THE UNIVERSITY OF SYDNEY

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Professor Anne Twomey
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Senator Anthony Chisolm
Chair
Senate Select Committee on Administration of Sports Grants

Dear Senator,

Please accept this submission to the Committee's inquiry. The Committee is inquiring into a very serious matter involving unlawful government spending of public money on a significant scale. Governments, like citizens, are obliged to obey the Constitution and the law, and this is not happening. Breaches of the law and the misuse of public money for political advantage lead to the loss of public confidence in the system of government and a lack of respect for the law. If Members of Parliament are concerned by the increasing disengagement of the public from the political system and the lack of respect for politicians, then this is a potent example of precisely what causes it. Serious action to reform the grants system and restore integrity to governance is necessary to arrest the ongoing corrosion of public confidence in our democratic system.

In the attached Appendix, I explain in detail the nature of the unlawfulness involved and the breaches of applicable guidelines and standards. This includes the making of grants without constitutional power, the Minister approving grants without the legal power to do so, the breach of administrative law requirements for fair and impartial decision-making, the breach of guidelines and the breach of the Statement of Ministerial Standards. The following points are of particular relevance to the Committee's terms of reference:

(a) Program design and guidelines: Guidelines must be consistent with the statute that authorises the making of the decision to which they relate. In my view, as explained in the attached Appendix, the Program Guidelines were invalid to the extent that they nominated the Minister as the final approver of the grants and the 'Program delegate'. This was contrary to the *Australian Sports Commission Act.* The Program Guidelines are also constrained by s 7(1)(n) of the Act which gives the Commission power to 'administer and expend money appropriated by the Parliament… for the purposes of the Commission'. Accordingly, the scope of the 'other considerations' that the approver could consider under the Program Guidelines is limited to considerations giving effect to the purposes of the Commission (not other political considerations).

(b) Requirements placed on applicants for funding: I have no comment.

(c) Management and assessment processes: There were multiple failures in the management and assessment process. There was inadequate consideration of the extent of the Commission's legal power to make these grants and who was entitled to make the

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final approval. There was a failure to document properly the decision-making process. There was a failure to make the decisions in an impartial and procedurally fair manner. The legality of the decisions could be challenged on several grounds. Large amounts of public money were spent unlawfully.

(d) Adherence to published assessment processes and program criteria: It appears from the evidence produced by the Audit Office that there were breaches of the processes and criteria. Clause 5.6 of the Guidelines identifies 'ineligible' projects and states that the 'program will not fund projects that have already commenced works'. According to the Auditor-General, 272 projects had already commenced works and 8 had already finished, before the funding was granted to them. Such breaches of the rules are grossly unfair, because other sporting bodies would have failed to apply for the grants, believing that as they had commenced work on the project, they were ineligible. Those who play by the rules (which, in sport, is an essential attribute) should not be disadvantaged. In addition, late submissions were granted funding or amended after they had been submitted and assessed. If the same opportunities were not given to everyone, this was also unfair. Natural justice required that everyone be treated fairly in administering the grant rules. This did not occur.

(e) The role of the offices of the Minister, the Prime Minister and Deputy Prime Minister and any external parties in determining which grants would be awarded and who would announce the successful grants: As discussed below in detail, the power to make the grants for particular purposes was conferred by statute upon the Australian Sports Commission and the public money was appropriated to it for these purposes. The Minister had no power to approve the grants and her action in this regard was unlawful. Any action in pressuring the Australian Sports Commission to nominate the Minister as the approver of the grants and confer additional discretion upon her breached the Statement of Ministerial Standards.

Just as the Minister had no lawful power to approve the grants, the offices of the Prime Minister and Deputy Prime Minister had no power to direct how the decisions were to be made.

(f) Any related programs or matters: As discussed below, most of the funding given to projects under the scheme was unlawful because there was no constitutional head of power to support it. Other similar programs are affected by the same constitutional problems. The Commonwealth Government must obey the rule of law and cease spending public money without lawful authority.

Please let me know if I can provide any further assistance to the Committee or if you would like me to give oral evidence before it.

