Bond University

Sports Law eJournal

Volume 1 Issue 1

2020

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GOVERNING ESPORTS: PUBLIC POLICY, REGULATION AND THE LAW

ERIC L. WINDHOLZ*

Esport is an enigma – at once a sport; technological innovation; and profit maximizing business. As a sport, it has much in common with traditional sports. It has leagues and franchises, teams and skilled players, competitions, sponsors, broadcasters and, at the elite level, significant prize money and all the risks that come with it. As a technological innovation, it has created new markets and value networks outside the control of sports' traditional hegemony. And while many sports today generate significant revenues, esports differ because of the primacy of its profit motive. Unlike traditional sports, it does not see itself as the custodian of artefacts of great socio-cultural importance. This gives rise to a plethora of governance, policy, regulatory and legal issues. This article examines these issues through the lens of regulatory scholarship. Regulatory scholarship provides a valuable framework for examining why governments regulate in the form in which they regulate. Regulatory theory looks behind governments' stated public interest purposes to examine the impact private interests, institutional parameters, and ideational currents have on the regulatory endeavour. Regulatory scholarship enables us to look beyond traditional doctrinal law to debate the many complex issues and multiple perspectives inherent in the phenomena that is esports.

1 INTRODUCTION

Esports are a modern phenomenon.¹ Their recent growth is nothing short of spectacular; its growth potential excellent. In 2019, global esports revenue was estimated to have been US\$1,096 million, and is forecast to reach US\$1,790 million by 2022, a cumulative annual growth rate from 2017 to 2022 of 22.3% (see Figure 1).² In the same year, esports total global audience was estimated at

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¹ Also known as 'electronic sports'. Esports are defined in this article as 'organised, competitive video gaming'. See Part 2 for an explanation and discussion of this definition.

² Newzoo, *Global Esports Market Report 2019*, Light Version, 24 <<https://newzoo.com/insights/trend-reports/newzoo-global-esports-market-report-2019-light-version/>>.

453.8 million, and is forecast to grow to 645 million by 2022, a cumulative annual growth rate from 2017 to 2022 of 14% (see Figure 2).³ In 2019, these audiences watched over 4,000 tournaments with a collective prize pool of over US\$211 million.⁴ Of these, the largest individual player event (the Fortnite World Cup Finals) offered a prize pool of US\$15.29 million, and the largest team event (DOTA's The International Championship Tournament) a prize pool of US\$34.33 million.⁵ In these events, the winner, and members of the winning team, each earned approximately US\$3 million, more than that year's winner of the Australian Open Tennis.⁶

Figure 1
Esports Global Revenue Growth

Figure 2
Esports Global Audience Growth

³ Ibid 23. PwC also identify esports as the sport with the greatest potential to grow revenues ((PwC, *Sports industry: Time to refocus* (PwC's Sports Survey 2019) 14-15 <<https://www.pwc.ch/en/insights/sport/sports-survey-2019.html>>.

⁴ Kevin Hitt, 'The Top 10 Esports of 2019 by Total Prize Pool', *The Esports Observer* (online), 27 December 2019 <<https://esportsobserver.com/biggest-esports-2019-prize-pool/>>. See also Esports Earnings, Top Games of 2019 <<https://www.esportsearnings.com/history/2019/games>>.

⁵ Statista, Leading esports tournaments worldwide as of November 2019, ranked by overall prize pool <<https://www.statista.com/statistics/517940/leading-esports-tournaments-worldwide-by-prize-pool/>>.

⁶ Cale Michael, 'The International 2019 prize pool surpasses \$33 million', *DOT Esports* (online), 15 August 2019 <<https://dotesports.com/dota-2/news/the-international-2019-prize-pool-surpasses-33-million>>; Sean Mantesso, 'How esports went from child's play to a multi-million-dollar global juggernaut', *ABC News* (online), 10 September 2019 <<https://www.abc.net.au/news/2019-09-10/how-esports-went-from-childs-play-to-global-juggernaut/11480732>>.

In Australia, historically slower internet speeds stunted esports uptake.⁷ As a result, its size is more modest. In 2018, the Australian esports market was estimated to be worth only A\$4 million, although this is estimated to double to A\$8 million in 2023.⁸ Tournament prize money also pales in comparison to international events, with major tournaments offering prize pools of A\$50,000.⁹

As esports has grown, it not surprisingly has become the focus of academic debate and discussion. Amongst legal scholars, the discussion largely has centred on the legal issues that arise from the esports endeavour. Numerous articles catalogue these legal issues; some provide a deeper analysis of them.¹⁰ The purpose of this article is not to conduct a legal doctrinal analysis. Rather, its purpose is to take a step back from (and above) the examination of legal issues to examine esports through the lens of regulatory scholarship and ask whether governments should involve themselves in the governance and regulation of esports, and if the answer to that question is ‘yes’, how? As a sport? As a commercial activity? As a hybrid of both?

This is an important question because important consequences attach to its answer. As Pomfret and Wilson observe, ‘[t]he “peculiar” nature of sporting activities makes them distinct from other types of industry and has led to extensive government intervention.’¹¹ These interventions range from providing generous subsidies, grants and other funding, to exemptions from labour,

⁷ Bridget Brennan, ‘Australian gaming industry being held back by lagging internet speeds’ *ABC News* (online), 11 August 2016 <<https://www.abc.net.au/news/2016-08-11/slow-internet-speeds-holding-back-gaming-industry/7719888>>.

⁸ PwC Australia, *Australian Entertainment & Media Outlook 2019-2023 - Interactive games and e-sports* <<https://www.pwc.com.au/industry/entertainment-and-media-trends-analysis/outlook/interactive-games.html>>. Cf. IBIS World that estimates the Australian esports industry will have been worth A\$20 million in 2019 (Anthony Colangelo, ‘Buried treasure: High school gamers at forefront of eSports growth’ *The Sydney Morning Herald* (online), 28 April 2019 <<https://www.smh.com.au/business/companies/buried-treasure-high-school-gamers-at-forefront-of-esports-growth-20190417-p51f18.html#targetText=While%20the%20global%20eSports%20industry,2019%2C%20according%20to%20IBIS%20World>>).

⁹ Michelle Mannering, ‘Melbourne Esports Open sets new record, shows off new games’, *Daily Esports* (online), 2 September 2019 <<https://www.dailyesports.gg/melbourne-esports-open-sets-new-record-shows-off-new-games/>>.

¹⁰ See generally: Mark Lebbon, ‘An Australian perspective on the esports industry and its core legal issues’, *LawInSport* (online), 10 July 2018 <<https://www.lawinsport.com/topics/item/an-australian-perspective-on-the-esports-industry-and-its-core-legal-issues>>; John T Holden, Anastasios Kaburakis and Ryan Rodenberg, ‘The Future is Now: Esports Policy Considerations and Potential Litigation’ (2017) 27 *Journal of Legal Aspects of Sport* 46; Jas Purewal and Isabel Davies, ‘The eSports Explosion: Legal Challenges and Opportunities’ (2016) 9(2) *Landslide* 24; James Gatto and Mark Patrick, ‘Overview of Select Legal Issues with eSports’ (2017) 6(3) *Arizona State Sports and Entertainment Law Journal* 427-446.

¹¹ Richard Pomfret and John K Wilson, ‘The Peculiar Economics of Government Policy Towards Sport’ (2011) 18(1) *Agenda* 85, 85.

competition, migration and gambling legislation, through to bespoke legislation (e.g., Olympic insignia protection; anti-doping institutions and rules).¹² Should esports be entitled to these funding and regulatory exemptions and protections? It also is an important question because of the valuable insights and lessons its examination might offer to better understand the regulation of traditional sports (and possibly other activities) more broadly.

Regulatory scholarship provides a valuable lens with which to answer this question. Regulatory scholarship recognises that society ‘today is both more diverse and increasingly complex, with regulatory functions being undertaken by a variety of different actors (public and private; state and non-state) across multiple sites (local, national and international) and through a variety of different mechanisms (rule based and non-rule based).’¹³ It also recognises that regulation is broader than a legal instrument emanating from the legislative processes of Parliament. As Hodge observes, regulatory scholars ‘tend not to focus on legal doctrine and the text of legislative instruments, but instead debate how regulatory systems can be best designed, what tools and mechanisms work most effectively in responding to particular circumstances, and the degree to which citizens and other stakeholders see regimes as having legitimacy and credibility.’¹⁴ Further, and importantly for the purposes of this article, regulatory scholarship provides a framework for examining why governments regulate in the form in which they regulate. Regulatory theory looks behind governments’ stated public interest purposes for regulating to examine the impact that private interests, institutional parameters and ideational currents have on the regulatory endeavour.¹⁵ All of this combines to enable us to look beyond traditional doctrinal law to debate the many complex issues and multiple perspectives inherent in the phenomena that is esports.

This article proceeds in three parts. Part 2 explores the threshold question of ‘what are esports’. Part 3 then examines whether esports constitute a ‘sport’, before addressing the question ‘how should esports be governed and regulated’ in Part 4. Part 4 itself is divided into three sub-parts. Part 4.A examines the theories of regulation and how they apply to the regulation of traditional sports; Part 4.B examines the policy, regulatory and legal issues emanating from esports; and Part 4.C examines how those issues might best be governed and regulated.

¹² See ns 90-94 and accompanying text.

¹³ Eric L Windholz, *Governing through Regulation: Public Policy, Regulation and the Law* (Routledge, 2018) 27.

¹⁴ Graeme Hodge, ‘Public Policy and Administration in an Era of Regulatory Capitalism’ in Thomas R Klassen, Denita Cepiku and TJ Lah (eds), *The Routledge Handbook of Global Public Policy and Administration* (Routledge, 2017) 15, 44 (citations omitted).

¹⁵ For an overview of these theories (public, private, institutional and ideational), see Windholz, above n 13, Ch. 3.

2 WHAT ARE ESPORTS?

When approaching the question ‘what are esports’, one is confronted with a variety of lay, industry and scholarly definitions.¹⁶ Notwithstanding some differences amongst them, most of these definitions share three common elements, namely that esports are: (1) organised; (2) competitive; (3) video gaming.¹⁷ Each of these elements are essential to the concept of esports. Let us look at each in turn, starting with ‘video gaming’.

A Video gaming

Video gaming refers to the playing of a video game. Video games have two important elements. First, they are played by people interacting through a variety of information and communication technologies. Some of these technologies require subtle physicality such as pressure on a toggle or pressing a button; others that employ motion controller technology require more overt physical activity. Second, the game’s outcome-defining activities take place within computer generated and mediated environments. As Adams, Devia-Allen and Moore observe: ‘While players operate the games within the “real physical world”, the

¹⁶ One also is confronted by spelling differences, with ‘Esports’, ‘eSports’, ‘e-sports’ and ‘esports’ all being used to varying degrees. Notwithstanding the bastion of the English language (the *Oxford English Dictionary*) adopts the spelling ‘e-sports’, this article uses the spelling ‘esports’. It is the spelling employed by most major esports organisations, and is the preferred spelling of Associated Press (Kieran Darcy, ‘Why the Associated Press Stylebook went with esports, not eSports’, *ESPN* (online), 7 July 2017 <https://www.espn.com.au/esports/story/_/id/19860473/why-associated-press-stylebook-went-esports-not-esports>).

