"Constitutional Risk", Disrespect for the Rule of Law and Democratic Decay

Anne Twomey*

One indicator of democratic decay is a lack of respect for the rule of law. This can be seen when the Government dismisses strict compliance with the rule of law and instead opts for an assessment of 'constitutional risk' – whether it is likely that anyone with the standing to do so will challenge the constitutionality or legality of its conduct. While this approach may be pragmatic, it reveals an underlying acceptance of failure to comply with the law as long as one is not called to account for doing so. This article discusses how a scandal in Australia concerning the allocation of grants to local bodies for sporting activities revealed failures to comply with the Constitution, act within legal power, comply with financial rules and meet ministerial standards. Political benefit was placed above the need for strict compliance with the rule of law. This is how democratic decay begins.

* Anne Twomey is a Professor of Constitutional Law at the University of Sydney, Australia. She has previously worked for the Parliament of Australia and The Cabinet Office of New South Wales.

I. Introduction

In Australia, like most countries, there is a huge temptation for politicians in government to use public money for partisan purposes to influence voting at elections. This is particularly notable in the exercise of ministerial discretion in the making of grants of public money to community groups, especially in marginal seats, in the period prior to an election.[1] Such action is commonly known as 'pork-barrelling'.

1 See *e.g.* David Denemark, "Partisan Pork Barrel in Parliamentary Systems: Australian Constituency-Level Grants" (2000) 62:3 The Journal of Politics 896; Clive Gaunt, "Sports Grants and the Political Pork Barrel: An Investigation of Political Bias in the Administration of Australian Sports Grants" (1999) 34:1 Australian Journal of Political Science 63 (regarding the analysis of the original 'sports-rorts affair' involving the Hawke Labor Government engaging in pork-barrelling through the distribution of community sports grants in 1993).

'Pork-barrelling' undermines the fairness of elections[2] and aids democratic decay by heightening public distrust of politicians and the efficacy of the system of government. Making grants on the basis of political advantage, rather than merit and need, results in the unfair distribution of public funds, the funding of unworthy or unviable projects, the inefficient allocation of scarce resources, poor planning and a lack of coordination with other levels of government in providing appropriate local facilities.

In addition to being morally corrupt,[3] economically inefficient and destructive of democracy, an additional ill has been evidenced in Australia. That is the disrespect for the rule of law shown by persistent breaches of the Constitution of the Commonwealth of Australia ("*Constitution*")[4], statutes, guidelines and ministerial standards when it comes to the allocation of grants to community groups. The constitutional breaches arise from the federal distribution of power in Australia. Unsurprisingly, the *Constitution* was not drafted in a way that permitted federal politicians to make grants to resurface a local playing field or build change-rooms at a local sporting club. Such matters fall within the jurisdiction of state and local governments.

The primary focus of the Commonwealth Government, however, has been on managing 'constitutional risk', rather than strict compliance with the rule of law. It involves evaluating the risk that someone who has standing to do so will challenge the making of the grant in court, resulting in it being struck down. As

---

2 See Andrew Leigh, "Bringing Home the Bacon: An Empirical Analysis of the Extent and Effects of Pork-Barreling in Australian Politics" (2008) 137:1/2 Public Choice 279 (regarding the analysis by Leigh of grant distribution prior to the 2004 Commonwealth election, in which he found "robust evidence that additional funding increased the swing towards the Coalition government, and suggestive evidence that a larger number of grants delivered to an electorate also helped the government" at 297).

3 Tim Prenzler, Bricklyn Horne & Alex McKean, "Identifying and Preventing Gray Corruption in Australian Politics" in Peter C Kratcoski & Maximilian Edelbacher, eds, *Fraud and Corruption – Major Types, Prevention and Control* (New York: Springer International Publishing, 2018) 61 at 68–70.

4 *Commonwealth of Australia Constitution Act* (UK), 1900 c 12, s 9 [*Constitution*].

most people do not object to receiving a grant, and others do not have standing to challenge it, the 'constitutional risk' is very low indeed. Even if it does arise, the political cost to the Government is low because it can blame the courts for the loss of funding or find another way to provide it.[5] Hence there has been a proliferation of grant schemes in recent decades that have no obvious constitutional basis, on the ground that any challenge to them is unlikely.

This notion of 'constitutional risk' is at odds with the fundamental principle of the rule of law. Governments are obliged to obey the law and comply with the *Constitution*. Government lawyers should not be assessing whether or not the Government is at 'risk' of being caught. Instead, they should be advising the Government to be rigorous in its compliance with the law, regardless of whether anyone would have the standing, and be likely, to sue. But as the examples discussed below show, either they are not doing so, that advice is not getting through, or ministers and public servants are deliberately not seeking necessary legal advice, as it might prove inconvenient.

The first part of this article discusses the constitutional constraints upon the Commonwealth Government validly making grants, including the history of the Commonwealth Government turning a blind eye to court rulings.

The second part provides a major case study of the legal problems arising in relation to the making of grants under the Community Sport Infrastructure Grants program. These grants were awarded by an independent statutory corporate entity to community sporting bodies in the lead up to a federal election in 2019. At every level, from the *Constitution*, to legislative authority, to ministerial standards, there were major failings in this process. It is a classic study of democratic decay.

The article concludes with observations about how the various failures to comply with the *Constitution*, statutes, legislative instruments and

5 For example, after the Commonwealth lost twice in the High Court in relation to the validity of its funding of a school chaplaincy scheme, it instead validly funded the scheme by making conditional grants to the States under section 96 of the Commonwealth Constitution.

administrative standards evince a worrying disrespect for the rule of law and the beginnings of democratic decay.

II. The Constitution and the Commonwealth's Power to Spend

Australia is a federation with an entrenched Constitution which distributes legislative power amongst the Commonwealth and the States. The subjects of Commonwealth legislative power include matters most appropriately dealt with at the national level, such as external affairs, defence and currency, and matters that cross state borders, such as interstate trade and commerce and industrial disputes that extend beyond one state.[6] Those powers do not extend to dealing with local community matters, such as sporting clubs and local facilities.

The Commonwealth's power in section 81 of the *Constitution* to appropriate money is confined to appropriations for the 'purposes of the Commonwealth'.[7] It appears that this was intended to confine the Commonwealth's spending to those subjects about which it could legislate.[8] But the Commonwealth later became frustrated by this limitation on its powers and began to take the view that the 'purposes of the Commonwealth' were whatever purposes it chose to identify as the purpose of the appropriation, regardless of whether the spending would fall within its heads of legislative power.

Whether this was so remained unresolved until recent times, as legal challenges to appropriations were rare. There were only two cases where the

---

6 See *Constitution*, *supra* note 4 (the concurrent heads of Commonwealth legislative power listed in section 51 of the *Constitution*. States retain full power to legislate on matters not withdrawn from them by the Commonwealth Constitution. Where there is an inconsistency between valid Commonwealth and State laws, section 109 of the *Constitution* provides that the Commonwealth law prevails).

7 *Ibid*, s 81.

8 See *e.g.* Austl, Melbourne, *Official Record of the Debates of the Australasian Federal Convention* (14 February 1898) at 898 (Sir John Downer).

validity of appropriations was considered by the High Court of Australia,[9] in 1945[10] and 1975.[11] In neither case was the scope of the Commonwealth's spending power clearly determined. However, in the 1975 case, known as the *AAP Case,*[12] an appropriation beyond the scope of the Commonwealth's legislative power was upheld because the fourth member of the majority, Stephen J, held that the States had no standing to challenge a Commonwealth appropriation.[13]

Upon this shaky foundation, the Commonwealth built a complex web of spending programs, intervening in areas in which it otherwise had no legislative power and using its capacity to spend and contract to exercise power and win electoral favour. Those persons directly affected by the grants – the recipients – were unlikely to object to receiving the money, and there was doubt as to whether anyone else would have standing to challenge, including the States.

---

9 The High Court of Australia is Australia's highest court. It hears appeals from State Supreme Courts and has an original jurisdiction, which includes determining matters involving the interpretation of the Constitution.

10 *Attorney-General (Vic) ex rel Dale v The Commonwealth* (1945), 71 CLR 237 (HCA) (in this case both a regulatory scheme and an appropriation were involved. The law establishing the regulatory scheme was held invalid as the regulatory scheme did not fall within a head of Commonwealth legislative power. The validity of the appropriation was not finally determined, with different positions being taken by some judges and others finding it unnecessary to decide).

11 *Victoria v The Commonwealth* (1975), 134 CLR 338 (HCA) (in this case there was no legislation involved other than an appropriation. The Court split with three upholding the appropriation, two finding the appropriation invalid, one finding the executive action to implement the scheme invalid, and the final judge deciding there was no standing to challenge the appropriation) [*AAP Case*].

12 *Ibid* (the case concerned the establishment of the Australian Assistance Plan which involved a non-statutory scheme to fund newly established Regional Councils for Social Development to provide social welfare services in each region).

13 *Ibid* at 390, Stephen J.

Hence, the 'constitutional risk' of such action was low, despite the significant doubts about its validity.

This position changed in 2009. In response to the global financial crisis, the Commonwealth Government decided to make payments of money to taxpayers to stimulate the economy. It is an extraordinary person who will sue the government for giving him or her money, but the Commonwealth was unlucky that one of the recipients of its largesse, Bryan Pape, was such a man. Pape had long been concerned about the Commonwealth spending beyond its constitutional powers but had previously had no standing to bring legal proceedings. As a recipient of this Commonwealth payment, however, he now had standing to bring legal proceedings. He therefore sued the Commonwealth, objecting to the constitutional validity of the payment he had received.

A. The Pape Case

In *Pape v Federal Commissioner of Taxation*,[14] the High Court treated separately the validity of an appropriation and the authority to spend the appropriated sum. It regarded the appropriation as the earmarking or 'setting aside' of public money.[15] But the Commonwealth could only spend that money if it had legislative or executive power to do so. This shifted the debate from "purposes of the Commonwealth" in section 81 of the *Constitution* and the problem of standing in challenging an appropriation, to the question of whether the Commonwealth had the constitutional authority to spend on a particular subject.[16] The consequence was that the Commonwealth could no longer claim that it could spend money on any subject that it decided was a purpose of the Commonwealth. It now had to be able to identify a head of constitutional power to support that expenditure.

---

14 (2009), 238 CLR 1 (HCA) [*Pape*].

