



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

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### 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.<sup>2</sup> 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.<sup>3</sup> 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-making

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<sup>2</sup> 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).

<sup>3</sup> 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.<sup>4</sup>

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.

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<sup>4</sup> 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://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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> Corporate constitu-

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<sup>5</sup> 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).

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

<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

The corporate constitution necessarily defines the voting rights of the company members and the division of powers between company members and directors.<sup>10</sup> 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.

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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-8WDU>].

<sup>8</sup> *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).

<sup>9</sup> 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).

<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> The company members of an NSO or NLCO are typically the

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<sup>11</sup> 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/AFFederation/Generic/02/14/97/88/FIFASTatuten2013\\_E\\_Neutral.pdf](http://www.fifa.com/mm/document/AFFederation/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).

<sup>12</sup> 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.<sup>13</sup>

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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).

<sup>13</sup> 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://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.<sup>14</sup> 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.<sup>15</sup> Rationale for state intervention broadly includes matters of public interest such as the protection of the health and safety of sporting participants<sup>16</sup> or protection of the integrity of sporting competition.<sup>17</sup> The object of ensuring the international success of Australian representative teams and athletes has been more controversial.<sup>18</sup>

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

<sup>14</sup> 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://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).

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

<sup>16</sup> 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).

<sup>17</sup> 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].

<sup>18</sup> 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://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://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.<sup>19</sup> 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.<sup>20</sup>

The ASC first released formal sport governance principles for NSOs in 2002.<sup>21</sup> These were updated in 2007,<sup>22</sup> 2012<sup>23</sup> and 2013.<sup>24</sup> 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.<sup>25</sup> The 2012 sport governance principles were supported by the ASC's publication of a Template Constitution for

<sup>19</sup> 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.clearinghouse.forsport.gov.au/\\_\\_data/assets/pdf\\_file/0017/634013/Shaping\\_Up\\_-\\_A\\_Review\\_of\\_Commonwealth\\_Involvement\\_in\\_Sport\\_and\\_Recreation\\_in\\_Australia.pdf](https://www.clearinghouse.forsport.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>].

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

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

<sup>22</sup> 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://anzsla.com/sites/default/files/ASC_Governance_Principles_2007.pdf), [<https://perma.cc/8G7C-S2CS>].

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

<sup>24</sup> 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://www.ausport.gov.au/__data/assets/pdf_file/0003/531165/ASC_Mandatory_Sports_Governance_Principles.pdf), [<http://perma.cc/Y43R-TACH>]

<sup>25</sup> 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.<sup>26</sup> A new ASC policy of performance-based NSO funding was released in March 2013 and included revised sport governance principles<sup>27</sup> for which compliance was mandated for 'large partner' NSO's receiving more than \$5 million in annual ASC funding. This category includes BA Limited.<sup>28</sup> 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

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[www.playthegame.org/fileadmin/documents/good\\_governance\\_reports/aggis\\_final\\_report.pdf](http://www.playthegame.org/fileadmin/documents/good_governance_reports/aggis_final_report.pdf), [http://perma.cc/A5NX-EUKN].

<sup>26</sup> 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://www.ausport.gov.au/__data/assets/pdf_file/0004/484555/Template_Constitution.pdf), [http://perma.cc/J683-DZ5P].

<sup>27</sup> 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](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.

<sup>28</sup> 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://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://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”).<sup>29</sup>

Commentators have noted the clear parallels to governance guidelines published by the OECD and the Australian Securities Exchange (“ASX”),<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

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.<sup>33</sup> 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

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<sup>29</sup> 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://www.ausport.gov.au/__data/assets/pdf_file/0010/576172/Sports_Tally.pdf), [http://perma.cc/Q84N-WS8B]

<sup>30</sup> 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).

<sup>31</sup> See Freeburn, *supra* note 30, at 79–80.

<sup>32</sup> 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”).

<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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”<sup>36</sup>—have been aptly described as an “alliance of sworn

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<sup>34</sup> 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).

<sup>35</sup> 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).

<sup>36</sup> *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".<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

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<sup>37</sup> *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).

<sup>38</sup> 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.").

<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> Finally, contractual certainty facili-

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

<sup>41</sup> 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.

<sup>42</sup> *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;<sup>43</sup> 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 contract<sup>44</sup> or where in breach of the terms of that contract.<sup>45</sup>

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,

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<sup>43</sup> 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).

