

Seal the barrel: a new robust system for the administration of government grants

Executive Summary

Since its establishment in 2018, the Morrison Government has awarded at least \$55 billion of public money under Commonwealth grants programs.¹

Where these programs have been the subject of audit by the Australian National Audit Office, findings have suggested the existence of systemic problems with the way in which Commonwealth grants programs are administered: most recently, the audit of the Safer Communities Fund concluded that *"[f]unding decisions were not appropriately informed by departmental briefings and, for the majority of decisions, the basis for the decisions was not clearly recorded"*.²

Various constraints exist upon grant expenditure: these include the Constitution; the requirements of administrative law; the Statement of Ministerial Standards; and the grant administration framework established by the *Public Governance, Performance and Accountability Act 2013* (Cth) (*PGPA Act*), the *Public Governance, Performance and Accountability Rule 2014* (Cth) (*PGPA Rule*), and the Commonwealth Grant Rules and Guidelines (*CGRGs*). Yet the fact that the requirements the *CGRGs* establish in respect of transparency do not apply to many kinds of payments made by the Commonwealth – even where they resemble grants –, and the fact that there are no consequences for failure by Ministers to comply with the requirements of the grants administration framework, are contributing to significant maladministration of grants programs.

The case for an overhaul of grants administration is compelling,³ with much to be done in order to improve transparency and accountability in respect of the expenditure of public funds, and a clear impetus to do so. The Centre for Public Integrity has developed a tripartite approach designed to promote parliamentary oversight and achieve transparency and accountability of the expenditure of public funds via grants programs. This approach establishes requirements relating to clear criteria, robust reporting and augmented accountability:

- **Clear criteria:**
 - merit selection criteria and program guidelines to be published and tabled for grants programs worth less than \$100 million.

¹ Total expenditure on grants approved between 24 August 2018 and 29 March 2022 amounted to \$55,636,859,656. This data was obtained from GrantConnect. It is important to recognise that not all programs which might be referred to as 'grants' in the vernacular meet the definition of 'grant' for the purposes of the Commonwealth Grants Rules and Guidelines (such as payments made under the Urban Congestion Fund. Spending under such programs is not required to be published on GrantConnect, and therefore is excluded from this calculation.

² Australian National Audit Office, *"Award of Funding under the Safer Communities Fund"* <https://www.anao.gov.au/work/performance-audit/award-funding-under-the-safer-communities-fund> 14 February 2022, accessed 9 March 2022, at para 12.

³ The term "grants administration" in this paper refers to payments sharing the characteristics of grants as defined under the *CGRGs*, rather than merely payments other than those set out at para 2.6 of this instrument.

- Parliament to set out criteria and guidelines in primary legislation for all grants programs worth over \$100 million.
- **Robust reporting:**
 - Ministers to report to the Parliament on a quarterly basis in respect of expenditure decisions which deviate from departmental advice; and
 - departments to periodically table documentation pertaining to administration of grants programs worth over \$100 million.
- **Augmented accountability:**
 - a dedicated parliamentary committee;
 - improved applicability and enforceability of the existing legislative framework;
 - a reassertion of the role of an independent public service to enable it to provide 'frank and fearless' advice about the administration of grants programs; and
 - a National Integrity Commission, with strong powers and a broad jurisdiction, to investigate serious or systemic breaches.

The need for change

Since coming to office, the Morrison Government has spent more than \$55 billion on grants programs.⁴ Over the same period, 100% of audits by the Australian National Audit Office in respect of the administration of grants programs have identified flaws ranging from minor areas for improvement to serious deficiencies.⁵

In the case of the grants awarded under the Safer Communities Fund, the ANAO concluded that "*Funding decisions were not appropriately informed by departmental briefings and, for the majority of decisions, the basis for the decisions was not clearly recorded*".⁶ In respect of the Regional Jobs and Investments Packages, the agency concluded that "*Applications were not soundly assessed in accordance with the program guidelines*".⁷ In respect of the award of a \$433.4 million grant to the Great Barrier Reef Foundation, it reported that there was "*insufficient scrutiny of the foundation's proposal in*