15 *Ibid* at para 79, French CJ, 177, Gummow, Crennan & Bell JJ, 292, Hayne & Kiefel JJ, 601–02, Heydon J.

16 *Ibid* at paras 111, French CJ, 178, 183, Gummow, Crennan & Bell JJ, 320, Hayne & Kiefel JJ, 601–02, Heydon J.

In *Pape,* the expenditure had been supported by authorising legislation. A bare majority of the High Court accepted that the Commonwealth did have the legislative authority to enact the law. It considered that there was a 'nationhood' power[17] to deal with "short-term fiscal measures to meet adverse economic conditions affecting the nation as a whole, where such measures are on their face peculiarly within the capacity and resources of the Commonwealth Government".[18] Pape, therefore lost the case, but won on the more significant point that all Commonwealth expenditure must fall within an identified Commonwealth head of power.

In response, the Commonwealth Government took no action to review its expenditure to identify those payments that did not fall within a Commonwealth head of power so that they could be authorised in a valid manner, such as by a conditional grant to the States.[19] Officers of the Department of the Prime Minister and Cabinet told a Senate Select Committee in 2011 that the Department had received advice from the Attorney-General's Department "that we should continue with current arrangements unless a demonstrated need arises to change them".[20] As it was unlikely that anyone else with standing would object to receiving a Commonwealth grant, the 'constitutional risk' was low, so the Commonwealth continued to spend on hundreds of programs with no legislative authority and in many cases no obvious constitutional head of power.

---

17 *Ibid* (this power is supported by ss 61 and 51(xxxix) of the *Constitution* and is based upon a test set out by Mason J in the *AAP Case*, *supra* note 11 at 397).

18 *Ibid* at para 133, French CJ; See also paras 241–43, Gummow, Crennan & Bell JJ.

19 Under section 96 of the *Constitution*, the Commonwealth can make grants to the States on such terms and conditions as the Commonwealth Parliament considers fit. This can include a condition that the money be passed on to individuals, schools, sporting clubs or local government bodies, for specific uses.

20 Austl, Commonwealth, Senate Select Committee on the Reform of the Australian Federation, *Australia's Federation: An Agenda for Reform* (Canberra: Senate Printing Unit, June 2011) at 91 [footnotes omitted].

B. The Williams (No 1) Case

Unfortunately for the Commonwealth, another extraordinary plaintiff, Ron Williams, soon appeared.[21] Williams objected to the Commonwealth making grants to religious organisations to fund a chaplaincy program in the State school attended by his children. Williams had claimed sufficient standing due to his parental relationship to his affected children, but the defendants contested his standing. A majority of the High Court considered that the question of standing could be put to one side because a number of States, which clearly had standing, had intervened in support of Williams' arguments.[22] Williams challenged the grant to Scripture Union Queensland, which supplied the school chaplains, on the basis that it did not fall within a Commonwealth head of power. In this case there was no legislation (other than the appropriation) supporting the scheme. Instead, the Commonwealth relied upon its powers as a polity with a legal personality to contract and spend to establish the school chaplaincy scheme and to spend appropriated sums for that purpose.

In *Williams v Commonwealth (No 1)*, the Commonwealth argued that, taking a broad view, it had the same capacity as any other legal person to spend money upon any subject that it chose, as long as a valid appropriation had been passed. Alternatively, the Commonwealth put a narrow view that it had the power to spend public money on subjects that fell within the scope of the Commonwealth's legislative power, even when no such legislation had been enacted. The High Court, however, rejected both the broad[23] and the narrow

21 *Williams v Commonwealth (No 1)* (2012), 248 CLR 156 (HCA) [*Williams (No 1)*].

22 *Ibid* at para 112, Gummow & Bell JJ; with agreement at paras 9, French CJ, 168, Hayne J, 475, Crennan J, 557, Kiefel J.

23 *Ibid* at paras 38, 83, French CJ, 159, Gummow & Bell JJ, 182, 253, Hayne J, 534, Crennan J, 577, 595, Kiefel J; (Heydon J found it unnecessary to decide at 407).

view.[24] The Court held that as the expenditure of public money was involved, parliamentary authorisation was needed, except in limited cases.[25]

The High Court stressed the importance of the accountability of the Executive to Parliament.[26] Parliament needed to have a role in the "formulation, amendment or termination" of programs for the expenditure of public money,[27] beyond the appropriation. The Court noted that the Senate's powers in relation to appropriations are limited, as it cannot initiate them or amend bills for the appropriation of the ordinary annual services of government (although it can 'request' amendments to such bills).[28] In contrast, the Senate has full power to deal with laws that authorise expenditure.[29]

A further consideration was that it was 'public money' that was being spent, rather than the Commonwealth's own money.[30] The Executive must be accountable to the public, through Parliament, for such expenditure, including seeking approval for the programs upon which it is to be expended. Justice Crennan, for example, observed:

---

24 *Ibid* at paras 36, French CJ, 134–37, Gummow & Bell JJ, 537, 544, Crennan J (Hayne J at paras 286, 288 and Kiefel J at para 569 found it unnecessary to decide upon the narrow ground because no Commonwealth head of legislative power could potentially support the expenditure under the chaplaincy scheme).

25 *Ibid* (exceptions included when the expenditure was for the ordinary administration of the functions of the government or in support of prerogative powers); see further Anne Twomey, "Post-*Williams* Expenditure – When Can the Commonwealth and States Spend Public Money Without Parliamentary Authorisation?" (2014) 33:1 University of Queensland Law Journal 9 at 9–25.

26 *Williams (No 1)*, *supra* note 21 at paras 60, French CJ, 136, 145, Gummow & Bell JJ, 173, 219, Hayne J, 516, Crennan J, 579, Kiefel J.

27 *Ibid* at para 145, Gummow & Bell JJ.

28 *Constitution*, *supra* note 4, ss 53–54.

29 *Williams (No 1)*, *supra* note 21 at paras 60, French CJ, 136, Gummow & Bell JJ, 532, Crennan J.

30 *Ibid* at paras 151, Gummow & Bell JJ, 173, 216, Hayne J, 519, Crennan J, 577, Kiefel J.

> The principles of accountability of the Executive to Parliament and Parliament's control over supply and expenditure operate inevitably to constrain the Commonwealth's capacities to contract and to spend. Such principles do not constrain the common law freedom to contract and to spend enjoyed by non-governmental juristic persons.[31]

Justices Gummow and Bell pointed out that the absence of legislative engagement gives rise to a "deficit in the system of representative government".[32]

The expenditure on a chaplaincy scheme did not fall within the nationhood power, the prerogative or the ordinary administration of the functions of government. The money had been spent under a program that was initiated and run by the Executive Government without parliamentary scrutiny beyond the passage of an appropriation for the vaguely expressed purpose of achieving "high quality foundation skills and learning outcomes from schools".[33] The Court held that the executive power was insufficient to support expenditure on the chaplaincy scheme, and it was therefore invalid.[34]

C. The Financial Framework (Supplementary Powers) Act 1997

This time the Commonwealth Government did react – at least in a formalistic manner. It asked every government department to identify all its non-statutory funding programs. It collected them in a list of over 400 programs and rushed approval of them through both Houses of Parliament in just over 24 hours.[35]

---

31 *Ibid* at para 516, Crennan J.

32 *Ibid* at para 143, Gummow & Bell JJ.

33 *Ibid* at para 227, Hayne J.

34 *Ibid* at paras 83–84, French CJ, 161, Gummow & Bell JJ, 289–90, Hayne J, 548, Crennan J, 597, Kiefel J; Heydon J, dissenting at paras 441, 592–93.

35 Austl, Commonwealth, House of Representatives, *Parliamentary Debates* (26 June 2012) at 8041; Austl, Commonwealth, Senate, *Parliamentary Debates* (27 June 2012) at 4752 (the Bill received its first reading in the House of Representatives at 5:38pm on 26 June 2012 and received its third reading in the Senate at 6:56pm on 27 June 2012. It was debated for 3 hours and 5

Consideration of the Bill was extremely limited, with virtually no scrutiny of the listed programs, apart from a cursory discussion of the school chaplaincy program, which was one of those listed. The then Opposition raised concern about whether the listed programs fell within the Commonwealth's powers. It complained that it had had almost no time to scrutinise those programs.[36] Nonetheless, the Bill was passed. The process made a mockery of the importance that the High Court had accorded to the parliamentary approval and scrutiny of the expenditure of public money. The Commonwealth gave formal effect to the requirement for legislative approval, but did not give effect to the Court's reasoning.

The result was the enactment of section 32B of an Act since retitled the *Financial Framework (Supplementary Powers) Act 1997*.[37] It validated and authorised Commonwealth spending on all grants or programs listed in what became the *Financial Framework (Supplementary Powers) Regulations 1997*[38] ("*Financial Framework Regulations*"). The use of regulations to identify these programs meant that more could be added by the Commonwealth at any time without the need for direct parliamentary scrutiny that would otherwise have been required for the passage of legislation. Further, the descriptions of the listed programs were often so broad that almost anything could be included within them. Examples include expenditure of public money for "Regulatory Policy", "Diversity and Social Cohesion" and "Regional Development".[39] Many of the listed programs had no apparent constitutional head of power to support them. Again, reliance was placed upon the fact that it was unlikely that anyone would challenge them. The 'constitutional risk' was again regarded as low.

---

minutes in the House of Representatives and 2 hours and 6 minutes in the Senate) [*Senate Parliamentary Debate*].

36 *Senate Parliamentary Debate*, *supra* note 35 at 4651–53 (Senator Brandis).

37 (Cth) (Austl), 1997/154, s 32B [*Financial Framework Act*].

38 (Cth) (Austl), 1997/328 [*Financial Framework Regulations*].

39 *Ibid*, schedule 1AA, part 4.

D. Williams v Commonwealth (No 2)

But Mr. Williams' children still attended a school with a chaplain paid by Scripture Union Queensland from Commonwealth funds. Williams again commenced legal proceedings, arguing this time that while there was a legislative provision that purported to authorise expenditure on the school chaplaincy program, there was no Commonwealth head of power to support that legislative provision.[40] Again, the High Court held that the school chaplaincy program was not validly authorised.