<sup>44</sup> 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.

<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> The minimum allowable number of (proposed) members is one.<sup>49</sup> 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.<sup>50</sup>

The constitution of a company is a statutory contract between, *inter alia*, the company and each company member.<sup>51</sup> 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.<sup>52</sup> This pre-registration requirement for unanimity differs from the voting rule for adoption of a constitution once the company is registered.

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<sup>46</sup> *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.

<sup>47</sup> *See id.* s 517.

<sup>48</sup> *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).

<sup>49</sup> *See Corporations Act 2001* (Cth) s 114.

<sup>50</sup> *See id.* s 119.

<sup>51</sup> *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).

<sup>52</sup> *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.<sup>53</sup> 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).<sup>54</sup> 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,<sup>55</sup> while each member of a company limited by guarantee will have one vote each at a meeting,<sup>56</sup> 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

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<sup>53</sup> 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?

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

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

<sup>56</sup> See *id.* s 250E(2).

meeting of the company to be in favor for that resolution to be passed.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>

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.<sup>60</sup> For example, the *Corporations Act 2001* (Cth) mandates a special resolution if the members wish to adopt the inaugural constitution after company registration,<sup>61</sup> modify or repeal the existing constitution,<sup>62</sup> change the name of the company<sup>63</sup> or commence the voluntary wind up of the company.<sup>64</sup> 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.<sup>65</sup>

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<sup>57</sup> 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.

<sup>58</sup> See *Corporations Act 2001* (Cth) s 201G.

<sup>59</sup> 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.

<sup>60</sup> 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).

<sup>61</sup> *Id.* s 136(1)(b).

<sup>62</sup> *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).

<sup>63</sup> *Id.* s 157(1)(a).

<sup>64</sup> *Id.* s 491(1).

<sup>65</sup> *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.<sup>66</sup> 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.<sup>67</sup> 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 relationships<sup>68</sup> or a system of team production.<sup>69</sup> Voting itself has attracted

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<sup>66</sup> *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).

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

<sup>68</sup> 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,<sup>70</sup> 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.<sup>71</sup> 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

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*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://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://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_661_RespondentAmCuEconomists.authcheckdam.pdf), [http://perma.cc/7KGZ-LTM8].

<sup>69</sup> 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).

<sup>70</sup> See *supra* notes 8–10.

<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup> Yet analysis of the optimal voting majority rule itself has been

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<sup>72</sup> 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.

<sup>73</sup> 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).

<sup>74</sup> See Coase, *The Problem of Social Cost*, *supra* note 68.

<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> Governance and constitutional design therefore demands consideration of:

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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).

<sup>76</sup> 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.

<sup>77</sup> *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 minimising the *sum* of the expected external costs and expected decision-making costs.<sup>78</sup>

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<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup>

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.<sup>81</sup> The external cost function is expected to decline with the voting majority, falling to zero when the voting rule requires unanimity among the voters.<sup>82</sup> High external costs may result in a

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

<sup>79</sup> 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 Razzolini & William F. Shughart eds., 2013); see KEITH L. DOUGHERTY & JULIAN EDWARD, THE CALCULUS OF CONSENT AND CONSTITUTIONAL DESIGN 1–19 (2011).

<sup>80</sup> 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).

<sup>81</sup> 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).

<sup>82</sup> 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.<sup>83</sup>

Any voting rule other than a requirement for unanimity may therefore be understood as a function of the decision-making costs of the issue,<sup>84</sup> the time and effort required to secure agreement including the "costs of haggling and bargaining over the terms of trade"<sup>85</sup> 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.<sup>86</sup> 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-

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<sup>83</sup> 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).

<sup>84</sup> BUCHANAN & TULLOCK, *supra* note 2, at 91–92.

<sup>85</sup> See *id.* at 69.

<sup>86</sup> 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.<sup>87</sup>

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.<sup>88</sup> 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.<sup>89</sup> Fifth, importantly, Buchanan and Tullock’s model is a framework for the choice of governance structures and comparison of the relative costs of pri-

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<sup>87</sup> 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  $K/N = 50$ ).

<sup>88</sup> 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).