⁴ Total expenditure on grants approved between 24 August 2018 and 29 March 2022 amounted to \$55,636,859,656. This data was obtained from GrantConnect. It is important to recognise that not all programs which might be referred to as 'grants' in the vernacular meet the definition of 'grant' for the purposes of the Commonwealth Grants Rules and Guidelines (such as payments made under the Urban Congestion Fund. Spending under such programs is not required to be published on GrantConnect, and therefore is excluded from this calculation.

⁵ The relevant audits (all of which are available at the website of the Australian National Audit Office at <https://www.anao.gov.au/pubs/>) include the following: *Award of Funding Under the Safer Communities Fund, Award of a \$443.3 Million Grant to the Great Barrier Reef Foundation, Award of Funding under the Community Sport Infrastructure Program, Award of Funding under the Supporting Reliable Energy Infrastructure Program, Administration of Commuter Car Park Projects within the Urban Congestion Fund, Award of Funding Under the Regional Jobs and Investment Packages, Implementation of the Great Barrier Reef Foundation Partnership, Indigenous Advancement Strategy – Children and Schooling Program and Safety and Wellbeing, Australian Research Council's Administration of the National Competitive Grants Program, and Grant Program Management by the Australian Renewable Energy Agency.* Some of these programs are not grants programs for the purposes of the Commonwealth Grants Rules and Guidelines, but have been included here because they are characterised by the Australian National Audit Office as pertaining to grants administration.

⁶ Australian National Audit Office, "*Award of Funding under the Safer Communities Fund*", <https://www.anao.gov.au/work/performance-audit/award-funding-under-the-safer-communities-fund>, accessed 9 March 2022, at para 12.

⁷ Australian National Audit Office, "*Award of Funding Under the Regional Jobs and Investment Packages*", <https://www.anao.gov.au/work/performance-audit/award-funding-under-the-regional-jobs-and-investment-packages> accessed 6 July 2021, at para 13.

three key areas examined".⁸ The agency's report into the administration of sports grants concluded that "the award of grant funding was not informed by an appropriate assessment process and sound advice",⁹ and, in respect of the Supporting Reliable Energy Infrastructure Program the ANAO found that the award of funding "was not fully informed by an appropriate assessment process and sound advice on the award of grant funding. Aspects of the approach did not comply with the Commonwealth Grant Rules and Guidelines".¹⁰ In its audit of the Commuter Car Parks Program under the Urban Congestion Fund, the ANAO remarked on the complete absence of "published guidelines, eligibility criteria or merit criteria".¹¹

These conclusions demonstrate the need for a strengthened grants administration framework: for example, had the CGRGs applied to payments made under the Urban Congestion Fund, criteria would have been required to be established. The urgency of grants administration reform is exacerbated by the scale of public money being expended via grants programs.

