2000s. The NBL Management Limited Members included the NBL clubs of each season and ABF Inc. (which enjoyed veto rights on critical issues).

An extended basketball reform process commenced in 2000 and ABF Inc. and the NBL clubs eventually agreed to form BA Limited. The new company assumed responsibility as both the NSO and NLCO from July 1, 2009, with objects including, to:

act as the Australian national member federation of FIBA [International Basketball Federation] . . . conduct, encourage, promote, advance, control and manage all levels of Basketball in Australia . . . conduct elite national level competitions for both males and females . . . [and] select, prepare and enter Australian teams in international competitions.¹⁸⁴

BA Limited failed to resolve the financial or strategic weaknesses in Australian basketball, and by 2013, the NBL club owners were keen to regain control of the NBL competition organizer. The NBL clubs and private investors formed National Basketball League Pty Ltd, a company limited by

¹⁸² See, e.g., AUSTRALIAN BASKETBALL FEDERATION INCORPORATED CONSTITUTION cl. 6.1–6.4, 9.2 (at Oct. 26, 2002) (identifying ABF Inc. Members with voting rights at General Meetings of the ABF Inc. Council).

¹⁸³ *Id.* cl. 9.2 (specifying Member representation on the ABF Inc. Council: NSW (x 3 representatives); Victoria (3), Queensland (2), SA (2), WA (2), Tasmania (1), Northern Territory (1), Australian Capital Territory (1), NBL Management Ltd. (1), Women's National Basketball League Ltd. (1), Australian Basketball Association Ltd. (1)).

¹⁸⁴ BA LIMITED CONSTITUTION cl. 2.1.1–2.1.3, cl. 2.1.8 (July 1, 2009) [hereinafter BA LIMITED 2009 CONST.]; see *id.* cl. 2.2 (explaining BA Limited “will establish and conduct elite national competitions for both men and women” (emphasis added)) (on file with authors).

shares, and a “de-merger” was finalized in October 2013.¹⁸⁵ National Basketball League Pty Ltd assumed NLCO responsibilities from season 2013/14 under license from BA Limited, which continued as the NSO. The BA Limited Constitution was amended in December 2013 to remove the NBL participant clubs as company members, address associated membership issues and to downgrade the responsibility of BA Limited regarding the conduct of national competitions.¹⁸⁶

1. Voting Company Members & National League Clubs

Prior to the de-merger amendments, the BA Limited Constitution recognized two classes of “Voting Members”, the “Constituent Association Members” and the “NEW NBL Club Members”,¹⁸⁷ which were entitled to appoint an individual as their representative at General Meetings of the company.¹⁸⁸ Voting Members were bound by the Constitution, By-Laws, General Statutes and Internal Regulations of BA Limited.¹⁸⁹

In provisions unchanged by the de-merger, the BA Limited Constitution required the NSO to recognize only one entity in each State as the Constituent Association Member, to be “responsible for ensuring the efficient administration of basketball in the State”.¹⁹⁰ All eight Constituent Association Members were previously Members of ABF Inc.,¹⁹¹ as well as being not-for-profit entities incorporated pursuant to either the *Corporations Act 2001* (Cth) or the relevant State or Territory associations legislation.

The 2009 integration of ABF Inc. and NBL Management Limited prompted a revamp of the national league. Clubs seeking to participate in the NBL from the 2009/10 season onward were required to re-apply for admission to the league. Applicants were assessed against criteria determined by BA Limited, with those clubs accepted as participants in the

¹⁸⁵ BA LIMITED, GENERAL PURPOSE FINANCIAL REPORT – REDUCED DISCLOSURE FOR YEAR ENDED 30 JUNE 2013, at 3 (2013).

¹⁸⁶ See generally BA LIMITED CONSTITUTION (Dec. 7, 2013) [hereinafter BA LIMITED 2013 CONST.], <http://www.basketball.net.au/wp-content/uploads/2014/12/BA-Limited-Constitution-as-Amended-at-7-December-2013.pdf>, [<http://perma.cc/53R2-D58X>]; see *id.* cl. 2.2 (explaining BA Limited “may establish and conduct elite national competitions for both men and women” (emphasis added)).

¹⁸⁷ BA LIMITED 2009 CONST., *supra* note 184, cl. 1.1 (definition of Voting Members); *id.* cl. 13.1.6 (prohibiting Members of other classes from voting at general meeting of company).

¹⁸⁸ *Id.* cl. 10.2.

¹⁸⁹ *Id.* cl. 5.2, 5.3.3.7, 5.4.3.6.

¹⁹⁰ *Id.* cl. 5.3.1.

¹⁹¹ *Id.* cl. 5.3.2, Schedule 1 (identifying the Constituent Association Members).

NEW NBL competition (with BA Limited acting as the NLCO between 2009 and 2013) comprising the class of NEW NBL Club Members of BA Limited.¹⁹² NEW NBL Club Members also signed a Licence Agreement with BA Limited to participate in the NEW NBL competition.¹⁹³ Ongoing NBL participation was contingent upon a club meeting annual financial and organizational performance targets. The withdrawal of the Gold Coast Blaze NBL club after the 2011/12 NBL season left eight Voting Members in this Member class. During 2012 and 2013, the NBL clubs included a club incorporated under the *Associations Incorporation Act 1981* (Qld), companies limited by guarantee and proprietary companies limited by shares incorporated under the *Corporations Act 2001* (Cth), as well as one New Zealand limited company, registered pursuant to the *Companies Act 1993* (NZ).¹⁹⁴ This created the unusual circumstance where a New Zealand-based company (the parent company of the New Zealand Breakers NBL club) was a Voting Member of an Australian NSO.

2. Board of Directors

The BA Limited Constitution required between five and seven Directors, with no more than five Directors to be elected by the Members.¹⁹⁵ Individuals were ineligible to be a Director of BA Limited if an employee or office holder of a Voting Member or of a basketball club or association affiliated to a Voting Member of BA Limited. Employment by BA Limited also disqualified an individual from being a Director of the company.¹⁹⁶ Directors were to hold office for a term of four years and were limited to serving two consecutive terms.¹⁹⁷ A retiring Director who was previously the Chairman would however be eligible for appointment as an Appointed Director and reappointment as Chairman for one further term.¹⁹⁸ The Directors were required to elect one of their number to be the Chairman of the Board of Directors,¹⁹⁹ to appoint the CEO²⁰⁰ and entitled to appoint a maximum of

¹⁹² *Id.* cl 5.4.

¹⁹³ *Id.* cl. 1.1 (defining “NEW NBL Licence Agreement” as a license agreement between BA Limited and a NEW NBL Club Member setting out the rights that Member as a participant in the NEW NBL competition, as organized by BA Limited from 2009 to 2013).

¹⁹⁴ *Id.* cl. 5.4.2, Schedule 2 (identifying the NEW NBL Club Members).

¹⁹⁵ *Id.* cl. 14.1.

¹⁹⁶ *Id.* cl. 14.3.2–14.3.4.

¹⁹⁷ *Id.* cl. 14.5–14.9.

¹⁹⁸ *Id.* cl. 14.8.2–14.8.3.

¹⁹⁹ *Id.* cl. 16.9; *see id.* cl. 16.9.4 (a person serving two consecutive terms as Chair cannot be reappointed for a third term).

two other Appointed Directors.²⁰¹ The Board established five “commissions” with delegated authority to oversee, administer and advise the Board on various aspects of Australian basketball, including the administration of the NBL.²⁰²

3. Constitutional Voting Rules

Voting rights were weighted across and within the two classes of Voting Members. This facilitated the integration of ABF Inc. with NBL Management Limited, of which the NBL clubs had previously enjoyed substantial control.²⁰³ The NEW NBL Club Members collectively held 40% of the total votes at a General Meeting. Individual NEW NBL Club Members controlled an equal share of those votes.²⁰⁴ The Constituent Association Members collectively held 60% of the total number of votes at a General Meeting. The number of votes held by each Constituent Association Member was determined by the Directors, subject to each holding at least one vote.²⁰⁵

²⁰⁰ *Id.* cl. 18.1.

²⁰¹ *Id.* cl. 16.9.

²⁰² BA LIMITED, ROLE AND RESPONSIBILITIES OF BASKETBALL AUSTRALIA COMMISSIONS (July 1, 2009). The NBL Commission included the CEO and two Directors of BA Limited, along with four persons elected by the NBL clubs. (on file with authors).

²⁰³ BASKETBALL REVIEW STEERING COMMITTEE, STRUCTURE AND GOVERNANCE REVIEW OF BASKETBALL IN AUSTRALIA: REPORT OF THE STEERING COMMITTEE 6–7 (Nov. 2007) (explaining governance reform proposals), https://secure.ausport.gov.au/__data/assets/pdf_file/0003/150933/Structure_and_Governance_Review_of_Basketball_in_Australia_-_Report_of_the_Steering_Committee_November_2007.pdf, [<https://perma.cc/9GUS-6S9N>]; *see also* INTERIM BOARD OF BASKETBALL, COMMERCIAL REFORM OF BASKETBALL IN AUSTRALIA: STATEMENT OF FUTURE DIRECTIONS (Sept. 2008) (outlining governance and financial reform objectives for Australian basketball).

²⁰⁴ BA LIMITED 2009 CONST., *supra* note 184, cl. 13.1.2, 13.1.5.

²⁰⁵ *Id.* cl. 13.1.3–13.1.4. *See also* BA LIMITED, BY-LAW—VOTES OF MEMBERS by-law 6.1 (Sept. 17, 2010) (voting weights were based upon the number of players registered with each Constituent Association Member, as follows: 1 vote (< 10,000 players), 2 votes (10,001–25,000 players), 3 votes (25,001–40,000 players), 4 votes (40,001–55,000 players), 5 votes (55,001–70,000 players), 6 votes (70,001–85,000 players), 7 votes (85,001–100,000 players), 8 votes (100,001–120,000 players), 9 votes (120,001–140,000 players), 10 votes (140,001–170,000 players), 11 votes (170,001–200,000 players), 12 votes (200,001–240,000 players)); *see also* BA LIMITED, BY-LAW—VOTES OF MEMBERS by-law 8 (Sept. 17, 2010) (based upon 2010/11 player registration data, votes were apportioned to all Voting Members as follows: Victoria (8), NSW (4), WA (2), SA (2), Queensland (2), Tasmania (1), Austra-

In accordance with the statutory provision, the Directors were required to call a General Meeting upon the request of Members with at least 5% of the votes that may be cast at a General Meeting.²⁰⁶ Therefore, one of the larger Constituent Association Members, or any two other Voting Members, would have been sufficient to request a General Meeting. A quorum of four Constituent Association Members and at least 50% of the NEW NBL Club Members was required for a General Meeting.²⁰⁷

The BA Limited Constitution specifically defined a Special Resolution as “a resolution that must be passed by a majority of 75% of votes exercisable by Members entitled to vote at the relevant General Meeting”.²⁰⁸ The terms “resolution” and “ordinary resolution” were not defined in the Constitution.

Subject to compliance with the Constitution and By-Laws, the Directors were able to recommend the termination of the membership of a Constituent Association Member to a General Meeting, whereupon the Voting Members were entitled, by Special Resolution, to so terminate the membership of that Member.²⁰⁹ The Voting Members were then entitled to endorse a further recommendation of the Directors to admit a new entity as a Constituent Association Member.²¹⁰ The Voting Members did not enjoy constitutional voting rights on the admission or expulsion of new NBL clubs, the admission or expulsion of NEW NBL Club Members or the merger or relocation of company members or NBL clubs.

Any Voting Member was able to nominate a candidate for each vacancy for the position of Elected Director.²¹¹ An exhaustive ballot was to be used to elect Directors, with successive rounds of voting eliminating the nominee(s) with the least number of votes until, in the last round with only one or two candidates remaining, a resolution of the Voting Members was neces-

lian Capital Territory (1), Northern Territory (1), NEW NBL Club Members (9 x 1.56), total votes (35)).

²⁰⁶ BA LIMITED 2009 CONST., *supra* note 184, cl. 10.2.2 (Voting Members may convene a General Meeting in accordance with Corporations Act); *see also Corporations Act 2001* (Cth) s 249D(1)(a).

²⁰⁷ BA LIMITED 2009 CONST., *supra* note 184, cl. 11.1; *id.* cl. 11.3.1–11.3.2 (if quorum not present at a Special General Meeting convened by or called upon the request of the Members, that meeting is to be dissolved; or in any other case adjourned); *id.* cl. 11.4 (if quorum not present at Annual General Meeting (AGM), the meeting stands adjourned and such Voting Members as present at the reconvened AGM constituted a quorum).

²⁰⁸ *Id.* cl. 1.1 (definition of “Special Resolution”).

²⁰⁹ *Id.* cl. 8.1.1–8.1.3.

²¹⁰ *Id.* cl. 8.1.4.

²¹¹ *Id.* cl. 8.1.4.

sary to approve the election of a successful nominee.²¹² However, if this process of elimination resulted in there being no remaining nominees in a given round, the Chair had the discretion to either call for a re-vote of the last round of voting or the position would otherwise be treated as a casual vacancy,²¹³ thereby giving the Directors the right to appoint a Director who would be subject to ratification by resolution at the next Annual General Meeting.²¹⁴ The practical effect of the exhaustive ballot was to require a simple majority of votes cast by Voting Members to elect a Director. The Voting Members were able to remove any Director by ordinary resolution at a General Meeting.²¹⁵ Directors so removed were unable to be re-appointed within four years unless otherwise resolved at a General Meeting.²¹⁶

The BA Limited Constitution was silent on the voting process to approve constitutional amendment or voluntary wind up of the company by the Members. In accordance with the *Corporations Act 2001* (Cth), a special resolution was therefore necessary to either amend the Constitution²¹⁷ or to commence wind up of the company.²¹⁸

D. Rugby League / Australian Rugby League Commission Limited

The New South Wales Rugby League (“NSWRL”) and the Queensland Rugby League (“QRL”) were formed as unincorporated associations in 1907 and 1908 respectively.²¹⁹ The Australian Rugby League Board of Control, also an unincorporated association, was formed by NSWRL and QRL in 1924.