<sup>89</sup> 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;<sup>90</sup> 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

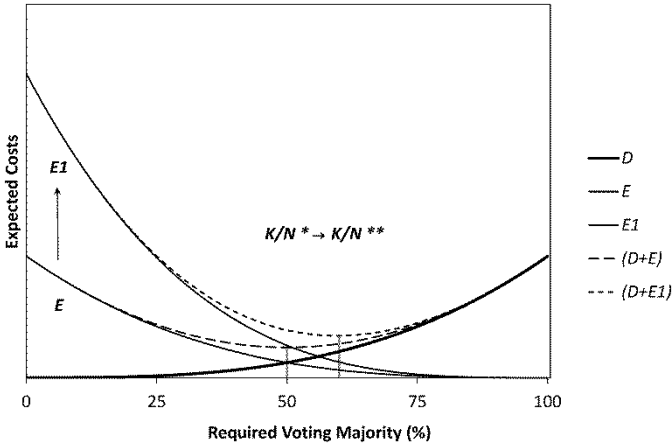
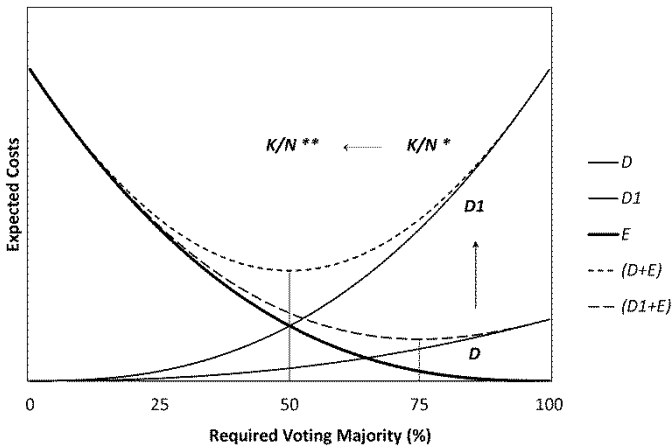


FIGURE 2: OPTIMAL VOTING MAJORITIES WITH CHANGE IN DECISION-MAKING COSTS CURVE



<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup> 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.

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<sup>91</sup> 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.

<sup>92</sup> 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.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup>

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

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<sup>93</sup> 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).

<sup>94</sup> 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).

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

<sup>96</sup> 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,<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> This is usually, but not always, the case in sport and league governance.<sup>100</sup> Conversely, external costs increase with the

<sup>97</sup> See *infra* text accompanying notes 271–276 and notes 278–279.

<sup>98</sup> 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).

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

<sup>100</sup> 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.<sup>101</sup>

## 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.<sup>102</sup> The optimal voting majority therefore depends upon the relative change in decision-making costs and external costs,<sup>103</sup> but greater heterogeneity reduces the likelihood of collective action, irrespective of the majority voting rule.<sup>104</sup> 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),<sup>105</sup> in their preferences for alternative outcomes (as allowed by

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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).

<sup>101</sup> 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).

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

<sup>103</sup> 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.

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

<sup>105</sup> 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),<sup>106</sup> in the intensity of preferences for alternatives,<sup>107</sup> in the probability of alternative outcomes being successful,<sup>108</sup> in voter risk aversion toward change from the status quo,<sup>109</sup> as well as in the ability of voters to identify the optimal outcome among the choice(s) being voted upon.<sup>110</sup>

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.<sup>111</sup>

### 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.

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

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

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

<sup>109</sup> See, e.g., Wickström, *supra* note 93, at 289.

<sup>110</sup> 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).

<sup>111</sup> 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.<sup>112</sup> 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

