

CONFLICT OF INTEREST, ACCOUNTABILITY AND CORPORATE GOVERNANCE: THE CASE OF THE IOC AND SOCOG

SAUL FRIDMAN*

I. INTRODUCTION

Imagine the following concept: what if a number of individuals (picture yourself as one of them) decided that periodically they would organise and stage the world's largest party. They alone would determine the guest list and the activities. In fact, this select group would oversee everything concerning the party: they would sell tickets, and even market broadcast rights. These people would in fact do everything except pay for the party. That onerous obligation would be for the public (indirectly) and the government of the country hosting the party. So far so good. Then, for good measure, imagine that this party is accepted as the embodiment of all that is good and just in the world, and thus sponsors worldwide jump at the opportunity to be associated with it. Furthermore, host governments see the party as prestigious and profitable, therefore compete with each other, and even attempt to bribe our organising group of individuals, just for the right to host the party (even though it is clear that the obligation to pay for the party is theirs and theirs alone). Were you to suggest this concept in these terms you might be dismissed as a fool. Yet, this is precisely how one might describe the work of the International Olympic Committee (IOC). In this paper, I examine the rules governing the IOC, and ask whether there is any convincing argument that the 'party' created by the IOC should either be given to others to manage, or whether the IOC ought accept certain reforms.

The last year has seen international sport beset by controversy. Legal wrangling over positive drug test results involving elite athletes has affected many premier events: the Tour de France, the Olympics and the World

* LLB (UWO) BCL (Oxon). Senior Lecturer, Faculty of Law, University of Sydney. Barrister and Solicitor (ACT and Ontario), Solicitor (England and Wales). The author wishes to thank the Donald McCredie Fellowship Fund for financial support as well as Dr Nick Sneddon, Tony Buti and the anonymous referees for their helpful suggestions. All errors, of course, remain the responsibility of the author.

Swimming Championships to name just three. Concern over widespread drug use threatens the integrity of sport. At the same time, questions have been asked about the competence of current administrators and administrative structures to deal with the drug problem. This last year, the International Olympic Committee convened a World Conference on Doping in Sport in an effort to standardise test protocol and sanctions, as well as establish an internationally respected, autonomous, independent anti-doping authority.

The doping issue is a substantive problem that needs to be tackled by the various governing bodies controlling organised sporting activity. However, the most high profile international effort to tackle this problem, the World Conference, was overshadowed by concern about the management of international sport and, specifically, the competence of the IOC to organise the fight against doping. Indeed, as this article was going to press, the latest IOC effort to tackle the doping problem was overshadowed by US led objections to the prominent role of the IOC in the proposed World Anti-Doping Agency.¹ Much of this concern was triggered by allegations of improper conduct during the process of determining the site for the 2002 Winter Olympic Games, ultimately awarded to Salt Lake City.

In the rash of public comment that has continued unabated since last year, what has emerged is serious concern over the integrity of the IOC. To be sure, the IOC itself has acted, by conducting internal investigations into the conduct of some of its members, as well as establishing an ethics commission to promulgate rules of conduct for members.² Numbers of commentators and interested parties have questioned the appropriateness of the IOC particularly to govern international sporting activity.³ The same comments that have been made about the IOC could apply equally to a number of other international sporting federations: particularly the IAAF and FIFA, both of which control popular and lucrative sports with substantial international following. In the case of the IOC, some have even gone so far as to suggest that the Olympic Games should be "taken away from the IOC".⁴

While it is clear that there has been some loss of confidence in the integrity of the IOC, what is not clear is what, if anything, should be done about it. Furthermore, how might reform, if advisable, be achieved. Is the IOC best regarded as a private organisation, best regulated by the behaviour of market forces, or is there some public interest which mandates the enforcement of regulatory norms on this body, and what ought those norms be?

In this brief article, I explore the nature of the issues confronting the governance of international sporting activity, using the IOC as a case study. My

1 See "Olympic Drugs Turf War" *Sydney Morning Herald*, 15 November 1999, p 1.

2 See "IOC Ethics Commission Debates Principles for a Code of Ethics", Media Release, 3 May 1999, available on <http://www.olympic.org/flat/news/press/pr113_e.html>.

3 Press comment has been too widespread to summarise usefully here. However, it is worth noting that pressure for reform is coming from Olympic athletes, as demonstrated by the formation of the organisation, "Olympic Athletes Together Honorably" (OATH). See F Litsky "Olympians Seek Voice in Changing IOC", *The New York Times*, 14 June 1999, p 14.

4 Notably, one of those to make such a suggestion was Minister Thompson, the former Liberal Minister for Sport.

starting proposition is that the IOC is essentially a private organisation, albeit one that manages to secure access (directly and indirectly) to substantial public moneys. As far as removing the Olympic Games from the aegis of the IOC, it is this author's view that there is no body with either authority or mandate to do this, though there is nothing preventing interested parties from establishing an alternative to the Olympic Games.⁵ A more interesting problem is that concerning the Olympic Movement itself. The Olympic Charter establishes the IOC as the ultimate authority concerning the Olympic Movement. It states:

1. Supreme Authority

1. The IOC is the supreme authority of the Olympic Movement.
2. Any person or organisation belonging in any capacity whatsoever to the Olympic Movement is bound by the provisions of the Olympic Charter and shall abide by the decisions of the IOC.⁶

The Olympic Movement is a shorthand way of describing a catalogue of values relating to fair play, health, competition and ethics. According to the Olympic Charter:

2. Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy found in effort, the educational value of good example and respect for universal fundamental ethical principles.

3. The goal of Olympism is to place everywhere sport at the service of the harmonious development of man, with a view to encouraging the establishment of a peaceful society concerned with the preservation of human dignity. To this effect, the Olympic Movement engages, alone or in cooperation with other organisations and within the limits of its means, in actions to promote peace.