¹⁷ See e.g., Newzoo, above n 2, 4; Juho Hamari and Max Sjöblom, ‘What is eSports and why do people watch It?’ (2017) 27(2) *Internet Research* 211, 211; Seth E Jenny, R Douglas Manning, Margaret C Keiper and Tracy W Olrich, ‘Virtual(ly) athletes: Where esports fit within the definition of “sport”’ (2017) 69(1) *Quest* 1, 4; Holden et al., n 10; Veli-Matti Karhulahti, ‘Reconsidering Esport: Economics and Executive Ownership’ (2017) 74 *Physical Culture and Sport, Studies and Research* 43, 45. Some definitions add to these elements. For example, Wagner includes ‘develop[ing] and train[ing] mental or physical abilities in the use of information and communication technologies’ (which he refers to a ‘cyberfitness’ (Michael Wagner, *On the Scientific Relevance of eSports*, proceeding of the 2006 International Conference on Internet Computing and Conference on Computer Game Development 3 <<https://www.semanticscholar.org/paper/On-the-Scientific-Relevance-of-eSports-Wagner/5be4a1125a6c473259183698109e301c6c5309cd> accessed 26 January 2020)>); and Hollist who requires there be an audience (Katherine E. Hollist, ‘Time to be Grown-Ups About Video Gaming: The Rising eSports Industry and the Need for Regulation’ (2015) 57 *Arizona Law Review* 823, 825). The definition is susceptible to criticism for being too simple and generic. However, the definition of esports (like sports) needs to be broad to cover its different games, genres and disciplines, and different levels of skill, competition and professionalism.

outcomes of these actions occur in the virtual world through a human-computer interface purposed to allow competition among players.’¹⁸

Table 1 (below) describes the major genres of video games the bases of esports competitions, and lists each genre’s most popular esports games.¹⁹ As can be seen, a dichotomy can be drawn between esports that simulate traditional sports, and esports that do not. The later generally are fantasy based, and often involve significant violence. Interestingly, esports based on fantasy-based video games involving violence have proven to be the most popular and lucrative. Ranking esports in terms of tournament prize pool, players and number of tournaments, in 2019 esports based on games of violence occupied nine of the top ten positions. The highest-ranking esports based on traditional sports ranked 15 (FIFA 19) and 23 (F1 2019).²⁰

¹⁸ Kelly L Adams, Gabriella Devia-Allen and Maria A More, ‘What is Esports?’, in R. Rogers (ed.), *Understanding Esports: An Introduction to the Global Phenomenon* (Lexington Books, 2019) 3, 5. See also Cem Abanazir, ‘E-sport and the EU: the view from the *English Bridge Union*’ (2019) 18 *The International Sports Law Journal* 102, 107 who observes that with esports (unlike traditional sports) there is a ‘disassociation’ between action (in the real world) and effect (in the virtual world).

¹⁹ EsportsBettingElite, ‘What type of games does esports include?’ <<http://www.esportsbettingelite.com/learn-esports/what-types-of-games-does-esports-include/>>. The genres listed in Table 1 are not exhaustive. Moreover, there are different ways to classify genres, and the one game can have elements of multiple genres. See e.g., Vince, ‘The Many Different Types of Video Games & Their Subgenres’, *iD Tech* <<https://www.idtech.com/blog/different-types-of-video-game-genres>> for a list of 49 genres and sub-categories.

²⁰ Esports Earnings, above n 4.

Table 1
Major esports genres and games

Genre	Description	Popular Games (and publisher ²¹)
Sports video games	Games that simulate the real world-sporting environment to create an authentic competitive environment using actual player, team and stadia likenesses. ²²	<i>FIFA</i> , <i>NHL</i> , <i>Grand Slam Tennis</i> , <i>NBA Live</i> (Electronic Arts Inc (EA Sports)) <i>NBA2K</i> (2K Games)
Fighting games	Games that involve two players controlling characters engaged in hand-to-hand combat.	<i>Mortal Kombat</i> (Interactive Entertainment) <i>Street Fighter</i> (Capcom) Super Smash Bros (Nintendo)
Real-time strategy games	Games that involve strategically building and deploying an army to gain dominance over a map and defeat other players' armies	<i>StarCraft</i> (Blizzard Entertainment) <i>Command and Conquer</i> (Electronic Arts Inc (EA))
First-person shooter games	Games that involve weapon-based combat in the first-person perspective (so that the player sees the environment as the character would see it).	<i>Call of Duty</i> (Activision) <i>Halo</i> (Xbox Game Studio) <i>Overwatch</i> (Blizzard Entertainment) <i>Counter-Strike</i> (Valve Corporation)
Multiplayer online battle arena games	Games in which a player controls a single character in a team that competes with, and seeks to defeat, other teams in the environment.	<i>League of Legends</i> (Riot Games) Fortnite (Epic Games) <i>DOTA2</i> (Valve Corporation)

²¹ The video game publisher is, as its name suggests, the company that makes the video game available to the public. The games may be developed by the game publisher internally, or externally by a video game developer with which the publisher collaborates or from which it otherwise obtains the commercial rights. Some games are published by multiple companies over time. Table 1 lists the game's predominant publisher.

²² These games are made possible only by the governing body of the simulated sport collaborating with the game developer and publisher, and licensing to them the right to use their sports', and their sports' team, athletes and sponsors, likenesses and intellectual property. Note there also are sports video games that present the sport in a stylised manner adopting imagery that is more generic. They have not proven to be popular bases for esports competitions, however.

B Competitive

The second element is that the game be competitive. This, in turn, requires that the video game connect players (individually or in teams) with other players in a way that enables them to compete based on their comparative skills, and which produces winners and losers.²³ Without the competitive element, the video game remains just that, a game. Esports have developed various competitive formats, often informed by those of traditional sports.²⁴ For example, some esports adopt a tournament format. Similar in approach to professional golf and tennis, there is a tournament circuit with various competitions throughout the year, success in which qualifies players to participate in the competition's major tournaments. Valve Corporation's *Counter-Strike* adopts this format.²⁵ Another format are promotion and relegation systems adapted from European football competitions. In these systems, teams move between leagues or divisions based on their performance in the completed season, with the best performing teams being promoted to higher leagues or divisions for the next season, and the worst performing teams being relegated to lower leagues or divisions. Activision's *Call of Duty* and Riot Games' *League of Legends* have employed this format.²⁶ And yet another format are franchised leagues in which guaranteed places in the league are franchised (licensed) to private owners who recruit players to form teams to compete in the leagues. Franchised leagues resemble America's Major Baseball League (MLB) and cricket's Indian Premier and Big Bash Leagues. Blizzard Entertainment's *Overwatch* League is an example of such a competition. Like the MLB, it also has minor leagues in which franchised teams compete and between which players can be switched.²⁷

C Organised

Finally, to qualify as an esports that competition must be organised by a third party independent of the players themselves. As Adams, Devia-Allen and Moore point out, this organisational element differentiates esports 'from casual, albeit competitive play amongst friends or acquaintances'.²⁸ Game publishers are

²³ Adams et al, n 18, 6.

²⁴ For a description of these formats see: John George and Brett Sherrick, 'Competition Formats in Esports' in R. Rogers (ed.), *Understanding Esports: An Introduction to the Global Phenomenon* (Lexington Books, 2019) 45; John T Holden and Thomas A Baker III, 'The Econtractor? Defining the Esports Employment Relationship' (2019) 56(2) *American Business Law Journal* 391, 400-410.

²⁵ George and Sherrick, above n 24, 46-48.

²⁶ Ibid, 49-51.

²⁷ Ibid, 51-54.

²⁸ Adams et al, n 18, 6.

central to the organising of esports competitions.²⁹ Some like Riot Games, publisher of *League of Legends*, organise competitions involving their games themselves.³⁰ Others licence third parties to do so. An example of the latter is Valve Corporation's licensing of ESL (formerly known as Electronic Sports League) to produce competitions for its *Counter-Strike* and *DOTA2* games.³¹

It also is important to observe that as esports competitions have become larger and more lucrative, their organisation has become more structured and institutionalised. Esport competition organisers (be they the game publisher or licensed third party) have developed sophisticated regulatory structures to govern their competitions, including standardised rules, mechanisms to enforce those rules, and sanctions that attach to their breach.³² And the teams that compete in the competitions too have become more sophisticated, contracting players, employing managers and trainers, and implementing sometimes rigorous training schedules.³³ This increased level of professionalism has seen competitions, teams and individual players attract passionate fan bases and, in turn, significant sponsorships from mainstream commercial actors, such as Intel, Coca-Cola, Red Bull, Mobil, Audi and Airbus, to name but a few.³⁴

3 ARE ESPORTS 'SPORTS'?

The next question to consider is whether esports are 'sports'? This is a much debated and heavily contested question. Answering the question requires us to define what we mean by the term 'sport'. Sport, like art, is an 'essentially contested concept', something people recognise and intuitively understand but whose meaning and use (interpretation and application) is disputed and

²⁹ See Table 1 for the publishers of the most popular esports video games; and n 21 for an explanation of game publishers.

³⁰ Lebbon, above n 10 observes that in doing so, Riot Games employs the players and controls every aspect of the league and its various events.

³¹ See ESL's website - <<https://www.eslgaming.com/>>.

³² See e.g., the *League of Legends* 2019 Official Rules at <https://nexus.leagueoflegends.com/wp-content/uploads/2019/01/2019-LCS-Rule-Set-v19.3_uh6o67g0zd58db0o5p08.pdf>; and ESL's Global Rules at <<https://play.eslgaming.com/dota2/europe/dota2/major/rules>>.

³³ Harrison Jacobs, 'Here's the crazy training schedule of young guys who make a huge salary playing video games', *Business Insider Australia* (online), 12 May 2015 <<https://www.businessinsider.com.au/pro-gamers-explain-the-insane-training-regimen-they-use-to-stay-on-top-2015-5>>.

³⁴ Andrew Meola, 'The biggest companies sponsoring eSports teams and tournaments' *Business Insider* (online), 12 January 2018 <<https://www.businessinsider.com/top-esports-sponsors-gaming-sponsorships-2018-1/?r=AU&IR=T>>.

continuously debated.³⁵ Definitions of 'sport' abound.³⁶ In answering the question are esports sports, I have chosen to eschew definitions found in legal, regulatory and policy documents. As those well versed in these fields know - and as Table 2 illustrates - these definitions are malleable and purposive, crafted to further the policy objective sought to be achieved.

Table 2
Definitions of sport (illustrative examples)

Source	Purpose	Definition
United Nations, <i>Sport as a Tool for Development and Peace</i>	Sport as a means to promote education, health, development and peace	'... all forms of physical activity that contribute to physical fitness, mental well-being and social interaction, such as play; recreation; organized, casual or competitive sport; and indigenous sports or games.' ³⁷
Council of Europe, <i>European Sports Charter 1992</i>	Promotion of sport as an important factor in human development	"Sport" means all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels.' ³⁸
<i>Charities Act 2011</i> (UK)	Advancement of amateur sport	"Sport" means sports or games which promote health by involving physical or mental skill or exertion.' ³⁹
Sport Australia (Australian Sports Commission)	Eligibility criteria for national sporting organisations to access resources	'A human activity capable of achieving a result requiring physical exertion and/or physical skill which, by its nature and

³⁵ WB Gallie, 'Essentially Contested Concepts' (1956) 56(1) *Proceedings of the Aristotelian Society* 167.

³⁶ For a comprehensive examination of a number of these definitions and whether esports satisfy them see Holden et al., n 10. See also Abanazir, above n 18 for an analysis of whether esports satisfy European Union legal and policy definitions of sport.