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<sup>112</sup> 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 & Location <sup>1</sup>	<i>Total AFL Clubs (18)</i> <i>Victoria (10)</i> Carlton Collingwood Essendon Geelong Hawthorn Melbourne North Melbourne Richmond St Kilda Western Bulldogs <i>New South Wales (2)</i> Greater Western Sydney Giants Sydney Swans <i>Queensland (2)</i> Brisbane Lions Gold Coast Suns <i>South Australia (2)</i> Adelaide Port Adelaide <i>Western Australia (2)</i> Fremantle West Coast Eagles	<i>Total A-League Clubs (10)</i> <i>New South Wales (4)</i> Central Coast Mariners Newcastle Jets Sydney FC Western Sydney Wanderers <i>Victoria (2)</i> Melbourne Heart Melbourne Victory <i>Queensland (1)</i> Brisbane Roar <i>South Australia (1)</i> Adelaide United <i>Western Australia (1)</i> Perth Glory <i>New Zealand (1)</i> Wellington Phoenix	<i>Total NBL Clubs (8)</i> <i>New South Wales (2)</i> Sydney Kings Wollongong Hawks <i>Queensland (2)</i> Cairns Taipans Townsville Crocodiles <i>South Australia (1)</i> Adelaide 36ers <i>Victoria (1)</i> Melbourne Tigers <i>Western Australia (1)</i> Perth Wildcats <i>New Zealand (1)</i> New Zealand Breakers (Auckland)	<i>Total NRL Clubs (16)</i> <i>New South Wales (10)</i> Canterbury Bulldogs Cronulla Sharks Manly Sea Eagles Newcastle Knights Parramatta Eels Penrith Panthers South Sydney Rabbitohs St George-Illawarra Dragons Sydney Roosters Wests Tigers <i>Queensland (3)</i> Brisbane Broncos Gold Coast Titans North Queensland Cowboys (Townsville) <i>Aust. Capital Territory (1)</i> Canberra Raiders <i>Victoria (1)</i> Melbourne Storm <i>New Zealand (1)</i> New Zealand Warriors (Auckland)
State & Territory Sporting Associations <sup>1</sup>	<i>Total (8)</i> 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.	<i>Total (9)</i> 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	<i>Total (8)</i> 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.)	<i>Total (8)</i> 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 Revenue <sup>2</sup>	\$471.493 m	\$84.589 m	\$14.179 m	\$185.668 m
ASC Funding <sup>3</sup>	\$1.165 m	\$5.680 m	\$6.115 m	\$1.012 m
10 Yr. ASC Funding <sup>3</sup>	\$7.307 m	\$59.817 m	\$48.458 m	\$9.466 m
Total Attendance <sup>4</sup>	6,238,876	1,666,942	586,811	3,151,660
Ave. Attendance <sup>4</sup>	31,509	12,348	5,239	16,415
Sport Participation <sup>5</sup>	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	ARLCL 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
<b>NSO Majority Voting Rules</b>				
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%) *	Special Resolution (75%) *	Special Resolution (75%) *	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.<sup>113</sup> 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-

<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup>

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.<sup>116</sup> 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

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<sup>114</sup> 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.

<sup>115</sup> 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.

<sup>116</sup> 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.”<sup>117</sup> The reform proposals adopted in July 1993 ceded most of the club’s decision-making powers to the AFL Commission,<sup>118</sup> which was reconstituted as the independent board of directors of the League.<sup>119</sup> The AFL formally assumed national governing body responsibilities in 1995, after the wind up of the under-resourced National Football League of Australia Limited,<sup>120</sup> 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]”<sup>121</sup> and to “promote and encourage the Australian National Game of Football”.<sup>122</sup>

### 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.<sup>123</sup> After experiments with private ownership in the 1980s and 1990s, nearly all AFL clubs

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<sup>117</sup> 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).

<sup>118</sup> 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.

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

<sup>120</sup> 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.

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

<sup>122</sup> *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).

<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup> 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.”<sup>126</sup> 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.<sup>127</sup> 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.<sup>128</sup> The Commission itself has the responsibility for appointing a Chairman of the Commission from among the non-executive Commissioners<sup>129</sup> and for appointing and removing a chief executive officer (“CEO”), who is a voting member of the Commission as of right,<sup>130</sup> and one other non-voting executive Commissioner at its discretion,<sup>131</sup> neither of whom are subject to retire-

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<sup>124</sup> 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).

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

<sup>126</sup> *Id.* at art. 10.

<sup>127</sup> 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.

<sup>128</sup> AFL ARTICLES, *supra* note 119, at art. 37

<sup>129</sup> *Id.* art. 44.

<sup>130</sup> *Id.* arts. 43–45.

<sup>131</sup> *Id.* arts. 43, 46.

ment by rotation.<sup>132</sup> 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 months<sup>133</sup> or who had been appointed by the Commission itself since the last annual general meeting.<sup>134</sup> Retiring non-executive Commissioners are eligible for re-election.<sup>135</sup>

### 3. Constitutional Voting Rules

Each Appointee has one vote at a general meeting of the League.<sup>136</sup> Any three Appointees may requisition a general meeting,<sup>137</sup> with eight Appointees required for a quorum at a general meeting or annual general meeting.<sup>138</sup> 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.<sup>139</sup> 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.<sup>140</sup>

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<sup>132</sup> *Id.* arts. 45–46.