In *Williams v Commonwealth (No 2)*,[41] the High Court held that there was no Commonwealth head of power that supported expenditure on a chaplaincy program. Arguments that it was supported by the power to make laws with respect to trading corporations[42] or "benefits to students"[43] were rejected by the High Court. However, the High Court did not strike down section 32B in its entirety. Instead, it read it down so that it only authorised the making of grants that were within the Commonwealth's constitutional power.[44]

The Commonwealth had argued for the restoration of its previously claimed power to spend on whatever subjects it wished. It contended that if any limitations on its power to spend were deemed necessary, the Commonwealth should still be permitted to contract and spend in relation to "all those matters that are reasonably capable of being seen as of national benefit or concern; that is, all those matters that befit the national government of the federation, as discerned from the text and structure of the Constitution".[45]

The High Court was not sympathetic to this argument. It noted that the proposition was one of great width and that it was "hard to think of any program

---

40 *Williams v Commonwealth (No 2)* (2014), 252 CLR 416 (HCA) [*Williams (No 2)*].

41 *Ibid.*

42 *Ibid* at para 49, French CJ, Hayne, Kiefel, Bell & Keane JJ.

43 *Ibid* at paras 43–48, French CJ, Hayne, Kiefel, Bell & Keane JJ.

44 *Ibid* at para 36, French CJ, Hayne, Kiefel, Bell & Keane JJ.

45 *Ibid* at para 70, French CJ, Hayne, Kiefel, Bell & Keane JJ [emphasis omitted].

requiring the expenditure of public money appropriated by the Parliament which the Parliament would not consider to be of benefit to the nation".[46] It added that this was simply "another way of putting the Commonwealth's oft-repeated submission that the Executive has unlimited power to spend appropriated moneys for the purposes identified by the appropriation".[47] The Court was not prepared to accept this submission. It contended that the Commonwealth's argument was flawed because it assumed that the Commonwealth's executive power was the same as that of the United Kingdom. But this was not the case because Australia is a federation and its *Constitution* distributes powers and functions between the Commonwealth and the States. Their Honours concluded:

> The polity which, as the Commonwealth parties rightly submitted, must "possess all the powers that it needs in order to function as a polity" is the central polity of a federation in which independent governments exist in the one area and exercise powers in different fields of action carefully defined by law. It is not a polity organised and operating under a unitary system or under a flexible constitution where the Parliament is supreme. The assumption underpinning the Commonwealth parties' submissions about executive power is not right and should be rejected.[48]

III. Government Grants and 'Pork-Barrelling'

Despite the above legal history which made it abundantly clear from 2014 onwards that the Commonwealth cannot spend money on subjects outside those distributed to it by the *Constitution*, and that section 32B[49] does not provide legislative authorisation for any spending outside its powers, the Commonwealth has persisted in funding programs with little if any discernible relationship to a head of constitutional power. Again, it relies on advice concerning 'constitutional risk', which is largely predicated upon the

46 *Ibid* at para 71, French CJ, Hayne, Kiefel, Bell & Keane JJ.

47 *Ibid* [footnotes omitted].

48 *Ibid* at para 83, French CJ, Hayne, Kiefel, Bell & Keane JJ [footnotes omitted].

49 *Financial Framework Act*, *supra* note 37.

unlikelihood of anyone with standing taking legal action in relation to such grants. The amounts of money involved are large[50] and the scrutiny of them is limited. [51] In the 2018-2019 financial year, there were 312 different Commonwealth grants programs or grant opportunities, with AUD $18,639,000 being awarded in grants.[52]

On occasion, the Auditor-General, through the Australian National Audit Office ("ANAO"), has examined spending programs and criticised the Government for bias in spending decisions or failures in process. While the ANAO considers whether there is legal authority to make grants, it does not address constitutional issues and its assessment of legal issues is limited. Its focus is instead on whether there has been a fair and efficient process. For example, in its audit of the use of the National Stronger Regions Fund, the ANAO noted that a policy decision had been made to spend the money on projects beyond 'regional Australia', including in metropolitan areas. No such change was made to the scope of the program as authorised by the *Financial Framework Regulations.* Accordingly, such expenditure, which involved 51 grants totalling AUD $189.2 million for projects in major cities, was unlawful as it had no legislative authorisation. But instead of criticising the Government for unlawful spending, the ANAO merely observed that "there would be benefit" in the

---

50 "Scrutiny of Commonwealth Expenditure" (30 September 2020) online: *Parliament of Australia* <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_Commonwealth_expenditure> (the amounts involved in such expenditure programs are regularly tabulated by the Senate Standing Committee for the Scrutiny of Delegated Legislation).

51 The most consistent scrutiny comes through the Senate Standing Committee on the Scrutiny of Delegated Legislation which considers programs when authorised by delegated legislation. But it is not able to scrutinise spending on programs where the authorization is sourced in statute, as is the case with the CSIG program.

52 Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Response to Question on Notice* (Department of Finance, Hearing of 22 July 2020) (Parliament of Australia: Additional Documents, 5 August 2020) at 1.

Department ensuring "that it advises decision-makers of the legislative authority for proposed grants and that the legislative authority accurately reflects the nature and scope of the granting activity at the time".[53]

Whether or not any of the projects funded by those grants were supported by a Commonwealth head of power is also unclear. This is because the scope of the Fund is broadly described, it relies upon a wide range of Commonwealth heads of power, and there is a disjunct between those heads of power and the actual projects funded. According to the *Financial Framework Regulations*, the purpose of the National Stronger Regions Fund is to "provide grants to support the construction, expansion and enhancement of infrastructure across regional Australia".[54] It relies upon the Commonwealth's powers in relation to subjects including: territories, Indigenous Australians, financial assistance to the States, aliens and immigrants, interstate and overseas trade and commerce, Australia's obligations under international agreements, the provision of welfare benefits, electronic communications, assistance to foreign, trading or financial corporations and measures that are peculiarly adapted to the government of a nation that cannot otherwise be carried on for the benefit of the nation.[55]

Funded projects included the construction of an aquatic centre in Robertson, upgrading the Terrigal Rugby clubhouse, improving the heating in the Pool Hall of the Whyalla Leisure Centre, a Healthy Living Centre in Norlane, a basketball stadium extension in Frankston, a youth hub and skate park in Mansfield and a Community Health and Wellbeing Space in Romsey.[56] It is doubtful that these projects would fall under any of the above heads of

53 Austl, Commonwealth, Australian National Audit Office, *Design and Implementation of Round Two of the National Stronger Regions Fund* (Report No 30) by Grant Hehir (Canberra: ANAO 2016–17) at 32–3.

54 *Financial Framework Regulations*, *supra* note 38, schedule 1AA, part 4, item 62.

55 *Ibid*.

56 See further Australian Government, "National Stronger Regions Fund: Round Two List of Approved Projects" (6 October 2017), online (pdf): *Department of Infrastructure, Transport, Regional Development and Communications* <www.regional.gov.au/regional/programs/files/NSRF_Round_Two_List_of_Approved_Projects_071215.pdf >.

Commonwealth constitutional power. Such funding is not 'peculiarly adapted to the government of a nation' and it can clearly be funded by the relevant State Government if it regards it as a worthy project. While immigrants and Indigenous Australians may use these facilities, that is not a sufficient connection to provide legislative authorisation of the making of the grants.

Essentially, the problem is that while programs can be vaguely described[57] and then justified as having some potential connection to a plethora of different heads of power, there is no disciplined checking[58] that any of the actual grants made under those programs fall within the scope of the relevant head of power. The consequence is large-scale unlawful spending by the Commonwealth Government. The 'constitutional risk' is again low because no one is likely to check the conformity between actual spending and constitutional authority to do so.

Such unlawful and unconstitutional expenditure only tends to be revealed in relation to political scandals where there have been other failures in proper administration, such as political bias in the allocation of grants. The Community Sport Infrastructure Grant program provides a perfect case study of such a scheme. While on the one hand, it is not unusual, as 'pork-barrelling' involving sporting grants has been a conspicuous activity of both sides of government over a long time, on the other hand, this program was the subject of detailed scrutiny by a number of parliamentary committees, producing a great deal of primary documents and oral evidence from those involved. This has

57 See *e.g. Financial Framework Regulations*, *supra* note 38, schedule 1AB, part 4, item 46 (the 'Strengthening Communities' program), item 61 (the 'Community Development Grants Programme'), and item 91 (the 'Stronger Communities Program' which was used to fund projects including a mini-golf course, a children's water frog slide and a reusable Santa sleigh); see also Rosie Lewis, "Potato Peelers and Mini-Golf Enthusiasts Among Grant Winners", *The Australian* (13 August 2018).

58 Note that while the Senate Standing Committee for the Scrutiny of Delegated Legislation examines all new instruments that add programs to the *Financial Framework Regulations,* and queries whether these programs are supported by a constitutional head of power, its jurisdiction does not extend to scrutiny of the actual expenditure under those programs.

provided an unusual degree of enlightenment about the government practice in dealing with such programs of doubtful legal validity.

IV. Community Sport Infrastructure Grant Program

The Community Sport Infrastructure Grant Program ("CSIG Program") was established by the Commonwealth Government in 2018. The Treasury's budget papers[59] show that the money for the CSIG Program was appropriated for the purpose of expenditure by the Australian Sports Commission (also known as "Sport Australia") in the form of grants. The *Australian Sports Commission Act 1989*[60] establishes the Commission as a corporate Commonwealth entity with its own legal personality and powers to enter into contracts and spend money. It has the function of implementing programs to promote equality of access to and participation in sport by all Australians, and to spend money appropriated by Parliament for the purposes of the Commission.[61] It was established as a statutory body, rather than as part of a government department, so as to ensure its independence and operation at arm's length from the Government.[62]

The *Australian Sports Commission Act* gives power to the Commission to make grants and enter into contracts.[63] It is this statutory power, rather than section 32B of the *Financial Framework (Supplementary Powers) Act*,[64] which has been regarded as supporting expenditure on the grants under the CSIG Program. Section 8 simply says that the Commission has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions and, in particular may: "(a) enter into contracts;

59 Austl, Commonwealth, *Budget Measures*, Budget Paper No 2 (2019) at 92–93.

60 (Cth), 1989/12 [*Australian Sports Commission Act*].

61 *Ibid*, s 7.

62 Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Committee Hansard* (22 July 2020) at 34 [*Committee Hansard 22 July 2020*].

63 *Australian Sports Commission Act*, *supra* note 60, s 8.