Nine clubs, eight based in Sydney and one in Newcastle, contested the inaugural NSWRL season in 1908. The Queensland competition commenced in 1909 with four Brisbane-based clubs. Over time, the wealthier

²¹² *Id.* cl. 13.2.

²¹³ *Id.* cl. 13.2.3.3.2.

²¹⁴ *Id.* cl. 14.9.

²¹⁵ *Id.* cl. 14.13.1.

²¹⁶ *Id.* cl. 14.13.2.

²¹⁷ *Corporations Act 2001* (Cth) s 136(2).

²¹⁸ *Id.* s 491(1).

²¹⁹ See GARY LESTER, *THE STORY OF AUSTRALIAN RUGBY LEAGUE* chs. 2, 4, 5 (1988) (the NSW Rugby Football League (NSWRFL) and Queensland Rugby Association (QRA) were both formed when interested parties broke away from the established rugby union clubs and local governing bodies, the Southern [NSW] Rugby Football Union (established 1874) and the Northern [Queensland] Rugby Football Union (established 1883). Commonly known as the NSWRL, the body was formally the NSWRFL until 1983. The QRA was renamed the Queensland Amateur Rugby League (1909), then the QRL from 1911.).

NSWRL clubs attracted most of the best players from both States and elsewhere in Australia. As a purely Sydney-based competition from 1910, the NSWRL eventually stabilized with the same eight clubs from 1938; expansion to 10, then 12 clubs followed in 1947 and 1967. Thirty years of competition expansion and contraction, governance reform and litigation commenced with the expansion of the NSWRL beyond the city of Sydney in 1982, with 16 clubs based in NSW, Queensland and the Australian Capital Territory ("ACT") between 1988 and 1994. One Sydney-based club exited the competition after the 1983 season, with unsuccessful attempts to exclude another Sydney club ahead of both the 1984 and 1985 seasons.²²⁰

The two State Associations, QRL and NSWRL, were incorporated in 1972 and 1983, respectively. The corporate governance structure of New South Wales Rugby League Ltd ("NSWRL Ltd") was a variant of the delegate model.²²¹ Australian Rugby Football League Limited ("ARFL Limited") was incorporated in 1986. Both the Members and Directors of ARFL Limited were nominees of the two State Associations.²²²

Plans were made to expand the NSWRL competition to 20 clubs from 1995, with resolution among the three governing bodies that ARFL Limited should assume ultimate control, with NSWRL Ltd to be appointed the com-

²²⁰ See *Bernasconi v. Bellew* (unreported, Supreme Court of NSW, Helsham CJ in Equity, 22 Nov. 1983) (Austl.) (NSWRL found not to have constitutional authority to exclude the Western Suburbs club from the 1984 NSWRL competition; this decision prompted incorporation of NSWRL); *Wayde v. New South Wales Rugby League Limited* (1985) 180 CLR 459 (Austl.) (NSWRL Ltd board of directors was found to have acted in good faith for a proper purpose when resolving to exclude Western Suburbs club from 1985 NSWRL season; Western Suburbs was nevertheless re-admitted for 1985 and future seasons).

²²¹ The company members of NSWRL Ltd included the delegates of the NSWRL clubs and other parties, the general manager and 11 office bearers of NSWRL Ltd and the executive chairman of ARFL Limited (if a resident of NSW). The nine-person NSWRL Ltd board of directors included the President of NSWRL Ltd (elected by the members), the executive chairman of ARFL Limited, three members elected from among themselves, one nominee of the NSW Country Rugby League, the general manager of NSWRL Ltd and two independent directors (with no links to the NSWRL clubs) elected by the board. See *News Limited v. Australian Rugby Football League Limited* (1996) 64 FCR 410, 438–439 (Austl.).

²²² When first incorporated in 1986, both the members and board of ARFL Ltd were defined to include three nominees each of NSWRL Ltd and QRL Limited and the Executive Chairman (as elected by the board of directors). The Executive Chairman's position was to be rotated between NSWRL Ltd and QRL Limited. This structure was later amended, to define the members and the board to be four nominees each of NSWRL Ltd and QRL Limited, the Chairman and the Chief Executive Officer of the company. See *New South Wales Rugby League Ltd v. Australian Rugby Football League Limited* (1999) 30 ACSR 354, 356–360 (Austl.).

petition organizer of the renamed Australian Rugby League (“ARL”). Expansion prompted a 1994 proposal from News Limited—the Australian publishing and media company—for a smaller 10-12 club “Super League” competition. Although the proposal was rejected by ARFL Limited, the 1995 and 1996 ARL seasons were contested in the shadow of litigation. In *News Limited v. Australian Rugby Football League Limited*,²²³ the Full Court of the Federal Court of Australia held the loyalty and commitment agreements—via which ARFL Limited and NSWRL Ltd intended to tie the 20 ARL clubs to the traditional governing bodies—to be exclusionary provisions in breach of s 45 of the *Trade Practices Act 1974* (Cth) (Austl.). Super League kicked-off in 1997, with eight former ARL clubs joined by two new clubs created by News Limited. The ARL continued as a 12-club competition in 1997.²²⁴

Common sense and financial expediency prevailed ahead of the 1998 season. The National Rugby League (NRL) was formed via an agreement between ARFL Limited, News Limited and related parties to merge the ARL and Super League competitions. The NRL commenced play with 20 clubs in 1998. Contraction via the withdrawal of some clubs, two separate mergers and exclusion of the South Sydney club ensured that 14 clubs contested the 2000 and 2001 NRL seasons, as per the merger agreement.²²⁵ Public pressure and legal action forced the reinstatement of South Sydney from 2002.²²⁶ There have been 16 NRL clubs since 2007.

²²³ *News Limited v. Australian Rugby Football League Limited* (1996) 64 FCR 410 (Austl.).

²²⁴ See, e.g., Perrine, *supra* note 38, at 753–88 (advocating a “media league,” owned by a party external to the sport as a solution to economic and regulatory problems of existing national leagues in Australia and the U.S.; note, however, the reforms creating ARLC Limited refute the viability of this “media league” model).

²²⁵ See *South Sydney District Rugby League Football Club Ltd v. News Limited* (2000) 177 ALR 611, 618–26, 627–30 (Austl.) (detailing the ARL-Super League merger and the key contracts and companies involved in the merger); see *id.* at 627–30, 729–33 (detailing the admission criteria used to rank and select fourteen clubs to participate in the 2000 NRL season).

²²⁶ The South Sydney Rugby League Club (“Souths”) was excluded from the NRL competition for the 2000 and 2001 seasons and challenged the validity of the admission criteria used to determine the fourteen clubs for the 2000 NRL season. Souths was successful on appeal to the Full Court of the Federal Court of Australia, which ruled the admission criteria to be exclusionary provisions in breach of the *Trade Practices Act 1974* (Cth) s 45. This prompted readmission of Souths to the NRL competition from 2002, even though the decision was overturned on further appeal. *South Sydney District Rugby League Football Club Ltd v. News Limited* (2000) 177 ALR 611, *rev’d*, *South Sydney District Rugby League Football Club Ltd v. News Limited* (2001) 111 FCR 456, *rev’d*, *News Limited v. South Sydney District Rugby League*

The “NRL Partnership” between ARFL Ltd and National Rugby League Investments Pty Ltd (a wholly owned subsidiary of News Limited) formally commenced in May 1998 and was governed by a Partnership Executive Committee (PEC) comprising three nominees of both Partners.²²⁷ The NRL Partnership created and engaged National Rugby League Limited (NRL Limited) to be the competition organizer of the NRL, while exclusively retaining “all media, sponsorship and merchandising rights . . . in relation to the NRL Competition.”²²⁸ Both Partners appointed an equal number of Directors to NRL Limited, which was a company limited by guarantee with the NRL Partners, or their appointees, as the company members.²²⁹ For the 1998-2011 seasons, the clubs contracted with NRL Limited to participate in the NRL competition, while ARFL Limited continued as the NSO.²³⁰

After several years of negotiation, the NRL Partnership was dissolved in February 2012. A new sport and league governance structure was implemented with three objectives—the removal of News Limited from any formal position in the governance structures of Australian rugby league and the NRL, unification of the NSO and the NLCO and the creation of an independent NSO board of directors.²³¹ The ARFL Limited Articles and Memoran-

Football Club Limited (2003) 215 CLR 563 (admission criteria for 2000 NRL season not exclusionary provisions); see also Stephen F. Ross, *Some Outside Observations on Overly Restrictive Agreements and the Souths Rugby Case*, 12 COMPETITION AND CONSUMER L.J. 83 (2004) (explaining case history and implications for league competition organizers seeking to regulate league size).

²²⁷ See *Seven Network Limited v. News Limited* [2007] FCA 2059, paras 253–254 (Austl.) (explaining the legal structure of the NRL Partnership and related companies involved in the ARL-Super League merger).

²²⁸ *Id.* para. 3072 (citing NRL Partnership Agreement, cl. 1.1, 5.7, 5.8).

²²⁹ *Id.* para. 256.

²³⁰ *Id.* paras. 256–59 (explaining the governance structures of both the NRL competition and of rugby league in Australia).

²³¹ See, *Official Release: Clubs Support Independent Commission*, NATIONAL RUGBY LEAGUE (Jan. 18, 2010) (explaining agreement in principle to establish an independent rugby league commission), <http://www.nrl.com/tabid/10874/newsId/57447/Default.aspx>, [http://perma.cc/8KSS-MFPT] (last visited Mar. 22, 2015); *Path Cleared for Rugby League Commission*, NATIONAL RUGBY LEAGUE (Dec. 14, 2010) (announcing agreement between ARFL Limited and News Limited on governance reform proposals), <http://www.nrl.com/news/news/newsarticle/tabid/10874/newsid/60990/path-cleared-for-rugby-league-commission/default.aspx>, [http://perma.cc/EW5V-5C6V] (last visited Mar. 22, 2015); *ARL Commission Officially Formed*, NATIONAL RUGBY LEAGUE (Feb. 10, 2012) (announcing reconstitution of ARFL Limited as ARL Commission Limited), <http://www.nrl.com/arl-commission-officially-formed/tabid/10874/newsid/65810/default.aspx>, [http://perma.cc/Z4LL-66WS] (last visited Mar. 22, 2015); *Path Cleared for Rugby League Commission*, NATIONAL RUGBY LEAGUE

dum of Association were replaced with a new Constitution, the company name was changed to Australian Rugby League Commission Limited (“ARLC Limited”) and NRL Limited became a fully controlled subsidiary of ARLC Limited.²³²

The new corporate governance structure established the ARL Commission as an independent board of directors, with the company members enjoying few residual decision-making rights. The objects of ARLC Limited include to:

be the single controlling body and administrator of the Game [of rugby league in Australia] . . . [organize] and conduct all State of Origin and Australian representative games . . . [organize] and conduct the NRL Competition . . . [and] liaise with the Rugby League International Federation Limited . . . in the fostering and control of the game of rugby league throughout the world’.²³³

1. Voting Company Members & National League Clubs

ARLC Limited has three classes of Voting Members: (a) the eight individual members of the Board of Directors of the company; (b) the two state governing bodies, NSWRL Ltd and QRL Limited; and (c) the Licensees holding a licence to participate in an NRL competition.²³⁴ The Constitution distinguishes between ‘Joint Members’ and other Licensees. Where a Member of the company is a Licensee comprised of more than one legal entity, those entities are “Joint Members”, collectively treated as one Member for

(Dec. 14, 2010), <http://www.nrl.com/news/news/newsarticle/tabid/10874/newsid/60990/path-cleared-for-rugby-league-commission/default.aspx>, [<http://perma.cc/ALV6-32PA>] (last visited Mar. 22, 2015) (announcing agreement between ARFL Limited and News Limited on governance reform proposals).

²³² See NATIONAL RUGBY LEAGUE LIMITED, MINUTES OF ANNUAL GENERAL MEETING (Feb. 10, 2012) (on file with authors) (outlining the dissolution of the NRL Partnership, noting the reconstitution of ARFL Limited as ARLC Limited and confirming ARLC Limited as only company member of NRL Limited).

²³³ AUSTRALIAN RUGBY LEAGUE COMMISSION LIMITED CONSTITUTION r. 6(a), 6(d)–(e), 6(g) (Feb. 10, 2012) [hereinafter ARLC LIMITED CONST.].

²³⁴ *Id.* r. 10 (membership of company); *id.* r. 1 (defining NRL Competition as “the National Rugby League Competitions, being as at the date of adoption of this Constitution the NRL Telstra Premiership and the Toyota Cup [under 20’s] competitions as may be replaced or renamed from time to time but excluding the State Competitions.” Definition of State Competitions as “those rugby league competitions run or under the direct or indirect control of the NSWRL or QRL”).

all purposes under the ARLC Limited Constitution.²³⁵ This ensures the number of Licensee Members of the company is equal to the number of NRL clubs.

Both state governing bodies, NSWRL Ltd and QRL Limited, are companies limited by guarantee. The 16 NRL clubs (or their controlling entities) include companies limited by guarantee, proprietary companies limited by shares and public companies limited by shares (one club, Brisbane Broncos Limited, is listed on the Australian Securities Exchange), as well as one New Zealand Limited company incorporated under the *Companies Act 1993* (NZ). Since the formation of the NRL competition in 1998, the clubs had been granted fixed-term licences to participate in the NRL competition.²³⁶ NRL Limited, as the wholly owned subsidiary of ARLC Limited, continues to license NRL clubs on fixed-term agreements to participate in NRL competitions.²³⁷

2. Board of Directors

The ARLC Limited Constitution mandates eight Directors,²³⁸ with the initial Directors of ARLC Limited specifically identified. These Directors are split into Groups A (two Directors), B (three Directors) and C (three Directors) which had to retire at the 2013, 2014 and 2015 Annual General Meetings, respectively, with the order of retirement recommencing thereafter.²³⁹ Directors serve a maximum three-year term. Those who retire from office are entitled to stand for re-election,²⁴⁰ but a Director who is removed from office may not stand for or be re-elected for three years from the date of the Director's removal from office.²⁴¹ Individuals who are currently, or have in

²³⁵ *Id.* r. 16, Schedule 1 (identifying both the Brisbane Broncos and Melbourne Storm NRL clubs as being jointly represented by two companies).