<sup>133</sup> *Id.* art. 39(1).

<sup>134</sup> *Id.* art. 48.

<sup>135</sup> *Id.* art. 39(2).

<sup>136</sup> *Id.* art. 32.

<sup>137</sup> *Id.* art. 21.

<sup>138</sup> *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).

<sup>139</sup> *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”).

<sup>140</sup> *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.<sup>141</sup> The Appointees may elect non-executive Commissioners by resolution.<sup>142</sup> 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.<sup>143</sup> The Appointees may also remove and replace a sitting non-executive Commissioner, with both actions requiring separate ordinary resolutions.<sup>144</sup>

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.<sup>145</sup> 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.<sup>146</sup>

#### 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.<sup>147</sup> 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-

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<sup>141</sup> *Id.* art. 42(2).

<sup>142</sup> *Id.* art. 41.

<sup>143</sup> *Id.* arts. 41(4)(viii), 41(4)(ix).

<sup>144</sup> *Id.* art. 49(1).

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

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

<sup>147</sup> 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.<sup>148</sup> Decades of conflict between individuals, clubs and State Associations and regular mismanagement threatened the growth and even the solvency of the NSO.<sup>149</sup> 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.<sup>150</sup> 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”.<sup>151</sup> FFA Limited “may [also] establish one or more Football Leagues, including under licence.”<sup>152</sup>

<sup>148</sup> 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).

<sup>149</sup> 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).

<sup>150</sup> 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://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://www.ausport.gov.au/_data/assets/pdf_file/0020/624161/FFA_sustainability_report.pdf), [<http://perma.cc/FF8T-RMPT>].

<sup>151</sup> 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://www.footballaustralia.com.au/dct/ffa-dtc-performgroup-eu-west1/National%20Constitution_1rnkm5524of6m1vl6c8v75hqkt.pdf), [<http://perma.cc/Z5FU-N35N>].

<sup>152</sup> *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.<sup>153</sup>

### 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.<sup>154</sup> The Directors *must* recognize one body from each State, plus one further body from NSW, as a “State Body”,<sup>155</sup> then invite those bodies to apply for company membership.<sup>156</sup> 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.<sup>157</sup> 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

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

<sup>154</sup> 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)).

<sup>155</sup> *Id.* art. 3.3 (recognition of state bodies).

<sup>156</sup> *Id.* art. 3.4(a) (new Members of company).

<sup>157</sup> 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.<sup>158</sup>

The FFA Limited Directors *may* also invite a representative of a Football League (established by FFA Limited) to apply for company membership,<sup>159</sup> provided that representative has been nominated by a majority at least 75% of the clubs participating in that Football League.<sup>160</sup> 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.<sup>161</sup>

## 2. Board of Directors

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

The Elected Directors are able to elect one of their number to be the chairman of directors.<sup>166</sup> 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.<sup>167</sup> An Elected Director is limited to two consecutive terms and then ineligible for re-election

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<sup>158</sup> 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\\_nfgxdu5pbk1lpo4b6qg5b4r.pdf](http://www.footballaustralia.com.au/dct/ffa-dtc-perform-group-eu-west-1/FFA%20Member%20Federation%20Charter_nfgxdu5pbk1lpo4b6qg5b4r.pdf), [http://perma.cc/Z7L2-AZSG].

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

<sup>160</sup> *Id.* art. 3.6(a) (process for electing Football League Member).

<sup>161</sup> 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).

<sup>162</sup> FFA LIMITED CONST., *supra* note 151, art. 10.1(a)

<sup>163</sup> *Id.* art. 10.1(b)(i)

<sup>164</sup> *Id.* art. 10.1(b)(ii)

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

<sup>166</sup> *Id.* art. 10.9(a).

<sup>167</sup> *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.<sup>168</sup> 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.<sup>169</sup>

### 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,<sup>170</sup> with a quorum requirement of 60% of the voting Members at a general meeting.<sup>171</sup> 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).<sup>172</sup> 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).<sup>173</sup> 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.<sup>174</sup> Up to three rounds of voting are permitted if the nominee(s) receive less than a Prescribed Major-

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<sup>168</sup> *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).