³⁷ UN Inter-Agency Task Force on Sport for Development and Peace, *Sport as a Tool for Development and Peace* (United Nations, 2003)

³⁸ Council of Europe, Committee of Ministers Recommendation No.R (92) 13 REV of The Committee of Ministers to Member States on the Revised European Sports Charter, Article 2(1)(a) <<https://rm.coe.int/16804c9dabb>>.

³⁹ *Charities Act 2011* (UK), s 3(2)(d)

	made available by Sport Australia	organisation, is competitive and is generally accepted as being a sport'. ⁴⁰
<i>Racing Act 1958</i> (Vic)	Registration of persons to carry on the business of bookmaking	"sports" means bicycle races, foot races, coursing matches, dog races (other than greyhound races), cricket matches, football matches or any other game, exercise, pastime or contest (other than a horse race) to which persons commonly resort as spectators. ⁴¹

Moreover, to focus on existing legal, regulatory or policy definitions is to miss the point of the article. The question being considered in this article is not whether esports *do* fall within an existing definition and are subject to existing government policy, regulation or law, but whether esports *should* be so subject to government policies, regulation or law, and therefore defined by government as a sport. For this reason, I have chosen to approach the question conceptually, employing Allen Guttmann's categorisation of non-utilitarian activities (i.e., those that are not necessary for survival).⁴² Guttmann's categorisation has been described as a 'seminal definition' in the field of sport sociology,⁴³ and 'essential for determining whether esports are appropriately conceptualised as a sport'.⁴⁴

Guttmann conceptualised four types of non-utilitarian activities: play; games; contests; and sports (see Figure 3).⁴⁵

⁴⁰ Sport Australia, *Recognition of National Sporting Organisations*, <https://www.sportaus.gov.au/recognition_of_national_sporting_organisations>.

⁴¹ *Racing Act 1958* (Vic), s 84

⁴² Allen Guttmann, *From Ritual to Record: The Nature of Modern Sports* (Columbia University Press, 2004) 1.

⁴³ Jenny et al, n 17, 5. See also Malcolm who refers to Guttmann's categorisation as an 'excellent definitional statement' (Dominic Malcolm, *The SAGE Dictionary of Sport Studies* (Sage, 2008) 238).

⁴⁴ Nicholas D Bowman and Gregory A Cranmer, 'Can Video Games Be a Sport? Debating and Complicating Esports as Physical Competitions' in R. Rogers (ed.), *Understanding Esports: An Introduction to the Global Phenomenon* (Lexington Books, 2019) 15, 16.

⁴⁵ Guttmann, above n 42, 9.

Figure 3
Guttman's Taxonomy of Non-utilitarian Activities

According to Guttman, the most general category of activity is ‘play’, which he defines as an activity engaged in for the pleasure of the activity - ‘an end in itself’ - and not as a means to achieving some other end such as money or health. Play may be spontaneous or organised. Guttman refers to organised play as ‘games’. Games are structured by rules that provide a goal and restrict the path through which that goal may be accomplished.⁴⁶ Guttman next differentiates between competitive and non-competitive games. Competitive games, which Guttman labels ‘contests’, requires competition between individuals (or teams of individuals) producing winners and losers. This competitive element gives the activity an end – a reward – beyond the pleasure of the activity itself. That reward may be monetary, symbolic (e.g., a ribbon or medal) or simply the satisfaction of outperforming other players. And when those contests are determined primarily through physical skills (as opposed to intellectual skills), they constitute a ‘sport’.⁴⁷ So, in summary, according to Guttman, sports are organised (in the sense of being structured by rules), competitive and physical.

So how do esports perform against the definition? Esports (as we have explained them) clearly are organised and competitive forms of play. Whether they are physical contests is the contentious element of Guttman’s definition.

⁴⁶ Suits too argues that a goal and rules are necessary components of a game and, therefore, of a sport. It is rules that imbue sports with their degree of difficulty by forbidding the easiest way to achieve the goal (Bernard Suits, ‘The Elements of Sport’, in W. J. Morgan (ed.), *Ethics in Sport* (Human Kinetics, 2nd ed., 2007) 9, 11-12).

⁴⁷ The requirement for (physical) skill also differentiates sports from games of chance.

Guttman is not alone in requiring sporting activities to be physical.⁴⁸ Many commentators require that the activity require either a high degree of physicality and/or that the physical activity be significant, or determinative of, or central to, the contest's outcomes.⁴⁹ Esports perceived lack of physicality remains the greatest barrier to its general acceptance as a sport. As Bowman and Cranmer observe, an activity played sitting down with very little physical exertion by largely untrained physical bodies is, for many, the 'anathema to athletic competition'.⁵⁰

What type of physicality – and how much of it – is necessary to satisfy this criterion? The answer to this question is left largely ill-defined by most commentators. Coakley observes that '[w]here the line is drawn between physical and nonphysical, between complex and simple, and between vigorous and nonvigorous, is largely an arbitrary decision.'⁵¹ It is not the purpose of this article to attempt to divine a comprehensive answer to this question capable of universal application. It suffices for the article's purpose to observe that esports require physical activity and motor skills that can vary from pressing a button in some games, to more overt physical activity in games that employ motion controller technologies, and that the skilful performance of these physical components can directly impact the participant's in-game performance.⁵² For example, Rambusch, Jakobsson and Pargan found that esports reward 'fast reflexes, good manual dexterity and excellent eye-hand co-ordination.'⁵³ Other studies have demonstrated the physical exertion associated with intense and sustained playing

⁴⁸ Most of the illustrative definitions of sport in Table 2 above require a physical element.

⁴⁹ See, for e.g., Jenny et al, n 17, 9 who conclude '[i]t is clear sport is physical at its core'; Dennis Hemphill, 'Cybersport' (2005) 32 *Journal of the Philosophy of Sport* 191, 199 who observes that in the sports-philosophy literature, 'physical prowess is the key feature distinguishing sport from games'; Jay J. Coakley, *Sport in Society: Issues and Challenges* (Time Mirror/Mosby College Publishing, 4th ed., 1990) 15 who requires that sport 'involve vigorous physical exertion or the use of relatively complex physical skills'; Suits, above n 46, 15-16 who argues that sports involve physical skills; and Jim Parry, 'E-sports are Not Sports' (2018) *Sport, Ethics and Philosophy* <https://doi.org/10.1080/17511321.2018.1489419> at p. 7 who argues that sports are physical 'in the sense that the actual physical movement produces the outcome'.

⁵⁰ Bowman and Cranmer, above n 44, 15. See also Jenny et al, n 17, 5.

⁵¹ Coakley, above n 49, 9.

⁵² It is noted though that at present, there are comparatively fewer esports competitions based on video games employing motion controller technologies.

⁵³ Jana Rambusch, Peter Jakobsson and Daniel Pargman, 'Exploring E-sports: A Case Study of Gameplay in Counter-strike' (Paper presented at the Digital Games Research Association International

Conference, Tokyo, Japan) 59 <<http://www.diva-portal.org/smash/record.jsf?pid=diva2%3A25495&dsid=-7574>>. See also Jenny et al, n 17, 9 who argue that 'successfully directing an avatar through the mechanism of handheld controls, while engaging in eSports, requires precise physical skill' and Hemphill, above 49, 204 who concludes that 'whether through keyboard, game pad, foot pedal, cycling ergometer, or whole-body controllers ... the prowess involved in certain computer games is sufficiently "physical" and "skillful" to qualify them as sport in their own right.'

of video games.⁵⁴ And other studies still have demonstrated the high physical and psychological intensity of training at esports' elite levels, well in excess of the World Health Organisation Guidelines for Physical Activity.⁵⁵ Moreover, this physical activity is similar in nature and degree to activities that have long been accepted as sports, such as shooting and archery.

It is clear from this discussion that lay perceptions of esports being an activity with no physicality are not accurate. Esports involve a physical element, and some a significant physical element. It follows from this that when played in an organised competitive manner, they are capable of being classified as a sport. However, esports also possess features that differentiate them from traditional sports. It is to these features that the article now turns.

A Esports differentiating features

The most distinctive differentiating feature of esports is that players' actions are computer-facilitated, the playing environment computer-generated, and the outcome computer-mediated. Esports are an example of a technological innovation par excellence, combining and integrating different technologies to produce new and highly successful products, markets and value networks. However, unlike other recent technologically driven commercial innovations such as ride-sharing apps (e.g., Uber) and online market places (e.g., Airbnb), esports have not proven to be disruptive of traditional sports existing markets and value networks. On the contrary, esports offer opportunities for traditional sports to attract new audiences and to develop new revenue streams. Thus, we have seen examples of traditional sporting leagues and clubs collaborating with video game publishers to develop video game simulations of their sports, and invest in esports leagues and teams (both sports and fantasy based).⁵⁶

⁵⁴ For studies demonstrating the important role of physical skills and exertion in esports, see Bowman and Cranmer, above n 44, 18-23.

⁵⁵ A. M. Pereira et al., 'Virtual sports deserve real sports medical attention' (2019) 5(1) *BMJ Open Sport & Exercise Medicine* Published online 1 December 2019 doi:10.1136/bmjsem-2019-000606

⁵⁶ Examples of league investments include the NBA's role in creating the NBA2k eLeague (Jonathan Landrum, 'NBA, video game company to launch new gaming league in 2018', *NBA* (online) 9 February 2017 <<https://www.nba.com/article/2017/02/09/nba-video-game-company-launch-new-gaming-league-2018>>; the A-League establishing its own esports league called the E-League - <<https://www.a-league.com.au/e-league>>; and the Australian Football League (AFL) collaborating with Riot Games to run a 'League of Legends: League of Origin' competition - <<https://www.afl.com.au/news/136642/league-of-legends-league-of-origin>>. Examples of club investments include Paris St-Germain football club establishing its own esports team - <<https://psg-esports.com/home/>>; and the AFL's Adelaide Football Club and Essendon Football Club investing in esport teams, although the Essendon Football Club recently sold its licence (Max Loughton, 'Say goodbye to the gadget-type operators as Essendon pulls out of esports', *Fox Sports* (online), 3 December 3, 2019 <<https://www.foxsports.com.au/afl/afl-2020-essendon-esports-team-bombers-pull-out-of>

A further differentiating feature is that the physical location model of traditional sports is not necessary in the esports model.⁵⁷ Two important consequences flow from this. First, esports cannot capitalise on the regionalism of traditional sports that sees governments incentivise, invest in and subsidise team's operating within their jurisdiction.⁵⁸ Second, internet technology means that esports competitions can be conducted without bringing players to one physical location. While live stadium events are increasingly popular, esports competitions often are played by players from different countries competing against one another remotely in the game's virtual environment. Moreover, audiences engage with the competitions via online streaming services. The dramatic growth of esports audiences and revenue (see Figures 1 and 2 above) is largely attributable to the streaming of competitions. Twitch (a subsidiary of Amazon), in particular, is credited with esports recent growth and of having 'opened up access to competitive video gaming without regard for geographic constraints'.⁵⁹

Another important differentiating feature is esports overt commercial (profit) orientation. While many sports today are highly commercialised and significant revenue generators, they were not born with the specific purpose of marketing and increasing sales of a commercial product. Esports are first and foremost a commercial tool for the companies that develop and publish the underlying video games.⁶⁰ Esports form an important part of the game publisher's business model, attracting new customers for, and increasing sales of, their games.⁶¹ Game publishers do not perceive of themselves as custodians of artefacts of great social and cultural significance – as guardians of a sporting ideal. Profit maximisation is their primary motivating force. To the extent esports might be considered 'sports', they share more in common with manufacturer (car, engine, tyres, etc) dominated motor sports than they do with Olympic sports.