²³⁶ *See, e.g., South Sydney District Rugby League Football Club Ltd v. News Ltd* (2000) 177 ALR 611, 731 (Austl.) (explaining the clubs satisfying admission criteria for the 2000 NRL season (as published Sept. 1998), were to be granted either a seven-year (1999–2005) or five-year license (2000–2004)); *Id.* at 702 (explaining South Sydney signed a two-year contract to participate in the 1998 and 1998 NRL seasons).

²³⁷ *See, e.g., Brisbane Broncos Limited, 2012 Annual Fin. Statements & Reports*, 52 (Mar. 19, 2013), available at <http://www.broncos.com.au/content/dam/broncos/pdfs/club/2013-announcements/19%20March%202013%20%E2%80%93%2012%20Annual%20Report%2C%20NOM%20and%20Proxy.pdf>, [http://perma.cc/8CSR-Q3GU] (granting fixed-term NRL license until 2018).

²³⁸ ARLC LIMITED CONST., *supra* note 233, r. 31(a).

²³⁹ *Id.* r. 32(a), 33(a)–(b).

²⁴⁰ *Id.* r. 33(c).

²⁴¹ *Id.* r. 32(i).

the past 36 months been, an officer or employee of a Licensee (the NRL clubs), QRL Limited, NSWRL Ltd, NRL Limited or any related body corporate of any of these entities may not be a Director of ARLC Limited.²⁴²

The Constitution provides complex provisions for the election or removal of Directors in special circumstances. The Directors are Members of the company as of right,²⁴³ however the individuals serving in the dual roles of Director and Member must distinguish between the two. Incumbent Directors have the right to elect new Directors by simple majority²⁴⁴ or to appoint a Director to fill a vacancy at any time,²⁴⁵ either of which may occur at a duly convened meeting of Directors. This is not an exercise of power by those individuals as Members at a General Meeting of the company. The Directors are required to elect one of their number as the Chairman.²⁴⁶ They may also appoint a chief executive officer, who may not be appointed as a Director.²⁴⁷

3. Constitutional Voting Rules

On a poll, every Member present and having the right to vote at a General Meeting has one vote.²⁴⁸ A General Meeting may be requisitioned by any one Member,²⁴⁹ which currently represents a lower threshold than the statutory provision.²⁵⁰ The required quorum for a General Meeting is not less than 50% of the total number of Members entitled to attend and vote on any item of business included in the notice of that General Meeting.²⁵¹ As explained below, NSWRL Ltd and QRL Limited enjoy a right of veto on certain resolutions.

The ARLC Constitution reserves decision-making rights on the admission, expulsion, merger or relocation of company members or NRL clubs for the board of directors. However, NSWRL Ltd, QRL Limited and the Licensee Members (but not the Director–Members) may themselves appoint and

²⁴² *Id.* r. 32(b).

²⁴³ *Id.* r. 10(a)(ii).

²⁴⁴ *Id.* r. 32(d).

²⁴⁵ *Id.* r. 32(h).

²⁴⁶ *Id.* r. 42.

²⁴⁷ *Id.* r. 35.

²⁴⁸ *Id.* r. 26(b)(iii).

²⁴⁹ *Id.* r. 18(b)(ii).

²⁵⁰ There are currently 26 ARLC Limited company members (Eight Director–Members, NSWRL Ltd, QRL Limited and sixteen Licensee Members). *See also Corporations Act 2001* (Cth) s 249D(1) (general meeting must be called upon requisition of members with at least 5% of the votes to be cast at the general meeting).

²⁵¹ ARLC LIMITED CONST., *supra* note 233, r. 20.

remove Directors in limited circumstances, with the consequent effect of admitting or expelling Director–Members.

In addition to the rights of existing Directors to elect or appoint new Directors, there are two cases where Members, excluding the Director–Members, may appoint new Directors. First, in the event of there being fewer than eight Directors for more than six months, the Members (other than the Directors–Members) will have the right to unanimously appoint as many Directors as necessary to ensure there are eight Directors.²⁵² Second, if at any time there are fewer than five Directors, then despite anything else in the Constitution, the Members (excluding Director–Members) shall be entitled to appoint additional Directors by passing a resolution at a General Meeting that requires the support of both NSWRL Ltd and QRL Limited and not less than 75% of the Licensee Members.²⁵³ These rules provide for the appointment of Directors where the Board itself has either taken too long or is incapable of refreshing its numbers to the required eight Directors.

Directors may be removed by company members in one of two ways, both of which are subject to the maintenance of a quorum at a General Meeting. A resolution passed by a simple majority of all the Members at a General Meeting is sufficient to remove a Director.²⁵⁴ Alternatively, a resolution with the support of at least 10 Licensee Members and both NSWRL Ltd and QRL Limited will remove a Director.²⁵⁵

In addition to the statutory requirement for a special resolution of the company members,²⁵⁶ the ARLC Constitution further provides that the Constitution may not be amended, varied or replaced unless the relevant matter has been approved by a “Specific Majority” of all “Eligible Voting Members”.²⁵⁷ The Eligible Voting Members are defined as NSWRL Ltd, QRL Limited and the Licensee Members (but does not include the Director–Members).²⁵⁸ A Specific Majority is defined as all Eligible Voting Members except one, which must not be either NSWRL Ltd or QRL Limited.²⁵⁹ A Specific Majority is also required for the company to undertake a “Speci-

²⁵² *Id.* r. 31(b)–(c).

²⁵³ *Id.* r. 32(g).

²⁵⁴ *Id.* r. 32(e)(i). For the mandatory rule, see also *Corporations Act 2001* (Cth) s 203D(1).

²⁵⁵ ARLC LIMITED CONST., *supra* note 233, r. 32(e)(ii).

²⁵⁶ *Corporations Act 2001* (Cth) s 136(2).

²⁵⁷ ARLC LIMITED CONST., *supra* note 233, r. 30(a)(ii); see *id.* r. 30(b) (explaining further requirement for the approval of at least 75% of the Eligible Voting Members for the giving of a financial benefit to a related party of the company).

²⁵⁸ *Id.* r. 30(c)(i).

²⁵⁹ *Id.* r. 30(c)(vi).

fied Action”,²⁶⁰ whether (a) the sale, transfer, assignment or disposal of the main assets or undertaking of ARLC Limited or NRL Limited; (b) subcontracting or ceding the conduct of the NRL Competition to any person other than NRL Limited or a related body corporate of ARLC Limited; (c) a change of the name of ARLC Limited or (d) a change of company type.²⁶¹ Issues (a) and (b) reflect scenarios where ARLC Limited would no longer be both the NSO and the NLCO. The ARLC Constitution is silent on the process for voluntary wind up of the company. A special resolution of the Members is therefore necessary to commence wind up.²⁶²

V. DISCUSSION

The constitutional voting rules summarized in TABLE 3 suggest the voting majorities broadly conform with the predictions of Buchanan and Tullock’s model. With only limited exceptions (in the case of ARLC Limited), the voting majority rules for constitutional issues require a higher majority than for electoral issues. These voting rules are a consequence of both the mandatory provisions of the *Corporations Act 2001* (Cth) as well as the explicit agreement of company members. They accord with the argument that distributive issues (which alter the allocation of individual rights) will attract higher external costs than electoral issues, where the scope of the issues is narrower and voters have greater recourse to reverse unfavorable outcomes. Across the four NSOs, the required majority for the few examples of voting rights relating to admission, expulsion, merger or relocation of company members or national league clubs represent a midpoint between the majority required for the passage of resolutions relating to constitutional issues and electoral issues.

As explained in Part IV, each NSO adopted a unique set of voting company members. These choices generally reflect the different origins of each NSO and the (economic) power of the national league clubs relative to that of the State Associations and the NSO itself. At one extreme, the membership of the AFL reflects the origins of the NSO as a state league, where the clubs were able to retain an important status in the governance structures of Australia football as the VFL expanded to become the AFL. The membership of BA Limited and ARLC Limited reflects a much greater tension between the State Associations and the national league clubs for control of the national league. The 2009 merger and 2013 de-merger of the NSO,

²⁶⁰ *Id.* r. 30(a)(i).

²⁶¹ *Id.* r. 30(c)(v).

²⁶² *Corporations Act 2001* (Cth) s 491(1).

Basketball Australia and the NLCO of the NBL necessitated change to the membership of the NSO, as well as suggesting wider strategic and financial problems within the sport. Conversely, the structure and membership of ARLC Limited is a historic compromise accommodating both the NRL clubs and the two dominant State Associations, NSWRL Ltd and QRL Limited. If the AFL represents an example of spontaneous “bottom up” growth driven by (or perhaps in spite of) sporting clubs, FFA Limited represents the opposite, where the governance structure of the sport and the national league was imposed from the “top down” by the Australian government (via the ASC) in conjunction with compliant parties in need of financial assistance.

As noted in Parts II and III, the design of optimal majority voting rules is an issue nested within a series of choices about the optimal legal and economic structure for a sport or league. Some of these choices are constrained by legislative or regulatory requirements including the mandatory requirements of corporate law. This wider set of governance design choices and constraints, along with the brief sketch of the history of each sport presented above, pose challenges to the Buchanan and Tullock model by suggesting the choice of company member is at least partially determined by exogenous factors other than the minimization of the sum of external costs and decision-making costs. Even so, the evolution of sport and league governance toward a model of NSO director independence reflects an appreciation of these two costs of collective action. In addition to analysis of the implications of the identity, number and heterogeneity of the company members for the design of constitutional voting rules, we therefore also address board independence as a policy objective in NSO and NLCO constitutional design.

A. *Constitutional Issues and Electoral Issues*

For all four NSOs, the voting majority rule is higher for constitutional issues than for the election and removal of company directors. The residual voting rules for the election of ARLC Limited company directors represent a partial exception to this finding. Constitutional issues concern the re-allocation of rights between company members. The *Corporations Act 2001* (Cth) requires passage of a special resolution for both the voluntary wind up of the company and for constitutional amendment, and three NSO constitutions are consequently silent on voting rights regarding both matters. The ARLC Limited Constitution is silent on the voting rights of company members regarding wind up, but is the only constitution to specify further require-

ments for constitutional amendment, in addition to the special resolution.²⁶³ The mandatory requirement for a special resolution on these two constitutional issues economizes on decision-making costs at the time of constitutional drafting. This is not a trivial consideration, for the NSO and/or NLCO of each sport have been reorganized at least once in the past quarter century. The mandatory special resolution also implies the ratio of external costs to decision-making costs is high for constitutional issues, higher than for the election and removal of company directors.

The corporate constitution may replace the *Corporations Act 2001* (Cth) simple majority rule for the election of directors,²⁶⁴ as well as provide alternative means for the removal of directors, in addition to the mandatory simple majority rule.²⁶⁵ Despite considerable differences in the identity, number and other voting rights of the respective company members, both the AFL Articles of Association and the BA Limited Constitution included clauses with the practical effect of requiring a simple majority for both the appointment and removal of directors. The FFA Limited Constitution requires a Prescribed Majority of 60% to elect company directors but is silent on the removal of directors.

The ARLC Limited Constitution differs substantially from the legislative provisions by providing three ways for the election and two ways for the removal of directors by assigning differential voting rights and majority voting rules across three classes of company member. The 16 NRL club Licensee Members and the two State Associations, NSWRL Ltd and QRL Limited, enjoy only residual rights to elect and remove company directors. The electoral voting rules ensure that for the Licensee Members, decision-making costs fall as the capacity of the board (or individual directors) to effectively function diminishes.²⁶⁶

Aside from the wind up of the company, members have two fundamental sources of power over the directors. Constitutional amendment may change the balance of power between members and directors, while the replacement (or removal) of sufficient incumbent directors may alter the bal-

²⁶³ See *Corporations Act 2001* (Cth) ss 136(2)–(4) (corporate constitution may provide for additional requirements to be met in addition to mandatory requirement of a 75% majority to pass a Special Resolution).

²⁶⁴ *Id.* s 201G.

²⁶⁵ *Id.* s 203D.

²⁶⁶ The required majority of Licensee Members falls from unanimity (when there has been a long-term vacancy on the board) to 75% (when half or more of the eight director positions are vacant), to 62.5% (when removing a director). The agreement of both NSWRL Ltd and QRL Limited is required in all three cases. See *supra*, pt. IV.D(3).

ance of opinions among the directors themselves on a particular matter. Either course of action can mitigate the external costs imposed upon State Associations and national league clubs (whether company members or not), but it is certain that either strategy will incur considerable decision-making costs in the true sense of these as transaction costs.²⁶⁷ Such actions and transaction costs are not unknown to Australian sporting organizations,²⁶⁸ especially those mired in internal politics²⁶⁹ or resorting to constitutional reform to solve underlying financial and management problems.²⁷⁰ Among many examples, rugby league best highlights the sheer cost of wholesale constitutional and organizational reform of a sport, commencing with the Super League “war” of the 1990s and ending with the 2012 amendments creating ARLC Limited. The regular turnover of NSO and NLCO directors in association football and basketball also highlights both the real and opportunity costs of electoral issues.

The difference between the majority voting rules attached to constitutional and electoral issues—both in the mandatory and replaceable majority voting rules of the *Corporations Act 2001* (Cth) and in constitutional clauses drafted by the company members themselves—may be explained by two factors: the inability of any one director to make unilateral decisions and the potential for the company members to reverse the collective decisions of the board of directors. External examples support this interpretation. For example, where decision-making authority is concentrated in the hands of one individual, a voting rule more inclusive than the simple majority has been

²⁶⁷ See, e.g., Boros, *supra* note 10 (noting the decision-making costs of three scenarios: (i) improper drafting of constitutional clauses intended to allow members to give directions to the directors by resolution; (ii) conflict between fiduciary duties owed by directors to the company and to the members where such clauses exist, and (iii) an extraordinary general meeting to remove directors, amend constitution or allow members to exercise constitutional decision-making rights).

²⁶⁸ Directors are occasionally removed from office. Terry O'Connor (AFL Commissioner, 1993–2001), was not reelected after losing the support of a coalition of Victorian-based AFL clubs, due to his view that the number of Victorian-based AFL clubs should be rationalized. See Karen Lyon, *O'Connor Takes on Victorians to Save Seat*, THE AGE (Melbourne) Feb. 24, 2001 (on file with authors); Patrick Smith, *Presidents Dine Out on AFL Gristle*, THE AUSTRALIAN (Sydney) Oct. 19, 2001 (on file with authors).