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

<sup>170</sup> *Id.* art. 6.1(a).

<sup>171</sup> *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).

<sup>172</sup> *Corporations Act 2001* (Cth) s 249D(a).

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

<sup>174</sup> *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.<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup> 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 resolution<sup>178</sup> and approve either constitutional amendment<sup>179</sup> or the voluntary wind up of the company<sup>180</sup> 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.).<sup>181</sup> 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-

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<sup>175</sup> *Id.* art. 10.11(b).

<sup>176</sup> *Id.* arts. 10.11(b)(i), 10.11(b)(iii)

<sup>177</sup> *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).

<sup>178</sup> *Corporations Act 2001* (Cth) s 203D(1).

<sup>179</sup> *Id.* s 136(2).

<sup>180</sup> *Id.* s 491(1).

<sup>181</sup> 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.<sup>182</sup> 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.<sup>183</sup>

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.<sup>184</sup>

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

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<sup>182</sup> 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).

<sup>183</sup> *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)).

<sup>184</sup> 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.<sup>185</sup> 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.<sup>186</sup>

### 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”,<sup>187</sup> which were entitled to appoint an individual as their representative at General Meetings of the company.<sup>188</sup> Voting Members were bound by the Constitution, By-Laws, General Statutes and Internal Regulations of BA Limited.<sup>189</sup>

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”.<sup>190</sup> All eight Constituent Association Members were previously Members of ABF Inc.,<sup>191</sup> 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

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

<sup>186</sup> 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)).

<sup>187</sup> 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).

<sup>188</sup> *Id.* cl. 10.2.

<sup>189</sup> *Id.* cl. 5.2, 5.3.3.7, 5.4.3.6.

<sup>190</sup> *Id.* cl. 5.3.1.

<sup>191</sup> *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.<sup>192</sup> NEW NBL Club Members also signed a Licence Agreement with BA Limited to participate in the NEW NBL competition.<sup>193</sup> 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).<sup>194</sup> 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.<sup>195</sup> 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.<sup>196</sup> Directors were to hold office for a term of four years and were limited to serving two consecutive terms.<sup>197</sup> 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.<sup>198</sup> The Directors were required to elect one of their number to be the Chairman of the Board of Directors,<sup>199</sup> to appoint the CEO<sup>200</sup> and entitled to appoint a maximum of

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<sup>192</sup> *Id.* cl. 5.4.

<sup>193</sup> *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).

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

<sup>195</sup> *Id.* cl. 14.1.

<sup>196</sup> *Id.* cl. 14.3.2–14.3.4.

<sup>197</sup> *Id.* cl. 14.5–14.9.

<sup>198</sup> *Id.* cl. 14.8.2–14.8.3.

<sup>199</sup> *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.<sup>201</sup> 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.<sup>202</sup>

### 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.<sup>203</sup> 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.<sup>204</sup> 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.<sup>205</sup>

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<sup>200</sup> *Id.* cl. 18.1.

<sup>201</sup> *Id.* cl. 16.9.

<sup>202</sup> 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).

<sup>203</sup> 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://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).

<sup>204</sup> BA LIMITED 2009 CONST., *supra* note 184, cl. 13.1.2, 13.1.5.

<sup>205</sup> *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), Australia (1)).

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.<sup>206</sup> 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.<sup>207</sup>

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”.<sup>208</sup> 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.<sup>209</sup> The Voting Members were then entitled to endorse a further recommendation of the Directors to admit a new entity as a Constituent Association Member.<sup>210</sup> 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.<sup>211</sup> 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-

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

<sup>206</sup> 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).

<sup>207</sup> 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).

<sup>208</sup> *Id.* cl. 1.1 (definition of “Special Resolution”).

<sup>209</sup> *Id.* cl. 8.1.1–8.1.3.

<sup>210</sup> *Id.* cl. 8.1.4.

<sup>211</sup> *Id.* cl. 8.1.4.

sary to approve the election of a successful nominee.<sup>212</sup> 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,<sup>213</sup> thereby giving the Directors the right to appoint a Director who would be subject to ratification by resolution at the next Annual General Meeting.<sup>214</sup> 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.<sup>215</sup> Directors so removed were unable to be re-appointed within four years unless otherwise resolved at a General Meeting.<sup>216</sup>

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 Constitution<sup>217</sup> or to commence wind up of the company.<sup>218</sup>

#### 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.<sup>219</sup> 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

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<sup>212</sup> *Id.* cl. 13.2.