Figure 1: Commonwealth grant programs reported on GrantConnect since 2018

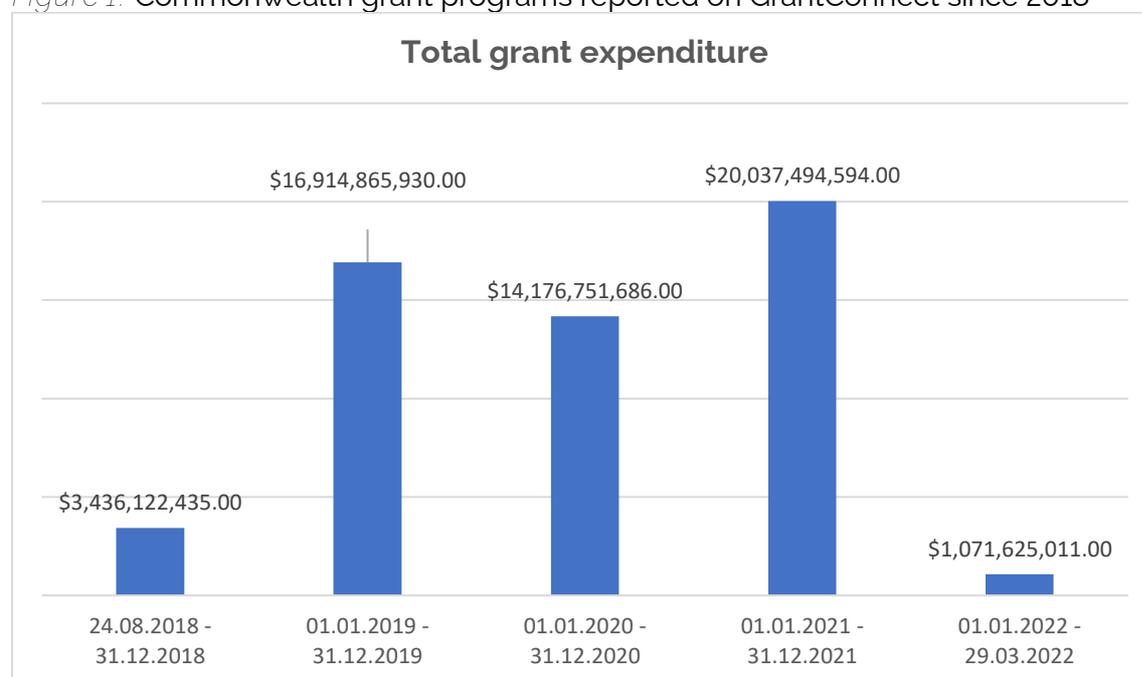


Figure 2 calculates grant expenditure reported on GrantConnect by department over the same period.

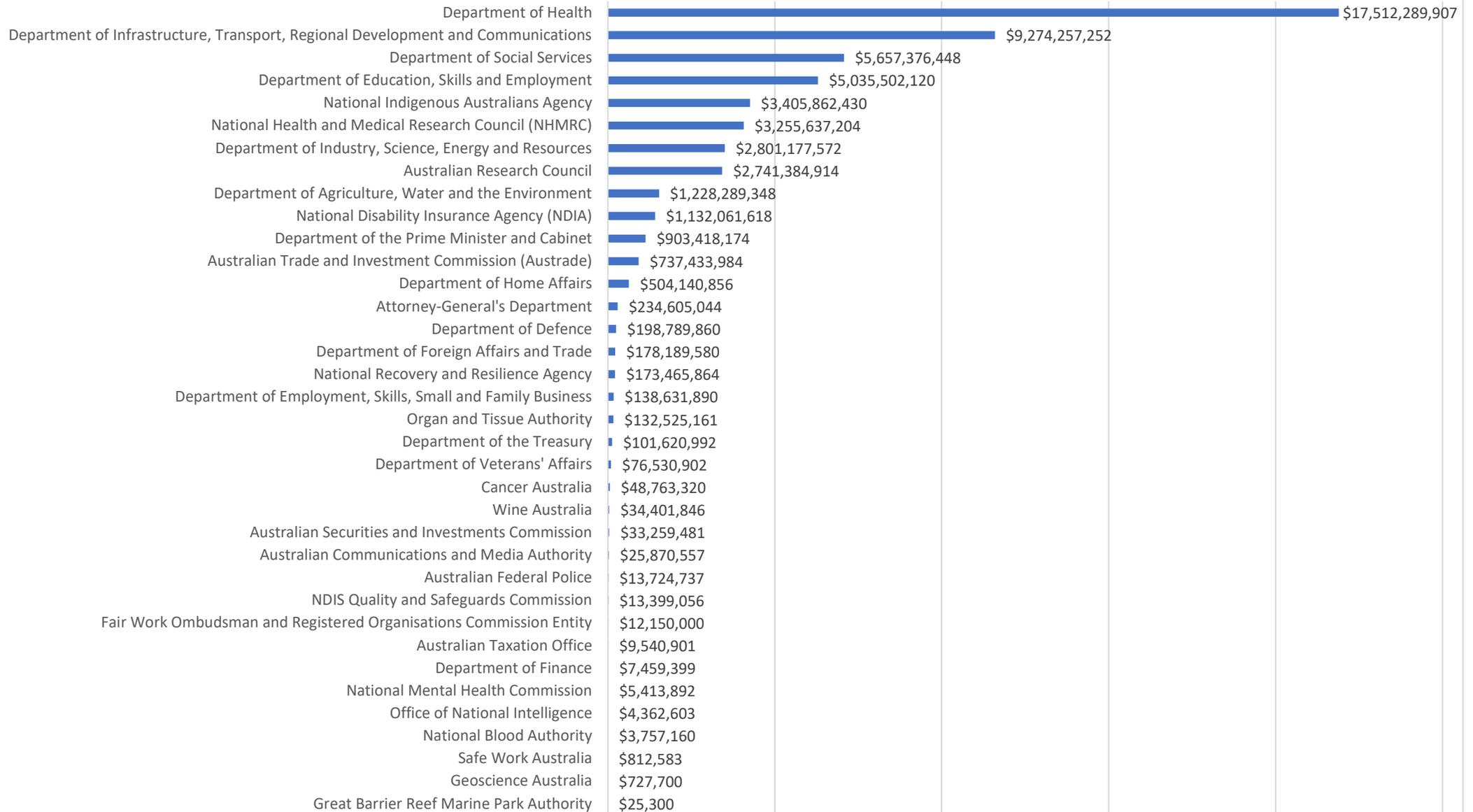
⁸ Australian National Audit Office, "Award of a \$443.3 Million Grant to the Great Barrier Reef Foundation", <https://www.anao.gov.au/work/performance-audit/award-4433-million-grant-to-the-great-barrier-reef-foundation> accessed 6 July 2021, at para 13.