Game publishers' ownership of the intellectual property (IP) rights in the underlying video games is another important differentiating feature. The ownership and control of these rights gives game publishers significant bargaining power in negotiations with tournament organisers and league

esports-oceanic-pro-league-opl-license-sold-to-pentanetgg/news-story/876ac8183c1a77d3a875f3c67a43fc4c>.

⁵⁷ Joao Pedro Brito Cicio de Carvalho, *Business Models in Professional Electronic Sports Teams* (Master Degree in Marketing and Strategy Thesis, University of Minho, 2015) 22-23.

⁵⁸ Ibid, 22-23. This phenomenon is much stronger in the United States where teams are more portable between cities (see e.g., Marc Edelman, 'Sports and the City: How to Curb Professional Sports Teams' Demands for Free Public Stadiums' (2008) 6 *Rutgers Journal of Law and Public Policy* 35).

⁵⁹ Holden et al., n 10, 47.

⁶⁰ T. L. Taylor, *Raising the Stakes: E-Sports and the Professionalization of Computer Gaming* (MIT Press, 2012) 166. See also Karhulahti, above n 17, 46-7.

⁶¹ Lebbon, above n 10.

administrators, broadcasters and streamers, teams and players, and sponsors and other investors. Karhulahti goes so far as to refer to game publishers having ‘executive ownership’ over esports enabling them to exercise ‘absolute power’.⁶² As noted above, they have used this power to develop sophisticated regulatory structures to govern their competitions.⁶³ This makes them the de facto governing body of competitions utilising their games. It also enables the game publisher to exclude others from conducting competitions using their games. This is an important difference from traditional sports, where the IP in the game itself is not owned by any one entity, thereby allowing rival leagues and competitions to be established (as has been the case with cricket, rugby league, and recently swimming).

Yet another differentiating feature is esports lack of structural specificity. Structural specificity is the term employed by the European Commission in its 2007 White Paper on Sport to describe sports’ ‘pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national basis, and the principle of a single federation per sport.’⁶⁴ Coakley similarly suggests that a characteristic of a sport is that it has achieved a requisite level of ‘institutionalisation’ which he defines as: (a) standardised rules; (2) rule enforcement by regulatory agencies (which he says ‘could include everything from a local community rules committee to the highly organized central office of the National Collegiate Athletic Association’); (3) organisational and technical rationalisation (in the sense of there being coaches, training schedules, uniforms and equipment designed to enhance and maximise performance); and (4) formalised learning of the game’s skills (evidenced by the presence of expert coaches, trainers, managers and team physicians).⁶⁵

As demonstrated in section 1.3 above, individual esport competitions and teams have achieved a reasonably high level of institutionalisation. However, esports as a whole are yet to establish a structure such as that suggested by the European Commission. A single overarching global federation such as FIFA

⁶² Karhulahti, above n 17, 47. Abanazir describes Karhulahti description as ‘spot on’ and notes that the publisher’s IP rights gives it an effective monopoly over who may participate in its competitions (see Abanazir, above n 18, 109).

⁶³ See n 32 and accompanying text.

⁶⁴ European Commission, *White Paper on Sport* (COM(2007) 391 Final) 13. Cf. Beloff who argues that ‘[n]one of these factors seem to me of themselves to differentiate sport in any important sense from other areas of human activity, and all are subject to exceptions.’ (Michael J Beloff QC, ‘Fourth Edward Grayson Memorial Lecture: The Specificity of Sport Rhetoric or Reality?’ (2011) 19 *Sport and the Law Journal* 88).

⁶⁵ Coakley, above n 49, 10-11. See also Jenny et al who also require institutionalisation, but whose elements are: (a) rules are developed and standardized; (b) learning of the game becomes formalized; (c) expertise develops; and (d) coaches, trainers, officials, and governing bodies emerge (Jenny et al, n 17, 13).

(for football) or the ICC (for cricket) is yet to emerge, and a formal enforceable pyramid structure is still to evolve. However, some progress is being made. In 2016, the World Esports Association (WESA) was established by (and consists of) leading professional esports teams and the ESL with the goal of standardising regulations, better representing players and teams, and ensuring a fairer revenue sharing model.⁶⁶ The same year also saw the establishment of the Esports Integrity Commission (ESIC). ESIC works with esports stakeholders to prevent (and if necessary, investigate and prosecute) threats to the integrity of esports competitions including, but not limited to, match-manipulation and doping. ESIC's main members are gambling interests and competition organisers.⁶⁷ And in 2018, the International Esports Federation (IESF) was established at the initiative of the South Korean Government. Its mission is to see esports competitions and athletes accepted on a par with traditional sports. IESF seeks to achieve its mission by establishing standards for referees, players, titles and competitions, hosting world championships, and collaborating with traditional sports' international federations.⁶⁸ The IESF presently consists of 48 national esports federations, one of which is the Australian Esports Association (AESA). Established in 2013, the AESA promotes and advocates for esports in Australia by raising public awareness, advancing esports favourable policies, and developing rules, policies and processes to ensure esports' accountability and transparency.⁶⁹ The existence of rival governing bodies is not without precedent, especially with respect to emerging sports.⁷⁰ Consolidation commonly occurs, although not always as boxing is testament to.⁷¹ And while these bodies represent important progress towards 'structural specificity', noticeably absent from the membership

⁶⁶ WESA website - < <http://www.wesa.gg/>>. WESA has developed a Player Code of Conduct and Arbitration Rules for disputes.

⁶⁷ ESIC website - <<http://www.wesa.gg/>>. It was formerly known as the Esports Integrity Coalition.

⁶⁸ The IESF is a signatory to the World Anti-Doping Code. See the World Anti-Doping Agency (WADA) website - < <https://www.wada-ama.org/en/code-signatories>>.

⁶⁹ AESA website - <<http://www.aesa.org.au/>>. The website does not have a list of members. Sport Australia (formerly the Australian Sports Commission) presently does not recognise the AESA. This is in contrast to Sport New Zealand's recognition of the New Zealand Esports Federation (NZESF) as the national sporting organisation for esports (Jonno Nicholson, 'New Zealand Esports Federation named national sporting organisation for esports', *Esports Insider* (online), 24 March 2020 <<https://esportsinsider.com/2020/03/new-zealand-esports-federation-nso/>>).

⁷⁰ In addition to the above global bodies, there also are regional federations (e.g., the Asian Electronic Sports Federation (AESF) <www.aesf.com>; and the European Esports Federation <www.esportseurope.org>).

⁷¹ Boxing presently has five federations – the International Boxing Association (IBA) that is recognised by the International Olympic Committee; and the four bodies that sanction professional boxing: the International Boxing Federation (IBF); the World Boxing Association (WBA); the World Boxing Council (WBC); and the World Boxing Organization (WBO).

of these bodies are the major game publishers that we observed earlier are esports dominant actors and regulators.

A final differentiating feature is that esports itself is continually evolving. New video games are frequently released, and existing games updated on a near annual basis. Each new game and each new version possess new features and rule changes.⁷² This has fuelled and sustained the growth of the video game business, but the variability and pace of change it introduces poses challenges to the development of a coherent and consistent governance structure such as exist with more rule stable traditional sports.

In conclusion, this discussion has demonstrated that esports possess the attributes of organisation, competitiveness and physicality found in most conceptions of 'sport'. However, it also found that esports have important differentiating attributes. This combination of shared and different attributes arguably give governments a choice – to approach esports as a traditional sport, or to approach it as some other form of activity. After all, as noted above, definitions are malleable and purposive. The choice of whether to treat esports as a sport or some other form of activity ultimately is a question of policy and purpose. And it is to this question that the article now turns.

4 HOW SHOULD ESPORTS BE GOVERNED AND REGULATED?

A strong theme permeating the esports literature is that it requires a better and different governance structure to meet the policy, regulatory and legal challenges it faces. As noted above, the current structure is controlled by game publishers (directly or indirectly), and operates for their commercial benefit.⁷³ Those advocating for change mostly argue for esports to adopt a governance structure akin to those that exist for traditional sports – one with an overarching global governing body sitting atop a pyramid structure, governing and regulating esports and its participants, consistently and coherently across all its guises.⁷⁴ Many also suggest that governments assist in this endeavour.⁷⁵ In this Part this call for governance change is examined and challenged. First, the reader is introduced to four sets of theories that explain why governments regulate in the form in which they regulate, which theories are then applied to explain traditional sports' governance model. Next, the main policy, regulatory and legal issues confronting esports are discussed, after which the article asks whether these

⁷² Holden and Baker, above n 24, 397.

⁷³ See ns 60-63 and accompanying text.

⁷⁴ See e.g., Lebbon, above n 10; Jacqueline Martinelli, 'The Challenges of Implementing a Governing Body for Regulating Esports' (2019) 26(2) *University of Miami International and Comparative Law Review* 499; Hollist, above n 17, 843-4; Laura L Chao, "You Must Construct Additional Pylons": Building a Better Framework for Esports Governance' (2017) 86 *Fordham Law Review* 737, 760-5.

⁷⁵ See e.g., Chao, above n 74, 762-4; Hollist, above n 17, 843-6.

issues justify governments intervening to steer esports towards adopting a traditional sport governance model.

A Theories of regulation and traditional sports

Numerous theories exist to explain why governments regulate in the form in which they regulate. This section categorises them into four sets: public interest theories; private interest theories; institutional theories; and ideational theories.⁷⁶

Public interest theories

The fundamental task of government is to act in the ‘public interest’. But what is the ‘public interest’? A review of the literature reveals two broad approaches to conceptualising the public interest: economic (or market-orientated) approaches and social (value-orientated) approaches.⁷⁷

Economic (or market-orientated) theories of regulation view markets as the best and most legitimate mechanism for the effective production and distribution of goods and services, and which restrict regulation to correcting for market imperfections.⁷⁸ One imperfection often cited to justify government regulation is that sports’ societal benefits (e.g., improved health, productivity and economic activity) are not factored into its price with the result that absent government intervention, less of it would be supplied and consumed than is socially desirable. Economists refer to this as a positive externality, and it is used to justify government expenditure of public money on sports and sporting mega-events.⁷⁹ Another imperfection relates to what some economists refer to as ‘the peculiar economics of sport’ and its need for ‘competitive balance’ and ‘uncertainty of outcome’.⁸⁰ The ‘peculiar economics of sport’ is used to justify exemptions from

⁷⁶ Windholz, above n 13, Ch. 3. These categories are similar to those employed by Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007); and Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 2nd ed, 2012).

⁷⁷ For an overview of the literature see Eric Windholz and Graeme Hodge, ‘Conceptualising Social and Economic Regulation: Implications for Modern Regulators and Regulatory Activity’ (2012) 38 *Monash University Law Review* 212. The literature sometimes refers to a third approach – risk control. Risk control increasingly is the language with which regulatory decisions are explained and justified (see Windholz, above n 13, 39-41. See also: Christopher Hood, Henry Rothstein and Robert Baldwin, *The Government of Risk* (Oxford University Press, 2001); Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage Publications, 1992)). For present purposes, risk is conceptualised as events that threaten the attainment of the economic and social benefits discussed in this section

⁷⁸ For a discussion of the economic theories of regulation see Windholz, above n 13, 36-8.