Yours sincerely,

Anne Twomey
Professor of Constitutional Law

SUBMISSION – SELECT COMMITTEE ON ADMINISTRATION OF SPORTS GRANTS

APPENDIX – ANNE TWOMEY

The rule of law

The primary constraint upon a Minister exercising power is that he or she must obey the law. This is encapsulated in the fundamental principle of 'the rule of law'. It was made clear by the High Court in the *Williams (No 1)* case that the payment by the Government of public moneys to third parties as grants or under contracts had to be authorised by legislation, beyond that appropriating the money.[1] As the High Court held in *Williams (No 2),* such legislation will be invalid if there is no head of Commonwealth power which supports the expenditure of the public money for the particular purpose.[2]

In this case the Treasury's budget papers[3] show that the money for the Community Sport Infrastructure Program was appropriated for the purpose of the expenditure upon grants by the Australian Sports Commission (otherwise known as 'Sport Australia'). The *Australian Sports Commission Act 1989* (Cth) provides that the Commission 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 (s 7). It gives a power to the Commission to make grants and enter into contracts (s 8).

Constitutional head of power to support expenditure

In *Williams (No 2),* legislation had been enacted to authorise spending on a wide range of government programs. The High Court held that as the spending on the national schools chaplaincy program could not be supported by a head of legislative power in the Constitution, the relevant legislation could not validly authorise that expenditure.

The same issue arises in relation to the Community Sport Infrastructure Grant Program. While the Australian Sports Commission may be authorised to spend money on grants for the Commission's purposes, it is necessary to identify whether the subject matter of the expenditure (such as grants to re-surface ovals, install lights, build change-rooms and provide social spaces) falls within any Commonwealth head of legislative power.

There is no express head of power in the Constitution for the Commonwealth Parliament to make laws with respect to sport or local community facilities. The Commonwealth was aware of this in 1989 when it enacted the *Australian Sports Commission Act.* Section 7(5) deals with this problem as follows:

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[1] *Williams v Commonwealth (No 1)* (2012) 248 CLR 156. Note that legislation is not required to authorise expenditure under a prerogative power or for the ordinary administration of the government.
[2] *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.
[3] Budget Paper No 2 2019-20, 2 April 2019, pp 92-3.

> 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:
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> 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.

At that time, the Commonwealth took the view that it had the authority to spend money for any purpose for which the money was appropriated under s 81 of the Constitution. This view was rejected by the High Court in 2009 in *Pape v Commissioner of Taxation.*[4] Accordingly s 7(5)(a) is ineffective in supporting the Australian Sports Commission's expenditure on grants.

The Commonwealth may be able to use its power to make laws for territories (s 122 of the Constitution) to support the Act to the extent that it establishes the Australian Sports Commission as an institution in the Australian Capital Territory. This power could also be used to support the making of grants with respect 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 s 51(xi) of the Constitution 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 s 51(xx) of the Constitution, but the grant guidelines require recipients to be not-for-profit community bodies, most of which would not be trading or financial corporations. 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 in the grants could not be characterised as laws with respect to trading or financial corporations. There 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.[5]

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',[6] might be relied on to support funding of national teams, such as Olympic teams, but

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[4] *Pape v Commissioner of Taxation* (2009) 238 CLR 1, [111] (French CJ), [178], [183] (Gummow, Crennan and Bell JJ), [320] (Hayne and Kiefel JJ), [601]-[602] (Heydon J).
[5] *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, [271]-[272] (Hayne J) [575] (Kiefel J); *Williams v Commonwealth (No 2)* (2014) 252 CLR 416, [50]-[51] (French CJ, Hayne, Kiefel, Bell and Keane JJ).
[6] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 397 (Mason J).

not the resurfacing of a local oval. Local sports infrastructure funding could also not be characterised as a 'national emergency'.[7]

In relation to the external affairs power in s 51(xxix) of the Constitution, the activities of the Australian Sports Commission may be supported in relation to anti-doping by the implementation of Australia's obligations under the International Convention Against Doping in Sport. The Commission also has a purpose of fostering co-operation in sport between Australia and other countries, which may be supported by the 'geographical externality' aspect of the external affairs power. Australia has a number of international agreements with other countries on cultural cooperation, which expressly address co-operation between sporting institutions. Hosting international sporting competitions may also be covered by the external affairs power.

The external affairs power 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'.

Article 30(5) of the UN Convention on the Rights of Persons with Disabilities imposes an obligation on parties to encourage and promote the participation of 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 s 51(xxix) of the Constitution 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. Of the six specific aims of the program listed on p 2 of the Community Sport Infrastructure Grant Program Guidelines (the 'Program Guidelines'), only one – 'prioritise opportunities for women and girls, multicultural communities and people of all abilities to play sport and be physically active' – appears to be capable of support by the external affairs power.