4. The Olympic Movement, led by the IOC, stems from modern Olympism.

5. Under the supreme authority of the IOC, the Olympic Movement encompasses organisations, athletes and other persons who agree to be guided by the Olympic Charter. The criterion for belonging to the Olympic Movement is recognition by the IOC. The organisation and management of sport must be controlled by the independent sport organisations recognised as such.

6. The goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practised without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.

Clearly, the controversies that have erupted in the last year have, at least in the minds of some, placed some doubts on the suitability of the IOC to hold itself out

5 As most are aware there is already a precedent for precisely such a development. In 1980, in the wake of a US led boycott of the Moscow Summer Olympic Games, Ted Turner organised the "Goodwill Games". No doubt Turner was at least in part motivated by the desire to seize the opportunity created by the vacuum in sports programming left by the Olympic boycott to develop and control his own sports programming. Interestingly enough, the Goodwill Games have survived, though their appeal in no way reaches that of the Olympic Games.

6 Olympic Charter, Ch 1, The Olympic Movement.

7 Olympic Charter, Fundamental Principles.

as the guardian of these values. One could debate such conclusions endlessly, but of more interest is the question of to what extent can such an association be challenged or controlled through any form of legal mechanism. And furthermore, is such use of the law appropriate?

Ultimately, international sporting federations are immune from direct state intervention. This of course, is not true of national sporting bodies, which are subject to the law of the jurisdiction in which they are situated. In addition, those same national bodies are subject to state pressure (and direct control) to the extent that they or their members are in receipt of state funds.⁸ It is thus clear that an international federation is under no legal obligation to adopt particular governance practices mandated by a national authority. Even a national sporting federation is under no such obligation, save to the extent that it may choose to be incorporated under State or Commonwealth legislation, which may impose minimal governance requirements.⁹ Even the most highly regulated of our corporate species, the public company which is a member of the Australian Stock Exchange, is not obliged to adopt a particular set of governance practices. Indeed, the only obligation imposed on such bodies is that of reporting.¹⁰ In the corporate world it is recognised that it is for each corporation to determine the manner by which it will be governed:

There is no simple universal formula for good governance. Companies vary so greatly in size, complexity, ownership structure and other characteristics that what is ideal in some cases may be inappropriate in others. Moreover, as companies and industries change, ways of governing may need to adapt. Tried and proven structures and processes can help to improve governance, and can play an important role in building shareholder confidence in the soundness of their investments and thus a company's ability to attract capital. However, it is essential that all involved, and particularly boards of directors, should adopt the practices best suited to the good governance of their organisations in their particular circumstances.

If the IOC is private, then by what laws is it governed and with what other organisations might it be appropriately compared? The obvious analogue is the private corporation. Like the IOC, the corporation has legal personality and acts

8 A good example is in the area of doping, where there are differences between the model rules promulgated by the Australian Olympic Committee (which reflect the IOC model) and the Australian Sports Commission. The rules differ in respect of sanctions, particularly those applicable in cases of inadvertent doping or use of prohibited methods or substances for therapeutic purposes. However, it is clear that the ASC model will be applied to an athlete in receipt of federal assistance or making use of federal facilities, such as the Australian Institute of Sport. See *ASC Doping Policy*, April 1999 and *AOC Model Doping Policy for National Sports Federations*, April 1999.

9 All such legislation contains few obligations relating to corporate governance. State incorporated associations' legislation merely imposes the obligation to select a managing committee; the *Corporations Law* simply requires a minimum number of directors. In the case of the *Corporations Law*, the legislation leaves it to the incorporators to determine who shall manage the corporation. The "replaceable rules" do suggest that the appropriate locus of managerial power is the board of directors: s 226A. Further observations concerning the corporate governance obligations of corporations are made below.

10 Australian Stock Exchange, *Listing Rules*, Rule 10 requires member corporations to include a statement of corporate governance practices in their annual report.

11 H Bosch et al, *Corporate Practices and Conduct*, AIDC (3rd ed, 1995) p 7.

as a framework around which activity is organised. The IOC is specifically given this legal status by legislation in Switzerland, where it is domiciled.¹²

The appropriateness of the corporate analogy is one matter but, even if we accept the analogy, there remain many questions to answer. There are many varieties of corporation and the law is rapidly changing to recognise the increasing role many non-traditional stakeholders ought play in corporate governance.¹³

The resulting corporate governance debate has consumed many scholars in the corporate law world, particularly since the reaction to a widely acknowledged decade of corporate failures in the 1980s. What was once a simple matter of recognising that corporations ought be governed by representatives of their owners, the shareholders, has become increasingly more complex. Shareholders' meetings are easily controlled by management in a widely held public company, and shareholders are not the only important stakeholders. Therefore, even though we can say with complete confidence that shareholders are the owners of the corporation, that does not resolve all questions of appropriate governance structure.

In the case of the IOC, it is not even clear what the IOC is: is it a corporation, is it a board of directors, is it a public body? Even if we accept that the IOC is the 'owner' of the Olympic Movement (including the Olympic Games), that does not mean that others with a stake in the Games (governments, sponsors, athletes) ought be excluded from matters to do with their governance.

In an article of this nature, all one can hope to do is raise questions and place them within an appropriate context, in an effort to refine the nature of public debate. What follows is intended to serve as a trigger for further debate on the question of IOC reform and is also intended to offer some legal structure around which that debate could intelligently focus.

II. THE CURRENT STRUCTURE OF THE IOC

The International Olympic Committee was established in 1894 by the International Athletic Congress of Paris. In 1981, the IOC was established as

12 The IOC describes itself as an "international non-governmental non-profit organisation of unlimited duration, in the form of an association with the status of legal person": Olympic Charter, Rule 19. This status was recognised by decree of the Swiss Federal Council on 17 September 1981.

