

Att: Committee Secretary
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

20 February 2020

Dear Senators and Members of Parliament,

**Submission from Dr Marie dela Rama, Scott Hamilton and Professor Stuart Kells
to the Select Committee on Administration of Sports Grants**

Thank you for the chance to contribute to the Select Committee on Administration of Sports Grants. This is an important inquiry into a matter of high public interest.

Professor Kells and I would be happy to participate in public hearings associated with the Committee's work if needed. It may be of interest to the Committee to note that we recently contributed to the Joint Parliamentary Committee into the Regulation of Auditing.

In advance of any hearings, please see some general discussion points, below, that we are happy to submit as input for the Committee's consideration and discussion. Also, I draw your attention to the following articles recently published in The Mandarin (copies are in the Appendix to this submission):

<https://www.themandarin.com.au/125268-quango-directors-need-to-speak-out-an-interview-with-andrew-wilkie/>

<https://www.themandarin.com.au/124401-the-sport-australia-board-should-resign-in-protest/>

Yours sincerely,

Scott Hamilton

Fundamental principles

- Key principles of public administration and public entity governance include:
 - Accountability, for use of public resources, and the exercise of powers
 - Integrity, and the application of high standards of governance
 - Efficiency and effectiveness, including the demonstrable creation of public value
 - Equity and fairness
 - Transparency, including making defensible decisions, and being open to audit and other external scrutiny.

Legislative context

- The recent administration of the Community Sport Infrastructure Grant Program by the Australian Sports Commission (ASC), known as 'Sport Australia' has rightly focused people's attention on the government, the Board of Sport Australia, and the formal framework of governance in which Sport Australia operates.
- The ASC was established in 1985 and it performs statutory functions under the *Australian Sports Commission Act 1989* (the 'Act'). It is governed by a Board of Commissioners appointed by the Minister for Sport.
- Section 5 of the Act establishes the ASC:
 - S 5(2) The Commission:
 - (a) is a body corporate with perpetual succession;
 - (b) shall have a common seal; and
 - (c) may sue and be sued.
- Section 7 of the Act defines the functions of the ASC, including:
 - 7 (1) The functions of the Commission are:
 - (a) to advise the Minister in relation to the development of sport;
 - (b) to co-ordinate activities in Australia for the development of sport;
 - (c) to develop and implement programs that promote equality of access to, and participation in, sport by all Australians;
 - (h) to establish, manage, develop and maintain facilities for the purposes of the Commission;
 - (m) to raise money through the Australian Sports Foundation, or by other means, for the purposes of the Commission;
 - (n) to administer and expend money appropriated by the Parliament, or raised in accordance with paragraph (m), for the purposes of the Commission;

Submission to the Select Committee on Administration of Sports Grants, February 2020

- (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;
- The *Commonwealth Authorities and Companies Act 1997* applies to the ASC. That Act deals with matters relating to Commonwealth authorities, including reporting and accountability, banking and investment, and conduct of officers.
 - The ASC Board determines the ASC's overall direction, decides the allocation of resources, decides policy for delegated decisions, and is accountable to the Minister for Sport.

Functions and objectives

- The functions of the ASC are clear: it may only administer and expend money for the purposes of the Commission – not for the purposes of campaigning for a minister or the government of the day.
- Section 11 of the Act gives the Minister for Sport the power to intervene, under strict requirements, in the functions of the ASC.

S11 (1) Subject to subsection (2), the Minister may give written directions to 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, and the Commission shall comply with the directions.

- (2) The Minister shall not give a direction to the Commission under subsection (1) unless the Minister:
- (a) has informed the Commission, in writing, that the Minister is considering giving the direction; and
- (b) has given the Chairperson an opportunity to discuss the need for the proposed direction with the Minister.
- (3) The Minister shall cause a copy of each direction given under subsection (1):
- (a) to be published in the Gazette as soon as practicable after giving the direction; and
- (b) to be laid before each House of the Parliament within 15 sitting days of that House after giving the direction.
- Prima-facie, the Minister for Sport may not have adhered to this section of the Act. There is a danger, moreover, that the ASC was in contravention of the Act (by expending money appropriated by the Parliament for other purposes) and that it was not acting in the spirit of the Act.