Overall, it appears that the Commonwealth did not have constitutional power to support the expenditure of money under the *Australian Sports Commission Act* on this particular sports program, although it would have the power to spend on some items that fall within its scope. Section 7(5) of the Act therefore required the Commission to limit its spending to purposes that fall within the Commonwealth's legislative powers under the Constitution. This is consistent with s 15A of the *Acts Interpretation Act 1901* which instructs the courts to read

[7] *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, [146] (Gummow and Bell JJ); [196] and [240] (Hayne J); and [499] and [503] (Crennan J); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, [150] (Hayne and Bell JJ).

and construe Acts so that they do not exceed the legislative power of the Commonwealth.[8] On this basis, the provisions in the Act would not be 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.

The same problem arises in relation to other Commonwealth sports funding programs, such as the Female Facilities and Water Safety Stream program, which primarily funded the building of swimming pools, rather than female facilities.

The Committee should consider recommending that the Australian Sports Commission take legal advice as to the scope of its powers and limit its activities, including the making of grants, to matters that fall within the scope of its legal powers. This is essential for compliance with the rule of law.

Legislative power with respect to approving the grants

Even if there was sufficient constitutional power and legal power for the Australian Sports Commission to make some of these grants, this does not mean that the Minister could make the final decision concerning the allocation of the grants.

The Australian Sports Commission was created as an independent corporate entity. It is not a government department created under s 64 of the Constitution. 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. Assertions that the Minister had 'ministerial discretion' to act as if the Australian Sports Commission were a department are not correct.

The *Australian Sports Commission Act* is explicit about the Minister's powers. It specifies when the Minister may act, such as in relation to the appointment (s 13(2)) and termination of appointment (s 19(1)) of Members of the Commission or in relation to the Commission's corporate plan (s 23) and the Commission's annual operational plan (s 26). The operational plan sets out particulars of the programs the Commission proposes to carry out and the resources to be allocated to them. The Minister may only request a change to that 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) and (5)).

Section 11 gives the Minister 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'. 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 practices, with respect to how the Commission exercises its own functions and powers. Further, any such direction must be in writing, published in the Government Gazette and tabled in

[8] S 15A 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 that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

Parliament. No such direction was ever made. This provision is manifestly directed at transparency and accountability in its exercise and shows the absence of any general or informal 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.

Section 54 of the 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. There is no power to delegate the Commission's powers to the Minister. Nonetheless, Appendix A in the Program Guidelines defines 'Program Delegate' as the Minister for Sport.[9]

It might be argued by the Commonwealth that the Minister was the 'authorised agent' of the Commission under the *Carltona* principle. 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 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.[10]

But 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 Act already provides for other delegates to do this. The 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 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 cl 8.1 of the Program Guidelines. 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 this 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

[9] 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.
[10] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 38 (Mason J).

> body as a corporate Commonwealth entity and that the Department of Health raised concerns and said that they should get legal advice.[11]

This is consistent with para 2.17 of the Auditor-General's report which notes that in 'early June 2018, Sport Australia recorded that adherence to the ASC Act required that it, not the Minister, approve the award of CSIG funding'. In para 2.16 the report also states that 'Sport Australia advised the ANAO in March 2019 that the program guidelines would only be approved on the basis that the Minister was the decision-maker'. It appears, therefore, that the Minister, either directly or through her office, insisted upon the Program Guidelines nominating her as the approver of the grants, contrary to the law, and that the Australian Sports Commission allowed this to occur, despite knowing that it was unlawful.

It cannot be contended that despite the existence of ss 11, 54 and all the other provisions of the Act which stipulate the Minister's limited powers, that 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. This is for three reasons. First, ministerial power under s 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 entities established by statute. Second, as the body 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 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 was invalid as it was inconsistent with the Act. Any instruction by the Minister or her office to include clause 8.1 in the Program Guidelines would also have been unlawful (both because the Minister did not exercise a valid power to make the direction, and because the substance of the direction was unlawful).