13 The most commonly cited example of this is the increased attention given to the status of corporate creditors by both courts and legislation. In this regard, commentators usually cite provisions of the *Corporations Law* such as s 588G, imposing a duty on company directors to avoid incurring debts when the corporation is insolvent, as well as cases such as *Kinsella v Russell Kinsella Pty Ltd* (1986) 4 ACLC 215 imposing a duty on company directors to have regard to the interests of company creditors as the company approaches insolvency. To varying degrees, arguments have also been made for increasing the attention given to employees: see B Milman "From Servant to Stakeholder: Protecting the Employee Interest in Company Law" in J Feldman and H Meisel (eds) *Corporate and Commercial Law: Modern Developments* (1996), and Lord Wedderburn "Companies and Employees: Common Law or Social Dimension?" (1993) 109 *LQR* 220. A wider argument is that the company ought recognise a broader constituency including suppliers, customers and even the community at large: see for example J Parkinson *Corporate Power and Responsibility* (1993), Ch 9.

what it describes as an “international non-governmental, non-profit organisation of unlimited duration”.¹⁴

Given the legal personality of the IOC, it is tempting to analogise the IOC to a corporation, particularly a non-profit corporation, given its stated aims. However, the IOC is not subject to any domestic corporate legislation in Switzerland. It is free to adopt its own constitution and its own structure. This it has done in the form of the Olympic Charter.

The Olympic Charter is a curious document, which serves a multitude of purposes. For one to understand the Charter, one must appreciate the desire of the founders of modern Olympism to preserve their domain, that of international sport, from the interference of national governments. It is for this reason that the IOC has attempted to constitute itself as the supreme authority in matters of international sport, particularly concerning the Olympic Movement. As we shall see below, it is also for this reason that members of the IOC are clearly stated to be representatives of the IOC in their countries of origin, rather than representative of those countries to the IOC.

III. CORPORATE COMPARISONS

If there is one characteristic that defines the modern corporation it must be that of corporate personality.¹⁵ The separate legal personality of the corporation is what produces perpetual succession and, of more interest to most users of the corporate form, limited liability. Given the IOC’s status as legal person, it is tempting to treat the IOC as a corporation. However the analogy soon breaks down.

Certainly the modern business corporation is a far more complex animal than the IOC. In the case of corporations incorporated under national general incorporation legislation,¹⁶ such legislation typically deals with matters such as:

- Management of the corporation;¹⁷
- Meetings of members;¹⁸
- Rights of members and non-members;¹⁹
- Accountability to national regulatory authorities;²⁰

14 Olympic Charter, Rule 19, para 1.

15 *Corporations Law*, s 124. Judicial acceptance of the reality of corporate personality is usually ascribed to the seminal case of *Salomon v A Salomon & Co Ltd* [1897] AC 22.

16 For example, the *Corporations Law* in Australia.

17 See for example s 226A, the replaceable rule designating the board of directors as the locus of central managerial authority. Note that this provision is a “replaceable rule” and corporations using the *Corporations Law* are free to design other more appropriate arrangements for themselves should they choose to.

18 See s 249L for the law concerning the convening of meetings of members; procedure at meetings is more typically dealt with in corporate constitutions, though there are replaceable rules (see ss 249R – 250Z) dealing with this.

19 See for example s 246AA providing for the right of members to complain of “oppressive, unfairly discriminatory or unfairly prejudicial” conduct.

- Reporting and auditing requirements;²¹
- Relations between the corporation and those dealing with it;²²
- Duties and responsibilities of corporate managers;²³
- Remedies available to corporate stakeholders.²⁴

This, of course, is not an exhaustive list. By contrast the IOC Charter deals with few, if any, of these issues. In fact, the IOC Charter does little beyond state that the IOC is to be the supreme authority regarding questions concerning the Olympic Movement and the Olympic Games.²⁵ Olympism is dealt with in the first section of the Olympic Charter. It is defined as:

a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy found in effort, the educational value of good example and respect for universal ethical principles.²⁶

As an aside, it is the inclusion in the Olympic Charter of provisions such as this which leads to the argument that the IOC is answerable to a higher standard than other corporate organisations. While this may be so, the more difficult question from a legal perspective is the determination of the mechanism for such accountability. This we shall explore below.

The Olympic Movement, therefore, over which the IOC asserts supreme authority, is the:

building [of] a peaceful and better world by educating youth through sport practised without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.²⁷

As the supreme authority of the Olympic Movement, the IOC asserts authority over a number of other sporting bodies, including: International Federations (IFs), National Olympic Committees (NOCs), Organising Committees of the Olympic Games (OCOGs), national associations, clubs and the persons belonging to them (which is stated to include judges, referees, coaches and sports technicians).²⁸

The Olympic Charter provides that the Olympic Games are to be the exclusive property of the IOC, which owns all rights relating thereto (Rule 11). These rights include rights concerning the Olympic Flame, Olympic Flag, Olympic Motto and Olympic Anthem.

There are relatively few provisions in the Olympic Charter dealing with the constitution of the IOC. Rule 19 refers to the granting of legal personality to the IOC by the Swiss Government. Interestingly enough, when it comes to the

20 Note here provisions mandating preparation of annual reports, as well as provisions enabling the Australian Securities and Investments Commission (ASIC) to enforce provisions of the legislation.

21 *Corporations Law*, s 327.

22 *Ibid*, ss 127-129.

23 *Ibid*, s 232.

24 *Ibid*, ss 246AA, 461, 1324.

25 Rule 1 of the Olympic Charter provides: "The IOC is the supreme authority of the Olympic Movement".

26 Olympic Charter, Fundamental Principles, para 2.

27 *Ibid*, para 5.