64 *Financial Framework Act*, *supra* note 37, s 32B.

and … (d) make grants or lend money, and provide scholarships or like benefits".[65]

Three rounds of grants were made in December 2018, February 2019 and April 2019, before the federal election was held on 18 May 2019. A total of AUD $100 million was awarded in a competitive grants scheme to 684 projects. The projects included resurfacing sporting fields, providing lighting for sporting facilities, walking tracks and carparks, improving spectator facilities and upgrading clubrooms. The *Program Guidelines* [66] set out the eligibility conditions[67] and three weighted merit criteria against which applications were assessed. [68] They concerned the extent to which the project enhanced community participation in sport, satisfied community need and showed appropriate project design and planning. The applicant also had to show a proven capacity and capability to complete the project. The *Program Guidelines* stated that applications would be assessed for eligibility and then against the selection criteria.[69] The assessment would occur by way of an industry panel using the same selection criteria.

Clause 8.1 of the *Program Guidelines*, controversially, then conferred the power of final approval on the Minister. It provided:

> The Minister for Sport will provide final approval. In addition to the application and supporting material, other factors may be considered when deciding which projects to fund.
>
> While delivery of funding will be on a competitive basis, if, after completing the assessment process, emerging issues have been identified and/or there are priorities that have not been met, other projects may be considered to address

65 *Ibid*, ss 8(1)(a),(d).

66 Austl, Commonwealth, Australian Sports Commission, *Community Sport Infrastructure Grant Program* (Program Guidelines) (Australian Government, August 2018) [*Program Guidelines*].

67 *Ibid*, clause 5.

68 *Ibid*, clause 6.

69 *Ibid*, clause 8.

> these emerging issues (or other forms of financial arrangements with applicants to otherwise further the objectives of the program). It is expected that, in these cases, the assessment criteria outlined in these guidelines will remain applicable.
>
> The Program Delegate may require additional conditions be attached to the grant funding.

Clause 9 of the *Program Guidelines* added that the decision of the Program Delegate – the Minister – was final and was not subject to review or appeal.

Numerous announcements of funding under this scheme were made by Ministers, Members of Parliament who belonged to the Coalition Liberal - National Party Government and even Coalition candidates in the lead up to the Commonwealth election, as part of campaigning.[70] The last round of grants, amounting to AUD $40 million, was controversially finalised on 11 April 2019, after the Parliament had been dissolved at 8:30 am that morning and the Government had commenced the period of caretaker governance.[71] Successful grants were then announced during the election period. The Minister for Sport,

---

70 "Georgina Downer's $127,000 bowls club novelty cheque to be examined by auditor-general" (22 March 2019), online: *ABC News* <www.abc.net.au/news/2019-03-22/georgina-downers-bowls-club-cheque-to-be-investigated/10928020> (the investigation by the ANAO was instigated after a Liberal Party candidate, who was not the local Member of Parliament, was photographed handing over a novelty cheque for a government grant to a bowling club, featuring the candidate's face and Liberal Party logos).

71 See Grant Hehir, "Letter by Auditor-General" (16 April 2020) online (pdf): *Parliament of Australia* <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Administration_of_Sports_Grants/AdminSportsGrants/Additional_Documents?doacType=Additional%20Information> (An email from the Minister's Office to the Australian Sports Commission was received at 8:46 am, with details of those projects approved for funding in Round 3 of the grants. A further email was received at 12:43 pm with a changed list of approved projects. According to the ANAO there were 11 changes made between 8:46 am and 12:43 pm, with a net increase of AUD $2,767,071 in grant funding. Grants were removed, reduced, added and increased. Some were new applications made after the close of the scheme).

Senator Bridget McKenzie, later said that she had made her final approval of the grants on 4 April 2019 and that it was later changed without her approval.[72]

In January 2020, the ANAO presented a report to Parliament upon the administration of the CSIG Program. It found that while the Commission had assessed the grant projects on the basis of merit, the office of the Minister for Sport had run a parallel process which was based on factors other than those identified in the *Program Guidelines*, "such as project locations including Coalition 'marginal' electorates and 'targeted' electorates".[73] Indeed, the Minister's office sent the Australian Sports Commission a list of approved grants before the Commission's independent panel had even met to make its merit assessment or the Board had met to approve the grant recommendations.[74] When it came to the second round, the Commission did not even bother making recommendations to the Minister, based on merit. It just acted as instructed by the Minister as to which grants should be made.[75] For the third round, the Commission put recommendations to the Minister, but then made

72 Bridget McKenzie, "Statement Regarding Senate Estimates" (5 March 2020), online: *Bridget McKenzie* <www.bridgetmckenzie.com.au/media-releases/statement-senate-estimates/>; Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Committee Hansard* (27 August 2020) at 8–9 (no record of the signed brief was entered into the Department's computer system until 11 April 2019) [*Committee Hansard 27 August 2020*]; *Committee Hansard 22 July 2020*, *supra* note 62 at 22–23 (note that the Department of the Prime Minister and Cabinet took no action to determine who was purporting to exercise the Minister's powers without the Minister's authority, the lawfulness of doing so, and the appropriateness of acting after the caretaker period commenced).

73 Austl, Commonwealth, Australian National Audit Office, *Award of Funding under the Community Sport Infrastructure Program* (Auditor-General Report no 23) by Grant Hehir (Canberra: ANAO, 2020) at para 18 [*ANAO Report no 23*].

74 Austl, Commonwealth, Joint Committee of Public Accounts and Audit, *Committee Hansard* (3 July 2020) at 11, 24 [*Committee Hansard 3 July 2020*].

75 *Ibid* at 3.

the grants according to the Minister's instructions, overriding its own recommendations.[76]

The ANAO added that there was "evidence of distribution bias in the award of grant funding".[77] It concluded:

> The award of funding reflected the approach documented by the Minister's Office of focusing on "marginal" electorates held by the Coalition as well as those electorates held by other parties or independent members that were to be 'targeted' by the Coalition at the 2019 Election. Applications from projects located in those electorates were more successful in being awarded funding than if funding was allocated on the basis of merit assessed against the published program guidelines.[78]

It also concluded that there was no evident legal authority for the Minister to be the decision-maker in making the grants.[79] The reference in the *Program Guidelines* to the Minister as providing the final approval and as the Program Delegate did not give her the legal power to fulfil this role.

As a consequence of the ensuing controversy, the Prime Minister, asked the Secretary of the Department of the Prime Minister and Cabinet, Philip Gaetjens, whether Senator McKenzie had breached ministerial standards. While the report was not released, the Prime Minister summarised it in a press conference, stating that the report concluded that the Minister, according to the *Program Guidelines*, had the final approval authority with respect to the grants and the right to consider other factors. The Minister used that discretion, and there was no basis to find that she had breached the ministerial standards in that respect. The Prime Minister said that the Secretary did not consider that the process was "unduly influenced by reference to marginal or targeted electorates".

---

76 *Ibid* at 13.

77 *ANAO Report no 23*, *supra* note 73 at para 24.

78 *Ibid*.

79 *Ibid* at paras 10, 13, 2.19.

He found "no basis for the suggestion that political considerations were… the primary determining factor".[80]

The Prime Minister stated, however, that the Secretary found that the Minister had a conflict of interest with respect to a grant to a gun club of which she was a member. Due to her failure to manage that conflict of interest, the Minister 'tendered her resignation' as a minister.[81]

A. Constitutional Validity of the Grants

As the Commonwealth has no express power to make laws with respect to sport or local infrastructure, a question arises as to the constitutional validity of the *Australian Sports Commission Act,* including the functions and powers conferred upon the Commission, such as the making of the grants. This is reflected in section 7(5) of the Act, which provides:

> 7 (5) The Commission may perform its functions to the extent only that they are not in excess of the functions that may be conferred on it by virtue of any of the legislative powers of the Parliament, and, in particular, may perform its functions:
>
> (a) by way of expenditure of money that is available for the purposes of the Commission in accordance with an appropriation made by the Parliament;
>
> (b) for purposes related to the collection of statistics;
>
> (c) for purposes related to external affairs; and
>
> (d) for purposes in relation to a Territory.[82]

This provision was enacted in 1989, at a time when the Commonwealth still considered that it had the full power to spend public money appropriated for any purpose that the Parliament considered to be a purpose of the Commonwealth. As discussed above, that position was rejected by the High

---

80 "Press Conference – Australian Parliament House, ACT" (2 February 2020), online: *Prime Minister of Australia* <www.pm.gov.au/media/press-conference-australian-parliament-house-act-4> [*Press Conference*].

81 *Ibid.*

82 *Australian Sports Commission Act*, *supra* note 60, s 7(5).

Court in the *Pape Case*[83] in 2009. Accordingly, section 7(5)(a)[84] is ineffective in supporting the Australian Sports Commission's expenditure on grants.

The Commonwealth Parliament's power to make laws for territories in section 122 of the *Constitution*[85] could be used to support the establishment of the Australian Sports Commission as an institution in the Australian Capital Territory and to make grants to bodies located in the territories. But it would not extend to supporting the Commission making grants to community groups in the States.

The power to make laws with respect to "census and statistics" in section 51(xi) of the *Constitution*[86] may support research conducted by the Commission into the level of sporting activity across the country and the gathering of statistics upon it but is not sufficient to support grants to sporting clubs to provide infrastructure.

If the grant recipients were trading or financial corporations, the grants might be supported under the corporations power in section 51(xx) of the *Constitution*,[87] but the grant Guidelines require recipients to be not-for-profit community bodies, most of which would not be trading or financial corporations.[88] In any case, as there was no legal requirement for the recipients to be trading or financial corporations, the corporations power would be insufficient to support the grants, as the provisions in the *Australian Sports Commission Act* which authorise spending on the grants could not be characterised as laws with respect to trading or financial corporations.[89] There

83 *Pape*, *supra* note 14 at paras 111, French CJ, 178, 183, Gummow, Crennan & Bell JJ, 320, Hayne & Kiefel JJ, 601–02, Heydon J.

84 *Australian Sports Commission Act*, *supra* note 60.

85 *Constitution*, *supra* note 4, s 122.

86 *Ibid*, s 51(xi).

87 *Ibid*, s 51(xx).

88 *Program Guidelines*, *supra* note 66.