The unlawful expenditure of money by the Australian Sports Commission on grants may result in liability by a Minister or official, who 'caused or contributed to the loss by misconduct, or by a deliberate or serious disregard of reasonable standards of care' to pay to the Commonwealth 'so much of the loss as is just and equitable having regard to the Minister's or official's share of the responsibility for the loss'.[12]

Constraints upon ministerial discretion

Even if the Commonwealth Government could establish that the grants were validly authorised by legislation supported by a head of constitutional power and the Minister had power to approve the making of the grants, as specified in cl 8.1 of the Program Guidelines, there would still have been significant constraints upon the Minister's exercise of discretion. These include: constraints in financial legislation; constraints imposed by administrative law;

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[11] Senate, Select Committee on Administration of Sports Grants, Committee Hansard, 13 February 2020, p 13.
[12] *Public Governance, Performance and Accountability Act 2013* (Cth), s 69. Note that s 70(3) provides that a person's liability under s 69 is 'not avoided merely because the person has ceased to be a Minister or an official'.

constraints in policies and guidelines; and constraints imposed by the Statement of Ministerial Standards. There is no unfettered discretion held by Ministers for the allocation of grants to community organisations. Any assertion made to the contrary is wrong in law.

Financial Legislation: Section 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth) ('PGPA Act') 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'. 'Proper' is defined in s 8 as meaning 'efficient, effective, economical and ethical'.

Where a Minister has to be 'satisfied' of a matter before being able to exercise a power, the Minister must be able to show evidence of the facts relied upon and their logical relationship with establishing that satisfaction. In its inquiry into the administration of the Community Sport Infrastructure Program, the Committee should therefore seek to establish: (a) what reasonable inquiries were made by the Minister to satisfy herself that the expenditure would be a proper use of the money; (b) what factual evidence was relied upon by the Minister to reach that state of satisfaction; and (c) how these facts established that the expenditure was 'efficient, effective, economical and ethical'.

Administrative law: Section 75 of the Constitution gives the High Court original jurisdiction with respect to matters in which the Commonwealth is being sued or where a writ of mandamus (ordering an action to be performed as required by law) or prohibition (ordering an action that is outside jurisdiction not to be performed) or an injunction is sought against an officer of the Commonwealth. An officer of the Commonwealth includes a Minister. The consequence is that there is a constitutionally mandated jurisdiction for the High Court to undertake judicial review of decisions made by Ministers.

An equivalent jurisdiction is conferred on the Federal Court by s 39B of the *Judiciary Act 1903* (Cth). The Federal Court also has a broad jurisdiction to review matters 'arising under any laws made by the Parliament' (s 39B(1A)(c)). Accordingly, where a Minister makes an administrative decision pursuant to a power conferred by statute (eg if the power conferred by statute on the Australian Sports Commission to make grants had permitted the Minister to be the decision-maker, as suggested by the Commonwealth), it may be reviewed by the Federal Court.

The grounds of such a judicial review are relatively well settled. Ministers, as decision-makers, must act within the scope of their legal powers, or otherwise their decisions will be regarded as *ultra vires* (i.e beyond power). 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.

For example, the mere fact that irrelevant material was presented to, or requested by, the decision-maker (such as the location of a grant applicant in a marginal or targeted seat) 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 reasonably apprehend that the decision-maker might not bring an impartial mind to making the decision.[13] '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'.[14]

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* (Cth) ('*ADJR Act*'), 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 and abuse of the power' (s 5, *ADJR Act*).

All Ministers must 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. No Minister has an unfettered ministerial discretion to make decisions according to his or her own personal wishes or political advantage and it would be a matter of great concern if any Minister believed otherwise.

The Program Guidelines: Governments may adopt guidelines or apply a policy to aid consistency in decision-making. The guidelines must be consistent with the law, including relevant statutes.

In the case of the Community Sports Infrastructure Program, potentially two sets of guidelines applied. The first were the Program Guidelines of August 2018, which were made by the Australian Sports Commission and introduced by a 'Message from the Minister'. As noted above, the Program Guidelines are invalid, at least to the extent that they are inconsistent with the Act by nominating the Minister as the Program Delegate who is the final approver of the grants.[15]

However, as most Government attention, including the report and submission by Mr Philip Gaetjens, has focused on the Minister's compliance with the Program Guidelines, rather than compliance with the law, it is appropriate to address this issue, working on the (in my view incorrect) assumption that cl 8.1 of the Program Guidelines is valid.

The Program Guidelines set out in detail the selection criteria for making the grants. They were: (1) community participation (50%); (2) community need (25%); and (3) project design and delivery (25%). Within each criterion there was a break-down of considerations for which a certain amount of points were allocated. The applications were then ranked on the basis of how well they met the criteria.