28 Olympic Charter, Rule 3.

transacting of the usual business of the IOC, the IOC prefers to work through locally incorporated bodies, constituted as OCOGs. Thus, for example, in the case of the 2000 Olympic Games in Sydney, all matters concerning the games are managed by SOCOG, a statutory authority, incorporated by legislation in New South Wales.²⁹

The manner in which the Olympic Charter deals with this is to provide that the organisation of the Olympic games “shall not be entrusted to a city unless [that city] has submitted to the IOC a document drawn up by the Government of the country under consideration, in which the said Government guarantees to the IOC that the country will respect the Olympic Charter”.³⁰ Not leaving anything to chance, the Olympic Charter also provides that a contract shall be entered into between the IOC and the host city and the NOC of its country, which agreement will specify the obligations incumbent upon them. The Charter specifically states that candidate cities are to offer “such financial guarantees as considered satisfactory by the IOC Executive Board”. It is to be assumed that the contract entered into between the IOC, host city and NOC will usually deal with financial guarantees of this kind, as well as rights to revenues generated by the Olympic Games and management of Olympic trademarks and other IOC intellectual property.

The Charter does mandate that the OCOG shall have the status of a legal person, with an executive committee including:

- The IOC member or members of the country;
- The President and Secretary General of the NOC; and
- At least one member representing and designated by the host city.³¹

The Charter does allow for the inclusion of other members of the executive committee of the OCOG such as representatives of public authorities or “other leading figures”.³²

Despite its instructive role in the negotiation of the contract with the host city and NOC and its role as the “supreme authority” of the Olympic Movement, the

29 See *Sydney Organising Committee For the Olympic Games Act 1993 (NSW) (SOCOG Act)*. Section 9 of this legislation states that “[t]he primary objective of SOCOG is to organise and stage the Games of the XXVII Olympiad in Sydney in the year 2000, in accordance with the rights and obligations conferred and imposed under the Host City Contract”. SOCOG is given the same legal capacity and powers as a company under the *Corporations Law* (s 6) and the exercise of any of SOCOG’s powers is restricted to purposes specified in the legislation, Part 3 (dealing with the primary objective of SOCOG and any necessarily ancillary matters).

30 Olympic Charter, Rule 37, para 3.

31 Section 14 of the *SOCOG Act* provides for the constitution of the SOCOG Board, which consists of: the President of SOCOG; the members of the IOC representing the IOC in Australia; the President of the Australian Olympic Committee; the Secretary General of the Australian Olympic Committee; the Lord Mayor of the City of Sydney; the Chief Executive Officer of SOCOG; the Shadow Minister for the Olympics; five persons with appropriate expertise and experience appointed by the Governor of NSW on the recommendation of the Minister for the Olympics; two persons with appropriate expertise and experience appointed by the Governor of NSW on the recommendation of the Minister for the Olympics, being persons nominated by the Prime Minister of Australia.

32 Olympic Charter, Rule 39, para 3.

IOC assumes no financial responsibility for the conduct of the Olympic Games. Rule 40 of the Olympic Charter provides:

The NOC, the OCOG and the host city are jointly and severally liable for all commitments entered into individually or collectively concerning the organisation and staging of the Olympic Games, excluding the financial responsibility for the organisation and staging of such Games, which shall be entirely assumed jointly and severally by the host city and the OCOG, without prejudice to any liability of any other party, particularly as may result from any guarantee given pursuant to Rule 37, paragraph 5 [which requires host cities to provide financial guarantees to the satisfaction of the IOC Executive Board]. The IOC shall have no financial responsibility whatsoever in respect thereof.

Thus, in summary, the IOC has supreme authority concerning the Olympic Movement, which includes absolute authority concerning the staging of the Olympic Games and management of Olympic intellectual property. Furthermore, the IOC has ensured that commercial arrangements involving the Games leave it in a position of minimal or no risk.

IV. HOW THEN IS THE IOC ITSELF CONSTITUTED AND MANAGED?

These matters are dealt with in Rules 19 to 28 of the Olympic Charter. It is here that the comparison between the IOC and the modern corporation becomes difficult.

Let us start with the question of membership. The members of a corporation are, quite simply those who become members by subscription, transfer or transmission. For a corporation to come into existence, there must be an incorporator or incorporators. In the case of the IOC, the members are chosen and elected by the IOC itself, "from among such persons as it considers qualified".³³

The only qualification for membership is that the member must be a national of a country in which they have their domicile or main centre of interests and in which there is an NOC recognised by the IOC.³⁴ Members must speak at least one of the languages used at IOC Sessions. The Charter does provide that there cannot be more than one member elected in a country, unless that country has held either a Summer or Winter Olympic Games, in which case there may be a second member elected. In addition, the President of the IOC may propose the election of up to ten additional members without distinction of nationality or domicile. In such cases, the election must be motivated by the "function of the persons concerned or by their particular qualifications".³⁵

The question of membership has been one of the most controversial matters relating to the business of the IOC, especially given recent controversies concerning the behaviour of some members. It has been suggested that the IOC

33 *Ibid*, Rule 20, para 1.

34 *Ibid*.