⁷⁹ Pomfret and Wilson, above n 11, 86-90.

⁸⁰ Ibid, 93-96. Pomfret and Wilson attribute the term ‘peculiar economics of sport’ to Walter C. Neale, ‘The Peculiar Economics of Professional Sports: A Contribution to the Theory of the Firm in Sporting Competition and in Market Competition’ (1964) 78 *Quarterly Journal of Economics* 1.

labour, competition and other laws that create and entrench market imperfections not tolerated in other sectors of the economy. For example, exemptions from labour and competition laws (where they exist) can operate to entrench existing monopolistic structures and the unequal bargaining power of those at their pinnacle.⁸¹

Social (or value-orientated) theories, on the other hand, justify regulation in terms of attaining socially desirable outcomes different to and better than those produced by an efficiently operating market economy.⁸² Socially desirable outcomes advanced by sport (and in the pursuit of which government sporting policies have been justified) include improved quality of life and personal development, social cohesion and reduced isolation.⁸³ But there also are examples of government interventions that run counter to entrenched social values, such as sporting exemptions from laws that prohibit discrimination on the basis of sex, gender and age.⁸⁴

These exemptions – and governments’ tolerance of anti-competitive conduct in this arena – suggest other forces may be at play. This brings us to our second set of theories – private interest theories.

Private interest theories

Private interest theories posit that regulation emerges, not from a benevolent pursuit of the “public interest”, but from the actions of individuals and groups motivated to maximise their (private) self-interest.⁸⁵ There are a number of private interest theories that help explain why and how governments regulate sport. One such theory is capture theory.⁸⁶ Capture theory analogises regulatory

⁸¹ Sport Australia also entrenches the monopoly position of existing sporting organisations by restricting its recognition (a pre-requisite to accessing a range of government provided resources) to the organisation ‘recognised as the pre-eminent organisation in Australia by an international federation which is a member of the Global Association of International Sports Federations.’ (Sport Australia, *Recognition of national sporting organisations* <https://www.sportaus.gov.au/recognition_of_national_sporting_organisations>).

⁸² Windholz, above n 13, 39.

⁸³ See e.g., the Australian Government’s Sport 2030 strategy (Australian Government, *Sport 2030* (Commonwealth of Australia, 2018)).

⁸⁴ See e.g., exemptions from age discrimination legislation: *Equal Opportunity Act 2010* (Vic), s 72(2)(b); *Anti-Discrimination Act 1997* (NSW), s 49ZYW(1); and exemptions from sex and gender discrimination legislation: *Sex Discrimination Act 1984* (Cth), s 42; *Equal Opportunity Act 2010* (Vic), s 72; *Anti-Discrimination Act 1997* (NSW), s 38.

⁸⁵ Windholz, above n 13, 43. These theories were given prominence by the ‘economic theory of regulation’ championed by the Chicago School of Economics in the 1970s. See, eg: George J Stigler, ‘The Theory of Economic Regulation’ (1971) 2 *Bell Journal of Economics and Management Science* 3; Richard A Posner, ‘Theories of Economic Regulation’ (1974) 5 *Bell Journal of Economics and Management Science* 335; Sam Peltzman, ‘Towards a More General Theory of Regulation’ (1976) 19 *Journal of Law and Economics* 211.

⁸⁶ Windholz, above n 13, 43-5

decision making to market decision making and treats regulation as a ‘good’ which is ‘demanded’ and ‘supplied’ according to the same basic principles governing the demand and supply of ordinary economic goods. Posner described the approach best when he said ‘regulation [is] a product allocated in accordance with basic principles of supply and demand ... [and] other things being equal, we can expect a product to be supplied to those who value it the most’.⁸⁷ Strong elements of capture theory are evident in sports regulation. Autonomy and independence from government interference are fundamental principles of all major international and national sporting organisations.⁸⁸ Yet at the same time sporting organisations are proclaiming - and at times vigorously defending - their autonomy,⁸⁹ they also are bringing their significant power to bear upon governments to extract from them significant regulatory support and assistance.⁹⁰ One of the clearest examples of this is their acquiring (capturing) national anti-doping and cheating at gambling laws to support their efforts to address the scourges of performance-enhancing drugs and match-fixing.⁹¹ Other examples include state protection of International Olympic Committee (IOC) intellectual property,⁹² exemptions from anti-discrimination laws,⁹³ and government provided sports dispute resolution forums,⁹⁴ to name but a few.

⁸⁷ Posner, above n 85, 344.

⁸⁸ The IOC, for example, requires National Olympic Committees and international sporting federations affiliated with it to preserve and maintain their autonomy and independence from political, legal, religious and economic pressures which may prevent them from complying with the Olympic Charter (International Olympic Committee, *Olympic Charter* (at 9 October 2018) (*‘Olympic Charter’*) Rule 27.6. See also 2.5 and 25). Similarly, FIFA’s statutes requires that it, its national association members, and any clubs, leagues or any other groups affiliated with its national associations, operate independently and are not influenced by any third parties, including national governments (FIFA, *FIFA Statutes* (at August 2018) (*‘FIFA Statutes’*) arts 14(1)(i), 19(1), 20(2)).

⁸⁹ See e.g., Henk Erik Meier and Borja García, ‘Protesting Private Transnational Authority against Public Intervention: FIFA’s Power over National Governments’ (2015) 93(4) *Public Administration* 890; and Eric L Windholz and Graeme Hodge, ‘International Sports Regulation: An Evolving Private-Public Partnership’ (2019) 45(2) *Monash University Law Review* 298, 317-8 for a discussion of how the IOC and FIFA protect their and their associates’ autonomy and independence.

⁹⁰ Major sporting organisations possess significant power: structurally by controlling entry into their competitions of national teams and athletes; instrumentally through their ‘soft power’ influences such as funding of grass roots sport and knowledge and expertise; and discursively by establishing in the minds of the citizenry that they (and not government) are the legitimate actor to govern sports. For a discussion of their power and the manner with which it is employed to influence governments, see Windholz and Hodge, above n 89.

⁹¹ For anti-doping laws see *Australian Sports Anti-Doping Authority Act 2006* (Cth) and *Australian Sports Anti-Doping Authority Regulations 2006* (Cth); and for cheating at gambling laws see e.g., *Crimes Act 1958* (Vic), Div. 2B; *Crimes Act 1900* (NSW), Pt 4ACA.

⁹² See e.g., *Olympic Insignia Protection Act 1987* (Cth).

⁹³ See n 84 above

⁹⁴ See e.g., *National Sports Tribunal Act 2019* (Cth).

Another private interest theory is public choice theory which, despite its name, describes situations where politicians, public servants and regulators seek to advance their own private interest, and not the public interest.⁹⁵ Sport always has been used for political purposes,⁹⁶ and politicians have always seen siding with sporting interests election enhancing, with the result that sporting organisations seeking favourable regulatory settings often find willing partners in politicians seeking to share the spotlight their sporting success provides.

A third private interest theory is interest group theory. Interest group theories posit that regulation is the product of competition between different self-interested groups.⁹⁷ And this too can be seen in the sporting arena – with much regulation the product of balancing and trading off the interests of, for example, federations, leagues, teams, athletes, broadcasters and most recently, gambling interests.

Public interest theories supply the technical or theoretical justifications for why governments regulate. Private interest theories cast light on the darker motivations of actors involved in the regulatory process, providing what Morgan and Yeung refer to as ‘a necessary corrective to the excessive optimism or even naïveté of public interest theories’.⁹⁸ Sports’ governance and regulatory structures have emerged from a merging of these public and private interests. And over time they have become entrenched institutionally and in the minds of the public. This brings us to our third and fourth sets of theories.

Institutional and ideational theories

Institutions and ideas matter. As we have observed, most international sports have what the EC refers to as ‘structural specificity’ – a ‘pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national

⁹⁵ Windholz, above n 13, 45-7.

⁹⁶ The gladiators in the colosseum is an early example of sport being used for political purposes. More recent examples include African nations during the 1970s using sport to distract both domestic and international audiences from their autocratic tendencies, and communist countries using sport to demonstrate their superiority over Western democracies (Lincoln Allison and Terry Monnington, ‘Sport, Prestige and International Relations’ in Lincoln Allison (ed), *The Global Politics of Sport: The Role of Global Institutions in Sport* (Routledge, 2005) 5). Closer to home and more recent, is the Morrison Coalition Government’s targeted use of sports grants to advance its reelection prospects (David Speers, ‘Bridget McKenzie’s sport grant cash splash is a particularly brazen example of pork-barreling’ *ABC News* (online), 16 January 2020 <<https://www.abc.net.au/news/2020-01-16/bridget-mckenzie-saga-pork-barrelling-brazen-example/11874224>>).

⁹⁷ Windholz, above n 13, 47-9.

⁹⁸ Morgan and Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 52.

basis, and the principle of a single federation per sport.’⁹⁹ Three features of these structures are critical for present purposes. First, these structures did not arise overnight. They evolved over time. Second, these structures emerged in the absence of direct government intervention. Rather (and as discussed above), they are the product of a range of actors asserting, contesting and often compromising their interests in the pursuit of a shared goal. Third these structures have proven durable and stable because they operate as coordinating mechanisms that aggregate the preferences of its constituent parts, control (or at least constrain) their self-interest, and mediate between public and private interests in a manner that generates collective benefits across sports’ various stakeholders.¹⁰⁰ Such has been their success that sports’ pyramid structure has become a powerful idea in its own right. They are the accepted norm for how sports should be governed and the template for how sports and sporting organisations should be structured.¹⁰¹ This is evidenced by the EC’s identifying it as one of two elements that give sport its specificity,¹⁰² by most international sporting organisations basing their governance structures on the examples provided by sports first truly global organisations (the IOC and FIFA), and by it being the template upon which calls for esports governance reforms are based.

That sports should be governed in this manner also is reflective of another powerful idea, namely that sports should be self-regulatory, autonomous and independent of government.¹⁰³ This is an idea that has been shaped and promulgated by the sporting organisations themselves. As Windholz and Hodge observe:

‘They have established in the minds of world citizens that they — the IOC and FIFA — exist to nurture and promote the purity of sport and the sporting ideal for the betterment of all mankind, unhindered and unencumbered by the national prejudices and political biases that attach to nation-states and their governments. They have been able to project their interests as being synonymous with the general interest not of any one state or people, but of all states and all people, thereby creating the perception that they have the ‘right’ to govern their sports and to the

⁹⁹ European Commission, above n 64, 13.

¹⁰⁰ This is an example of rational choice institutionalism. See Windholz, above n 13, 52-3. See also B Guy Peters, ‘Institutional Theory’ in C K Ansell and J Torfing (eds), *Handbook on Theories of Governance* (Edward Elgar, 2016) 308, 311; Kenneth A Shepsle, ‘Rational Choice Institutionalism’ in R A W Rhodes, S A Binder and B A Rockman, *The Oxford Handbook of Political Institutions* (Oxford University Press, 2008) 23.

¹⁰¹ This is an example of sociological institutionalism. See Windholz, above n 13, 53-4.

¹⁰² The other being ‘[t]he specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions’. European Commission, above n 64, 13.