²⁶⁹ See, e.g., *New South Wales Rugby League Limited v. Australian Rugby Football League Limited* (1999) 30 ACSR 354 (conflict regarding constitutional amendments altering balance of power between NSWRL Ltd and QRL Limited).

²⁷⁰ On financial instability, governance reform, and the turnover of decision-makers in Australian association football, see HAY & MURRAY, *supra* note 147, at 237–42, 246–58; see SOLLY, *supra* note 149. On these problems in Australian basketball, see, Macdonald & Burton, *supra* note 100; see RAMSAY, *supra* note 181.

adopted, as with the NFL Commissioner (two-thirds majority)²⁷¹ or MLB's Commissioner (three-quarters majority).²⁷² Both the NFL and MLB Commissioners enjoy considerable unilateral decision-making authority, especially when dealing with disciplinary issues and threats to the best interests of the league.²⁷³ These electoral voting rules are either less inclusive or equivalent to the three-quarters majority required to amend either the *Constitution & Bylaws of the National Football League*²⁷⁴ or the *Major League Constitution*.²⁷⁵ Even though both the NFL and MLB are structured as unincorporated associations of the league clubs,²⁷⁶ the constitutional voting rules of both leagues are still broadly consistent with the logic of Buchanan and Tullock's model.

Those constitutional voting rules more inclusive than the legislative standards suggest a perception of an even greater ratio of external costs to decision-making costs for constitutional issues (in the case of ARLC Limited) or electoral issues (for both ARLC Limited and FFA Limited) than implied by statute. Conversely, weighted voting rights, such as those of BA Limited company members, lessen the ex-ante probability of external costs

²⁷¹ NFL CONST., *supra* note 4, art. 8.1 (requiring affirmative vote of not less than two-thirds or eighteen, whichever is greater, of the (currently 32) NFL clubs to appoint the NFL Commissioner).

²⁷² ML CONST., *supra* note 4, art. II, s. 9 (requiring three-fourths majority of the (currently thirty) MLB Clubs, for election of the Commissioner of Baseball).

²⁷³ See Reinsdorf, *supra* note 96 (explaining the evolution of the scope of the power of the Commissioner of Baseball over time); see also ROSS & SZYMANSKI, FANS OF THE WORLD, *supra* note 68, at 25–41, 166–74 (explaining the potential role for commissioner (or alternatives) as independent competition organizer and residual claimant); see also PAUL C. WEILER, GARY R. ROBERTS, GARY R., ROGER I. ABRAMS & STEPHEN F. ROSS, SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS ch. 1 (4th ed. 2011) (explaining the scope of unilateral decision-making authority of the commissioner in the U.S. major leagues).

²⁷⁴ NFL CONST., *supra* note 4, art. 25.1(A) (requiring affirmative vote of not less than three-fourths or twenty-one, whichever is greater, of the NFL clubs to amend the constitution or bylaws); *id.* art. 25.2 (requiring unanimity to approve an amendment proposed without notice); *id.* art. 25.3 (requiring unanimity to amend constitutional provisions relating to regulatory issues of a distributive nature, or to alter voting rights on the NFL Executive Committee); *id.* art. 6 (identifying Executive Committee as comprising representatives from all 32 NFL clubs, with one vote per club).

²⁷⁵ ML CONST., *supra* note 4, art. V, s. 2(b)(7) (requiring affirmative vote of three-fourths of the Major League Clubs for approval of constitutional amendments, except as specifically provided elsewhere in the Constitution).

²⁷⁶ NFL CONST., *supra* note 4, art. 2.1(A); ML CONST., *supra* note 4, art. II, s. 1 (The Office of the Commissioner of Baseball is an unincorporated association of the MLB clubs).

being incurred by the members controlling the most votes. This is at the expense of those less powerful members who control fewer votes.²⁷⁷

B. Regulatory Issues

Unlike U.S. major leagues such as the NFL,²⁷⁸ MLB,²⁷⁹ or even the

²⁷⁷ Weighted voting rights lessen the probability of members with fewer votes imposing external costs upon those members holding more votes, but also minimize decision-making costs by lowering the proportion of individual members required to pass any resolution. *See, e.g.*, BA LIMITED 2009 CONST., *supra* note 184; pt. IV.C (3) *and* text accompanying note 205 (voting weights indicate a coalition of the five largest BA Limited Constituent Association Members sufficient to elect a director with a simple majority). From December 2013, the NBL clubs were removed as company members of BA Limited and the weights of Constituent Association Member voting rights were revised; *see* BA LIMITED 2013 CONST., *supra* note 186; BA LIMITED, BY-LAW – VOTES OF MEMBERS cl. 6–8 (Dec. 11, 2013) (voting weights revised to: 1 vote (< 15,000 registered players), 2 votes (15,000–100,000 players), 3 votes (> 100,000); while also requiring a simple majority of votes and the support of at least four members to pass an ordinary resolution, or a 75% majority and the support of at least five members to pass a Special Resolution).

²⁷⁸ NFL CONST., *supra* note 4, arts. 5.6, 5.9, 6.6 (an affirmative vote of not less than three-fourths, or 20, whichever is greater, of the NFL clubs required to approve an action or decision made at an Annual Meeting, Special Meeting or by the NFL Executive Committee, except where otherwise required by the Constitution). The member clubs of the NFL enjoy voting rights on a wide range of regulatory issues. *See, e.g., id.* art. 3.3(C) (application for membership of NFL); *id.* art. 3.5(C) (approval of transfer or succession of membership of NFL); *id.* art. 4.5(G) (realignment of NFL conferences and divisions). Unlike the constitutions of the four Australian NSO's, the NFL Constitution specifically addresses central regulatory issues. *See, e.g., id.* art. 4 (territorial rights of clubs); *id.* art. 10 (broadcasting, television and equal sharing of broadcasting revenue among clubs); *id.* arts. 14–17 (player recruitment, contracts, transfer and roster regulations). As a representative example of Australian practice, AFL labor market regulations are addressed outside of the AFL Articles & Memorandum of Association, *see* AFL, RULES (Dec. 2014), <http://s.afl.com.au/staticfile/AFL%20Tenant/AFL/Files/AFL%20Rules%20-%202015.pdf>, [<http://perma.cc/42F6-3LCU>].

²⁷⁹ ML CONST., *supra* note 4, art. II, s. 9 (requiring three-fourths majority of the MLB Clubs for election of the Commissioner of Baseball); *id.* art. V, s.2(b) (requiring three-fourths majority for approval of constitutional amendment; league expansion and contraction; revenue-sharing; club sale to an independent third party; club relocation; club expulsion, and changes to league divisional structure and club alignment (with any club to be realigned enjoying right of veto)); *id.* art. V, s. 2(a) (majority of clubs required for approval of actions related to collective bargaining issues; season scheduling; actions related to broadcasting, media and electronic rights, and playing and scoring rules (excepting amendment of designated hitter rule, which requires three-quarters majority)).

English Football Association Premier League,²⁸⁰ the participant clubs of the AFL, A-League, NBL and the NRL do not enjoy extensive voting rights on matters such as the admission and expulsion of national league clubs, labor market regulation or revenue sharing. Nor, where members of the NSO, do the State Associations. The distributive consequences of these regulatory issues suggest the majority voting rules ought to be more inclusive, due to the high-expected external costs, yet the assignment of voting rights to company members may forestall any decision being reached. By assigning decision-making rights to the NSO or NLCO on most regulatory issues, the decision-making costs of company members (along with those of the State Associations or national league clubs not granted the status of company member) are minimized. This is a hallmark of the Australian model of sport and league governance.

Only the company members of the AFL and BA Limited enjoy voting rights on the admission, expulsion, merger or relocation of national league clubs or company members in ordinary circumstances. Under the 2009 BA Limited Constitution, the company members may approve, by special resolution, recommendations of the BA Limited board regarding expulsion of existing and admission of new Constituent Association Members. Similar provisions were later included in the *ASC NSO Template Constitution*, published in 2012.²⁸¹ These special resolution requirements weight the external costs of the issue more heavily than in the equivalent provision of the *AFL Articles of Association*.

The residual decision-making rights of AFL company members (the Appointees of the AFL clubs) highlight alternative perspectives on the bal-

²⁸⁰ The Football Association Premier League Limited is a U.K. private company limited by shares, initially incorporated pursuant to the Companies Act 1985 (U.K.), to act as the NLCO of The FA Premier League (“FAPL”) competition. *See* FAPL LIMITED ARTICLES, *supra* note 4, cl. 4, 34 (providing that the (20) FAPL clubs of each season (the “Members”) hold one ordinary share each and one vote at general meetings of the company); *see id.* cl. 7.1–7.3 (The Football Association Limited, as “national” governing body, holds one special share, with right of veto on resolutions relating to fundamental corporate governance matters and aspects of the league tournament format, fixtures and regulation of club ownership, but no right to vote at general meetings of the company); *see id.* cl. 27, 49 (“any dealings relating to television, broadcasting, sponsorship or like transactions or other matters materially affecting the commercial interests of the Members” require passage of a resolution approved by a majority of two-thirds of the Members who are present and vote at a general meeting).

²⁸¹ The Template Constitution does not propose weighted voting rights. *See* ASC, *supra* note 26, cl. 5, 12.1 (recommending equality of company members votes where the NSO is a federation with the State Associations as the company members).

ance between an independent board of directors and the protection of members with both minority and majority positions. The mandatory requirement for *ratification* (by a simple majority of the members) of an AFL Commission decision to suspend or terminate the Licence Agreement of an AFL club represents a constitutional balance of the power of the directors relative to the members, as well as a balance of external costs and decision-making costs. The significant external costs of these issues warrant a mandatory requirement for a vote of the members, whereas a vote of the members to *overturn* an AFL Commission decision to admit, merge or relocate AFL clubs first requires three members to requisition a general meeting, at which a majority of two-thirds of the members must be in favor of overturning the decision. The requirement for requisition of a general meeting imposes additional decision-making costs relative to a mandatory voting requirement, while the majority voting rule is a reversal of the status quo bias seen, for example, in special resolutions to amend the constitution. This rule effectively accepts a Commission decision to admit, merge or relocate AFL clubs as the ex-ante position to be modified; but only where there is strong opposition to that Commission decision, even though such decisions may impose considerable external (opportunity) costs upon all AFL clubs.²⁸²

C. Group Size, Heterogeneity & Electoral Issues

Comparative analysis of voting rules as a function of the number and diversity of NSO company members yields ambiguous theoretical conclusions. All else equal, decision-making costs ought to be less in smaller, more homogeneous groups, but changes in group size and heterogeneity can both shift decision-making costs and external costs in the same direction. This complicates the analysis and comparison of NSO voting rules for the election of company directors supports these propositions as often as not.

That a 60% majority of the nine company members is required to elect FFA Limited directors, relative to the simple majority required to elect AFL commissioners or BA Limited directors, offers support for the view that a less inclusive voting rule is warranted for larger groups. But this 60% majority might also be explained as a constitutional trade-off to offset the external costs inherent in the denial of FFA Limited member voting rights on regulatory issues (as possessed in the limited form by the AFL and BA Lim-

²⁸² See, e.g., AFL, Club Funding & Equalization Strategy 2012–16: Presentation to the Media, at 4 (Sept. 26, 2011) (detailing the ten-year (2007–2016) budgeted \$139 million AFL investment in the Gold Coast (2011) and Greater Western Sydney (2012) expansion clubs, in addition to the standard payments from the AFL to each club) (on file with authors).

ited members) or simply as a counter to the external costs of voting blocs among the company members.²⁸³

Australian football and basketball also offer confounding historical evidence on the implications of group size and heterogeneity. The number of AFL clubs expanded from 14 to 18 between 1994 and 2012, without amendment of the required voting majority rules in the AFL Articles of Association on any issue, including election of AFL Commissioners.²⁸⁴ The December 2013 de-merger of the NBL competition organizer halved the number of BA Limited members to eight, without amendment of the voting majority required to elect company directors.²⁸⁵ These examples highlight a status quo bias and the significance of the simple majority as both a norm and critical lower threshold (beyond which problems of contradictory resolutions and vote cycling more readily emerge), even though a key implication of the Buchanan and Tullock model is that the calculus of relative external costs and decision-making costs changes with the number of voters.

Is a large group of national league clubs more heterogeneous than a smaller group of State Associations? Without case-by-case information on voter preferences, intensity of preferences or risk aversion, the heterogeneity of company members must be estimated. Heterogeneity is an observable function of the obligations owed by company members (and their representatives or appointees) to the other members and to the company itself, in the decision-making independence of such representative or appointees, in the diversity of the legal form and objects of the entities (whether national league clubs or State Associations) enjoying the status of company member or the right to appoint members, in the financial and operational position of

²⁸³ For example, NSW is a traditional stronghold of association football, with the “NSW” and “Northern NSW” governing bodies based in Sydney and Newcastle respectively. The ACT is a small region within the State of NSW. As a voting bloc, the NSW, Northern NSW and ACT State Associations would control one-third of the votes at a general meeting of FFA Limited.

²⁸⁴ Compare this to a 1983 constitutional amendment that lowered the number required to pass a resolution to “grant suspend exclude or forfeit the right of a football club to representation on the League” from three-quarters to a two-thirds majority of the 12 VFL company members of the time (the VFL clubs), suggesting decision-making was being impeded at a time when the league was in crisis. See VICTORIAN FOOTBALL LEAGUE MEMORANDUM OF ASSOCIATION cl. 2(c)(xi) (June 8, 1983) (on file with authors); see also AYLETT, *supra* note 118, at 193–200, 219–37 (explaining financial and legal crises facing the VFL and the commencement of the VFL governance reform process).

²⁸⁵ See BA LIMITED 2009 CONST., *supra* note 184, cl. 13.2; see also BA LIMITED 2013 CONST., *supra* note 186, cl. 13.2.

those entities and in the market size faced by national league clubs and State Associations (see TABLES 1 and 2).