35 *Ibid*, Rule 20, para 1.3. The Charter also limits the ability of such members to take part in voting on certain matters, including selection of a venue for the Olympic Games.

needs to alter the method by which individuals become members. At present, members are elected by the IOC. In practice, such election follows nomination by the President. There is no nomination committee, nor is there any requirement beyond that of domicile and linguistic ability. Some have suggested that the IOC form a nomination committee, and that the Charter be amended to provide that the IOC's membership ought be more representative. One suggestion calls for IOC membership to be drawn from representatives of National Olympic Committees, International Sports Federations, recent Olympic athletes, lifetime olympians and independent 'at large' members. The latter group, it is suggested, might be elected from a list produced by a nominating committee.³⁶

Implicit in this suggestion (and others like it) is the sense that the IOC is, in effect, a public body which ought be obliged to afford some representation to its stakeholders. It is interesting to contrast such suggestions with the corporate model. As noted above, there has been increased recognition of non-traditional stakeholders in modern corporate law. However, despite such recognition, corporate law has stopped far short of obliging corporations to afford their stakeholders any form of managerial representation.³⁷

If we use the corporate analogy, the IOC members are in effect the equivalent of corporate shareholders. As such, one would not expect to find the imposition of any equivalent to a 'duty of care' on them. Indeed, the Olympic Charter does not disappoint. Rule 20, paragraph 2 contains a list of obligations of IOC members, largely to do with participation in IOC Sessions (the equivalent of the company general meeting) and representation of the IOC in his or her home country.

IOC members are subject to some rudimentary conflict of interest rules. The Olympic Charter provides:

Members of the IOC may not accept from governments, organisations, or other legal entities or natural persons, any mandate liable to bind them or interfere with the freedom of their action and vote.³⁸

Management of the IOC is vested in the Executive Board.³⁹ The Executive Board is elected from amongst the members of the IOC by a general meeting of

36 This suggestion (provided to the author in draft form) is currently under consideration by OATH (see note 3 *supra*).

37 Of course, corporations are free to choose to grant board representation to their key stakeholders, and many do, in the form of nominee directorships.

38 Olympic Charter, Rule 20, para 1.6. This provision differs in scope and content from similar provisions applying to directors of corporations. Such individuals are prohibited from making improper use of their position or information acquired by virtue of their position: *Corporations Law*, s 232(5) and (6). Furthermore, such individuals are under an obligation to act honestly: *Corporations Law* s 232(2). Judicial consideration of these provisions and application of principles of equity have made it clear that directors must also act independently and for a "proper purpose": see *Whitehouse v Carlton Hotel Pty Ltd* (1987) 70 ALR 251. No similar obligation is imposed on members of corporations, although there is some implicit suggestion that the majority shareholder of a company must, at least when using majority power to amend the corporate constitution, act for a "proper purpose" and not oppress the minority: see *Gambotto v WCP Ltd* (1995) 16 ACSR 1. This decision has been the subject of extensive debate and criticism: see for example I Ramsay (ed) *Gambotto v WCP Ltd: Its Implications for Corporate Regulation*, Centre for Corporate Law and Securities Regulation, University of Melbourne (1996).

those members (a Session).⁴⁰ Once again, aside from setting out specific duties of the Executive Board (such as administering the IOC, approving its internal organisation, managing IOC finances and preparing an annual report) the Olympic Charter does not contain any statement of the standard of care applicable to Board members.⁴¹

In an age where the Games themselves were far less commercially successful and the Movement was defined by amateurism, this simplicity of structure was not only understandable but probably also practical. However, since the early 1980s the nature of the Olympic Movement has changed drastically. In the first place, the IOC has capitalised on the immense commercial value of the Olympic Games, most notably in the form of exploitation of the Olympic trademark and sale of broadcast rights to the Games. As a result, the IOC controls significant financial resources and assets of tremendous commercial value. Furthermore, it must be recognised that this commercial value is a result of increased and widespread interest in the Games themselves, as well as the workings of the IOC, thus resulting in increased scrutiny. Increasing interest in sport at a national level, worldwide, has led to increased public expenditure on sport at both the grassroots and elite level, thus leading to growing governmental interest in the Olympic Games, whether as a vehicle for securing international recognition and prestige, through superior athletic performance, or as a vehicle for promoting participation in sport. This is exemplified by the fact that at the recent World Conference on Doping in Sport, over 30 Ministers for Sport addressed the Conference. Finally, increased professionalism amongst athletes, and the abandonment of the requirement of amateurism for eligibility for the Olympic Games makes the position of the athlete somewhat analogous to the corporate employee. Thus, it is arguable that the success of the Games derives from the efforts of the athletes, much in the same way that it is argued that corporate success derives from the efforts of the worker.⁴²

These developments are no doubt responsible for the increased focus on reform of the IOC itself. The IOC has responded already in the form of the IOC 2000 Commission, whose mandate is to prepare and propose to the Session recommendations for the modification of the IOC's structures, rules and

39 Olympic Charter, Rule 23, para 6. Interestingly enough, the Olympic Charter even uses similar terminology to that used by corporate lawyers, describing the Executive Board as an "organ" of the IOC: see Rule 24.

40 Olympic Charter, Rule 23, para 2.

41 As in the case of s 232(4) of the *Corporations Law* which provides that "In the exercise of his or her powers and the discharge of his or her duties, an officer of a corporation must exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances". See Olympic Charter, Rule 23, para 6.

42 Of course this begs the question of whether the athlete or employee ought be afforded representation in management. There are of course corporate models, notably in certain European countries, which provide for employee representation on corporate boards. The Olympic parallel would be to include representation of athletes at the IOC, as the OATH suggestions provide. At present, athlete participation in Olympic affairs is through the Athletes' Commission, which reports to the President of the IOC. To be sure, the question of whether the value of the Games derives from the efforts of athletes, or whether the athletes themselves are beneficiaries of the efforts of those who organise and finance the games, is a vexed one.

procedures. In addition, the IOC has established an Ethics Commission to draft a Code of Ethics for the IOC as well as provide oversight. Importantly, five of the eight members of this Ethics Commission are external to the IOC.⁴³

Notwithstanding the efforts of the IOC at self-reform, it is clear that the matter of the IOC's constitution, rules and practices are now clearly in the public domain, as evidenced by the significant public attention being paid to these matters.