Submission to the Select Committee on Administration of Sports Grants, February 2020

- All board members have a legal duty to act in good faith in the organisation's interests as a whole. In the case of public bodies such as the ASC, specific legislation defines their duties. The *Public Governance, Performance and Accountability Act 2013* ('PGPA Act') spells out the duty to govern the entity in a way that: features proper management of public resources for which the authority is responsible; and promotes the achievement of the purposes of the entity.
- Section 5 of the PGPA Act spells out its purpose:

S5 The objects of this Act are:

(a) to establish a coherent system of governance and accountability across Commonwealth entities; and

(b) to establish a performance framework across Commonwealth entities; and

(c) to require the Commonwealth and Commonwealth entities:
 - i. to meet high standards of governance, performance and accountability; and
 - ii. to provide meaningful information to the Parliament and the public; and
 - iii. to use and manage public resources properly; and
 - iv. to work cooperatively with others to achieve common objectives, where practicable; and
(d) to require Commonwealth companies to meet high standards of governance, performance and accountability.
- Prima-facie, the recent administration of the Community Sport Infrastructure Grant Program by ASC did not conform to these objectives. In particular, sections c) and d) of the PGPA Act may have been disregarded, and the ASC may have contravened sections a) and b).

Roles and duties of public body directors

- Division 3 of the PPGA Act establishes the five duties of government board directors:

Section 25: Duty of care and diligence

Section 26: Duty to act in good faith and for proper purpose

Section 27: Duty in relation to use of position

Section 28: Duty in relation to use of information

Section 29: Duty to disclose interests.

- Formally, the duties of public body directors are clear. They include legal duties to act in good faith and to manage public resources properly. Typically, the directors are tasked with pursuing their organisational objectives independently from day-to-day direction by the executive branch of government.
- Transparency (and making decision processes auditable) is important to ensure good governance of public funds and keeping trust and confidence in our institutions. The ASC has a Conduct policy that includes a flowchart on how allegations that are raised will be treated by the ASC. However, there is room for better articulation and publication of integrity-related decision-making processes at the ASC.

Improving the ASC's integrity processes

- The ASC board should update, consolidate and publish their ethical decision-making process.
- Other jurisdictions' rules and frameworks provide useful guidance and benchmarks in this regard. For example, the NSW Government Boards and Committees Guidelines state under 7.3:

"Decisions of the board or committee should be made in the light of applicable legislation, the code of conduct, Government policy and agency objectives. Decisions and outcomes must be in the public interest and be able to withstand public scrutiny. Conflicts of interest, including personal gain at public expense, must be avoided."

Wider implications of an integrity deficit

- Observers have suggested the minister's actions in the ASC affair may have constituted a crime. Former NSW auditor-general Tony Harris, for example, said on 3 February in relation to the affair, 'there should be an investigation into the crime of misconduct in office and there should be an investigation into the crime, whether or not it occurred, into electoral bribery'.
- The example this sets for other agencies, and for our neighbours in the region, is concerning. There have been reports of bribery, corruption and 'vote buying', in countries such as Indonesia and PNG, which are being addressed by respective leaders. Instances of poor governance and maladministration in Australia do not help in bilateral and multilateral conversations about improving governance and integrity.
- Forms of electoral bribery are common in countries where 'electoral clientelism' is established in the form of 'networks of civic engagement [that] explain the likelihood of being targeted with electoral incentives'. Such networks run counter to principles of democracy¹ and sound governance.

¹ Muhtadi, B.(2019) *Vote Buying in Indonesia: The Mechanics of Electoral Bribery*, Singapore: Palgrave Macmillan <https://link.springer.com/content/pdf/10.1007/978-981-13-6779-3.pdf>.

- The politicisation and corrupting of the ASC process, whereby grants seem to have been selected based on political rather than merit-based considerations, raises questions over the integrity and vulnerability of our democracy and its institutions. If such conduct is not challenged and is not addressed by established checks and balances, the overall quality and integrity of our political system is at risk. The purpose of the checks and balances is to ensure the short-term political interests of ministers (such as those who disburse public funds in politically beneficial ways), do not override the interests of the communities to which those funds ultimately belong.²

Implications for the board as a whole

- The affair has posed a dilemma for the board of the ASC, and the dilemma is yet to be resolved. How should the board respond to an apparent breach of integrity and statutory requirements? Some have called for the whole board to resign, either in protest or to set an example. That is still a live option, and there are good precedents, including a mass resignation of directors during the NSW electricity privatisation.
- A collective decision to step down would help define the role of independent public body boards, and the boundaries of ministerial interference in their affairs. In this particular case, it would also signal a strong response to an apparent breach of public integrity. As Tony Harris noted, a group resignation would empower other public body boards to protect their independence, just as the Australian Parliament intended.