Are the 18 AFL club appointees a more homogeneous group than the eight or nine State Associations members of BA Limited or FFA Limited? The 18 AFL club appointees are constitutionally expected to act with an independent mind and in the interests of the AFL,²⁸⁶ while the AFL clubs appointing those members have the primary objective of fielding (winning) teams in competitions conducted by the AFL.²⁸⁷ This suggests a relative homogeneity of company members, irrespective of the great variance in the financial and operational position of the AFL clubs.²⁸⁸ In comparison, the objectives of the State Associations in any sport include a much broader range of (conflicting) objects.²⁸⁹ There is also a wide variance in population

²⁸⁶ See AFL ARTICLES, *supra* note 119, art. 10 (company members “shall not act as or be deemed to be a trustee or agent for the Club that he represents but shall act independently for the encouragement and promotion of football in accordance with the objects of the League”).

²⁸⁷ See, e.g., CONSTITUTION OF THE ESSENDON FOOTBALL CLUB cl. 9.1.1–9.1.2 (Dec. 15, 2011) (a company limited by guarantee with objects including “the playing of [Australian] Football in general” and “in particular, by maintaining, providing, supporting and controlling a team or teams of Footballers bearing the name of the Essendon Football Club in any competition with other clubs primarily within Australia”), <http://s.afl.com.au/staticfile/AFL%20Tenant/Essendon/Images/EssendonFC-Constitution-Dec-11.pdf>, [<http://perma.cc/Z5C7-9FZB>]; see also PATERSON, *supra* note 124, at 509–15 (explaining the corporate structure of most AFL clubs as companies limited by guarantee).

²⁸⁸ Of the 16 established AFL clubs, there was a \$45.277 million gap between the 2013 revenue of the largest (Collingwood, \$75.238 m) and smallest (St. Kilda, \$29.961 m) clubs and a 2013 club membership gap of 54,297 club members between the largest (Collingwood, 78,427 members) and smallest (Brisbane Lions, 24,130 members). See *Big Bucks Game*, HERALD SUN (Melbourne) Jan. 28, 2014, at 68 (reporting 2013 AFL club financial statistics) (on file with authors); AFL RECORD SEASON GUIDE 2014, at 839 (Michael Lovett, ed. 2014) (reporting 2013 AFL club membership statistics).

²⁸⁹ See, e.g., BASKETBALL VICTORIA CONSTITUTION cl. 2.1(a)–(b) (Feb. 25, 2008) (an incorporated association with objects including “to encourage, promote, manage and control the sport of basketball in the State of Victoria . . . [and to] represent the interests of basketball and basketballers within the State of Victoria at national level”), http://www.basketballvictoria.com.au/fileadmin/user_upload/PDF_ADMIN/Approved_BV_Constitution_redraft_April_2010.pdf, [<http://perma.cc/A7NQ-6WGW>]; see, e.g., FOOTBALL NSW LIMITED CONSTITUTION cl. 1.1(a)–(b) (Aug. 26, 2011) (a company limited by guarantee with objects including “to be the member of FFA in respect of the State and to comply with the constitution and by-laws of FFA . . . [and] to govern, administer and regulate Football throughout the State and protect Football from abuse”), <http://admin.footballnsw.com.au/>

and participation rates across the States and Territories.²⁹⁰ Comparisons of relative heterogeneity within and across classes of company members are speculative, but even this limited data challenges the predictions of the Buchanan and Tullock model. For example, it is reasonable to suggest the two classes of BA Limited company member (prior to the 2013 de-merger of the NSO and the NBL clubs) were collectively more diverse than the nine State Association members of FFA Limited, yet the latter faced a more inclusive electoral voting rule.

The ARLC Limited Constitution also highlights the theoretical tensions regarding the effect of group size and the heterogeneity of voter preferences upon voting rules. Only a simple majority of the eight ARLC Limited directors—in their capacity as directors—is required to appoint new directors; whereas the residual electoral voting rules require either a super majority or unanimous support of the 16 NRL club Licensee Members, plus the agreement of both NSWRL Ltd and QRL Limited to elect a director. The preference heterogeneity of these Licensee Members and State Associations is arguably greater than that of the eight ARLC Limited directors, warranting a more inclusive voting rule in accordance with Buchanan and Tullock's logic. Conversely, a larger group of voters will face higher decision-making costs, implying a less inclusive optimal voting rule. As noted earlier, the impact of decision-making costs—independent of group size—is acknowledged by the requirement for only a 75% majority of the Licensee Members (plus the agreement of NSWRL Ltd and QRL Limited) to elect directors in the circumstance where the board is least able to function.

D. The Evolution of Independence

Underlying the external and decision-making costs of all voting rules discussed above is the issue of “independence”, as an objective in the design of the corporate constitution of the NSO and NLCO. As noted in Part II, this has long been the quest of stakeholders in each sport, yet the term itself has been open to multiple interpretations. Reforms intended to achieve “independence” have been at least as much concerned with the formal separation of powers between the NSO (or NLCO) and other entities in the sport (primarily the national league clubs and State Associations) as with ensuring that the NSO board functions as an effective monitor of company manage-

fileadmin/user_upload/Resources_and_Documents/CONSTITUTION.pdf, [http://perma.cc/37Y7-4HCJ].

²⁹⁰ See *supra* Table 2 (population data) and note 205 (BA Limited member voting weights as example of the variance in participation rates across States and Territories).

ment by comprising directors who are individually and collectively independent, disinterested and outsiders to the NSO and other entities in the sport.²⁹¹

Independence depends upon the formal allocation of decision-making rights in the corporate constitution, bylaws and other contracts defining the relationship between (a) the board and management of the NSO, (b) the NSO and the company members and (c) the NSO, the State Associations and the national league clubs (if not granted the status of company members). Independence also requires role specification and enforcement of the required characteristics and behavioral expectations of NSO directors and members. These expectations are formalized by the statutory and general law directors' duties,²⁹² embodied in the corporate constitution and bylaws and influenced by external guidelines, such as the *ASC Sports Governance Principles*.²⁹³

The formal division of powers is established by a provision in each NSO constitution that the directors may exercise all the powers of the company, except those required by either the *Corporations Act 2001* (Cth) or the constitution to be exercised by the company in general meeting.²⁹⁴ For three NSO's, but not the AFL, the division of powers between the directors and the members is further reinforced by the formal constitutional requirement

²⁹¹ See, e.g., Donald C. Clarke, *Three Concepts of the Independent Director*, 32 DEL. J. CORP. L. 73 (2007) (a non-executive director may possess one or more of the qualities of being *independent* of the influence of company management and thus able to act as a monitor of management; an *outsider* who is not a company employee, and *disinterested* as being free of material conflicts-of-interest with those of the company); see also ASX, *supra* note 30, at 37 (independent director defined as a director free of "any interest, position, association or relationship that might influence, or reasonably be perceived to influence, in a material respect his or her capacity to bring an independent judgement to bear on issues before the board and to act in the best interests of the entity and its security holders generally").

²⁹² See Pearce & Thomas, *supra* note 30 (explaining the "independent director" in Australian law and as defined in various Australian NSO constitutions); see also AUSTIN & RAMSAY, *supra* note 39, at chs. 8–9 (explaining director's duties and liabilities in Australian corporate law).

²⁹³ See ASC, *supra* note 23, at princ. 1.8 (recommending that all NSO board members ought to be independent directors, being "those that are not appointed to represent any constituent body, are not employed by or have a significant business relationship with the organization, do not hold any other material office within the organizational structure and have no material conflict of interest as a result of being appointed director").

²⁹⁴ AFL ARTICLES, *supra* note 119, art. 53; ARLC LIMITED CONST., *supra* note 233, r. 36(a); BA LIMITED 2009 CONST., *supra* note 184, cl. 15.1; FFA LIMITED CONST. *supra* note 151, cl. 11.1. These clauses supersede the equivalent replaceable rule. *Corporations Act 2001* (Cth) s 198A(2).

for individual directors to be independent of other entities within each sport.²⁹⁵ Similar provisions in AFL Articles of Association are limited in scope to dealing with commercial relationships between Commissioners and the League.²⁹⁶ By definition, NSO board independence lessens the decision-making costs of company members by limiting their decision-making rights; at a minimum to those required by the *Corporations Act 2001* (Cth). As we have seen in Part IV, few decision-making rights are assigned to the company members irrespective of the classes of individuals or entities (national league clubs, State Associations, their representative or appointees) granted the status of company member in any of the four NSO constitutions. In particular, the voting rights of the ARLC Limited and FFA Limited company members are essentially restricted to the minimum set of constitutional and electoral issues necessary for the functioning of a company.

There are two corresponding expectations of the reforms intended to enhance board independence. First, that the independent NSO board will make decisions on regulatory issues (if not also constitutional and electoral issues) for the collective benefit of the sport and the national league, free of the self-interest of State Associations or national league clubs. Second, that the value of such decisions will exceed the sum of the value of decisions made either collectively or individually by State Associations or national league clubs, so that—at least in theory—those parties may be compensated for the external costs inherent in their loss of decision-making rights. Although the latter set of expectations are outside the domain of corporate law, poor financial or strategic performance often prompts the removal of incumbent directors, if not also constitutional reform.

A broad perspective across the four sports suggests the adoption of NSO and NLCO constitutions which, over time, have progressively enhanced the independence of the board. Even so, the history of each sport suggests the evolution of independence has been neither linear,²⁹⁷ nor sug-

²⁹⁵ ARLC LIMITED CONST., *supra* note 233, r. 32(b); BA LIMITED 2009 CONST., *supra* note 184, cl. 41.3; FFA LIMITED CONST., *supra* note 151, cl. 10.16–10.17. Note that AFL Commissioners are, without prior approval,

²⁹⁶ AFL ARTICLES, *supra* note 119, art. 50(2) (non-executive Commissioners may be paid, with prior approval of Commission, on reasonable commercial terms for services rendered to League in professional or technical capacity); *id.* art. 51(g)-(h) (office of Commissioner shall become vacant if Commissioner holds any office of profit under the League, subject to art. 50, or if Commissioner fails to declare a direct or indirect interest in any (proposed) contract with the League).

²⁹⁷ Australian basketball is the most prominent counter to the suggestion of a linear evolution of sport governance or league governance. *See, e.g.*, Macdonald & Burton, *supra* note 100; *see also* Macdonald & Booth, *supra* note 11, at 239–48;

gestive of a single optimal constitutional design for either an NSO or an NLCO.

Relative to the three other NSO constitutions we have reviewed in Part IV, the ARLC Limited Constitution provides the greatest independence to the board of directors (the ARL Commission) from the company members.²⁹⁸ The desire for independence in rugby league, both of the sport at large (from outside influence) and of the ARL Commission (from the company members), reflects the extreme financial and social costs of the damaging Super League conflict of the mid 1990s.²⁹⁹ The 2012 ARLC Limited Constitution was the result of over three years of negotiation between News Limited, ARFL Limited (the former name of the NSO), NSWRL Ltd, QRL Limited and the 16 NRL clubs, with the NRL Partnership dissolved at the same time as the NSO constitutional amendments. Control of the national league was thereby transferred to the NSO, 14 years after the formation of the NRL competition and the partnership between News Limited and ARFL Limited to manage the national league. Although the constitutional voting rules, in most cases, impose high decision-making costs upon the three classes of ARLC Limited company member, they also reflect a desire to minimize the external costs of collective decision-making. This creates a strong status quo bias against amendment of the 2012 ARLC Limited constitution or, indeed, the removal of ARL Commissioners.

The ARLC Limited directors are company members as of right but with primary responsibility for electing or appointing new directors in their capacity as directors. Regulatory issues are the exclusive domain of the ARL Commission. These constitutional features reflect a progression from previ-

251–56 (evolution of governance in Australian football, association football and rugby league); Nadel, *supra* note 118, 79–89 (evolution of the AFL Commission) and text accompanying notes 219 and 220 (evolution of NSWRL, NSWRL Ltd & ARFL Limited).

²⁹⁸ See also, ARLC LIMITED CONST. *supra* note 233, at r. 32(b) (prohibiting a person from being appointed or remaining a director if that person is, or in the previous 36 months has been, an officer or employee of a Licensee (an NRL club), NSWRL Limited, QRL Limited, NRL Limited or any related body corporate of those entities).

²⁹⁹ See Neil Chenoweth, *Lachlan's Legacy: \$560m Lost on Super League*, AUSTRALIAN FINANCIAL REVIEW (Sydney), Aug. 5, 2005 (on file with authors); Roy Masters, *League Apart*, SYDNEY MORNING HERALD Mar. 26, 2005 (Super League costs estimated as \$1 billion), <http://www.smh.com.au/news/League/League-apart/2005/03/25/1111692629384.html>, [http://perma.cc/X7GQ-4GSC] (last visited Mar. 26, 2015).

ous similar constitutional arrangements in rugby league,³⁰⁰ as well as the experience of other Australian NSOs.³⁰¹

The AFL Commission has been lauded as a benchmark for independent and efficient governance since the 1993 amendment of the AFL Articles of Association created the 'independent commission' discussed above. Yet relative to the AFL company members, the potential for collective action on electoral issues by the 16 Licensee Members (the NRL clubs), NSWRL Ltd and QRL Limited is constrained by the combination of conditional voting rights and unanimity or super majority voting rules (including the right of veto for both NSWRL Ltd and QRL Limited) when those members exercise their residual right to elect or primary right to remove directors. Of the four NSOs we have reviewed in this article, the ARLC Limited constitution is also the only one to include additional requirements for constitutional amendment beyond the mandatory special resolution. The combined effect of these features of the ARLC Limited constitution is the provision of relatively greater independence to the ARL Commission than that enjoyed by the AFL Commission.

The ARLC Limited constitution offers a good example of how the Buchanan and Tullock model can be deployed. The *Corporations Act 2001* (Cth) mandatory rules provide efficiency at the time of constitutional design, as do default rules when future conditions are unknown, unknowable or experience offers little guide. But when the expected external costs are well understood (as with the consequences of the Super League war and the NRL Partnership) and a strong view is held about the acceptability of the decision-making costs of a constitutional structure (as with the desire for 'independence' of the board of directors), the assignment of constitutional voting rights to different classes of company member and the majority voting rules can be designed accordingly.