89 *Williams (No 1)*, *supra* note 21 at paras 271–72, Hayne J, 575, Kiefel J; *Williams (No 2)*, *supra* note 40 at paras 50–51, French CJ, Hayne, Kiefel, Bell & Keane JJ.

are also doubts, flowing from *Williams (No 2)* about whether merely making a grant to a trading or financial corporation is sufficient to attract the application of the power.[90]

The nationhood power, which supports activities and enterprises that are "peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation",[91] might be relied on to support funding of national teams, such as Olympic teams, but not local sporting facility upgrades. The provision of funding for local sporting infrastructure could also not be characterised as a "national emergency".[92]

The external affairs power in section 51(xxix) of the *Constitution*[93] would support a number of the Commission's functions, such as fostering co-operation in sport between Australia and other countries. It is less useful with respect to grants to local community sporting bodies in Australia. There are, however, two relevant treaties that Australia has ratified. Article 10(g) of the *Convention on the Elimination of all forms of Discrimination Against Women* requires parties to take "all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women… the same opportunities to participate actively in sports and physical education".[94]

Article 30(5) of the *Convention on the Rights of Persons with Disabilities*[95] imposes an obligation on parties to encourage and promote the participation of

---

90 *Ibid.*

91 *AAP Case, supra* note 11 at 397, Mason J.

92 *Williams (No 1)*, *supra* note 21 at paras 146, Gummow & Bell JJ, 196, 240, Hayne J, 499, 503, Crennan J; *CPCF v Minister for Immigration and Border Protection* (2015), 255 CLR 514 (HCA) at para 150, Hayne & Bell JJ.

93 *Constitution*, *supra* note 4, s 51(xxix).

94 *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, GA Resolution 34 at article 10(g) (entered into force 18 December 1979).

95 *Convention on the Rights of Persons with Disabilities*, 13 December 2006, HRC TS 2515 at article 30(5) (entered into force 3 May 2008).

persons with disabilities in mainstream sporting activities and to ensure they have an opportunity to participate in disability-specific sporting activities. It also requires parties to ensure that persons with disabilities have access to sporting venues.

The external affairs power in section 51(xxix) of the *Constitution*[96] would, therefore, support the implementation of this treaty obligation with respect to funding for change rooms for women or facilities and access for persons with a disability. However, this is not sufficient to support the whole of the grants program, given that grants were made for many other purposes, such as upgrading playing surfaces or providing lighting. Of the six specific aims of the CSIG Program listed on page 2 of its *Program Guidelines*, only one – "prioritise opportunities for women and girls, multicultural communities and people of all abilities to play sport and be physically active"[97] – appears to be capable of support by the external affairs power.

Overall, it appears unlikely that the Commonwealth had constitutional power to support the expenditure of money under the *Australian Sports Commission Act* on this particular sports program in its entirety, although it would have had the power to spend on some items that fell within its scope. Section 7(5) of the *Australian Sports Commission Act*[98] therefore required the Commission to limit its spending to purposes that fell within the Commonwealth's legislative powers under the *Constitution*. This is consistent with section 15A of the *Acts Interpretation Act 1901*[99] which instructs the courts to read and construe Acts so that they do not exceed the legislative power of the Commonwealth.[100] On this basis, the provisions in the Act would not be

96 *Constitution*, *supra* note 4, s 51 (xxix).

97 *Program Guidelines*, *supra* note 66 at 2.

98 *Australian Sports Commission Act*, *supra* note 60, s 7(5).

99 (Cth) (Austl), 1901/02, s 15A [*Acts Interpretation Act*].

100 *Ibid* (Section 15A of the *Acts Interpretation Act*, provides that "Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of

invalid, but some or all of the spending under the program would be. Both the Commission and the Minister should have been aware that, by law, the power to make grants was limited in this way.

B. Legislative Power to Make the Grants

Accepting that some grants, however, may have been supported by a constitutional head of power, such as those for female changing facilities and those made to organisations within a Territory, did the Minister for Sport have the power to decide who received those grants?

The Australian Sports Commission was created as an independent corporate entity. It is not a government department created under section 64 of the *Constitution*.[101] Its existence, functions and powers are determined by legislation. Its relationship with the Minister is also determined by legislation. While a Minister may have a general power to direct public servants in his or her department (subject to any statutory obligations and the requirements of administrative law), a Minister does not have the same power with respect to corporate entities established by statute.

The *Australian Sports Commission Act* is explicit about the extent of the Minister's powers.[102] Section 11 gives the Minister the power to direct the Commission with respect to the "policies and practices to be followed by the Commission in the performance of its functions and the exercise of its powers".[103] It does not permit the Minister to exercise the Commission's powers. It only permits her to direct the Commission, at the higher level of policies and

---

that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power").

101 *Constitution*, *supra* note 4, s 64.

102 See *e.g. Australian Sports Commission Act*, *supra* note 60, ss 13(2), 19(1), 23, 26 (for example, the Minister may only request a change to the operational plan, or fail to approve it, if the Minister is of the opinion that it is inconsistent with the corporate plan relating to that period, and such a request is given in writing (s 26(2)(5)).

103 *Ibid*, s 11.

practices, with respect to how the Commission exercises its own functions and powers.[104] Further, any such direction must be in writing, published in the Government Gazette and tabled in Parliament. No such direction was ever made in relation to the CSIG Program.[105] The purpose of this provision is to ensure the exercise of the Minister's power of direction is subject to transparency and accountability. Its existence points to the absence of any general executive power to direct the Commission. There would be no point in requiring that the Minister's directions be gazetted and tabled if the Minister had an unwritten parallel power to direct the Commission that avoided tabling and gazettal.

After the Auditor-General's report on the administration of this scheme became public, the Prime Minister asked the Attorney-General for advice about the legality of the Minister's conduct. The Prime Minister refused to release that advice.[106] He noted in a press conference, however, that the Auditor-General had found that in the absence of the Minister making a direction under section 11 of the *Australian Sports Commission Act,* there was no evident legal authority under which the Minister was able to approve of the program grants.[107] The Prime Minister stated that the Attorney-General considered that the "Auditor-General's assumption arising out of his apparent interpretation of section 11 of the Australian Sports Commission Act is, as he notes with respect, not correct".[108] It remains unclear what the Attorney-General considers to be the correct interpretation of section 11. No Commonwealth officer appearing before the Senate Select Committee that inquired into these grants was able to

104 *Committee Hansard 3 July 2020*, *supra* note 74 at 20 (the Australian Sports Commission also took the view that section 11 does not allow the Minister to direct the Commission "to make specific grants to specific organisations").

105 *ANAO Report no 23*, *supra* note 73 at 2.19.

106 Letter from Christian Porter to Senator Payne (11 February 2020) (note that the Senate ordered the production of the advice on 5 February 2020 (Order No 388), but the Attorney-General refused to produce it on the ground that it was privileged legal advice).

107 *Press Conference*, *supra* note 80.

108 *Ibid*.

identify any legal authority for the Minister's actions or any different 'interpretation' of section 11 that would provide such authority. Nor has any submission been made to the Committee, as would ordinarily be the case, from the Attorney-General's Department[109] or any other agency, which has identified the Minister's source of power to approve of the grants or the 'correct' interpretation of section 11.

The *Program Guidelines* described the Minister as the 'Program Delegate'.[110] Could the Australian Sports Commission have delegated its powers to the Minister? Section 54 of the *Australian Sports Commission Act* confers on the Commission the power to delegate its powers to a member of the Commission; a committee of the Commission; the Executive Director, the Director or a person employed by the Commission.[111] There is no power to delegate the Commission's powers to the Minister. Despite this fact, Appendix A in the *Program Guidelines* defines the 'Program Delegate' as the Minister for Sport.[112] In answers to questions taken on notice, the Australian Sports Commission stated that it "did not delegate or attempt to delegate any statutory power pursuant to section 54".[113] Instead, it "exercised its own power under section 8

109 Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Committee Hansard* (2 September 2020) at 26–31 (officers of the Commonwealth Attorney-General's Department gave oral evidence to the Committee but claimed legal privilege as the ground for declining to identify the legal authority held by the Minister to approve the grants).

110 *Program Guidelines*, *supra* note 66.

111 *Australian Sports Commission Act*, *supra* note 60, s 54.

112 *Program Guidelines*, *supra* note 66 (note that the Program Guidelines have a status no higher than policy. They do not comprise a statutory instrument and they cannot alter a law).

113 Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Parliamentary Inquiry Question on Notice* (Sport Australia) (Parliament of Australia: Additional Documents, 13 May 2020) at 12 [*Parliamentary Inquiry 13 May 2020*].

of the Act to make grants and enter into contracts for the purpose of the Community Sport Infrastructure Grant program".[114]

It might be argued that the Minister was the 'authorised agent' of the Commission under the *Carltona* principle.[115] This is a principle that allows a public servant to act as the agent for his or her Minister or Department head, even when there is no formal delegation. It is based in part upon the fact that the Minister remains responsible to Parliament for that action. It is also based upon the argument of practical necessity – i.e. that it is impossible for a Minister or senior official to make personally the large number of decisions required by the powers conferred upon him or her. As a matter of statutory interpretation, it may sometimes be accepted by a court that Parliament intended that a power would not be personally exercised by the Minister on whom it was conferred, because administrative necessity would require the Minister to act through officers responsible to him or her.[116]

To apply the *Carltona* principle in relation to the Minister exercising the powers of the Australian Sports Commission would be to turn the principle on its head. The Minister is not a subordinate officer who is responsible to the Commission. There is no practical necessity for the Minister to take the administrative load from the Commission. The *Australian Sports Commission Act* already provides for other delegates to do this. The *Australian Sports Commission Act* also makes quite clear the relationship between the Minister and the Commission, and the Commission's degree of independence from the Minister. One could not argue that Parliament, in enacting the *Australian Sports Commission Act*, really intended that the Commission's powers to make grants

114 *Ibid.*

115 *Carltona Ltd v Commissioner of Works* [1943] 2 ALL ER 560 (CA (Eng)) (note that the existence of an express power to delegate does not automatically preclude an implied power to authorise another to exercise the power as an agent; *O'Reilly v State Bank of Victoria Commissioners* (1983), 153 CLR 1 (HCA) at 12–13, Gibbs CJ, 32, Wilson J.

116 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (HCA) at 38, Mason J.

should be exercised, by reason of administrative necessity, by the Minister. If Parliament had intended that the Minister should make the grants, it would have said so in the Act.