Recommendations and a way forward

- In addition to the integrity process-related recommendation above, we recommend that the Committee consider amendments to the *Australian Sports Commission Act* to establish a stronger framework and controls on expenditure and grants by the ASC and the Minister. Such a framework would include merit-based criteria, strong principles of transparency and accountability, and a specific statement of the objectives and impacts to be pursued by the ASC and relevant programs.
- An area for the Committee to consider is the field of ‘radical transparency’. An example: in a grants program, all the applications would be made public in real time; and all the evaluation criteria and assessment results would also be published. This could be a powerful way to achieve greater rigour, transparency and integrity.
- We further recommend that the Committee consider amendments to the PGPA Act and other relevant legislation to ensure greater transparency in the selection and appointment of skills-based boards to all Commonwealth public bodies, including the ASC. The model for appointing the ABC board could be used as a guide.

² dela Rama, M. & Lester, M. (2019) Anti-corruption commissions: lessons for the Asia Pacific region from a proposed Australian federal corruption watchdog, *Asia-Pacific Business Review*, 25 (4): 571-599
<https://www.tandfonline.com/doi/abs/10.1080/13602381.2019.1589971>.

Submission to the Select Committee on Administration of Sports Grants, February 2020

- It is recommended that the ASC board publish a Code of Conduct policy (either as an addendum or a separate policy) covering duties of directors and executives, including how the board and staff should deal with ministers and their staff. The ASC should also publish documents demonstrating the operationalisation of the duties of directors in accordance with the PGPA Act and ethical decision-making processes.
- Another beneficial step by the government would be to renew the rules and guidance for public entity boards and officials, including rules and guidance regarding: proper conduct; following ministerial directions; adherence to legislation; and applying sound principles of public administration. Collectively, these matters should also be a focus of external audit programs and criteria.
- As a further important step, the much discussed National Integrity Commission should be established, with suitable powers and adequate funding, as a matter of priority to ensure the integrity of our publicly funded institutions, including the ASC. If such a body is established, the government should simultaneously revisit the functions and powers of other public integrity bodies, and it should ensure all legislation and guidance for public integrity is up to date and fit for purpose.
- Integrity is cultural, and a holistic response is essential.

About the authors:

Dr Marie dela Rama is an academic in the Management Discipline Group at UTS Business School, Sydney, Australia and is a past recipient of the Australian Government's Endeavour Research Fellowship. Previously, she worked for the foreign investment arm of the World Bank Group and Caritas Management Corporation (San Francisco).

Scott Hamilton is Melbourne-based author, researcher and policy advisor. He is an experienced senior executive with 30 years' experience in the public service, including his role as Executive Director of Policy, Governance and Legislation within the Environment Department. He has a Diploma from the Australian Institute of Company Directors and was non-executive director of Moreland Energy Foundation Ltd. He is currently a strategic advisory panel member of the Australian-German Energy Transition Hub at the University of Melbourne. With Stuart Kells he is currently researching the history of bipartisanship in Australian politics

Professor Stuart Kells is Adjunct Professor at La Trobe Business School, and Honorary Senior Fellow at the Collaborative Research Centre in Australian History. He was formerly Assistant Auditor-General in the Victorian Auditor-General's Office, and he has had a diverse career in academia, government and the private sector. He represented the Australian States and Territories at the World Trade Organization Ministerial Congress in Cancun, Mexico. With Scott Hamilton he is currently researching the history of bipartisanship in Australian politics.

APPENDIX

The Sport Australia board should resign in protest

This article was first published in The Mandarin on 30 January 2020.

Our big country is full of big things. The Big Banana. The Big Pineapple. The Big Prawn. Big grants programs with large whiteboards, colourful spreadsheets and giant cheques.

February 28, 1994 was a big day in Australian politics. Minister Ros Kelly was forced to resign from Paul Keating's cabinet over the 'big whiteboard' sports rorts affair. She was the third minister to exit within two months. To lose one minister is forgivable, to lose two looks like carelessness, and losing three is a continental-scale disaster. For the presiding PM, the trifecta was a trigger to start planning life after politics.

Kelly was Minister for the Environment and Sport. A Keating ally, she'd helped him win the 1992 leadership battle against Bob Hawke, and she was generally regarded as 'a good operator'. But this time, even Keating's famous confidence couldn't dig her out of a big hole.

Questionable grants made under the Community, Cultural, Recreational and Sporting Facilities Program had come to light after a damning Auditor-General's report. The auditor's main concern was that poor (and easily erasable) record-keeping meant allegations of political bias in the awarding of grants couldn't be resolved.

In light of the audit report, the Australian Democrats – led by Cheryl Kernot – threatened to join with the opposition to initiate a Senate inquiry. Under extreme political pressure, Labor referred the issue to the Standing Committee on Environment, Recreation and the Arts, a bipartisan committee, albeit one with a Labor majority, in the House of Representatives.