<sup>213</sup> *Id.* cl. 13.2.3.3.2.

<sup>214</sup> *Id.* cl. 14.9.

<sup>215</sup> *Id.* cl. 14.13.1.

<sup>216</sup> *Id.* cl. 14.13.2.

<sup>217</sup> *Corporations Act 2001* (Cth) s 136(2).

<sup>218</sup> *Id.* s 491(1).

<sup>219</sup> 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.<sup>220</sup>

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.<sup>221</sup> 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.<sup>222</sup>

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-

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<sup>220</sup> 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).

<sup>221</sup> 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.).

<sup>222</sup> 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*,<sup>223</sup> 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.<sup>224</sup>

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.<sup>225</sup> Public pressure and legal action forced the reinstatement of South Sydney from 2002.<sup>226</sup> There have been 16 NRL clubs since 2007.

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

<sup>224</sup> 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 ARFL Limited refute the viability of this “media league” model).

<sup>225</sup> 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).

<sup>226</sup> 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.<sup>227</sup> 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.”<sup>228</sup> 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.<sup>229</sup> For the 1998–2011 seasons, the clubs contracted with NRL Limited to participate in the NRL competition, while ARFL Limited continued as the NSO.<sup>230</sup>

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.<sup>231</sup> The ARFL Limited Articles and Memorandum

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*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).

<sup>227</sup> 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).

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

<sup>229</sup> *Id.* para. 256.

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

<sup>231</sup> 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.<sup>232</sup>

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’.<sup>233</sup>

### 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.<sup>234</sup> 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

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(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).

<sup>232</sup> 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).

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

<sup>234</sup> *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.<sup>235</sup> 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.<sup>236</sup> NRL Limited, as the wholly owned subsidiary of ARLC Limited, continues to license NRL clubs on fixed-term agreements to participate in NRL competitions.<sup>237</sup>

## 2. Board of Directors

The ARLC Limited Constitution mandates eight Directors,<sup>238</sup> 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.<sup>239</sup> Directors serve a maximum three-year term. Those who retire from office are entitled to stand for re-election,<sup>240</sup> 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.<sup>241</sup> Individuals who are currently, or have in

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

<sup>236</sup> *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).

<sup>237</sup> *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).

<sup>238</sup> ARLC LIMITED CONST., *supra* note 233, r. 31(a).

<sup>239</sup> *Id.* r. 32(a), 33(a)–(b).

<sup>240</sup> *Id.* r. 33(c).

<sup>241</sup> *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.<sup>242</sup>

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,<sup>243</sup> 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 majority<sup>244</sup> or to appoint a Director to fill a vacancy at any time,<sup>245</sup> 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.<sup>246</sup> They may also appoint a chief executive officer, who may not be appointed as a Director.<sup>247</sup>

### 3. Constitutional Voting Rules

On a poll, every Member present and having the right to vote at a General Meeting has one vote.<sup>248</sup> A General Meeting may be requisitioned by any one Member,<sup>249</sup> which currently represents a lower threshold than the statutory provision.<sup>250</sup> 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.<sup>251</sup> 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

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<sup>242</sup> *Id.* r. 32(b).

<sup>243</sup> *Id.* r. 10(a)(ii).

<sup>244</sup> *Id.* r. 32(d).

<sup>245</sup> *Id.* r. 32(h).

<sup>246</sup> *Id.* r. 42.

<sup>247</sup> *Id.* r. 35.

<sup>248</sup> *Id.* r. 26(b)(iii).

<sup>249</sup> *Id.* r. 18(b)(ii).

<sup>250</sup> 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).

<sup>251</sup> 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.<sup>252</sup> 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.<sup>253</sup> 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.<sup>254</sup> Alternatively, a resolution with the support of at least 10 Licensee Members and both NSWRL Ltd and QRL Limited will remove a Director.<sup>255</sup>

In addition to the statutory requirement for a special resolution of the company members,<sup>256</sup> 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”.<sup>257</sup> The Eligible Voting Members are defined as NSWRL Ltd, QRL Limited and the Licensee Members (but does not include the Director–Members).<sup>258</sup> A Specific Majority is defined as all Eligible Voting Members except one, which must not be either NSWRL Ltd or QRL Limited.<sup>259</sup> A Specific Majority is also required for the company to undertake a “Speci-

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<sup>252</sup> *Id.* r. 31(b)–(c).