⁹ Australian National Audit Office, "Award of Funding under the Community Sport Infrastructure Program", <https://www.anao.gov.au/work/performance-audit/award-funding-under-the-community-sport-infrastructure-program> accessed 6 July 2021, at para 7.

¹⁰ Australian National Audit Office, "Award of Funding under the Supporting Reliable Energy Infrastructure Program", <https://www.anao.gov.au/work/performance-audit/award-funding-under-the-supporting-reliable-energy-infrastructure-program> accessed 6 July 2021, at para 8.

¹¹ Australian National Audit Office, "Administration of Commuter Car Parks Projects within the Urban Congestion Fund" <https://www.anao.gov.au/work/performance-audit/administration-commuter-car-park-projects-within-the-urban-congestion-fund>, accessed 9 March 2022, at para 1.12.

Total grant spend by department



A tripartite approach

Clear criteria

In the case of the Commuter Car Parks Projects, there were no established merit selection criteria or program guidelines. Rather, the ANAO reports that a series of investment principles were agreed by government: these were not released publicly.¹² The need for the development and publication of clear criteria is self-evident: without clear criteria, proper assessment of merit is precluded.

Grants programs worth up to \$100 million

In order to avoid public funds being allocated via inappropriately opaque processes, merit selection criteria and program guidelines for all grants programs worth up to \$100 million should be published and publicly accessible in an easily accessible and searchable repository.

Grants programs worth over \$100 million

In respect of grants programs worth over \$100 million, merit selection criteria and program guidelines should be set out in primary legislation: this would enhance transparency and accountability and enable the Parliament to perform a real and meaningful role in respect of the use of significant amounts of public money. This measure would also help avoid scenarios like that encountered in respect of the administration of sports grants, where the ANAO concluded that the legal authority for the Minister's approval role in the process was unclear;¹³ furthermore, it would ensure that there is legislative authority for government grant-making.