Labor's John Langmore chaired the committee. On tabling its report, Langmore told parliament that his parliamentary colleague's record-keeping 'was seriously inadequate and her administration was deficient'. The report stopped short, however, of recommending censure.

Warren Truss, a widely respected National Party MP from south-east Queensland, was deputy chair of the committee. Arguing that the Parliament should formally censure Kelly, Truss read from a letter from the Auditor-General: 'A weakening of the processes of accountability of Government programs will be difficult to reverse. New and lower standards could then apply to future governments of whatever political persuasion. This would be a tragedy for all political parties and indeed for the strength of our democracy.'

Truss argued that Kelly was culpable for the botched program, over and above her ordinary responsibility as portfolio minister: Kelly had 'adopted a hands-on approach... She was personally involved in the selection process. She must, therefore, be held responsible for the inadequacies and gross deficiencies outlined in the Auditor-General's report.'

Particularly damning for Kelly was evidence that the program was used as part of the government's marginal seat election strategy. Eoin Cameron, Liberal member for Stirling, pointed out that 'Safe Labor electorates, where one would imagine there is a greater need, received less than marginal electorates... The Minister has alleged the grants were allocated on a needs basis. The only need she had was to shore up support for Labor.'

Kelly wasn't the first politician to be caught pork barrelling, and nor was she the last. On 22 February 2019, Georgina Downer presented a big novelty cheque to the Yankalilla Bowling Club, representing a \$127,323 grant under the Community Sport Infrastructure Program. The cheque was part of an effort to win the seat of Mayo for the Liberal party.

Centre Alliance MP Rebecca Sharkie tweeted about the politicisation of the federal grant: 'The protocol is that the local Federal MP is notified of a grant prior to the Minister advising the club. In more than a decade of politics I've never seen a TAX-PAYER funded grant delivered by cheque with a candidate's face and name on it. Rather desperate and misleading.'

Shadow Attorney-General Mark Dreyfus referred the Downer stunt to the Auditor-General. On 15 January 2020, the auditor published a bombshell report on the Community Sport Infrastructure Program, which Senator Bridget McKenzie oversaw as Minister for Sport. Of the grants awarded, 417 (61 percent of the total approved) had scored below the merit-based cut-off.

The audit's recommendations included a proposal that the Australian Government adopt a consistent framework for situations where a minister decides on the award of grant funding. The government agreed with other recommendations but only 'noted' this one – a polite way of saying the government wouldn't be adopting a framework like that any time soon.

Using arguments that feel like hair splitting, the government has sought to differentiate the current grants fiasco from the Ros Kelly affair. But the parallels are striking. In the recent program, clubs and communities that were demonstrably more deserving – including struggling sports clubs in rural and regional areas – missed out. The Auditor-General found that 'Funding decisions for the three rounds were not informed by clear advice and were not consistent with the program guidelines'. The ABC has since published the colour-coded spreadsheet that showed how party politics entered the funding decisions.

McKenzie's exit from Cabinet appears to be imminent. If it is, that will prove parliamentary accountability is not entirely dead in Australian public administration. In an era of patchy public integrity, the episode has highlighted the importance of our chief independent auditor. The value of private-sector auditors might be contentious, but public ones are indispensable.

The episode has also shone a light on the role and accountability of 'Quangos', and particularly their boards and officials. Sport Australia CEO Kate Palmer has resigned and will finish on 31 January 2020. Glenys Beauchamp, the departmental secretary and ex-officio board member, will retire on 28 February (one day before Senate estimates, as reported by Shannon Jenkins at The Mandarin). The Sports Australia executive who pushed back on the political interference has also quit.

The scandal has rightly focused people's attention on the government, but the board of Sport Australia is in the picture, too. At least notionally, the organisation is an independent body

Submission to the Select Committee on Administration of Sports Grants, February 2020

that sits at arms' length from the government. The board has a statutory duty to pursue the objectives of Sport Australia, not the government. The board members are decent and honourable people. Call it a protest, call it setting an example, but they all need to reject this impairment of their independence. The board as a whole should resign.

The Auditor-General was right to conclude that we need new rules for spending public funds. One suggestion: when a minister elects not to follow officials' advice about allocating grants, the minister should publish the grounds for the departure. We also need greater clarity, and a strong practical example, on the role of public body boards when ministers behave badly. And here's some more free advice: ditch the handover ceremonies with giant novelty cheques.

Scott Hamilton

Scott Hamilton is a Melbourne-based author, researcher and policy adviser. He is researching the history of bipartisanship in Australia.

Quango directors need to speak out — an interview with Andrew Wilkie

This article was first published in The Mandarin on 14 February 2020.