<sup>253</sup> *Id.* r. 32(g).

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

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

<sup>256</sup> *Corporations Act 2001* (Cth) s 136(2).

<sup>257</sup> 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).

<sup>258</sup> *Id.* r. 30(c)(i).

<sup>259</sup> *Id.* r. 30(c)(vi).

fied Action”,<sup>260</sup> 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.<sup>261</sup> 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.<sup>262</sup>

## 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,

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<sup>260</sup> *Id.* r. 30(a)(i).

<sup>261</sup> *Id.* r. 30(c)(v).

<sup>262</sup> *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.<sup>263</sup> 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,<sup>264</sup> as well as provide alternative means for the removal of directors, in addition to the mandatory simple majority rule.<sup>265</sup> 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.<sup>266</sup>

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-

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<sup>263</sup> 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).

<sup>264</sup> *Id.* s 201G.

<sup>265</sup> *Id.* s 203D.

<sup>266</sup> 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.<sup>267</sup> Such actions and transaction costs are not unknown to Australian sporting organizations,<sup>268</sup> especially those mired in internal politics<sup>269</sup> or resorting to constitutional reform to solve underlying financial and management problems.<sup>270</sup> 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

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<sup>267</sup> 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).

<sup>268</sup> 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).

<sup>269</sup> 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).

<sup>270</sup> 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)<sup>271</sup> or MLB's Commissioner (three-quarters majority).<sup>272</sup> 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.<sup>273</sup> 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*<sup>274</sup> or the *Major League Constitution*.<sup>275</sup> Even though both the NFL and MLB are structured as unincorporated associations of the league clubs,<sup>276</sup> 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

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<sup>271</sup> 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).

<sup>272</sup> 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).

<sup>273</sup> 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).

<sup>274</sup> 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).

<sup>275</sup> 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).

<sup>276</sup> 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.<sup>277</sup>

### B. *Regulatory Issues*

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

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<sup>277</sup> 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).

<sup>278</sup> 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>].

<sup>279</sup> 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,<sup>280</sup> 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.<sup>281</sup> 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-

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<sup>280</sup> 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).

<sup>281</sup> 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.<sup>282</sup>

### 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-

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<sup>282</sup> 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.<sup>283</sup>

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.<sup>284</sup> 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.<sup>285</sup> 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

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<sup>283</sup> 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.

<sup>284</sup> 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).

<sup>285</sup> 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,<sup>286</sup> while the AFL clubs appointing those members have the primary objective of fielding (winning) teams in competitions conducted by the AFL.<sup>287</sup> This suggests a relative homogeneity of company members, irrespective of the great variance in the financial and operational position of the AFL clubs.<sup>288</sup> In comparison, the objectives of the State Associations in any sport include a much broader range of (conflicting) objects.<sup>289</sup> There is also a wide variance in population

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<sup>286</sup> 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”).

<sup>287</sup> 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).

<sup>288</sup> 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).

<sup>289</sup> 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://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.<sup>290</sup> 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-

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fileadmin/user\_upload/Resources\_and\_Documents/CONSTITUTION.pdf, [http://perma.cc/37Y7-4HCJ].

<sup>290</sup> 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.<sup>291</sup>

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,<sup>292</sup> embodied in the corporate constitution and bylaws and influenced by external guidelines, such as the *ASC Sports Governance Principles*.<sup>293</sup>

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.<sup>294</sup> 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

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<sup>291</sup> 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").

<sup>292</sup> 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).

<sup>293</sup> 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").

<sup>294</sup> 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.<sup>295</sup> Similar provisions in AFL Articles of Association are limited in scope to dealing with commercial relationships between Commissioners and the League.<sup>296</sup> 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,<sup>297</sup> nor sug-

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<sup>295</sup> 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,

<sup>296</sup> 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).

<sup>297</sup> 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.<sup>298</sup> 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.<sup>299</sup> 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-

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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).

<sup>298</sup> 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).

<sup>299</sup> 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,<sup>300</sup> as well as the experience of other Australian NSOs.<sup>301</sup>

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.

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<sup>300</sup> 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.

<sup>301</sup> 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.”<sup>302</sup> 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-

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<sup>302</sup> 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.