¹⁰³ For a discussion of ideational theories, see Windholz, above n 13, 56-8.

outcomes they pursue, and that operating in accordance with their interests is the 'right' thing to do.'¹⁰⁴

These institutional and ideational forces has spawned a global diffusion of sport's pyramid structure. This, in turn, has seen the patterns of power reflected in that structure reproduced across the sporting landscape.

In conclusion, there are public interest reasons for governments to intervene in the governance and regulation of traditional sports. However, as we have seen, these reasons often have been shaped and influenced by powerful private interests acting upon susceptible political actors to advance their own interests. This has resulted in regulatory regimes in which sporting organisations maintain their autonomy and independence from government while simultaneously receiving from those governments a slew of benefits ranging from generous subsidies, to regulatory exemptions, to bespoke legislation. They also are regimes in which private sporting organisations become rule-makers, and governments are rule-takers. Windholz and Hodge label the resulting regulatory regime a private-public partnership, one in which the private sector (sporting organisations) have co-opted the public sector (governments) to assist it in delivering its private sector objectives.¹⁰⁵

Esports similarities with traditional sports combine with strong institutional and ideational currents to create an environment within which traditional sports' governance and regulatory framework has become the default frame of reference for those advocating for reform of esports' governance arrangements to address the policy, regulatory and legal challenges esports face. However, an uncritical transfer of traditional sports' governance and regulatory framework to esports risks policy and regulatory failure – of benefits that are not worth the cost (in taxpayer dollars and rights sacrificed), or of proscriptions and restrictions that are detrimental to esports, its participants and/or society more broadly.¹⁰⁶ So before we hitch a ride on the governance reform bandwagon, let us examine those policy, regulatory and legal challenges.

B Policy, regulatory and legal issues

The policy, regulatory and legal issues confronting esports are numerous.¹⁰⁷ The purpose of this section is not to undertake a comprehensive analysis of them,

¹⁰⁴ Windholz and Hodge, above n 89, 329.

¹⁰⁵ Ibid, 327.

¹⁰⁶ Dolowitz and Marsh would refer to this as 'inappropriate transfer' – where insufficient attention is paid to the different economic, social, political and ideological contexts of the different activities (David P Dolowitz and David Marsh, 'Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making' (2000) 13 *Governance* 5).

¹⁰⁷ Like any other commercial venture a myriad of commercial issues also attach to esports. Commercial issues are outside the scope of this section, however. Having said that, it is worth noting that IP protection and utilisation arguably is the most important of the commercial

but to illustrate the range and diversity of issues as context for a discussion of how they might best be addressed.

Market power issues

We have observed that game publishers ownership of the IP in the video games that underpin esports vests in them significant (some say absolute) power.¹⁰⁸ The power and control held by game publishers has led to accusations of conflict of interest and abuse of power. Riot Games, publisher of, and tournament organiser for, *League of Legends* in particular, has been embroiled in several controversies. For example, in 2013 Riot Games was criticised for amending its contact terms to prevent players from participating in other competitions and from streaming their playing other video games;¹⁰⁹ in 2016, it was criticised for the manner in which it sat as investigator, prosecutor and judge to ban the Renegades team from the *League of Legends* Championship Series without any recourse for appeal by the owners of the Renegades team;¹¹⁰ and in 2017, it was accused of bias and a conflict of interest in the manner with which it resolved allegations made by a player against the Tainted Minds team in Australia.¹¹¹

Significant market power always is at risk of misuse and abuse. That is why there are laws to guard against it. For example, in Australia there are competition and consumer protection laws, as well as the common law doctrine of restraint of trade.¹¹² Of course, these laws can be complex, and enforcing them a time consuming and costly process. Doing so is beyond the capacity and resources of many players. However, where access to courts of law can be problematic, access to the court of public opinion can prove useful. For example, Riot Games withdrew its 2013 amendment to its player contracts (discussed above) when details of it were leaked resulting in a public outcry in support of the players.¹¹³ And we also have seen the creation of national and international esports

issues. The centrality of IP rights in esports underlying video games, and the power and control they confer on game publishers, highlights the importance to game publishers of protecting those rights, and ensuring licensing arrangements are properly constructed. Leagues, teams and players also have IP in their brands and likenesses. Proper protection and licensing of them will be important to maximising the merchandising and related opportunities esports offers them.

¹⁰⁸ See ns 62-63 and accompanying text.

¹⁰⁹ See Chao, above n 74, 755; Hollist, above n 17, 829-30.

¹¹⁰ See Lebbon, above n 10.

¹¹¹ Ibid.

¹¹² For a discussion of these laws and their application to the sporting context see David Thorpe et al., *Sports Law* (Oxford University Press, 3rd ed., 2017) Ch. 11.

¹¹³ See Chao, above n 74, 755; Hollist, above n 17, 830.

associations that have the potential to negotiate with game publishers on a more equal footing to obtain more equitable outcomes.¹¹⁴

Labour issues

One area where power differentials give rise to particular challenges is in the area of player contracts. Players generally are contracted either to leagues, teams and in some cases to the game publishers. The terms of those contracts and how they are structured can have significant ramifications on players' incomes, security (or maybe more to the point, insecurity) of employment, and individual rights.¹¹⁵ Most players are contracted as independent contractors, not employees, with the result they do not receive legislated rights and protections afforded employees (e.g., workers' compensation insurance; minimum employment conditions (hours of work; rest breaks)).¹¹⁶ Yet most players being contracted are young and inexperienced,¹¹⁷ with short careers spans.¹¹⁸ They also come from a large pool of ready and willing replacements. Combine these factors with the power, control and financial might of game publishers and competition organisers, and it is clear most players have comparatively little bargaining power with which to wage individual campaigns for better conditions.¹¹⁹ This can lead to issues of player exploitation.¹²⁰ For example, some contracts restrict a player's ability to compete in other leagues, or to stream or publicise their use of a competitor's game.¹²¹ Other contracts impose significant training obligations on players which, in turn, gives rise to health, safety and welfare issues.¹²² A range of adverse health effects are associated with high amounts of screen time. These include sleep disruption, cognitive and

¹¹⁴ See ns 66-70 and accompanying text.

¹¹⁵ Like traditional sport player contracts, esports player contracts can include behavioural covenants and restraint of trade clauses.

¹¹⁶ See generally Holden and Baker, above n 24; Hollist, above n 17.

¹¹⁷ Most esports players are in their late teens and early to mid-twenties. See Hollist, above n 17, 831-2.

¹¹⁸ Studies suggest that the cognitive skills required for high performance begin to decline at the age of 24. See e.g., Joseph J. Thompson, Mark R. Blair and Andrew J. Henrey, 'Over the Hill at 24: Persistent Age-Related Cognitive-Motor Decline in Reaction Times in an Ecologically Valid Video Game Task Begins in Early Adulthood' (2014) 9(4) *PLoS ONE* <https://doi.org/10.1371/journal.pone.0094215>.

¹¹⁹ Holden and Baker, above n 24, 415-8; Hollist, above n 17, 838-9.

¹²⁰ Hollist goes so far to argue that the current esports model 'makes it impossible for players to secure fair or reasonable working conditions for themselves or other players' (Hollist, above n 17, 825).

¹²¹ *Ibid*, 829 describing restrictions in contracts players had to sign to compete in leagues organised by Riot Games in 2013.

¹²² See, e.g., Tom DiChristopher, 'Pro Gamers Story: Get Big, Burn Out, Retire Young', *CNBC* (Online), 3 February 2014 <<http://www.cnbc.com/id/101380550#>>.

socioemotional impairment, and overuse injuries such as fatigue, neck and back pain, and repetitive strain injuries.¹²³

Mechanisms to better protect players are emerging. France, for example, has legislated to confer protections specifically upon esports players. Under its 2016 Bill for a Digital Republic, all professional gamers are subject to the French Labour Code making them eligible for certain tax and social benefits and must be employed under written employment contracts. The Bill also requires esports organisations to obtain parental or guardian consent for minors to participate in tournaments.¹²⁴ And the South Korea Government – the most proactive of all governments in this area – established the Korean Esports Association (KeSPA) as a branch of the Ministry of Culture to promote and regulate esports in that country. As regulator, KeSPA has established enforceable minimum salaries for professional players, and requires player contracts to have a minimum term of one year, thereby providing a degree of income and contractual certainty and stability.¹²⁵

Some esports also have introduced standard contracts and minimum standards, and some, borrowing from the traditional sports model, have created player associations and councils.¹²⁶ However, as Holden and Baker observe, these attempts have been league managed and as a result fail to provide true player representation.¹²⁷ Hollist points out that achieving fair and reasonable standards through player associations (unionisation) invariably has taken significant time to negotiate, often has involved disputation, and generally requires the support (and sometime financial sacrifice) of high profile players. Hollist concludes that because of esports' players' weak bargaining position, such a path is not presently feasible. Instead Hollist argues for government intervention: first, by supporting the creation of international and national esports associations that would (among other thing) establish fair and reasonable minimum working conditions; and secondly, by requiring esports leagues and teams to engage players as employees (*cf.* independent contractors).¹²⁸

¹²³ Pereira et al., above n 55. See also the discussion at ns 143-144 and accompanying text re 'gaming disorder'.

¹²⁴ TaylorWessing, 'eSports in France: A new legal framework before the end of 2016' (2016) <eSportsinFrance_15.08.16 (1).pdf>. See also Purewal and Davies, above n 10, 26.

¹²⁵ Emin Ozkurt, 'Esports in South Korea – a short overview of the legal ecosystem', *LawInSport* (online), 10 April 2019 <<https://www.lawinsport.com/topics/item/esports-in-south-korea-a-short-overview-of-the-legal-ecosystem>>.

¹²⁶ The IESF, for example, created an Athletes Commission to protect player welfare and interests (IESF Establishment of Athletes Commission, 17 June 2016 <<https://www.iesf.org/news/iesf-establishment-of-athletes-commission/>>).

¹²⁷ Holden and Baker, above n 24, 434-8.

¹²⁸ Hollist, above n 17, 843-6.

Integrity issues

Like all competitive endeavours, esports face integrity issues. Esports' large prize pools – and the large amounts of money wagered on it – creates incentives for teams, players, their associates and third parties to cheat to win or lose, as the case may be.¹²⁹ There already have been a number of match fixing scandals involving esports. For example, in 2013 four players were banned (one permanently) for betting against their own team and then playing to lose,¹³⁰ and in 2015 Valve Corporation banned seven players for fixing matches in one of its *Counter-Strike* tournaments.¹³¹ And more recently and closer to home, last year in Australia, Victoria Police's Sporting Integrity Intelligence Unit arrested six people for allegedly fixing matches in the ESEA-Mountain Dew League involving Valve Corporation's *Counter-Strike* game.¹³² And esports mix of cognitive and physical attributes makes it ripe for performance enhancing drugs. As Lebbon observes, '[d]rugs, such as Adderall, Ritalin and Selegiline, have been used to assist players in a number of ways including by increasing concentration, calming nerves, reducing fatigue and boosting reaction times.'¹³³ And esports also face their own forms of technological and mechanical doping.¹³⁴ The computer-mediated environment within which esports are played provides fertile

¹²⁹ See generally: John. T Holden, Ryan M Rodenberg and Anastasios Kaburakis, 'Esports Corruption: Gambling, Doping, and Global Governance' (2017) 32 *Maryland Journal of International Law* 236; Sok Min Yun, 'A Comparative Overview of Esports against Traditional Sports Focused in the Legal Realm of Monetary Exploitation, Cheating, and Gambling' (2019) 37(2) *Cardozo Arts & Entertainment Law Journal* 513.