There appears, therefore, to be no legal basis upon which the Minister could have been made the delegate or agent of the Commission to undertake the approval of the grants under clause 8.1 of the *Program Guidelines*.[117] Such an appointment would subvert the relationship established by statute between the Minister and the Commission.

It also appears that the Australian Sports Commission and the Minister's Department were aware that the Minister did not have the power to act as the delegate of the Commission in approving these grants. The Auditor-General noted in evidence before a parliamentary Committee that:

> The evidence to us was that Sport Australia expressed a view during the audit they didn't believe that the minister had the authority, that they were the decision-making body as a corporate Commonwealth entity and that the Department of Health raised concerns and said that they should get legal advice.[118]

That concern was set out in an email from an officer in the Department of Health, dated 28 June 2018, which examined the *Australian Sports Commission Act* and concluded that it did not give the Minister authority to approve expenditure where the amount was less than AUD $500,000, but that the Minister could give a written direction to the Commission under s 11 of the

117 *Program Guidelines*, *supra* note 66.

118 Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Committee Hansard* (13 February 2020) at 13 (this is consistent with paras 2.16 and 2.17 of the *ANAO Report no 23*, *supra* note 73).

Act.[119] It concluded "It may be worth seeking further advice from Legal services if the Minister intends to pursue this option".[120]

In its submission to the Senate Committee, the Department of Health deflected all responsibility for obtaining legal advice back to the Australian Sports Commission ("Sport Australia"), observing:

> While the department collaborated with Sport Australia on the development [of] the program guidelines…, the department did not seek legal advice. It was the responsibility of Sport Australia to satisfy itself in relation to the legality of processes outlined in the guidelines.
>
> The process of administering the Community Sport Infrastructure Grant Program was ultimately a matter for Sport Australia.[121]

Mr. Wylie, the Chair of the Australian Sports Commission, when asked about the legal basis for the Minister's decision-making stated that it was "not for us to comment on the minister's legal basis for decision-making".[122] He added that he was satisfied that Sport Australia acted within the powers and purposes under the *Australia Sports Commission Act*. He observed that the "Department of Health did not raise the issue of the need for legal advice, and so we're confident that this program and the manner of implementation of this program is consistent with our legal powers and purposes".[123] He also asserted that it was "open to Sport Australia to take account of the minister's approval in

---

119 Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Parliamentary Inquiry Question on Notice* (Department of Health) (Parliament of Australia: Additional Documents, 27 August 2020) at 3.

120 *Ibid.*

121 Austl, Commonwealth, Department of Health, *Submission to the Senate Select Committee on Administration of Sports Grants* (Submission No 21) (Canberra: Select Committee on Administration of Sports Grants, 21 February 2020) at paras 12–13.

122 Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Committee Hansard* (27 February 2020) at 14 [*Committee Hansard 27 February 2020*].

123 *Ibid.*

relation to a grant program". He drew a distinction between ministerial approval and the actual awarding of the grants, which was done by Sport Australia.[124]

In answers to questions taken on notice, the Australian Sports Commission stated that the Minister for Sport had previously provided approval for grants in the 'Move It AUS' programs. It asserted that the legal basis was the Commission's powers under its own Act to make grants. It added that it had legal advice[125] that "in exercising its powers, it was open to Sport Australia to take account of the Minister's approval".[126] Yet the Commission's own records show that it regarded the Minister as the final decision-maker, stating that the Minister had "overturned some of the recommendations that were put forward to her and endorsed others that were not part of the original recommendations".[127] It put a brief to the Minister to approve an "attached list of 245 round three Community Sport Infrastructure grants recommended by Sport Australia", but this was amended by hand on the brief to approve instead the grants "approved by the Minister".[128] It was the Minister's list that was given effect — not that recommended by the Commission. The Auditor-General

124 *Ibid* at 15.

125 *Committee Hansard 27 August 2020*, *supra* note 72 at 20 (the Commission initially agreed to provide a copy of that advice to the Senate Select Committee, but the Minister for Sport prevented that, raising a claim for public interest immunity with respect to it).

126 *Parliamentary Inquiry 13 May 2020*, *supra* note 113 at 1; *Committee Hansard 27 August 2020*, *supra* note 72 at 21.

127 Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Parliamentary Inquiry Question on Notice* (Answers to Questions taken on Notice during 27 February public hearing, received from Sport Australia) (Parliament of Australia: Additional Documents, 17 March 2020) at 11–14 (Australian Sports Commission, Minutes of Meeting No 107 of the Sport Australia Finance Audit and Risk Committee, 13 December 2018) [*Parliamentary Inquiry 17 March 2020*].

128 Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Parliamentary Inquiry Question on Notice* (Answers to Questions taken on Notice during 27 February public hearing, received from Sport Australia) (Parliament of Australia: Additional Documents, 17 July 2020) at 1459 [*Parliamentary Inquiry 17 July 2020*].

observed that if the Australian Sports Commission had been the decision-maker, and the Minister just an adviser to it, then there should have been evidence of its board making the decisions, but there was not.[129]

The Commission did not independently exercise its powers, taking into account the Minister's views. It acted at the dictation of the Minister, despite expressing concern about the effect upon the "integrity of the assessment process" and the risks involved.[130] Moreover, in its brief to the Minister, the Commission requested a 'delegation' from the Minister to the Commission of the power to make minor changes "to the scope/amount of individual grants approved by you", taking into account the lengthy period between the original application and the award of the grants and possible changes in the status of projects in the meantime. [131] This clearly shows that, in practice, the Commission treated the Minister as the final decision-maker and that it did not merely 'take into account' the Minister's approval in making its own decisions.

The Department of Health regarded the Minister as the 'decision-maker' and noted that the Minister had never entertained the view that she would not be the decision-maker.[132] Senator McKenzie, in her submission to the inquiry into the administration of the CSIG Program, also regarded herself as the decision-maker, rather than as someone whose 'approval' was merely taken into account. She continued to claim that she had ministerial discretion to approve the grants. She stated that as Sports Minister she "was responsible for the policy settings and the decision-making process for the CSIG program".[133] She also claimed that the "provisions for and exercise of Ministerial authority in the case

129 *Committee Hansard 3 July 2020*, *supra* note 74 at 20.

130 *Parliamentary Inquiry 17 March 2020*, *supra* note 127 at 11–14.

131 *Parliamentary Inquiry 17 July 2020*, *supra* note 128 at 1460.

132 *Committee Hansard 27 August 2020*, *supra* note 72 at 4.

133 Austl, Commonwealth, Select Committee on Administration of Sports Grants, *Statement to the Senate Select Committee on Administration of Sports Grants* (Admission of Sports Grants Submission 44) by Senator the Hon. Bridget McKenzie (Canberra, ACT, 2600: 29 April 2020) at 5 [*Senator McKenzie Submission no 44*].

of the CSIG program was conducted within existing Commonwealth legislated requirements",[134] without identifying what those legislated requirements were. She stated that she "made the decision"[135] to depart from the merit-based recommendations of the Commission that had been made under the criteria set out in the *Program Guidelines*. She considered that it was her 'prerogative' and responsibility to exercise ministerial discretion, arguing that under the Westminster system, "Ministers are given the responsibility of making the final decisions in the execution of programs in their portfolios".[136]

Senator McKenzie did not seem to understand the difference between the public service and an independent statutory corporation upon which specific powers have been conferred, except to the extent that she considered this difference exculpated her from the usual requirements of ministerial accountability for decision-making regarding grants.[137] Despite stating that she had the power and responsibility for making the grants, she noted a 'technical question regarding the statutory basis of [her] discretion' and complained that it had not been raised with her or her Ministerial office. She stated that she "expected the Australian Public Service would resolve such legal issues, if they exist, prior to advising a Minister on how she should proceed with the expenditure of public monies".[138] This was no mere 'technical question'. It was a fundamental question of whether she had the legal authority to decide on the making of the grants, which she did not.

Senator McKenzie's argument that she had a prerogative power or general ministerial discretion under the Westminster system to make the grants is

134 *Ibid* at 14.

135 *Ibid* at 20.

136 *Ibid* at 42.

137 *Ibid* at 14 (Senator McKenzie claimed that the requirements of the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grant Rules and Guidelines 2017* did not apply, because it was a statutory body that was administering the grants; see the discussion below about the application of the Act and the Guidelines).

138 *Ibid* at 44.

untenable. All executive power, including the prerogatives and capacities of the Crown in Westminster systems of government, is subject to statute. Statute conferred the power on the Australian Sports Commission – not the Minister or a public service body.

It cannot be contended that despite the existence of sections 11, 54 and all the other provisions of the *Australian Sports Commission Act* which stipulate the Minister's limited powers, she had some kind of general discretion to direct the Commission and to exercise its powers by providing "the final approval" in relation to the allocation of grants by the Commission.[139] This is for three reasons. First, ministerial power under section 64 of the *Constitution* to administer "such departments of State of the Commonwealth as the Governor-General in Council may establish" does not extend to corporate Commonwealth entities established by statute.[140] Second, as the Commission is a creature of statute, its powers and functions are necessarily determined by statute, and it has no capacity to act outside statute. Third, the statute expressly deals with the power of the Minister to direct the Commission and expressly addresses who may act as a delegate of the Commission. The exercise of executive power is subject to statute, and any exercise of executive power contrary to the limited powers conferred by statute would be invalid.

Accordingly, to the extent that clause 8.1 of the *Program Guidelines* stated that the Minister was the final approver of the grants, it appears to have been invalid as it was inconsistent with the *Australian Sports Commission Act*. As the ANAO asserted, there appears to have been no legal basis for the actions of the Minister and her staff in approving grants under the CSIG program.

This problem did not arise only with respect to this grants program. For example, Senator McKenzie, as Sports Minister, also approved AUD

139 *Committee Hansard 3 July 2020*, *supra* note 74 at 12–13 (note that on 3 July 2020, when a Government MP, Dr Gillespie, did seek to assert that the Minister does have discretion, the Auditor-General replied that he had seen no legal advice to this effect and that it is inconsistent with the legal framework with respect to corporate entities).

140 *Constitution*, *supra* note 4, s 64.

$22,925,568 worth of grants under the 'Move it AUS – Better Ageing' grant program and AUD $18,000,089 under the 'Move it AUS – Participation' grant program,[141] even though the power to award the grants was held by the Australian Sports Commission, not the Minister.