Robust reporting

Central to improving the administration of government grant programs is bolstering transparency, accountability and the Parliament's ability to perform its oversight function in respect of the expenditure of public funds. Robust reporting requirements would support the Parliament's ability to fulfil this function, by ensuring access to essential information.

Departments table in Parliament documentation pertaining to grant administration

Parliament's ability to access information to enable it to perform its scrutiny function would be assisted by a requirement that Departments table documentation pertaining to grant administration at specific points of the grant-making process. Such points could include tender, selection and delivery.

This would also encourage appropriate departmental record-keeping – which was found to be deficient in the Commuter Car Parks Project audit¹⁴ and capable of being improved in the sports grants audit¹⁵ – and enable access by the public to these records.

¹² Australian National Audit Office, *Administration of Commuter Car Park Projects within the Urban Congestion Fund* <https://www.anao.gov.au/work/performance-audit/administration-commuter-car-park-projects-within-the-urban-congestion-fund> 28 June 2021, accessed 8 March 2022, at para 3.32.

¹³ Above n 7, at para 8.

¹⁴ Above n 9, at para 10.

¹⁵ Above n 7, at para 3.

Ministers report to Parliament where their decisions deviate from recommendations

Currently, paragraph 4.12 of the Commonwealth Grants Rules and Guidelines requires ministers approving grants against the advice of relevant officials to notify the finance minister. Transparency and accountability of executive spending is not furthered by one member of the executive informing another of such cases: it would, however, be furthered by a requirement that ministers report such cases to the Parliament.

Augmented accountability

The current dearth of accountability mechanisms available in respect of the administration of grants programs needs to be rectified: levers to penalise wrongdoing and incentivise compliance are critical to changing the status quo.

A joint standing committee to oversee grant administration and report to Parliament

Committees can play a valuable information and transparency role, and promote accountability of the executive to the Parliament.

A committee whose sole functions are to oversee grant administration in relation to all portfolios, and report to the Parliament, is an essential element of any framework designed to achieve improved scrutiny of the expenditure of public funds. Such a committee could report on a quarterly basis throughout the administration of any grant program worth in excess of \$100 million, with a discretion to report more frequently, and in respect of programs below the threshold.

Any such committee must be multi-party with no more than half of its members coming from parties forming government, in order to give effect to the Commonwealth Parliamentary Association's recommendation that scrutiny committees should ensure "meaningful opportunities for minority or opposition parties and independent MPs to engage in effective oversight of government expenditures".¹⁶

Improved applicability and enforceability of the existing legislative framework governing grants administration

The specific legislative framework governing Commonwealth grant expenditure consists of the *Public Governance, Performance and Accountability Act 2013 (Cth)*, the *Public Governance, Performance and Accountability Rule 2014 (Cth)*, and the Commonwealth Grants Rules and Guidelines.¹⁷

Public Governance, Performance and Accountability Act 2013 (Cth)

The *Public Governance, Performance and Accountability Act 2013 (Cth)* (PGPA Act) provides for the use and management of public resources by the Commonwealth and Commonwealth entities.

Division 9 of Part 2-4 of that Act sets out provisions relating only to Ministers. These include s 71(1), which requires that a Minister "must not approve a proposed expenditure of

¹⁶ Commonwealth Parliamentary Association, "Recommended benchmarks for democratic legislatures", <https://www.cpahq.org/media/lojik2nh/recommended-benchmarks-for-democratic-legislatures-updated-2018-final-online-version-single.pdf> accessed 6 July 2021 at para 7.2.3.

¹⁷ The administration of grants programs must also comply with the requirements of administrative law.

relevant money unless the Minister is satisfied, after making reasonable inquiries, that the expenditure would be a proper use of relevant money"; "proper" is defined in s 8 of the Act to mean "efficient, effective, economical and ethical". Division 9 also includes s 71(3)(b), which requires that Ministers must "comply with any other requirements prescribed by the rules in relation to the approval", and s 71(2), which requires that where a Minister approves a proposed expenditure, they must record the terms of the approval and comply with any other relevant requirements established by the rules.