¹³⁰ Ben Kim, 'Dota 2 team banned for alleged match fixing', *PC Gamer* (online), 17 June 2013 <<https://www.pcgamer.com/dota-2-team-banned-for-match-fixing/>>.

¹³¹ Ben Skipper, 'Pro Counter-Strike players banned by Valve following \$10,000 match fixing investigation', *International Business Times* (online), 27 January 2015 <<https://www.ibtimes.co.uk/pro-counter-strike-players-banned-by-valve-following-10000-match-fixing-investigation-1485323>>.

¹³² Nino Bucci and Sarah Curnow, 'Australian esports criminal investigation reveals video game industry is ripe for corruption' *ABC News* (online) 24 September 2019 <<https://www.abc.net.au/news/2019-09-24/fears-world-of-esports-is-ripe-for-corruption/11521008>>.

¹³³ Lebbon, above n 10.

¹³⁴ Technological doping refers to the practice of gaining a competitive advantage through sports equipment. Examples include the LZR Racer swimsuit banned by FINA in January 2010 ('Hi-tech suits banned from January' *BBC Sports* (online), 31 July 2009 <http://news.bbc.co.uk/sport2/hi/other_sports/swimming/8161867.stm>; and more recently Nike's Vaporfly shoe (Liam Butterworth, 'Nike Vaporfly shoe controversy sparks World Athletics to introduce new rules ahead of Tokyo 2020 Olympics' *ABC News* (online), 2 February 2020 <<https://www.abc.net.au/news/2020-02-01/world-athletics-tightens-regulations-around-running-shoes/11916716>>). Mechanical doping refers to the use of hidden mechanical devices to improve performance, the best known example of which is the use of a hidden motor to help propel a racing bicycle (see 'Mechanical doping: A brief history', *Cycling News* (online), 17 November 2017 <<https://www.cyclingnews.com/features/mechanical-doping-a-brief-history/>>).

environments for such endeavours. Common forms of cheating include automating actions to remove the human element, manipulating the games' software to give players in-game characters special powers and immunities, and attacking servers and communication portals to slow an opponent's game play.¹³⁵

One aspect of traditional sports' transnational regulatory regime that appears suitable for esports is the manner with which it addresses corrupting forces such as match fixing and doping.¹³⁶ Some esports, learning from traditional sports, have introduced policies prohibiting players from betting on competitions in which they compete,¹³⁷ and have implemented drug testing regimes.¹³⁸ And as noted above, the IESF is a signatory to the WADA Code and is working to develop policies and rules to prohibit the use of performance enhancing drugs, and testing protocols and regimes to detect them.¹³⁹ There also is ESIC, created in 2016 to act as esports integrity guardian.¹⁴⁰ Notably absent from ESIC's members, however, are the game publishers, leading ESIC Commissioner Ian Smith to lament that game publishers are more concerned with profits than integrity.¹⁴¹

Social issues

Another form of integrity issue arises from the video games themselves. Video games are associated with unhealthy life-style choices, and the most popular of them with anti-social behaviours.¹⁴² The World Health Organisation (WHO), for example, recently recognised 'gaming disorder' as a disease.¹⁴³ The WHO defines gaming disorder as 'a pattern of gaming behavior ('digital-gaming' or 'video-gaming') characterized by impaired control over gaming, increasing priority given to gaming over other activities to the extent that gaming takes precedence over other interests and daily activities, and continuation or

¹³⁵ Lebbon, above n 10. See also Yun, above n 129, 531-33 (and the examples cited therein)

¹³⁶ Holden et al, above n 129, 271.

¹³⁷ See Matthew Dobill, 'Leveling (up) the Playing Field: A Policy-Based Case for Legalizing and Regulating Esports Gambling' (2017) 37(2) *Loyola of Los Angeles Entertainment Law Review* 139, 167 (and the examples cited therein).

¹³⁸ See Luke Plunkett, *Pro Gaming League Will Drug Test Its Players*, *Kotaku* (online), 22 July, 2015 <<https://kotaku.com/1719623820>>; Saira Mueller, 'eSports Drug Testing Update: ESL Announces List of Banned Substances Including Adderall, Cocaine, Pot, Steroids and More', *International Business Times* (online), 12 August 2015 <<https://www.ibtimes.com/esports-drug-testing-update-esl-announces-list-banned-substances-including-adderall-2050245>>.

¹³⁹ See n 68.

¹⁴⁰ See n 67 and accompanying text

¹⁴¹ Bucci and Curnow, above n 132.

¹⁴² This is not to deny esports social benefits – e.g., creating social interactions and bonds (albeit online), and contributing to digital literacy.

¹⁴³ World Health Organisation, *International Classification of Diseases* (11th ed. 2018) <<https://icd.who.int/browse11/l-m/en>> to which 'gaming disorder' was added.

escalation of gaming despite the occurrence of negative consequences.¹⁴⁴ These negative consequences include isolationism and obesity.¹⁴⁵ Some governments have regulated to mitigate these risks to player health and safety. France's Bill for a Digital Republic, for example, requires minors to obtain parental or guardian consent to participate in tournaments.¹⁴⁶

Many of esports most popular games also are extremely violent. Others are perceived by some to be racist and misogynist.¹⁴⁷ It is not surprising therefore, that the IOC has stated that should esports eventually become an Olympic sport, it would be limited to those that mimic traditional sports, and would not extend to games with violent content. As Thomas Bach, President of the IOC said at its 135th Session:

'We have defined very clearly what divides us from this [esports] industry and in particular with regard to the values. We have said there is a red line with regard to the content of some of these games. We do not want to have anything to do with killer games or games promoting discrimination.'¹⁴⁸

Some governments have already taken action to address these risks by subjecting video games to classification in a similar fashion to movies and magazines. In Australia, for example, video games are subject to classification based in their content, and in extreme cases can be banned.¹⁴⁹

Gambling issues

A particular social issue exacerbated by esports is gambling. Gambling on esports is a lucrative business, as it is with traditional sports.¹⁵⁰ The global esports gambling market was estimated to have been worth US\$5.5 billion in

¹⁴⁴ See WHO, Gaming disorder: Online Q&A, September 2018
<<http://www.who.int/features/qa/gamingdisorder/en/>>.

¹⁴⁵ Abanazir, above n 18, 110 (and the articles cited therein).

¹⁴⁶ See n 124 and accompanying text.

¹⁴⁷ Abanazir, above n 18, 110.

¹⁴⁸ Karolos Grohmann, 'Olympics: Games must connect with gamers to keep Olympics relevant – Bach', *Reuters Technology News* (online), 11 January 2020
<<https://www.reuters.com/article/us-olympics-ioc/olympics-games-must-connect-with-gamers-to-keep-olympics-relevant-bach-idUSKBN1Z91M2>>. The incongruity of video game content with Olympic values is one of two main issues holding esports back from Olympic recognition. The other is the lack of a single international federation for the sport.

¹⁴⁹ *Classification (Publications, Films and Computer Games Act 1995* (Cth).

¹⁵⁰ The most recent data reveals that of the total amount expended on gambling in Australia (A\$24.887 billion in 2018-18), A\$1.235 was expended on sports betting, an increase of 16.3% over the 2016-17 amount (Queensland Government Statistician's Office, *Australian Gambling Statistics* (Queensland Treasury, 35th ed., 2019) 227, 241).

2016, and is estimated to grow to US\$12.9 billion in 2020.¹⁵¹ This is larger than revenue from esports itself (see Figure 1 above). There is no reliable data on the amount expended on gambling on esports in Australia, but based on the global data, the amount too is likely to be large and growing. In addition to the threats to the integrity of esports it incentivises (see above discussion), gambling on esports also imposes broader societal costs. These costs include, in addition to direct financial losses, family and relationship problems, emotional and psychological issues (including distress, depression, suicide and violence), costs to the government of regulating gambling and providing support services to adversely affected gamblers, lost productivity and other work-related costs, and the costs of crime, including to businesses and the justice system.¹⁵² It is argued by some that these impacts and costs are accentuated by esports' popularity among young people, giving rise to concerns that esports may normalise and increase gambling in this susceptible population¹⁵³ – concerns that underpinned the South Australian Government's decision to ban gambling on esports.¹⁵⁴

Governance issues

As noted above, a strong theme permeating the esports literature is that esports require different and better governance arrangements.¹⁵⁵ Advocates for change point to the preceding issues as evidence of the current governance structures' failures. They also lament the lack of standardised rules and playing conditions across esports – a state of affairs Lebbon describes as 'fractured governance'¹⁵⁶ – and that esports de facto governing bodies (game publishers and their licensed competition organisers) govern to serve their commercial interests, and not the interests of esports qua sport.¹⁵⁷ Some also suggest that deficiencies in the manner with which esports are governed and regulated have

¹⁵¹ Eilers & Krejci Gaming, *Esports & Gaming: Where's the Action?* (Version 2, 15 August 2016) <<https://www.thelines.com/wp-content/uploads/2018/03/Esports-and-Gambling.pdf>>.

¹⁵² There is no specific data for esports, but all gambling in Australia is estimated to have imposed a social cost of at least A\$4.7 billion in 2010 (Productivity Commission, *Gambling*, Report No. 50 (2010)).

¹⁵³ See e.g., Sally M Gainsbury, Brett Abarbanel and Alex Blaszczyński, 'Intensity and gambling harms: Exploring breadth of gambling involvement among esports bettors' (2017) 21(8) *Gaming Law Review* 610-615; Daniel L King, *Online gaming and gambling in children and adolescents – Normalising gambling in cyber places* (Victorian Responsible Gambling Foundation, 2018). 'Electronic sports competitions' also are covered by the *Broadcasting Services (Online Content Service Provider Rules) 2018* (Cth) that restrict how online content service providers can use gambling promotional content during the streaming of esports competitions.

¹⁵⁴ 'SA Government bans betting on computer gaming following rise of eSports', *ABC News* (online) 6 August 2016 <<https://www.abc.net.au/news/2016-08-06/sa-government-cracks-down-on-esports/7696864>>.

¹⁵⁵ See ns 73-75 and accompanying text.

¹⁵⁶ Lebbon, above n 10.

¹⁵⁷ See ns 60-61 and accompanying text.

– or will in the near future – inhibit esports growth and progress.¹⁵⁸ The mooted solution to these issues generally revolves around the creation of a pan-esports governance body to govern and regulate esports and its participants, consistently and coherently across all its forms.

There are a number of responses to these concerns. First, most of the issues discussed above also afflict traditional sports. The governance structures to which many commentators suggest esports aspire have not been successful in eliminating these issues. Second, esports commercial success is undeniable. For those who argue it has been hampered by sub-optimal governance, how much more do they suggest it would have grown had it been governed by an international federation or the like? Or maybe its success is, in part, attributable to the absence of the conformity and homogeneity that can come from having a standardising international federation? In this regard, what ails esports (and to what extent) is a matter of perspective. Like beauty, it is in the eye of the beholder. Take the ownership of IP rights. For game publishers (and those with aligned interests), it is a source of power that has driven esports success – something to be protected. However, for those who feel the brunt of that power, it is something to be tempered by (or even delegated to) an independent external overseer.