³⁰⁰ See AUSTRALIAN RUGBY FOOTBALL LEAGUE LIMITED ARTICLES OF ASSOCIATION arts. 1–3, 34 (Apr. 29 1986) (definitions and identification of company members and company directors); *New South Wales Rugby League Ltd v Australian Rugby Football League Limited* (1999) 30 ACSR 354, 359 (Austl.) (citing amendment to AUSTRALIAN RUGBY FOOTBALL LEAGUE LIMITED ARTICLES OF ASSOCIATION art. 34 (Apr. 8 1997) (identification of company directors)) and text accompanying notes 221–222.

³⁰¹ See, e.g., BA LIMITED 2009 CONST. *supra* note 184, at cl. 5 (identifying all national league clubs and all State Associations as company members of the NSO); AUSTRALIAN SOCCER ASSOCIATION LIMITED CONSTITUTION cl. 3, 10, 22 (Sept. 26, 2003) (specifically identifying the same seven individuals as both "First Directors" and "First Members" of the company, with the status of first member to expire after a defined transition period during which the First Directors were to invite State Associations to apply for membership of the company).

VI. CONCLUSION

In his 1993 *AFL Administrative Review*, prominent company director and sport governance expert David Crawford noted, “there is no one universally correct structure. There is a need to regularly review a structure in order to move with changes that are required as circumstances change to ensure that the optimum results are achieved in accordance with the “raison d’être” for a particular competition.”³⁰² Buchanan and Tullock’s model accords with this view and represents an extension of previous literature on the law and economics of sport and league governance. Their simple normative proposition is that any voting rule minimizes the sum of the external costs and the decision-making costs of the issue in question. This model offers positive tools of analysis by suggesting that the optimal voting majority varies with the relative external costs and decision-making costs of an issue. On this logic, there is no reason to prefer a simple majority (or any other majority) as the *a priori* optimal voting rule for an issue.

We have explained the allocation of decision-making rights and voting rules in the corporate constitutions of the AFL, FFA Limited, BA Limited and ARLC Limited. Between February 2012 and October 2013, these four companies shared like responsibilities as both the NSO and NLCO for their respective sports, yet the constitutional structure of each company was quite different. None shared a like set of voting company members. Neither were the voting rights nor voting majority rules standardized across the constitutional issues, electoral issues and regulatory issues examined above. Our findings generally conform to the predictions of the model. In most cases, where external costs have been perceived to be high relative to decision-making costs (as with the constitutional issues), more inclusive voting rules have been adopted than for issues where this ratio is perceived to be smaller (as with electoral issues). Where decision-making costs were perceived to be so high as to preclude efficient outcomes to collective decision-making (as with most regulatory issues), national league clubs and State Associations have been denied decision-making rights altogether. The *Corporations Act 2001* (Cth) distinction between the special resolution and the ordinary resolution also reflects the logic that distributive issues which (permanently) alter the rights of company members ought to require a more inclusive voting majority than other matters, where the decision may be reversible or where the relationship between voting and the external costs of an issue is much weaker. The requirements of the *Corporations Act 2001* (Cth) and the ASC sport governance principles have reinforced ‘independence’ as a central ele-

³⁰² Crawford, *supra* note 117, at 12.

ment of an Australian model of sport and league governance. This model emerged well before more recent claims in the sports law and sports economics literature for similar governance reforms in the U.S. major leagues.

Each NSO provides at least one example in support of these conclusions, as well as confounding examples. Much work therefore remains to understand the unique and combined effects of the number, identity and heterogeneity of voters and the impact of pre-existing allocations of decision-making rights upon contemporary constitutional voting rules. Future research should investigate the evolution of constitutional voting rights and majority voting rules and draw from a wider selection of case studies.

Buchanan and Tullock's logic naturally fits with the transaction cost approaches of Coase and Williamson, who argue the minimization of transaction costs motivates the choice of efficient governance structure. For some issues it will be more efficient to allow individuals to enter into their own private contracts in the marketplace. For other issues it will be more efficient to adopt a collective decision-making process and vote or to assign the decision-making rights to an independent decision-maker. Whereas existing commentary on sport and league governance design concentrates upon the optimal allocation of decision-making rights, Buchanan and Tullock's model fills a conceptual gap by concentrating upon the decision-making process itself. Legal counsel will often need to draft constitutional voting rules for parties who value the right to vote. Constitutional drafting also requires counsel to assess whether to accept, strengthen or otherwise amend the mandated and default voting rules in corporations and associations statutes. The Buchanan and Tullock model is a viable analytical tool when drafting or advising on the design of such collective decision-making rules.



Financing Music Labels in the Digital Era of Music: Live Concerts and Streaming Platforms

Loren Shokes*

In the age of iPods, YouTube, Spotify, social media, and countless numbers of apps, anyone with a computer or smartphone readily has access to millions of hours of music. Despite the ever-increasing ease of delivering music to consumers, the recording industry has fallen victim to “the disease of free.”¹ When digital music was first introduced in the late 1990s, industry experts and insiders postulated that it would parallel the introduction and eventual mainstream acceptance of the compact disc (CD). When CDs became publicly available in 1982,² the music industry experienced an unprecedented boost in sales as consumers, *en masse*, traded in their vinyl records and cassette tapes for sleek new compact discs.³ However, the introduction of MP3 players and digital music files had the opposite effect and the recording industry has struggled to monetize and profit from the digital revolution.⁴ The birth of the file sharing website Napster⁵ in 1999 was the start of a sharp downhill turn for record labels and artists.⁶ Rather than pay

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¹ See David Goldman, *Music's Lost Decade: Sales Cut in Half*, CNN MONEY (Feb. 3, 2010), available at http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/.

² See *The Digital Era*, RECORDING HISTORY: THE HISTORY OF RECORDING TECHNOLOGY, available at <http://www.recording-history.org/HTML/musicbiz7.php> (last visited July 28, 2015).

³ See Goldman, *supra* note 1.

⁴ *Id.*

⁵ Napster was a website that facilitated downloading and sharing MP3 audio files for free. See Tom Lamont, *Napster: The Day the Music was Set Free*, THE GUARDIAN (Feb. 23, 2013), available at <http://www.theguardian.com/music/2013/feb/24/napster-music-free-file-sharing>.

⁶ Alex Suskind, *15 Years After Napster: How the Music Service Changed the Industry*, THE DAILY BEAST, <http://www.thedailybeast.com/articles//06/06/15-years-after-nap>

the traditional \$14.00 for a CD,⁷ Napster provided the means for consumers to obtain a high-quality copy of a CD free of charge. At the height of its popularity, Napster boasted over 60 million active users.⁸ Even though Apple's iTunes music store is largely credited with reintroducing the concept of paying for music, the four-year gap between the launch of Napster and the debut of iTunes "is where the music industry lost the battle."⁹ As music analyst Sonal Gandhi explained, the recording industry "lost an opportunity to take consumers' new behavior and really monetize it in a way that nipped the free music expectation in the bud."¹⁰ Rather than vehemently fight against and lobby Congress to introduce legislation to block file sharing services when Napster and analogous websites were first launched, the music industry took a lackadaisical approach and initially refused to take action.¹¹ As a result, digital music file sharing websites and apps that offer free music are now permanent fixtures. Even more problematic for the music industry is the shift in society's attitudes about paying for music. A staggering seventy percent of Americans between the ages of eighteen and twenty-nine actively pirate media and only thirty-seven percent of Americans under the age of thirty support punishing file sharers.¹² As a result, the music industry has had to scramble to find a new means to turn a profit.

Live music concerts are one of the oldest and most revered ways musicians make a profit.¹³ Nevertheless, the innovation of smartphones and advanced recording technology has quickly desecrated this once-robust means

ster-how-the-music-service-changed-the-industry.html ("Hundreds of download programs have come and gone since 1999 (Limewire, Kazaa, BitTorrent, to name a few). Napster deserves credit not just for being the first, but for revolutionizing a new frontier in music consumption. Even today, its legacy and its effect on the industry are still very much in play.").

⁷ See Benj Edwards, *The CD Player Turns 30*, PCWORLD (Oct. 1, 2012), available at <http://www.pcworld.com/article/2010810/the-cd-player-turns-30.html>.

⁸ Suskind, *supra* note 6.

⁹ Goldman, *supra* note 1 (internal quotations omitted).

¹⁰ *Id.* (internal quotations omitted).

¹¹ See *id.* Artists and the recording industry did not wait forever, and in 2000 Metallica, Dr. Dre, and the RIAA sued Napster. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001).

¹² Jason Mick, *Nearly Half of Americans Pirate Casually, But Pirates Purchase More Legal Content*, DAILY TECH (Jan. 21, 2013), <http://www.dailytech.com/Nearly+Half+of+Americans+Pirate+Casually+But+Pirates+Purchase+More+Legal+Content/article29702.htm>.

¹³ Paul Michael, *How Much?! A Breakdown of Concert Ticket Prices*, WISEBREAD (July 5, 2011), available at <http://www.wisebread.com/how-much-a-breakdown-of-concert-ticket-prices> (illustrating how, on average, 74% of ticket prices are paid directly to artist).

for performers to earn a living. Additionally, increasingly popular streaming services have a love-hate relationship with artists: in exchange for providing countless artists unprecedented access to a global audience of music lovers, streaming services pay fractions of pennies per stream of a song.¹⁴ While streaming music could have proven extremely fruitful for the major recording companies and unsigned musicians, the lack of a statute dictating what streaming platforms must pay artists (which exists for streaming's analog corollary, the radio) has proven to be disastrous for the music industry as a whole and many artists are averse to offering their music on such services.¹⁵

This Note will first examine the obstacles music companies have been forced to face in light of the development of music infringing websites and the types of remedies and alternative measures record labels can take to ensure that they are adequately compensated for live concerts. Second, this paper will explore the origins of music streaming websites and examine what types of measures need to be taken for record companies and musicians to profit from streaming services.

LIVE CONCERTS

Although concerts have historically proven to be a reliable means for artists to earn a living, the introduction of smartphones with recording capabilities has spurred new hurdles for the recording industry.¹⁶ Virtually every concertgoer today brings a smartphone with audio-visual recording capabilities to music festivals and shows and many subsequently post footage they recorded online and on social media platforms. Seeking to monetize on the vast array of "free" footage, countless Internet applications and websites have emerged that pirate the recordings of live music concerts online for anyone to see and hear.¹⁷ Such apps scour through the Internet for

¹⁴ Paul Resnikoff, *A Quick Summary of What Streaming Services Are Paying Artists*, DIGITAL MUSIC NEWS (Dec. 13, 2013), available at <http://www.digitalmusicnews.com/2013/12/13/> (illustrating how artists have to have their records streamed hundreds of times before they earn \$1.00 USD).

¹⁵ *Id.*

¹⁶ See Steve Knopper, *Nine Ways Musicians Actually Make Money Today*, ROLLING STONE (Aug. 28, 2012), available at <http://www.rollingstone.com/music/lists/9-ways-musicians-actually-make-money-today-20120828>.

¹⁷ Helienne Lindvall, *How Record Labels Are Learning To Make Money From YouTube*, THE GUARDIAN (Jan. 4, 2013), available at <http://www.theguardian.com/media/2013/jan/04/record-labels-making-money-youtube> (Unlike YouTube, which has ad partnership deals and allows record labels to make upwards of \$5,000 per million views, the apps in question do not pay the record labels or artists anything).

bits and segments of footage of a live show, place them in chronological order, and allow anyone on their site to stream or download the concert, often free of charge. Evergig is one such example. With the motto “every concert, at your fingertips,”¹⁸ Evergig is “the ultimate platform for collaborative on-demand concert video – by the fans and for the fans, all around the globe.”¹⁹ The website works by hunting the Internet for the best audio and visual footage of a concert shot by concert-goers, enhances it by filtering out any and all excess noises and distortions, and then posts the entire concert on its website, often within minutes of the show’s conclusion.²⁰ Deemed “the new venue for live-music fans,” within four months of the site’s launch date, over one million concerts had been uploaded and the number of users has doubled each month since its launch date.²¹ The two founders have explained that their objective was:

to make use of the web to allow a maximum number of people to experience exceptional musical moments which are today still far too inaccessible. From now on, an internet [sic] user can experience a concert as if it were live at Madison Square Garden, or relive the New Year countdown show on Copacabana Beach.²²

While such websites are extremely enticing for music lovers who could not attend the live show or did not want to pay the ticket price, these websites and apps do not pay the artists or the artists’ record labels for such footage and have proven extremely costly to the music industry. While the record labels have found some success blocking recordings of concerts from being posted on the Internet and uploaded to various smartphone and Internet applications on copyright infringement grounds when the artist is lip-syncing and the master recording is heard,²³ this has not been the case for shows where the artist is performing live without the master recording. The copyright act does not apply to live music performances²⁴ and record labels have been forced to find alternative sources of support to justify blocking footage of live performances uploaded by concertgoers to the Internet.

¹⁸ Evergig.com, available at <http://blog.evergig.com> (last visited Sept. 13, 2015).

¹⁹ *Evergig Hits ONE MILLION Concerts!*, PRWEB (Oct. 9, 2014), available at <http://www.prweb.com///10/prweb12233163.htm>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See, e.g., *Broad. Music, Inc. v. McDade & Sons, Inc.*, 928 F. Supp. 2d 1120, 1129 (D. Ariz. 2013); see *The Law*, RIAA, available at http://www.riaa.com/physical_piracy.php?_=piracy_online_the_law (last visited Sept. 4, 2015).

²⁴ See 17 U.S.C. § 102 (2015) (a performance must be fixed in some non-transient form to qualify for copyright protection).

WHY EVERGIG AND RELATED SITES OUGHT TO BE BANNED

When an artist goes on tour, there are multitudes of expenses that incur, and the artist's label must pay the bill. Hundreds of people, from the artists to their managers, promoters, road crew, lighting and sound engineers, security, and bus drivers, upheave their lives for the duration of the tour, which often extends for months, and all must be compensated. With respect to venue, arenas often require an upfront payment of \$20,000 per night and amphitheaters often charge \$10,000 per night.²⁵ Moreover, when artists are touring outside of their home area, they either must sleep on their tour bus or pay to stay in a hotel, and pay for catering and other food expenses. With respect to transportation, artists must pay for their flights, a tour bus, a driver, gas, insurance, and big rig to carry their stage, instruments, and all other necessary equipment. Accordingly, producing a single show can easily cost tens, if not hundreds, of thousands of dollars and record labels rely on ticket sales to pay for all expenses. Therefore, when people stream concerts for free from sites such as Evergig, they are stealing directly from the record labels, which cuts their profits and makes it difficult for them to continue producing concerts and worldwide tours while paying the artists and additional personnel, transportation, and arenas.