V. THE THEORETICAL BASIS FOR IOC REFORM

Suffice to say that, though possessed of legal personality and bearing superficial resemblance to the corporation, the IOC differs in many respects from the modern company. Membership is by invitation. The IOC is itself effectively immune from regulation. There is no legal standard applicable to the actions of IOC members or its Executive Board. In effect, the IOC is a private club, which owns extremely valuable property which is of interest to the public at large, as well as their elected representatives. This leads many to suggest that the IOC ought submit to significant reform proposals.

The problem with most publicly-mooted reform proposals is that they lack sound theoretical basis. The suggestion, for example, that the Olympic Games ought be 'taken away from' the IOC is one that ignores the fact that the IOC was formed privately and developed the Olympic Games (as well as associated intellectual property) itself (albeit with the voluntary participation of the world's governments). Indeed, one ought credit the founders of modern Olympism with great foresight, having recognised from the outset that government involvement was an absolute necessity, but adopting a structure designed to free the games from government machinations.⁴⁴ If you like, the Olympics is today as much a 'product' as Coca Cola. Like Coca Cola, the Olympics derives its value from the fact that the product is popular and has often been associated with certain values. Yet no one would seriously contend that because Coca Cola is popular, because many consumers purchase the product, and because governments have found Coca Cola useful (the United States, for example, has always ensured that Coca Cola is available in liberal quantities to its soldiers overseas because it is a comforting reminder of home and home values) that Coca Cola should be 'taken from' its rightful owner.

Likewise, the suggestion that the IOC should be 'democratised' is also flawed. It is clear from any history of the Olympics that the success of modern Olympism owes much to the efforts of its founder, Baron Pierre de Coubertin.⁴⁵ Many question the method of selection of IOC members, yet the selection of initial

43 IOC, "IOC Names Ethics Commission", Media Release, 3 May 1999, <http://www.olympic.org/flat/news/press/pr113_e.html>.

44 There are numerous histories of the modern Olympics, but one useful compendium is N Muller, *One Hundred Years of Olympic Congresses 1894-1994* (1994). See also A Guttmann *The Olympics: A History of the Modern Games*, IOC (1992).

45 See for example, N Muller, note 44 *supra*, pp 21-35.

members appears to have been remarkably uncontroversial. According to Muller:

There are no documents regarding the election of an International Committee for the Olympic Games, as the IOC was called initially, by the Paris Congress [the first Olympic Congress, held at the Sorbonne in Paris in 1894]...Obviously without protest, the Congress approved of a list of the members of the new committee presented by Coubertin. None of the delegates could have possibly evaluated the importance of these individuals. Coubertin commented later: 'I was allowed a free hand in the choice of members of the IOC. Those proposed were elected without any amendment'.⁴⁶

Little appears to have changed, at least in terms of the selection process, as members are effectively proposed by the President of the IOC and elected (or confirmed) by Session.

To those who find this unacceptable, it would appear as though there is an implicit assumption that there is some 'public' aspect to the IOC. Yet the IOC was formed privately, and remains, effectively, a private organisation, despite the immense public interest in its work.

Given the IOC's corporate status it would appear appropriate to apply corporate law norms. There are in fact aspects of corporate law that have public law analogues. Rules of standing for intervention in corporate management have some superficial similarity to equivalent public law rules.⁴⁷ The requirement that company directors act for a proper purpose appears somewhat inspired by similar requirements found in principles of administrative law.⁴⁸ Nonetheless, the corporate animal is essentially a private one, with the possible exception of statutory corporations.⁴⁹ And, in any event, even if we were to apply the corporate model to the IOC, it remains that corporate law is remarkably permissive in terms of corporate governance. Furthermore, were we to apply corporate standards to the IOC, there remains the problem of accountability. Even within corporate law, accountability is a problem. Company directors owe their duties to the company, and as is axiomatic in company law, it is only the company which can enforce a duty owed to it.⁵⁰ Enforcement of the *Corporations Law* is, when not left to private action,⁵¹ given to the national regulatory authority, the Australian Securities and Investments Commission (ASIC). There is no equivalent body with regulatory power over the IOC.

46 *Ibid*, p 36.

47 See S Bottomley, "Shareholder Derivative Actions and Public Interest Suits: Two Versions of the Same Story?" (1992) 15 *UNSWLJ* 127.

48 See S Fridman, "An Analysis of the Proper Purpose Rule" (1999) 10 *Bond Law Review* 164.

49 *Ibid*.

50 This it will readily be recognised is a somewhat simplistic formulation of the famous (or infamous) rule in *Foss v Harbottle* (1843) 67 ER 189. The rule itself has been subject to exceptions and of course at least a half-century of criticism, yet remains a central tenet of corporate law. Incursions have been made by means of "statutory derivative actions", a version of which is presently included in the most recent package of corporate law reform in Australia: Corporate Law Economic Reform Program Bill 1998, Part 2F 1A. Members of companies have available to them other remedies, most notably the "oppression" remedy, *Corporations Law*, s 246AA.

51 One of the objectives of the Corporate Law Economic Reform Program has been to leave the matter of enforcement of corporate law to private action, rather than the regulatory authority. See *Explanatory Memorandum*, Corporate Law Economic Reform Program Bill at para 2.18.

Curiously enough, it may be that the IOC's response to recent scandal may demonstrate that, as with corporations, it is appropriate to empower members to enforce standards of behaviour of management. However, as members of the IOC are effectively selected by management they are unlikely to take such action, much as the general meeting of a corporation is now recognised as an ineffective curb on corporate managerial excess.⁵² Furthermore, as the members of the IOC are not, themselves, stakeholders in the same way as members of a corporation, the question of incentive and appropriate remedy is problematic.