C. Financial Legislation

Senator McKenzie, in her submission to the Senate Select Committee, stated that her exercise of ministerial discretion to approve the grants was "not governed by the *Public Governance, Performance and Accountability Act 2013"* ("*PGPA Act*").[142] This does not appear to be correct. As the Department of Finance and the ANAO both recognised, section 71 of the *PGPA Act* applies to ministers approving the expenditure of public money, even when this is being done through a corporate Commonwealth entity, such as the Australian Sports Commission.[143]

Section 71 provides that a "Minister must not approve a proposed expenditure of [money held by a corporate Commonwealth entity] unless the Minister is satisfied, after making reasonable inquiries, that the expenditure would be a proper use of the relevant money".[144] 'Proper' is defined in section 8 of the *PGPA Act* as meaning "efficient, effective, economical and ethical".[145] The Minister was therefore required by law to satisfy herself, which would require a rational assessment of relevant evidence, whether the allocation of these grants was 'efficient, effective, economical and ethical' in circumstances where they

141 *Parliamentary Inquiry 13 May 2020*, *supra* note 113 at 16–21.

142 (Cth) (Austl), 2013/123 [*PGPA Act*]; *Senator McKenzie Submission No 44*, *supra* note 133 at 14 (Senator McKenzie referred to the ANAO report as authority for this proposition, but misread it. It in fact said that section 71 of the *PGPA Act* applies to Ministers regardless of whether the grant making power was vested in a Commonwealth corporate entity).

143 *Committee Hansard 22 July 2020*, *supra* note 62 at 37; *ANAO Report no 23*, *supra* note 73 at 1.7, 4.2.

144 *PGPA Act*, *supra* note 142, s 71.

145 *Ibid*, s 8.

overturned independent merit assessments. It does not appear that the Minister did so.

D. Commonwealth Grants Rules and Guidelines 2017

In 2009, the Commonwealth wisely sought to clean-up the grant-making process to make it more transparent and accountable. It set out guidelines and regulations which were later updated and reissued as the *Commonwealth Grants Rules and Guidelines 2017* ("CGRGs").[146] The CGRGs were made by way of a statutory instrument under section 105C(1) of the *PGPA Act*[147] and therefore have the force of law. The CGRGs comprise two parts – mandatory requirements in Part 1 and guidance on key principles in Part 2. The material discussed below falls within the mandatory part.

The CGRGs do not impose obligations upon corporate Commonwealth entities, such as the Australian Sports Commission.[148] Accordingly, there was no obligation on the Commission to comply with them. However, the Australian Sports Commission has its own Grant Management Framework based upon the CGRGs.[149] In particular, it provided that in "instances where the delegate rejects or changes the funding account from what is being recommended, the reasons should be recorded".[150] The Minister's office was reminded by email that if the Minister wished to depart from the recommendations of the Australian Sports Commission, she needed to record her reasons.[151] The final brief sent to the Minister for approval also stated that under section 6.1.1 of the Commission's Grant Management Framework, the Minister must "provide reasons for

146 (Cth) (Austl), 2017/F2017L01097 [*CGRGs*].

147 *PGPA Act*, *supra* note 142, s 105C(1).

148 *CGRGs*, *supra* note 146 at para 1.2.

149 *ANAO Report no 23*, *supra* note 73 at 2.1.

150 *Parliamentary Inquiry 17 March 2020*, *supra* note 127 at 1–8.

151 *Ibid* (see emails on 5 and 9 December 2018. Note that the Minister's office was also advised that if it wished to fund projects that involved significant risks to successful completion, it could fund them separately via a ministerial budget).

rejecting or changing the recommended grant applicants".[152] The brief was returned with this marked as 'agreed', and with changes made to the recommended grants, yet without any reasons provided for making those changes.[153] The Minister seems to have taken the view that she could instruct an independent statutory entity, or exercise its powers, but was not obliged to comply with that entity's rules, which substitute for the application of the CGRGs.

In any case, the CGRGs still appear, on their face, to apply to the Minister, even when the grant program is being conducted by a corporate Commonwealth entity. Paragraph 2.9(a) expressly states that the "CGRGs apply to grants administration performed by … Ministers".[154] Grants are defined in para 2.3 as arrangements for the provision of financial assistance by the Commonwealth or on behalf of the Commonwealth under which "relevant money" is to be paid to a grantee other than the Commonwealth.[155] "Relevant money" includes money standing to the credit of the bank account of a corporate Commonwealth entity, such as the Australian Sports Commission. Accordingly, the CGRGs apply to Ministers administering grants where the money comes from the bank account of the Australian Sports Commission, even though they do not impose obligations on the corporate Commonwealth entity itself.

Paragraph 3.3 requires Ministers to comply with relevant legislative requirements in the *PGPA Act* and with the CGRGs[156]. Paragraph 3.11 repeats the *PGPA Act* requirement that Ministers must not approve expenditure unless satisfied, after reasonable inquiries, that the expenditure would be 'proper', but adds that the "terms of the approval *must* be recorded in writing as soon as

152 *Parliamentary Inquiry 17 July 2020*, *supra* note 128 at 1459.

153 *Ibid*.

154 *CGRGs*, *supra* note 146 at para 2.9.

155 *Ibid* at para 2.3.

156 *Ibid* at para 3.3.

practicable after the approval is given".[157] Paragraph 4.10 then states that a Minister must not approve a grant without first receiving written advice from officials on its merits.[158] The Minister must then record, in writing, "the basis for the approval relative to the grant opportunity guidelines and the key principle of achieving value with relevant money".[159]

Paragraph 4.12 provides that while Ministers may approve grants that are not recommended by relevant officials, they must report annually to the Finance Minister by 31 March about all instances where they have approved a grant which the officials recommended be rejected.[160] The report must contain a brief statement of reasons for the approval of each grant. No such report was made in relation to the CSIG program.

The ANAO, in its report, relied upon advice from the Department of Finance that the CGRGs would not apply to the Minister when dealing with grants made through a corporate Commonwealth entity, unless it was acting on behalf of a non-corporate Commonwealth entity, such as the Department of Health.[161] The Department of Finance, when asked about this by the Senate Select Committee, said that it is up to accountable authorities to seek legal advice on the application of the CGRGs[162] and pointed to the ANAO's conclusion, after much work, that the CGRGs did not apply.[163]

The key legal question is whether the Minister is performing grant administration. If the Minister were merely a delegate of the Australian Sports Commission, operating under its statutory powers, then she would not be exercising any ministerial discretion under sections 61 or 64 of the

157 *Ibid* at para 3.11.

158 *Ibid* at para 4.10.

159 *Ibid*.

160 *Ibid* at para 4.12.

161 *ANAO Report no 23*, *supra* note 73 at 4.3.

162 *Committee Hansard 22 July 2020*, *supra* note 62 at 33.

163 *Ibid* at 40.

Constitution[164] and the CGRGs would clearly not apply. If, however, Senator McKenzie was correct in her conclusion that she was exercising her ministerial discretion in administering the grants by being the decision-maker or approver of who received the grants, then the CGRGs would appear to apply.

E. Administrative Law Breaches

If one were to accept that there was constitutional power to make the grant and that the Minister had legal power to act as the approver of the grants, then issues arise concerning the potential breach of administrative law requirements in the decision-making process. In Australia, the High Court has a constitutionally mandated jurisdiction to undertake judicial review of decisions made by Commonwealth Ministers, and an equivalent jurisdiction is conferred by legislation on lower federal courts.

The grounds of judicial review are relatively well settled. Ministers, as decision-makers, must act within the scope of their legal powers, otherwise their decisions will be regarded as *ultra vires*. They must not act for an improper purpose or in an irrational manner. They must take into account relevant considerations and must not take into account irrelevant considerations. They must behave in a manner that is procedurally fair to those affected by the decision. This includes not acting in a biased manner or a way that is perceived as biased.[165]

For example, the mere fact that irrelevant material was presented to, or requested by, the decision-maker (such as whether grant applicants were located in marginal or targeted seats) may be sufficient to establish apprehended bias, regardless of the actual decision made. The courts have long recognised the risk of 'subconscious bias'. They look to whether a fair-minded, lay observer might

164 *Constitution*, *supra* note 4, ss 61, 64.

165 See further Mark Aronson, Matthew Groves & Greg Weeks, *Judicial Review of Administrative Action and Government Liability*, 6d (Australia: Lawbook Co, 2017) at 195–730.

reasonably apprehend that the decision-maker might not bring an impartial mind to making the decision.[166] Nettle and Gordon JJ have observed:

> One does not need to find that the irrelevant material affected the decision. One needs only to find that the fair-minded lay observer might have reached the conclusion that the irrelevant material might lead to a deviation from the merits.[167]

Alternatively, if a person aggrieved by a decision of an administrative character made under a Commonwealth Act challenged it under the *Administrative Decisions (Judicial Review) Act 1977*,[168] then similar issues would arise. The person could contend, for example, "that the person who purported to make the decision did not have jurisdiction to make the decision", or "that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made" because of the decision-maker "taking an irrelevant consideration into account in the exercise of a power" or exercising the power "for a purpose other than a purpose for which the power is conferred" or exercising "a discretionary power in bad faith" or "at the direction or behest of another person" or in any other way "that constitutes an abuse of the power".[169]

Ministers should be conscious (and advised by public servants and ministerial staff) of these legal constraints on the exercise of discretionary powers conferred upon them, especially when acting under statutes. Contrary to the beliefs expressed by some Ministers, no Minister has an unfettered ministerial

166 *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50 at para 56, Nettle & Gordon JJ.

167 *Ibid* at para 70, Nettle & Gordon JJ.

168 (Cth) (Austl), 1977/59.

169 *Ibid*, s 5.

discretion[170] to make decisions according to his or her own personal wishes or political advantage.

F. The Statement of Ministerial Standards

In 1996 the Prime Minister, John Howard, introduced a ministerial code of conduct. It has since been reintroduced in various forms, with the latest version, the "Statement of Ministerial Standards" ("Ministerial Standards") being released on 30 August 2018, shortly after Prime Minister Morrison took office.[171] It provides that Ministers "may be required to resign if the Prime Minister is satisfied that they have breached or failed to comply with these Standards in a substantive and material manner".[172] It also provides that the "Prime Minister may seek advice from the Secretary of the Department of the Prime Minister and Cabinet on any matters within these Standards, at any time" and that the Secretary may seek professional advice,[173] such as legal advice, in providing that advice. The Secretary's advice may be made public by the Prime Minister.[174]

As noted above, the Prime Minister referred to the Secretary, Philip Gaetjens, the question of whether Senator McKenzie had breached the Ministerial Standards, but declined to make public the Secretary's advice,[175] which appears

---

170 *Wotton v Queensland* (2012) 246 CLR 1 (HCA) at para 10, French CJ, Gummow, Hayne, Crennan & Bell JJ (the "notion of "unbridled discretion" has no place in the Australian universe of discourse").