"Freemium" services like Evergig are plaguing the recording industry, as the public has grown accustomed to hearing music and seeing their favorite concerts for free. Without legal redress under the copyright act for live music concerts,²⁶ nothing is preventing a proliferation of Evergig-type sites, which would severely curtail an artist's ability to sell enough concert tickets at a price that allows them to pay for all of their expenses. Therefore, some form of redress that adequately and effectively prevents sites such as Evergig from stealing from artists and their labels is necessary.

HOW TO PROTECT LIVE CONCERTS FROM ILLEGAL UPLOADING

Musicians and music producers have traditionally enjoyed copyright protection in two separate formats: since 1831, musical compositions have

²⁵ Ryo Vie, *The Price Of A Concert: Breaking Down Where The Money Goes*, THE ROCK AND ROLL GURU (March 30, 2011), available at <http://rockandrollguru.blogspot.com/2011/03/price-of-concert-breaking-down-where.html>.

²⁶ §102(a) of the Copyright Act states that copyright protection extends to "works of authorship fixed in any tangible medium of expression" and § 102(a)(3) protects "dramatic works, including any accompanying music." However, because live concerts are not in a tangible medium, the Copyright Act affords them no protection. 17 U.S.C. § 102 (2015).

been safeguarded under US copyright law²⁷ and in 1971 Congress further extended the scope of the Copyright Act to incorporate sound recordings when it enacted the Sound Recording Act.²⁸ The expansion of the statute meant “persons who made unauthorized reproductions of records or tapes, which is known as ‘piracy,’ could be prosecuted or face civil liability for copyright infringement.”²⁹ Nevertheless, a void remained: live, unrecorded music concerts and performances did not fall under the purview of US copyright law.³⁰ Even with the enactment of the Sound Recording Act, anyone could record a live musical performance and distribute copies of the recording without violating US copyright law.³¹ This loophole was increasingly exploited as technology progressed and people became more adept at recording high-quality unauthorized copies of live concerts or performances. At the same time, record companies, artists, and music producers were left both without compensation from such recordings and without a means of recourse. After numerous campaigns and vigorous lobbying efforts to expand the law to offer protection for live music, Congress created the anti-bootlegging statute.³² The statute prohibits the unauthorized fixation of, and trafficking in, sound recordings and music videos of live musical performances and subjects; those who violate the statute to the same penalties as copyright infringers.³³

Shortly after the passage of the anti-bootlegging statute, questions about its constitutionality arose, specifically with regards to whether it was fundamentally at odds with the Copyright Clause. While there is relatively little legislative history with respect to the passage of the anti-bootlegging statute, the insight that is available suggests that it was Congress’ intent to enact the statute in accordance with its authority under the Copyright Clause.³⁴ However, this action proved problematic. The Copyright Clause empowers Congress “[t]o promote the Progress of Science and useful Arts,

²⁷ See *id.* at § 102(a)(2) (stating that copyright protection extends to “musical works, including any accompanying words”).

²⁸ *Id.* at § 102(a)(7) (stating that copyright protection extends to sound recordings).

²⁹ *U.S. v. Moghadam*, 175 F.3d 1269, 1271 (11th Cir. 1999).

³⁰ *Id.* at 1272.

³¹ *Id.*

³² *Id.* (the civil provision of the anti-bootlegging statute is found in 17 U.S.C. § 1101 and the criminal provision is embodied in 18 U.S.C. § 2319A).

³³ See 17 U.S.C. § 1101 (2012).

³⁴ See 140 Cong. Rec. H11441, H11457 (daily ed. Nov. 29, 1994) (statement of Rep. Hughes) (“There are a number of changes in copyright that will advance our interests in the area of bootlegging, which is going to basically protect our country.”).

by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁵ The term “writings” in the clause encompasses the concept that works that are copyrightable must be “fixed,” meaning that a work must be capable of being “reduced to some tangible form.”³⁶ Although “writings” has been interpreted broadly to include things such as choreographic works and pantomimes,³⁷ and not merely literary works,³⁸ there are limitations. In his eponymous treatise, Nimmer explains, “[i]f the word ‘writings’ is to be given any meaning whatsoever, it must, at the very least, denote some material form, capable of identification and having a more or less permanent endurance.”³⁹ Accordingly, and despite the expansion of the types of works that are considered “fixed” under the Copyright Act, live performances remain exempt. Congress may only exercise powers granted to it by the Constitution,⁴⁰ and it is the duty of the courts to determine if Congress acted within its constitutionally granted powers when it enacted the statute in question. With respect to the constitutionality of the anti-bootlegging statute, numerous courts and scholars have established that the statute does not fall within the scope of the Copyright Clause and therefore Congress lacks the authority to legislate live performances under the Copyright Clause.⁴¹ However, rather than dismiss the statute as unconstitutional, a federal court in *Kiss Catalog, Ltd. v. Passport Int’l Prods., Inc.* found that “the Commerce Clause grant[ed] Congress the power to enact the Statute.”⁴² The Supreme Court “noted that legislation that could not be permitted under the Copyright Clause could nevertheless pass muster under the Commerce Clause—if the independent requirements of that clause were met.”⁴³ The court in *U.S. v. Lopez* explained that the test of constitutionality under the Commerce Clause is “whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.”⁴⁴ With respect to live musical performances, modern case

³⁵ U.S. CONST. art. I, § 8, cl. 8.

³⁶ See *United States v. Moghadam*, 175 F.3d 1269, 1273 (11th Cir. 1999).

³⁷ See 17 U.S.C. § 102(a)(4) (2006).

³⁸ See 17 U.S.C. § 102(a)(1) (2006).

³⁹ MELVILLE B. NIMMER, 1 NIMMER ON COPYRIGHT § 1.08[C][2], at 1–66.30 (internal quotation marks omitted).

⁴⁰ See U.S. CONST. art. I, § 8.

⁴¹ See, e.g., *Kiss Catalog, Ltd. v. Passport Int’l Prods., Inc.*, 405 F. Supp. 2d 1169, 1174 (C.D. Cal. 2005).

⁴² *Id.* at 1173 (explaining that KISS Catalog, Ltd. is the owner of trademarks relating to the band KISS).

⁴³ *Id.* at 1174 (analyzing the Supreme Court’s decision in *Trade-Mark Cases*, 100 U.S. 82 (1879)).

⁴⁴ 514 U.S. 549, 551 (1995).

law reflects the current trend of expanding how the Commerce Clause is interpreted “and modern cases upholding trademark protection are based on the Commerce Clause.”⁴⁵

Despite falling under the powers conferred in the Commerce Clause, the anti-bootlegging statute bestowed a type of quasi-copyright protection to live musical performances in a way that embraced the underlying idea of the Copyright Act. As the court in *Kiss Catalog* explained, “the [Anti-Bootlegging] Statute complements, rather than violates, the Copyright Clause by addressing similar subject matter, not previously protected—or protectable [*sic*]—under the Copyright Clause.”⁴⁶ Even when defendants have attempted to argue that their recordings of live performances constitute a derivative or entirely new work due to the performer changing or altering part of a song during a live performance, the courts have dismissed their logic on grounds often found in copyright infringement cases. Further, the court in *Broad. Music, Inc. v. McDade & Sons, Inc.* explained that *even if* during a live performance the performer changes or alters a word of their original song, such a change does not create a new composition that comments on the original author’s works, so as to support a fair use or parody defense to copyright infringement.⁴⁷

WHAT CAN CONGRESS DO?

Even though record labels and artists currently must sue under the Commerce Clause if website and app developers stream recordings of their live concerts without paying royalties, change is likely to come in the near future. While courts have the ability to judicially expand the scope of copyright protection, they will likely defer to Congress instead.⁴⁸ In *Sony Corp. of Am. v. Universal City Studios, Inc.*, the Supreme Court explained that rather than change the Copyright Act itself,

[s]ound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.⁴⁹

⁴⁵ *Kiss Catalog*, 405 F. Supp. 2d at 1175.

⁴⁶ *Id.* at 1176.

⁴⁷ *Broad. Music, Inc. v. McDade & Sons, Inc.*, 928 F. Supp. 2d 1120, 1131 (2013).

⁴⁸ See Wendy M. Pollack, *Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 *FORDHAM L. REV.* 2445, 2460 (2000).

⁴⁹ 464 U.S. 417, 431 (1984).

Congress has the ability to amend the Copyright Act so as to incorporate and protect recordings of live concerts, and such a change in reaction to advancements in Internet technology would not be not unprecedented. President Clinton signed the Digital Performance Right in Sound Recordings Act (“DPRSA”) into law in 1995 in response to the new challenges artists faced as a result of advancements in computer technology. Therefore, if the music industry continues to lose revenue as more and more Evergig-like websites are created, the major and independent labels need to persuade Congress members of the need for a statutory means of recourse.

STREAMING SERVICES

With respect to music streaming services such as Pandora and Spotify, artists and record labels have had a tempestuous relationship. While streaming music platforms provide an ever-increasing number of artists an efficient and effective way to reach a global music audience, such artists are often not paid or are paid so little that they cannot make a living simply from the profits they make from streaming music. There currently is no statute or case law that explicitly delineates what rate such services must pay artists or record labels, and streaming companies have readily taken advantage of the fact.⁵⁰ The issue is further complicated by the fact that artists are not directly paid per stream of their music by streaming services and “[h]ow much money artists ultimately are paid for streams or purchases depends on a number of factors such as royalty rates, ownership and contractual terms.”⁵¹ Without regulatory guidance, even popular and successful streaming services such as Spotify⁵² pay an average of only \$0.007 per song play.⁵³ Even though artists have zealously protested such practices by refus-

⁵⁰ See Glenn Peoples, *Business Matters: How Much Do Streaming Services Pay Artists? Ask the Labels*, BILLBOARD (Oct. 27, 2011, 4:30 PM), available at <http://www.billboard.com/articles/news/business-matters-how-much-do-streaming-services-pay-artists-ask-the-labels>; Stuart Dredge, *Streaming music payments: how much do artists really receive?*, THE GUARDIAN (Aug. 19, 2013, 6:03 AM), available at <http://www.theguardian.com/technology/2013/aug/19/zoe-keating-spotify-streaming-royalties>.

⁵¹ Peoples, *supra* note 50.

⁵² See Yinka Adegoke, *Spotify Now Has 10 Million Paid Subscribers, 3 Million In U.S. (Exclusive)*, BILLBOARD (May 21, 2014), available at <http://www.billboard.com/biz/digital-and-mobile/6092226/spotify-now-has-10-million-paid-subscribers-3-million> (stating that as of May 2014, Spotify had over 40 million active users, 10 million of which were paid subscribers).

⁵³ *Spotify Reveals Artists Earn \$0.007 Per Stream*, BBC (Dec. 4, 2013), available at <http://www.bbc.com/entertainment-arts-25217353>.

ing to have their work available on such platforms,⁵⁴ the popularity of streaming music continues to expand because it is both legal and based on a simple, user-friendly concept: for a small monthly fee⁵⁵ customers have access to a virtually limitless library of music.⁵⁶ Thus, in exchange for receiving mere cents on the dollar per stream of a song, by placing their music on streaming services, artists can reach a broader audience and gain unprecedented exposure which they hope will inspire their fans to legitimately purchase their merchandise and tickets to their live shows.

Streaming music is a relatively recent phenomenon and the music industry had been slow to adapt. Sony Music, Warner Music Group, and Universal Music Group, also known as the “Big Three” record companies, traditionally controlled upwards of eighty percent of the music industry.⁵⁷ For decades, the Big Three delivered music directly to paying consumers through “their tried and true physical business model”⁵⁸ which consisted of three components: 1) finding, signing, and recording an artist; 2) marketing, advertising, and promoting the artist’s recording; and 3) manufacturing and distributing a physical copy of the recording as a CD, vinyl, or tape.⁵⁹ However, the rise of digital music distribution and dissemination uprooted this established system and severely undermined the record labels’ profits.⁶⁰

⁵⁴ Jack Dickey, *Taylor Swift’s Spotify Paycheck Mystery*, TIME (Nov. 12, 2014), available at <http://time.com/taylor-swift-spotify-borchetta/> (explaining how pop singer Taylor Swift and rock singer Thom Yorke of the band Radiohead have pulled their music from Spotify “to protest the size of its payouts.”).

⁵⁵ Ben Taylor, *By the Numbers: The Streaming Music War (and Who’s Winning)*, TIME (Aug. 14, 2014), available at <http://time.com/3109273/streaming-music-services-compared/> (explaining that Streaming services are generally marketed as costing between \$0.00/month and \$10.00/month).

⁵⁶ Nick Pino, *Spotify, Apple Music and More: Which is the Best Music Streaming Service?*, TECH RADAR (July 27, 2015), available at <http://www.techradar.com/news/internet/music-streaming-showdown-which-service-is-best-for-you-1173743> (explaining that as of July 2015 Spotify, Apple Music, and Rdio have over 20 million tracks in their music catalogues).

⁵⁷ William Sloan Coats et al., *Streaming Into the Future: Music and Video Online*, 20 LOY. L.A. ENT. L. REV. 285, 286-87 (2000).

⁵⁸ Patrick Fogarty, *Major Record Labels and the RIAA: Dinosaurs in a Digital Age*, 9 HOUS. BUS. & TAX L.J. 140, 144 (2008-2009).