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[13] *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50, [56] (Nettle and Gordon JJ).
[14] *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50, [70] (Nettle and Gordon JJ).
[15] Whether the invalid part of the Program Guidelines could be severed, leaving the rest of the Program Guidelines in place remains doubtful.

Clause 8.1 of the Program Guidelines provides as follows:

> **8.1 Final Approval**
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> 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.
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> 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 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.
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> The Program Delegate may require additional conditions be attached to the grant funding.

Mr Gaetjens, in his submission to the Committee, has pointed to the reference to 'other factors may be considered' in the second sentence in clause 8.1. He stated that he 'found no constraints in the Guidelines limiting the other factors that the Minister may consider, so a wide discretion was available'.[16] However, it seems to be clear from cl 8.1 that the limitations on that discretion were in the paragraph immediately below, where it says that 'emerging issues' may be identified and 'priorities that have not been met'. It is only on this basis that the delivery of funding can depart from the 'competitive basis', but even then it is 'expected' that 'the assessment criteria in these guidelines will remain applicable'.

The Committee should therefore seek to establish what these emerging issues and unmet priorities were, why they were not identified at the time the Guidelines were made, and how as a matter of logic they supported the final decisions made by the Minister. The Committee should also then assess whether these emerging issues and unmet priorities, which were the basis of departing from the competitive basis of the grants program, were consistent with the purposes of the Commission as set out in the Act. This is because s 7(1)(n) only allows the Australian Sports Commission to spend money appropriated by Parliament 'for the purposes of the Commission'. These purposes are set out in s 6. Unsurprisingly, they do not include any purpose of distributing funding by reference to electorate, the political party that holds a seat and whether or not it is marginal or targeted.

The oral evidence provided to the Committee by the Audit Office has shown that relevant ministerial advisers were unable to recall the reasons for the Minister approving grants that departed from the competitive merit system otherwise established by the Program Guidelines. The oral evidence from officers of the Audit Office to the Committee showed that the Minister's office requested the Australian Sports Commission to include in the spreadsheet the electorate in which each applicant body was situated and the political party that held the

[16] Mr Philip Gaetjens, Secretary of the Department of the Prime Minister and Cabinet, Submission to the Senate Select Committee on Administration of Sports Grants, 14 February 2020, [8].

seat. The Minister's office then added an additional column to the spreadsheet identifying whether the electorate was 'marginal' or 'targeted'.[17] It was also revealed that the Minister's office 'never saw the actual applications'.[18] This suggests that the Minister, in departing from the merit rankings provided by the Australian Sports Commission, based her assessment on party-political considerations of the electorate in which the applicant was located, which party held the seat, and whether it was marginal or targeted. It is hard to see how this could be considered as falling within the Program Guidelines when read consistently with the Act.

CGRGs: The second set of Guidelines which may be relevant are the 'Commonwealth Grants Rules and Guidelines 2017' (the 'CGRGs'). They were made by way of a statutory instrument under s 105C(1) of the *Public Governance, Performance and Accountability Act 2013* 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 apply to corporate Commonwealth entities (cl 1.2), such as the Australian Sports Commission. Accordingly, there was no obligation on the Commission to comply with them. The Commission apparently has its own Guidelines which are similar in form.[19] As the CGRGs require officials to advise Ministers explicitly about the legal authority for the grant, their powers and their reporting obligations, one would imagine that the Commission's own Guidelines provide similar obligations. The Committee might wish to inquire into whether the Commission complied with its own Guidelines in relation to its advice to the Minister and the conduct of this grants program.

Even though the CGRGs do not apply to the Australian Sports Commission, it is unclear why they do not apply to the Minister. I note that the Audit Office assumed that they did not, but did not set out the legal basis of this assumption.

If the Minister was not exercising his or her general executive power under s 61 of the Constitution, but was in fact exercising power conferred by statute upon a corporate entity, such as the Australian Sports Commission, as a delegate of that body, then I accept that the Minister's powers would be confined to those able to be exercised by the Commission under statute (with no ministerial discretion applying) and the CGRGs would not apply. As noted above, in my view there is no statutory power of the Commission to delegate to the Minister.

If, however, Commonwealth Ministers were correct in asserting that the Senator McKenzie was exercising her ministerial discretion, which is reposed in the executive power in s 61 of the Constitution, in approving the Community Sport Infrastructure Program Grants, then the CGRGs would appear to apply.