Indeed, the pressure for change – and for government intervention to effect that change – is coming either from those outside of esports (e.g., academics viewing esports through the prism of sports), or from actors whose private interests, in order to be realised, require those in control (i.e., game publishers) to relinquish part of that control to a body more attuned to their interests. Some of these other actors can be identified by examining the membership of the various bodies that have been established to perform the pan-esports governance role at a national or international level. They predominately are tournament operators, teams and players.

They also can be seen in the Olympic movement encouraging traditional sports' international federations 'to consider how to govern electronic and virtual forms of their sport and explore opportunities with game publishers.'¹⁵⁹ As Carrabine observes, inclusion of esports into the Olympics would certainly add value to the Olympic movement (a new, modern sport with a young, engaged audience). However, it is unclear if it would add value to the game publishers, especially if their more popular games were not permitted because of their violent and otherwise undesirable content, and if the competitions they have established

¹⁵⁸ Yun, above n 129, 543. See also Chao, above n 74.

¹⁵⁹ 'Declaration of the 8th Olympic Summit', Press Release, 7 December 2019 <<https://www.olympic.org/news/declaration-of-the-8th-olympic-summit>>.

and licensed (and from which they generate significant revenue) would be diminished as a result.¹⁶⁰

Game publishers are likely to resist attempts to temper their power and control over the uses to which their games are put, and to subject them to the rules and oversight of an external body they do not control.¹⁶¹ As much is evident from their absence from the international governing bodies created to date. It is in anticipation of this resistance that some call for government to play a role.

C So what approach should governments take?

In Part 4.A above, we observed that traditional sports governance arrangements are explicable by reference to regulatory theory – that traditional sports have forged, over time, a sophisticated, coherent and durable global governance structure that mediates between public and private interests in a manner that generates stable collective benefits for its participants. We also observed that the sporting institutions that sit atop this structure have been able to inculcate into the minds of the public that they (and not governments) are the custodians of their sports and of the sporting ideal, that they are best placed to govern their sports, and that they should be free from political interference in doing so. This confers on sporting organisations strong legitimacy and discursive power that they have employed to acquire (capture) favourable regulatory settings from susceptible governments.¹⁶² The sporting frame also has provided a strong institutional and ideational template for how esports should be governed and regulated.

Esports have many things in common with traditional sports. They have leagues and franchises, teams and skilled players, competitions and tournaments, spectators and fans, and sponsors and broadcasters. These similarities suggest that the governance template provided by traditional sports should be applied to esports. However, we also have observed that there are important differences between traditional sports and esports. Most notable among these are that esports are commercial, for-profit ventures operated by game publishers who do not perceive of themselves as custodians of a social and cultural institution, and whose ownership of the IP in the game gives them significant power over how (and where, when and by and with whom) esports competitions are conducted. These differences suggest that governments should not allow esports similarities to traditional sports to seduce them into automatically applying the policy and

¹⁶⁰ Zach Carrabine, 'Paris 2024 GLHF: Esports' Quest for Olympic Inclusion' (2019) 26 Sports Lawyers Journal 229, 243-4.

¹⁶¹ Ibid, 237.

¹⁶² See generally Windholz and Hodge, above n 89.

regulatory framework of traditional sports to esports. Esports are different from traditional sports, and its governance structure should reflect those differences.

So how best to develop a governance structure reflective of esports unique combination of features – part sport, part profit-maximising business and part technological innovation? There are two broad schools of thought. First, there are those who call for the hand of government (and not the invisible hand of the market) to steer and direct the esports ship.¹⁶³ They point to the examples of France’s Bill for a Digital Republic that includes esports;¹⁶⁴ the South Korean Government’s active role in establishing KeSPA and the IESF;¹⁶⁵ and the United Kingdom Government’s support for the establishment of the British eSports Association.¹⁶⁶

The second school of thought comprises those who believe esports should be allowed to evolve without government intervention according to the interests and values of its various participants and stakeholders. As we observed earlier, this is how traditional sports’ governance structure evolved.¹⁶⁷ This author is an adherent to this second school of thought.

The public interest justification for governments playing a role in establishing esports governance arrangements is not strong. The market for esports is flourishing (see Figures 1 and 2 above). There are no obvious market failures or limitations of such scale to warrant governments intervening to shape the activity’s governance arrangements. Nor are there strong social grounds for governments intervening. Participation is strong. Not every aspect of community life is or should be conducted under the auspices of the state. Privately founded and privately managed organisations — even those with numerous adherents and devotees such as esports — should not necessarily be subject to control or direction by the state. That is certainly not to say that such organisations may treat themselves as above the law: it is merely to acknowledge that the state should not discourage private organisations from ordering their own affairs within acceptable limits.¹⁶⁸

¹⁶³ As an aside, the term ‘governance’ derives from the Latin *gubernor*, meaning to ‘pilot, steer or direct’ (David Levi-Faur, ‘From “Big Government” to “Big Governance”’ in D Levi-Faur (ed), *The Oxford Handbook of Governance* (Oxford University Press, 2012) 3, 5. See also Owen Hughes, ‘Does Governance Exist?’ in SP Osborne (ed), *The New Public Governance? Emerging Perspectives on the Theory and Practice of Public Governance* (Routledge, 2010) 87, 88).

¹⁶⁴ See ns 124 and 146 and accompanying text.

¹⁶⁵ See ns 68 and 125 and accompanying text.

¹⁶⁶ Joss Wood, ‘The UK Gets A Government-Sponsored National Governing Body For Esports’ *The Lines* (online), 30 June 2016 <<https://www.thelines.com/uk-government-esports-body/>>.

¹⁶⁷ See n 100 and accompanying text.

¹⁶⁸ Those familiar with Australian sporting jurisprudence might recognise this as a paraphrasing of Justice Tadgell’s judgement in *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546, 549.

Suggesting governments adopt a hand-off approach when it comes to esports' future governance arrangements does not mean that esports are (or should be) left to operate in a legal and regulatory lacuna. As we observed in the discussion of the policy, regulatory and legal issues confronting esports, in Australia (as in many other countries) there is a substantial body of generally applicable laws and regulations that apply to esports.¹⁶⁹ These range from laws that govern how esports' corporate entities, directors and officers operate and govern themselves and each other, to competition, consumer protection and labour laws, through to laws that govern gambling and the content and accessibility of the video games themselves. It is possible these laws may prove deficient in their application to esports. For example, it may be that existing labour laws are not well suited to addressing the risks of player exploitation and their associated health, safety and welfare issues (just as they increasingly are being found deficient in the application to gig economy workers).¹⁷⁰ It may be that reform in this area is warranted. However, any change should be clearly justifiable by reference to the public interest.

What governments should be wary of are private interests dressed in the clothes of the public interest. After all, as Shafritz and Russell observe, no one would advocate for public policy that was not in the public interest.¹⁷¹ The esports pie is large; the pie is growing; and everyone wants a piece of the pie. As such, we have a classic interest group dynamic – a contest amongst competing interests and perspectives, most notably by some tournament organisers, teams and players seeking to challenge the current hegemony of game publishers. This is not new. We see interest group contests amongst traditional sports too.

Governments largely have not involved themselves in resolving interest group conflicts within traditional sporting organisations, choosing to respect the autonomy of those involved with the sport to work matters out for themselves. And nor should they involve themselves in the case of esports. Market forces have allowed esports to grow and flourish. To the extent market forces may not be operating well – for example, because game publishers are misusing their market power to the detriment of players, teams and other participants; or teams are engaging players on contracts that are unfair or unsafe – there may be a basis for governments to intervene, just as they might with respect to other commercial ventures suffering the same failures or limitations. However, legislative and regulatory exemptions based on traditional sports' social and cultural value, and

¹⁶⁹ See Part 4.B.

¹⁷⁰ Andrew Stewart and Shae McCrystal, 'Labour regulation and the great divide: Does the gig economy require a new category of worker?' (2019) 32(1) *Australian Journal of Labour Law* 4.

¹⁷¹ Jay M Shafritz and E W Russell, *Introducing Public Administration* (Pearson Longman, 4th ed, 2005) 9–11.

sporting organisations' role as custodians of those values, should not apply to a commercial venture such as esports.

5 CONCLUSION

This article began by asking 'what are esports?' and 'are esports sports?' At one level, the latter of the two questions is unnecessary: one could examine esports as a commercial activity without reference to traditional sports.¹⁷² However, it is 'more than an esoteric classification exercise'.¹⁷³ The answer to the question can determine the application of current laws. It also can have a significant impact on how we perceive of esports themselves. As Dobill observes, sports have their own history, traditions, institutions, issues and paradigms. Conceptualising esports as a sport results in all of this being projected upon it.¹⁷⁴

Discussion of whether esports ought to be classified as sport arguably suggests that to the extent existing definitions confine sports to activities that are highly physical or have certain institutional features, it may be time to evolve those definitions.¹⁷⁵ While esports may not yet have disrupted traditional sports' markets and value networks, they may have disrupted traditional and popular conceptions of what constitutes sport. The activities we accept as sport evolve as society evolves culturally and technologically. Witness for example, the evolution from stone throwing to archery to shooting, and from running to horse racing to motor car racing. Esports is another step in that evolution. As Wagner explains:

During recent years we have seen a rapid development and cultural integration of information and communication technology. The mastery of multimodal communication ... has become one of the most fundamental capabilities to acquire high status within a group, particularly in youth culture. It is therefore expected that anybody participating in this culture - in particular individuals with high achievement motivation - will feel the need to demonstrate this mastery by succeeding in competition. One of the most obvious ways of doing so is by competing in computer gaming events. The emergence of eSports can thus be interpreted as a logical and irreversible consequence of a transition from an industrial society to the information and communication based society of today.¹⁷⁶

Our discussion of how esports should be regulated revealed contestation amongst competing interests and perspectives, most notably by tournament organisers, teams and players seeking to challenge the power and dominance of

¹⁷² Wagner, above n 17, 3.

¹⁷³ Holden et al, above n 129, 250.

¹⁷⁴ Dobill, above n 137, 160.

¹⁷⁵ Jenny et al, n 17, 12.

¹⁷⁶ Wagner, above n 17, 2-3.

game publishers. This article has suggested that the contest be left to the relevant actors to resolve for themselves, and that governments resist the temptation to interfere and impose a solution. And we are witnessing attempts by the parties to that contest to do just that.¹⁷⁷ Maybe the better way to view the current state of affairs is not as one of ‘regulatory fragmentation’ (as Lebbon suggests), but as a period of ‘regulatory experimentation’, as Purewal and Davies suggest.¹⁷⁸ They point out that across the spectrum of esports, there are a variety of different regulatory approaches, spanning from global, regional and national regulation, and regulation at the league and tournament level.¹⁷⁹ Traditional sports were given the freedom to experiment and learn as they developed and evolved (and continue to develop and evolve) their governance structures. Esports should be given the same freedom.

¹⁷⁷ See e.g., the Memorandum of Understanding signed by the IESF and the AESF to form a collaborative relationship to promote and advance esports worldwide and across Asia (‘The International Esports Federation and Asian Electronic Sports Federation Unite’, Global Association of International Sports Federations News (online), 31 March 2020 <<https://gaisf.sport/the-international-esports-federation-and-asian-electronic-sports-federation-unite/>>); Neil Shefferd, ‘United esports world moves a step closer as IESF signs partnership with WESCO’, Inside the Games, 16 May 2020 <<https://www.insidethegames.biz/articles/1094323/united-esports-world-step-closer>>.

¹⁷⁸ Purewal and Davies, above n 10, 27.

¹⁷⁹ Ibid.