The term ‘quango’ — ‘quasi-autonomous non-government organisation’ — became famous in 1980. Episode seven of ‘Yes Minister’ has Sir Humphrey concealing a critical report on a major building project and instead telling the minister everything is on track. Minister Hacker then appears on the BBC, where he praises the project as an example of a public-private partnership.

Banker Desmond Glazebrook is prepared to bail the project out, in exchange for a lucrative appointment as chair of a quango. But how can Hacker and Sir Humphrey silence Joe Morgan, the unionist who knows the truth about the project? Hacker has a brainwave. ‘Glazebrook might need a *Deputy* Chairman, one with real experience of industry. A trade unionist perhaps.’ Humphrey thinks this is an awfully good idea. ‘It takes two to quango, Minister.’

The ‘Yes Minister’ episode refers to Britain having an incredible 8000 quangos. In Australia today, the number across the federal and state governments is even higher than that. And the recent sports rorts scandal has shone a light on the role of quangos, their board members, and whether they should call out breaches of public integrity.

Formally, the duties of directors are clear. They include legal duties to act in good faith and to manage public resources properly. Typically, the directors are tasked with pursuing their organisational objectives independently from day-to-day direction by the executive branch of government.

In practice, though, the executive branch is often very hands-on with public bodies, and this often puts the board members in a difficult position. That difficulty is magnified when a hands-on minister also tests the limits of propriety.

Andrew Wilkie is the independent member for the federal seat of Clarke. We interviewed him on 5 February about the sports rorts affair and public integrity in general. Though pork barrelling was a familiar feature of government, he said, the sports rorts affair was a remarkable example. ‘This one was bad practice on steroids, because it was just so blatant... Arguably, the minister did not have the legal right to allocate the grants. And I think it is very alarming that the secretary of Prime Minister and Cabinet did not find fault in that regard.’

Observers have suggested the minister’s actions in the affair may have constituted a crime. Former NSW auditor-general Tony Harris, for example, said on 3 February in relation to the affair, ‘there should be an investigation into the crime of misconduct in office and there should be an investigation into the crime, whether or not it occurred, into electoral bribery’.

This posed a devil's dilemma for the Australian Sports Commission, and the dilemma is yet to be resolved. Some have called for the whole board to resign. That is still a live option, and there are good precedents, including a mass resignation of directors during the NSW electricity privatisation.

A collective decision to step down would help define the role of independent boards, and the boundaries of ministerial interference in quango affairs. In this particular case, it would also signal a strong response to an apparent breach of public integrity. As Tony Harris noted, a group resignation would empower other boards to protect their independence, just as parliament intended.

Boards of all major organisations need to be reminded from time to time of their duties and responsibilities, including the responsibility to speak out. Richard Goyder is chair of Qantas and Woodside Petroleum, and he was on the AFL Commission when Adam Goodes faced racist attacks. Goyder later shared with the Australian Institute of Company Directors his reflections on that time: "We listened to too many people and just didn't come out and say what we thought, which was that the behaviour against him was racist...We didn't jump on it."

For Andrew Wilkie, the pressures on public body boards are symptomatic of a wider problem, "an erosion of integrity in the political class and the lack of safeguards to detect integrity issues, most notably the absence of an effective integrity agency. The government is talking about a federal integrity agency of some kind but they're dragging their feet and what they envisage, it's just going to be half-baked and ineffective."

In the famous 'Yes Minister' episode, political advisor Frank suggests a new regime where an independent Select Committee of Parliament makes all appointments to quangos, to "end the scandal of ministerial patronage, all those thousands of jobs for the boys — get the best men for the job, instead of old chums, party hacks, and you scratch my back and I'll scratch yours". In response, Sir Humphrey deploys his most damning bureaucratic criticisms: Frank's proposal is 'original', 'imaginative' and 'novel'.

All board members perform difficult roles. In their dance with the executive branch, they must step through a minefield. But there are lines that mustn't be crossed. Taking an analogy from cricket, it might be OK to rub the ball on your trousers, but sandpaper in the palm is a step too far. To avoid corruption and a creeping loss of confidence in our institutions, we need a bipartisan commitment to the integrity and independence of quangos.

We've all heard the line that integrity is doing the right thing when no-one is looking. Well now everybody is looking. The sports rorts affair should serve as an ethical call to action for public body directors to be more assertive of their independence, their principles and their legal duties. When a minister or senior official steps over the line, directors need to call it out — even if to do so would be 'courageous'.

Scott Hamilton and Stuart Kells

Scott Hamilton and Stuart Kells are Melbourne-based authors, researchers and policy advisers. They are researching the history of bipartisanship in Australia.