Nothing in the CGRGs excludes their application to a Minister when the grant program is being conducted by a corporate entity. There are separate obligations that are imposed on Ministers, as long as they are administering grants. Clause 2.9 expressly states that the

[17] Senate, Select Committee on Administration of Sports Grants, Committee Hansard, 13 February 2020, pp 18-19.
[18] Senate, Select Committee on Administration of Sports Grants, Committee Hansard, 13 February 2020, p 21.
[19] I was unable to find a copy of these guidelines online, so am unable to apply them for the purposes of this submission.

'CGRGs apply to grants administration performed by … Ministers'. Grants are defined in cl 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. '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.

Clause 3.3 requires Ministers to comply with relevant legislative requirements in the PGPA Act and with the CGRGs. Clause 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 practicable after the approval is given'. Clause 4.10 then states that a Minister must not approve a grant without first receiving written advice from officials on the merits. 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'.

Clause 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 but rejected. The report must contain a brief statement of reasons for the approval of each grant.

The Auditor-General recommended that the CGRGs be extended to Ministers who are decision-makers with respect to a grants program of a corporate Commonwealth entity. In my view, that is already the situation on the face of the CGRG (unless the Minister is acting as a delegate of the entity, rather than in the exercise of his or her own ministerial power). If the Minister were therefore found to be validly exercising ministerial power with respect to approving these grants, the Minister failed to comply with the CGRGs by not recording in writing the basis for the approval relative to the grant guidelines and achieving value for money and by not reporting to the Finance Minister about the reasons for departing from the advice of officials.

The Statement of Ministerial Standards: Mr Gaetjens, in his submission to the Committee, noted that Senator McKenzie informed him that she considered the distribution of grants amongst electorates held by political parties as a factor, among others, in her consideration in approving the grants.[20] Mr Gaetjens also stated that he did not find evidence that the Minister's office was 'unduly influenced'[21] by reference to marginal or targeted electorates or that political considerations were the 'primary determining factor in the Minister's decisions to approve the grants'.[22] This, however, suggests that he accepted that it was an influence and a factor, if not the primary determining one.

[20] Mr Philip Gaetjens, Secretary of the Department of the Prime Minister and Cabinet, Submission to the Senate Select Committee on Administration of Sports Grants, 14 February 2020, [12].
[21] Mr Philip Gaetjens, Secretary of the Department of the Prime Minister and Cabinet, Submission to the Senate Select Committee on Administration of Sports Grants, 14 February 2020, [19].
[22] Mr Philip Gaetjens, Secretary of the Department of the Prime Minister and Cabinet, Submission to the Senate Select Committee on Administration of Sports Grants, 14 February 2020, [27].

Mr Gaetjens, in his submission, did not address at all what the Statement of Ministerial Standards requires of Ministers. He only stated a conclusion that 'Senator McKenzie did not act in breach of the Standards with respect to fairness'.[23] In the absence of a more detailed consideration of the relevant Standards, I point to some of the relevant ones below.

Clause 1.3 of the Statement of 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'. In his report to the Prime Minister, Mr Gaetjens would therefore have been obliged to assess whether the Minister acted lawfully within the scope of her statutory or other powers. But Mr Gaetjens has not addressed the lawfulness of the Minister's actions in his submission to the Committee. As noted above, the Minister's actions in approving the grants appear to be unlawful, in breach of clause 1.3 of the Standards.

Mr Gaetjens also did not address in his submission to the Committee how the Minister's actions were 'disinterested', given the fact that consideration was given to the marginal or targeted status of seats and which political party held the seat. Such conduct would not appear to be 'disinterested'.

Cl 2.8 states 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'. If the Minister directed funding to assist sporting bodies in particular seats 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 closed, 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.

Cl 3.2 states 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'. There is no requirement here that this be the 'primary determining factor'. If a Minister, in making an official decision, takes into account considerations of private advantage or disadvantage, 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.

Cl 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'. If the Minister, directly or through her 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 and the power to take into account other considerations, then this would appear to be a breach of cl 5.2.

Accordingly, I cannot see how, on the basis of the facts found by the Audit Office, the Minister did not breach the Statement of Ministerial Standards other than failing to reveal a conflict of interest.

[23] Mr Philip Gaetjens, Secretary of the Department of the Prime Minister and Cabinet, Submission to the Senate Select Committee on Administration of Sports Grants, 14 February 2020, [27].