Clearly then, the analogue of the publicly listed corporation is not particularly helpful. This has led to suggestions that a more appropriate analogue is the not-for-profit organisation, which also has corporate status. However, this analogue, too, proves lacking. In the first place, despite the non-profit status, such organisations are also established under legislation containing similar remedial and organisational provisions as affect public companies.⁵³ Despite this crucial difference, there are some fruitful avenues of comparison. The larger non-profit associations confront similar dilemmas when it comes to determining whose interests to serve. Twaits points out the different formulations of the duties of non-profit boards when he refers to John Carver's assertion that such boards often misconceive their obligations as being primarily to customers.⁵⁴ Simply alluding to the non-profit association does not assist in proper identification of the stakeholders whose interests must be served by the IOC. Another formulation puts it thus:

directors should determine the social and demographic characteristics of the users who generate the sales revenues to ensure that the organisation is serving the truly needy and the other groups it intends to serve.⁵⁵

52 This is a corollary of the well known Berle and Means thesis that management effectively controls the general meeting of the widely held public company through a combination of shareholder apathy and control of the machinery of the general meeting: A Berle and G Means, *The Modern Corporation and Private Property*, McMillan (revised ed, 1968). There are those who argue to the contrary that shareholder apathy is rational and that shareholders will take appropriate action to the extent that the costs of monitoring management and taking appropriate action are exceeded by the concomitant benefits: see for example MC Jensen and WH Meckling, "Theory of the Firm; Managerial Behaviour, Agency Costs and Ownership Structure" (1976) 3 *Journal of Financial Economics* 305. There does remain the problem of "collective action", or the difficulties of ensuring that individuals with little at stake act in concert to achieve the benefit of enforcement. This may be less of a problem in an age of institutional investment, but it is not yet certain that the institutional investor will act in such a manner as to solve this problem: see GP Stapledon, *Institutional Investors and Corporate Governance*, OUP (1996).

53 The *Corporations Law* provides a mechanism for many such organisations in the form of the company limited by guarantee. In one particularly well known case, the honorary chairman of such a company was found personally liable for insolvent trading debts incurred by the corporation on the basis of having breached the duty of care he owed: see *Commonwealth Bank v Friedrich* (1991) 9 ACLC 946. See also A Twaits, "The Duties of Officers and Employees in Non-Profit Associations", (1999) 10 *Bond Law Review* 202.

54 A Twaits, note 53 *supra* at 207, citing J Carver, "When Owners are Customers: The Confusion of Dual Board Hats" 10 *Nonprofit World* 4 at 11.

55 R Herzlinger "Effective Oversight: A Guide for Nonprofit Directors" (July-August 1994) *Harvard Business Review* 52 at 55.

While superficially attractive, such an assertion is completely at odds with all traditional formulations of the duties of company directors, whether in non-profit associations or otherwise.

In the final analysis, if one were to adopt the corporate model as the appropriate model upon which to base any reform of the IOC, there are several structural and theoretical difficulties.

One problem which I have not yet addressed is that of identification of appropriate stakeholders. Creation of rules of governance requires identification of stakeholders. To suggest that an organisation be held accountable begs the question of 'accountable to whom?'. In the case of the IOC this question is a difficult one to answer. At one extreme, one could argue that, as an entirely private organisation, the IOC is accountable to no one but itself in the strictly legal sense. In the wider sense, it may be accountable to those who support its activities through the mechanism of the market. Indeed, current reform initiatives may well be a reflection of this.

Of course, the business corporation is not the only corporate analogue that might possibly be applied. The corporate form is used in a myriad of circumstances: business corporations, cooperatives, mutual companies and non-profit organisations, to name a few. At a basic level, the corporate status of the IOC is merely efficient because, as the economists point out, it reduces the costs of contracting by replacing a group of separate contractors with a common signatory. Yet within the corporate family are numerous alternative forms of organisation, each with their own forms of governance.⁵⁶ However, in all of these cases, the organisation in question is governed by municipal law and subject to some form of legal accountability mechanism.

In the final analysis, recognition of the IOC as a corporate animal is insufficient. To continue the biological metaphor, that would equate to determining the genus, but not the species.

VI. THE POSITION OF SOCOG

SOCOG's position is entirely different from that of the IOC. In the first place, given its incorporation by State legislation, SOCOG is subject to municipal Australian law. There is an interesting question about whether the duties of directors of statutory corporations differ in content and application from those applying to corporations incorporated under the *Corporations Law*. This argument has been explored elsewhere.⁵⁷ Suffice to say that in the case of a state owned corporation incorporated by statute there is a strong argument that the stakeholders include the public at large. An example of this underlying theme can be found in the controversy surrounding the recent Sydney Games ticketing

56 A good starting place for the exploration of these forms is H Hansmann, *The Ownership of Enterprise* Belknap Press of Harvard University Press (1996). Hansmann looks at diverse patterns of 'ownership' and engages in a comparative study of their principal characteristics, comparing investor owned enterprise with partnerships, cooperatives, non-profits and mutuals.

57 See S Fridman, note 48 *supra*.

scandal. At the time of writing, revelations emerged that a number of premium tickets for Olympic events had been set aside for particular persons, including in at least one case an organisation prepared to pay a premium.⁵⁸ In one respect, one could argue (as no doubt the SOCOG Board members believe) that the decision to market tickets in this fashion was in the best interests of SOCOG as it maximised revenue from ticket sales (this of course assumes that the previous general marketing efforts were not in breach of *Trade Practices Act* 1974 provisions proscribing misleading or deceptive conduct). In this event, it could be argued that board members (assuming they were aware of the marketing methods, which to this point they have denied) were acting in accordance with their normal corporate duties. On the other hand, there is a strong argument that in the case of a corporation such as SOCOG, normal rules of corporate governance pertaining to the private sector do not apply. Looked at another way, SOCOG is seen as an emanation of the Crown, and its directors owe duties that are not purely to act in the commercial interests of the corporation. SOCOG, if you accept this argument, exists to fulfil a public purpose. Given the fact that taxpayers indirectly fund SOCOG and given the way its board is structured, this is a strong argument. One thing is certainly clear, and that is that it would be inappropriate for members of the board of SOCOG to act solely in the interests of the IOC (or perhaps even exclusively in the interests of the Olympic Movement).⁵⁹ Given the mode of its incorporation, the structure of its board and its source of funding, we can definitely conclude that SOCOG is, to continue the biological metaphor, a different species to the IOC.