171 Prime Minister Scott Morrison, "Statement of Ministerial Standards" (August 2018), online (pdf): *Prime Minister of Australia* <www.pmc.gov.au/sites/default/files/publications/statement-ministerial-standards-3.pdf > [*Ministerial Standards*].

172 *Ibid* at 7.2.

173 *Ibid* at 7.4.

174 *Ibid* at 7.5.

175 Austl, Commonwealth, Submission to the Select Committee on Administration of Sports Grants, (Submission no 1) by Philip Gaetjens (14 February 2020) (note however, that the Secretary's submission to the Senate

to have been very limited in scope, not dealing with most of the relevant Standards.

For example, paragraph 1.3 of the Ministerial Standards provides that in carrying out their duties, Ministers must act in "the lawful and disinterested exercise of the statutory and other powers available to their office".[176] If the Minister acted unlawfully because she had no legal power to approve the grants or she breached administrative law requirements in the decision-making process, then she would also have breached paragraph 1.3 of the Ministerial Standards. Gaetjens, in assessing whether Senator McKenzie breached the Ministerial Standards, declined to assess whether the Senator had failed to act lawfully. He did so because he said he was not a lawyer and could not make such an assessment.[177] However, he conceded that most of the drafting of his report was done by other persons in his Department,[178] which does contain lawyers who are capable of making that assessment.[179] Moreover, the Ministerial Standards expressly permitted him to seek professional advice, and he could have also sought to apply the Attorney-General's advice.

Paragraph 2.8 of the Ministerial Standards provides that "Ministers will not provide advice or assistance to any enterprise otherwise than in a disinterested manner as may be required in their official capacity as a Minister".[180] If, as was alleged, the Minister directed funding to assist sporting bodies in particular electorates for party-political advantage, or instructed that certain enterprises should be permitted to make applications after the date for applications had closed, or allowed applicants to alter applications after the applications had

---

Select Committee appears to reflect the substance of that advice) [*Submission 14 February 2020*].

176 *Ministerial Standards*, *supra* note 171 at para 1.3.

177 *Committee Hansard 22 July 2020*, *supra* note 62 at 16–17, 20–21.

178 *Ibid* at 17–18.

179 The Department has a Legal Services branch in its Government Division which provides legal advice.

180 *Ministerial Standards*, *supra* note 171 at para 2.8.

closed,[181] but did not afford the same opportunity to all potential applicants or existing applicants, it is hard to see how this could be regarded as 'disinterested' conduct.

Paragraph 3.2 of the Ministerial Standards provides that "Ministers are required to ensure that official decisions made by them as Ministers are unaffected by bias or irrelevant considerations, such as considerations of private advantage or disadvantage".[182] This requirement is absolute. It does not permit bias or the application of considerations such as private advantage as long as this is not the "primary determining factor".[183] If a Minister takes into account any considerations of private advantage or disadvantage when making an official decision, including the advantage or disadvantage to political parties and the advancement to the Minister's career that would flow from helping her colleagues to be re-elected, this would appear to breach this standard.

Paragraph 5.2 states that "Ministers must not encourage or induce other public officials, including public servants, by their decisions, directions or conduct in office to breach the law".[184] If the Minister, directly or through her

181 See further *Parliamentary Inquiry 17 March 2020*, *supra* note 127 at 6, 8, 32 (the application process closed on 14 September 2018. The Commission stated publicly that no new applications would be accepted. Nonetheless, the Minister's Office asked the Commission to assess four amended and five additional applications, by email on 22 March 2019. This was despite the warning by the Australian Sports Commission to the Minister's Office in an email of 5 March 2019 that to "invite applications on an ad hoc basis outside of the grant program means that all applicants do not enjoy the same opportunity" and in an email dated 22 March 2019 that "it is not appropriate to invite or accept new applications". The Commission did not recommend the additional or amended projects, but the Minister approved them and they were funded).

182 *Ministerial Standards*, *supra* note 171 at para 3.2.

183 *Submission 14 February 2020*, *supra* note 175 at 27 (note that the Secretary of the Department of the Prime Minister and Cabinet appeared to exonerate the Minister in this regard on the basis that political considerations were not the "primary determining factor in the Minister's decisions to approve the grants").

184 *Ministerial Standards*, *supra* note 171 at para 5.2.

office, pressured or directed the Australian Sports Commission to make guidelines conferring on the Minister the power to be the final approver of all grants contrary to the requirements of the *Australian Sports Commission Act*, then this would appear to be a breach of paragraph 5.2. When asked about this, the Secretary of the Department of the Prime Minister and Cabinet responded that he was not aware of any evidence that pressure had been applied by the Minister with respect to the Guidelines.[185]

In contrast, the ANAO's report said that during the development of the *Program Guidelines*, the Department of Health 'reminded' the Commission that "the Minister wanted to approve CSIG funding"[186] and that the Commission also advised the ANAO in March 2019 that "the program guidelines would only be approved on the basis that the Minister was the decision-maker".[187] The Australian Sports Commission confirmed that the original draft guidelines, produced in May 2018, did not include the Minister for Sport as the program delegate.[188] It also confirmed that the Minister's office told the Australian Sports Commission that the program guidelines would only be approved if she was made the approver of the grants.[189]

As noted above, Gaetjens found that the Minister had not breached the Ministerial Standards in relation to matters such as fairness in the manner in which the grants were allocated, but that she had failed to declare that she had an actual conflict of interest in awarding funding to an organisation of which she was a member and had not managed the conflict appropriately.[190] This caused Senator McKenzie to resign as a Minister.

---

185 *Committee Hansard 22 July 2020*, *supra* note 62 at 19.

186 *Parliamentary Inquiry 13 May 2020*, *supra* note 113 at 4 (this was confirmed by the Australian Sports Commission which said that it was advised by email on 7 June 2018 that the Minister would like to approve the grants).

187 *ANAO Report no 23*, *supra* note 73 at 2.16.

188 *Parliamentary Inquiry 13 May 2020*, *supra* note 113 at 5.

189 *Committee Hansard 3 July 2020*, *supra* note 74 at 22.

190 *Submission 14 February 2020*, *supra* note 175 at 27–28.

V. Conclusion

Despite the rulings of the High Court in the *Pape* and *Williams* cases, there appears to be a continuing cavalier attitude within the Commonwealth Government as to the application of the rule of law when it comes to grants that are used to seek to influence public favour in relation to elections. Minimal formal compliance is shown by including programs under job-lot approvals, such as s 32B of the *Financial Framework Act*[191] or under ongoing legislative powers by bodies to 'make grants', without any substantive parliamentary consideration of whether money ought to be spent on any particular program. In establishing grant programs, little consideration is given to whether the scope of the program fully falls within Commonwealth heads of legislative power, and no genuine consideration is given to whether actual expenditure under a scheme (such as resurfacing a football oval or constructing lighting in a carpark) is supported by a Commonwealth head of legislative power. The focus appears to be on 'constitutional risk' – namely, what one can get away with, rather than strict compliance with the *Constitution* and the rule of law.

While the *PGPA Act*[192] very properly requires Ministers to be satisfied that grant money is being spent in an efficient, effective, economical and ethical manner, there is scant evidence that this obligation is taken seriously. There is no effective enforcement of it, other than the political embarrassment that may arise from an adverse report by the Auditor-General. The *CGRGs*[193] also create an admirable system for the management of grants, but the above case study shows that these rules may be bypassed.

Even when the CGRGs should apply, because a grant is being administered by a public service department, as in the case of the "Female Facilities and Water Safety Stream Program", the requirements for grant application guidelines, selection criteria and merit assessment can all be avoided by describing a grant

191 *Financial Framework Act*, *supra* note 37, s 32B.

192 *PGPA Act*, *supra* note 142.

193 *CGRGs*, *supra* note 146.

scheme as 'one-off or ad hoc'.[194] In this way, grant schemes can be used to give effect to promises made during election campaigns when there has been no assessment at all of need, value for money, or the capacity of the recipient to build, operate or maintain the facility being funded, and funding is allocated to influence voters.[195] After the election, the public service is only obliged to make guidelines to manage the administration of the grants, on the basis that the selection had already been made by politicians making promises during the campaign.[196] An election apparently absolves anyone of the obligation to administer public money on the basis of need and merit, without bias and self-interest.

When questions of legality are raised by the Auditor-General or in parliamentary committees, the response has been almost invariably one of shifting blame to others for not obtaining the relevant legal advice or obfuscation of the issues. Evidence of government failure is hidden behind reams of heavily redacted documents, privilege is claimed to prevent the production of potentially damning evidence and transparency is negligible.

Ministers seem to be under the impression that they have unfettered discretion to act as they please, including spending public money for party-political gain, whether that be through making grants in the lead up to an election, including in the caretaker period, or making election promises that are then later implemented without regard to the existing rules. The rules of administrative law, such as those concerning bias and what can relevantly be taken into account, are ignored. Ministerial standards are treated with contempt

194 *Committee Hansard 27 August 2020*, *supra* note 72 at 7–8.

195 Jack Snape & Andrew Probyn, "Government's $150 Million Female Sports Program Funnelled into Swimming Pools for Marginal Coalition Seats" (7 February 2020), online: *ABC News* < www.abc.net.au/news/2020-02-07/government-cash-splash-swimming-pools/11924850>.

196 Letter from Senator Richard Colbeck to Senator Scott Ryan, President of the Senate (24 February 2020) in response to an order for the production of documents.

both by those who are meant to obey them and those who are meant to administer them.

This is what the decay of democracy looks and smells like. It is by no means full-blown decay. Australia is still one of the most law-abiding and democratic countries in the world. But when the rule of law is disregarded because it is inconvenient, when governments calculate how they should behave according to what they can get away with, when public servants facilitate such action rather than insisting upon the application of the law, and when power is seen as giving immunity from the application of rules and impunity from the legal consequences, then the rot in the democratic system has begun and will spread unless action is taken to stop it.