Commonwealth Grant Rules and Guidelines

Section 105C of the PGPA Act enables the Finance Minister to make provision about grants by the Commonwealth.

The Minister has done so in the form of the Commonwealth Grants Rules and Guidelines (CGRGs), which "establish the overarching Commonwealth grants policy framework and articulate the expectations for all non-corporate Commonwealth entities in relation to grants administration".¹⁸ While Part 1 of the CGRGs establishes mandatory requirements, Part 2 sets out guidance on key principles.

Part 1 requires that in managing the affairs of a relevant entity, accountable authorities must comply with the Constitution, the PGPA Act, the PGPA Rule, and any other relevant law.¹⁹ In administering grants, accountable authorities and officials must consider their obligations under the PGPA Act and Rule, and internal guidelines, operational guidance and grant opportunity guidelines must be consistent with that framework's requirements.²⁰ Accountable authorities and officials must also ensure that arrangements are supported by legal authority.²¹

Grant opportunity guidelines must be developed by officials for all new grant opportunities. Officials must also provide ministers with advice in relation to the requirements of the PGPA Act, the rule, and the CGRGs where ministers are considering a proposed expenditure of relevant money.²²

Under the CGRGs, ministers must receive written advice from officials on the merits of a proposed grant before approving expenditure in relation to it; ministers are required to record the basis for approval 'relative to the grant opportunity guidelines and the key principle of achieving value with relevant money'. (This is precisely what did not happen in the administration of the Sports grants, where the CGRGs did not apply.)²³

The CGRGs allow ministers to approve grants within their electorates, though they are required in most cases to advise the finance minister in writing.²⁴ In addition, in cases where ministers approve grants that are not recommended by relevant officials, they must report to the finance minister (annually) and provide a statement of reasons.²⁵

Public Governance, Performance and Accountability Rule 2014

Part 2-4 of the *Public Governance, Performance and Accountability Rule 2014* (**PGPA Rule**)

¹⁸ CGRGs paragraph 1.2.

¹⁹ Ibid para 3.2.

²⁰ Ibid para 3.4.

²¹ Ibid para 3.6.

²² Ibid para 4.4.

²³ Ibid para 4.10.

²⁴ Ibid para 4.11.

²⁵ Ibid para 4.12.

provides for the use and management of public resources by corporate Commonwealth entities.

As a result of the Auditor-General's recommendation that parts of the CGRGs should apply to grants made by corporate Commonwealth entities where the decision-maker is a minister, as of December 2020 the rule also establishes requirements for the making of grants by corporate Commonwealth entities where a minister is to approve the grant.²⁶ These requirements include the preparation and publication of grant guidelines (although the accountable authority or the minister can decide that there is a specific policy reason to not publicise the guidelines, and publication is not required where the grant is provided on a one-off or ad hoc basis).

In circumstances where the entity recommends to the minister that the grant not be made, and the minister continues with their intention to make it, the accountable authority must provide the minister with written notice meeting particular requirements.

The rule further specifies that the minister must not approve the making of a grant by or on behalf a corporate Commonwealth entity (CCE) without receiving notice meeting the specified requirements, assessing the grant by having regard to the matters in the notice, and creating a record of their assessment.²⁷ Where a minister approves a CCE grant and it is made by or on behalf of a corporate Commonwealth entity, the accountable authority of that entity must publish specified information about the grant on GrantConnect unless — among other things — publication could reasonably be expected to adversely affect the achievement of a government policy outcome.²⁸

The rule also sets out reporting requirements for ministers who are members of the House of Representatives and who approve CCE grants in their electorates (where those grants are not of a kind that is made across a region by applying a formula): as soon as such a grant is made, such a minister must notify the finance minister (unless the relevant minister is the finance minister, in which case the prime minister must be notified), and their notice must include a statement of reasons for approving the grant.²⁹ These same notice requirements apply where a minister approves a CCE grant in spite of a contrary recommendation by a corporate Commonwealth entity.³⁰