VII. A TENTATIVE CONCLUSION AND A TEMPTING SUGGESTION

All of the above discussion relates to identifying possible analogues for reform. It has been assumed throughout that the corporation is the appropriate model. However, one remaining problem is that of whether it is appropriate to mandate reform. Even if it is, the question of how that reform might legally be mandated is a difficult one.

There is one corporate species which also bears close resemblance to the IOC. This organisation shares the following characteristics with the IOC:

- It (or its key functionaries) has corporate status;
- It is associated with high moral values;
- It is subsidised by the State;

58 See "Want the Best Olympic Tickets? Join the Club", *Sydney Morning Herald* 16 November 1999, p 1.

59 It has long been established that it would be inappropriate for directors of a subsidiary nominated by a parent company to act exclusively in the interests of the parent company: see *Scottish Co-operative Wholesale Society v Meyer* [1959] AC 324.

- It prefers to remain independent of politics and national interference;
- Its central government is undertaken by unpaid individuals, who are not democratically elected;
- Its central governing body is accountable to no one but itself; and
- It was founded by a small group of individuals, acting out of concern for the public good, and its membership has grown exponentially since formation;
- It is the subject of extensive public interest and participation;
- It makes use of locally incorporated 'subsidiaries'.

The organisation to which I am here referring is none other than the Roman Catholic Church!

The corporate status of the Church has been the subject of judicial discussion in Australia. In *Archbishop of Perth v AA to JC*,⁶⁰ the Roman Catholic Archbishop of Perth was recognised as having the status of corporation sole. In this respect, the Archbishop of Perth might be seen as analogous to the local subsidiary of a vast multinational!

Taking the analogy further, it is clear that the Roman Catholic Church sees as its principal purpose, the guardianship and promotion of certain moral values, much in the same way as the IOC associates itself with the Olympic Movement.

Just as some argue that governments support the work of the IOC by financing the staging of the Olympic Games, so too do governments support or subsidise the work of the Catholic Church by exempting it from taxation. Indeed, one could extend the analogy to include private sponsors, as many choose to donate to the Church.

Just as the IOC prefers to remain above or outside the political arena, so too, the Church prefers not to involve itself in political debate and our polity accepts the principle of the separation of Church and State. To continue, despite this intent, the Olympic Movement has, from time to time, become tainted by political intrigue, as witness the various boycotts of modern Olympic Games and the revelation that certain governments used the Olympic Games as a promotional vehicle.⁶¹ Likewise, the Church has been unable to avoid political involvement, whether in the form of occasional comment by Church officials on matters of national debate, or in the form of involvement of Church officials in movements of national liberation.

- Neither the Church nor the IOC are subject to the control of a national regulatory authority;
- Neither Church officers nor IOC members are democratically elected, nor is either paid;
- Both organisations were founded by a small number of individuals, wishing to pursue certain values;

60 (1995) 18 ACSR 333.

61 I am here referring to the revelations of institutionalised doping in the former East Germany, undoubtedly inspired by the desire to exploit Olympic success for political purposes.

- Both organisations have been beset by controversy in recent times. In the case of the IOC, that controversy has centred on the behaviour of certain IOC members. In the case of the Roman Catholic Church, similar concern has been expressed in several countries regarding conduct of priests at orphanages operated by a particular order.

I make this analogy not to provoke, but to make a particular point. It is clear that the Roman Catholic Church is not a democratic organisation, that its functionaries are subject to a form of internal discipline that is independent of state action and that it is accountable to no terrestrial body or person. Furthermore, the Church depends for its success on grassroots participation and the unpaid efforts of millions of volunteers. In these respects it is closely analogous to the IOC. In fact, when one examines the fundamental principles of modern Olympism, they are not entirely dissimilar to good Christian values.

While there has been controversy concerning the behaviour of certain priests, it has never been seriously suggested that the Roman Catholic Church, despite its 'public' nature, should be compelled to submit to some form of democratic reform, supported by municipal law. However, where a locally constituted subsidiary contravenes national law, it is clear that that subsidiary (that is, the Archbishop of Perth) is subject to that national law. In this respect, so too is the locally incorporated subsidiary of the IOC (SOCOG) subject to the law of Australia.

Both organisations are, in their own way, it is argued, subject to 'market forces'. Were the leaders of the Church to be seen to stray from the values they represent, it might be the case that Church attendance (and donations) would decline, as would the Church's ability to recruit. Likewise, if the IOC strays too far from the values enshrined by modern Olympism, the resultant cynicism might well destroy public confidence in the Games and lead to the erosion of the Olympic trademark's value.

In this respect, one might conclude that it would be wise for the members of the IOC to pay close attention to public sentiment, as indeed recent reform efforts suggest they are doing. In the final analysis, any reform of the IOC will need to be voluntary. In considering what reform, if any, is required, it is suggested that the corporate model bears close enough resemblance to the IOC's structure to be worthy of careful consideration. However, simply parroting corporate norms without closer examination of which form of corporation is the most appropriate analogue would be ill-advised.

The guardians of modern Olympism need to pay close attention to the identification of their key stakeholders. Only then can appropriate and workable reform be voluntarily adopted.