⁵⁹ *Id.*

⁶⁰ The most noteworthy “industry-transforming technology” was the MPEG-1 Audio Layer 3, commonly referred to as the MP3. The MP3 was groundbreaking in that it enabled CD-quality “audio data, which previously occupied a large amount of space, to be compressed into files that are easily transferred across the Internet and downloaded onto a personal computer.” Moreover, the MP3 truly began rattling the music industry to its very core when faster modems and processors became the standard for personal computers, which decreased the time it took for people to

With respect to the first and second prongs of the traditional business model, record labels are no longer the sole means for artists to share their work with the public, as “the Internet offers a low-cost method to upload music files and instantly disseminate them worldwide.”⁶¹ Starting with the Internet Underground Music Archive (IUMA) and followed by the rise of YouTube, any artist around the world with Internet access has the ability to create her own website or YouTube channel where she can market and sell her music and merchandise to anyone without the backing of a major record label.⁶² The loss of the monopoly over music distribution put record labels at a competitive disadvantage as they were, for the first time ever, forced to compete with indie labels and unsigned artists for distribution on a national and international scale.⁶³ Additionally, the third prong of the record labels’ traditional business model has been rendered null and void. When most consumers previously purchased CDs or music tapes, “[a]pproximatley half of the gross sales price of a physical product (for example, \$7.70 of a \$17.00 CD) [went] back to the label for production, distribution, and packaging costs.”⁶⁴ With digital music, on the other hand, there is no physical production or distribution component to delivering digital music, and therefore the labels lose the vast majority of the \$7.70 they used to make, which severely stripped away their profits.

Another key aspect of the unprecedented loss of revenue the record companies experienced in the 1990s and early 2000s was the emergence of digital music, specifically “MP3 technology, broadband access, and file-sharing software” that “resulted in widespread music piracy”⁶⁵ that crippled the music industry for years. Even after the launch of iTunes in 2003 and other similar digital music stores, which were initially “believed to be the record industry’s savior after years of [illegal] piracy,”⁶⁶ the music industry failed to match the profits made prior to the digital revolution. By 2013, digital music sales were in sharp decline: single-track sales were down six percent and album sales fell eight percent.⁶⁷ Rather than purchase CDs or digital singles or albums from online retailers such as iTunes, the public

download a song from hours, to minutes, to seconds. Pollack, *supra* note 48, at 2449-50.

⁶¹ Coats et al., *supra* note 57, at 287.

⁶² *See id.* at 287-88.

⁶³ Fogarty, *supra* note 58, at 145.

⁶⁴ *Id.* at 144.

⁶⁵ *Id.* at 145.

⁶⁶ Steve Knopper, *Digital Music Takes a Dive as Record Sales Slip Again in 2013*, ROLLING STONE (Jan. 8, 2014), available at <http://www.rollingstone.com/music/news/digital-music-takes-a-dive-as-record-sales-slip-again-in-2013-20140108>.

⁶⁷ *Id.*

started to rely on alternative means of disseminating music via the Internet, the most popular of which is “streaming,”⁶⁸ much to the chagrin of music labels and recording artists.

Defined as “the live distribution of music . . . online in which no permanent copy is created on the downloader’s system,”⁶⁹ streaming is a relatively recent phenomenon that requires a fast running Internet broadband connection that can play data in “real time.”⁷⁰ If the Internet connection is lost or interrupted, the computer or smartphone automatically stores a limited “buffer” of the data to ensure that the music will continue to play until the Internet connection is reestablished.⁷¹ However, if the Internet connection is down for an extended period of time and there is no more stored data in the buffer, the music will cease until a new Internet connection is subsequently established.⁷²

Streaming music has forever shattered the once-robust business practice record companies relied on for revenue, and the evidence is in the numbers: as of August 2014 there were over 102 individual streaming service providers that cost between \$0 and \$10 per month.⁷³ David Bakula, Senior Vice President of Industry Insights at Nielsen Entertainment, stated in January 2015 that on-demand streaming experienced a 54% growth compared with the previous year, and over 164 billion songs were played in 2014 alone.⁷⁴ At the same time streaming became ever more popular, music sales suffered; only one song in 2014 sold more than 5 million individual tracks, whereas three songs in 2013 surpassed that mark.⁷⁵

Despite providing anyone with Internet capability access to a virtually unlimited music catalogue, the rise of streaming has come at the severe expense of the Big Three record companies and has forever shattered the once-robust “traditional physical business model.” Although music artists across all genres have unprecedented ability to advertise and circulate their product to consumers, streaming has not been a major source of income for

⁶⁸ *See id.*

⁶⁹ Coats et al., *supra* note 57, at 288.

⁷⁰ *What is Streaming*, BBC (Oct. 10, 2012), available at <http://www.bbc.co.uk/webwise/guides/about-streaming>.

⁷¹ *Id.*

⁷² One advantage streaming offers to music labels, as compared to music downloads, is that it decreases unauthorized dissemination of music as “no permanent copies are made on the user’s system.” Pollack, *supra* note 48, at 2449.

⁷³ Taylor, *supra* note 55.

⁷⁴ Christopher Morris, *Album Sales Continue Decline, Music Streaming Rises in 2014*, VARIETY (Jan. 6, 2015), available at <http://variety.com/2015/music/news/album-sales-continue-decline-music-streaming-rises-in-2014-1201394229/>.

⁷⁵ *Id.*

either the record labels or artists. At its peak and prior to the digital music revolution, the music industry garnered approximately \$38 billion a year, a far cry from the \$16.5 billion it earned in 2012.⁷⁶ The primary reason for the sharp decline in revenue is that there is no statute that universally establishes how much streaming services are required to pay artists or their labels.

The struggles of musician Zoë Keating illustrate the vast differences in how streaming and music downloading services pay artists. Spotify paid Ms. Keating \$808 for 201,412 streams of her tracks, which averages out of \$0.004 per stream; Rhapsody paid her \$54.40 for 7,908 plays, which is approximately \$0.69 per stream; and she earned \$13.38 from 387 plays of her music on Microsoft's Xbox services, which is an average of \$0.035 per play.⁷⁷ The lack of stability and regularity in how much money artists will garner depending on which streaming platform their music is made available is extremely troublesome, especially for artists trying to get their "big break" in the industry. Yet many artists, from those who are well established to those just beginning their careers, comply with such terms and continue to put their new music on such services because streaming services provide them with a worldwide audience that otherwise would not be possible to reach. The *quid pro quo* between artists and streaming services is simple: musicians theorize that, in exchange for essentially giving away their music, the exposure they receive from such platforms will prompt their new fans to legitimately purchase their songs and albums on music stores such as iTunes, pay for tickets to their live shows, and purchase their merchandise.

While streaming has become mainstream, record labels have failed to stay abreast of the changes within the industry, and their lack of innovation and initiative has cost them severely. Even when the digital evolution of music was starting to be accepted as a permanent fixture within the recording industry in the early 2000s, many artists began to see the fault the Big Three record companies were making by continuing to invest and rely upon outdated business practices. For example, Sir Paul McCartney, who had been a signature figure of the music label EMI since 1962 when he signed with the Beatles, switched to the new Hear Music label in 2007, "hoping to

⁷⁶ Eric Pfanner, *Music Industry Sales Rise, and Digital Revenue Gets the Credit*, N.Y. TIMES (Feb. 26, 2013), available at http://www.nytimes.com/2013/02/27/music-industry-records-first-revenue-increase-since-1999.html?_r=0.

⁷⁷ Stuart Dredge, *Streaming Music Payments: How Much Do Artists Really Receive?*, THE GUARDIAN (Aug. 9, 2013), available at <http://www.theguardian.com/technology/2013///zoe-keating-spotify-streaming-royalties>.

draw on the eagerness and energy of an upstart label.”⁷⁸ McCartney further elaborated on his decision to leave EMI by explaining that,

I have left the family home, but it doesn't feel bad. I hate to tell you — the people at EMI sort of understood. The major record labels are having major problems. They're a little puzzled as to what's happening. And I sympathize with them. But . . . the major labels these days are like the dinosaurs sitting around discussing the asteroid.⁷⁹

IS STREAMING MUSIC ANY DIFFERENT THAN STEALING MUSIC?

Some artists have paradoxically stated that they prefer their fans to download their music illegally than to stream their songs via Spotify or other streaming platforms.⁸⁰ The reason is that illegal downloading implies that the transaction literally takes money away from an artist, but with streaming, the listener's conscience is clear because she is either pays a nominal monthly fee or is forced to endure advertisements. Thus when listeners stream music content, they feel that they are adequately paying their favorite artist for access to their music catalogue. However, artists and record companies do not receive any meaningful revenue, as there is virtually no discernable difference between earning mere fractions of a penny per stream of a song and giving it away for free. Moreover, it is a common misconception that comparing iTunes to Spotify is like comparing apples to oranges; the two entities offer the same benefits to artists, with the key difference being that artists can actually turn a profit from their songs being sold on iTunes or other digital music stores.

While many argue that streaming has liberated artists from the clutches of major record labels because they now can publish their own work online to a global audience, the same is true for artists who put their music on iTunes, Amazon Music, or any other legitimate digital music storefront. The key difference between digital music stores and streaming services from an artist's perspective is that artists are actually fairly compensated when people buy their music rather than stream an album. All of the benefits of Spotify and Pandora in terms of discovery and access to artists' recordings

⁷⁸ Allan Kozinn, *Still Needing, Still Feeding the Muse at 64*, N.Y. TIMES (June 3, 2007), available at http://www.nytimes.com/2007/06/03/arts/music/03kozi.html?_r=1&.

⁷⁹ *Id.* (internal quotation omitted).

⁸⁰ Derek Webb, *Giving it Away: How Free Music Makes More Than Sense*, TUMBLR.COM (last visited Sept. 25, 2015), available at <http://derekwebb.tumblr.com/post/giving-it-away-how-free-music-makes-more-than>.

are true of iTunes and Amazon Music. There are no benefits to streaming music compared to purchasing music either in a record store or online; artists are not able to better connect or establish rapport with their fan base. “[M]usic readily available on Spotify for little to no payment completely poaches the record sales upon which middle-class musicians are depending for survival,”⁸¹ and “Spotify refuses to pay the same amount to independent artists as they pay major labels, unlike iTunes.”⁸²

WHY RECORD COMPANIES’ SURVIVAL IS IMPERATIVE

With artists able to sell their works directly to the public on Spotify, iTunes, Amazon, and other digital platforms, the question that arises is: are record labels still necessary? In short, yes. The major labels are still a quintessential aspect of the music industry. They do far more than distribute their artists’ music to the public, and much of their work is done away from the public eye. The purpose of record companies is to transform a person into an artist that can make songs and generate revenue for the label. Streaming services lack the expertise to make an artist into a household name: they do not invest in the artist; they do not contribute to the costs incurred on artists’ tours; they do not have a marketing department devoted to artist promotion; they do not pay for lyricists, composers, sound engineers, producers, sound mixers, backup singers, or instrumentalists to create a song. Rather, streaming services and other online platforms that offer music to the public for free profit from the labor of the labels without compensating them.

Labels are still necessary because they “offer artists the security they need to produce their best work.”⁸³ Jake Gosling, the producer for popular English pop-folk singer Ed Sheeran, explained that while Sheeran had managed to record numerous EP’s, climb to number two on the iTunes best-seller chart, and gain millions of hits on his YouTube site without the aid of a label as an unsigned artist, he signed to a division of Warner Music Group.⁸⁴ Gosling explained that while Sheeran had proven to the labels that he could “make it big” on his own, the label provided the type of support and financial resources that Sheeran could never achieve independently. Elaborating on the importance of labels, Gosling explained,

⁸¹ *Id.*

⁸² *Id.*

⁸³ Helienne Lindvall, *Behind The Music: What Do Record Labels Actually Do? You’d Be Surprised*, THE GUARDIAN (Feb. 2, 2012), available at <http://www.theguardian.com/music/musicblog/2012/feb/02/behind-music-record-labels>.

⁸⁴ *Id.*

You still need labels. You've got to remember they've got marketing teams, press teams, radio pluggers, accounts departments and when you get bigger you need help with that stuff. You need a good team around you. OK, maybe you could hire those people yourself and set up your own label, but there's something to be said for deciding that you want to make music and be creative, and I don't want the hassle. You can be really creative but not very good at business and marketing.⁸⁵

Even musician Neil Young, who is notorious for having an anti-corporate attitude, sang praises for his label by explaining that they "present and nurture artists," which is something that is not offered by online music stores.⁸⁶ Accordingly, with all of the resources, time, and money that the labels invest to simply be able to record one song track, services like Evergig that offer music to fans free of charge and streaming services that pay fractions of a penny per stream are stealing from the labels and rendering it unsustainable for them to continue their business of making music. Sites like Spotify, Pandora, and Evergig are not redistributing resources; rather, they are reaping where they have not sown. They depend on the resources that the labels devote to the development and promotion of their artists. When a popular album is released, streaming sites make it available on their websites or apps, and rather than pay the labels for their work creating the product, they require a song to be streamed millions of times before the record labels earn a single dollar. Sites like Evergig fail to compensate the labels, the artist, or any of the thousands of people who devoted countless hours to perfecting an album or song. It is a form of stealing and the labels need a way to rectify this increasingly costly problem.

THE FUTURE

Digital music and streaming are the new norms of the music industry and record labels must adapt to this change or perish in their wake. The old, time-honored, and established business models that the record labels could consistently depended upon to keep them afloat are gone. Therefore, in order to remain relevant and entice artists to sign to their labels, the Big Three need to make digital music work in their favor. The current business models and practices the Big Three have used for decades are no longer sufficient in today's digital age, and even when they have attempted to litigate against streaming services for their meager payouts,⁸⁷ their efforts have

⁸⁵ *Id.* (internal quotations omitted).

⁸⁶ *Id.* (internal quotations omitted).

⁸⁷ Sony, Universal, and Warner Music, along with the independent label ABKCO, which has the rights to some of the earliest Rolling Stones' songs, sued

not proven fruitful. Rather than depend on the courts to resolve their issues, it will ultimately be up to Congress to amend the Copyright Act to incorporate live music under its purview as well as determine a universal per-stream payout rate that streaming services must pay musicians and their labels.

Pandora Media for copyright infringement. The labels argued that they were owed royalties for songs produced prior to 1972. Ben Sisario, *Big Labels Take Aim at Pandora on Royalties*, N.Y. TIMES (Apr. 17, 2014), available at <http://www.nytimes.com/2014/04/18/business/media/lawsuit-against-pandora-seeks-royalties-for-golden-oldies.html?hpw&rref=technology>.