Limitations of existing constraints

By virtue of paragraph 2.6 of the CGRGs, certain payments are taken not to be grants. These include payments made under the Urban Congestion Fund, which are made to the States, pursuant to the *Federal Financial Relations Act 2009* (Cth). However, as the ANAO concluded, payments made under the UCF share many of the characteristics of grants:³¹ indeed, we can see no persuasive reason for not extending the application of the CGRGs to cover payments such as those made under the UCF (and indeed those made to State and Territory governments under s 96 of the Constitution, and to local governments under the *Local Government (Financial Assistance) Act 1995* (Cth)). There is every reason to do so if integrity is to be achieved.

An additional, significant deficiency of the framework relates to its requirement for

²⁶ These additional requirements were inserted into the Rule by the *Public Governance, Performance and Accountability Amendment (Grant Rules for Corporate Commonwealth Entities) Rules 2020* (Cth).

²⁷ *Public Governance, Performance and Accountability Rule 2014* (Cth), para 25B(6).

²⁸ *Ibid* para 25F(3).

²⁹ *Ibid* para 25D.

³⁰ *Ibid* para 25E.

³¹ Above n 9, footnote 10.

ministers approving certain kinds of grants (such as those within their own electorates, or against the advice of relevant officials), to notify the finance minister. Transparency and accountability of executive spending is not furthered by one member of the executive informing another of such cases: it would, however, be furthered by a requirement that ministers report such cases to the Parliament (see above reporting recommendations).

Enforceability is significantly circumscribed within the current framework. Neither the PGPA nor the CGRGs impose any penalties for breach of their provisions; while there may be consequences for breach by officials via the Australian Public Service Code of Conduct, the Statement of Ministerial Standards is not independently enforceable and the political reality that a Prime Minister has a strong incentive to minimise perceptions of any ministerial wrongdoing militates against current enforcement arrangements being effective.

Enforcement of the constitutionality of Commonwealth expenditure of public funds, as well as the requirements that it have legislative authority and comply with the specific framework created by the PGPA Act, PGPA Rule and CGRGs, is effectively left to whoever has the motivation, standing and resources to pursue such matters. This is evinced by the cases of *Pape* (in which Bryan Pape, a constitutional law academic who found himself with standing to challenge unlawful executive spending when the Rudd Government in 2009 paid a tax bonus to all Australian residents who met specific requirements for the 2007-08 financial year), the two *Williams* cases (in which Toowoomba father Ron Williams challenged executive spending on the chaplaincy program at his children's school), the recent challenge brought by the NT Environment Centre in respect of the Beetaloo Basin fracking program and the challenge currently on foot in the Federal Court, brought by the Beechworth Lawn Tennis Club in relation to the administration of sports grants.

Associate Professor Yee-Fui Ng has observed that relying on administrative law as the only available remedy is unsatisfactory:

A major issue with judicial review is that the main remedy that an unsuccessful grant applicant could achieve [...] is that the courts will set aside the decision for a breach of the grounds of judicial review, and remit the decision back to the original decision-maker to be remade. The decision-maker may well refuse the grant again, this time making their decision legally, leaving the aggrieved applicant without any real redress.³²

Improved enforceability of the framework could be achieved via the adoption of an appropriate and independently-enforced Code of Conduct for parliamentarians and political staffers, and the establishment of a fit-for-purpose National Integrity Commission with the requisite powers and resources to investigate and report on cases which may involve broadly-defined corrupt conduct.

A strengthened public service

The proper administration of grants programs is predicated upon the existence of a public service that is able to provide 'frank and fearless' advice with respect to the merit of grants applications.

The 2019 Independent Review of the Australian Public Service, led by David Thodey AO, made 40 recommendations designed to reinforce and support a public service that is

³² Yee-Fui Ng, 'Regulating the courts: the legal governance of grants programs in Australia', 2021(unpublished).

“*apolitical, merit-based and open [and] underpinned by integrity*”. The Government has agreed in full in 15 of the Thodey Review’s recommendations, and in part with a further 20. However, a number of vitally important recommendations remain to be adopted, including:

- recommendation 39c, relating to the implementation of “robust processes” governing secretaries’ terminations. Specifically, the Review recommended that the Public Service Act 1999 (Cth) be amended in order to allow termination only on legislated grounds, or that the APS Commissioner and PM&C Secretary develop a policy governing what must be done before the Prime Minister is provided with advice in relation to a proposed termination govern the termination of secretaries’ appointments”;
- recommendation 7, relating to the need to amend the *Public Service Act 1999* (Cth) in order to empower the APS Commissioner to undertake own-motion investigations and reviews, and to require agencies to provide integrity information to the Australian Public Service Commissioner; and
- recommendation 11, in respect of the need to establish a legislated code of conduct for ministerial advisers, and the implementation of guidance that policy advisors with public service experience compose at least half of the advisory staff within ministerial offices.

The adoption of these and the Review’s remaining recommendations is vitally important to empowering the public service to act as a bulwark against the misuse of public funds.

A National Integrity Commission

A National Integrity Commission is required to investigate serious or systemic breaches of the grant rules and governance framework. The National Integrity Commission will need a broad jurisdiction which includes the ability to investigate breaches of Commonwealth Grant Rules and Guidelines or the PGPA governance framework at the discretion of the Commissioner.

Conclusion

As successive reports of the Australian National Audit Office establish, there is an urgent need to create a grants administration framework that facilitates transparency and accountability: public funds are not infinite, and more must be done in order to guarantee that expenditure is for proper, public purposes, and achieves value for money. Essential elements of a fit-for-purpose framework include:

Clear criteria

- i. merit selection criteria required to be published and tabled for all grants programs worth under \$100 million.
- ii. Parliament to set out criteria and guidelines in primary legislation for all grants programs worth over \$100 million.

Robust reporting:

- i. Ministers be required to report to the Parliament on a quarterly basis in respect of expenditure decisions which deviate from departmental advice.

- ii. Departments be required to periodically table in Parliament documentation pertaining to grant administration.

Augmented Accountability:

Improved applicability and enforceability of existing legislative framework governing grants administration

- i. Extend the application of the Commonwealth Grants Rules and Guidelines beyond non-corporate Commonwealth entities, to grants made by corporate Commonwealth entities, as well as to grants made to the States via s 96 of the Constitution and the *Federal Financial Relations Act 2009* (Cth), and by local government under the *Local Government (Financial Assistance) Act 1995* (Cth).
- ii. Impose consequences for Ministers and officials who breach the requirements of the existing legislative framework applicable to them, including via the adoption of an appropriate and independently-enforced Code of Conduct for parliamentarians and political staffers.

A joint standing committee be established in order to oversee grant administration and report to the Parliament.

- i. A dedicated and appropriately constituted parliamentary committee should be established to have oversight of the administration of grants programs worth in excess of \$100 million

A reassertion of the role of an independent public service

- i. Termination of secretaries' appointments should be possible only on specific legislated grounds.
- ii. The Australian Public Service Commissioner should be empowered to undertake own-motion investigations and reviews.
- iii. A ministerial staffer code of conduct should be adopted.

A National Integrity Commission

- i. A National Integrity Commission with strong powers and a broad jurisdiction to investigate serious or systemic breaches of the Commonwealth Grant Rules and Guidelines or the PGPA Act.

About The Centre for Public Integrity

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, protecting the integrity of our accountability institutions, and eliminating undue influence of money in politics in Australia. Board members of the Centre are the Hon Stephen Charles AO QC, the Hon Anthony Whealy QC, Professor George Williams AO, Professor Joo Cheong Tham, Professor Gabrielle Appleby and Geoffrey Watson SC. Former board members include the Hon Tony Fitzgerald AC QC and the Hon David Ipp AO QC. More information at www.publicintegrity.org.au.